CHAPTER IX.

THE SUBJECT-MATTER OF *WAKF*.

SECTION I.

GENERAL PRINCIPLES.

Principle. Everything capable of being reduced to possession or which may yield profit permanently, may form the subject of *wakf*.

UNDER the Mussulman Law there is absolutely no restriction on the dedication of any kind of property so long as it admits of yielding permanent benefit either in itself or by renewal from time to time or by conversion into something else which admits of the same possibility. Thus every kind of property, immovable as well as movable,—every object in fact which is capable of being possessed or being reduced to possession actually or constructively, equally with interest in trade, commerce, or investments—is a fit and lawful subject of *wakf*.

It will be seen, therefore, that the validity of a *wakf* does not depend on the nature of the property dedicated, but on the probability or presumption of permanent benefit being derived from it by any mode of dealing of which it is capable, or by converting it into something else. It is only where the object is absolutely unfit for being turned into profitable use, that its dedication falls to the ground. Land which is arid and waste, and cannot be cultivated or used for pasturage or any other purpose yielding a profit for the maintenance of the *wakf*—would be an unfit subject. But an object which was likely to be consumed in user and which, therefore, had no permanency in itself, can be sold and the proceeds invested in any manner customary among people in order to yield a permanent return, without any restriction to its renewal from time to time. For example, even eatables are fit subjects of *wakf* for they can be sold and the price so obtained laid out "in business." When a *wakf* is made of actual coin ("*dirhems* and *dinârs*"), it is to be invested with the like object.

Fatwa on this point according to Mohammed.

In two instances the British Indian Courts have lost sight of the root-idea underlying the principle, and have, therefore, failed

to grasp the meaning of the jurists who had expressed themselves in favour of the *wakf* of certain kinds of moveable property as against others. It was thus that a canonical significance came to be attached in a Calcutta case(1) to the enunciations of the jurist Abû Yusuf, although by the consensus of Mussulman lawyers his doctrine is *not* adopted for judicial decisions (*fatwa*) in this matter. But even his *dictum* properly analysed, is merely illustrative but not restrictive. Nor must it be forgotten that when he speaks of invalidity in connection with any kind of property, he does not mean to imply that the *wakf* is unlawful on account of something in the nature of the property which forms the subject of the *wakf* but rather that it does not possess, on the basis of "analogy" (*Kiyâs*), in his judgment, the characteristic of yielding permanent benefit as being apt to be consumed in user.

Articles which Mussulmans cannot lawfully buy or sell—such as swine's flesh or intoxicants—cannot lawfully be dedicated, even though they can be sold to non-Moslems. The test, therefore, which was applied in early times to discover whether the property dedicated answered the root-idea was whether it was the "practice" in any particular locality to dedicate such objects, for the existence of the practice, to whatever extent, would indicate that they were the subjects of mutual dealing among the inhabitants of the place or people of the country, for otherwise they would not be capable of being bought or sold, or of yielding a permanent benefit by renewal or by the investment of the proceeds when sold.

These preliminary remarks will help to explain the authorities.

After dealing with the subject of *Mushâ'a*, the *Durr-ul-Mukhtâr* states the rules relating to the *wakf* of movables in the following terms :—"And similarly is valid the *wakf* of all movables [made] intentionally [*i.e.*, not as accessories to something else] which are the subject of mutual dealing among mankind (*tâ'amulun li'l-nâs*)(2) such as spades and axes and even *dirhems* and *dinârs*. I (3) say, that even an order has issued [from the sovereign(4)] to the Kâzis in that respect [*viz.*, to declare the validity of the *wakf* of *dirhems*

(1) *Kulsum Bibi* v. *Golam Hossain Cassim Ariff* [1903], 10 Cal. W. N., 499.

(2) The meaning of the expression *T'aâmul* will be further discussed later on, see p. 261 "Mankind" refers to the Mussulman people so as to exclude articles, the buying and selling of which is regarded unlawful by them.

(3) The author of the *Durr-ul-Mukhtâr*.

(4) Meaning the Sultan, see *ante*.

and *dinârs*] as is set forth in the Ordinances of Mufti Abû S'aûd; and of everything which can be measured or weighed; such things shall be sold and its proceeds shall be invested in *muzâribat* or *bazâ'at* (business or commerce). Thus if a person makes a *wakf* of several measures of wheat or barley on the condition that the *Mutwalli* should loan it to a cultivator for purposes of sowing, and after the crop has been reaped take back the measure, and then loan it again and so on, it is lawful as stated in the *Khulâsa*. . . . And it is lawful to make a *wakf* of cauldrons and biers and shrouds and the Koran and books (in general) for custom excludes analogy(1) according to the *hadîs* (traditional saying of the Prophet) that whatever the Mussulmans hold to be good is good in the estimation of the Almighty.(2) The *Bahr* has placed the *wakf* of boats and ships in the same category as the *wakf* of furniture, it not being customary."

Wakf of ships and boats valid.

With reference to this statement [quoted from the *Bahr-ur-Râik*], Imâm Halebi, the author of the *Multeka-ul-Abhar* distinctly lays down that "in our times the *wakf* of ships is customary."

As Tahtâwi points out in his *Sharh* (commentary) there is no difference of opinion among the Disciples regarding the validity of the *wakf* of horses and implements of warfare, "for with respect to them there are many traditions and proofs;" the difference relates to objects other than these. According to Mohammed the *wakf* of all movables is lawful provided there is a practice with regard to them, whereas Abû Yusuf holds otherwise. "But in the *Mujtaba* it is stated that according to Mohammed the *wakf* of all movables is valid *absolutely*, and according to Abû Yusuf when there is a practice. Although the language of the *Nahr-ul-Fâik* would give rise to an inference that the *wakf* of movables

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(1) In other words when a certain mode of dealing or practice grows up among a people with the tacit approval of the community, the doctrine of "analogy" by which certain things, on pure hypothetical reasoning based on *à priori* considerations, are held to be invalid—does not apply.

(2) ما رآه المسلمون حسنا فهو عند الله حسن

This is the Moslem form of the ancient saying *Vox populi Vox Dei*. The difficulty is to find the *vox populi*. In the Mussulman system the practice or dealing of the community is the test. Professor Kresmárik in his article already referred to (*ante*, p. 207), says in any case it is necessary the subject of the *wakf* must not be *extra-commercium* and must be in the actual ownership of the consecrator, p. 529.

is valid only in places where the practice exists, Mufti Abû S'aûd has declared that there is no such limitation."

And the same writer dealing with the conditions of *wakf* says :— "Another condition is that the subject is suitable for dedication. According to the correct doctrine both immovable and movable property may be made *wakf*. [With respect to the latter] anything which by usage and practice it is customary [to dedicate] like the Koran and books of traditions may lawfully be made *wakf*. From this it follows that though in the neighbourhood of Egypt, it not being customary a *wakf* of current coins may not be valid, in the countries of Rûm [the Turkish Empire] the *wakf* of *dirhems* and *dinârs*, being customary, is lawful. When such a *wakf* [*viz.*, of actual money—*dirhems* and *dinârs*—or the equivalent of money] is made, it will be invested in *muzâribat* (business) and the income will be devoted to the purposes of the *wakf* "(1)

The development in the legal conceptions will become apparent from the fact that although in Tahtâwi's time the *wakf* of money was not customary in Egypt, it is now universally practised in that country as in the rest of the Moslem world. And not only money is dedicated in Egypt but shares in companies, stocks and bonds are commonly made *wakf*.

Even during the period which elapsed between the compilation of the *Hedâya* and that of the *Durr-ul-Mukhtâr*—a period of barely three hundred years—the legal conception appears to have made an advance. For the *Hedâya* regards the dedication of a bondsman as invalid, as the subject did not possess permanency, whilst the *Durr-ul-Mukhtâr* declares it to be valid—and adds that if the bondsman is intentionally killed by somebody the murderer should not be executed but should be made to pay as *wehr-geld* the full price of the bondsman so that another may be purchased in his place.(2) This shows that the idea of permanency by renewal had already grown up in the fifteenth century of the Christian era.

The rule relating to the *wakf* of movable property is enunciated in the following terms in the *Khazânat-ul-Muftiïn*(3) :—" If a

(1) Allâmah at-Tahtâwi's Commentary on the *Durr-ul-Mukhtâr ;* See Morley's Dig., Introd., p. cclxxvlii.

(2) *Durr-ul-Mukhtâr*, p. 413, Hooghly Ed.

(3) The Treasure-house of the Muftis, (Jurists) frequently quoted by the law officers of the Sudder Dewanny Adawlat, and referred to in the *Fatâwai Alamgiri* and in the cases given in Macnaughten's Principles and Precedents of Mahommedan Law : See pp. 332, and 342 ; and Morley's Dig. Introd., p. cclxxxvii.

man makes a *wakf* of *dirhems* [here used generally for money] or food or whatever is weighed or measured, according to Imâm Zuffar it is lawful. When asked how such things can be made *wakf*, he answered the money should be invested in *muzâribat*,(1)and whatever profit is derived therefrom will be devoted to the purposes of the *wakf*; and what is weighed or measured will be sold and its price like money will be invested in business. And the jurists have held, and analogy is so, that if the *wâkif* provide thus—this measure of wheat will be loaned to the poor, for purposes of cultivation for themselves, and that after they have reaped the crops, the same measure will be taken back from them, and similarly for ever it should be loaned to other poor [people]; this will be lawful. And like this there are numerous *wakfs* in Damawand and the hilly tracts of Tabaristan [Northern Persia]

It must be noted in this connection that Imâm Zuffar is regarded in the Hanafî world as a *mujtahid* Imâm—a Jurist of the first rank entitled to lay down principles, standing next to Abû Yusuf and Mohammed.(2) And as I shall show abundantly later on, it is open to the Mussulman Judge to follow Zuffar's or any other principal jurist's rule, if, in his considered judgment, it appears more consistent with the needs of the times or the requirements of justice.

"According to the great Jurist Shams ul-Aïmma as-Sarakhsi," says Kâzi Khân, "*wakf* of movables is valid; custom and usage, however, regulate what movables can be made *wakf*. The *wakf* of shrouds, books, etc., are lawful according to all. The *wakf* of the milk of a cow is valid if customary. The *wakf* of *dirhems* (money) is valid. They would be applied in business, and the profit arising therefrom would be used for the purposes of the *wakf*. In the same way, a measure of wheat may be dedicated."

Commenting on the passage already quoted from the *Durr-ul-Mukhtâr*(3) the *Radd-ul-Muhtâr* says as follows:—"The dedication of movables subsidiary to immovable property (تبعًا للعقار) is lawful without divergence between them [Abû Yusuf and Mohammed]. Similarly, there is no divergence regarding the validity of a *wakf* of implements of warfare or horses, which are lawful according to well-

(1) *Muzâribat* is defined in Johnson's Arabic and Persian Dictionary to mean partnership business.

(2) See *ante*, p. 15.

(3) *Ante*, p. 247

known proofs. The difference [between the two] relates to the dedication of [movable property] other than these. For, according to Abû Yusuf, it [*viz.*, a *wakf* of every movable] is not valid; whereas, according to Mohammed, it is valid when dealing [or practice] pertains to such articles. And this rule has been adopted by the majority of the jurists of all countries(1) as is mentioned in the *Hedâya*; and *it is correct* as is mentioned in the *As'aâf*. And it is the doctrine of the majority of jurists as is mentioned in the *Zahîria*, for analogical reasoning is excluded where there is dealing.(2) And in the *Mujtaba*, it is mentioned, from the *Siyar*, that, according to Mohammed, the *wakf* of movables is unrestrictedly valid, and according to Abû Yusuf, the *wakf* of those movables as form the subject of dealing is lawful. 'And all this is mentioned in the *Bahr-u-Râik* and the first is well-known.... ....In the *Khulâsa* this doctrine relating to the validity of the *wakf* of *dirhems* and *dinârs* (money) is referred to Ansâri;(3) Ansâri was a disciple of Zuffar. And in the *Khânieh* it is referred to Zuffar, where he has said it is related from Zuffar on the authority of Sharnabalâlieh. And the author has stated in the *Manah* [*-ul-Ghuffâr*(4)] 'that the dealing is current in our days in the countries of Rûm [Turkey] and others;' thus the *wakf* of *dirhems* and *dinârs* comes within the dictum of Mohammed on which is the *Fatwa*, that 'every article which forms the subject of dealing a *wakf* thereof is lawful' and all this is patent. Consequently, it is not necessary to specify alone the dictum of Imâm Zuffar reported by Ansâri for its validity (*viz.*, the validity of a *wakf* of *dirhems* and *dinârs*).....Thus the Moulâna, the Sâhib ul-Bahr (the author of the *Bahr*), has given a *fatwa* that the *wakf* of *dirhems* and *dinârs* is lawful and has not stated any contrary doctrine."

Imâm Mohammed's *dictum.*

Wakf of movables unrestrictedly valid.

Wakf of *dirhems* and *dinârs.* The *Fatwa* according to Mohammed.

"In the *Manah* [*-ul-Ghuffâr*] it is stated that Ramli(5) thought as doubtful the inclusion of *dirhems* and *dinârs* [money] in those articles to which dealing pertains, for [he said] they

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(1) *Amsâr*, pl. of *misr*.

(2) *Radd-ul-Muhtâr*, Vol. III p. 579; (لأن التعامل يترك به القياس)

(3) Mohammed ibn Abdullah al-Ansârî, a great jurist died about 830 A. C.

(4) The *Manah ul-Ghuffâr* and the *Tanwir ul-Absâr*, are by the same author (Shaikh Shams ud-din bin Abdullah al-Gazzi). The *Durr-ul-Mukhtâr* is a commentary on the *Tanwîr ul-Absâr*, whilst the *Radd-ul-Mukhtâr* is a commentary on the *Durr-ul-Mukhtâr*.

(5) A jurist of Egypt.

dirhems and *dinârs*] are not such articles as one can derive profit from retaining [their character] in specie in the ownership [hands] of the *wâkif*; and that the *fatwa* given by the author of the *Bahr* without mention of any difference of opinion does not prove that the *wakf* of *dirhems* and *dinârs* comes within the meaning of Mohammed's dictum on which is the *fatwa*, that the *wakf* of all articles which form the subject of dealing is valid, for it is possible that he, the Sâhib ul-Bahr, has adopted the opinion of Zuffar and given *Fatwa* accordingly.....I [*viz.*, the author of the *Radd ul-Muhtâr*] say that money (*darâhim*, plural of *dirhem*) does not become specific because it is specified, and though it cannot yield profit retaining its specific character, yet because it cannot be retained in specie, its equivalent [what it is changed or converted into] stands in its place....Consequently, it may be taken as remaining for ever. And there is no doubt that it is movable property and, therefore, where the dealing [or practice] exists it will be included in what Mohammed has held to be capable of valid dedication. And it is for this reason that Mohammed referred to articles which were dealt with [or regarding which there was a practice] in his own time. The *Fath-ul-Kadîr* says that the Jurists proceeding on what was laid down by Mohammed extended the application of the principle to many other articles with respect to which they found the dealing [or practice] prevailing [in their times].....And in the *Khulâsa* it is stated that the *wakf* of a cow in order that its milk be distributed among the travellers, *abnâ-us-sabîl*, ('children of the road') will be considered lawful wherever the practice has come into existence."

"And Ansâri (who was a disciple of Zuffar) was asked, if a person made a *wakf* of *dirhems* and of such things as can be weighed and measured, whether it would be valid? He answered, 'yes;' on being questioned how that could be done, the reply was—the money would be invested in *muzâribat*, and its income would be devoted to the purposes of the *wakf*; and things which are capable of being weighed or measured would be sold and the proceeds invested in *muzâribat* or *bazâ'at*."

"The author says, it is upon this analogy that the *wakf* of a measure of wheat with the condition that it should be given to the poor (peasantry who are unable to procure seedlings) and they after reaping their crops, should return the wheat, and this measure of wheat should be again given to others who are in the same condi-

tion, in this way for ever—is lawful and valid. There are many such [*wakfs*] in Rai(1) and in the vicinity of Damâwand.(2) From this is clear the correctness of the principle stated by the author [of the *Tanwîr*] that the *wakf* of *dirhems* and *dinârs* is included in the rule of Mohammed on which is the *Fatwa, viz.:* "That whatever movable it is customary (3) (بالمنقول المتعارف) to make *wakf* it is valid....."The reason for ascribing to Zuffar specifically the validity of a *wakf* of moneys was that in his time it was not generally in vogue, and he orginally enunciated the doctrine.' In the territories of Rûm [Turkey] it is customary to make a *wakf* of money," (وقف الدراهم و دنانير تعورف فى الديار الرومية .(4)

"According to all the jurists," says the *Fath ul-Kadîr*, "the *wakf* of all movables in ordinary use among mankind is valid." "Shâfeï says that everything the sale of which is valid, and which can be renewed from time to time by its usufruct or otherwise, can be validly dedicated, and this also is the opinion of Mâlik and

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(1) Ancient Rhages.

(2) See *ante*, p. 250.

(3) From *'urf*, (custom); *Radd ul-Muhtâr*, Vol. III, pp. 578-9.

(4) *Fath ul-Kadir*, Vol. II, p. 636; also the *Surrat ul-Fatâwa*, p. 427. See also the *Hâwi*.

The above doctrines will explain the following passage in the *Hedâya*:—

"The appropriation of things which are consumed in using, such as gold and silver, or eatables and drinkables, is not unlawful according to the generality of the lawyers, but by gold and silver are not to be understood *dinârs* and *dirhems*, or what is not ornament. And if one should make an appropriation of *dirhems* or things estimated by measure, or of clothes, it would not be lawful. *But it is said that in places where this is customary, decrees are given in favour of the legality of the appropriation.*"

"If it be asked how, that is, how can the money be applied? It is answered that the *dirhems* may be lent to the poor and taken back again or given in *muzâribat*, and the profit laid out in charity, and wheat may be lent to the poor to sow and then taken from them, and clothes lent them to wear when necessary and then taken back."

"It is not lawful to appropriate movables, the appropriation of which is unusual or uncommon according to our doctors. The argument of our doctors is, that appropriation requires perpetuity, according to what has been already stated, and this cannot exist in movables since these are not of a lasting nature; analogy therefore suggests that the appropriation of movables in general is unlawful; it is admitted, however, in some articles (although contrary to analogy), because of the traditions already recorded and in other articles (such as axes, saws, and so forth) because of utility, but the appropriation of furniture, clothes and slaves is unlawful as being contrary to the suggestions of analogy, because they have neither tradition nor utility to support the legality, and therefore resemble *dirhems* and *dinârs*;" Hed. II (Eng. Tr.), p. 344. Since the *Hedâya* was indited the *wakf* of money has been expressly recognised; *Fath-ul-Kadir*, Vol. II, p. 636.

Ahmed ibn Hanbal "....." ornaments can be dedicated, for Hafsa, the daughter of Omar (the Caliph), dedicated her ornaments and such has been the practice." . . . . . "Ansâri, who was a disciple of Imâm Zuffar, was asked if the *wakf* of money (*dirhems*) and whatever can be weighed or measured is valid or not. He replied—yes, a valid *wakf* may be made thereof. Asked how such things can be made *wakf*, he replied—such money should be invested in some partnership business and its profit applied to the purposes of the *wakf*. And if it is an article it should be sold and its price invested similarly."(1)

The same principle is enunciated in other authorities. For example, in the *Ramz ul-Hakâik* of Allamah 'Aini it is laid down in clear terms, "and the *wakf* of movables also is valid, as horses, and utensils of war, cauldrons, and shrouds and copies of the Koran, law-books, &c., for the *wakf* of these things is the result of necessity and recognised by the conditions of society."

So also in the *Wajîz ul-Muhît*, "every movable property which it is the practice to make *wakf* of, may be legally dedicated. . . . . Accordingly where a *wakf* of *dinârs* and *dirhems* (money) is in vogue it is lawful." And further, "according to Imâm Shâfeï, everything which may lawfully form the subject of bargain and sale may validly form the subject of *wakf*." And on this point there is not only a *consensus* among the Sunni Imâms, but also an agreement with the Shiahs who hold the *wakf* of both movables and immovables to be valid.

These authorities were evidently not placed before the High Court of Calcutta in the case of *Fatima Bibi* v. *Ariff Ismailjee Bham*.(2)

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(1) *Radd-ul-Muhtâr*, Vol. III, 579.

Professor Kresmárik states that Mohammed Ibn Abdullah al-Ansâri is the usual authority relied upon regarding the validity of a *wakf* of money, food-stuffs and movable objects which are measurable by weight or bulk. He emphatically declares that he holds such objects as lawful subjects of *wakf*. When he was asked how money can be dedicated to fulfil the purpose of a permanent *wakf*, he answered money should be given to merchants for commercial purposes and the profits divided among the poor. Similarly, grain can be applied in the interests of the *wakf* by loaning it to poor peasants who have no seeds; when they pay back, it should be given to others, and so on; *Zeitschrift der Deutschen Morgenländischen Gesellschaft* (1891), p. 529.

(2) [1881] 9 Cal. L. R., 66.

The Allahabad High Court has, in a considered judgment, in which the authorities were carefully reviewed, dissented from the decision in the above case, and held that according to the Mahommedan Law a *wakf* of movable property including money may be validly constituted.(1) The same view has been taken by the Calcutta High Court in *Sakina Khanum* v. *Luddun Sahiba*.(2) In the case of *Banubi* v. *Narsingrao*.(3) the High Court of Bombay (Jenkins, C. J., and Beaman, J.), dealing with the question whether the dedication of movable property including money was valid under the Mahommedan Law, expressed itself in the following terms :—" As to whether property of this kind can legitimately form the subject of a *wakf*, we need only say that movables, in our opinion, may ; and if movables, there seems no sound reason in these days to exclude from that category funded moneys."

Wakf of Government securities, etc., valid.

The Sunni doctrine as to the validity of a *wakf* of movables including money is repeated in the same terms in the *Tas-hîl*, the *Jouharat-un-Nayyerèh*, the *Ghâit-ul-Bayân* and other works. From these principles it will be seen that, under the Hanafî Law, the *wakf* of Government Securities, Shares in Companies, Debentures and other stock, is perfectly lawful and valid. The doubt, which one or two of the ancient Hanafî doctors had expressed as to the validity of the *wakf* of certain kinds of movable property in contradistinction to certain other things, was the outcome of the primitive and archaic conditions of society, and was founded on the notion that as perpetuity was essential to the validity of *wakfs*, it could hardly be secured by the dedication of movable things generally. But as the Mussulman communities progressed in material civilisation and commerce developed, it came to be universally recognised that the *wakf* of everything, " to which practice appertains among mankind (تعامل الناس) or which it is customary in any particular locality to do so, is valid." The observant reader will not fail to see that " custom " or " usage " (*'urf*) is an important factor in Mahommedan Law. Like *istehsân* (liberal interpretation), it expresses the spirit of development. It enables com-

(1) *Abu Sayid Khan* v. *Bakar Ali* [1901], I. L., 24 All., 190.

(2) App. from O. D. No. 110 of 1900, decided on 10th June 1902 [1905] ; 2 C. L. J., 218.

(3) [1906], I. L. 31 Bom., 250.

munities to progress and develop in spite of the strict letter of the law.(1)

Principle.

