STATE AND SOCIAL CHANGE – THE ROLE OF JUDICIARY – A CASE STUDY OF MALABAR 1792-1940

VASANTHA KUMARI C.

THESIS SUBMITTED FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY OF THE
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2003

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CERTIFICATE

This is to certify that this Thesis, **STATE AND SOCIAL CHANGE - THE ROLE OF JUDICIARY - A CASE STUDY OF MALABAR 1792-1940**, is a bonafide record of genuine research done by Smt. **C. VASANTHA KUMARI** under my supervision for the Ph.D Degree of the University of Calicut and no part of this has been submitted for any degree before.

Department of West Asian Studies,
University of Calicut.

Dr. E.K. Gangadharan Nambiar
(Supervising Teacher)

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DECLARATION

I do hereby declare that this written account entitled **STATE AND SOCIAL CHANGE - THE ROLE OF JUDICIARY - A CASE STUDY OF MALABAR 1792-1940** is the record of research done by me under the supervision of **Dr.E.K.GANGADHARAN NAMBIAR**, Professor and Head, K.M.Centre of West Asian Studies, University Calicut and it had not been previously submitted for the award of any Degree, Diploma, or other similar title of recognition.

University of Calicut

Date : 17-12-2003

C. VASANTHA KUMARI

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PREFACE

The present study focuses on the historical role played by one of the most vital organs of the British administrative machinery in India, the Judiciary, in the complete recasting of an extremely custom-oriented, highly conservative, almost stagnant Malabar society into one well-suited to the modern standards of life. The thematic aspect of this area, though highly appreciable as a reliable source for a historical analysis of the customary past of Malabar and its gradual transformation to what it is today, has seldom been deservingly recognized. Even scholars earnestly engaged in tracing the stimulants which worked behind this historical realization could not properly make out the positive role the Judiciary played in this process, even with the fact that the judicial records, so plainly self-speaking, are extensively available for reference throughout India.

Judiciary was viewed only as an inevitable part of the British colonial rule, acting in tune with the latter's imperialistic designs. But the truth is that though the introduction of the Judiciary was colonially motivated, its functioning in India was not in complete subjection to the same. The historical past of every region in India came to be so completely analysed and retold through the earnest effort of the judicial veterans in the process of deciding customary cases. The truths revealed through the judicial findings went a long way in training the custom-ridden minds of Malabar to maturity to make the option by themselves, of what to be accepted or rejected in

a society exposed to the challenges of time. Without sound and fury, the Judiciary was becoming the harbinger of the revolutionary social changes Malabar was going to witness in the process of its encounter with the western ideologies.

An undeveloped theme like this entered my mind while going through the occasional judicial references available in history books pertaining to the social changes in modern Malabar, and upon many of such issues judgements are still coming. As not many research publications in this area have come out, much confidence was not there while choosing the title of the topic. However, it seemed like a challenge to go through the judicial records, pragmatic and authoritative in character, to see whether the historical reconstruction of the bygone civilization of the people of Malabar would be possible with the information available in them. The task became Herculean, but it is a joy to record at the end that it did not go unrewarding.

The present work is not the outcome of my personal effort only. So many blessing hands jointly anchored me to the destination. It was my fortune to get Dr. E.K.G. Nambiar, then Reader in History at the University of Calicut as my guide whose patient and encouraging attitude helped overcoming all hurdles I happened to come across in the course of the study. His readiness to spend long hours in discussion of every aspect of the topic gradually increased my confidence to finish the work with an undisturbed spontaneity - this work is deeply indebted to his sincere, affectionate guidance. I have

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deep gratitude to Dr. K.K.N. Kurup, former Vice Chancellor of the University of Calicut, for giving me the needful guidance while selecting the topic as well as when started doing judicial references. I am greatly obliged to Dr. S.M. Muhammed Koya, former Professor and Head of the Department of History of the University of Calicut for giving me whatever help I requested of him while doing the chapter on Mappilas, the area of his specialization. I have heartfelt thanks to Dr. Kunhali, Professor and Head of the Department of History, University of Calicut for extending every help needed when the work reached its completion stage. I am equally thankful to all the teachers, the office and library staff of the Department of History, University of Calicut, for the unstinted help they were always ready to extend in substantiating my thesis in its present form.

I have deep felt gratitude to Dr. M.G.S. Narayanan, Chairman, Indian Council of Historical Research, from whom I heard the primary lessons of true historical research years back, for the valuable guidelines he was ever ready to give to an enquiring researcher like me. I am thankful to Dr. V.V. KunhiKrishnan for the readiness he had shown in clearing my doubts on the Malabar tenancy question.

I am grateful to the University Grants Commission for granting me the Teacher Fellowship under IX plan for the completion of my Thesis and the College Development Council, University of Calicut for helping promptly to complete all the official formalities and correspondence connected to the enjoyment of the award. I am

thankful to Mrs. Latha Rajendran of the University of Calicut for helping me sincerely in all the office dealings at the University of Calicut during the deputation period.

The study is the outcome of a continuous dialogue between me and the large variety of judicial and administrative records pertaining to British Malabar. This burden could be smoothly managed due to the warm and dignified library atmosphere I was fortunate to get at all the centres where the records are carefully kept. The Honourable District and Sessions Judges of the District Courts of Thalaserry and Calicut were kind enough to give every help requested by me at their library and record rooms. I am equally grateful to the staff of the District Courts who made comfortable arrangements for me throughout the considerably long period I was doing reference work there. I enjoyed the same warmth at the Revenue Reference Library, Thalaserry, the Regional Archives, Calicut and Azad Memorial Library, Thalaserry for which I am deeply indebted to their staff.

I have to acknowledge with gratitude the guidance and help I received from some eminent personalities and friends in the course of my study. I have personal indebtedness to Dr. Mrs. Nirmala Nambiar, Professor and Head of the Department of Russian, University of Calicut, for the so many soothing words spoken affectionately by her whenever any tension overwhelmed me in the course of my work. My special thanks are to Sri. A.C. Mathew R.D.O. of Thalaserry when I was doing reference work in the Revenue Reference Library attached

to his office for giving free use of whatever rare records are available in his office. In the process of grasping the judicial theme in the appropriate way very sincere help was given to me by Advocate C. Mohan of District Court Thalaserry who took great interest in my study. I would like to acknowledge the help rendered by the teachers and friends of Government Brennen College Thalaserry, my *Alma Mater*, in the course of the study.

I express my deep, sincere gratitude to Dr. Sankaran Kutty, Reader in English, a scholar of great calibre, for being kind enough to go through the manuscript carefully and suggest appropriate changes. I am thankful to Sri. Arun, typist, and the other staff of Bharat Sevak Samaj, Computer Training Centre, Thalaserry, for taking up the typing and binding work of my Thesis with utmost sincerity.

Finally my heartfelt gratitude must go to my family members, my mother, brother, sisters and son for the whole-hearted co-operation so lovingly extended by them towards the completion of my work. I feel that this is the proper occasion to pay tribute to the dedicated memory of my late father, primary school teacher, who became my very first academic guide in life and it is a tranquil thought that he guided me in the right way.

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ABBREVIATIONS

AS	:	Appeal Suit
FB	:	Full Bench
IC	:	Indian Case
ILR M	:	Indian Law Reports, Madras Series
ILR All	:	Indian Law Reports, Allahabad Series
ILR Bom	:	Indian Law Reports, Bombay Series
ILR Cal	:	Indian Law Reports, Calcutta Series
IR	:	Indian Review
JP	:	Judicial Proceedings
LW	:	Law Weekly
Mal	:	Malayalam
MDR	:	Malabar District Records
MHCR	:	Madras High Court Reports
MIA	:	Moore's Indian Appeals
MLJ	:	Madras Law Journal
MLR	:	Madras Law Review
MLR	:	Malabar Law Reports
MLT	:	Malabar Law Times
MWN	:	Madras Weekly Notes
OS	:	Original Suit
PC	:	Privy Council
RCSU	:	Report of the Court of Sudder Udalat
SA	:	Sudder Appeal
TLR	:	Travancore Law Reports
WR	:	Weekly Reports

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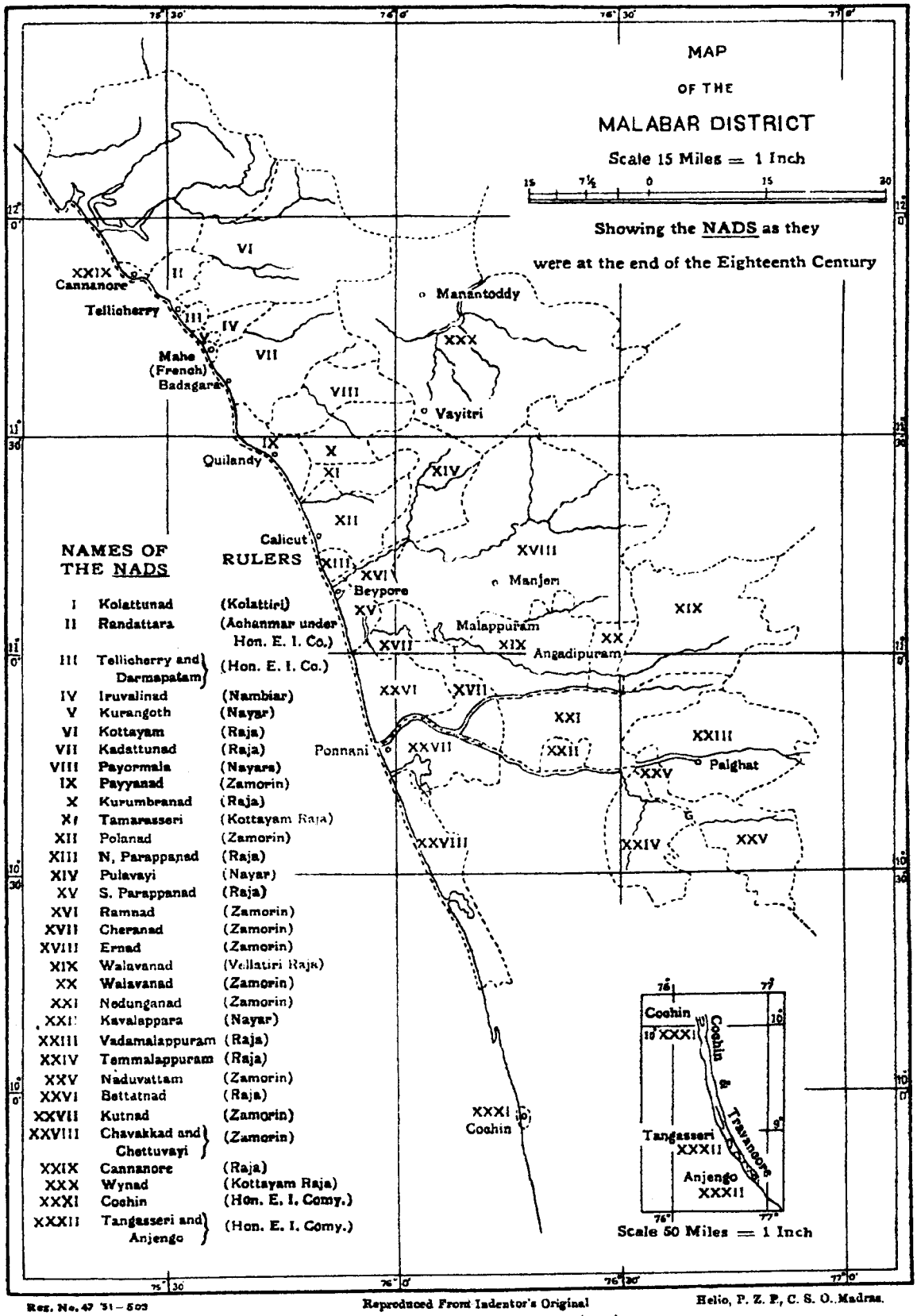

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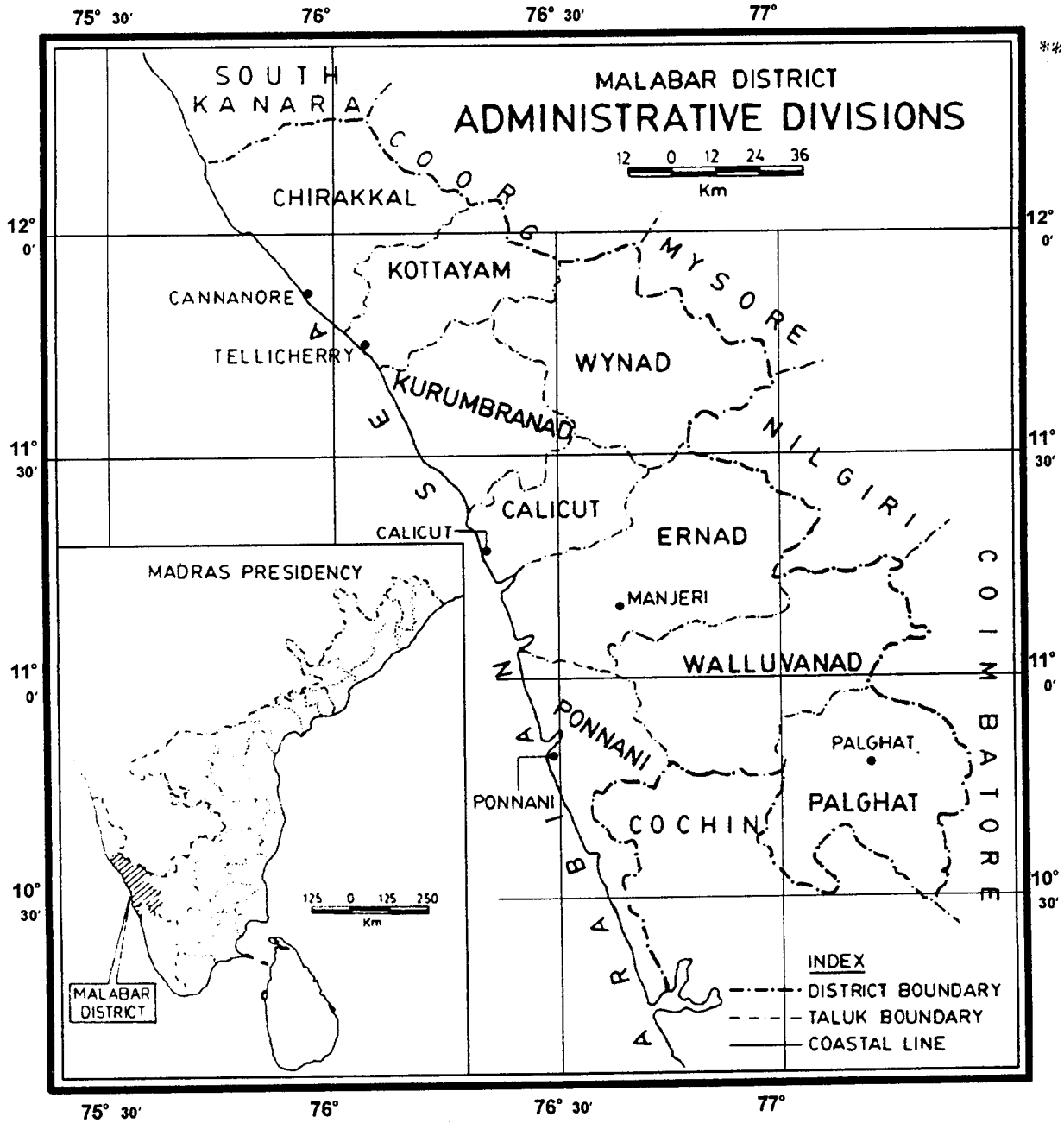
* Innes CA., Madras District Gazetteers, PP 42-43



** William Logan, Malabar Mannual Vol. 1 PP 718-719

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INTRODUCTION

One of the most enduring legacies of the British rule in India was the establishment of a strong Judiciary with high traditions of independence and fairness[1], matured through a strange amalgam of local oral and customary laws and the British rule of law[2]. The British East India Company's vast acquisitions in India at the close of the eighteenth century necessitated regular vigilance on the activities of the increasing number of the company's servants and the maintenance of law and order in the newly acquired territories. But a unique difference they noticed in the case of India was that the acquired territory was not a newly discovered country, but one well peopled by a civilized race and governed by long established laws to which they were much attached, and which it would have been highly inconvenient and dangerous to change[3]. This demanded caution, an inevitability to master those dominating customs for administrative fairness, an awareness that the total displacement of the local traditions of the ruled ones would do only harm to the company's revenue interests. That the British legal method based on the rule of law and strict sense of justice, needing prolonged legal procedure, could be applied in the Indian context only in tolerable

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[1] Pylee M.V, The Federal Court of India, Foreword by B.P.Sinha, Former C.J of India, Bombay 1960, p.VIII

[2] Setalvad M.C, The Common Law in India, Bombay 1970, p.225.

[3] Aiyar, Balasubramaniya, Advocate, 'The Methods of Judicial Interpretation of Hindu Law Sources', *Lecture in Madras Law Journal*, 1937 January to June, p.5.

harmony with the latter's dominant segmentary factors, and that legal institutions could take shape only through a blending of indigenous and alien institutions, and interplay between the socio-economic and political factors[4]. Exploitation under cover of civilization would make things easier, and judicial process became its machinery[5].

Malabar[6], the northern districts of Kerala in peninsular India, well-known to the outside world from time immemorial, finally became the prize of the British East India Company as one of their colonies in the south east, in the course of the Anglo-Mysore wars. Put under the Madras Presidency in 1800 for administrative and judicial purposes, the status of Malabar in the administrative map of British rule in India was never that of an outstanding territory with multiple interests. Outside being treated as a revenue source, the British administrators had no great enthusiasm for this territory, which, in their view, was never even familiar with a well-developed native powerful statecraft. For the same reason the stupendous material remains of the British administrative machinery, characteristic of many of the Indian cities cannot be seen anywhere in

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[4] Paul, John J, The Legal Profession in Colonial South India, Bombay 1991, p.1.

[5] Hollander, Barnett, Colonial Justice: The Unique Achievement of the Privy Council's Committee of Judges, London 1961, Chapter 1.

[6] Malabar was a district in the Madras Presidency, bounded on the north by South Canara and Coorg; on the South by Cochin and Travancore; on the east by Coorg, Mysore, the Nilgiris and Coimbatore, and on the West by the sea. The district consisted of Taluks like Calicut, Chirakkal, Cochin, Ernad, Kottakkal, Kurumbranad, Palghat, Ponnani, Walluvanad and Wynad. (Details taken from the Directory of Madras 1933, p.1249 - Malabar. See the Map p.viii

Malabar. The stimulus the western ideologies infiltrated into the hearts of many an Indian nationalist in North India, arousing them to political activism, did not bring a quick impact in the people of Malabar. The light and heat of the nationalist movement too reached here only sufficiently late. But in one thing, that is, for being put under the guard and guidance of a strong judicial machinery, perhaps the status of Malabar in the administrative history of the British in India was unique. Malabar happened to be one of the largest inheritors of the grand system of British judicature based on the British rule of law and strict sense of justice.

The establishment of a strong Judiciary to channelise the administrative machinery, in the newly 'discovered' colonies, in the proper direction formed an important aspect of the British colonial policy anywhere in the world. This is the true explanation of its introduction in India, and all the Indian territories separately. "Settlement established subsequent to 'discovery' at once necessitated the creation of new courts, the evaluation and application of local and even tribal laws and customs; acquisitions by conquest raise problems of domestic law existing prior to and following the new sovereignty; transfers of government or possession by purchase, or cession involve like solution"[7]. But in the case in Malabar, the Judiciary, hence created with the motive of enabling a

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[7] 'Discovery' was the term used by the British in the case of those colonies which came to their possession in the days of the geographical discoveries, though such colonies were there even before, well peopled and with their own cultural heritage. Hollander, Barnett, op.cit., p.4

smooth revenue collection by giving little chance to the people to resist, was actually the installation of a clear, well ordered institution of permanent value in the customary enigmatic legal historical background of the region, and an effective organ to guide the people to improve their social existence.

The functional aspect of the Malabar Judiciary was very much indebted to the historical background of the region, an outcome of centuries of customary ways and their destruction by Mysorean in-roads. Not only that pre-British Malabar lacked a substantial political machinery to control and guide their daily activities, but the absolute subjection of the people to their age-old customs made the Judiciary's task difficult. The customs of Malabar had become so institutionalized due to centuries of continuous observance that an easy legal interpretation of them seemed very difficult, especially in the absence of authentic written records. It became Judiciary's task to find out reasonable solutions to the multifarious legal problems faced by an extremely custom-ridden society. Besides, the post-Mysorean days were turmoiled, which doubled the difficulty of the East-India Company's administrators: the law and order situation had to be tackled; unobstructed revenue collection had to be guaranteed; the local peculiarities had to be given due regard; and the people's confidence had to be won through civilized means. The directions from the Government to show respect to the usages of the people while carving out laws[8] needed much caution on the part of the

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[8] Warren Hastings' Plan of 1772.

Judiciary. The truth that so many of the historical identities, the time-honoured institutions, were going to reach the stage of extinction through unkind judicial dissection was not in the imagination of anybody at the time of its experimental stage. However, it became soon clear that it is not such a difficult task to find out legal guidelines even from the oral tradition of Malabar, for the purpose of deciding cases. The oral tradition of Malabar, so clear-cut, became a positive factor to the Judiciary, to master them through earnest effort. However, an independent judicial approach became impossible in the case of the tenurial problems which had been defined in advance with unusual haste by the first administrative enquirers in the revenue interest of the company. But their interpretation was in a quite improper way, and against the customary traditions of Malabar, which gave much trouble to the Judiciary when tenurial cases began to arise. But in the case of the personal laws of the people of Malabar Judiciary made independent approach.

The Judiciary, through years, was transforming itself into a body capable of making healthy suggestions on the customary problems of Malabar wherever needed. The entry of capable Indian lawyers and proficient Indian judges made the Judiciary bold, from the second half of the nineteenth century onwards in so far as suggesting creative solutions to the people's problems. Judicial atmosphere too underwent changes, with the growing enthusiasm in the people to seek legal reddressal on almost every issue connected to their personal laws, which gave them the opportunity to examine

and evaluate them by themselves. Judiciary did not take it as its task to alter the laws; but some of their suggestions did actually sound as though the altered law has come[9]. Though legislative interference became inevitable to give birth to permanent laws, Judiciary's creative role made the latter harbinger of the impending social changes.

Any study of the modern history of Malabar becomes almost impossible without a proper appreciation of the very effective role the Judiciary played in remodelling the custom-bound society to what it is today. Even the structural evolution of legal institutions came in response to some historical requirements of the Malabar social environment. The innumerable judgments on Malabar law are real history, authoritative for their pragmatic value. Perhaps, more than any other branch of the British administrative machinery, the Judiciary took pains in exploring deep into the historical roots of the Malabar customs which had only oral traditions, and helping them gradually to come out from the grip of their outmoded, irrational customs. More than that, it was due to the effort of the Judiciary that a theoretical framework could be chalked out for the Malabar customs. What was achieved through this was a real social history for Malabar, a thing that had not been achieved by any conventional historian before that. The references made during judicial proceedings about the customs and conventions of the other parts of the country helped the people of India to know the customs of each

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[9] Puthanpurayil Kuniyan Baduvan v Puthanpurayil Alikutty, ILR 42 M, 603 FB.

other, belonging to the different regions of India.

Though this is the truth about the role of the Judiciary in alerting the people of this country to the modern realities of life, the judicial records, which give exhaustive explanations about the circumstances contributory to those judgements are not given the deserving attention for purpose of historical studies. Their role has always been enumerated as not very positive as far as the social problems of the people were concerned. For that reason perhaps, historical writings of Malabar only make casual reference to judicial records while writing the social history of the region. An attempt to understand the social history of Malabar exclusively drawing facts from the innumerable judgements on the customary laws of the people was never in the idea of the historical writers, though they form the most reliable recorded history of the region. While administrative historians of the British days, and the judges of the period, had to depend on the travel accounts of the foreign visitors, the local compositions of the natives, which were very rare and often unreliable, the help of the local experts and personal enquiry into their usages, for the historian of independent India, the voluminous records, administrative and judicial, form the most potential source for an understanding of how Malabar was before modern social reforms were concretized. But even when government records were carefully examined by later administrators and social reformists, earnest attention was never given in examining closely and elaborately the judicial records.

To understand what the Judiciary did for the social upliftment of a class of people, a careful search into the judgements alone will help. The administrators sought the help of the judicial documents for the smooth functioning of the administrative machinery; the later judges did the same for serving the needs of their profession. Definitely some of the renowned English and Indian judges, beyond their service in the court chambers, attempted to study the customs of the people from a judicial and historical point of view. We have great names in this line of such enthusiastic, eminent judges, like Justices Holloway, Reid, Wigram, T.L.Strange, Mayne, Moore, Turner, Muthuswami Aiyar, Sreenivasa Aiyangar, Sundara Aiyar, Chandrasekhara Aiyar, O.Chandu Menon, Hidayatullah and others. C.A.Innes' Madras District Gazetteer, William Logan's Malabar Manual etc. highlight judicial points in their works. Judicial records have been elaborately used by some of the historians on modern Malabar like K.N.Panikkar. References of judgements and judicial records are available in the peasant studies of K.K.N.Kurup, K.N.Panikkar, V.V.Kunhikrishnan, P.Radhakrishnan and several others. The early stages in the evolution of legal institutions, under the Bombay and Madras Presidencies are obtained in the works of T.K.Ravindran. The legal aspects of the matrilineal system in Malabar had been the topic of research of P.V.Balakrishnan. The evolution of legal system in colonial South India has been traced by John J. Paul. Legal references are seen in the historical works of a lot of historians on Malabar, especially those works connected to the nationalist movement, peasant resurgence etc. However, beyond contextual

references, a historical work fully utilizing judicial records as the chief source material remained unexplored.

This became the challenge before the present researcher to select a topic giving full emphasis to judicial records. The inspiration definitely came from the scattered judicial references in many historical works, though the present study's main indebtedness is to judicial records. Most of the information connected to the social history of Malabar we obtain in the works of the historians had been surprisingly told years back in the judgements on Malabar law. The present study is the result of a deep search into the innumerable Malabar judgements of the British period and other facts obtained from legal publications like the Indian Law Reports, Madras High Court Reports, Indian Law Cases Digest, Madras Law Journals, Rulings of the Court of Sudder Udalat, Case details kept in the Record Rooms of the various courts and Archives, details in the Madras District Gazetteers, Statistical and Survey Reports, relevant volumes of the Madras Code, Travancore Manuals, Legal Libraries and other Law Publications, besides historical reference books. A span of 150 years has been covered in the study starting from the introduction of the Judiciary in 1792 and ending with the close of the fourth decade of the twentieth century. Though it is a long period, we see any substantial legislative change to the social context of Malabar taking place only in the last decade under study. The fruition of the judicial suggestions of the earlier periods came during this decade in a series of legislative enactments.

While doing chapterisation I took care not to deviate from the main theme of this study, that is, an unprejudiced effort to see whether the Judiciary did play any historical role in effecting substantial social change in Malabar. This thrust upon me the burden of identifying the dominant social identities and customary realities pertaining to the people of Malabar as they stood in the immediate pre-Judiciary period, and also whether the same had any projecting historical spontaneity from the very remote origin of those customs. This was necessary since what happened during judicial proceedings was an attempt to dig deep into the roots of those customs, which came to the Judiciary's perusal. Legal interpretations were made on almost every issue connected to customary Malabar life, which was more an interaction between the hoary past and the existing realities. This process went on till the very end of the British rule in India, and to such an extent that Malabar and the world came to sense that such interpretations were so powerful as to arouse a stagnant society to dynamism, and shake the very foundations of the customary feudal structure of Malabar society.

In the first chapter the historical background of Malabar, which urged the entry of the British system of justice is traced. The introduction of Judiciary as a tranquiliser to set right the paralysed state of affairs arising from the Mysorean wars and the expulsion of Tipu Sultan, is analysed. The unique peculiarity of Malabar as a territory without a central political chieftain from whom to demand revenue, urged the company to seek other means to realize the same. Drawing ideas from the Mysorean concept, the company hastily

formed a picture of the existing tenurial relations of Malabar. The conclusion reached at by the enquiring Joint Commissioners that revenue payment was unknown to the people of Malabar made them to decide the actual class from whom to demand the same. For this purpose their next enquiry was whether the institution of private property was known to the people of Malabar; their discovery was that private property as a full-fledged institution was known in Malabar and that all lands belonged to the customary *janmis* as absolute proprietors of the soil. The Company hastily took steps to give registered proprietary rights to the customary *janmis* who were allowed to lease out the lands to the customary cultivators called *kanakkars* from whom to collect the revenue. In deciding the class from whom revenue payment is to be demanded the Mysorean model of revenue collection was imitated. But the problems before the East-India Company were many, and haunting too: the Mappila *kanakkars* who had lost their lands were restless; the *kanakkars* were dissatisfied; the position of the *janmis* was not yet in fully settled condition, and the law and order situation was very weak. To counter this turmoiled state, the company was forced to adopt some civilized method, which finally led to the establishment of the courts of law. Their intention was to prevent internal dissensions among the chiefs and to win under a regular administration of justice the people's confidence which would safeguard the revenue interests of the company in Malabar.

In the second chapter a considerably exhaustive explanation is given about the customary Malabar society as it stood at the end of

the eighteenth century. As what the Malabar society was from the very ancient days was beyond the scope of this study, attempt is not made to grasp it by depending on archaeological sources. The materials for this chapter are drawn mainly from the history books on Kerala by renowned historians, foreign and native, as well as the British official reports about them. While portraying the features of customary Malabar society, special emphasis is given to those aspects, which later came for direct judicial consideration. While such customs are treated in great detail, a few others, which were not directly for judicial reddressal, are only given passing reference. An important aspect of customary Malabar life, the tenurial relations, which was earlier rather misinterpreted by British enquirers, has been explained exhaustively in order to make clear what changes they were subjected to undergo in the official and judicial hands at a later period. The chief peculiarities of the family tenures like the *makkathayam* and *marumakkathayam* systems of inheritance are also explained in detail. The customs of the various castes and communities of Malabar as well as the main social identities of the region have been highlighted.

The third chapter focuses on the evolution of chief judicial institutions as it came to be introduced in Malabar according to the necessity of the region. Judiciary came into being as an organ of the administrative machinery of the East-India Company on an all India basis and judicial institutions in various parts of India grew according to regional necessities. According to the requirements of the three Presidencies, courts came to be established at various

levels, from the court of first instance to that of the highest court of appeal. The Indian background in the process of the evolution of the legal system is explained and the various experiments in the structural pattern of the various courts are also traced. The approach of the different administrators in giving weightage to the local peculiarities is examined. While Lord Cornwallis stressed more on the continental system of justice, liberal governors like Lord Munro were in favour of giving due respect to native customs, panchayath systems etc. The early system of criminal justice is also examined.

The fourth chapter, entitled Malabar Law, seeks to grasp the interpretative aspect of the Judiciary at the operational level while giving legal effect to the customary Malabar laws through the application of the British common law based on the elaborate rules of British justice, that of justice, equity and good conscience. The chapter explains how the early judicial experts like Sir. Justice William Jones[10] recommended for giving due respect to the traditional native usages of the people of India while preparing legal guideline on personal laws. This recommendation was fully implemented in the case of Malabar also. An effort has been made to clarify a criticism always raised against the Judiciary for doing wrong legal interpretation in the case of the Malabar land tenures.

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[10] Sir William Jones (1746-94), a linguistic genius, came to Calcutta in 1783 as a Judge of the Supreme Court, under the Governor-Generalship of Warren Hastings. It was on his initiative the Royal Asiatic Society of Bengal was founded in 1784 with the genuine enthusiasm and aim to reveal India's past - details taken from Basham A.L., Wonder that was India, Fourteenth Impression, New Delhi, 1991, p.5.

Not only that this criticism is groundless since the Judiciary was not responsible in so doing, but that many of the judges were even expressing regret about this harm done by the early enquirers, once matters became clear to them later. The personal laws of the various castes and communities came to be legally interpreted in course of time along with the chief social identities of the region, that is customary laws connected to *makkathayam* and *marumakkathayam* systems of inheritance. Such legally interpreted customary laws were put under the broad legal title called the 'Malabar Law'.

The fifth chapter, the longest one in this study, is entirely devoted for explaining the Malabar Judgements on the multiple customary aspects of the region. Innumerable judgements on Malabar, reported through various Law Reports, have been carefully examined to make this chapter. The contents of many of the judgements were so well told that going through them became a vital experience; they are capable enough to instil trust in anybody about the dignity of the Judiciary and the judicial heritage. The much controversial issue of Malabar tenures was subjected to vertical and horizontal examination during legal arguments. The leanings of the judges were oscillating in opposite directions. Definitely, judges' predelictions, at times, played a role in the announcement of the judgements and not always just. On the tenurial side the *janmam* rights of the customary landlords and the compensation rights of the *kanakkars* alone were recognized as absolute truths. The Judiciary's earnest effort to understand the real implications of the customary realities of Malabar unravelled many truths so far unknown to the

people of the region, and hence very valuable and reliable. Help was sought from every possible source to master those customs. Cases were mainly decided on merit; however Judiciary did not hesitate in giving creative, healthy suggestions when occasions called for them. The judgements connected to the chief Malabar communities and the inheritance rules are also examined. The fifth chapter however is limited to, more, narrating the individual judgements on Malabar Law, which became responsible to legislative action and permanent social change.

The sixth chapter is an effort to evaluate the judgements of the previous chapter, ironically enough accepting a judge's point of view. It left no doubt in me to identify the very positive role played by the Judiciary in enlivening a comparatively stagnant society to dynamism as to transform it to a rational one and in compatibility with the modern standards of life.

With all humility the study is concluded with a readiness to salute the dignified judicial heritage of the nation for which the contribution of the Malabar Judiciary under the British rulers was no mean.

A few Acts, which brought substantial change in the social conditions of the people of Malabar are added as Appendices at the end of the main theme. A detailed glossary based on primary records and a Table of Statutes, quoted in the study, are also included, besides arranging the cases cited, in alphabetical order.

STATE AND SOCIAL CHANGE – THE ROLE OF JUDICIARY – A CASE STUDY OF MALABAR 1792-1940

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CHAPTER I

BACKGROUND

The introduction of an advanced system of judicature based on the rule of law, as matured in England through years of untiring experiments by legal experts[1], into the extremely custom-oriented Indian context is one of the creative aspects of the British rule in India. Judiciary in modern India is a direct offspring of two centuries of British political domination, the projecting aspect of which definitely was economic exploitation. Exploitation under cover of civilization, the chosen policy of British Colonialism anywhere in the world, is the apt explanation for the introduction of this remarkable institution in India too. Law and the judicial process at all times occupied a great place in colonization, commanding and controlling a growing civilization and the system of nationhood[2]. But once given the chance to perform on the Indian stage, the Judiciary did not simply leave it acting strict to the instructions of the sponsor, but went beyond in awakening the people of Malabar from their age-old stagnated and out-of-date customary ways to the modern realities of life. Malabar, the southern territory on the west coast of India, became one of the largest inheritors of the grand system of British Judicature.

In order to get mastery over the Indian sub-continent the

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[1] Maitland, Constitutional History of England, London, 1887.

[2] Hollander, Barnett, op.cit., p.3

British East India Company had to fight prolonged wars against the native chieftains of several parts of India, and their own European trade rivals. It was amidst such a war, the war between the English East India Company and the Mysore Sultans, that Malabar, comprising Calicut, Palghat and the northern districts excepting Wynad[3], northern districts of Kerala in Peninsular India passed into the hands of the company in 1792 by the Treaty of Srirangapattanam. The conquest of Malabar was equally the culmination of the East India Company's quest to control the Malabar Spice trade for which the European powers had struggled for almost three centuries[4].

The East India Company's first effort on obtaining possession of any new region in India was to make speedy arrangements for immediate revenue collection. The early servants of the company, with experience only as a trading concern, lacked any knowledge in revenue matters, was a real handicap, which they hoped to solve through a study of the local customs and usages in this respect[5]. This problem was finally settled through the Permanent Settlement, popularly known as the Cornwallis system of 1793, by making the *zamindars* permanent owners of the land subject to the payment of a fixed annual revenue to the Government. Later the Permanent Settlement was made applicable to all the territories under the

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[3] Though Wynad too had been included in the districts ceded to the British after the fall of Srirangapattanam in 1799, its complete subjugation became possible only after the suppression of the Pazhassi revolt in 1805.

[4] Panikkar, K.N., Against Lord and State, Religion and Peasant Uprisings in Malabar 1836-1921, Delhi, 1992, p.2.

[5] Majumdar, R.C. and others, An Advanced History of India, London, 1949, p.791.

Calcutta, Bombay and Madras Presidencies, the three major head-quarters of the British rule in India.

In India the administration of civil justice was closely associated with the management of revenue[6], and any experiment in the evolution of the judicial system in India can only be understood with reference to the system of revenue administration. The case of Malabar was not different in this respect; the thought of the immense revenue potentialities of the newly acquired region, which passed into their hands earlier than their calculations, almost intoxicated the company to take immediate steps to realize the revenue. The instruction from Lord Cornwallis, the Governor General of India, to the Bombay Governor Abercromby was "to lose no time in coming to an agreement with all the chiefs for some specific revenue to be paid for the ensuing year"[7]. And though first annexed to the Bombay Presidency as a 'province', Malabar was put under the Madras Presidency in 1800 for purposes of the effective administration of justice.

Though the British reached the Kerala coast as early as the beginning of the seventeenth century[8], their actual interest in Malabar started only from 1664 onwards, in the context of the

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[6] Ibid., p.795.

[7] Ravindran, T.K., Malabar under Bombay Presidency - A Study of the Early British Judicial System in Malabar, 1792-1802, Calicut, 1969, p.ix.

[8] Reports of Joint Commission Bengal and Bombay appointed to inspect into the state and condition of the Province of Malabar in the years 1792 and 1793, Vol. I, p.7.

Portuguese decline and the Dutch ascendancy, when they obtained permission from the Zamorin of Calicut to start factories at Ponnani and Calicut. Later in 1708, a grant of the Fort of Tellicherry from the Kolathiri was obtained. By gaining considerable political influence among the local chieftains the company succeeded in well guarding their trading interests and establishing a near monopoly in the lucrative spice trade of Malabar[9]. It was this advantageous position, which was put to trial with the conquest of Malabar by the Mysore Sultans, Haidar Ali and his son, Tipu Sultan. This highhandedness of the Mysore Sultans only helped precipitating the already hostile situation existing between the company and the Sultans in the context of the Anglo-Mysore wars going on since 1767. Negotiations did not work, and the company's army, with the support of the Rajas of Malabar who were on friendly terms with the company's officials, fought against the Sultan's army, ending in the latter's defeat, and the political supremacy over Malabar passing into the hands of the British.

The paradox in the Malabar acquisition was that it was not achieved at the end of a war between the English and a chieftain of Malabar, but in the process of checking the political designs of the chieftains of the neighbouring territory of Mysore. The Treaty of Srirangapattanam simply effected the transfer of paramountcy from the Mysoreans to the British; for all the subsequent relations the company had to reach at a working arrangement with the native

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[9] Panikkar, K.N., op.cit., p.2.

chieftains of Malabar. In the absence of a central chieftain to plan for the whole of Malabar, the general attitude of the territory towards the Anglo-Mysore rivalry was neither on the offensive nor on the defensive, rather passive. The local chieftains preferred the company's friendship, which was a century old, than the overlordship of the Mysore Sultans whose actions forced some of them to flee their country in terror to Travancore. The local Rajas gave word to stand on the side of the British and the latter promised to restore their lost kingdoms once the Mysore chieftain was expelled.

The peculiar situation arising in Malabar after the expulsion of Tipu seemed not very encouraging as far as the revenue interest of the company was concerned. Both in ancient institutions and the manners of its inhabitants, Malabar differed widely from those what generally prevailed over the peninsula of India[10]. While every other region of India at all times was under the control of one or other central political authority, Hindu or Muslim, Malabar offered the singular example of a territory where such an authority was conspicuously absent after the decline of the *perumals* in the twelfth century A.D. A speedy recovery from the aftermath of the Mysorean invasion too could not be anticipated. But the company's impatience to remove all obstacles on the way to immediate systematic revenue collection could easily plan things to their advantage in a way

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[10] Munro, Thomas (First Commissioner) - A Report on the Judicial System in the Province of Malabar dated 4th July 1817, Calicut, 1912.

appealing to their European mentality of the age.

Soon after the treaty of Srirangapattanam the East India Company came to terms with the local chieftains by restoring them to their pre-Mysorean status, though the military powers enjoyed by them were taken away. In order to inspect the countries ceded by Tipu Sultan, Joint Commissioners were appointed from Bombay and Bengal with instruction to study and report on three specific points of vital importance. These were, to collect information from all possible sources to get a correct picture as to whether any thing like a revenue administration was familiar to the people of Malabar at any time prior to Tipu, the Mysore Sultan; to what extent private right to property was recognized in Malabar; and to inquire into the system of justice practised by the people of the province prior to Tipu[11].

On the first point, which was the most crucial one too, the Commissioners were in unanimous agreement about the conspicuous absence of any regular revenue collection by any ruling political authority in Malabar before the Mysorean invasion[12]. This view was shared by Mr. Farmer, the First Commissioner[13], Major Walker[14],

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[11] Innes, C.A., Madras District Gazetteers - Malabar and Anjengo, Madras, 1908, pp.287-312.

[12] Ibid.

[13] Mr. Farmer's Report (Voucher No. 39) to the Bombay Presidency dated 25th February 1793.

[14] Walker, Major, Report on the Tenures of Malabar 1801, quoted by C.A. Innes, op.cit., p.290.

Mr.Thackeray[15], Collector of Malabar in 1807, Mr. Warden[16] and Buchanan[17] in his travel account. The Joint Commissioners were of the opinion that the Rajas who became independent chieftains in their own respective *nadus* after the decline of the *perumals* were not in the habit of collecting revenue from their subjects[18].

When the centralized political authority of the *cheras* of *mahodayapuram* declined in the 12th century A.D., many of their officials in territories like *nadus* claimed independence[19], leaving the whole of Malabar into so many fragmented political identities. About this Buchanan wrote in 1800, that after the *cheraman perumal*, the country became so divided that it became a common saying, "that in *malayala* a man could not make a step without going into those of

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[15] Thackery, William, A Report on Malabar, Canara and Ceded Districts 1807, Calicut 1911, p.15, Report to the Board of Revenue dated 4th August, 1807.

[16] WARDEN, Thomas, Report to the Board of Revenue dated 12th September, 1815.

[17] Buchanan, Francis, A Journey from Madras through the Countries of Mysore, Canara and Malabar, Vol. 1, AES, New Delhi,1988, p. 360.

[18] Sir Charles Turner's Minute on the Draft Bill relating to the Land Tenures of Malabar, Ch. III. The first recorded instance of the levy of land revenue in Malabar licensed in historical times was in 1731-32 A.D. when the Kolathiri Raja, hardpressed by the invasion of the Bednur Raja imposed a tax of 20 per cent. When the invaders retreated, the tax was probably discontinued, and the district was not assessed again till the Mysorean invasion. In 1757, the Zamorin, who had previously possessed himself of the *nad* of Naduvattam, overran the remaining territory of the Palghat Raja, and to meet the expenses of the force required as a defence against the Mysoreans, who were then threatening an invasion by way of the Palghat gap, imposed a land tax called *kavalphalam.*

[19] Kunhikrishnan, V.V., Tenancy Legislation in Malabar (1880-1970), New Delhi, 1993, p.2.

another", which Hyder took advantage of[20]. Logan's collections of the deeds of 15th and 16th centuries point to the absence of a full-fledged revenue collection[21]. The local chieftains consulted by the British officials on this question, testified that no land revenue was collected during the pre-Hyder Ali period and that their income consisted of sea-customs, fines, customary offerings during the time of festivals and other sundry charges[22]. Except during political exigencies, when the people, the Nambudiri landholders and Nair militia, came forward to help their chieftains, the latter lived on the income of their own royal lands called *cherikkal*. Hence, beyond the ownership of the *kovilakam* properties, the Rajas never acted in the capacity of the ultimate landlord of their territory except defending it from external enemies.

The knowledge that the lands of Malabar were never under state control, and that revenue payment to a state authority was unknown to the people of Malabar, was a direct antithesis of what the company happened to see in other parts of the country. The fact that state was never the ultimate landowner in customary Malabar made the company to decide in favour of continuing the system unaltered and to treat all lands in Malabar as private property for all revenue purposes. This shortsighted policy of the first Commissioners, of treating the whole land of a territory as private property, gave rise to a lot of problems throughout the British rule in

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[20] Buchanan, Francis, op.cit., p.350.

[21] Innes, C.A., op.cit., p.303.

[22] Panikkar, K.N., op.cit., p.3. Foot Note 10.

Malabar to the administrators and the judiciary[23].

The presumption that land as a whole in Malabar is private property was partial explanation to the second point the Commissioners were entrusted to enquire into. To the question, to what extent private property was recognized in Malabar, the unanimous answer of the Commissioners was that private property as a well-defined institution was in existence in Malabar from ancient days as in any other European country. But the fact that revenue payment had no native precedent in Malabar put the burden on the company to find out the actual owner of the land from whom revenue payment could be demanded. A search into the very depth of the tenurial history of Malabar did not seem advisable in consideration of the company's immediate revenue requirements. The Commissioners were more concerned with giving an accurate account of the land tenures as they found them through an exhaustive survey, instead of speculating about their origins[24]. This later became a Herculean task to the Judiciary, for purposes of deciding tenurial questions, to actually explore into their origins.

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[23] The later analysts of this decision were criticising the company for not making the state the owner of all Malabar lands, which would have helped them to solve the tenurial problems with ease. Baden Powell in his Land Systems of British India (p.157) criticizes this decision as responsible for the loss of claim to the state even to the forest and unoccupied waste, which had elsewhere been properly asserted. C.A. Innes in his Malabar and Anjengo (p.304) states it unfortunate that the company, instead of asserting the state's right to waste lands, adopted the presumption that every acre of land was the private property of some *janmi*.

[24] Innes C. A., op.cit., p.289.

The Joint Commissioners had acquired some knowledge regarding the Malabar tenurial relations from the local chieftains and Brahminic compositions like *keralolpathi* [25].

The first plan of the company was to entrust the task of collecting the revenue to the local Rajas. Cornwallis restored their authority over the countries that had formerly belonged to their families; and after taking away their military powers allowed one-fifth of their country's revenue to support their dignity, which Buchanan recorded, "is more than any sovereign of consequence in Europe can spare for that purpose"[26]. The attempt of the restored Rajas or *naduvazhis* to collect the revenue, ended in complete failure in a war-torn country like Malabar, where the people could not recognize a local chieftain as a revenue collecting authority.

However, the company was determined to have their revenue, and from the appropriate hands too. To their great relief, the revenue arrangement carved out by the Mysoreans, their predecessor, was there as a model. The Joint Commissioners soon proceeded to make careful enquiries into the Mysorean land revenue system in Malabar. The Mysorean settlement, which had been hurriedly conducted by Arshedbegkhan, the Head *amildar* under Tipu, during the interval

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[25] Gundert Herman, (ed), Keralolpathi (Reprint) Trivandrum, 1961. They came to understand that the socially superior class, the Malabar Brahmans called Nambudiris was recognized as the customary hereditary landlords of Malabar. That the Nambudiris were not doing cultivation work directly; that they were leasing out the greatest part of their estates temporarily to cultivating farmers called *kanakkars*, with occupancy rights, for rent, and at times by taking advance.

[26] Buchanan, F, op.cit., p.350.

between the wars, was not based upon any definite plan or fixed principles, and hence arbitrary. The revenue resources of the territory were hardly examined, the Mysore governor's intention was only to collect the maximum possible amount to meet the expenses of the war against the British[27].

The Joint Commissioners' Report claimed a complete study of the Mysorean system of assessment based on Arshedbegkhan's *jamabandhy*, which the later British officials like Graeme criticized as simply imaginary on the part of the former as an excuse to their overassessment[28]. Regarding the assessment Grame's Reports tell us that the *kanakkar* was likely to have made reservation of 3/20th out of the gross produce for the payment of their *janmakar* and landholders; 11/20th for their own support and profits and for the charges of cultivation; and agreed to pay the residue, being about 6/20th to the Government[29]. However, Graeme admits that in the absence of any original records, as belonging to the Mysorean days available, such claims by the company's officials could not be taken at their face value.

The Mysoreans had settled with the cultivating tenant, about which Oodhat Rao, Collector of Chirakkal under Hyder, stated to the Joint Commission: "The *janmakars* are, in this country, for the greater part Namboories, who do not themselves carry on the cultivation, nor

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[27] Panikkar K.N, op.cit., p.3.

[28] Graeme H.S. Esq., Commissioner of Malabar, Report of the Revenue Administration of Malabar dated 14th January 1822, Calicut, 1898, p.195, para 1157.

[29] Ibid., p.28, para 96.

do they use to attend at the *cutchery* wherefore the settlement was made with the ryots[30]. The flight of many royal chieftains and the *janmis* in terror gave the Mysoreans the easy option of settling with the *kanakkars*, who were the cultivators and occupants of the soil[31].

Though the tax imposed by the Mysore Sultan was an unprecedented one, the people of Malabar did not feel it much, since in the absence of the *janmis* a share of the *pattom* or rent due to them could be diverted to pay revenue to the Mysore sultan. In this arrangement, the *kanakkars* remained as *kanakkars*; Tipu Sultan did not promise to grant them proprietary rights; *kanakkars* never perhaps expected it too; rather, to them, it appeared as getting freedom from the *janmi's* control; the *janmam* right stood frozen in the Mysorean days. Under the Mysoreans, many Mappilas too became *kanakkars*. Tipu's calculation was to cajole the *kanakkars* who were the actual cultivators, whereas the *janmis* were simply a class living in ease and comfort, which would be of no use in the Mysorean interest.

A scrutiny into the Mysorean settlement helped the company's officials to identify the class from whom revenue collection could be made. But while the Mysorean settlement was an easy process through the complete rejection of the *janmi* class, the company was obliged to recognize the existence of a landlord between the state and the actual cultivator. In such an arrangement while the *kanakkars*

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[30] Mr. Duncan's Report on the Revenue Settlement of the Ceded Countries, Malabar District Records, Vol.2531, F.99.

[31] Innes C.A., op.cit., p.328.

would be made to pay revenue to the state, were equally obliged to give customary *pattom* to the *janmi*, which definitely would be a great burden to them.

It was not, however, the revenue question which troubled the company, since the revenue rates had to be fixed by the Government, and, which, they came to know from the Rajas, that if readmitted to their lands the *janmis* would gladly agree to pay the amount. But the problem was how to tackle the newly arisen tenurial situation, arising from the Mysorean revenue settlement[32]. As per the promise given by the company to the Nambudiri landlords and Nair noblemen, for their help against the Mysoreans, they had to be restored to their old status. But this could not be done without doing harm to those Mappila *kanakkars* who were raised to that status by the Mysore sultans. The fear had been expressed by Mr. Farmer, the Supervisor of the Joint Commission, that "the *janmis* who had been long dispossessed by the Mappilas could not now be reinstated without risking not only the Commission of some degree of injustice but the general resistance and even an open rebellion in that part of the country[33]. Still, the company did not want to see a class hostile to their interest in a dominant position, which directed them in taking the next executive action.

As Tipu Sultan had tried to create the impression that he was doing the right thing in Malabar, the company too, while trying to

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[32] Joint Commissioners' Report, Vol.II, pp.227-228, para.200.

[33] Ibid., Vol. II, p.463, para. 457.

turn upside down the former's tenurial reforms, wanted to create the same notion that they were moving in the right direction. The British enquirers came to hear from the Nambudiris that the latter alone had always enjoyed the full *janmam* or proprietary right in the land which was divinely gifted to them by Parasurama, the legendary divine hero of Hinduism. The written source presented to the Commissioners, the Malayalam composition, *keralolpathi*[34], which itself was a Brahminic composition, with repeated explanations about the divine origin of the land, was one well justifying the Nambudiri claims. The Nambudiris also convinced the Commissioners that the former were expressly exempted by Manu, the Hindu lawgiver from payment of taxes.

The British officials were ready to accept the Parasurama tradition of Brahman proprietorship as a simple and satisfactory explanation for giving effect to their next plan. The *kana-janma-maryada*[35] aspect of customary Malabar tenures was either ignored by the Commissioners or was not properly explained to them by the native experts. Anyhow, the early Commissioners were in unanimous agreement about the existence of private property, in the Roman model[36], as a well-defined institution in Malabar from ancient days as in any other European country, and that the Nambudiris were the only class with proprietary rights.

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[34] Gundert Herman, (ed) op.cit., A Malayalam Composition about the origin of Kerala.

[35] Variyar M.R. Raghava (ed), Keralolpathi Granthavari (The Kolathunadu Traditions, Calicut University Historical Series, 1984, p.10 *ola* 11, *puram* 1.

[36] Davies H.A., An Outline History of the World, London 1969, (Reprint), p.304.

Steps were hastily taken by the company to give documented proprietary rights to the customary *janmis* through a Proclamation of 1799 of registering the transfers of landed property either in the provincial or local *adalats*[37]. As a measure of compromise, it had been stated in the Proclamation published by the Joint Commissioners that the Mapppila *kanakkars* who had been in possession of lands for over six years should be left undisturbed in full rights, but the lands in the hands of those with less than the stipulated period would be given back to the old *janmis* with right to sue for possession of their lands[38].

Though proprietorship of an absolute nature was granted to the customary *janmis,* the company was not for provoking an immediate calamity. The *janmis* were instructed not to enjoy the newly conferred status till their mortgage liabilities with the pre-Mysorean *kanakkars* were finally settled. In taking such a step the company had the twin motive of getting enough time to chalk out plans for the future as well as, to keep away the bitter truth from the *kanakkars* that their centuries-old undisturbed occupancy rights were going to be lost forever. An immediate outburst of fury from the part of the existing *kanakkars* had to be averted. However, the Mappila *kanakkars,* who happened to lose their land in the new arrangement, became revengeful both against the colonial rule and the Hindu *janmis* of their creation, resulting in so many isolated outbreaks in the nineteenth century beginning from 1836 and ending in 1921 with the

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[37] Innes C.A., op.cit., p.367.

[38] Ibid., p.304.

fatal upsurge, the Malabar Rebellion of 1921[39].

It was in Malabar that the class, which was not granted permanent rights of occupancy, was made to pay the revenue[40]. Though the Proclamation of 1805 contemplated a settlement with the actual *janmi*, the same did not come into effect. This later became a matter of discord between the government and the courts, and the fundamental irregularity of the arrangement was pointed out by the High Court in 1888, and the declaration of it as illegal[41].

The Joint Commissioners were well aware of the multiple problems the Malabar Government was going to face in the years ahead from their revenue settlement, which aimed only at the immediate benefit of the company. It was reported that the general restoration of the old Nair and Brahman landholders could not be effected without some degree of hardship and injustice whichever side is favoured. Since during the many years the tenants were enjoying considerable freedom, which was going to be affected through the reinstatement of the old *janmis*, pushing them to once more to a life of dependency, would be painful to them[42]. It happened to be the mission of the Commissioners to prevent internal dissensions among the chiefs, and to secure under a regular administration of justice all those advantages to the company which

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[39] Nair, K. Madhavan, Malabar Kalapam (Mal), Calicut, 1971, Nair C. Gopalan, The Mappila Rebellion 1921, Calicut 1923.

[40] Kunhikrishnan V.V., op.cit., p.11.

[41] S.A. 78 of 1888, MHCR.

[42] Joint Commissioners' Report, Vol. II, p.228, para 201.

their situation and valuable productions were capable of affording both in revenue and commerce[43].

To counter popular unrest arising from the new revenue settlement some adjustable safeguards had to be chalked out. Economic domination over a people who had their own well-established customary institutions and laws could be won only by creating the impression that the new ruler is their benefactor. Hence the company projected the improvement of the lot of the people, through proper education, as their declared policy, and the guarantee of equal justice to all their subjects[44], through the introduction of the British Rule of Law in combination with the latter's own customary laws. Colonial justice anywhere in the world was shaped more or less in the same pattern - "settlements established subsequent to 'discovery' at once necessitated the creation of new courts, the evaluation and application of local and even tribal laws and customs; acquisitions by conquest raise problems of the domestic law existing prior to and following the new sovereignty; transfers of Government or possessions by purchase, or cession involve like solution"[45]. However, in the case of India the company was more cautious when found that the acquired country was not a newly discovered country, but well peopled by a civilized race and governed by long-established laws to which they were much attached, and which it

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[43] Ibid., p.108, para 80.

[44] Arbruthnot, Sir Alexander J. (ed), Major General Sir Thomas Munro, Vol.I, London, 1881, p.xii.

[45] Hollander, Barnett, op.cit., p.4.

would have been highly inconvenient and dangerous to change[46].

Though customs dominated everywhere in India, Malabar was outstandingly unique in this sense. Malabar was conspicuous for the absence of a centralized political authority; but she was equally conspicuous for the presence of another mighty authority of a very different nature. That was 'custom', which was later identified as king paramount by William Logan, the Malabar Collector in the 1880s[47]. Malabar was an extremely custom-oriented country; no written authority brought them into a theoretical framework, but the oral tradition was so strong; most of the customs through centuries of unbroken observance became institutionalized, in which the social status and identity of every class was specifically marked, and nobody was expected to violate them.

Before giving shape to a substantial legal system to handle successfully the turmoiled Malabar situation, it was essential for the company to get the true picture of customary Malabar and the system of justice practised by them. The third instruction to the Commissioners was to enquire and provide authentic information as to the state and circumstances of the country in relation to the manner and degree in which justice had hitherto been administered in Malabar[48]. To study the situation, General Abercromby, Governor of Bombay, himself visited Malabar[49]. The purpose of the visit was to

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[46] Aiyar Balasubrahmaniya, Malabar Law Journal op.cit., p.5.

[47] Logan William, Malabar Manual, (Reprint) Vol I, Trivandrum 1981, pp.183-211.

[48] Joint Commissioners' Report, Vol.II, p.182, para 156.

[49] Ibid., p.180, para 154.

help the company's officials to become aware of the legal background of Malabar which would enable them to more advantageously administer the same sort of justice to all classes of the natives in combination to their own system of justice. For the same reason the Joint Commissioners were instructed to determine in a satisfactory manner on the number and constitution of the several courts that would be necessary to ensure equal justice to all classes of society.

Enquiries brought home the fact that the administration of justice in customary Malabar was primitive in several respects[50]. There was no written code of laws nor one law for all; it was one strictly based on the *chaturvarnya* ideals suited to the society of those days[51]. The company's findings in this direction helped them a lot in setting up the Judiciary in Malabar in a form suited to the requirements of the province, and in the preparation of a legal code based on the British Common Law. It was decided to give due respect to the centuries old oral tradition of the country which had such a firm hold on the people as any modern written legal code.

Whatever be the creative role the Judiciary was going to play in the years ahead in deciding the destiny of the people of Malabar, its introduction in 1792 had no such ambitious projects in view. It was primarily meant for saving the honour of the company from the abysmal situation it had reached at the end of the Anglo-Mysore

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[50] Menon, Sreedhara (ed) Kerala District Gazetteers, Cannanore, 1972, p.563.

[51] Bhaskaranunni, Pathonpatham Nootandile Keralam - A study (Mal), Thrissur, 1988, p.455.

wars; equally it was the aim of the company to hide behind the garb of justice their colonial motive, of turning the revenue potential of the region to their advantage.

STATE AND SOCIAL CHANGE – THE ROLE OF JUDICIARY – A CASE STUDY OF MALABAR 1792-1940

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CHAPTER II

CUSTOMARY MALABAR SOCIETY - EIGHTEENTH CENTURY SITUATION

Malabar, the southern territory on the west coast of India, destined to be ruled by the British since 1792 till the independence in 1947, was well known to the outside world from time immemorial. Its unique geographical peculiarities, outstanding commercial potentialities, coupled with the generosity extended by its chieftains to outsiders, made it a land of much temptation to the foreigners. How intense this fascination was is clear from the fact that the trade and cultural exchange which started in some dim, distant past well succeeded in stretching beyond centuries down to the modern times. And it was perhaps the outstanding qualities of the trade items of this region, which again tempted the Europeans in the modern times to select this part of the world as one of their coveted destinations in the process of expanding their colonial ambitions.

Even more wonderful to the European minds was the very extraordinary cultural peculiarities they happened to see in this region, which were quite different from the general Indian peculiarities. It was a great surprise to the early British enquirers, the Joint Commissioners deputed by the East India Company in 1792, to see that Malabar was not under the control of a single central political chieftain, but under several feudatory chieftains of varying degrees of power. This was not the only deviation Malabar had from

the other parts of India. While in the rest of India the ruler was looked upon as the sovereign of all lands of the country, in Malabar political authority and land control were two entirely different entities. While the political chieftains were never asserting any authority over the land except those lands which were allotted for their expenditure called the *cherikkals*, the so called *janmis* who were at the helm of land control were not claiming any political power for themselves.

A very unique peculiarity, which every foreign visitor noticed in customary Malabar, was the intense attachment of its people to their customs. The every day life of the people of Malabar was so strictly regulated by so many age-old usages, perhaps with almost dictatorial might. William Logan, Malabar collector in the 1880s, who approached the Malabar problems with a sort of sentimental attachment, gives a graphic account of it[1]. There was no written authority to guide them; but the oral tradition was high, and nobody had the guts to violate or overrule the customs. Most of the customs, the roots of which could be searched somewhere in the post-*perumal* era, became gradually institutionalised, through so many centuries of continuous observance. The people of Malabar were not at all disturbed by whatever was happening beyond their geographical and cultural horizons. While outsiders took great fancy in visiting Malabar, the people of Malabar seldom went out to see the world beyond them. It was an extremely conservative, almost stagnant

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[1] Logan, William, Malabar Manual, Vol.I, op.cit., pp. 183-211

social set-up that the British enquirers happened to see in Malabar.

For a study of the customary Malabar society as it existed just before the British ascendancy, the most important sources are the early British Survey Reports[2] and the innumerable Judicial Records available in the Archives and the Court Record Rooms. The early reports of the East India Company's officials were mainly based on the details collected by them from the local experts, as well as through direct observation. Beyond their official needs some of the company's officials were really enthusiastic to study the wonderful aspects of Malabar culture. We have a full glossary of the Malabar tenurial terms prepared by H.S. Graeme Esq., while as Commissioner of Malabar, prepared in 1820s and available in manuscript form[3]. Along with the growth of British power in Malabar, so many official publications came out giving very exhaustive explanations on every minute aspect of Malabar society. The Manuals, Gazetteers, Statutory Reports, Statistical Atlas etc are invaluable sources for a student of Malabar history. The names of British officials and judges like Farmer, Graeme, Munro, Holloway, Strange, Wigram, William Logan, Henry Mayne, Innes C.A. and others are remarkable in this line. Buchanan's Travel Accounts, though with exaggeration of details

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[2] British East India Company's officials started surveying the Malabar region even before its actual acquisition came in 1792. Detailed reports came out in almost every correspondence done in those days. A very substantial one which is an exclusive Survey Report was the 'Descriptive Memoir of Malabar' by Lieutenants Ward and Conner which gives in admirable way the details of the geographical and statistical surveys of the Malabar region undertaken during 1824-1830.

[3] Graeme's Glossary (Manuscript), Regional Archives, Calicut.

here and there, give an attractive description of the Malabar of 1800[4].

The British compositions definitely had their limitations, since their authors were explaining the features of a civilization completely alien to theirs, but the painstaking effort expended over them by the early enquirers can never be underestimated. The Judicial Records are truly reliable sources for the very exhaustive way they have analysed and explained the customary truths of Malabar by collecting information from all possible sources. A true picture of the harm done to the customary *maryadas* of the land through the irrational and unjustifiable revenue settlement of the company too is obtained from the judicial sources. Indian Judges like Muthuswami Aiyar, Sadasiva Aiyar, Sundara Aiyar, Chandrasekhara Aiyar, Chandu Menon, Hidayatullah and others contributed towards explaining historical truths about Malabar social realities through judicial interpretations.

Attempts to study the cardinal features of customary Malabar life in a more scientific way came from the part of the native historians of Kerala in the pre-and-post-independent era. The source materials they relied most were the archaeological remains belonging to much earlier periods, the contemporary epigraphic records and the early foreign accounts. The process is still going on. The substantial contributions came from historians like Shankunny Menon, Elankulam Kunhan Pillai, K.P. Padmanabha Menon, K.V. Krishna Aiyar, M.G.S. Narayanan, Rajan Gurukkal, Raghava Variyar, Kesavan

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[4] Buchanan Francis, op.cit.

Veluthat, K.N. Ganesh, M.P.Joseph, Ibrahim Kunhu and many others.

To anybody looking dispassionately at the customary Malabar society prior to British ascendancy the immediate striking impression would be an awareness of its projecting multiple socio-economic identities. Of these, the most important one definitely was the extraordinary importance attached to landed properties, whether at the tenurial or on the family inheritance level. Land, which was viewed with deep veneration, and recognized as divinely gifted to the Brahmans, was the chief binding force of Malabar social life between various classes. Land was never subjected to division or partition. Every human activity in customary Malabar was in complete subordination to their land concept.

Land relations and the system of production then existed definitely was not the continuation of the system existed in primeval Kerala, the growth of which might have been arrested at some historical turning points in the history of the region. Private ownership of land was familiar to the people of Malabar as early as the *sangam* age when land remained in the hands of the indigenous population, mostly cultivators who enjoyed customary proprietary rights till the sixth century A.D[5]. The arrival of the Brahmans to Malabar, which began during the turn of the Christian era from the northern regions,[6] resulted in a wholesale change in the primeval

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[5] Pillai, Elamkulam Kunjan, Janmi Sampradayam Keralathil (Mal.) Kottayam, 1967, p.8.

[6] Veluthat, Kesavan, Brahmana Settlements in Kerala, Calicut, 1976, pp.12-17.

communal ownership and the primitive agricultural system based on co-operative labour[7]. The Brahmans, by lavishly using their vocabulary, knowledge in the Vedas, wisdom and new techniques of agriculture prompted the people to donate their lands to the temple, the God's abode. And through long series of land transfers called *attipper* grants, the whole land in Malabar, cultivated and uncultivated, including all its grass, stone, shrubs, snakes and every thing else became the absolute property of the temples[8]. After achieving this, the temples in turn transferred the inferior right to cultivate the land to the original donors as *karalars*. In this land re-distribution the Brahmans as temple *uralans* became the most superior class with their legitimization myth that the Kerala land was divinely gifted to them by the legendary divine hero Parasurama. The Tiruvalla copper plates speak of the great volume of wealth accumulated by the temples in the eleventh-twelfth centuries A.D[9].

Divine claims of the Brahmans, called the Nambudiris of Malabar, gradually pushed down the other classes to social inferiority; the social status of any class in Malabar came to be reckoned according to the way it affected the Nambudiri interest. A marked change in the medieval social transformation was the birth of the *janmi* system, when the Nambudiris converted this title on the land to *janmam* or hereditary right. The complete authority over the

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[7] Gurukkal, Rajan, The Kerala temple and the Early Medieval Agrarian system, Kottayam, 1992, p.28.

[8]Ibid., p.34.

[9] Ibid., p.32.

temple lands and an equal authority over the agricultural lands made the Brahmans a power factor in medieval Kerala, giving the impression to an outsider that lands were under their absolute control.

However, the Nambudiris did not take direct possession of the land so donated; they directly controlled only those lands where their *illoms* situated. All the other lands, so scattered, were allowed to remain in the hands of the original donors, but as though leased to them by the Nambudiris, whose duty was just to cultivate them and pay rent to their Nambudiri landlords as divinely appointed guardians. Originally called *karalars,* in medieval times, cultivators gradually came to be called *kanakkars* with occupancy rights on the lands they were cultivating. By giving this right to the *kanakkars* the *janmi* found it quite convenient to manage the widely scattered landed properties about which he himself had no definite picture[10]. The *kanakkars,* in whose possession most of the *janmi's* lands were, did the cultivation work through their caste inferiors, the actual tillers of the soil, whose occupancy rights were limited to their habitats only.

Theoretically speaking, the *kanom* right and the occupancy rights following from it, were only temporary, subject to revocation or renewal after an agreed term, usually twelve years. Though redemption clause was included in the lease deeds, evictions etc. did not take place. In most cases renewals alone took place, which almost

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[10] Ganesh K.N., Keralathinde Innalekkal, Trivandrum, 1990, p.146.

became a precedent, allowing the same family of *kanakkars* to continue for several decades and even centuries, with their occupancy rights almost becoming permanent. Renewal of the right took place on the expiry of the existing *kanom* deed or on the death of the existing *kanakkar* when his successor to become the next *kanakkar.* Hence, though the *janmis* were the customary proprietors of all lands in customary Malabar, the occupancy rights were always with the *kanakkars*[11].

A very unique aspect of the customary Malabar tenurial relations was the right conferred upon each class in sharing the resources of the country. Land as a saleable item with any definite market value was never recognized in customary Malabar. Since the only purpose for which land was used then was for cultivation, the value of the agricultural produce from the land alone was considered for the full value of the lands. The produce of the land was divided among the various classes according to the social status of each class as their customary share of the produce. The right enjoyed by any class in customary Malabar was this share of the produce, and never an absolute right on land itself. The *janmi's* share of the produce was the *janmam* right, the *kanakkar's* share the *kanom* right[12] and that of the inferior classes including the tillers of the soil, their *cherujanmam.*

The quality and quantity of the share of each class came to be decided according to their social status. The source of the *janmam*

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[11] Tiruvalla Plates, Travancore Archaeological Series, Vol. II, Part III, pp.131-207.

[12] Variyar Raghava (ed), Keralolpathi Granthavari, op.cit., p.10

right, the most superior one, was the *janmi* himself, as the proprietor of all lands. The *janmi's* share of the produce was a permanent right, which the *kanakkars* were liable to pay[13]. The right is hereditary too; it passes spontaneously from father to son. The right remains forever with the *janmi*, till he himself opts to give it up, which is possible through an absolute sale to an outsider, who is his caste equal, called *attipper*. Unlike the *janmam* right, all the inferior rights were only temporary, which could be revoked at any time at the pleasure of the *janmi*, though the same rarely happened in customary Malabar. In most cases the members of the same family of *kanakkars* continued; still their right could never become permanent; it could not automatically pass from a *kanakkar* to his natural successor; renewal of the old contracts was an inevitable aspect of the *kanom* interest.

For cultivating the land of the *janmis* as well as for occupying it, the *kanakkars* had to pay regular rent or *pattom* to the *janmi* which became the latter's share of the produce. At times either as security to the lands leased or as loan the *janmi* was taking advance from the *kanakkar*. Whenever the *janmi* was in need of money, it was the duty of the *kanakkar* to advance loans, which were refunded by the former with interest. Both lease and mortgage were in existence in Malabar[14]. Out of the yield from the land in his possession, the *kanakkar*, after paying the rent, that is *janmi's* share of the produce, and meeting the expenditure of the cultivation, including the share of those working

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[13] Ganesh, K.N., Keralathinde Innalekal (Mal), op.cit., p.84.

[14] Indian Law Reports, Madras Series, Judgements on Malabar Law - Land Tenures.

under them as actual tillers of the soil, the balance became his share. Below the *kanakkars* were the actual tillers of the soil whose rights were far inferior to those of the upper classes. In *keralolpathi* the right of these inferior castes is referred to as *kizhkur*[15]. The artisans, craftsmen, astrologer, goldsmith, carpenter, washerman, barber, and the tillers of the soil working for the melody of the society had their own privileges, great or small[16]. Neither the *janmi* nor the *kanakkar* could deny the privilege of any other depending class, which would result in unpleasant happenings. In customary Malabar every class was entitled to enjoy its share of the produce inspite of the rigid caste practices, which definitely denied human consideration to a large majority.

The land rights enjoyed by the various classes in customary Malabar were transferable too. The *janmi* could effect an absolute transfer of his interest through sale called *attipper*, which terminates his *janmam* right on the land. Since the lands were recognized as divinely gifted to the Nambudiris in *janmam*, *attipper* grants could be made only to a Nambudiri who alone was found appropriate to keep its sacredness. The right so transferred was only the previous *janmi's* share of the produce as rent, and in no way affected the *kanom* transactions effected by him. As the *janmi*, the *kanakkar* too could transfer or sell his interest to one willing to do the obligations to the *janmi* and accept all the tenurial encumbrances attached to the *kanom*

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[15] Variyar, Raghava (ed), Keralolpathi Granthavari, op.cit., p.10.

[16] Menon, K.P. Padmanabha, Kochi Rajyacharithram (Mal), Ernakulam, 1914, p.121.

right. By the fifteenth century *attipper* etc. became rare, since most of the *janmis* became interested in keeping their *janmam* right intact instead of transferring it to anybody else[17]. However, it was this buying and selling process conducted through *attipper* and the wording in the deeds in which such transactions were recorded, that misled the early British administrators and caused them to form erroneous views on the general subject of this *malayalee* land tenures[18].

Malabar society of the eighteenth century carried within it many of the feudal characteristics - private property in a customary sense did exist there. The local chieftains called the *naduvazhis* had lands belonging to their *kovilakoms* called *cherikkal* lands. There were hereditary *janmam* properties of the Nambudiris called *brahmaswams* with *attipper* rights. There were large acres of lands called *devaswoms* attached to temples. The lands under the *kanakkars* too appeared as their permanent property because of their continuous stay in them for so many years. Even the tillers of the soil had the consoling factor that they would not be expelled from their small holdings. It was a broad structure of co-existence and interaction based on dependence and obligation in the descending order[19] from the *janmis* to the agrestic slaves. The customary tenurial co-existence is defined as *kana janma maryada* in *keralolpathi*[20]. The paradox of the Malabar landed

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[17] Ganesh, K.N., Keralathinde Innalekal (Mal), op.cit., p.144.

[18] Logan, William, op.cit., p.602.

[19] Gurukkal, Rajan, op.cit., p.67.

[20] Variyar, Raghava (ed), Keralolpathi Granthavari, p.10, *Ola* 11, *Puram* 1.

property was that the ownership was simultaneously absolute as well as non-absolute. While the title of *janmam* was absolute, the soil as such was never absolutely owned by anybody. Private property in Malabar was never in the Roman model. Roman landlord's right over the soil was absolute; the right he was giving the tillers of the soil was only for cultivation[21].

There was a triangular feudal relationship between the three-landowning classes in Malabar. These three classes, the Nambudiris, the *naduvazhis* or the Rajas and the Nairs had a sort of indebtedness to each other arising from their special requirements connected to land ownership, political status or social circumstances.

For getting complete recognition to their spiritual superiority and *janmam* claims the Nambudiri's indebtedness to the *naduvazhis*, the political chieftains of Malabar, was great. In gratitude, the Nambudiris were never claiming any political authority over the lands under their control, and during times of external threats quite readily helped the *naduvazhis* by sending their Nair militia. Nambudiri *janmis* were indebted to the Nair *kanakkar* for organizing the army as well as to get Nair concubines for the younger male members of the *illom*.

In the early stages of the Brahman settlement it was most likely that clashes took place between the tribal chieftains called *nattudayavar* and armed Brahmans. A modus operandi might have

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[21] Davies H.A., op.cit., p.304.

reached at a later stage, which helped some of the powerful tribal chieftains to become the *naduvazhis* in *swaroopams* with spiritual sanction and Kshatriya status granted by the Nambudiris and the Nambudiris became ready to recognize the *melkoyma* of the *naduvazhis*[22]. The *naduvazhis* were indebted to the Nair soldiers for military service in the process of defending the country.

The *kanakkars* were mainly the Nairs, whose social status was inferior to that of the Nambudiris, but superior to that of most other castes. In order to ensure the military service of the Nairs they were granted the *kanom* rights, which made them gradually the permanent occupants of most of the cultivable lands, and assured for them the status of a high caste. The peculiar system of family inheritance of the Nambudiris and the Nairs in which family property always remained impartible, Nambudiri men found it convenient to enter into loose marital unions with Nair women called *sambandhams,* which gave the former no liability.

The very large joint families of Nambudiri *illoms, naduvazhi kovilakoms* and Nair *tarwads* became the three active pillars upon which the feudal superstructure of customary Malabar was made to stand. Customs became so well established and almost institutionalized with so many socially inferior classes in the service of these three upper classes at the base. This was the actual picture of customary Malabar on the tenurial side at the time the Joint Commissioners deputed by the British East India Company started

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[22] Ganesh, K.N., Keralathinde Innalekal (Mal), op.cit., pp. 122 to 131.

their enquiry in 1792, though a little mutilated due to the Mysorean inroads.

A historical analysis of the customary tenurial relations of Malabar does not become complete without a reference to the much discussed composition in Malayalam, the *keralolpathi*[23], which was offered to the British Commissioners by the Nambudiris as the written authority for a proper understanding of the Malabar tenures[24]. This historical treatise of unknown origin, but of a later compilation is supposed to be the Malayalam version of the Parasurama stories, which appeared in different ways in different parts of the country. Probably composed by the Nambudiris, its factual aspect tries to tell us that Parasurama brought the Arya Brahmans from outside to whom sixty-four gramams with water and flower were granted with *janmam* rights in the fertile lands of Tulunad and Kerala[25]. Sudras were brought, settled and instructed to obey the Brahmans, their protectors, and various rules of conduct were also prescribed for them. "He created *adima* and *kudima* in the *desam,* protected *adiyans* and *kudiyans,* established *taras* and *sankethams,* separated the Nairs into *taras*" and the supervision work over the land was given to them. To the *kudiyans* the *kizhkur* (inferior share) to the Brahman the *melkur* (the superior share); to the former the *kanom,* and to the latter the *janmam;* and so the law of *kanom* and *janmam* and the rules of conduct for the Brahmans and custom for the

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[23] Gundert, Herman.(ed.) Keralolpathi (Reprint) Trivandrum, 1961.

[24] Joint Commissioners Report 3 Vols. Regional Archives, Calicut.

[25] Variyar Raghava (ed), Keralolpathi Granthavari, op.cit., pp.1-3.

sudras were ordained[26]. The morale of the tenurial relations of customary Malabar was *kana-janma-maryada,* that is the observation of *brahmanacharam* and Sudra *maryada*[27] and the construction of *illoms* for the Brahmans.

The *keralolpathi* also tells us of how the *perumals* were brought from outside by the Brahmans to become ruling chieftains of Kerala. It is so stated that in order to settle the disputes among the several Brahman groups *kazhakams* were formed and even then when solutions could not be found, it was decided that henceforth protection and administration need not go well in the hands of Brahmans and that there should be a king to rule the country. This is being projected as the background of the origin of a political sovereignty in Malabar with the blessings of the Brahman priests. The reference to the *akambadi* soldier, the *patamalai nayar* is also obtained. Hints to the installation of seventeen *naduvazhis* in the seventeen *nadus* for giving happiness and satisfaction to the Brahmans are there. It is also hinted in the *keralolpathi* that after completing his political mission in Malabar *cheraman perumal* started for Mecca with the Arab Muslims who came to his kingdom[28].

However, the repeated stress in the *keralolpathi* is only to the Brahman domination over all the lands in Malabar; in almost every page it is done. All other social peculiarities explained are only

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[26] Quoted by Innes, C.A., op.cit., p.305.

[27] Variyar, Raghava, Keralolpathi Granthavari, op.cit., p.10, *Ola* 11, *Puram* 1.

[28] Ibid., pp.1-65.

agencies to safeguard the land, which was divinely gifted to the Brahmans. Perhaps *keralolpathi* might be exaggerated versions of some socio-political developments, which actually might have taken place[29]. And whatever might be the truthfulness of this composition, the tenurial reality the British Commissioners happened to see in Malabar at the end of the eighteenth century was one well suited to the explanations given in the *keralolpathi*.

In the Proceedings of the Sudder Court, 1856, we get an account of the land tenures of Malabar with the conditions on which they were held at customary basis in pre-British India, that is the legal interpretation given to the tenurial terms as identified by the early British Surveyors[30].

Family Inheritance

According to William Logan, the most important of the customs in which the people of Malabar differ from the people elsewhere is that connected to the inheritance of property[31]. Landed property in Malabar, whether on the agrarian or on the family inheritance side, was a mighty venerated institution of inestimable spiritual value. Its inalienability and impartibility became everybody's concern; such divinity was attributed to everything connected to land, especially its

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[29] Ganesh, K.N., Keralathinde Innalekal (Mal), op.cit., p.132.

[30] Proceedings of the Court of Sudder Udalat, 5th August 1856. See Appendix No.I. p.412.

[31] Logan, William, Malabar Vol.I, AES, Reprint, New Delhi, 1989, p.153.

impartibility on the family inheritance side, that all human relationships were so shaped as to do no harm to its undivided existence. This was responsible for the cultivation of so many very peculiar, extraordinary, social habits by the people of Malabar which went to the extent of denying to a great majority of them even the primary joys of human life, and the gradual stagnation of the society itself.

The Malabar family, irrespective of caste distinctions, was a joint family in which so many generations lived under the same roof sharing the fruits of the undivided family property in common. The system of inheritance was mainly of two types - *makkathayam* or patrilineal succession in which descent was traced through the male, that is from father to son, and *marumakkathayam* or matrilineal succession in which inheritance was through the maternal line, that is, from the maternal uncle to the nephew or the immediate younger male member on the female side. While the former was the system practised by the rest of India, the latter was something peculiar to Malabar. The Malabar counterpart of even those communities, who are absolute followers of the patrilineal system in other parts of India or world, came to adopt the *marumakkathayam* system in the inheritance of family properties.

The existence of such a system of inheritance in which a person's natural successor is not his children but his sister's children was a rare phenomenon in the eighteenth century world context. And so too, we could not hear of a Muslim community anywhere in the

world at that time following strict matrilineal succession, which is un-Islamic in character, as a section of the Mappilas of Malabar[32]. And it was equally strange that in the whole of India the only matrilineal example of the Brahmans was that of the Thirumulpads of Payyannur *Gramam* in North Malabar. And nowhere in India was people's attachment to the land so high as to forsake everything else for its sake.

In order to understand the agrarian relations of customary Malabar we have recorded evidence in works like *keralolpathi* with proper explanation to the tenurial terms. On that aspect mistake came on the part of the early interpreters, who misinterpreted those terms in a way they did not mean. But to understand the family inheritance system of customary Malabar no such written authority was available as to form a clear picture immediately. Only through constant observation of the existing situation could the early British enquirers, mainly for judicial purposes, enter into their chequered history kept alive through oral tradition.

Social Order

Malabar is famous for its wide variety of castes and communities, consisting of those who originally occupied it and of those that migrated to it from other countries[33]. The aborigines of

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[32] Koya S.M.Muhammad, Mappilas of Malabar, Studies in Social and Cultural History, Calicut, 1983, pp. 62-70.

[33] Aiyar, Sundara, Malabar and Aliyasantara Law, Madras, 1922, pp.1-2.

Malabar are possibly represented by the Cherumans and Pulayans, the agrestic slaves of the soil, and by the jungle tribes of the Kurumbans, Kurichiyans, Paniyans[34] etc. Beyond these original inhabitants, who were later pushed down to the lowest rungs of society by the socially superior classes, all the different castes and communities of Malabar were the offspring of the immigrants from various parts of India as well as outside. This was the case with the Nambudiris, Nairs, Tiyas or Ezhavas, Ambalavasis, Mappilas, Christians and all other major or minor social classes.

The post-*perumal* period, that is from the twelfth to the end of the sixteenth century, witnessed the expansion and re-organisation of the *nadus* of which Kozhikode and Kolathunad became prominent in Malabar. Their political importance began to diminish from the seventeenth century and suffered the first major setback at the hands of the Mysore Sultans. The *naduvazhi swaroopams* were greatly indebted to the temple and Nambudiris for their origin and growth. The ritual authority of the Brahmans legitimized the political authority of the *swaroopams,* while the term *melkoyima* signifies the latter's overlordship, which helped the latter to take up the role of kingship in their political and juridical authority[35].

The temples, which began to play a vital role as an economic

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[34] Innes C.A., Malabar Gazetter, Vol.I & II, Reprint, Government of Kerala, 1997, p.24.

[35]Ganesh, K.N., Polity and Society in Medieval India - Preliminary considerations in Kurup. K.K.N. (ed.), New Dimensions in South Indian History, University of Calicut, 1996, p.104.

and ideological power centre in the *perumal* period itself, later became associated with the *nadus*. That the *nediyirippu swaroopam* became associated with the Guruvayoor temple under the Zamorins of Calicut is symbolic of it. The spiritual submissiveness of the political chieftains to Godhead, Gods' abode, that is temples or *devasthanoms* and the God's voice spoken through the tongue of Brahman priests could be seen in their every day activities. Including the a*riyittuvazhcha* of the *naduvazhi,* which was conducted very ceremoniously, every auspicious function in the *naduvazhi* family took place with the blessings of the Brahman priest. The first pledge taken by the *naduvazhi* was to protect the Brahmans, temples and cows[36]. Doing anything against the spiritual authority of the Nambudiris was considered a sin for which the *naduvazhi* would be appropriately punished. However, the role of the Nambudiri priest was only to spiritually guide the *naduvazhis* and not to make any political interference into the *nadus*.

The family abode of the *naduvazhis* was called *kovilakom* and their authority was entitled *koima*. The *'jati'* formation took place in the post-*perumal* period on the birth of a new class of 'Kshatriyas'. It led to the dominating position of the Nairs[37]. The Zamorins of *nediyirippu swaroopam* were an aristocratic Nair sect of Malabar and so was the Kolathiris of Chirakkal, and many other lesser *naduvazhis*, attaining kshatriya status. The *naduvazhi swaroopams* followed

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[36] Aiyar, K.V. Krishna, The Zamorins of Calicut from the earliest times down to A.D. 1806, University of Calicut (ed.) 1999, pp.28-43.

[37] Ganesh, K.N., Keralathinde Innalekal (Mal.) op.cit., p.198.

matrilineal system of inheritance. The royal properties attached to the *kovilakoms* were called *cherikkals; ankam, chunkam* etc. were known as contributory revenue source. Though no regular revenue was collected, *varom, pattom* etc. occasionally came from their subjects. Nair soldiers were giving *akampadi* to the chieftains. The *naduvazhis* like Zamorin had relations with the Arabs, Chinese and later the Europeans. The fight with the Portuguese, Dutch etc. gradually weakened the power of the *naduvazhis*. With the English ascendancy it was completed. The British settlement of 1792 agreed to pay a share of the revenue of the *naduvazhi's* territory to him on submission. Those, like Zamorin, Pazhassi Raja etc. who opposed it were soon suppressed.

In the Malabar *kovilakom* properties, which formed a tenure by themselves, certain portions were set apart for the individual enjoyment of the Senior Rajas, called the sthanom properties. The *'sthanom'*, also called *'kuruvazhcha'* was a dignity attained by the senior Rajas in Malabar *kovilakom* in the order of rank as first, second, third, fourth etc. Those who attained any of these ranks were allotted separate properties called *sthanom* properties and do not share in the general *kovilakom* properties[38], though the *sthanis* role in the management of which would continue. As the *sthanom* is a personal title, accumulations made by the *sthani* were at his absolute disposal but if undisposed of during his lifetime would merge into the *kovilakom* properties. For his personal debts also he alone would be liable.

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[38] Moore, Lewis, Malabar Law and Custom, Madras, 1905, p.340.

The multiple castes of Malabar are classified into two broad divisions on the basis of the twin systems of inheritance. The Malabar Gazetteers of the British period furnish a list of the Malabar castes in which twenty-two are recorded as governed by *makkathayam*, and twenty-seven as by *marumakkathayam*[39].

Of the *makkathayam* Hindu castes of Malabar, the most dominant and the socially superior class was the Nambudiris. Only a section of the Nambudiris in North Malabar, the Payyannur Brahmans, became the followers of the *marumakkathayam* system. According to the Parasurama legend in *keralolpathi* it was in obligation to the desire expressed by Parasurama that they accepted the matrilineal system of inheritance, which the other Brahmans did not consent to do, on which the former brought the Sudras to act as *akambadi* to the Brahmans etc[40].

The Nambudiris, that is the indigenous Brahmans of Malabar, are the descendants of the Rig-Vedic Aryans whose system of inheritance was basically patrilineal. The Brahmans came as immigrants from Konkan to the South in the early centuries of the Christian era and founded their first settlement at Cellur, Taliparamba in North Malabar[41]. By using their trustworthy behaviour, scholarship and vedic background the Brahmans succeeded in well persuading the indigenous *desavazhis* and

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[39]Aiyar, Sundara , op.cit., Appendix, A, p.327.

[40] Variyar, Raghava (ed.) Keralolpathi Granthavari, op.cit., p.6, *Ola* 4, *Puram* 2.

[41] Veluthat, Kesavan, op.cit., pp.11-17.

cultivators to donate their lands to the temples in Gods' trust, by accepting the Nambudiris as their *uralans* or governing agents[42]. In this way most of the riverside lands in Malabar passed into the hands of the Nambudiris, while their original donors correspondingly became just recipients of inferior rights from the former. The temples, acting as nerve centres of life in medieval Kerala, prepared the ground ready for the Nambudiris to transform their interest on land as hereditary right, that is *janmam*, and their caste status as the most superior one.

The Nambudiri chapter of Malabar history is abounded in themes of Nambudiri exploitation of all the other socially inferior classes as customary landlords. But behind the outward spendour of their *janmam* pretensions, an exploitation of a worse kind thrust upon their own community through the observance of a few intensely conservative and irrational customs was the inside picture of the Nambudiri caste. The result being that a large majority of their males and the females as a whole were put to inescapable agony for so many generations was a story little known to the outsiders till modern times. The Judiciary established by the British became largely responsible in bringing out from oblivion some of the most unpardonable customs of the Nambudiris to the public attention to be treated sympathetically[43].

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[42] Pillai, Elamkulam Kunhan, Janmi Sampradayam Keralathil, Kottayam, 1967, pp. 58-59.

[43] Indian Law Reports, Madras Series, Judgements on Nambudiri Law.

The Nambudiri customs were very extraordinary in character. The most important custom, which distinguished them from the Brahmans of the rest of India was their insistence to keep the family property impartible. Unusual divinity was attached to the *illom* properties, the protection and impartibility of which became the chief concern of all the family members. This dissuaded them from entering into any other profitable profession, which would have given mobility to the community. Including marriage, every other custom of the Nambudiris was adjusted for the sake of this prime purpose of safeguarding the family property impartible. While in other parts of India gradually the idea of partition came to be recognized among the Brahmans, the Nambudiris, as the followers of the ancient patriarchal set-up of the Vedic Aryans continued to stick on the custom of the younger members of the family remaining under the absolute control of the eldest male member of the family, under whose absolute control the family properties were.

A Nambudiri joint family or *illom* consisted of both males and females, each of whom was entitled to a share in the family property. The oldest male member of the *illom* the *karanavan,* became the manager of the properties from whom the title passed on to his eldest son from a legal marriage. In the absence of a male, the senior female member of the *illom* enjoyed this right; any member of the *illom* other than the *karanavan* was called the *anandaravan.* The old patriarchal set-up in which the son was a mere appendage to the father, with no right of property as opposed to him continued more or less in its

original form in the Malabar Nambudiri *illoms*[44].

Though the *karanavan's* authority in the management of the *illom* properties was almost absolute, he too, like all the other junior male members and unmarried female members of the *illom,* was only entitled to maintenance out of the *illom* property. A married woman had no right in her parental *illom,* but in the *illom* of her husband. The widow continued to live in the husband's family and without liberty to appear in the public. When an alienation of the property became inevitable the *karanavan* should get the consent of at least the senior *anandaravan,* and for division of *illom* into separate houses to suit the growing number of the family members, he should get the consent of all.

Legal marriage formed the basis of succession among the Nambudiris, as in the case of the rest of the Brahmans of India. But in the context of the impartibility of family property, the growth of the numerical strength of the *illom* had to be restricted, which compelled them to allow only the eldest son of the family to customarily marry a Nambudiri woman in the typical caste endogamous practice. The junior male members were forced to seek women outside their own community, especially in the warrior caste of the *marumakkathayam* Nairs. The children of these alliances belonged to their mother's family with no liability to the Nambudiris. Only the descendants of

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[44] Mayne John D., Hindu Law and Usage, Chandrasekhara Aiyar (ed.), Madras, 1959, pp.302-303.

the eldest male should perform their obsequies and became their heirs.

The condition of the junior male members of the Nambudiri family in this regard was far from happy, but that of the females was really pathetic. A Nambudiri woman had no right to marry a person belonging to any other caste; she must be ready to accept any Nambudiri of her *illom's* choice, at times a person as old as her grandfather with many other wives. A married Nambudiri woman's rights were only in her husband's *illom* even after becoming a widow; even if very young, she was not allowed to remarry once widowed. Only very few among the Nambudiri women got married, that too only to become one among the several wives of the eldest male member of an *illom*. Even with so many eligible bachelors in their own caste, but without the fortune of getting married to them, the majority of the Nambudiri women were fated to lifelong spinsterhood. The only consolation to her was the equality she enjoyed along with the males in the family property, whether married or unmarried, and as marriage usually took place on puberty many infant widows were not there in Malabar[45].

There was an extraordinary type of marriage among the Nambudiris called the *sarvaswadanam* marriage. It took place when a father, whose line was under threat of extinction in the absence of a male heir to succeed, chooses to give a daughter in marriage exclusively for the purpose of raising up an heir for it. A son born of

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[45] Vasudevan v. The Secretary of State for India, ILR 11, 157.

such an alliance would be considered as the real son of her father, that is the appointed daughter comes back as a son and becomes a member of his mother's *illom*. He was not entitled to have any right in his father's *illom*, where he could become only an *attaladakkam* heir. In most cases it might be an already married person who was accepted through the *sarvaswadanam* marriage, whose only mission was to become the father of a male child to save the father-in-laws' *illom* from extinction.