When a *wakf* is made of articles which are "capable of being weighed or measured," like corn or cloth, they will be sold, and the proceeds will be invested in commerce or partnership business. The *wakf* of such articles as grain-seeds will have effect given to it by being loaned to the poor. The *wakf* of cauldrons to cook food for distribution to the poor, and other utensils of the like nature is lawful. "In ordinary practice," to paraphrase the Arabian rule, "analogy (*kyâs*) has no application." In saying that practice excludes analogy, the jurists mean to say, that analogy declares that when perpetuity is an essential condition of *wakf*, and a movable property cannot exist perpetually, a *wakf* of movable property *primâ facie* cannot be valid. But, according to present usage, "wherever it has become customary to make *wakf* of any kind of movable property," says the *Radd-ul-Muhtâr*, "it will be held valid notwithstanding that, in the time of the Companions, the custom may not have existed." From this it is evident that the appropriation of movables depends purely upon the circumstances of the age and the conditions of society and the usages of the people. According to this principle, the appropriation of mere rights and *profits à prendre* would be valid.

Wakf of books.

Similarly, the *wakf* of books is lawful. When a *wakf* is made of copies of the Koran for the use of students in a particular mosque, they can be studied only in that mosque and cannot be removed anywhere else. Nor, when a *wakf* is made of books for the people of a particular locality *exclusively*, can the books be taken to another locality.

Wakf of clothing.

A *wakf* of warm clothing for the poor to be worn in winter and then returned is lawful.

It must be noted, however, that the word "usage" or "custom" when used in connection with the dedication of movable property does not connote the idea conveyed by the term "custom" in English law; nor would the evidence required to prove "custom" under the rules of English law be required to establish the question of practice in the Mussulman system. The Kâzi is not called upon to see how long the "custom" of making such dedication has existed; what he has to determine primarily is whether the article dedi-

(1) *See ante* p. 17.

cated is capable of yielding permanent benefit by any mode of dealing usual among mankind; and secondly, whether its *wakf* is recognised or has become common among the people of the place where the dedication is made. Even where it is an uncommon *wakf*, he has the unquestioned authority to declare it to be a valid dedication if he considers that it is directly or indirectly for a pious object, and that the subject-matter is capable of yielding permanent benefit to the purposes of the *wakf* by any mode of user recognised among human beings.

SECTION II.

THE WAKF OF MONEY AND MOVABLE PROPERTY IN GENERAL.

Wakf of money.

In the case of *Kulsum Bibi* v. *Golam Hossain Cassim Ariff*,(1) the High Court of Calcutta in the exercise of its original jurisdiction has held that "the *wakf* of shares in Companies is not valid under the Mahommedan Law."

It is respectfully submitted that this conclusion proceeds upon an erroneous and strained construction of the principles, is not warranted by the authorities and has the effect of unsettling a settled and recognised rule of Mussulman Law; whilst in adopting the dictum of Abû Yusuf it ignores the doctrine in force among the Hanafîs; for the *Hedâya* itself lays down that "the majority of the jurists of all countries (اكثر فقهاء الامصار) act according to the rule of Mohammed (may the peace, etc.)"

There can be no question that funded moneys and shares in Commercial Companies constitute property (*mâl*) within the meaning of the Mahommedan Law; they are capable of being renewed and are, therefore, *mâl mutakawwim*, something over which the rights of ownership can be exercised; and as they form the subject of common dealing they are not *extra-commercium*. Again, they yield, or can yield permanent benefit either as shares or by other forms of investment. Then it may be asked how is it that a *wakf* of shares in Commercial Companies is invalid? The reasoning on

(1) [1903], 10 Cal. W. N., 499, *supra*. This case has been followed without examination of the authorities by the Bombay High Court in *Bai Fatmabai* v. *Golam Husen* [1907], 9 B. L. R., 1337, and the Madras High Court in *Kadir Ibrahim Rowther* v. *Mahomed Rahumatulla Rowther* [1909], I. L., 33 Mad., 118.

which the Calcutta High Court in the case referred to has proceeded requires, therefore, serious consideration.

In the first place, it is evidently supposed that in stating that the *wakf* of actual money or money invested in business was lawful under the Mahommedan Law,(1) the present writer had enunciated some novel doctrine and assumed the functions of *Ijtihâd*. There seems to be some misapprehension regarding the meaning of *Ijtihâd*. This word signifies the evolution of principles. The privilege of evolving new principles ceased, according to Hanafî ideas, in the third, fourth and fifth centuries of the Hegira ; but there is absolutely no warrant for holding that any limit is imposed on the interpretation of the old rules and doctrines to bring them into accord with social progress and the requirements of the times.(2) On the contrary the Kâzi (Judge) is authorised to construe "liberally" the legal principles and to apply them in a manner most consistent with justice and expediency.(3)

The next submission is that it is a mistake to suppose that in the Hanafî system the views of Imâm Abû Yusuf are more authoritative *in all matters* than those of Imâm Mohammed.

Rule of law when there is a difference of opinion among the principal expounders.

In dealing with the Hanafî Law it should always be remembered that when there is a difference of opinion between Imâm Abû Yusuf and Imâm Mohammed, "the Mussulman Judge is at liberty to adopt either of the two decisions which seems to him the more consonant with reason,"(4) or consistent with the requirements of the times.(5) And this rule applies to divergence of opinion among all the jurists.

In the *Durr-ul-Mukhtâr* it is stated first that the Hanafî Judge is authorised to decree either according to Abû Yusuf or Mohammed ; and again that when there are two "correct" doctrines in respect of any particular question, it is lawful to pass a decree and give a *fatwa* according to either of them.(6) On this the comment of the *Radd-ul-Muhtâr* is both instructive and important. After explain-

(1) *Ante*, p. 246.

(2) See the authorities cited in the Introd., p. lii.

(3) The chapter on "the Duties of the Kâzi" in the *Radd-ul-Muhtâr* and similar works deserve careful study.

(4) Sir William Jones' Works, Vol. III, p. 540; also *ante*, p. 17.

(5) *Fatâwai-Hamâdia.*

(6) *Durr-ul-Mukhtâr*, p. 413.

ing(1) that it is allowable for a Hanafî Judge to pass a decree according to the opinion of either Abû Yusuf, Mohammed or any other Hanafî Imâm, as they are all followers of *the* Imâm (Abû Hanîfa, the founder of the School)—it proceeds thus :—"With reference to his(2) statement that when there are two 'correct' doctrines, etc., it means that when they are declared to be correct in an equal sense [*i.e.*, the Judge may decree in accordance with either doctrine], but if it be not so, it is best(3) to adopt the one which is stronger in correctness. For example, one doctrine [*Kawl, saying*] is declared to be 'correct,' whilst the other is declared to be one on which is the *fatwa*,(4) the latter is the stronger (*akad*) of the two. And if one is mentioned in the Texts or in the Approved Traditions or it is said that there is an agreement of a majority on it or that it is most in accord with the [needs of] people, then it is best to adopt it instead of the other opposed to it, although it may be said to be also 'correct' as I have already stated in the beginning of the book(5)....."

"Although it is allowable to the Judge to decide according to one or other of two 'correct' doctrines [as explained above], when he has decided a particular case (*hâdisa*) according to one doctrine, he is not authorised to decide the same case again according to the other doctrine, but he may do so in some other case. And these rules apply also to the *Mufti* [the jurist who has to expound the law for the Court to act upon]. He should carefully consider(6) what is most in accord with the times or the needs of the people or what is most expedient (اصلح), and this is their meaning [*i.e.*, the meaning of the learned] that the *Mufti* can deliver *fatwas* according to what he considers most expedient; from expediency is meant not mundane expediency but that which is pious."(7)

Judge to decide according to what is just and consonant with the requirements of the times.

In the law relating to *wakf* there are certain primary rules on which the principal doctors are in agreement. With regard to the subsidiary principles there is considerable divergence. The primary rules are, (*a*) that the subject of the *wakf* should be dedi-

Primary rules relating to *wakf*

(1) *Radd-ul-Muhtâr*, Vol. III, p. 577.

(2) Namely, the author of the *Durr-ul-Mukhtâr* on which the *Radd-ul-Muhtâr* is commenting.

(3) اولى *Awla*, pre-eminent, most excellent, proper, fit.

(4) عليه الفتوى

(5) *Radd-ul-Muhtâr*, Vol. III, p. 578.

(6) Lit. "view with raised eyes."

(7) *Radd-ul-Muhtâr*, Vol. III, p. 578.

cated in perpetuity; (*b*) that all human right should be divested therefrom; and (*c*) that it should be made non-heritable and inalienable.

With regard to these there is *consensus*. When we come to the subsidiary principles, *e.g.*, how and for whom a *wakf* may be made, what expressions should be used in its constitution, what things are fit subjects for *wakfs*, we find a difference of opinion between Abû Yusuf and Mohammed. On some "the *fatwa* is with Abû Yusuf," that is, decrees are passed according to his views; on others, according to Mohammed. Mohammed insists that for a *wakf*, to be valid, an unfailing object should be expressly designated; Abû Yusuf does not consider that essential. The jurists of Bokhâra adopted Mohammed's view; those of Balkh, Abû Yusuf's. In India this was the recognised rule. But the British Indian Courts have chosen to follow Mohammed's principle.(1)

Difference between Abû Yusuf and Mohammed.

Mohammed considered consignment to a trustee essential; Abû Yusuf did not, and his views were adopted by the jurists of Balkh, and were followed in India.(2)

Abû Yusuf considered that, save certain kinds of movable property which it had already become the practice to dedicate, the *wakf* of others was not valid, being inconsistent with the main purpose of a dedication, namely, *perpetuity*, as they were likely to be consumed in user. Mohammed was of opinion that every kind of movable property which formed the subject of common dealing among men, or which it was the practice anywhere to dedicate, may lawfully be constituted as *wakf*. The rule of Mohammed is now the universally recognised doctrine; and in every treatise it is laid down that on this point "the *fatwa* is with Mohammed," that "*fatwas* (decisions) are given according to his rule."(3)

Zuffar, a contemporary and disciple of Abû Hanîfa, who is classed with Abû Yusuf and Mohammed(4) as a *mujtahid* Imâm of the first rank, that is, entitled to *ijtihâd*, i.e., to evolve principles, agreed with Mohammed and declared the *wakf* of movables, *including money*, to be absolutely lawful. "And Zuffar (may the peace, etc.),

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(1) See *Amrut Lall Kalidas* v. *Shaikh Hussein Mahomed Ibrahim* [1887], I. L., 11 Bom., 492.

(2) See *Doe dem. Jaun Beebee* v. *Abdoollah Barber*, supra.

(3) *Radd-ul-Muhtâr*, Vol. III, p. 578.

(4) See the *Multeka* and d'Ohsson, *Tableaux General de l' Empire Ottoman*.

has declared that when a man has dedicated money (*darâhim*, pl. of *dirhem*), or comestibles (*at-ta'âm*) or anything else which can be weighed or measured, it is valid. On being questioned how that could be, he answered, the *dirhems* would be laid out in *muzâribat*(1) and the income devoted to the purposes of the *wakf*; and similarly things measurable or weighable should be sold and the proceeds invested like money in *bazâ'at* or *muzâribat*."(2) The same view has been expressed by another mujtahid Imâm, Zuhri.(3)

The author of the *Radd-ul-Muhtâr* emphatically states that as the rule of Mohammed, *according to which is the Fatwa*, covers all kinds of movable property, it is not necessary to refer to Zuffar.(4) The rule of Mohammed the recognised law.

It is a fundamental error, therefore, to suppose that on this point the opinion of Abû Yusuf supplies the principle for decision. Such an assumption is at variance with the recognised rule of Mahommedan Law.

With regard to movable property, as already stated, the jurists require that the article dedicated should be the "subject of mutual dealing among mankind," as, if it were not so, it would hardly be possible to renew it or derive permanent benefit therefrom. For example, unless a cow dedicated for supplying milk to the poor, the validity of which is recognised, could be sold when it ceased to give milk, the benefaction would come to an end.

Exception has been taken to the rendering of the passage(5) from the *Radd-ul-Muhtâr* on the ground that the word (تعامل) (*t'aâmul*) means the "practice of making *wakf*," and not as construed by the writer "dealing". This view confuses the two expressions, *t'aâmul* and *t'aârûf*, on the assumption that they are synonymous. Both these words occur in the passage translated in this work.

The word *t'aâmul* is defined in Catafago's Arabic Dictionary, and in Johnson's "Arabic and Persian Dictionary" as meaning "dealing, acting together;" whilst *t'aârûf*, according to Johnson,

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(1) Partnership business, in which one partner supplies capital and the other labour.

(2) *Fatâwai Kâzi Khan*, Vol. IV (Cal. Ed.), p. 240.)

(3) Allâmah Aini's *Umdat-ul-Kâri*, a Commentary on the *Sahîh-ul-Bukhâri*, Vol. VI, p. 516.

(4) *Radd-ul-Muhtâr*, Vol. III, p. 578, see also the *Fath-ul-Kadîr*, Vol. II, 636.

(5) In p. 178 of the previous Edition; pp. 251-2 of the present.

signifies "practice, custom, fashion." *T'aâmul* is emphatically *not* synonymous with *t'aâruf*.(1)

The same definition is given in the Arabic *Tâj-ul-Arûs* and Lane's Arabic Lexicon which explain the words (تعامل) (*t'aâmul*) and (معاملة) (*m 'uâmilat*) both derived from the same root as meaning "dealing together, as buying and selling" . . "for example, one says (تعامل الناس بالدراهم) 'people dealt together in buying and selling with *dirhems*'; (يتعامل به) business of buying and selling is transacted with it (فلوس, coin).'"

Dozy defines the meaning of تعامل in the same terms, "(عامل بالدراهم), employér des dirhems dans à commerce: (عامل في دراهمة) faire un remplacement d'argent un emploi utile." And in the *Kash-shâf-ul-Istilahât il funûn*, an identical explanation is given. تعامل (*t'aâmul*) does not appear to be ever used synonymously with تعارف (*t'aârûf*) nor does تعامل or معاملة convey the same meaning as تعارف (custom or practice).

The *Ghâit-ul-Bayân* has the following passage in which the two words occur together in the same sentence, excluding the suggestion that they both convey the same meaning.

صح ايضاً وقف منقول كالكراع و السلاح و الفاس و القدر و القدوم و المنشار الجنازة وثيابها والمصاحف و كتب الفقه و الحديث و الادبية غير ذلك مما فيه تعامل و تعارف لوقفه *

Wakf of movables.

"Similarly is lawful the *wakf* of movables (*mankûl*), such as implements of husbandry and war, hatchets, saws (*manshâr*), biers and shrouds, copies of the Koran, books on jurisprudence, traditions, and literature, and *other things which people deal in* (*t'aâmul*) *and which it is the practice* (*t'aâruf*) *to make wakf of.*"

Assuming that *t'aâmul* does not mean dealing, as all the great lexicographers, European and Arab, declare it does, but the practice of making *wakf*, it makes no difference, it is respectfully submitted, in the settled principle relating to the validity of all kinds of movable property including money. It would only mean that the *wakf* of every article which people are in the practice of making *wakf* is lawful; and considering that the practice of making a *wakf* of money or anything else in which

(1) تعامل is derived from عمل *'aml* or act; whilst تعارف comes from عرف *'urf* or usage.

it is invested has become universal since the edict of the Sultan mentioned above,(1) there can be no question as to its validity.

It is evident that the enunciation of Mufti Abû S'aûd already mentioned(2) was not brought to the notice of the learned Judge in *Kulsum Bibi* v. *Golam Hossein Cassim Ariff*,(3) nor the fact that, as stated in the *Durr-ul-Mukhtâr*,(4) the Kâzis had been directed by sovereign authority (clearly, with the object of putting an end to casuistical discussion as common then as now), "to declare the validity of the *wakf* of moneys." This edict which gave expression to the developed rule of Mussulman Law and which appears to have been promulgated about the middle of the 15th century, and the enunciation of Mufti Abû S'aûd, one of the greatest Hanafî Jurists, leave no possible room for doubt as to the correct rule of law.

Since the days of Abû Yusuf, the legal conception regarding articles that may validly be made *wakf* has made a great advance. He did not recognise the validity of the *wakf* of buildings and trees apart from the land; *that* is now universally admitted by the Hanafî jurists. The *wakf* of money (*dirhems* and *dinârs*) which he discountenanced on the ground of *analogy* (*kyâs*), as likely to be consumed in use, is now admitted as lawful, wherever it is in vogue, and it is declared that where money is dedicated its value should be laid out in *muzâribat* (business) or *bazâ'at* (commerce).(5) (This is not even referred to in the judgment in *Kulsum Bibee* v. *Golam Hossein Cassim Ariff*.) If any other object likely to perish in its use is made *wakf*, the direction is that it should be sold and its proceeds similarly invested. Even where a thing is dedicated the *wakf* of which is not common, the Kâzi is authorised to declare its validity, if he considers it suitable for its purpose.(6)

No sacramental value or significance is attached to the *wakf* of any particular kind of property in contra-distinction to another. What the Judge has to see is whether the article dedicated is capable of yielding *permanent* benefit by renewal from time to time, or by investment of the proceeds, when sold, in business or commerce,

(1) Ante, p. 247.
(2) See *ante*, p. 247 and following pages.
(3) Supra.
(4) See *ante*, p. 247.
(5) See *ante*, p. 248.
(6) *Radd-ul-Muhtâr*, Vol. III, p. 579.

(*muzâribat* or *bazî'at.*) It is a mistake to attach canonical importance to the statements and arguments in the *Hedâya*, for many of the doctrines set forth in it are long since exploded, or have been considerably modified.

Shâfeï and Shiah doctrines identical.

The validity of the *wakf* of movables including moneys is accepted without question among the Shâfeïs, the Mâlikis, the Hanbalis, and the Shiahs. "And Shâfeï has held," says the *Hedâya*, "that the *wakf* of everything from which benefit can be derived consistently with the retention of the *corpus* is valid; and whatever can be lawfully sold(1) may be lawfully dedicated, for what is capable of yielding profit [from changes of form] resembles lands, horses and arms."

The *wakf* of money is now common everywhere among Mahommedans from Algeria to India and Burmah. The Shrine at Mecca and at Kerbela, the endowments at Ajmere, Hossainabad (Lucknow), and many of the mosques and religious institutions all over the country, are largely supported by the income of moneys invested in Government Securities, which people have come to regard as safer and more permanent than even land. In Egypt, the income of many important endowments created in modern times is, for the most part, derived from shares in commercial companies.

Money invested in Government or Municipal stock is employed by the State or local authorities, as the case may be, generally in productive work, and a share of the profits derived therefrom is received by the investors under the name of dividends or interest. The income derived from money invested in commercial companies stands in the same category. And the *wakf* of moneys invested in trade or commerce (*bazâ'at*) has been recognised as lawful for centuries.

Section III.

The Wakf of Buildings and Musha'a Property.

The rule relating to the dedication of a building without the land on which it is situated is thus given in the *Durr-ul-Mukhtâr*(2) :—"a person builds a house on [some] land and dedicates it with intention without the land, [in that case] the *wakf* is

(1) This gives an indication to the sense in which the word *t'aámul* is used in this connection.

(2) P. 416.

not correct [according to some], whilst others have held that it is correct (valid) *and on this is the fatwa.* The Kâri-ul-Hedâya(1) was asked regarding the validity of *wakf* of buildings and trees without the land, and he answered that *fatwas* are given (decrees passed) in favour of the validity of such *wakfs.* The author of the *Sharh-i-Wahbânieh* has preferred this view; and the author [of the *Tanwîr-ul-Absâr*] has enforced the doctrine by declaring that as buildings and trees are movable property, and it is the practice to make *wakf* thereof, it is established that *fatwas* should be given in favour of its validity."

Wakf of a building without the land.

As regards the *wakf* of a building without the land on which it is built, although there seems to have been some difference of opinion on the part of the ancient jurists, its validity is now clearly recognised. Allâmah al-Kâsim thought such a *wakf* was not valid, and he appears to have adopted the views of Mohammed and Hilâl ibn Yahya Basrî on this point. But, says the *Radd-ul-Muhtâr*, "it is stated in the *Bahr (ur-Râîk)* from the *Zakhîra* that where it is customary to dedicate a building without the land upon which it is erected, the dedication of the building without the land is valid; but where it is not customary to do so, the dedication is not valid."

In connection with this point the *Radd-ul-Muhtâr* mentions a memorable disputation which took place in the presence of Sultan Malik uz-Zâhir,(2) at a Convocation held for the purpose, between the Allâmah and his celebrated disciple 'Abdu-bar Ibn Shahna, who held in opposition to his master, that the *wakf* of a building without the land was valid, that this doctrine had been recognised for over two hundred years, and repeated decisions had been passed in accordance therewith by learned Kâzis. This view of Ibn Shahna was combated by Allâmah Mohammed ibn Zahîra, but has been universally accepted in recent times. The author of the *Radd-ul-Muhtâr* lays down the proposition broadly, "that the *wakf* of a movable thing of which it is customary to make *wakf* is valid; so the *wakf* of a building without the land, when it is customary, is

(1) The Kâri-ul-Hedâya's real name is Sirâj-ud-din. He was a disciple of Shaikh Akmal-ud-din (the author of the *Inâya*, and master of the author of the *Fath-ul-kadîr*). As he read the *Hedâya* eighteen times with his master, he received the designation of Kâri-ul-Hedâya (Hedâya-reader); Tahtâwi.

(2) The Great Sultan Baibars.

valid, and this doctrine is not in conflict with the views of those who hold that such a *wakf* is not valid, *for the question of validity turns upon the custom recognised in the locality where the wakf is made. If people are in the habit of making such wakfs, the law will recognise them as valid.*"(1)

Modern doctrine. The *wakf* of land subject to a mortgage.

The doctrine now in force is, that the *wakf* of a building without the land on which it is situated is valid and the *fatwa* is accordingly.(2)

As already stated the *wakf* of land which is in lease or which is subject to a mortgage is valid.(3)

"And if the land is dedicated to the same purpose as the building [lit., for which the building is being appointed] it is valid as subsidiary to the *wakf* of the land. [But] if the land has been dedicated to a different purpose, there is a difference of opinion, and the correct doctrine is that it is valid [*i.e.*, the *wakf* of the building], so in the *Manzûma ul-Mujiba.*"

" Ibnu Nujaim was asked regarding the *wakf* of trees without the land and he answered that it is valid, although the two *wâkifs* may be different."

"He was further asked regarding the *wakf* of buildings and trees on land held on lease by another on a monthly or yearly tenancy,(4) and he answered ' it was valid.' "

But the *wakf* of a building on land belonging to another, of which the dedicator is in possession as bailee or lessee is not valid. The *Durr-ul-Mukhtâr* states the rule thus—" the *wakf* of a building on land held in *'aârîat*(5) or *ijâra*(6) is not valid." The *Radd-ul-Muhtâr* commenting on this passage states as follows :—" from this must be excluded cases such as have been mentioned by Khassâf, that is, lands in which the dedicator has a limited permanent interest;(7) the *wakf* of a building on such land is valid; so in

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(1) *Radd-ul-Muhtâr*, Vol. III, p. 604.

(2) *Jouharat-un-Nayyerèh.*

(3) See *ante*, pp. 203-205. *Zakhîrat-ul-Akhyâr ;* see also the case of *Khaja Hossain Ali* v. *Hazara Begum* [1869], 12 W. R., 498.

(4) الأرض المحتكرة lit. land leased for short periods.

(5) Bailment.

(6) Lease.

(7) متقررة الا حتكار I construe these words to mean that the person dedicating has a permanent *limited* interest in the land on which the building is situated. *Ihtikâr* literally means accumulating grain for selling, but the legal meaning is different.

every *wakf* is *kurbat*, approach to the Almighty; prayers are one form of *'ibâdat* and *kurbat*.

I have dwelt on this subject at some length in consequence of the erroneous view taken in the case of *Abdul Gane Kasim* v. *Hussan Miya Rahmatulla*,(1) in which the learned Judges enunciated the somewhat startling proposition that a *wakf* in order to be valid must "be solely to the worship of God." It is difficult to understand the meaning of this comprehensive dictum. If that view were correct, a *wakf* to an *Imâmbara*, to a *Khânkâh*, to a *Dargâh*, &c., would be invalidated. It is impossible to gather from the report upon what basis the view was founded, for no single original authority appears to have been cited. As will be seen afterwards, it is in absolute contravention of the Mussulman Law.

SECTION II.

THE CLASSIFICATION OF WAKFS.

Wakf divisible into three classes.

The Mussulman lawyers divide *wakfs* into three classes, *viz.* :—

I. *Wakfs* for the affluent (اغنيا) first and then for the indigent.

II. *Wakfs* for the affluent and indigent alike, in other words, *wakfs* in the benefit of which both the affluent and the indigent are entitled to participate.

III. *Wakfs* for the indigent exclusively.

The *Kinia't-ul Muniah*(2) says, "in the Book on *wakf* by Hillâl [*lit.* in the *wakf* of Hillâl] [it is stated] *wakf* may be of three kinds, one kind being *wakf* for the poor exclusively; another kind being for the affluent and *after them* for the indigent; and the third being for the rich and poor alike such as *rubâts* (monasteries), *khâns* (caravanserais), cemeteries, mosques, acqueducts, bridges, etc., for both rich and poor have their needs attached to them."

The *Durr-ul-Mukhtâr* states the classification in similar terms:— "there are three kinds of *wakf*—(*a*) in favour of the poor; (*b*) in favour of the rich, and *then* in favour of the poor; and (*c*) in favour

(1) [1877], 10 B. H. C. Rep., p. 10.

(2) P. 201. The *Kinia't-ul-Muniêh* is by a distinguished jurist of the name of Mukhtâr bin Mahmûd bin Mohammed az-Zâhidi, surnamed "The Imâm of the Learned" (*al-Imâm ul-'Ullâma*), also "the Star of Religion" (*Najm-ud-dîn*), d. 658 A. H. (A. C. 1259). The *Kinia't-ul-Muniêh* is a commentary on the *Nafis-ul-Kudûri*.

of both equally, such as rest-houses for wayfarers, reservoirs of drinking water for the use of travellers, burial grounds, bridges, and such like things, as mosques, water-mills, and basins, inasmuch as every one is in need of them."

All these *wakfs* are valid and lawful. The first class includes all trusts or consecrations in favour of individuals, or one's descendants, or relations, or friends, with the ultimate remainder for the poor, either expressly provided at the creation of the trust, or affixed by the law. If the reversion is expressly provided for at the time of consecration, the *wakf* is valid *without any difference of opinion*. But if the poor are not mentioned at the time when the *wakf* is constituted, still it is valid and binding according to the accepted doctrine, the remainder being for the poor by implication of law upon the extinction of the people named.

Hanafi Law.

The second class includes *wakfs* in favour of objects in the benefit of which both rich and poor may participate, *e.g.*, mosques, caravanserais, rest-houses, reservoirs, shrines, hospitals, colleges, cemeteries, &c.

The third class includes *wakfs* in which the poor are solely interested, *e.g.*, *lungar-khânahs*, where the poor alone are fed; charities for distributing doles of food, supplying raiment to the living, or shrouds for the dead, poor-houses, hospitals for paupers, &c.

Dealing first with class I, it may be stated shortly that a *wakf* can be validly made in favour of any person or class of persons subject to the exception immediately following.

Wakf lawful in favour of any person or class of persons.

It can be made in favour of—

(*a*) a Mussulman or a *Zimmi*, but not in favour of an alien or *harbi* (an inhabitant of the *Dâr ul-Harb*); (1)

(*b*) one's children and descendants, male and female, born or unborn;

(*c*) similarly, other people's children and descendants;

(1) *i.e.*, an inhabitant of a country with which the State is at war. The Moslem jurists, like the jurists of Christendom, until very recent times, divided the world into two portions, one the *Dâr ul-Harb*, the country of warfare, and the other the *Dâr ul-Islâm*, the country of peace. Juridically, all Mussulman nations were at peace with each other. As a matter of fact, no Mussulman Sovereign could declare war against another without first pronouncing him to be a heretic and beyond the pale of Islâm. The non-Moslem subjects of Moslem States are called *Zimmis*. The non-Moslem subjects of non-Moslem Sovereigns at peace with Islâmic States are called *Mustâmins*.

favour the *wakf* is made should be a Moslem nor that the *wâkif* should belong to the faith of Islâm; and then the author proceeds to state the rule as follows: "so if a man were to constitute a *wakf* for his children and his *nasl* (posterity), and destine it after them for the poor, that will be lawful."(1)

"And when any one of the recipients of the benefaction dies, and the *wâkif* has made no mention what would become of his share upon his decease, in that case the usufruct will be divided among his surviving children every year, and will be given both to the affluent and the indigent of them, unless he [the *wâkif*] has provided that the *wakf* is for the needy [of his children] . . . . . it must be known [*lit.* know] that when he [the *wâkif*] mentions [in the *wakf*] his children and kindred [in other words, when the *wakf* is for them], the *wakf* is valid for the affluent and indigent among them, unless he has specified that it is for the needy [of them alone] as I have already stated. But if it [the *wakf*] is for others than they [*viz.*, if it is for strangers] in such a case the Shams-ul-Aïmma [Sarakhsi] has stated that if he [the *wâkif*] has specified its application for purposes of necessity, it is valid whether the persons in whose favour it is made are limited or unlimited in number, for the object of a *wakf* is to obtain the approval of God, and when its application is provided for, both the affluent and indigent are equal in it. If no purpose is specified and the *wakf* is for a limited body of people, it is valid in respect of them; but not, if they are unlimited in number, unless the *wâkif* has used some expression which ordinarily or customarily or *in fact* implies *need, e.g.*, if the *wakf* is for orphans generally it is valid, and its benefit shall be applied to the poor among them and not to the affluent."(2) All this, *viz.*, what the Shams-ul-Aimma says, is applicable to a *wakf* in favour of strangers, and not to *waḳfs* in favour of one's children and kindred.

In the *Ramz ul-Hakâik* the following passage is to be found in regard to the same principle:—"If a *wâkif* constitute the proceeds of the *wakf* for his benefit, that is, if it be written in the deed of *wakf* in this way, that the income of the *wakf* should be applied *Ramz ul-Hakâik.*

(1) اما الاسلام فليس بشرط فلو وقف الذي على ولده نسله و جعل خره للمساكين جاز *

(2) *Fâth-ul-Kadir*, Printed Ed., p. 858.

to his *jihat* (benefit) [during his life] and after his death to so-and-so, or any specified object, such a *wakf*, is valid according to Abû Yusuf . . . . . and the jurists of Balkh have decided in accordance therewith. . . And Abû Yusuf bases his rule on the practice of the Prophet who used to eat out of his *wakfs*." There is no mention of children here, but there is no restriction whatsoever; the word *jihat* including a dedication in favour of one's posterity.

Fatâwai Alamgiri.

In the *Fatâwai Alamgiri* the principle is laid down in similar terms.

First of all "everything that is said in respect of a *wakf* in favour of one's own children, applies to a *wakf* in favour of another's children."(1) So that there is no distinction between the validity of a *wakf* in favour of one's children, and of that in favour of strangers.

"When a man has made a *wakf* of his land in favour of his children and after them on the poor, the child [or children] who may be in existence at the time the produce comes into existence will take it, whether he was born at the time of the *wakf* or thereafter."(2)

"And in like manner if he said 'on my child and what child may be born to me and when they fail, upon the poor . . . . in such a case the *wakf* is valid."(3)

"And if a man should say, 'I have made a *wakf* on my children,' males and females are included in its benefit."

"If a man were to say 'this my land is a *wakf* on my child, and the child of my child, and the child of the child of my child,' mentioning three generations, the income is to be spent upon his descendants for ever so long as there are any, and is not to be applied to the poor; while one remains the *wakf* is for him [or her] unto the very lowest of the descendants,—the nearer and more remote being equal [in the share of the produce], unless the *wâkif* declared in making the *wakf* that the 'nearer was nearer' or said, 'on my child and then after them on the child of my child,' or said, 'generation after generation' when a beginning must be made with them with whom the *wâkif* had begun."(4)

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(1) *Fatâwai Alamgiri*, Vol. II, p. 474.

(2) *Ibid*, p. 471.

(3) *Ibid.*

(4) *Ibid*, p. 474; *Fath ul-Kadir*, Vol. II, p. 643 (*b*). Comp. Baillie's Dig. (2nd Ed.), p. 577.

the *Bahr* [*-ur-Raik*]. And it is stated by Asa'ât and it is also mentioned in the book on *wakf* of Khassâf that if a person were to make a *wakf* of shops(1) situated in the market—place (*aswâk*, pl. of *sûk*) it would be lawful, if the land has been held in *ijâra* by the builders of the shops, without any attempt by the Sultan to eject them, and has been inherited and been partitioned without objection."(2)

In other words where the lease is of a permanent character and the lessee cannot be ejected from the land without process of law, the lessee is entitled to dedicate any building on such land.

When the land and the building belong to the same person he is entitled to dedicate them separately to different purposes. But the *wakf* of the building would carry with it the right of way over the land whether the dedications are made at one and the same time or separately.(3)

What is included in a *wakf* of a house.

Where a house has been made *wakf*, everything that would be included in its sale would be included in the *wakf*, whether it be mentioned or not that the house is made *wakf*, " with all its rights and everything, small and great, belonging to it, or in it, or of it." So also in the *wakf* of shops everything is included that would be included in the sale thereof.

In the *wakf* of lands, the buildings and trees standing thereon are included, but not the fruit then on the trees, nor the crop if the land has already been sown. Canes and other plants that are cut annually are not included, but such as are cut biennially are included in the *wakf* of the land.

" Khassâf mentions in his Book on *Wakf*, that when a dedication is made of land for specified purposes with the ultimate reversion in favour of the poor, the buildings on the land, and the palm and other trees are included in the *wakf*. He also mentions that existing fruit is not included in an appropriation of trees, and most of our Shaikhs are of that opinion, and *it is correct*." " When a *wakf* is made in the following terms :—' I consecrate this my land as a *sadakah* with its rights, and all that is in it, and of it,' and there happens to be at the time fruit on the trees, he ought to bestow the fruit in charity on the poor, though not by way of *wakf* but by

(1) *Hawânit*, pl. of *hanût*.
(2) *Radd-ul-Muhtâr*, Vol. III, p. 605.
(3) *Ibid*.

virtue of his vow, on a favourable construction, and what is subsequently produced is to be applied to the purposes specified in the *wakf*. Similarly, when a *wakf* is made in the following words, 'my land is consecrated as a *sadakah* after my death, to the end that what produce God may cause to come out of it shall be for the servants of God,' upon the death of the *wâkif* the fruit actually on the trees are not included in the bequest by virtue of the *wakf*."

Rent already accrued due is not included in the *wakf* of land.

It follows from these principles that when a property or land occupied by tenants is made *wakf*, the rent that has already accrued due will not be included in the *wakf* unless expressly declared to be so, and the *mutwalli* will not acquire a right to collect the same unless specially authorised.

It is not necessary for the validity of a *wakf*, that the boundaries of the land or house appropriated should be specifically set forth. It is only requisite that what is constituted as *wakf* should be ascertainable. Where, therefore, a house or land is well-known, it may be made *wakf* without specifying the boundaries. "And though the witnesses may testify that the land was not bounded in their presence and they did not know it," the *wakf* will not be invalid on that account.

Mills in a field whether turned by water or hand, and Persian wheels and buckets used for raising the water are included in the *wakf* of the land.

When a man has made a *wakf* of his land without mentioning a right of water or way, both are included "on a favourable construction," because land is not dedicated except on account of what it will produce and for that purpose both rights of water and way are included.

Wakf of mushâ'a valid.

The *wakf* of *mushâ'a*, in other words, the *wakf* of an undivided share of a property which is capable of partition, is valid according to Abû Yusuf. Mohammed differs from him, and bases his difference on the difficulty of delivering possession of a property, which was not specifically divided off or apportioned from the rest. Abû Yusuf, however, holds delivery of possession wholly unnecessary in the case of a *wakf*. Kâzi Khân says, "the opinion of Abû Yusuf has been adopted by the jurists of Balkh, whilst that of Mohammed by the Shaikhs of Bokhâra." And the *Fatâwai Alamgiri* adds, "the moderns decide according to the opinion of Abû Yusuf, who held that [the *wakf* of *mushâ'a*] was lawful, and *this is approved*."

According to the *Siraj ul-Wahâj* the *wakf* of *mushâ'a* is valid by *consensus*.

Wakf of *Mushâ'a.*

But where the property is incapable of partition, Mohammed agrees with Abû Yusuf and holds that the dedication of a share thereof is lawful. For example, the dedication of a moiety of a public bath or *hammâm* is valid according to Abû Yusuf as well as Mohammed, "for a *hammâm* is not partible."

Both Abû Yusuf and Mohammed, however, agree in holding that where a piece of land is dedicated for *erecting* a mosque or *building* a tomb thereon, that piece of land ought to be divided off. The reason of this is apparent. But no division is necessary, according to Abû Yusuf, if the dedication is in *favour* of a mosque or for the maintenance of a mausoleum.

As a consequence of the rule laid down by Abû Yusuf regarding the validity of the *wakf* of a partible *mushâ'a*, and which has been adopted by the majority of the Hanafî jurists, it is held that where a person purports to make a dedication of the whole of his property, but for some reason it cannot operate as to the whole, the *wakf* of the undivided share would be valid, *e.g.*, if a person were to make *in his death-illness* a *wakf* of his house in favour of his children and after them for the poor, and to leave no other property but this house, and no other heir besides the children, according to Abû Yusuf, the *wakf* would take effect with reference to one-third unless all the children consent.(1) "In case of any dispute regarding the *wakf* of undivided property, the Kâzi can decree partition."

A *wakf* by two or more individuals of a joint property is valid according to all the jurists.

Wakf by two joint owners.

When two persons are in joint possession of a piece of land and one of them dedicates his share for his children (*i.e.*, his descendants) in perpetuity, so long as any one of them happens to exist, and, upon their failure, for the poor; and the other partner dedicates his share for his *brethren* and the *people of his family* (*ahl-ul-bait*), and on their failure, for the performance of pilgrimages, and both of them consign the trust to one and the same *mutwalli*, such a *wakf*

(1) *Fatâwai Alamgiri*, Vol. II, p. 455; a *wakf* intended to operate after the death of the *wâkif* takes effect with regard to one-third of the estate of the appropriator; Comp. *Doe dem. Jaun Beebee* v. *Abdoollah Barber*, Fulton's Repo.ts, p. 345.

is valid. Similarly, if one of the partners were to dedicate his moiety for the poor, and the other his moiety for another purpose, it would be valid. This is according to both Mohammed and Abû Yusuf. But the latter does not insist upon consignment to a *mutwalli* as an absolute essential. "And as he does not insist upon consignment or delivery of possession for the validity of a *wakf, so according to him partition is not necessary.* And this is the accepted doctrine."(1)

It is not necessary that the property dedicated or the share dedicated should be ascertained at the time. If a person were to dedicate his share in a certain property, intending that the dedication should take effect as to the whole of his share, and subsequently his share is found to be larger than what he had supposed, the whole would become *wakf; e.g.*, "if a person were to declare 'I make a *wakf* of my share in this house which is one-third,' and it afterwards appears that his share amounts to half or two-thirds, the entire share would become *wakf.*" Similarly, "if a man were to say in his will, 'I leave to so-and-so one-third of my property, *viz.*, 1,000 dirhems,' and it turns out subsequently that the one-third of his estate amounts to 4,000 dirhems, the legatee would get the latter sum." This is different from sale, in which the vendee would only get the amount specified.

Where two persons are jointly entitled to many houses, or where a land is jointly held by two partners, and one of them dedicates his share in all those houses or in that specific land for a pious purpose, and afterwards desires to have a partition of his share effected by the Kâzi, and the Kâzi in effecting the partition allots to the *wâkif* one house or one specific plot for his interest in all the houses or in the entire land, the *wakf* will take effect with reference to that house or that specific plot of land.

When two persons jointly own a piece of land, either of the co-sharers may make a valid *wakf* of his own share.

When a *wakf* is made of land which is leased to another person, the lease is not cancelled; it continues in force until the end of the term, the rent paid by the lessee being applied during that term to the purpose of the *wakf*, but on its expiration the entire income arising from the leased property is to be applied to such purposes.

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(1) *Fath ul-Kadir*, Vol. II, p. 642.

Similarly a dedication or *wakf* of property subject to a mortgage or in the possession of tenants is valid. When a property is dedicated which is subject to a mortgage, its income will be devoted to the discharge of the debt, and after it has been paid off, it will be applied to the purposes of the dedication. A *wâkif* may lawfully make a dedication with the condition that the income of the property should be applied for his maintenance or in the payment of his debts and afterwards be devoted to the poor or any other unfailing object.

As regards the *wakfs* of *jâgîrs* or grants made by Kings and Ameers :— *Wâkf of jâgîrs.*

Jâgirs (*ikt'aât*) are of two kinds, one where the land has been granted in fee, that is, first the sovereign has purchased it from the *Bait-ul-mâl* and presented it to the grantee, or it is a portion of the royal domains; 2nd, where the usufruct is only granted and the jâgir is vested in the Crown. In the former case, the grantee may make a *wakf*, in the latter case not.

In the *Fatâwai Alamgiri* occur the following remarks on this subject :—

"It is a branch or consequence of property being a condition, that the dedication of *ikt'aât*, or royal grants, is not lawful, except when the grant is of waste land, or of land belonging to the Imâm [Sovereign] himself, which he has granted to the person making the *wakf*. Nor is the *wakf* of *houz* land in the possession of the Imâm lawful, for it is not his property. And by *houz* is to be understood land which the owner is unable to cultivate and pay its *kharâj* or land-tax, and has surrendered it to the Imâm [Sovereign] that the yearly profits may be applied in payment of the *kharâj*." *Meaning of houz.*

"If the land has been validly purchased from the *Bait-ul-mâl* the *wakf* thereof is lawful whether the purchaser be the Sultan or any private person, and the *wakf* will be governed by the conditions which the *wâkif* may validly impose on the *wakf*."

"If the Sultan has even without purchasing it, set apart any portion of the public land, *i.e.*, land which yields revenue to the public treasury, by way of *wakf* of a permanent inalienable character for any charitable or pious purpose, such *wakf* is valid. And the Allâmah Kâsim has given *fatwa* according to this principle when he was asked regarding the dedication made by Sultan Fârûk,

who had set apart a portion of the public lands for the purpose of a mosque ; and he also held that no future Sultan could set aside the *wakf*."

Wakf by the Sultan lawful.

The principle then is, that if the Sultan makes any *wakf* from the *Bâit-ul-mâl* for any purpose of public utility, such as a mosque, caravanserai, a madrassa, etc., it is valid, for it is lawful to set apart from the public revenue an allowance to maintain such objects ; and the King is authorised to set apart land sufficient to pay the allowance in question, instead of disbursing the expenses periodically from the public treasury. But he cannot make a *wakf* of *public* lands in favour of his children, even though the ultimate reversion may be reserved for the poor. But he may make a *wakf* for any object from which benefit accrues to the generality of Mussulmans, for the *Bait-ul-mâl* is for the benefit of Moslems at large.

CHAPTER X.

THE MOWKOOF ALAIHIM; OR, THE OBJECTS OF A *WAKF*.

SECTION I.

GENERAL OBSERVATIONS.

THE subject of this chapter forms one of the most important branches of the law relating to *wakf*. In the Mussulman system, law and religion are almost synonymous expressions, and are so intermixed that it is difficult to dissociate the one from the other; in other words, generally speaking, what is *religious* is lawful: what is *lawful* is religious.

A *wakf* may be created for any object of piety or charity.

According to *all* the schools of Mussulman Law, a *wakf* may be created for the benefit of any person or class of persons, or for any object of piety or charity. It may even be for children that are *unborn*. If the person or object in whose favour it is created is not in existence at the time of the creation of the trust, it will be applied "for the poor," who are the ultimate recipients of all *wakfs*, unless any other object is named.

Definition of charity.

The words "piety" and "charity" have a much wider signification in Mussulman Law and religion than in any other system. *Khair*, *birr*, *ihsân*, &c., include every purpose which is recognised as *good* or *pious* under the Mussulman religion and the Mussulman Law; and the test of what is "good" or "pious" or "charitable" is *the approval of the Almighty*. Every "good purpose" (*wajah-ul-khair*) which God approves, or by which approach (*kurbat*) is attained to the Deity, is a fitting purpose for a valid and lawful *wakf* or dedication. *A provision for one's self, for one's children, for one's relatives is as good and pious an act as a dedication for the support of the general body of the poor.* The principle is founded on the religion of Islâm, and derived from the teachings of

Hanafî Law.

the Prophet, and therefore any variation of the rule is a direct interference with the Mussulman religion.(1)

Wakf for any purpose is for the benefit of human beings.

Another point worthy of attention in the Mussulman Law is that every trust for whatever purpose created is *really* and in fact for the benefit of human beings. *The religious and legal system of Islâm is founded essentially on the service and well-being of humanity.* A dedication may be made for a mosque,—but the mosque is intended for human beings to pray in; it may be for a school, intended for the instruction of students; for *khânkâhs*, where a particular class of people congregate for religious exercises, and so forth. Every object, therefore, is intended for the spiritual, religious, moral, or material good of human beings. This is the meaning of the terse and sententious rule pronounced by the Prophet "tie up the property and leave its usufruct free for mankind." A *wakf* once made for whatever object, has the effect of "detaining" the property in the custody of the Almighty, its produce alone being applicable for the good of human beings. This is the meaning of the definition given by the law officers in the case of *Mohammed Sadik* v. *Mohammed Ali and others*,(2) that *wakf* implies "the relinquishment of the proprietary right in any article of property such as lands, tenements, &c., and consecrating it in such manner to the service of God that *it may be of benefit to men.*" This definition was not invented by them but borrowed from the law-books, and must be read with the explanations given in them.

In the Islâmic system there is no such thing as a dedication "solely to the worship of God." A dedication "solely to the worship of God" is an unmeaning phrase in Islâm. The service of man and the good of humanity constitute pre-eminently the service and worship of God. Everything which is dedicated to God is in reality for the good of mankind; and everything which is dedicated for the good of human beings, individually or collectively, is for the service of God. Every pious act is *'ibâdat* (worship), "the service of God:" to provide maintenance for one's parents, for one's children, for one's poor relations are acts of *'ibâdat*. The essence of

(1) See Zailye's *Takhrij-ul-Hedâya*, Book on *wakf* where the traditions (*hadises*) and the *sanads* (authorities) on which the Hanafi doctrine of *wakf* is based, are set forth. A translation of the principal passages will be found in the Appendix.

(2) 1 Sel. Rep., p. 17.

every *wakf* is *kurbat*, approach to the Almighty; prayers are one form of *'ibâdat* and *kurbat*.

I have dwelt on this subject at some length in consequence of the erroneous view taken in the case of *Abdul Gane Kasim* v. *Hussan Miya Rahmatulla*,(1) in which the learned Judges enunciated the somewhat startling proposition that a *wakf* in order to be valid must "be solely to the worship of God." It is difficult to understand the meaning of this comprehensive dictum. If that view were correct, a *wakf* to an *Imâmbara*, to a *Khânkâh*, to a *Dargâh*, &c., would be invalidated. It is impossible to gather from the report upon what basis the view was founded, for no single original authority appears to have been cited. As will be seen afterwards, it is in absolute contravention of the Mussulman Law.