An age-old custom among the Nambudiris was the system of adopting heirs to the *illom* when the family was in danger of extinction. There was no limit to the age or number of persons adopted, but the same *varna* or tribe was insisted. The widows too could admit such an outsider to perpetuate an *illom* or for the purpose of begetting issue through marrying for *illom* as in the case of *sarvaswadanam* marriage. In the case of the widows, not the one who was senior in age, but the one who was married first to the *illom* got the upperhand in the case of the management of properties. Individual possession of lands, self-acquisitions etc. were rare especially in the absence of family formations through valid marriages by the younger male members of the Nambudiri *illoms*.

A custom, which may seem quite undignified to the ethos of a civilized society, prevalent in the Nambudiri community from the early days, was the so called *smarthavicharam*, which was an enquiry made by the caste tribunal into the charges of immorality brought

against a Nambudiri woman[46]. The suspected woman, who was referred to as *sadhanam*, or thing, was subjected to continuous questioning in a torturing way into the details of her sexual irregularity by the Panchayat under the *smartha*, its president, till she admits her guilt. When found guilty, her funeral rites were performed; she was outcasted and purificatory ceremony was held in the *illom*. Along with her, those males who had a suspected share in her offence were also deprived of the sacred caste privileges.

The Nambudiris of Malabar were extremely conservative in their social habits, which gave no room for any progressive ideas to make entry. Their *janmam* pretensions though put them at a social status of unimaginable height, their irrational customs were capable of pulling them down to the abyss. This was where the Nambudiri community reached at, at the end of the eighteenth century.

A system of inheritance, which had no parallels in the Indian context, was the *marumakkathayam* system practised by a great majority of the people in customary Malabar. The term *'marumakkathayam'* is applied to that system of kinship, which regulates succession through the maternal line, that is from the maternal uncle to the nephew, and in which fathers are practically ignored[47]. A *marumakkathayam* family consisting of all the descendants in the female line of one common female ancestor was known as *tarwad*. The urge and effort of every member of the *tarwad*, to keep

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[46] Innes, C.A., op.cit., pp.383-384.

[47] Panikkar, T.K.Gopala, Malabar and its folk, AES Reprint, Delhi, 1983, pp.17-34.

the prestige of the impartible, inalienable *tarwad* property had been recorded by the early foreign visitors like Sheik Zainuddin[48].

Though *marumakkathayam* system of inheritance was followed by certain sections of all the castes in Malabar, the Nairs, who were the possessors of most of the agricultural lands in Malabar as *kanakkars*, as a whole were its followers; and for that reason the most typical example for a case study. In the exceedingly complex *marumakkathayam* family set-up of the Nairs, a mother and all her children by her daughters, male and female, all her grandchildren by her daughters, all her brothers and sisters and the descendants on the sisters' side, in short all the woman's relatives on the female side, however distant their relationship, lived together in the same block of buildings, sharing everything there in the property, and share it after her death in common with one another, sometimes the number of members even exceeding two hundred[49].

The property belonging to the *tarwad* is the property of all the males and females that compose it. The individual members of the family had no right to anything but maintenance. Though the individual members were not entitled to enforce partition of *tarwad* properties, at times division was made inevitable due to the uncontrollable growth of the number of the *tarwad* members. On such occasions division was effected through the common consent of the *tarwad* members, diverting a share of the property to those who were

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[48] Zainuddin, Sheikh, Tohfat-ul-Mujahidin, (Tr.) SMH Nainar, Madras, 1942.

[49] Panikkar, T.K.Gopala, op.cit., p.18.

desiring to form a new branch; any member in the original *tarwad* was at freedom to join with the new branch. The branches hence formed from the root *tarwad* were called *tavazhis,* which keep up the original tradition of their common descent, that is community of pollution, but enjoy their proportion of the *tarwad* property separately; that is the community of property no more exist[50].

A Malabar *marumakkathayam tarwad* spoke through its head, the *karanavan* who was the senior most male member on the female side in charge of the management of the family properties. It was his right and duty to manage alone the property, movable and immovable, of the *tarwad,* to take care of it, to invest the movable ones in his own name either on loans on *kanom* or other security or by purchasing in his own name lands and to receive the rents of lands[51]. Though in theory all property was vested in the female members, their natural incapacity for family management authorized the eldest male member to act as the life trustee. The authority of the *karanavan* in the *tarwad* was almost absolute, with full control over the family members. However, in some of the *kovilakoms,* like the Zamorin's family, the eldest female managed with the same power as the male *karanavan.*

Though as manager of *tarwad* properties *karanavan's* authority was absolute, he too was entitled, like all the other members of the family, only to maintenance out of the joint property. He could not misuse his authority for personal interest, or alienate the *tarwad*

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[50] Moore, Lewis, op.cit., p.1.

[51] Mayne, John, D., op.cit., Appendix III, p.973.

properties without the unanimous consent of the family members. His self-acquisitions too, if any, would merge into the *tarwad* property after death as those of others. Buchanan in 1800 wrote, "A man's movable property, after his death, is divided equally among the sons and daughters of all his sisters. His landed estate is managed by the eldest male of the family, but each individual has a right to a share of the income[52]. Any junior member of a *marumakkathayam tarwad* was equally a co-owner and co-proprietor of the family properties, and deserving proper maintenance from the *karanavan*. But in the *marumakkathayam tarwad* nobody could demand for his separate share. On the death of the existing *karanavan*, the next eldest among the juniors, a brother or a nephew, that is *anandaravan*, becomes the next *karanavan*.

Though the *marumakkathayam* system of inheritance gave enough life security to the male and female members of the joint family, one tragic aspect of the system was, especially in the case of the Nairs, the almost complete denial of the right to legal marriage to a large section of the Malabar population. The military importance of this class was partly responsible for the absence of legal marriage in this caste. The support of the Nair militia was highly essential for the existence of the *naduvazhi swaroopams*. The Nair men were liable to be called at any time for active military service, which deprived them of their opportunities to settle down, except in old age, to look after the family property. A Nair soldier's life was completely attached to the

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[52] Buchanan, Francis, op.cit., p.96.

battlefield in obligation to the Nambudiri *janmi* and in service of the *naduvazhi*, which would be dulled once his greater affection was allowed to go to his wife and children. However, the high status the Nairs enjoyed in their military capacity came to an end with the East India Company taking away the military powers of the *naduvazhis* through an order after the acquisition of Malabar in 1792.

The absence of legal marriage and the absence of the Nair males in the *tarwad* on most occasions gave the younger male members of the Nambudiri *illoms*, who were denied of the privilege of marrying in their own caste, an opportunity to enter into conjugal relations with the Nair women, and without encumbrances. The children in the *marumakkathayam* family belonged to their mother's family, claim and caste. They were Nairs, not Nambudiris, so the Nambudiri could not touch them without pollution[53]. The Nambudiri relation helped the Nairs to enjoy the status of a superior caste, and to become the permanent occupants of the soil as *kanakkars*.

Promiscuity is ascribed to the *marumakkathayam* community, especially to the Nairs, by almost all the European authors from Fernao Lopez de Castinheda[54] to William Logan[55], whereas contemporary indigenous folk literature or ballads do not speak about them[56]. But the early foreign authors do not give hints to the

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[53] Fawcett, F., Nairs of Malabar, AES, New Delhi, 1985, p.225.

[54] Castinheda, Fernao Lopez de, The History of the Conqest of India, Kerr's Collection of Voyages and Travels, Vol. II, London, 1811, p.353.

[55] Logan, William, op.cit., pp.164-165.

[56] Kurup. K.K.N., Aspects of Kerala History and Culture, Trivandrum, 1977, p.43.

existence of a customary marriage among the Nairs called *sambandham,* which, however, did not carry much meaning in a society which just ignored the paternal parent, and in which children grew under care of the maternal uncle. Still, their studies admit the fact that for over three hundred years Nair women of North Malabar had been living with the households of their husbands. The opinion is shared by Fawcett too, who had noted the existence of polyandry in South Malabar[57]. However, the right of a *marumakkathayam* wife in her husband's house was only till his death, after which she had to return to her own *tarwad* with her children and without much chance of visiting there again.

In a polyandrous society where paternity could not be determined, male inheritance of property became meaningless, leaving the option to the safe, unobjectionable method of female inheritance, by which nephews, and by necessary consequence sisters became the rightful heirs to a man's property instead of his wife and children[58]. It is graphically portrayed that the odd feature of the *marumakkathayam* system was that a man had his nephews about him in the house, while his wife and family lived in another *tarwad*[59]. In a *marumakkathayam* Nair family everybody was a victim to this custom, which took away from them the spice of family life.

Attempts to trace the origin of the *marumakkathayam* system

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[57] Fawcett, F. op.cit., p.237.

[58] Panikkar, T.K. Gopala, op.cit., p.39.

[59] Fawcett, op.cit., p.237.

have not met with great success; the absence of any native written authority stood in the way. However, the travel accounts of the foreigners as eyewitness reports guided the early British enquirers. It was through constant observation and enquiries that an outline of these customs could be prepared, when became necessary for judicial purposes. A more wonderful aspect of the *marumakkathayam* system in Malabar was the circumstances, which helped its perpetuation here such as the Nambudiri factor, the insistence on the impartibility of properly, the military factor etc., the like of which was not in existence anywhere in India or abroad. Nevertheless, it had some good aspects too in the sense that it denied nobody's right and provided a life of security to the female members of the family[60].

The *tarwad* was the nucleus of all the multiple activities of the family members, cultural and intellectual. It had its own temples with separate property for their maintenance. The *kalarippayattu*, the martial art of Kerala, was an important aspect of the life of a Nair male through which his soldierly qualities sprouted. However, as part of their policy, the British after becoming masters of Malabar, immediately took steps to disband the Nair militia and to stop the military training of the Nairs through *kalari*. Another custom of the *marumakkathaya*m Nairs is connected to their girls was the *thalikettu kalyanam*. It was a function in which the Nambudiri tied a *thali* round the neck of a Nair girl before the attainment of puberty. It was a sort of a mock marriage, which ends with the end of the ceremony itself.

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[60] Balakrishnan, P.V., Marumakkathayam, Its legal aspects, Ph.D. Thesis, Calicut University, 1975, p.29.

Among the other *marumakkathayam* followers of Malabar a branch of the Brahmans called the Thirumulpads of Payyannur, the Thiyas of North Malabar, the Mappilas of the coastal Belt of North Malabar etc. were important.

Mappilas, the Malayalam speaking Muslim community of Kerala was another prominent segment of Malabar population. The Mappilas were the descendants of the Arabs, one of the several non-Indian religious communities welcomed to Malabar in some remote past, from their union with the local Hindu women of this region[61]. "The Moplah community of Kerala is undoubtedly descended from settlers and converts long before the days of the Muslim invasion of India".[62] Malabar became one of the chief centres of the trading activities of the Arabs as early as the fourth century A.D. leading to its permanent settlement by a few of them by the seventh century A.D., mainly in the coastal belt[63]. The first mosques were founded in Cranganore soon after the death of the prophet in 643 A.D. when a group of twenty Muslims led by Malik Ibn Dinar reached Kerala[64]. Gradually, several Muslim settlements developed around important trading posts, particularly Cannanore, Pandalayini Kollam (Quilandy), Calicut and Quilon.

European domination over Malabar trade led to the shifting of the Mappilas to interior regions to become rural peasants and later to

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[61] Koya, S.M., Muhammad, op.cit., pp 16-20.

[62] Basham A.L., op.cit., p.347.

[63] Panikkar, K.N., op.cit., p.50.

[64] Koya, S.M., Muhammad, op.cit., p.5.

become victims of *janmi*-colonial exploitation in the days of the British rule. The expulsion of the Mysore Sultans and the conferment of absolute proprietary rights on the customary *janmis* by the East India Company led to the worsening of the living conditions of the poor peasants of Malabar, especially the Mappila tillers of the soil. The wholesale conversion of the low caste Hindus like the Cheruman, Pulayan, Vettuvan and Mukkuvan gradually raised the number of the Mappila population in Malabar. The statistical reports of the early twentieth century state that Muhammadans were more numerous in Malabar than in any other district in the Presidency and make up 30% of the total population, especially due to the conversion from the lower castes[65]. The community consisted of pure Arab settlers, of the descendants of Arab traders and women of the country, and of converts to Muhammadanism, mainly from the lower Hindu castes[66].

The Mappilas of Malabar, as the Muslims anywhere in the world, were strict followers of Islam in their everyday spiritual life, being in complete submission to the injunctions of the Quran. And Islamic rules guided them in matters connected to the mosque, charity, marriage, and responsibilities of the partners in life, duties of every earnest Muslim and almost everything else. But in shaping the family laws and the laws of inheritance Islam was agreeing to grant a certain amount of liberalism in the case of its first converts by allowing them to continue their pre-Islamic usages. It was for the

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[65] Benson, C. (compiled), A statistical Atlas of the Madras Presidency, Madras, 1908, p.616.

[66] Innes, C.A., op.cit., p.25.

purpose of making the new faith less hostile to the new converts, even while fully conscious that they were in direct contradiction to the Muslim ideology. This explains the background of the observance of the very extra-ordinary *marumakkathayam* customs by a section of the Mappilas of Malabar, especially of North Malabar, inspite of the strict father-right system of Islam.

Matriliny in Islamic setting is a paradox. The Islamic law of inheritance runs parallel to the matrilineal principle[67]. Perhaps, the *marumakkathayam* of the Mappilas arose from the reluctance of some of the early converts to Islam to give up their pre-conversion Hindu matrilineal habits which was not objected by the Arabs who themselves had some mother-right ideologies[68]. It was also a convenient arrangement for them, since their stay with the local women had a temporary nature. The great bulk of the Mappilas of South Malabar followed the patrilineal system of inheritance according to the Shariat law. Matrilineal customs were followed by a few wealthy families in the coastal towns of North Malabar like the Keyis of Tellicherry, the Ali Rajas of Cannanore, the Mappilas of Laccadives etc.

Contrary to the Islamic law of inheritance, in the Mappila *marumakkathayam* families, succession was traced through the females. In the Arakkal *swaroopam*, the only Muslim royal family in Malabar, succession was through the females, the Beebies, with

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[67] Dube, Leela, Matriliny and Islam, Delhi, 1969, p.78.

[68] Koya, S.M., Muhammad, op.cit., p.17.

sometimes the senior most ladies even acting in the capacity of the ruler[69]. In South Malabar too, though the property was divided according to the Islamic law, the mother-right was recognized, and the parental home became the common property of all the members. While the daughter's interest in the parental home was permanent, the interest of the son ceased with his death[70].

While on the inheritance side Mappilas followed the twin systems like the *makkathayam* by those of South Malabar and *marumakkathayam* by those of North Malabar, on the marriage rules all the Mappilas followed the Muhammadan rule. There was no restriction for the follower of one system to enter into matrimonial alliance with a person following the other system. Marriage was a substantial social institution with the Mappilas. As followers of the Mohammadan law, in South Malabar the girl after marriage was going to the husband's home; in North Malabar, in most cases, she continued staying in her parental home even after marriage. However, although the children of the Mappila *marumakkathayam* were brought up in the mother's *tarwad*, the father had to contribute towards the expense and the maintenance of his children. In the matrilineal set-up, matrilocal residence too existed. The wife stayed in her own *tarwad* unless the husband provided her a separate house for her and her children, and the husband, often going out as sailor, rather was a visitor to her house.

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[69] Ibid., pp. 68-69.

[70] Ibid., p.70.

In all other aspects the general characteristics of the *marumakkathayam* system persisted in the Mappila families too. The members of a *tarwad* lived in a common house, had a common kitchen and enjoyed the *tarwad* property in common. The eldest male member of the *tarwad*, known as the *karanavan*, managed the *tarwad* property, directed its affairs and conducted its social and religious ceremonies. The *karanavan* was succeeded by the next senior-most member, who is either the brother of the former or the nephew[71]. Among the *marumakkathayam* Mappilas the practice was for the husband to take his residence permanently in the wife's home, his and his wife's expenses being met by him. He would pay only rare visits to his parental house. In the Arakkal palace the custom was for a Beebee's consort to be maintained by the royal household. If a prince married outside royalty, the wife had to live in the palace, it being considered infra dig for a prince to live in the wife's house[72].

One marked difference between the *marumakkathayam* Hindus and the *marumakkathayam* Mappilas was that the latter practised marriage as a perfect legal institution in accordance with the Islamic law. And the fact that the husband was under obligation to protect his wife and children necessitated his having some means of livelihood for himself. Hence the impartibility of *tarwad* property, the inevitable aspect of the *marumakkathayam* system, did not affect much the individual life of a Mappila. So too his attachment to *tarwad*

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[71] Kunju, Ibrahim, Mappila Muslims of Kerala History and Culture, Trivandrum, 1989, p.181.

[72] Vasudevan, Churiya, The Keyis of Malabar, Tellicherry, 1930, p.11.

property was not so thick as in the case of the *marumakkathayam* Hindu whose only means of livelihood was his right to maintenance in the *tarwad* property.

However, the marital ties were not so strong among the Mappilas of Malabar. Divorce rules were not very rigid, which gave the males of this class chance to easily get rid of their wives. Muhammadan law also permitted the males to keep more than one wife, though the females were not allowed to have more than one husband, till death or divorce interferes. Mappila widow too could remarry after completing the funeral duties to her deceased husband. This peculiarity resulting in the birth of children from multiple marriages to Mappila couples often belonging to the *makkathayam* and *marumakkathayam* systems of inheritance simultaneously, became a matter of great concern to the Judiciary, based on the British rule of law, once started functioning in Malabar.

Of the other castes, the Thiyas or Ezhavas were the numerically largest caste in Malabar. According to tradition, the Ezhavas came from Ceylon[73]. They were mainly engaged in coconut pulling and toddy tapping. Many of them were engaged in the cultivation work under the *kanakkars*. Thiyas followed *marumakkathayam* in the North, and in a few parts of Ponnani fraternal polyandry was practised[74]. In social status they did not enjoy upper caste privileges in the Nambudiri dominated caste hierarchy in Malabar. But even in the old

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[73] Innes C.A., op.cit., p.124.

[74] Ibid., p.125.

social organization there existed some privileged groups among the Thiyas, like the *chekons* of *kadathanad*. By the eighteenth century the economic position of the Thiyas considerably improved, especially in North Malabar by engaging in various professions like agriculture, trade or clerical service under the East India Company.

The condition of the socially inferior classes, which found hardly any place in the institutional history of Malabar, was far below the normal standards of human existence. But the condition of the most depressed class, the so-called agrestic slaves, was most deplorable. This deteriorated condition of theirs was not a heritage from the very ancient past of this region, but one directly contributed by the new system of agriculture introduced by the Nambudiri Brahmans later. The genesis of the institution of slavery in Malabar, like all other social institutions here, is attributed to Parasurama, who is supposed to have organized the slave caste as a provision for agriculture, when he gave the country to the Brahmans. Historically, there can be no doubt that it arose out of conquest of the original owners of the soil by invaders and settlers from the north[75]. In course of time, children born of the slaves naturally became slaves of their parents' masters. In times of acute famine the slave parents were selling their own children.

Every landed proprietor in Malabar possessed a community of Paraiahs to cultivate his folds who were actually his slaves and

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[75] Menon, K.P.Padmanabha, History of Kerala, Vol.II, Ernakulam, 1929, p.272.

formed an integral part of his property[76]. The master could sell, let out, pledge or mortgage them when necessity arose. A *janmi*, while transferring or selling his *janmam* right to another one, was transferring, along with the landed properties, the agrestic slaves attached to the property who were the actual tillers of the soil. The slaves had no right to go away from the existing master, whether *janmi* or the *kanakkar*. They were agrestic slaves and not domestic slaves, since the law of caste pollution barred their entry into their master's house[77].

The English East Company's Records tell us that when their commercial activities progressed in Malabar they too became active participants in the slave trade[78]. Buchanans' travel accounts explain its existence in Malabar, who were termed *cherumacal*, and in which were included the Pariahs, Pulayas, Kuravas etc[79]. These were treated as polluted castes and subjected to inhuman practices like untouchability, unapproachability etc. Even the primary requirements of life were not provided to them. The nature of the slavery as practised in Malabar is well explained in the Malabar commission Report prepared on the question of slavery from the answers collected through a questionnaire put to the local people[80].

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[76] Dubis, Abbe J., Hindu Manners, Customs and Ceremonies, Third Edition, Oxford, 1959, pp.56-57.

[77] Nair, Adoor K.K. Ramachandran, Slavery in Kerala, Delhi, 1986, p.16.

[78] Ibid., p.17.

[79] Buchanan, F, op.cit., pp. 491-496.

[80] Malabar Commission Report, Correspondence on the subject of slavery in Malabar from May 1819 to August 1822, Vol. I. No.4055.

Though caste discrimination became an integral part of the social observances of the Malabar people, there also existed a unique type of harmony and adjustability among the various classes and castes of Malabar, both at the tenurial level and in the every day life. Even while caste pollution existed, there were times when the so-called superior castes were made to depend on the inferior castes to remove the formers' pollution. The Malabar interpretation of purity-impurity concept required the service of the polluted castes during polluted periods connected to birth, death etc. - *vannathimattu,* the cloth washed in a sacred way by the polluted caste called vannathi was required to terminate such pollutions; so too, during *upanayana* the Nambudiris consent to the barber class to touch their head for shaving. But in all spiritual activities the Nambudiris kept utmost pollution from all other classes.

Pollution was observed by all castes and classes in Malabar - coming from the other world or going to the other world were observed with pollution[81]. The paradox of the Malabar pollution concept could be seen in the very extraordinary way the caste sufferers reacted to the extremities of the caste superiors. Some of the concepts like *yakshi, chathan, koodothram, pulappedi, mannarpedi* etc. arose from the unrest of the lower classes to terrify the superior classes during some seasons[82].

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[81] Ganesh K.N., Keralathinde Innalekal, op.cit., p.329; Vayaleri, Kumaran, Kurichiyarude Jeevithavum Samskaravum, Ernakulam 1996, pp.23-28.

[82] Ganesh K.N., Ibid., p.205.

The status enjoyed by the females in customary Malabar society was positive as well as negative. They enjoyed property rights along with males both in the *makkathayam* and the *marumakkathayam* systems. While the females of the upper classes could boast of their caste superiority, many of the simple joys of life, which the women of the inferior classes could enjoy, were denied to them. Women of the upper classes were fated to lead a life of seclusion; those of the lower classes could freely move in the public, subject to caste restrictions. Though female education was not very popular, women of the Nair caste got some traditional type of education, but most of the women of the Nambudiri caste remained illiterate. Beyond the right to maintenance in the impartible family property, female dignity got little recognition in customary Malabar society. While the *marumakkathayam* Nair women did not get the privilege of getting legally married, the Nambudiri women became the tragic victims of their orthodoxism, whether married or unmarried. Mappila women too became helpless in front of their too flexible divorce rule, which gave them no option to decide.

Temples played a vital role in the day-to-day life of the people of customary Malabar. The different kinds of temples in Malabar were: (a) Ancient temples alleged to have been founded by Parasurama (b) temples founded by Rajahs, and (c) temples founded by devotees from alms received[83]. The first two groups were usually public institutions and with properties attached to them, with large

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[83] Moore, Lewis, op.cit., p.359.

paraphernalia of *devaswam* tenures and connected temple employees. The right of the sovereign to superintend all religious endowments has always been recognized in Malabar and was called *melkoyima*. The temple or *devaswam* property was a corporation sole with its ownership vested in the *uralan*s or managers who were Nambudiris. The office of the *uralan* was called *uraima*. The *uralans* had no authority to alienate temple property. The temple servants the Ambalavasis, whose social status was between the Nambudiris and the Nairs, were allotted one or other function in the daily activities of the temple based on caste status. Subordinate service tenures of temple lands were created in order to provide accommodation to the temple servants, the Ambalavasis. They could not be ousted from those lands so long as their service was ensured.

Customary Malabar was also familiar with a system of justice suited to its requirements - it was primitive in several respects[84]. There was no written code of laws, nor one law for all; but the punishment assigned by the tradition usually fitted the crime and justice was dispensed according to the qualities of the person[85]. Justice was administered strictly based on the *chaturvarnya* ideals suited to the society of those days[86]. For legal matters the Hindu rulers of those days, with the assistance of the Brahmans, were mainly depending on the oral tradition set up by the *smriti* rules of

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[84] Menon, A. Sreedhara, (Compiled and edited) Kerala District Gazetteers Cannanore, Trivandrum, 1972, p.563.

[85] Innes C.A., op.cit., p.363.

[86] Bhaskaranunni, Pathonpatham Noottandile Keralam (Mal.), Thrissur, 1988, p.455.

Manu, Yajnavalkya and Parasara as is evident in the *vyavaharamala*[87]. Besides judicial matters the book also treats the division of the produce between the cultivator and the proprietor. On the judicial side, it lays down specifically the grounds, properly numbered eighteen of them, on which one can go for a *vyavahara* that is case.

It was Manu's dictum that while people should take utmost care to avert such circumstances, their commitment to speak nothing but the truth as the caste rules permit was insisted in the event of such an occurrence. The importance of eliciting eyewitness accounts, and the qualities needed for a witness are laid out[88]. While penalty of death was reserved for the more serious offences, mutilation and fines were common forms of punishment.

Justice in customary Malabar was not equalitarian. To safeguard the respectability of the Nambudiris was one of its chief concerns. While the lower castes had to undergo severe punishments even for slight offences, such and even bigger offences on the part of the Nambudiris were treated light-heartedly.

Caste offences were generally tried by caste tribunals, a striking example of which is to be found in the *smarthavicharam,* or enquiries into charges of immorality against Nambudiri women, resulting in the conviction of the offender as an outcaste[89]. Trials by

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[87] AMN Chakyar, Avasanathe Smartha Vicharam, (Mal. Tr.) K.K.Sankaran Nambudiri, Department of Cultural Publications, Government of Kerala, Trivandrum, 2001, p.14.

[88] Bhaskaranunni, op.cit., pp.364-365.

[89] Innes C.A., op.cit., pp. 364-365.

ordeals were common in the Malabar system of justice[90], and continued to exist even after the establishment of the British rule. The legal usages of Malabar, capable of outweighing any written authority on law, succeeded to a great extent in giving justice to the people, though based on caste status, and at times even cruel. Taking from the modern judicial standards, the system of justice practised in customary Malabar was not highly appreciable but the decision of the *gramapanchayat* based on their own dharma was not altogether uncivilized. And it was perhaps for this reason that foreign visitors like Sheikh Ibn Betuta, Abdur Razak, Varthema, Pyrard de Laval, Durate Barboza as well as the Joint Commissioners deputed by the English East India Company in 1792 marked their admiration about this aspect of Malabar life[91].

It was to such a geographical zone and to such a cultural heritage that the British East India Company decided to introduce their own Rule of Law, the remarkable outcome of the British legal experiments through centuries. Very few could then realize the very substantial role this foreign agency was going to play in the process of the Indianisation of law based on that system of justice, in perfect harmony with the customs of this country in recasting a custom-ridden society to one awakened to the modern standards of life.

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[90] Jayakumar, N.K., Niyamam (Mal), Kerala Bhasha Institute, Thiruvananthapuram, 2000, pp.87-88.

[91] Innes C.A., op.cit., p.362.

STATE AND SOCIAL CHANGE – THE ROLE OF JUDICIARY – A CASE STUDY OF MALABAR 1792-1940

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CHAPTER III

EVOLUTION OF JUDICIAL INSTITUTIONS IN BRITISH MALABAR

The British East India Company's vast acquisitions in India at the close of the eighteenth century necessitated regular vigilance on the activities of the increasing number of the company's servants and the maintenance of law and order in the newly acquired territories. This was highly essential to ensure the full co-operation of the company's servants and less hostility from the natives of the acquired territories towards systematic and peaceful collection of revenue. Exploitation under cover of civilization would be easier, the company was sure, and law and judicial process became its machinery[1].

Indian Background

A study of how the modern judicial system originated in the general Indian context is essential for a proper understanding of how the legal system developed in several parts of India suiting to the local requirements of each territory. As in the case of revenue, repeated experiments were made before a definite system of administration of justice was evolved[2].

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[1] Hollander, Barnett, op.cit., Ch.1.

[2] Majumdar R.C and Co., op.cit., p.795.

The British East India Company in its early days did not show any enthusiasm either to introduce their system of justice in India, or to study with any seriousness the system of justice practised by the people here, since its activities were of a purely commercial character; only the maintenance of discipline mattered[3]. But with the increase in the number and importance of the company's settlements in the East, need was felt for the exercise of regular judicial powers over the company's servants on land. The Mayor's Courts established at the Presidency towns of Madras, Calcutta and Bombay in 1726 with the Governor and his council acting as the Justices of Peace served this purpose by confining their jurisdiction over the British subjects only.

As the company began to transform itself from a commercial concern into a political power the limitations of the Mayor's courts and Justices of Peace as effective agencies for the discharge of judicial functions also became clear. The next major step came when it was decided to extend to India the Rule of Law and to entrust its administration to a strong and independent Supreme Court, appointing its judges directly by the Crown and holding them during the Majesty's pleasure.

The replacement of the Mayor's courts became possible with the enactment by the British Parliament of the Regulating Act of 1773, on the assumption of governmental powers by the East India Company through the grant of the *diwani* by the titular Mughal emperor in 1765

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[3] Pylee M.V., The Federal Court of India, Bombay 1966, p.64.

marking the beginnings of the judicial and legal history of British India[4]. The Supreme Court of Judicature at Fort William, that is Calcutta, in the model of King's Court in England came into being during the Governor Generalship of Warren Hastings. It consisted of a Chief Justice and three other judges who were barristers of not less than five years standing. The court was empowered to exercise civil, criminal, ecclesiastical, admirality and equity jurisdiction over the inhabitants of Calcutta and over the British subjects in the provinces of Bengal, Bihar and Orissa. Provision was also made to appeal to the King-in-Council in England on the decisions of the court.

The English legal system found its way to India between the years 1774 and 1783 when the English judges of the Supreme Court in Calcutta took steps to introduce for the first time into India the rule of law which was to have a far reaching influence on Indian society[5]. Rule of Law, first asserted in the Magna Carta, the celebrated British charter of liberty[6], stresses that no person, however great and powerful, could disregard the ordinary law of the land and which guarantees "equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts"[7].

Independence of the Judiciary was another aim of the legal

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[4] Pylee M.V., op.cit., p.vii.

[5] Pandey B.N., The Introduction of English Law into India – The Career of Elijah Impey in Bengal, 1774, New York, 1967.

[6] Holt J.C., Magna Carta, London, 1965.

[7] Dicey F.N., Law of the Constitution, 10th edition, London, 1959, p.202.

system, which meant the security of the Judges in their office and their freedom from governmental influence and public pressure. Prior to this, most of the reforms revolved round the position and function of the District Collector who was the pivot of the District administration both in the executive and judicial fields. It was the determination of Warren Hastings, the first Governor General under the Company's rule, to effect the separation of the judicial from revenue functions. Before the establishment of the Supreme Court at Calcutta in 1774 there did not exist in India any English court which was independent of control by the executive. However, Lord Cornwallis, his successor, reunited the functions in the name of simplicity, energy, justice and economy, and to relieve the collector of his heavy burden of work, native commissioner and registrars were appointed to try and dispose of petty suits. This, along with other reforms effected in criminal justice, became popular as 'Cornwallis System', which was introduced in Bombay and Madras in 1802[8].

The Supreme Court established in Calcutta was the first of its kind in India which administered justice equally to Indians and Europeans, and whose judges were recruited[9]. But in Bombay and Madras the old arrangements continued for some more time, until the Mayor's courts in these cities were replaced by the Recorder's courts in 1787, each consisting of the Mayor, three Aldermen and a Recorder

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[8] Pylee M.V., op.cit., p.66.

[9] Puri S.K. and Gitanjali Nain Gill, Indian Legal and Constitutional History, Allahabad, 1980, pp. 56-58.

appointed by His Majesty. In 1801, the Recorder's Court at Madras and in 1823 that at Bombay were abolished and Supreme Courts were established in both these places in the model of the Supreme Court at Fort William, and continued till 1861[10].

The peculiarity of the Indian Judicial system at this time was the co-existence of two systems of courts, namely the Supreme Courts in the Presidency towns and the Sudder Courts in the provinces. The former derived their authority from the king and parliament while the latter was established by the Company under the authority derived from the Mughal emperor and the native rulers[11].

It was Warren Hastings' plan to establish a network of subordinate courts in the provinces. By the Regulation of 1772 two courts of judicature were established in each district, one the Muffassal Diwani Adalat for purposes of civil cases and the Foujdari Adalat for the trial of criminal cases. Superior courts were established at Calcutta and Murshidabad like the Sudder Diwani Adalat and the Sudder Nizamat Adalat or the Supreme Criminal Court[12].

Soon after the assumption of the Indian administration directly by the Crown wholesale reshuffling in the judicial administration took place. The King's Courts in the Presidency towns and the Company's Courts in the *muffasal* were amalgamated into a single

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[10] Pylee M.V., op.cit., p.65.

[11] Ibid.

[12] Pandey, op.cit., p.25.

judicial system by the Indian High Courts Act of 1861, which empowered the Crown to establish High Courts at Calcutta, Madras and Bombay. On the establishment of the High Courts, the Supreme and Sudder Courts were abolished and the judges became the judges of the new courts. Later High Courts were established in other provinces also.

The High Courts inherited the appellate jurisdiction of the Sudder Adalats and the original jurisdiction of the Supreme Courts in the Presidency towns. The original jurisdiction of each of the High Courts was to exercise the powers to entertain suits and complaints with regard to civil, criminal and other matters over the persons and authorities, which were under the jurisdiction of the Supreme Court in each of the Presidency towns. With regard to appellate jurisdiction the powers of hearing appeals from the decisions given by the lower courts over the persons and authorities which were under the Sudder Adalats was given to each of the High Court[13].

The High Court acted as a supreme court of appeal from all the subordinate courts in the province and with powers of superintendence over them. Within India there was no court to hear any appeal from the High Court and therefore every appeal from the High Courts of India had to go to the Judicial Committee of the Privy Council. The practice of the Governor General hearing appeals from the Sudder Adalat had come to an end in 1818 in consequence of the

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[13] Puri.S.K. and Gitanjali Nain Gill, op.cit., pp.98-99.

passing of the Regulation VIII of 1818[14].

It was in the British sovereign's requirement of advisers, to whom powers were necessarily delegated, to administer properly the British empire, including its acquired territories, the genesis of the Privy Council could be traced. As early as 895 A.D., Alfred, King of England, set up a small council, a cabinet, to act as his advisers, which came to be enlarged from time to time as to become the King's Privy Council, and acquiring great significance during her eighteenth century colonial expansion[15]. Appeals from the Dominions and Colonies and from certain other courts were to be heard by a special committee, the Judicial Committee, of the Privy Council, who would advise the action to be taken. The committee, in the capacity of an imperial court representing the Empire, was located in London for accessibility. This committee hears appeals from the highest court in the state or territory of each separate member of the Commonwealth, colony, state or possession, the final Court of Appeal of the entire British empire, except Britain and Ireland.

However, opinion was strongly against the Privy Council as the sole appellate court and for the establishment of a Supreme Court in India to hear appeals from the various High Courts[16]. A very

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[14] Ravindran T.K., Towards a Liberal Policy, A Study of the Munro System in Malabar, Calicut, 1969, p.91.

[15] Hollander, Barnett, op.cit.

[16] Pylee M.V., op.cit., p.67.

important provision of the Government of India Act of 1935[17] was the establishment of a Federal Court in India, with jurisdiction extending over the whole country, the first All-India Court as also the first Indian Constitutional Court. The court came to be inaugurated on 1st October 1937 at Delhi with a Chief Justice and six subordinate judges. These judges were to be appointed by His Majesty from amongst the persons who must have worked at least for five years as judge in the High court or must have practised law at least for ten years in any Indian or British High Court[18]. This court with original, appellate and advisory jurisdiction was the federal institution to be established in the country.

With the passage of time the jurisdiction of this court was further extended and ultimately all the rights enjoyed by the Privy Council to hear appeals from the decisions of the High Courts so far, came to be vested in it[19]. However, the Federal Court functioned only for a little over a decade, when it was replaced by the Supreme Court of India under the provisions of the new Constitution of Independent India in 1950[20].

The Judicial hierarchy in the Presidency towns and the provinces in India evolved like this: Supreme Courts in the

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[17] Government of India Act, 1935. Provided for the establishment of Federal System of Government of India.

[18] Jain M.P., Outlines of Indian Legal History, Delhi, 1952, p.103.

[19] Puri S.K. and Gitanjali Nain Gill, op.cit., p.103.

[20] The Constitution of India, came into force on 26th January 1950 making India a "Sovereign Democratic Republic".

Presidency towns with original jurisdiction, with the provincial counterparts called the Sudder Courts at the apex of the Muffassal Courts with appellate jurisdiction; provincial courts of the western, northern and southern divisions; then there were subordinate courts and below them the Munsiff's courts. Later Supreme Courts of the Presidency towns and the Sudder Courts in the provincial appellate courts came to be incorporated into the High Courts of Bombay, Calcutta and Madras with original and appellate jurisdiction. Provincial Courts were replaced by the District and Sessions courts.

Malabar Courts

The pattern followed in the establishment of judicial institutions in several parts of India was more or less uniform, with only slight variations suiting to the local peculiarities of each region. As regards social customs, Malabar offered a puzzling deviation from the rest of the country demanding caution while introducing legal institutions. It seemed highly essential for them to get a clear picture of the system of justice practised by the people of Malabar prior to the invasion of Tipu. It was for the purpose of enabling them to more advantageously administer the same sort of justice to all classes of the natives in combination to their own customary system of justice. The company's findings in this direction helped them a lot in setting up the judiciary here in a form suited to the requirements of the province, and in the preparation of a legal code.

Enquiries brought home the fact that the administration of

justice in customary Malabar was primitive in several respects[21], which provided little room for rational, progressive ideas to germinate. Centuries of unobstructed and unbroken observance of many customs made them so deep-rooted as to become as valid as any written modern law, though there never existed a written authority to guide them. This dominant factor was not underestimated by the British while planning to give effect to a system of justice based on the British Common Law. For the same reason the Cornwallis system, which came into existence in 1793 and introduced in other parts of India soon, was not applied in the case of Malabar immediately, as the atmosphere was not found very cordial.

Soon after the acquisition of Malabar Lord Cornwallis decided to annex it to the Bombay presidency for administrative purposes. The motive was to save the company's honour from the newly created situation of uncertainty on the defeat and withdrawal of Tipu, the Mysore Sultan. At the same time to ensure systematic and peaceful collection of revenue a less hostile atmosphere was inevitable too. The Joint Commissioners were instructed to determine in a satisfactory manner on the number and constitution of the several courts that would be necessary to ensure equal justice to all classes of society[22].

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[21] Menon, Sreedhara (ed.), Kerala District Gazetteers, Cannanore, 1972, op.cit., p.563.

[22] Ravindran T.K., Malabar Under Bombay Presidency - A Study of the early British Judicial System in Malabar, 1792-1802, Calicut, 1969, pp.xi-xiii.

The first idea of the East India Company was to leave the administration of justice in the hands of the Rajas[23] who were living in terror during Tipu's inroads for being loyal to the company, and after the treaty of Srirangapatnam just on their way back to their old possessions. But the plan did not work, since the law and order situation in the country had deteriorated much due to the Anglo Mysore wars and due to the disunity of the *naduvazhis*. The British, to evolve order out of chaos, instituted a well-organised system of courts with the intention of preventing internal dissensions among the chiefs and to bring the country back to normalcy. However, special care was taken to make the Rajas of Malabar to confide in the new system of justice by not forcing them at first to come under the new legal jurisdiction, especially to console them in the context of their losing military powers under the Company's rule.

As a first measure, in December 1792, a temporary Court of Justice, presided over by each of the Joint Commissioners in turn was established in Calicut, but it was abolished three months later. The province was divided into three districts, which were placed in charge of the three servants of the company, a Supervisor and two Superintendents, and a system of annual settlements was introduced. The Superintendents had the triple duty to preserve peace, to administer justice and to receive the revenue, subject in all these points to the direction and control of the Supervisor, who is the general magistrate of the court. Mr. Farmer was appointed

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[23] Innes C.A., op.cit., p.365.

Supervisor of Malabar and two superintendents under him with civil and criminal jurisdiction in the Northern and Southern divisions[24]. The Supervisor and the Superintendents conducted periodical circuits, the former after inspecting the activities of the latter, reported to the Governor of Bombay, who in turn informed the same to the Governor-General-in-Council with necessary remarks[25].

The new administration under the Commissioners was launched according to a plan laid down by them into two sets of codes, the Civil code of 12th June 1793 and the Criminal Code of 9th July 1793[26], the former for the administration of justice in civil cases and the latter in criminal cases. The Regulation 12th June 1793 provided for the appointment of native Registrars, *maulavis* and *pandits* to explain Hindu and Muhammadan laws, and native pleaders or *vakils*. The general rule laid down for the guidance of the jurisdiction of the Provincial Court for which no specific directions were given, the respective judges should act according to justice, equity and goodconscience[27].

For the preparation of the criminal code all the rules related the Hindus and Muslims were methodized, a general summary of the criminal laws of these communities then in prevalence was prepared and finally uniformly codified so as to ensure justice to all equally. As a first step, seven local Darogas, that is native judicature, were

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[24] Joint Commissioners' Report, para 68.

[25] Ravindran T.K., op.cit., p.8.

[26] Regulation, 12th June, 1793; Regulation, 9th July 1793.

[27] Ravindran T.K., op.cit., p.23.

established on July 1st, 1793 in Cannanore, Quilandi, Tanur, Tirurangadi, Ponnani, Chettuvayi, and Palghat for the administration of criminal justice[28]. The Regulation of 9th July 1793 was framed for the Foujdary department, which included the police administration and the administration of justice in criminal cases handled by the Supervisor as Chief Magistrate and the Superintendent as Provincial Magistrate, with the assistance of the Darogas or native judges. Provincial Foujdary Courts were established at Calicut, Cherupulassery and Tellicherry.

The Commissioners warned against the interference by the Mayor's courts of Bombay in Malabar affairs especially in handling the criminal cases. It became an emotional problem for the convicts to go all the way to Bombay for being tried in the criminal cases as the same would go against their religious beliefs[29]. For this and several other reasons, the system of judicial administration established by the Regulation of 1793 proved unworkable at the operational level.

The mistaken revenue policy of the Commissioners, the dilemma the people of Malabar felt in absorbing the spirit of the inflexible, written legal code based on the rule of law, the impatience the East India Company's officials showed in implementing the new system, the oppression of the officials, the unheard of court formalities, delay in trials etc only helped arousing suspicion in the conventional Malabar minds about the new arrangement. At the same

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[28] Innes C.A., op.cit., p.365.

[29] Taylor, Robert, Letter, 20th June 1793, District Records, Vol.1513, pp.114-117.

time the ignorant, illiterate local Darogas too failed to act as a healthy mediator between the new Judiciary and the fear-prone Malabar minds. Hence, between the years 1793 and 1800, though several reforms were suggested and put to experiment a satisfactory judicial order remained an unsolved problem.

In 1800 the first step towards the reshuffling of the administrative set-up of Malabar started. The Government of India was not satisfied with the continuation of Malabar under the Bombay Presidency; its civil administration was transferred to the Madras Presidency with effect from 1st July 1800. The Cornwallis system,[30] first introduced in Bengal in 1793, and subsequently expanded to Madras in 1802, could not be immediately applied in the case of Malabar due to the unstable political situation in the territory.

The office of the Superintendents had been abolished in 1799 and the province of Malabar had been divided into twelve circles or collectorates to which the company's servants were appointed. It was decided to put Malabar under a principal collector with three subordinate collectors for the administration of the revenue and of

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[30] Ravindran T.K., Cornwallis System in Malabar, Calicut, 1969, p.2. The Cornwallis System recommended at the apex of the hierarchy of courts in the Presidency the Sudder and Faujdary Adalat in its dual capacity of a civil and criminal court and exercising jurisdiction over the whole Presidency. Below this in the same capacity called the provincial court when it dealt with civil suits and as circuit court when it decided criminal cases, with jurisdiction over a group of districts. Below this, the zillah court with jurisdiction over one district – the zillah judge was both a civil judge and magistrate.

the civil government. For judicial purposes, four Provincial Courts, which were to hear appeals from the decisions of the Zillah Courts were established for the Northern, Central, Southern and Western divisions. In 1802 the Judiciary was separated from the Executive. The Sudder Adalat or the Chief Court of Appeal, above the Provincial Courts, was established in the Madras Presidency, consisting of the Governor and his council, and a Chief Criminal Court at Madras designated as Foujdary Adalat[31]. A Provincial Court was established at Tellicherry presided over by three judges.

Administration of justice in Malabar even after its annexation to the Presidency of Madras was not fair which finally led the authorities to decide in favour of introducing the Cornwallis System in Malabar. The new system, that is the Cornwallis System, introduced in 1806, was an amalgamation of the Indian and English elements of justice, but which gave more importance to the continental features and less regard to the native institutions and customs. It had a written code specifying the functions and jurisdictions of each court; it inaugurated a regular system of appeals from the lower to the higher tribunals, and transferred the duties of the Magistrate and Superintendent of Police from the Collector to the Judge. With this the revenue courts also disappeared. It was in response to the detection of the irregularities in the performance of the twin duties of revenue and justice with equal conscientiousness by the collector. As magistrate the judge of the Zillah Court had

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[31] Ravindran T.K., Ibid., pp.22-46.

criminal jurisdiction over all the subjects within the territory of the Zillah except the European British subjects.

The Cornwallis code stressed the enforcement of the personal laws of the Hindus and Muslims in civil cases and Muhammadan law alone in criminal cases and anticipated a strict regularity in all kinds of dealings in accordance with the British principles of justice. By the Regulation IX of 1809 *pandits* who explained the laws and usages based on the *sastras*, and *qazis* according to Quran were appointed during judicial proceedings[32]. Regulation X of 1802 had empowered the Sudder Adalat or the chief court of appeal to appoint and licence as many pleaders, Hindu and Muslim, as might be necessary for the functioning of a multitier court[33]. Accordingly a number of Hindu and Muslim veterans came to be licenced as *vakkils* or pleaders, to act as the legal representatives of the suitors at courts of all levels like the Zillah Courts, Provincial Courts of Appeal and Sudder Adalat. Introducing stamp paper for all kinds of application was another reform of this period.

The Courts of Circuit were established in the four divisions of the Presidency for speedy trial of the convicts of criminal cases., The judges of the Provincial Court of Appeal became judges of the Court of Circuit. While the senior judge was to remain at the Sudder station, subordinate judges went on circuit with a *qazi* and *mufti* periodically to the districts within its jurisdiction for the trial of

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[32] Ravindran T.K., Ibid., p.19.

[33] Paul, John.J., op.cit., p.18.

sessions cases. Cases of extreme criminal nature deserving death punishment etc were referred for final decision to the Foujdari Adalat[34].

Zillah Courts were established at Tellicherry and Calicut and a Registrar's Court at Calicut[35]. Cochin territory acquired from the Dutch was for the time being placed under the jurisdiction of the judge and magistrate of Angadippuram. In 1812 an auxiliary Zillah Court was set up in Cochin, and placed under the jurisdiction of the Provincial Courts of Appeal and Circuit for the Western Division.

The implementation of the Cornwallis System too could not remedy the multifarious legal problems of Malabar. Very strict, codified laws, legal precedure demanding perfect exactitude, stamp duty deposit fees, over emphasis on English legal system, the non-acquaintance of the English judges to the local customs and the corresponding negligence of the native system of justice, all contributed towards the failure of it at the experimental level. The unsatisfactory performance of the local *vakils* weakened the native side. In a country where people were used to the custom of summary disposal of cases through the *panchayat*, the irrational application of Muhammadan law and the unpredictable delay in passing the verdicts appeared tiresome. Certainly, the response from the people to the new system was disappointing.

To remedy the shortcomings of the Cornwallis System the Court

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[34] Regulation VII 1802.

[35] Innes C.A., op.cit., pp.365-366.

of Directors appointed Colonel Munro belonging to the Liberal School as the First Commissioner, who held that law was only a means to achieve the greater end of justice while to Cornwallis, law was an end in itself. He criticised the English attitude of viewing the Indians as unqualified for anything worthy and attempt to superimpose their laws which were absolutely alien to native customs. Even against the English view, it was his decision to employ the Indians who become qualified in public service to train them for their own self-government in the long run. Munro also criticised the Cornwallis Code for taking away the duties of Magistrate and Superintendent of Police from the Collector, who, in his opinion, alone could adequately discharge them with his wide public contacts while the judge would not get sufficient time to attend them.

Regulation IV of 1816, framed by Munro and his assistants, sought to effect sweeping reforms in the administration of justice. With the purpose of letting a speedy disposal of cases as well as to substantiate the native involvement for giving the deserving justice to the people and in recognition of the ancient form of judicial administration in India, the Heads of villages were declared to be Munsiffs in their respective villages[36]. He was ready to recognize the customary laws of the country as part of the Common Law of India; which seemed to him as thick as the Jury in England. The Village Munsiff or Judge had original jurisdiction in suits for real or personal property not exceeding ten rupees. Then, as a modified form of the

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[36] Judicial Despatch from the Court of Directors, 29th April, 1814, para 49.

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office of the Native Commissioners, that of the District Munsiff post was created with a larger jurisdiction. Appeals from the District Munsiff were to be heard by the Zilla Judge. The Hindu and Muhammadan law officers of the Provincial and Zillah courts came to be appointed as Sudder Amins or Head Native Commissioners to decide on appeals from the decisions of the District Munsiff and District Panchayat and for the trial of cases referred to them by their judges of their respective Zillahs[37].

A grave defect pointed out by Munro about the Cornwallis Code was regarding the conferment of the magisterial powers on the judge. Regulation IX of 1816 sought to transfer once again the functions of the Zillah Magistrate from the Judge to the Collector, which would empower the Collector to settle cases of offence on the spot, while judge could concentrate more on the civil suits. The Judge could deal with criminal cases brought before them by the Magistrates, or their police officers. The native *vakils* were allowed to continue on condition of not misguiding the parties involved in cases.

The Munro System helped changing the attitude of the British authorities toward the customary realities of Malabar as something to be respectably viewed and considered while preparing the legal guidelines for helping the judicial proceedings. Definitely this system too was confronted with certain limitations at the operational level.

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[37] Ravindran T.K., Towards a Liberal Policy - A Study of the Munro System in Malabar, Calicut, 1969, pp.40-42.

For example, the village courts were not as popular as had been visualized by Munro, and could not appreciably lighten the burden of the civil courts; only a very few of the total number of suits launched in Malabar were filed in the village courts even at the beginning of the twentieth century[38]. And the bestowing of the magistracy, police and revenue in the same hands making the position of the Collector all powerful could not improve much the law and order situation of Malabar. The union, that is the union of revenue and police, and not separation, as it was till 1814, became responsible in paralyzing the police[39]. The police handling of revenue defaulters, the application of the old, uncivilized system of ordeals etc became targets of attack. Still, the greater aim envisaged by the founder did bear fruit in the long run in the administration of justice not only in the case of Malabar, but in the case of the whole of India.

Very few fundamental changes were effected in the administration of justice between the years 1816 and 1843. In 1820 the Zillah judge was empowered to try suits brought by Indians against the British subjects residing in the districts, appeal being made liable to the Supreme Court or the Sudder Adalat[40]. The Regulation I of 1827 was enacted for the introduction of auxiliary courts, superintended by an Assistant Judge of the respective Zillah. Pleaders, ministerial officers and Hindu and Muslim Sudder Amins were permitted to be

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[38] Innes C.A., op.cit., p.366.

[39] Ravindran T.K., Towards a Liberal Policy - A Study of the Munro System in Malabar, op.cit., p.84.

[40] Regulation II of 1820.

appointed in these courts[41]. In Malabar, Tellicherry was selected for the location of the Auxiliary court. In response to the criticism aroused against the uniting of the police and revenue functions, separation of the latter from the former was an alteration of these years, as also the gradual enlargement of the powers of judicial officers of the district on the criminal side. While the Assistant Judge acted as the Joint Criminal Judge of the Zillah, with the Subordinate Collector as the Joint Magistrate, the Principal Sudder Amin, the Indian Judge appointed in 1827 acted in the civil and criminal capacity with jurisdiction over the Indian subjects.

From Munro's earnest desire to revive the age-old *panchayat* system of the Indians, even against the opposition of his own people, mooted the Regulation X of 1827. Munro had strongly advocated the revival of the native legal institution called the *'panchayat'* a court of arbitration composed of five or more persons and transfer of the duty of superintending the police from the Judge to the Collector, who, moving frequently about his district, and mixing with the people had better means of effectively supervising the police than by the stationary judicial officer[42]. However, his desire to bring to life again the old village *panchayat* system could not blossom to perfection due to his untimely death. In the absence of proper official recognition, it could not become a substantial aspect of the judicial reforms in the succeeding years.

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[41] Ravindran T.K., Towards a Liberal Policy - A Study of the Munro System in Malabar, op.cit., p.106.

[42] Arbruthnot, Sir Alexander J., (ed.), Major General Sir Thomas Munro, Vol. I, London, 1881, p.cxxxii.

With the legislative enactment of 1843[43] the courts like the Provincial Courts of Appeal and Circuit, the Civil and Criminal Zillah Courts, the Registrar's Court, the Auxiliary Zillah Court of Cochin etc. were abolished in the subsequent years, retaining only the District Munsiff's Courts[44]. The places of these courts were taken by new Zillah Courts like the Civil and Sessions Courts of Tellicherry and Calicut, the subordinate courts of Calicut and the Principal Sudder Amin's Courts at Tellicherry and Cochin. The judge of the Zillah court came to be designated the Civil and Sessions Judge of the Zillah with the jurisdiction of the previous Provincial Court of Appeal. To the Subordinate Judge was transferred the original jurisdiction of the provincial courts, as also the Provincial Sudder Amins.

The new Zillah Judge as civil judge was empowered to hear appeals from the decrees of the Subordinate Judge and the Principal Sudder Amin, the Sudder Amin and the District Munsiff. And he was to refer at times to the Subordinate Judge and Principal Sudder Amin's applications for the execution of decisions of District Panchayat. The Criminal jurisdiction exercised by the Courts of Circuit now passed into the Zillah Judge with directions to hold permanent sessions for the trial of the accused formerly done by the Courts of Circuit. The criminal jurisdiction of the District Munsiff was extended as to include the petty offences and petty thefts.

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[43] Act VII of 1843.

[44] Innes C.A., op.cit., p.366.

In the establishment of the Sessions Courts and other reforms in the judicial administration brought through the Act of 1843 we get the nucleus of the modern civil and criminal law[45]. The next change in the structural formation of judicial institutions came in 1875 when the designation of the Civil and Sessions Judges became the District and Sessions Judges of North and South Malabar, and the Principal Sudder Amins became Subordinate Judges. Tellicherry and Calicut became the headquarters of the District Judges. Hence, before the close of the nineteenth century Malabar as a whole was roused to a new judicial era with District Courts at Calicut and Tellicherry, Subordinate Judges Courts at Calicut, Palghat and Cochin and nearly two dozen District Munsiff's Courts in South and North Malabar taken together.

Further expansion of the lower courts followed in the opening years of the twentieth century in consideration of the immense volume of litigations registered in the Malabar district. In North Malabar, besides the starting of a Subordinate Judge's court at Tellicherry District Munsiff's Courts were started at Badagara, Cannanore, Kuthuparamba, Nadapuram, Payyoli, Quilandi, Taliparamba and Tellicherry. In South Malabar, there came into being Sub Courts and District Munsiff's Courts at Calicut, Palghat and Ottappalam and District Munsiff's Courts at Alathur, Chawghat, Manjeri, Parappanangadi, Pattambi, Ponnani, Tirur and

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[45] Ravindran T.K., Towards a Liberal Policy - A Study of the Munro System in Malabar, op.cit., p.134.

Perintalmanna[46]. Additional judges of different ranks were absorbed into the different courts of the district with the aim of administering justice with greater efficiency.

Connected with the civil courts the Registration Department also became active, which was inaugurated in 1799 through a Proclamation that "all writings in evidence of the transfer of landed property... shall be registered either in the provincial or local adawlets"[47]. For North and South Malabar there were two District Registrars, with jurisdiction corresponding to those of the District Judges, and many Sub Registrars. Though in the peculiar Malabar tenurial context sales, absolute alienations of property etc rarely took place, abundance of leases came to be registered.

The establishment of the law courts in India came like a necessity, an inevitable instrument of colonialism, for the smooth running of the administrative machinery upon alien civilizations, with well-developed customary institutions of their own. To silence their rising sentiments against the former, it became highly essential. This factor could be seen in every step taken by the East India Company towards judicial reforms. Caution was applied when it became aware that in a land where centuries old mighty indigenous social forces worked, British sense of justice could work only in

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[46] Aiyar, Krishna Swamy, Madras District Gazetteers - Statistical Appendix for Malabar District (Together with a supplement to the District Gazetteer by C.A. Innes and F.B. Evans-Madras, 1933, p.366, para.2.

[47] Logan William, A Collection of Treaties, Engagements and Other Papers of Importance Relating to British Affairs in Malabar, Malabar Manual, Vol. III, Gazetteers Department, Government of Kerala, 1998, p.330, No.ccv.

combination with the former. Hence, even some of the unwise customs like trial by ordeals, the practice of sending the convicts to the temples accompanied by the commissioner with the civil court's verdict etc continued even after the introduction of the courts based on the rule of law. So too, the help of the local veterans, as *vakils, dubashis* or go-betweens etc was sought in almost every conflict which came before a court of law[48].

The early English view was that the native inhabitants were governed by their own law and that English law applied only to the English subjects[49]. It was with this purpose that every aspect of the family laws of the natives was studied with great seriousness and exhaustive volumes were prepared in the subsequent years explaining the legal incidents of the native usages. The purpose was to allow the Hindus to be governed by the Hindu Law and the Muslims by the Muhammadan Law. In the case of the Muffassal Courts Regulation III of 1793 directed that where no specific rule existed the courts should decide according to justice, equity and good conscience. And no attempt seems to have been made at any time to apply the English Law as such to the natives of India. Even in the case of court languages Persian and local dialects were used in the early stages for court proceedings, though for practical reasons English replaced the same in 1839[50].

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[48] Paul John J., op.cit., p.1.

[49] 1837, I MIA, 175.

[50] Rao, B. Sitarama, Law Reporting, English Reports, *The Madras Law Journal*, Vol. LIX, 1928.

To be brought under a system of inflexible written codes and regulations in the place of the custom-ridden arbitrary laws and irregular courts, whether of the old caste tribunals or the Muslim Adalats, was a new experience to the people of Malabar. But to those who were acquainted with only such systems, the new experience did not seem highly appealing at first. The extraordinarily long and complicated court proceedings, needing every minute detail of the case in cut-and-dry terms from the involved parties was only arousing suspician in the natives about the new system. This was especially so in their attitude to the Cornwallis Code which gave more importance to the English legal system and less respect to native customs. However, the modification and reforms introduced by liberal administrators like Munro helped removing the doubts of the people. Recognition to the respectability of their native institutions, the opportunity given to the people to prove their innocence through the courts, the judicial method showing equal respect to the plaintiffs and the defendants, the judicial efforts to master their customs by collecting information from every channel, judicial earnestness in reaching at just conclusions on complicated issues etc. gradually instilled confidence in the people to approach the courts which once seemed to them alien and strange. However, the courts became more accessible to the rich and dominant class in society; to them it became a luxury to go to the court as a constant resort[51].

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[51] Innes C.A., op.cit., p.366.

Once fear vanished, courts became a consoling agency to the aggrieved hearts of Malabar. Complicated issues connected to every aspect of their social existence found way to the courts for reddressal. This resulted in an enormous increase in litigation. C.A. Innes, writing in the early years of the twentieth century noted that persons engaged in litigation in Malabar were higher than in any other districts of the Presidency, North Malabar being worse in this case. He wrote, "in the last ten years an average of one in every 56 persons in North Malabar has been engaged in litigation and one in every 99 persons in South Malabar"[52]. To the conservative section of the society, the fact that their customary identities were fully recognized, that many of the traditional practices like ordeals etc. were not changed and such things became pleasing enough.

Hence, this aspect of the East India Company's colonial administrative machinery, that is, the introduction of a system of justice based on British rule of law, with plan to work in combination with the centuries old mighty indigenous legal practices of the natives becomes the most memorable acts of the British rule in India beyond centuries, as laying the foundations of the modern legal system of the nation.

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[52] Ibid.

STATE AND SOCIAL CHANGE – THE ROLE OF JUDICIARY – A CASE STUDY OF MALABAR 1792-1940

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CHAPTER IV

MALABAR LAW

Indian Context

Before the British legal machinery, based on the Rule of Law, started functioning effectively in India, a very important question to be settled with utmost attention was what family law and legal system of the Indians in the bygone ages was to be adopted in deciding the cases of the various classes of the Indian society, with long-established customs of their own. The awareness soon came to them that the rule of law could not be applied so easily, that the legal system could take shape only in tolerable harmony with the dominant segmentary factors, and legal institutions through the blending of indigenous and alien institutions and interplay between the socio-economic and political factors[1].

In the early stages the British East India Company, as a commercial concern, did not take much interest or effort in getting properly informed of the personal laws of the different sections of the people of India. Their early view was that the native inhabitants were governed by their own laws and that the English law to be applied only to British subjects. Until the East India Company took over the administration of Bengal, the question of the law to be

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[1] Paul,John. J., op.cit., p.1.

applied to the natives did not assume a serious practical form[2]. When the *diwani* right of Bengal passed into the hands of the company in the second half of the eighteenth century the question of giving civil and criminal justice to the natives too became their task.

It became apparent to the company's government that no law had ever prevailed in India embracing the entire country which would have helped them to give birth to a uniform legal base for the whole country. No governing power, whether Hindu or Muslim, had ever imposed any such law applicable to all their subjects irrespective of caste or community. The claim of divine authority as their personal law source by both the native Hindu and Islamic law interpreters brought home the fact of the pre-dominating role of religion in the formation of the personal laws of both these communities. While the Hindus were firmly upholding their *dharma*, the Muslim rulers did not like to extend their law of *'shara'* to the non-believers, resulting in the Hindu personal law untouched by the Muslim rulers. This made the task of the British Judiciary difficult in codifying their personal laws in a uniform pattern. However, the Muslim criminal law, applied to all classes of people equally with out any distinction of caste, creed, rank or position by the Muslim chieftains became acceptable to the English Judiciary in the process of the codification of the criminal laws of the country, especially in the initial stages[3]. It became the object of the East India Company to

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[2] Illbert, Sir Courteney, Government of India, Bengal Digest of the Statute Law Relating Thereto, 3rd ed., Oxford, 1915, p. 355.

[3] Puri S.K. and Gitanjali Nain Gill, op.cit., p. 166.

make as little alterations as possible in the existing state of things.

The colonial advocates were well aware of the fact that any radical change in the personal laws of the people of the country would turn harmful to the revenue interest of the company. They wanted to avert such calamities in consideration of the long-term interest of the Company. Warren Hastings' Plan of 1772 provided that in all suits regarding marriage, inheritance, caste, the other religious usages and institutions, the laws of the Quran with respect to the Muhammadans and those of the *shastra* with respect to the Hindus should be invariably adhered to, and that where only one of the parties should be Muhammadan or Hindu, by the laws and usages of the defendant[4].

In the letter addressed to the India Government by Sir Justice William Jones dated 19th March 1788, it was suggested that "nothing could more obviously be just than to determine private contests according to those laws which the parties themselves had ever considered as the rules of their conduct and engagements in civil life, nor could any thing be wiser than, by a legislative act, assure the Hindu and Mussalman subjects of Great Britain, that the private laws which they severally hold as sacred, and a violation of which they would have thought the most grievous oppression, should not be superseded by a new system of which they could have no knowledge, and which they must have considered imposed on them by a spirit of

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[4] Warren Hastings Plan of 1772.

rigour and intolerance"[5]. The suggestion of Sir William Jones was earnestly taken into consideration while giving legal definitions to the long-established customs of each region in India, which were studied with care and dedication.

William Jones had further suggested the compilation of a complete Digest of Hindu and Muhammadan laws, in order not be misguided by the unreasonable interpretation and explanation of them by *pandits* and *moulavis*, and which would give the natives of the Indian provinces a permanent security for the due administration of justice among them, similar to that which Justinian gave to his Greek and Roman subjects[6]. Warren Hastings did his best to get the Muhammadan and Hindu laws compiled through the British Judges with the aid and assistance of the native law officers. But the attempt was not a complete success; the main problem was that even in the existing original books, law in a pure form was not available; law, religion and morality were all mixed up and it was difficult to ascertain what was obligatory, what was mandatory and what was merely directory[7]. And the native law officers were not well informed as to explain authoritatively their laws.

By Regulation IV of 1793, it was provided that in suits regarding succession, inheritance, marriage and caste, and all

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[5] Extract of the letter quoted in 'A Digest of Hindu Law, on Contracts and Successions; with a commentary by Jagannatha Terapanchanana - translated from the original Sanskrit by H.T. Colebrooke, Third Edition, Madras 1864, p.ix.

[6] Ibid., p.xi.

[7] Jain M.P., op.cit., p.698.

religious usages and institutions, Muhammadan law with respect to Muhammadans, and Hindu laws with respect to Hindus were to be considered as the general rules by which judges were to form their decision[8]. Regulation II of 1802[9] made the rule clearer that 'in cases for which no specific rule may exist the judges are to act according to justice, equity and good conscience'[10].

While the need for respecting the age-old usages of the people was stressed, it also was a question of paramount importance as to the criterion to be adopted for recognizing custom as actual law for legal purposes. A custom, when proved to exist came to be judicially recognized as law even if not sounding completely rational, since a change to which would be unpleasant to its followers. The admission of this fact was in perfect harmony with the Indian notion of it from ancient days. The term *sadachara,* or custom, explained as one of the sources of law in our ancient scriptures,[11] came to be legally defined as a rule which in a particular family or particular district has for long usage obtained the force of law and that it must be ancient, certain and reasonable[12]. The Ruling of the Privy Council in Collector of Madura v Mutoo Lingam[13] affirms it that clear proof of usage outweighs written texts of law.

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[8] Moore, Edmond. F, Indian Appeals, 1837-1841, Vol.II, London, p.524.

[9] Section XVII, Regulation II of 1802.

[10] Marshal H.H., Natural Justice, Third Edition, Reprint, New Delhi, 1998, p.165.

[11] Supakar, Shraddhakar, The Law of Evidence in Ancient India, Calcutta, 1990, p.xiv.

[12] Hur Parshed v. Sheo Dayal, LR 31, 259.

[13] 12 MIA, 397.

The legal status custom could attain had come for judicial perusal amidst legal arguments. In Lala v Hira Singh[14] it was held that "a custom to be valid must be ancient, must have been continued and acquiesced in, and must be reasonable and certain". It was the plan of the Judiciary to subject every customary term of the country to legal interpretation before chalking out a system of law applicable to all their British Indian subjects equally. Hence, while giving shape to a substantial judicial set-up, along with the progressive application of the British Common Law, full effect was given to custom both by courts and by legislature, in all the three Presidencies. It was this harmony effected which made possible the "Indianisation of Law"[15].

In course of time, more reliable works on the personal law of the various classes of Indian society came out when judicial veterans started very earnest effort to master them especially for the purpose of helping them during judicial arguments. When new controversies arose, the law applied in the preceding cases helped for making judicial references. Gradually many of the judges became proficient in oriental languages through personal effort, which helped them to obtain information direct from the people. One fruitful result of this was that the Government could terminate the service of the native, unqualified law officers, who were not competent to act as legal experts, through the Act XI of 1864.

[14] I.L.R 2 All 49.

[15] Setalvad M.C., op.cit., p.225.

Thanks to the effort of the nineteenth century legal experts voluminous compositions on the personal laws of the Hindus and Muhammadans came out in their legal connotations like Hindu Law, Muhammadan Law etc. Besides, family laws applicable only to particular classes like the *mitakshara, dayabhaga, aliyasantana, marumakkathayam* etc also came to be separately compiled. The codification of these laws helped a lot in lessening the burden of the judges and the parties involved in cases to understand the particular law, which would apply in their case for which no written authority helped them so far. Erroneous interpretations too were there; but it was more due to the insufficient information they got than any deliberate act.

The process of codification started in India with the appointment of the First Law Commission under the chairmanship of Lord Macualay constituted under the Charter Act of 1833. Lord Macaulay was very particular to give a uniform and systematic law for the country with due weightage to the age-old usages of the people of India. This obstructed the aim of the Law Commission to recommend a full-fledged codification of the personal laws of the Hindus and Muslims even at the end of the second term of the Second Law Commission. However, the members of the Commission were unanimous on the issue that the actual requirement of India was the formation of a body of substantive civil law, in preparing which the law of England should be used as a basis, but which once enacted

should itself be the law of India on the subject it embraced[16]. In the case of the Hindu law, the process of codification started in the latter part of the nineteenth century, in the case of Muhammadan Law it started only after the twentieth century was born.

Malabar Law

The customary laws of Malabar, judicially interpreted, and accepted as a procedural code for the purpose of helping the judges during legal arguments were brought under the broad legal title called the 'Malabar Law'. Every issue connected to Malabar life had to be scrutinized so as to enable rule of law laid for them. The challenge before the judiciary anywhere in India was how to subject the usages of the people to an effective interpretation. This problem was in its most acute form in the case of Malabar. The customary laws of Malabar appeared like a puzzle to the early British enquirers; they were so extraordinary and complicated when compared to the rest of India; it was equally clear to the company that any attempt to bring about a drastic change in their present state would only endanger the company's revenue interest. While in the other parts of India there were written texts on their ancient laws, there was almost a complete absence of any such authority in Malabar pertaining to its personal laws. For understanding the tenurial terms alone works like *keralolpathi,* though abounding in unbelievable myths, helped to a certain extent for a portrayal of the existing realities. However, the

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[16] Puri S.K. and Gitanjali Nain Gill, op.cit., p.168.

oral tradition of Malabar was so strong as to give the long established unbroken usages a status equal to the written laws of a country. They were more self-speaking than any written authority. Hence it became the Company's task to give full effect to the suggestion of Sir Justice William Jones in the case of Malabar, and bring minimum alterations to the customary laws of the country. Their decision was only to legally interpret them for judicial purposes.

It came to the notice of the legal interpreters that the Malabar customs though might appear as quite irrational while viewing from the modern standards, were not at all a disturbing factor to the Malayalee minds. The Company, without trying to go to the historical depths of those laws, decided to give legal effect to those customs which were contemporarily observed. Those laws, which were placed on a complete legal footing through judicial interpretation, became popular as judge-made-laws[17]. However, this codification process was a long and laborious one; perhaps throughout the nineteenth century the Judiciary was engaged in this task, and even at the time of the withdrawal of the British, a complete mastery over the customary laws was not substantiated.

In the process of constructing a workable judicial base out of the enigmatic legal realities of Malabar the Judiciary was very active in collecting information from all possible sources; all the available

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[17] 'The law as an Instrument and Measure of Social Progress', the Sri Krishna Rajendra Silver Jubilee Lecture, 1939 delivered by Sir Alladi Krishnaswami Aiyer, Advocate General, Madras. The *Madras Law Journal*, II November, 1939, p.97.

local compositions were examined; the help of the local *pandits* was sought; answers were obtained from influential people through questionnaire; foreign visitors' travel accounts were subjected to careful scrutiny; the Joint Commissioners' Reports were searched into; comparison and contrasts with the local customs of the people of the rest of India were made, and the people's usages were subjected to close study through continuous observation. Besides, Privy Council's advice was sought on crucial issues where important legal points were involved. In the case of those laws and usages, which appeared so well-established in the every day life of the particular communities in Malabar were judicially noticed and recognized without further proof. In the case of those which were observed but not sure whether well established, proof was required before being judicially recognized and enforced[18]. Some of the customary general terms like *tarwad, karanavan* etc. common to all classes came to be interpreted according to the way each class observed them.

As a result of the painstaking efforts of the English and Indian Judges exhaustive volumes on Malabar Law came to be published. English Judges like Holloway, Reid, Graeme, Strange, Mayne, Moore and others were earnest in their studies on Malabar Law; later Indian Judges like Justices Sundara Aiyar, Muthuswami Aiyar, Chandra

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[18] In the case of Malabar customs like the non-permission to the younger male members of *illoms* to marry; Nair *sambandhams* etc. the court was not sure what actually is their customary law. Justice Moore, Justice Sundara Aiyar etc. have commented on such issues. Moore, Lewis, op.cit., pp. 56-93, Sundara Aiyar J. op.cit., pp. 197-207.

Sekhara Aiyar and others, made substantial contribution in this direction. Almost every customary term with legal implications came to be legally defined with corresponding English translations. Till legislative interference resulted in the alteration of the customary laws, the judge-made-laws in strict adherence to the long-established customs became the guidelines for the judges to decide the Malabar cases. The real service of the judge-made-laws happened to be that, by letting the people of Malabar to hear their own customs, never previously recorded by anybody, explained, discussed and criticized, in the court chambers through a foreign agency, they succeeded in arousing the people to judge the right and wrong of their customary laws by themselves at a later stage.

The interpretation of the customary laws went on almost till the end of the British rule in India. It came like an irony that by the time they had almost mastered them for legal use, the Malabar society had become mature enough to say adieu to them.

Land Tenures

Malabar Law on the land tenures was the judicial guideline prepared for purposes of deciding cases on the issues connected to the various aspects of the land relations of customary Malabar, which would guarantee an unobstructed revenue collection for the East India Company with minimum resistance from the people. So too, later it became a matter of much criticism at the hands of legal analysts. But the problem began at the very point where the genesis

of the Malabar Law on the customary Malabar tenures was marked , and not when it was finally compiled by the Judiciary in 1856. While Malabar Law in the case of the various other aspects of customary Malabar society was directly done by the Judiciary through independent legal interpretation, in the case of the land relations Judiciary's task was allowed to start only where the administrative machinery had finished its task[19]. Only through a realization of this first truth it becomes possible for one to understand why the Malabar law on the land tenures came out in the way it did from the legal hands instead of their natural form.

Madras administrative records on the tenurial issues of Malabar give the general impression that Judiciary was completely responsible for defining the customary tenurial terms legally; but actually it was not so. The voluminous Report submitted by the Joint Commissioners in 1793 and the reports of the other Commissioners in the subsequent years tell us that 'definition' work of the tenurial terms was done by the administrative machinery itself, and only the codification was later done by the Judiciary. Even in the codification process Judiciary was not given the freedom to interpret them with an impartial outlook, as the same would adversely affect the revenue interests of the company. Continuously circulars were issued by the Home Government reminding the Judiciary to limit the scope of their task specific to the instructions of the Home Government[20].

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[19] Joint Commissioners Report 1793, 3 Vols, op.cit.

[20] Circular Orders of the Court of Sudder Adalat from 1803 to 1834, Regional Archives, Calicut.

Though the codified customary laws of the country are usually called Judge-made-laws, it is not fully correct in the case of the customary tenurial terms of Malabar. The tenurial laws of this region definitely mooted before they reached the judicial hands for codification. The first Joint Commissioners, with specific instructions from the Bombay Government, made elaborate studies on the tenurial realities of Malabar and passed their own conclusions regarding the existing state of affairs. But what was ignored by them was that for a proper grasp of a customary reality of a region a deeper search into its roots is essential, and which alone would be helpful in the shaping of a future plan of action. This first folly committed by the Joint Commissioners could never again be rectified, about which later the administrative machinery as well as the judges repented, especially in the context of the Mappila outbreaks[21]. The absence of understanding between the Executive and the Judiciary in colonial Malabar[22] too contributed towards the Malabar Law coming out with a changed meaning through the Sudder Court Proceedings of 5th August 1856[23].

Judiciary's interpretation had to start with the first truth told by the Joint Commissioners that private property was an age-old full-

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[21] Mr. Wigram, while commenting on a Full Bench Decision (Reported in ILR III M, 382) pointed out that it was too late to revive the ancient practice and that whatever harm had been done by official misunderstanding had been done already and could not be undone, Herbert Wigram, A Commentary on Malabar Law and Custom (Reprint) Madras, 1982.

[22] T.L. Strange, Special Commissioner, Report on the affairs of Malabar, 25th September, 1852.

[23] Sudder Court Proceedings dated, 5th August 1856, See Appendix I, p.412.

fledged social institution in Malabar exactly in the Roman model; and that the customary *janmis* were the absolute proprietors of the soil. Not only the first Commissioners, but those reported in the subsequent years too, including even the liberal minded Munro,[24] and Graeme[25] who prepared an exhaustive glossary of customary tenurial terms were only endorsing this view. Buchanan's travel accounts too spoke the same[26]. It would have been impossible for the Judiciary to form a different opinion on this generally accepted notion of the administrative machinery, upon which the latter had even published the Proclamation of 1799[27]. Judiciary's public contact was also very limited as to hear from the people direct, their customary realities based an *kana-janma-maryada*[28] and their completely changed meaning at the hands of the early English interpreters.

The judges were not asked to examine the right and wrong of the interpretation of the Commissioners, still judges like Justice Rickards pointed out the anomalies in them at the very beginning of the nineteenth century. But the administrative machinery put the whole blame of forming such a fallacious interpretation of the customary tenurial terms on the Judiciary. Even Logan, who definitely sympathized with the tillers of the soil of Malabar, was not

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[24] Munro, Sir Thomas, A Report on the Revision of the Judicial Systems in the Province of Malabar, 4th July 1817, Calicut 1912.

[25] Graeme, H.S., A Report on the Revenue Administration of Malabar, 14th January 1822, Calicut, 1898.

[26] Buchanan, Francis, op.cit.

[27] Proclamation of 1799, op.cit.

[28] Variyar, Raghava M.R., Keralolpathi Granthavari, op.cit., p.10.

free from lamenting over the "pestilential legal fiction"[29].

However, gradually the judiciary was not only realizing the wrongs done to the Malabar tenurial structure, but explaining so exhaustively, during legal arguments, their real meaning as familiar to the people through ages. But as it was not the Judiciary's task to alter the laws, they were passing verdicts according to the Malabar Law carved out in 1856, about which Justice Moore wrote in the early years of the twentieth century, that "what appears to be a complicated system of tenures may be so arranged as to be easily intelligible". Customary tenurial relations were explained[30] and how they would be utilized for legal purposes by the Judiciary was also explained[31] all in a simplified form, the starting point of which was that customary *janmis* were the absolute owners of land in Malabar.

The keynote of the proper understanding of the land tenures of Malabar was, in Wigram's opinion, the meaning of the three words *pattom, kanom* and *janmam*[32]. The highest in the land system was what has came to be known as *janmam*[33]. The Sanskritized form of the Dravidian phrase, *nirattipperu* which was an absolute transfer or

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[29] Quoted by Aiyar P.R. Sundara J., Malabar and Aliyasantana Law, op.cit., p.283.

[30] Sudder Court proceedings 5th August 1856, See Appendix I, p.412.

[31] Moore, Lewis, op.cit., p.191.

[32] Wigram, Herbert, A Commentary on Malabar Law and Custom, Reprint, Madras, 1982.

[33] In connection with the landed property the term *janmam* first appears in a Nambudiri deed dated 1681, in the collocation "*Tarwad janmam* land" and "*Janmam water*" (*janmanirudakam*). The collocations *Janmabhumi, Janmakhandum* for hereditary property" are also found, quoted by Innes C.A., op.cit., p.305.

alienation of ownership. The Malabar Law recognized this unique feature of the *janmam* right, that this right transferred through the *attipper* was the proprietary right itself; *janmi's* right forever on the land as well as on its produce, along with the right to evict the *kanakkar*, came to be recognized legally. Next, in order of superiority of the land tenures in Malabar, was the *kanom*, which in olden days was the right of possession to the cultivating tenants, came to be judicially recognized. But Malabar Law, by giving absolute rights over the land to the *janmi*, along with eviction powers, abruptly put an end to the permanent occupancy rights so far enjoyed by the *kanakkars*. However, the unique feature of the customary Malabar tenures, that all mortgage deed lease hold tenants were entitled to the value of improvements effected by them was given legal validity. The term *pattom*, as it came to be interpreted for legal purposes, was the rent which the *kanakkar* was paying to his landlord for the enjoyment of occupancy rights over the latter's land for a specific period, generally twelve years. The customary meaning of *pattom*, both in the sense of rent as well as mortgage amount or *kanom*, came to be recognized. All the subtitles in the tenurial order came to be legally interpreted according to the way they were connected to anyone or more of the three major identities.

For a proper understanding of how the Judiciary came to interpret the Malabar tenurial problems in the way it did, an idea of how the legal incidents of the various tenures, as they have been gradually defined by the Civil Courts, is important:

"Janmam is the full proprietary right in the soil, subject only to the payment of the government revenue;

"Kanom is the tenure partaking of the nature of both a mortgage and a lease; the tenant pays a lumpsum (*kanom*) to the *janmi*; an annual rent (*pattom*) is fixed according to the capacity of the land, and from it the tenant is entitled to deduct the interest due to him on the amount of the *kanom*; the net balance payable to the *janmi* annually is called the *purappad*; the *kanomdar* is entitled to twelve years enjoyment, unless another term is definitely fixed, and on its expiry to the value of improvements effected by him, if the tenancy is not renewed. If, at the expiry of the twelve years, the parties desire renewal, the tenant must pay a renewal fee, which is fixed by the *janmi*. The *kanomdar* is at liberty to transfer his interest during his tenancy, or to mortgage it. Denial of the *janmi's* title, and wilful waste by the *kanomdar* entitle the *janmi* to compensation before the expiry of the usual term.

"Akin to the *kanom* are several varieties of tenure carrying similar incidents, and differing chiefly in the amount and nature of the sum advanced to the *janmi*.

"In the *kuzhikanom* lease, the sum to be expended on improvements is considered the advance made; the tenant is entitled to enjoy the land rent free, or on a merely nominal rent for twelve years. At the end of that period he must get an ordinary *kanom* or *verumpattom* lease from the *janmi*, or must surrender on receiving the value of his improvements.

The *otti* differs from the *kanom* only in that, (1) the amount advanced is sufficient to make the interest on it equal to the *pattom* so that the *janmi* gets no *purappad*, and (2) the *ottidar* has the right of preemption, if the *janmi* wishes to sell.

"The *kaividuga otti, ottikumpuram, nirmudal and janmapanayam* are further species of mortgage, in which the *janmi* surrenders all his rights, retaining nothing but the mere name. Whether all or any of these are redeemable is a disputed point but the forms of deed are now practically obsolete.

"The *panayam* is a simple mortgage, with or without possession. The terms may be similar to those of a *kanom*, but there are no implied covenants for twelve years enjoyment, or for compensation for improvements. The *unduruthi panayam* is a mortgage, of which the amount is such that both principal and interest will be extinguished by the usufruct within a definite period and the land then reverts free of encumbrance to the mortgagor.

"The *verumpattom* is a simple lease from year to year; the rent is often the whole of the net produce after deducting the bare cost of the seed and cultivation, in which case the tenant is practically a labourer on subsistence wages; but the older custom is for one-third of the net produce, after deducting cost of seed and cultivation, to be reserved for the tenant, and remaining two thirds paid to the *janmi*. The lease may continue in force for years and the tenant is entitled to compensation for proper improvement effected with the express or implied consent of the *janmi*.

"Finally there are grants of land *pro servitiis vel impendendis,* which generally take the form of perpetual leases; if made to a Brahman, the grant is called *santathi brahmasvam;* if to a non-Brahman of caste equal to or higher than the grantor, it is called *anubhavam* or *sasvatham;* if to a person of inferior caste *adima,* or *kudima janmam.* A nominal fee is payable ordinarily to the *janmi,* in acknowledgement of his title. Similar grant of simple lands on service tenure are termed *karaima"*[34].

Litigations connected to Malabar land tenures were all dealt with basing on the legal definitions given above for the customary tenurial terms.

Nambudiri Law

The very extraordinary customs of the Nambudiris of Malabar had to be subjected to complete legal interpretation for the purpose of deciding the cases connected to their personal laws. Their dominant status as the absolute proprietors on the soil came to be recognized by the courts basing on the data available in the Malayalam composition called *keralolpathi* and on the information provided by the early British Reporters. It became a hard task to the Judiciary to carve the legal outline of the personal laws of the Nambudiris especially in the absence of reliable written sources.

A very important question which quite often came to the notice

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[34] Innes C.A., op.cit., pp. 305-307.

of the Judiciary was what family law and legal system of the Indians in the bygone ages was to be made applicable in the case of the Nambudiris[35]. The main problem was that though the Nambudiri family was patriarchal and patrilineal, with the headship descending on the male line as in the case of the rest of the Indians following the *mitakshara* and *dayabhaga* systems,[36] in many other customs they not only marked a complete departure from these, but followed the extraordinary customs of Malabar *marumakkathayam* castes like the Nairs.

The social observances which distinguish the Nambudiris were not properly viewed by the courts of Malabar in early days[37]. They were of the view that the Nambudiris were a branch of the rest of the Brahmans of India who follow the *mitakshara* or the ordinary Hindu Law[38]. And on questions of Nambudiri Law the burden was put on the parties involved to prove whether any other law would be made more applicable to them other than the Hindu Law, without realizing the truth that Nambudiri arrival to Malabar took place long before the *mitakshara* was written. At the same time, wherever they found similarity in the customs of the Nambudiris and the Malabar *marumakkathayam* castes like the Nairs it was presumed as a local adoption by the former from the latter.

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[35] Indian Law Reports, Madras Series-cases decided on the personal law of the Nambudiris.

[36] Mayne, John. D., op.cit.

[37] Aiyar, P.R. Sundara, op.cit., p.210.

[38] Amayur alias Agnirathan v. Itticheri, 1889, I MLJ, 303.

The chief questions before the court were whether the principles of *marumakkathayam* or the Ordinary Hindu Law was to be applied in disputed cases to the Nambudiris and whether by ordinary Hindu Law it meant the *mitakshara* or the very ancient law (of the *sastras*) which was prevalent when the Nambudiris arrived in Malabar[39]. The courts soon found that the *mitakshara* Law[40], though helpful to them in dealing with the cases of the rest of India, could not be applied in the case of the Nambudiris.

The laws laid down in the *dharmasastras* with the translation for *dharma* as 'Sacred Law' which guide the Brahmans throughout India was recognized by the courts. However, the *dharma* of the Nambudiris was more orthodox and priest dominated came to be interpreted as a direct heritage from the ancient patriarchal system of the Vedic Aryans in which the patriarch's control over the rest of the family members was almost absolute. It was observed by the Privy Council that when a class of Hindus migrated from one place to another, and retain their ancient religion, the presumption is, unless the contrary is shown, that they carried their personal law with them to the new settlement[41]. This was accepted as a Rule of Law in legal procedure connected to the Hindus.

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[39] Aiyar Sundara P.R., op.cit., p.214.

[40] Mitakshara - A commentary by the medieval jurist Vijnaneswara on the law book, the Dharmasastra of Yajnavalkya, explains exhaustively the system of family to be adopted by the Hindus became the basis of the civil law of modern India.

[41] Rucheputty v Rajeendar, 2 MIA, 133.

In Vasudevan v the secretary of state for India[42] the question as to what law should be applied to Nambudiri Brahmans was very fully considered and it was held that they were governed by Hindu Law modified by special customs, which they had adopted since their settlement in Malabar[43]. The Hindu Law was the ancient Hindu law as it was probably understood and followed about the commencement of the Christian era. While the modified customs of Hindu Law as explained in the *mitakshara* are not to be seen among the Nambudiris, the sixty four *anacharams* observed by the Malabar Nambudiris are not to be seen in ordinary Hindu Law[44].

The courts equally attempted to see what all customs of the Nambudiris were influenced by the local customs after their settlement in Malabar. In the absence of any written authority it became a hard task to form a substantial idea, but it was successfully done by the Judiciary by collecting information from every possible channel. The *pandits* of North and South Malabar were consulted, references were made to the Cochin and Travancore courts; comparisons and contrasts were made with every existing personal law of the country like the *mitakshara, marumakkathaya, aliyasantana* and others; the interpretation of the *vedas* and *dharmasastras* was done through experts; similar cases everywhere in India were discussed; and the advice of the Privy Council was sought wherever important legal points were involved.

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[42] ILR, 11 M, 157.

[43] Moore, Lewis, op.cit., p.21.

[44] Thurston, Castes and Tribes of South India, Vol. V, Madras, 1909, p.185.

Legal definitions were chalked out for all aspects of Nambudiri customs which were regulating the every day life of the Nambudiris, such as the *illom* properties, *karanavan*, property impartibility, *anandaravan's* identity, marriage, adoption, female rights, dowry, gift, partition, *sarvasvadanam* marriage, widow's rights to property, self-acquired property and everything else[45]. Nambudiri customs, so codified and brought under a substantial legal framework, came to be called the 'Nambudiri Law'.

Regarding the most important aspect of the Nambudiri customs, that is the impartibility of *illom* property, it was presumed that as in all Hindu Law, so in the archaic form of it which existed in Malabar, including that of the *marumakkathayam*, the first conception of family was of an indivisible unit, a mere aggregate with no separate rights, living under one head, united more especially by their connection with the same *sacra*[46]. The law accepted in the case of the Nambudiri property was that partition among Malabar Brahmans was wholly alien to the principles of the law, which governed them[47].

As in *marumakkathayam*, *karanavan's* authority in the management of *illom* properties as almost absolute and unquestionable so long as he is bonafide and not fraudulent was judicially recognized.

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[45] Bose B.D., ed., A Digest of Indian Law cases, 1836-1909, 1912-1913, Malabar Law, pp.8066-8101.

[46] Erambappalli Korappan Nayar. v Erambappalli Chennan Nayar, VI Madras High Court, 411.

[47] AS 36 of 1860 (Tellicherry) Holloway's Judgements, Record Room, Dt. Court, Tellicherry.

The junior members and unmarried female members' right in the family property, that is the right to maintenance too got judicial recognition.

Under the Nambudiri Law, legal marriage formed the basis of succession as in the case of the rest of the Brahmans of India. And only the descendants of the eldest male, who definitely are the children from a legal marriage, should perform the obsequies and became their heirs.

At the very early stage, that is when the Judiciary had just started functioning, the impression was that the Nambudiri Law does not permit the junior male members to marry. But later this view was changed when found that there is no rule of law and no custom prohibiting the junior males from marrying[48].

According to the Nambudiri Law, a married woman loses her rights in her parental *illom*; she would take her husband's *gotram* and continues to stay in the husband's *illom* even after becoming a widow.

Nambudiri Law permitted marriage only after the attainment of puberty, which is contrary to the custom of the Brahmans elsewhere whose custom sanctioned child marriage.

The very strange custom among the Nambudiris, the *sarvaswadanam* marriage came to be judicially recognized,[49] as also the

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[48] Vasudevan v The Secretary of State for India, ILR 11 M, 157.

[49] Moore, Lewis, op.cit., p.49.

fact that the male issue from that marriage as belonging to the mother's *illom*.

The age-old custom of adoption based on the very ancient *smriti* law among the Nambudiris got legal recognition. The customary usage of the Nambudiris of affiliating the member of another *illom* for the purpose of begetting issue was recognized valid by the courts.

Regarding the right of the female members in the Nambudiri *illom* for ownership of the property, the ancient patriarchal state of law was made applicable, in which except the patriarch, both males and females have equal rights. The females to become the manager to the *illom* property, the one who was married to the *illom* first got the superior position and not the one senior in age; in the case of the unmarried, she becomes eligible if born before the first marriage of a male took place in the *illom*. Nambudiri widow does not possess the power of alienation of *illom* property became legally accepted.

As self-acquisitions were rare among the Nambudiris, no definite law was mooted in the beginning; but later the ordinary Hindu Law which gives the right to inherit such properties to one's own immediate heirs became the rule of law in the case of the Nambudiris also. However, in the case of the personal debts of the Nambudiris, for example, due to illness etc, the *marumakkathayam* usage was given legal effect since no individual had separate claims in the *illom* property; hence the *illom* was liable.

The Nambudiri customs, which were never explained by any

historian of the pre-British period or made available by any written authority through interpretation, were put on a complete legal footing to become effective guideline not only during judicial proceedings, but later to guide the protagonists of social reform.

Marumakkathayam Law

The customary law of inheritance prevalent in Malabar was of two types *makkathayam* or patrilineal, where inheritance passed from father to son and *marumakkathayam* or matrilineal in which succession passed from maternal uncle to nephews. While the former was the system practised by the rest of India and certain communities in Kerala, the latter was something peculiar to Malabar. While certain classes as a whole were the followers of *marumakkathayam* in Malabar, peculiar section of certain other classes whose general law of inheritance was *makkathayam* were also its followers[50]. The Nairs as a whole were its followers; so too were a section of the Nambudiris called the Payyannur Brahmans; the Thiyyas and other cognate castes in North Malabar and the Mappilas of the coastal belt were the followers of *marumakkthayam*[51].

Literally, the word *marumakkathayam* is applied to that system of kinship which regulates succession through the maternal line, that is through nephews and nieces, and in which fathers are practically

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[50] The followers of these two legally identified systems of inheritance practised by the people of Malabar were published, Quoted by Sundara Aiyar in Appendix A. pp.327-329.

[51] Ibid.

ignored[52]. The law by which succession is regulated in the Malabar *marumakkathayam* communities came to be called Marumakkathayam Law. Marumakkathayam Law as administered by the courts is a body of customs and usages which have received judicial recognition[53], and may be taken to be well settled on most matters, at the same time subjecting them to modification through the legislation in tune with the growing needs and aspirations of a progressive community.