SECTION II.

THE CLASSIFICATION OF WAKFS.

The Mussulman lawyers divide *wakfs* into three classes, *viz.* :— *Wakf* divisible into three classes.

I. *Wakfs* for the affluent (اغنيا) first and then for the indigent.

II. *Wakfs* for the affluent and indigent alike, in other words, *wakfs* in the benefit of which both the affluent and the indigent are entitled to participate.

III. *Wakfs* for the indigent exclusively.

The *Kinia't-ul Muniah*(2) says, "in the Book on *wakf* by Hillâl [*lit.* in the *wakf* of Hillâl] [it is stated] *wakf* may be of three kinds, one kind being *wakf* for the poor exclusively; another kind being for the affluent and *after them* for the indigent; and the third being for the rich and poor alike such as *rubâts* (monasteries), *khâns* (caravanserais), cemeteries, mosques, acqueducts, bridges, etc., for both rich and poor have their needs attached to them."

The *Durr-ul-Mukhtâr* states the classification in similar terms :— "there are three kinds of *wakf*—(*a*) in favour of the poor; (*b*) in favour of the rich, and *then* in favour of the poor; and (*c*) in favour

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(1) [1877], 10 B. H. C. Rep., p. 10.

(2) P. 201. The *Kinia't-ul-Muniah* is by a distinguished jurist of the name of Mukhtâr bin Mahmûd bin Mohammed az-Zâhidi, surnamed "The Imâm of the Learned" (*al-Imâm ul-'Ullâma*), also "the Star of Religion" (*Najm-ud-dîn*), d. 658 A. H. (A. C. 1259). The *Kinia't-ul-Muniah* is a commentary on the *Nafis-ul-Kudûri*.

of both equally, such as rest-houses for wayfarers, reservoirs of drinking water for the use of travellers, burial grounds, bridges, and such like things, as mosques, water-mills, and basins, inasmuch as every one is in need of them."

All these *wakfs* are valid and lawful. The first class includes all trusts or consecrations in favour of individuals, or one's descendants, or relations, or friends, with the ultimate remainder for the poor, either expressly provided at the creation of the trust, or affixed by the law. If the reversion is expressly provided for at the time of consecration, the *wakf* is valid *without any difference of opinion*. But if the poor are not mentioned at the time when the *wakf* is constituted, still it is valid and binding according to the accepted doctrine, the remainder being for the poor by implication of law upon the extinction of the people named.

Hanafi Law.

The second class includes *wakfs* in favour of objects in the benefit of which both rich and poor may participate, *e.g.*, mosques, caravanserais, rest-houses, reservoirs, shrines, hospitals, colleges, cemeteries, &c.

The third class includes *wakfs* in which the poor are solely interested, *e.g.*, *lungar-khânahs*, where the poor alone are fed; charities for distributing doles of food, supplying raiment to the living, or shrouds for the dead, poor-houses, hospitals for paupers, &c.

Dealing first with class I, it may be stated shortly that a *wakf* can be validly made in favour of any person or class of persons subject to the exception immediately following.

Wakf lawful in favour of any person or class of persons.

It can be made in favour of—

(*a*) a Mussulman or a *Zimmi*, but not in favour of an alien or *harbi* (an inhabitant of the *Dâr ul-Harb*); (1)

(*b*) one's children and descendants, male and female, born or unborn;

(*c*) similarly, other people's children and descendants;

(1) *i.e.*, an inhabitant of a country with which the State is at war. The Moslem jurists, like the jurists of Christendom, until very recent times, divided the world into two portions, one the *Dâr ul-Harb*, the country of warfare, and the other the *Dâr ul-Islâm*, the country of peace. Juridically, all Mussulman nations were at peace with each other. As a matter of fact, no Mussulman Sovereign could declare war against another without first pronouncing him to be a heretic and beyond the pale of Islâm. The non-Moslem subjects of Moslem States are called *Zimmis*. The non-Moslem subjects of non-Moslem Sovereigns at peace with Islâmic States are called *Mustâmins*.

(*d*) heirs as well as non-heirs ;

(*e*) one's kindred, neighbours, &c.

(*f*) strangers ;

(*g*) one's dependants, servants, &c ; and

(*h*) *under the Hanafî Law* in favour of the *wâkif* himself first, and then for other objects, in other words, a *wâkif* may constitute himself the first beneficiary of the trust.

Ultimate reversion.

The ultimate reversion may be *expressly* reserved in these cases for any specific object of *general* benevolence, charity or piety, of a permanent character, such as a mosque, a madrassa, the *rouzah* (mausoleum) of the Imâm, an imâmbara, &c., or for the poor at large. Where no such express reservation has been made, the law supplies the deficiency and declares that on failure of the primary object of the *wakf*, it will continue for the benefit of the ultimate recipients of all charity, *viz.*, the poor. *The wakf can under no circumstance fail.*

A *wakf* can never fail.

Principle. Hanafî Law.

The *Fath ul-Kadîr* (1) after stating that "there is an analogy between *wakf* and *mushârikat* (partnership)... and its great excellence is that it enables mankind to perpetuate good actions," goes on to say, "it is necessary to define its literal signification and its technical meaning, its essentials, and its rules. Literally it signifies *detention* ; . . . in law . . . according to the Disciples, the tying up of the substance of a thing in such a manner that it does not become the property of any one excepting that of God. . . . The *wâkif* may give the produce to whomsoever he likes, and the reason of it is that though a desire to approach the Deity should form the ultimate motive of all *wakfs*, yet, if, without such an [immediate] desire, a person were to consecrate a property in favour of the *affluent*, the *wakf* would be valid, in the same way as a *wakf* in favour of the *indigent* or for the purposes of a mosque, for in giving to the affluent there is as much *kurbat* (nearness) as in giving to the poor or to a mosque, and though the profits may not have been [expressly] given in charity [to the poor] on the extinction of the affluent, yet it is *wakf* and will be treated as *wakf* before their extinction. This principle is founded on the reason that the motive in all *wakfs* is to do good to the living in this world and to approach the Almighty in the next."

Meaning of *wakf*.

(1) For the authority of this work see *ante*, p. 219, footnote.

Wakf dependent on a contingency.

"And the conditions which are requisite for all acts of bounty or generosity are also required for the valid constitution of a *wakf*, that is, freedom, puberty and understanding. In order to be operative it must operate at once and not be dependent on a contingency; for example, if a man were to say 'this house of mine would be *wakf* for the poor *if* my son comes back,' the house will not be *wakf* even if the son comes back."

Wakf in favour of one's posterity.

"In *wakf*, Islâm is not a condition. Consequently, if a *Zimm* were to make a *wakf* on his children and his posterity and give it a the end to the indigent, it is lawful [equally with that made by a Moslem]. And it is lawful in such a case to give the usufruct (conditioned for the indigent) to the poor of both Moslems and *Zimmis*. The *wâkif* may lawfully condition to give the usufruct solely to the poor of the *Zimmis* and in that will be included the Jews, Christians and Magians; and if he condition that a special body of them should get the produce, such special body will then be entitled to it . . . . whatever condition the *wâkif* makes, if it is not contrary to the *Shar'aa*, will be lawful. And the *wâkif* may give to whomsoever he likes so long as it is not sinful . . . . And there is no doubt in this that charity for *Zimmis* is *kurbat* . . . but it is necessary in the case of a *wakf* (in favour of *Zimmis*) that the object should be *kurbat* according to them as well as ourselves (Moslems). . . . . So a *wakf* by a *Zimmi* to promote *Hajj* or *'Umra* to Mecca is not valid, for *Hajj* is not lawful according to them. But a *wakf* to the mosque at Jerusalem is valid because both Christians and Moslems regard it as holy."

A *wakf* goes into the ownership of the Almighty.

Then, after dealing with the terms by which a *wakf* may be constituted, which I have explained already, the author goes on to say, "if a man were to say 'this property of mine is for God' it is equivalent to saying 'it is *sadakah-mowkoofa*.' . . . . According to the Disciples *wakf* means the tying up of property so as to subject it to the rules governing property belonging to God, and accordingly the right of the *wâkif* in the property becomes extinguished and it goes to God, and its benefit is applied for His creatures. According to 'us,' it is clear that the right of the proprietor becomes extinguished if he ties it up for the good of God's creatures, for every property belongs always to God, and so it is written in the lucid language of Kâzi Khân." In other words, "a dedication or consecration of property, means only its preservation in the custody of God

not to be descendible or alienable". . . . . "That a *wakf* once made cannot be inherited nor sold nor be given by way of gift is clear from the recorded sayings of the Prophet."

Then, after quoting the sayings of the Prophet and giving the examples of the *wakfs* created by the early Disciples and Companions, the author states that it is conclusively established that when a *wakf* is once created, it is thenceforward absolutely inalienable and non-heritable and neither the *wâkif* nor his heirs have any right or title to it, excepting what may have been specially provided for them in the usufruct. "And like all testamentary dispositions, a *wakf* which is to come into operation after the death of the donor may be revoked by him at any time before his death, but if not revoked, it will be operative in respect of a third if not assented to by the heirs." . . . . .

A testamentary *wakf*.

"According to both Abû Yusuf and Mohammed the proprietary right of the *wâkif* is extinguished for ever when once the property has been constituted *wakf*. According to Abû Yusuf the right becomes extinguished by his merely declaring that he has made a particular property *wakf*, and this also is the opinion of the three [other] Imâms, *viz.*, Shâfeï, Mâlik and Ahmed [ibn Hanbal], and of the universality of jurists, because the extinguishment of the right of property in a *wakf* is like that in emancipation. Mohammed says that the *wâkif's* right becomes extinguished on his consigning the property to a *mutwalli*. . . . . The rule laid down by Abû Yusuf is most approved by the universality of the learned, and in the *Kinia* it is stated, *that decrees are passed in accordance therewith*, and this is the opinion of the *Mashâikh* of Balkh . . . . The *Mabsût* has thus answered Mohammed's objections, 'Consignment is only intended to evidence the fact that the *wâkif* has parted with all interest in the property; it is not intended for completing the *wakf*. Its object is the protection of the *wâkif* by his withdrawal. When a *mutwalli* is appointed, it is to shew that the *wâkif* has no further interest in it.'"

Consignment not necessary. *Fatwa* with Abû Yusuf.

Declaration sufficient for the completion of a *wakf*.

"According to Abû Yusuf the *wakf* of *mushâ'a* is valid. Owing to the difference of opinion on the question of consignment, Mohammed thinks that when a share of a property capable of division is made *wakf*, it ought to be divided off. According to Abû Yusuf such consignment not being necessary, the *wakf* of a *mushâ'a* becomes complete by the mere declaration of the *wâkif* that

he constitutes it *wâkif*. The opinion of Abû Yusuf has been followed by the jurists of Balkh, whilst that of Mohammed by some lawyers of Bokhâra."

The opinion of Abû Yusuf, as already stated, has been adopted by the Hanafî jurists in India.

The author then proceeds to lay down his own view—"in *wakf* there is no *tamlîk* or assignment of a right of property (to another) so as to require delivery of seisin or consignment, and therefore without consignment, the right of the *wâkif* becomes extinguished on the declaration." . . . "When the property is not capable of partition, both Abû Yusuf and Mohammed are agreed in holding the *wakf* valid without partition." "When a piece of land is dedicated as a cemetery or to build a mosque on, it must be divided off from the other property of the *wâkif*." . . .

"If a house be dedicated for the residence of a body of people or for the children and posterity of the *wâkif*, so long as they are in existence, with the condition that on their extinction the rents and profits arising therefrom should be given to the poor, the *wakf* will be valid, and after the extinction of his posterity the house will be let out to tenants and the rent received from them will be expended on the poor. None of the *mowkoof-alaihim* (beneficiaries) will be entitled to let it; . . . . if his descendants are so many that the house has not sufficient accommodation for all of them, they may occupy it in rotation." . . . . . .

Mention of perpetuity not necessary.

"According to Abû Yusuf the mention of perpetuity or dedication to an object of a permanent nature is not necessary to constitute a valid *wakf*, for the words *wakf* and *sadakah*, either conjunctively or separately, convey the meaning of perpetuity." . . . In the *Barâmika*(1) it is stated that according to Abû Yusuf when a *wakf* is made in favour of specific individuals, on their extinction, the profits of the *wakf* will be applied to the poor." . . . . .

Wakfs of the Companions of the Prophet.

"A large number of the Companions of the Prophet (may God's blessings be with him), made *wakfs*, and an authentic account of such *wakfs* made by men and women, I have given already.(2) And

(1) A collection of *Fatwas* made under the orders of the Barmekides during the Caliphate of Hârûn ar-Rashid.

(2) The author mentions them, beginning with this remark:—"In the traditions there are repeated statements about them, and all the Disciples, the Tâbiîns and their immediate successors have always acted in conformity with them,

the *sanads* (authorities) thereof are given by Khassâf. Among these, which we regard as *sanad* (authority for our rules), are the *wakfs* of [the Caliph] Omar (may God be pleased with him) of his land called *Samagh* at Khaibar; . . . . that created by Zubair bin Awwâm for (the support of) his daughter who had been divorced [by her husband]; the *wakf* of Osmân bin Arkam Makhzûmi on his children and descendants of his house called *Dâr ul-Islâm* at *Safa* (near Mecca), where the Prophet used to preach Islâm and where many of the disciples (among them Omar) accepted the Faith. . . . . Baihaki in his *Khilâfiât* has stated upon the authority of Abû Bakr Obaidullah bin Zubair al-Humaidi that [the Caliph] Abû Bakr had a house in Mecca which he made *wakf* of in favour of his children, and that it is still in existence. . . . and S'aad ibn Wakkâs made a *wakf* of his houses in Medîna and in Egypt in favour of his children and that *wakf* is still in existence; and [the Caliph] Osmân made a *wakf* of his lands on his descendants and that *wakf* also is still continuing."

Then, after stating that all articles which form the lawful subjects of common dealing among mankind may be validly dedicated according to the approved doctrine, in which the other "Imâms are agreed," and giving the opinion of Ansâri on the subject of a *wakf* of movables, the author proceeds to state, "according to Abû Yusuf, the *wâkif* may lawfully retain the governance of the trust or *reserve the profits for himself during his life.* These two subjects have been fully dealt with by Kudûri. . . . . The Jurists Ahmed Ibn Abî Laila, Ibn Shabarna, Zuhri and others agree with Abû Yusuf. . . . Mohammed holds a contrary opinion. . . Abû Yusuf bases his rule upon the practice and recorded precepts of the Prophet himself, who used to participate in (*lit.* eat out of) the produce of the lands dedicated by him. . . . . .Another proof in support of Abû Yusuf's rule is that the meaning of *wakf* is to extinguish the right of property in one's self and consign it to the custody of God. Therefore, when a person reserves the whole or a portion of the profits for himself, . . . it does not inter-

Wakf of movables.

The *wâkif* may reserve the profits for himself —Hanafî Law.

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and of these are the *wakfs* of the Prophet (God's blessing, &c.), [the Caliphs] Abû Bakr, Omar, Osman, and Ali, of Zubair, of M'uaz ibn Jabal, of Zaid ibn Thâbit, of 'Ayesha [the daughter of Abû Bakr], of her sister Asma, of Umm Sulma, of Umm Habîba, of S'afiya, of S'aad ibn Wakkâs, of Khâlid bin Walîd, of J'aabir bin Abdullah, of Okba bin 'Amir, of Abdullah bin Zubair (may God be pleased with them all)."

fere with the consecration, for that also implies the approval of the Almighty and is lawful. Nor is the providing of subsistence for one's self contrary to it. For example, if a man were to dedicate a caravanserai and make a condition that he may rest in it, or a cistern, and condition that he should take water from it, or a cemetery, and say that he may be buried there, all this would be lawful. [Further] our Prophet (may the blessings of God be with him) has declared that a man making a provision for his (future) subsistence is doing a pious act and giving charity. This *Hadîs* has been substantially handed down by a large number [of people] and is authentic, and Ibn Mâja reports from Mikdâm bin M'aadi Karib that the Prophet declared that no gain of a man is so meritorious as that which is earned by the labour of his hands, and his making a provision for the maintenance and support of himself, his family and his dependents, is *sadakah*. And Imâm Nisâî from Bakia and he (Bakia) from Buhair has given the same tradition in these words :—'Whatever thou providest for thyself is a *sadakah*.' Ibn Hâbân in his *Sahîh* states that Abû S'aîd reports from the Prophet that any one who acquires property in a lawful manner and provides therewith a subsistence for himself and for other creatures of God or clothes himself and them out of it, gives alms in the way of the Lord. . . . . And Dâr-Kûtni reports from J'aabir that the Prophet (may God's blessings be with him) declared that a man providing subsistence for himself, his children and his people and for the maintenance of his and their position, is giving charity in the way of God. . . . Tibrâni has reported from Imâma that the Prophet of God declared that a man making a provision for his [own] maintenance or that of his wife, his family or children, is giving *sadakah*. And in the *Sahîh* of Muslim it is stated from J'aabir that the Prophet told a man to make a beginning with himself and give the remainder to his family. All these traditions support Abû Yusuf's rule. And Sadr ush-Shahîd has laid down that decisions are passed according to Abû Yusuf's rule, . . . *and we all decide according to that rule.* And the *Mashâikh* of Balkh have adopted the same. And it is also approved in the *Hedâya*, as is evident from the author mentioning the opinion of Abû Yusuf at the end, though he does not deal with it in detail."(1)

Principle.

Provision for one's self, family and children lawful.

The *Hedâya*

(1) *i.e.*, after mentioning the opinion of Abû Hanifa and Mohammed; *Fath ul-Kadir*, Vol. II, pp. 630—638 (*b*). For the conditions the *wâkif* may lawfully make in his own favour, see *post*.

Similarly, in the Chapter "On the *wakf* of a man on himself, his children, his kindred, or his neighbours" in the *Fatâwai Kâzi Khân*, the authority of which cannot be disputed, the principle is stated thus, "says Fakîh Abû J'aafar (may the mercy of God be with him), if a person were to make a *sadakah wakf* on himself on condition that he should eat the whole or part (of the income) during his lifetime it is valid according to Abû Yusuf, and the *Mashâikh* of Balkh (may the peace, &c.) have adopted his rule and have held that both the *wakf* and the condition are valid and Sadr ush-Shahîd has laid down that decrees should be passed according to the rule of Abû Yusuf."(1) *Fatâwai Kâzi Khân.* Principle.

Again, "a person makes a *wakf* for the poor and conditions that the entire [produce] will be for him, and says that it will be lawful for him to eat out of it, Abû Bakr Askâf holds such [*wakf*] to be valid."(1) General consensus.

And further "if a man were to say 'I have made this *wakf* on myself,' it is valid according to Abû Yusuf, and on his death it will be for the poor."

"Or if he were to make a *wakf* on 'the mothers of his children' it would be as valid as the *wakf* on himself."

And again "Ansâri has stated in his work on *wakf* that when a person constitutes a *wakf* in the following term—'This my land is *wakf* for the sake of God in perpetuity and its produce will be applied to my uses as long as I live' and adds nothing further, it is valid; and when he dies, its benefit will go to the poor."(2)

The same principle is laid down in the *Radd ul-Muhtâr* in identical terms:—"If a person were to make a *wakf* and reserve the produce or the governance of the trust for himself, it would be valid according to Abû Yusuf, and on that is the *Fatwa*," that is decisions are passed in accordance with that rule. "And that is

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(1) رجل وقف على الفقراء و شرط لنفسه الكل و قال على ان لي ان اكل منها قال ابوبكر الاسكاف رح يجوز ذلك و لو قال وقفت على نفسي عن ابي يوسف رحمه الله انه قال يجوز ذلك و اذا مات يصير لمساكين *

(2) For the authority of Kâzi Khân (Imâm Fakhr ud-din Hassan) see Introduction, and Morley's Digest. His decisions have been frequently quoted in the Sudder and Supreme Courts, *e.g.*, see *Doe dem Jaun Beebee* v. *Abdoollah Barber.* supra, 1 Fulton's Rep., 345.

the opinion of Sadr ush-Shahîd, and it is the authority among text-writers, and the same has been preferred by the author of the *Fath* [*ul-Kadîr*], and has been adopted by the jurists of Balkh. And in the *Bahr* [*ur-Raik*] it is stated from the *Hâwi* that this rule has been adopted for the *fatwa*, &c.(1)

A *wakf* for the payment of the debts of the *wâkif*, or for other purposes beneficial to him.

"When a man," says the *Fatâwai Alamgiri* quoting the *Zakhîra*, "has made a *wakf* of land or something else with a condition, that the whole or part of it shall be for himself while he lives and after him for the poor, the *wakf* is valid according to Abû Yusuf, and the jurists of Balkh have adopted his opinion and ruled accordingly, and the *Fatwa* is in conformity with that opinion as an inducement to the making of *wakfs*. There are several ways in which this may be done, as for instance, by a person saying 'on condition that he will pay my debts out of the produce,' or 'when death happens to me, if I should be in debt, that he will begin with the payment of my debts,' or 'when death happens to such an one, meaning the *wâkif*, take every year one-tenth share of the produce and apply it to the performance of the *hajj* or pilgrimage to Mecca on his account or on the expiation of his vows and so-and-so' (naming something); 'or take every year out of this *sadakah* so many *dirhems* and expend them in such a manner and the remainder on so-and-so.' *In all these cases the wakf is lawful.* And if the *wâkif* were to say 'This is a *sadakah-mowkoofa* to Almighty God and he, the *mutwalli*, will pass its produce to me while I live,' without adding anything more, it would be lawful, and after his death, the benefit will go to the poor. So also if he should say, 'This my land is a *sadakah-mowkoofa*, he (meaning the *mutwalli*) will pass the produce to me while I live, then after me to my child and my child's child and their *nasl* for ever, while there are any and when they cease, to the indigent.' *This is lawful.* So also if he should make it a condition, 'That he may maintain himself and his child and pay his debts out of the produce and that when death happens to him the produce of the estate is for such an one, the son of such an one, and his child and child's child and his *nasl*.' Or, if he should

Principle.

Wakf in favour of descendants, valid.

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(1) جاز جعل غلة الوقف او الولاية لنفسه عند الثاني و عليه الفتوى كذا قاله الصدر الشهيد و هو مختار اصحاب المتون و رجحه في الفتح و اختاره مشائخ بلخ و في البحر عن الحاوي انه مختار للفتوى *

begin by saying 'for such an one and then for himself,' it would be lawful as conditioned, the putting himself, first or last, says Khassâf, making no difference. A person makes a *wakf* for the poor with a condition 'that he may eat and feed others (out of its produce) so long as he lives and that after his death it is to be for his child and in like manner to his child's child for ever while there are any descendants,' the *wakf* is lawful with such a condition."(1)

So also in the *Ramz ul-Hakâik* of Allâmah 'Aini; "If the *wâkif* reserves the produce of the *wakf* for himself, that is, if he makes it a condition in the *wakf-nâmah* that during his lifetime the produce should be applied for his benefit, and after his death to the benefit of so-and-so or any specific object, such a *wakf* is valid according to Abû Yusuf and the *Mashâikh* (jurists) of Balkh have decided on that rule, &c."(2)

In the *Fatâwai Alamgiri* the section dealing with this subject runs thus:—"Section II on *wakfs* on one's self, and on one's children and descendants: A man says, 'This land of mine is a *sadakah-mowkoofa* on myself,' that *wakf* is valid by consensus, so in the *Khazânat ul-Muftiïn*. Or, he says 'this land is *wakf* for myself and after me on so-and-so, and after him for the poor,' such a *wakf* is valid according to Abû Yusuf, so in the *Hâwi*. Or, 'that it is a *wakf* for so-and-so, and then for me, or for me and after me for so-and-so, or for my slaves and after them for so-and-so,' it is valid according to the most approved authorities, so in the *Ghyâsia*."(3)

Authorities proving absolute consensus.

(1) *Fatâwai Alamgiri*, Vol. II, p. 495; I have omitted the authorities cited.

(2) و ان جعل الواقف غلة الوقف لنفسه فان قال فى كتابه يصرف الريع اليه مدة حياته ثم من بعده الى فلان و فلان او على جهات عينّها جاز ذلك عند ابي يوسف رح و عليه مشائخ بلخ ترغيبا للناس علي الوقف *

(3) *Fatawai Alamgiri*, Vol. II, p. 471. Comp. Baillie's Digest (Second Ed.), p. 576.

"There is a passage," says the author of the *Radd ul-Muhtâr*, "in Kâzi Khân, to the effect that 'when a person makes a *wakf* on himself and another, the *wakf* so far as regards that person will be valid and not with reference to himself; and if he says that *that* person shall take after him, the whole *wakf* will be void.'" "This statement," continues the author of the *Radd ul-Muhtâr*, "is founded upon *weak* authority, and is evidently an interpolation; in fact it is not recognised as law, and so it is stated in the *Bahr* [*ur-Raik*];" *Radd ul-Muhtâr*, Vol. III, p. 598.

Similarly, in the *Ghâit ul-Bâyân* :—

" And if a man reserve the income of the *wakf* for himself or the governance thereof, it is valid according to Abû Yusuf. And Ulu'l w'alji has stated in his *Fatâwa* that the jurists of Balkh have accepted the rule laid down by Abû Yusuf; and Sadr ush-Shahîd also decided in accordance therewith....." Therefore, if he conditioned the whole for himself during his lifetime and after it for the poor, it will be valid."(1)

And the *Tas-hîl* lays down the principle in the same terms :—

" Abû Yusuf has held it lawful for the *wâkif* to make a condition that the profits either in whole or in part should be for himself for his life, and on this is the *Fatwa;* and the Prophet (may the blessing, &c.), used to eat himself out of his *wakf*, but the *wâkif* cannot take any share therefrom (*lit.* eat therefrom) unless he so conditions."(2)

So in the *Wajiz ul-Muhît* :—" According to Abû Yusuf no such conditions [as are required by Abû Hanîfa or Mohammed] are necessary ; so that if a person makes a *wakf* for himself, or for the mothers of his children (*i.e.*, bondswomen who have borne him children), or for his own children, or makes a *wakf* of *mushâ'a*, it is lawful."(3)

The rule laid down by Abû Yusuf was recognised as the law in force among the Hanafîs in the case of *Doe dem Jaun Beebee* v. *Abdoollah Barber*.(4)

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(1) فان جعل الواقف غلة الوقف لنفسه او جعل الولاية اليه جاز عند ابي يوسف رح *

قال الو الوالجي في فتاواه و مشائخ بلخ اخذوا بقول ابي يوسف رح والصدر الشهيد كان يفتي به ايضاً ترغيبا للناس في الوقف الي قوله فا ما اذا شرط الكل لنفسه ما دام حياً ثم على الفقراء فانه يجب *

(2) يجيز ابو يوسف رح بشرط المنفعة كلها او بعضها..... لنفسه و فيه به يفتي ترغيبا للناس ....و اكل عم من وقف نفسه و لم يحل لاكل بلا شرط *

(3) و عند ابي يوسف شيء من ذلك كله ليس بشرط حتى لو وقف علي نفسه او على امهات اولاده او اولاده او وقف مشاعاً يصح عنده *

(4) Fulton's Repts., p. 345, supra.

Shiah and Shâfeï Laws.

The Shiahs and the Shâfeïs differ from the Hanafîs on one point. According to the recognised and accepted Hanafî doctrine, the *wâkif* may reserve the entire produce of the *wakf* property for his benefit during his lifetime—may, in fact, constitute himself the primary beneficiary of the trust. According to the Shiahs and the Shâfeïs, the *wâkif* can, if he be the *mutwalli*, receive only the allowance reserved for the trustee. Mohammed agrees with the Shiahs and the Shâfeïs in holding that the *wâkif* cannot reserve for himself the entire produce of the *wakf* during his lifetime.

Principle—*Wakf* in favour of one's descendants valid without difference among all the schools.

But as regards the lawfulness of *wakfs* in favour of one's descendants there is absolutely no difference of opinion. All the schools and all the jurists recognise the validity of such *wakfs*.

The *Durr-ul-Mukhtâr* citing the *Mawâhib* says "if a person makes a *wakf* on himself, his children, descendants and posterity, and reserves the income for himself during his lifetime, and similarly *thereafter* and *thereafter*, it is valid according to Abû Yusuf and on this is the *fatwa*."(1)

The *Radd ul-Muhtâr* is most explicit on this point. "It is lawful," it says, "to reserve the produce of the *wakf* for one's self according to Abû Yusuf; the words *thereafter* and *thereafter* which the *wâkif* mentions have no connection with the present discussion; for example, if a person makes a *wakf* on himself and thereafter on *his* children and thereafter on *their* children *there is no difference as to the validity of this wakf on such children;* whatever difference there is refers to the reservation by the *wâkif* of the whole of the produce for himself during life, but none as to the lawfulness of the dedication in favour of the *wâkif's* children."(2)

General consensus.

This was indited in the middle of the 17th century. The author of the *Majm'aa ul-Anhar*, writing at the end of the eighteenth century, *states in positive terms that the principle is acknowledged by all the schools and sects.* He lays down emphatically that "there is *no difference* if a person condition the profits of a *wakf* for his

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(1) *Durr-ul-Mukhtâr*, p. 427.

(2) جاز جعل غلة الوقف لنفسه عند الثاني قوله ثم و ثم حكاية لما يذكره الواقف من العطف بثم فى وقفه كقوله ثم من بعدي على اولادي ثم على اولادهم و هذا لا مدخل له فى نقل الخلاف لان الخلاف فى جعله الريع لنفسه لا لاولاده * Vol. III, p. 676.

Acknowledged rule.

children, and, accordingly, in such a *wakf* male and female [children] will take together, unless he condition for the male alone."(1) From the time of the Founder of Islâm, until the present day, this has been the acknowledged rule of law among Mussulmans.

As pointed out in the *Radd ul-Muhtâr* there is absolutely no question about the lawfulness of *wakfs* in favour of one's children. Whatever difference of opinion exists among the several schools or between Abû Yusuf and Mohammed, relates to the reservation by the *wâkif* of the income of the *wakf* for himself during his lifetime.

I have already given some of the texts in which the validity of *wakfs* in favour of the *wâkif's* descendants is recognised. I now proceed to give the rule as laid down in the leading authorities. A special chapter is devoted in every work on law to the subject of these *wakfs*.

In the *Fatâwai Alamgiri* it is headed thus :—"Second section relating to *wakfs* on one's self, on one's children, and on his *nasl*."

In the *Radd ul-Muhtâr*, it runs thus :—"Section relating to all that pertains to *wakfs* in favour of one's children"

And similarly in every other law-work.

Zailye.

According to Zailye, one of the greatest of Hanafî jurists whose authority is recognised as undisputable throughout the Sunni world, "if a man constitute a *wakf* with these words, 'this my land is a *sadakah-mowkoofa* for my children or my *nasl* (descendants),' it is valid according to both Abû Yusuf and Mohammed, for the mention of the word *sadakah* [according to Mohammed] shows that the *wakf* is perpetual, and that on the extinction of his children it would go to the poor who never fail. But if he said 'this my land is *mowkoofa* on my children or *nasl*, the effect would be the same according to Abû Yusuf and *this is correct*."(2)

Fath ul-Kadîr.

The passage in the *Fath ul-Kadîr* dealing with the subject, has already been given, but it may be quoted again with advantage here.

"Islâm," says the author, "is not among the conditions of *wakf*;" in other words, it is not necessary that the object ir whose

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(1) *Majm'aa ul-Anhar* (Constantinople Ed.), Pt. II, p. 640.

(1) *Takhrîj-ul-Heddya*, MSS. copy belonging to the Patna Anglo-Oriental Library; see Appendix where the part of the chapter dealing with a *wakf* in favour of the *wâkif* and his descendants has been translated in *extenso*.

favour the *wakf* is made should be a Moslem nor that the *wâkif* should belong to the faith of Islâm; and then the author proceeds to state the rule as follows: "so if a man were to constitute a *wakf* for his children and his *nasl* (posterity), and destine it after them for the poor, that will be lawful."(1)

"And when any one of the recipients of the benefaction dies, and the *wâkif* has made no mention what would become of his share upon his decease, in that case the usufruct will be divided among his surviving children every year, and will be given both to the affluent and the indigent of them, unless he [the *wâkif*] has provided that the *wakf* is for the needy [of his children] . . . . . it must be known [*lit.* know] that when he [the *wâkif*] mentions [in the *wakf*] his children and kindred [in other words, when the *wakf* is for them], the *wakf* is valid for the affluent and indigent among them, unless he has specified that it is for the needy [of them alone] as I have already stated. But if it [the *wakf*] is for others than they [*viz.*, if it is for strangers] in such a case the Shams-ul-Aïmma [Sarakhsi] has stated that if he [the *wâkif*] has specified its application for purposes of necessity, it is valid whether the persons in whose favour it is made are limited or unlimited in number, for the object of a *wakf* is to obtain the approval of God, and when its application is provided for, both the affluent and indigent are equal in it. If no purpose is specified and the *wakf* is for a limited body of people, it is valid in respect of them; but not, if they are unlimited in number, unless the *wâkif* has used some expression which ordinarily or customarily or *in fact* implies *need, e.g.*, if the *wakf* is for orphans generally it is valid, and its benefit shall be applied to the poor among them and not to the affluent."(2) All this, *viz.*, what the Shams-ul-Aimma says, is applicable to a *wakf* in favour of strangers, and not to *wakfs* in favour of one's children and kindred.

In the *Ramz ul-Hakâik* the following passage is to be found in regard to the same principle:—"If a *wâkif* constitute the proceeds of the *wakf* for his benefit, that is, if it be written in the deed of *wakf* in this way, that the income of the *wakf* should be applied *Ramz ul-Hakâik.*

(1) اما الاسلام فليس بشرط فلو وقف الذي على ولده نسله و جعل خره للمساكين جاز *

(2) *Fâth-ul-Kadir*, Printed Ed., p. 858.

to his *jihat* (benefit) [during his life] and after his death to so-and-so, or any specified object, such a *wakf*, is valid according to Abû Yusuf . . . . . and the jurists of Balkh have decided in accordance therewith. . . And Abû Yusuf bases his rule on the practice of the Prophet who used to eat out of his *wakfs*." There is no mention of children here, but there is no restriction whatsoever; the word *jihat* including a dedication in favour of one's posterity.

Fatâwai Alamgiri.

In the *Fatâwai Alamgiri* the principle is laid down in similar terms.

First of all "everything that is said in respect of a *wakf* in favour of one's own children, applies to a *wakf* in favour of another's children."(1) So that there is no distinction between the validity of a *wakf* in favour of one's children, and of that in favour of strangers.

"When a man has made a *wakf* of his land in favour of his children and after them on the poor, the child [or children] who may be in existence at the time the produce comes into existence will take it, whether he was born at the time of the *wakf* or thereafter."(2)

"And in like manner if he said 'on my child and what child may be born to me and when they fail, upon the poor . . . . in such a case the *wakf* is valid."(3)

"And if a man should say, 'I have made a *wakf* on my children,' males and females are included in its benefit."

"If a man were to say 'this my land is a *wakf* on my child, and the child of my child, and the child of the child of my child,' mentioning three generations, the income is to be spent upon his descendants for ever so long as there are any, and is not to be applied to the poor; while one remains the *wakf* is for him [or her] unto the very lowest of the descendants,—the nearer and more remote being equal [in the share of the produce], unless the *wâkif* declared in making the *wakf* that the 'nearer was nearer' or said, 'on my child and then after them on the child of my child,' or said, 'generation after generation' when a beginning must be made with them with whom the *wâkif* had begun."(4)

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(1) *Fatâwai Alamgiri*, Vol. II, p. 474.
(2) *Ibid*, p. 471.
(3) *Ibid.*
(4) *Ibid*, p. 474; *Fath ul-Kadir*, Vol. II, p. 643 (*l*). Comp. Baillie's Dig. (2nd Ed.), p. 577.

"If a man were to say, 'This my land is a *wakf* on my child and my *nasl* (posterity),' the *wakf* is valid."(1)

In the Commentary of Allâmah at-Tahtâwi(2) the principle is given in almost identical terms:—"And according to Abû Yusûf it is lawful for the *wâkif* to reserve the usufruct of the *wakf* or its governance for himself, *and on this is the fatwa*(3)". . . .

"If a man makes a *wakf* of his land on his children and children's children for ever so long as his posterity lasts, the produce will be divided equally among his descendants, and no preference will be given to males over females, for the *wâkif* established an equal right for all of them; in the *Zâhir-ur-Rawâyet* (the approved traditions) it is stated that in such a *wakf* the descendants through females [*lit.* daughters] will not be included; on this is the *fatwa*.(4)

"And in the *Hindièh* (the *Fatâwai Alamgiri*) it is stated that when a *wakf* is made on one's *nasl* (progeny) and *zurriyèt* (posterity) in that are included one's descendants through males as well as through females, whether near or remote."(5)

"When a person says this land of mine is *wakf* on my *walad* [child in the singular] in that case the produce will be for the child [or children] of his loins male or female."

It will be seen that in these statements the validity of benefactions in favour of one's self and one's descendants is taken for granted.

The *Khazânat-ul-Muftiïn* states the rule thus:—"If a man say 'this land is a *mowkoofa* or *sadakah-mowkoofa* on myself' this is as lawful as if he had made a condition that during his lifetime he should feed himself out of it and feed others. Therefore, it is approved as authority that this *wakf* is valid."

Again "a man makes a *wakf* on the poor and makes a condition that he should eat out of it, saying that it will be lawful for me to eat of it; this is lawful." "And if he says 'this land of mine is a *sadakah-mowkoofa* or *mowkoofa* in perpetuity for Almighty God, that so long as I am alive its produce should be [*lit.* remain current] for me,' and adds no more, it will be lawful. And when he dies, the *wakf* will be for the poor."

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(1) *Fatâwai Alamgiri*, Vol. II, p. 475.
(2) See *ante*, p. 249.
(3) P. 544.
(4) P. 562.
(5) P. 568.

" And if he says 'whilst I am alive its produce will be for me and after me for my child and child's child and their *nasl* (progeny) so long as their *nasl* exists, it will be for them, and when they cease to exist it will be for the poor;' this will be lawful." " And when the *wâkif*, besides his maintenance, has made this condition that his debts should be paid out [of the produce], this condition will be lawful."

The same rule is enunciated in the *Durrar ul-Ahkâm* and the *Mawâhib*(1) " if a person appoints [*lit.* fixes] the usufruct for himself during his lifetime and thereafter, and thereafter, it will be lawful according to the second [*viz.*, Imâm Abû Yusuf]; and on this is the *Fatwa*, etc.(2)

The passage in the *Bahr-ur-Râik* which is more detailed is equally important.(3)

Majm'aa ul-Anhar.

The *Majm'aa ul-Anhar* written towards the close of the 18th century thus sums up the result of the authorities :—A *wakf* in favour of one's self is valid according to Abû Yusuf, and on this is the *fatwa* (in other words, this is the law). A *wakf* in favour of one's children and *nasl* with the ultimate benefit for the poor in case of the failure of the *wâkif's nasl* is valid by *consensus*. If the poor are not mentioned, but the word *sadakah* is used with the term *wakf*, it is valid both according to Abû Yusuf and Mohammed and on the extinction of the *wâkif's* descendants it will be for the poor. Even if the poor are not mentioned and the word *sadakah* is not used, the *wakf* is valid according to Abû Yusuf, and its produce on the extinction of the *wâkif's nasl* or posterity will be spent on the poor, and on this is the *fatwa*."

Sirâj ul-Wahâj.

In the *Sirâj ul-Wahâj* it is taken for granted that a *wakf* in favour of the *wâkif's* children and thereafter in favour of the poor is valid :—" And according to the *Wâkiât*(4) if a man were to make a *wakf* of his land in favour of his children and after them destine it for the poor, and some of the children die, the [proceeds of the] *wakf* would be applied to the survivors of the children, and

(1) The author of this work, commonly called the Sâhib-i-As'aâf (the author of the *As'aâf*) is placed by D'Ohsson on the same footing with the author of the *Hedâya, Tableaux Generale de l'Empire Ottoman.*

(2) Tahtâwi, Vol. II, pp. 569-70.

(3) See Appendix.

(4) A work of great authority among the Sunnis; Morley's Dig., Introd, p. cclxxxv.

when they [all] die, the *wakf* will be expended towards the poor."(1)

In the *Wajiz ul-Muhît* the principle is laid down in similar terms : " Chapter relating to *Wakfs* in favour of one's children and *nasl* and *then* on the poor,"—" where a person makes a *wakf* on his *awlâd* (children), all his *own* children and the children of his sons(2) will be included therein ; but there are two opinions regarding the inclusion of the children of daughters . . . . and when a man makes a *wakf* of his land on his *awlâd* (children) and then on the poor, upon the death of any one of the children the interest devolves upon the survivors, and if they were all to become extinct the *wakf* would be applied for the poor. This is different from the case of a *wakf* on so-and-so and so-and-so, naming them specifically among his (the *wâkif's*) children, and then on the poor, in such a case upon the death of any of the specific individuals so named, the share of such deceased would be for the poor, etc."(3) Here it is assumed that a *wakf* in favour of children with an ultimate reversion in favour of the poor is valid. *Wajîz ul-Muhît.*

The *Fatâwai Kâzi Khân* is conclusive on the point :—

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(1) و فی الواقعات رجل وقف ارضا علی اولاده و جعل آخره للفقراء فمات بعضهم یصرف الوقف الی الباقي و ان ماتوا صرف الوقف الی الفقراء *

(2) *Viz.*, all lineal male descendants.

(3) باب الوقف علی الولد و النسل ثم علی الفقراء و لو وقف علی اولاده یدخل فیه اولاده لصلبه و اولاد لصلبه و فی اولاد البنات روایتان فی ظاهر الروایة لا یدخلون کما فی الامان و لو وقف ارضه علی اولاده و جعل اخره للفقراء فمات بعضهم یصرف الوقف الی الباقین فان ماتوا صرف الی الفقراء بخلاف ما لو وقف علی فلان و فلان و فلان و سمّاهم تعینهم من اولاده و جعل آخره للفقراء ثم مات واحد منهم بعینه یصرف نصیبه الی الفقراء لانه لو وقف علی کل واحد منهم بعینه فنصیب بلمیت لا یستحقه الباقون و فی الاول وقفه علی کل اولاده قل او کثر و بعد موت بعضهم بقي اولاده فاستحقه الباقون *

Fatâwai Kâzi Khân.

"And Khassâf(1) has laid down that when a man makes a *wakf* in these terms, 'this my land is a *sadakah-mowkoofa* or *mowkoofa* and its produce will remain current for me so long as I live, and after me it will be for my children and children's children and their descendants in perpetuity so long as my posterity exists, and on their extinction, it will be for the poor,' it is lawful."(2)

Hâwi.

In the *Hâwi*, a work of great authority, frequently referred to in the *Fatâwai Kâzi Khân* and the *Fatâwai Alamgiri*, the principle is thus stated—"If a person make a *wakf* of a piece of land or garden on the condition that should he be in need of the income, it should be applied to meet his wants, the *wakf* will be valid with the condition; or, if he reserves the entire produce or the governance for himself, it will be lawful; similarly, if he makes a *wakf* with the condition that so long as he is alive he shall eat out of it and feed others therewith, and that upon his death, his children will have the same power and after them his children's children in perpetuity so long as his posterity lasts, *viz.*, that they should eat of the same and feed others too, this *wakf* is valid with the condition. This is according to Abû Yusuf and it is authoritative and the *Fatwa* is thereon."

Hâwi.

"If a person says 'this land of mine is dedicated for me,' Hillâl says it would not be valid, but all the [other] jurists hold that according to Abû Yusuf it would be valid, and the *Mashâikh* of Balkh have adopted this rule of Abû Yusuf. And they have laid down that both the *wakf* and the condition are valid; and Sadr ush-Shahîd has held that . . . the *Fatwa* is on the rule of Abû Yusuf. And if the *wâkif* were to say 'this land of mine is *mowkoofa*, and so long as I am alive the produce is for me, and on my death for my children, and my children's children and their posterity so long

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(1) Of Khassâf, the author of the *Radd ul-Muhtâr* speaks thus—"Khassâf is an Imâm, whose worth has been testified to by Shams-ul-Aïmma Halwâni, who has declared that Khassâf's views are adopted everywhere;" *Radd-ul-Muhtâr*. Vol. III, p. 672.

(2) وذكر الخصاف رح لو قال ارضي صدقة موقوفة او موقوفة تجري غلتها علي ما عشت ثم بعدي على ولدي و ولد ولدي و نسلهم ابد اما تناسلوا فاذا انقرضوا فهي على المساكين جاز *

as any of them exists, and on their extinction, it will be for the poor,' such *wakf* is lawful."(1)

In the *Fatâwa'l Ankirawia*,(2) the principle is laid down thus : *Fatâwa'l Ankirawia.*

" Q. What is the rule in a case where a man makes a *wakf* in these terms, ' this my land is a *sadakah-mowkoofa* on my child and my child's child and their children ?"

" A. It is lawful, and it will be applied to all of them."

" Q. Would its produce be given to others lower in degree?"

" A. Yes, because such a dedication amounts to a dedication for his descendants so long as his *nasl* (posterity or line) exists, and here three generations are mentioned, and whenever three generations are mentioned the right construction is that the *wakf* is for the *wâkif's* posterity so long as they exist."