However, the conspicuous absence of a codified law or even any reliable, authoritative written record, blocked the way of the English judges from making any easy interpretation of the customary *marumakkathayam* law, while it was easier for them in the case of Hindu law relying on the *sastric* ideals as source. But the judges were on a strenuous effort to carve actual rule of law on *marumakkathayam* questions through consultation of the native *pandits*, constant personal observation of their customs, examination of the Joint Commissioners' Reports, Buchanan's accounts etc. The role of eminent judges like Mr. Justice Holloway was remarkable in enunciating legal connotation on Malabar Law; as to become renowned as the Father of the modern Marumakkathayam Law. To begin with, Judiciary gave more concern to the existing realities only in the initial stages while doing intepretation on the system of *marumakkathayam*. The need for deeper investigations came when complicated issues began to emerge in course of judicial arguments.

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[52] Panikkar, T.K. Gopala., op.cit., p.34.

[53] Aiyar, Chandra Sekhara (ed.), Mayne's Treatise on Hindu Law of Usage, Madras, 1949, p.971.

First hand information was collected from all possible sources utilizing the service of the native scholars and *pandits*, and through constant observation of the age-old practices, so divinely kept close to their bosom by their followers. This gradually helped the Judiciary to explore into the very roots of the system and a substantial Marumakkathayam Law.

Of the followers of the Marumakkathayam Law of inheritance, the customs of the Nairs of Malabar, the chief military community and the customary *kanom* holders, become the most potential example for a case study. According to Fawcett, "The chief immediate interest attached to them lies in the fact of their being the best, that is the fullest, the most complete existing example of matriarchy, or to be more strictly accurate, of inheritance through female"[54]. The Judiciary attempted to study every term connected to the family laws of the Nairs very carefully and exhaustively and found that most of such laws could be made applicable in the case of the other *marumakkathayam* communities too.

The law by which succession was regulated in the Malabar Nair *tarwad* or joint family based on matriliny came to be designated, the Marumakkathayam Law, and applied in the case of similar other *marumakkathayam* communities also. Marumakkathayam Law had little actual resemblance with the ordinary Hindu law, since the former is founded on the matriarchate, while the Hindu law is

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[54] F. Fawcett, op.cit., p.186.

founded upon the agnatic family[55]. The multiple aspects of *marumakkathayam*, the problems of which came for legal redressal[56], like *tarwad*, partition, *karanavan*, *anandaravan*, *tavazhi*, marriage or *sambandham* self-acquisition, adoption, inheritance, succession, alienation of property and all the other major and minor aspects were subjected to detailed legal interpretation.

The *tarwad* came to be identified and legally defined as the undivided family in the *marumakkathayam* system of inheritance where descent is traced through the female line, which formed the nucleus of the society in Malabar. The joint family in a *marumakkathayam* Nair *tarwad* consists of a mother and her male and female children and the children of those female children, all her brothers and sisters and the descendants on the sister's side-in short all the woman's relatives on the female line, however distant their relationship[57]. Community of property, that is *mudal sambandham*, connects the members of the joint family, with every member enjoying equal rights in the property by reason of his or her birth in the *tarwad*, and on whose death, his or her interest, in the *tarwad* property, devolving on the other members of the *tarwad* by survivorship.

Regarding partition of *tarwad* property it was judicially interpreted that impartibility is the rule prescribed and community of

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[55] Mayne, John D, op.cit., p.972.

[56] Bose J.D. (ed.), A Digest of India Law cases, op.cit., pp.8066-8101.

[57] Mayne John. D, op.cit., p.973.

interest can only be severed by voluntary separation and partition[58]. It was laid down that one or more members of a *tarwad* could not claim partition and separate possession of their share of the *tarwad* property without the consent or concurrence of all the members thereof[59]. Still when a *tarwad* becomes too unwieldy, natural forcces begin to work and bring about a division of it into various distinct *tarwads* which keep up the original tradition of their common descent (*pulabandham*), but have no legal right to the property of one another (*mudal bandham*). Through such partition separate *tarwad* called *tavazhi* springs up with their eldest male as its *karanavan*[60].

The seniormost male member in a *marumakkathayam tarwad*, the *karanavan*, and in the absence of any adult male member, the senior most female member, who is called the *karanavathi*, came to be entitled to carry the management of the family. Some of the cases give us detailed explanation of the legal interpretation of the customary laws. In Varanakot Narayanan v Varanakot Narayanan[61] it is stated that under the Malabar law, the eldest male member of the *tarwad* is the *karanavan*, that in him is vested actually (though in theory in the females) all the property movable and immovable, belonging to the *tarwad*, that it is his right and duty to manage alone the property of the *tarwad*, to take care of it, to invest it in his own

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[58] I Madras, Sudder Dicisions, 118; A.S. No.28 of 1814 and S.A. No.4 of 1857; Madras. Sudder Dicisions, 1857, 120.

[59] Ibid.

[60] Panikkar, T.K. Gopala, op.cit., p.18.

[61] ILR 2, M, 328.

name (if it be movable) either in loans on *kanom* or other security, or by purchasing in his own name lands, and to receive rents of lands. In the words of Holloway. J, "A Malabar family speaks through its head, the *karanavan,* and in courts of justice, except in antagonism to that head can speak in no other way"[62]. The *karanavan's* absolute authority over the *tarwad* property as its manager came to be legally recognized, though in theory in the female. In some exceptional cases the ownership of *tarwad* property was vested in the females as *streesothu,* such as *kovilakoms,* Mappila *marumakkathayam* families etc. In Zamorin's *kovilakom* the eldest female managed as *karanavathi.*

To succeed to the office of the *karanavan* was a birth right recognized by the customary law of Malabar. It was not a creation by contract or just a trustee or of an officer of a corporation or the like[63]. Seniority of birth alone was the test applied and not nearness by descent to the common ancestress. Though generally the term *karanavan* was applied to the brother of a mother that is uncle to his *anandaravans,* in Malabar Law the eldest male member of a Malabar *tarwad* was called the *karanavan* in his managerial capacity. Even nephews in seniority could become *karanavan* and if all the males are juniors, or in their absence senior female could become *karanavathi.*

According to the Marumakkathayam Law, almost the only restraint on the *karanavan* in the management of the *tarwad* property

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[62] Mayne, John D, op.cit., p.983.

[63] Ibid.

was that he could not alienate the lands of the *tarwad*[64]. In this respect the power of the *karanavan* was governed by the customary law of Malabar. For any alienation for the common benefit of the *tarwad*, that the unanimous agreement of the family members was essential, was the earliest judicial authority on alienation passed in 1816 in the Provincial Court of Western Division[65]. However, there was no rule of Malabar Law that the assent of every member of a *tarwad* was necessary to render valid the alienation of *tarwad* property.

While the *karanavan's* powers as manager were recognized as absolute, as a member of the *tarwad* he too was entitled only to maintenance out of the *tarwad* property. The term 'maintenance' not only included the basic necessaries of life but also the other reasonable and legitimate expenses of junior members.

The privileges granted to the junior members of a *marumakkathayam tarwad* were recognized as Malabar Law. A junior member would be a co-owner or co-proprietor of the family properties with the other members thereof. He is entitled to be maintained by the *karananvan*, to object to unauthorized alienation of the *tarwad* property, to become the *karanavan* on becoming the senior most male member of the family, to a share on a partition, to object to an adoption etc.[66] The Rule of Law is that the junior members should be allowed for their maintenance what is reasonable and proper,

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[64] ILR 2, M, 328.

[65] 1855, Holloway, Subjudge, Calicut.

[66] Mayne John D, op.cit., p.989.

considering their need and according to the capacity of the *tarwad*[67].

Regarding self-acquisitions of a male member of a *marumakkathayam tarwad,* it became the accepted law that unless he had disposed of such properties in his life time, lapsed to the *tarwad* on his death and formed part of its property. Its legal presumption was that the customary law demands such properties would become part of the *tarwad* properties on the death of the acquirer.

Regarding marriage, the legal interpretation was that it was absolutely impossible for a man or a woman who followed the Marumakkathayam Law to contract a valid marriage, using the word marriage in its ordinary popular signification[68], the quasi matrimonial connection or *sambhandam* among the *marumakkathayam* Nairs though had all the elements of a valid marriage had not been recognized by the Judiciary as a legal marriage for a long time[69].

Adoption as a mode of perpetuating any *tarwad,* which is likely to become extinct was recognized under the *marumakkathayam* system of inheritance from early times came to be legally accepted[70]. Different kinds of adoption by different communities and the conditions to be observed in so doing came to legally defined.

The *attaladakkam* form of succession came to be defined as the

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[67] Kunhali Kutti Haji v Kunhaman, ILR, 46 M, 567.

[68] Moore Lewis, op.cit., p.69.

[69] Ibid., p.74.

[70] Mayne, op.cit., 980.

right of succession by virtue of distant relationship to a divided branch of a *tarwad* when the branch becomes extinct[71].

In the case of *marumakkathayam* usages, there was only the oral tradition, and an absolute absence of any written authority. It was through constant personal contacts and enquiries that the Judiciary very successfully carved out the facts needed for the Marumakkathayam Law.

Some of the Mappilas of the West coast, the Musalmans in religion, have largely adopted the Marumakkathayam Law. It is a question of fact in each case whether the particular family has done so or not", so interpreted Justice Mayne in his study on Hindu Law & Usage.

Malabar Law - Mappilas

The recognition of custom having the force of law in legal proceedings in the case of the Muslims who are at the same time strict followers of Islamic religious ethos was derived from the indirect sanction of the Islamic agencies themselves as a concession granted to the early converts to the faith. Throughout India the Muslims were hence guided by the Islamic Law mixed with local practices. The Rule of Law accepted in the case of the Mappilas of Malabar was a combination of the general rule of law accepted in the case of Muhammadan plus a recognition of those aspects of

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[71] Ibid., p.978.

marumakkathayam which some of them were observing for centuries, requiring its applicability to be made applicable in their case.

According to the classical belief of the Muslims the word of God is law and law is the command of God. This law is known as sharia. The accepted sources of Islamic law[72] are: (1) The Quran, the Holy Book of the Muslims which according to their belief was revealed to the Prophet by Gabrial (2) Hadis (Sunna), that is precepts, actions, and sayings of the Prophet Muhammad, not written down during his life time, but preserved by tradition and handed down by authorized persons. (3) Ijma, that is a concurrence of opinion of the companions of Muhammad and his disciples, and (4) Qiyas, being analogical deductions derived from a comparison of the first three sources when they did not apply to the particular case[73]. Though not a source of law, Fatawas as opinions of judges and muftis in the light of facts are important. These have been instrumental in the development and enrichment of legal principles[74].

In the Indian context the accepted legal connotation of the term 'Muhammadan' was "any person who professes Muhammadan religion, that is, acknowledges, (1) that there is but one God and (2) that Muhammad is His Prophet, is a Muhammadan. Such a person may be a Muhammadan by birth, or he may be a Muhammadan by

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[72] Hidayathulah M., and Arshad Hidayathulah (ed), Principles of Muhammadan Law, Nineteenth Edition, Bombay 1990, p.33.

[73] Ibid., p.xxi.

[74] Ibid., p.xxiv.

conversion[75].

As the Muslim jurisprudence recognizes only the God's authority in enacting laws which is fairly expressed in the Quran, and never allows any alteration to the Quranic injunctions Judiciary was very cautious in approaching those laws. For judicial purpose only those verses in the Quran, found in a scattered manner and which deal with the personal status of the Muhammadans were selected in which were included questions like succession, inheritance, marriage, gifts, dower, divorce wills, wakfs, pre-emption, property, maintenance of relatives etc.[76] In the case of Malabar where it was a combination of Muhammadan and Marumakkathayam Law the chief questions which demanded legal solutions were those of the devolution of property, gifts, maintenance, mosques, partition, *stridhana, strisothu,* succession, testamentary disposition etc.

The law envisaged for the Malabar Mappilas was one which could be in conjunction with their Islamic faith and the local habits which they were following as a system of law. The court never interfered into any of the actions connected to the Islamic belief. But in the case of personal laws their interference was necessitated by the extraordinary observances, which were outside their true Islamic construction, of several sections of Mappilas, in order to assure social

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[75] Abraham v Abraham, 1863, MIA, 199, 243.

[76] B.D. Bose (ed.), A Digest of Indian Law cases 1836-1909, op.cit., p.4807, Vol XI, J-M, Calcutta, 1912.

tranquillity. Considering the fact that since even pure Islamic agencies themselves were ready to make such adjustments in the initial stage in the case of personal laws in order to get increased number of converts the courts did not hesitate to carve legal guideline for the personal laws of the Mappilas. For example, among the Mappilas, customs varied from place to place: in North Malabar, Mappilas, as a rule followed the *marumakkathayam* system of Inheritance, though it is opposed to the precepts of the Quran, but a man's self-acquisitions usually descended to his wife and family in accordance with the Muhammadan Law of property. In the South, the *makkathayam* system was usually followed, but even here succession to religious *sthanoms,* such as that of the *valia tangal* of Ponnani, usually went according to the *marumakkathayam* system[77]. The combination of the two systems of law often led to great complications[78].

By Malabar Law, as accepted in the case of the Mappilas of Malabar, Judiciary's mission was to give justice as far as possible to all classes of Mappilas, whether *makkathayis* or *marumakkathayis* or a combination of both, through a study of their existing customs only. Though perfectly Muslim in their religious observance, the Mappilas of different regions and different families were followers of different types of customs. The courts found practical difficulty in carving a procedural code in the case of the Mappilas because of the twin systems followed by them on the property inheritance side. The court

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[77] Ibrahim Kunju, op.cit., p.174.

[78] Innes C.A., Malabar District Gazetteers, op.cit., p.193.

recognized both laws in the case of the Malabar Mappilas, and decided the case as the situation required. The practice continued till at last the Shariat Act was passed in 1937.

It is very natural and very probable that when a very large section of a community adopts a new religion the converts should retain the rules of inheritance to which they were previously subject and it is also extremely likely that the heads of the new religion should encourage conversion by making the change as easy and agreeable as possible to the new converts[79]. The Privy Council was prepared to allow a community changing its religion to accept either the rules of inheritance prevailing among the followers of that religion or adhere to the rules which formerly governed them, that is to become adherents to their new religion in part while sticking to their old system in part[80].

The courts, though at first, were reluctant to give legal recognition to the usage of *marumakkathayam* to the Mappilas gradually found its relevance as one completely recognized by the Mappila themselves. They also came into contact with similar other Muslim communities in other parts of India continuing their old Hindu customs as the Khojas of Bombay, the Memon Cutchis of Goa & Gujrat etc. The principles laid down in their case was that (1) the Muhammadan Law generally governs converts to that faith from the Hindu religion, yet (2) a well established custom of such converts

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[79] Abraham v Abraham, Sundara Aiyar, op.cit., p.231.

[80] Seramah Umah v Palatham Veettil Mariyakutty Umah-1871, 15, WR, P. 47.

following the Hindu law of inheritance would override the general presumption. (3) that this custom shall however be confined strictly to cases of succession and inheritance; and that, if any particular usage, at variance with, the general Hindu Law applicable to these communities in matters of succession be alleged to exist, the burden of proof lies on the party alleging such special custom[81]. The customary laws actually followed by the people of several parts of India were separately considered for legal interpretation.

Hence the courts in Malabar were ready to recognize the *marumakkathayam* law of inheritance and the rule of non-division in the case of the Mappilas of North Malabar so long as no usage contrary to it has been proved. Justice Holloway, the Civil judge of Tellicherry laid down the law: the presumption of course is that the descent is that of the nephews as is the rule of North Malabar universally[82]. It came to be legally accepted that the Mappilas of North Malabar follow the *marumakkathayam* system of inheritance, while the Mappilas of South Malabar with a few exceptions follow the ordinary Muhammadan Law, that considerable portion of the Mappilas were followers of *marumakkathayam* rules long before they embraced the faith of Islam[83].

Under Muhammadan Law a girl married passes over to her husband's family and there is no obligation on the members of her

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[81] Moosa Haji Joonas Noorani v Abdul Rahim (1906), 30, Bom-197; Haji Saboo Siddick v. Ali Muhammaed (1906), 30, Bom-270.

[82] Sudder Decisions, S.A 651, 1860.

[83] Moore Lewis, op.cit., pp.324-325.

natural family to maintain her after marriage, even if she is divorced. In the absence of a specific law regarding gift Muhammadan Law in this respect got legal recognition[84]. Regarding co-parcenary it was held that there is no authority for saying that the custom of holding property in co-parcenary is a recognized custom among Mappilas in Malabar[85]. Under Muhammadan Law, the estate of a deceased person must be applied to the payment of his funeral expenses and debts before the heirs can make partition of it[86]. Under Muhammadan Law, no special expressions are necessary to constitute a valid divorce, nor except when the repudiation is final, need the words be repeated thrice. If the divorce pronounced is liable to be, but is not, revoked with in the period of iddat, it becomes final[87]. A gift to take effect at an indefinite future time is void under Muhammadan Law[88]. Under Muhammadan Law, to constitute a valid gift, possession must pass to the donee[89]. According to Muhammadan Law, a woman may manage the temporal affairs of a mosque, but not the spiritual affairs connected with it, the management of the latter requiring peculiar personal qualification[90]. A co-sharer by Muhammadan Law has a right to a specific share in each item of property left by the person

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[84] ILR, 36, M, 385.

[85] B.D. Bose (ed.), A Digest of Indian Law cases (1836-1909), Vol. III, J-M, Calcutta, 1912, p.8068 - Reported in ILR 15, M, 60.

[86] Ibid., p.7864, Reported in ILR 26, M, 734.

[87] Ibid., p.7866, Reported in ILR 12, M, 63.

[88] Ibid., p.7928, Reported in ILR 10, M, 196.

[89] Ibid., p.7946, Reported in ILR 30, M, 305.

[90] Ibid., p.7908, Reported in ILR 4, M, 23.

from whom he inherits[91].

The courts in administering, Muhammadan Law, should not, as a rule, attempt to put their own construction on the Quran, in opposition to the express ruling of Muhammadan commentators of great antiquity and high authority (Sura (ii), Verses 241-242). Regarding this, it was held by their Lordships of the Privy Council that it was not open to a judge to construct it in a different manner[92]. Under Muhammadan Law, the payment of the debts of the deceased takes precedence over the legacies. The Muhammadan cannot by will dispose of more than one-third of what remains of his property after payment of his funeral expenses and debts, unless the heirs consent there to[93].

For every specific action, major or minor, there is a clear-cut meaning, definition and explanation in Islamic law, which, the Muslims believe cannot be changed through human interpretation. What the human beings were expected to do was only an effort to understand them in their pure form as laid down in the Quran. But the fact that the Islamic agencies' readiness to adjust to the local habits of the new converts in order not to provoke the latter to give up the new faith, and that it could not be terminated even after many centuries became the heritage of Islamic law which came to the British courts for interpretation. This became problematic to the

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[91] Ibid., p.7961, Reported in ILR 14, M, 324.

[92] Aga Muhamed Jaffer v Koolsom Beebee, 1897, 25, Cal, 9, 18.

[93] Hidayatullah and Arshed Hidayatullah, Mulla's Principles of Muhammadan Law, op.cit., p.24.

Judiciary, which was forced to apply the twin law in the case of the Malabar followers of the Islamic faith.

Except the wakf no gift can have perpetuity in Islamic law. Among those who profess to follow Marumakkathayam Law, the practice frequently prevails of treating the self-acquisitions of a man as descendible to his wife and children under Muhammadan Law[94]. Although the Mappilas of Malabar ordinarily followed closely the Hindu custom of holding family property undivided, yet that, as Mappilas were not subject to the same personal law as the Hindus, their claims could not be governed by the legal presumption of joint ownership[95], as in the recognized meaning of the joint Hindu family property.

The questions of self-acquired property, enjoyment of family property, the inheritance issues of children from multiple marriages etc became haunting problems to the Judiciary. The problem resembled the problem that was confronted with in the case of the Nambudiris whose laws were different from the rest of the Brahmans of India. Similarly, the Mappilas, though were strict followers of the Islamic faith had non-Islamic customary practices like joint family property, staying at the wife's house etc.

In the case of the self-acquisitions of a Mappila the court found it difficult to chalk out a conclusive law in the case of the *marumakkathayam* followers though opinions differed from judge to

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[94] As 124 of 1851, Zillah decisions, Tellicherry Civil Court, Dec 1851, p.9.

[95] ILR 8, M, 452.

judge. The practice of the junior members of Mappila *tarwads* entitled to maintenance from the *tarwad* when living in their wife's house and to a higher rate of maintenance if living with their consort separately got legal recognition[96]. The decision in Abraham v Abraham was made applicable in the case of the Mappilas too.

Christians

Cases connected to the family laws of the Christians hardly came for judicial reddressal in Malabar. Hence the law generally accepted in the case of the converts was the legally recognized law in Malabar too[97]. In Abraham v Abraham[98] it was laid that Euraseans have no code of law of their own; the rules by which they are to be governed are to be ascertained by evidence of the customs and usages prevailing among the class in general, or in the particular family to which they belong (i.e., Europeans, Hindus etc.). It had been made clear in section XVII Regulation II of 1802 that "in cases for which no specific rule may exist the judges are to act according to justice, equity and good conscience",[99] that the rule of law must be according to the customs and usages of the class to which the parties belonged, which was to be ascertained by evidence[100]. However, the Privy Council made it clear that in cases where the civil law and religion

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[96] Aiyar P.R.Sundara, op.cit., p.237.

[97] Kunhichekkan v Lydia, 1912, MLT, 232.

[98] 9, MIA, 195.

[99] Mayne John D, op.cit., p.97.

[100] Abraham v Abraham, 9 MIA, 195.

became inseparable might debar anyone who had accepted the religion from relying on a custom opposed to the law, for example, monogamy; an essential part of Christianity was made applicable in the case of the converts, or the ban on adoption by the Muslim in the case of Muslim converts etc.

The question whether the Hindus who are converted to Christianity may retain the Hindu law or parts of it has often arisen[101]. The Privy Council in Abraham v Abraham[102] held that upon the conversion of a Hindu to Christianity, the Hindu law ceases to have any continuing and obligatory force upon the convert. He may renounce the old law by which he was bound as he has renouneed his old religion, or, if he thinks fit, he may abide by the old law, not with standing he has renounced the old religion.

The *makkathayam* system of inheritance for the Thiyas of South Malabar and *marumakkathayam* for those of North Malabar came to be legally accepted. However, the Hindu rule of partibility of family property as accepted in the Mitakshara system was not made applicable to the *makkathayam* Thiyas of Malabar, though they too were viewed belonging to the ordinary Hindu law.

Not many cases have been reported in the case of the other castes of Malabar.

The privileges attached to the *sthanom* property as existed in

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[101] Ibid., pp.98-99.

[102] 9, MIA, 195.

some of the aristocratic Hindu families like *kovilakoms* of Malabar as a special status, were legally recognized. The inalienability of the *sthanom* property by the *sthani* was also given legal recognition, that is, the limited connotation of the *sthanom* right got legal validity. The creation of new *sthanoms* was not allowed.

Regarding the ownership of Malabar temples the presumption that they were fully privately owned got greater legal validity than the idea that government could be its sovereign or *melkoyima*. The *uraima* right in the temples with the *uralans* as legal co-owners of the *devaswam,* and the *karalan's* status in attachment to the temples got legal recognition. Regarding the actual law to be followed in the management of the temples it came to be recognized that the only law to be applied in institutions like these is to be found in custom and practice which are to be proved by testimony[103].

The *uralan's* privileges in the temple management got legal recognition[104]. It was legally accepted that the *uralans* alone could sue and be sued in cases connected to *devaswam*. While absorbing new trustees to the *uraima* right it was legally insisted that the applicant should be in possession of a *devaswam* and its properties for more than twelve years. The *uralan's* right to alienate the trust property was put under legal restrictions in conformity with the usages of the country. The custom that an *uralan* has no power to transfer his *uraima* right to a stranger got legal recognition.

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[103] Greedhree Doss v Nandokissore Doss, XI Moore's Indian Appeals, 405.

[104] Kunhunni Nambiar v Neelakandhan, ILR 2 M, 167.

The *samudayam,* another title connected to the *uraima* right came to be legally interpreted as an agent of the *uralans.*

The *karanavan* of a *tarwad* has no right to dispose of the private temples of the family as *tarwad* property was legally confirmed.

Starting from the early years of the nineteenth century till almost the end of the British rule in India the courts were in an unending effort to give a legal base to the age-old customs of the several parts of the country. The outstanding merit of this task was that it was not done with the help of any effective written authority as guideline, but against its conspicuous absence, and with a dedication suitable to the legal profession, resulting, in course of time, in the complete interpretation of the customary laws of the country and their gradual codification. In Malabar, the outcome of this, that is, the bringing of the customary laws of the country into a theoretical framework came to be designated the "Malabar Law".

STATE AND SOCIAL CHANGE – THE ROLE OF JUDICIARY – A CASE STUDY OF MALABAR 1792-1940

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CHAPTER V

MALABAR JUDGEMENTS NECESSITATING LEGISLATIVE ACTION

Judiciary started functioning in Malabar in accordance with the instructions from the Home Government and as set forth in the Regulating Act of 1773[1] which stressed that justice be administered in perfect harmony with the age-old customs of the country along with the application of the British Rule of Law. This was for the purpose of guaranteeing the deserving justice to the people, as also to safeguard the interests of the East India Company. Judiciary kept this tradition till the very last of the British rule in India, though, bold, healthy suggestions were not rare from their part capable of arousing the almost stagnant Malabar society to dynamism and mobility, and alerting the rulers to take legislative action. They did not hesitate to frankly react in the case of usages which were proved abuses and when found to be against the broad and just principle underlying the English statute of law, of justice, equity and good conscience[2].

Of the thousands of cases registered in the courts of first instance only a small percentage reached the highest court of appeal in the country. There were only a very few cases which reached the level of the Privy Council in England in the case of Malabar. But the

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[1] Regulating Act of 1773.

[2] ILR 26 M, 540.

innumerable problems of the custom-ridden society of Malabar, raised before the Judiciary, were subjected to unkind dissection vertically and horizontally at the hands of judicial veterans, and answered in a way which succeeded in raising this organ of the administrative machinery the most reliable one as the custodian of human rights.

Land Tenures: -

The most crucial question before the Judiciary was that connected to the tenurial relations of Malabar because of its inevitable connections with the revenue interests of the East India Company in this region. The company's irresistible temptation to realize the maximum possible revenue from the newly acquired territory in the very first year of its acquisition itself made them view things in a fallacious and shortsighted way. The Joint Commissioners who enquired the land relations of Malabar were in unanimous agreement about the existence of absolutely owned private property here in the Roman model[3]. From this first mistake followed the next mistake when steps were hastily taken by the company to give documented proprietary rights to the *janmis* through a Proclamation of 1799 of registering the transfers of landed property either in the provincial or local *adalats*[4].

Two factors could be pinpointed as responsible in misguiding

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[3] Davis H.A, op.cit., p.304.

[4] Innes C. A. op.cit., p 367.

the Commissioners in their interpretation of Malabar tenures: first, the reality they happened to see with surprise in Malabar, that while in all other parts of India the political sovereign of the region was recognized as the ultimate landowner too, in Malabar there was a conspicuous absence of such a political sovereign in whom the ultimate land control was vested. If it was not Government property, it was private property became the hypothesis upon which the Company's officials hastily chalked out their future plan. The *keralolpathi,* a Nambudiri composition, presented to the company's officers as the written authority on Malabar tenures, was speaking about the Nambudiris as customary *janmis* or landlords, whose *janmam* rights more or less resembled that of the Roman dominus, absolute and hereditary. That contemporary society too was one Nambudiri-dominated as explained in the work, was sufficient to confirm the notion of the Commissioners.

Whatever the truth about the Malabar tenures, it was upon this first impression mooted by the Commissioners that the Judiciary was expected to function, making an independent judicial approach in this matter impossible. Judiciary was told that the customary *janmi* was the absolute proprietor on land from very ancient time onwards; that this right, the *janmam* right, could never be taken away by any authority, unless the *janmi* himself decides to alienate it to a caste equal through such absolute transfers called *attipper*[5], as explained in the *keralolpathi.* Basing upon the data provided by the administrative

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[5] Graeme's Glossary, op.cit., p.2.

machinery the legal incidents for the various terms as they were held on customary basis were prepared by the Judiciary and published as the Sudder Court Proceedings of 1856[6].

Though the British rule ultimately led to the break-up of the feudalistic pattern of society, their first action only helped giving a new lease of life to it[7]. The creation of a new propertied class with registered title deeds to establish their rights in the court, was an unprecedented phenomenon in Malabar. However, the Government took care to caution the newly created janmis from freely enjoying their newly conferred privileges with haste. As the new *janmis* were those customary *janmis* who had fled in fear in the days of the Mysorean invasion their pre-Mysorean *kanom* liabilities with the old *kanakkars* had remained unfulfilled. The instruction from the Company's Government was to take any action against the existing *kanakkars* only after fully settling the *kanom* arrears due to them[8]. For the same reason, perhaps, Judiciary's attention in this direction was not immediately called for, though the absolute proprietary rights conferred on one class led to corresponding suffering to all the other classes. Two possible reasons are pointed out by Justice Moore for the conspicuous absence of judicial decisions on tenurial problems during the first sixty years of British occupation of Malabar, that

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[6] Proceedings of the Court of Sudder Udalat, 5th August 1856, See Appendix No.I, p.412.

[7] Narayanan MGS, Malabar Samooham Kazhinha Noottandil, Oru Avalokanam, *Deshabhimani Logan Pathippu* (Mal), February 1981, p 10.

[8] Joint Commissioners' Report, op.cit.

either the evicted *kanakkar* was afraid to oppose the *janmi,* or he had acquired a quasi-permanent right of occupancy[9].

Perhaps there existed confusion in the *janmi, kanakkar* and tiller of the soil about the actual implications of the newly created situation. Though the Judiciary's interference was not much solicited in the early days, problems connected to land ownership and tenurial relations did arise quite early is clear from the beginning of the Mappila unrest in the 1830s as a consequence to the loss of their tenurial privileges in the post-Mysorean days. It was the early outbreaks of the Mappilas of South Malabar which alerted the British administrative machinery towards the need for a clear-cut procedural code for legal purposes on Malabar tenures. It soon came to their notice that things were not moving smooth between the landlords and the tenants and the tillers of the soil. However, a proper account of the registered cases for the first half of the nineteenth century is not made available in reported form. Law Reporting started only from the second half of the nineteenth century.

During the early years of its functioning, and perhaps throughout the nineteenth century, it became the burden of the Judiciary to go on interpreting the customary tenurial laws of the country collecting information from multiple sources. However, in preparing the Sudder Court Proceedings the Judiciary's task was simply to give legal incidents to the tenurial terms as had already

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[9] Moore, Lewis, op.cit., p 214.

been interpreted by the Commissioners[10]. The tragedy of it was that the people of Malabar were forced to believe and accept as their customary tenurial law what was explained to them by the English interpreters and courts, and not what actually was theirs for centuries, based on *kana-janma-maryada*[11]. But for this harm done to the Malabar folk, to blame the Judiciary is not proper, since they were only a latecomer in this field, made incapable of taking an independent approach being obliged to the Home Government's instructions. Still, when awareness began to appear on the actual realities of the customary Malabar tenures amidst legal argument, many of the judges, who were hailing from dignified professional background, became disturbed about the anomalies in the original settlement. However, gradually each customary term, as interpreted by the early officials, came to be legally defined by the civil courts so as to guide the judges while dealing with tenurial cases:

"*Janmam* is the full proprietary right in the soil, subject only to the payment of the Government revenue.

"*Kanom* is a tenure partaking of the nature of both a mortgage and a lease; the tenant pays a lumpsum (*kanom*) to the *janmi*; an annual rent (*pattom*) is fixed according to the capacity of the land, and from it the tenant is entitled to deduct the interest due to him on the amount of the *kanom*; the net balance payable to the *janmi*

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[10] A detailed glossary of the tenurial and customary Malabar terms was prepared in the early years of the nineteenth century by Grameme H.S., op.cit.

[11] Variyar, M.R.Raghava, op.cit., p.10.

annually is called the *purappad;* the *kanomdar* is entitled to twelve years enjoyment, unless another term is definitely fixed, and on its expiry to the value of improvements effected by him, if the tenancy is not renewed. If at the expiry of the twelve years the parties desire renewal, the tenant must pay a renewal fee, which is fixed by the *janmi.* The *kanomdar* is at liberty to transfer his interest during his tenancy, or to mortgage it. Denial of the *janmi's* title, and wilful waste by the *kanomdar* entitle the *janmi* to compensation before the expiry of the usual term.

"Akin to the *kanom* are several varieties of tenure carrying similar incidents, and differing chiefly in the amount and nature of the sum advanced by the *janmi.*

"In the *kuzhikanom* lease, the sum to be expended on improvements is considered the advance made; the tenant is entitled to enjoy the land rent-free, or on a merely nominal rent for twelve years. At the end of that period he was to get an ordinary *kanom* or *verumpattom* lease from the *janmi,* or must surrender on receiving the value of his improvements.

"The *otti* differs from the *kanom* only in that, (1) the amount advanced is sufficient to make the interest on it equal to the *pattom* so that *janmi* gets no *purappad,* and (2) the *ottidar* has the right of pre-emption, if the *janmi* wishes to sell.

"The *kaividuga otti, ottikumpuram, nirmudal* and *janmapanayam* are further species of mortgage, in which the *janmi* surrenders all his

rights, retaining nothing but the mere name. Whether all or any of these are redeemable is a disputed point but the forms of deed are now practically obsolete.

"The *panayam* is a simple mortgage, with or without possession. The terms may be similar to those of a *kanom*, but there are no implied covenants for twelve years enjoyment, or for compensation for improvements. The *unduruthi panayam* is a mortgage, of which the amount is such that both principal and interest will be extinguished by the usufruct within a definite period and the land then reverts free of encumbrance to the mortgagor.

"The *verumpattom* is a simple lease from year to year; the rent is often the whole of the net produce after deducting the bare cost of seed and cultivation, in which case the tenant is practically a labourer on subsistence wages; but the older custom is for one-third of the net produce, after deducting cost of seed and cultivation, to be reserved for the tenant, and the remaining two-thirds paid to the *janmi*. The lease may continue for years and the tenant is entitled to compensation for proper improvement effected with the express or implied consent of the *janmi*.

"Finally there are grants of land pro servitiis vel impendendis, which generally take the form of perpetual leases; if made to a Brahman, the grant is called *santathi brahmasvam*; if to a non-Brahman of caste equal to or higher than the grantor, it is called *anubhavam*; if to a person of inferior caste *adima* or *kudima janmam*. A nominal fee is payable ordinarily to the *janmi*, in acknowledgement of his title.

Similar grant of simple lands on service tenure are termed *karaima"*[12].

Litigations connected to Malabar land tenures were all dealt with basing on the legal definitions given above for the customary tenurial terms.

The tenurial question began to alert the Judiciary when the *janmis,* arrogating themselves in their newly attained status, expressly started harassing the tenants through threats of eviction, over lease etc. Soon litigations began to heap in all the courts, many of them reaching the highest court of appeal in the Presidency. While the *janmis* were suing for getting evicted many of their old *kanakkars* through the courts, the latter were getting bewildered at the knowledge that with a court order they could be evicted at any time from their age-old possessions.

The tenurial truths primarily accepted by the courts in the case of Malabar were the never ending *janmam* right of the customary landlord, and the right to compensation to the *kanakkar* for the improvements effected by him on the land, at the time of eviction. Through out the British rule, Malabar Judiciary was guided by these basic principles; all the other tenurial aspects came to be treated as ephemeral. The *janmi's* right to evict the *kanakkar* was accepted as a customary truth of Malabar.

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[12] Innes C. A, op.cit., pp 305-307.

Janmam Rights

Malabar Judgements on the tenurial cases have to be examined according to the way they affected each particular right, title and interest involved in such relations. As far as the *janmis* and *janmam* rights were concerned, one undeniable fact the court recognized was the unending nature of the *janmam* title so long as the *janmi* wanted to retain it, and on the strength of which, he could, with the court's permission, evict the tenant whose title had only a temporary existence. While in all other respects the courts considered only the specific issue involved in the case, and mostly decided on merit, in this one respect they were not ready to regard any other class outside the customary *janmis* competent to get the *janmam* title. Outside this one reservation, no special consideration was extended to either the *janmis* or the possessors of lesser titles.

The Sudder Court Proceedings were the first reported cases in the Presidency. In Valia Thamburatti v Ravi Purushothaman Nambudirippad[13] the Sudder Court made it clear that the *janmi's* absolute right over the property granted as usufructuary mortgage is unchangeable, and hence redeemable. But in a case decided in 1858 the *janmi* was reminded that though time does not impair the right of a mortgagor so long as they be quiescent and unopposed to the demand of the mortgagor for recognition of his title and compliance

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[13] Sudder Decisions, No.143 of 1857, 26.

with its consequences if refused[14], could be redressed if only within the period allowed by law. In the same year another case was decided to the effect that time does not impair the right of the mortgagor. In the case of land, even if remaining with a mortgagee for sixty six years without renewal of the mortgage deed in between, it was held that the mortgagor was still entitled to the *janmam* right on it; the local usage in so some districts that renewals of lease are made once in every twelve years is not binding upon lessors as to render their title invalid if it not be observed[15]. And that even if the lessor is heavily indebted to the mortgagee to the extent of *janma panayam* the former's right to redeem is not lost which can be effected through the complete repayment of the mortgage debts.

In Periyapparavan Kunhammad v Nalappadi Kannan[16] it was declared that a tenant could not, in law, dispute his landlord's title even if it is an assignee from the original landlord; the tenant's readiness to pay rent to the landlord's assignee should also recognize the latter's right to eject the tenant. But Ittirappan v Chekku[17], while recognizing the undeniable right of the landlord to redeem the land irrespective of its occupation by the *kanakkars* for any number of years, also recognized the undeniable right of the mortgagee to get

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[14] Manavikrama Zamorin Raja v Valiya Veetil Moosakoya, Sudder Decisions, No. 38 of 1858, 187.

[15] Erambala Odenan v Kuberan Nambudiri, Sudder Decisions, No. 168 of 1858, 34.

[16] Sudder Decisions, Special Appeal No. 103 of 1859.

[17] Sudder Decisions, 1856.

compensation. In Kuberan Nambudiri v Raman[18] also the *janmi's* redemption right was confirmed.

The courts often changed their attitude in deciding the same type of questions according to the notion of the judges. While in Nanu Pattar v Ittunni Raman Nair[19], a suit by an owner of the land in combination with the superior mortgagee in Malabar, to pay off an inferior mortgagee, was ruled to have been irregularly brought, the same was affirmed in another suit in the same year[20]. While *janmi's* redeeming right was stressed in special appeals No.320 of 1860 and 250 of 1860[21], in Appeal No. 463 of 1860[22], which was decided on merit, it was made clear in a rather confessing way that only the actual owner has the right to eject the mortgagee, even if he is an assignee from the original mortgagor, in whose name the land remains registered for a long series of years, and limitation starts working in the case of the original mortgagor. It was made further clear in Moven Raman v Kunjumon[23] that when a mortgagor sues for redemption of land which was remaining in the possession of a mortgagee for long years and who claims that the land was purchased by him, the burden to prove the title on bonafide evidence is required to do justice to the deserving one.

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[18] Nos 109 and 119 of 1856, RCSU, 69.

[19] No. 106 of 1860, RCSU, 197.

[20] No. 108 of 1860, RCSU, 198.

[21] RCSU, 48 and 50.

[22] RCSU, 56.

[23] Special Appeal No. 463 of 1860, RCSU p.164.

The attitude of treating the *kanom* tenant as something little more than a tenant-at-will was gradually getting legal sanction. The pronounced sympathy for the landlords could be seen in the Sudder Court Decisions, perhaps a reflection of the insufficient knowledge the judges had on the actual nature of the Malabar tenures. Even regarding the actual term a tenant could enjoy his *kanom* interest before renewal is to be done, they had no clear idea. It was Mr.Strange, the Judge of the Sudder Court of Madras, with more than twenty years of Malabar service, on being appointed as Special Commissioner to search into the cause of the early Mappila outrages got it confirmed that the tenant should be allowed twelve years undisturbed enjoyment of his lease if the lease terms are punctually observed[24]. It was observed as a compromise between the recognition of the tenant's permanent right of occupancy and of the proprietary right of the landlord[25].

The dictum of twelve years became a disturbing factor to the *janmis* who became impatient to add some stipulations in the *kanom* deed by which earlier redemptions could be affected especially in the context of the High Court's Ruling that mere non-payment of rent would not work for forfeiture[26]. By adding additional terms in the *kanom* deed such as, that the property would be surrendered 'on demand' etc, the *janmis* found short-cuts to sue for eviction. This is

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[24] Sudder Court Proceedings of 13th February 1854.

[25] Moore, Lewis, op.cit., p.217.

[26] Sheikh Rauthan v Kadangot Shupan, IMCHR, 112; SA 3 of 1863 and SA 84 of 1862 (Extracts in IMCHR, 112)

affirmed in the decision in Sekhara Panikkar v Raru Nair[27] when it was decided that although the right to hold for twelve years is inherent in every *kanom* according to the custom of the country, it is competent to the *janmi* to exclude this right by express agreement. The age-old understanding between the *janmi* and the *kanakkar* was gradually vanishing; even a slight ill-feeling between them was provoking the *janmi* to evict the existing *kanakkar*. When such terms were added in the registered *kanom* deeds, the judges found it difficult to decide in another way, considering the cause of action and in the absence of any safeguards provided in the Sudder Court Proceedings against such rash clauses.

The attitude of the courts gave encouragement to the *janmis* to add further stipulations at the time of initiating the *kanom* deeds in violation of the legal meaning attributed to the term *kanom*. In Ahammed Kutty v Kunhammad[28] the clause inserted was that when the *paramba* was demanded the tenant would restore the same by receiving the *kuikanom* and *kanom* amount according to the custom of the country. And the High Court held that though the primary intention when a *kanom* is granted is that it should be redeemed after the expiration of twelve years, if that intention is negatived, either expressly or by necessary implication by a special clause the *kanakkars* could not be held to be entitled to hold for twelve years. But in Raman Nambudirippad v Muhammad Kutty[29] when the High

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[27] ILR 2 M, 193.

[28] ILR 10 M, 192.

[29] SA 747 of 1885, HC.

Court was convinced that a clause was deliberately added on the deed that "but we reserve to ourselves the right of turning you out at any moment we like, provided we pay you your *kanom* and the proportionate part of the renewal fee received", the decree came against the mortgagor. And in Muhammed v Ali Koya[30] decided in 1890, seeing that there did not arise any special exigency as to demand surrender on the strength of the clause in the deed that "if at any time the property shall be necessary for you", the suit by the mortgagor was declared premature, and dismissed. But the verdict in Vadenkunneth Bappoo v Kayanta Akath Ayissa[31] was one definitely affirming the mortgagor's claim that it is not necessary to prove any exigency before the *janmi* could put an end to the tenancy on the assumption that the *janmi* would not have sued unless he wanted to have the land for some purpose or other. Later the Full Bench too found it rightly decided. That the *kanakkars* were bound to surrender on demand was the decree in Seeyalli Kandi Kalanakandi v Koyassan Kutty[32] also.

Most of the judgements in the context of the Mappila troubles were with a pronounced inclination for the mortgagor's claims than that of the *kanakkar*. Eviction without much rationalism was getting greater legal backing. The clauses deliberately added in the *kanom* documents were gradually becoming less objectionable in the courts. Besides these, charges like fraudulent conduct on the part of the

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[30] ILR 14 M, 77.

[31] SA 1665 of 1898.

[32] SA 269 of 1899.

tenant derogating from his landlord's title, commission of wilful waste, failure to cultivate in husband-like manner etc. came to be treated as grounds for forfeiture[33]. To quote Justice Holloway's words, "while the landlord covenants to allow twelve years quiet enjoyment, the tenant on his part covenants to do nothing against the permanency of his landlord's rights". Any wilful act on the part of the tenant would authorize the *janmi* to terminate the contract for twelve years quiet enjoyment[34].

In the context of more and more *melkanoms* taking place the question arising was whether a *melkanakkar* had the right to redeem a prior *kanom* in order to get established his title and whether the *janmi* is right in granting a *melkanom* without giving an opportunity to the previous *kanakkar* to advance the *melkanom* amount. It was held in Marakkar v Parameswaran Nambudiri[35] that the holder of a *melkanom* may recover the land from the sum advanced by the latter, and of the value of improvements. It was also made clear that the *janmi* was not bound to give the *kanom* holder the option of making further advances before demising to another tenant on *kanom*.

We have enough examples in the Judicial records on land tenures, of how the Judiciary was becoming uncertain on many

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[33] Raman Nair v Kandapani Nair IMHCR, 445; Maya Vanjeri Chumaran v Nimini Mayuran, II MHCR, 109.

[34] As 157 of 1855, Zillah Decisions, Calicut Sub Court, August 1856 and AS 211 of 1859, Tellicherry.

[35] ILR 6 M, 140.

tenurial issues. In Zamorin of Calicut v Sitarama[36], it was held that when a land holder allows the registry of the land to stand in the name of another one, and the revenue falling to arrears, a sale of the land under the provision of the Revenue Recovery Act of 1864[37], effected after service of notice upon the person in whose name the patta stands, will pass the land holder's interest into the purchaser at the revenue sale. The *janmi's* argument that it was only the lease hold right which was sold and not the *janmam* right was not accepted by the court. But Turner C.J. who passed this judgement later changed his notion by emphatically stating that in Malabar *janmam* right is exclusively meant for the customary *janmi* even if the *patta* remains in the hands of somebody else[38].

In Thopra Mussad v The Collector of Malabar[39] it was made clear that no pretext of adverse possession would adversely affect the mortgagor's right to redeem a land even if the mortgagee's title passes to a third party through purchase in a court sale. It was held that the purchaser was at the time of the escheat, in possession of a manager for mortgagee that the escheat proceedings of which the mortgagor had no notice did not affect his rights to redeem, that the denial by the mortgagee in possession of the mortgagor's right to redeem is not sufficient to convert such possession into adverse

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[36] ILR 7 M, 405.

[37] Madras Act II of 1864.

[38] Minutes on the Draft Bill Relating to Malabar Land Tenures, Madras, 1885, Ch.III.

[39] ILR 10 M, 189.

possession, since the limitation to redeem a mortgage is sixty years.

The court's indecisive attitude, even regarding the twelve years term of guaranteed protection to the tenants, was becoming a bane to the tenants. In Ahammed Kutty v Kunhammed[40], on a mortgage deed with the clause that "when the *paramba* is demanded I shall restore the same by receiving the *kuikanom, kanom* amount... according to the custom of the country", it was decided that the primary intention that a *kanom* is to be redeemed only after twelve years can be negatived either expressly or by implication by a special clause. Further stated that in that matter the court was not at liberty to introduce special provision which make it inoperative. Perhaps the court was not without the knowledge of such clauses which the tenants were forcibly made to include, to make possible easy foreclosure of the *kanom*. But when a mortgagor did not carry out the terms of the decree on a redemption suit by him, which had fixed six months for redemption from the date of the decree, the High Court did not entertain the application for execution by him on mortgagee's submission that the redemption amount had not been paid within six months[41].

Contrary to the above judgement was the High Court's decision in a redemption suit by a *janmi* of Malabar in 1886 of a *kanom* of 1849 on which the first decree was one directing the tenants to surrender

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[40] ILR 10 M, 192.

[41] Manavikraman v Unniappan, Letters Patent Appeal No. 30 of 1890, ILR 15 M, 170.

the lands to mortgagor on payment of the *kanom* amount and the value of the improvements by the latter within three months of the date of the decree. When the *janmi,* by letting the decree to remain unexecuted without paying the money as decreed brought another suit to redeem the same *kanom* in 1890, the court, as though confirming the mortgagor's infinite right to redeem held that the present suit was not barred by the former decree[42]. However, this decree was later over ruled by the Full Bench in 1902. On this issue various other High Courts' stand was examined; Bombay High Court's stand was that "under the Anglo Indian Law it has been recognized that a decree holder must obtain satisfaction of this decree by execution, not by another suit". Even at the point of a court sale the mortgagor could regain his right if ready to pay the *kanom* amount.

As time passed, Malabar tenurial complications were only increasing; *janmis* harassing their *kanakkars* through *melcharths, melkanoms* etc. made the latter to be bold enough to lavishly mishandle their title by letting their mortgage rights to pass into the hands of submortgagees. The number of redemption suits was also increasing. The twelve-year's term, compensation rights etc. came to be interpreted according to the approach of the judges. Unlike the attitude of the earlier judges, the tenurial issues were no more giving much challenge to many of the judges who were deciding cases just on their merit. On many occasions the rents from the tenants were

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[42] Ramunni v Brahmadattan, ILR 15 M, 366.

falling into arrears upon which the suits for foreclosure of *kanom* became excusable before the expiry of twelve years. In Achuthan Nair v Kesavan[43], the High Court, while admitting that though as per the custom of the country the *kanom* becomes redeemable only after the expiry of twelve years, stressed that it cannot supersede the general rule of processual law that a judgement creditor is entitled to attach the judgement debtor's property. And the court doubted when such a protection is guaranteed to the *kanakkar* in the case of compensation why the *janmis* would be denied of such a privilege. The decision was that a *janmi* who has obtained a decree for arrears of rent, might sell the *kanom* before the expiry of twelve years; such a sale does not put an end to the *kanom*; but only transfers the *kanakkar's* interest to the purchaser in the execution sale.

Similar decisions defending the *janmi's* right to be compensated again came from the part of the court. This was the decision in Krishna Pattar v Srinivasa Pattar[44] the mortgagor applied for execution of a decree on a redemption suit by him; within six months the mortgaged land's value was found very much diminished due to the loss of trees. The High Court decreed that the loss should fall on the mortgagee without accepting the latter's argument that it was due to lack of water. The court's stand was that if a mortgagee was found making more improvements before the execution of a decree for a redemption a revaluation of improvement is made[45], then a

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[43] ILR 17 M, 271.

[44] ILR 20 M, 124.

[45] Ramunni v Sankaran, ILR 10 M, 367.

mortgagee in possession is liable for waste also and it can be deducted from the mortgage amount. This alone would give justice to the *janmi* was their argument, because so long as the tenant is in possession of the land the loss also should fall on him that as the tenants enjoy certain leniency in certain matters, the landlords too should be shown at times such leniency. Whatever the new challenges posed by the changing circumstances, the court's attitude to the *janmam* title always remained the same, though perhaps not a deliberate act on their part was a typical example of the British conservatism in such matters.

Any condition in a mortgage deed that would affect the mortgagor's title was never allowed by the courts. This occurred in a mortgage contract in which it was stated that if the mortgage money is not paid on the due date the mortgagor would sell the property to the mortgagee at a price to be fixed by umpires. On this the High Court held that such a selling of the property was not binding on the mortgagor... and that since 1858 the principle applicable to mortgages in the Presidency were those administered by the Courts of Equity in England, according to which agreements derogating from the right of redemption were treated as unenforceable[46].

The Judgement in Erassa Menon v Shamu Pattar[47] affirmed the right of the mortgagor to set off rent due to him against the value of improvements to the mortgagee, whether the mortgaged land at the

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[46] Kanaran v Kuttooly, ILR 21 M, 110.

[47] ILR 21 M, 138.

time of redemption remained in the mortgagee's hands or with any submortgagee of the former, who could not have any argument against the rules of eviction. The judgement in Achutha v Kali[48] was cited as example, which held that a Malabar *janmi* being entitled, on redemption of the land, to set off a claim for arrears of rent due to him by the *kanom* holder against the claim of the latter for compensation for improvements, a pledge of his rights to a third party by the *kanom* holder will not prejudice the right of the *janmi* to set off his claim for arrears of rent against the sum found due to the *kanom* holder for improvements.

In Malabar the British Government was not ready to claim land ownership, in the concept that all land in customary Malabar was private property. Those lands upon which no *janmi* claimed ownership previously were granted to applicants, who were ready to cultivate, through Government cowles. Later even such lands were recognized as belonging to some *janmis* who came forward with claims. The cultivators' optimism that those lands were theirs was dashed to the ground when the *janmis* approached the courts. The Court's firm belief that the *janmi* and the *janmi* alone was the absolute proprietor of all Malabar lands made them to pass the decree in Maniappa Chetti v Muppil Nair[49] that it is a fact that the cowle does not affect the *janmis'* rights, nor prevent the holder of the cowle to settle with the *janmis* at the same time when he receives the

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[48] ILR 7 M, 545.

[49] ILR 21 M, 169.

cowle from the Government.

The non-payment of *kanom* amount by the mortgagor even after obtaining the redemption decree may result in the court sale of the said land. But this brings only the transfer of the *kanakkar's* interest and not the mortgagor's redemption right. In Mayan Pathutti v Pakman[50] it was held that notwithstanding such sale and confirmation, the mortgagors might not be precluded from suing to redeem the mortgaged property on payment of the amount given on credit by the mortgagee in respect of the sale, that is the *janmi* could recover the land from the purchaser by clearing the mortgage debt.

A *kanakkar* was barred from asserting any right belonging to the mortgagor basing on the wording of the mortgage contract. This is made clear in a verdict favouring the mortgagor. When the mortgagee tried to defend his side on a wording in the contract that "if we assign our right over the properties to anyone, the land delivered possession of to you, for appropriating the interest shall be assigned to you alone and it shall not be assigned to anybody else"[51].

As a very long period was fixed as the limitation period for redemption which enabled the *janmis* to get enough time to settle all the problems amidst, whether connected to compensation, *melcharth*, overlease, submortgages or any such question, and with whom ever the land remained in possession, and get the land redeemed. Only

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[50] ILR 21 M, 347.

[51] Ramasami Pattar v Chinnan Asari, ILR 24 M, 449.

occasionally, without knowing any details about the subcontracts made by the mortgagees who by, pretending as mortgagors taking large amounts from the submortgages, the original mortgagor falls into the trap when forced to repay larger sums as *kanom* amount than had been taken by them[52]. In this Full Bench case a consensus could not be reached at among the judges about the repayment of the *kanom* amount, whether the landlord who benefitted nothing, or the original mortgagee pretending as owner enjoyed the rent and the *kanom* amount from the submortgagee, but losing nothing. But the submortgagee's possession for more than twelve years made him qualified for purchasing the title and for the *kanom* amount. One of the Judges, David J, called it unjust to throw upon the original mortgagor the burden of paying the high mortgage amount the original mortgagee had taken from the submortgagee and argued that "English usages cannot be applied in Indian context and that purchase is an absolute title through sale, while mortgage is only a mortgage and both are not the same", while as per English statutes, purchase was defined also as a mortgage.

In an extraordinary judgement of 1902[53], it was established that not only the land itself but even the invisible items in it are the property of the mortgagor. It was held that though a tenant of lands for the cultivation of paddy may possibly be justified in digging up shells from the land for the cultivation of the land in a proper and

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[52] Manavikraman v Ettan Thampuran, ILR 24 M, 471, FB.

[53] Chaladan Tholan v Kakkoth Kunhambu, ILR 25, M, 669.

husband-like manner, the property in the shells so dug up is (in the absence of local custom) not in the tenant but with landlord, and the tenant had no right to convert them to his use.

Regarding the performance of the Judiciary in the opening years of the twentieth century in settling the tenurial problems, it seemed as though moving away from the English sense of justice. Instead of giving due weightage to the recognized customary privileges of the tenurial classes the courts started giving undue importance to the prejudiced extra-clauses included in the *kanom* deeds. In Kelu Nedungadi v Krishnan Nair[54] two vernacular terms contained in the *kanom* deed, as *"aavassyamayi chodikkumbol"* in the lessor's *kychit*, and *"aavassyamayi varumbol"* in the lessor's *kanom* deed were such extra clauses. Before the Full Bench the question was whether these words meant, "on demand" or "on demand based on some special exigency". The Full Bench opined that the Malayalee words mentioned in the order of reference do not impose on a *janmi* the obligation of proving some special exigency as a condition precedent to his right to recover on demand before twelve years. The Full Bench decision was only capable of pulling the clock to the reverse.

The inevitable duties of a mortgagee on entering into a contract are explained in Parambath Manakkal v Puthengattil Moosama[55] that every transaction of lease imposes on the lessee the obligation of

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[54] ILR 26 M, 727.

[55] ILR 28 M, 406.

delivering to the landlord possession of the property at the expiration of the lease, and every transaction mortgage imposes upon the mortgagee the obligation of re-transferring after the expiration of the terms of the mortgage, the property free from all encumbrances created by him, and if necessary, delivering possession of the same to the mortgagor on discharge of the mortgage debt by payment or otherwise.

The Judges started no more paying much attention to the terms and conditions ought to be kept by the contracting parties of a mortgage deed. In Gopalan Nair v Kunhan Menon[56] it was decided that whatever the instruments under which the property is demised and whatever is stated in the *kanom* deed about the renewal terms in future, promising favourable of the *kanakkar,* unless the demisee obtains the renewed demise registered in accordance with law, the *kanakkar* cannot resist the suit for redemption. It is no matter arguing on a clause in the deed promising the tenant of a renewed demise on the expiration of every twelve years and hold the *kanom* etc. but without mentioning anything about the rent payable on such renewal.

The Malabar Compensation Act of 1900[57], passed with the purpose of giving the tenants the deserving compensation, though expected as a relief to the Malabar tenants at least as far as compensation for improvements was concerned, did not bring much

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[56] ILR 30 M, 300.

[57] Malabar Compensation for Tenant's Improvements Act, (I of 1900), See Appendix No.IV, p.447.

change in the existing situation. Cases decided even after its passage were not as encouraging as expected. In Randupurayil Kunhisore v Neroth Kunhikannan[58] it was held that section 19 of the Act of 1900 does not affect the validity of contracts made prior to 1st Jan 1886, whether the improvement was made before or after the coming into operation of the Act of 1887. This attitude continued even in the second decade of the twentieth century that is after sixteen years after the passing of the Act. Again we see the judicial machinery rather not awake, from the retrogressive to the progressive, in responding to the changing realities. The judgement in Rayarappa Atiyodi v Kelappa Kurup[59] was that on contracts entered into between a Malabar tenant and his landlord before the 1st Jan 1886, according to which compensation is payable at certain rates therein specified are valid and binding, whether the rates are more or less favourable to either party than the rates prescribed by the Malabar Compensation for Tenant's Improvement Act (1900). And when the question of the rate of compensation comes up for determination at a date after the introduction of the Act, it was not open to either party to the contract to elect to have the rates fixed according to the Act in performance to the rates mentioned in the contract.

More and more complications began to arise along with the increasing number of *melcharth, melkanom,* submortgages etc. Both the *janmis* and the *kanakkars* began lavishly misusing their respective

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[58] ILR 32 M, 7, FB.

[59] ILR 40 M, 594, FB.

rights in entering into other lease contracts even while the existing *kanom* was not yet expired. The result was that more complications were at the stage of settling the compensation while redeeming the land. In the Letters Patent Appeal No. 19 of 1917[60] such a *melcharth* took place when just one year was left for the original *kanom* to expire. The condition to the *melchartidar* was to redeem the *kanom* in the next year after clearing the *kanom* arrears. But the *melchartidar,* instead of redeeming the *kanom,* let it remain with the *kanakkar* through another *melcharth,* pretending in the capacity of the mortgagor. The mortgagor came to know of this later and sued. The question before the Judiciary was whether the original mortgagee's obligations were to the actual mortgagor or the *melchartidar* from whom he received the *melcharth.* The judges were divided in suggesting a solution. The Judgement was one recognizing the general applicability in India of the Common Law Rule that the parties to a contract are the proper parties to sue on it. The Jury doubted whether it was possible for the *kanakkar* while claiming the advantages which he got by reason of the assignment of the *melcharth* without performing the obligations imposed by the *melcharth.* Here more weightage was given to the fact that the mortgagor was not aware of the second *melcharth.*

In many cases *melkanoms* were granted before the expiry of the existing *kanom,* on condition that on expiry of the existing *kanom, melkanakkar* would be the next *kanom* holder, that is automatically at

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[60] Itti Panku Menon v Dharman Achan, ILR 41 M, 489.

the end of the twelfth year, the existing *kanakkar* becomes evicted without getting a chance to continue for another term at times the *melkanakkar* even before his term begins, and even without trying to redeem from the original *kanakkar* transfers his right to still another submortgagee. Forestlands were leased with a small amount fixed as rent mainly for the purpose of improvement, and *kanom* amount even if taken any, might be quite insignificant too. Regarding such *kanom* the High Court observed that though one is called a *kanom* deed and the other, as improvement lease the substance is the same. It is quite impracticable to enquire into each case, just because the *kanom* is an insignificant amount, to enquire whether it is only a lease and not a mortgage[61].

The court gave specific rules for anyone who tried to establish adverse possession. In Koothali Moothavar v Peringati Kunhassankutty[62], a *karanavar* of the Mappila family upon the strength of their possession for a number of years of some forestlands suitable only for punam cultivation, without being objected by any owner, declared adverse possession. The actual owner sued for getting it back. The case ultimately reached the Privy Council where it was passed that adverse possession in order to bar by limitation a suit for possession of land must be adequate in continuity, in publicity, and extent so as to show that it is possession adverse to the competitor. When a person establishes his title to land and prove that

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[61] Kanarakurup v Sankaravarma Raja Avargal, ILR 44 M, 344.

[62] ILR 44 M, 883, P.C.

he has been exercising during the currency of his title various acts of possession the quality of those acts, even though they might have failed to constitute adverse possession against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which required from any person challenging by possession of rightful title. The Privy Council dismissed the petition.

Malabar tenurial cases were gradually becoming an unusually prolonged process due to the unending appeals and counter appeals filed by both parties involved in them. Cases were mostly decided on merit leaving sufficient grounds for those who became affected by the previous decisions, to appeal. In a Civil Miscellaneous Second Appeal by a *janmi*, who was plaintiff in the suit for redemption, it was held that a landlord in Malabar who obtained a decree for ejectment of his tenant on payment by him of an ascertained amount for compensation for value of improvements, applied for execution of the decree by ejectment of the tenant after depositing into court the amount specified in the decree for value of improvements, he was entitled to an order in execution for ejectment of the tenant from all the lands specified in the decree, even though the value of improvements effected by the tenant on some of the lands subsequent to the decree had not been ascertained under sec. 6(3) of the Malabar Compensation Act[63]. The court allowing the *janmi's* appeal for redemption also passed the comment that to implement literally the

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[63] Sankaran Nambudiripad v Sankaran Nair, ILR 44 M, 960.

clause of paying the entire compensation subsequent to the decree might mean that a tenant could postpone eviction perpetually by continually making fresh improvements, while enquiry into the last application for evaluation was going on.

There were such occasions also when the court was vehemently critical of the overbearing nature of some of the landlords as responsible for the growing tendency among the tenants to override the landlord's rights. During the first decade of the twentieth century, the court tried to evaluate it as the oppressive conduct of many of the Malabar *janmis* in the matter of the grant of the *melcharths* over the heads of tenants of longstanding. It was probably also due to the change of general attitude on the part of the tenant towards *janmis,* an attitude which was formerly, even in the case of *kanom* tenants, that of a social inferior to an acknowledged social superior, but was not longer so in most cases. A fairly large proportion of *kanakkars* and other tenure holders being in recent times recruited to high posts as legal practitioners, government servants and businessmen hailing from the families of *kanakkars* who of course could look upon themselves as holding a position of under dependence on their landlords in the matter of dealings with the land held by them[64]. This also is a pointer to the proportionate backwardness the Nambudiri *janmis* began to suffer due to their pronounced indifference to modern education and still living on the hollow pretensions of superiority on the strength of the *janmi* title

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[64] Venkatachalam Pattar v Krishna Pattar, ILR 45 M, 394, FB.

with its diminished value, more honorific than substantial.

The judgements of the second decade of the twentieth century fairly tell us of how suspicious the *janmi* and the *kanakkar* were feeling to each other with the days that passed. While in the early days the *janmis* were doing maximum extortion from the *kanakkars*, the opening years of the twentieth century witnessed large scale overactions on the part of the latter against the former through so many subleases. Cases began to drag on for many decades in the form of appeals and counter appeals confusing the court in the case of compensation, redemption, etc. ever after the passing of the Malabar Tenancy Act of 1930. Except on very rare occasions, the Judiciary too was just sticking on the accepted so called age-old customs of the community like the *janmis'* redemption right, *kanakkar's* compensation rights, etc. Outside these, they were rather indifferent to the newly arising radical trends of the society.

The granting of *melcharth*, submortages etc. were becoming too common to be noticed by any organ of the administrative machinery. The fact that most of these further transactions were taking place without the knowledge of the original mortgagor or the original mortgagee was creating problems when the time came for redemption and for fixing compensation. Neither the court nor the other responsible branches of the administrative machinery like the Registration Department was viewing it with the deserving seriousness, and as to the steps to be adopted on such occasions. The tenurial uncertainties were only increasing; the insistence that

everybody should make it known to all others involved in the original transactions regarding every detail about the further transactions for the purpose of being impleaded was found to be quite impracticable. On such occasions the Judgements too were unpredictable, since the notions of the judges played a part. Viswanath Aiyar v Chimmukkutty Amma[65] was such a case in which the first mortgagee transferred his mortgage right to a submortgagee, and the latter assigning it to a third party. The original mortgagor was unaware of all these further transactions and sued for redemption and though a court decree ejected the original mortgagee through a settlement out of the court. The High Court endorsed the District Munsifs' finding that, if a mortgagor without notice of any sub-mortgage pays off his mortgage out of court, the submortgagee cannot, after that redemption, bring the right mortgaged to him to sale, The rule that a payment made out of court after the preliminary decree in a redemption suit will not be recognized by the court, if disputed, cannot affect the right of the mortgagor and the mortgagee to settle between themselves out of court and report the matter to the court.

When they do so a third party impleaded in the suit cannot question the validity of the payment. The court observed that the assignee's right in such a case is only to a personal decree against his mortgagor who is only a sub-mortgagee. Though the court commanded that "we cannot turn the clock back", here it was also a

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[65] ILR 55 M, 320.

truth that it was the court which was turning its back to the new realities even after the passing of the Malabar Tenancy Act.

The fixity of tenure granted to certain sections of *kanakkars* (in *kudiyirippu*) through the Malabar Tenancy Act of 1930 as only giving birth to new complication to the tenurial problems of Malabar. The clause in it that it is heritable too was making it a coveted one, and one subjected to the individual judge's predilection too. Fixity of tenure promised was not easily achievable because of another condition of the Act that only the tenant or the members of his family in continuous occupation of the *kudiyiruppu* for ten years alone could claim the benefit of the Sec 33 of the Act. An assignee from a tenant in October 1929 claimed this right after occupation of just seven weeks when the *janmi* sued for eviction. The court could not take decisive answer but the Bench from whom the High Court sought opinion observed that the single tenant must have been in occupation for the whole ten years.[66] This indecisive attitude of the court did greatly precipitate political agitations in Malabar from bad to worse.

Many of the sections of the Land Tenancy Act were ambiguous and hard to subject to proper interpretation. Section 18 of the Act entitled the immediate landlord to redeem the *kanom*, but the High Court in Nattalia Sequira v Abdul Khadar, minor[67], made it clear that though Section 18 of the Act speaks of the immediate landlord, the definition of the landlord comes first, that a person must satisfy the

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[66] Rajagopalan Pillai v Namashivayam Pillai ILR M, 58, 1023.

[67] ILR 59 M, 419

definition of "landlord" before he can be spoken of as the "immediate landlord", and see if the *melchartdar* is not really a landlord within the meaning of the definition in the Act. This was suit by a *melchartdar's* children after her death without the knowledge of the original landlord, for redeeming a *kanom* from an original *kuzhikkanakar* in 1930, while the latter filed an application claiming a renewal under Sec.22 of the Malabar Tenancy Act.

Even after passing of the Malabar Tenancy Act of 1930 the courts were still sticking on the old the theory of eviction, compensation, etc. *jammi's* unending right or redemption was again stressed in Viroopakshan Nambudirippad v Chembu Nair[68] in which it was held that the mere fact that a decree for redemption in a former occasion has not been executed would not prevent the mortgagor from maintaining a subsequent suit for redemption. The true construction of tenurial terms in the light of the Act of 1930 did not come to be properly appreciated.

In the case of compensation the court decreed that if the tenant by doing what is not permitted of him resulting in loss of value of the property leased to him he was bound to pay compensation to the *janmi*. At the time when the land was demised on *kanom* the tenant had promised through the *kychit* that if he cuts precious trees such as *veetti* without the consent of the *kovilakom*, he would pay the costs and agree to redemption before completion of twelve years. Even after cutting the trees he continued in possession for more than

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[68] ILR M, 1937, 345 FB.

twelve years and without paying compensation upon which the present suit which reached the High Court. The subordinate court though decreed compensation did not decree the full value. The Full Bench found the action of the tenant as one not at all for the purpose of the improvement of the *paramba* but waste, hence entitling the *janmi* to the full amount of the compensation claimed by her[69].

Kanom Rights

The position of the *kanakkars* after the British occupation of Malabar and the new contract made with the customary *janmis*, became much deplorable. The centuries old status they were enjoying as permanent occupants of the soil as cultivators and supervisors was lost forever. Though in customary Malabar, renewals were necessary the lands remained with the same *kannakkars* without being redeemed. But by the new arrangement made by the company with the *janmis* all the lands mortgaged to the *kanakkars* became redeemable for which the landlord could seek the help of the court. Except the *janmis* all the other classes were reduced to the status of just temporary occupants of soil, who could be evicted at any moment. However, the instruction by the company to the landlords that till their old mortgage liabilities were not cleared the new rights conferred on them should not be put in to practice delayed its operation. The *kanakkars* too hence could not realize the dangers befallen their lot till redemption suits began to arouse them to the

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[69] Valiya Thamburatti v Aidross Kurikkal, ILR 1939 M, 995 FB.

unpleasant reality. So many years of possession after the British occupation of Malabar, by the mortgagees prior to the first eviction suit was filed in the court is clear indication of the fact that in olden days the mortgagees rights too were permanent though terms like eviction etc. were added in the mortgage deeds. And though we do not have many court records regarding evictions till 1850s, the fact that peasant restlessness etc. started even in 1830s is pointer to the dissatisfaction of the tenants and tillers with the new arrangements. In Erambala Othenen v Kuberan Nambudiri[70] the decision on mortgaged land that it is redeemable even after its possession by the *kanakkars* for sixty-six years is an example to the new situation.

The court while recognizing the never ending right of redemption of the *janmis* also recognized the mortgagee's right to get compensation on being evicted. In Ittirappan v Chekkon[71] it was held that at the expiration of a lease in Malabar the landlord is bound to pay the tenant the value of all productive trees planted by him, and of all other improvements he might have made.

The Sudder Court Decisions clearly tell us of how the Judiciary was misled about the true construction of the customary Malabar tenures, when started judging things based on the early interpretation on them by the Joint Commissioners. It came to be taken for granted that outside the *janmam* rights all the other rights were temporary and that even after so many years of possession by

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[70] No. 168 of 1858 RCSU, pp.100-101.

[71] Special Appeal No.108 of 1859, RCSU p.29.

the same *kanakkar* the property became redeemable after paying back the mortgage debts and compensation. The administrative machinery and the Judiciary failed to grasp the idea that even in the absence of any written authority the people of Malabar were fully conscious of the interest, title and right of each class, whether big or small, in respect of the sharing of the produce. The denial of it was equal to taking away their life itself - they were forced to accept a system which was never theirs.

Though the Sudder Court Proceedings guaranteed twelve years undisturbed enjoyment to the *kanakkars,* the *janmis,* by adding unnecessary stipulations in the contract like the 'surrender of the land on demand' etc. made possible the foreclosure of the contract[72]. The limitations of the *kanom* holder are made clear in Kunhamu v Kesvan Nambudiri,[73] that a *kanom* does not carry with it the right of pre-emption and *janmi* has full liberty to grant to a stranger a similar or superior tenure on the lands; only that the *kanari's* right to hold for twelve years from the date of original demise is not interfered with.

Once the Court recognized redemption as an undeniable right of the *janmi,* tenant's rights to compensation also held the serious attention of the court. In Narayanan Nair v Viroopakshan Nambudirippad[74]., the question was whether at time of redemption

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[72] Shekara Panikkar v Raru Nair, ILR 2 M, 193.

[73] ILR 3 M, 246.

[74] ILR 4 M, 287.

compensation is to be counted for each renewal or to be calculated from the last renewal only. The High Court held that it is not the invariable usage in Malabar for the *kanom* holder to require adjustment of his claim to compensation for improvement on each renewal; and that there is no universal usage in Malabar nor any presumption that a tenant is entitled to compensation for improvements effected prior to the date of the *kanom* under which he holds and not specially reserved to him by the *kanom* deed. The High Court recognized the issue as a matter of so much importance and added that even if in the renewal deed if any improvements made by the tenant are mentioned as the property of the *janmi,* the same should not be used as to deny the tenant's right if he has evidence in his defence.

In Manavikkrama Zamorin v Soorya Narayana Bhatta[75], the tenant's right to get the deserving compensation is stressed; held that by the custom of Malabar a condition is attached to all *kanom* demises that the mortgager had to pay the value of improvements made by the mortgagee during the term of the demise before he could redeem, in the same manner as the repayment of the principal advanced. This suit that came to the court for the purpose of deciding Jurisdiction tells us of the wide gulf between the amount calculated as compensation by the mortgagor and mortgagee - while the former calculated it as Rs.75 and the latter Rs.4,500 finally the amount granted was the Court's calculation of Rs.1,486-7-2, definitely much

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[75] ILR 5 M, 284.

less than what was claimed by the mortgagee.

As years passed by, some of the judges, through personal effort, started grasping the proper meaning of the customary tenurial relations. It came to their serious notice that things were not made to move in the proper direction by the very first interpreters of the Malabar tenures. Some of the judges even thought it not right on the part of the rulers, but they could judge only on the data furnished to them regarding the tenurial realities. There were judges who genuinely felt that justice was not done to the tenants and were ready to give justice as far as possible from their judicial capacity. This is done in some of the monumental judgments of the last quarter of the nineteenth century. In a historically important Judgment of 1882 Justice Reid, after reiterating the tenant's rights as established in the Sudder Court Proceedings, as District Judge of North Malabar stated that, where a deed was described as a *kanom* deed and contained stipulation as to compensation for improvements, a clause to the effect that the land was to be surrendered "whenever the amount advanced is ready " would not entitle the mortgagor to redeem before the customary twelve years term has expired but must be construed as referring to a period subsequent to the term of twelve years[76]. Justice Reid called the *kanom* a pregnant legal term, "the wisdom of the ancients of Malabar" and recognition of the practice of allowing twelve years enjoyment through legislation as a wise measure which would let to the tenant a reasonable time to enjoy his

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[76] Kanarakurup v Govindan, ILR 5 M, 310.

produce before he could be ousted. The Judgment is clear contradiction with the judgment that on demand the tenant has to surrender. This judgment safeguards tenant's right against irrational encroachment by the landlord.

A *kanakkar's* right is limited to only twelve years' enjoyment is stressed in a case where the question was whether a *melkanakkar* from a *janmi* has the right to redeem a land from the existing *kanakkar* without whose knowledge the *melkanom* was granted. The High Court held that the *janmi* is not bound to give the *kanom* holder the option of making further advances before demising to another tenant on *kanom*. Justice Wigram, then District Judge of South Malabar well versed in customary Malabar tenures[77], whose opinion is recorded in this Judgment quoted a paragraph from Justice Strange's Report dated 25th September 1852 that "it is obviously highly essential that the tenants should not be disturbed from possession arbitrarily and unduly short period"[78]. But after twelve years it is the *janmi* to decide Wigram makes a statement of his acquired knowledge on Malabar tenures : that *kanom* in ancient days was simply a lease for three to six years, with a year's rental paid in advance, and though renewal took place, gradually developed into a fixity of tenure, and that as long as there was good feeling between the landlord and tenant, there were no disputes; that the relations became strained with the imposition of a Government tax on land with the general advance in

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[77] Wigram, Herbert, op.cit.

[78] Correspondence on Moplah Outrages Vol I p.470, quoted in ILR 6 M, 140.

the cost of living and with tenant's assertions of greater independence. That then the landlords out of difficulty or avarice began to look about for persons "who either from motives of private animosity or simply from land hunger were willing to advance a substantial sum for the privilege of cultivating the land". This helped easy eviction of tenants just after two or three years of possession of land. Though the courts at first decided that the tenant ought to have the option of making further advances before the *janmi* decides to assign the mortgaged land to an entirely new party[79]., finally settled the matter by holding that the tenant was entitled to twelve years quiet enjoyment. Wigram's evaluation of the whole matter was expressed hence, "until fixity of tenure is secured by the Legislature to the first *kanom* tenant, the rule which the *kanakkar* contends for is practically useless. The *janmi* may turn him out after twelve years and grant to another". The High Court affirmed the *melkanom* made by the *janmis*.

Though the courts gradually began to realize the truth about the customary Malabar tenures, a going back to the old state was practically impossible. But we see the judges attempting to redefine and explain the Malabar tenures based on their new understanding. They came to disbelieve the maxim raised years back by the Joint Commissioners that Malabar *janmam* is the equivalent of Roman dominus. In Nangely v Raman[80] it was defined that in Malabar the

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[79] Paidal Kidavu v Imbichi Kidavu, I MHCR, 13.

[80] Nangali v Raman, ILR 7 M, 226.

janmi is not often in actual possession of the lands; and long tenures whether by way of mortgage or lease for a term renewable or permanent are so common, that it would be impossible to maintain as propositions of general application that the *janmi* is at liberty to eject at his pleasure a family of tenants who have been in possession for many years.

We see a kind of pronounced sympathy on the part of some of the judges towards the tenants who came to be under rated due to the granting of proprietary rights to the customary *janmis*. Even Justice Turner, though later corrected his own earlier version to a worse one, in one of his first decisions favoured a *patta* holder from a *janmi* as the real owner. He held that "when a land holder allows the *patta* to remain in the hands of another one, and the revenue falling to arrears, a sale of the land under the provision of the Revenue Recovery Act of 1864, effected after service of notice upon the person in whose name the patta stands, will pass the land holder's interest into the purchaser at the revenue sale".[81]

As time passed we see new trends developing in the mortgagees too. As the *janmi* was entering into overlease or *melcharth, melkanom* etc. even while their contract with the first mortgagee was not exhausted, inorder to make foreclosure easier, the mortgagees too started sub mortgaging the lands leased to them. This was giving rise to new problems regarding repayment of mortgage amount, rent

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[81] Zamorin of Calicut v Sitarama, ILR 7 M, 405.

payment, compensation fixing etc. Manisha Eradi v Siyali Koya[82]. is such a case, the cause of action in which was to decide the jurisdiction allowed to the judges of the Judicial hierarchy. Here the first mortgagee sub mortgaged the land leased to him, took rent from the latter acting as the actual mortgagor, but took no effort to pay rent to his own mortgagor.

In the context of the passing of the Malabar Compensation for Tenant's Improvements Act[83], for the first time land as a commodity with market value came to be recognized and subjected to legal discussion in the ensuing Judgment[84]. It was a redemption case in which two cross appeals came before the High Court one by the land lord arguing that the compensation decreed by the lower Courts was too much; the other by the tenant complaining that it was too low. The court's task was rather a difficult one. The various tenurial terms like holding, improvement, compensation etc., though age-old in the case of Malabar, came to be redefined for the purpose of the Act. Compensation came to be defined as a legal right through legislative steps, and holding or land, even if yield no rent, was to have proprietary value; and improvement as any work which adds to the value of the holding. In this case the Court, while admitting the fact that such improvement might definitely increase the land value advantageous to the *janmi*, also stated that it was also a truth that in

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[82] ILR 11 M, 220.

[83] The Malabar Compensation for Tenant's Improvements Act, (I of 1887), See Appendix No.IV, p.447.

[84] Valiya Thamburatti v Parvathi, ILR 13 M, 454.

some cases the *kanakkars* were also benefiting more than the land lords, the latter getting only a nominal rent fixed so many years back.

That rich influential *kankkars* who could lend money to *janmi* could not be evicted so easily and were in possession of the lands so many years together, though were fully conscious that eviction could be effected by the *janmi* at any time. In this case the Court pointed out that the tenant had enjoyed the increased produce for about thirty years with out paying any additional rent is indicative of the benefit enjoyed by the tenant. This aspect was not touched in the Malabar Compensation Act, which the court said, was incorporated in the Bengal Tenancy Act. The High Court observed that it could be reasonable to allow the tenant the actual cost of effecting the improvement and that the sum to be allowed for compensation should be in consideration of the improvement; the ruling should be one non-injurious to either party.

The court was not unmindful of the injustice often done by the mortgagors against their tenants. In Kannan v Krishnan[85] the mortgagor sold a land, already mortgaged to another tenant, to a third party under a registered sale deed. The first mortgagee, already in possession of a registered instrument from the mortgagor agreeing orally to purchase the land, sued protection under the Specific Relief Act-Act I of 1877 against the cheating by the mortgagor. The High Court decided in favour of the first mortgagee and declared the registered sale to the third party as void.

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[85] ILR 13 M, 324.

The tenant's right to compensation was fully given effect to in Malikan v Shankunni[86] in an appeal suit connected to redemption on a *paramba* regarding compensation. It was decreed that Section 7 of the Malabar Compensation Act provides that nothing in any contract made after 1st January 1886 should take away or limit the right of a tenant to make improvements and claim compensation for them in accordance with the provisions of the Act, and the mortgagor's appeal was dismissed as being instituted after 1st January 1886. Another attempt by a mortgagor to foreclose a *kanom* holding on a clause in the *kanom* instrument that the property would be surrendered "if at any time the property should be necessary for the *janmi*", was defeated at the court when it was held that in the absence of any special exigency the suit is premature and must be dismissed[87]. This was the contradiction of an earlier judgment of a similar type[88].

A suit for redemption which came on appeal in 1892 the decree was in favour of the mortgagor, that a second suit by same *janmi* against the same *kanakkar* with out executing the decree of the first suit was not barred by the former decree[89]. (on a *kanom* of 1849 up on which the present suit came in 1886, that is a very long gap in between). In this connection a long explanation of the various kinds of Malabar mortgage was done in the judgment. The mortgagor's right to redeem the land by paying the *kanom* amount even at the

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[86] ILR 13 M, 502.

[87] Mahomad v Alikoya, ILR 14 M, 76.

[88] Shekharapanikkar v Raru Nair, ILR 2 M, 193.

[89] Ramunni v Brahmadathan, ILR 15 M, 366.

point of a court sale was a recognized maxim with the courts.

Connected to redemption suits appeals and counter appeals became too common, whether by the mortgagor, *melchartdar,* first mortgagee or other sub mortgagees. In Krishnan v Chadayan Kutti Haji[90]. a decree was obtained by the first mortgagee against his mortgagor to get back the mortgage money which was questioned by the second mortgagee. When the Court sale took place the first mortgagee purchased it but was questioned by the second mortgagee again, but the court decreed that second mortgagee was estopped from now asserting his claim.

As time passed the judges were finding it difficult to identify the genuineness of the causes or to distinguish between proper and improper suits. The tenurial complication compelled them to stick mainly on a few basic guidelines, of upholding the unending right of the *janmi* to redeem; to let the tenant to enjoy the *kanom* as far as possible for twelve years; to decide compensation etc. Especially in the last quarter of the nineteenth century, the court became less enthusiastic about the right and wrong of the Malabar law on land tenures; cases came to be decided more on merit.

The Malabar Compensation Act raised a lot of problems at the operational level. In Veeru Muhamad v Krishnan[91], regarding the improvement which took place before and after the passing of the

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[90] ILR 21 M, 149.

[91] ILR 11 M, 106.

Act, it was held that the bulk of the improvements might have been effected before the Act came into force, and that for the improvement effected before that date, they are only entitled to be paid according to the rates stipulated in the sub-*kanom* deed, and that the value of improvements effected subsequently should be calculated under the provisions of the Act.

An eviction case, extraordinary and premature, questioned by the *kanakkar*, was decided in his favour[92]. The land was demised in 1888 and evicted in 1896 upon which *kanakkar* sued in 1896 to recover the amount of *kanom*. The court held that the period of limitation applicable to the suit was six years and that the suit was not barred by limitation.

Opinions of the judges varied on the same theme. In Sreedevi v Vira Rayan[93] it was held that the *kanom* in the mortgage aspect of it is a usufructuary mortgage, and there is no authority to support the contention that it is a simple mortgage apart from an observation in Ravunni v Brahmadattan[94] in which through a long explanation it was held that *kanom* is both simple and usufructuary mortgage.

At this stage many of the *kanakkars* too had started conveniently forgetting the terms of their contract and creating submortgages as far as possible. In Vasudeva Shenoy v Damodaran[95] we get an

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[92] Unnichaman v Ahamadkutty Keyi, ILR 21 M, 242.

[93] ILR 22 M, 350.

[94] ILR 15 M, 366.

[95] ILR 23 M, 86.

example of an original mortgagee cheating both his landlord and a submortgagee. The original mortgagee, while collecting rents from his submortgagee did not care to pay rent to his landlord. To avoid payment of rent he surrendered the land to the landlord, obtained a new lease in the name of his niece and the landlord, without knowing the dealings of the mortgagee with the other submortgagee, agreed to set off the arrears of rent against the compensation to be paid to the mortgagee. The submortgagee, who was in actual possession of the land from the very beginning, and who actually deserved compensation, sued. But the court could not find fault with the landlord, who was innocent about the submortgage, and held that the right of a tenant in Malabar to compensation is analogous to the right to a chose - in - action and transfer of such a right by a tenant to a third party cannot affect the landlord unless the latter had notice of the transfer when he accepts the surrender of the property demised and settled the account with his tenant in reference to arrears of rent and the amount due as compensation. The High Court also sought the opinion of the lower courts in the event of the landlord knowing it what would have been done.

Regarding *poramkadam* the Judiciary's attitude was that it may not affect the other conditions of the *kanom* though the mortgagor could repay it even before the expiry of the twelve years' term[96] And the court was ready to consent to the setting off the arrears of rent with mortgage amount or compensation payable to the mortgagee.

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[96] Kunhi Amma v Ahammad Haji, ILR 23 M, 105.

Held that the mortgagees were entitled to set off the amount payable by them to the landlord by way of cost (That is the cost of the suits) against the mortgage amount and value of improvements payable by the latter to the former.

On the strength of the Malabar Compensation Act of 1887, and when its modification as Act I of 1900 was about to be published the court decreed against the mortgagor for complaining against the felling of trees by the tenant which the latter claimed was planted by him. It was held that a *kanakkar* is entitled, during the period of his occupation, to remove and to appropriate to himself (for his own use) any trees that he had planted, provided that he leaves the property substantially in the state in[97] which he had received it[98].

The passing of the Malabar Compensation for Tenant's Improvement Act - Act I of 1900, in modification of the Act I of 1887 is clear proof to the fact that the lot of many of the tenants was far from being satisfactory. Even after the implementation of the Act premature redemption etc did not come to an end. By adding some extraordinary stipulations in the *kanom* deed this was made easier to the harm of the tenant[99] When two mortgagees successively getting the same land sued with claims on the same land with court decrees in a gap of three years the court decreed in favour of the second mortgagee who was in possession of the land through purchase. It

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[97] Kelappan v Madhavan, ILR 25 M, 452.

[98] Vasudevan Nambudiripad v Valiya Chathu Achan, ILR 24 M, 47 FB.

[99] Kelu Nedungadi v Krishnan Nair, ILR 26 M, 727 FB.

was held that between the two purchasers the question of priority must be determined, not by reference to the mortgage documents, but according to the dates of the sales and recovery of possession under them.

In Lakshmi Narayanappa v Meloth Raman Nair[100] the right of a tenant - for - life to assign his interest on his death to a successor was granted, that is the rent from those subtenants to whom he had leased immovable property. In another case, the court objected the attempt of a *janmi* to redeem a *kanom* granted for fifty-nine years without reaching its maturity simply on the allegation that the mortgagee repudiated the mortagor's title. The High Court held that when a *kanom* is granted for a fixed period, it becomes redeemable only after completion of that period, and also stated that even if such a denial of title by the mortgagee becomes relevant, that too is only after the maturity of *kanom* as per the contract. The suit was declared premature. The Judiciary was not deliberately partisan or pro-landlord as to deny all justice to the tenants. They were working with the realities and the evidences in front of them.

Some type of lease hold cases came but on very rare occasions. Neelakandan v Namboodiripad[101] is such a one where an *ubhayapattom* was defined as a *kanom* mortgage, a covenant for perpetual renewal, which does not require periodical payment unlike the other mortgages, but the *janmi's* interest forever remained untouched as in

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[100] ILR 26 M, 540.

[101] ILR 30 M, 61.

the case of the other cases.

Amidst, we also hear the Judiciary making creative remarks like why" the validity of a covenant for perpetual renewal in a lease has long been established in England", is non-existent in Malabar[102]. Those studying the tenurial issues were becoming more and more restless to which the courts too could not be indifferent. Every lease holder in Malabar was becoming eager to become the possessor of some higher title; perhaps the insecurity feeling generated from the constant evictions might be one of factors which haunted them inaugurating their fight for permanent occupancy rights. In Kanaran v Unnooli[103] the court had to decide contrary to such ambitions, that what interest is transferred from the demisor alone could become the title of the recipient demisee; suing for a higher title could not be granted; that one who purchased the title of a simple mortagee at a court sale could not sue for a higher title.

The passing of the Act of 1887 aroused a lot of legal problems as to the apt criterion to be adopted in deciding the compensation. The judges were not unanimous on this point; especially in the case of those title deeds which were entered into long before the passing of the Act, but the redemption question came after the Act came into effect. In Kerala Varma Valiyaraja v Ramunni[104] the Full Bench opined that the landlord is bound to pay compensation for improvements at

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[102] Gopalan Nair v Kunhan Nair, ILR 30 M, 300.

[103] ILR 30 M, 500.

[104] ILR 33 M, 218 FB.

the rate prevailing at the time of compensation, instead of that prevailing at some former time, with the suggestion that compensation must be of course limited to improvements recognized as such in Section 3 of the Act. In Unichennan v Rarukutty,[105] Section 7 of the Act was called as prospective, that is only meant for future use, which would save the landlord from the obligation of paying the rate at the time of compensation. The judges' predilictions played a great role on such occasions.

In Sree Manavikraman v Ananthpattor[106] too it was decided in favour of the tenant in the case of a *kanom* dated November 1872, promising compensation to be paid according to local custom, the High Court held that "there is no authority for the position that mere rates of compensation fixed by contract before the Act are decisive as between the parties, and preclude the tenant from claiming the rates under the Act if he elects to proceed under Section 5. That where there is such a contract, the tenant, if the contract rates are lower than the rates provided in the Act, can claim the latter rates under Section 5, and if the contract rates are higher, he can claim such rates notwithstanding Section 6 of the Act. Here the District Munsif decreed more, the Subordinate Judge less, and the High Court restored that of the Munsif.

In Achutha Menon v Sankaran Nair[107], the first case on a

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[105] Second Appeal No. 334 of 1890 Unreported.

[106] ILR 34 M, 61.

[107] ILR 36 M, 380.

karankari tenure, which is a temple connected service tenure with permanent interest, but not alienable and where the proprietary title is vested in a pagoda, when the holder of the lease transferred his interest the court observed that *karankari* tenure is inalienable and confined to that of cultivation, though it is permanent, and the word itself means only permanent right of cultivation. So too the alienation put an end to the right created by the demise of *karankari* tenure. As it happened, so the tenant's right is terminated was the decree.

Even after the Compensation Act came into full effect, the tenants were not properly getting compensation is clear from the judgements which were decided to the advantage of the tenants. In Kochu Rubia v Abdurahiman[108] it was held that the contract is not binding on the tenant, if it is less favourable to him than Sections 5 & 6 of the Malabar Compensation Act, and that the tenant was entitled to claim compensation according to the provisions of the Act. To the improvements already made and to the improvements still going on the tenant was to have claim. The cases decided for and against the terms of the Act were put to detailed discussion. However, even at this stage the Judiciary was not opining seriously regarding the fixity of tenure, about which the political activists were clamouring; courts were still speaking only about compensation.

The right of compensation was not only limited to those tenants who became so by entering into mortgage contract, but also to any person who entered into possession of waste land before the former

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[108] ILR 38 M, 589 FB.

and without the consent of the owner, but with the bonafide intention of paying customary rent to the owner when ascertained, the cowle holders from government on surrender to the *janmi*, the tenants holding under invalid *kanoms*... and such other *kanoms* on surrender to the *janmi* was entitled to compensation.[109] Then the court proceeded to look into the definition of tenant given in Major Walker's Report (1801) on the land tenures of Malabar: "should (suppose) there be a *paramba* without any known owner and a *kudiyan* (tenant) believing that it was without a master settled on it and made considerable improvements, on the return of the *janmakar* or any one producing sufficient proof that he was the owner of the *paramba*, the *kudiyan* must in that case, without dispute, accede to the demand, provided the *janmakar* pays *kuikanom* or the value of improvements". Though at a certain time the cowle or *patta* holders were given hope that they would be given proprietary rights the policy of the Company from the very beginning was to recongnise the *janmi* and only the *janmi* as the proprietor of Malabar lands. Even after so many years of occupation the right of any other social class in Malabar was only that of a *kanakkar* with rights only for compensation, where *kanom* amount was not there, for example in the case of *kuikanom*; but the Malabar Compensation Act provided compensation to such unauthorised occupants also, even if the *janmi* signs a lease deed later with another mortgagee.

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[109] Chooriyayi Kanaran v Mattarai Chirutha, ILR 38 M, 954.

In the context of more and more subleasing taking place, the court made it clear that a mortgagee with possession from the lessee is not liable to the lessor for rent as there is neither privity of estate nor of contract between them[110] - privity of estate being a technical term of English Law under which such privity arises only where the whole of the lessee's interest is assigned over and not where a subsidiary interest (that is partial assignment etc) is carved out of the lessee's interest. There is no privity between a lessor and a sub lessee unless the absolute transfer is made by the lessee, in the absence of which the lessee's liability of the lessor would not cease; and landlord could put an end, by a proper notice to the tenancy of his tenant unmindful of whatever existed between the mortgagee and the sublessees.

Later, some of the influential tenants were also trying to get the maximum out of the deeds they were entering into. In the Raja of Cochin v Kittunni Nair[111], the Full Bench observed that when a tenant (here the *diwan* of Cochin) cuts down the precious trees like teak, rosewood etc on the pretext of improving the land which belonged in *janmam* to the Cochin State by clearing forest trees, definitely should have profit motive in doing so beyond his statement. This was done in violation of the terms of the contract barring the tenant to cut them down without the permission of the state and without paying the *kuttikkanom* and in violation of the agreement that even if cut, the

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[110] Thethalan v Elaya Raja Avargal, ILR 40 M, 1111.

[111] ILR 40 M, 603 FB.

tenant was liable for paying up either the fine imposed by the state or the value of the trees. Held that a stipulation in Malabar lease for the payment of *kuttikkanom* or customary fee to the landlord in respect of trees cut down is not necessarily contrary to the provisions of Section 19 of the Malabar Compensation Act (Act I of 1900). That it is a question of fact to be determined in each case, whether the cutting down of trees is an improvement or not, and whether the fee stipulated is reasonable or so unreasonable as to be prohibitive of the cutting down of the trees at all. The court could not find the imposition of a customary fee of eight *annas* per tree cut down as unreasonable.

Just a statement in a mortgage deed by a mortgagee to a third party without the knowledge of the former's landlord, that certain properties excluded from the assigned deed belong to him in *janmam*, is not a denial of his *janmi's* title to be taken as a ground for premature eviction (forfeiture) of the mortgagee. The court made it clear that if only it is done affecting the mutual relationship of the landlord and the tenant or as an unequivocal denial, or with the clear knowledge of landlord, it becomes actual denial of the landlord's title and should work for a forfeiture. Just a casual statement, uncommunicated to the landlord is a harmless one, and appeal was dismissed. But a question mark arose before the court, of what would be their stand if there was an actual denial of the title, and presumed that it would be upto the tenant then to prove as under the English Law that the denial was occasioned by the fraud, mistake or accident of the landlord and that the tenant himself was neither careless nor

negligent[112]. In such cases it might be either the genuine fear of the landlord or his eagerness to evict the tenant which prompted him to sue.

The court was not ready to compromise with the evasive attitude of some of the parties even after obtaining decrees. When a mortgagor, after getting a decree to eject on payment of compensation under the Malabar Compensation Act of 1900 let the decree to become barred, and sued again, it was held that when a decree is obtained on a cause of action and allows the decree to become barred, the same party has no right to sue against the same defendant for the very same relief; the tenant's statutory right to continue in possession after decree until he is paid for his improvements, confirmed in the Act was not kept by the mortgagor.

The early years of twentieth century witnessed the coming in to prominence of eminent lawyers and outstanding Indian judges who wanted to be responsive to the changing social trends of Malabar. A very important judgement of the second decade of the twentieth century became unique not exactly for its verdict but for the remarkable dissenting note heard amidst the judicial procedure from one of the judges, Justice Seshagiri Aiyar[113], alerting the Judiciary to the new realities and values germinating on the Malabar soil. It was on a suit filed by a *melchartdar* from a *janmi* to evict an existing tenant from only one item, to which he had obtained *melcharth*, of the

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[112] Kizhakkakath Kamalooti v Pallikkalakath Muhammad, ILR 41 M, 629.

[113] Baduvan v Alikutty, ILR 42 M, 603 FB.

eleven items of property demised to the latter. The lease period of the original lease was eight years which had expired at the time of the suit. The question before the Full Bench was whether, when several items of property are comprised in a lease, the landlord was entitled to evict the tenant from one of those items only, without paying him compensation for the improvements on the other items. The Full Bench (Seshagiri Aiyar dissenting) held that a lessor is not entitled to eject a tenant from a part only of the holding, but the assignee of the reversion, in part of the demised premises is entitled to eject a tenant for due cause from each part on payment of the value of improvements to that part and that this rule applies to the tenancies of Malabar. Seshagiri Aiyar's dissenting note was that neither the lessor nor the assignee of a part of the premises can evict a tenant from a part of the premises during the continuance of a tenancy; in the case of a terminated tenancy, the Malabar Compensation Act does not contemplate the possibility of a partial eviction on payment of the value of improvements on a part of the holding. However, the Chief Justice opined that if such an action proves to be oppressive to the tenant's interest the proper course is to move for an amendment of the Act to give more justice to the tenant on the side of compensation. Seshagiri Aiyar burst out about the agony of the tenants in the event of piecemeal evictions: "the danger which threatens the tenant is not an imaginary one, the tenant may be evicted from a portion where he constructed a house or dug a tank which had been irrigating other parts of the holding too." He concluded by making the emotional statement "that I am anxious to

impress on the Legislature the necessity of so amending the law as to make the lot of the Malabar tenant more tolerable than it would be under our decision."

Again judgements came defending the cause of the tenant to opt the rate of compensation more favourable to him. In a contract signed in 1886, the terms according to *desamaryada* was included, which in no way prevents the tenant from getting the compensation at the rate prevailing at the time of ejectment. Section 19 of the Malabar Compensation Act does not prevent the tenant from claiming compensation under a contract made after the passing of the Act, if it is more favourable to him than the Act [114].

As decades passed by and the old values reached the point of being rung out, the judges too became confused to simply stick on the old so called unalterable Malabar Law, just because they were once legally recognized. More and more cases began to be referred to the Full Bench for more satisfactory solutions. This became so when so far unheard of cases connected to usages began to make their appearance even in the third decade of the twentieth century. Venkatachalam Pattar v Krishna Pattar[115], was the first case registered on Malabar Law connected to *santatibrahmaswam*. In the context of the singular absence of any judicial authority on such a subject, and in the context of the flooding spirit of a social revolution all through Malabar, the court was extremely cautious in showing any over-

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[114] Ammalu Amma v Kolangarath Raman Nair, ILR 43 M, 722.

[115] ILR 45 M, 394 FB.

enthusiasm in constructing unnecessary judicial precedents for future use in such matters. It was when the people of Malabar themselves were fast losing faith in their own archaic *maryadas* that the *santatibrahmaswam* case arose, when the title holding tenant alienated it as against the customary usage about it. According to Malabar custom, *santatibrahmaswam* is an inalienable perpetual lease, passed from its holder to his successors forever and which the landlord does not take back. This service tenure, meant for the temple servants, was granted to them to serve the temple (which itself is its landlord) forever in return for getting it, to serve the temple and its day-to-day activities from generation to generation. But a very important condition of the tenure was that it could not be alienated; in the event such an alienation takes place, what might happen was never adjudicated. The *janmi,* in whose *cherikkal* lands attached to Vadakkumnadhan Devaswam, sued in 1912 on a lease of 1859 & 1867 for possession with arrears of rent, making the demises liable to surrender when the tenant against the Malabar usage, alienated the lands. The Full Bench after making a peep into the historical background of the *janmi* system in Malabar, and after hearing the exhaustive arguments from both sides, reached at the decision that, neither in the written evidence nor in the oral evidence was there enough to establish a custom in favour of a right of re-entry of a landlord of such tenure, on alienation by the tenant[116].

During this time a case connected to *adimayavana* also came for

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[116] Ibid.

the first time as redemption suit. *Adimayavana,* like *santatibrahamaswam* was, by usage, a perpetual one, but the case arose when the *janmi* filed a redemption suit arguing that services were not rendered by the tenant and hence to be ejected. When the issue reached the stage of the Full Bench it was against the remand order passed by the subordinate court and held that the Lower Appellate Court was competent to pass the order of remand.[117]

The following years, that is, the early decades of the twentieth century, witnessed the changing ethos of all the tenurial interests in Malabar and a corresponding growing suspician against each other. While the *janmi* was alarmed at the thought of their *janmam* rights slipping out of their grip to tenants who might get permanent occupancy rights sooner or later which would force the former to wait upon the latter's mercy even for rent, the tenant was always bewildered about their very existence if once evicted by the *janmi* with a court order. This led to the creation of too many titles and interests and numberless contracts and infinite litigations, making the tenurial picture of Malabar a total confusion.[118]

When the terms of the lease contract entered upon were not properly observed the tenant's right to get renewal was lost, as was decided in Secretary of State for India in Council v Volkert Brothers[119]. The lease of land granted in 1821 for ninety-nine years

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[117] Raman Nair v Krishnan Nambudiripad, ILR 45 M, 900 FB.

[118] Sankara Variyar v Ummer, ILR 46 M, 40.

[119] ILR 51 M, 885 PC.

contained the clause of renewal for another ninety-nine years if the terms of the contract were observed. But the tenant sold a considerable portion of their interest and claimed renewal for the land remaining in their possession. The decree was that upon the true construction of the covenant the respondents were not entitled to the renewal claimed.

Even in the context of the passing of the Malabar Tenancy Act of 1930 the question of compensation had to be decided through the court. In the case of a deed entered in 1884 that is before Ist January 1886, on condition that compensation for improvements was to be at half their life and repeated in the renewal deed of 1900. When the appeal reached the High Court the chief question was at what rate the compensation was to be calculated. The High Court decreed that the rates in the 1884 contract are enforceable only upto the date of the renewal in 1900 and not after it.[120]

In Thayingoli Valiya Kalyani v Thayingoli Krishnan Nambiar[121] the *melcharthdar's* right to redeem was restricted when found to be in violation of the *kanakkar's* right to continue after the renewal deed was signed. Held by the court that in Malabar a person who takes a *melkanom,* the term of which was to begin after the expiry of a *kanom* in force in favour of a third party, must be held to have had notice of an agreement for renewal by the *kanakkar.* The term *kanom* came to be

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[120] Pazhancheri Panangat Blahayil v Araka Kalapurayil Kaliani Ammas' Children, ILR 55 M, 658.

[121] ILR 55 M, 519.

treated both as a lease and a mortgage, and with the passing of the new Act, Legislature recognised the practice and conferred a legal right on the part of the *kanom* holders to a renewal of such demise on certain terms. Dismissing the Letters Patent Appeal it was reminded to the *melcharthdar* that her allegation that she had no notice of the renewal was due to her own fault, since everybody knows that renewal is a usual condition between a *kanakkar* and *janmi* in Malabar tenurial relations; and she might have enquired it before accepting the *melcharth*.

The grant of fixity of tenure to certain sections of *kanakkars* (in *kudiyirippu*) through the Malabar Tenancy Act was giving birth to problems of a different nature. The clause that it is heritable too could increase the temptation of the people to come with claims of relationship with *kanakkars*, but the condition that the right (interest or title) would pass only to the legal representative or assignee of the *kanakkar* proper became hindrance to such claimants. Still a sort of competition started among the family members to become the rightful successor of the *kanakkar*. In Achayi v Parameswaran Nambudiripad[122], on the death of *kanakkar*, his two sisters claimed the *kanom* amount due to him from the date of his eviction in 1929, that is just before the passing of the Act, on the ground that, as heirs of their father, their joint interest in the *kanom* should be recognized as per the Act and that their brother was merely a *kanakkar* for himself and on their behalf. The High Court attempted to quote the

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[122] ILR 58 M, 334.

definitions of "*kanom*", "tenant" and "landlord" as per the Act[123]. And held that under the Malabar Tenancy Act where a *kanom* is evidenced by a written instrument, the *kanakkar* can be no other person than the transferee mentioned in the document or his legal representative or his assignee. Since the two contracting parties were the landlord and tenant only, the former could not recognize any person other than the person to whom the *kanom* had been transferred and could not grant a renewal of a *kanom* to any person other than the *kanakkar*. It was decreed that upon this construction of the particular terms in the Act the two sisters were not entitled to a renewal of the *kanom*.

Of the various titles allowed to the *kanakkars* the most potential one was that of the *ottidar*. *otti* was a customary tenure of Malabar which guaranteed its holder the right of pre-emption at the time of the renewal of the *kanom*. It is because the landlord, by borrowing a very big amount as *kanom* becomes so indebted to the tenant as to redeem the land easily. Regarding the *ottidar's* right of pre-emption and many other aspects connected to the granting of the *otti* tenure, came to the courts' arbitration throughout the British period.

The *ottidar's* right of pre-emption was recognized from the very beginning by the Malabar courts. In Kuni Taruvayi v Achabi Umma[124] it was held that a party holding the land under the tenure of *otti* has the right of pre-emption as a well recognized usage in Malabar. The occupant under the tenure has advanced money on the land nearly

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[123] Malabar Land Tenancy Act, (XVI of 1930), See Appendix No.VII, p.467.

[124] No.93 of 1859, RCSU p.142.

equivalent to the full value of the land, and the privilege in question secures to him the opportunity of becoming proprietor against other would - be purchasers in case the owner pleases to sell it.

The *otttidar's* right was stressed in Valiyathamburatti v Konduvetti Kadiaragath[125] it was held that the *otti* mortgagee in Malabar could not be ousted by the owner in favour of a superior mortgagee unless he has had the option given to him of making the further advance of money required by the owner. Again, the *ottidar's* pre-emption right was recognized in another decree when an assignee of the *janmi's* title sued for redeeming the *ottidar* when it was held that the failure of the *otti* mortgagee to prove his *poramkadam* right, does not forfeit his right as *otti* holder, just because he pleaded in answer to the suit for redemption of an assignment of *janmam* title as invalid. The High Court further stated that though it is not necessary to take the *ottidar's* written consent, his right of pre-emption should be sought[126]. In Kunhamu v Kesavan Nambudiri[127] an *otti* mortgagee's right to redeem an earlier *kanom* was recognized. The distinction between an *ottidar* and a *kanakkar* was drawn clearly by the court that the prior right of an *ottidar* to make advances is established by authorities, but there is no author to support a *kanakkar's* claim to a similar privilage. The *ottidar's* upper hand is more graphically explained in Kumini Amma v Parkum Kolusheri[128] that an *otti*, like a

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[125] No.17 of 1860, RCSU p.249.

[126] Kunhali v Kunhatha ILR 3 M, 74.

[127] ILR 3 M, 246.

[128] I MHCR 261.

kanom, cannot be redeemed before the lapse of twelve years from its date. An *otti* differs from a *kanom* first in respect of the right of pre-emption, which the *otti* holder possesses, secondly in being so large a sum taken as mortgage amount, practically the *janmi's* right is merely to receive a pepper - corn rent.

In another judgement we see the court vehemently commenting against the *janmi's* action of not respecting the *ottidar's* title in the appropriate way. Here the *ottidar's* right of pre-emption was overlooked by the *janmi* by letting his interest to be sold to a third party through court sale. The court held that an *otti*-holder should not be driven to give any fancy auction price at an auction. He should be fully informed of what price he was to pay before he makes up his mind to buy. That public notice of and the option of bidding at a court sale of the *janmi's* right do not constitute a valid offer of pre-emption[129].

The *ottidar's* right of pre-emption was customarily recognized; judges like Justice Turner, who had pronounced leanings toward *janmi's* rights, were not ready to grant such special privileges to them. His notion was that the *ottidar*, if he wanted to purchase, should be present at the time of the auction sale, and by paying what the highest bidder is ready to pay could buy the right. The case arose when the judgement creditor, from whom the *janmi* had taken *poramkadam* without the knowledge of the *ottidar*, obtained a decree to redeem the *ottidar*. The *ottidar* sued on the ground that the *janmi*

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[129] Cheriya Krishnan Nambudiri v Illath Vishnu Nambudiri, ILR 5 M, 198.

had no right to mortgage the land on *janmapanayam*, a higher title than *otti*. The court decreed that the *veppu* holder that is the *ottidar*, was not entitled to have either *janmapanayam* or the auction sale set aside; but assuming that he came into court with in time, he was entitled on tendering the price, to claim that the *janmapanayam* should be transferred to him. The court did not consider the fact that the highest bidder with previous hostility to the *ottidar* could offer a very big amount in order to trap the latter[130]. However, in Ambu v Raman[131], in a contrary judgement, it was decreed that according to custom no *janmapanayam* could be raised by *janmi* from a third party on land held on *otti* tenure and that as long as an *otti* is unredeemed, the *ottidar's* right to make further advances subsists. And as long as the *otti* holder is not given chance to make further advance, the *janmapanayam* holder's claim is not valid.

But even after being specially invited, at the time of court sale, if an *ottidar* did not make use of the opportunity, though he was present on the occasion too, to purchase, the court decreed that then he loses his right of pre-emption[132]. The *ottidar's* pre-emption right upon a third party's purchase of the *janmam* title was again upheld in Krishna Menon v Kesavan[133].

However, the court was not ready to allow the *ottidar's* right of

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[130] Vasudevan v Krishnan, ILR 7 M, 309.

[131] ILR 9 M, 371.

[132] Ammootti Haji v Kunhayan Kutti, ILR 15 M, 480.

[133] ILR 20 M, 305.

pre-emption to exceed to a right to veto that of a right of election. The High Court commented on such a decision earlier by the Sudder Court, in which the *ottidar* was allowed to avoid the sale without offering to become the purchaser, as one which created a wrong precedent of giving the *ottidar* which the custom did not give him[134]. The High Court observed that the Sudder Court decision[135] was the outcome of an earlier decision by the Subordinate Judge, Holloway J. who held that "until the refusal of the *ottidar* to purchase, to no other purchaser could *janmam* right by the custom of Malabar being sold", but by omitting that part of Holloway's decision that such option would be by receipt of a fixed sum of money within a fixed time.

In another case when the *janmam* right was sold by the mortgagor to a third party in the auction sale in 1895, the purchaser made an attempt to ask the *ottidar* to surrender the property by accepting the *otti* amount. Here the suit by the *ottidar* himself to get established his right, right of pre-emption, which had been gained under a deed of 1890. Against this injustice, the High Court decreed on the basis of justice, equity and good conscience. The court by stressing the customary right of an *ottidar* for pre-emption on the west coast held that any attempt by the owner of the property to sell it to a third party must be made known to the *ottidar* to see whether he would utilize his rights of pre-emption. Here the court was equally critical about some of the earlier decisions which allowed

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[134] Kadakamvalli Sankaran Mussad v Makkuth Ussain Haji, ILR 30 M, 388.

[135] Sudder decisions 1857 p.121.

only an option to the *ottidar* to purchase at a rate a third party was willing to offer, which might be the result of a conspiracy between the *janmi* and the third party. The High Court criticized the lower courts for not trying to know when exactly the *ottidar* came to know of the sale, from which time alone the limitation would run against him, before dismissing the suit. The Judiciary was ever ready to correct their earlier erroneous decisions in the light of fresh clues, though were not ready to deviate from the Malabar law laid on customary realities[136].

Quite contrary is the decision of the Full Bench in Vasudevan Moosad v Ittirarichan Nair[137] when the legal question involved in the *ottidar's* case was put to discussion. The Full Bench opined that though *ottidar* in Malabar is given a place of prominence, the right of pre-emption was found to be only an agreement between the *janmi* and the *ottidar,* and not one preserved by the Legislature. The *ottidar's* right of pre-emption has relevance only when the *janmi* plans to make a second demise at his own will, but in a court sale etc mere proclamation is sufficient to call attention of all intending purchasers including the *ottidar.* After scrutinizing the earlier cases the Full Bench expressed wonder for this point never coming to legal notice previously. In the present case of an *ottidar's* suit against the purchaser's attempt to redeem the land in the former's possession after purchasing the land in a court sale in execution of a decree

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136 Mammali v Kunhipakki Haji, ILR 38 M, 67.

137 ILR 41 M, 582 FB.

against the *janmi*, it was decided that in the absence of any statutory reservation of the right, a right of pre-emption does not exist in cases of involuntary sales. That a Malabar *otti* mortgagee has no right of pre-emption against a purchaser in court auction of the mortgaged property and he is not entitled to any notice of the intended court sale or the price fetched at the sale. The *ottidar's* right of pre-emption is limited only to his choice when the owner intends to sell the land by private treaty, but here even the price was not decided by the *janmi*. The Full Bench decreed for the purchaser.

In another case of the ensuing year the fact that the *ottidar's* right to assert on a sale by a *janmi* was affirmed by the High Court when found that he had paid the lionshare of the value of the *janmam* right of the property.

When the Malabar Tenancy Report of 1940[138] was published, the tenurial picture of Malabar was not highly promising. Still cases on compensation, the inability to settle the complications arising from the fixity of tenure etc were continuing. Political unrest on one side and economic disappointment on the other began to cloud the Malabar horizon. People were losing their faith in the conventional Malabar judgements and now, often, Judiciary's role was becoming restricted to decreeing just on the specific issue involved in each case. However, the protracted legal discussions on such problems for the last so many decades made the judges and the lawyers well-versed in every aspect of the Malabar problems, that when occasion

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[138] Report of the Malabar Tenancy Committee, 1940.

came for legislative solution the Government, the public and the political activists waited for the most creative suggestions from the Judiciary's part.

Nambudiris

The Nambuduri aspect of Malabar Society at the time the British rule of law came to be applied was a paradox in terms - two mutually contradictory truths about them appeared like a puzzle to the early legal interpreters. On the surface, it was a picture of projecting splendour of this class as customary *janmis* and now with its British conferred status of absolute proprietary rights on land with the right to evict the tenants at any time, adding colour to it. But underneath was there a dreadful picture of an intensely suffering community, due to their self inflicted orthodox and irrational customs which denied to a large majority of this caste even the primary joys of human life.

The strenuous effort of the judicial interpreters gradually succeeded in grasping the bitter truths about the family laws of the Nambudiris and to bring them into a theoretical framework for legal purposes. Repeated cases of the same nature helped them much in this process even against the absence of any written authority. While the Nambudiris in the capacity of the *janmi* were again and again sued, cases on their personal laws were not many. Like the depressed classes who had no voice in the tenurial relations of Malabar which placed them clearly out of adjudication, the members of the

Nambudiri *illom* too had only extremely limited rights as to legally fight against their exploiting customs. Still, the fact that many of their customs came to be legally defined, even through the limited number of cases registerd, credit goes to the Judiciary for collecting information from every possible source, which went a long way in instilling confidence in the Nambudiri folk to seek solution through the court on many complicated issues.

As in the case of all the other classes in Malabar, in the case of the Nambudiris too the first attitude of the Judiciary was just the defence of their age-old usages, whether rational or irrational. The Judiciary found that, of all the customs of the Nambudiris, the most extraordinary and that which distinguished them from the Brahamans of the rest of India was their insistence to keep the family property impartible, as in the case of the *marumakkathayam* Nair families of Malabar. It was found that unusual divinity was attached to the *illom* property, which was meant for religious sacrifices and spiritual purposes alone, and in the protection and impartibility of which everybody in the family was most concerned about. Including marriage, every custom of the community was adjusted for the purpose of keeping intact the divinely gifted property[139]. It was their determination never to place the management of the *illom* properties in any impure hand, even at the point of extinction of the *illom*[140].

The law applicable to the Nambudiri Brahamans of Malabar was

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[139] Vasudevan v The Secretary of State for India, ILR 11 M, 157

[140] Narayanan Nambudiri v Krishnan Nambudiri, ILR 57 M, 725.

intepreted as the Hindu law modified by special custom. It was observed that the custom of the Nambudiris in the management and assignment of property did not differ from the customs of the Nairs. Impartibility was the rule and the eldest member was the manager. The only difference between a Nambudiri *illom* and Nair *tarwad* was that in the former the offspring of the marriage and the married women became the members of the husband's *illom,* while the children of a Nair woman became members of her own *tarwad* [141].

Judicial enquiry into the impartibility question brought home the fact that as in all Hindu law, so in the archaic form of it which existed in Malabar including that of the *marumakkathayam* - the first concept of a family was of an indissoluble unit, a mere aggregate with no separate rights, living under one head, united more especially by their connection with the same sacra[142]. The highest court's verdict in this regard came as early 1814 when the Sudder Court of Madras passed that impartibility is the rule prescribed and community of interest can only be severed by voluntary separation and partition[143]. Later Justice Holloway laid the law that partition among Malabar Brahmans was wholly alien to the principles of the law which governed them[144].

That even in the Nambudiri *illoms* there were members who

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[141] Nilakandan v Madhavan, ILR 10 M, 9.

[142] Erambappalli v Chennan Nair, VI MHCR 411.

[143] AS 28 of 1814, I Sudder Decisions 118.

[144] AS 36 of 1860, Holloway's Judgements, Record Room, District Court, Tellicherry.

were not pleasant about the unusual insistence on the impartibility of the *illom* property and seeking legal redressal is clear from the comments of some of the judicial experts of the personal laws of various communities in India. John D Mayne stated that definitely there were those natives attempting to cast off their own customs and to deal with their property by partition, alienation, and division, as if it were governed by the Hindu law and at times obtaining favourable decrees in the provincial courts; "but were invariably fooled on appeal to the Sudder Court at Madras", where there were judges thoroughly acquainted with Malabar customs[145]. Moore shared the same view when stating that "had the court been without such special experience ... that by this time every Malabar *tarwad* would have been broken up"[146]. Perhaps, while the English intepreters preferred the impartible property concept in their revenue interest too, it is to be doubted whether at least a few among the Nambudiris were not becoming conscious of the changes taking place in other parts of India on this question[147]. In other parts of India, gradually the idea of partition came to be recognized when the joint families became so large and unmanageable, when the 'sacred law' made provision for its break up.

The oldest male member of the *illom* became the manager of the properties, from whom the title passed to his eldest son from a legal marriage. In the absence of the birth of such a male, the senior most

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[145] Aiyar Chandrasekhara (ed), Mayne on Hindu Law and usage op.cit., p.xiii.

[146] Moore Lewis, op.cit., p.16.

[147] Basham A.L., op.cit.

female member of the *illom* enjoyed this right. The *karanavan's* authority in a Malabar family, whether *makkathayam* or *marumakkathayam,* got immediate judicial recognition. It was held that the *karanavan* of a *tarwad* is not a mere trustee, though he too like all the other members of the *tarwad,* was only entitled to maintenance out of the *tarwad* property[148]. Almost the only restraint on him in such management was that he could not alienate the lands of the *tarwad* except with the assent of the senior *anandaravan,* or in certain circumstances, of the other *anandaravans.*

Judiciary was against the move of making the other members of the *illom* binding on the personal debts of the *karanavan.* In Vasudevan v Narayana[149] it was held that a decree obtained against the *karanavan* is not binding on the members of the family who were not parties to the suit in which that decree was obtained or had no notice of the suit. At the same time when the *karanavan* of a Malabar *tarwad* or *illom* had not been impleaded as such in a suit, and there was nothing on the face of the proceedings to show that it was intended to implead him in his representative character, *tarwad* property could not be attached and sold in execution of the decree, even though it was proved that the decree was obtained for a debt binding on the *tarwad*[150]. But such a decree becomes binding on the *tarwad* in which the *karanavan* of a Nambudiri *illom* or a

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[148] Varanakot Narayanan Nambudiri v Varanakot Narayanan Nambudiri ILR 2 M, 328.

[149] ILR 6 M, 121.

[150] Haji v Atharaman, ILR 7 M, 512.

marumakkathayam tarwad was, in his representative capacity, joined as defendant and which he honestly defends, even if the members of the family were actually made parties. The *karanavan* could not sell or alienate the *tarwad* property unnecessarily nor could enforce its partition. To effect an alienation, the *karanavan* should get at least the consent of the senior *anandaravan,* and for division of *illom* into separate houses to suit the growing number of the family members, he should get the consent of all[151].

The rights enjoyed by the individual members of the community in the family property became a topic of detailed discussion during judicial proceedings. A Nambudiri joint family or *illom* consists of both males and females, each of whom was entitled to a share in the family property. As the *karanavan* all the junior male members called *anandaravans* and unmarried female members or *antarjanams* in the *illom* have an equal right in the family property[152]. Whereas in the *marumakkathayam* system succession was traced through females, property descending from mother to daughter, among the Nambudiris succession was traced through males, property passing from father to son. The old patriarchal set up in which the son was a mere appendage to his father, with no right of property as opposed to him continued more or less in its original form in the Malabar Nambudiri *illoms*[153].

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151 Varanakot Narayanan Nambudiri v Varanakot Narayanan Nambudiri ILR 2 M, 328.

152 Vasudevan v The Secretary of State for India, ILR 11 M, 157.

153 Mayne John D, op.cit., pp.302-303.

The court was ready to follow both systems of law, *mitakshara,* or the Vedic patriarchal law, or the *marumakkathayam,* as it became most reasonable in the case of the Malabar Nambudiris. It was held that the rule of Hindu law by which the son was bound to pay the debts of the father, neither illegal nor immoral, could not be applied in the case of the Nambudiris whose property was impartible in which neither the father nor the son had any individual interest and in contrast with the *mitakshara* which allowed partition[154].

The court was sticking on the impartibility dictum, stretching it to its maximum extent, almost to its breaking point. It was held that a Nambudiri *illom* differs in many respects from an ordinary joint Hindu family on account of the impartibility and its close resemblance to a Nair *tarwad.* In Kunhikutty Amma v Mallaprath[155], it was decided that the debt incurred by the deceased, who was head and manager of the *illom* to treat the illness of his deceased son, though not for immoral or illegal purpose, was not binding on the members of the *illom,* even with the fact that the members of the *illom* were his own sons and grandsons. The judgement also tells us of the five points in which an *illom* and a *tarwad* in Malabar agree: (a) *karanavan* (or father in the case of the Nambudiris) too had only an equal right of maintenance along with all others. (b) His personal debts were not liable to be paid by the other members of the family. (c) He could not enforce the partition of the family property. (d) His

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[154] Nilakandan v Madhavan, ILR 10 M, 9.

[155] ILR 38 M, 527.

alleged share cannot be attached or put to sale by a creditor for his personal debts. (e) He could not alienate his alleged share to an alienee who would enforce partition in the family property. However, the judgement was silent about the procedure to be adopted to help the judgement creditor.

Legal marriage formed the basis of succession among the Nambudiris, as in the case of the rest of the Brahamans of India. But in the context of the impartibility of family property, the growth of the numerical strength of the members of the *illom* had to be restricted, which compelled them to allow only the eldest son of the family to customarily marry a Nambudiri woman in the typical caste endogamous practice. Usually, only the eldest of a number of brothers, marries, and amongst the sons of the eldest brother again, only the eldest brother marries and so on[156]. Only the descendants of the eldest male should perform their obsequies and became their heirs. It was held that the notion of paternal relation founded upon legal marriage as the cause of inheritance was custom common among the Nambudiris and Brahamans of the east coast[157].

As to the right of the junior male members to marry within their own caste, the early impression of the Malabar courts was that such marriages are invalid[158]. When, later this error came to the notice of the Sudder Court it was corrected that there was no rule of

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[156] Aiyar P.R.Sundara op.cit., p.209.

[157] Vasudevan v The Secretary of State for India, ILR 11 M, 157.

[158] OS 35 of 1873, Sub Court Calicut and A.S 562 of 1876 District Court Calicut.

law and no custom prohibiting the junior males from marrying[159]. In exceptional cases junior members married without being objected, but pecuniary interest was the only bar, since the Nambudiris were entirely depending on the family property for financial assistance. In Pappi Antarjanam v Theyyan Nair[160] the point directly arose, and it was held that there is no prohibition of law or custom for junior members of a Nambudiri *illom* contracting valid marriages in their own community. It was also remarked that it is unjust to deprive the Nambudiri juniors of a right enjoyed by the Brahamans throughout India. However, considering the very orthodox insistence of the Nambudiris about the impartibility of *illom* property, the legal point involved in such issues remained unsettled until popular agitation urged legislative solution.

The Judiciary never attempted to make unwanted interference into the deep seated customs of the people. Hence, even while knowing that there is no objection in recognizing the Nambudiri junior males marrying, the High Court's stand was that except in so far as recognized custom has made any inroad into the law of the *smritis*, he is governed by that law[161]. In the absence of partition of the *illom* properties, and as the Nambudiris were not in the habit of seeking any other profession than to depend on their properties, if all the juniors marry and make their own families, would invite unprecedented troubles was the chief obstruction. But where such

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[159] Vasudevan v The Secretary of State for India, ILR 11 M, 157.

[160] 14 MLJ 214.

[161] Vishnu Nambudiri v Akkamma, ILR 34 M, 497.

marriages actually took place, the Judiciary was ready to grant them legal relief if sued[162].

One tragic aspect of the absence of legal marriage to the junior male members of the Nambudiri *illoms* was that while they were forced to seek concubines in the *marumakkathayam* Nair families, most of the Nambudiri women were fated to life long spinsterhood. The status of Nambudiri woman in her married or unmarried capacity, or as widow came to be very exhaustively explained during legal proceedings[163]. A Nambudiri woman had no right to marry a person belonging to any other caste; she must accept any Nambudiri of her *illom*'s choice, at times a person as old as her grandfather with many other wives; she would lose all her rights in her parental *illom* once married; she would take her husband's *gothram* and perpetual widowhood and incapacity to remarry however young she is, became her lot. Only very few among the Nambudiri women got married, that too only to become one among the several wives of the eldest male member of an *illom*. The only consolation to her was the equality she enjoyed along with males in the family property, whether married or unmarried. And, if all the males die in an *illom* the widow of the last co-parcenor becomes heir to the whole property, while the widows of the co-parcenors who died previously become entitled only to maintenance[164].

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[162] 14 MLJ 214.

[163] Vasudevan v The Secretary of State for India, ILR 11 M, 157.

[164] Aiyar P.R.Sundara op.cit., p. 218

The anomalies in the marriage customs of the Nambudiris though had come to the notice of the Judiciary, were not legally discussed in the absence of a direct case on it. Later, when a section of the young radicals among the Nambudiris, being influenced by the contemporary radical social reform movements of other castes, became bold enough to react strongly against their illogical, outmoded customs[165], the Judiciary too became alerted. They used the opportunity to remind the administrators of the shocking truth that unless substantial measures were taken in this respect, the Nambudiri community would die in a few decades. Definitely the main object of the Madras Nambudiri Act of 1933 became the substantial step it recommended to enable every member in a Nambudiri family to enter in legal marriage within his /her caste with certain dowry rights to the females[166].

From the very orthodox family laws of the Nambudiris such as the unusual divinity attached to the impartible *illom* property, the extremely limited number of legal marriages among them, the insistence that a son born of the legal marriage alone could become the *karanavan* or the manager of the *illom* property, the absence of such sons on many occasions etc., followed many other extra ordinary and complicated customs, especially in the urge to save the *illom* from extinction. These wonderful customs too got legal

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[165] Bhattathirippad V.T., Adukkalayilninnu Arangathekku (Mal), Third Edition, Kozhikode, 1957; Vee Teeyude Sampoorna Krithikal (Compiled) D. C. Books, Kottayam, 1997.

[166] The Madras Nambudiri Act (XXI of 1933), See Appendix No.VIII, p.517.

recognition. The age-old custom of adoption among the Nambudiris, that is, the system of introducing heirs when the family was in danger of becoming extinct, was the most important among them. The courts noticed three kinds of adoption among the Malabar Nambudiris: adoption by ten hands (*pattukayyaldathu*) in which the hands of the adopters (wife and husband), the adoptee, and the adoptee's parents would join together during the ceremony, adoption by *chamatha*, that is, by burning a pan of sacred grass, and adoption by taking into the family, which is more common[167]. There is no limit to the age or number of persons adopted, but the same *vamsa* or tribe was insisted. When the question of the adoption of one's sisters son came, the Sudder Court did not support it saying that the general Hindu Law prohibits such an adoption. But later, the Full Bench, after obtaining a variety of clues from Nambudiri *pandits* through the subordinate judge held that the adoption of a sister's son by Nambudiri Brahamans was sanctioned by the customary laws of Malabar[168]. It was accepted that the rule of Manu that "a person cannot be adopted whose mother the adoptee could not have married" is not observed by the Nambudiris who were the followers of the very ancient *smriti* law.

Regarding the introduction of a stranger to perpetuate the existence of an *illom* it was held that the Malabar Nambudiri customs admit the adoption of an outsider to perpetuate an *illom* and that a

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[167] Moore Lewis op.cit., p.31.

[168] Vishnu v Krishnan, ILR 7 M, 3 FB.

widow could do so. (Here it was her brother's son) That such an appointee could enjoy even the *uraima*ship of the *illom* which could not be questioned by the co-*uralers*[169]. The customary usage of Nambudiris of affiliating the member of another *illom* for the purpose of begetting issue was recognized valid by the courts. The issue born of such marriage would be validly affiliated as member of the first *illom*[170]. The adoption of the son is the practical effect of the *sarvasvadanam* marriage also.

The *sarvasvadanam* marriage of the Nambudiris was another strange custom which got judicial recognition and which seemed to be a relic of the old *putrikaputra* (son of the appointed daughter)[171] of the *smriti* law. This extraordinary type of marriage, admittedly peculiar to the Nambudiris of Malabar, takes place when a father, whose line was under threat of extinction in the absence of a male heir to succeed, chooses to give a daughter in marriage exclusively for the purpose of raising up an heir for it, who would be considered as the real son of the father. The formula used in the marriage is: "I give unto thee this virgin who has no brother decked with ornaments; the son who may be born of her shall be my son", that is the appointed daughter comes back as a son. Through this extraordinary agreement between the bride's father and the bridegroom the latter becomes co-partner in the bride's property; but in the event of the wife's death without issue, or by the failure of issue, such property

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[169] Kesavan v Vasudevan, ILR 8 M, 297.

[170] Kesavan Unni v Nicholas, 23 MLJ 165.

[171] Moore Lewis op.cit., p.49

would revert to the *illom* of his father-in-law. But later it was admitted that on the death of a *sarvasvadanam* wife without issue, her husband does not lose all his rights over the property of her *illom*[172]. And, though belonging to a patriarchal community, the eldest male issue from the *sarvasvadanam* marriage becomes a member of his mother's *illom* and without any right in his natural father's *illom* where he could become only the *attaladakkam* heir. In most cases the husband accepted through a *sarvasvadanam* marriage was already a married man with one or more wives and children, and whose mission was only to become the father of a male child to save the father-in-law's *illom* from extinction.

The Judiciary had prolonged discussions on the rights enjoyed by the females in the Nambudiri *illoms*, especially the widows who were often confronted with the problem of adoption in order to save their husband's *illom*, in the absence of male heirs, from extinction, which would lead to escheat by the Crown. An important question was whether the female members of a Nambudiri *illom* have ownership in the property in the same manner as its male members have[173]. The ordinary Hindu law limits the ownership of property to males alone while the females were given only inferior position and just maintenance rights. But the females of the Nambudiri *illoms*, to whom the ancient patriarchal state of law was made applicable, females had equal rights with the males. The Travancore High Court

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[172] Lakshmi Amma v Thuppan Nambudiri, ILR 25 M, 662.

[173] Aiyar P.R.Sundara op.cit., p.216.

held that the Nambudiri ladies possessed greater rights than a right of maintenance[174].

A similar question was as to who among the many widows of an *illom* would be the manger of the properties. Sometimes the widow of the father may be younger than the widow of the son as the Nambudiris go on marrying late in life[175]. In the case of widows, not the one who is senior in age, but the one who was married to the *illom* first got this superior position. In the case of the unmarried, if she was born before the first marriage took place in the *illom*, she became entitled to become the manageress.

Usually female involvement came only in cases connected to adoption, alienation of property etc. In Vasudevan v The Secretary of State for India[176], a case which so very exhaustively discussed every aspect of Nambudiri Law, by collecting information from a large variety of sources, the main issue was whether a widow who becomes the last surviving member of an *illom* and without any *attaladakkam* heirs can be treated as the absolute owner and manager of the property, so as to adopt an outsider who promises to marry for the *illom* and get heirs to save it from extinction. As to the question whether a Nambudiri widow possesses a power of alienation of *illom* property it was held that she was not at liberty to do so. But the right of the widow to appoint an heir to perpetuate the *illom* in the said

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[174] 12 Travancore Law Reports 46 FB.

[175] Aiyar P.R.Sundara op.cit., p.221

[176] ILR 11 M, 157.

case was declared valid against the crown. The fact was reiterated in the very extraordinary case, Narayanan Nambudiri v Krishnan Nambudiri[177] the final verdict of which came in the very year of the passing of the Madras Nambudiri Act. A case which very fully considered the Nambudiri law of adoption by seeking evidence from all neighbouring courts and local experts also made clear that to become the sole surviving member of the *illom* it is not necessary that all its members should have ceased to exist by reason of death. Their excommunication and surrender of rights are sufficient. The existence of *attaladakkam* heirs is no bar to such adoption[178]. However, the court left untouched a humanitarian aspect in the case, which might have been wounding to its followers, regarding what to be done about the unpolished customs like *smarthavicharam* which was so humiliating to the females who were undergoing the trial, and the males who became victimized due to it[179].

No cases exclusively dealing with the self-acquired properties of Nambudiris are found reported in the Sudder Decisions, perhaps due to the fact that self -acquisitions by Nambudiris were very rare in their peculiar social set up. The observation by the judges in

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[177] ILR 57 M, 725.

[178] ILR 57 M, 725, Narayanan Nambudiri v Krishnan Nambudiri. In this case the surviving *attaladakkam* heir had been outcasted for reasons of immorality by the Raja of Cochin in 1904 at a Kalavicharam (*Smarthavicharam*), that is a court of enquiry, and the other a widow, had surrendered her rights for reasons of her own.

[179] A.M.N.Chakyar, Avasanathe Smarthavicharam, (Mal. Tr.) T.K.Sankaran Nambudiri, Government of Kerala, Trivandrum, 2001.

Vasudevan v The Secretary of State for India[180] that "self acquired property merges, on the death of the person acquiring it, into the family property as is the case among Nairs" was a mere obiter dictum while generally discussing the personal law of the Nambudiris. When the question came for the discussion in Lakshmi Amma v Thuppan Nambudiri[181] it was urged that in the absence of any other authority, the ordinary Hindu law which gives the right to inherit such properties to one's own immediate heirs would prevail. The substantial decision in this came in Vishnu Nambudiri v Akkamma[182] when it was held that the self-acquisitions of a Nambudiri pass to his heirs after his death under the Hindu Law and not to the *illom*. It was further stated that no *marumakkathayam* usage has influenced the family law of the Nambudiris in this respect and that no doctrine of ancient Hindu Law denied the right of the son to succeed to the separate property of his father. A Nambudiri's right to alienate his self-acquisitions in his life-time without regard to any necessity or to the wishes of the other members of his family was also confirmed. The Nambudiri Act of 1933 guaranteed this right in the context of more and more Nambudiris seeking jobs outside their old theory of absolute dependence on family property.

If in the case of the self-acquisitions of a Nambudiri the *mitakshara* usage was accepted, in the case of his personal debts the Judiciary's observation was different. It was held that the rule of

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[180] ILR 11 M, 157.

[181] ILR 25 M, 662.

[182] ILR 34 M, 496.

Hindu Law by which the son was bound to pay the debts of the father, which are neither illegal nor immoral, could not be applied in the case of the Nambuidiris, whose property is impartible, in which neither the father nor the son has any individual claim[183]. This view was retained and repeated even in a case where the deceased debtor's family consisted of mainly his own sons and grandsons by sons[184].

The Malabar Judgements on the Nambudiris were all only giving legal effect to their age-old customs. But they so graphically explained things as to arouse anybody who listens to them to dynamism; Judiciary succeeded in telling the young generation of the Nambudiris how reactionary many of their customs were. On the initiative of the radical organization of the Nambudiris called Yogakshemasabha[185] and the emotional outbursts of radicals like V.T.Bhattathirippad, mainly through his literary compositions, M.R.Bhattathirippad[186] and others finally legislative interference came in the form of the Madras Nambudiri Act of 1933[187] to save the Nambudiris from total extinction.

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[183] Nilakandan v Madhavan, ILR 10 M, 9.

[184] ILR 38 M, 527.

[185] Nambudiri, Parayil Raman (ed), Nambudirimar (Mal.), Yogakshema Publications, Trichur, 1917.

[186] Bhattathiripad V.T., op.cit.; Bhattathiripad M.R., Marakudakkullile Mahanarakam, Thrissur, 1963.

[187] Madras Nambudiri Act (XXI of 1933), See Appendix No. VIII, p.517.

Marumakkathayam

One of the major aspects of Malabar life, which drew the attention of the Judiciary from the very beginning, was the complications connected to the *marumakkathayam* usages. Even in the absence of any written authority, Judiciary's effort bore fruit in giving effect to a substantial legal guideline for deciding the *marumakkathayam* cases.

Though *marumakkathayam* was practised by different castes and communities of Malabar, in matters connected to inheritance of family properties, it was only in the case of the Nairs that marriage, as a legal social institution did not develop. The almost complete absence of legal marriage in this caste was noticed by the foreign visitors to this country beginning from de-Castinheda[188]. Even in the early years of the twentieth century conditions did not much improve is clear from a judicial statement that "so far as decided cases go, Malabar Law does not recognize marriage as a legal institution"[189].

Regarding marriage, the *marumakkathayam* usage which got legal recognition and applied as Malabar Law in cases was that it was absolutely impossible for a man or woman who followed this system to contract a valid marriage in its ordinary popular signification[190] Justice Moore writing in the early years of the twentieth century

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[188] De-castinheda, op.cit.

[189] Aiyar P. R. Sundara, op.cit., p 197

[190] Moore Lewis, op.cit., p.69.

comments that foreigners who came in later periods were all drawing source from the writings of de-Castinheda who attributed the non-existence of legal marriage to the military life of the Nairs. It was his hypothesis that they might have neither wives nor children on whom to fix their love and attachment and that being free from all family bonds they might the more willingly devote themselves to warlike service. He further stated that a *kalari* - trained Nair soldier's life was completely devoted to defend the Brahamans and to serve the *naduvazhis*. Mr. Warden, Collector of Malabar from 1804 to 1816 too endorsed this view when reported to the Board of Revenue in 1815[191] that in the purely military based rule of the medieval Rajas the profession of arms by birth, subjecting the males of a whole race to military service from the earliest youth to the decline of manhood, was a system of polity utterly incompatible with the existence among them of the marriage state... from which originated their customs of inheritance, through the female line, without reference to the paternal parent, a custom that had afforded matter for much speculative opinion.

The quasi-matrimonial connection or *sambandham* among the *marumakkathayam* Nairs, though had all the elements of a valid marriage, had not been recognized by the Judiciary as legal marriage[192]. The English lawyers were reluctant to recognize Malabar marriages, which denied son's children any privilege, which have no

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[191] Warden's Report op.cit.

[192] Moore Lewis, op.cit., p.69.

meaning as man and wife, and which ties could be easily broken. They rather were ready to believe the falsified versions in works like Kerala Mahatmyam which embody rules laid by Parasurama that while a Brahman wife would be chaste, the women of other castes need not have chastity[193]. It was also a fact that the question as to whether a *marumakkathayam sambandham* had any of the characteristics of a legal marriage had never been in any manner adjudicated on by the High Court, although the legal nature of similar sexual unions among followers of *aliyasantana* system[194] had been discussed in several systems. Perhaps due to the easily terminable nature of the *sambandham* at the will of either party, the law did not take notice of them. In course of time, during such a discussion the judicial observation was that in Malabar there was no legal marriage came like an obiter dictum [195].

When the Rajas' military powers were taken away, definitely the soldierly aspect of Malabar Nair life also might have come to an end, which made them to settle down as cultivating *kanakkars*, confining their interest inside the *tarwad* only. Even then why such issues had not sought Judiciary's help or interference in conjugal matters is a wonder. Mr. Wigram, a judge of considerable Malabar experience, explained the reason for this, that but for the Brahamans, all traces of polyandry would long since have disappeared, and that the Brahmans encouraged concubinage between the younger male

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[193] Aiyar P.R. Sundara, op.cit., p 113

[194] Moore Lewis, op.cit., p.74.

[195] Queen Empress v Basava, ILR M 15, 75.

members of the their family and the Nair women for the purpose of maintaining the impartibility of their estates[196]. The socio-economic submissiveness the Nairs as *kanakkars* had with their Nambudiri *janmi* might be a reason for the non-complaining attitude of the former. And so long as the land continued as the only source of livelihood of the people of the Malabar customary society, such ties could not be easily broken.

Situation began to change when a group of young Nair men who got English education became employees under the English East-India Company and no more had to depend upon their *tarwad*s for maintenance. The élan vital was to come from within and not as imposed from without. The non-recognition of *sambandham* as legal marriage became a disturbing factor to the young men of many of the respectable Nair families especially in North Malabar, where even the European observers had admitted that, for over three hundred years Nair women had been living with the households of their husbands.

Though no decided cases guided to take a positive attitude in this direction, there were judges, English and Indian, who took interest on this issue, and were either for forming a clear idea about this age-old institution or for viewing things sympathetically. While the English Judges were drawn by curiosity about the customs, some of the native judges were restless about its continuation. O.Chandu

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[196] Moore Lewis, op.cit., pp.60-61.

Menon[197], who served for many years in Malabar as District Munsiff, Subjudge and Sessions Judge of South Malabar, when appointed as the member of the Malabar Marriage Commission in 1891 viewed the *sambandham* between a Nair girl and a man of her own caste especially of North Malabar, if not between a Brahman and Nair women as a real marriage, like the Sanskrit *'vivaham'*. His request to the court and society was to look upon *sambandham* as real marriage, and *pudamuri,* as it was called in North Malabar as one of the most solemnly conducted with the bride's and bridegroom's relatives, participating with divine ceremonies.

The educated young man of a Nair family going away from home seeking jobs found it highly inconvenient to take his wife and children with him in the absence of the legality of his marriage. Legislative interference in Nair marriages became a pressing need in the latter half of the nineteenth century. It was in this context that Mr. C. Sankaran Nair, a prominent and working member of the community introduced into the local legislative council a measure for legalizing such marriages[198]. The matter was put to discussion leading to the appointment of the Malabar Marriage Commission with Justice Muthuswami Aiyar, as its President, which submitted its Report in 1894. The recommendations of this Commission came to be included

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[197] The author of the famous Malayalam novel of the nineteenth century, 'Indulekha', in which the hurt feelings of an intelligent and educated Nair youth about the illicit connections which were still prevailing between the Nambudiris and the girls of the Nair caste is graphically portrayed.

[198] Panikkar, T.K.Gopala, op.cit., p. 24

in the Malabar Marriage Act of 1896[199].

The Malabar Marriage Commission had submitted a detailed explanation of the Malabar Marumakkathayam Law in the Report submitted to the Madras Government. After going through the historical details about the Nair customary marriages, the Commission reported that "whether what prevailed in ancient days is not the question. At the time the Malabar Marriage Commission enquires there is a marriage in practice; and if so whether the custom relating thereto are such as would furnish a basis for legislation". The Commission raised the doubt as to why, when all the other castes and communities which observed *marumakkathayam* like Thiyyas, Payyannur Brahamans, Mappilas etc can have legal marriage the Nairs alone could not have it[200]. The Commission evaluated that the existence of a multiplicity of husbands on mutual consent to a single woman etc has no recognized form in *marumakkathayam* castes in Malabar. The Commission opined that if polyandry simply meant an usage which permitted a female to co-habit with plurality of lovers without loss of caste, social degradation or disgrace, then it could be apprehended that the usage was distinctly sanctioned by *marumakkathayam,* and still in prevalence in certain castes like Blacksmiths, Carpenters etc, and in certain localities like Ponnani, Walluvanad etc. After prolonged discussion in which arguments came for and against the usage, the Act was finalized validating

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[199] Malabar Marriage Act, (Madras Act No. IV of 1896), See Appendix No.II, p.421.
[200] Aiyar, P.R.Sundara, op.cit., p 198.

Malabar *sambandhams* as legal by the Madras Legislature.

Though this issue as such was never adjudicated, an interesting incident took place while the Malabar Marriage Commission was holding its sittings from the part of a man of the *marumakkathayam* system. A criminal case was registered before the Palghat Taluk Magistrate on a charge of house breaking by a man in the night in order to commit theft, which later came to the High Court's reconsideration[201]. Though at first was filed as a theft case, on appeal, the Head Assistant Magistrate held that the appellant committed no offence since his intention was not theft but to carry on an intrigue with a woman who was living with the prosecutor who claimed that he had married her through *sambandham*. The Magistrate held that it was impossible for a person bound by the Marumakkathayam Law to contract a legal marriage, and that the intriguer cannot be treated as an offender.

It was Justice Moore who referred the decision of the Magistrate to the High Court, that the latter's decision was one done in haste and not based on true evidence, with the argument that since it had never been held by the Madras High Court in any reported decision that a Nair man and a woman cannot enter into a valid marriage contract[202]. He also pointed out that the High Court had never judicially decided that it is impossible for a Nair to contract a valid marriage and leading members of the Nair community

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[201] ILR 6 M, 374, Appellate Criminal, Section 456 of the Penal Code.

[202] Moore, Lewis, op.cit., p 84.

strenuously deny that such is the case[203]. However, the High Court declined to order any further enquiry in the matter as though conforming to the recognized law in the case, about which Justice Moore regretted that "an opportunity was not taken to arrive at a decision, after full and careful enquiry, as to what the law on this subject actually is"[204].

It was finally on the conclusion reached at by the Malabar Marriage Commission that legislative action was found expedient in the matter. The Commission Report stated that the Nairs, who were practising *sambandham*, are all, or nearly all of them, better than their custom, and the majority cleave to one woman for life. It was Justice Moor's suggestion that for giving legal effect to *sambandham* among the followers of the *marumakkathayam*, the High Court might not refer such falsified compositions like *keralolpathi, kerala mahatmyam, aliya santhana kattu kattalai* etc[205] which project Nambudiri superiority, and only recognize the present state of such dignified marriages like *pudamuri* conducted with the blessings and approval of the *karanavan*. The result of the deliberations of the Malabar Marriage Commission was the passing of the Act of 1896 which was entitled as "an act to provide a form of marriage for persons following the *marumakkathayam* or *aliyasanthana* law", permitting such marriages to

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[203] Ibid., p 85.

[204] Ibid., p 83.

[205] A Canarese Pamphlet by Bhutala Pandya, which is the only available indigenous account of *aliyasantana* law, that is descent in the line of nephews. The work lays down fourteen rules for the castes other than the Brahmanas. Quoted by P.R.Sundara Aiyar, op.cit., p 329.

get registered.

Even after the passing of the Act a change of mentality in the conservative circle of the Nairs was not easily possible. The number of *sambandhams* coming for registration was only namesake and even, diminishing year after year. The absence of permission of the *karanavan*, the delicacy of the young men, Nambudiri involvement etc stood in the way. However, questions as to whether the children born of *sambandham* marriage were liable to be protected by the father came as a legal question. Here a Nair woman's suit for getting maintenance to her child from a *sambandham* marriage was granted by the High Court by rejecting the father's appeal against the decision of the Head Assistant Magistrate[206]. The Head Assistant Magistrate's orders under Section 488 of the Code of Criminal Procedure was that "a child born during the continuance of the *sambandham* must be presumed to be the child of a man who was received and recognized as the husband" making the father liable to maintain the child, thereby recognizing Nair marriages as legal. In Venkata Krishna Pattar v Chimmukutty[207] also the same procedure was followed and the High Court's decree was in favour of the child of a *sambandham* marriage, to be maintained by the father. But the fact that *sambandham* marriage did not get full endorsement from the Nairs themselves is clear in the statement by Justice Sundara Aiyar that even in the early years of twentieth century that it had not become a

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[206] Aiyar Pattar v Kalyani Ammal, Criminal Revision Case No.338 of 1893 (unreported), printed in a note in ILR 22 M, 247.

[207] ILR 22 M, 246, Appellate Criminal, 1899.

legal social institution[208].

Even though at a snail's pace gradually people started realizing the benefit of the new Act. The wife's claim to maintenance in the house of her husband came to be legally recognized in subsequent cases. The Nambudiri hold too began to loosen when a class of radical Brahaman youths began to react against the Nair *sambandhams* of the Nambudiri males, while their own women were victimized to life-long spinsterhood. Social reform movements played vital role in projecting the misfortune of both Nairs and the Nambudiris. However, the uncertain situation continued, till the passing of the Madras Marumakkathayam Act of 1933[209] when legal marriages did not become highly popular among the Nairs especially of South Malabar.

Property Inheritance

Mr.Holloway, who became an eminent judge of the the High Court of Judicature of Madras, took pains in understanding the customs of the people of Malabar and enunciating legal principles on the Malabar Law. The curiosity and sincerity with which he studied every aspect of *marumakkathayam* brought for him the title of the Father of the modern Marumakkathayam Law[210].

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[208] Aiyar, P.R. Sundara, op.cit., 197.

[209] Madras Marumakkathayam Act, (XXII of 1933), See Appendix No.IX, p.529.

[210] Holloway's Judgements, Record Room, District Court, Tellicherry.

The *marumakkathayam,* legally interpreted as a system of family inheritance in which descent was traced through females was an orally kept tradition of long centuries by a large majority of the Malabar folk. Though the tradition was strong the Malabar people were little disturbed about the right and wrong aspect of the system, because their life was revolving round its major identity- that is, the impartible *tarwad* property which promised maintenance to all its members equally. The British idea to keep unaltered the customary laws of the various sections of the Malabar people kept this social institution undisturbed for yet a few more centuries. But the changes introduced by them in the Malabar tenurial relations resulting in the change of life style of *marumakkathayam* Nairs, and the introduction of English education giving the people of this country an opportunity to seek jobs outside their *tarwad* existence, began to affect the family relationships also. The fact that the British Courts prepared a rule of law for dealing with *marumakkathayam* cases helped them to apply the same for practical legal purposes. Soon it was becoming clear that beyond their outward splendour, the members of the *tarwad* were not completely satisfied with the matters going on there.

The central point in the Marumakkathayam Law was the complete recognition of the impartibility of *tarwad* property. The absolute management of the *karanavan* over *tarwad* property, the *anandaravan's* right to maintenance, equal maintenance to male and females, the right to form into *tavazhis,* right to enter into *kanom* transactions with *janmis* etc are a few other inevitable aspects of *marumakkathayam* system.

From the very beginning of the functioning of the Judiciary in Malabar, it was established that no member of a *marumakkathayam tarwad* could claim division of property as a matter of right and every member could resist partition if he did not like it, that is, the unanimous vote of all the members was necessary to effect a partition. The law of impartibility had been laid down by the highest court since 1814[211]. Justice Holloway was a strong advocate of the impartibility concept, but later consented to the idea that unwieldiness owing to numerical increase was a good ground for partition[212]. In the Zilla Decisions, the knowledge of all the members of the *tarwad* was stressed for a valid division of *tarwad* property, and the mutual consent and agreement had full authority to effect a partition of the family estate[213].

A substantial aspect of the *marumakkathayam* system regarding the rights of the members of the *tarwad* is obtained in a judgement connected to the *marumakkathayam* Mappilas of Malabar[214]. It was stated that in *marumakkathayam* not only that succession is traced through females, but the property is indissoluble, so that the members of the family may be said rather to have rights out of the property than rights to the property, that the family, and not the individual, is the social unit. The property acquired by any member of a *tarwad,* if undisposed of in his life time falls into and becomes

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[211] Ambu v Raman Nambiar, A S 28 of 1814, I Sudder Decisions 118.

[212] Korappan Nair v Chennan Nair, 6 MHCR, 411.

[213] Zillah Decisions, Calicut, 1856, 19; Zillah Decisions January 1857.

[214] Kunhammed Haji v Kuttiath Haji, ILR 3 M, 169.

part of the common stock and descends neither to his offspring nor exclusively to those of the *tarwad*.... The individual right of the members of the *tarwad* is so feeble that it is not competent to any one of them to insist on partition. The males take the interest in the *tarwad* property enduring only for their lives and do not pass to their offspring nor are available for the satisfaction of their private debts. Malabar Law as laid down in the judgements of Justice Holloway[215] an authority on Malabar usages, was taken as the basis upon which judgements were passed for a number of years.

The non-partibility of *tarwad* property came to be discussed in several judgements later. In Moideenkutty v Krishnan[216] it was stated that individual members of the *tarwad*, as regards *tarwad* property, have no rights vested in them separate from the *tarwad*, and that they can only sue as regards *tarwad* property in a suit when all the members of the *tarwad* are either joined as plaintiffs or are made parties as defendants to the suit. Members of a *tarwad* can consent to partition. It is a *tarwad* alone, as a body, that can sue, and this only for the *tarwad*, not for the benefit of any individual. The *tarwad* property is not partible at the pleasure of any member, and he cannot maintain a suit to enforce partition because no separate right to partition exists... and even the *karanavan* who manages the *tarwad* property, cannot exceed his lawful authority and waste it, and the *anandaravans* can be vigilant about it.

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[215] Holloway's Judgements, Record Room, District Court, Tellicherry.

[216] ILR 10 M, 322.

From the time of the introduction of the Judiciary, one of the cardinal problems before it was the status to be attributed to a Malabar *karanavan*. It was decided by the High Court in affirmation of the decision of the Provincial Court of Western Division that in cases where the *marumakkathayam* rule of inheritance prevails the property is considered indivisible, the management thereof and a collection of the rents and income are invariably vested in the senior male in whom devolves the responsibility of providing the support and maintenance as far as the funds would admit, of the other branches of the family, especially of the women and children[217]. Mr. Strange, as Special Commissioner on the affairs of Malabar reported on 25th September 1852 that the property is vested in him for the common good of all and indivisible[218].

The courts also recognized the genuine rights of the junior members of the *tarwad* but in conformity with the dignity of the *tarwad*. It was held that if the junior of the family is not properly supported by the head his remedy is clear, but he is not justified in holding the land of the family against the wish of its head[219].

The leading case in the Sudder Court on the subject of the liability of the family for the debt incurred by the *karanavan* was Pangiachan v Charles Fell[220]. Here it was observed that it is on no

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217 Ambu v Raman Nambiar, AS 28 of 1814, I Sudder Decisions, p.118.

218 Strange T.L., 25th September 1852, op.cit.

219 AS 199 of 1855, Holloway's Judgements, Tellicherry.

220 AS 69 of 1884, H C.

occasion customary to call together the whole of the members of the *tarwad* and obtain their sanction to an agreement into which the *karanavan* was about to enter; hence the several members of the *tarwad* were liable for the debt since it was clearly proved that the contract was entered into openly, its circumstances were known, and there was not the least reason to suppose collusion.

In a suit for money due under a mortgage deed executed by a *karanavan,* Mr. Strange laid down the law that all are held to have a common interest in all family possessions. Hence the *anandaravans* had to have a voice with transactions affecting the property in order to prevent the *karanavan* from forwarding his own interest at the expense of theirs, the Sudder Court confirmed it[221]. It had been laid in 1844 that the *tarwad* property was not liable for a debt contracted by the head of a *tarwad* for his own use[222].

According to the Sudder Court Proceedings of 13th February 1854 it was established that the *karanavan* can alienate all movable property, ancestral or self-acquired, at his discretion. But as to immovable property, whether self-acquired or ancestral, he must have the written assent of the chief *anandaravans*[223]. Also that the debtor's estimated share in the family property is not liable for individual debts. Again and again the Sudder Court, and Mr. Holloway as Civil Judge of Tellicherry, reiterated the principle that,

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[221] AS 29 of 1846, Sudder Decisions.

[222] AS 37 of 1844, Sudder Adalat.

[223] Strange T.L., Manual of Hindu Law, 2nd ed., 1863, p.97.

in the absence of evidence to the contrary, a debt contracted by a *karanavan* is presumed to be a family debt.

However, in Kutti Mannadiyar v Payanu Muthan[224], the High Court ruled that there was no such presumption of law and that whatever may be the powers of the *karanavan* in the management of the property of the *tarwad,* it is clear that the *karanavan* cannot, without the consent of the members of his *tarwad,* bind them to pay his private debt. In Kombi Achen v Lakshmi Amma[225], which was a suit brought by the junior members of a family to set aside a sale of family property in execution of a money decree obtained against the *karanavan,* it was observed by the High Court that the assent of the other members of the family must be shown to the particular alienation. A bonafide creditor is protected, if, after due enquiry, he satisfied himself that the money was required by the *karanavan* for a family purpose.

In Parakkal Kondi Menon v Vadakkethil Kunni Penna[226], the High Court held that property assigned by males of a Nair family for the support of their females, is still family property and liable as such to be taken in execution of a judgement against the *karanavan* which was binding on the family.

The Judiciary was never ready to change its stand on the *karanavan's* authority in Malabar *marumakkathayam tarwad.* At the

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[224] ILR 3 M, 288.

[225] ILR 5 M, 201.

[226] II MHCR 41.

same time, most of the litigations registered were those by the *anandaravans* against the dictatorial powers of the *karanavans,* which denied them their genuine privileges. Of all the cases connected to *marumakkathayam,* the largest number came questioning the authority of the *karanavan,* in whose control the younger members of the family, male and female were. Though *marumakkathayam* usage insisted absolute obedience of all to the dictates of the *karanavan,* many of the younger members were becoming restless about this. The intolerance and impatience some of them began to feel against the *karanavan* came out in the form of continuous litigations. But the British courts' stand, throughout, was in favour of keeping the status of the *karanavan* undisturbed.

It was not in the idea of the Judiciary to replace a *karanavan* by another one unless the actions of the latter became detrimental to the interests of the *tarwad.* In one of the early judgements reported, since Law Reporting started[227], that where a *karanavan* was found to have made perpetual grants of certain lands belonging to his *tarwad* for other than family purposes, and to have made demises of certain other lands belonging to his *tarwad* for unusual periods on no justifiable ground was not allowed a sufficient ground for the removal of the *karanavan* so long as his actions do not seriously risk the interests of the family. The courts denounced the recent trends among the *anandaravans* to approach the courts for removal of the *karanavan* and pointed out that like the father of a Hindu family the

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[227] Eravanni Ravivarman v Ittappi Ravivarman v Dhathri Valiyamma, ILR 1 M, 153.

karanavan's situation as the head of the family comes to him by birth..., that benefit seldom accrues to a family or an institution, from removing one man, and putting in another, which may only stir up family quarrels throughout the district, and that those who sue to substitute the *karanavan* are in no way better than the latter as had been pointed out by the lower courts. The question was not merely whether a man is unworthy of his position, for that is not the ground for removing him, but whether the removal will benefit the family.

But in a later Full Bench Decision it was held that a person appointed as *karanavan* of a *tarwad* by an agreement or *karar* of the members of the *tarwad* is liable to be removed for gross misconduct by a suit at the instance of the junior members[228].

The courts consented to the idea of *karanavan* appointing an agent or manager temporarily for looking after the *tarwad* property. But the condition always was there that he could revoke it at his will. It was held that a *karanavan,* who appoints a junior *anandaravan* as his agent to manage part of the *tarwad* property, collect rent and perform such other duties, could on behalf of the *tarwad* revoke this authority at any time and take the management into his hands. In Kunhamed Haji v Kuttiath Haji[229], the High Court made its stand clear that the courts should remove from office a *karanavan* only when a strong case is made out to show his unfitness for the office. It was decreed that the grant of a very improvident lease following on a course of

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[228] Chinddan Nambiar v Kunhiraman, ILR 41 M, 577, FB.

[229] ILR 3 M, 169.

conduct persued for some years, in which the interest of the *tarwad* was persistently disregarded, is sufficient ground for removing a *karanavan* from the management of the *tarwad* property. The court observed that the respect for elders, which is a marked feature of all Hinduism, is nowhere stronger than in Malabar, which made the *karanavan* more powerful than the manager of a Hindu family. And, though he could not alienate the *tarwad* lands, he could lease at rack-rents ordinarily for the term of four years of cultivation and similar *kanoms* etc, but the court also reminded that such transactions should be only in consideration of the benefits of the *tarwad* and according to local usage[230]. Even while deciding against a particular *karanavan*, the court was viewing with regard his high title.

In Kannan Nair v Tenju Nair[231], not only the *karanavan's* right to demand restoration of the property of the *tarwad* in the hands of an *anandaravan* at any time, but it was declared that an *anandaravan* had no right to the value of improvements effected by him in such property on surrender, when such improvements are not made with private funds. It was also in the discretion of the *karanavan* to any lease on any items of property he pleases even while in the possession of the *anandaravan*.

The issue of whether a personal decree against the *karanavan* for a debt incurred by him had been before the court on several occasions. In a Regular Appeal No.37 of 1844 it was decreed that the

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[230] Ibid.

[231] ILR 5 M, 1.

family property was not liable for a debt contracted by the head of the family for his own use. A little later, in Cheriya Moideenkutty v Kunhikalandar[232], this decision was contradicted, that property belonging to a *tarwad* was answerable for debts contracted by a *karanavan,* unless it could be clearly and satisfactorily proved that they were not contracted for the benefit of the *tarwad.* In Kombi Achan v Lakshmi[233] the High Court set aside a sale of a *tarwad* property in execution of a money decree obtained against a *karanavan* of a *tarwad* in South Malabar. The observations were that the *karanavan* is not the agent of the family to make alienations, but must have special authority in each case; that there is no invariable presumption, on whom the burden of proof lies as to the necessity of a loan made to the *karanavan,* that a decree against a person who happens to be the *karanavan* of a Malabar *tarwad* is not necessarily binding on the *tarwad* in the absence of fraud etc.

The court was holding different versions on different occasions on the same issue. In Gopalan Nair v Valiya Thamburatti[234], the issue again came when the junior members of a Malabar *tarwad* sued when their landlord obtained a decree against the *karanavan* and senior *anandaravans* of their *tarwad* for the recovery of certain lands demised on perpetual lease to the *tarwad* on the ground that the tenure was forfeited by the denial of the landlord's title by the *karanavan.* The prayer of the junior members was to set aside the decree and also the

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[232] MSD, 1852, 48.

[233] ILR 5 M, 201.

[234] ILR 7 M, 87.

forfeiture of the tenure which if executed, would lead to the loss of a perpetual tenancy of very valuable lands to the *tarwad*, as well as the removal of the *karanavan* for misconduct, on the argument that the decree against the *karanavan* is not binding on the *tarwad*. But the High Court held that the decree could not be set aside, that it is not shown that the *karanavan* acted on his own, that is not in collusion with the members of the *tarwad*, but in good faith and therefore there is no ground for removing the *karanavan* from his office, and lastly that the leasehold could not be restored because it has been forfeited by the bonafide act of the *karanavan*, who represented the *tarwad* as the manager. The *karanavan* was viewed here in his representative capacity.

The *karanavan* was bound to give maintenance to all the members of the *tarwad* and when it was denied in the proper way the *anandaravan* could sue. But it was insisted by the court that a member of a Malabar *tarwad* living in the *tarwad* house could not bring a suit against the *karanavan* for a monthly allowance in money on the ground that the *karanavan* did not make sufficient provision for his or her maintenance[235].

Though the Judiciary recognized the dominant status of the *karanavan* in the capacity of the manager of the *tarwad* properties, the actual right allowed to him in them was, as in the case of all others, only maintenance right. It was held that the *tarwad* is a family of which the *karanavan* is the manager, and although as a senior member

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[235] Kunhammatha v Kunhikutty, ILR 7 M, 233.

he enjoyed special consideration, he has no higher claim in the enjoyment of the income than any other member of the family[236]. The High Court disapproved the recent practice of awarding one moiety of the net income of the *tarwad* to the *karanavan*, as not authorized by law, and to others only a proportionate share of the other half of the available income. The *karanavan* should be granted the amount needed for the extra-ordinary expenses related to *tarwad*, but only for the benefit of the family; for his own maintenance his right was only equal to others.

At a later stage the court was finding fault with some of its earlier observations, of which, one was about the granting of the complete representative capacity in which the Malabar *karanavan* was placed, which brought problems in connection with the complaints against the *karanavan*. In Ittiachan v Velappan[237] it was critically observed that the customary law of Malabar vesting in the senior male or *karanavan* the management of the family property, an error unfortunately crept into the procedure adopted by the courts of Malabar, and it was considered not only that a *karanavan* might sue alone on behalf of the *tarwad* but that he might be impleaded alone as representing the *tarwad*. The High Court referred the case in Haji v Atharman[238] in which it was held that where a suit was brought against a person who was a *karanavan* of a *tarwad*, but who was not impleaded in that capacity, nor was the debt alleged to be a *tarwad*

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[236] Narayani v Govindan, ILR 7 M, 352.

[237] ILR 8 M, 484.

[238] ILR 7 M, 514.

debt, a sale in execution of a decree would not bind the *tarwad* property. It became the High Court's stand that where the members of a *tarwad* were not parties to the proceedings and had not been represented in the manner prescribed by the Procedure Code, they are not estopped from showing that the debt was not a *tarwad* debt. Here the court was admitting its own mistake, in the changing circumstances and in the changing relations between *karanavan* and *anandaravan,* when the other members were made to suffer for the personal debts of the *karanavan*. Court's recognition of the *karanavan* was only in its representative character.

On some occasions, the court was explaining Malabar Law generally on all issues connected to *marumakkathayam.* In Moideenkutty v Krishnan[239], the case as such being connected to the Civil Procedure Code, an explanation of the Malabar Law is obtained. Malabar Law of *marumakkathayam,* like impartibility of *tarwad* property, *karanavan's* identity, individual member's right in the *tarwad* property and many such things are explained. It was observed that a *karanavan* may sue to be declared *karanavan,* but all the members of the *tarwad* should be parties. The right of a *karanavan* was not separate from the *tarwad.*

In Sankaran v Parvathi[240] again it was decreed that a decree against a *karanavan* and an *anandaravan* of a Malabar *tarwad,* and the resulting execution sale of *tarwad* property, was not binding on the

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[239] ILR 10 M, 322.

[240] ILR 12 M, 434.

tarwad, as the former were not sued in as the representatives of the *tarwad* but in their individual names. But in another suit when it was found that the judgement debt had been contracted for proper *tarwad* purposes by the *karanavan*, it was held that members of the *tarwad* were not entitled to contend that the decree was not binding on them[241]. And in Mathu Amma v Cherukot[242] it was held that where a decree was passed against the *karanavan* of a *tarwad* in his representative capacity, all the members of the *tarwad* must be held to be parties to the suit.

Occasions were abundant amidst judicial argument for discussion on Malabar Law and the various aspects of Malabar social life, whatever the cause of action shown in such cases. A few such observations were made while dealing with a suit brought by one of the members of the *tarwad* to obtain a declaration of his status, that is his proportionate share in the *tarwad* property for valuation for purposes of jurisdiction[243]. It was estimated that according to the *marumakkathayam* usage, no member of a *tarwad* can enforce partition of *tarwad* property at his pleasure, though such partition could be made with consent of all its members. Another observation announced was that the status of a member of a Malabar *tarwad* carries with it four distinct rights, namely (1) a right to be maintained in the *tarwad* house;, (2) a right to sue that the *tarwad* property is not alienated otherwise than in accordance with law;, (3)

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[241] Chathappan v Pydel, ILR 15 M, 403.

[242] ILR 30 M, 215.

[243] Ibrayan Kunhi v Komamootti Koya, ILR 15 M, 501.

a right to become *tarwad karanavan* when he becomes the senior most male member; (4) a right to a share if a partition were made and the *tarwad* broken up by common consent.

Adoption definitely was an issue connected to the *marumakkathayam* system during legal interpretation, as came in the case of the Nambudiri *makkathayam* when the family was in danger of becoming extinct. But while among the Nambudiris adoption to perpetuate the *illom* was a common practice, in the case of the Nairs an adoption was naturally to be done by the *karanavan* on behalf of the *tarwad*. Mr. Justice Holloway spoke about it as "the singular and unheard of process of Nair adoption" and took it as a "ludicrous absurdity of adopting a nephew"[244]. A *karanavan* adopting a stranger without consulting the other members of the *tarwad* came as an issue for the first time at the close of the nineteenth century when the members of a South Malabar *marumakkathayam tarwad* were reduced to two, the *karanavan* and his younger brother[245]. The appeal from the High Court's order on this case later went to the Judicial Committee of the Privy Council[246]. The brothers quarrelled and the *karanavan*, that is the elder one of the two, without the consent of the younger brother, adopted as members of the *tarwad* his son and daughter, and the children of the latter. The younger brother sued for a declaration that the adoptions were invalid and the High Court gave him a

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[244] AS 21 of 1814; AS 183 of 1861, quoted by Moore Lewis, op.cit., p 33.

[245] Payyoth Nanu Menon v Thiruthippalli Raman Menon, ILR 20 M, 51.

[246] Thiruthippalli Raman Menon v Variangattil Palisseri Raman Menon, ILR 24 M, 73 PC.

decree as prayed for. On referring a statement in Strange's Manual of Hindu Law, that "on failure of the sister's progeny, male and female, the head of the family may make adoption"[247], the High Court in this context doubted, it, what might be the inspiration behind such a statement, but found that it might be only an idea which the author might have mentally shaped while dealing with the general question of adoption in *marumakkathayam tarwad*s. The High Court while recognizing the almost mighty status of the *karanavan* as manager of *tarwad* properties was not ready to grant him similar independent authority with reference to adoptions into the family, since the question of which would arise only in the case of a moribund *tarwad* with the only surviving male member.

When the case on High Court's order went on appeal to the Privy Council[248], the Jury, besides affirming the decision of the High Court, made some general statements about the Malabar usages. It was stated that the usages of the Nairs are very peculiar; some of them are so well established as to be judicially noticed without proof. But others of them are still in that stage in which proof of them is required before they can be judicially recognized and enforced. They were ready to agree with the law envisaged in Strange's Manual but as to *karanavan*'s powers to adopt they could find no precedent as to a *karanavan* ever adopting a stranger into the family without consulting the other members of it. The Privy Council opined that there is no

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[247] Strange T.L., Manual of Hindu Law, Second Edition, 1863, Paragraph 403.
[248] ILR 24 M, 73, PC, 1900, op.cit.

sacred book or writing among the Nairs having legal authority, and there is no series of decisions which can be applied to in this case, and the burden of proving the validity of adoption is upon those who assert its validity itself.

As time passed, the Judiciary was objecting to some of the overbearing measures of the *karanavan* too. In Cheriya Kunhammad v Kunhunni[249], a suit by the present *karanavan* against the previous *karanavan* for granting a lease by the latter which was to take effect on the expiry of a prior lease whose term was to expire four years later, and it was found that there was no justification for granting the subsequent lease, four years prior to the expiry of the term of the prior lease. It was held that the subsequent lease was not valid or binding on the succeeding *karanavan,* even though the prior lease expired when the grantor continued to be the *karanavan,* since there was no necessity or justification for the attempt to deal with the property before the expiry of the former term.

With the passage of time, the junior members were growing indignant about the actions of *karanavan;* ill feeling was becoming stronger especially since the *anandaravans* were not allowed to interfere in the income and expenditure accounts of the *tarwad.* In Kozhikot Puthiyakovilakath Manavedan v Sreedevi[250] certain junior members of Malabar *tarwad* sued for the removal of the *karanavathi* on allegations of fraud, misappropriation of family funds in general, and

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[249] ILR 43 M, 715.

[250] ILR 50 M, 431.

for devoting the funds to her particular branch, and prayed that she should render a general account of her management and pay personally whatever sums to be found due to the family. But during the pendancy of the suit, the defendant, the *karanavathi* attained the *sthanom* of another *kovilakom,* and ceased to be the *karanavathi* of the suit *kovilakom,* with which the prayer for her removal became non-existent. It was not for the judgement it self, which came as the dismissal of the suit, but for the detailed emphasis made on the powers and obligations of the *karanavan* during the arguments of the case. Reference to the previous similar cases and decisions was made. In Kunnoth Puthanveetil *tavazhi* v Narayanan[251] it had been held that the *karanavan* is not liable to pay to the *tarwad* any surplus income. In Karunakara Menon v Kuttikrishna Menon[252] it was reminded that the right of the junior members is confined to suing for maintenance, suing cancellation of any transaction entered into by the *karanavan* to the detriment of the family, and to suing for his removal, but not to suing to render accounts of his management.

Some of the *anandaravans* were becoming anxious to know the correct picture of the financial dealings of the *karanavan.* However, for the time being the court was not ready to grant this right to them[253]. From the very beginning it had been made clear in Varanakot

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[251] ILR 18 M, 182, FB.

[252] 1917, 38, IC, 666.

[253] ILR 2 M, 328.

v Varanakot[254] that the *karanavan* is not accountable to any other member of the *tarwad* in respect of the income of it, nor can a suit be maintained for an account of the *tarwad* property in the absence of fraud on his part. Till legislative interference came, the Judiciary's stand was that even when the *anandaravans* call up on the *karanavan* to render accounts, it may not be with a view to recover from the *karanavan* the amount found due, which remedy being directly opposed to the inherent status of the *karanavan*, and is unheard of, ... to hold him liable to render accounts would be to reduce the *karanavan* "to the position of a trustee which he certainly is not"[255]. What the junior members could demand maximum was, on inevitable circumstances, the removal of the *karanavan* when his actions are found harmful to the *tarwad*. It was observed by the High Court that a *karanavan* was not bound to render any account or to pay to the *tarwad* any surplus he might have in his hand, but could utilize it for the benefit of the *tarwad*. If it be proved against him that he had abused this discretion and fraudulently misappropriated the family estate, he must account for that transaction, and if he failed to do this he could be removed[256].

Amidst, there came an interesting case when the *karanavan* of a *tarwad* sued against the other members of the *tarwad* for getting back

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[254] This right was granted to them through the Madras Marumakkathayam Act of 1933. See Appendix No.IX, p.529.

[255] ILR 50 M, 431, op.cit.

[256] Ibid.

the money, he alleged, he had lent for *tarwad* purposes. It was a junior member of the *tarwad,* claiming to be the legatee under the will of the last *karanavan* who instituted the suit, for recovering the debts of the *tarwad* to that deceased *karanavan.* A case which had to be decided under the Limitation Act, it was the argument of the respondent (that is the junior member) that during the life time of that *karanavan* it would have been impossible for him to sue since, as the *karanavan* he was also in the role of the borrower, so that he could not be the plaintiff and defendant in the suit simultaneously. But the court explained the essential side of the contract in this way - that any contract is possible between at least two persons, one in the capacity of the promiser and the other that of the promisee, and expressed the difficulty in understanding the case as laid down on the basis of a contract concluded by a person with himself. The respondent failed to furnish any relevant documents for his claims and suit was dismissed. In the course of the arguments again it was heard that the *karanavan* is the person to sue and be sued, for and against the *tarwad,* which is settled law[257].

The question of *tavazhi,* which definitely takes as the branch of a *tarwad,* in relation to the *tarwad* properties, also came to the court's consideration.

In Narayanan Nambudiri v Theva Amma[258] the question referred to the Full Bench was whether in a decree passed against the

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[257] Ammalu Amma v Narayanan Nair, ILR 51 M, 549.

[258] ILR 51 M, 46, FB.

karanavan of a *tarwad* in his representative capacity, all the members of the *tarwad* must be held to be parties to the suit. It was held that a *karanavan* of a Malabar *tarwad* sued as such represents only the members of the *tarwad* and not the members of the *tavazhi* within that *tarwad* of their *tavazhi* property. It was observed that though according to the peculiar system of Malabar Law members of a *tavazhi* may form a *tarwad,* yet each *tavazhi* is entitled to property separately, and the *tarwad* cannot utilize the properties of the *tavazhi* for its purpose; they are two distinct entities for purposes of owning property. The Full Bench expressed its dissatisfaction for not giving proper effect to this distinction in some of the decisions made by the courts earlier. In a suit against the *tarwad* only, it was held that it would not be right to say that the *tavazhi* also was represented merely because they too belonged to the *tarwad.* A person sued in the capacity of the *karanavan* of the *tarwad,* if held that he is also sued as representing the *tavazhi* is unjust. The earlier decisions that a decree passed against the *karanavan* of a *tarwad* in his representative capacity is applicable to the members of the *tavazhi* were observed as wrong, and overruled in this decision, and the question referred to the Full Bench was answered in the negative.

The Full Bench decision in Vasudevan v Sankaran[259] it was held that a decree against the *karanavan* of a *tarwad* sued as such in a suit which he defended bonafide was binding on all the members of the *tarwad,* that they were so represented and not in any other capacity

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[259] ILR 20 M, 129.

like a separate *tavazhi*. But in Kamalkutty v Ibrayi[260], upon a decree passed against the *karanavan* a senior member and manager it was held that members of the *tarwad* who claimed certain property in their individual right were held to be parties or representatives of parties. And so too, in a case decided in the first decade of the twentieth century[261].

The qualification to become the *karanavan* of a *tarwad* had been clearly laid down in the Marumakkathayam Law from the very beginning. The senior-most male member on the female line becomes the *karanavan*; on the death of the existing *karanavan* the senior-most *anandaravan* becomes the next *karanavan*. In most of the cases connected to *marumakkathayam* this fact was repeatedly stressed as one of the inevitable aspects of the system. In Sankunni Mannadiar v Krishna Mannadiar[262], the question raised was whether a junior *anandaravan* who was acting as co-manager of the deceased *karanavan*, through a decree against the *karanavan* prior to the latter, could become the next *karanavan*, when another *anandaravan* senior to him was alive. When the case went on appeal to the High Court, it was decreed that the right of the senior *anandaravan* in the suit to be the *karanavan* in his turn was neither renounced by him by reason of his allowing his junior to act as co-manager with the deceased *karanavan*, nor negatived by necessary implications by the decree in the former suit, and that on the late *karanavan*'s death he becomes the de jure

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[260] ILR 24 M, 658.

[261] Mariveettil Mathu Amma v Pathram Kunnoth Cherukot, ILR 30 M, 215.

[262] ILR 51 M, 320.

karanavan according to Malabar Law. Further, that when a *karanavan* is removed by a decree, the next senior in age becomes the de jure *karanavan*... without any appointment by the court.

The High Court explained the nature of succession to *karanavanship*: "that the right to the management of the *tarwad* affairs in the case of a *marumakkathayam tarwad* devolves on the seniormost male member according to the Marumakkathayam Law; that there is no need to appoint the next *karanavan* on the removal of the existing *karanavan;* that automatically is the next seniormost male". Even in the third decade of the twentieth century the court was sensationally remarking on the status of the *karanavan,* that *karanavan*ship is a much valued right among members of a *marumakkathayam tarwad* and the seniormost male member is entitled to be the de jure *karanavan* with rights of management; that this right would be lost to the seniormost member when only removed by decree of court or renunciation by act of party or by death. The future rights of the junior members could never be affected through temporary *karars.*

A very important aspect of Malabar *marumakkathayam,* in the handling of which the Judiciary was expected to be vigilant and cautious, was the status and rights of *anandaravan* in the *tarwad* properties. The lionshare of the suits which sought justice through Judiciary were the expressions of dissatisfaction of *anandaravans* against the complications in the individual's right to the indivisible *tarwad* property. It is interesting to see how the courts managed to deal with this problem with their unshakeable stress on the absolute

powers of the *karanavan*, the manager of the *tarwad* property.

Judiciary recognized not only the *karanavan*'s absolute authority over the impartible *tarwad* property as its manager, but the right of every other member to be maintained properly. Regarding maintenance every *anandaravan* had an equal right as that of the *karanavan*. In a suit for money due under a mortgage deed executed by a *karanavan*, Mr. Strange laid down the law that all are held to have a common interest in all family possessions, though the individual share of the member could not be made available for the discharge of personal debts[263]. That the *anandaravans* should have a voice in the transactions affecting the *tarwad* property to prevent the *karanavan* from forwarding his own interest at the expense of theirs got judicial confirmation[264]. In the case of immovable property, whether self-acquired or ancestral, the *karanavan* was expected to get at least the written assent of the chief *anandaravans* for an alienation[265].

Decisions came in abundance defending the cause of the *anandaravans* against the *karanavans*, when the latter were denying the former the deserving justice. In Peru Nair v Ayyappan Nair[266] it was held that though the general rule is that an *anandaravan* can not have separate maintenance, there are exceptions to that rule, in the event

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[263] Sudder Court Proceedings, 13th February 1854.

[264] AS 29 of 1846, Sudder Adalat.

[265] Strange T.L., op.cit., p 97.

[266] ILR 2 M, 282.

of the *karanavan* not allowing the *anandaravan* to live in the *tarwad* house or ill-treats him which compels him to leave the family house. A similar appeal was granted in Parvathi v Chathu Nambiar[267] in the case of a member of a *tarwad* and her children due to a family dispute, living in one of the *tavazhi* houses, claimed for maintenance from the *karanavan,* whose stand was that if she was entitled to maintenance she was bound to live in the *tarwad* house. The High Court's Ruling was that the general rule that the member of the *tarwad* is not entitled to maintenance if she ceases to reside in the family house is not contravened by the recognition of a right to maintenance in a member in residing in one of the several houses which convenience or necessity has it, where affiliated to the original *tarwad* home as places of residence for members of the *tarwad.*

So too the suit by the junior members of a Mappila *marumakkathayam tarwad* for the removal of the *karanavan* who made a very improvident lease of *tarwad* property for ninety-nine years, quite against the Malabar usage was favourably decided. The existing *karanavan* was removed and the *anandaravan,* next in seniority was appointed in his place[268]. The allegations against the *karanavan* were that he had mismanaged the affairs of the *tarwad,* had improperly demised and mortgaged portions of the *tarwad* estate... and had demised one portion of the property for the term of ninety-nine years; that he had unnecessarily contracted debts for the benefit of

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[267] ILR 4 M, 169.

[268] Kunhammad Haji v Kuttiath Haji, ILR 3 M, 169.

his own family and for purposes other that the benefit of the *tarwad;* that he had allowed the government revenue to fall into arrears; that he was by nature of a fickle and unchanging disposition etc. This decision is indicative of the fact that the might of the *karanavan* was recognized by the courts only in his capacity as the largest defender of *tarwad* property, and not as its destroyer. On such occasions *anandaravans* could assert themselves to defend the *tarwad* property. In Chindan Nambiar v Kunhiraman[269] too the junior members' right to defend the *tarwad* property is affirmed by the Full Bench. It was held that a person appointed as *karanavan* of a *tarwad* by an agreement, that is a *karar* of the members of the *tarwad,* is liable to be removed for gross misconduct by a suit at the instance of the junior members.

Even while completely admitting the respectable status of the *karanavan* of a Malabar *tarwad,* the court never allowed such trends to grow in them as to deny the *anandaravan's* right to be maintained, on flimsy grounds. In Theyan Nair v Raghavan Nair[270], it was decreed that a *karanavan* of a Malabar *tarwad* is not justified in excluding an *anandaravan* from participating in the income of the family property on the ground of misbehaviour, or has other property of his own. Here the Judiciary is also keeping awake to the changing trends of the *marumakkathayam tarwads,* in the context of the junior members seeking fortunes beyond the *tarwad* limitations. It was observed that

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[269] ILR 41 M, 577, FB.

[270] ILR 4 M, 171.

the circumstance that the *anandaravan* has other property must not be taken to deprive him of his rights in the joint family property, which would have the effect of turning down the ambitions of a man to enter on a new industry in life, in which case gradually the *anandaravans* would be losing all rights in the *tarwad* property.

Though there existed a type of marriage among the *marumakkathayam* Nairs called *sambandham,* it was not legally recognized by the courts till the Malabar Marriage Act was passed in 1896[271]. However, before the court there was an evidence from a passage from Buchanan's Travel Account of 1800[272] that the practice in North Malabar for females was to reside in the *tarwad* of the male with whom they co-habit as husband and wife. By relying on Buchanan's statement High Court ruled that in North Malabar, the male members of a Nair *tarwad* were by custom entitled to receive from the *karanavan* an allowance for the maintenance of their consorts and children while living in the *tarwad* house. On enquiry through the district judge it became clear to the High Court that such expense "is a proper charge on the revenues of the husband's *tarwad*[273]. Though Judiciary does not alter the laws, some of the decisions implicitly sound that way. Granting such a privilege to the wife and children of a *marumakkathayam* follower Judiciary was recognizing a truth which was non-existent in the then Malabar context, that is, the Malabar context which did not legally validate the *sambandham*

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[271] Madras Act No. IV of 1896. See Appendix No.II, p.421.

[272] Buchanan, Francis, op.cit., p.513.

[273] Parvathi v Kammaran Nair, ILR 6 M, 341.

marriages. It was really revolutionary.

On the maintenance question it became common to the *anandaravans* to approach the courts, as the latter's stand towards this was sympathetic. It was observed that the members of the *tarwad* were entitled to receive maintenance out of the *tarwad* house when there is no room for them in that house, and if the *karanavan* makes an insufficient allowance, the *anandaravans* were entitled to apply to the court to determine what allowance is sufficient, having regard to the circumstances of the family[274]. But on a suit by a woman to recover from the *karanavan* of the *tarwad* separate maintenance of certain sum per mensem, in which appeals and cross appeals came, it was decreed that a member of a Malabar *tarwad* living in the *tarwad* house cannot bring a suit against the *karanavan* for a monthly allowance in money on the ground that the *karanavan* does not make sufficient provision for his or her maintenance. Turner C.J decreed that the only remedies open to the members of the *tarwad* in such cases are to procure supplies on credit for the payment of which the *tarwad* properties would be liable, or to sue for the removal of the *karanavan* on the ground of his neglect of primary duty. While admitting the fact that the maintenance could be only as far as the *tarwad* funds admit, and though did not decree in favour of the *anandaravan*, it was opined that since *tarwad* property is for the joint enjoyment of the members, the *karanavan* is legally bound to provide a suitable maintenance for his *anandaravans* in the *tarwad* house.

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[274] SA 23 of 1882 (unreported), quoted by Wigram, Herbert, Malabar Law and Custom, op.cit., p.40.

In Kalyani v Narayanan[275], the High Court overruled the judgement of the Subordinate Judge that no *karanavan* or any number of *anandaravans* can permanently alienate *tarwad* property against the will of any single member of the family, and stated that if that rule holds good, a single factious *anandaravan* may bring about the ruin of the whole family even when such an alienation is a prudent measure and essential for the good of the family. It was held that the factious or capricious dissent of single *anandaravan* ought not to be allowed to invalidate a sale made in pursuance of the decision of a family conclave, and which was either absolutely necessary or the most reasonable and prudent arrangement for the protection of the other family property.