Be it noted that the word *sadakah* is used here in conjunction with the word *wakf*, and accordingly the *wakf* is valid by *consensus*, though the poor are not mentioned as the recipients of the usufruct upon the possible contingency of the *wâkif's* posterity becoming extinct; for, as stated already, according to Mohammed the word *sadakah* implies a dedication to the poor. Nor is there any difference of opinion where the word *sadakah* is not used, but the poor(3) are expressly mentioned. According to Abû Yusuf, however, the use of the word *sadakah* is wholly immaterial; and in the above case, even if the word had not been used, the dedication would have been perfectly valid.(3)

And in the *Jouharat un-Nayyerèh*, there occurs the following passage: " When a man makes a *wakf* in these terms, ' this land of mine is for ever a *sadakah* or *wakf* for the sake of God for my children,' then upon their extinction, the poor will become entitled to its produce." Here it will be noticed there is nothing certain as to the time when the children will become extinct, and yet the *wakf* is held to be valid. *Jouharat un-Nayyerèh.*

In the case of *Rosamaya Dhur Chowdhuri* v. *Abul Fata Mohammad Ishak*,(4) the Calcutta High Court enunciates a proposition for which, it is submitted, there is not the least warrant in the Mahommedan Law. It says " that a dedication must not depend upon an uncertain contingency, such as the possible extinction of *Rosamaya Dhur Chowdhuri* v. *Abul Fata Mohammad Ishak.*

(1) *Surrat-ul-Fatâwa*, pp. 443, 444.
(2) See Morley's Dig., Introd., p. cxxc.
(3) *Sirâj-ul-Wahâj.*
(4) [1891], I. L., 18 Cal., 390.

the family, has recently been well laid down by the Madras High Court in *Pathukutti* v. *Avathalakutti.*"(1) Speaking with respect, this dictum seems to be based on an erroneous apprehension of the Mussulman Law. A *wakf* dependant for its operation upon the happening of a contingency is undoubtedly held to be invalid. Examples of such contingent *wakfs* are given in the law-books, and a reference to any treatise will show what is meant by this rule. For example, if a man were to say, "if my son arrives to-morrow, or if my ship arrives from Basra on Friday next, this house of mine will become *wakf*," the operation of such a dedication is dependant on the happening of a contingency which may or may not occur; the son may arrive to-morrow or may not; the ship may arrive on Friday or may not. The *wakf* is *not* intended to have any effect until the event, upon the happening of which it is made dependant, has actually occurred: but as its happening is wholly uncertain and contingent, the *wakf* is held to be invalid, for it is one of the conditions of a *wakf inter vivos* that it should be immediately operative in favour of some object not deemed *sinful* under the Mahommedan Law; or if it is testamentary, it should be similarly operative upon the death of the *wâkif*. A

The rule relating to *wakfs* depending on uncertain contingencies has no bearing whatsoever on the question of a *wakf* in favour of one's descendants, but it seems to have been introduced into the judgment on a complete misapprehension of the Law of *Wakf*. provision for one's children and descendants—nay, for one's self in the Hanafî system—is regarded as a pious duty by which "nearness" (*kurbat*) to God is attained. The mention of the poor is required by Mohammad (not by Abû Yusuf "with whom is the *Fatwa*") *not to give validity to the wakf but to ensure perpetuity;* and as human beings are liable to become extinct and as a *wakf* must be a *permanent* dedication, Mohammad required that the poor should be expressly "named," or "implied" by the use of the word "*sadakah.*" Abû Yusuf, on the other hand, held that whether the poor were named or not, or whether the word "*sadakah*" was used or not, the word *wakf* implied *perpetuity*, and, therefore, unless some other object was named, on failure of the *wâkif's* posterity, the income would be applied for the poor

(1) [1888], I. L., 13 Mad., 66. This case has absolutely no bearing on the point in issue.

There is no question about the validity of the *wakf*; the mention of the poor does not make the *wakf per se* more or less valid; it only ensures perpetuity insisted upon in the law.

The view expressed by the High Court in the case above referred to is evidently founded, *firstly*, upon a misapprehension of the law relating to *contingent wakfs*; and *secondly*, upon the notion that the ultimate dedication to the poor was the real dedication. There is no indication, however, in the judgment of the authority upon which this notion is founded.

In order to understand the nature of the conflict between this decision and the principles of Mussulman Law, it is necessary to state the facts of the case as appearing in the authorised report.

By a deed dated the 21st December 1868, duly registered and purporting to be a deed of *wakfnâmah*, two brothers named respectively, Abul Hossein Mohammad Abdur Rahman and Abu Mohammad Abdul Kadir, made a settlement of all their immovable properties in the following terms:—

"For perpetuating the names of our father and forefathers and for protecting our properties, we, leaving ourselves to the mercy and kindness of God and relying upon the bounty of Providence, and being in possession of sound health of body and mind as enjoined in the Mahommedan Law and fully capable of performing and observing all the religious rites and ceremonies, and of our own free will and accord and without reluctance or compulsion, make this permanent endowment (*wakf*) of all our shares and rights in the immovable properties, that is, all our pergunnahs, zemindaris, talooks, segas, rent-free lands, and all ancestral and self-acquired properties such as purchased at private or auction-sale, and all properties, either standing in our own names or in the names of others, and all our rights and interest in connection with the same, that are in our possession and enjoyment, *for the benefit of our sons and children and the members of our family from generation to generation and in their absence for the benefit of the poor and beggars and widows and orphans.* We two brothers take upon ourselves the management and supervision of the same in the capacity of *mutwallis* for such time as we may live, and as *mutwallis* we enjoy all rights and interest in the *wakf* properties.* * * * * * * We shall deal in the following way with the net profit that will come to our hands. If it be necessary to bring any suit or put in any answer or objection or claim in respect of these *wakf* properties or the profits, etc., of the same in the Civil Courts* * * * * * * * then we, the *mutwallis*, shall do those acts according to the laws and rules for the time being, and we shall pay the expenses for the same from the profits of the *wakf* properties. In order to maintain the name and prestige of our family, we, the *mutwallis*, shall make reasonable and suitable expenses according to our means and position in life. We shall, according to our choice, fix allowances for the support and maintenance of the persons who are now living or may be born afterwards for whose benefit the *wakf* is made, and we shall pay the same to them every month, and also the expenses of their marriage and the mourning ceremonies whenever they may be required. It will be competent for us, the *mutwallis* and our successor

mutwallis to enhance or reduce the allowances of the persons who are now living or who may hereafter be born for whose benefit the *wakf* is made, in consideration of course of their position and circumstances and the state of the income of the *wakf* properties * * * * * to use the *wakf* properties as security and grant *putni and durputni* and permanent and temporary *ijara* settlements, and to purchase some other properties with the money to be received as *salami* for the aforesaid settlements, and to exchange any of the lands in this *wakf* with some other lands or to include the lands so acquired by purchase or in change, in the *wakf*, to spend the profit of the same towards the expenses of the *wakf* and keep the surplus profit in stock in the *tahvil*, and to try to increase the *wakf* properties and the amount in cash. Whatever properties may be acquired by us the *mutwallis* or our successive *mutwallis* after execution of this document shall be in this way *wakf*. * * * * * * * None of the persons for whose benefit the *wakf* is made shall be able to make any claim for taking any of the *wakf* properties or to sell or mortgage or to make any gift of his allowance, and the allowance shall not be attached and sold in execution of any money decree against any of those persons because the *wakf* properties have been settled only for the support of our sons, grandsons, etc., from generation to generation. It will not be competent for any of the persons for whose benefit the *wakf* is made to call upon the *mutwalli* or *mutwallis* to submit any accounts in respect of the *wakf* properties, or to bring any suit in any Court against the *mutwalli* or *mutwallis* for increasing his allowance or for taking possession of the *wakf* properties, or for any accounts in respect of the same, and if any such suit is brought it will be rejected by the Court, but it will be competent for any of the persons for whose benefit the *wakf* is made to ask the *mutwallis* for increasing his allowance or for any occasional expenses and if the *mutwallis* are satisfied that he is actually in need or want, then the *mutwallis* will increase his allowance or meet his demands. The principal object of this *wakf* is that there is to be no loss to the properties, and that the profits of these properties be appropriated towards the maintenance of the name of the family and the support of the persons for whose benefit the *wakf* is made. * * * * * * Be it known here that up to the time of executing the document we are not indebted to any one, that, without keeping in our possession even a very small portion of the properties that are in our possession, we make a *permanent wakf* of all our properties and take in our possession and custody the documents and other papers in connection with the *wakf* properties, that will furnish sufficient information and description regarding the *wakf* properties, and so no schedule thereof is given below."

The deed undoubtedly purported to create an absolute and immediate dedication in favour of the settlors and their descendants with an ultimate reversion for the poor. It thus fulfilled all the conditions required by the Hanafi Law to which the settlors were subject. The provisions regarding the appointment of new Mutwallis were not contrary to the rules of Mussulman Law. The power, however, which the executants of the deed attempted to reserve to themselves for reducing the allowances without any right of question on the part of the beneficiaries, and the provision excluding the obligation of accountability were, like some others, vicious and opposed to the directions of the law. But if the dedication became

absolute immediately the *wakf* was created by the execution of the document, which the Mussulman Law declares is the case, conditions contrary to its rules do not destroy or invalidate the *wakf* but are themselves voided. The obligations which attach to a *wakf* are the creation of the law; and a man making a dedication cannot cut down its operation, or by any subsequent conduct affect its character.

This, it is respectfully submitted, is the rule of Mussulman Law.

Examination of the case of *Rasamaya Dhur Chowdhry* v. *Abul Fata Mohammad Ishak.*

The terms of the deed show an absolute and immediate dedication of the properties, whilst it contains provisions regarding the appointment of new *mutwallis*, and for the appointment of any of the settlors' male descendants as *mutwallis*.

After the execution of the deed, Abdur Rahman and Abdul Kadir dealt with the properties as *wakf* properties. They held themselves out as *mutwallis* and for some years described themselves as such in collection and other papers connected with the management of the properties. In 1874 Abdur Rahman became involved in difficulties; and on the 7th November of 1874 he executed an *ijara putta* for Rs. 4,200 per annum of his share in the properties in favour of his brother, Abdul Kadir, and Abdul Kadir executed a *kabuliat* or counterpart thereof in favour of Abdur Rahman on the 1st of June 1875. Both the deeds were duly registered, and in them the two brothers declared that by reason of their necessities they had revoked the *wakf* of the 21st December 1868, which under the Mussulman Law they had absolutely no power to do.

In 1881 Abdur Rahman and Abdul Kadir made a formal partition of all the *wakf* properties. In this deed of partition, which was executed on the 11th of September 1881, it was stated that the *wakf* of 21st December 1868 was invalid, as the *wakfnâmah* did not contain the word *sadakah* or charity, and was not made according to the provisions of the Mahommedan Law.(1) After the execution of the deed of partition, Abdul Kadir and Abdur Rahman each dealt with his share as exclusively his own. And Abdur Rahman, who had now become heavily involved, mortgaged and alienated several parcels of the property. If the *wakf* was, in its inception, valid, none of these acts, which amounted to mis-

(1) This was evidently in consequence of the decision in 8 Cal. L. R., p. 164.

Rasamaya Dhur Chowdhry v. *Abul Fata Mohammad Ishak*—contd.

feasance on the part of the trustees, could affect the validity of the dedication or of the trusts of the deed.

On the 6th March 1881, Abul Fata Mohammad Ishak, on behalf of himself and his minor brothers, the sons of Abdur Rahman, instituted this suit as beneficiaries under the *wakf*, *inter alia* to have it declared that all the properties were *wakf*, to recover from the transferees the properties alienated by their father, Abdur Rahman (defendant No. 1), and to have him removed from the post of *mutwalli*.

The material issues in the case were the following :—

11*th*.—Whether the *wakf* deed propounded by the plaintiffs was valid ? If so, what relief the said plaintiffs were entitled to ?

12*th*.—Whether the *wakf* deed in dispute was bad in law, fraudulent and collusive and whether it was ever acted upon ?

13*th*.—Whether the disputed *wakf* was cancelled by the subsequent acts and conduct of the defendants Nos. 1 and 2 ?

The Subordinate Judge found that Abdur Rahman and Abdul Kadir had executed the *wakfnâmah ;* that at the time of its execution they were joint-owners in possesson of the *wakf* properties, that they were *free from debt*, sound in mind and body, and had of their own accord and free will and in good faith made the *wakf* for the purpose of dedicating their properties to the service of God ; that after the execution of the deed they had acted as *mutwallis*, supported the beneficiaries, kept up a Madrassah for teaching the Koran and other religious books of the Mahommedans, and had described themselves as *mutwallis* in collection papers, *chittas*, *terij taujee*, and other documents connected with the management of the *wakf ;* that five or six years after the execution of the *wakfnâmah*, Abdur Rahman was much involved in debt, and on the 11th of September 1881 had partitioned the *wakf* properties with his brother, Abdul Kadir, that shortly after the partition Abdur Rahman, without the knowledge or consent of Abdul Kadir, had transferred, mortgaged and granted leases of some of the *wakf* properties, and that he had been guilty of waste and misconduct. The Subordinate Judge held that the deed was valid and irrevocable under the Mahommedan Law ; that Abdur Rahman should be removed from the office of *mutwalli ;* that defendant No. 2 should be appointed sole *mutwalli ;* and that the transfers, mortgages, and leases, etc., executed by the defendant, Abdur Rahman,

were invalid and should be set aside. He accordingly gave the plaintiffs a decree.

Rasamaya Dhur Chowdhry v. *Abul Fata Mohammad Ishak*—contd.

The defendant appealed to the High Court. The learned Judges, who decided the case, after setting out the above facts, said as follows :—

"The learned Advocate-General contended that the decisions in *Abdul Ganne Kasam* v. *Hussein Miya Rahimtulla*(1) and *Mahomed Hamidulla Khan* v. *Lutful Huq*(2) were wrong upon the authority of *Doe dem Jaun Beebee* v. *Abdoollah Barber*,(3) a case tried in the Supreme Court of Calcutta before Ryan, C. J., and Grant, J. He also relied upon *Fatima Bibee* v. *The Advocate-General of Bombay*,(4) and *Amrutlall Kalidas* v. *Shaikh Hussein*,(5) and upon the authorities cited by Mr. Ameer Ali in the Tagore Law Lectures for 1884, including Mr. Baillie."

"The judgment of Ryan, C. J., based as it was upon the opinions of the Moulvies to whom the questions of Mahommedan Law were referred, is certainly entitled to very great weight, but all that the judgment decides in respect of the validity of a *wakf* is that an endowment to charitable uses is valid, though qualified by a reservation of the rents and profits to the donor himself during his life, and that the donor may appoint himself *mutwalli* and need not deliver possession to another. It does not declare that a *wakf* which on the face of it is not an endowment to religious or charitable uses is valid, and that is the question now before us. That judgment does show that the decision in *Abdul Ganne Kasam* v. *Hussein Miya Rahimtulla* and *Mahomed Hamidulla Khan* v. *Lutful Haq* went too far in holding that a valid *wakf* must, from its creation, be solely and exclusively for religious or charitable purposes, but it does not show that they were wrong in laying down that the primary and substantial objects must be of that nature. And in the case of *Doe dem Jaun Beebee* v. *Abdoollah Barber* the benefit to the religious purposes indicated in the deed were not wholly and indefinitely postponed to the interests of the donor and his descendants so long as any of the latter should con-

(1) [1873], 10 Bom. H. C., 7.
(2) [1881], 8 Cal. L. R., 164.
(3) [1838], Fulton's Repts., 345.
(4) [1881], I. L., 6 Bom., 42.
(5) [1887], I. L., 11 B., 403.

tinue to exist; but the reserve was in favour of the donor himself and of certain persons only who were already in existence."

Rasamaya Dhur Chowdhry v. *Abul Fata Mohammed Ishak*—contd.

"The other two cases relied upon by the Advocate-General, *Fatima Bibee* v. *The Advocate-General of Bombay* and *Amrutlall Kalidas* v. *Shaikh Hussein*, seem to lay down practically that a perpetuity in favour of the donor and his descendants is a valid *wakf*, if an ultimate dedication be made in favour of some religious or charitable object upon the occurrence of a contingency, however remote and improbable. And we are not prepared to follow this ruling unless we find it irresistibly supported by unquestionable authority. Baillie, no doubt, as well as the learned Tagore Law Lecturer of 1884, seem to favour this interpretation of the law, but the *Hedâya* as translated by Hamilton, and most of the cases laid before us, seem to us to establish the fact that a *wakf* must be in favour of a religious or charitable purpose, although there may be a temporary intermediate application of the whole or part of the benefits to the appropriator's family. All the cases that expressly sanction this latter arrangement were cases in which at least the ostensible and principal object of the *wakf* was religious or charitable. And that the dedication must not depend upon an uncertain contingency such as the possible extinction of the family, has recently been well laid down by the Madras High Court in *Pathukutti* v. *Avathalakutti*."(1)

"We have the authority of the Privy Council in the case of *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu*(2) cited by Mr. Evans for refusing to recognize as a valid deed of *wakf*, an instrument which uses a particular form of words as a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable.

"Precisely such, in our judgment, is the deed before us, and notwithstanding the fact that for a few years after its execution the owners of the property dealt with it nominally as *mutwallis*, it is certain that they had not really intended to give up their proprietary rights in it. And before very long they abandoned even the semblance of mere trusteeship. We cannot believe that the authors of Mahommedan Law intended that, under cover of a pretended dedication to Almighty God, owners of property should

(1) [1888], I. L., 13 Mad., 66.
(2) [1889] I. L., 17 Cal., 498.

be enabled to secure it for their own use, protect it for ever from their own and their descendants' creditors, and repudiate alienations in respect of which they have received full consideration." Unfortunately, no original authority appears to have been discussed at the Bar. Certainly there is no reference to any in the judgment. Even Mr. Baillie's Digest is dismissed with a passing remark; nor is any endeavour made to explain or reconcile the principles stated there with the views expressed in the decision of the case. Hamilton's *Hedâya* is referred to as supporting the proposition that a "*wakf* must be in favour of a religious or charitable purpose, although there may be a temporary and intermediate application of the whole or part of the benefits to the appropriator's family." It has already been shown from the recognised authorities that this view is utterly opposed to the principles of the Mahommedan Law, and that there is no warrant for cutting down *wakfs* in the way suggested. Whether there is anything in the *Hedâya* which countenances the view taken will be discussed later on.

Rasamaya Dhur Chowdhry v. *Abul Fata Mohammed Ishak*—contd.

One cannot help remarking that in former times the Courts of Justice took every pains to acquaint themselves with the law they had to administer. For example, in *Doe dem Jaun Beebee* v. *Abdoollah Barber*,(1) neither of the parties appears to have cited original authorities, but the Supreme Court of its own motion had the available works carefully translated. In later times, the citation of original authorities has been to some extent discouraged.

It is submitted that the main idea which underlies the judgment under discussion is founded on an inaccurate application of the words "religious" and "charitable." Referring to the judgment of Ryan, C. J., in *Doe dem Jaun Beebee* v. *Abdoollah Barber*, the learned Judges say "it does show that the decisions in *Abdul Ganne Kasam* v. *Hussein Miya Rahimtulla*(2) and *Mahomed Hamidulla Khan* v. *Lutful Haq*(2) went too far in holding that a valid *wakf* must, from its creation, be solely and exclusively for religious or charitable purposes, but it does not show that they were wrong in laying down that the primary and substantial objects must be of that nature." And again, "all the cases that expressly sanction this latter arrangement (*i.e.*, application of the

(1) Supra. (2) Supra.

Rasamaya Dhur Chowdhry v. *Abul Fata Mohammed Ishak*—contd.

whole or part of the proceeds to the appropriator's family) were cases in which at least the ostensible and principal object of the *wakf* was religious or charitable."

Now in both these passages there is a clear misapplication of the terms "religious" and "charitable." The words are unquestionably used in the *English*, and *not* in the *Mussulman*, sense. These terms were introduced by Mr. Hamilton into a note in his translation of the *Hedâya*, and are not found in the Mahommedan Law. Under the Mussulman Law, every "object of piety" is a fitting purpose for a dedication. It is expressly declared in the Hanafî Law, with which the learned Judges were dealing, that making a provision for one's self, is a pious act. As regards a provision for one's children or kindred there is *absolutely no difference among the jurists of the several schools*. Such a provision in the Mussulman religious and legal system is as much a "religious and charitable purpose" as a dedication for the poor. To confine the word "charitable" to objects which would be called such in the English legal system is, it is submitted, a mistake. In the case of *Meer Mahomed Israil Khan* v. *Sashti Churn Ghose*(1) Mr. Justice O'Kinealy very pertinently observed that in interpreting a deed of *wakf* "we must naturally look to what is really meant by the words 'religious or charitable' among Mahommedans. As an example we know that the words 'charitable purpose' in Scotland have quite a different meaning from that in which they are used in England. And so in India, in judging of what is really meant by the words 'religious and charitable' by a Mahommedan we must take the view which their law takes, and not what is to be found in the English Dictionary."

As already stated, a *wakf* has been defined to mean the detention of the *corpus* in the ownership of God *in such a manner that its profits* may be applied for the benefit of His servants; (تعود منفعته على العباد). It is nowhere laid down that these *must* be the poor and the indigent. The idea that, as in *Doe dem Jaun Beebee* v. *Abdoollah Barber*, "the reserve was in favour of the donor himself and of certain persons only who were already in existence," it consequently made a difference in the validity of the *wakf*, is founded on an absolute misapprehension of the authorities referred to by the Law-Officers of the Court. A more

(1) [1892], I. L., 19 Cal., 412, 437.

careful study of the Mahommedan Law will show that whether a *wakf* is made in favour of persons in existence or not, it has nothing to do with the validity of the *wakf*.

Examination of *Rasamaya Dhur Chowdhry* v. *Abul Fata Mohammad Ishak*— concld.

There is another passage in the judgment which deserves some notice:—"We cannot believe that the authors of Mahommedan Law intended that, under cover of a pretended dedication to Almighty God, owners of property should be enabled to secure it for their own use, protect it for ever from their own and their descendants' creditors, and repudiate alienations in respect of which they have received full consideration." Speaking again, with respect, it is difficult to follow the exact meaning of this sentence, which shows some misconception of the nature and legal effect of a *wakf* under the Mahommedan Law. In using the word "pretended," the whole question for decision is begged.

Under the Mussulman Law, a provision for one's self or for one's posterity or kindred is an act of piety, and a fitting purpose for a *wakf*. The word "pretended" used in connection with a transfer, whether by sale, gift or dedication, implies that though there is an appearance of a transfer,—in reality, the transferor does not part with his proprietary interest. A "pretended" gift means, that whilst the donor purports to give the property to another, he retains it all the while as his own. If possession is transferred in such a case, it is subject to a secret trust for the donor. Similarly, in the case of a "pretended" sale or dedication, the vendor or dedicator never parts with the property. It continues his all the while. The words "pretended" or "ostensible" or "colorable" can hardly have any application to a *wakf* in the Mahommedan system, for when a *wakf* is once made, the *wâkif's* proprietary right in the *property* "drops" altogether,—in other words, becomes extinguished by *operation of the law*. The property is thenceforth "in the custody of God." If the *wâkif* is in debt *at the time of the dedication*, the law lays down rules as to how, under the circumstances, the *wakf* should be dealt with. But if he was *not in debt at the time*, or had other property from which the debt could be discharged, his creditors have no right to look to the property for the satisfaction of their debts, for the property is no more his. If he has any interest in the usufruct, such usufruct may be available *during his lifetime* for the payment of his

The rule of Mussulman Law.

debts.(1) If his descendants are the beneficiaries and any of them contracts a debt, his allowance *during his lifetime* may be available for the payment of the debt. But neither the *wâkif* nor his heirs can in any way burden or alienate the property, whether for consideration or not. Any dealing with the property contrary to the conditions of the deed of *wakf* is a breach of trust. This, it is submitted, is the Mahommedan Law; and the importation of the word "pretended" cannot in any way affect the legal consequences resulting from the conduct of a person, competent at the time to make a valid and binding dedication which becomes, under the law, immediately operative and irrevocable.

The rule of Mussulman Law—contd.

Mahomed Ahsanullah Chowdhry v. *Amar Chand Kundu.*

In the case of *Mahomed Ahsanullah Chowdhry* v. *Amar Chand Kundu*,(2) which is referred to by the learned Judges and which undoubtedly lends some colour to the view expressed by them, their Lordships of the Privy Council had declined to enunciate any general principle and had carefully guarded themselves against laying down "any precise definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift."

Certainly, so far as that case is concerned it does not appear that the Judicial Committee intended to go beyond the facts before them which were somewhat peculiar, and calculated to give rise to doubts and prejudice in the minds of English lawyers.(3) Paragraph 8 of the deed of *wakf*, which gave to the *mutwallis* the power of increasing their own salaries at their own discretion, was objectionable and, perhaps, invalid. But, as already observed, under the Mahommedan Law an invalid condition in the *wakfnâmah* does not invalidate the *wakf* but is itself void. This, however, does not seem to have been brought to the notice of their Lordships, for they say: "On the other hand, they (their Lordships) have not been referred to, nor can they find any authority that, according to Mahommedan Law, a gift is good as a *wakf* unless there is a substantial dedication of the property to charitable uses at some period of time or other." No authority appears to have been cited in support of the validity of such *wakfs*, a point

(1) *Surrat-ul-Fatâwa*, 425.