The question of separate maintenance to the *anandaravans* continued to haunt the Judiciary more strongly with the arrival of the twentieth century. In Kunchi Amma v Ammu Amma[276] the suit for arrears of maintenance was by a lady of a *marumakkathayam* Nair *tarwad* living in a separate house with her husband alleged that due to a personal grudge, proper maintenance was denied to her by her family members. Being defeated in the lower courts she appealed. The High Court, after examining the matter, while recognizing such discord between family members, was not ready to encourage such suits on the mere ground that there is not such complete harmony in the house as to ensure the happiness of the claimant. The point was

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[275] ILR 9 M, 216.

[276] ILR 36 M, 591.

also hinted, that the lady's purpose might be to stay with her husband who might not be in good terms with her family members, separately. It was held that such a junior member of a Malabar *tarwad* leaving the *tarwad* house... is not entitled to separate maintenance if he or she was responsible for the discomfort complained of. The court was not very much interested in harming the *tarwad* set-up in its joint impartible family property capacity.

The legalisation of *sambandham* marriage through the Act IV of 1896 came like a great relief to the *marumakkathayam* followers of Malabar which gave their males the opportunity to form their own families, and the females to become the members of their husbands family. The court, though was at first reluctant to recognize the validity of *sambandham,* once recognized it, was speaking in great encouraging tone, about those living as man and wife in the former's house. Even before the Act was passed, it was decided in a case in North Malabar[277] that wife should be maintained in the husband's *tarwad* and found that such expense is a proper charge on the revenues of the husband's *tarwad.* After the passing of the Act, a suit arose[278] from a *marumakkathayam* wife and her children staying in her husband's house for maintenance for a period of twenty-seven months against the *karanavan* of her *tarwad* in the context of the insufficient means in her husband's family, to give them a comfortable existence. The lower court dismissed the suit on the

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[277] Parvathi v Kammaran Nair, ILR 6 M, 341.

[278] Mathu Amma v Gopalan, ILR 36 M, 593.

argument that it is the duty of the husband to maintain his wife and children etc. The question before the High Court was whether, according to Marumakkathayam Law, a wife living with her husband's house is entitled to maintenance from her *tarwad*. The High Court made a monumental statement in defence of the new status attained by the *marumakkathayam* community through wedlock, and in criticism of those conservatives among them for their indifference to the new situation. It was observed that it is considered honourable that a wife should live with her husband if asked to do so, which is equally honourable to her *tarwad* too, when a husband asks his wife to live with him... but just because she stays in her husband's house she need not make a waiver of her right to maintenance by her *tarwad*. The lower court's attitude that it is disgraceful to the husband, has been criticized by the High Court, since the Marumakkathayam Law permits all members of the *tarwad* being entitled to the benefit of *tarwad* property. In Maradevi v Pammakka[279] a comment on customary law was made that some social customs may change without effecting the legal rights of parties, was applied here.

The in-born claim of a every member of a *tarwad* in the *tarwad* property is emphatically stressed in a similar suit by a married woman and her children for arrears of maintenance against the other members of the *tarwad* which necessitated the court to examine whether the Malabar Marriage Act in any way was a bar to the claims of maintenance for a married woman in her *tarwad*. The *tarwad*

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[279] 22 MLJ, 309.

members got the favourable Ruling from the lower court that since she was maintained in the husband's family, she is not entitled to any claim for maintenance in her *tarwad*. On her appeal, the High Court explained the literal implications of the term 'maintenance' in *marumakkathayam* cases. It was made clear that it is not any concession granted by anybody to anybody else, that "the allowance claimed by an *anandaravan* of a Malabar *tarwad* or by a junior member of a Hindu family is not as a dependant upon the owner of the property but as one who in his own right is entitled to participate in the income... the claim for separate allowance is an index of proprietorship and not founded upon moral or quasi-legal obligations or inability to maintain himself or herself". Cases earlier decided clarifying this point, like Theyan Nair v Raghavan Nair, 1882, ILR 4M 171, Theeyu v Shangunni, 1882, ILR 5M 71, Achuthan Nair v Kunhunni Nair, 1903 13 MLJ 499 etc were referred to. Granting the appeal the High Court stated that the claim by a *tarwad* member is of the character of proprietary right to a share in the income of the *tarwad* property, and that a female member of a *tarwad* is not deprived of such right by reason of her marriage under the provisions of the Malabar Marriage Act (Act IV of 1896).

When the number of legal marriages began to increase in *marumakkathayam* families, the number of litigations for separate maintenance, allowance etc too began to increase. The court too was in the front in encouraging it, though isolated voices of peculiar judges were still arguing for the retention of the old *tarwad* setup. But definitely it was becoming provocative to the conservative

section of the community. In this context arose an appeal from a suit by a male member staying in the wife's *tarwad,* for arrears of *menchilavu* from the *tarwad.* The question before the High Court was whether a male member of a *tarwad* leaving the *tarwad* house solely for the purpose of living with his wife would be entitled to separate maintenance. The earlier rulings established the married female's continued right in her *tarwad* even while staying in her husband's house for maintenance; the court found that there is nothing improper in a husband staying in his wife's house, getting the same privilege, since the male members too have a proprietary interest in the *tarwad* property. To the fear expressed that the success of the male *anandaravan* in this case would mean the disrupting the *tarwad,* the High Court opined that it "comes too late in the day; disintegration commenced long ago".

The question of self-acquisitions by individual member of a *marumakkathayam* family was a rare occurrence in customary Malabar, since the members of the family were almost completely depending on the joint *tarwad* property for maintenance. In the agriculture-based economy of Malabar everybody's interest was revolving round the land, upon the produce of which stood their social tranquillity and status. In the absence of individual nuclear families, desire for self-acquisition of immovable property too was very remote in the *malayalee* mentality. However, there were rare occasions when a member of *marumakkathayam* family was acquiring a property of his own through personal efforts with no connection with family funds. But there did not develop any custom about such acquisitions as to

what would happen to them after the death of the purchaser, till hard and fast rules were introduced by the courts.

To the judicial enquirers, the first evidence to this was the explanation found in the travel accounts of Buchanan[280], which speaks that in a Nair family a man's movable property was on his death divided equally among the sons and daughters of all his sisters. The eldest male of the family managed his landed estate; but each individual had a right to a share of the income. The earliest decision on the subject of self-acquisitions was passed in 1839 in the Provincial Court of Western Division[281]. The court held that no *karanavan* could alienate real property, acquired by himself or otherwise, without first obtaining the consent of his *anandaravan*[282].

While definite rules on the question of self-acquisiton were yet to be laid out, a few decisions came to the effect that a man's self-acquisitions, on demise should go to the nearer heir in preference to the head of the family. In a decision of the Sub-judge of Calicut it was held that according to the law of nepotism, a nephew may be heir to a *karanavan*'s private property, but as regards the *tarwad* property, the eldest member of the *tarwad* is the rightful heir[283]. Basing on this decision, Justice Strange stated that self acquisitions, whether of male or female belong exclusively to the acquirer with

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[280] Buchanan, Francis, op.cit., Vol II, pp.95-96.

[281] Moore Lewis, op.cit., p.174.

[282] SA 27 of 1839, Provincial Court, Western Division.

[283] AS 320 of 1852, Calicut Zillah Decisions, 1853.

absolute rights of disposal, and if undisposed of, on demise, it descends, in the case of males, to their sisters' sons, or nearest *anandaravans,* and in the case of females to their issue, male and female[284].

In Cheriya Kunhi Amad v Poyilil Awoolah[285], it was made clear that it is immaterial in what way land is obtained in Malabar in a family governed by *marumakkathayam,* the rule being that however acquired by a member of the family, it becomes incorporated in the family possessions and is under all the restrictions as to alienations affecting such property. But in 1863 Philips and Holloway J J, laid down that self-acquisitions of land by a member of a *tarwad* are his separate property during his life and may be charged by him for his personal debts. After his death they lapse in to his *tarwad* property, but, if accepted by the members, they carry their obligations with them[286]. This was the first recognition, through the court, of an individual member to dispose of his self-acquisitions.

The law was subsequently more fully laid down by the High Court, with Holloway as one of its judges, in Kallati Kunhu Menon v Palat Erracha Menon[287], the leading case on the subject, by decreeing that it is unquestionably the law of Malabar that all acquisitions of any member of a family, undisposed of at his death, form part of the

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[284] Strange T.L, Manual of Hindu Law, op.cit., Section 397.

[285] SA 88 of 1859, Sudder Court.

[286] SA No.378 of 1863 (unreported), quoted in ILR 4 M, 150.

[287] 2 MHCR, 162.

family property, that they do not go to the nephews of acquirer but fall, as all other property does, to the management of the eldest surviving male. But in the case of the *karanavan,* it was held that a *karanavan* who is in possession of his family funds would be supposed to have made all acquisitions with them, in his representative capacity, for the benefit of the family, and in his case the presumption would be very strong. The court was only giving effect to the *marumakkathayam* usage of viewing the family as an indissoluble unit in which the individual's separate rights did not mean much, though by this time the lower courts started thinking and at times decreeing to the favour of the separate branches of the *tarwad* or *tavazhi* on the rightful successor to the self-acquisitions of the *anandaravans.* The High Court was not giving serious attention to see whether such a custom has any relevance in the Malabar background till very late.

The question of the self-acquisition was gradually becoming a real problem when the *marumakkathayam* ideologies began to undergo changes. In Kanarapanikkar v Rayarappapanikkar[288] when a *karanavan* sued for recovery of lands as *tarwad* property occupied by an *anandaravan* and his mother as *tavazhi* property for more than twelve years, the court held it as adverse possession and the *anandaravan* acquiring an independent title against the *karanavan.* In Rayarappan Nambiar v Kelukurup[289] the Ruling was that, in a family governed by

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[288] ILR 3 M, 212.

[289] ILR 4 M, 150.

Marumakkathayam Law, the self-acquired property of an individual member, though it became *tarwad* property on his death, still remained liable for the debts of the deceased acquirer in the hands of the members of the *tarwad*. The decision was on a case when sued by a person to whom the deceased was indebted upon the members of the *tarwad*, who were then in possession of the self-acquisitions undisposed of at his death.

In Achuthan Nair v Cheriotti Nair[290] the claim of legatee was recognized over that of a *karanavan*. It was a case in which when a member of a *marumakkathayam tarwad* died leaving self-acquired property, the *karanavan* applied for succession certificate, and the legatees under a will of the deceased opposed it. The High Court held that the will was valid, and that the succession certificate, should not be granted to the *karanavan* but to one of the legatees, while the District Judge had earlier decreed for the *karanavan*.

With Judiciary the *tarwad* concept as an inevitable aspect of *marumakkathayam* could not compromise with the idea of self-acquisitions going to the immediate *anandaravans* or *tavazhi*. The decision in Kalladi Kunhu Menon v Erracha Menon[291] had been affirmed by a majority of the Full Bench in Govindan Nair v Sekharan Nair[292] and had been followed in later cases, though it was felt that the law enunciated therein was opposed to the consciousness of the

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[290] ILR 22 M, 9.

[291] 2 MHCR, 162.

[292] ILR 32 M, 351, FB.

people[293] in this case the question put before the Full Bench was whether the separate property of a member of a *tarwad* lapses to the *tarwad* or is inherited by his *tavazhi*. While a section of the judges including the Chief Justice answered that the separate property of a member of a *tarwad* lapses on his death to the *tarwad*, others opined that the separate property of a member of a *tarwad* is inherited by his *tavazhi*, and decreed as was held by the former.

The importance of the case, Govindan Nair v Sekharan Nair[294], was not for its Ruling, but for the monumental observations made by the judges while analysing the issue of self-acquisitions by the members of the *marumakkathayam* families. Its significance was greater in the context of the changed circumstances while more and more members of the *marumakkathayam* families were going out seeking different jobs and with their own personal earnings leading to more self-acquisitions by individual members. After the passing of the Malabar Marriage Act of 1896[295], some of them were on the way of having their own families through legal marriage. Judges were in general agreement about the fact that it is time the meaning of the terms self-acquisitions underwent changes suiting to the present requirements of the *marumakkathayam* peoples. The question was very exhaustively discussed; the earlier judgements were critically examined; expressed doubts on the law laid by Holloway and others;

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[293] Aiyar, Chandrasekhara (ed), Mayne's Treatise on Hindu Law and usage, op.cit., p.977.

[294] ILR 32 M, 351, FB.

[295] Malabar Marriage Act (IV of 1896), See Appendix No.II, p.421.

and some of them upheld the view of Justice Strange[296] that a man's property goes to his sisters, sisters' sons, sisters' daughters, sisters' daughters' sons and daughters, mother, mothers' sisters etc. According to Strange, a man's sons are not in the line of his heirs.

While the English judges still were thinking only in terms of *tarwad*, many of the native judges, who were proficient authorities on Malabar Law like Justices Gopalan Nair, K.R.Krishna Menon, Chandu Menon etc were advocating the *tavazhi*. They gave their printed opinion to the Malabar Marriage Commission in favour of recognizing *tavazhi* in the case of self-acquisition. The Chief Justice Arnold White, though expressed his inability to alter a decision well established long ago was ready to share the sentiments newly developing among the *marumakkathayis*. Abdu Rahim J was arguing for *tarwad*.

In a case decided very soon after this decision came, in the case of a property which came in the possession of an *anandaravan* of a Malabar *tarwad* through acquisition, who was also the manager of a branch of the *tarwad* and was in possession of funds belonging to such branch, but not of the *tarwad*, the presumption would be that such property belongs to the branch[297].

Gradually the court was realizing the importance to be attached

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[296] Justice Strange, the earliest English writer on Marumakkathayam, with a long experience in Malabar as Registrar and Judge and subsequently as Judge of the Sudder Court.

[297] Chathu Nair v Sekharan Nair, ILR 33 M, 250.

to self-acquisitions when possibilities of private funds to individuals began to increase. In Govinda Panikkar v Narayanan Nair[298] the decree was in favour of the recipient of a gift property from her deceased husband, which the former claimed were properties belonged to the latter exclusively. The suit, and later the appeal, by the *tarwad* member was that certain plaint items were *tarwad* properties and the acquisitions by the recipient's husband when he was *karanavan,* were made from *tarwad* funds for the benefit of the *tarwad*. The High Court endorsed the decision of the lower courts and held that no such presumption of law can be raised as to whether properties acquired in the name of a junior member of a *tarwad* belong to him or to his *tarwad*. Any presumption to be raised is one of fact. The High Court observed that what is important is to prove the existence of any family funds at the time of the acquisition which disappeared after the acquisition. The right to dispose of one's private acquisitions while alive came to be recognized.

What happens to the self-acquisitions of a female member of a *marumakkathayam tarwad* if undisposed of during her life time came for the first time before the Full Bench in Krishnan Nair v Damodaran Nair[299]. It was decided that the self-acquisitions of a female member of a *marumakkathayam tarwad* do not lapse on her death to her *tarwad,* but to descend to her *tavazhi,* which would be her issue if she had any, and in the absence of the issue, would be her mother and her

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[298] ILR 36 M, 304.

[299] ILR 38 M, 48, FB.

descendants. The case arose when the other members of the *tarwad* sued to set aside an order which granted a succession certificate to the immediate heirs or the *tavazhi* of the deceased lady, with no children of her own, including her mother, brother, sisters and sisters' children. The lower courts have decided in favour of the *tavazhi*. It was brought to the notice of the Full Bench that in the case of a property acquired by a female, her *tavazhi* means, in case she dies issueless, her mother and her mother's descendants in the female line. So long as there are members of this description in her *tavazhi*, the succession cannot devolve upon the *tarwad*.

During the judicial proceedings of this case, almost every decision, assenting or dissenting, passed earlier on the issue of self-acquisition by a male or female, was put to detailed discussion. The Full Bench found not a single case, in which it had been directly ruled that the self-acquisitions of a female passed to her *tarwad* in preference to her *tavazhi*. Even in the case of males they found it strange to let the more distant relatives succeed to the acquirer's property equally as his closest *tavazhi* relatives. In this context, *tavazhi* came to be defined again. The Full Bench stated that between the male and the female members in a *marumakkathayam tarwad*, the important distinction is that the female is the stock of descent while the male is not. But the females usually acquire property by gifts from husband, father or favourite brother or uncle, and that such property is intended for her and her children. The Full Bench reminded the need for applying at times the principles of justice, equity and good conscience while deciding such cases instead of

expressing helplessness.

Justice Sundara Aiyar[300], who was one of the Full Bench judges in this case, and who had been advocating the cause of the *tavazhi* even earlier, pointed out that several subordinate judges, who were followers of the Marumakkathayam Law, denied the correctness of the dictum in Kallati Kunhu Menon v Palat Erracha Menon. He raised the doubt of, how, if the whole *tarwad* split into *tavazhi* divisions, the property would lapse to the *tarwad* when it is no more there.

The court explained the *tavazhi,* which definitely takes shape as a branch of the *tarwad,* also in connection with a few judgements. The difficult question as to whether when a *tarwad* has for many years been separated into branches, community of property (*mudal sambandham*) as well as community of pollution (*pula sambandham*) still exists between them had been dealt with in Korappan Nair v Chennan Nair[301]. When the case reached on appeal to the High Court Holloway J upheld the immediate lower court's decision that the plaintiffs and defendants though descended from a common stock, no community of interest existed between them or, in other words, that they belonged to different *tavazhi*s possessing a right to the separate enjoyment of property.

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[300] Justice Sundara Aiyar, who was proficient in Malabar Law, contributed substantially through the Malabar Law Journal, towards settling the law, especially in matters like junior member's right to maintanance etc. His 'Treatise on Malabar and Aliyasantana Law', posthumously published, became highly useful to legal practitioners and everybody interested in the customary usages of Malabar and South Canara.

[301] 6 MHCR, 411.

It was held in the judgement that in Malabar, as elsewhere, the inconvenience of the state of affairs has made itself felt and families becoming very numerous have split into various branches. In Govindan Nair v Sekharan Nair[302], *tavazhi* was explained as the name for a group of relations consisting of a man's brothers, sisters and their descendants and would not include his mother and grandmother nor their brothers and sisters and their children, all of whom, however, would belong to the man's *tarwad* which comprises all the decendants of a common female ancestor ranging from the nearest to the most remote.

In the Full Bench decision of Krishnan Nair v Damodaran Nair[303] the *tavazhi* is defined as a woman and her descendants in the female line; that there may be many *tavazhi*s therefore in a *tarwad*. When a female has descendants, they all together form the *tavazhi*, of which she is the root and her property devolves on them as her *tavazhi*. In another case in which the main issue was whether, under the Malabar law, a separate branch of a *tavazhi* can be established consisting of a woman and her children by one husband to the exclusion of her children by another husband, and decided positively[304]. That no doubt the word *tavazhi* might have derived from *tayar* (mother) and *vazhi* (way), and it would naturally include all the descendants of that woman.

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[302] ILR 32 M, 351, FB.

[303] ILR 38 M, 48, FB.

[304] Imbichi Beevi Umma v Eranhipurath Raman Nair, ILR 42 M, 869.

The judgement, going deep into the meaning of *tavazhi*, stated that even though that is the real meaning of *tavazhi*, it has been held that branches of a *tarwad* consisting of persons who have acquired separate property from their father are constituted as *tavazhi* by virtue of the possession of that property. The very fact that the *tavazhi*s are very frequently called *puthravakasam*, *tavazhi*s lead to the inference that they are not merely descendants of one female, but also branches of the family which are benefited by a gift from their father and are thereby constituted as *tavazhi*. Hence the *tavazhi* of a woman could consist of two branches, by two husbands, and each branch might own separate properties obtained from their respective fathers. So too, as there are branches or *tavazhi*s in *tarwad*, so there could be branches within the *tavazhi*, and have in fact become new families. The court quoted the common speech of the people of Malabar as the best evidence of the customary law: "is such a man of your *tarwad*? There is community of purity and impurity between us, but no community of property". Hence though such people have the same root *tarwad*, in the sense the courts of justice take them, and since they stay in separate houses without going back to their *tarwad* house, they could be treated as separate *tavazhi*s. Hence though originally of the same *tarwad*, community of property has ceased to exist between them.

In Haji Peer Muhammad Isac Sait v Kunkan[305] it was explained that a *tavazhi*, like the *tarwad*, is a corporate unit just like the

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[305] AIR 1938 M, 242.

mitakshara joint Hindu family. The members are joined in food, worship and estate, but the property held by them is impartible except with the consent of all the members.

The separate identity of the *tavazhi* is more stressed in Ambu Nair v Utha Amma[306] in which it was held that where the *karanavan* of a *tarwad*, who was the head of his *tavazhi* also acquired properties in the name of the members of his *tavazhi*, and for a long time they were treated as *tavazhi* properties, and several succeeding *karanavan* did not question it, it is not open to a new *karanavan*, after a lapse of many years to reopen the transaction, after all evidence had disappeared. The inference to be drawn from the long and uniform acquiescence by the *tarwad* is that the acquisitions were made for the *tavazhi* and not for the benefit of the *tarwad* as a whole. And it was held that so long as *karanavan's* self-acquisitions are not proved otherwise, that is, that it is not by using the *tavazhi* fund, such acquisitions would be considered as *tavazhi* property[307].

In a judgement connected to Mappila *marumakkathayam* the essentials needed for the formation of a *tavazhi* is again explained. The issue was on a gift of property made by a husband to his wife and children, when she had already children living by a former husband, the court held that the donees do not take the property with the incidents of *tarwad* property, but only as tenants-in-common. The court also stated that a *tavazhi* cannot be constituted by a woman and

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[306] AIR 1938 M, 202.

[307] Chathu Nambiar v Sekharan Nambiar, AIR 1925 M, 430.

some of her children only, they being children of one father, others being excluded... that it is not open to any man by his own act to create a corporate unit not known to law, and enable it to hold property with the incidents confined to such recognized units only; and that a *tavazhi* any more than a *tarwad* cannot be created by act of parties[308]. This decision was in contradiction to an earlier decision connected to Mappila *marumakkathayam* itself when it was held that where the second husband of a Malabar woman gives property to her and his children by her, the presumption is that the grantor intends to benefit only the woman and his children by her, who form a branch *tavazhi*. The children of the woman by her first husband do not take any interest in the properties in the absence of any expression of intention to that effect by the grantor[309].

Regarding the right for separate maintenance to a member of a *tavazhi* came for judicial solution in Naku Amma v Raghava Menon[310]. The High Court decreed that a member of a *tavazhi* has a right to maintenance from *tavazhi* properties... it is immaterial whether he has sufficient private means for maintenance without recourse to *tavazhi* property. A member is entitled to an allowance for maintenance both from the *tavazhi* and *tarwad* properties.

In Damodara Menon v Ramakrishna Aiyar[311], the *tavazhi*'s right

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[308] Moideen Kutty v Ayisa, AIR 1928 M, 870.

[309] Imbichi Beevi Umma v Raman Nair, ILR 42 M, 869.

[310] ILR 38 M, 79.

[311] AIR 1925 M, 624.

to alienate its interest to a third party is admitted in a case in which the three *tavazhis* formed from a *tarwad* for convenient management and enjoyment arose were involved. The *tavazhis* were prohibited from charging the properties with any debts so as to bind the *tarwad.* The decision of the High Court was that this clause does not restrain the *tavazhis* from alienating their rights, in the properties under the arrangement infavour of a third person, ... such restraint would not prevent the *tavazhi* alienating its interest for its debts, as such restraint would be void under section 10 of the Transfer of Property Act.

The *marumakkathayam* system, though a vital aspect of the customary Malabar society at the time of the introduction of the Judiciary, gradually began to lose its glamour and even relevance in a fast changing society. The modern concept of living, which started in Malabar, with the introduction of western education and western ideologies and styles of life, and development of science, paved the way to the growth of individualism, and to the gradual disintegration of the joint family system. Job opportunities outside the *tarwad* limitations became highly relieving to the younger male members of the *tarwads* to have their own individual earnings. When alternative sources of income came, landed property ceased to be a binding force.

Human relations too were undergoing drastic changes; the legalisation of Nair *sambandham* was resulting in the Nair educated youths becoming bold enough to marry girls of their choice and form their own families, and impatient to demand their share of the

property. In many cases the junior members of the *tarwad* started feeling suffocation and humiliation to continue under the arbitrary command of the *karanavan,* and most of the cases in the early years of the twentieth century were those filed against the *karanavan's* authority. At the same time, *karanavan* had his own agony - even his self-acquired properties were under threat of getting merged into the *tarwad* property according to *marumakkathayam* usage, and the courts were finding it difficult to decide otherwise in the absence of specific laws. Whether *karanavan* or *anandaravan,* one's own children were becoming dearer, instead of his sisters' children. However, the Malabar Marriage Act had already proved its incompetence at the operational level. The orthodox section of the society was still not encouraging legal marriage, mainly due to the fear of letting the indivisible *tarwad* property fragmented into so many individual shares.

Day after day it was becoming clear to the political authorities as well as the social reformists that the only solution they could get through the courts was what the existing law could permit. A change to the existing situation could be possible only through the alteration of the existing laws based on usages. The Madras Legislature after a lot of discussion with the judges and the advocates for reform in the *marumakkathayam* community chalked out the guidelines, finally substantiating in the enactment of the Madras Marumakkathayam Act of 1933[312]. The Act was mainly intended to give perfect legal sanction

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[312] Madras Marumakkathayam Act of 1933, (XXII of 1933), See Appendix No.IX, p.529.

to *marumakkathayam sambandham* marriages, to curtail *karanavan's* power in the management of *tarwad* or *tavazhi* properties, to guarantee the partition of *tarwad* property, and to give priority to the acquirer's family regarding the self-acquisitions of individuals for inheritance.

In the context of the new Act problems connected to the partition of the family property came as a crucial issue, especially regarding the shares allowable to the members. In Sreedevi Nethiar v Peruvunni Nair[313] it was held that partition of *tarwad* properties is per capita. Minors cannot set aside a partition, on attaining majority, already reached at among the elders while he was a minor, on the ground that it was stirpital or per capita. A bonafide partition arrangement assented to by all the adult members of the *tarwad* cannot be set aside at the instance of such a member. The suit was one connected to the *tarwad-tavazhi* property - from the original mother, her two daughters equally inherited; while one daughter's share went to her only daughter, the other daughter's share went to her two daughters and their children, and her son on per capita basis. After the death of the only daughter on the other side, the issue was as to how to divide her property, among the surviving *tavazhi* members, whether per stirpes into three equal shares or per capita, giving greater weight to female line. The lower courts decided in different ways leading to the Letters Patent Appeal. The High Court considered the peculiarity in providing maintenance to the members

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[313] ILR 58 M, 36.

of the *tarwad* - that the children of one sister are not given a lower rate of maintenance because they exceed in numbers than the children of another. Hence prima facie, when division takes place, it should be per capita, unless all persons interested agree to another mode of division. The court observed that per capita division in Malabar is prevalent to such an extent that when a female member is in her family way when the partition settlement is being settled, she is allotted another extra share for the children in her womb - the court calling it quite natural, just and proper, decreed in favour of per capita.

Judiciary soon began to give substantial effect to the various clauses in the Madras Marumakkathayam Act while deciding cases pertaining to them. In Kunchi Amma v Meenakshi Amma[314] it was held that under the new law every *tavazhi* in a joint undivided *marumakkathayam* family has an indefeasible right to demand partition of its share in the joint family property, and all the other *tavazhi*s must submit to it whether they like it or not. Section 38 of the Act indicates that so far as a *tavazhi* is concerned its separation from the *tarwad* is effected on its claiming to take its share of the properties of the *tarwad*. Hence such a claim must be deemed to have been made when a notice demanding its share is given, or at least when a suit filed for that purpose. Regarding another section of the Act, that is Section 43 that "not less than two-thirds of the major members of a *tarwad* may, at any time, present a petition to the

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[314] ILR 59 M, 693.

Collector for the registration of the *tarwad* as impartible" the High Court held that they do not believe that its intention was to render the right granted under Section 38 illusory just because of the words in it "at any time". The right of the *tavazhi*s to claim their separate property became a fact.

A similar judgement came in connection with another partition suit in 1939[315] in which it was held that a *tavazhi* is not precluded from filing a suit for partition under Section 38 of the Marumakkathayam Act because there happens to be pending an application for registration of the *tarwad* to which it belonged, as impartible under Section 43 of the Act. The order of the Collector permitting such a registration subsequent to the institution of the suit, was declared null and void, and held that it did not have the effect of defeating the suit for partition. The reason is that the filing of the suit for partition put an end to the right of the other members of the *tarwad* to apply for registration under Section 43. The right of partition already asserted by filing the suit cannot be taken away by subsequent registration as impartible. And it was made clear in Kunhi Lakshmi Amma v Krishna Menon[316] that the fact that a Malabar *tarwad* has been registered as impartible under Section 43 does not ipsofacto render a *tavazhi* within that *tarwad* also impartible.

As *tavazhi* and *tavazhi* rights were legally sanctioned, the liabilities arising therefrom were also viewed. It was held that the

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[315] Madhavi Amma v Nagappan Nair, ILR 1940 M, 1008.

[316] AIR 1939 M, 799.

share of a member who constitutes a *tavazhi* could be attached and sold in execution of a decree[317]. And in Krishnan v Narayanan Nair[318] it was decreed that the share of a member who constitutes a *tavazhi* by himself could be attached and sold in execution of a decree. The fact that subsequent to the attachment the *tarwad* has been registered as impartible does not prevent the decree holder from selling that interest in execution.

The decrees, which came in the years subsequent to the passing of the Madras Marumakkathayam Act, were highly consoling to those who were suffering under the system reaching its extinction point, and craving for such a change, which would guarantee for them the joys of family life, denied to them for so many centuries previous to it.

Other Malabar Castes

Judgements related to the personal laws of the other castes of Malabar were not many. Their comparatively inferior social status, the absence of landed property in their possession, lack of enough education resulting in the insufficiency of proper knowledge regarding legal procedure etc. kept them away from the courts. In the case of Thiyyas, though their general social status was not very influential, some of them gained enough knowledge as to seek legal reddressal on problems connected to their personal laws.

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[317] Subramanya Tirumumpu v Narayana Tirumumpu, AIR 1938 M, 553.

[318] AIR 1938 M, 555.

The Thiyyas of North Malabar as a rule, followed the *marumakkathayam* system of inheritance, and those of South Malabar the *makkathayam*. This gave birth to problems regarding the property inheritance at the family level. In OS No.278 of 1873 the Sub-Judge of Calicut had decided that a Thiyya woman governed by *marumakkathayam* does not forfeit her right to her family property by her having been once married to, but subsequently divorced by, a Thiyya who followed the *makkathayam* rule. The question as to the system of inheritance that should be followed in the case of the issue of parents governed by different systems first came in Chathunni v Sankaran[319], the parties to which were Thiyyas from North Malabar. It was held by the High Court that, where the woman belongs to a Malabar *tarwad* governed by the Marumakkathayam Law, such issues are prima facie entitled to their father's property in accordance with the Makkathayam Law. Special customs of the Thiyyas are noted in Rarichan v Perachi[320] where the judges found that the Thiyyas, though follow *makkathayam*, are not governed by the ordinary Hindu Law in all its incidents that an extraordinary custom found in South Malabar, especially in Calicut Taluk in an undivided Thiyya *tarwad* was that the self-acquired property of one of the members passed on his death to his brother in preference to his widows. Whereas in Imbichi Kandan v Imbichi Pennu[321] it was decreed that on the death of a member of *makkathayam* Thiyya *tarwad* his mother, widow and

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[319] ILR 8 M, 238.

[320] ILR 15 M, 281.

[321] ILR 19 M, 1.

daughter were entitled to succeed to his self-acquisitions, in preference to his father's brothers. In Kunhi Pennu v Chirutha[322] it was held that among the Thiyyas of Calicut governed by the Makkathayam Law, the widow of the deceased owner is a preferential heir to his mother.

Attempts were made by the courts to see whether Hindu Law relating to partibility of property had any application to the Ezhavas and Thiyyas of South and North Malabar. In Raman Menon v Chathunni[323] the High Court accepted the finding of the Sub-Judge of South Malabar, that according to the custom prevailing among the *makkathayam* Thiyyas, as in the case of the *marumakkathayam* caste, compulsory partition could not be effected at the will of one member of the *tarwad*, that there was no presumption that the Hindu rule of partibility of family property applied to the case of *makkathayam* Thiyyas. This version was repeated in a case of the Ezhavas of Palghat in Velu v Chamu[324]. The finding of the District Judge was that partition was prevalent in the Ezhava community and had been judicially noticed since 1872. The High Court observed that even with identical origin the Ezhavas had been long treating themselves as a separate class from the Thiyyas and that they follow the rule of partibility, partition being enforced as a matter of right, and that there is no instance in which it was refused.

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[322] ILR 19 M, 440.

[323] ILR 17 M, 184.

[324] ILR 22 M, 297.

A case arose as to whether in a *marumakkathayam* Thiyya family the daughter of the last male owner of the widow of a nephew, who died before the last full owner of the property, was entitled to succeed. The High Court confirmed the decision of the subordinate judge, and reversed that of the District Munsif who decreed against the daughter. The High Court held that under ordinary Hindu Law, the widow of the nephew would have had no claim and that she had not proved any special customs among South Malabar Thiyyas in support of her contentions[325].

Though the courts could notice slight variations in the customs of the Thiyyas of Malabar based on the *makkathayam* system from the ordinary Hindu Law of the rest of India, its application was accepted whereever found similar. In Kuttiath Kutty v Achuthan[326] it was held that prima facie the ordinary Mitakshara Law applies to the Thiyyas of South Malabar, and the burden of proving a custom opposed to the Hindu Law is on the party alleging such custom. A person who admittedly belongs to the Hindu community and is domiciled in South India is ordinarily governed by Hindu Law.

The uncertainty regarding the actual law to be applied in deciding the cases of the Thiyyas governed by Makkathayam Law continued. In Chekkutty v Chandu Kutty[327] it was held that the *marumakkathayam* Thiyyas are governed by customary law and where

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[325] S.A. 518 of 1901, H C.

[326] AIR 1921 M, 74.

[327] AIR 1927 M, 877.

any question arises, the courts have to see what is the rule of customary law amongst them in that matter. If no prior cases are decided on the point, and in the absence of evidence the rule of Hindu Law must be presumed to be the rule of customary law obtaining amongst the community on that matter. It was further pointed out that no custom of impartibility exists among Thiyya families. The same principle was followed in a subsequent case on the same issue of partibility when the court ordered the plaintiffs to establish first the customary law inheritance governing them to enable the court to decide whether they have proved such a customary law; if not the court would apply to them the ordinary Mitakshara Law[328].

In the case of all those who were Hindus and who were not followers of the *marumakkathayam* system in Malabar the general attitude of the courts was that they belong to the category of those coming under the general Hindu Law. In Kunhi Kutty v Raman[329], a case reported on the Thattans, another *makkathayam* caste of Malabar, it was held that the Thattans are Hindus and therefore the courts have to apply to them the principles of Hindu Law unless and until it is proved that they follow any other customary law. The rule of Hindu law is in favour of partibility, and the court found it reasonable to apply the Hindu Law in the case of the Thattans who were followers of the *makkathayam* system. Partibitlity, being

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[328] AIR 1929 M, 508.

[329] ILR 46 M, 597.

unknown to the *marumakkathayam* system, and an exception to the general law, is the ordinary law of the *makkathayam* caste.

Sthanom

Though the *sthanom* identity of customary Malabar society was one effecting only a minority of the old *naduvazhi* families of *kovilakoms* and a few influential Nair families, there arose disputes on issues connected to *sthanom* properties. The earliest decision of the courts with respect to *sthanoms* was on a suit filed by the senior Rajah of the *kolathiri* family in the early years of the nineteenth century. The suit was to recover the arrears of *malikhana* paid by the British government to his junior who had been recognized as *sthani*... and for his recognition by the members of all the five *kovilakoms* which formed sub divisions of the *kovilakom*. While all the four *kovilakoms* agreed to this, the head of the Chirakkal *kovilakom* resisted it on the ground that their branch is their own sovereign and had been in enjoyment of the *malikhana*. The suit was defeated both at the Provincial and Sudder Courts[330].

Since *sthanom* is a title meant for the life time of the *sthani* alone, an alienation by him of the *sthanom* property was not entertained by the court. In Manavikrama Raja v Subramanyam Pattar[331] the Sudder Court disallowed a permanent lease granted by the fourth Raja of Calicut holding that the tenure of the *sthanom* is

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[330] Moore, Lewis, op.cit., pp.343-344.

[331] S.A. 63 of 1852, Sudder Decisions, 1853, p.216

only a temporary one and that the holder thereof could not be authorized to alienate its revenue. The temporary nature of the *sthanom* property was stressed by Justice Holloway, as Sub Judge of Calicut, that the nature of *sthanom* property according to custom of Malabar is that the present holder has in it a life interest only, and the successor derives no benefit therefrom during the life of the present holder[332].

The court was against any sort of alienation of the *sthani*'s interest beyond his lifetime. In SA 263 of 1860 the Sudder Court refused to recognize a mortgage of the *sthani*'s interest, holding that the previous *sthani* could not hypothecate it beyond his lifetime, as it had to pass with the *sthanom* to his successor. Similarly in 1862 on SA 71 and 72 the High Court endorsed the decision of the Tellicherry Civil Court that a *sthanom* holder had no legal authority to execute a deed which, from its conditions, entailed permanent laws to the *sthanom*.

In Muppil Nair v Ukkuna Menon[333] the judgement of the High Court was that the lands attached to the *sthanom* of the *sthanomdars* in Malabar, unless the contrary be specifically proved in any particular case, is liable to alienation and change, at all events for the payment of the debts incurred for the conservation of the *sthanom*. In this case, an observation was made on the *sthanom* attached to the Zamorin's authority that it has never been decided that the property attached to

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[332] OS 14 of 1855, Zillah Decisions, Calicut Sub Court, July 1856, p.39.

[333] ILR 1 M, 88.

his *sthanom* is not liable for debts incurred for its conservation. In Venkateshwara Aiyar v Sekhara Varma[334] observations were made regarding the power of each *sthanomdar* with reference to the *sthanom* property. It was observed that in the families of Malabar Rajas it was customary to have a number of palaces, to each of which there is attached an establishment with lands for maintaining it, called by the name of a *sthanom*... and that he may alienate the property for the benefit or proper expenses of the *sthanom*.

In Manavikrama v Sundaram Pattar[335] a suit was brought by the successor of a *sthani*, who had alienated on a perpetual lease called *santati brahmaswam* certain land attached to a *sthanom* in a Malabar royal family on the ground that a perpetual lease at a fixed rent was prejudicial to the interest of the *sthanom* and consequently beyond the powers of the *sthanom* holder for the time being to grant. The court, while admitting that such grant may be prejudicial at times, also observed that in this specific case, the recognition of it by no less than eight successive *sthanom* holders is strong evidence upon which the courts might properly find that the grant is not injurious to the estate, and they have so found. And in Ittirarichan Unni v Kunhunni[336] the High Court found nothing wrong in the *sthani* granting a lease permitting the lessee to fell timber on certain lands attached to the *sthanom*, calling it the only way of enjoying the estate granted to him by the *sthani* by the proper way. The judgement was

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[334] ILR 3 M, 384.

[335] ILR 4 M, 148.

[336] ILR 21 M, 144.

one reversing the District Judge's decision to treat the *sthani* as if he was a tenant for life, impeachable for waste on an injunction suit to restrain the lessee from felling and for damages. It was pointed out that the *sthani* has no longer powers than are attributed to him by the judge, and the mere cutting of the trees, which in no way was harmful to the estate, to give his successor the right to complain.

In certain other cases like the Zamorin v Vythi Pattar and Krishna Pattar v Kunju Pattar[337], in the former when the ailing seventy-three year old Zamorin, who died three months later, had granted a large number of leases for a term of twelve years and took a great premium, and a similar action by another ailing Raja of Palghat by granting a *melkanom* with respect to certain lands belonging to a *devaswam* attached to his *sthanom;* in the former, the court decreed that the Zamorin had no authority to grant such leases and that they are not binding on his successor, and in the latter declared the Palghat Raja's action as invalid.

In a suit by the junior members of a *tarwad,* which consisted of three *sthanoms* and three *tavazhis,* to set aside certain alienations made by the *karanavan,* the position of a *sthanom* holder with respect to his reversioners was considered[338]. It was held that the present holder has in the *sthanom* property a life interest and the successor derives no benefit from it during the life of his predecessor, whereas in ordinary *tarwad* property each member of the *tarwad* has a

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[337] S.A. 978 of 1895, H C; S.A. 84 of 1901 H C.

[338] Muhammad v Krishnan, ILR 9 M, 106.

concurrent interest and a joint beneficial enjoyment..., the person that succeeds to a *sthanom* takes the same qualified estate that his predecessor had.

Regarding what steps to be adopted to recover a debt incurred by a previous *sthani* also came to be discussed in a few cases. Such a case came in 1855 when Mr. Holloway was Subordinate Judge of Calicut was whether the debt was to be recovered from the successor to the *sthanom* or from the head of the debtor's family. Here the court expressed the difficulty to determine whether the debt incurred was for the estate or simply a personal debt - unlike the *karanavan* of a *tarwad* who actually represent the *tarwad* members, the *sthani* is only a personal title; hence only a debt incurred for the benefit of the estate by the previous *sthani* alone should fall upon the successor and it is up to the lender to show that it is so[339].

A similar case arose in the case of the senior Raja of Palghat in 1882 when Mr. Wigram was the District Judge of South Malabar, in which the question was whether a Malabar Raja is liable for the simple debts bonafide incurred by his predecessor. The court found in this case only a moral duty and held that the successor if derived no assets, cannot be held responsible for such debts. The case made a general analysis of the *sthanom* title that the position of a senior Raja, or second or third Raja, to succeed to the *sthanom,* comes according to the seniority; that certain lands are set apart for the maintenance of the dignity, and, in addition, he receives a Government *malikhana;*

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[339] Zillah Decisions, Calicut Sub Court, November 1855, p.17.

that he has an absolute right to the income, but cannot alienate the corpus of the estate except under special circumstances; that accumulations made by one Raja, if undisposed of in his life time, do not pass to his successor but to his *edam*[340] in the case of the Palghat family.

What would happen to such property had been earlier explained in Vira Rayan v Valiya Rani[341], that property acquired by *sthanom* holder in the family of the Zamorin Rajas, if not merged by him in the *sthanom* properties or not otherwise disposed of by him in his life time, would become, on his death, the property of the *kovilakom* in which he was born.

In Raja of Palghat v Ramanunni[342] too the *sthanom* in customary Malabar came to be explained. The case arose when a *sthani* transferred his right to the management of a *devaswam* and its properties absolutely to a third party whose successors assumed control and possession of the same. The *sthani*'s successor filed the suit to recover the properties but was barred by the Limitation Act Article 124. However in this connection the succession rules in the case of a *sthanom* were explained, and also how the management of the temples came to the Rajas as trustees as part of the Government policy to divest itself of the direct management of religious institutions. It was also observed that though it is true that, like a

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[340] AS 193 of 1882, District Court, South Malabar.

[341] ILR 3 M, 141.

[342] ILR 41 M, 4.

widow, the *sthanom* holder holds his property for life, the *sthani* is not bound by the same limitations as the widow is. The next in succession is his own heir; on the death of the first *sthani,* the person at the head of the next *sthani* succeeds; and then the first and the other *sthanoms* should be held by the members of the same family.

The *sthani's* right to renewal of a *kanom* deemed before the expiry of the previous one was decided as valid by the court, provided there is no fraud or other circumstance vitiating the transaction[343].

Judgements on *sthanom* properties scarcely affected the general social condition of Malabar since they were issues of a specific minority belonging to the royal class. However, the courts were ready to recognize the identity of the *sthanis* by granting the special privileges attached to their *sthanom* property; at the same time always reminding them of the way their rights to be enjoyed without the right to alienate the property.

Temples

The general superintendence that the Malabar Rajas enjoyed over the temples of their *nadus,* and known as *melkoyima,* ceased to exist once their sovereign power was taken away by the East India Company's Government. But this right the Rajas enjoyed was allowed to fall into abeyance as the British did not care to take over charge of

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[343] Kelu v Imbichi Kunhan, ILR 1937 M, 353.

them. The *devaswam* and its chief offices, the *uraima, samudayam, karaima, shanti* and *pattamali* continued to function. The *uralans,* in whom the ownership of the property of the *devaswa*m was vested, alone could sue and be sued in cases connected to the *devaswam*[344].

In the early years of the nineteenth century through a Regulation[345] the British Government, as the ruling power had decided to take over the overlordship or *melkoyima* of the temples, which would enable it to interfere in the case of disputes or fraudulent practices occurring in temple administration. But in December 1817 itself the then Collector Mr.Vaughan recommended the suspension of the Regulation in Malabar, as all the temples were private endowments[346]. Thereafter the Board of Revenue never attempted to assume control over the temples. Even those temples which came to the management of the Government through escheat were made over to the local Rajas like the Zamorin of Calicut or the Palghat Raja. In 1841 Mr. Conolly as Collector of Malabar recognized the independent nature of the pagodas of Malabar from Government interference. He held the view that they are either the property of some influential family, the ancestors of which either built and endowed them, or those claimed and managed by a body of trustees or hereditary *uralans,* and had always been independent of Government interference, though under patronage and

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[344] Unni Nambiar v Neelakandhan Bhattathiripad ILR 4 M, 141.

[345] The Regulation VII of 1817.

[346] Moore, Lewis, op.cit., p.361.

superintendence of one Raja[347].

A different view was expressed by the judges regarding the *melkoyima* right enjoyed by the Rajas. Justice Holloway interpreted it as the right of the sovereign power possessed over property of which the legal ownership was in others[348], which had ceased to exist. This idea was shared by Justice Wigram in A.S. 501 of 1876 of South Malabar that the *melkoyima* is nothing more than the right of the ruling power to interfere in the administrative disputes of the temples, a right which the British Government virtually assumed when they enacted Regulation VII of 1817. On an application made to Justice Wigram, then District Judge of South Malabar to appoint a person to be *uralan* of a *devaswam* under Section 5 of Act XX of 1863 he held that the District judge is competent to it based on the Act of 1817. But when Act XX of 1863, which vested in him a supposed discretion, was passed, the Collector had long ceased to interfere with the *devaswams*. However, on appeal, the High Court held that as the institution to which the application related had never been controlled by the Board of Revenue under provisions of Regulation VII of 1817, and had never been transferred under Section 4 of Act XX of 1863, the District Judge had no jurisdiction to make an appointment[349].

The question as to whether the *melkoyima* right enjoyed by a

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[347] Collector Conolly's Report to the Board of Revenue, 1841.

[348] AS 118 of 1861, Tellicherry.

[349] Ittunni Panikkar v Irani Nambudiri, ILR 3 M, 401.

Malabar Raja had been converted into an *uraima* right on the introduction of the British rule came before the High Court in Zamorin of Calicut v Krishnan[350]. It was when the existing Zamorin of Calicut, on the ground that his ancestors as rulers of Malabar had held *melkoyima* over the Guruvayoor temple, brought a suit to have it declared that, that he had an *uraima* right over the institution. Though enough speculations were done in this case, the court preferred a safer path by following the decision by the Privy Council in Greedharee Doss v Nandokissore Doss[351] that the only law to be applied in institutions like these is to be found in custom and practice which are to be proved by testimony.

The Government's decision not to act in the sovereign capacity over the temples, subsequent to the loss of sovereignty to the Rajas automatically ending their old *melkoyima* over the temples created problems. The chief enquiry was whether *melkoyima* meant actual sovereignty or just in the capacity of a trustee. When there were existing hereditary *uralans*, the *melkoyima* right of the Rajas being converted to *uraima* was questioned by the former. In Neelakandhan v Padmanabha Ravi Varma[352] such a question arose when the members of a Nambudiri *illom* on whom were vested the *uraima* right in a Malabar *devaswam* sued to get declared that their families were entitled to the exclusive management since 1845 in accordance with the provisions of a deed of compromise with the defendants. The

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[350] R.A. 35 of 1887, H C.

[351] XI Moore's Indian Appeals, 405.

[352] ILR 14 M, 153.

defendants represented the family, which ruled over the tract of the country where the *devaswam* was situated. It was held by the High Court, which was later confirmed on appeal by the Judicial Committee of the Privy Council[353], that the compromise that had been entered into by the *karanavan* of the plaintiff's *illom,* and that the compromise was not vitiated by fraud or the like, and was binding on the plaintiffs. In the case of their claim to exclusive management it was held that it was barred by limitation since both families had been in joint management according to the deed of compromise. The status of the Nambidi family as patrons of the institution, as part of its ancient constitution, and a status, had not ceased on the introduction of the British rule. In this case the different interpretations given at different times by the courts as to the actual meaning of the *melkoyima* right have been referred and discussed.

The *uraima* was the name given to the right enjoyed by the *uralans* who were acting in the capacity of temple managers, and was invariably vested in families and was hereditary, the head of the family in that capacity. Whatever be the origin of the *uraima* right, as time passed, many new trustees were absorbed into the status, the condition observed came to be that the actual possession of a *devaswam* and its properties for more than twelve years conferred on the person a possessory, if not a proprietary, title to the *uraima*. Though the lower courts affirmed the introduction of such new

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[353] ILR 18 M, 1, PC.

uralans with the consent of the majority or whole body[354], in SA 579 of 1881 the High Court held that the act was ultra vires.

Judicial scrutiny came on the other titles connected to the *uraima* right. The *samudayam* was originally the committee of management who managed on behalf of the body of the *uralans*[355], which, when was vested in a single *uralan,* came to be called *samudayi.* At times *samudayi* was appointed from outside as the agent of the *uralans;* but the status of a *samudayi* selected from among the *uralans* was greater. Whatever it is, the courts' early trend was to treat the *samudayi* as a mere agent of the *uralans.* Justice Holloway vehemently attacked the trend of some of the *samudayis* to setup a title independent of the *uralans* as available in the Zillah Decesions of 1856 of the Calicut Sub Court. Similarly in Kunhunni Nambiar v Neelakandhan[356] it was held that the *uralans* are the persons in whom the estate and the property of the temple is vested and the *karaima samudayam* was an agent accountable to the *uralans* and subject to be dismissed by them for misconduct. In Rama Variyar v Krishnan Nambudiri[357] the High Court held that the *samudayi* of a temple is not competent to bring a suit on behalf of the *devaswam.* The proper parties to sue are the *uralans.* These decisions were in contradiction with the decisions on S.A. 105 of 1817 and S.A.367 of 1875 by the

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354 AS 118 of 1861, Holloway's Judgements, Tellicherry; AS 240 of 1880 North Malabar.

355 Moore Lewis, op.cit., p.368.

356 ILR 2 M, 167.

357 ILR 3 M, 270.

High Court recognizing the *samudayi's* right to sue on behalf of the *devaswam* in former days.

In Raman Somayajipad v Kunhikutty Kovilamma[358] the decision was again in a way recognizing the *samudayi's* title. It was held that a hereditary *samudayi* in possession and acting in management of the *devaswam* properties for the statutory period without reference to the *uralans* acquires title by prescription and is entitled to sue in his own name for redemption of a *kanom* of *devaswam* properties. This decision came after once more analysing the origin of the history of *samudayi* and *uralan* and completely dissenting from the former rulings on the same issue.

The view had been repeated in the succeeding verdicts too. In Krishnan Unni Nambiar v Neelakandhan Bhattathiripad[359] the decision was that the ownership of the property of the *devaswam* is vested in the *uralans* who are the proper parties to sue the tenants of the *devaswam* lands. If it is shown that they refused to join as plaintiffs they could be impleaded as defendants.

Regarding the nature of the powers the *uralans* enjoyed in maintaining suit Justice Wigram in A.S. 114 of 1882 of South Malabar held that one *uralan* sufficiently represented the *devaswam,* and different from the case of a *samudayi,* who is merely an agent of the *uralans*. Wigram explains the reason for taking such a view, being the

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[358] 34 MLJ 344.

[359] ILR 4 M, 141.

constant dissensions among *uralans* injurious to both their respectability and to the trust property which they represent. But the High Court's stand in Krishna Pisharadi v Narayana Somayajipad[360] rendered it imperative for every *uralan* to become a party to the suit when suits were brought on behalf of the *devaswam*. About this decision Wigram regretted that such a rule would tend to promote internal dissension and would result in one *uralan* siding with the tenant for the purpose of resisting his co-*uralan*. He also added that if the *uralans* are in future to be treated as legal co-owners of the *devaswam*, it would be necessary that all of them should join in conducting suits on behalf of the *devaswam*.

The disunity among the *uralans* again and again obstructed the smooth solving of the legal problems connected to the temple properties. There were many occasions when certain sections of the *uralans* were planning to approach the courts without consulting the other sections. A few such cases were reported. While it was stressed in Krishnan Unni Nambiar v Neelakandhan Bhattathiripad[361] that those *uralans* who refused to join as plaintiffs could be impleaded as defendants, in Parameswaran v Sankaran[362] when it appeared to the courts that one of two co-*uralans* was not deliberately consulted while suing to recover *devaswam* land and joined as defendant, it was held that the suit was bad for non-joinder of the co-*uralan* as plaintiff. Similar was the decision in Puramathan Somayajipad v

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[360] ILR 3 M, 234.

[361] ILR 4 M, 141.

[362] ILR 14 M, 489.

Sankara Menon[363]. Here in the case of a temple, though managed by three *sabhas*, only two *sabhas* represented in bringing a suit for recovery of temple property by redeeming a *kanom*. The High Court held that the suit was not maintainable in the absence of showing genuine grounds for not including the other *sabha* as plaintiffs. In Savithri Antarjanam v Raman Nambudiri[364] the High Court insisted on the necessity of an *uralan* being asked to join as plaintiff before he was impleaded as defendant, and a suit brought otherwise is unsustainable. The ruling was confirmed in a subsequent suit too. In Cheeru v Narayanan Nambiar[365] the decision was that the rule that the act of majority is valid does not apply to cases where there are only two trustees, as one of them alone cannot constitute a majority - so a mortgage of trust property by one only of the two trustees is invalid even though it was made after consultation and the latter wrongly refused to join the act.

Though the *uralan's* unquestionable right over the management of the *devaswam* properties was granted, the courts made it clear that they have no right to alienate trust property, though they might create subordinate tenures in accordance with local usage. In Erambala Chandu v Coomery Chathu[366] the Sudder Court decided that with the knowledge and consent of each other the *uralans* have the right to mortgage the pagoda lands, if for the benefit of the

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[363] ILR 23 M, 82.

[364] ILR 24 M, 296.

[365] ILR 42 M, 335.

[366] S.A. 10 of 1847, Sudder Decisions.

pagoda. Regarding alienation the Sudder Court made a distinction between public and private *devaswams*. In Chappunni v Ittiachi[367] it was held that by the custom of Malabar, the lands attached to a family pagoda are alienable as any other private possession. But if the *uralans* create mortgages in favour of members of their own families, that circumstance alone is strong presumptive evidence of fraud[368].

The question also arose as to whether the *uralans* could transfer their office and its duties together with the trust property to a stranger. The appeal which finally sought the opinion of the Privy Council was whether the *uralans* of the Tracharmana pagoda could lawfully alienate to the Chirakkal Raja to manage the pagoda[369]. The Privy Council, after carefully examining all the legal points involved in the case with reference to similar decided cases, opined that no authority has been laid before them to establish the proposition that persons holding such a trust are capable of transferring it at their own view, that the *uralans* had no power under the Common Law of India to transfer their *uraima* right to a stranger. In Mannian Nambudiripad v Agnisharman Nambudiripad[370] it was held that the appointment of an agent by two out of three *uralans* without giving due notice to the third *uralan* is invalid. However, this rule was liberalized in the decision of Raman Nambudiri v Uralars of

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[367] R.A. 64 of 1861, Sudder Decisions, 1862, p.90.

[368] Krishna Pisharady v Valiya Raja of Chirakkal Kovilakom, S.A.339 of 188, H C.

[369] VII MHCR, p.210, Quoted by Moore Lewis, op.cit., pp.378-379.

[370] 1914 MWN, 251.

Kanhirangat Devaswam[371], it was held that the rule that the trustee cannot delegate his trusteeship to a stranger is not applicable to a case when all the trustees of a temple consisting of over fifty persons delegate the management to a committee of five of those trustees to facilitate the management. In Sankaran Nambi v Devaki Antarjanam[372] it was declared that a renewal of a *kanom* by one of the trustees without consulting the others is not binding on the *devaswam*.

Private temples were recognized by the courts though they too had to observe the customary usages generally meant for the other temples. In Appu Pattar v Kurumba Amma[373] it was held that the property belonging to a private temple is trust property and cannot be alienated. But the members of the family may unanimously put an end to it if desired, but for which there must be clear proof of a subsequent dedication to the public to sustain a plea that the temple is the public one. It was also laid down that property set apart for the purposes of a temple belonging to a *tarwad* is not *tarwad* property and that *karanavan* cannot dispose of them as if they are *tarwad* properties. The property is trust property, and continue as such till all the members agree to put an end to the private temple. However, in Kelu Achan v Sivarama Pattar[374] it was made clear that when a trust is vested in a *tarwad* the real trustee is the *karanavan,* and the junior

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371 40 LW, 540, 21 MLJ 588.

372 43 MLJ, 572.

373 21 MLJ, 588.

374 AIR 1928 M, 879.

members having no interest in it. They have only a right to succeed to the trusteeship on becoming *karanavan*. For a *tarwad* to restore a trust property, which is lost, the possession to the *tarwad* has to be traced, especially if the public has been using it for long years, and since there is no presumption as to whether a temple in Malabar is private or public.

In Mundancheri Koman v Achuthan Nair[375], the Judicial Committee of the Privy Council passed the opinion on this issue that the decision depends on the inference to be derived from the evidence in the case as to the way in which the temple endowments have been dealt with and the evidence as to the public user of the temples. The meaning of the terms *'uralan'* and *'uraima'* came to be explained again, the former as a guardian or a manager of a temple and the latter as the office of *uralan* to which is attached the superintendence of the affairs of the temple.

The courts were reminding that great care is needed while passing decisions in the case of the properties of the religious and charitable trusts, even if they are private *devaswam*. In Ukanda Variyar v Raman Nambudiri[376] it was held that when the *uralans* of a *devaswam* were four *tarwads* a sale of the *uraima* right by one *tarwad* without the consent of the others was altogether invalid and the vendee could not redeem a *kanom* of *devaswam* land, although the person who exercised the *kanom* was the *karanavan* of the very *tarwad*

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[375] AIR 1934, PC, 230.

[376] I MHCR, 262.

which assumed to sell the *uraima* right. Still the courts also agreed that generally *uraima*ship is an incident of *karanavan*ship, that is in the capacity of the title *karanavan*. Where a *karanavan* ceases to be such, he ceases to be the *uralan* also. The uraimaship goes to his successor who becomes the next karanavan[377]. In Ravivarma Raja v Subramania Pattar[378] it was held that in the case of an alienation of trust property belonging to the private *devaswam* of a *tarwad* by a *karanavan* without the consent of the other members of the *tarwad* must be proved to uphold the transactions. Necessity and good faith are necessary to uphold it.

To be an *uralan* subjection to caste rules and regulations was insisted by the court. In Harihara Aiyar v Ukkandan Nair[379] it was observed that convictions for a criminal offence and absence of re-admission into caste after return from jail disqualifies a Nambudiri to the right of management of *illom* properties. The continuance in caste of a person chosen as an *uralan* of a *devaswam* is essential for his continuing as *uralan*.

Maximum number of cases reported connected to temples and *devaswam* were those pertaining to *uraima* and *uralans'* rights. In Chandu v Rairu[380] it was repeatedly stressed that it is well established rule that all *uralans* are entitled to be consulted before

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[377] 22 MLJ, 126.

[378] 31 MLJ, 733.

[379] AIR 1925 M, 207.

[380] 42 MLJ, 280.

any act of management regarding *devaswam* properties, such as the granting of leases *melcharths* etc. is done. There can be no exception to this rule even when the omission to consult was due to the fact that the *uralan* not consulted possessed interests, which would disqualify him from giving an independent opinion. The court had recognized the rule through the preceeding cases like Ashtamurthi v Raman Menon; Narayanan Nambi v Krishnan Moosad etc.[381], though it was decided in Raru Nair v Neelakandhan Nambudiri[382] that one of the two co-*uralans* alone can sue to redeem a *kanom* without consulting the other *uralan*.

Cases connected to temples and *devaswam* were mostly decided on merit. The British policy was guided by the fact that in the case of the beliefs of the people and their religious institutions the safest approach would be to leave them in the native control itself which would help them to avoid a sentimental calamity from their part.

Mappilas

The Madras Civil Courts Act of 1873, Sec 16 laid down that all questions regarding "succession, inheritance, marriage... or any religious usage or institution shall be decided, in cases where the parties are Muhammadans, by the Muhammadan law or by custom having the force of law, and in cases where no specific rule exists the

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[381] 9 MLJ, 312; 1911(2) MWN 537.

[382] 1920 MWN, 646.

courts shall act according to 'justice, equity and good conscience'[383]. Even before this Act was passed it had been accepted by the Judiciary that in deciding the cases of the Malabar Mappilas justice should be done to the Muhammadan Law and the local customs followed by a section of the Mappilas.

Malabar Law on the Mappilas posed confusion to the British Judiciary as it was the combination of Muhammadan Law, which is the general Muslim Law, and the Marumakkathayam Law, followed locally by the Malabar Mappilas. While Muhammadan Law strictly followed father-right in matters of succession and inheritance, the *marumakkathayam* was based on mother-right, succession through females, and impartibility of *tarwad* property. It was not the twin system of property inheritance which gave confusion to the Judiciary, but the flexible marriage and divorce rules sanctioned by the Muslim personal law, giving rise to a lot of complicated problems on the inheritance side. The not uncommon multiple marriages practised by the Mappilas of Malabar, by both men and women, invited problems pertaining to *tarwad* property, self-acquisitions, dower, gifts etc., and the dispute was as to who could be the actual claimant to inherit such rights in each case. While Islam has definite guidelines for every single aspect of personal life and inheritance to property of a Muslim, though not always just, *marumakkathayam* law could not compromise to the idea of partitioning *tarwad* property. The insistence that any acquisition by a member of the *marumakkathayam*

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[383] The Madras Civil Courts Act (III of 1873)

tarwad would become part of the *tarwad* property after his death created problems in the case of the Mappilas to whom children from legal marriages were dearer than sister's children.

The Mappilas, as an earnest branch of the world Muslims, observed all the tenets of Islam on spiritual side and strictly followed Quranic injunctions[384] in their every day spiritual life; but on secular matters they were ready to adjust to certain personal laws which were quite unIslamic. The courts took care to make the least interference in matters connected to the faith of the Mappilas. But while dealing with the personal laws, they gave weight to that point which was more appealing to justice, equity and good conscience. In *marumakkathayam* Mappila cases *marumakkathayam* usage as local usage also was duly respected by the British courts as was the recognized norm of colonial justice anywhere in the world. At the same time throughout their existence in India, the theme was continuously subjected to legal discussion as to whether the *marumakkathayam* and other regional, local usages are to be replaced by Muhammadan Law. After prolonged discussion it was decided to bring the personal law of the Muslims throughout India on a uniform status which led to the passing of the Shariat Act of 1937[385]. At the same time showing respect to the local usages of the Muslim in various regions, Reform Acts specially applicable to the followers of particular systems were also passed. This was the purpose of the

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[384] Ali, A. Yusuf, The Holy Quran, Text, Translation and Commentary, Delhi, 1934.
[385] The Muslim Personal Law (Shariat) Application Act, 1937 (Act No.XXVI of 1937).

Madras Mappila Marumakkathayam Act of 1939[386] specially applicable to the Malabar Mappilas.

However, in the initial stages, the Judiciary was ready to recognize both the Muhammadan Law, as it was called, and the Marumakkathayam Law, in deciding cases relating to the Mappilas of Malabar.

On the religious side the court made its stand clear from the very beginning, that, as early as 1821, when the Provincial Court of Western Division decided to apply only Islamic Law, that is Muhammadan Law of succession in the case of the management of mosques, whether the followers were following the Muhammadan Law or the Marumakkathayam Law. In Kunhibivi Sheriff v Abdul Aziz[387] the argument by the petitioners that a particular mosque belonged to their *marumakkathayam tarwad* as *janmam* property was not granted. It was held that in the absence of a proved custom, succession must be governed by Muhammadan Law. Wherever custom as an established law did not exist, the court without hesitation was recognizing only the general rules of Islam.

An important aspect of Muhammadan family law which reached for the court's perusal was the giving and accepting of gifts. Especially in connection with marriages, as successors and as loved ones giving gift was commonly practised by the Mappilas. A good

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[386] Mappila Marumakkathayam Act. (XVII of 1939) See Appendix No.X, p.556.
[387] ILR 6 M, 103.

number of such cases came before the court. In Chekkukutti v Ahmed[388], applying Muhammadan Law, it was held that a gift to take effect in an indefinite future time is void under the Muhammadan Law; only such gifts in which the interest of each must be clearly defined, either at the time of making the gift or on delivery are valid. The fact was more emphatically stressed in Kandath Veettil Bava v Musaliar Veettil Pakrukutti[389], that under Muhammadan Law, to constitute a valid gift, possession must pass to the donee - once possession is passed, even if the donor continues to live with the donee, does not invalidate the gift.

When the question of gifts came in cases in which the *marumakkathayam* parties were involved, finding solution became a harder process to the Judiciary. In Muhammadan Law only the self-acquired properties could be given in gift according to the acquirer's will, but in *marumakkathayam* families, even the self-acquisitions of a person merge into the *tarwad* property after the acquirer's death. In a *marumakkathayam* Mappila *tarwad*, a gift given by the husband to his wife and children may lead to the formation of a *tavazhi* including the males, the interest in which also is equal to the *tarwad* property.

How to deal with the gift case of the *marumakkathayam tarwads* was a problem to the Judiciary; the approach of the judges dealing with the issue also played a role; a perfectly justifiable solution

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[388] ILR 10 M, 196.

[389] ILR 30 M, 305.

seemed remote. In Kunhacha Umma v Kutti Mammi Haji[390], the Full Bench decided in contradiction to the Dt. Judge's version that where the donor expressed no intention as to how the properties should be held by the donees, and in the absence of such expression, the presumption is that they should take them as properties acquired by their branch or as the exclusive properties of their own branch with the usual incidents of *tarwad* property, in accordance with the *marumakkathayam* usage, which governed the donees. The argument that no donor would be giving a gift to his wife and children for the enjoyment of all the members of the tarwad did not appeal much to the Full Bench. This attitude was continued in the case Kunhamina v Kunhambi.

In Kunhamina v Kunhambi[391], a deed granted to the female descendants alone was not acceptable to the court. A person governed by Marumakkathayam Law executed a deed of gift in favour of his wife and the three daughters under which they and their female descendants were to enjoy the properties hereditarily, males being excluded. The last surviving daughter made a gift of the properties to her own female descendants, which was objected by the other female members of the line through a suit. Held that the condition excluding the males was invalid; that the wife and daughters did not take as joint tenants so as to vest the whole property in the last survivor and that such properties have the incidents of *tarwad* property. It was made clear that nobody has such

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[390] ILR 16 M, 201, FB.

[391] ILR 32 M, 315.

interest in *tarwad* property which he or she might convey to her descendants; *tarwad* property automatically conveys through the female line from generation to generation; that males could not be excluded from the enjoyment of *tarwad* property; that only the self-acquired property could be given as gift etc.

But in Bivi Umma v Kutty[392] it was decreed that the gift of property, limiting the descent of property to the female line, excluding males and prohibiting partition, belongs to the class of gifts known as *strisothu* or Henumule and the intention of such a gift is that the property should be held by the class of females jointly as *tavazhi* with *marumakkathayam* incidents. Such a gift is valid for the state given as one known to the *marumakkathayam* usage.

Decisions varied from case to case on points where the Judiciary could not reach at a consensus on the legal guideline to be adopted on certain issues. The decision in Muhammad Kunhi v Pakrichi Umma[393] the legal standpoint again changed in holding that the institution of a *strisothu tarwad* is unknown to Marumakkathayam Law. Property cannot be settled on female members to the exclusion of males so as to authorize female members to sell the family property otherwise than for *tarwad* necessity without the consent of males. Only that in the case of *strisothu* property, while the males have equal rights of enjoyment, females alone have the right of management.

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[392] 1910, MWN, 693.

[393] ILR 46 M, 650, FB.

It was becoming expressly clear that in more and more Mappilas of Malabar the urge was to see that their self-acquired properties descend to their own children instead of the entire members of the *tarwad*. In Chakrakannan v Kanhipoker[394] the question before the Full Bench was whether a gift given by a Muhammadan to his *marumakkathayam* wife with the clear wording in the gift deed that the donees were to hold the property "in the same way as I was holding them" with the meaning that the donees took them in absolute interest which involves the right to alienation also. The Full Bench, though agreed with the finding of the Division Bench that the presumption is in favour of an absolute gift to the wife and children, stated that the same would substantiate, if only they live as a separate *tavazhi*, but since they live in the *tarwad* itself, the donees are intended to take the property with the incidents of *tarwad* property. The principle laid down by the Privy Council that "the law governing the parties is one of the circumstances to be taken into consideration in ascertaining the intention of the donor" was upheld. It was held that the property could be conserved only if it was held with the incidents of *tarwad* property. Though not ready to deviate from the established law, the Full Bench was reaching at logical conclusions suiting to the changed circumstances in such matters as appealing to justice, equity and good conscience. The hope came to be expressed that "if any change is to be made it should be made by the legislature".

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[394] ILR 39 M, 317, FB.

However, this presumption was again changed when it was held in Imbichi Beevi Umma v Raman Nair[395] that where the second husband of a Malabar woman gives property to her and his children by her the presumption is that the grantor intends to benefit only the woman and his children by her who form a branch *tavazhi*. The children of the woman by her first husband do not take any interest in the properties in the absence of any expression of intention to that effect by the grantor.

In Pathumma v Abdulla Haji[396] a contrary stand is seen when it was decided that a gift of property to a woman governed by Marumakkathayam Law and her children does not of itself constitute the mother and her children a separate *tarwad*. But they take such property with the incidents of *tarwad* property. On the death of the mother it does not pass to her heirs under the Muhammadan Law.

In the case of gifts made to parties belonging to *marumakkathayam*, the judges were deciding according to the clues appealing most to them. In the case of such a gift made by a husband to his *marumakkathayam* following wife and children, while she had already children from her former husband, it was held that the donees do not take the property with the incidents of *tarwad* property but only as tenants in common, that is each having specific absolute rights. That a *tavazhi* cannot be constituted by a woman and some of her children only, they being children of one father, others being

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[395] ILR 42 M, 869.

[396] ILR 31 M, 228.

excluded, and such a group of members is not a recognized group in Malabar law entitled to hold property with the special incidents of *tarwad* property. It is not open to any man by his own act to create a corporate unit not known to law; and enable it to hold property with the incidents conferred to such recognized units only. A *tavazhi* any more than a *tarwad* cannot be created by act of parties[397].

What happens to a gift when complete transfer of possession is done through the gift deed in Marumakkathayam Law is interpreted in Kunhammad v Cheria Mammad[398]. A Muhammadan of North Malabar executed a gift deed to his daughter with the terms that "except you and your offspring (*santanam*) there is no claim, concern or right of entry for me over the *paramba....*; you shall hold the said *paramba* in possession and enjoy the same as your *janmam*". It was held that the property became *putravakasam* property belonging to the donee's *tavazhi*, and not the absolute estate of the donee. And in Abdulla v Chekkutti[399], it was stressed that if properties are gifted in *puthravakasam* to certain members of a *tarwad* the senior amongst the grantees has the right of management of such properties though the grantees and their descendants do not become a *tarwad*.

Marriage as a recognized social institution in Islam was given full legal effect since the introduction of the Judiciary. And Muhammadan Law was applied to litigations connected to marriage

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[397] Moideen Kutty v Ayissa, ILR 51 M, 514.

[398] 47 MLJ 679.

[399] ILR 34 M, 245.

even in the case of the *marumakkathayam* Mappilas of Malabar. The Muhammadan Law that every Muhammadan of sound mind, who has attained puberty, may enter into a contract of marriage was recognized[400]. A girl when married passes over to her husband's family and there is no obligation on the members of her natural family to maintain her after her marriage even if she is divorced. But a girl under the *marumakkathayam* system stayed in her parental house with her husband even after marriage, unless the husband provides her a separate house. In Bappan v Makki[401] the practice is found of the junior members of Mappila *tarwads* entitled to maintenance from the *tarwad* when living in the wife's house and to a higher rate of maintenance if living with their consorts separately.

An issue connected to marriage which came for legal reddressal was what might happen to the gift made to the husband by the girl's family. It was held that in the absence of any usage among Mappilas governed by Muhammadan Law, such a gift does not become void, and does not revert to the members of her natural family, when the girl dies or is divorced[402]. But in the case of those governed by Marumakkathayam Law the rule is otherwise[403]. In SA 1810 of 1916 too it is stressed that in the case of a *marumakkathayam* girl the *strisothu* or *stridhana* from the wife's house is also a gift to maintain

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[400] Hassan Kutty v Jainaba, ILR 52 M, 39.

[401] ILR 6 M, 259.

[402] Mariyam v Abdulla, S.A. No. 1746 of 1895 (unreported), quoted in ILR 36 M, 385.

[403] Pakrichi v Kunhacha, ILR 36 M, 385.

her. The gift ordinarily reverts to the family, though not invariably, on the death of the wife without issue or on divorce[404]. The husband has no duty to maintain his wife if she lives away from him.

To consider gifted property as part of *tarwad* property was creating dilemma to the Judiciary. In the closing years of the third decade of the twentieth century, in a Judgement it was laid that a father who is governed by the Malabar Law is entitled to make a gift of his property to anyone he likes. If it is given by him absolutely to anyone, nobody is entitled to claim it for the benefit of the family.

The requirements of a gift of immovable property under the Muhammadan Law are: a) declaration by the donor; b) acceptance by the donee, delivery of possession by the donor to the donee. Where the execution of the gift deed by the donor was followed by delivery of possession to the donee, the gift would be valid[405].

On the inheritance side, the Judiciary was constantly confronted with the question of the self-acquisitions of the Mappilas. The question more often had been, as to who might be the heirs to the self-acquired property of a Muhammadan in North Malabar, whether those who would be entitled to succeed under the Marumakkathayam Law, that is his *tarwad*, or his heirs under the Muhammadan Law[406]. An early decision, reported, recognized that among those who prefer

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[404] S.A. 1810 of 1916.

[405] Hedaya, 482, Baillie 520-522 quoted in AIR 1933 M, 86.

[406] Aiyar, P.R.Sundara, op.cit., p.232.

to follow Marumakkathayam Law the practice frequently prevails of treating the self acquisitions of a man as discernible to his wife and children under Muhammadan Law[407].

The propriety of two distinct laws of inheritance, the *marumakkathayam* as the rule governing the descent of *tarwad* property and the *makkathayam* rule governing the self-acquisition (SA 269 of 1855) came to be questioned in courts and AS 110 of 186 (Tellicherry) Mn.Holloway decided against the validity of what he termed "a piebald system of descent"[408]. And when it went before the Privy Council in 1871 it was found that it was not sufficiently established[409]. The Privy Council's observation was that when it is admitted that the family is governed by Marumakkathayam Law as regards *tarwad* property, the presumption is that the self-acquisition of the individual members descends according to that law. All classes of property, whether ancestral or self-acquired, follow one rule of devolution. The Muhammadan Law makes no distinction between ancestral and self-acquired property, and recognizes no principle of difference in the matter of lineal and collateral succession as is the case under the *mitakshara* which divides inheritance into "unobstructed and obstructed heritage". If custom governs succession to the ancestral estate, the presumption is that it attaches also to the personal acquisition... and it is up to the person or party

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[407] A.S. 124 of 1851, Zillah Decisions Tellicherry Civil Court, December 1851, 9.

[408] Moore, Lewis, op.cit., p.325.

[409] Ibid., p.326.

claiming it to prove a line of devolution different from the customary one[410].

In Chathunni v Sankaran[411] it was ordered that it is up to the person concerned to elect whether he would be bound by the one or the other system in respect of his self acquisitions. The legal base to be adopted on this issue again and again haunted the Judiciary. On an appeal against the court of first instance's order that in *marumakkathayam* Mappila families the self-acquired property of a female descends to her children and does not lapse on her death to her tarwad, the High Court ordered that no custom in North Malabar was proved in the case according to which devolution of self-acquired property was said to be governed by the ordinary Muhammadan Law. The legal point remained unanswered when the High Court ordered the lower court to make more observations on it.

In deciding cases connected to self-acquisitions Judiciary considered more the law followed by the deceased one even if his father followed one system of family law and mother the other one. The Judiciary started having the notion that it is irrational to bar the legal heirs from succeeding to the self-acquired properties of their father in compliance with the Muhammadan Law, even while sharing in the impartible *marumakkathayam* property of their mother. In Assan v Pathumma[412] it was laid that in North Malabar, if a deceased person

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[410] Muntaza Hazimkhan v Muhammad Hazim Alikhan, ILR 38, Allahabad, 552.
[411] ILR 8 M, 238.
[412] ILR 22 M, 494.

was admittedly governed by the Muhammadan Law, "the presumption would be that the law governing the devolution of his estates would be the Muhammadan Law, not withstanding that the deceased was, through his mother, interested in *tarwad* property". That the Muhammadan Law must be taken to govern the devolution of separate and exclusive property of a Mappila notwithstanding that he is a member of a *tarwad* owning property subject to Marumakkathayam Law, except when it is shown that the Marumakkathayam Law has, even in regard to separate and exclusive property of such a person, been superseded by rules established by usage or otherwise.

At the same time Judiciary reminded that this rule should not be understood as laying down that in every case between Muhammadans in North Malabar, even when they are members of a *marumakkathayam tarwad,* the devolution of property is governed by the Muhammadan Law until the contrary is shown. Where the deceased has followed the Marumakkathayam Law his self-acquired property passes on his death to his *tarwad*[413].

The dilemma of deciding cases on self-acquisitions was finally solved through the passing of the Mappila Succession Act of 1918[414] which stated, that the properties of those dying intestate should, not withstanding any custom to the contrary, devolve upon his heirs in the order and according to the rules of Muhammadan Law. It was

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[413] Kunhimbi Umma v Kandy Moitheen, ILR 27 M, 77.

[414] Mappila Succession Act (Act I of 1918), See Appendix No.V, p.463.

also made clear that the Bill would apply only to the ordinary properties of a Muhammadan and would not apply to the *tarwad* properties, succession to which would continue in the customary way.

The Muhammadan Law of guardianship in the case of minor children is clearly explained in the Quran: "when the donee is a minor, or insane, the right to take possession for him belongs to his guardian, who is first his father, then his father's executor, then his grandfather, then his executor[415]. If there be none of these, possession may be taken for the minor by any person under whose power he may happen to be"[416]. Quranic version does not grant guardianship to mother. Under Muhammadan Law, any person who has attained puberty is entitled to act in all matters affecting his or her status or his or her property. Until then the court has power to appoint a guardian of his person or property or both under the Guardians and Wards Act VIII of 1890[417].

In the case of guardianship of minor children the Muhammadan Law that the mother is not the legal guardian of the property of her minor children so as to subject the property of the latter to sale or

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[415] The law in the Hedaya permits a person who is in actual charge of the property and person of the minor only to do acts which are of imperative necessity, having regard to the wants of the infant and acts which by their nature were necessarily advantageous to the infant.

[416] S. 36 Baillie 539, Hedaya 484, quoted by Hidayatullah and Arshad Hidayatullah, Mulla's Mohammadan Law, op.cit., p.125.

[417] Ibid., p.299.

alienation was accepted in Fathima Beevi v Vittil Ummachabi[418]. Overruling the lower court's decision, it was held that if she did so the same cannot bind the children, unlike the Hindu Law in which co-parcenership is a fact. As to guardianship, the Courts of Law recognized the Muhammadan Law in which the mother, the widow of the father, is not the legal guardian of the property of her minor children and could not do any act relating to their property so as to bind them.

In another emphatic decision the court not only confirmed the decision in Fathimabi v Vittil Ummachabi, but also explained the grounds upon which such alienation of immovable property of a minor by a legal guardian could do, such as (1) where he can obtain double its value, (2) when the minor has no other property and the sale is necessary for his maintenance, (3) where there are debts of the deceased and no other means of paying them, (4) where there are legacies to be paid and no other means of paying them, (5) where the expenses exceed the income of the property, (6) where the property is falling into decay, (7) where the property has been usurped and the guardian has reason to fear that there is no chance of fair restitution[419].

It was held in Aydermankutti v Syed Ali[420] that under the Muhammadan Law, the general rule is that the dealings of a defacto

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[418] ILR 26 M, 734.

[419] Thottoli Kottilan Aliyumma v Kunhammad, ILR 34 M, 527.

[420] ILR 37 M, 43.

guardian of a minor with the minor's properties do not ipso facto bind the minor. The rule is, however, subject to exception. In this case a sale by a mother of the minor's property for finding money for the marriage expenses of the minor's sister or for the discharge of family debts and for other family purposes was decreed as not binding on the minor.

The courts found it difficult to suggest any alterations in the existing laws about guardianship. Though the matter had been referred to the Privy Council, no clear-cut answer came except that unless it is for the benefit of the minor such alienation is illegal. Defacto guardian, even if it is mother, is to have only the custody and the upbringing of the minor, but has no right to sell the property of the minor unless for the benefit of the minor, and which is the law the Hedaya lays in this regard[421]. A defacto guardian is neither the legal guardian nor one appointed by the court, but one voluntarily acting in the capacity as merely a custodian of the person and property of the minor[422].

A very important aspect of the *marumakkathayam* system is the impartibility of the *tarwad* property and the dominant position enjoyed by the eldest male member on the female side acting as the manager of the joint property with the title the *karanavan*. Though the Muhammadan Law does not recognize a joint family as a legal entity,

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[421] Hedaya - Hamilton's translation - Grady's edition, Vol IV, Ch. VII, Para 699, quoted in ILR 37 M, 514.

[422] Kunhibi v Kaliani Amma, 1939, 2 MLJ, 463.

the Mappila *marumakkathayam* families too, like the Hindus, had joint *tarwad* property, which was recognized as a custom to be retained by the Judiciary[423].

The great bulk of the land of North Malabar were in the hands of immense number of *tarwads*, Hindu and Mappila, with the rule of impartibility and with very large powers of management vested in the *karanavan*, who was expected to do everything for the benefit of the *tarwad*. The court fully recognized the fact is proved in a judgement from a *marumakkathayam* family in North Malabar in which the *karanavan* claimed the amount awarded under the Land Acquisition Act. The Full Bench decision was that under section 33 of the Land Acquisition Act 1894 a "person having no power to alienate" has no application to *karanavan* since the *tarwad* as a body has right to alienate and the *karanavan* receives the money on behalf of all the members of the *tarwad* and for their benefit. So the *karanavan* is entitled to be paid the amount awarded under the Land Acquisition Act[424].

While dealing with the cases of Mappila *marumakkathayam* Judiciary was viewing and judging things as exactly was following in the case of *marumakkathayam* Hindus. All the factors recognized in Hindu *marumakkathayam* were applied in the case of Mappila *marumakkathayam* too.

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[423] Kunhi v Kunhi, ILR 19 M, 176.

[424] Abdu Rahiman Kutti Haji v Hussain Kunhi Haji, ILR 42 M, 761.

In another interesting case the members of a Mappila *marumakkathayam* family, though were all the male members engaged in trade from generation to generation, the court was not ready to consent to the idea that the other members of the *tarwad* are bound by the liabilities incurred by the *karanavan* connected with the trade. It was held that trade is not one of the ordinary pursuits of a Malabar *tarwad* and carrying on trade is not within the ordinary scope of authority of a Malabar *karanavan,* that the rule applies even in the case of the Mappila *tarwads* where all the male members habitually follow trade as their ordinary avocation. Beyond the *karanavan's* title as the manager of *tarwad* properties the fact that trade had been accepted as their habitual profession by all the members of the *tarwad* was the qualification to consider it as their *tarwad* occupation, but only as personally conducted by each with all its liabilities falling on each one, whether profit or loss. The legal point involved in the question of whether the *karanavan* of a Malabar *tarwad* is entitled to carry on a trade on behalf of the *tarwad* was put to detailed discussion. However, the court could not notice a single such instance among the *marumakkathayam* Mappilas to treat it as a hereditary family profession. At the same time many such trading families like the Chettis, in the Madras presidency, Marvadis etc. were identified as trading castes to whom trading was a *kulachara* with liabilities on the family for profit or loss; but for personal business even among them the liability was to the person itself. It was opined that "a Malabar *karanavan* conducting a trade on behalf of

the *tarwad* is a rare exception"[425].

Personal allegation against the *karanavan* such as that the *karanavan* increased debts, alienated *tarwad* property, allowed government revenue to fall into arrears, failed to conduct suit with diligence, was of a fickle and changing disposition etc. were held insufficient to remove him from *karanavan*ship[426]. And so too, such allegations in the name of separate maintenance by members of the *tarwad* were not entertained by the court though it was insisted that it was upto the *karanavan* to give attention to the requirements of the members living out of the *tarwad* house. The High Court found fault with the Ruling of the lower court in Kunhalikutty Haji v Kunhimayan[427] that "*karanavan* personally and as *karanavan* of his *tarwad* to pay" is equal to giving the junior members the right to arrest him if he did not pay forthwith. It was held that any action of the *karanavan* which the junior members could question is only as *karanavan;* personally he is like any other member of the *tarwad* with no obligation to them. Even in the third decade of the twentieth century, the Judiciary was not ready to curtail the *karanavan's* powers very much. Their stand still was that the Malabar family opeaks through its head, the *karanavan,* and in courts of justice, except in antagonism to that head, can speak in no other way[428].

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[425] Ibid.

[426] Kunhamad Haji v Kuttiath Haji, ILR 3 M, 169.

[427] ILR 46 M, 567.

[428] Soopi v Mariyumma, ILR 43 M, 393.

A number of cases pertaining to *marumakkathayam* properties came before the courts in the case of the Mappilas as in the case of the Hindus. In settling them the Muhammadan Law was never applied, but only the *marumakkathayam* law. In Kunhalikutty Ali v Muhammad Haji[429] it was held that granting a *kuzhikanom* lease for a term of twelve years is in the powers of the *karanavan*. Unless exceptional circumstances exist the junior members cannot sue to set it aside: Mere allegation of fraud, detriment to *tarwad* etc. are not sufficient ground for so doing; only gross betrayal of the *tarwad* would lead to the removal of a *karanavan*.

There were a number of cases in Mappila *marumakkathayam* too and decided exactly in the same way as was done in the case of the Hindu *marumakkathayam,* definitely giving due weight to the legal marriage aspect of Mappila *marumakkathayam*. The problem arose only when children from multiple marriages of the Mappilas raised questions of inheritance. The Marumakkathayam Law of inheritance is explained in many of the judgements of the Mappilas[430] as is done in the case of the Hindus, in a highly convincing way.

A very substantial definition of the *marumakkathayam* system and rights of the members of the tarwad is obtained in a judgement connected to Mappila *marumakkathayam*[431]. It is stated that in

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[429] ILR 54 M, 239.

[430] Kunhammad Haji v Kittiath Haji, ILR 3 M, 169; Haji Peer Muhammad Isac Sait v Kunkan, AIR 1938 M, 242.

[431] Ibid., ILR 3 M, 169.

marumakkathayam not only that succession is traced through females, but the property is indissoluble, so that the members of the family may be said rather to have rights out of the property than rights to the property; that the family, and not the individual is the social unit. The property acquired by any member of a *tarwad*, if undisposed of in his lifetime falls into and becomes part of the common stock and descends neither to his offspring, nor exclusively to those of the *tarwad* with whom by birth the acquiring member was most closely connected. The individual right of the members of the *tarwad* is so feeble that it is not competent to anyone of them to insist on partition. The males take interest in the *tarwad* property which endure only for their lives and do not pass to their offspring, nor are available for the satisfaction of their private debts. Malabar Law as laid down in the judgements of Justice Holloway, an authority in Malabar usages, was taken to as the basis upon which judgements were passed for a number of years.

The junior member's right was limited to maintenance, and with only very limited right to question the actions of the *karanavan* so long as he is bonafide in safe guarding the interest of the *tarwad*. In Soopi v Mariyumma[432] it was decreed that only under very special circumstances can junior members of a Malabar *tarwad*, following the Marumakkathayam Law, maintain a suit for the redemption of a *kanom* granted by the *karanavan*. The junior members' allegation of misbehaviour detrimental to the *tarwad* interest on the part of the

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[432] ILR 43 M, 393.

karanavathi was not allowed by the High Court in the absence of sufficient proof. Though the Judiciary was confirming the almost unquestionable power of the *karanavan* on every thing connected to the *tarwad,* and to act on behalf of the *tarwad,* they were equally noticing the restlessness among the junior members against the *karanavan*'s unlimited authority. However, the court was ready to recognize that the junior members of a Malabar *tarwad* could become entitled to separate maintenance out of the *tarwad* house when there was no room for them to live in that house.[433] Any how have an *anandaravan* could not sue unless there were very special circumstances, such as fraud on the part of the *karanavan.*[434]

Regarding the special circumstances under which the junior members could sue to redeem a *kanom* granted by *karanavan* was not made clear in the judgement, Soopi v Mariyumma, but in Amina Umma v Rayarappan Nambiar[435] it was inferred that collision between the *karanavan* and *kanakkar* on prejudice to the *tarwad* interest by the continuance of the *kanom* would be sufficient. Again in Pakki v Muhammad[436] it was emphasised that the junior members of a *tarwad* except under very special circumstances, when there is a *karanavan* in existence who can bring the suit, could sue against the *karanavan.*

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[433] Kunhalikutty Haji v Kunhi Mayan, ILR 46 M, 567.

[434] Pakki v Muhammad, AIR 1926 M, 150.

[435] AIR 1923 M, 706.

[436] AIR 1926 M, 150.

Muhammad v Kunhikutti Ali[437] was a representative suit instituted by the senior *anandaravan* of a Malabar *tarwad,* against an alienation of the *tarwad* properties by the *karanavan* to two other members of the *tarwad,* to get declared as not binding on the *tarwad* and for recovery of possession. When the *anandaravan* died another *anandaravan* continued the case. It was held that the petitioning *anandaravan,* though not the senior most one, was entitled to be brought on record as the legal representative of the deceased *anandaravan.* And in Kunhipokker v Bapputty[438] the decree was that where a *kanom* without consideration or necessity was granted by the *karanavan* in favour of an *anandaravan* to whom the tenants attorned and paid rent, a suit by another junior member for possession on behalf of the *tarwad,* ignoring the alienation, was proper.

The rules relating to *marumakkathayam* inheritance were similar in the case of the Mappilas and Hindus. In Thayyil Mammad v Purayil Mammad[439] the conditions of an *attaladakkam* inheritance is explained. To the question, whether the *attaladakkam* heirs were entitled to question and avoid the alienations made by the *karanavan* of a Malabar *tarwad,* the court replied that an *attaladakkam* heir succeeds to the properties of *tavazhi* only where there are no members of the *tavazhi* left, and only to properties which were not disposed of by the last member of the *tavazhi;* and that an *attaladakkam* heir cannot challenge an alienation made by the

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[437] AIR 1929 M, 451.

[438] 1919, MWN, 815.

[439] ILR 44 M, 141.

karanavan which is not challenged by the other members of the *tarwad* during their life time. That the *karanavan* and the junior members together make a gift of the entire family property if they chose to do so.

A very haunting problem since the inception of the Judiciary based on the rule of law was, what law to be applied on the questions of the personal laws of the *marumakkathayam* Mappilas. The Mappilas of North Malabar were especially the followers of the *marumakkathayam* system. The early judges took pains to reach at the roots of the system, for which there was no guiding written authority. Justice Holloway had laid the rule that the presumption of course is that of the nephews, as is the rule of North Malabar universally[440]. The problem was grave not on cases where the Muhammadan or Marumakkathayam Law alone appeared, but on cases where the twin systems intermixed. On such occasions, for practical purposes, the court was recognizing the law actually followed by the parties, for doing justice to the cause of action in such cases and appealing to justice, equity and good conscience.

Regarding the application of Hindu property peculiarities to the Mappilas, it was decided in Ammutti v Kunhikeyi[441] that although Mappilas in Malabar ordinarily follow the Hindu custom of holding family property undivided, yet they are not subjected to the same personal law as the Hindus. Their claims cannot be governed by the legal presumption of joint ownership. In the early years of twentieth

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[440] Second Appeal No. 651 of 1860, Sudder Decisions.

[441] ILR 8 M, 452.

century, to many of the Mappilas it became a matter of great concern as to how to find out a permanent solution to this dilemma. In Kunhambi v Kalanthar[442] this issue became the very cause of action of the suit, and in which a large number of members joined on either side, as to whether the Mappilas of North Malabar were governed by the Muhammadan or that of the Marumakkathayam Law. Some of the early cases like Assan v Pathumma(i), Kunhimbi Umma v Kandy Moitheen[443(ii)] etc were decided on the facts proved in those cases. For this case it was held that there is no presumption that the North Malabar Mappilas are governed by Marumakkathayam Law as it is not a matter on which there could be a presumption. The strict rule of Muhammadan Law may be varied by proof of family custom and the usage. The courts were to administer the law adopted by the parties by their customs and usages and not the law which the historical circumstances or religious books may lead the court to infer. Repeated occurrence of the same issue connected to certain customs among communities of people led the courts to take judicial notice of it as to be recognized through legislative interference. Such universal acceptance was not noticeable in the case of Malabar Mappila *marumakkathayees* to categorise it by that name as written laws, like the Hindu Law, Muhammadan Law etc. "A custom varying Muhammadan Law to be recognized as valid must satisfy the entails of peaceableness and consistency". The case was dismissed at all levels.

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[442] ILR 38 M, 1052.

[443] (i) ILR 22 M, 494; (ii) ILR 27 M, 77.

When a custom gets actual legal status is explained in Seethi v Umayya[444] like this: "Courts will take judicial notice of a custom only when its existence among the class affected by it has been proved repeatedly". In determining the appropriate system of law that is applicable to a case the court was no doubt to be guided by the fact that the parties have been governing themselves in regard to similar transactions by a particular system of law or by some special custom. When, however, there is no recognized law or custom, the proper course is to give effect to justice, equity and good conscience.

In the case of divorce it was accepted that any Muhammadan of sound mind who has attained puberty might divorce his wife whenever he desires without assigning any cause, and that *talak* may be oral or in writing[445]. In Kunhi v Moideen[446] judicial interpretation of *mahr* or dower is also seen, defined as a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage... . Under Muhammadan law dower is an obligation imposed upon the husband as a mark of respect to the wife, which is called the bride price.

In Pakrichi v Kunhacha[447] it is maintained that a daughter when married passes into her husband's family and there is no obligation on themselves of her natural family to maintain her, not even if she is

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[444] 1915, MWN, 805.

[445] Hedaya 75, Baillie 209, Quoted by Hidayathullah and Arshad Hidayathullah (ed.), Mulla's Muhammadan Law, op.cit., pp.258-259.

[446] ILR 11 M, 327.

[447] ILR 36 M, 385.

divorced according to Hedaya. But in Seethi v Umayya[448] it is decreed that under Muhammadan Law, though after marriage the wife goes to live in her husband's house there is no severance to the family ties. Her right to maintenance from her blood relations is suspended so long as she can claim maintenance from her husband. If the claim against the husband is lost due to any cause, such as divorce, the claim against the relation by blood revives unless there was some other disabling cause such as possession of property by her.

Charity in the name of the Divine is a very important aspect of Islamic Law. The Arabic term 'wakf' is defined as a permanent dedication by a person professing the Islamic faith of the property for any purpose recognized by the Mussalman Law as "religious, pious or charitable"[449]. According to Muhammadan Law, all proprietary rights of man should be extinguished in the property so dedicated, and become vested in god, and those in charge of superintendence and management of them through the mosque, and could not exclude any Muhammadan who wishes to say his prayers in it except for misbehaviour. To the Sunnis, both Shafei and Hanafi, it is so[450]. The prime purpose of wakf according to Mussalman Law is charity; its ultimate benefit expressly or implicitly is reserved for the poor. In Kunhamukutty v Ahammad Musaliar[451], a wakf made for the purpose of reciting Quran over the tomb of a private person on the

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[448] 1915, MWN, 805.

[449] The Mussalman wakf Act 1923, Act No. 42 of 1923.

[450] Ravuthan v Ravuthan, ILR 35 M, 681.

[451] ILR 58 M, 204.

ground that it is the daughter of *tangal* was decreed as not a valid wakf for not being 'charitable'.

According to Abu Yusuf (the disciple of Abu Haneefa, another disciple of Imam Muhammad), a mere declaration of endowment by the owner is sufficient to extinguish the proprietary rights of the wakif, for by that the property is assigned over to God like the emanicipation of a slave[452]. This view has been adopted by the High Courts of Calcutta, Rangoon, Patna, Lahore and Madras, and Oudh Chief Court. The Privy Council decreed in Abadi Beegum v Kaniz Zainab[453] that though physical delivery is not essential, but such delivery as is possible must be given. In Pathukutty Umma v Nedungadi Bank Ltd[454], it is made clear that according to both Shafei and Hanafi schools of Muhammadan law delivery of possession is not necessary to validate a wakf which is other wise valid, which the High Court held that, is more appealing to modern conditions, and more in accordance with the modern legal principles.

But when the actual meaning of the declaration of wakf is misinterpreted, such a wakf was declared invalid by the courts as done in Pathukutty v Avuthalakutty[455]. It was a wakf made by a Muhammadan wife who conveyed her property to her husband upon trust to maintain herself and her children out of the income, and to

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[452] Ameer Ali, Muhammadan Law, Vol.1, 4th ed., Calcutta, 1912, p.231.
[453] 1926, ILR 6 Pat 259, PC.
[454] ILR 1938 M, 148.
[455] ILR 13 M, 66.

handover the property to the children, on their attaining majority, and, in the event of her death without leaving children to devote the income to certain religious uses. It was held that it was not a valid wakf, for it was contingent on the death of the settler without leaving issue, the wakf by reserving to himself the power of revoking makes the wakf invalid.

Upon almost all the issues connected to Muslim personal law the Mappilas of Malabar approached the courts. Amidst, there were cases, though very rare, which raised the question of faith among the Muslims themselves with different concepts about the faith. In a criminal case decreed in 1922[456] the issue was between Muhammadans and Ahmadiyas of Malabar. The issue of this case was the second marriage of a Muslim woman when her first marriage with another Muslim was still existing, when the Muslim priests declared him an apostate for becoming an Ahmadiya. According to Muhammadan Law, marriage relation with a person who was declared an apostate was null and void. But the court declared that an Ahmaddiya cannot be called an apostate since the prime base of Islam is not violated in it - that the Ahmmadans too accept the Kalima (the individual Muslim pronouncing), the Prophethood of Muhammad and the authority of the Quran, which are the essential conditions for a person to be a Muhammadan - and can be called governed by Muhammadan Law, and that the contention that Ahmmadans are apostates does not stand. The court called it a question of public

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[456] Narantakath Avulla v Parakkal Manami, ILR 45 M, 986, App. Criminal, 1922.

importance relating to the personal status of a substantial part of a Muslim community. However, considering the ignorance and the bonafide belief that the marriage with her first husband is automatically severed by his becoming an apostate, the lady was shown a little leniency when the sentence against her bigamy was announced.

At the same time the court criticized the attitude of the theologians in denouncing others, by quoting Sir Abdurahim in his Muhammadan jurisprudence, (Page 250) of the trend of some people, who are too prone to charge others with unbelief and treating them as heretics on the failure of the witnesses to prove their stand[457].

Most of the cases connected to Mappilas of Malabar were those pertaining to the complications arising from their peculiar, flexible, marriage and divorce rules. Children from multiple marriages stood in the way of deciding property inheritance question in an easy way. However, the court tried as far as possible to give justice to the deserving parties on such issues.

Judiciary performed its task with pronounced vitality throughout the British rule in India. No aspect of Malabar life remained untouched amidst judicial proceedings. The Malabar judgements were gradually, but systematically, revealing the full history of the bygone ages of the region with an accuracy, which so far never had been realized by anybody in the past. Another visible

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[457] Ibid.

fact about those judgements is the way they became instrumental in arousing conservative Malabar to dynamism and through social reformist movements to compel the legislature to determine in favour of the modern living standards.

STATE AND SOCIAL CHANGE – THE ROLE OF JUDICIARY – A CASE STUDY OF MALABAR 1792-1940

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CHAPTER VI

JUDICIARY AND SOCIAL CHANGE IN MALABAR

Few civilizations have perhaps undergone such wholesale remarkable change in habits and practices as the Malabar civilization has done when the British rule in India came to an end during the fifth decade of the twentieth century. The substantial expression of this came only during the last two decades of the rule through a series of remarkable legislations which helped the people of Malabar to come out from the absolute control of their centuries old irrational customs, proved to be thoroughly unfit to the requirements of modern life. Though governmental machinery's interference became inevitable to put an end to them legally, actually it was a by product of the changed mentality of the people, a new awareness about their own customs after so many centuries of dedicated following, that they were wrong in many of their old ways, and a departure from it is so needful to make themselves participants in the onward march of civilization.

What wonders one is not exactly the changes which came to the Malabar social set-up through legislative action, but the forces which were at work in bringing such a state of affairs to such a highly conservative order. The new awareness came upon them due to the working of a few background factors which ultimately led the Malabar folk to bid farewell to their outmoded customs. Not only that Malabar in its customary garb was a wonder to the world, but its

changed look too came to be viewed with equal wonder by the outside world as to give it the connotation, the 'Kerala Model'[1]. A peep into the contributory factors definitely becomes delightful.

Political activism, though a late comer in the case of Malabar, once reached here became so vital as to absorb the revolutionary socialist doctrines of the west at the germinating level itself[2]. Social re-generation, inaugurated by saintly preachers like Sree Narayana Guru[3] worked with such a mighty appeal in Malabar that its people were not ready to compromise with any thing less than complete eradication of caste inequalities like untouchability, unapproachability etc. But there was another force, the potential contribution of which had not been properly noticed or appreciated by many, since it was an organ of the British administrative machinery, but the role of which was very substantial in arousing the Malabar society to momentum. It was the Judiciary, which by continuously reminding the people through court room arguments what their usages were, was creating a sort of disturbance and repulsion against their own age-old customs, as to make them gradually and spontaneously mature enough to react against them.

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[1] Presidential address by E.M.S.Nambudiripad, 'Keralam' (Mal), International Congress on Kerala studies - Abstracts Vol. I, A.K.G. Centre for Research and Studies, Thiruvananthapuram, 27- 29 August 1994.

[2] Menon, Dilip M., Caste, Nationalism and Communism in South India, Malabar, 1900-1948.

[3] Sree Narayana Guru, 1854-1928, Enlightened Saint of Kerala, who waged philosophical war against social disabilities and caste inequalities the depressed classes were suffering in Kerala, and through revolutionary demonstration of his ideas got much popular appeal.

The revolution aroused by the Judiciary in the Malabar minds was silent but strong as to make them ready to welcome the modern trends of civilization.

The voluminous judicial records, kept in the various courts throughout the country, the innumerable revenue and legal documents, and the detailed official correspondence on such matters available at the government offices, the systematic legal collections at the national and regional archives and the Record offices are easily accessible to anybody interested in going through them. But quite surprisingly the social scientists and historical analysts have not taken proper effort to estimate their real value through careful elaborate scrutiny which alone could tell us sufficiently what role the Judiciary played in creating social mobility in a given class of people any where in India. The task of the Judiciary was indeed only to interpret the laws already in existence and to make judicial suggestions; to alter the laws is definitely the task of the legislature. But amidst judicial proceedings, every minute aspect of the issue at question was examined and commented upon as to make it so useful to the social activists; at times the judicial suggestions sound indirectly the altered law itself but which would substantiate only at the legislative hands within a short time[4].

Several criticisms have been raised against the judicial performance on Malabar problems of the colonial period. It is usually heard that Malabar Judiciary did not take a sympathetic approach to

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[4] Puthanpurayil Kuniyan Baduvan v Puthanpurayil Alikutty, ILR 42 M, 603, FB.

the cause of the depressed classes. It is a truth that humanitarian issues like those pertaining to slavery, caste inequality, untouchability, poverty of the tillers of the soil, uncivilized practices like customary ordeals, extremities of the caste tribunals and similar problems connected to the pathetic existence of the socially inferior classes, or those without any voice in social matters, did not get the deserving attention at the hands of the Judiciary. The judicial indifference in such matters became the target of attack at the hands of the political activists, peasant advocates, radical social reformists and historical analysts from the very beginning the Judiciary started functioning. Though the factual aspect of these criticisms sounds correct, the blame was not solely of the Judiciary, since any matter gets judicial attention only when it is brought for legal reddressal.

Though the socially inferior classes suffered intensely under the caste superiors, socially as well as economically, Judiciary could not be instrumental to assure justice to them, since not a single case was registered in their name by either a person belonging to the same class or on behalf of them by an outsider, seeking relief to their agony, based on the existing laws of the country. Poverty, illiteracy and fear blocked their way to the Judiciary, which had high sounding, complicated etiquettes and mannerisms. The court's arbitration was sought only on disputes connected to landed property, whether on the agrarian or on the property inheritance side. Even the disputes on family laws had connections with the property question. Only the propertied class with money and knowledge about the Judiciary found access to the courts, especially

in the early stages. A large section of the tillers of the soil were only agrestic slaves who were ignorant and extremely poor, and were simply treated as part of the landlord's property. They had no social identity of their own and were not treated as even human beings equal to the influential classes; hence they never got any recognition at the official or judicial level.[5] Slavery as a recognized social institution in India came to be viewed by the Judiciary too in that way; so too the courts got no opportunity to speak on their behalf, except in their capacity as agrestic slaves attached to the property of the landlord.

However, the question of slavery got some attention at the hands of the administrators from the very beginning of the East India Company's rule in India. The British found slavery an institution already established at different levels especially in Kerala. The early British attitude was that slavery, being consistent with Hindu and Muslim Law was necessarily legal in India, and many among them even encouraged the practice with the argument that action against the slavery would be against their principle of respecting local customs. The administrators were more concerned about their own revenue and political interests, which they were afraid, would be affected if the slave owning upper class was displeased.

However, from time to time some servants of the East India Company, including Lord Cornwallis raised their voice against slavery. John Richard of Leicester, who was a judge of the Committee

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[5] Nair, Adoor K.K. Ramachandran, Slavery in Kerala, Delhi, 1986.

of Circuit, attacked its perpetuation in the most touching language when he said, "Nothing perhaps is so revolting as the idea of hereditary slavery of a man's inheriting at his birth nothing but the misfortunes of his parents, without hopes of emanicipation"[6]. His suggestion for passing an Act to stop it was not accepted by the Supreme Court by confirming its legal existence in India. It held that the abolition of slavery on "general principles of justice and humanity" was not possible in India, though the court wished that the "slavery could be discontinued"[7]. However, the resistance against slavery was growing stronger with the result that the question was referred to the Law Commission, which submitted its Report in 1841. After holding many more legal consultations the Government of India passed the Act known as Act V of 1843 by which slavery was legally abolished in India[8]. The Act promised the slave the same legal protection against violence as free men, with specific clause that claims upon the slave could not be established in the courts. The British need for free labourers on wage basis in their newly started Estates is explained as one of the motivating factors for the passing of the Act V of 1843. This legislative measure as in the case of the rest of India became applicable to Malabar too. Whatever it is, the poor and ignorant slaves seldom came to know of such progressive measures, went for no legal protection, remained as slaves and the institution continued. But when such cases reached the courts,

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[6] Quoted by T.R. Sareen in 'Slavery in India under British Rule' 1772-1843 in the *Indian Historical Review* Vol. IV Nos. 1-2 (July 1988 and January 1989) p.263.
[7] Ibid., p.264.
[8] Act V of 1843.

though very rarely, the Judiciary took care to give them justice[9].

Though caste inequality was horrible in Malabar, and later taken up with utmost humanitarian consideration by the social reformers and nationalists of our country, not a single opportunity came to the Judiciary to examine the matter directly. No case related to this has been judicially reported. Caste inferiors, often very poor were perhaps not even aware of the purpose of the court as an administrative organ for giving justice, since they had seen only the propertied upper classes approaching it. The administrators or the Judiciary did not give much attention to the caste aspect of the Malabar society, since the same in no way affected their revenue interest, and accepted it as a customary reality. However, at a later stage, in the context of the nationalist movement, when anti-untouchability movement became very strong throughout Kerala persuading the Travancore Government to initiate legislation for the betterment of the socially depressed classes, the Malabar Government too came forward with the Removal of Civil Disabilities Act of 1938[10]. If caste inequality question had been raised before the Judiciary during the British rule, at least the legal attitude to it might have come out, whether positive or negative. Any how, one of the first administrative measures of the company in India, the introduction of

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[9] Amina against Queen Empress, Appellate Criminal, ILR 7, p.277. A case in which a girl, aged 13 years, who was sold for Rs.25/- by its owner, was described as *'vellati'* in the transaction document, which according to the findings of the Court, means slave as understood by the Mappilas of North Malabar-hence coming under Penal Code Section 370. The parties involved were tried and punishments given.

[10] Removal of Civil Disabilities Act 1938, (Madras Act XXI of 1938)

a uniform Criminal Procedure Code of 1793[11] applicable to all the natives irrespective of caste status, though enacted with the primary intention of ensuring the law and order situation of the country happened to be a good beginning to instil caste equality consciousness in radical minds in the succeeding years as to compel the authorities to take more effective steps to social justice through legislation.

A major drawback pointed out by later analysts in the approach of the Judiciary was the lack of interest showed by this organ of the British administrative machinery in granting the deserving justice to the tenants and tillers of the soil. Though the largest number of cases registered in Malabar were those connected to the tenurial problems among the various classes that Judiciary did not bother to give justice to the lowest class in the tenurial hierarchy. Even with direct involvement into the tenurial problems of Malabar, it was only a truth that an independent approach became impossible to the Judiciary of those days because of the official instructions to limit their task within the freedom allowed to them. While it was possible for the popular leadership to directly take up the people's grievances and fight against the authorities till justice is obtained, the Judiciary could not.

On the tenurial side, though the Judiciary's position was handicapped from the very beginning due to the rash arrangements effected by the company's early officials through their false revenue settlement, the anomalies in them were noticed by the courts at the

[11] Criminal Procedure Code, 9th July 1793.

very outset. Some of the judges like Justice Rickards even pointed out that the company's settlement was not fair. Soon creative interpretations started and there were judges who were expressing regret on the action of the Joint Commissioners of conferring absolute proprietary rights on customary landlords. The *janmi's* attempts to add harsher clauses in the *kanom* deeds and increase in the number of eviction cases called for the vigilance of the Judiciary in the latter half of the nineteenth century. It was in this context that Mr. Strange, the Judge of the Sudder Court of Madras got it confirmed through the Sudder Court Proceedings of 1854 that the tenant should be allowed twelve years' undisturbed enjoyment of the lease if the lease terms are punctually observed[12]. Many other judges, who served in the Malabar courts and the High Court of Madras like Holloway, Wigram, Reid etc shared this sympathetic view. Wigram after expressing his regret on the folly committed by the Joint Commissioners, went to the extent of saying that until fixity of tenure is secured by the legislature to the first *kanom* tenant, the *janmi* would unscrupulously turn out the tenant at his pleasure[13]. Mr. Reid as the District Judge of North Malabar, in one of his monumental judgements admired the customary tenurial setup as the "wisdom of the ancients of Malabar", and even argued that any stipulation in the *kanom* deed could be counted only for the period subsequent to the term of twelve years[14]. The fundamental irregularity in the original revenue settlement was pointed out by the

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[12] Sudder Court Proceedings of 13th February 1854.
[13] Marakkar v Munhorali Parameswaran Nambudiri, ILR 6 M, 140.
[14] Kanara Kurup v Govindan, ILR 5 M, 310.

High Court in S.A. No. 78 of 1888[15].

Definitely there were judgements which were highly injurious to the tenant's interest. Such a judgement came from Chief Justice Turner of the High Court when he changed his first attitude to recognize the *patta* holders as real owners of the land into a harsher one later of recognizing only the customary *janmis* as landlords of all lands. Denouncing William Logan's proposals justice Turner was emphatic in his statement that "whatever be the origin of the title, the *janmis* were, and, for centuries before the British rule, had been the owners of the soil in full proprietary right[16]. Similar judgements occasionally came which did more harm to the tenants and tillers than good. Though it is a truth that British sense of justice went more in favour of the landlord class, whether they were actually prejudiced is a matter of doubt. Even Indian judges who were well aware of the Indian customs were expressing doubts and finding it difficult to understand the proper meaning of several local practices. Still there was a positive aspect of even such judgements. Such adverse judgements resulted in the people's vehement reaction against them. Emotions were rising high especially among the *kanakkars* who were repeatedly disappointed by such judgements, as to deceive their landlords whenever and wherever possible, and at a later stage to start popular agitation to get fixity of tenure. Definitely, individual judge's predilections did play a role in the

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[15] S.A. No. 78 of 1888, HC.

[16] Sir Charles Turner's Minute on the Draft Bill relating to the Land Tenures of Malabar, Chapters II & III.

judgements passed by him; but even those were not with a deliberate intention to deny justice to any class.

Throughout the British period Judiciary took it as one of its earnest missions to safeguard the infinite *janmam* right of the landlords with eviction powers; they were equally earnest in ordering the *janmi* to grant compensation to the *kanakkar* on eviction. The *janmi's* reluctance to give proper compensation decreed by the court created great complications in the tenurial relations urging legislative interference. But the passing of the Malabar Compensation Act of 1900[17], though definitely was meant for giving the deserving compensation to the tenants did not bring the expected result due to the rising hostility between the landlords and the tenants. A noticeable fact in the opening years of the twentieth century was the birth of a new trend in Malabar; both the people and the courts were in a mood to forget the old *maryadas* of the land; there was no more any nostalgia about the customary usages nor any urge to bring it back again; safeguarding the existing tenurial status became everybody's concern, an outcome of the new awareness achieved through the progressive interpretation of the customs by the Judiciary. The Malabar legal atmosphere became clouded with issues of *kanom, melkanom,* mortgage, submortgage, unending appeals and counter appeals - all bringing home the fact that people's patience was reaching at a breaking point.

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[17] Malabar Compensation for Tenant's Improvements Act (Madras Act I of 1900). See Appendix No.IV, p.447.

After a period of lethargy, when cases were decided in a rather mechanical way by completely sticking on the usages on the specific issues, the Judiciary too became alerted to the newly created awareness. The entry of qualified Indian lawyers and eminent Indian judges became contributory factors towards this. The lawyers' readiness to take up the people's problems with genuine sympathy instilled confidence in the people. The optimism of the landlords that they would be always protected by the authorities began to shake when the judges too started pointing out that it was the overbearing nature of some of the landlords which was responsible for the growing discontent among the tenants. That their oppressive conduct, harsh attitude to the tenants, their attitude to the tenants as that of a social superior towards an inferior especially in the context when many of the families of the *kanakkars* had already become educated, influential and at times even richer than the *janmis*, while many of the families of the Nambudiri *janmis* were remaining less educated and less polished, came to be pointed out by the courts as highly provocative[18]. In Nangali v Raman[19] the *janmi*'s power to eject a tenant whose family had been in possession for many years came to be questioned. To grant occupancy rights to the *kanakkars* was becoming the pressing question of the hour, to which finally legislative answer had to come, and came with the enactment of The Malabar Tenancy Act of 1930[20].

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[18] Venkatachalam Pattar v Krishna Pattar, ILR 45 M, 394, FB.
[19] ILR 7 M, 226.
[20] Malabar Tenancy Act of 1930. (XIV of 1930), See Appendix No.VII, p.467.

The Malabar Tenancy Act of 1930 was the culmination of the incessant fight of the *kanakkars*, whose occupancy right though once was practically permanent but later taken away, for justice. Behind the passing of the Act definitely judicial suggestions played a substantial role. Judiciary was alerted to this fact as early as the days of judges like Justice Wigram. More creative suggestions came with the years that passed and in consequence of the passing of the Malabar Compensation Act. In Gopalan Nair v Kunhan Menon[21] it was remarked that "the validity of a covenant for perpetual renewal in a lease has long been established in England" and why it is non-existent in Malabar, where the court was sharing the anxiety of the tenant. A very remarkable reaction against piecemeal eviction of a tenant by the *janmi* came from Justice Sheshagiri Aiyar when the Chief Justice opined that if such practices are to be stopped the proper course is to move for an amendment of the existing Act regarding compensation. The agony of the tenant was given full expression in the statement of the judge that "I am anxious to impress on the legislature the necessity of so amending the law as to make the lot of the Malabar tenant more tolerable than it would be under our decision"[22]. These and similar judicial suggestions are clear proof to the earnestness of the Judiciary even while giving unpleasant verdicts.

On the tenurial side the role of the Judiciary before independence was neither positive nor absolutely negative. Standing

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[21] ILR 30 M, 300.

[22] Puthanpurayil Kuniyan Baduvan v Puthanpurayil Alikutty, ILR 42 M, 603, FB.

within the limits of judicial freedom the courts always were on the side of justice. It was becoming clear to the political activists and peasant advocates that getting perfect justice through the Judiciary is impossible, to organize against the official indifference seemed a must. But even behind the formation of such organizations the legal brains worked hard. The Malabar Tenant Organisation was formed in 1922 by the lawyers of the Munsiff Court of Pattambi[23]. In the early years of the twentieth century a class of eminent lawyers came forward with the bold idea of organizing against official injustice and demanding legal solutions to the Malabar tenancy question. They became competent for it from the knowledge gained inside the courts as well as through careful study of the judgements of the yesteryears. While discussion on Malabar Tenancy Bill was going on several consultations were made with the judges by the Madras Government[24]. Any commission appointed to study a problem requiring legislative interference was usually put under the chairmanship of a judge is indicative of the competence of the judges in giving healthy suggestions in the process of the alteration of a law. This indirect role of the Judiciary has immeasurable value as the harbinger of social change in Malabar on the tenurial side too. Judiciary's readiness to always correct its own earlier decisions, when found erroneous, in the light of newer clues, made it the most dignified organ of the British administrative machinery.

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[23] V.V.Kunhikrishnan, G.Sankaran Nayarum Malabar Kudiyan Sanghavum (Mal), *Deshabhimani Logan Pathippu* (Mal), 1981, pp.30-31.

[24] Report of the Madras Tenancy Committee, 1927, 2 Volumes, Madras 1928.

Malabar Tenancy Act of 1930 was only a mild step in the direction of solving the tenurial problems of Malabar. The grievances of the actual tillers of the soil still remained unsolved. To the courts, the tillers of the soil never appeared as a class for being considered for the ownership of the land, even at the end of the British rule. Rather, sharing the view of the authorities they too wanted to make least interference into the feudal relations of the land, though the Mappila troubles in South Malabar[25] would have been sufficient to convince them of the misery of the cultivators. The offences committed by the poor tillers of the soil came to be viewed and categorized as criminal offences punishable by law. Though enthusiastic officials like William Logan as Special Commissioner to enquire into the early Mappila outbreaks recommended granting of lands to the tillers of the soil, the suggestions were not accepted by the Government[26]. It was the Government's policy to do nothing against the interest of the *janmis*, which would invite unnecessary troubles in the process of smooth revenue collection. Judiciary too could act only according to the instructions from the Home Government[27] on land tenancy question. However, this aspect of the Judiciary was vehemently criticized by Logan, though his suggestions too were unacceptable to the Government. Those engaged in peasant studies in later years relied more upon Logan's views than making a

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[25] Panikkar K.N., Against Lord and State, op.cit.

[26] Report of the Malabar Land Tenures Committee 1884, Vol I, op.cit., Madras, 1887, pp.85-87.

[27] Circular Orders of the Court of Sudder Adalat from 1803-1834, Regional Archives, Calicut.

direct study of the judicial records.

The years following the passing of the Malabar Tenancy Act of 1930 were clouded with peasant unrest and popular movements against the negligence of their cause in the Act. Several cases came to be registered and reported on the Act before the Malabar Tenancy Report came to be published in 1940[28]. Judiciary's comparatively inactive role in dealing with the Malabar tenurial problems convinces us an inviolable truth - that while it is easy to do injustice to anybody, it is difficult to undo it even if desired; still Judiciary performed its task well at least in convincing the people of Malabar that it is possible with their own will power.

Outside the tenurial issue, the main problem which came to the Judiciary's attention was that connected to the personal laws of the different castes and communities of Malabar. As the parties involved in such cases were family members, either blood relatives, or those who became relatives through marriage, adoption etc, there was a sentimental touch in such cases. The chief questions dealt with were those pertaining to property inheritance either *makkathayam* or *marumakkathayam*, the questions of marriage and divorce, the status of the family members, guardianship, maintenance, adoption and all other questions which would lead to a family dispute. Judiciary could use its full discretion in deciding such cases connected to family laws, since no official interference came in them being, non-harmful to the company's revenue interest. For that reason,

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[28] Report of the Malabar Tenancy Committee, Madras, 1940

Judiciary's performance in settling them became definitely outstanding. Through remarkable judgements the Judiciary played a substantial role in recasting an extremely custom oriented society into one suitable to the modern standards of life.

The family laws of all the Malabar castes and communities were complicated because of their most important aspect, the urge to keep the joint family property impartible. At first it was the policy of the Judiciary just to interpret the personal laws of each class and to apply them suitably while deciding their cases and without disturbing their basic features in any way. But gradually, on closer examination, it became clear to the courts that many such laws were quite unappealing to reason and uncivilized too, completely shutting the path of their followers to progress to the modern realities. Hence Judiciary did not hesitate to give healthy suggestions though without trying to change their basic features. Judicial suggestions became highly valuable to the authorities in giving birth to legislative alteration to the existing laws of the different classes in Malabar.

In the case of the Nambudiris it was the Judiciary which made the first effort to bring to the public notice the bitter truth behind the outward splendour of their *janmam* pretensions the intense suffering the majority of the community was undergoing due to their too suffocating, puritan, self-inflicted customs. A search into the judicial records at once convinces one of how commendably the Judiciary had subjected every aspect of the Nambudiri customs to intense study and deep scientific analysis against the lack of any written authority.

However, the court's first attitude was just to safeguard those usages for not provoking their followers, who were the customary *janmis*, whether rational, or irrational. Though it appeared very strange that a community as a whole was made to suffer by restricting legal marriage only to the eldest male member of the *illom* just for the sake of keeping the family property impartible, the court was ready to affirm it in the name of respecting the native usages.

Though this was their first attitude, the courts were ready to correct their earlier notions when found that they were misled in so doing. In the case of the junior male members of the *illom* the first impression of the court was that the former could not enter into legal marriage[29]. But later the Sudder Court came to understand that no such rule existed, that no custom prohibiting the junior males from marrying was there[30], and that it was only a convenient arrangement mooted by the conservative section of the community for safeguarding the *illom* property impartible. After this, in exceptional cases when the validity of the married junior male members was questioned in the court, such legal objections were not entertained. Judicial remark was that it was unjust to deprive the Nambudiri juniors of a right enjoyed by the Brahmans throughout India. Here we see the Judiciary anticipating the altered law itself, which would come within a few years. However, the Nambudiris of Malabar had to wait till the fourth decade of the twentieth century to see the court's dictum legally sanctioned.

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[29] O.S. 35 of 1873, Sub Court Calicut and AS 562 of 1876, District Court Calicut.
[30] Vasudevan v The Secretary of State for India, ILR 11 M, 157.

By subjecting the status of Nambudiri woman, in her married or unmarried capacity, to a detailed study amidst legal discussion[31] the Judiciary was doing an invaluable service towards arousing the public conscience to the tragic life of this class. The tragic themes in the literary works of Nambudiri radicals like V.T.Bhattathiripad, M.R.Bhattathiripad and others[32]. About the bitter social realities of the Nambudiri caste had been factually told so many years ago by the Judiciary and reported exhaustively for the posterity to go through, which definitely guided the radical generation to speak for them.

Though the Judiciary at first did not give much attention to the dangerous situation the Nambudiris were going to confront with due to their very limited scope for legal marriage, once it was convinced, they did not hesitate to remind the authorities of the shocking truth that unless substantial measures were taken to make possible legal marriage to all the male members in their own community, within a very brief span the Nambudiri class would come to an end. That the only way to save the community from total extinction would be to alter the laws so as to open the way of legal marriage to all the males and females in the community, which found positive answer through the enactment of the Madras Nambudiri Act of 1933[33].

At times the courts were trying to affirm even the sentimental values of the parties involved in cases. They were trying to explain

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[31] Ibid.

[32] Bhattathiripad V.T., Adukkalayilninnu Arangathekku, (Mal), op.cit.; Bhattathirippad M.R., Marakkudakkullile Maha Narakam (Mal), op.cit.

[33] Madras Nambudiri Act 1933. (Act XXI of 1933)

the affection that might exist among the family members when they are very near relatives. Such an example could be seen in Vishnu v Krishnan[34] on an issue connected to adopting one's sister's son to perpetuate an *illom* when reaching the state of extinction.

In some of the judgements like Vasudevan v Secretary of State for India[35] the true and sad picture of the Nambudiri community came to be very exhaustively and touchingly explained. A study of such judgements tells us of how this community with all their scholarship, was turning their back to any new idea outside their own *dharma* and lagging behind in responding to the radical challenges posed by western education and modern means of living, unlike the rest of the Brahmans of India. Little rebellious by nature, they could not think of fighting against their orthodoxism, even while suffering intensely, and their numerical strength coming down horribly, for quite a long time. At last when a section of young Nambudiris, drawing inspiration from the other castes engaged in radical social reform movements, became courageous enough to organize against the conservatism of their community, the Government too became alert. Definitely what had been done by the Judiciary, through so many years, by placing the age-old Nambudiri customs on a perfect legal footing, guided the progressive Nambudiri organisations like the Yogakshema Sabha[36] to lead their mission in the proper direction and the Government to become aware of the

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[34] ILR 7 M, 3 FB.
[35] ILR 11 M, 157.
[36] Nambudiri, Parayil Raman (ed), Nambudirimar (Mal), op.cit.

dangerous situation. The legislative solution, the Madras Nambudiri Act of 1933 aimed at mainly to let the Nambudiri males to marry the girls of their own caste which would save them from total extinction, was more an outcome of the earlier judicial findings.

However, the court did not bother very much in examining some of the uncivilized practices in the community like *smarthavicharam,* which to them appeared simply as a caste practice. This indifference continued till the very last of the British rule in Malabar, even in the context of a highly sensational case connected to the Nambudiri personal law in the early years of the twentieth century, and the final verdict of which came on the eve of the enactment of the Madras Nambudiri Act[37]. Court's attention fell only on the legal aspect of the case, that is the extinction of the *illom* in the absence of proper heirs to succeed, and not on the wounds inflicted on the parties involved in the unnatural context of that case[38].

In the case of the Mappilas of Malabar Judiciary was in a dilemma at first as to what law to be applied in deciding their cases, since they were the followers of the Muhammadan law on the one side and that of *marumakkathayam* of the locality on the other in cases of property inheritance. Muhammadan law was respected by Judiciary, and as far as possible applied it in the case of the Mappilas, but where the Mappilas, as converts to Islam were following the laws of their pre-conversion heritage, equal weight was given to their

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[37] Narayanan Nambudiri v Krishnan Nambudiri, ILR 57 M, 725.
[38] Chakyar A.M.N, op.cit.

local heritage also. Marriage and divorce rules of the Mappilas, both of which had legal sanction in Islam, had to be brought into compromise with the property concept of the *marumakkathayam* system. Though the Judiciary was taking every effort to give justice to the personal law of the suing parties, the topic came for continuous detailed discussion as to whether it is possible to give effect to a uniform system of law applicable to the whole Muslim community of India based on Muhammadan law. The substantiation of this earnest effort from the part of the Judiciary came through the passing of the Sharia't Act of 1937[39].

The Judiciary was however never ready to overlook the local usages of the people of the various par's of India. But as in the case of the personal laws of the other communities, Mappila *marumakkathayam* too had to undergo changes with the change of circumstances. The fact that marriage was a legal institution with the Mappilas, that their men had right to have more than one wife, that Mappila women too could as widow or after divorce from the existing husband could remarry, that Mappilas had the possibility of having children from multiple marriages etc. were the problems the Judiciary found difficult in adjusting with the Malabar *marumakkathayam*. Distinction had to be made between the self-acquisitions of an individual and his supposed share in the *tarwad* properties.

With the passage of time the growing urge in most of the

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[39] The Mu[illegible] Personal Law (Sharia't) Application Act 1937, op.cit.

marumakkathayam Mappilas was to see that their self-acquired property descended on their own children instead of letting it to pass to the entire members of the *tarwad.* In Chakrakannan v Kunhipoker[40], the hope came to be expressed that "if any change is to be made it should be made by the legislature". This shows the sympathetic attitude of the Judiciary to the problems of an advancing society especially on the sentimental side.

The question of *tarwad* property was a constant disturbing factor to the Judiciary in the case of the Mappilas because of its impartible nature, while they had children from legal marriages, whose benefit they were much concerned about. It was an automatic desire in a man to see his own children succeeding to his self-acquisitions. Judiciary had to decide between respect to a custom and justice to a genuine cause. Finally victory of the latter over the former became inevitable, as had been pointed out by the Judiciary even earlier, when through the Mappila Succession Act of 1918[41] one's self-acquisitions were made liable to be descended to one's own children according to the Muhammadan law of inheritance. And later, through the Mappila Wills Act of 1928[42], the testamentary law of the Mappila was brought into conformity with the Muhammadan law relating to Wills, which made the tendency of some of the Mappilas to dispose of their entire separate property by Will as against the Muhammadan law, which permits a Muhammadan to

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[40] ILR 39 M, 317 FB.
[41] Mappila Succession Act of 1918 (I of 1918), See Appendix No.V, p.463.
[42] Mappila Wills Act (VII of 1928), See Appendix No.III, p.439.

dispose of by Will only one-third of his estate left after defraying funeral expenses and debts.

A very haunting problem since the introduction of the Judiciary based on the British rule of law was to concretise an uncontroversial law applicable in the case of the *marumakkathayam* Mappilas. With the passage of time it became the ardent wish of the Mappilas too to find a permanent solution to the dilemma. A direct case came on this when the entire members of a family taking opposite sides argued for and against Muhammadan and *marumakkathayam* law[43]. Dismissing the argument in favour of *marumakkathayam* the court held that "a custom varying Muhammadan law to be recognized as valid must satisfy the entails of peaceableness and consistency". More than the judgement itself, it was a classical evaluation of the origin of customary laws in the country made by one of the judges, Justice Erskine, made the case remarkable. Regarding the stage when a court takes judicial notice of a custom is explained in Seethi v Ummayya[44], and also that when there is no recognized law or custom the proper course the court adopts as deciding according to justice, equity and good conscience as court's discretion.

To every possible extent the courts were acting as genuinely courts of justice, even if the suing parties, belonging to be the followers of a belief or custom, were of a microscopic minority. In a criminal case decided in 1922[45] on an issue between Muhammadans

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[43] Kunhambi v Kalandhar, ILR 38 M, 1052.
[44] 1915, MWN 805.
[45] Aiyar P.R.Sundara, op.cit., p.197.

and Ahamadiyas of Malabar the court's decree favouring the stand of the Ahamadiya is such a case. The court did not hesitate to criticise the tendency of religious followers of particular faiths criticising against each other.

Though the courts were always wishing to put the personal law of the Muslims throughout India on a uniform legal footing based on Muhammadan law, the local usages were never underestimated. While deciding cases connected to the *marumakkathayam* properties of the Mappilas, as in the case of the *marumakkathayam* Hindus, that law alone was applied. It gradually came to the realization of the Judiciary that the junior members of the Mappila *tarwads,* as those of the *marumakkathayam* Hindu *tarwads* were becoming highly restless against the continuing impartible nature of the *tarwad* property, *karanavan's* over bearing, dominant nature etc. The number of litigations was growing day after day for proper maintenance and demanding partition from the junior members. The progressive section of the community with an urge to bring the modern standards of life accessible to the community advocated strongly for legislative interference for getting the *marumakkathayam* system adjusted for the sake of Muhammadan law. This gave confidence to the legislature to decide in favour of the desire of the Mappilas through a separate legislation called the Mappila Marumakkathayam Act of 1939[46] which made possible the partition of *tarwad* property.

Hindu *marumakkathayam,* a mighty aspect of customary social

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[46] Mappila Marumakkathayam Act (XVII of 1939), See Appendix No.X, p.556.

life of Malabar continued undisturbed even after the Mysorean invasion, the breakup of the *naduvazhi swaroopams* and change in land relations as a result of the British ascendancy in the region. In the absence of any written authority, it was entirely due to the effort of the Judiciary that a substantial legal guideline came to be chalked out for handling *marumakkathayam* cases. The notion of the early British judges did definitely influence the interpretation of the *marumakkathayam* usages especially on issues like *karanavan's* authority, junior members' rights, strict property impartibility etc. This, that is the *marumakkathayam* law, to a certain extent, made the Judiciary's task difficult in the early stages, and which gave birth to a lot of legal problems in the subsequent years. However, this also helped the Judiciary gradually to analyse the whole matter with the purpose of giving justice to the *marumakkathayam* followers through legal discussions.

A very negative aspect of the system was the almost complete absence of legal marriage among the Nairs who were the most dominant and typical example of the *marumakkathayam* sections in Malabar. This peculiarity, though noticed by the Judiciary at the very outset, was not given the deserving attention in the concept that it was a usage of the Nairs, which should not be changed. For quite a number of years the judicially recognized Malabar law on this issue was that it was absolutely impossible for a man or a woman who followed this system to contract a valid marriage on its ordinary popular signification[47]. The quasi-matrimonial connection or

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[47] Moore Lewis, op.cit., p.69.

sambandham among the *marumakkathayam* Nairs, though had all the elements of a legal marriage had not been recognized by the Judiciary due to the very easily terminable nature of this sort of matrimonial connection at the will of either party. Though in North Malabar its sanctity was fully testified to by even early British authors like Buchanan[48] it was not seriously viewed by the Judiciary. Further, the issue as such never came for direct judicial perusal made the chances of an easy solution from the judicial hands remote, though the legal nature of similar sexual unions among followers of *aliyasantana* system had been discussed in several cases[49]. Apart from that, though the prolongation of Nair polyandry came to be discussed occasionally, the issue of legal marriage to Nairs was seldom adjudicated.

However, with the passage of time the non-recognition of *sambandham* as legal marriage gave unprecedented mental strain to the educated young men of the influential Nair families. The Judiciary came to realize the seriousness of the matter though could not directly involve into it. But when O.Chandu Menon, as the Sessions Judge of South Malabar and as the member of the Malabar Marriage Commission in 1891 requested the court and society to look upon *sambandham* as real marriage and *pudamuri*, as it was called in North Malabar as one of the most solemnly conducted one, the court did not give proper attention to it. It was the purpose of the judge really to alert the Judiciary on a genuine issue as to urge the

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[48] Buchanan F, op.cit., p.513.
[49] Balakrishnan P.V., op.cit., p.26.

legislature to interfere. The suggestion of the Malabar Marriage Commission, under the Presidentship of Justice Muthuswami Aiyar, after going through the historical details about Nair marriages was equally a creative one. It was reported, "whether what prevailed in ancient days is not the question. At the time the Malabar Marriage Commission enquires there is a marriage in practice; and if so, whether the custom relating thereto are such as would furnish a basis for legislation". The detailed Report of the Commission submitted to the Madras Government on Marumakkathayam Law was also the result of a dedicated study[50].

The occurrence of an interesting incident while the Marriage Commission was holding its sittings in Malabar upon which the registration of a criminal case of house breaking by a man in the night came before the Taluk Magistrate, was actually giving a very good opportunity to the courts to peruse the matter. While the prosecutor called it a theft case, the culprit himself argued that his intention was to meet his concubine with whom the former was staying. However, the court did not give the deserving seriousness to the matter and affirmed the intriguer's argument. Justice Moore who referred this case to the High Court later regretted that "an opportunity was not taken to arrive at a decision, after full and careful enquiry as to what the law on this subject actually is"[51]. It tells us of how when the Judiciary as an institution was indifferent to certain matters individual judges were taking genuine interest to

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[50] Report of the Malabar Marriage Commission, 1894.
[51] Moore, Lewis, op.cit., p.83.

solve the sentimental problems of various communities in Malabar, and how later their wish and will were substantiating through legislature.

The Malabar Marriage Commission's Report was a highly dignified one, in full conformity with the judicial findings and in full respect to the enquiries made with representatives of the followers of the system. It was based on this Report that the Malabar Marriage Act 1896[52] was passed which permitted the *sambandham* marriages to get registered as fully legal. But as usual, the extremely conservative, custom-ridden mind of the *marumakkathayam* Nairs could not be so easily tamed as to appreciate the genuineness of the Act. Few people were mentally ready to accept the provisions of the Act, still fewer ready to come for registration etc. In the absence of a positive response from the incumbents the *sambandham* marriages continued to be just the good old loose marital unions for many more years, till the passing of the Madras Marumakkathayam Act of 1933[53], when people became finally mature enough to think and act more rationally. However, the Judiciary fully considered the clauses of the Malabar Marriage Act for deciding positively the cases connected to *sambandham* marriage thereafter, and the maintenance to children from such marriages came to be ordered. The court though was at first reluctant to recognize the validity of *sambandham* as real marriage due to their commitment to the usages, once found it legally sanctioned was too ready to encourage such marriages, and was

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[52] Malabar Marriage Act (IV of 1896), See Appendix No.II, p.421.
[53] Madras Marumakkathayam Act, (XXII of 1933), See Appendix No.IX, p.529.

passing comments, advocating the cause of husband and wife resulting from *sambandham* marriages.

On the family inheritance side, the impartibility of *tarwad* property was very strongly upheld by the Judiciary for a long time. Judges like Justice Holloway took pains to master every single aspect of *marumakkathayam* usages from the local experts who were well aware of the same. Still interpreters were handicapped by the fact that they have no other source to depend upon in the case of *marumakkathayam,* whereas in the case of the Mappilas they had the well defined personal laws of Islam, and for the Nambudiris at least the *sastric* texts of the Brahmans of the rest of India. Still the Judiciary well succeeded in preparing for the posterity the elaborate rules of *marumakkathayam,* which helped in a substantial way the later social reformers to advocate the cause of the rights of the members of the *tarwads.*

The *marumakkathayam* property cases were abundant in Malabar throughout the British period. In the case of the Nairs, though their attachment to property became stronger after the expulsion of Tipu Sultan when the British took away the military powers of the *naduvazhis* compelling the Nairs to turn to cultivation, such bonds began to loosen with the change of social habits, especially in the newly educated class. There began to develop a strong reaction against many of the unnecessary obligations the members of the *tarwad* were made to observe in the customary *marumakkathayam* families.

The urge for partition of *tarwad* property, reaction against the absolutist tendencies of the *karanavan,* attachment to one's own children among those who became legally married after the passing of the Malabar Marriage Act of 1896, anxiety to see one's self-acquisitions to pass to one's own children etc. were some of the genuine issues which compelled the members of the *tarwad* to sue. A few undisputed truths, which the Judiciary took care to defend, in the initial stages, while deciding *marumakkathayam* cases were the impartibility of *tarwad* property, the absolute control of the *karanavan* over the junior members of the *tarwad* and over *tarwad* properties, to provide equal maintenance to all the members of the *tarwad* etc. For quite a long time the court's attempt was simply to decide in absolute conformity with the Malabar usages and nothing in contravention of them. Though the largest number of litigations on *marumakkathayam* came against the authority of the *karanavan,* the court was not ready to change its attitude about this concept. But it was always insisted that the *karanavan* should provide proper maintenance to the *anandaravans.*

Changes were fast taking place in the life style of many of the *marumakkathayam* families. Many of the junior members of the influential Nair families who became employed under the British service, were growing indignant about the overbearing nature of the *karanavan* especially in matters connected to the income and expenditure aspect of the *tarwad* property. The question of the *tavazhi* rights too came to the attention of the Judiciary. It was becoming clear from the very nature of the cases registered that the followers

of the *marumakkathayam* were no more interested in safeguarding many of their outmoded usages, which would only help their followers to shrink into the narrow limits of the *tarwad*.

The court was also strongly in favour of granting maintenance rights to the *marumakkathayam* wife in her husband's house after the *sambandham* marriage was legalized. Regarding this and against the still pervading conservatism of some of the members of the system against legal marriage the High Court made a monumental comment[54] in defence of the new status attained by the *marumakkathayam* Nairs through wedlock. The court suggested that it would be a matter of great honour to the wife's and husband's house that while it is the duty of the husband to maintain his wife, the latter should not be made to lose her claims in her own *tarwad* property.

Gradually when self-acquisitions began to grow, especially when people who were employed outside started purchasing property for themselves, it was brought to the attention of the courts, arousing the doubt as to what would happen to them after the death of the acquirer. The opinion of the judges in later days began to show more leanings to the *tavazhi* than the *tarwad* in the case of self-acquisitions. Though, basing on the old concept, the judges were still giving verdicts in favour of *tarwad*, they were ready to share the feeling of the young generation, in whose favour statements began to come, especially from the Indian judges. Justice Sundara Aiyar, the author of 'Malabar and Aliyasantana Law' strongly advocated the

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[54] Mathu Amma v Gopalan, ILR 36 M, 593.

cause of the *tavazhi*, junior members' right to maintenance etc[55].

Though Judiciary was occasionally commenting on some of the unhealthy tendencies of *marumakkathayam* followers, still was not ready to deviate from the age-old usages while giving judgements. But a change in the existing laws was very much desired by it and was fully sharing the agony of the junior members of the *tarwad* who were living outside the *tarwad* premises. Judiciary had equal sympathy to the *karanavans* who were facing much hostility from their *anandaravans*. The Madras Marumakkathayam Act of 1933[56] was the final legislative solution to the suffocating community to get their individual claims established and their genuine demands granted, and to live according to their own will in a way suitable to the modern ethos of life.

Definitely, the new Act gave birth to problems connected to the partition of the family property which became heritable too, whether on per capita basis or on stirpital etc. But it is only quite natural that solution to a problem gives birth to a series of new problems in complicated matters. Still, that in no way minimizes the importance of the solution already framed through the effort of multiple forces. All the other problems following from the Act of 1933 were gradually solved, since they were only questions of adjustment arising from the newly arisen situation, and not any like the life and death problems of the pre-Marumakkathayam Act days. In dealing such a blow to the

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[55] Krishnan Nair v Damodaran Nair, ILR 38 M, 48 FB.

[56] Madras Marumakkathayam Act (XXII of 1933), See Appendix No.IX, p.529.

marumakkathayam system the contribution of the Judiciary was commendable. Through so many years of discussion of the prevailing facts, their effort was not to give it a new lease of life, but to give it a peaceful death. The joys of family life, as man and wife with their children, became possible to the *marumakkathayam* followers due to the very practical judicial suggestions cast from time to time after a thorough study of the usages of the community.

A remarkable performance of the Judiciary in the social change of Malabar was one which came from it quite unconsciously. The contributory share of the Judiciary in the upliftment of the female community of Malabar was great. Outside the right to maintenance the women of customary Malabar did not enjoy any rights and often became the silent victims of the peculiar irrational customs. They had no access to the Judiciary with any class consciousness, whether belonging to the Nambudiri, Nair or any other caste or community. A closer examination brings home the truth that their status was equal to that of the socially inferior classes. Though not exactly the judgements were meant for them, indirectly, they were becoming the spokesmen of the female cause as it is clear from the later Acts, which brought marked change in the existing situation of this section; the female status actually became raised. While it gave the Nambudiri woman liberation from the thraldom of puritan Nambudiri customs and a new married status, it cleared the path to have a decent existence to the woman of the *marumakkathayam* caste from her age-old submission as concubine to many men; and it was inaugurating a new era of enlightenment to Mappila woman to fight

in the years to come for substantial voice in the marriage and divorce rules of her community.

Social change through Judiciary became possible due to a few other substantial factors too. Once every aspect of customary Malabar society came to be very exhaustively studied and explained from a historical point of view, of how things were, and by judging how things ought to be, the people of Malabar were not only getting their personal laws perfectly codified for posterity, but the first, most substantial, recorded history of pre-British Malabar also. Its relevance becomes greater when one realizes that these were not prepared for any theoretical or academic purpose, but for the purpose of giving justice to the aggrieved ones through wholesale collection of information from every possible source. For this reason, the judgements, contemporarily recorded, are vibrant with life. Pitfalls indeed came in the process, very likely when it is done by an alien machinery with little knowledge about the laws of this land, but the sincerity with which it was done cannot be questioned. The professional dignity of the Judiciary was throughout admirable.

STATE AND SOCIAL CHANGE – THE ROLE OF JUDICIARY – A CASE STUDY OF MALABAR 1792-1940

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CONCLUSION

The study began with an analysis of the circumstances arising from the large-scale acquisition of territories in India by the British East-India Company at the end of the eighteenth century urging the introduction of a permanent system of justice, which would enable an undisturbed revenue collection. British rule of law based on strict sense of justice found its way to India in the 1780s resulting in the establishment of a multi-tier type of courts in the Presidency towns as well as in the lower units. It was the decision of the British East India Company to let the common law of England to work in complete harmony with the customary laws of the newly acquired territories.

The task of the Judiciary in the early stages was a tough one. The English judges, hailing from a very different background, being familiarized only with their system of justice had to train themselves to become suitable to the new situation of the acquired territories. The problem of Malabar was that it was not only an alien country with an unfamiliar tongue, but one with so many strange extraordinary habits which had such a possessive influence upon the inhabitants of the region. The administration of justice, familiar to the people of Malabar was one based on their caste ideals, mixed with superstition and the observance of unpolished practices like ordeals. The political situation of the country was equally un-encouraging, the turmoiled situation being the outcome of the Anglo-

Mysore wars, coupled with the enigmatic authority of the local *naduvazhis*. Besides all these, beyond such mythological compositions like the *keralolpathi*, any kind of written authority to guide the early judges was completely lacking in the case of Malabar. It was with these adverse circumstances that the Judiciary in Malabar had to cope with.

However, one positive factor which became helpful in guiding the Judiciary in the proper direction was the deep awareness the people of Malabar had about their customs, which had such a command over their everyday life as an unwritten law. The oral tradition of Malabar was so strong; every section of the Malabar population was fully conscious of its specific social identity, and proficient enough to explain those peculiarities to a curious enquirer. They were living in complete subjection to their age-old *maryadas*, perhaps quite uninfluenced and undisturbed by whatever was going on beyond their geographical horizons. The *malayalee* mentality had been observed and analysed by the early British officials like Graeme, and came to be recorded as cheerful, independent and with clear sense of their just rights and privileges[1].

It was soon clear to the company's officials that much caution is needed while applying the rule of law in the case of Malabar. At the same time Judiciary was convinced from the very beginning that

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[1]Graeme H.S, Esq., Commissioner of Malabar, Report of the Revenue Administration of Malabar dated 14th January 1822, Calicut 1898, pp.9-10, paras 29-30.

some of the extremely conservative practices of the people of Malabar were quite irrational and retrogressive, and capable of only blocking their way to social mobility, but about which the latter had least awareness. However, the Judiciary was bound to act according to the instructions from the Home Government and as laid down in the Regulation of 1793[2], which allowed least injury to the usages of the natives. What was expected of the Judiciary was only to give legal effect to those usages. This unique adjustment, designed to be effected between an extremely codified system of law and a completely uncodified legal tradition, was a revolutionary step giving birth to a new judicial era in the history of Malabar. This arrangement, while fully recognizing the broad principles of the English common law, of justice, equity and good conscience, was never meant to underestimate the dominant local peculiarities of the Malabar folk. Few at the time of the introduction of the Judiciary could anticipate the remarkable role it was going to play in transforming an extremely conservative society into one fully responsive to the advanced ideologies of the modern period.

Legal interpretation of customary usages started from the very outset of the Judiciary's functioning in Malabar. Legal connotation for the customary terms mooted in the process of deciding cases, mainly with the help of local experts, whose explanations of them were carefully examined. This work was done with utmost keenness and sincerity by the early English judges. Though at first it was felt

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[2] Regulation IV of 1793.

that a study of the existing realities would suffice, soon it became clear that an in-depth search into the roots of the customs is inevitable. Here the task of the judicial enquirer exactly resembled that of an earnest historian starting his work with the source materials available for his study. While the historian's interaction is with the facts in front of him, that of a judicial enquirer is through a close examination of the living realities before him whose roots stretch deep into the past. While the historian deals with the historical data available before him, the judicial enquirer forms the historical data from the living truths before him, that is utilizing the applied aspect of history for the purpose of bringing them into a theoretical framework.

Judicial interpretation of the custom connected to the personal law of the people of Malabar was done without official interference, since the same in no way affected the revenue interest of the company. Though perfect accuracy could not be achieved in so doing Judiciary's effort did bear fruit in chalking out an effective legal guideline even against complete absence of written authority. Malabar law, as it came to be called, became the chief legal guideline throughout the British period in deciding cases on the personal law of the people of Malabar. Though the British notion of things at times misguided them regarding the true meaning of many Malabar customary terms, it became sufficient to guide them in courts in the ensuing years. Only in carving legal outline for the tenurial relations of Malabar the Judiciary's freedom was curtailed by the hasty steps taken by the first Joint Commissioners to Malabar in 1792. The

interpretation given by them to those terms was erroneous since the former was interested only in safeguarding the revenue interest of the company. However, such terms were legally interpreted for purpose of deciding tenurial cases.

The Judiciary of the colonial days was not a fully independent body with powers to make bold, revolutionary suggestions, even on matters which demanded such a role from them. It had obligation to act according to the requirements of the company and the instructions of the Home Government[3]. The absence of true understanding between the Judiciary and the Executive was also a handicapping factor, which, at times, even affected the smooth functioning of both these organs of the administrative machinery[4].

From the very beginning it was clear to the Judiciary that the injury done upon the tenurial relations of Malabar was grave; still it was equally clear to them that a go-back to the old situation is just an impossibility. Hence it became the burden of the Judiciary to go ahead with the existing situation and give legal incidents to them in the revised meaning. This, however, resulted in the passing of a considerable number of judgements, which became quite fatal to the interest of the tenants and tillers of the soil. But we also see the Judiciary making bold statements in favour of the tenurial sufferers whenever possible in order not to deny complete justice to them. However, the negative judgements only helped increasing the

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[3] Circular Orders of the Court of Sudder Adalat from 1833-1834, op.cit.

[4] Strange T.L., Report on the Affairs of Malabar, op.cit.

indignation of the people and giving birth to popular unrest and agitation in the later days.

Judiciary of the colonial days was never intended to take the role of a social reformer for the purpose of bringing radical changes in the existing social order of Malabar. Their commitment was only to decide on the cause of action of each case. But when it was on issues pertaining to the age-old social institutions Judiciary was taking special care to study very exhaustively the historical implications of those customs. This helped arousing the people to new realities and to the succeeding social mobility. When the same customary issue came to be judicially examined repeatedly, it became helpful to those affected by them to make a judgement by themselves. Hence, really speaking, it was the people who became responsive to the new judicially created awareness, which won their trust upon this alien institution as their benefactor. The number of cases registered was systematically on the increase as years passed by[5]. Judicial findings were largely responsible in giving a clear notion of the drawbacks of their age-old customs to the people of Malabar. Once this awareness came, the passage to start popular agitations towards social reform through legislation also was becoming clear.

Most of the cases were decided on merit. Judicial notice on a specific issue comes on its repeated occurrence; if it is a custom Judiciary tries to evaluate its relevance in a changing social order. The judgments of the latter half of the nineteenth century were

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[5] Innes C.A., op.cit., p.366.

considerably exhaustive, which became highly useful as reference to those working for social reform. Judicial reporting started from 1850s when the Sudder Decisions were first published. With the establishment of the High Courts systematic reporting started with the result that voluminous Law Reports of every part of India came out. The importance of the Law Reports to a changing society like Malabar was appreciable; people came into contact with them for the purpose of knowing the relevant social peculiarities of every region of India; scholars on history came to refer them for the composition of historical works of the bygone ages. It became a potential historical source, because of its unchangeable character; nobody can add or omit anything in a judgement reported; their value is equal to that of an archaeological record.

Judicial suggestions become concretized when the legislature becomes alerted, and steps in to change the existing laws. Legislative action gives birth to permanent laws, an alteration or amendment of which becomes possible only through another legislative enactment. Though it is never the task of the Judiciary to alter the laws, judicial suggestions based on careful evaluation of the conflicting values and interests involved in a case, at times, become so powerful as to appear that the altered law has come[6]. In the words of Sir Alladi Krishnaswami Aiyer, "sometimes a new rule of law enunciated by a court may work a thorough metamorphosis and give a new direction

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[6] Friedmann W., Law in a changing society (Abridged Edition), Reprint, Delhi, 1996, pp.35-67.

to social progress even to the extent a scientific invention may sometimes make and has made a new world of our planet"[7]. The seriousness of some of the judicial suggestions leaves no other alternative with the legislature but to change the existing law to guarantee social tranquillity. In the case of Malabar the legislative action came after a considerable delay due to the official indifference in such matters and the reluctance of the conservative native minds to cope with the changing circumstances. However, many of the judicial pronouncements were anticipating the altered law so many years back, especially on the personal laws connected to Malabar life.

The judicial performance in the case of Malabar came to be felt in varying degrees upon the different classes and interests; still almost all of them gradually became responsive to the new ideas emerged from the judicial hands. Judicial alertness too came in different ways at different times. After a period of energetic action, the Judiciary's performance became slackened, especially once the codification of the customary laws of the country became substantiated. The cases were mostly decided on merit; little effort came from the part of the Judiciary to evaluate them beyond redressing their grievances of everyday life. The fact that the tenurial problems etc were mounting up and becoming more and more complicated was not given the deserving attention. Judiciary did not bother very much to make healthy suggestions. A change to this

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[7] 'The law as an Instrument and Measure of Social Progress', the Sri Krishna Rajendra Silver Jubilee Lecture, 1939 delivered by Sir Alladi Krishnaswami Aiyer, Advocate General, Madras. The *Madras Law Journal*, II November, 1939, p.97.

method came with the rise to prominence of a good number of eminent Indian judges and a whole lot of competent native lawyers[8]. They were responsible in bringing to limelight the genuine problems of the customary Malabar society and the urge of the people for social freedom from the entanglements of their centuries-old irrational customs. Though many of such native legal experts were hailing from influential high class families, the lessons they learnt from the English rule of law made them bold enough to take up the cause of the underprivileged. They were becoming actual fighters for social justice. Behind the passing of the Malabar Acts the role of such lawyers was unique.

Some of the early English judges did commendable work in the interpretation of the customary Malabar laws and their codification later. The names of justices like Rickards, Holloway, Wigram, Strange, Mayne, Moore and others are memorable in this line. A dedication beyond the colonial needs definitely might have worked in them in their Herculean effort to master the customs of a people which were so strange to their own. They took pains in studying them so systematically and writing so extensively in historical sequence, against the almost complete absence of a written authority. The early findings of some of these judges were largely responsible in instilling confidence in the people about the trustworthiness of the Judiciary. They were happy to be put under the protection of legal safeguards as well as to be made completely familiar to their own

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[8] Paul John J., Legal profession in Colonial South India, Madras 1991.

customs in a codified, written, way. Most of these judges were hailing from highly dignified professional background, and just for the sake of colonial interest they were not ready to forsake the dedication and the responsibility demanded by their profession. This was a direct heritage the Indian judges were fortunate to get from their English forefathers regarding judicial etiquettes.

Definitely there were occasions when the Judiciary was either indifferent to the genuine issues of the people of Malabar, or at times passing quite negative rulings. For example, they did not give much serious attention in the early stages to view the *sambandham* marriages as either dignified or legally valid, nor did take pains to understand the dilemma of the Nambudiri marriages; the Judiciary was rather absolutely indifferent to the suffering of the people belonging to the depressed classes, though it is a truth that such issues rarely reached the courts. But even the negative attitude of the Judiciary especially on problems connected to tenurial relations, played a positive role in arousing the sufferers to turn against those decisions harmful to their interest, at a later stage.

Though perfect impartiality is expected of the Judiciary, the judges too could not be completely free from their own individual notions. In the words of Justice Hidayathullah, "judicial method is difficult to define; sometimes a judge is influenced by the philosophy of law; sometimes he looks at the 'mores' of the society, sometimes at the social conditions, sometimes at the state of law as still then fixed by the legislature or determined by other judges, and having weighed

the matter from one or more of these angles, he approaches the facts and decides what the solution of the controversy before him should be"[9]. Especially while dealing with the historical identities, at times, the personal predilections of the judges played a role in deciding a case to the favour or otherwise of the one actually deserving justice.

Some of the judgements on customary laws really reflect the Judiciary's message to the authorities to save the victims of certain unreasonable customs. Malabar abounds in examples of such judgements and healthy judicial suggestions which contributed much in changing the existing social situation through legislation. In legalizing the *sambandham* marriages, in assuring the chance of marriage to the younger male members of the Nambudiri families, in saving the Mappila community from the confusion of the dual system of inheritance, in saving the *marumakkathayam* communities from the thraldom of their joint, impartible *tarwad* property order and to get established their individuality, in projecting the errors committed by the earliest interpreters about the customary tenurial relations of Malabar, in arguing for the sake of the tenants of the soil towards getting fixity of tenure, and on many other customary issues the judicial suggestions shared the sentiments of those who were adversely affected by their irrational customs.

As the first step towards legislative action enquiry commissions were appointed to study the matter from all angles. Such commission

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[9] Hidayathullah M., Former C.J of the Supreme Court of India, The First B N Rao Memorial Lecture, Delhi, 1970, p.21.

reports, chaired by renowned judges, were very genuine exhaustive study of the relevant issues from a full historical perspective. Long experience in the court chambers and dedicated study on the matter helped the judges in studying any such issue from every angle possible[10]. Judgements passed on similar issues in other parts of the country became substantial guideline while thinking about bringing reforms in any part of the country.

The public contacts of the judges in the days of the colonial rule were not much. Their professional morale did not allow too much mingling with the rank and file, since the same was supposed to affect the judicial career. Contrary was the case of the collector who had direct contacts with the people which allowed them to get first-hand knowledge about people's problems. A native Judiciary might not have found it so difficult since the judges too belong to the same social set up as others. But in the case of the early British-Indian Judiciary their whole reliance was on the evidences, witness reports, answers obtained through questionnaire and information from the legal experts. This made their task considerably difficult in the process of legally interpreting the Malabar customs.

There always existed a sort of ill feeling between the Executive and the Judiciary; while the Executive openly commented on the action of the Judiciary, the latter kept the judicial reservation in that

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[10] Justice Muthuswami Aiyer, the first Indian Judge of the High Court of Madras, did a commendable work as the President of the Malabar Marriage Commission in preparing the monumental Report, which became the legal basis for the Malabar Marriage Act (IV of 1896).

also. It started from the very beginning the company's rule started in Malabar. Even in the introduction of the Cornwallis System in Malabar a compromise formula could not be easily chalked out. This dilemma continued throughout the nineteenth century. William Logan, Malabar Collector in the 1880s was vehemently critical about the attitude of the Judiciary as a contributory factor in flaring up the peasant unrest and the early Mappila uprisings in Malabar. Though the pronounced sympathy that Logan had to the tillers of the soil is admirable, in his criticism of the Judiciary he was overlooking the fact that the tenurial problem was the creation of the company's earliest administrators of Malabar and not of the Judiciary is equally undeniable. However, slow and steady, the judicial decisions were more accurate than the hasty decisions of the other organs of the administrative machinery, especially because of the former's readiness to correct their own erroneous decisions previously made in the light of new evidences. Individual judges contributed greatly in this direction. The monumental remarks made by justice Seshagiri Aiyar about the agony of the Malabar tenants in the changed socio-economic milieu of Malabar[11] is an example for this. Very soon was passed the Malabar Tenancy Act 1930.

Independent India's indebtedness to the Judiciary created by the British rule is great. It not only made the people of this country feel the dignity of being brought under the guidance of a rule of law and codified personal laws, but to enjoy the benefits therefrom

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[11] Baduvan v Alikutty, ILR 42 M, 603 FB.

through legal safeguards. This was a new experience to the Indians who were familiar only with customary laws based on their *dharma* ideology and *chathurvarnya* - based unequal laws. The social transformation of Malabar in the modern period has greater indebtedness to the Judiciary than any other factor. By exploring deep into the roots of the customary truths of Malabar and telling its people what they were, the Judiciary became largely responsible in persuading the receptive mind of the *malayalee* to come out from its centuries-old conservative garb as to keep awake to the modern realities of life. Judiciary's role was indirect, and never with the reforming zeal, but it was potential.

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APPENDIX I

PROCEEDINGS OF THE COURT OF SUDDER UDALAT

5th August, 1856

The Land Tenures of Malabar with the conditions on which they are held and conveyed, as established either by precedent or immemorial usage.

Verumpattom (Simple lease)

This lease runs only for a single year, unless otherwise specified. At the end of the year, the landlord is at liberty either to renew the lease or to let the land to another tenant; but he cannot under any circumstances disturb the tenant in his enjoyment until the year has expired. Where the lease is for a specified period, the tenant cannot be ejected during that period, unless he endeavor to defraud the landlord or allow the rent to fall into arrears, In either of these cases, however, an action of ejectment will lie against the tenant.

Kuzhikanom (Mortgage of waste land with a view to its being planted on

Where no express period has been stipulated, this lease is considered to run for 12 years, otherwise for such period as may have been agreed upon. At the expiration of either of these periods, the landlord may either renew the lease to the same tenant, paying him the value of the improvements, which may also be invested in a mortgage, or he may satisfy the tenant's claim upon the land for the improvements, and may let the property to a new tenant. Compensation is allowed for buildings and fruit-producing trees and shrubs of every description. In the event of the tenant failing to reclaim the land, plant trees, and otherwise fulfil the conditions of the deed, he may be dispossessed by the landlord before the expiration of the period specified. The landlord exercise a similar power in the event of the tenant setting fraudulent title to the land.

Kuzhikanapattam [Mortgage of wasteland for improvements, the tenant paying rent]

Under this tenure the tenant binds himself to pay stipulated rent, as well as to bring new land under agriculture. Failure in either of these respects or any attempt to defraud the landlord of title will render the tenant liable to ejectment. If no period is named in the agreement, the lease will be considered to extend to twelve years.

(Mortgage of waste land for improvements the landlord receiving some pecuniary consideration)

A tenant cannot be disturbed under this tenure for 12 years or during the period, if any, stipulated, unless he attempt to set up a claim subversive of landlord's rights. Possessing a pecuniary interest in the property, he cannot be dispossessed for neglect, to improve it.

Panayom, or Thotu Panayom (Simple pledge, without possession)

The land is here pledged as security for the re-payment with interest, of certain sums advanced, but the lender has no right to interfere in the management of the property. In some cases it is stipulated that, on failure on the part of the borrower to pay the interest, the lender shall be placed in possession of the land. Where such stipulation exists, the lender can sustain an action for possession. In other cases, he must sue for the recovery of the principal and interest of the loan the land being liable in the event of the money not being paid.

Kanom (Mortgage with possession, a fee being generally paid)

If no period be specified, the mortgage is considered to extend to 12 years, and always so where a fee has been paid. The mortgagee has possession recovering the interest of the money he has advanced for the produce of the land, and paying over the net profits to the landlord. Should he fail in the last respect the amount is placed to the landlord's credit, when the mortgage is paid off, allowance being made on the other side for any improvements which the mortgagee may have effected. Failure to pay over the net proceeds regularly to the landlord will

not give the latter power to redeem his land before the expiration of the period stipulated or that of 12 years, unless here be an express condition to that effect in the deed. Any attempt, however, on the part of the mortgagee to defraud the landlord and usurp the property will give the latter that power.

Should the landlord desire to raise a further sum of money on the land and the mortgagee be unwilling to advance it, he may mortgage the property to a third party, who will be entitled to possession, on paying off the sum originally advanced by the first mortgagee. The latter, however, has the option of advancing the required sum, and remaining in possession if he pleases. Where the land has been mortgaged for a particular period, the landlord cannot interfere, until the expiration of such period. Kanom mortgages are generally renewed at the end of the period fixed, the landlord receiving a fee; but there is no obligation on either side to renew them, unless the landlord and mortgagee should be mutually desirous of doing so. Where the mortgagee discovers that the landlord has acted fraudulently, involving the produce of the land, he is entitled to have the deed cancelled.

Mel-kanom (Higher mortgage)

Under this tenure, the mortgagee has only the right to cultivate the land. If no period be specified, the landlord is at liberty to pay off the mortgage whenever he pleases. This tenure prevails in the neighbourhood of Palghat.

Koyu Panayam (Mortgage of the right of cultivation)

This is an expedient for raising the money on land already made over or Kanom. It is quite a separate transaction, sometimes taking place at the time of the mortgage; in which case it is referred to in the Kanom deed; at other times effected long after the mortgagee has come into possession. In the latter case the fact of the

(Loan advanced on the security of land already held on mortgage)

mortgage is alluded to in this deed, and the landlord engages to pay off both the mortgage and the loan together. The loan thus made give the mortgagee an additional lien upon the property as security for the re-payment of the loan. Where the new loan is added the sum first advanced and a fresh bond is executed, the transaction is treated altogether according to the rules applying to Kanom mortgages.

(Usufructuary mortgage, the full value of the land being advanced)

This tenure gives the mortgagee possession and the entire produce of the land, the landlord merely retaining the proprietary title and the power to redeem. Where no period has been stipulated the landlord may pay off the mortgage at any time. The principal alone is re-payable, the mortgagee recovering the interest of his money from the produce of the land. If the landlord be desirous of raising a further sum and the Otti mortgagee refuses to advance it, the money may be received from a third party, and mortgage transferred to him but the original mortgagee has a right to be first consulted.

Kaivituka Otti (Usufructuary mortgage, with relinquishment of the power of transfer

The landlord in this case relinquishes the power of transferring the property to a third party and binds himself to borrow any further sum he may require, only from the mortgagee. Should the latter decline to advance the amount, the landlord may pay off the mortgage and re-assign the property to another party.

Ottikumpuram (Where a sum is advanced beyond the Otti amount)

When the landlord wishes to obtain a further sum, he applies to the Otti mortgagee, and on receiving it executes this deed to him, in which he binds himself to re-pay the amount at the same time that he pays off the mortgage, The mortgagee must have always the option of making such further advance, but if he decline, the landlord may apply to a third party and

assign the property to him, the latter paying off the claim of the original mortgagee.

Neermuthal (Where a further sum is advanced on an Otti mortgage in addition to the Ottikkumpuram

When the landlord requires to borrow a still further sum on the security of land assigned to an Otti mortgagee to whom he has already executed an Ottikkum-puram deed, he is bound first to apply to such mortgagee, and if the latter should consent to make the required advance, the landlord gives him a Neermuthal document by which he makes over to him all but the right of water. Such further advance is recoverable with the amount of the original mortgage, the Otti claim being in fact merged in the Neermuthal deed. In this case, as in that of Ottikkum-puram transaction, if the mortgagee decline to make the advance, the landlord may obtain it from a third party who satisfies the claim of the original mortgagee and comes into possession. In any of the three cases last mentioned, the landlord is at liberty at any time to pay off the mortgage and redeem his property.

Janmom Panayam (Mortgage of the proprietary right)

This is the last resource, short of selling altogether. In executing this deed, the landlord relinquishes the power to redeem his land, and has nothing left to him out of the nominal right of proprietorship. By going through the form of casting a few drops of water from his hand, he yields up all right of further interference in the land. Nor can he sell his further proprietary title to any one but the mortgagee, as he has already made over to him all the rights and privileges possessed by a proprietor. The three last tenures prevail only in the neighbourhood of Calicut.

Jenmum or Attipper (Outright sale of the proprietary right)

The purchaser in coming into possession is bound by all the obligations which attached to the proprietor. He cannot disturb those who may be holding the property or any portion of it on Kanom mortgage, but merely receive the surplus

rent produce in place of the former landlord. On the other hand, he comes into all the rights and privileges of the former landlord and may pay off Otti mortgages and sell or transfer the property as he pleases.

Peruvartham (Usufructuary mortgage, the land being redeemable at its value in the market at the time of redemption)

This tenure approximates closely to that of Otti, the mortgagee being in possession and enjoying the whole produce. The peculiarity of the transaction is that the sum advanced, which is always the full mentioned in the deed, and the landlord in redeeming the property does not repay the amount originally advanced, but the actual value of it in the market at the time of the redemption. In other respects, the same rules that apply to Otti mortgages are applicable to these also. Deeds of this kind are in use only in Palghat and Temmalapuram.

Adima or Kutima Jenmam (A permanent but inalienable right granted for favour or for performance of certain services)

In this case the land is made over in perpetuity to the grantee, either unconditionally as a mark of favour, or on condition of certain services, being performed. The terms Atima and Kutima, mean a slave or one subject to the landlord, the grant generally being made to such persons. A nominal fee of about two fanams a year is payable to the landlord to show that he still retains the proprietary title. Land bestowed as a mark of favour can never be resumed, but where it is granted as remuneration for certain services to be performed, the non-performance of such services, involving the land. The non-payment of the annual fee will form no ground for ousting the grantee, but it will be recoverable by action. The hereditary property of native princes cannot be enforced on this tenure, the ruling prince having only the right of enjoyment during life, without power to alienate.

Anubham or Anubhavam (Relinquishment of land for enjoyment by the tenant in perpetuity)

It was customary for princes, when conferring a title on any person, to grant him at the same time sufficient land to enable him to maintain the dignity of his position. Grants under this tenure were also bestowed upon persons for special services rendered, or for the future performance of certain services. The tenant cannot be ejected, except where there are conditions imposed and he fails to fulfill them; but on the other hand, he and his heirs have only the right of enjoyment and cannot alienate their title. A trifling annual fee is generally paid to the landlord to show that he has not surrendered the proprietary right.

Karankari or Jamma Koyu (Sale or transfer a perpetuity of the right of cultivation)

In this case the land is made over for permanent cultivation by the tenant in return for services rendered. Where the proprietary title is vested in a pagoda, the grant will be made for future services. In some cases the land is mortgaged on this tenure, the kanom mortgagee paying the surplus rent produce to the landlord, after deducting the interest of the money he has advanced. The tenant has, in North Malabar, only a life-interest in the property which at his death reverts to the landlord. In the south, the land is enjoyed by the tenant and his descendants until there is a failure of heirs, when it reverts to the proprietor. Except where the land is granted for special services, an annual rent is payable under this tenure. The tenant's right is confined to that of cultivation, but it is permanent, and he cannot be ousted-for arrears of rent, which must be recovered by action, unless, there be a specific clause in the deed declaring the deed cancelled, if the rent be allowed to fall into arrears.

Karaima (Right of perpetual enjoyment)

Lands made over by the trustees or managers of pagodas to those employed in performing certain services therein, are conferred on this tenure. So long as they fulfill their duties, the tenants are not liable to be ousted; to maintain an action of

ejectment, therefore, it must be shown either that they have neglected their duties which have rendered it necessary to employ other persons to perform them, or that they have endeavoured to set up a proprietary claim in subversion of that of the Pagoda.

Cooderoopad or Nelamuri (Assignment of rent produce)

This is an arrangement between a landlord and his creditor according to which the latter agrees to receive the rent produce of land leased to tenant, in lieu of interest in money upon the sum borrowed by the landlord. Should any dispute arise between the landlord and his tenant, and should the latter in consequence, refuse to deliver the rent produce according to the landlord's deed of assignment, the creditor can sustain an action only against the landlord.

The tenant is much in the same position as a Kanom mortgagee, having possession and recovering the interest of his money from the rent produce of the land. Instead, however of making over the surplus produce to the landlord he places it to his credit in account to be applied to the reduction of the principal. As soon as the principal is in this manner repaid the mortgagee must restore the land to the proprietor.

Kutti Kanom (Mortgage of forests, the mortgagee felling the timber for trade and paying a fee on each stump or tree to the landlord)

This is an arrangement by which the landlord assigns on mortgage a tract of forest land, receiving a stipulated fee for every tree felled by the mortgagee, the entire number of trees to be cut down and the period within which they are to be felled being expressly fixed in the Karar entered into between the parties. The mortgagee usually makes an advance and agrees to pay the balance by instalments. The non-payment of the stipulated instalments does not render the mortgage liable to dispossession, unless there be a special clause in the agreement to this effect. The instalments may be recovered by action, but the mortgagee remains in possession during the period stipulated.

Sub-mortgage

Mortgatees may transfer their interest to sub-mortgagees, and the latter come into the enjoyment of the same rights and privileges as the former possessed. A notice should be given to the landlord at the time of the transfer. In an action for the recovery of the property, the landlord must recognize and sue the party in possession, but is only liable to pay the amount which would have been payable to the original mortgagee.

APPENDIX II

ACT IV OF 1896

THE MALABAR MARRIAGE ACT

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STATEMENT OF OBJECTS AND REASONS

In 1891, the Government of Madras, for the reasons stated in G.O., dated 4th May 1891, No.25, appointed a Commission to ascertain the customs connected with marriages contracted by the followers of the Marumakkathayam law of inheritance and to report whether legislation to provide a form of marriage or to recognize any prevailing form of marriage is necessary and expedient. Five of the Commissioners where in favour of permissive legislation on the grounds that (1) as a permissive law it will not force a legal marriage on those who are unwilling to contract it; (2) a marriage law is an important aid to national progress and good morals; (3) the demand for legislation will be repeated year after year until it is conceded; (4) the right to contract a legal marriage is personal to every one of Her Majesty's subjects and the demand for a permissive law is but reasonable; (5) though the minority that desires legislation is small it is a growing and educated minority and every year will add to its strength and influence. The sixth Commissioner also was of opinion that legislation was expedient and necessary if the Courts do not recognize the marriages of the classes referred to as legal. The Courts have not hitherto recognized these marriages as legal, and the President of the Commission, Sir T. Muthuswamy Iyer, was of opinion that it is not likely that the Courts will adopt any other view.

The Governments of Madras and India concur in the view that the legislation is necessary and expedient. This Bill is framed to carry out the above suggestion.

The various provisions of the Bill have been fully referred to by the Member in charge of the Bill in his speech requesting the Council for leave to produce the Bill.

Section (1) declares that this Act shall be applicable to all Hindus in the Presidency of Madras following the Marumakkathayam or Aliyasantana law.

Section (1) declares that this Act shall be applicable to all Hindus in the presidency of Madras following the Marumakkathayam or Aliyasantana law.

Section (3) empowers the Government to appoint Registrars to register marriages.

Section (4) to (6) refers to certain requirements preliminary to marriage.

Section (7) declares that any person interested may object to the registration of marriage on the ground that such marriage contravenes any of the conditions here subsequently referred, viz., relationship, age, caste, etc.

(i) Relationship

According to the Marumakkathayam usage, persons descended from common female ancestor are not at liberty to marry one another. There is difference of opinion as to whether the member of the tarwad of a deceased or husband is eligible as a second wife or husband. Clause (a), section 7 of Bill, accordingly provides that any of the persons interested might object to registration of marriages on the ground that, according to the custom of the country, a marriage between the parties would render them liable to religious excommunication, and if the objection is proved valid in a Court of Law, the marriage will not be registered. If, however, a marriage, which is against custom of the country is registered then it will be null and void, if a relationship can be traced between the parties through some common ancestor who stands to each of them in a nearer relationship than that of a great grandfather or grandmother.

(ii) Age

In the Marumakkathayam family every member, whether a minor or adult, is subject to the karanavan. But it appears according to the evidence before the Commission that the junior members do

not always obtain the consent of their guardians and that the only mode in which the karanavans deal such conduct is that of refusing permission to the junior member bringing wife into the tarwad house unless and until he is reconciled to the union. It is advisable not to interfere with the freedom of adults to marry without the consent of the karanavan and at the same time "to fix the age at which the karanavan's consent may be dispensed with sufficiently high to enable the contracting parties to see whether they can support the obligations of married life without aid from their tarwad" and section 7 accordingly provides that if any objection is raised the Registrar may refuse to register if either the husband or wife is below the age of 21 and the consent of the guardian has not been obtained.

(iii) Caste

According to usage there are restrictions due to caste. A Nambudiri may marry any Nair girl, a Nair of higher caste may marry a Nair female of low caste but a female of a higher caste is not allowed to marry one belonging to lower caste. Those restrictions, the violations of which will lead to religious ex-communication, are recognized and the Bill, clause C Section 7, provides that the Registrar shall refuse to register such marriages as are not allowed by caste as said above.

(iv) Form of Marriage

There are various forms of marriage prevailing in the districts of Malabar and Canara among those following the Marumakkathayam and Aliyasantana laws. They are referred to in the speech praying for leave to introduce this Bill. The Bill provides accordingly that the form in which marriages may be contracted under the Act ought to be described as the one customary in the caste or class to which the woman belongs. "It is necessary to describe it so in order that a Nambudiri Brahmin or a male member of a Kovilagam may contract marriage under the Act if he chooses to do so; otherwise there may be no form applicable to the case as the Brahmin or the Kashatria marriage ritual does not apply to a marriage with a Nair woman".

The evidence showed that polyandry has almost died out in the district of Malabar and that polygamy is very rare, The Commissioners were of opinion that polygamy ought not to be recognized in the interests of women., The Government considers

'that the Bill should contain provisions prohibiting registration there under of a marriage between parties either of whom has previously registered a marriage which is still subsisting". Such a prohibition is necessary to prevent those difficulties as to the right of maintenance and the devolution of property, which will certainly arise, and as freedom of divorce is allowed prohibition cannot be objected to as effecting a material change in the habits of the people. The bill adopts this view and it declares that a marriage though registered is null and void if either party has another husband or wife living whose marriage has been registered under this Act.

(v) Maintenance

According to usage the husband maintains his wife, and where he is unable to do so his tarwad maintains the wife and children where the marriage has taken place with the consent of the tarwad, except in cases where the wife may forfeit such claim by her conduct. S. (14) declares the liability of the husband or father to maintain the wife or children. It was suggested by Mr.Winterbotham that the husband ought to be entitled to refuse maintenance in those cases where section 488 of the Criminal Procedure Code would be a bar to the wife's claim. Sir Muthuswamy Iyer considered that whatever defence would be available to the husband under Hindu Law in answer to the wife's claim for maintenance must be available to him under the proposed Act. The Government of Madras considers that under the proposed law, the wife's claim ought not to be upheld if she would not be entitled to claim maintenance under section 488 of Criminal Procedure Code or under the Hindu Law. This view has been adopted.

(vi) Guardianship

Under the Marumakkathayam law, the karanavan is the legal guardian, whether the wife and children live in the tarwad house or with the husband and father. But practically the father is the guardian of the children when they permanently live with him, or in his tarwad. The proposed law converts this De~~sign~~ facto guardianship into legal guardianship. No right of guardianship is recognized in the husband and father, when the wife and children live in the tarwad - Section 15.

(viii) Divorce

Sir Muthuswamy Iyer says in his report: "Among Marumakkathayam Hindus marriage has yet to be legalized, polyandry has ceased but recently, and no religious sanction sustains the notices that one man is united in wedlock to one woman all life for better or for worse" and further that "save adultery no other determinate cause is recognized and no specific form is observed throughout Malabar or even in the same part of the district". The Government considers that though divorce is practically unrestricted at present, yet such freedom of divorce is not abused and there is no reason to suppose that it will be abused in the case of marriages registered under the proposed Act. Beyond, therefore, presenting an interval of six months to afford ample opportunity for reconciliation and to render temporary dissension innocuous, before the marriage is dissolved, the Government considers that divorce should be unrestricted., The impositions of further restrictions in the opinions of Government, would render the new law unpopular and prevent it from attaining that measure of success which may otherwise be anticipated. Sections 16 to 18 of the Bill accordingly provide that a husband or wife may apply to a Court to dissolve the marriage and six months after the service of notice on the other party the Courts shall declare the marriage dissolved.

(viii) Inheritance

Sections 19 to 22 deal with the question of inheritance. Once marriage is legalized, it appears to follow that the fate of a man's family after his death should not be left altogether to the mere chance of his having married a wife for the sake of simplicity, and in view of the prevailing practice in the district it has been suggested that one half of the self-acquired or separate property of the deceased should go to his wife and children and the other half to his tarwad. The Bill accepts this suggestion. If he leaves no widow, then his children take that share. In the case of a woman whose marriage has been registered under this Act one half shall devolve upon her children. As registration is the only evidence of a marriage relation already formed, whether the children were born before or after the registration they will inherit.

Section 23 makes the section 494 or 495 of the Indian Penal Code applicable to those who register their marriage while a marriage, which has been already registered, is subsisting.

MADRAS ACT No. IV OF 1896

THE MALABAR MARRIAGE ACT. [14th March 1896; 27th May 1896]

An Act to provide a form of marriage for persons following the Marumakkathayam or the Aliyasantana Law.

Preamble

WHEREAS it is expedient to enable persons following the Marumakkathayam or the Aliyasantana Law of Inheritance to contract marriages which shall be recognized by courts of law as legal marriages and to provide for the issue of such marriage; it is hereby enacted as follows:-

Title and application

1. This Act may be called "the Malabar Marriage Act, 1896", and it shall be applicable to all Hindus domiciled in the Presidency of Madras following the Marumakkathayam or the Aliyasantana Law of Inheritance.

Definitions

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

"Sambandham"

"Sambandham" means an alliance between a man and a woman by reason of which they, in accordance with the custom of the community to which they belong or either of them belongs, cohabit or intend to cohabit as husband and wife;

"Children"

"Children" means sons and daughters of parents whose Sambandham has been registered as a marriage under this Act, whether born before or after such registration; but shall not include step sons or step-daughters. In the case of anyone whose personal law permits adoption, "children" shall include adopted sons and aughters;

"Marriage" — "Marriage", with its grammatical variations and cognate expressions, means, except in section 3, clause (n), the last me of section 3, clause c, section 15, clause (a), and the last me of section 15, clause (c), a Sambandham registered under the provisions of this Act,

"Tarwad" — "Tarwad" means and includes all the members of a joint family with community of property governed by the Marumakkathayam or the Aliyasantana Law of Inheritance.

Conditions subject to which a Sambandham may be registered as a marriage — 3. A Sambandham between Hindus both or either of whom follow the Marumakkathayam or the Aliyasantana Law of Inheritance may be registered under this Act as hereinafter provided subject to the following conditions:-

(a) neither party must be subject to a personal law of marriage according to which he or she, as the case may be, cannot validly contract a marriage with the other party;

(b) the relation of the parties must not be such in respect of consanguinity or affinity that a Sambandham between them is prohibited by any custom or usage applicable to the community to which they belong or either of them belongs;

(c) neither party must at the date of the notice under section 5 have a husband or wife living whose Sambandham with her or him has been registered under this Act and which marriage is not null and void under section 15 or with whom she or he is otherwise legally married;

(d) the parties must not belong to different communities between the members of which, according to the custom or usage applicable to either community, cohabitation is prohibited;

(e) the Sambandham must have been formed in accordance with the customary ceremonies, if any prevailing in the community to which they belong or either of them belongs;

(f) a party to a Sambandham who is a minor must have obtained the consent of his or her legal guardian to the registration of the Sambandham as a marriage.

Appointment of Marriage Registrars

4. The Local Government may appoint one or more Registrars under this Act, either by name or as holding any office for the time being, for any portion of the territory subject to its administration. The officer so appointed shall be called "Registrar of Marriages under the Malabar Marriage Act, 1896", and is hereinafter referred to as the "Registrar". The portion of territory for which any such officer is appointed shall be deemed his district.

Registration Notice of intention to register a Sambandham to be given to the Registrar

5. When it is intended to register a Sambandham as a marriage under this Act, both or either of the parties shall give notice in the form (A) to this Act annexed, to the Registrar within whose local jurisdiction either of the parties resided at the time when the Sambandham was formed or within whose local jurisdiction it is intended to form it.

Registrar to file such notices and to maintain the Marriage Notice Book"

6. The Registrar shall file all such notices and keep them with the records of his office, and shall also forthwith enter a true copy of all such notices fairly into a book to be kept for that purpose supplied to him by the Local Government and to be called "The Marriage Notice Book". Such book shall be open at all reasonable times without fees to all persons desirous of inspecting the same.

Copies of notice to be served on interested parties

7. (1) Every Registrar, shall, on receiving any such notice, forthwith cause a copy thereof to be affixed to a notice board in some conspicuous place in his office and shall then serve or cause to be served at the expense of the party giving such notice a copy thereof on the other party to the Sambandham, if both parties have not joined in giving such notice, on the guardians, if any, of

the parties thereto, and on the managing members of the Tarwads or families to which they respectively belong.

Withdrawal of notice

(2) If at any time before registration is effected the party by whom notice was given under section 5 signifies in writing to the Registrar that he withdraws such notice, the Registrar shall, thereupon, at the expense of the party withdrawing the same, communicate the fact of withdrawal to the persons mentioned in sub-section (1).

Persons entitled to object to registration of a Sambandham. Grounds on which objection may be taken

(3) Any person entitled to receive a notice under subsection (1) of section 7, any member of the tarwad or family of either party, or any person having any expectancy of succession to the property, if any, of such tarwad or family of either party may, within one month from the date of such service of notice, object to such registration on the ground that such Sambandham or registration is in contravention of the conditions prescribed in section 3.

Procedure of Registrar if objection is taken

(4) Such objection shall be in writing signed by the person objecting and shall be presented by the objector or his duly authorized agent to the Registrar who shall file the same in his office. A copy of such objection shall at the expense of the objector be served on the party by whom notice was given under section 5.

(5) On receipt of a notice of objection [made under subsection (1) the Registrar shall not proceed to register the Sambandham as a marriage until the expiry of four months from the receipt of such notice unless such notice is in the meantime withdrawn.

(6) If no such objection be made under this section and if neither party withdraws the notice under section 7, sub-section (2), such Sambandham may at any time, not being less than one month nor more than six months from the service of the notice under section 7, be registered as a marriage.

Person objecting may file a suit in Civil Court

8. Any person objecting to the intended registration of a Sambandham may, after complying with the provisions of section 8, file a suit in a competent Civil Court for a declaratory decree declaring that such registration would contravene one or more of the conditions prescribed in section 3.

Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with Registrar.

9. The judge before whom such suit is instituted shall thereupon give the person instituting the same a certificate to the effect that such suit has been filed. If such certificate be lodged with the Registrar within four months from the receipt of notice of objection, the Sambandham shall not be registered as a marriage under this Act till the decision of such Court has been given and the period allowed by law for appeal from such decision has elapsed; or, if there be an appeal from such decision, till the decision of the Appellate Court has been given or such suit or appeal has been withdrawn or dismissed for default.

If such certificate be not lodged within the period prescribed in the last preceding paragraph, or if the suit by the objector be finally dismissed or withdrawn, the Sambandham may be registered as a marriage.

Declaration to be signed before registration

10. Before a Sambandham is registered as a marriage, the parties thereto and three witnesses shall, in the presence of the Registrar, sign a declaration in the form (B) to this Act annexed. If either party is a minor, the declaration shall also be signed by his or her legal guardian, and in every case it shall be counter-signed by the Registrar.

Registrar to enter certificate of marriage in the Marriage Certificate Book

11. When such declaration has been made, the Registrar shall enter a certificate of marriage in a book to be kept for that purpose supplied to him by the Local Government and to be called "The Marriage Certificate Book" in the form (c) to his

Act annexed, and such certificate shall be signed by the Registrar and counter-signed by the parties, three witnesses and, if either party is a minor, by his or her guardian also.