(2) [1889], I. L., 17 Cal., 498.

(3) Their Lordships have since explained their meaning in *Abul Fata Mohammad Ishak* v. *Rasamoya Dhur Chowdhry* [1895], I. L., 22 Cal., 619.

on which there is absolute *consensus;* no Arabic law-work was referred to, and the case both in the High Court and before the Judicial Committee was discussed upon the wholly erroneous notion that a *wakf* in order to be valid must be a substantial dedication to what is called "charitable uses" in English Law. The word "charity," as understood in the Mahommedan system, was not explained; nor was it pointed out that, under the Mussulman Law, a provision for one's family is the highest act of charity, and a "tying-up" of property for the support of one's descendants as substantial a dedication "to charitable uses," as "if the beginning had been made with the poor," to use the language of the *Radd ul-Muhtâr*. Nor does it appear to have been shown from well-known authorities, that when a *wakf* is created in express terms, the non-mention of the poor as the ultimate beneficiaries upon the failure of the primary object or objects, does not affect the validity of the *wakf*, for the law implies as a necessary incident of the *wakf* that the reversion is for the poor, "who are the ultimate recipients of all charities whether named or not," as is expressly stated in the *Ghâit-ul-Bayân*. It was not shown that a *wakf* in favour of unborn children is valid, nor was it pointed out that when the primary object or purpose fails or is for some reason void, the property does not revert to the donor or become the property of his heirs, but is applied to the next succeeding object, or, if none such is mentioned, to the poor. For example, if a *wakf* is created in favour of *A's* children and *A* has no children, the proceeds of the *wakf* would be given to the poor so long as *A* has no children; and, if children are subsequently born to him, to them;(1) or if a *wakf* is created in favour of *A*, and after him in favour of *B*, and after him for the poor, if the *wakf* in favour of *A* cannot take effect either because he is not existing or because he is incapable of taking, being, for example, a *Harbi* (an alien enemy, in whose favour a *wakf* by a Moslem is invalid), the *wakf* does not fail but takes effect in favour of *B* and the poor.

Examination of *Ahsanullah Chowdhry* v. *Amar Chand Kundu.*

There is one other matter in connection with this case which seems to have escaped attention—and perhaps naturally because it is connected with the religious system and the inner life of the Moslems. In most *wakfnâmahs*, whereby property is dedicated for the benefit of the *wâkif's* family and beggars and *wârid-sâdir*

(1) See *post;* even Macnaghten gives this principle.

(travellers and mendicants), there is no sum fixed for the latter purposes. This is by no means an indication of a motive to leave more for the family. On the contrary, it is owing to the fact that when a fixed sum is specified, no more need be spent, so that whilst a few receive help, the majority are turned away. Under the general provisions all who seek help *must* receive help—and if they do not, the Kâzi's door is open and they get redress either by the removal of the *mutwallis* or by a stricter control.

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From the year 1798 downwards the Courts of Justice have uniformly applied the Mussulman Law to the determination of questions affecting the validity of dispositions made by Mahommedans. In the case of *Jewan Das Sahu* v. *Shah Kabiruddin Ahmed*(1) the appellant was a Hindu, and the question was whether the property which formed the subject-matter of the suit was *wakf* or not. Their Lordships in the Privy Council decided the case on the basis of the Mahommedan Law. And every case before and since has proceeded upon the same principle.(2)

Apart, therefore, from the question whether a *wakf* in favour of the endower's family is a religious institution or not, it is submitted with respect that it would be contrary, not only to the principles of "justice, equity and good conscience," which the British Indian Courts have to administer, but also to "immemorial and recognized practice," to apply to its consideration any principle other than that of the Mahommedan Law. And their Lordships of the Judicial Committee have condemned in express terms the idea that the validity of dispositions made by Mussulmans should be decided from any other point of view than that of their own laws and customs.(3)

The Mahommedan Law, therefore, must be sought in authorities recognised by the Mahommedans as such, for it would hardly be right to profess to decide a case according to Mahommedan Law, and yet wholly to ignore the works in which that law is to be found.

Mr. Morley points out in his Digest(4) the sources from which the Mahommedan Law is derived. He shows that the Mussulman Law is founded (*a*) on the Koran ; (*b*) on the precepts of the Prophet ; and (*c*) on the decisions of the leading disciples. The

(1) [1840], 2 Moo. I. A., 390.

(2) See also *Zohoruddin Sircar* v. *Baharulla Sircar*, W. R., 1864, 187.

(3) See *post*.

(4) See *ante* Introd., p. ccxxvii.

direct precepts and practice of the Prophet form part of what may be called the Statutory Law of Islâm, being regarded as supplementary of the divine ordinances in the Koran. Mr. Morley also repeatedly mentions how closely connected religion and law are among the Mussulmans, and how impossible it is to dissociate the one from the other. His remarks on this subject are worthy of consideration.

"In considering the propriety of altering or abrogating the Hindu or Mahommedan Laws, all preconceived notions of the relative excellence of the English and native systems of jurisprudence should be taken as secondary consideration. Nor should it be called in question whether such systems are in themselves good or bad, for it should never be forgotten . . . . that they are an integral part of the faith of that people, and that though we may not be bound by absolute treaty, we have virtually pledged ourselves to preserve them by repeated proclamations and enactments."(1)

The institution of *wakf*, in which the endower's family and descendants are the immediate recipients of the benefaction, owes its origin to the direct ordinances of the Prophet. Not only did he declare that a provision for one's family was the best of alms-giving, but he encouraged members of his household and his companions to create such *wakfs*, and himself set the example by consecrating certain lands at Khaibar. As I have said before, in dealing with the Mussulman Law the meaning attached by Mussulmans to the words "charitable purposes" has been, unfortunately, often lost sight of. Charity has been construed to mean "charity to the poor," irrespective of the endower and his descendants; and piety and religion to mean such acts as would, in practical Europe, be regarded as pious or religious. This is *not* the Mussulman Law, which will be best explained by the following passages from the *Mishkât*,(2) showing what the Prophet considered "piety and charity" to mean:—

The institution of *wâkf* in favour of the *wâkif's* family.

"The Apostle of God said, 'When a Mussulman bestows on his family and kindred, hoping for reward in the next world, it becomes alms, although he has not given to the poor, but to his

(1) Morley's Digest, Introd., p. cliii.

(2) For the value and authority of this work, see Morley's Digest, Introduction, p. cclviii; I quote from Capt. Mathew's Translation, Vol I. p. 453 (1823). See Morley's Digest, Introd., pp. ccliii and cclv.

family and children.' '' '' The Apostle of God said, '.There is one *dinâr* which you have bestowed in the way of God and another in freeing a slave, and another in alms to the poor, and another given to your family and children; that is the greatest *dinâr* in point of reward, which you gave to your family.' '' '' The Apostle of God said, ' The most excellent *dinâr* which a man bestows, is that which he bestows upon his own family; and a *dinâr* spent upon quadrupeds, in the way of God, and a *dinâr* which a man bestows upon his friends, in the way of God.' '' '' Umm-i-Salma says, 'I said to the Prophet, is there any good tiding for me of rewards, for my bestowing on the sons of Abû Salma? His sons are no otherwise than mine.' '' '' The Prophet said, ' Then give to them, and for you are the rewards of what you bestow upon them.' ''

'' The Apostle of God said, ' Giving alms to the poor has the reward of one alms, but that given to kindred has two rewards; one the reward of alms, the other the reward of relationship.' ''(1)

These precepts are also given by Kâzi Khan in his Decisions known as the *Fatâwai Kâzi Khân*, and by Imâm Zailye in substantially the same terms as in the *Fath ul-Kadîr* and are considered as binding on Mahommedans.(2)

In Muslim and Bokhâri the precepts of the Prophet are given in detail. I shall quote here only two :—

'' The Prophet of God declared that a pious offering to one's family [to provide against their falling into want] is more pious than giving alms to beggars. The most excellent of *sadakah* is that which a man bestows upon his family.''

'' To give money to free slave, to give alms to the poor, to give to your children and kindred are all *sadakah*.''

Meaning of the words "charitable purposes" in Mussulman Law.

It is unnecessary to multiply these quotations. A reference to any book on Mahommedan religion or law will show that the expression '' charitable purposes '' is not used in the Mussulman Law in the restricted sense in which it has been attempted to be used in the British Courts of Justice. It has already been pointed out that according to the Founder of their religion, it is a pious duty among all Moslems to make a provision for their family and descendants; among the Hanafîs all over the world a provision

(1) See also *ante*, p. 215. (2) See *post*.

for one's self comes in the same category. The notions, therefore, derived from other systems of law or religion form no index to the understanding of the Mussulman Law. The words "piety" and "charity" have a much wider signification in Mussulman Law and religion than perhaps in any other. Every "good purpose," *wajah-ul-khair* (to use the language of the *Kifâyá*), which God approves or by which approach (*kurbat*) is attained to the Deity, is a fitting purpose for a valid and lawful *wakf*. A provision for one's children, for one's relations and, under the Hanafî Sunni Law, for one's self, is as good and pious an act as a dedication for the support of the general body of the poor. The principle is founded on the religion of Islâm and derived from the teachings of the Prophet.

Examination of the authorities.

The *wakfs* created in the lifetime of the Prophet, under the sanction of his sacred authority, are set out at length in the *Fath ul-Kadîr*;(1) and Imâm Zailye, one of the greatest expounders of the Mahommedan Law, has preserved for us a copy of the deed of Osmân bin Arkam (an immediate disciple of the Prophet) by which he dedicated his house in charity upon his children without any reference to the poor.(2)

Fatâwai Barâmika.

In the earliest collection of decisions called the *Fatâwai Barâmika* (those delivered by Imâm Abû Yusuf, who was the Chief Judge of Bagdad under the Caliph Harûn ur-Rashîd), it is laid down that a *wakf* is lawful in favour of any object, and will, after its extinction, enure in favour of the poor,—the ultimate beneficiaries of all benefactions.

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(1) See *ante*, p. 280.

(2) "He [Osmân bin Arkam] had a house close to Safa. This was the house dwelt in by the Prophet, peace and safety be unto him, at the time of the promulgation of Islâm, and it was in this house that he invited people to embrace Islâm. A large number of people accepted the Faith in this house, of whom Omar Ibn-ul-Khattâb was one, and the house was therefore called (the house of Islâm). Arkam dedicated the said house to his child [meaning, children], and the deed of *wakf* was as follows :—

'In the name of God the most Merciful. This relates to how Osmân bin Arkam disposed of the usufruct of his property which lies close to Safa, that is to say, he has consecrated it in charity to his child [meaning, children], together with the place where it lies, *viz.*, its environs, so that it may neither be sold nor inherited.'

"This was witnessed by Hishâm, son of 'Aâs, and by the slave of Hisham, son of 'Aâs. This house all along continued to be a permanent *sadakah* (a thing given in charity), his descendants living in it, letting it out on hire, and they alone appropriating its proceeds. No one raised any objection."

Fatâwai Hâwi.

The next collection of decisions now extant, in order of date, is the *Fatâwai Hâwi*, quoted in the *Fatâwai Alamgiri* as "the *holy Hâwi.*" Its author Kâzi Jamâl ud-din Ahmed,(1) who died in A. H. 600, was a celebrated lawyer and Kâzi of Ghazni (in Afghanistan). In it we find the following rule :—

Wakf in favour of one's self and posterity.

"If a man makes a *wakf* of a piece of land, or of an orchard, on condition that whenever he should be in want of the produce thereof, he should have it, the *wakf* will be valid according to the said condition. If he reserves for himself the whole of the produce of the *wakf* property, or makes himself *Mutwalli*, it will be valid according to *istehsân ; and this also will be the case when a man makes a wakf on the condition that he should eat out of it and feed others with it, during his lifetime, and, upon his death, his child shall have the same privilege, and such will be the case with his child's child also, for ever, so long as his posterity continues, who would eat out of it, and feed others with it ; the wakf will be valid with these conditions.* The whole of the above is what Abû Yusuf says, and *fatwas* are given in accordance with the same."

Kiniat-ul-munièh.

The opinion of Kâzi Khan who was his contemporary has already been given.(2) In the *Kiniat-ul-munièh*(3) (A C. 1259) the principle is laid down in almost identical terms.

Zakhîrat-ul-Fatâwa.

In the *Zakhîrat-ul-Fatâwa*,(4) a collection of decisions prepared about the end of the 13th century, and frequently referred to by the Law-Officers of the Sudder Court, there is the following :—

"It is laid down in the book *Ajnâs* by Nâtiki(5) that if a man makes a *wakf*, and lays down in it with respect to himself that he should, during his lifetime, eat out of it, and feed those whom he likes ; that after him it should go to his child, his child's child and to his posterity for ever, so long as it may continue, and that upon its becoming extinct, it should go to the poor ; this is valid according to Abû Yusuf, may the mercy of God be on him, and it is not a disposition in the nature of a will in favour of his child, the child eating out of a property belonging to God, the Most High. *Do you not see that when a man makes a wakf in favour*

(1) A distinguished Kâzi of Irâk who flourished about the latter half of the 12th century ; see Morley's Digest, Introd., page cclxv.

(2) See *ante*, p. 293.

(3) See Morley's Digest, Introd., p. cclxxxvi.

(4) *Ibid*, p. cclxxxv.

(5) A celebrated Kâzi of Irâk, recognised as a great authority in India

of his children and their children so long as their posterity may continue, and gives it afterwards to the poor, it is valid. Now this case is just like it.''

In the *Khazânat-ul-Muftiïn*, an important collection of decisions of the year 1339, frequently referred to by the Law-Officers in India,(1) the *Fatwa* is given thus :— *Khazânat-ul-Muftiïn.*

'' If any one says 'I make a *wakf* of this land of mine in favour of my child and child's child and afterwards in favour of the poor,' the income thereof would go to his child and his child's child till they be dead and none of them be alive, and even if the third generation be forthcoming, the income would go to the poor, and not to the third generation. If he says : 'In favour of my child, my child's child and the child of my child's child,' making mention of three generations, the income would be spent by his descendants for ever, so long as his posterity continues, and not by the poor till any of his descendants be alive, be he of a degree howsoever low.''

The *Fath ul-Kadir* by Kamâl ud-dîn Siwâsi who died in 1456 A. C. has already been referred to. *Fath ul-Kadir.*

The *Bahr ur-Râik*(2) (1562), a work of great authority in India states that '' there is no difference [of opinion] regarding a *wakf* in favour of one's descendants.'' *Bahr ur-Râik.*

In the *Durr-ul-Mukhtâr* (1660), the principle is enunciated in these words :— *Durr-ul-Mukhtâr.*

'' If one should declare the income of it [*i.e.*, the *wakf* property] to be for [*i.e.*, receivable by] himself during his lifetime—and thereafter—and thereafter [*i.e.*, then for his children, and then for his children's children], it is lawful according to the Second [Imâm Abû Yusuf], and the *Fatwa* is in accordance with it. And if he should add (thereto) a third generation, it would include his *nasl* in general.''

The *Radd ul-Muhtâr* (written about the end of the 17th century) commenting on the above passage, *viz.*, '' if a person fixes the usufruct for himself during his lifetime and *thereafter* and *thereafter*, it will be lawful according to the Second [Abû Yusuf], and on this is the *Fatwa*,'' says as follows :— *Radd ul-Muhtâr.*

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(1) See Macnaghten's Principles and Precedents of Mahommedan Law, pp. 332, 342, etc.

(2) See *Mohammud Sadik* v. *Mohammud Ali and others*, 1 Sel. Rep., 17.

"It is lawful to reserve the produce of the *wakf* for one's self. According to Abû Yusuf, the words (thereafter and thereafter) which the *wâkif* mentions have no connection with the present discussion. For example, if a person makes a *wakf* on himself and thereafter on his children, and thereafter on their children, there is no difference as to the validity of the *wakf* on such children; whatever difference there is, refers to the reservation by the *wâkif* of the whole of the produce for himself during life, *but none as to the lawfulness of the dedication in favour of the wâkif's children.*"

Majm'aa-ul-Anhar.

The passage from the *Majm'aa-ul-Anhar*, compiled towards the end of the last century, showing that there is absolutely no difference among lawyers about the validity of *wakfs* in favour of one's *awlâd* (children or descendants), has already been quoted;(1) as also the principle enunciated in the *Fatâwai'l-Ankirawia* of the Shaikh-ul-Islâm Mohammed bin-al-Hussain, who died in A. H. 1098 (A. D. 1686), a work of great authority among the Hanafîs.

Fatâwai'l-Ankirawia.

But of all the works on Mahommedan Law, which possess an interest for those who are charged with the administration of justice in India, the most important is the great Code which was compiled in that country, in the reign of the Emperor Aurungzeb Alamgir, by Indian Judges and Muftis, barely a hundred years before the establishment of British rule.

The Fatâwai Alamgiri.

The *Fatâwai Alamgiri* has been cited and followed not only in the old Sudder and Supreme Courts, but also in the High Court of Calcutta. Kemp, J., decided the case of *Khaja Hossein Ali* v. *Shahazadi Hazra Begum*(2) upon the law laid down in that work; and in *Mullick Abdul Guffur* v. *Mussummat Muleka*,(3) Garth, C. J., referred to it frequently. In it the subject of *wakfs* on one's self and on one's children and posterity is treated in two aspects. In one part the recognised law as to the validity of *wakfs* in favour of one's self and one's children and descendants is discussed in detail.(4) In the other part relating to *conditions in wakfs*, the subject is dealt with by way of reservations or

Discusses the law in two aspects.

(1) See *ante*, p. 287.

(2) [1869], 12 W. R., 344.

(3) [1884], I. L., 10 Cal., 1112.

(4) In Section II, Chapter III, Volume II, p. 471 (Calcutta Edition): Baillie's Digest, 2nd Ed., p. 576.

conditions.(1) The first establishes that a man may make a *wakf* directly constituting himself and his descendants the recipients of the benefaction with an ultimate reserve for the poor; the second that he may create a *wakf* in general terms. or expressly in favour of the poor, and reserve the usufruct for himself and his family so long as they exist. The dedication is valid in both cases. A cursory study of Baillie's Digest would show what is laid down in the *Fatâwai Alamgiri, viz.*, that there is absolutely no question about the validity of a *wakf* in which one's descendants are the recipients of the benefaction ; and further, that the view expressed by Mohammed, the second disciple of Abû Hanîfa, that the endower could not reserve any benefit for himself, was never followed among the Hanafîs, and that decisions on this point have always been in accordance with the rule laid down by Abû Yusuf.

The *Fatâwai Alamgiri* is substantially the Mussulman Code of India, and it is submitted that the law derived from it, or from authorities quoted in it, has been recognised and given effect to by the Courts of Justice ever since the establishment of British power in that country.(2)

From the promulgation of Islâm up to the present day there has been an absolute consensus of opinion regarding the validity of *wakfs* on one's children, kindred and neighbours. Practical lawyers, experienced judges, high officers of every sect and school under Mussulman sovereigns, are all in unison on this point. There are minor differences, *viz.*, whether a *wakf* can be created for one's self, whether the unfailing object should be designated, whether the property should be partitioned or not, whether consignment to the *mutwalli* is necessary or not; but so far as the validity of a *wakf* constituting one's family or descendants the recipients of the benefaction, in whole or in part, is concerned, there is absolutely no difference. Absolute consensus.

A *wakf* is a permanent benefaction for the good of God's creatures; the *wâkif* may bestow the usufruct, but not the *corpus*, upon whomsoever he chooses and in whatever manner he likes, only it must endure for ever. If he bestows the usufruct in the first instance upon those whose maintenance is obligatory on Principle.

(1) In Chapter IV, p. 459 ; Baillie's Digest, 2nd Ed., p. 596.
(2) For additional authorities, see Appendix.

him, or if he gives it to his descendants so long as they exist to prevent their falling into indigence, it is a pious act,—more pious, according to the Prophet, than giving to the general body of the poor. He laid down that one's family and descendants are fitting objects of charity, and that to bestow on them and to provide for their future subsistence is more pious and obtains greater reward than to bestow on the indigent stranger. And this is insisted upon so strongly that when a *wakf* is made for the *indigent* or *poor* generally, the proceeds of the endowment are applied first to relieve the wants of the endower's children and descendants and kindred in the first place.(1) When a *wakf* is created constituting the family or descendants of the *wâkif* the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in *not* for the purpose of making the *wakf* charitable (for the support of the family and descendants is a part and parcel of the charitable purpose for which the dedication is made), but simply to impart permanency to the endowment. When the *wâkif's* descendants fail, it *must* come to the poor. So it is an enduring benefaction—an act of *'ibâdat* or worship, to use the language of the (Shîah) *Jawâhir ul-Kalâm*,—an act by which *kurbat* or nearness is obtained to the Deity, according to the (Hanafi) *Bahr-ur-Râik*.

Doe dem Jaun Beebee v. *Abdollah Barber.*

Coming now to the cases decided by the British Indian Courts, we find that the first directly bearing on the subject is that of *Doe dem Jaun Beebee* v. *Abdollah Barber*(2) (1838). In that case, the ultimate benefit was not given to the poor in express terms. The lady dedicated the property in general terms as is customary among Mussulmans. In the first paragraph, she provided that after paying the revenue and taxes she should appropriate as much of the produce as was required for her own use, and the remainder to "hereditable and charitable purposes." She provided further that her several relatives should receive their maintenance as heretofore; that she should have the power of increasing or decreasing the number of incumbents; and that the repairs of the mosque, etc., and other expenses connected therewith in Ramazân and the Id festivals should be defrayed from the produce. By para-

(1) See Baillie's Digest, 2nd Ed., p. 593.

(2) Fulton's Reports, page 345; the *wakfnâmah* in that case is set out in this Appendix.

graph 2 she constituted herself the *mutwalli* during her lifetime; after her death, her daughter's son Abdollah was to be the *mutwalli*, and after him some one among her relations most deserving of the office; and she declared that the property was to be for ever inalienable.

It will be seen that the usufruct was, after paying the revenue, to be appropriated to the endower's own use and towards the maintenance of the members of her family. The amounts disbursable for the repairs of the mosque and for the performance of the festivals were postponed until after the maintenance of the family. But neither the decision of the Judges nor the opinion of the Law Officers turns upon this provision, and it was stated by no one that the provision for the maintenance of the family invalidated the *wakf*. The word "hereditable" in the first paragraph, the power of increasing the persons receiving maintenance, the appointment of *mutwallis* one after another for the purpose of carrying out the directions in the *wakfnâma*, coupled with the answer of the Law Officers to the third question, all show that the provision for maintenance did not refer to "specific individuals then existing," but to the endower's descendants at large. It was never attempted to be argued in that case that the *wakf* was bad, because it was wholly or mainly for the support of the endower's family, or because it was not wholly, or mainly, or substantially for a mosque or for the poor. It was impugned on the only ground open under the Mohammedan Law that the *wâkif* had reserved the usufruct for herself. And the case was decided on the *Fatwa* of the Law Officers founded on well-known authorities, following the rule laid down by Abû Yusuf, whose doctrine on the point in question has always been recognised as the binding authority.

Bibi Kuneez Fatima v. *Bibi Saheba Jan*

In the case of *Bibi Kuneez Fatima* v. *Bibi Saheba Jan*(1) (1867) the question was whether certain properties which had been conveyed by one of the defendants to the others were or were not *wakf* and consequently inalienable.