Registration at a private residence

12. Subject to such rules as may be prescribed in that behalf by the Local Government, the Registrar may attend at the private residence of the parties or of the guardian of a party who is a minor for the purpose of such declaration and marriage certificate book being signed by them in his presence.

Fees payable to Registrar

13. The Local Government shall prescribe the fees payable for the duties to the discharged by the Registrar under this Act.

The Registrar may demand payment of any such fee before the registration of the Sambandham or performance of any other duty in respect of which it is payable.

The said marriage certificate book shall, at all reasonable times, be open for inspection. The Registrar shall furnish certified extracts from the marriage certificate book upon payment of the fee prescribed by the Local Government therefore, and such extracts shall be admissible as evidence of the due registration as marriage of the Sambandham therein mentioned.

14. (1) A marriage shall be null and void only -

Marriage when null and void

(a) if either party is subject to a personal law of marriage according to which he or she, as the case may be, cannot validly contract a marriage with the other;

(b) if a relationship can be traced between the parties through some common ancestor who stands to each of them in a nearer relationship than that of great-great-grand father or great-great-grand mother, and by reason of such relationship a Sambandham between them is prohibited by any custom or usage applicable to the community to which they belong or either of them belongs;

(c) If either party has a husband or wife living whose Sambandham with such party has been registered as a marriage under this Act and such marriage is not null and void under clauses (a) and (b) of sub-section (1) or with whom she or he has been otherwise legally married.

(2) A marriage shall not be invalid on the ground that the Sambandham or registration contravenes any of the grounds mentioned in section 3 other than those specified in clauses (a), (b) and (c) of sub-section (1).

Marriage not invalid by reason of irregularity in procedure

15. (1) No marriage under this Act shall be held invalid by reason of any irregularity in the giving of notice under section 5 or of failure to give notice under section 7 to any person entitled to receive it, or by reason of any irregularity in the publication or service of the copy of such notice or in complying with the provision of sections 5, 11 and 12.

(2) But, when any person entitled to be served with copy of notice under section 7 has not been so served, it shall be competent to him to institute a suit within three months from the date of registration of the Sambandham for cancellation of such registration on all or any of the grounds mentioned in section 3.

Maintenance

Maintenance of wife and children

16. (1) The wife and children shall be entitled to be maintained by the husband or father, as the case may be. In a civil suit by the wife or children for maintenance, it shall be open to the husband or father to plead all defences open in such a suit to a Hindu governed by the ordinary Hindu Law.

(2) Nothing herein contained shall affect the right of the wife and children to be maintained by the tarwad.

Guardianship

17. When a man's wife and children are minors maintained by him or his tarwad, he shall,

Guardianship of minor wife and children

subject to the provision of the Guardians and Wards Act, 1890, be the guardian of his wife when she is over fourteen years of age and of his children: Provided that such guardianship shall not extend to the right and interest of his wife or children in the property of the tarwad to which his wife and children belong.

Divorce

Petition for dissolution of marriage

A husband and wife or either of them may present a petition for dissolution of the marriage in the Court of the District Munsif within the local limits of whose jurisdiction either the husband or wife, or in cases in which one of them alone is petitioner the respondent, has a permanent dwelling or actually and voluntarily resides or carries on business or personally works for gain at the time when the petition is presented.

[*Explanation* - For the purpose of this section the Madras City Civil Court shall be deemed to be the Court of the District Munsif in respect of the area within the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Madras.]

Notice to be given to other party, if petition is not joint

19. A copy of such application when made by one party alone shall be served on the other party to the marriage at the expense of the petitioner.

Court to declare marriage dissolved on motion made within a specified period

20. Six months after the presentation of a petition by both parties, or in cases where the application is made by one party alone six months after the service of notice under section 20, the Court shall, on the motion of the applicants or applicant, declare in writing the marriage dissolved: Provided that such motion is made within seven days after the expiration of the six months or, if the Court is closed then, that such motion is made on the day on which the Court is re-opened. Upon such declaration the marriage shall be deemed dissolved from the date of such

declaration; and no declaration made under this section shall be held invalid by reason of any irregularity in complying with the provisions of sections 19, 20 and 21. If no such motion is made within the time hereinbefore prescribed, the Court shall dismiss the petition.

Maintenance when claimable by divorced wife

21. Where a marriage has been dissolved without the consent of the wife, she shall, notwithstanding such dissolution, be entitled to claim maintenance from the husband so long as she remains a Hindu, continues chaste, and does not form a Sambandham or contract a marriage: Provided that she was not guilty of adultery uncondensed before such dissolution.

Succession to separate property of a married man dying intestate

22. Where a man following the Marumakkathayam or the Aliyasantana Law of Inheritance dies intestate in respect of his self-acquired or separate property or any portion thereof, one-half of such property or in the event of no member of his tarwad surviving him the whole of such property shall devolve on his widow if he leaves no children, or on his children in equal shares if he leaves no widow, or on his widow and children in equal shares if he leaves both widow and children.

Succession to separate property of a married woman dying intestate

23. Where a woman following the Marumakkathayam or the Aliyasantana Law of Inheritance dies intestate in respect of her separate or self-acquired property or any portion thereof, one-half of such property shall devolve in equal shares upon her children and in the event of no member of her tarwad surviving her the whole of such property shall devolve on her husband.

Services of notices under this Act.

24. Copies of notices under sub-section (1) of section 7, notice of withdrawal under sub-section (2) of section 7, copies of objections under sub-section (2) of section 8, shall be served through

such officer or Court as the Local Government may direct in this behalf, and the law in force for the time being for the service of summons on a defendant in a civil suit shall apply to such service (a).

FORM A

(SECTION 5)

Notice of Marriage

To

_____ a Registrar of Marriage, under Act for the District of

I hereby give you notice that I intend registering as a marriage under Act. The Sambandham between me and the other party herein named and described.

Name	Names of tarwad & of the managing member thereof	Names of the legal guardians (if any)	Rank or profession or calling	Residence	Age	Caste	The place in which the Sambandham was formed or is intended to be formed
A, B. ...							
C, D. ...							
Witness my hand, this day of 193 (Signed)							

a) By S.2 of the Madras Marumakkathayam Act this Act is repealed as far as it is applicable to Hindus following the Marumakkathayam law of inheritance.

FORM B

(SECTION 11)

Declaration to be made separately by the Bridegroom and by the Bride.

A, B, hereby declare as follows: -

1) I am a Hindu governed by the Law of Inheritance

2) I am years of age

3) The registration of my Sambandham with will not contravene any of the conditions prescribed in section 3 of Act.

4) I consent to the registration as a marriage of the Sambandham between me and C D. [or, if the party making the declaration is a minor, (4) my legal guardian consents to the registration as a marriage of the Sambandham between me and C D.]

5) I am aware that, if any statement in this declaration is false and if in making such statement I either know or believe it to be false or do not believe it to be true. I am liable to imprisonment and fine.

Three witnesses. (Signed) A, B (the Bridegroom or Bride).

(Signed G.H. (") E.F. (Guardian. If any)

(Signed I.J. (Countersigned) M.N.,

(Signed K.L. Registrar of Marriage under Act, for the District of

FORM C

(SECTION 12)

Marriage Certificate

1. E.F. certify that, on the of 193 appeared before me A, B and C, D., each of whom in my presence and in the presence of three witnesses, whose names are signed hereunder, made the declarations required by Act, and that the Sambandham between them was registered as a marriage under the said Act in my presence.

(Signed) E, F.

Registrar of Marriages under Act for the District of

(Signed) A.B.

(Signed) G.H (Signed) C.D.

(Signed) I.J. Three witnesses (Signed) M.N.

(Signed) K.L.

(Guardian, if any)

Dated the day of 193.

APPENDIX III

THE MALABAR WILLS ACT (V OF 1898)

STATEMENT OF OBJECTS AND REASONS: - The Bill declares the powers of persons following the Marumakkathayam or Aliyasantana Law of inheritance to devise by will property, which they can deal with by gifts *inter vivos*. The history of the proposed measure is briefly as follows: -

In 1881, Mr. Logan, then Collector of Malabar was placed on special duty to enquire into the condition of the agricultural classes of Malabar. In paragraphs 483-486 of his report he touched on succession to property remarking that, as the law stands, the self-acquisitions of a follower of the Marumakkathayam Law devolve, on his death, on the tarwad, and expressing the opinion that the power of regulating by will the succession to self-acquired property should be conferred upon all adults.

In 1884, Mr. Logan's report was referred for consideration to a committee; this body incorporated its views in four Bills, of which one dealt with the subject of marriage in Malabar and contained provisions conferring the testamentary right. These provisions were to the effect that, when a marriage had been contracted in accordance with the terms of the Malabar Marriage Act,

1) The parties should have power to dispose of their self-acquisitions by will, subject to the condition that due provision was made by the husband for his widow and children.
2) Property so devised should be treated as the self-acquired property of the devisee,
3) Certain formalities should be observed in the making of wills.

This Bill was referred to the High Court for opinion and was favorably received by that authority.

For some years after this no action was taken, but in 1890 the Hon'ble C. Sankaran Nair obtained permission to introduce into the local Legislative Council a Malabar Marriage Bill, which contained provisions on the subject of succession similar to those appearing in the Bill prepared by the Committee of 1884.

Doubt having been felt whether the Hon'ble Mr. C. Sankaran Nair's Bill did not require the prior sanction of the Governor-General, the question was referred to the Government of India, and that authority directed that further information as to the matrimonial customs of Malabar should be obtained.

Accordingly, a Commission was appointed to consider the matter in 1891, and in paragraph 84 of their report, the Commissioners stated that they and practically all educated people following the Marumakkathayam Law were agreed as to the advisability of conferring testamentary powers as proposed.

In reporting on the subject to the Government of India this Government expressed concurrence with the views of the Commissioners, but added that the privilege sought should not be restricted to persons who contract marriages under the proposed marriage law and that the best way of dealing with the matter would probably be to pass a separate Act declaring the existence of the testamentary power among all Hindus and extending the provisions of the Hindu Wills Act, 1870, to the whole of the Presidency.

In reply the Government of India stated that it had no objection to the course proposed so far as it related to the West Coast only. Accordingly this Government suggested to the Hon'ble Mr. C. Sankaran Nair that provisions on the subject of testamentary succession should not appear in the revised draft of the Malabar Marriage Bill; but on reconsideration His Excellency the Governor-in-Council came to the conclusion that the matter could most suitably be dealt with by a separate enactment.

The Hon'ble Judges of the High Court and the Hon'ble Advocate General were consulted as to the form which such an enactment should take, and after a consideration of their opinions the Government came to the conclusion that it was inadvisable to extend the provisions of the Hindu Wills Act, 1870, to the District of Malabar, because that Act has obviously been framed for communities having a le\gal form of marriage, and would be difficult to, apply in the case of classes governed by the Marumakkathayam or the Aliyasantana Law of Inheritance.

A Bill was accordingly drafted on the lines recommended by Mr. Justice Parker, and introduced into the Council on the 8th April 1896.

His Lordship the Secretary of State to whom the Bill and connected papers were submitted in due course suggested that the expediency of recognizing nuncupative wills or any wills made without some such formalities as are prescribed by section 56 of the Indian Succession should be considered and expressed the opinion that whenever it is posed to concede or place beyond doubt, the power of testamentary disposition, it is but reasonable that all testaments shall be in writing duly attested.

To give effect to the suggestion made, it has been found expedient redraft the Bill, and to incorporate therein rules relating to the revocation of wills which seem no less necessary than rules prescribing the forms of execution and attestation. It will be seen from the provisions of the Bill in its present form that they have been taken almost verbally from the Indian Succession Act, the section which have been copied being 50, 51, 55, 57, 58 and 60, which correspond to section 2 to 7 of the Bill Section 8 of the Bill has been inserted with a view to secure to soldiers and sailors belonging to the Marumakkathayam or the Aliyasantana community similar privileges in regard to the execution of oral wills to those which are enjoyed by members of other communities who follow these callings. It has not been thought necessary to import in the Bill special provisions regarding privileged wills, such as are contained in sections 52 and 53 of the Act.

This Bill like the one previously introduced does not purport to the privilege of testation on persons following the Marumakkathayam or the Aliyasantana Law of Inheritance in view of the fact that the ruling of the High Court in *Alami v. Komu* goes to show that wills have occasionally been made in Malabar in regard to self-acquired property. It is therefore essential that the Bill as revised should also be merely in declaratory form, as otherwise it might be construed as to throw doubts on the validity of wills made prior to its passing. Practically speaking, it will however, confer upon persons following the Marumakkathayam or the Aliyasantana Law of Inheritance the privilege of testation which they desire in as much as their general impression is that they have no testament power over

their separate or self-acquired property and this belief almost universally prevent the execution of wills.

The Act came into force on 2nd September 1898.

[9th July 1898; 3rd August, 1899]

An Act to declare the testamentary power of persons governed by the Marumakkathayam or the Aliyasantana Law of Inheritance, and to provide rules for the execution, attestation, revocation and revival of the wills of such persons.

Preamble

WHEREAS doubts have arisen regarding the testamentary power of persons governed by the Marumakkathayam or the Aliyasantana Law of Inheritance; and whereas it is expedient to remove such doubts, and to provide rules for the execution attestation, revocation and revival of the wills of such persons it is here by enacted as follows: -

PART I.

PRELIMINARY.

Short title

1. (1) This Act may be called THE MALABAR WILLS ACT, 1898.

Local extent

(2) It extends to the whole of the Presidency of Madras; and

Commencement

(3) It shall come into force on such date as the Local Government by notification shall appoint in this behalf:

Provided that nothing in this Act shall be deemed to affect the Hindu Wills Act, 1870.

Interpretation

2. In this Act, unless there be something repugnant in the subject or context,-

Minor

1) 'minor' means any person who shall not have completed the age of eighteen years.

Will

2) 'Will' means any legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death;

Codicil

3) 'Codicil' means an instrument made in relation to a will and explaining, altering or adding to its dispositions. It is considered as forming an additional part of the will.

PART II.

OF WILLS.

Persons to whom this part shall apply

3. This part shall apply to persons domiciled in the Presidency of Madras who are governed by the Marumakkathayam or the Aliyasantana Law of Inheritance.

Persons capable of making wills

4. Every person of sound mind and not a minor may by will dispose of property which he could legally alienate by gift *inter vivos* and shall be deemed to have been always competent so to dispose of such property.

Explanation I - Persons who are deaf or dumb or blind are not thereby incapacitated for making a will, if they are able to know what they do by it.

Explanation II - One who is ordinarily insane make a will during an interval in which he is of sound mind.

Explanation III - No person can make a will while in such a state of mind whether arising from drunkenness or from illness or from any other cause that he does not know what he is doing.

Will obtained by frand, coercion or importunity.

5. A will or any part of a will, the making of which has been caused by fraud or coercion, or such importunity as takes away the owning agency of the testator is void.

Will may be revoked or altered.

6. A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

Saving clause

7. Nothing contained in section 4 shall

(a) affect any right established before the commencement of this Act by a final decree of a Court of competent jurisdiction

(b) authorize a testator to deprive any persons of a right of maintenance of which, but for section 4, he could deprive them by will;

(c) affect any law of intestate succession or authorize a testator to create in property any interest which he could not have created prior to this Act.

PART III.

OF THE EXECUTION, ATTESTATION, REVOCATION, ALTERATION AND REVIVAL OF WILLS

Persons to whom this part shall apply

8. This part shall apply to persons governed by the Marumakkathayam or the Aliyasantana Law of Inheritance, whether they are domiciled in the Presidency of Madras or not.

Execution of wills and codicils

9. All wills and codicils made on or after the date of the commencement of this Act within the Presidency of Madras, and all such wills and codicils made outside the said Presidency so far as relate to immovable property situated within the said Presidency must be executed according to the following rules: -

1st - The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

2nd - The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it will appear that it was intended thereby to give effect to the thing as a will.

3rd - The will shall be attested by two or more witnesses, of whom must have seen the testator sign or affix his mark on the will, or have seen some other person sign the will in the absence and by the direction of the testator, or have received the testator a personal acknowledgment of his signature or, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.

Note: - As to oral wills relating to moveable property and made in the Madras Presidency, see 10 L. W. 204.

Incorporation of by reference

10. If a testator, in a will or codicil duly attested, refers to any other document then actually written, as expressing any part of his intentions, such document shall be considered as a part of the will or codicil in which it is referred to.

Witness not disqualified by interest by being executor

11. No person, by reason of interest in, or of his being an executor of, a will, is disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

Revocation of will or codicil

12. No will or codicil, nor any part thereof, shall be revoked otherwise than by another will or codicil, or by some writing declaring an intention to revoke the same and executed the manner in which a will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Effect of obliteration, interlineations or alteration in a will

13. No obliteration, interlineation, or other alteration made in any will after the execution thereof shall have any effect, except so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible,

unless such alteration shall be executed in like manner nor as hereinbefore is required for the execution of the same save that the will, as so altered, shall be deemed to be executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or on foot or end of or opposite to a memorandum referring that alteration and written at the end or some other part of the will.

Revival of a will or codicil

14. No will or codicil, nor any part thereof, which shall be in any manner revoked, shall be otherwise than by the re-execution thereof, or by a codicil executed in manner herein before required, and showing an intention to revive the same and when any will or codicil which shall be partly revoked and afterwards wholly revoked, shall be revived, such shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown by the will or codicil.

Execution and revocation of will or codicil by soldiers or mariners

15. No will or codicil made by a soldier employed in an expedition or engaged in actual war or by a mariner at sea and no revocation by such person of his will or codicil shall be deemed invalid by reason only of such codicil or revocation not being made in accordance with the provisions of this part.

APPENDIX IV

THE MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (I OF 1900)

STATEMENT OF OBJECTS AND REASONS: - Madras Act I of 1887, which was intended to secure to tenants in the Malabar District, who have been ejected from their holdings, the market value of their improvements, has failed to secure its purpose fully. This result is due mainly to the want of precision in the language of the Act, especially in the use and application of the term "improvement" and to the indefiniteness of the rules laid down in section 6 for the guidance of the Courts in determining the compensation payable. In consequence, the Act has been the subject of numerous conflicting decisions of the Courts. The Madras High Court held, in supersession of a previous ruling of 1888, that there was "no provision in the Act for capitalizing either the annual rent or the annual increment due to the improvement" and determined the compensation on the basis solely of the capital and labour actually expended in effecting the improvement. In another case decided in 1894 in which the holding had been improved by the planting of trees, the High Court decided that the compensation payable was not the market value of the trees, and that the improvement to be paid for was the 'work' of planting, protecting and maintaining the tree and not the tree itself, which was the result of that 'work' nor its future produce. These decisions in effect deprive the tenant of the full market value of his improvements, that is to say, of the measure of compensation, which it was the object of the Act of 1887 to secure to him. It has also been found that the provisions of the act leave too much to the discretion of the courts and the assessors appointed under the act, while the absence of clear, uniform and definite principles to guide them in awarding compensation is a serious defect.

It is accordingly ~~to~~ proposed to repeal the act and to re-enact its provisions with such additions and modifications as the experience of its working during the past ten years and the further attention which the subject has received have shown to be desirable and practicable. The principal changes, which the Bill embodies, are the following: -

(a) Provisions (Clause 8, 9 and 10 of the Bill) have been introduced classifying improvements in to three distinct classes with a separate standard of compensation for each.

(b) The rate of interest to be adopted for capitalizing the value of improvements has been fixed at 6 per cent. (Clause II).

(c) Tables have been carefully prepared, based on the average price of fruit and produce, and the average cost of cultivating, planting and rearing. The data are embodied in schedules II, III and IV appended to the Bill. These tables the Courts are to use as presumptively correct calculating compensation. Power is reserved by clause 14 (I) to the Governor-in-Council to modify the schedules from time to time.

(d) By clause 6 (5) a tenant is enabling to remove from the holding from which he is ejected buildings, works and trees that are not "improvements" for which compensation can be claimed, provided they can be removed without substantial injury to the property; while by clause 14 and the proviso to clause 10, protection is afforded to landlords against over plant and wasteful expenditure in carrying out certain kinds of improvements.

(Signed) H.M. WINTER BOTHAM

The Hon'ble Member when moving that a Bill be taken into consideration said: -

At a meeting of this Council held on 24th January last a Select Committee was appointed to consider the provision of the Bill to amend the law relating to compensation for improvements made by tenants in the Malabar district. I have now the honor to present to the Council the Select Committee's report and move under Rule 47 of the rules for the conduct of business that the Bill and report be taken into consideration at once with a view to the Bill being passed into law. Whatever may be thought of the Bill in its amended shape, I may at least claim for the Select Committee that we spared no pains over our task. The Committee held no less than 21 meetings at which the subject was discussed in every detail. It was considered in some quarters that a Bill to amend Act I of 1887, so as to make it answer its

original design and purpose, would not be a contentious measure. Taking that design and purpose to be that the evicted tenant should get the full market value of its improvements, it would probable be nearer the mark to say that there is hardly a section or provision of the Bill regarding which unanimity of opinion can be secured. However, by following the principle of give and take, the Bill has been at last licked into a shape, which every member of the Select Committee, except the Hon'ble Mr.Sankara Subbayyar, has been able to accept if not to approve. Unfortunately the one dissentient member was able to attend only five meetings of the committee, and it is permissible to surmise that had the Hon'ble gentleman been present throughout the Committee's discussion of the subject his assent to the Bill might possibly have been gained. The Bill and the Committee's report were published in July last for the information of the public, and it was fondly hoped that during the ample interval, which has since elapsed much useful criticism on the amended bill would be evoked for the many Malabar experts who favoured us with their opinions on the Bill in its original form. The sole communication, which has been received, is the memorial from certain landlords in North Malabar, dated October 20th, which has been laid up on the table. It abounds the incorrect assertions and obvious misapprehensions of the Bill, There was indeed been a remarkable absence of criticism- a circumstances from which Hon'ble Members will draw such conclusions as may seem to them warranted. Certain it is that the extensive modifications and alterations which the Bill has undergone have been in large measure founded on the useful suggestions offered on the original Bill by numerous residence of Malabar of all shapes of opinion and by the Malabar and other newspapers. We received and considered opinions and memorials from officers, both Judicial and Revenue from Rajas, from Vakils, from associations of landlords and representatives of tenants; and when we find that the publication of our amended bill has not led to a further influx of comment from the same quarter, I for my part am inclined to suppose that the Bill as amended is regarded in Malabar as no longer open to serious objections. I can't my self profess any very ardent admiration of the Bill in its new dress; but I do think we may venture to hope that it will prove a not altogether unsuccessful compromise between the opinion which prevailed when Act I of 1887 was passed, viz., that an evicted tenant was entitled to the full

market value of his improvements and revolt against that opinion which would calculate compensation on the sole basis of outlay. During the discussion of the numerous amendments of which notice has been given, those Hon'ble members who have not had occasion to study the subject will be introduced to the provisions of the Bill in detail, and it does not seem desirable to occupy valuable time in recapitulating what will be found more fully set forth in the report. I will briefly remark that the Bill will, we hope, be found to remedy many defects and uncertainties in the existing law. A definition of "tenant" has been elaborated which will, we believe cover every person who, according to the custom of Malabar, is entitled when evicted to compensation for improvements. The definition of "improvement" has been amended so as to make it clear that what the evicted tenant is entitled to be compensated for is not merely his work, but the result or product of his work. We have made it clear that a tenant to whom compensation is due is entitled to remain in occupation as tenant until the compensation is paid. While preventing a landlord from evading payment of compensation by pleading bogus and unconscionable contracts, we propose to strengthen the landlord's hands by upholding agreements in writing registered, when the object of the agreement is to settle the amount of compensation due in respect of improvements already made. Other important provisions of the Bill will immediately come under notice and discussion when the amendments of which notice has been given are moved. Before sitting down it is perhaps as well that I should remind the Council that Act I of 1887 was passed merely as compromise. A strong opinion had for some years prevailed that it was absolutely necessary to pass for Malabar a wide measure conferring occupancy right on the actual cultivator, and placing a check up on rack-rents. Those who feared to take so wide a step in the dark urged that the desired protection from rack-renting and eviction might be secured by an Act which would force the courts to make to the evicted tenant a liberal award of compensation for his improvements. Thus was passed Act I of 1887 by which the legislature intended that the evicted tenant should receive the full amount by which his improvements had added to the value of the property. Then followed the ruling of Courts, many of them in consistent with each other, but tending to construe the Act as if it had intended that compensation should be awarded on the sole basis

of outlay. Our Bill is again a compromise, which secures to the landlord a share in the amount by which the tenants' improvements add to the value of the property. Now what appears surprising to me is that the very same opinion, which is opposed to any indirect check being placed upon eviction and rack-renting by providing for the award of liberal compensation for improvements, advocates the far more drastic direct check of conferring upon the tenants the right of occupancy at fixed rent. Thus Hon'ble Mr. Sankara Subbayyar in his speech opposing the principle of the Bill expressed the opinion that the occupancy right or the fixity of tenure should be secure in definite way and on a legal basis, and that if this were done, all unrest will cease and the compensation scheme will fall back to its proper level and will not wear the gloomy and unwelcome look it now seems to present to the Janmies as a body. And again in its minute of dissent appended to the report he says: "It would be far better to let him (the tenant) continue in possession of the produce he has raised than make the Janmi pay compensation". The answer to this of course, is that the Janmi is not made to pay compensation unless he evicts. No tenant can claim compensation under our Bill unless and until he is evicted; and Janmi can refrain from eviction. I wish to draw the attention of those Hon'able members who dislike the policy of the Bill, and of my many old friends and acquaintances among the Janmies of Malabar, to this, viz., that the alternate proposed to the Hon'bale Mr. Sankara Subbayyar to accepting such indirect check on eviction as this Act may afford is to confer occupancy rights on the tenantry. If the Malabar landlord wish that this sleeping and tremendously difficult alternative should be allowed to slumber for a further indefinite term, they should be prepared to accept, if not to welcome, the very moderate measure of protection to the tenant which this Bill will afford when it becomes law. I beg now to move that the Bill and the Report be taken into consideration at once.

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THE MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT.

[4th Dec. 1899; 3rd Jan. 1900]

An Act to secure to Tenants in the Malabar District compensation for Improvements.

Short title and local extent

Whereas it is expedient to amend the law relating to compensation for improvements made by tenants in the Malabar District; It is hereby enacted as follows: -

Repeal of Act I of 1887

1) This Act may be called the Malabar Compensation for Tenant's Improvements Act 1899 and it shall be applicable to the whole of the Malabar District.

Interpretation Clause

2) Madras Act I of 1887 is hereby repealed.

3) In this Act unless there is something repugnant in the subject or context.

Tenant

(1) "Tenant" with its grammatical variations and cognate expressions, includes a person who as lessee, sub-lessee, mortgagee or sub-mortgagee or in good faith sub-mortgagee of land is in possession thereof, or who with the bonafide intention of attorning and paying the customary rent to the person entitled to cultivate or let waste land, but without the permission of such

person, brings such land under cultivation and is in occupation thereof as cultivator.

Ejectment

(2) "Ejectment" includes redemption or recovery of possession of land mortgaged.

Improvement

(3) "Improvement" means any work or product of a work which adds to the value of the holding, is suitable to it and consistent with the purpose for which the holding was let, mortgaged or occupied.

What are presumed to be improvements

4) Until the contrary is shown the following works on products of such works shall be presumed to be improvement for the purposes of this Act: -

a) the erection of dwelling-houses, buildings appurtenant thereto, and farm buildings;

b) the construction of tanks, wells, channels, dams and other works for the storage or supply of water for agricultural of domestic purposes;

c) the preparation of land for irrigation;

d) the conversion of one-crop into two-crop land;

e) the drainage, reclamation from rivers or other waters, or protection from floods, or from erosion or other damage by water, of land used for agricultural purposes, or of waste-land which is cultivable;

f) the reclamation, clearance, enclosure or permanent improvement of land for agricultural purposes;

g) the renewal or re-construction of any of the foregoing works, or alterations therein or additions thereto;

h) the planting or protection and maintenance of fruit trees, timber trees, and other useful trees and plants.

Tenant entitled to compensation on ejectment

5) (1) Every tenant shall on ejectment be entitled to compensation for improvements which have been made by him, his predecessor in interest, or by any person not in occupation at the time of the ejectment who derived title either of them and

for which compensation has not already paid; and every tenant to whom compensation is so due shall, not withstanding the determination of the tenancy or the payment or tender of the mortgage-money (if any), be entitled to remain in possession until ejectment in execution of a decree or order of Court.

(2) A tenant so continuing in possession shall during such continuance hold as a tenant subject to the terms of his lease or of the mortgage, as the case may be.

Decree in ejectment to be conditional on payment of amount of compensation ascertained under this act or the difference between it and the amount, if any, adjudged to the plaintiff from the defendant.

6) (1) In a suit for ejectment instituted against a tenant in which the plaintiff succeeds and the defendant establishes a claim for compensation due under section 5 for improvements, the Court shall ascertain as provided in sections 9 to 18 the amount of the compensation and shall pass a decree declaring the amount so found due and ordering that on payment by the plaintiff into Court of the amount so found due and also the mortgage-money (if any) the defendant shall put the plaintiff into possession of the land with the improvements thereon.

Compensation for subsequent improvements and revaluation if necessary, of improvements at the time of ejectment

(2) If in such suit the Court finds any sum of money due by the defendant to the plaintiff for rent or otherwise in respect of the tenancy, the court shall set-off such sum against the sum found due under sub-section (1), and shall pass a decree declaring as the amount payable to him on ejectment the amount (if any) remaining due to the defendant after such set-off.

(3) The amount of compensation for improvements made subsequent to the date up to which compensation for improvement has been adjudged in the decree and the revaluation an improvement for which compensation has been so adjudge when and in so far as such re-valuation may be necessary with reference to the condition of such improvement at the time of ejectment, as well as any sum of money accruing due to the plaintiff subsequent to the said date for rent or otherwise in respect of the tenancy, shall be determined by order of

the Court executing the decree and the decree shall be varied in accordance with such order.

(4) Every matter arising under sub-section (3) shall be deemed to be a question relating to the execution of a decree within the meaning of clause (c) of section 244 of the Code of Civil Procedure. *(Now section 47)*

Tenant may remove buildings, works or trees not deemed improvements within a time to be fixed.

7) Whenever a Court passes a decree or order for ejectment against a tenant and such tenant has erected any building, constructed any work or planted any tree which the Court finds is not an improvement for which compensation can be claimed, but which the Court finds can be removed without substantial injury to the holding, such tenant may remove such building, work or tree within a time to be fixed by the Court in its decree or order.

Power to make rules for appointment of assessors etc.,

8) The Local Government may, from time to time, by notification in the Fort St. George and Malabar District Gazettes, make rules requiring the Court to associate with itself, for the purpose of estimating the compensation to be awarded under section 6 for an improvement, such number of assessors as the Local Government thinks fit, determining the qualifications of those assessors, the mode of selecting them, the fee payable to them, and the procedure to be followed in case of difference of opinion between the Judge and one or more of such assessors.

Improvement producing an increase in the value of the annual net produce

9) (1) When the improvement is not an improvement to which section 13 applies and has caused an increase in the value of the annual net produce of the holding, the Court shall determine, as nearly as may be, the average net money value of such increase and the number of years during which such increase may reasonable be expected to continue, and shall then ascertain the present value, at 6 per cent of an annuity equal to such money value for such number of

years, and also the cost of making the improvement determined in the manner prescribed in section 11.

(2) If the present value of the annuity does not exceed the cost of making the improvement, the present value shall be the compensation to be awarded.

(3) If the value of the annuity exceeds the cost of making the improvement, the compensation to be awarded shall be the cost together with one-half of the excess.

Explanation - The value of the net produce means the amount remaining after deducting from the value of the gross produce the cost of cultivation and the Government assessment and cesses.

Improvements consisting of trees or plants spontaneously grown during tenancy or sown or planted by tenants

10) When the improvement is not an improvement to which section 9 applies but consists of timber trees or of other useful trees or plants spontaneously grown during the period of the tenancy or sown or planted by any of the persons mentioned in section 5, the compensation to be awarded shall be three-fourths of the sum which the trees or plants might reasonably be expected to realize, it sold by public auction to be cut and carried away.

Other kinds of improvements

11) When the improvement is not an improvement to which section 9 or 10 applies, the compensation to be awarded shall be the cost of the labour, including supervision thereof, and of the material together with other expenditure, if any, which would at time of the valuation be required to make the improvement less a reasonable deduction on account of the deterioration, any, which may have taken place from age or other cause.

Value of improvement to be ascertained in the way most favourable to the tenant

12) Nostwithstanding anything contained in sections 10 and 11, the amount of compensation to be awarded for an improvement shall be ascertained in the way prescribed by any of the

said sections, which is most favourable to the tenant.

Illustrations.

(a) The compensation to be awarded for a jack tree as fruit tree is ascertained under sec. 9 to be Rs.7, but for the same tree as a timber tree it is ascertained under section 10 to be Rs.10.

(b) The compensation to be awarded for an immature casuarinas plantation is ascertained under section 10 to be Rs.20, but under see 1 to be Rs.100.

In each case, the Court shall award the higher amount.

Improvement consisting in the protection and maintenance of trees and plants not sown or planted by tenants and of trees and plants spontaneously grown prior to tenancy

13) When the improvement consists in the protection and maintenance of timber or fruit trees or of other useful trees or plants not sown or planted by any of the persons mentioned in section 5, or of such trees or plants spontaneously grown prior to the commencement of the tenancy, the compensation to be awarded shall be the proper cost of such protection and maintenance ascertained as provided in section 11.

Power to frame tables of maximum and minimum rates of compensation

14) The Local Government may prepare for the whole or any part of the Malabar District tables showing the maximum and the minimum rates of compensation to be awarded under this Act for all or any class of improvements, and when such tables have been published the amount awarded as compensation under sections 9, 10, 11 and 12 shall not, except where the Court is satisfied that there has been exceptional care, skill or enterprise on the part of the tenant, exceed such maximum rate, nor shall it in any case be less than such minimum rates.

Power to prepare tables of prices of products, the cost of cultivating paddy, planting, protecting and maintaining trees and plants

15) (1) The tables prepared under this section shall on publication be receivable in evidence and the rates and amounts therein specified shall be presumed to be the proper rates and amounts until the contrary is proved; provided that in so

far as such tables prescribe prices of products, the presumption shall not be rebuttable except by proof of the average price as provided in section 16.

Such tables to be presumptive evidence that the prices and costs therein mentioned are correct

(2) For the purpose of determining the amount of compensation to be awarded under this Act, the Local Government may prepare tables for the whole or any part of the Malabar District showing all or any of the following matters: -

(a) the price of coconuts, arecanuts, pepper and paddy;

(b) the cost of-

(i) cultivating and harvesting a crop of paddy;

(ii) planting, protecting and maintaining a coconut tree, an arecanut tree, a jack tree and a pepper vine until the tree or vine is in bearing;

(iii) protecting and maintaining a coconut tree, an arecanut tree, a jack tree and a pepper vine for one year when in bearing.

Value to be ascertained where no table has been prepared or the correctness of the price mentioned in the table is disputed

16) In respect of any product for which no table showing the price has been published, and whenever the presumption under section 15 as to price is sought to be rebutted, the Court shall adopt as the money, value or the purpose of awarding compensation under section 9, the average price as nearly as may be ascertainable, in the taluk where the land is situated, or period of ten years immediately preceding the institution of the suit.

Tables to be published,

17) The tables prepared under this Act shall be published in English and Malayalam in the For St. George and Malabar District Gazettes, and shall be kept publicly posted in the Courts having jurisdiction over the area to which the tables apply.

The Local Government may, by like publication, cancel or vary from time to time the tables so published.

Compensation may be refused where trees have been over planted

18) When trees are planted in excess of the following scale, the Court, if satisfied that, in circumstances of the particular case, the land is over planted, may, notwithstanding anything hereinbefore contained, either refuse to grant any compensation, or may grant compensation at a lower rate, for so many of the trees are in excess of the scale and are immature: -

Coconut trees	120 per acre.
Arecanut trees...	720 per acre.
Jack trees	60 per acre.

In the case of a mixed garden each tree shall be allowed a proportionate fraction of an acre according to the above scale.

Contracts affecting tenant's right to make improvements and claim compensation under the Act invalid

19)Nothing in any contract made after the 1st day of January 1886, shall take away or limit the right of tenant to make improvements and to claim compensation or them in accordance with the provision of this Act:

Proviso

Provided that nothing herein contained shall affect any agreement in writing registered, made after the effecting of the improvements, setting the amount of compensation due therefore at the date of such agreement.

Saving clause

20) Nothing in this Act shall be construed as taking away the right of any person who may be entitled by law or custom to claim compensation for any improvements other than those dealt with under the provisions of the Act.

Tables prepared under Sec. 15. Vide Fort St. George Gazette of 11-6-1918.

I

Cost of Cultivating and harvesting a crop of paddy.

(a) In the Wynad taluk - Rs.6 an acre

(b) In other taluks.

Taram	(i) Wet lands.	Cost per acre. Rs.	A.	P.
1	... ...	18	12	0
2	... ...	18	0	0
3	... ...	16	8	0
4	... ...	15	0	0
5	... ...	12	12	0
6	... ...	10	8	0
7	... ...	8	4	0
8	... ...	6	0	0
	(ii) Modan (dry land paddy) lands			
1	... ...	9	0	0
2	... ...	8	10	0
3	... ...	8	4	0
4	... ...	7	8	0
5	... ...	6	0	0
6	... ...	4	8	0

II

Cost of planting, protection and maintaining a coconut tree, an arecanut tree, a jack tree and a pepper vine until the tree or vine is in bearing.

Name of tree or plant	Area	Cost

Coconut	...	The whole district	Rs. 4-2-0
		Except the Wynad taluk	
Arecanut	...	Do { ... irrigated tree	Rs. 1-2 as.
		{ Unirrigated tree	3 as. 9 ps.
Jack tree	...	The whole district	Rs. 3-3-0.
		Chirakkal, Kottayam	9 annas.
Pepper vine	...	{ and Wynad Taluks.	
		{ Other taluks.	5 as.3 ps.

III

Cost of protecting and maintaining a coconut tree, an arecanut tree, a jack tree and a pepper vine for year when in bearing.

Name of tree or plant		Area	Cost
Coconut	...	The whole district	3 as. 9 ps.
Arecanut	...	Do { ... irrigated tree	1 a. 11 ps.
		{ Unirrigated tree	3 ps.
Jack tree	...	Do	3 annas.
		Chirakkal, Kottayam	2 as. 3 ps.
Pepper vine	...	{ and Wynad Taluks.	
		{ Other taluks.	9 ps.

APPENDIX V

ACT 1 OF 1918

THE MAPPILA SUCCESSION ACT

STATEMENT OF OBJECTS AND REASONS

"During the last few years, there has been a feeling among the Mappilas of North Malabar and South Kanara, who are hitherto following the Marumakkathayam or the Aliyasantana Law of Inheritance, that their properties should on their dying intestate, devolve on their own children under the ordinary Muhammadan Law, and not on the children of their sisters. This feeling has been growing intense with the advance of civilization as people have begun to realize the interests of their own family apart from the interests of a tarwad which comprises a large number of families among its fold. This customary Marumakkathayam Law is not followed by the Mappilas of South Malabar, who follow the ordinary Muhammadan Law of inheritance. Further the Marumakkathayam Law is opposed to the teaching and tenets laid down in the holy Koran. The Marumakkathayam Law seems to have been originally borrowed from their Hindu neighbours. The Muhammadan community now feels the incongruity of the usage and looks upon the prevailing custom as a discredit to their religion and to their community. There have been a consensus of opinion in favour of the Bill and the Bill will be a most popular measure as the Mappilas who follow the Marumakkathayam custom of inheritance are practically unanimous in their opinion. Government are convinced of the wishes of the Mappila community in this respect, and have already expressed their welcome to a Bill designed to carry the wishes of the community into effect, through the Collector of Malabar.

The Bill is simple in itself and will apply only to the ordinary properties of a Muhammadan, and will not apply to the tarwad properties, succession to which it is not proposed to disturb at present, leaving them to devolve as usual under the existing law".

MADRAS ACT No. 1 OF 1918

THE MAPPILLA SUCCESSION ACT. [3rd May 1918; 25th May 1918]

An Act to amend and define the law of intestate succession among Mappillas governed by the Marumakkathayam or the Aliyasantana Law.

Preamble

Whereas, it is expedient to amend and define the rules of law applicable to intestate succession among Mappilas governed by the Marumakkathayam or the Aliyasantana Law of Inheritance; it is enacted as follows: -

Short title

I. (1) This Act may be called THE MAPPILA SUCCESSION ACT, 1918.

Local extent

(2) It extends to the whole of the Presidency of Madras.

(3) It applies to Mappilas domiciled in the Presidency of Madras who are governed by the Marumakkathayam or the Aliyasantana Law of Inheritance, and also in respect of immoveable property situated within the Madras Presidency, to Mappilas domiciled outside the said Presidency who are so governed.

Property in respect to which a deceased Mappila is considered to have died intestate

2. A person is considered to die intestate in respect of all property of which he has not made a testamentary disposition capable of taking effect.

Explanation - "Property" in this section does not include tarwad property unless the person dying intestate was exclusively entitled to it.

Devolution of such property

3. Such property shall, notwithstanding any custom to the contrary, devolve upon his heirs in the order and according to the rules of Muhammadn Law.

APPENDIX VI

THE MAPPILLA WILLS ACT (VII OF 1928)

STATEMENT OF OBJECTS AND REASONS:- Though the Mappillas generally follow the Muhammadan law, yet in the matter of inheritance the Mappillas of North Malabar and the southern part of Kasargod taluk in the South Kanara district have been following the Marumakkathayam law. In order to bring this law in conformity with the Muhammadan law, the Malabar Mappilla Succession Act of 1918 was passed. According to this Act, Muhammadan law of Inheritance has been made applicable to the self-acquired properties of Mappilas following the Marumakkathayam law of Inheritance.

The Malabar Wills Act V of 1898 applies to persons who are governed by Marumakkathayam law of Inheritance and are domiciled in the Madras Presidency and enables such persons to dispose of their entire separate property by will. Although when this Act was passed, it might not have beenthe intention of the Legislature to make it applicable to Mappillas, yet Mappillas also have been taking advantage of it. According to the Muhammadan Law, a Muhammadan may dispose by will only one-third of his estate left after defraying funeral expenses and debts. Bequests in excess of the bequeathable one-third of bequests to the heirs will not be valid unless the other heirs consent thereto after the death of the testator. It was supposed that the passing of the Malabar Mappilla Succession Act will make the Malabar Wills Act inoperative in respect of wills by Mappillas. But this point is not yet clear. Therefore in order to bring the testamentary law of the Mappilas also into conformity with the Muhammadan law relating to wills, it was proposed to amend the Malabar Wills Act by adding a proviso to section 4 of the Malabar Wills Act. Subsequently the legislature thought that the matter might be provided for by a separate enactment. Hence this Act.

[9th May, 1928; 30th May 1928.]

An Act to define the Law relating to Wills by Mappillas.

Preamble

WHEREAS it is expedient to define the law relating to testamentary dispositions by

Mappillas governed by the Marumakkathayam or the Aliyasantana Law of Inheritance;

AND WHERAS the previous sanction of the Governor General has been obtained to the passing of this Act; It is hereby enacted as follows: -

Short title

1. This Act may be called THE MAPPILLA WILLS ACT, 1928.

Commencement

2. (i) It shall come into force on the 1st day of January 1929.

Extent

(ii) It extends to the whole of the Presidency of Madras.

Persons to whom and properties to which this Act is applicable

(iii) It applies to testamentary dispositions by Mappillas governed by the Marumakkathayam or the Aliyasanthana Law of Inheritance in respect of property, which, but for such testamentary disposition, would devolve in accordance with the provisions of the Mappilla Succession Act, 1918.

Testamentary dispositions by Mappillas to be governed by this Act and not by Madras Act V of 1898.

3. Testamentary dispositions to which this Act applies, shall be governed by the Muhammadan Law relating to wills and not by the Malabar Wills Act, 1898.

APPENDIX VII

THE MALABAR TENANCY ACT (XVI OF 1930)

STATEMENT OF OBJECTS AND REASONS: - Questions connected with the relation o landlord and tenant in Malabar have been agitating the public mind for many years. The demands of kanamdars and cultivating tenants for securing fixity of tenure have long been the subject of anxious consideration by the government. Several special inquiries have been directed and held with a view to ascertain how far the claims put forward by and on behalf of the tenants were reasonable and what legislation was necessary to remedy the disabilities which they suffered from. Attempts were also made from time to time to deal with their demands. Madras Act I of 1887 was passed for awarding compensation or improvement to the tenant. This Act was repealed and reenacted with the additions and modifications in Madras Act I of 1900.

2. In 1924, Diwan Bahadur (now Hon'ble) M. Krishnan Nayar Avergal introduced a Bill which focussed the several claims made on behalf of the tenants. The main remedy suggested by that Bill was the grant of permanent occupancy rights to nearly all tenants in Malabar subject to certain reservations. This aroused considerable opposition on the part of the jenmies. The Government, in pursuance of their settled policy in the matter, afforded every facility to the tenants to put forward their case before the Legislative Council and they further tried to improve those portions of the Bill, which were opposed to what the Government considered was just and equitable, by moving amendments. This attempt of the Government met with little success. The Bill as finally passed, could not be accepted as a just and proper solution of the problem and His Excellency the Governor felt bound to withhold his assent under Section 81 (1) of the Government of India Act. While doing so, His Excellency stated that he intended "to ask his Government to re-examine the whole question and to take such steps as in their opinion were most likely to result in further legislative proposals being framed with due regard to the considerations which induced His Excellency to with hold his assent". To give effect to this intention, a committee under the Presidency of Diwan Bahadur Raghavayya Pantulu Garu, C.S.I., and consisting of prominent representatives of the landlords and tenants

of Malabar was constituted in 1927, with instructions to re-examine the whole question and submit such proposals as they deemed necessary to improve the relationship between landlords and tenants in Malabar. In the order laying down the terms of reference to the committee, the Government expressed themselves as follows: -

"The Government's position on this question, as clearly indicated during the course of the discussion on Mr.Krishnan Nayar's Bill has been that it is not profitable or just to go behind decisions of Courts ranging over three-quarters of a century, which have recognized the full proprietary rights of the janmi. The Government are therefore of opinion that any future attempt at legislation should take that right as a settled fact and proceed on the basis thereof. As a corollary to that proposition, they think that any attempt to take away the rights of the janmies in any substantial way whether it be by the grant of permanent occupancy rights or otherwise, should be accompanied by adequate provision for reasonable compensation being paid to the janmi. While this has to be conceded to the jenmi, the Government are also of opinion that in the case of homesteads at least, there is urgent necessity for creating security of tenure that the claim of the actual cultivator of the soil for fixity of tenure and security from arbitrary evictions must be viewed with considerable sympathy and that every possible attempt should be made to secure this to him in so far as it can be reasonable done without injustice to the janmies.

3. The Raghavayya committee submitted its report in the middle of the year 1928. The principal recommendations of the committee were (1) that any legislation undertaken to remedy the grievances of the tenants should be optional, (2) that cultivating verumpattamdars should be enabled to obtain fixity of tenure on certain conditions, (3) that customary verumpattamdars (both cultivating and non-cultivating) such as Kozhu tenants and Kovilagom lessees, Kanamdars (both cultivating and non-cultivating) and cultivating Kuzhikanamdars and intermediaries in Kuzhikanam should be entitled to obtain renewal in certain circumstances, (4) that the landlords should have the right to take the lands back for cultivation by them or by any members of their families subject to safeguards to prevent abuse of this right, (5) that the tenants should have the right to purchase the landlord's rights in Kudiyiruppus in the event of a suit for eviction, and (6) that melcharths should be

valid only under certain conditions. The committee was against the grant of permanent occupancy rights.

4. In the beginning of this year, the Government convened a conference of representative janmies and tenants of Malabar and discussed the recommendations of the Raghavayya Committee. The Government have again carefully examined the whole question and given their best consideration to the views put forward by the members of the conference on behalf of the landlords and the tenants of Malabar. They have accepted the recommendations of the Raghavayya Committee with some variations and the Bill embodies the conclusions arrived at by them. It is hoped that the provisions contained in this Bill will materially improve the condition of the tenants without prejudicing the inherent rights of the landlords and bring about better relationship between them. The appended notes on clauses explain in detail the more important provisions of the Bill.

NOTES ON CLAUSES OF THE BILL (No. 9 OF 1929)

Preamble: - Both the words 'alter' and 'amend' are used, as 'amend' is sometimes held to apply only to cases of alternation of statutory law.

The words 'to the extent', 'in the manner' and 'for the purposes hereinafter appearing' is used in order to show the restricted scope of the Act. It is not intended by this Bill to consolidate or declare the whole of the law of landlord and tenant. Even as regards the incidents of the tenures referred to therein, it is only some parts that are being altered by this Bill.

Sub-clause (2) to clause 1: - There is no sufficient reason to exclude Wynaad as has been done in some previous attempts at legislation on the subject. Owing to climatic conditions, the lot of the tenant is, if any thing, not so good in Wynaad as in the rest of the district. It is considered necessary to offer special inducements to him such as the grant of fixity under clauses 4 and 10 to 12, to induce him to stay in Wynaad and improve the agricultural conditions of that part of the district.

Clause 2: - Lands transferred by a landlord for felling timber or fugitive cultivation or for planting tea, coffee or rubber and building owned by a landlord including a house, shop or warehouse, the same

thereof, together with the garden or land appurtenant thereto are exempted from the provisions of this Bill.

Clause 3*(a)*: - The latter part of this clause has been put in with the view to provide for local variations in different parts of the district.

Clause 3*(f)*: - This contains provisions for fixing fair rent in the case of dry lands, wet lands, dry lands converted into wetlands, garden lands and sites and lands within Municipalities.

Clause 3*(l)*: - It has been found somewhat difficult to define the term 'kanam'. It sometimes partakes of the nature of a lease and sometimes of a mortgage, and often times it is an anomalous mortgage. It has been thought desirable to indicate the general incidents of the tenure as any short and cryptic definition may exclude transactions, which have customary incidents of kanam attached to them.

Clause 3*(p)*: - 'Melcharth' as defined in the sub-clause has some what wider meaning than the meaning popularly attached to the term in Malabar, It is, however, made purposely wide with a view to prevent the evasion of the rule against melcharth in clause 34 of the Bill.

Clauses 4 *to* 6: - The clauses provide for application by the cultivating verumpattamdar for fixity of tenure at any time or if and when suit for eviction is instituted against him. The fixity is limited to the wet lands in the holding and such other lands as are necessary for the convenient enjoyment of the wet lands to the extent of one-seventh of the area thereof. Garden lands in excess of that area are deemed to be held on Kuzhikanam.

Clause 7(A): - This describes the effect of a certificate granted under clause 6.

Clause 7(A) (1): - This specifies one of the grounds on which a tenant can legally be evicted under all systems of land tenure.

Clause 7(A) (4): - This provides for the landlord's right to take back the land for his own cultivation or use.

Clause 7(B): - This provides for the return of the security furnished by the tenant on the landlord taking back the land for his own cultivation or use. The certificate holder is empowered to sue for

the restoration of the land if the landlord, after eviction, transfers any of the lands on lease, etc., within six years of the eviction.

Clause 8: - This contains special provision for speedy collection of rent by summary process on the lines of Order XXXVII of the First Schedule of the Code of Civil Procedure, 1908.

Clause 9: - A later certificate revokes an earlier certificate in regard to a certificate holder with notice.

Clause 10: - This clause provides for the customary verumpattamdar's right to get renewal of the verumpattam lease and the renewal fee to be paid by him.

Clause 11: - This provides for the kanamdar's right to get renewal of kanam and the renewal fee to be paid by him.

Clause 12: - This deals with the right of the cultivating kuzhikanam any any intermediary of the kuzhikanam to get renewal of the kuzhikanam and renewal fee payable by them.

Clause 13: - This declares that there shall be no renewal fee in the case of dry lands converted into wetlands.

Clause 14: - This fixes the time within which the renewal fee should be paid.

Clauses 15 to 17, 19 and 20: - These prescribe the procedure for renewal etc. Clauses 15 and 16 are on the lines of S 46 of the Madras Estates Land Act, 1908.

Clause 18: - This clause confers on the landlord the right to take back the land for his own cultivation or use. Safeguard to prevent abuse of this right is provided by enabling the tenant to sue for restoration in the event of the release of the land by the landlord within six years.

Clause 21: - This lays down the effect of the renewal by an intermediary on the rights of the landlord's landlord.

Clause 22: - This enables the landlord to sue for renewal fee in certain circumstances.

Clauses 23 to 26: - These deal with fair rent, liability for payment of Government revenue, municipal tax, revision of rent etc.

Clause 27: - This declares that dues other than fair rent and renewal fees fixed under the Act are unenforceable against the certificate holder and any person obtaining renewal.

Clauses 28 *to* 32: - These deal with the tenant's right to purchase the landlord's right in kudiyiruppu in the event of a suit for eviction.

Clause 33: - The tenant's rights are declared heritable and alienable.

Clause 34: - This declares that melcharth will be valid only in certain circumstances.

Clause 35: - Renewal fees, michavaram and rent are declared first charge on the holding after Government revenue.

Clause 36: - This deals with the right of the landlord decree holder in eviction of kuzhikanam tenant to ask for sale of holding and of the right of the tenant to bid at such sale.

Clause 38: - A tenant who has obtained a certificate of fixity or renewal may surrender his holding by registered document. The landlord is not bound to accept the surrender unless written notice in respect of the entire holding is given three months prior to the date of the expiry of the agricultural year and the whole of the michavaram and rent due is tendered at the time of the surrender. The landlord is not bound to refund the kanartham or to pay the value of the improvements.

Clause 44: - This provides for the application of the Civil Procedure Code to the proceedings under this Act. As these proceedings are to be conducted in Civil Courts, the Civil Procedure Code would apply to such proceedings under the general principles of law. But to obviate any doubts on the matter, specific provision has been made in this clause.

Clause 45: - This deals with the Collector's duty of publishing a list of prices.

Clause 46: - This empowers the Local Government to make rules.

The following are extracts from the Reports of the Select Committee.

PRELIMINARY CHAPTER.

With a view to give effect to the beneficial provisions of the Bill as early as possible, we have decided that in respect of original suits instituted after the publication of this Bill in the Gazette, i.e. 30th July, 1929 and pending on the date this Bill; if passed, will come into force, the rights and obligations of parties should be governed by this Bill. We have accordingly added a proviso to sub-clause (3) of clause 1 to bring about this result. The intention of this Bill is to exclude lands on which pepper is the principal crop from its operation and we have inserted a proviso in clause 2 to make this clear.

CHAPTER I. DEFINITIONS

The definition of 'Fair rent' in the Bill contained a substantive provision of law laying down how fair rent is to be determined by the court. We have therefore decided to substitute a much simpler definition for existing definition and to include a new chapter entitled 'Fair rents'. We have also inserted two more definitions and have made certain amendments in the other definitions so as to make them more precise statement of the conceptions underlying them.

CHAPTER II. CULTIVATING VERUMPATTAMDAR.

The scheme of the original Bill was to give an option to a cultivating verumpattamdar to obtain fixity of tenure by application made at any time or if and when a suit for eviction is instituted against him. The fixity when obtained was limited to the wet lands in his holding and such other lands as were necessary for the convenient enjoyment of the wet lands to an extent, not exceeding one-seventh of the area thereof. The cultivating verumpattamdar could also be called upon to give security for the regular payment of rent, at the option of the landlord. We have thought it necessary to alter all this. It has been recognized that if any problem in Malabar calls for urgent solution in the interests of the economic prosperity the district, it is the position of the rack-rented verumpattamdar. Though technically, he is a tenant at will, he is ordinarily not disturbed and the award of some fixity to the verumpattamdar is not "doing anything violently repugnant to the genius of the agricultural system or to the popular sentiment in the district". We have therefore decided to declare once for all that the cultivating verumpattamdar shall have fixity of tenure in his holding. We do not see sufficient

reasons for limiting such fixity to the wetlands in his holding and thereby disturbing existing holdings. As the insistence on the deposit in cash or security of one year's rent would practically be tantamount to a denial of fixity of tenure which it is the intention of the Bill to grant and as the landlord is to be given under the Bill new facilities for the recovery of rent we have deleted all provisions relating to security. At the same time we have enlarged the grounds for the eviction of a verumpattamdar by a landlord by adding to them the ground of the collusion of the tenant with a stranger in encroaching on the holding or part thereof adversely to the interests of the landlord, The ground of eviction that the land is required for the cultivation or use of the landlord has been limited to those cases only where the requirement is *bonafide* and further as regards 'use', to cases where the 'use' is only for building purposes.

CHAPTER III. RENEWALS.

In the original Bill, while there existed provisions enabling the customary verumpattamdar, the kanamdar and the kuzhikanamdar to get a renewal of their respective interests and have the renewal fee payable by them fixed by a Court, there was no provision, except in respect of renewed kuzhikanam, which enabled the landlord to force a renewal upon the tenant or to recover the renewal fee from him, We consider that a customary verumpattam and kanam should be put on the same footing as a kuzhikanam in this respect., We have made the necessary change in clause 22 of the Bill accordingly., Clause 18 which refers to the landlord's right to evict a tenant referred to the legal grounds of eviction with defining such grounds. We have inserted a provision enumerating the grounds on which a landlord can evict the classes of tenants referred in this chapter, these grounds being almost the same as those regarding the cultivating verumpattamdar.

CHAPTER IV - RENTS.

We have altered clause 23, so as to express more clearly the intention of the Bill that in the case of cultivating verumpattamdars who are already on the land at the commencement of the Act, the existing rents should be regarded as fair rents for twelve years thereafter, and that in all other cases the fair rent should be as certained in accordance with the provisions of this Bill.

CHAPTER V - KUDIYIRUPPUS.

In the original Bill, the tenant's right to purchase the landlord's interest in a Kudiyiruppu could be exercised only in the event of suit for eviction by his landlord against him. We have now inserted a provision giving the tenant such a right even in cases where there is no suit against him. We have also reduced the number of years of continuous occupation, which would entitle the tenant of a kudiyiruppu to purchase the rights of his landlord, from fifteen years to ten.

CHAPTER VI. MISCELLANEOUS.

In this chapter we have inserted new provisions (i) regarding delivery of rent payable in kind, (ii) reserving to the jenmi certain rights in his holdings and (iii) declaring that the prices of paddy, coconut and arecanut published by the Collector in the Malabar District Gazette, under clause 45 of the Bill shall be conclusive for purposes of valuation of such produce, We have also provided that the rules made under clause 46 of the Bill shall be placed on the table of the Legislative Council, while in session, for a period of not less than three months before they come into force.

We consider it unnecessary to set forth the other changes made by us in the Bill.

The Act was published in the Fort St. George Gazette 25th November 1930 and came into force on the 1st December 1930.

THE MALABAR TENANCY ACT (XIV OF 1930)

[28*th March* 1930; 18*th November* 1930]

Preamble

WHEREAS it is necessary and expedient to define, declare, alter and amend, to the extent, in the manner, and for the purposes hereinafter appearing the law relating to landlord and tenant in the district of Malabar; And whereas the previous sanction of the Governor-General has

been obtained to the passing of this Act; It is hereby enacted as follows: -

PRELIMINARY

Short title

1. (1) This Act may be called the Malabar Tenancy Act, 1929.

Local Extent

(2) It extends to the whole of the district of Malabar.

Commencement

(3) It shall come into force on such date as the Local Government may by notification in the *Fort St. George Gazette*, appoint:

Provided that in all suits for eviction instituted after 30th July 1929 and pending in the court of first instance on the date when this Act comes into force, which would have been governed by the provisions of this Act had it been in force at the time of their institution the rights and obligations of the parties concerned shall be regulated by the provisions of this Act.

2. Nothing in this Act shall apply to

(1) lands transferred by a landlord for felling timber for fugitive cultivation or for planting tea, coffee, rubber cinchona or any other special crop prescribed by a rule made by the Local Government, or the erection of any building for the purpose of or ancillary to, the cultivation of such crop, or the preparation of the same for the market :

Provided that no rule under this clause shall affect any land in respect of which any cultivating verumpattamdar have a right of fixity of tenure under this Act or any customary verumpattamdar, kanamdar or kuzhikanamdar has a right of renewal under this Act, so long as such rights subsist; or

(2) lands on which pepper is the principal crop, or

(3) any building owned by a landlord including a house, shop or warehouse, and the site thereof, together with the garden or land appurtenant thereto.

CHAPTER I.

DEFINITIONS.

Definitions

3. In this Act, unless there is something repugnant in the subject or context –

'Agricultural year'

(a)'Agricultural year' means the year commencing with the 15th March in any calendar year and ending with 14th March of the following calendar year, or the year between such other dates as the Collector may specify in that behalf, by notification in the District Gazette, for the whole or any part of the district of Malabar;

'Court'

(b)'Court' means the Civil Court having jurisdiction under the Code of Civil Procedure, 1908, to entertain a suit for the possession of the holding or part thereof to which any legal proceeding under this Act relates;

'Cultivate'

(c)'Cultivate' with its grammatical variations, means cultivate either solely by one's own labour or with the help of the labour of the members of one's tarwad or family, or of hired labourers or both, or direct or supervise cultivation by such members or hired labourers, jointly or separately provided that such members or hired labourers have not agreed to pay or take any fixed proportion of the produce of the land they cultivate as compensation for being allowed to cultivate it or as remuneration for cultivating it;

'Dry land'

(d) 'Dry land' means a land which is neither a 'wet land' nor a 'garden land';

'Eviction'

(e)'Eviction' means the recovery of possession of land from a tenant and includes the redemption of a kanam;

'Fair rent'

(f) 'Fair rent' means rent as determined in accordance with the provisions of Chapter II;

'Garden land' (g)'Garden land' means any land used principally for growing fruit-bearing trees;

'Holding' (h)'Holding' means a parcel or parcels of land held under a single engagement by a tenant from a landlord and shall include, any portion of a holding as above defined, which the landlord and the tenant may agree to treat as a separate holding;

'Improvement' (i) (1) the word 'improvement' shall have the same meaning as it has in the Improvements Act;

'Improvements Act' (2) 'Improvements Act' means the Malabar Compensation for Tenants' Improvements Act, 1899;

'Intermediary' (j) 'Intermediary' means any person, who, not being a janmi, has an interest in land, and is entitled, by reason of such interest, to possession thereof, but has transferred such possession to others;

'Janmi' (k) 'Janmi' means a person entitled to the absolute proprietorship of land and includes a trust in respect thereof;

'Kanam' (l) 'Kanam' means the transfer for consideration money or in kind or in both by a landlord of an interest in specific immovable property to another (called the 'kanamdar') for the latter's enjoyment, the incidents of which transfer include

1) a right in the transferee to hold the same property liable for the consideration paid by him or due to him which consideration is called 'kanartham',
2) the liability of the transferor to pay to the transferee interest on the kanartham.
3) the payment of 'michavaram' by the transferee.
4) the right of the transferee to enjoy the same property for twelve years or any other period, and

5) the liability of the transferee to pay a renewal fee to the transferor, if transferee is permitted to enjoy the said property for a further period after the termination of the original period;

'Kudiyiruppu'

(m) (1) 'Kudiyiruppu' means and includes the site of any residential building, the site or site of other buildings appurtenant thereto, such other lands as are necessary for the convenient enjoyment of such residential building, and the casements attached thereto;

'Separate kudiyiruppu'

(2) 'Separate kudiyiruppu' means kudiyiruppu which is the sole property comprised in a holding;

'Separable kudiyiruppu'

(3) 'Separable kudiyiruppu' means a kudiyiruppu which is included with other property in holding and which is not necessary for that convenient enjoyment, as usual, of any other part of the holding;

'Kuzhikanam'

(n) 'Kuzhikanam' means and includes a transfer by a landlord to another (called the kuzhikanmdar) of garden lands or of other lands or of both, with the fruit-bearing trees, if any, standing there at the time of the transfer, for the enjoyment of those trees and for the purpose of planting such fruit-bearing trees thereon, the incidents of which transfer include (1) the right of the transferee to enjoy the lands for twelve years or for any other period, and (2) the liability of the transferee to pay a renewal fee to the transferor, if the transferee is permitted to enjoy the said lands for a further period after the termination of the original period;

'Landlord'

(o) 'Landlord' means a person under whom a tenant holds and to whom he is liable to pay rent or michavaram, and includes a janmi;

'Melcharth'

(p) 'Melcharth' means the transfer by the landlord of part of his interest in any land held

by his tenant by which the transferee is entitled to evict such tenant;

'Michavaram'

(q) 'Michavaram' means whatever is agreed by a kanamdar in a kanam deed to be paid periodically, in money or in kind or in both, to or on behalf of the janmi;

'Pay'

(r) 'Pay', with its grammatical variations, includes deliver;

'Prescribed'

(s) 'Prescribed' means prescribed by rules made under this Act;

'Renewal fee'

(t) 'Renewal fee' means fee or fees payable by a tenant to his landlord for the renewal of the legal relationship under which the tenant has been holding any land;

'Rent'

(u) 'Rent' means whatever is lawfully payable in money or in kind or in both, to a person entitled to the use or occupation of a land, by another, permitted by the person so entitled, to have the use or occupation of the said land, for any purpose, on the understanding, express or implied, that the person so permitted would pay consideration for such use or occupation;

'Tenant'

(v) 'Tenant' means any person who has paid or has agreed to pay rent, or other consideration for his being allowed by another, to enjoy the land of the latter, and includes an intermediary, a kanamdar, a kuzhikanamdar, and a verumpattamdar of any description;

'Verumpattamdar'

(w) (1) 'Verumpattamdar' means a tenant other than a kanamdar or kuzhikanamdar of a holding for agricultural purposes, which include wet lands, and may or may not include other lands;

'Cultivating verumpattamdar'

(2) 'Cultivating verumpattamdar' in respect of a holding means any verumpattamdar who not being a janmi, intermediary or customary verumpattamdar of that holding expressly or

impliedly, contracted to cultivate the lands in the holding, either as a tenant-at-will or during a fixed term and actually cultivates the same;

'Customary verumpattamdar'

(3) 'Customary verumpattamdar' means a verumpattamdar who is entitled by custom of the locality in which the land is situated to possession of the said land for a definite period of years and for whose continuance thereon after termination of that period, for a further period, a renewal fee has to be paid to the landlord as an incident of the tenure and

'Wet land'

(x) 'Wet land' means land, which is adapted for the cultivation of paddy.

CHAPTER II

FAIR RENTS.

4. In this chapter-

Interpretation clasuse

(a) 'seed required' means the quantity of seed customarily deemed to be required, and

(b) 'gross produce' in respect of wet lands means that produce obtained after paying the expenses of reaping.

5. Fair rent in the case of dry lands converted into by the tenant's labour shall be-

Fair rent of dry lands converted into wet by tenant's labour

(a)for a period of twenty years from the year in which the first wet crop is raised on the land, one-fifth of the difference between the annual gross paddy produce of the land and three times the seed required for the said land for an agricultural year, and

(b) after the expiration of the said period of twenty years, one-fifth of the difference between the annual gross paddy produce of the land and two and a half times the seed required for the said land for an agricultural year.

Fair rent of other wet lands

6. In the case of wet lands not falling under the previous section, fair rent shall be two-thirds of the difference between one-third of the gross

paddy produce of the land for the three years immediately previous to the date on which fair rent is to be ascertained and two and a half times the seed required for the said land for an agricultural year;

Provided that

(i) if, in any particular year, no crop at all is raised, or only a dry crop is raised on a land registered in the registers of the Government as a single-crop land, the produce shall be deemed to be the estimated produce of a single paddy crop; and

(ii) in the case of lands registered as double-crop lands in the said registers, account shall be taken as though two paddy crops have been harvested, irrespective of the number and the kind of the crops raised, and of the fact that no crop whatever is raised in any particular year on such lands.

Fair rent of garden lands

7. (1) In the case of garden lands, fair rent shall be a share, ascertained under sub-sections (2), (3) and (4) of this section, of one-third of the gross produce for the three years immediately previous to the date on which fair rent is to be ascertained.

(2) As regards coconut trees in respect of which the landlord is bound to pay compensation under the Improvements Act in case of eviction, the share shall be one fifth of the said one-third, of only the nuts included in such produce and, as regards trees in respect of which he is not bound to pay such compensation the share shall be two-fifths of the said one-third:

Provided that where a coconut tree has been let for tapping, its produce of nuts for the purposes of this sub-section during the said three years shall be deemed to be the same as the produce of nuts during the three years of a tree of a similar description and with similar advantages in the neighbourhood which has not been let for tapping;

(3) As regards areca trees and pepper vines where pepper is not the principal crop on the land in respect of which the landlord is bound to pay compensation under the Improvements Act in case of eviction, the share shall be one-sixth of the said one-third of only the nuts and pepper included in such produce, and as regards trees and pepper

vines in respect of which he is not bound to pay such compensation, the share shall be one-third of the said one-third;

(4) Nothing shall be payable (i) for the minor produce of coconut or areca trees such as leaves, fibre, etc., whether such compensation is payable or not in respect of the said trees, or (ii) for the produce of other classes of fruit-bearing trees such as jack, mango, tamarind, Palmyra and cashew nut.

Fair rent of dry lands.

8. Fair rent in the case of dry lands shall be three times the assessment payable in respect thereof per annum.

Fair rent of lands within municipal limits

9. (a) In the case of lands situated within the limits of any municipality and not built or planted upon, or on which no crop is grown, the fair rent shall be the rent paid or agreed to be paid in respect of similar lands, of the same extent, in the neighbourhood;

(b)In the case of other lands situated within the said limits, the fair rent shall be the fair rent determined under sections 5 to 8, or the fair rent determined under sub-section (a) of this section, whichever is higher.

CHAPTER III

CULTIVATING VERUMPATTAMDARS

Cultivating verumpattamdar's right to fixity of tenure

10. Notwithstanding any contract to the contrary entered into whether before or after the coming into force of this Act, every cultivating verumpattamdar shall have fixity of tenure in respect of his holding as hereinafter provided and shall not be evicted there from except as provided in this Act.

Application to court for fixing extent of holding, fair rent, etc.

11. Any cultivating verumpattamdar or his immediate landlord may apply to the court in the form prescribed for fixing the extent of the holding, the fair rent in respect of it, the instalments, if any, in which it shall be payable and the date or dates when the fair rent or the installments thereof shall be payable.

Procedure on receipt of the application

12. On the receipt of an application under section 11, the court shall issue notice to all the parties concerned and after enquiry determine by an order-

i. the extent of the holding;

ii. the fair rent that is payable in respect of it;

iii. the instalments, if any, in which the fair rent shall be payable; and

iv. the date or dates on which the said rent or instalments shall be payable.

Landlord's right to advance of one year's fair rent or security for such fair rent

13. (1) A landlord may, at any time, by notice in writing; call upon his cultivating verumpattamdar, at the latter's option.

(a) to pay one year's fair rent of the holding in advance, or

(b) to furnish security for the said fair rent, or

(c) to pay a portion of the said fair rent in advance and furnish security for the balance;

(2) If, within a period of six months from the date of the service of notice upon him under sub-section (1), the cultivating verumpattamdar fails to pay the advance or furnish the security demanded by the landlord, the landlord may apply to the court, in the form prescribed, for an order to direct the cultivating verumpattamdar at the latter's option.

(a) to pay one year's fair rent of the holding in advance, or

(b) to furnish security for the said fair rent, or

(c) to pay a portion of the said fair rent in advance and furnish security for the balance.

(3) On the receipt of an application under sub-section (2), the court shall issue notice to the cultivating verumpattamdar and, if satisfied after inquiry that the tenant has not complied with any of the provisions of sub-section (2), order the cultivating verumpattamdar, at the latter's option.

(a) to pay one year's fair rent of the holding in advance, or

(b) to furnish security for the said fair rent, or

(c) to pay a portion of the said fair rent in advance and furnish security for the balance,

within such date as the court may fix.

(4) Where the cultivating verumpattamdar has already paid a portion of one year's fair rent of the holding in advance or furnished security for a portion of the said fair rent, the provisions of sub-sections (1) to (3) shall apply in respect of the balance of such fair rent.

(5) Any advance of fair rent paid by a cultivating verumpattamdar to his landlord, whether before or after a demand under sub-section (1) or deposited by him for such payment under clause (i) of sub-section (4) of section 15, shall bear interest at six per cent per annum from the date of payment or from the date of service of notice of such deposit through court, as the case may be.

Grounds for eviction of cultivating verumpattamdar

14. No suit for eviction of a cultivating verumpattamdar from his holding shall lie at the instance of his landlord except on the following grounds: -

(1) that the tenant has willfully denied the title of the landlord before the date of such suit;

Explanation - A denial of the landlord's title under a *bona fide* mistake of fact is not wilful within the meaning of this clause;

(2) that the tenant has intentionally and wilfully committed such acts of waste as are calculated to impair materially and permanently the value or utility of the holding for agricultural purposes;

(3) that the tenant has not paid, within three months after the due date, the whole or any portion of the rent due in respect of the holding;

(4) that the tenant has collusively allowed a stranger to encroach on the holding or part thereof adversely to the interests of the landlord;

(5) that, at the end of an agricultural year, the landlord requires the holding *bona fide* for his own cultivation or for that of any member of

his family or tarwad or tavazhi who has a proprietary and beneficial interest therein;

(6) that, at the end of an agricultural year, the landlord requires the holding or part thereof *bona fide* for building purposes for himself or any member of his family or tarwad or tavazhi who has a proprietary and beneficial interest therein;

(7) that the tenant has not complied with the order of the court under sub-section (3) of section 13.

Provided that in cases falling under clauses (4) and (6) where only a part of the holding has been encroached upon or is required, as the case may be, the eviction shall be from such part of the holding only.

Explanation - In the case of a landlord governed by a law other than the Marumakkathayam law, the wife or husband and children of the landlord shall be deemed to be members of the landlord's family having a proprietary and beneficial interest in the holding.

Tenant's right to sue for restoration of possession of land in certain cases

15. (1) In any case in which eviction has been obtained on the ground specified in clause (5) of section 14, subject to the provisions of section 43, if the landlord who has obtained such eviction transfers any of the lands to any person on any kind of lease or mortgage with possession or on kanam, kuzhikanam or verumpattam within six years of such eviction, the cultivating verumpattamdar shall be entitled to sue for the restoration to him of the possession of all the lands from which he was evicted and to hold them with all the rights and subject to all the liabilities of a cultivating verumpattamdar.

(2) In any case in which eviction has been obtained on the ground specified in clause (6) of section 14, the cultivating verumpattamdar shall be entitled to the right of suit conferred by sub-section (1) not only under the circumstances mentioned therein but also if the building for constructing which the eviction was obtained is not erected on the lands within six years of the eviction.

(3) In any suit in which eviction is claimed on the ground specified in clause (3) of section 14, if the tenant deposits in court, for payment to

the plaintiff in the suit, (i) the amount of rent due with interest thereon at the contract rate, if any, (ii) interest on the principal amount of the rent due at twelve per cent per annum from the date of suit up to the date of deposit, and (iii) the costs of the plaintiff up to the date, the court shall dismiss the suit.

(4) In any suit in which eviction is claimed on the ground specified in clause (7) of section 14, if the tenant-

(i) (a) deposits in court for payment to the plaintiff in the suit one year's fair rent of the holding in advance furnishes security for the same or deposits in court for payment a portion of such fair rent and furnishes security for the remainder, or

(b)where he has already paid a portion of said fair rent or furnished security for a portion there deposits in court for payment to the plaintiff the balance of said fair rent or furnishes security for such balance or deposit in court for such payment a portion of such balance and furnishes security for the remainder; and

(ii) deposits in court for payment to the plaintiff the costs of the latter up to the date of deposit;

the court shall dismiss the suit.

CHAPTER IV

RENEWALS.

Customary verumpattamdar's right to claim renewal and the renewal fee to be paid by him

16. A customary verumpattamdar shall on the expiry of the verumpattam lease under which he holds to be entitled to claim and his immediate landlord shall be bound to grant a renewal enuring for a period of twelve years, of the same, on payment to him, as renewal fee, of three times, the balance of the annual fair rent of the lands covered by the verumpattam lease after deducting both the annual rent payable under the previous lease and the annual Government revenue in cases where the revenue is payable by such customary verumpattamdar.

17. (a) A kanamdar shall on the expiry of the kanam under which he holds to be entitled to

Kanamdar's right to claim renewal and the renewal fee to be paid by him

claim and his immediate landlord shall be bound to grant a renewal, enuring for a period of twelve years, of the same on payment, as renewal fee, of two and one-fourth times the balance of the annual fair rent of the lands covered by the kanam after deducting (1) the annual revenue payable on the kanam property to the Government, if payable by the kanamdar under the kanam deed. (2) the annual interest on the kanartham, and (3) the annual michavaram payable under the previous kanam.

(b)When neither the rate of interest nor the amount of interest per annum nor the sum total of the annual revenue payable on the kanam property to Government by the kanamdar and the amount of interest per annum, is specified in the kanam deed, interest shall, for the purposes of sub-section (a), be calculated.

(1) In North Malabar-at five per cent per annum, and

(2) In other places-at twelve per cent per annum when the kanartham does not exceed one thousand rupees; at nine per cent per annum subject to a minimum of one hundred and twenty rupees per annum when it exceeds one thousand rupees but does not exceed three thousand rupees; and at six per cent per annum subject to a minimum of two hundred and seventy rupees if it exceeds three thousand rupees:

Provided that, when any usage governing kanam transactions fixes a rate of interest lower than what is provided for in this sub-section, the interest shall be calculated at such rate.

(c) Nothing in this section shall apply to a kanam

(i) where the kanartham exceeds

in South Malabar, sixty per cent, and

in North Malabar, forty per cent,

of the value of the janmi's rights in the holding, or

(ii) where all the lands covered by the kanam are dry lands.

Explanation I - For the purpose of sub-sections (b) and (c), 'North Malabar' means the taluks of Chirakkal, Kottayam, Kurumbranad and Wynad; and 'South Malabar' means the other taluks in the district of Malabar.

Explanation II - For the purpose of sub-section (c), the janmi's rights in the holding shall be valued at twenty times the excess of the annual fair rent of the holding over the annual revenue payable thereon to Government-

(1) in the case of a kanam existing on the date of the commencement of this Act, on such date and

(2) in the case of a kanam created after the commencement of this Act, on the date of the kanam.

Cultivating kuzhikanamdar's right to claim renewal and the renewal fee to be paid by him

18. (1) A cultivating kuzhikanamdar shall on the expiry of the kuzhikanam under which he holds entitled to claim and his immediate landlord shall be bound to grant a renewal, for a period of twelve years, of the same on payment, as renewal fee, of the total one-fourth of the annual gross produces of the fruit-bearing trees and pepper vines where pepper is not principal crop in the holding, belonging to the cultivating kuzhikanamdar and one-half of the annual gross produce of other fruit-bearing trees and pepper vines where pepper is the principal crop in the holding.

Intermediary's right to claim renewal of kuzhikanam and the renewal fee to be paid by him

Any intermediary of the kuzhikanam shall, on expiry of the kuzhikanam under which he holds, be entitled to claim and his immediate landlord shall be bound to grant a renewal, enuring for twelve years, of the same on payment, as renewal fee, of the total one-fourth of the annual gross produce of the fruit-bearing trees and pepper vines where pepper is the principal crop in the holding, belonging to the intermediary and all the tenants below him including the cultivating kuzhikanamdar and one-half of the annual gross produce of the fruit-bearing trees and pepper

vines where pepper is not principal crop in the holding.

Explanation - For the purpose of this section, the annual gross produce shall be deemed to be equivalent to a third of total nuts, fruits and pepper produced during the immediate preceding three years, and where a coconut tree has been let for tapping its produce of nuts for the purposes of this section shall be deemed to be the same as the produce of nuts of a tree of similar description and with similar advantages in the neighbourhood which has not been so let.

Time within which renewal fee is payabale

19. Subject to the provisions hereinafter contained, the renewal fee fixed under sections 16 to 18 shall be payable as follows.

(a) In case the tenant is not a cultivating kuzhikanadar two-thirds of the renewal fee in the year next after the termination of the expiring transaction and one-third in the next following year;

(b) In case he is a cultivating kuzhikanamdar, one-third of the renewal fee in the year next after the termination of the expiring kuzhikanam and the rest in five equal consecutive annual instalments in the years following the said year.

Grounds for eviction of customary verumpattamdar, kuzhikanamdar or kanamdar

20. No suit for eviction of a customary verumpattamdar, kuzhikanamdar or kanamdar shall lie at the instance of his landlord except on the following grounds: -

(a) that the tenant has wilfully denied the title of the landlord before the date of such suit.

Explanation - A denial of the landlord's title under a *bona fide* mistake of fact is not wilful within the meaning of this clause;

(2) that the tenant has intentionally and wilfully committed such acts of waste as are calculated to impair materially and permanently the value or utility of the holding for agricultural purposes;

(3) that the period of the verumpattam, kuzhikanam or kanam, as the case may be, has expired and no renewal has been obtained;

(4) that the tenant has collusively allowed a stranger to encroach on the holding or part thereof adversely to the interests of the landlord;

(5) that the period of the verumpattam, kanam or kuzhikanam, as the case may be, has expired and there has been no renewal and the landlord requires the holding *bona fide* for own cultivation or for that of any member of his family or his tarwad or tavazhi who has a proprietary and beneficial interest therein;

(6) that the period of the verumpattam, kanam or kuzhikanam, as the case may be, has expired and there has been no renewal and the landlord requires the holding or part thereof *bona fide* for building purposes for himself or any member of his family or tarwad or tavazhi who has a proprietary and beneficial interest therein:

Provided that in cases falling under clauses (4) and (6) where only a part of the holding has been encroached upon or is required, as the case may be, the eviction shall be from such part of the holding only.

Explanation - In the case of a landlord governed by a law other than the Marumakkathayam law, the wife or husband the children of the landlord shall be deemed to be members of the landlord's family having a proprietary and beneficial interest in the holding.

Tenant's right to sue for restoration of possession of land in certain cases

21. (1) In any case in which eviction is obtained on the ground specified in clause (5) of section 20 subject to the provisions of section 43 if the landlord who obtains such eviction transferred any of the lands to any person on any kind of lease or mortgage with possession or on kanam, kuzhikanam or verumpattam within six years of such eviction, the tenant shall be entitled to sue for the restoration to him of the possession of all the lands from which he was evicted and to hold them with all the rights and subject to all the liabilities of a tenant.

(2) In any case in which eviction has been obtained on the ground specified in clause (6) of section 20, the tenant shall be entitled to the right of suit conferred by sub-section (1) not only under the circumstances mentioned therein but also if the building for constructing which the eviction was obtained is not erected on the lands within six years of such eviction.

Tenant's right to apply to court for execution of renewal deed

22. (1) Notwithstanding any contract to the contrary (whether made before or after the commencement of this Act), a customary verumpattamdar, kanamdar or kuzhikanamdar shall be entitled to apply to the court in the form prescribed for the execution of renewal deed.

(2) On the receipt of an application under sub-section (1) notice thereof shall be sent to the landlord from whom such renewal is claimed, fixing a date for the trial of the application.

Dismissal of application if landlord desires to evict the tenant on certain grounds

23. (a) On the date fixed under sub-section (2) of section 22 the court shall call upon the said landlord to state in writing whether he desires to evict the tenant on any of the grounds referred to in section 20 except ground (3) and take the holding; and if the landlord expresses his intention to do so the application shall be dismissed.

(b)If the landlord sues to evict the tenant on ground (3) referred to in section 20, the tenant shall be entitled to make an application or a fresh application under sub-section (1) of section 22 and the suit shall abide and follow the result of such application.

Procedure on application under section 22

24. If the application is not dismissed under sub-section (a) of section 23, the court shall

(1) determine

(a) the amount to be paid as renewal fee under section 6, 17 or 18.

(b) The amount of each installment under section 19, and

(c) The date on which each instalment was or will become due; and

(b)make an order for the deposit, within a time to be fixed in the said order, of

(a) the instalment or instalments due on or before the date of the order,

(b) interest at 12 per cent per annum on each such instalment from the date on which it became due or from the date of the commencement of this Act, whichever is later, and

(c) all arrears of rent with interest thereon at the contract rate, if any, found due up to the date of the order if the landlord claims that any arrears of rent are due:

Provided that no such interest on a renewal fee or a portion thereof shall be payable if the landlord has refused a valid tender of the renewal fee payable under section 19 or if an application under sub-section (1) of section 22 has been dismissed under section 23 (a).

Effect on failure to deposit renewal fee, etc

25 (1) If the deposit ordered under clause (ii) of section 24 is not made within the time fixed thereunder the court shall dismiss the application, and such dismissal shall bar any subsequent application under section 22 by the tenant or those claiming under him.

(2) If the said deposit is made within the time fixed, the court shall

Exeention of renewal deed by court

(i) execute a renewal deed containing such terms as it determines to be the terms of the expiring transaction and as are in accordance with law,

(ii) pass, where necessary, an order directing the person entitled to the renewal deed to pay the landlord a further instalment or instalments of the renewal fee in accordance with section 19 with interest at six per cent per annum on each instalment from the due date to the date of payment, and

(iii) make such order as to costs of the proceedings before it as it may deem fit.

Legal effect of renewal deed executed by court

(3) A renewal deed executed by the court under sub-section (2) shall have the same effect as if it was executed by the landlord himself, and shall entitle the tenant to enjoy the holding for twelve years from the date of termination of the previous lease, kanam or kuzhikanam.

Effect of renewal on the rights of landlord's landlord

26. (1) In case there are one or more intermediaries between the janmi and the tenant in actual possession of the holding and a renewal has been granted by an intermediary (hereinafter referred to in this section as the grantor) after this Act comes into force or by the court on his

behalf under sub-section (2) of section 25, if the grantor on his own part does not obtain renewal for any reason, the person to whom such renewal has been granted (hereinafter referred to as intermediary or the janmi who is the landlord next above the grantor, for the period of the renewal given to the grantee, on the terms on which the grantee had contracted with the grantor or on terms on which the grantor had contracted with such next landlord, at such landlord's choice, and there shall be deemed to be privity of contract between the grantee and such landlord subject to the right of the janmi or the landlord to evict the tenant on the grounds specified in section 20 other than the ground of non-payment of renewal fee.

(2) The intermediary or the janmi who is the landlord next above the grantor shall be entitled to sue the grantor for the proportionate share of any renewal fee which he might have obtained from the grantee for the period between the termination of such grantee's interest in the land and that of the period for which he had given renewal.

Illustration - A, a janmi, grants a kuzhikanam to B in 1928. B grants a sub-kuzhikanam to C in 1932. In 1940 B gets a renewal from A and in 1944 he grants a renewal to C. In 1952 B does not take a renewal. C shall be deemed to have contracted with A on the terms of his own renewal of 1944 or on the terms of B's renewal of 1940 at A's option, and A will not be entitled to evict C till 1956.

If, in the above illustration, B had taken a renewal fee of Rs.120 from C when granting the renewal in 1944, B shall be liable to pay A one-third of Rs.120 for the period between 1952, when his interest ends and 1956 up to which C is entitled to stay on the land.

Right of landlord to sue for renewal fee in certain cases

27. Where in respect of any customary verumpattam, kanam or kuzhikanam holding for which a renewal deed has been executed under the provisions of this chapter if (a) no application

is filed under sub-section (1) of section 22 or (b) within six months after the termination of the period for which the said renewal deed enures and of every period of twelve years succeeding such period, the tenant does not secure a renewal on such terms as may be agreed to between him and the landlord, he may be deemed at the option of such landlord to have agreed to a renewal on the terms of the said deed for twelve years from the date of the termination of each of the said periods, and the said landlord shall be entitled to sue the said tenant for the renewal fee specified in sections 16, 17 or 18.

CHAPTER V.

RENTS.

Cultivating verumpattamdar's liability to pay fair rent

28. Every cultivating verumpattamdar shall be bound to pay to his immediate landlord, fair rent as fixed under section 12:

Provided that in the case of a cultivating verumpattamdar's holding existing at the date on which this Act comes into force, the rent payable on such holding shall be deemed to be fair rent for a period of twelve years from such date; unless the rent fixed under section 12 has been taken into account for the purpose of calculating the renewal fee under Chapter IV and there has been a renewal, in which case, such rent shall be payable by the cultivating verumpattamdar from the date of renewal.

Liability for revenue as between landlord and cultivating verumpattamdar

29. (1) As between any landlord and a cultivating verumpattamdar, the latter shall be liable for the revenue payable to the Government and also the local cesses on any land on which no rent is payable under this Act, and any special charges leviable by the Government for special additional crops raised on the wet lands.

(2) In the case of lands (within the limits of a municipality) in respect of which the landlord has obtained fair rent as ascertained under section 9, he shall bear the tax levied by the municipality for such

land to the extent such rent is higher than what is payable therefore under section 5 to 8; but otherwise the landlord and the tenant shall bear such tax in equal share.

Revision of rent

30. (1) At any time after the expiry of twenty years from the date of an order fixing the fair rent in respect of a holding or from the date of the last confirmation or revision of such order under this section the cultivating verumpattamdar or his immediate landlord shall be entitled to apply, in the form prescribed, to the court for the revision of such order so far as the fair rent is concerned.

(2) On the receipt of such an application, the court shall after notice to the landlord or the cultivating verumpattamdar as the case may be, determine the fair rent and confirm or revise the order.

If the order is revised, the cultivating verumpattamdar shall be bound to pay rent according to the revised order from the beginning of the agricultural year next after the date of such revision.

Application to court to fix fair rent in case of kuzhikanam

31. (1) A cultivating kuzhikanamdar shall, when making an application under section 22, or the landlord may, when answering such an application, apply to the court dealing with the application to determine the fair rent payable in respect of the holding to which the application relates, and the court shall make an order determining the same before disposing of the said application, and for the period for which the renewal deed executed on the said application enures, the parties thereto shall be bound to pay and receive rent so determined by the court.

(2) Nothing in this section shall in respect of the trees which had begun to bear fruits at or before the time of the execution of the deed referred to in clause (i) hereunder,

(i) entitle the landlord to claim or compel the tenant to pay for a period of twelve years from the commencement of this Act, more than the rent specified in the latest kuzhikanam deed, original or renewed, executed before the commencement of this Act, or

(ii) authorize any claim for an enhancement at the time of each renewal by more than twelve and a half per cent of such rent.

Invalidity of claim for dues other than fair rnet and renewal fee fixed under Act

32. Notwithstanding any contract to the contrary, express or implied, whether entered into before or after the coming into force of this Act, no cultivating verumpattamdar shall be liable to pay to his landlord anything more or anything else than the fair rent and no tenant who is entitled to claim a renewal under this Act shall for the purpose of obtaining the renewal be liable to pay as renewal fee anything more or anything else than the renewal fee provided by this Act.

CHAPTER VI.

KUDIYIRUPPUS.

Tenant's right to offer to purchase landlord's right in kudiyiruppu

33. In any suit for eviction relating wholly or in part to a kudiyiruppu, which has been in the continuous occupation of a tenant or the members of his family for ten years on the date of the institution of the said suit, such tenant shall be entitled to offer to purchase the rights in the kudiyiruppu, of the landlord who seeks to evict him, at the market price on the said date.

Procedure to enforce the offer

34. (1) An offer under section 33 shall be in writing and shall contain the particulars prescribed.

(2) Notice of such offer, with a copy thereof, shall be served on the landlord at the expense of the tenant, fixing a date for the landlord to accept or decline the offer.

Points to be determined by court on the offer

(3) After such notice has been on the landlord,

(a) if the landlord unconditionally accepts the offer, the court shall record such acceptance and order the tenant to deposit in court the price specified in his offer together with the arrears, if any, of michavaram, the revenue payable to the Government by the tenant

and the local cesses payable by the tenant in respect such kudiyiruppu and on such deposit the landlord shall be paid the amount deposited; and the suit, in so far as it relates to the eviction from the kudiyiruppu, shall be dismissed; and

(b) if the landlord, for any reason, does not unconditionally accept the offer, the court shall decide whether the kudiyiruppu is a separate or separable kudiyiruppu.

Order to deposit market price, etc

(4) If the decision under clause (b) of sub-section (3) is that the kudiyiruppu is separate or separable the court shall proceed further and determine the market price of the landlord's rights as it stood on the date fixed for acceptance of the offer by the landlord and shall call upon the tenant to deposit the marked price so settled together with the arrears referred to clause (a) of sub-section (3), if any, on or before a date fixed by it in writing.

Payment of market price by instalments

(5) Notwithstanding anything contained in sub-section (4), the court, if it is satisfied that the tenant is too poor to pay the market price in lump sum, may dispense with the deposit of the market price and order that the said price be paid to the landlord, with interest at six percent per annum in as many annual instalments not exceeding twelve as the court may find having, regard to the means of the tenant, on condition that sufficient security is furnished by the tenant, for the regular payment of such instalments.

Effect of failure to deposit market price, etc

35. If the decision under sub-section (3) of section 34 is that the kudiyiruppu is neither separate nor separable, or if the deposit called for under sub-section (4) of the said section is not made or if the security called for under sub-section (5) of that section is not given on or before the date so fixed, the court shall dispose of the suit for eviction referred to in section 33 as if no such offer had been made.

Procedure on deposit of market price, etc

36. Upon the tenant making such deposit under sub-section (4) of section 34 or on security being given under sub-section (5) of that section together with the deposit of the arrears referred to in clause (a) of sub-section (3) of that section the suit referred to in section 33 in so far as it relates to the kudiyiruppu, shall be dismissed.

Investment of money deposited at the instance of persons interested

37. The court in which a deposit is made under this chapter may in its discretion at the instance of any person interested in the sum deposited order that such deposit be invested in the manner referred to in section 32 of the Land Acquisition Act, 1894.

Effect of order or decree under section 36

38. The order or decree under section 36 shall operate as a sale to the tenant of the landlord's rights in the kudiyiruppu subject to the condition that in the event of any sale of the kudiyiruppu, subsequent to the said order or decree by the tenant, his heirs, executors, representatives in interest or assigns or in execution of a decree against them or by a receiver in insolvency, the person who, but for the provision of this section, would be entitled to the landlord's rights in the said property at the time of such subsequent sale, shall be entitled to claim pre-emption.

CHAPTER VII

MISCELLANEOUS

Tenant's rights to be heritable and alienable

39. Subject to the provisions of this Act, all rights, which a tenant has in his holding, shall be heritable and alienable.

Tenant's right to avail himself of the provisions of Chapter III or IV in certain cases

40. (1) Any tenant whose holding has been granted on melcharth may when sued for eviction avail himself of the provisions of Chapter III or Chapter IV.

(2) No holder of a melcharth can when suing for eviction claim possession on grounds (5) and (6) of section 14 or on grounds (5) and (6) of section 20 as the case may be.

Renewal fees and arrears of michavaram and rent to be a first charge on holding after revenue

41. Renewal fees and arrears of michavaram or rent due to the landlord together with interest, if any, payable on the same shall be a charge on the interest of the person from whom they are due in the holding in respect of which they are due as at the time of the creation of such interest, and such charge shall have priority over all other charges on the same except the charge for the revenue and any dues thereon payable to Government or to a local authority and made a charge thereby any law for the time being in force.

Right of holder of decree for eviction of kuzhikanamdar

42. (1) A landlord who has obtained a decree for eviction in respect of a kuzhikanam, shall, in execution of such decree, be entitled to apply for the sale of the holding specified therein any of the improvements in respect of which compensation is awarded under the said decree, and for the payment to him of the balance of the sale price after deducting the amount of the said compensation.

Right of tenant to bid at such sale

(2) In case such an application is made by a landlord and a sale is held in pursuance of such application, the person to whom the said compensation has to be paid, shall be entitled to bid at the sale and set off the said compensation towards the sale price, and no deposit need be made by him at the sale except in so far as the price offered by him exceeds the said compensation.

Limitation for suits for restoration under sections 15 and 21

43. (1) (a) A suit for restoration under sub-section (1) of section 15 or under sub-section (1) of section 21 shall be instituted within one year from the date of the transfer by the landlord.

(b) A suit for restoration under sub-section (2) of section 15 or under sub-section (2) of section 21 shall be instituted within one year from the expiry of the six years after the eviction.

(2) If there are intermediaries between the landlord who has obtained the eviction and the person who cultivates the land, all persons whose interests in the holding are terminated by the eviction, shall be entitled to be restored to the respective interests they had at the time of the eviction as if there had been no eviction, and in case any one of them does not claim restoration the tenant next below him shall be entitled to claim such restoration and hold the land,

(a) on the terms on which the person not claiming the land held it , if he and the claimant belonged to the same class, or

(b) on the terms on which the claimant held it if he and the person who did not claim the land belonged to different classes;

Provided always that, if the landlord obtaining eviction had paid any value for improvements to any one whose interests were so terminated, the person claiming restoration shall, before such restoration is effected, be bound to return to the landlord the value so paid in respect of the improvements existing at the time of the restoration together with the kanartham, if any, and also the value of the improvements, if any, effected *bona fide* by the landlord between the date of eviction and the date of suit.

Explanation - For the purpose of this section, a kanamdar, an intermediary in respect of a kuzhikanam, a cultivating kuzhikanamdar, a verumpattamdar and a customary verumpattamdar belong each to a different class. A cultivating kanamdar, a non-cultivating kanamdar and a kanamdar under a kanamdar belong to the same class; and a cultivating verumpattamdar and a non-cultivating verumpattamdar belong to the same class.

Illustration - If A is the janmi, B and C are kanamdar and sub-kanamdar and D, verumpattamdar cultivating the land, if A the janmi exercises his power to take the land for his own use and then inducts some other tenant into it within six years, B shall be entitled to claim as against A to be restored to his previous rights. But on B getting such restoration, C shall be entitled to claim as against B to step in as sub-kanamdar, and D shall be entitled to claim the verumpattamdar's rights as against C. If however, B does not want to claim restoration,

C shall be entitled to claim as against A to be put in the position of B the kanamdar, and D shall be entitled to claim as against C to be treated as his cultivating verumpattamdar. If both B and C do not claim restoration, D shall be entitled to claim as against A to be a verumpattamdar on the terms, which he held the land under C.

Surrender of holdings

44. A kanamdar or kuzhikanamdar or customary verumpattamdar who has obtained a renewal of cultivating verumpattamdar may, at the of any agricultural year, surrender his holding to his immediate landlord, by a registered document.

Such a landlord shall not be bound to accept the surrender unless notice has been given in writing to him by the tenant of his intention to do so three months prior to the date of expiry of the agricultural year, and unless it be in respect of entire holding, and the whole of the arrears of the michavarm or rent is also tendered at the time of the surrender. Nor the landlord be bound to refund the kanartham or to pay value of the improvements which he would have been otherwise bound to pay under the Improvements Act.

Applicability of Act to redeemed kanamdars, etc

45. If (1) a cultivating kanamdar who consents to be deemed or (2) a cultivating customary verumpattamdar who gives up his rights as such desires to continue on the holding as a cultivating verumpattamdar, the provisions of this Act shall apply to him as if he were a cultivating verumpattamdar.

Contents of lease kanam or kuzhikanam deeds

46. Every deed by which a lease, kanam or kuzhikanam is created or renewed and its counterpart shall contain,

(a) the name, if any, and description and extent of the holding;

(b) the Government revenue and local cesses, if any, payable in respect of the holding;

(c) the amount of rent or michavaram payable in respect of the holding;

(d) the relation that any *para* or other measure according to which the rent or michavaram has to be paid, bears to the capacity of the Macleod seer;

(e) if it is a kanam deed,

(f) the kanartham;

(g) the rate or the amount of interest payable in respect of the said kanartham; and

(h) the renewal fee, if any, levied, and in case no such fee was levied, a statement to that effect.

Tenant's right to receipts and of such receipts

47. (1) Every tenant paying any rent or michavaram shall be entitled to receive and the landlord shall be bound to grant a receipt specifying

(a) a description of the holding in respect of which it was paid;

(b) the date of payment;

(c) the amount paid;

(d) the period to which the amount paid relates; and

(e) the arrears, if any, remaining due from the tenant after the said payment.

A reference to the date and registration number of the document under which the holding is held and also the name of the sub-registration district in which the said holding is situate, shall be deemed to be a sufficient description of the holding for the purpose of this sub-section.

(2) In the absence of the particulars specified in clause (e) of sub-section (1), the burden of proving that the tenant is bound to pay any arrears of rent or michavaram, which had accrued previous to the date of the receipt, shall be on the person claiming such arrears.

(3) If any landlord fails to grant a receipt as provided under sub-section (1), the tenant shall be entitled to send by money order, after deducting the charges for doing so,

(i) the money, if the rent or michavaram is payable in money, and

(ii) the money value of the rent or michavaram, if it is payable in kind.

Stamp and Registration fees to be paid by the tenant

48. The stamp and registration charges for any lease or kanam or kuzhikanam deed and for the

counterpart of such lease, kanam or kuzhikanam shall be borne by the tenant.

Improvements Act to apply to evictions under Act

49. The provisions of the Improvements Act shall apply in all cases of eviction to which this Act applies.

Code of Civil Procedure 1908 to apply to proceedings under Act

50. (1) The procedure provided as regards suits in the Code of Civil Procedure, 1908, include Orders XXXVIII, XXXIX and XL of the first schedule, shall be followed as far can be made applicable in all proceedings relating to applications under this Act.

Appeals

(2) Appeals shall lie from orders made under sections 12, 23, 25, 30, 31, 34, 35 and 36, as if they were decrees in suits.

Collector to publish list of prices

51. (1) The collector of the district shall in the month of April of every year publish in the Malabar District Gazette the average market price of paddy, coconut, arecanut and pepper, at each taluk headquarters, for the twelve complete months preceding the date of publication.

(2) Where any rent, michavaram or renewal fee payable under this Act is paid or is to be paid in money, in whole or in part, paddy, coconuts, arecanuts and pepper, shall be valued, for the purpose of determining the sum due, at average market price of the previous five years as published under sub-section (1).

Place of delivery of rent payable in kind

52. Where the rent is payable in kind, it shall, in the absence of a contract to the contrary, be delivered at the landlord's granary in the village in which the holding is situated; at such other granary within three miles of the village as may be provided in that behalf by the landlord.

Savings

53. Nothing in this Act shall affect the right of a janmi in any of his holdings

(1) to make irrigation channels, foot-paths, roads and ways into adjacent and other holdings,

(2) to work laterite and other quarries, and

(3) to cut and remove the trees or enjoy the usufruct trees and pepper vines belonging to him:

Provided that the tenant shall be entitled to a proportionate reduction of michavaram or rent if by the exercise of such right his profits are decreased.

Power to make rules

54. (1) The Local Government may make rules to carry out all or any of the purposes of this Act.

(2) In particular, and without prejudice to the generality the foregoing power, they may make rules regulating all or any of the following matters: -

The investing of courts of original jurisdiction with powers to try summarily suits for the recovery of rent or michavaram and the procedure to be followed in such suits;

The period of limitation for applications under this Act for which no period is specifically fixed therein.

(3) All rules made under this section shall be placed on the table of the Legislative Council while it is in session for a period of not less than three months before they come into force.

RULES UNDER THE MALABAR TENANCY ACT.

1. These rules may be called "The Malabar Tenancy Rules, 1930".
2. In these rules, "the Act" means the Malabar Tenancy Act, 1929.
3. Every application under section 11 of the Act shall be in Form I annexed to these rules with such variations as circumstances may require.
4. Every application under sub-section (2) of section 13 of the Act shall be in Form II annexed to these rules with such variations as circumstances may require.
5. Every application under sub-section (1) of section 22 of the Act shall be in Form III-A, III-B, III-C or III-D annexed to these rules, according as the applicant is a customary verumpattamdar, a kanamdar, a kuzhikanamdar or an

intermediary in kuzhikanam, with such variations as circumstances may require.

6. Every application under sub-section (1) of section 30 of the Act shall be in Form IV annexed to these rules with such variations as circumstances may require.

7. (1) Every offer by a tenant under section 33 to purchase the rights in the kudiyiruppu of the landlord who sues to evict him shall contain the following particulars, namely: -

(i) the number of the suit, in which the application is made;

(ii) the survey and sub-division numbers, extent description and boundaries of the kudiyiruppu, the amsam, desam and taluk within which it is situated, the assessment, if any, payable to the Government in respect thereof, the length and width of the site built upon, the number and description of the buildings thereon, the length and width of the entire holding and the easements, if any;

(iii) the total period for which the kudiyiruppu has been in the continuous occupation of the tenant or the members of his family on the date of the institution of the suit, with full details;

(iv) the arrears, if any, due by the tenant, of

(a) rent or michavaram,

(b) revenue payable to the Government where such revenue is payable by the tenant, and

(c) local cesses if such cesses are payable by the tenant;

(v) the nature and estimate of the market value according to the ant of the rights in the kudiyiruppu of the landlord who seeks to evict.

(vi) whether the tenant is willing to deposit the market price of kudiyiruppu or wishes to pay it in instalments and, if so, in how many instalments and the amount of each instalment; and

(vii) whether the tenant is willing to purchase the plaintiff's right at the price so specified or at the price to be fixed by the Court.

(2) If any dispute arises regarding the correctness of the description of the kudiyiruppu given in any such offer, the Court may call upon parties to furnish within such time as it may fix plans of the kudiyiruppu.

FORM I.

[*See Rule 3*]

IN THE COURT OF THE

APPLICATION NO. OF 19

Between

A B. ... ... *Applicants*

And

C, D and others... ... ... *Respondents*

Application of A. B. under section 11 *of the Malabar Tenancy Act,*

The above named applicant states as follows: -

1. A. B. the applicant, is the cultivating verumpattamdar of the holding described in paragraph 3 under C. D. the first respondent (*immediate landlord of C. D. the first respondent, a cultivating verumpattamdar of the holding described in paragraph 3*) and resides at

The address of the applicant for service of all notices and processes.

2. C.D., the first respondent resides at

E.F., the second respondent, is the janmi of the said holding resides at

G.H, the third respondent is the kanamdar of the said holding under the said E.F., the janmi, and resides at

3. The holding comprises the following lands, namely: -

[Here set out the survey and sub-divisions numbers, extent, description and boundaries of all the lands included in the holding in respect to which the application is made, the assessments payable to the Government is respect thereof, and the amsam, desam and taluk in which lands are situated. Particulars should be given separately of (a) lands, (b) garden lands and (c) dry lands.]

4. (a) Of the wet lands comprised in the holding, the following items were converted from dry lands into wet by the applicant's (first respondent's) labour: -

(b) The years' in which the first wet crop was raised, the annual gross paddy produce, the expense of reaping it and the quantity of seed

customarily deemed to be required for an agricultural year in the case of each of the said items are as follows: -

(c) The annual fair rent payable in respect of each of the item of wet land included in this paragraph is as follows: -

[Cases falling under clause of (a) section 5 of the Act should be mentioned together]

5. (a) Of the other wet lands comprised in the holding (that is to say, of lands not converted from dry into wet by the tenant's labour) are registered in the registers of the Government as single crop lands and as double crop lands.

(b) The annual gross paddy produce and the expense of reaping it in the case of each of the items of single crop lands for each of the three years immediately previous to the date of this application are

In the years no crop at all was raised on items and in the years only a dry crop was raised on item. The produce given above for the said years in respect of the said items is the estimated produce of a single paddy crop as required by proviso (i) to section 6 of the Act.

The quantity of seed customarily deemed to be required for each of the said items is

(c) The annual gross paddy produce and the expense of reaping it in the case of each of the items of double crop lands for each of the said three years are as mentioned below: -

Account has been taken as though two paddy crops have been harvested, irrespective of the number and the kind of the crops raised and of the fact that no crop what ever was raised in particular years-*vide* proviso (ii) to section 6.

[Here give details of all cases of departure from the normal rule of two paddy crops every year]

The quantity of seed customarily deemed to be required for each of the said items is

(d) The annual fair rent payable in respect of each of the items of wet land (single and double crop) included in this paragraph is as follows: -

6. In the case of the garden lands included in the holding-

(a) (i) the first respondent (*applicant*) is bound to pay compensation under the Improvements Act in case of eviction for coconut trees;

(ii) of these trees, trees have been let for tapping. The gross produce of nuts of trees of a similar description and with similar advantages in the neighbourhood for the three years immediately previous to the date of this application is estimated to be . Consequently, the gross produce of nuts of the trees let for tapping for the said three years is deemed to be under the proviso to sub-section (2) of section 7 of the Act;

(iii) the gross produce of nuts of the other coconut trees specified in sub-clause (i) for the said three years is ; and

(iv) the total gross produce of nuts of all the coconut trees specified in sub-clause (i) for the said three years is consequently and the annual fair rent payable in respect of them is

(b) (i) the first respondent (*applicant*) is not bound to pay compensation under the Improvements Act in case of eviction for coconut trees.

(ii), (iii), (iv), *As in sub-clause (a) above*

(c) the first respondent (*applicant*) is bound to pay compensation under the Improvements Act in case of eviction for areca trees and the gross produce of nuts of the said trees for the three years immediately previous to the date of this application is

The annual fair rent payable in respect of these areca trees is ;

(d) the first respondent (*applicant*) is not bound to pay compensation under the Improvements Act in case of eviction for areca trees and the gross produce of nuts of the said trees for the three years immediately previous to the date of this application is

The annual fair rent payable in respect of these areca trees is ;

(e) the gross produce of pepper vines in respect of which the respondent (applicant) is bound to pay compensation under the Improvements Act in case of eviction for the three years immediately previous to the date of this application is

The annual fair rent payable in respect of these vines is

(f) the gross produce of pepper vines in respect of which the respondent (applicant) is not bound to pay compensation under the

Improvements Act in case of eviction for the three years immediately previous to the date of this application is

The annual fair rent payable in respect of these vines is

7. The annual fair rent (three times the assessment per annum) payable in respect of each of the items of dry land included in the holding.

8. The following items of land are situated within the limits of the municipality of

The rents paid (agreed to be paid) in respect of (give details) being similar lands of the same extent in the neighbourghood are

Items have not been built or planted upon and no crop been grown on them. The annual fair rent payable in respect of each these items of land is

Items have been built or planted upon and crops have been grown on item . In respect of each of these items, the fair rents calculated in paragraphs 4 to 7 is which exceeds (does not exceed) the fair rent as calculated in this paragraph. Consequently, the annual fair rent payable in respect of these items of land is the higher of the two amounts of fair rent mentioned above, namely: -

9. The aggregate amount of annual fair rent payable in respect of the lands included in the holding is therefore

10. The applicant therefore prays that the Court may be pleased by order to fix-

a. the extent of the holding,

b. the annual fair rent that is payable in respect thereof,

c. the instalments, if any, in which the fair rent shall be payable and

d. the date (or dates) on which the said rent (or instalments) shall be payable.

I declare that what is stated in paragraphs is true to my knowledge and what is stated in paragraphs is stated on information and belief and I believe the same to be true.

(Signed) A.B.

FORM II.

(*See Rule 4*)

IN THE COURT OF THE

APPLICATION No. of 19

Between

A. B. ... ... *Applicant.*

and

C. D. ... ... Respondent.

Application of A. B. *under sub-section* (2) *of section* 13 *of the Malabar Tenancy Act* 1929.

The abovenamed applicant states as follows: -

1. The respondent is the cultivating verumpattamdar of the holding described in paragraph 3 and the applicant A. B. is his immediate landlord and resides at

The address of the applicant for service of all notices and processes is

2. C. D. the respondent, resides at

3. *The same as para 3 of Form 1.*

4. The annual fair rent payable in respect of the lands included in the holding is

5. The applicant called upon the respondent on by notice in writing at the latter's option-

(a) to pay one year's fair rent of the holding in advance, or

(b) to furnish security for the said fair rent, or

(c) to pay a portion of the said fair rent in advance and furnish security for the balance,

or

5. (a) The respondent has on paid as advance and on has furnished security for . In respect of the balance of one year's fair rent, viz., he has neither paid in advance nor furnished security.

(b) The applicant called upon the respondent on by notice in writing at the latter's option-

(i) to pay the said balance of one year's fair rent of the holding in advance, or

(ii) to furnish security for the said balance of fair rent, or

(iii) to pay a portion of the said balance of fair rent in advance and furnish security for the remainder.

6. (Here state in what respect the notice has not been complied with).

7. The period of six months for compliance with the notice referred to in paragraph 5 expired on

8. The applicant prays that the Court may be pleased to order the respondent, at the option of the respondent-

(a) to pay one year's fair rent (the balance of one year's fair rent) viz., in advance, or

(b) to furnish security for the said fair rent (balance), or

(c) to pay a portion of the said fair rent (balance) in advance and furnish security for the remainder.

(*Declaration as in Form I*)

(Sd.) A.B.

FORM III-A.

[*See Rule 5*]

IN THE COURT OF THE

APPLICATION No. OF 19 .

.A. B. ... ... *Applicant.*

And

C. D. ... ... *Respondent.*

(Here enter the cause title of the suit, if any, in which the application is made.)

Application of A. B. under sub-section (1) *of section 22 [read with section (b) of section 23] of the Malabar Tenancy Act, 1929.*

The abovenamed applicant states as follows: -

1. A. B., the applicant, is a customary verumpattamdar under respondent in respect of the holding in paragraph 3 and resides at

The address of the applicant for service of all notices and process.

2. C. D., the respondent, resides at

3. *The same as para 3 of Form* I.

The previous verumpattam expired (current verumpattam will expire) on 19 and its material terms are as follows: -

4. The annual fair rent payable in respect of the lands included in the holding is.

(State how the figure is arrived at.)

5. The applicant was paying under the expiring verumpattam the annual rent.

6. The amount of annual Government revenue which is payable by the applicant in respect of the lands included in the holding is

7.The renewal fee payable is (state how the figure is fixed).

8. The first instalment of (here enter two-thirds of renewal fee was (will be) payable in and the balance of was (will be) payable as a second instalment in in accordance with the provisions of clause of section 19 of the Act.

9. The applicant filed an application under sub-section (1) of section 22 of the Act in respect of the holding (Application No. on the file in the Court of)and that application was dismissed on under section 23(a) of the Act.

10. The applicant made a valid tender of the renewal fee payable under section 19 of the Act on and such tender was refused by the landlord.

11. The applicant prays that the Court may be pleased-

(i) to determine the renewal fee, the amount of each instalment thereof under section 19 of the Act and the date on or before which each instalment was, or will become, due;

(ii) to order a deposit of the instalment or instalments of the renewal fee due on or before the date of such order (with interest at 12% per

annum from the date on which each instalment became due [the date of the commencement of this Act]: and

(iii) on such deposit being made, to

(a) execute a renewal deed containing such terms as the Court determines to be the terms of the expiring transaction and as are in accordance with law, and

(b) pass an order directing the applicant to pay the landlord a further instalment (or instalments) of the renewal fee (here enter the amount of instalment) in accordance with section 19 of the Act with interest at 6% per annum on such instalment (or instalments) from the due date to the date of payment.

(*Declaration as in Form* I.)

(Sd.) A. B.

FORM III-B.

(*See Rule 5.*)

(*Begin as in Form* III-A *up to para* 1.)

1. *Same as in Form* III-A *but put 'kanamdar' for 'customary verumpattamdar.*

2, 3. *As in* Form III-A.

4. *Same as in Form* III-A *but put 'kanam' for, 'verumpattam'.*

5. *As in Form* III-A.

6. The amount of annual Government revenue which under, the kanam deed is payable by the applicant in respect of the lands included in the holding is

7.The kanartham is and the annual interest payable thereon is calculated at the rate of specified in the kanam deed [at the rate of in accordance with the provisions of section 17(*b*) of the Act.]

8. The applicant has been paying as michavaram under the previous (*current*) kanam above referred to.

9 to 13. *Same as paras* 8 to 12 *in Form* III-A.

(*Declaration as in* Form I)

(Sd.) A. B.

FORM III-C.

(*See Rule* 5).

(*Begin as in Form III-A*)

1. *Same as in Form III-A, but put,* 'kuzhikanamdar' *for* 'customary verumpattamdar'.

2, 3. As in Form III-A.

4. *Same as in Form III-A, but put* 'kuzhikanam' *for* 'verumpattam'.

5. The renewal fee payable is . (State how the figure is fixed).

6. The first instalment of (here specify one-third of the renewal fee) is payable in and the balance in five equal consecutive annual instalments of each in the years in accordance with the provisions of clause (b) of section 19 of the Act.

7, 8, 9. Same as paras 10, 11 and 5 of Form III-A.

10. *Same as para 12 of Form III-A* ; and

(iv) by order to fix the annual fair rent that is payable in respect of the holding.

(*Declaration as in Form I.*)

(Sd.) A. B.

FORM III-D.

(*See Rule* 5.)

(*Begin as in Form III-A*)

1. *Same as in Form III-A, but put* 'intermediary in kuzhikanam' *for* 'customary verumpattamdar'.

2 to 9. *Same as paras 2 to 4 and 8 to 12 of Form III-A but put* 'kuzhikanam' *for* 'verumpattam'.

(*Declaration as in Form I.*)

(Sd.) A. B.

FORM IV.

(*See Rule* 6)

(*Cause title as in Form I but delete* 'and others')

Application of A. B. under sub-section (1) of section 30 of the Malabar Tenancy Act, 1929.

The above named applicant states as follows: -

1. *Same as in Form I, but delete* 'first' *where it occurs.*

2. C. D. the respondent resides at

3 to 9. *Same as in Form, I but put only* 'the respondent' *for* 'the first respondent'.

10. On the Court last fixed the fair rent for the said holding and more than twenty years have elapsed since.

Or

On the 19 the Court last confirmed (revised) the fair rent existing on the said date in respect of the said holding thereby fixing (*and fixed*) it at payable as follows: - (Here given details)

and more than twenty years have elapsed since.

11) The applicant therefore prays that the Court may be pleased by order to fix-

a. The annual fair rent that is payable in respect of the holding;

b. The installments, if any, in which the fair rent shall be payable; and

c. The date (or dates) on which the said rent (or installments) shall be payable.

(*Declaration as in Form I*)

(Sd.) A. B.

APPENDIX VIII

THE MADRAS NAMBUDRI ACT (XXI OF 1933)

STATEMENT OF OBJECTS AND REASONS: - The Nambudiris though numerically not very large, constitute an important community of the West Coast. In the pre-British days their influence in all affairs of the country was very nearly supreme. But since the Government of the country passed from the hands of the Rajas the Nambudiris have been gradually losing their importance and now they have almost become a backward class.

2. The most important reason for the present unenviable position of the Nambudiris is that their social and economic systems are so obsolete and rigid that they are practically helpless in effecting any progress. Their rules of marriage compel many women to remain lifelong maidens and many men to seek women outside their community. With the advent of democratic Government in this country the numerical strength of the community has become a very important question. The Nambudiris cannot hope to exercise any influence on the political life of the country unless their number is proportionate to their stake. Thus for the sake of numerical strength and healthier domestic life it has become imperative to give the members of the community greater opportunities for marrying within the community. The satisfaction of this imperative need is the main object of this Bill. The Bill enables every member to marry within caste. When all or many marry within caste, the present economic system cannot continue and so members are given the right to claim partition under certain conditions. There are very few Nambudiris who have taken advantage of the present education. The right to partition given by this Bill is expected to give a great impetus to the progress of education in the community. As it is not desirable to abolish the joint-family system all on a sudden wherever possible provisions are made for the continuance of joint-family life and special provision is made for reunion. Under modern conditions of life, rigid observance of caste rules has become an impossibility and the community cannot make progress unless the members are allowed some amount of freedom from ultra-orthodox social rules. The social freedom that the Brahmans of other parts of India enjoy in practice is

largely responsible for their great advancement. Some provision is therefore made to mitigate the rigours of caste rules.

3.The law relating to Nambudiris is in a very uncertain state. Much of it is regulated by custom and usage. All that is attempted by this legislation is to make such alterations or modifications which are absolutely necessary to enable the community to continue to live under modern conditions. To leave the community as it is, is to allow it to die in a few decades, The Nambudiris of Travancore have already succeeded in moving their Legislative Assembly to make certain alterations in their laws which it is hoped the Maharani Regent would assent to and they are trying to make more to enable them to live better. The Nambudiris of Malabar also have been agitating for some time past to have legislative sanction for certain changes in their laws. Rao Bahadur O.M Narayanan Nambudiripad, ex-M.L.C, got the sanction of the Viceroy to introduce a Bill relating to various matters concerning Nambudiris but he did not introduce it in the Council. The agitation is getting stronger and the younger section of the Nambudiris is getting very impatient. The Yogakshema Sabha, the organization of the Nambudiris, and the Nambudiri Yuvajana Sangham, which is an organization of the Nambudiri youths, have demanded various changes. This Bill represents a kind of compromise between the conservative and the advanced opinion among Nambudirs. It is hoped that the Bill would pave the way for a great advancement of the Nambudiri community.

The Act was published in the Fort. St. George Gazette on 1st August 1933.

[21st March 1933; 12th April 1933]

An Act to define and amend in certain respects the law relating to family management, marriage, guardianship, intestate succession and partition applicable to Nambudiri Brahmans and certain other communities, not governed by the Marumakkathayam law of inheritance.

WHEREAS it is expedient to define and amend in certain respects the law relating to family management, marriage, guardianship, intestate succession and partition applicable to Nambudiri Brahmans and certain other communities, not governed by the Marumakkathayam law of inheritance;

AND WHEREAS the previous sanction of the Governor General has been obtained to the passing of this Act; It is hereby enacted as follows: -

CHAPTER I.

PRELIMINARY.

Short title and application

1. (1) This Act may be called the Madras Nambudiri Act, 1932

(2) It shall apply-

to all Nambudiri Brahmans in the Presidency Madras who are not governed by the Marumakkathayam law of inheritance; and

to all Nambudiri Brahmans outside the said Presidency, not governed by the said law, in respect of immovable property situated within it.

Definition

2. In this Act, unless there is anything repugnant in the subject or context-

(a) 'anandaravan' means any member of the illom other than the karanavan;

(b) 'illom' means all the members of a Nambudiri joint family with community of property and includes a 'mana';

Explanation - A female shall on her marriage cease to be a member of the illom in which she was born and become member of the illom of her husband;

(c) 'karanavan' means the oldest male member of an illom in whom the right to management of its properties vests or in the absence of a male member the senior female member;

Explanation- The seniority as between two or more females, who become members of the illom by marriage, shall be determined according to the dates of their marriages;

(d) 'major' means a person who has attained eighteen years of age; and

(e) 'minor' means a person who has not attained eighteen years of age.

CHAPTER II.

ILLOM AND ITS MANAGEMENT.

Proprietary right of members in illom properties

3. (1) Every member of an illom, whether male or female, shall have an equal proprietary interest in its properties.

(2) Such proprietary interest shall not in any manner be impaired or affected by reason of the deviation of such member from any orthodox custom or usage.

Duty of Karanavan to keep accounts

4. The karanavan shall keep true and correct accounts of the income and expenditure of the illom. The accounts of each year shall be available for inspection at the illom house by the major anandaravans once in a year throughout the month of Kanni following such year and any such anandaravan may take copies of or extracts from such accounts.

Alienation of immova ble property by karanavan

5. (1) Except for consideration and for illom necessity or benefit and with the written consent of the majority of the major members of the illom, no karanavan shall sell immovable property of the illom or mortgage with possession or lease such property, for a period exceeding twelve years.

(2) No mortgage with possession or lease with premium returnable wholly or in part, of any such property executed by a karanavan for a period not exceeding twelve years shall be valid unless such mortgage or lease is for consideration and for illom necessity or benefit.

(3) Nothing contained in this section shall be deemed to restrict the power of the karanavan to grant, in the usual course of management, for a period not exceeding twelve years any lease without premium returnable wholly or in part, or the renewal of an existing kanom.

Debt contracted by karanavan when binding on illom

6. No debt contracted or mortgage without possession executed by a karanavan shall bind

the illom unless the debt is contracted or the mortgage is executed for illom necessity.

Maintenance of members of illom

7. Every member of an illom, whether living in the illom house or not, shall be entitled to maintenance consistent with the income and the circumstances of the illom.

Relinquishement of karanavanship

8. Any karanavan may by a registered document give up his rights as karanavan.

CHAPTER III.

MARRIAGE.

Right of Nambudiri male to marry in his community

9. Notwithstanding any custom or usage to the contrary every major male Nambudiri shall, subject to the provisions of section 5 of the Madras Marumakkathayam Act, 1932, and any law for the time being in force, beat liberty to marry in his own community.

Right of major Nambudiri female to have her marriage performed and recover the marriage expenses and dowry

10. (1) Any unmarried major female member of an illom who marries, or had her marriage with a male belonging to her community performed with her consent her father or any other member of her illom shall be entitled to recover from the illom properties, the reasonable expenses of such marriage as well as her dowry;

Provided that not less than three months' previous notice in writing of the marriage shall be given to the karanavan.

(2) The amount recoverable under sub-section (1) shall not exceed one-third of the value of the share which would fall to such female member if a division per capita of the properties of the illom were made among all the members there living on the date of the marriage, or rupees ten thousand whichever is less:

Provided that where an illom consists of females only, the amount recoverable under this sub-section may extend to the full value of her share.

Nambudiri not to marry a Nambudiri woman during lifetime of a Nambudiri wife except in certain cases

11. No Nambudiri who has a Nambudiri wife living shall marry another Nambudiri woman except in the following cases: -

(a) where the wife is afflicted with an incurable disease for more than five years,

(b) where the wife has not borne him any child within ten years of her marriage,

(c) where the wife has become an out-caste.

Penalty for marrying in contravention of section 11

12. (1) Any Nambudiri male who contracts a marriage in contravention of section II shall be punished with fine which may extend to one thousand rupees, but a marriage so contracted shall not be deemed to be invalid.

(2) Any person who conducts, directs or abets the performance of any marriage in contravention of section II shall be punished with fine which may extend to one hundred rupees.

Dowry to be separate property of Nambudiri female

13. The dowry given to a Nambudiri female or recovered by her under section 10 shall be her separate property.

CHAPTER IV

GUARDIANSHIP

Guardianship of minors

14. (1) Subject to the provisions of sub-section (2), the following persons in the order named shall be the legal guardian of a minor, male or female in respect of his or her person and separate property, namely, father, mother, full brothers in the order of seniority, paternal grandfather, paternal uncles in the order of seniority, father's mother and consanguine brother in the order of seniority.

(2) The husband shall be the legal guardian of his minor wife in respect of her person and separate property.

Saving of the operation of Guardians and Wards Act VIII of 1890

15. Nothing contained in section 14 shall be deemed to affect the operation of the Guardians and Wards Act, 1890.

CHAPTER V

INTESTATE SUCCESSION

Property as to which a person is considered to have died intestate

6. A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

Illustrations.

(i) A has left no will. He has died intestate in respect of the whole of his property.

(ii) A has left a will whereby he has appointed B his executor but the will contains no other provisions. A has died intestate in respect of the distribution of his property.

(iii)A has bequeathed his whole property for an illegal purpose. A has died intestate in respect of the distribution of his property.

(iv) A bequeathed Rs.1000 to B and Rs.1000 to the eldest son of C and made no other bequest and died leaving Rs.2000, C died before A without ever having had a son. A has died intestate in respect of the distribution of Rs.1000.

Devolution of property left by Nambudiri male intestate

17. On the death intestate of a Nambudiri male, his property which is self-acquired or separate shall, subject to the provisions of section of the Madras Marumakkathayam Act, 19 devolve in the order and according to rules contained in sections 18, 19 and 20.

Where the intestate has left widow, children or lineal descendants

18. Where the intestate has left surviving him by a marriage or marriages in own community one or more of the following relations, namely: -

(a) a widow or widows,

(b) a son or sons,

(c) an unmarried daughter or unmarried daughters, and

(d) a lineal descendant or descendants (other than married females) in the male line through a deceased son or sons, the whole of the property shall belong to such surviving relation or relations.

Rules of distribution in cases falling under section 18

19. The distribution of the property among the heirs referred to in section 18 shall be made in accordance with the following rules:-

(i) The widow or, if there is more than one widow, each of the widows, shall be entitled to a share equal to that of a son or unmarried daughter.

(ii)Every son or unmarried daughter shall be entitled to an equal share:

Provided that if a son has pre-deceased the intestate, his lineal descendants in the male line (other than married females) shall be entitled to the share, which such son would have taken had he survived the intestate.

(iii) The sons and unmarried daughters of a deceased son shall be entitled in equal shares to what their father would have taken had he survived the intestate:

Provided that if a son's son has pre-deceased the intestate, his lineal descendants of the intestate in the male line (other than married females) shall be entitled to the share which such son's son would have taken had he survived the intestate.

(iv) In like manner, the property shall go to the surviving lineal descendants of the intestate in the male line (other than married females) where such descendants are in the degree of great-grandchildren or in a more remote degree.

Explanation: -The descendants of a son, son's son or other male descendant in the male line shall not be entitled to any share in such property, if such son, sons' son or other descendant is alive at the time of the death of the intestate.

Illustrations

(1) Z dies intestate leaving two widows A and B, a son C, a grandson D by such son, a married daughter E, an unmarried daughter F and by a deceased son, a grandson G, a married granddaughter H and an unmarried granddaughter J. A, B, C and F each gets one-fifth of the property, G and J one-tenth each and D, E and H do not get any share.

(2) Z dies intestate leaving no widow but leaving A a son, B an unmarried daughter, E a grandson and F an unmarried granddaughter by a deceased son C, an unmarried grand daughter G by a deceased son D and two great-grandsons H and J by a deceased son of D. A and B will each be entitled to one-fourth of the property, E and F will each be entitled to one-eighth, G will be entitled to one-eighth and H and J to one-sixteenth.

(3) Z dies intestate leaving no widow or child but leaving three grandsons A, B and C by a deceased son X and two unmarried granddaughters D and E by a deceased son Y. A, B and C will each be entitled to one-sixth and D and E will each be entitled to one-fourth of Z's property.

Devolution of property where the intestate has not left any of the heirs mentioned in section 18.

20. (1) Where the intestate has not left surviving him any of the heirs mentioned in section 18, the property shall devolve on the relations and in the order specified below: -

1) Father;

2) Mother;

3) Brothers and Sisters;

4) Sons and unmarried daughters of brothers;

5) Father's father;

6) Paternal uncles;

7) Sons of paternal uncles;

8) Sister's children;

9) Father's paternal grandfather;

10) Father's paternal grandfather's descendants in the male line, the nearer excluding the more remote; and

11) Father's remoter ascendants in the male line and their descendants, the nearer ascendant and his descendants excluding the more remote ascendant and his descendants and among the descendants of the same ascendant, the nearer excluding the more remote.

(2) Property devolving on two or more heirs under sub-section (1) shall be divisible among them equally.

Devolution of property left by a married Nambudiri female intestate.

21. (1) On the death intestate of a married Nambudiri female, her property which is self-acquired or separate shall devolve on the relation and in the order specified below: -

1) Sons and daughters;

2) Children of deceased sons;

3) Sons of deceased daughters;

4) Husband;

5) Father;

6) Mother;

7) Brothers and sisters;

8) Brothers' and sisters' children;

9) Relations of her husband mentioned in section 18 and not included in clauses (1) and (2); and

10) Relations of her husband mentioned in sub section (1) of section 20 in the order specified therein.

(2) Property devolving on two or more heirs under sub-section (1) shall be divisible among them equally:

Provided that where the property devolves on the relations of the husband referred to in clause (9) of sub-section (1), it shall be divisible among them in accordance with the rules laid down in section 19.

22. On the death intestate of an unmarried Nambudiri female, the whole of her property,

Devolution of property left by an unmarried Nambudiri female intestate

which is self-acquired or separate shall devolve on her parents. In the absence of her parents, it shall devolve on her brothers and sisters in equal shares and in their absence, it shall devolve on her illom.

CHAPTER VI

PARTITION

Right of member to claim partition

23. (1) Any member of an illom, male or female, may claim to take his or her share of all the properties of the illom over which it has power of disposal and separate from the illom.

Provided that where a male member of an illom whose wife is also a member thereof claims to separate from the illom, he shall do so on behalf of himself and his wife and the shares of the husband and wife shall be allotted to them jointly; and save as provided in sections 24, neither the husband nor the wife shall be entitled to claim partition from the other.

(2) (a) A member of an illom separating from it under sub-section (1) shall be entitled to such share of the illom properties as would fall to him or her if a division *per capita* were made among all the members of the illom then living.

(b)A husband and wife separating from an illom under the proviso to sub-section (1) shall be entitled to such share of the illom properties as would fall to them if a division *per capita* were made among all the members of the illom then living.

(3) No claim to separate from an illom made on behalf of a minor member shall be allowed by any Court unless it is satisfied that such separation would be to the benefit of such minor.

Partition on change on religion

24. (1) Any member of an illom who has changed his or her religion may claim, or be compelled by any other member of the illom, to take his or her share of the illom properties and separate from the illom.

(2) The member who claims or is compelled to divide from the illom under sub-section (1) shall be entitled to such share of the illom

properties as would fall to him or her if a division *per capita* were made among all the members of the illom then living.

Character of property taken on partition

25. The share obtained by any member separating from an illom under sub-section (1) of section 23 or under section 24 shall be the separate property of such member:

Provided that the share obtained by a husband and wife separating jointly under the proviso to sub-section (1) of section 23 shall be taken by them with the incidents of illom property.

CHAPTER VII

MISCELLANEOUS

Saving

26. Nothing contained in this Act shall be deemed to affect any law, custom or usage applicable to Nambudiri Brahmans except to the extent expressly laid down in this Act.

Application of the Act to certain communities

27. The provisions of this Act shall also apply to the following communities in the Malabar district who are not governed by the Marumakkathayam law of inheritance and who follow customs and usages similar to those of the Nambudiris, namely, Adigal, Elayads, Moosads, Pitarans and Nambissans.

APPENDIX IX

THE MADRAS MARUMAKKATHAYAM ACT (XXII OF 1933)

STATEMENT OF OBJECTS AND REASONS as in the Bill of Mr. V.P. Narayanan Nambiar, M.L.C: - The Communities governed by the Marumakkathayam and Aliyasantana law have been asking for the legal recognition of the customary marital union prevailing among them. The Malabar Marriage Act of 1896 was passed in response to this demand. But that legislation is a very imperfect measure and has failed to meet the requirements of the people concerned. It does not legalize the Sambandham, but provides for the optional registration of marital unions to invest them with validity. The machinery set up is against the sentiments and genius of the race, and only a few marriages have been registered under the Act.

All the same, the desire for obtaining legal sanction for the Sambadham has been steadily growing. In every other respect the community has advanced by leaps and bounds. Progressive ideas have gained ground everywhere. The social system alone remains unchanged. The refusal of the Court to regard the Sambandham as legal marriage has stamped one of the most enlightened classes in this country as an inferior race and prevented it from growing to its fullest natural stature. The tarwad is no longer the centre and focus of Marumakkathayam life. Men have outgrown the system imposed upon them and the social stream is flowing along more natural channels. The main object of this Bill is to adjust the social system to the changing needs of the society.

The Bill seeks to invest the Sambandham with all the incidents of a legal marriage. This may look, in theory, like a great departure from the existing state of things; but it is, in truth, no more than giving a formal legal sanction to what in practice, is regarded as a sacred and lifelong union.

Apart from marriage and inheritance, the need for a law providing for partition has long been felt. The tarwads have expanded beyond all natural limits so much so that it is often difficult to trace the exact relationship of the members composing them. The consequence has been ruinous litigation. There is hardly a family of substance in Malabar that is not in the courts. Suits for

maintenance instituted by the junior members are a common feature of marumakkathayam and aliyasantana life. There are instances of crime committed on account of family quarrels. The Bill endeavours to remedy this evil by providing for partition in rather a conservative fashion. It does not create the right to individual partition but only to tavazhi partition, partly as a concession to orthodox opinion and partly by way of abundant caution.

It may be pointed out that the adjoining States of Cochin and Travancore have passed regulations on lines exactly similar to those adopted this Bill. As marriages between British subjects and the subjects of these States are of common, everyday occurrence, it has become imperative to bring Malabar also into line with them.

The important features of the Bill are-

1) The recognition of the Sambandham as a legal marriage; the marriage of a marumakkathayam woman with a man of higher caste with whom marriage is permitted by custom being equally valid and binding.
2) The right of free divorce.
3) The enforcement of monogamy in all cases.
4) The right of wife and children to maintenance from the husband or father as the case may be.
5) The right of wife and children to inherit a moiety of the indisposed of self-acquisition of husband or father, the other moiety going to his tavazhi (not the tarwad).
6) The right of tavazhi partition.
7) The accountability of the Karanavan and restriction of his powers.
8) Provision for the registration of tarwad as impartible and also for the cancellation of such registration.
9) A Bill on the above lines was introduced into the third Legislative Council by Mr.K.Madhavan Nayar and it met with popular approval. Only a few minor verbal alterations have been made by me in the Bill.

The Act was published in the Fort St.George Gazette dated 1st August 1933.

THE MADRAS MARUMAKKATHAYAM ACT (XXII OF 1933)

[21st March 1933; 12th April 1933]

An Act to define and amend in certain respects the law relating to marriage, guardianship, intestate succession, family management and partition applicable to persons governed by the Marumakkathayam law of inheritance.

WHEREAS it is expedient to define and amend in certain respects the law relating to marriage, guardianship, intestate succession, family management and partition applicable to persons governed by the Marumakkathayam law of inheritance;

AND WHEREAS the previous sanction of the Governor general has been obtained to the passing of this Act; It is hereby enacted as follows :-

CHAPTER I.

PRELIMINARY.

Short title and application

1. (1) This Act may be called the MADRAS MARUMAKKATHAYAM ACT, 1932.

(2) It shall apply -

(a) to all Hindus in the Presidency of Madras who are governed by the Marumakkathayam law of inheritance;

(b) to all Hindus outside the said Presidency governed by the said law, in respect of properties within it ; and

(c) to all Hindu males, whether governed by the said law or not, who have contracted or may contracted or may contract marital alliances with Hindu females governed by the said law.

Repal of Madras Act IV of 1896

2. The Malabar Marriage Act, 1896, in so far as it is applicable to Hindus following the Marumakkathayam law of inheritance, is hereby repealed.

Definitions

3. In this Act, unless there is anything repugnant in the subject or context -

(a) 'anandaravan' means any member of a tarwad other than the karanavan;

(b) 'Collector' means the Collector of Malabar or South Kanara, as the case may be, and includes any Revenue Divisional Officer who is authorized by the Collector to perform his functions under this Act;

(c) 'Karanavan' means the oldest male member of a tarwad or tavazhi, as the case may be, in whom the right to management of its properties vests or, in the absence of a male member, the oldest female member or where by custom or family usage the right to such management vests in the oldest female member, such female member;

(d) 'major'means a person who has attained eighteen years of age;

(e) 'Marumakkathayam' means the system of inheritance in which descent is traced in the female line but does not include the system of inheritance known as the Aliyasantana;

(f) 'Marumakkathayi' means a person governed by Marumakkathayam law of inheritance;

(g) 'minor'means a person who has not attained eighteen years of age;

(h) 'prescribed' means prescribed by rules made under this Act;

(i) 'tarwad' means the group of persons forming a joint family with community of property governed by the Marumakkathayam law of inheritance;

(j) (i) 'tavazhi' used in relation to a female means the group of persons consisting of that female, her children and her descendants in the female line; and

(ii) 'tavazhi' used in relation to male means the tavazhi of the mother of that male.

CHAPTER II.

MARRIAGE AND ITS DISSOLUTION.

Marriages valid under the Act

4. (1) Save as provided in section 5, the conjugal union of a marumakkathayi female with -

(i) a male belonging to the same community as such female, or

(ii) a male not belonging to such community and whether marumakkathayi or not,

shall be deemed for all purposes to be a legal marriage if -

(a) the parties to the union are not related to each other in such degree of consanguinity or affinity that conjugal union between them is prohibited by any custom or usage of the community to which they belong or either of them belongs; and

(b) the union-

(i) was openly solemnized in accordance with the customary ceremonies, if any, prevailing in the community to which the parties belong or either of them belongs. Before the date on which the Act comes into force and is subsisting on such date; or

(ii) is so solemnized in accordance with such ceremonies on or after the date on which this Act comes into force and, where either or both the parties are minors, with the consent of the guardian or guardians of such minor or minors; or

(iii) was registered as a marriage under the Malabar Marriage Act, 1896, before the date on which this Act comes into force and is subsisting on such date.

(2) A conjugal union between minors or between a minor and a major which would otherwise be a valid marriage under sub-section (1) shall not be deemed to be invalid on the ground that the consent of the guardians or guardian of such minors or minor was not obtained to the union.

(3) Notice of every marriage contracted on or after the date on which this Act comes into force shall be given by such person, to such authority, in such form and within such time as may be prescribed. Failure to give such notice shall be punishable with fine, which may extend to fifty rupees but such failure shall not invalidate the marriage or affect the legal rights of the parties to, or the issue of, such marriage.

Marriage during continuance of prior marriage void

5. (1) During the continuance of a prior marriage, which is valid under section 4, any marriage contracted by either of the parties thereto on or after the date on which this Act comes into force shall be void.

(2) On or after the said date, any marriage contracted by a male with a marumakkathayi female, during the continuance of a prior marriage of such male, shall be void, not withstanding that his personal law permits of polygamy.

Dissolution of marriage

6. A marriage valid under section 4 may be dissolved-

(a) by a registered instrument of dissolution executed by the parties thereto; or

(b) by an order of dissolution as hereinafter provided;

Provided that if either or both the parties is or are minors, the marriage shall not be dissolved until after the party has become a major or both the parties have become majors, as the case may be.

Petition for dissolution

7. (1) A husband or wife may present a petition for dissolution of marriage -

(i) if the place where the marriage was contracted or the respondent has a permanent dwelling or actually and voluntarily resides or carries on business or personally works for gain, at the time the petition is presented situated within the local limits of the jurisdiction of the Court of a District Munsif, in such Court;

(ii) if such place is not situated within the local limits the jurisdiction of the Court of any District Munsif, in the Court of the Subordinate Judge or if there is no such Courts in the Court of the District Judge, within the local limits in whose jurisdiction such place is situated; and

(iii) if such place is situated within the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Madras, in the Madras City Civil Court.

(2) The petition shall specify the place where and the date on which the marriage was contracted and if the respondent was a minor at the time of the marriage, the name and address of the guardian, if any, with whose consent the marriage was contracted.

Service of copy of petition on respondent

8. A copy of such petition shall be served at the expense of the petitioner on the respondent.

Order of dissolution

9. On the motion of the petitioner made not earlier than six months after the service of the copy as aforesaid, if the petition is not withdrawn the Court shall, on being satisfied after such inquiry as it thinks fit that a marriage which is valid under section 4 was contracted between the parties, by order in writing declare the marriage dissolved. The dissolution shall take effect from the date of such order.

Application of the Code of Civil Proceedure, 1908 to petitions

10. The provisions in the Code of Civil Procedure, 1908, shall, so far as may be, apply to petitions under this Chapter.

Bar of suit for restitution of conjugal rights

11. No Court shall entertain a suit for restitution of conjugal rights between the parties to a marriage valid under section 4.

Chapter not to apply to marriages of Nambudiri women

12. Nothing contained in this Chapter shall apply to the marriage of any Nambudiri woman following the Marumakkathayam law of inheritance.

CHAPTER III.

MAINTENANCE AND GUARDIANSHIP.

Maintenance of wife and minor children

13. (1) The wife and minor children other than married minor daughters under the guardianship of their husbands shall be entitled to be maintained by the husband or the father, as the case may be.

Provided that the wife shall not be entitled to maintenance from the husband if she refuses to live with him without just cause.

(2) Nothing contained in sub-section (1) shall affect the right of any person to maintenance from his or her tarwad or tavazhi properties.

(3) In awarding maintenance under sub-section (1) the Court shall have due regard to the means and circumstances of the person

against and by whom maintenance is claimed and to the reasonable wants of the person claiming maintenance.

Guardianship of minor wife and children

14. The husband shall be the guardian of his minor wife in respect of her person and property and subject to the provisions of section 15, the father shall be the guardian of his minor children, other than married minor daughters under the guardianship of their husbands, in respect of their person and property:

Provided that such guardianship shall not extend to the right and interest of the wife or children in respect of their tarwad or tavazhi properties;

Provided further that nothing contained in this section shall apply to a female member of any of the tarwads included in the Schedule or her children, where such female member resides in her own tarwad house and not with her husband.

Guardianship of minor children by husband deceased or divorced

15. The mother shall be the guardian of the person and property of her minor children if their father is dead or the marriage of their parents is dissolved.

Saving of the operation of the Guardians and Wards Act, 1890

16. Nothing contained in sections 14 and 15 shall be deemed to affect the operation of the Guardians and Wards Act, 1890.

CHAPTER IV

INTESTATE SUCCESSION

Property as to which a person is considered to have died intestate

17. A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

Illustrations.

1) A has left no will. He has died intestate in respect of the will of his property.

2) A has left a will whereby he has appointed B his executor but the will contains no other provisions. A has died intestate in respect of the distribution of his property.

3) A has bequeathed his whole property for an illegal purpose. He has died intestate in respect of the distribution of his property.

4) A bequeathed Rs.100 to B and Rs.1000 to the eldest son of C and made no other bequest and died leaving Rs.2000. C died before without ever having had a son. A has died intestate in respect of the distribution of Rs.1000.

Devolution of property left by marumakkattayi male intestate

18. On the death intestate of a marumakkathayi male, his property which is self-acquired or separate, shall devolve in the order and according to the rules contained in sections 19, 20, 21, 22, 23 and 24.

Where intestate has left mother, widow, children and lineal descendants

19. Where the intestate has left surviving him a child or children, or a lineal descendant or descendants in the female line through a deceased daughter or daughters, or both, and also his mother or a widow or widows, or both his mother and a widow or widows, the whole of the property shall belong to them. In the absence of the mother and widow, the whole of the property shall belong to the child or children and such lineal descendant or descendants; and in the absence of the mother, widow and child, the whole of the property shall belong to such lineal descendant or descendants.

Rules of distribution in cases falling under section 19

The distribution of the property among the heirs referred to in section 19 shall be made in accordance with the following rules: -

(i) the widow or, if there is more than one widow, each of the widows, shall be entitled to a share equal to that of a child.

(ii) The mother shall be entitled to a share equal to that of a child.

(iii) Every child (son or daughter) shall be entitled to an equal share:

(iv) Provided that if a daughter has pre-deceased the intestate, the lineal descendants of such daughter in the female line, shall be entitled to the share which such daughter would have taken had she survived the intestate.

(v) Grandchildren by a deceased daughter, shall be entitled in equal shares to what their mother would have taken had she survived the intestate:

Provided that if a grand-daughter has pre-deceased the intestate, the lineal descendants of such grand-daughter in the female line, shall be entitled to the share which such grand-daughter would have taken had she survived the intestate.

(v) In like manner the property shall go to the surviving lineal descendants of the iutestate in the female line where such descendants are in the degree of great-grand children or in a more remote degree.

Explanation I. - The descendants of a daughter, daughter's daughter or other female descendant in the female line, shall not be entitled to any share in such property if such daughter, daughter's daughter or other descendant is alive at the time of the death of the intestate.

Explanation II. - The descendants of a son who has predeceased the intestate shall not be entitled to any share in such property.

Illustrations

(1) Z dies intestate leaving two widows A and B, his mother C, a son D, a daughter E, a grand-daughter F by such daughter, the lineal descendants of a deceased daughter G and the lineal descendants of a deceased son H. A, B, C, D and E each gets one-sixth and the lineal descendants of G get one-sixth of the property. The grand daughter F and the lineal descendants of H do not get any share.

(2) Z dies intestate leaving no widow or mother, but leaving A a son, B a daughter, E and F a grandson and a grand daughter by a deceased daughter C, and a grand daughter G by a deceased daughter D and two great-grand daughters H and J by a deceased daughter of D. A and B will each be entitled to one-fourth of Z's property, E and F will each be entitled to one-eighth, G will be entitled to one-eighth and H and J each to one-sixteenth.

(3) Z dies intestate leaving no mother, widow or child, but leaving three grand children A, B and C by a daughter X who had pre-deceased him and two grandchildren D and E by a daughter Y who has also pre-deceased him. A, B and C will each be entitled to one-sixth, and D and will each be entitled to one-fourth of Z's property.

Rules of distribution where intestate has left no children or lineal descendant but only mother or widow or both.

21. Where the intestate has not left surviving him any child or lineal descendant in the female line through a deceased daughter but has left his mother and a widow or widows, one half of the property shall devolve on his mother and the other half on his widow or widows in equal shares. In the absence of a widow, the whole of the property shall belong to the mother.

Rules of distribution where intestate has left only widow or mother's tavazhi or both.

22. Where the intestate has not left surviving him his mother or any child or lineal descendant in the female line through a deceased daughter but has left a widow or widows and his mother's tavazhi, one half of the property shall devolve on his widow or widows and the other half on his mother's tavazhi. In the absence of the mother's tavazhi, the whole of the property shall belong to the widow or widows and in the absence of a widow, the whole of the property shall belong to the mother's tavazhi.

Rules of distribution where intestate has left only father and maternal grandmother's tavazhi.

23. Where the intestate has not left surviving him any of the heirs mentioned in sections 19, 21 and 22 but has left his father and his maternal grandmother's tavazhi, one-half of the property shall devolve on his father and the other half on his maternal grand mother's tavazhi. In the absence of the maternal grand mother's tavazhi, the whole of the property shall belong to the father and in the absence of the father, the whole of the property shall belong to the maternal grand mother's tavazhi.

Rules of distribution where intestate has not left any of the heirs mentioned in sections 19, 21, 22 and 23.

24. Where the intestate has not left surviving him any of the heirs mentioned in sections 19, 21, 22 and 23, the property shall, devolve on the tavazhi of his mother's maternal grand mother or on the tavazhi of a more remote female ascendant in the female line, the nearer excluding the more remote.

Devolution of property left by marumakkathayi female intestate.

25. On the death intestate of a marumakkathayi female, her property which is self-acquired or separate shall devolve in the order and according to the rules contained in sections 26, 27, 28 and 29.

Rules of distribution where intestate has left children and lineal descendants.

26. Where the intestate has left surviving her, children or lineal descendants in the female line through deceased daughters, or both, the whole of the property shall belong to them.

The provisions of clauses (iii) (iv) and (v) of section 20 and of Explanations I and II to that section shall apply to the distribution of the property among the children and lineal descendants of the intestate.

Rules of distribution where intestate has not left any child or lineal

27. Where the intestate has not left surviving her any child or lineal descendant in the female line through a deceased daughter, the whole of the property shall devolve on her mother's tavazhi.

Rules of distribution where intestate has not left any of the heirs mentioned in sections 26 and 27, but has left husband and maternal grandmother's tavazhi.

28. Where the intestate has not left surviving her any of the heirs mentioned in sections 26 and 27 but has left her husband and her maternal grandmother's tavazhi, one-half of the property shall devolve on her husband and the other half on her maternal grand mother's tavazhi. In the absence of the maternal grandmother's tavazhi, the whole of the property shall belong to the husband, and in the absence of the husband, the whole of the property shall belong to the maternal grandmother's tavazhi.

Rules of distribution where intestaste has not left any of the heirs mentioned in sections 26, 27 and 28.

29. Where the intestate has not left surviving her any of the heirs mentioned in sections 26, 27 and 28, the property shall devolve on the tavazhi of her mother's maternal grandmother or on the tavazhi of a more remote female ascendant in the female line, the nearer excluding the more remote.

30. (1) On the death intestate of a male not being a marumakkathayi

(i) who-

Devolution of property left by non-marumakkathayi male intestate.

(a) has, before the date on which the Act comes into force, contracted a marriage with a marumakkathayi female which is valid under section 4; or

(b) has contracted on or after such date a marriage with a marumakkathayi female which is valid under that section; and

(ii) Who has left surviving him by such marriage or marriages one or more of the following relations, namely: -

(a) a widow or widows,

(b) children,

(c) lineal descendants in the female line through deceased daughters,

Such relation or relations shall be entitled, if the intestate has also left relations who are heirs according to the personal law by which he is governed, to one-half of his property which is separate or self-acquired and if the intestate has left no such heirs, to the whole of such property:

Provided that the reasonable funeral expenses of the intestate shall first be deducted from such separate or self-acquired property.

(2) The property devolving on the relations referred to in sub-clauses (a), (b) and (c) of clause (ii) of sub-section (1) shall be distributed among them in accordance with the rules contained in clauses (i), (iii), (iv) and (v) of section 20 and Explanations I and II to that section.

Possession and management of property until division

31. (1) The senior major male member among the children and other lineal descendants through deceased daughters of the intestate or in the absence of any such male member the widow, of if there is more than one widow, the senior among such widows, shall be entitled to possession and management of the property referred to in sections 19, 21, 22 and 26 until division is effected.

(2) In the case of property referred to in section 30, if the interstate has left relations who are heirs according to the personal law by which he is governed, such heirs shall be entitled to possession and management of the property until division is effected.

(3) The karanavan of the tavazhi mentioned in sections 23, 24, 27, 28 and 29 shall be entitled to possession and management of the property referred to therein until division.

CHAPTER V.

TARWAD AND ITS MANAGEMENT.

Duty of karanavan to keep accounts

32. The karanavan shall keep true and correct accounts of the income and expenditure of the tarwad. The accounts of each year shall be available for inspection at the tarwad house by the major anandaravans once in a year throughout the month of Kanni following such year and any such anandaravan may take copies of or extracts from such accounts.

Alienation of immovable property by karanavan

33. (1) Except for consideration and for tarwad necessity or benefit and with the written consent of the majority of the major members of the tarwad, no karanavan shall sell immovable property of the tarwad or mortgage with possession or lease such property for a period exceeding twelve years.

(2) No mortgage with possession or lease with premium returnable wholly or in part, of any such property executed by a karanavan for a period not exceeding twelve years, shall be valid unless such

mortgage or lease is for consideration and for tarwad necessity or benefit.

(3) Nothing contained in this section shall be deemed to restrict the power of the karanavan to grant, in the usual course of management, for a period not exceeding twelve years, any lease without premium returnable wholly or in part, or the renewal of an existing kanom.

Debt contracted by karanavan when binding on tarwad

34. No debt contracted or mortgage without possession executed by a karanavan shall bind the tarwad unless the debt is contracted or the mortgage executed, for tarwad necessity.

Maintenance of members of tarwad

35. Every member of a tarwad, whether living in the tarwad house or not, shall be entitled to maintenance consistent with the income and the circumstances of the tarwad.

Relinquishment of karanavanship

36. Any karanavan may by a registered document give up his rights as karanavan.

Application of chapter to tavazhies

37. The provision of this Chapter shall apply to every tavazhi possessing separate properties as if it were a tarwad.

CHAPTER VI.

PARTITION.

Right of tavazhi to claim partition

38. (1) Any tavazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad over which it has power of disposal and separate from the tarwad:

Provided that no tavazhi shall claim to be divided from the tarwad during the lifetime of an ancestress common to such tavazhi and to any other tavazhi or tavazhis of the tarwad, except with the consent of such ancestress, if she is a member of the tarwad.

(2) The share obtained by the tavazhi shall be taken by it with the incidents of tarwad property.

Explanation- For the purpose of this chapter, a male member of a tarwad or a female member thereof without any living child or

descendant in the female line, shall be deemed to be a tavazhi if he or she has no living female ascendant who is a member of the tarwad.

Partition on change of religion

39. Notwithstanding anything contained in section 38, any member of a tarwad who has changed his or her religion may claim or be compelled by any other member of the tarwad, to take his or her share of all the tarwad properties over which it has power of disposal and separate from the tarwad.

Ascertainment of shares at partitions

40. (1) In the case referred to in section 38, the tavazhi shall be entitled to such share of the tarwad properties as would fall to the tavazhi if a division *per capita* were made among all the members of the tarwad then living.

(2) In the case referred to in section 39, the member who claims or is compelled to divide from the tarwad, shall be entitled to such share of the tarwad properties as would fall to such member if a division *per capita* were made among all the members of the tarwad then living.

Application of Chapter to tavazhies

41. The provisions of this Chapter shall apply to every tavazhi possessing separate properties as if it were a tarwad.

CHAPTER VII.

IMPARTIBLE TARWADS.

Certain tarwads to be impartible unless registered as partible

42. (1) Every tarwad included in the Schedule shall be an impartible tarwad and the provisions of Chapter VI shall not apply to such tarwad unless and until it is registered as a partible tarwad.

(2) Not less than two-thirds of the major members of a tarwad referred to in sub-section (1) may at any time present a petition to the Collector for the registration of the tarwad as partible.

(3) Such petition shall be in such form and contain such particulars as may be prescribed.

(4) If, after giving notice to all the major members of the tarwad and making such inquiry as he deems fit, the Collector is satisfied that not less than two-thirds of the major members of the tarwad have signed the petition with their free consent and desire the registration of the tarwad as partible, he shall register the tarwad as partible.

(5) On such registration, the provisions of Chapter VI shall apply to such tarwad.

Registration of tarwad as impartible

43. (1) Not less than two-thirds of the major members of a tarwad may, at any time, present a petition to the Collector for the registration of the tarwad as impartible

(2) Such petition shall be in such form and contain such particulars as may be prescribed.

(3) If, after giving notice to all the major members of the tarwad and making such inquiry as he deems fit, the Collector is satisfied that not less than two-thirds of the major members of the tarwad have signed the petition with their free consent and desire the registration of the tarwad as impartible, he shall register the tarwad as impartible.

(4) On such registration, the provisions of Chapter VI shall not apply to such tarwad unless and until the registration is cancelled under section 44.

Cancellation of such registration

44. (1) Not less than two-thirds of the major members of a tarwad registered as impartible under section 43 may at any time present a petition to the Collector for the cancellation of such registration.

(2) Such petition shall be in such form and contain such particulars as may be prescribed.

(3) If after giving notice to all the major members of the tarwad and making such inquiry as he deems fit, the Collector is satisfied that not less than two-thirds of the major members of the tarwad have signed the petition with their free consent and desire the cancellation of the registration, he shall cancel such registration.

Powers of Collector to take evidence on oath etc.

45. The Collector shall, for the purposes of this Chapter have the same powers as are vested in a

Court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters namely: -

(a) enforcing the attendance of any person and examining him on oath or affirmation;

(b) compelling the production of documents; and

(c) issuing commissions for the examination of witnesses, and any proceeding before the Collector under this Chapter shall be deemed to a judicial proceeding.

Collector's order to be final

46. The order of the Collector registering a tarwad as partible under section 42 or registering a tarwad as impartible under section 43 or canceling such a registration under section 44 shall be final and shall not be questioned in any civil court.

Maintenance of register by Collector

47. The Collector shall keep a register of all petitions presented to him under sections 42, 43 and 44 and of all orders passed by him on such petitions and shall, a all reasonable times, allow search to be made in such register and shall, on payment of the prescribed fee, give a copy, certified under his hand, of any entry therein.

CHAPTER VIII.

MISCELLANEOUS

Construction of bequests, gifts, etc., to wife or wife and children

48. Where a person bequeaths or makes a gift of any property to, or purchases any property in the name of, his wife alone or his wife and one or more of his children by such wife together, such properties shall, unless a contrary intention appears from the will or deed of gift or purchase or from the conduct of the parties, be taken as tavazhi property by the wife, her sons and daughters by such person and the lineal descendants of such daughters in the female line:

Provided that in the event of partition of the property taking place under chapter VI, the property shall be divided on the stirpital

principle, the wife being entitled to a share equal to that of a son or daughter.

Rule

49. (1) The Local Government may take rules consistent with this Act to carry into effect the purposes thereof.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for -

(a) all matters expressly required or allowed by this Act to be prescribed; and

(b) the procedure to be followed in respect of application under chapter VII.

(3) All rules made under this section shall be published in the *Fort St.George Gazatte* and on such publication shall have effect as if enacted in this Act.

50. Nothing in this Act shall -

Savings

(a) be deemed to confer any rights on the parties to or the issue of any marriage which is dissolved before this Act comes into force, or

(b) be deemed to affect any rule of Marumakkathayam law, customary usage, except to the extent expressly laid down in this Act.

THE SCHEDULE.

[*See the second proviso to section 14 and sub-section* (1) *of section* 42]

LIST OF IMPARTIBLE TARWADS.

1) The Zamorin's family consisting of:
   (a) Puthia Kovilakom situate in Tiruvannoor, Calicut taluk.
   (b) Patinhare Kovilakom situate in Mankavu, Calicut taluk,and
   (c) Kizhakke Kovilakom situate at Kottakkal, Ernad taluk.
2) The Chirakal Kovilakom near Cannanore.
3) The Nilambur Kovilakom in Nilambur amsom, Ernad taluk.

4) The Kizhakke Kovilakom of the Kottayam Raja's family, Kottayam taluk.

5) The Thekke Kovilakom of the Kottayam Raja's family, Kottym taluk.

6) The Patinhare Kovilakom of the Kottayam Raja's family in Kottayam taluk.

7) Ayancheri Kovilakom in Purameri amsom, Kurumbranad taluk.

8) The Edavalath Kovilakom in Purameri amsom, Kurumbranad taluk.

9) The Ayiranazhi Kovilakom of the Walluvanad Raja's family in the Walluvanad taluk.

10) The Kadannamanna Kovilakom of the Walluvanad Raja's family in the Walluvanad taluk.

11) The Mankada Kovilakom of the Walluvanad Raja's family in the Walluvanad taluk.

12) The Aripura Kovilakom of the Walluvanad Raja's family in the Walluvanad taluk.

13) The tarwad from which the Kuthiravattath Nair attains stanom, situate in Pulapatta amsom, Walluvanad taluk.

14) The tarwad from which the Punnathur Raja attains stanom, in Kottapadi amsom, Ponnani taluk.

15) The Venganad Kovilakom of the Venganad or of Kollengode Valia Nambidi.

16) The Mayapadi Raja's family of Kasargod taluk.

17) The Neleswar Raja's family of Kasargod taluk.

RULES FRAMED UNDER SECTION 49 OF THE ACT.

1. These rules may be called the Madras Marumakkathayam Rules, 1933.

2. In these rules, "the Act" means the Madras Marumakkathayam Act, 1932.

3. The notice of marriage referred to in sub-section (3) of section 4 of the Act shall be given by the husband or if he is a minor, by his guardian.

4. Every such notice shall-

(a) be in Form I annexed to these rules and contain the particulars specified therein; and

(b) be signed by both the parties to the marriage or in case one or both of them is or are minors, by the guardian or guardians of such minor or minors.

The signatures referred to in clause (b) shall be attested by at least two witnesses.

5. Every such notice shall -

(a) be in duplicate, and

(b) be delivered either in person or by messenger or sent by registered post, to the Tahsildar having jurisdiction over the place where the a marriage took place, within fifteen days of the marriage.

6. (1) The Tahsildar shall on receipt of such notice-

(a) enter the particulars contained therein in a register to be kept by him for the purpose ; and

(b) return one copy of the notice to the husband or his guardian, as the case may be with an endorsement that the marriage to which the notice relates has been registered.

(2) The other copy of the notice shall-

(i) if the marriage took place in the city of Madras, be kept by the Tahsildar in his office for purposes of record ; and

(ii) if the marriage took place elsewhere, be sent by the Tahsildar to the Adhikari or Headman of the village in which the marriage took place, who shall enter the particulars contained therein in a register to be kept by him for the purpose and keep the copy of the notice in his office for purposes of record.

(3) The register kept by the Tahsildar under sub-rule(1) and by the Adhikari or Headman under sub-rule(2) shall be in Form II annexe4d to these rules.

The entries in such register relating to each marriage shall be authenticated by the signature of the Tahsildar or the Adhikari or Headman as the case may be.

7. Every petition under sub-section (2) of section 42 of the Act for the registration of a tarwad as partible shall be in Form III annexed to these rules and shall contain the particulars specified therein.

8. Every petition under sub-section (1) of section 43 of the Act for the registration of a tarwad as impartible shall be in Form IV annexed to these rules and shall contain the particulars specified therein.

9. Every petition under sub-section (1) of section 44 of the Act for the cancellation of the registration of a tarwad registered as impartible under section 43 of the Act, shall be in Form V annexed to these rules and shall contain the particulars specified therein.

10. A fee at the rate of three annas for every 175 words or part thereof copied, shall be charged for the grant of a certified copy of any entry in the register kept under section 47 of the Act.

11. The service of every notice referred to in sub-section (4) of section 42, sub-section (3) of section 43 or sub-section (3) of section 44 shall be effected-

(a) by giving or tendering the notice to the person for whom it is intended ; or

(b) if such person is not found, by leaving such notice at his last known place of abode or business or by giving or tendering the same to some adult member of his family or to his agent or servant ; or

(c) if such person does not reside within the jurisdiction of the Collector and his address elsewhere is known to the Collector, by sending the same to him by post registered ; or

(d) if none of the means aforesaid be available, by affixing the name in some conspicuous part of his last known place of abode or business.

FORM I.

[*See Rule 4* (a)]

Notice of marriage under sub-section (3) of section 4 of the Madras Marumakkathayam Act, 1932.

Serial No. (To be entered by the Tahsildar)

Name, description and place of residence of the husband	Name, description and place of residence of the wife	Date of birth		Name, description and place of residence of the guardian		Date and place of marriage
		Of the husband	Of the wife	Of the husband in case he is a minor	Of the wife in case she is a minor	
(1)	(2)	(3)	(4)	(5)	(6)	(7)

Attestors,
Signature and address
Of the Attestors
1.....
2.....
Endorsement by the Tahsildar.
Date of receipt of the notice.....

Date.
Signature of the husband (or in Case he is a minor, of his guardian
Signature of the wife (or in case She is a minor, of her guardian.)

In case of delivery in person or by messenger, name and address the person making the delivery .....

Serial number	Name, description and place of residence of the husband	Date of birth		Name, description and place of residence of the guardian		Date and place of marriage	Signature of the Tahsildar
		Of the husband	Of the wife	Of the husband in case he is a minor	Of the wife in case she is a minor		Adhikari Or Headman

FORM II.

[*See Rule 6* (3)]

Register of marriage to be kept by the Tahsildar, Adhikari Headman.

FORM III.

[*See Rule 7*]

To

The Collector of

Petition under sub-section(2) of section 42 of the Madras Marumakkathayam Act, 1932, for the registration of a tarwad as partible: -

1. Name of the petitioner's tarwad ....
2. Name and address of the Karnavan or manager of the tarwad
3. The total number of major members of the tarwad ...
4. Names and addresses of the petitioners in full .....
5. Name and addresses in full of the remaining major members of the
6. tarwad ... ...
7. Taluks and villages in which the tarwad owns houses or other immovable properties ... ...
8. Whether any petition for the registration of the tarwad as partible was at any time previously made and if so the date and result of such petition ... ...

DECLARATION.

We, the undersigned do hereby declare that we are majors and are members of the above mentioned tarwad, that we desire the registration of the tarwad as partible that the particulars stated above are true to the best of our knowledge and that we have signed this petition with our free consent.

Signature of Petitioners.

FORM IV.

[*See Rule 8.*]

To

The Collector of

Petition under sub-section (1) of section 43 of the Madras Marumakkathayam Act, 1932, for the registration of a tarwad as impartible :-

1. Name of the petitioners' tarwad
2. Name and address of the Karnavan or manager of the tarwad
3. The total number of major members of the tarwad
4. Name and address of the petitioners in full
5. Name and addresses in full of the remaining major members of the tarwad
6. Taluks and villages in which the tarwad owns houses or other immovable properties
7. Whether any petition for the registration of the tarwad as impartible was at any time previously made and if so the date and result of such petition.

DECLARATION

We, the undersigned do hereby declare that we are majors and are members of the above mentioned tarwad, that we desire the registration of the tarwad as impartible that the particulars stated above are true to the best of our knowledge and that we have signed this petition with our free consent.

Signature of Petitioners.

FORM V.

[*See Rule 9.*]

To

The Collector of

Petition under sub-section (1) of section 44 of the Madras Marumakkathayam Act, 1932, for the cancellation of the registration of a tarwad registered as impartible under section 43 of the said Act:-

1. Name of the petitioner's tarwad
2. Name and address of the karnavan or manager of the tarwad
3. The total number of major members of the tarwad
4. Names and addresses of the Petitioners in full
5. Names and addresses in full of the remaining major members of the tarwad
6. Taluks and villages in which the tarwad owns houses or immovable properties
7. The date on which the tarwad was registered as impartible under section 43 of the Act
8. Whether any petition for the cancellation of the registration was at any time previously made and if so the date and result of such petition.

DECLARATION.

We, the undersigned, do hereby declare that we are majors and are members of the above-mentioned tarwad that we desire the cancellation of the registration of the tarwad as impartible, that the particulars stated above are true to the best of our knowledge and that we have signed the petition with our free consent.

Signature of Petitioner.

APPENDIX X

ACT XVII OF 1939

THE MAPPILA MARUMAKKATHAYAM ACT

29th June, 1939.

WHEREAS it is expedient to define and amend in certain respects the law relating to family management, partition and succession among the Mappilas following the Marumakkathayam Law; it is hereby enacted as follows: -

CHAPTER I

PRELIMINARY

Short title

1. (a) This Act may be called THE MAPPILA MARUMAKKATHAYAM ACT, 1938.

Extent

(b) It shall apply to all Mappillas following the Marumakkathayam Law, who are either domiciled in the Province of Madras, or have property situate within the Province of Madras.

Definitions

2. In this Act, unless there is anything repugnant in the subject or context, -

(a) "Anandaravan" means any member of a tarwad or tavazhi, as the case may be, other than the karanavan,

(b) "Karanavan" means the oldest major male member of a tarwad or tavazhi, as the case may be, in whom the right to management of its properties vests or in the absence of such a male member, the oldest major female member; or where by custom or family usage the right to such management vests in the oldest major female member, such female member.

(c) 'Major' means a person who has attained eighteen years of age.

(d) "Marumakkathayam" means the system of inheritance in which descent is traced in the female line.

(e) "Minor" means a person who has not attained eighteen years of age.

(f) "Tarwad" means a joint family which includes all its members with community of property governed by the Marumakkathayam Law.

(g) "Tavazhi" means a branch of a tarwad consisting of a female, her children and all her descendants in the female line.

CHAPTER II

TARWAD AND ITS MANAGEMENT

Duty of the karanavan to maintain an inventory

3. The karanavan shall maintain a true and correct inventory of all the moveable and immoveable properties belonging to the tarwad.

Duty of the karanavan to keep accounts

4. The karanavan shall keep true and correct accounts of the income and expenditure of the tarwad.

Right of anandaravans to inspect inventory and accounts

5. (1) The inventory and the accounts of each year of the Malabar Era, shall be available for inspection at the tarwad house by the major anandaravans throughout the month of Vrischikam following such year, and any such anandaravan may take copies of or extracts from the same.

(2) If the inventory or accounts are not made available for inspection as provided for in sub-section (1), the Court of a District Munsif having jurisdiction over the place where the tarwad house is situated may, on application by any major anandaravan, and after notice to the karanavan, pass an order causing the inventory or accounts to be produced in Court and allowing the anandaravan to inspect, or to take copies of or extracts from, such inventory or accounts.

Right of every member for maintenance

6. Every member of a tarwad whether living in the tarwad house or not, shall be entitled to maintenance consistent with the income and the circumstances of the tarwad.

Investment of surplus income

7. Any surplus left out of the income of a tarwad after providing for the customary or legitimate expenses of the tarwad including charges pertaining to the education, marriage, or death of the members of the tarwad, and charges necessary for zakat and the proper maintenance or upkeep of the tarwad properties, shall be applied by the karanavan in the purchase of immovable property for the tarwad or otherwise invested to the best advantage of the tarwad.

Alienation of immovable property by karanavan

8. (1) Except for consideration and for tarwad necessity or benefit and with the written consent of the majority of the major members of the tarwad, no karanavan shall sell immovable property of the tarwad or mortgage with possession or lease such property for a period exceeding twelve years.

(2) No mortgage with possession or lease with premium returnable wholly or in part of any such property executed by a karanavan for a period not exceeding twelve years, shall be valid, unless such mortgage or lease is for consideration and for tarwad necessity or benefit.

(3) Nothing contained in this section shall be deemed to restrict the power of the karanavan to grant in the usual course of management, for a period not exceeding twelve years, any lease without premium returnable wholly or in part or the renewal of an existing kanom.

Debt contracted by karanavan when binding on tarwad

9. No debt contracted or mortgage without possession executed by a karanavan shall bind the tarwad unless the debt is contracted or the mortgage is executed for tarwad necessity.

Immovable property when liable for attachment or sale for maintenance

10. No immovable property of the tarwad shall be liable to attachment or sale in execution of any decree obtained by an anandaravan for maintenance, until after the decree holder has

exhausted his remedies, if any, against the personal property of the karanavan or the income of the tarwad property.

Right to remove karanavan by suit

11. An anandaravan may institute a suit in a Civil Court for the removal of a karanavan.

(i) for any malfeasance, misfeasance, breach of trust or neglect of duty in respect of the tarwad;

(ii) for any misappropriation or improper dealing with the income or the properties of the tarwad;

(iii) for unsoundness of mind or any physical or mental infirmity which unfits him for dfischargin the functions of a karanavan;

(iv) for persistent default in the maintenance of the inventory referred to in section 3 or the accounts referred to in section 4 or in making them available for inspection by the anandaravans under section 5; or

(v) for any other sufficient cause which, in the opinion of the Court, makes his continuance as karanavan injurious to the interests of the tarwad.

Relinquishment of right of management by karanavan

12. Any karanavan may, by a registered document, give up his right of management.

CHAPTER III

PARTITION

Right of tavazhi to claim partition

13. Any individual member of a tarwad may claim to take his or her share of the properties of the tarwad over which the tarwad has power of disposal and separate from the tarwad.

Right of tavazhi to claim partition

14. Two or more members belonging to the same tavazhi, may claim to take their share of the properties of the tarwad over which the tarwad has power of disposal, separate from the tarwad, and enjoy the same jointly, with all the incidents of tarwad property.

Representation of minor in claim to partition

15. For purposes of sections 13 and 14 a minor member of a tarwad shall be represented by his or her mother and in the absence of the mother, by his or her guardian under the Islamic Law.

Partition of tarwad house

16. In a partition of tarwad properties, unless two thirds of the members of the tarwad desire to the contrary, the tarwad house including the site or sites of any building appurtenant thereto, and such other land, as is necessary for the convenient enjoyment of the tarwad house shall be kept undivided for the common use of all the members of the tarwad in which case, the charges of up keep and maintenance of the tarwad house shall be borne by the member or members that live in the house;

Provided that where such house is no longer used or required for purposes of residence or is continually neglected, such house, site or sites, and land may be divided among the members of the tarwad entitled thereto.

Ascertainment of share at partititon

17. In case of a division under section 13 or section 14, the individual member, or the members of the tavazhi as the case may be, shall be entitled to such share or shares of the tarwad properties as would fall to such individual member or to such members, if a division *per capita* were made among all the members of the tarwad them existing.

Subsequent devolution of the property

18. Succession to the property obtained by an individual member on partition shall be governed by the Islamic Law of Inheritance.

Exemption of Arakkal family from partition

19. The provisions of this chapter shall not apply to the Arakkal family or to the stanom properties of the Ali Rajas of Cannanore.

CHAPTER IV

REGISTRATION OF TARWADS

Registration as impartible tarwad

20. (1) If within a year from the passing of this Act not less than two-thirds of the major members of a tarwad present a petition to the

Collector of the district in such form and with such particulars as may be prescribed he shall, after satisfying himself that not less than two-thirds of the major members of the tarwad consent and desire the registration of the tarwad as impartible, register the tarwad as impartible.

(2) On such registration the provision of Chapter III shall not apply to such tarwad unless and until the registration is cancelled under section 21.

(3) During the pendency of a petition under sub-section (1) of this section, all proceedings in Court if any under Chapter III shall be stayed.

Cancellation of registration

21. (1) If at any time after the registration of a tarwad as impartible, not less than two-thirds of the members of the tarwad present a petition to the Collector in such form and with such particulars as may be prescribed for the cancellation of such registration the Collector shall, after satisfying himself that not less than two thirds of the major members of the tarwad consent and desire the cancellation of the registration, cancel such registration.

(2) On such cancellation the provision of Chapter III shall apply to such tarwad.

Collector's powers

22. The Collector shall, for the purposes of this chapter, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 when trying a suit in respect of the following matters, namely: -

(a) enforcing of attendance of any person and examining him on oath or affirmation;

(b) compelling the production of documents; and

(c) issuing commissions for the examination of witnesses; and any proceeding before the Collector under this chapter shall be deemed to be a judicial proceeding,

Collector's order to be final

The order of the Collector registering a tarwad as impartible under section 20 or canceling such registration under section 21, shall be final and shall not be questioned in any Civil Court.

Collector to maintain a register

23. The Collector shall keep a register of all petitions presented to him under section 20 and 21 and of all orders passed by him on such petitions and shall on payment of the prescribed fee, give a copy, certified under his hand, of any entry therein.

CHAPTER V

GENERAL

Chapters II and III to apply to tavazhi

24. The provisions of Chapter II and III shall apply to every tavazhi possessing separate properties as if it were a tarwad.

Provincial Government to make rules

25. The Provincial Government may make rules consistent with this Act to carry out the provisions thereof and these rules shall have effect as if enacted in this Act from the date of publication of the same in the *Fort St. George Gazette*.

Savings

26. Nothing contained in this Act shall be deemed to affect the provisions of the Mappilla Succession Act, 1918, or of the Mappilla Wills Act, 1928, or of any law or custom or usage except to the extent expressly laid down in this Act.

STATE AND SOCIAL CHANGE – THE ROLE OF JUDICIARY – A CASE STUDY OF MALABAR 1792-1940

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THESIS SUBMITTED FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY OF THE
UNIVERSITY OF CALICUT

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2003

GLOSSARY

acharam	Established custom and is opposed to *anacharam.*
adalat, udalath	Court of Justice.
adhikari	Head of *amsam.*
adima	Feudal dependency of man of low caste upon his, patron, slavery.
adiyan	*adi* = foot. A servant or slave.
akambadi	Bodyguard; Hon. Title of Nairs, especially at Calicut.
aliyasantana	In heritance in the female line. The Canarese equivalent of *marumakkathayam.*
ambalavasi	Temple servant class.
ambalappadi	A seat of honour in the public place or temple.
amildar	Governor.
amin	Civil Judge or Judicial officer above a Munsif.
amsam	Part of a taluk, village.
anandaravan	Junior member of Malabar *tarwad.*
ankam	A royal privilege.
anubhavam	Enjoyment. Grants by the Rajas or *janmis* for services performed or to be performed or for maintenance of the dignity of the grantee.
arakkal swaroopam	Mappila royal family in Malabar.
ariyittuvazhcha	Coronation by pouring rice on the head.
attaladakkam	*attal* = extinction; *adakkam* = taking. Remote heir in the branch of the *tarwad.*
attipper	Absolute transfer.

brahmaswam	Hereditary *janmam* property of the Nambudiris.
chamayam	Expenses of building and other fixtures. *kizhchamayam* = expenses of cultivation; *purachamayam;* expenses of building.
chathan	A demon.
chathurvarnya	The four classes of Hindu society.
cheras	Kings of Kerala.
cheraman Perumal	One of the former emperors of Malabar.
cherical (cherakkal)	Land appropriated for the support of Rajas and temples.
cherujamam	Inferior right.
cherumacal	Members of an inferior caste in Malabar who are as a rule toilers attached to soil.
chunkam	Toll.
cowle	Applied to a grant by Government authorizing the grantee to cultivate waste land.
cutchery	An office of administration, a court home.
daroga	A police official.
dayadi	A member of the family, however remote, a relative.
dayabhaga	Legal text and system of family law leased thereon.
desam	Sub-division of an *amsom.*
devasthanam	Religious place.
devasvam	*deva* = God; *svam* = property. Temple property, a temple.
dharma, dharmasastra	virtue, legal or moral duty; sacred law.
diwan	A minister of state.

dubashi	A bilingual person, hence, an intermediary or broker.
ezhava	As Thiyas are called in Palghat and Walluvanad, follow *makkathayam.*
gothram	Lineage of Brahmans.
gramam	Village, applied to Brahmin Village or *agraharam.*
gramapanchayat	A village council.
illom	The house of an ordinary Nambudiri.
janmam	Birth right, hereditary proprietorship on land.
janmi, janmakar	Proprietor, landlord, the person in whom the *janmam* is vested.
janmakol	A perpetual lease, nominal annual rent payable.
janmapanayam	Mortgage of land with no right of redemption.
jati	caste.
kadathanad	The district from Mahe to Vadakara.
kaividuga otti	A tenure which leaves to the *janmi* merely nominal right.
kalarippayattu	A martial art of Kerala.
kanom	Land tenure based on mortgage or lease.
kanomdar, kanakkaran,	One who holds land on *kanom* tenure.;
kanoomdar, kanakkar	mortgagee, the person who has lent the *kanom.*
kana-janma-maryada	Land relations based on dependence & obligation.
kanom pattom	The rent payable by a *kanomdar.*
kanom poramkadam	Further charge payable with *kanom.*
kanuka	To see.

karaima	The office of a temple servant or *karalan.*
karalan	The deputy or agent of an *uralan* in the management of temple affairs.
karanam	Instrument.
karanavan, karanavathi	Eldest male or female member and manager of the *tarwad.*
karanakari	Vide *janmakol* - Permanent grant in return for services rendered - temple connected.
kavalphalam	Protection tax imposed by *naduvazhis.*
keralolpathi	A history of Malabar in Malayalam.
keezhkur koima	Inferior share.
kolathiri	A title of the Raja of Chirakkal.
koodothram	Witchcraft.
kovilakom	Palace, dwelling place of the Malabar Royal families.
kshatriya	The warrior class.
kudima janmam	A tenure under which a nominal quit-rent only is paid.
kudimanir	Transfer next in order to *attipper;* irredeemable, non-transferable, a nominal rent payable.
kudiyan	A cultivating tenant.
kurumban	Aboriginal tribe of Malabar.
kurichian	A hill tribe in Wayanad.
kuruvazcha	*kur* = above; *vazhuka* = rulership. The rank of second, third, etc., prince in a royal family.
kuzhikanom	A lease for improving the land, no rent is paid ordinarily.
kuzchikur	*kuzhi* = pit; *kur* = share; the share to which the tenant is entitled for digging pits and planting trees.

mahodayapuram	Kotungallur, the old capital of Keralam.
makkathayam	The law of inheritance from father to son.
malayala	The Malayalam language or customs.
malikana	Allowance paid to deposed chieftains.
mana	The household of a Nambudiripad.
mannan, vannan	A washer man.
mappila	Malabar Muslims.
marumakkathayam	The law of inheritance through the female line.
marupattom	Counterpart of a lease.
maryada	Custom, usage.
melcharth	Over lease.
melkanom	A mortgage over and above the first mortgage; a second mortgage to a third party.
melkoyima	Right of superintendence over temples vested in the sovereign.
melkur	Superior share.
mitakshara	A school of Hindu Law.
moulavi	A learned man of the law of the Quran.
mudalsambandham	Community of property as opposed to community of pollution (*pula sambandham*)
muffassal	The country as opposed to the principal town or city.
mukkuvan	A tribe of fishermen in Malabar.
munsif	Indian Civil Judge of the lowest rank.
nadu	Province, a political unit in medieval Kerala.
naduvazhi	Chief of a *nad;* name given to petty chief under the old Rajas.

nair, nayar	The principal military class among the Malabar Hindus.
nambudiri	Malabar Brahman.
nigudi (nigadi)	The land tax payable to Government.
nir	Water.
nirattupperu	Vide *attipper.*
nirmudal	Transfer of all but the *janmi* interest; the right to water and everything else.
nizamat	Supreme Court of Criminal Justice.
otti	A mortgage with right of pre-emption and pre-mortgage.
ottidar	Who is in possession of the *otti* right.
ottikkumpuram	A tenure higher than *otti* which leaves to the *janmi* merely nominal rights.
pad	Ruling authority.
panayam	Generic term for mortgage
pandit	A scholar in Hindu Law.
paniyan	A tribe of agricultural labourers living in the hilly tracts of Wynad.
panchayat	A court of inquiry.
paramba	Garden land; high land which cannot be irrigated artificially.
patamalai nayar	A minister of Cheraman Perumal.
patta	Land deed.
pattom	Rent.
pattomkaran	Simple lessee.
pattomali	A subordinate office attached to a temple subject to the *uralan,* usually hereditary.
peru	*peruka* = to bring forth.
perumal	The king or emperor over the whole of Kerala.

peruvartham	*peru* = to obtain; *artham* = gain. Like *otti*, but redeemable only on payment of market value.
pudamuri	Nair marriage in North Malabar.
pulappedi	A custom connected to caste pollution.
pulayan	One of the inferior castes of Malabar.
pulasambandham	Relationship such as to entail pollution on the occurrence of birth or death.
purappad	Rent.
quran	Holy book of the Muslims.
raiyat	*kudiyan*, cultivating tenant.
raja	A King, Prince.
sadhanam	Thing.
sadachara	Good old custom.
sambandham	Generic term for Malabar marriage.
samudayam	A council of Brahmans managing the affairs of a temple on behalf of the *uralans*.
samudayi	A member of the *samudayam*.
sangam	A group of traditional literary academies of Madurai.
santatibrahmasvam	Perpetual grant to Brahmans.
sarvasvadanam	Lit = The gift of the whole property; a kind of Nambudiri marriage.
sastram	Traditional rules or authoritative treatise on ancient Hindu Law.
sasvitham, sasvatham	Perpetual lease or mortgage.
shanti	Temple priest.
sharia, shariat	Muslim religious law, Islamic personal law.
smarthavicharam	Caste enquiry among Nambudiris.

smrithi	"Remembered" – a class of religious literature comprising law books, epics and *puranas*.
sthanom	Status and attendant property of the senior Rajahs.
sthani	Holder of the *sthanom* title.
sthridhana	dowrry.
sthrisothu	The ownership of *tarwad* property when vested in the female.
sudder adalat	High Court.
tarwad	A joint undivided *marumakkathayam* family.
thalikettukalyanam	Formal marriage ceremony preliminary to *sambandham*.
thampuratti	A senior lady in *kovilakom*.
tavazhi	A branch of the family being descendants of the same mother, separated more or less from the parent stock.
thiya	A numerous caste in Malabar.
thirumulpad	*marumakkathayam* Brahmans of Payyannur.
thodupanayam	Simple mortgage.
undaruthipanayam	*unnuka* = to eat; *aruti* = end; Usufructurary mortgage when the mortgage money is paid out of the usufruct both the principal and interest.
upanayana	The ceremony of initiation.
uraima	The office of an *uralan*.
uralan	Trustee of a temple.
vakil	Agent, representative or an authorised practitioner in a court of Justice.

valia tangal	A religious status in the Mappila community.
vannathi	A lower washer man's wife.
varam	Share.
veda	The oldest religious literature of the Aryans.
veppu	A deposit; another name for *otti* in Palghat.
verumpattom	Simple lease for one year.
verumpattakkaran	Cultivator, usually on wet lands.
vettukaram, vettuchamayam	Compensation payable to a tenant for clearing and levelling land.
vettuvan	Caste of predial slaves in Malabar.
vyavahara	Case, civil law.
vyavaharamala	A Sanskrit book on Malabar Law.
wakf	An endowment for religious or charitable purpose.
yakshi	A female demigod.
zamindar	Landlord, responsible for ground rents to Government.
zamorin	The ruler of Calicut.
zillah	Administrative unit or division.

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