In dealing with the case the Judges (Kemp and Glover, JJ.) considered two points—(*a*) the right of the plaintiff to sue, and (*b*) the meaning of the grants in the case. There was no mention of the word *wakf* in any of the *sanads* put forward by the

(1) [1867], 8 Weekly Reporter, 313.

plaintiff; they were all in fact *Madad Maash* grants.(1) Kemp, J., in discussing the first point, said "the grants of the lands in dispute make no mention of any provision for the maintenance of the plaintiff or any other member of the grantee's family." There is no suggestion that, had there been any such provision, it would have been invalid or that there could be no *wakf* for that purpose. Then after pointing out that the alleged endowment did not come under the provisions of Act XX of 1863, Kemp, J., proceeded to show that the plaintiff had no interest to entitle her to sue.

He first gives the substance of one of the *sanads* :—

"That the grantee, *i.e.*, Syud Mahomed Mir, had a large family to support, and had to defray the expenses of a 'Khânkâh,'(2) for travellers and the benighted, for students and mendicants who beg at his door; that the said grantee found it difficult to discharge all these duties which involved considerable expense; that in consideration of this the villages detailed in the grant were given to him at a fixed annual *jama* of Rs. 896. The *abwabs* and other cesses hitherto levied upon the grantee were remitted, and the aforesaid *jama*, which had all along been paid, was declared to be fixed. It was further recited that the grantee, after paying the said *jama*, was to enjoy the profits of the property, to support himself therewith, and to pray for the grantor."

The learned Judge then goes on to say—"Now, it is very clear, that this is not a grant constituting a *wakf*. There is *no dedication of the properties solely to the worship of God, or to any religious or charitable purposes*. The grant recites that the grantee and his predecessors have hitherto held the lands at a *jama* of Rs. 896, which *jama* is declared to be fixed at that rate henceforth. In consideration of the charitable disposition of the grantee and the expenses which he apparently voluntarily incurred in supporting poor students, in giving alms to mendicants, and food and shelter to travellers, the grantor remits the payment of *abwabs* and other cesses, which in the days of the Nawab Nazims were a heavy impost, and directs the officers of the *tehsil* to refrain from exacting the same from the grantee. For this indulgence, the

(1) Grants made by Mussulman Sovereigns or chiefs for the maintenance of the grantees and their descendants.

(2) See *ante*, p. 222.

grantee was requested to give the grantor the benefit of his prayers. The grantee was to enjoy the profits after paying the *jama* fixed, *viz.*, Rs. 896. In short, the grants were grants to an individual in his own right and for the purpose of furnishing the means for the subsistence of the grantee, and nothing further."

It seems to be perfectly clear that in using the term, "religious" or "charitable" in the passage above quoted, Mr. Justice Kemp used them in the Mahommedan sense, that is, as meaning a purpose which is regarded as religious or charitable by the people among whom the question arose. He had already observed that there was no provision for the maintenance of the grantee's family. He then pointed out that there was no provision for the support of the *khânkâh* or travellers, or students or mendicants; that, on the contrary, in consideration of the charitable disposition of the grantee, who apparently voluntarily incurred expenses in the performance of good acts, the grant was made personally to him, in return for which he was to give the grantor the benefit of his prayers. He accordingly held that such a grant could not be regarded as a *wakf* under the Mussulman Law. To imagine that in using the term "charitable," he meant to confine it to a dedication solely for the poor, would be going against the whole purport of his judgment.

Khaja Hossein Ali v. *Shahzadee Hazara Begum*

In the case of *Khaja Hossein Ali* v. *Shahzadee Hazra Begum*(1) (1869) the only question for determination, as pointed out by Kemp, J., was whether the subsistence of a mortgage, at the time the endowment was made, rendered such endowment wholly invalid under the Mahommedan Law or not. In the course of his judgment the learned Judge (who differed from his colleague, Markby, J.) made various observations pertinent to the case before him in support of his views. Kemp, J., as well as the Appellate Court which affirmed his judgment, took the law on the subject bodily from the *Fatâwai Alamgiri*. Mr. Justice Kemp also showed, quoting Harington's Analysis, that *Fatwas* or law decisions "are given primarily according to Abû Yusuf, and next according to Imâm Mahomed."

Mr. Justice Markby's judgment contains the following reference to the *wakfnâma* in this case :—

(1) [1869], 12 W. R., 344; *ibid* (on appeal), p. 398.

"In this document," says the learned Judge, "after referring to the duty which he felt it incumbent on him to perform of making provision for the assistance of travellers and the maintenance of the heirs of his late son, he (the endower) states as follows :—

'Consequently, for the sake of the maintenance of Khaja Hossein Ali, I do hereby appoint him (who is my grandson) as a *mutwalli* of the aforesaid *Astana* or sepulchre under the following conditions : that the said Hossein Ali shall neither be competent to transfer the aforesaid property under a sale, gift, or mortgage, nor to transfer the *wakf* property in any other way. He is hereby authorized to take care of and to assist the travellers and the poor. He is to attend to the Fatihas of Shabebarat, the Mohurrum, and the Eeds, and to allow such expenses as are for solemnizing the above festivals. He is to appropriate such amounts as would remain in hand, after the payment of the *sudder jama*, from the nett proceeds of *taluq* Lot Billissur and from the produce of gardens, for his personal expenses as well as for his family, *i.e.*, his grandmother and mother.'

It will be seen, therefore, that the endowment was for the maintenance of the endower's grandson, and that the proceeds went after the payment of the *sudder jama* towards his support and that of his family. The provisions relating to the travellers and the poor and the festivals were mere recommendations. He was authorised to take care of and to assist the travellers and the poor. He was "to attend to the Fatihas of Shabebarat, the Mohurrum, and the Eeds, the usual Mahommedan festivals, and to allow such expenses as are for solemnizing the above festivals." There was no specific dedication for those purposes.

Mr. Justice Kemp, dealing with one of the objections of the Lower Court to the *wakf* in that case, says as follows :—

"As to the endowment being uncertain and conditional, I do not find, on perusal of the *towliutnama*, that such is the case.

"The performance of certain ceremonies at the great Mahommedan festivals is provided for, the festivals are distinctly enumerated, the poor who are always with us are to be relieved, and travellers looked after. The Government revenue, or in this case the rent, is to be paid, and the residue is to be expended in the maintenance of the relatives (who are also specified) of the endower

that is, of his mother and grandmother. The sister of the endower is also to be maintained and a small marriage portion given to her. It will be seen that the poor are provided for, which is the primary object of every *wakf*. Settlements in favour of relations who are specifically named are made. Such an endowment is in every respect a lawful one under the Mahommedan Law."

The learned Judge was explaining the several particulars *in the document before him*, which went to establish that the endowment was neither uncertain nor conditional. And in doing so he pointed out that the poor were also provided for. And he added, what is no doubt true in one sense, but not so in another, that the primary object of every *wakf* is to provide for the poor, for it is unquestionable that there are many *wakfs* which have not the remotest connection with the poor, *e.g.*, a *wakf* for a mosque. But as I said before, his observation is correct in one sense ; in every *wakf*, the benefaction of which is bestowed upon any individual or on one's descendants, the charity is continued, upon their extinction, expressly or by implication of law, to the general poor. The poor are thus always present in the mind of a Mahommedan making a *wakf*. That Mr. Justice Kemp did not mean to hold that only such *wakfs* were valid as were intended for strangers or to provide for the general body of the poor, is apparent, *first*, from the fact that in that very deed, which he held to be valid, the poor formed a secondary object of the *wakf*, and, *secondly*, from his reference to Baillie's Digest,(1) where the subject of *wakf* on one's descendants is treated.

Whatever interpretation may be sought to be put upon the words of Kemp, J., the broad fact remains that the immediate recipients of the benefaction in that case were Khaja Hossein Ali and his family, though the deed contained discretionary directions about helping the poor and performing the usual family festivals. That case, instead of being an authority *against* the institution of *wakf* constituting the endower's family as the recipients of the benefaction, is an important authority in support of it.

Muzhurul Huq v. *Puhraj Ditarey Mohapattur*.

In the case of *Muzhurul Huq* v. *Puhraj Ditarey Mohapattur* (1870),(2) the plaintiff sued to obtain possession of certain lands which he had purchased with notice that they were *wakf*. The

(1) Pp. 585—586.
(2) [1870] 13 W. R., 235.

special appellant had intervened in the suit alleging that he was the *mutwalli* under the *wakfnâma*. The Judge in the Court below had decreed the suit on the ground (*a*) that the lands had not been endowed by the plaintiff's vendor, and (*b*) that the deed not being registered could not be admitted in evidence, and that therefore the intervenor had no *locus standi*. Dealing with the first ground, Kemp, J., examined the terms of the deed in order to show that they all constituted a valid endowment :—

Muzhurul Huq v. *Puhraj Ditarey Mohapattur.*

"Looking to the terms of the deed," he said, "it has all the characteristics of a valid endowment under the Mahommedan law. The primary objects for which the lands are endowed, and which are the objects which all Mahommedans have in view in endowing lands, are to support a mosque and to defray the expenses of the worship conducted in that mosque. The mosque had admittedly been in existence for a long period on the endowed land. It is first provided that from the profits of the endowed lands the mosque is to be repaired and lighted and furnished on certain festivals; that travellers are not to be allowed to go away hungry; that an establishment, including a Muezzin, or caller to prayers, and other necessary servants of the mosque are to be kept up; that mendicants are to have alms given to them; that a certain number of poor scholars are to be educated in Arabic, which necessitates the employment of a teacher; and, lastly, that from the remaining profits the expenses for the marriages, burials and circumcisions of the members of the family of the *Mutwalli* Muzhurul Huq were to be defrayed. This was to be done after the primary objects for which the endowment was made, and which objects have been already detailed above, were fully accomplished."

In this case, it will be observed the learned Judge calls an endowment in favour of a mosque as the primary object of a *wakf*, whereas in the previous case he had stated the poor to be the primary object. It is evident, therefore, that Kemp, J., could not have intended in either of these cases that his words should be taken as exhaustive, for he had already spoken of a *wakf* being in favour of *any religious* or *charitable* purpose; and he was well aware, that, under the Mussulman Law, one's family were objects of charity in a higher degree than indigent strangers and, therefore, entitled to be classed among the poor in the sense in which it is

understood in the Mussulman system. The learned Judge then proceeded to say :—

"We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family and for particular purposes, and which, after they lapse, will leave the whole profits intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahommedan Law. A person may make an endowment settling lands on himself and enjoying the profits during his lifetime, and after his lifetime devoting the profits to the support of the poor, the main object of the Mahommedan Law being that the profits of the land endowed should be endowed for a purpose which always remains in existence. Now the poor are always with us, and therefore a man making an endowment and enjoying the profits during his lifetime, to go to the poor after his death, does not make the endowment for an uncertain or non-existent object." * *

Consideration of Mr. Justice Kemp's expressions.

Here again the learned Judge was dealing with the question by way of an example, and there is no shadow of a ground for suggesting that the illustration is exhaustive or exclusive ; on the contrary, the very fact that he contemplated a provision for the members of a particular family for particular purposes would show that it never entered his mind to suggest that a *wakf* in which the proceeds are applicable towards the maintenance of the members of the endower's family was invalid. The views enunciated by Kemp, J., in the passage last quoted, have received the approval of their Lordships of the Privy Council in the cases of *Mahomed Ahsanullah Chowdhry*(1) and *Abdul Fata Mohammed Ishak*,(2) but that passage appears to me to deal with the question, which he was discussing, from the two aspects, to which reference has already been made(3) both of which are provided for in the *Fatâwai Alamgiri*, an authority upon which that learned Judge relied considerably. With reference to the first it is laid down that "when a man has made an appropriation of land or something else, with a condition that the whole or part of it shall be for himself while he lives, and after him for the poor, the appropriation is valid according to Abû Yusuf

Wakf for the poor with a condition.

(1) [1889], I. L., 17 Cal., 498. (2) [1892], I. L., 22 Cal., 619.
(3) *Ante* p. 284.

and the Shaikhs of Balkh have adopted his opinion, and the *Fatwa* is in conformity with it."(1) The instances in which this may be done are given. And then comes this passage :—

"So also, if he should say, 'this my land is a *sadakah mowkoofa*(2) (pious *wakf*) he (the *mutwalli*) will pass the produce to me while I live ; then after me, to my child and child's child and their *nasl* for ever, while there are any, and when they cease, to the indigent,' this also would be lawful. So also, if he should make a condition 'that he may maintain himself and his child and pay his debts out of the produce, and that when death happens to him, the produce of this estate is for such an one, the son of such an one and his child and child's child, and his *nasl*.'

. . . A person makes a *wakf* for the poor with a condition 'that he may eat and feed others (out of its produce) so long as he lives, and that after his death it is to be for his child, and in like manner for his child's child for ever, while there are any descendants,' the *wakf* is lawful with such a condition."

Here, the dedication is either in general terms or is expressly for the poor, subject to the condition that the benefaction should be bestowed wholly or partially on the endower and his family so long as they exist as part and parcel of the charitable purpose for which the dedication is made, the proceeds going to the poor (meaning indigent *strangers*) only on the extinction of the endower's descendants.(3)

The second aspect deals with a dedication primarily in favour of the *wâkif* and his family.

"A man says 'my land is a *sadakah mowkoofa* on myself'; such an appropriation is lawful according to approved traditions. So also, if he should say 'I have made a *wakf* of it on myself, and after me on such a one and then upon the poor' it would be lawful according to Abû Yusuf. And if one should say 'my land is *mowkoofa* on such a one, and after him upon me' or should say

(1) Volume II, p. 495 ; see Baillie's Digest, 2nd Ed., p. 595.

(2) *Mowkoofa*, past participle of *wakf* ; Mr. Baillie translates this word as "settled," but I prefer to follow the original, as the word "settled" is misleading.

(3) In p. 474, Volume II of the same work ; Baillie's Digest, 2nd Ed., p. 576.

'upon me and upon such a one, or upon my slave and upon such an one' the accepted doctrine is that it would be valid."

* * * * * * *

"If a man should say 'I have made a *wakf* of it on my children (*awlâd*),' males and females are included."

Dedication primarily in favour of one's self and family and descendants with a reversion for the poor.

"If one should say 'this my land is a *sadakah mowkoofa* on my child, and child of my child,' the child of his loins, and the child of his child in existence on the day of the consecration and those who are born afterwards are included, and the two generations participate in the produce, but none below them are included, nor the children of daughters according to the *Zâhir-ur-Rawâyèt* (approved traditions); and the *Fatwa* is in accordance with it. And if he should say, 'upon my child and child of my child, and child of the child of my child,' mentioning three generations, the produce is to be expended upon his children for ever, so long as there are any descendants, and is not to be applied to the poor; while one remains the *wakf* is to them, and the lowest among them; the nearer and more remote being alike unless the appropriator say in making the *wakf* 'the nearer is nearer,' or say 'on my child, then after them, on the child of my child,' or say, 'generation after generation,' when a beginning must be made with them with whom the appropriator has begun."

In these cases the *wakf* is primarily in favour of the *wâkif* or of his children and *afterwards* of the poor.

Mr. Justice Kemp, it is submitted, *affirms both these principles.* In the first part of the passage under reference, he recognises the Mussulman Law given in page 596 of Baillie's Digest. The words "the mere charge upon the profits of the estate of certain items, which must in the course of time necessarily cease, being confined to one family and for particular purposes" (be it for the payment of the endower's debts or the maintenance of his family or the payment of their marriage expenses), "and which after they lapse will leave the whole profits intact for the original purposes for which the endowment was made," show that the learned Judge recognises the validity of the *conditions* which may be superimposed by the endower upon the application or enjoyment of the property dedicated, as laid down in the *Fatâwai Alamgiri.* In the second part, he points out that "a person may make an endowment settling lands on himself and enjoying the profits during his

lifetime, and after his lifetime devoting the profits to the support of the poor," and mark these words "the main object of the Mahommedan Law being that the profits of the land endowed be endowed for a purpose which always remains in existence." Here there is no reference to the charge of any items upon the profits of an estate dedicated for some specific purposes. The principle is stated in the clearest terms that a person may make an endowment "settling lands on himself" with the reversion for the poor "who are always with us," who are, in other words, a perpetual object of bounty. Reference is made to the case of the endower himself, because on that point Abû Yusuf and Mohammed were disagreed, and the learned Judge enunciated the rule laid down by the former. There is no reason for suggesting that he intended cutting down the Mahommedan Law. If his words are studied with some care, it will be found that he enunciated the accepted rules of Mahommedan Law, *viz.*, that the endower may make an appropriation and *condition* that he and his family or children shall enjoy the usufruct so long as they last, the whole going to the general poor after they have ceased to exist; *or* that he may directly endow the lands for himself or his children or descendants, and in the end for the poor, in other words, constitute himself and his children the recipients of the charity in the first instance, the general poor taking their place on the extinction of the family.

Mahomed Hamidulla Khan v. *Lutful Haq.*

The case of *Mahomed Hamidulla Khan* v. *Lutful Haq*(1) is, as I have already ventured with all respect to point out, in absolute conflict with the Mahommedan Law, and displays some confusion of ideas. The substantial portion of the *wakfnâmah* was in these terms :—"I have made *wakf* of 4 annas in favour of *Jamela Khatun alias Dhone Bibi*, daughter of my daughter, and her descendants as also her descendants' descendants, so long as they may continue to have offspring, and, when they no longer exist, then in favour of the poor and needy." It will be seen that this dedication complied with all the essential requisites of the law. The learned Judges held, however, as follows :—

"There has been much argument before us as to the real signification of the term '*wakf*.' There is no doubt that there is a conflict of authority between Baillie and other writers on Mahom-

(1) [1881] 8 Cal. L. R., 164.

medan Law, Macnaghten and Hamilton, on this subject. But looking to the principal authority, the '*Hedâya*' as read by Abû Hanîfa, (*sic*) who was undoubtedly a Sunni, to which sect the family of Gholam Sharuff belong, and looking to the doctrines of his disciples, it seems to us that the balance of authority is strongly in favour of the view as stated by the Bombay Court in the case of *Abdul Ganne Kasâm* v. *Hussein Mirza Rahimtullah*, 10 Bom. H. C. R., 13, *viz.*, that 'to constitute a valid *wakf*, there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes.' Abû Hanîfa undoubtedly in 2 *Hedâya*, p. 334, points out that the appropriation that is *wakf*, must be to some 'charitable' purposes.''(1)

''Now here it is manifest that this appropriation in favour of Budrunnissa is not in the nature of a charity. It is simply in the nature of a settlement upon the daughter, a settlement of property which was to be heritable and to be taken by Budrunnissa's descendants in certain shares.(2) The words are clear, each daughter is to take four annas and in the terms of the deed, 'four annas share has been endowed in favour of each of the said ladies.' If, therefore, the principle underlying a *wakf* is charity, and if the ultimate application of the property, the subject of '*wakf*,' must be to objects which never became extinct, and those objects are all of a religious and charitable character, then this particular appropriation fails to answer to this description. Consequently, the appropriation of the one-fourth share, which is the subject of this appeal, is invalid and cannot be held to be a *wakf*.''

Mahomed Hamidulla v. *Lutfu Haq*— contd.

''There is, however, some force in the argument which has been addressed to us, that appropriation in the nature of settlement of property upon a man and his descendants have been treated by various exponents of Mahommedan Law as legitimate appropriation under the designation of *wakf*, but these settlements are all under Mahommedan Law termed *Sadakah* and in the view

(1) The learned Judges evidently thought that the *Hedâya* was the work of Abû Hanîfa, whereas Abû Hanîfa had died four centuries before the *Hedâya* was written. He neither read nor wrote it!

(2) Here the learned Judges have clearly misconstrued the document. It did not provide that the property dedicated should be "heritable" and "taken in certain shares." It only provided (as the Mussulman Law permits) that the descendants of the first recipients of the benefaction should take the usufruct in "certain shares."

apparently of Baillie, when a settlement of property is made in this way by a man in favour of his descendants, the term *Sadakah* must be used; but we do not gather that this term is employed in the deed of 1st Bhadro 1248. But further, even admitting that under Mahommedan Law appropriations or rather settlements of this character can be made, it seems to us clear that the present appropriation falls outside the principle of '*wakf*.' As explained in the case already referred to in 10 Bom. H. C. R., the doctrine of settlement rests entirely upon a saying attributed to the Prophet. 'A man giving subsistence to himself is giving alms,' but this doctrine only holds good according to Hamilton (2 *Hedâya* 351, note), where a man appropriates the whole of the property and so reduces himself to poverty, in which case the charity is as effectual with respect to him (where he necessarily reserves a sufficiency from the product for his own sustenance) as with respect to any other pauper. So that to validate a '*wakf*' by making a settlement of his property on himself, or his descendants, a man must, in the view taken by the Prophet, reduce himself to a state of absolute poverty. In the present case it is clear, and it is admitted by both sides, that there are other properties vested in the appropriator besides those which are the subject of this deed. Consequently, it cannot be said that Budrunnissa has received this property as a pauper."

Speaking with respect, not only does this judgment proceed upon patent erroneous assumptions, but shows an extraordinary confusion of ideas. It is by no means clear who is to reduce himself "to a state of absolute poverty" the endower or the recipient of the benefaction in order that the *wakf* may be valid. Again it is assumed that "there is a conflict between Baillie and the other writers on Mahommedan Law, Macnaghten and Hamilton." Macnaghten never pretended to write an exhaustive treatise on Mahommedan Law; he collected a few general elementary principles, many of which have been found to be incomplete.

Principle 4, Chapter X of Macnaghten's Principles and Precedents of Mahommedan Law, however, shows that an endowment may be made in favour of the children of a person and on their failure for the poor.(1) Cases are also given which refer

(1) Pp. 338 and 341.

distinctly to *wakfs* for the support of particular families.(1) The quotation from the *Khazânat-ul-Muftiîn* is emphatic.

Nor is there anything in the *Hedâya* to warrant the view taken by the learned Judges. It must be remembered that the English version is a rendering of a Persian translation of the original Arabic *Hedâya* with many interpolations and omissions. Mr. Hamilton in translating the Persian version into English rendered the word *wakf* by "appropriation;" but as every "appropriation" cannot be regarded as *wakf*, he took care to add in a footnote that it meant appropriations of a pious or charitable nature. *The learned Judges decided the case before them upon the authority of that footnote, construing it in the strictest English sense.* The rule stated in the *Hedâya*.

There is absolutely no warrant in the *Hedâya* itself for that view. In the *Hedâya*, a *wakf* is defined thus: "in law, it signifies, according to Abû Hanîfa, the tying-up of the substance of a property in the ownership of the *wâkif* and the devotion of its usufruct, amounting to an *'aâriat* . . . . . According to the Two Disciples, it means the tying-up of the substance of a thing under the rule of the property of God, whereby the proprietary right of the *wâkif* [therein] becomes extinguished and [it] is transferred to Almighty God for any purpose by which its profits may be applied to [the benefit of] His creatures." The *Hedâya*.

The definition given by the Disciples has been adopted for the *Fatwa*.(2) This has been explained over and over again in all the commentaries, in all the works of law, in decisions, and in *Fatwas*, to include every object of a meritorious character, by which 'reward' is obtained or 'nearness' sought; and a dedication for one's children is placed in the same category as one for a mosque.

The statement that "to constitute a valid *wakf* there must be a dedication solely to the worship of God, or to religious or charitable purposes," is unsupported by any authority. In the *Hedâya*, the subject of *wakfs* in favour of children is not discussed, as there was no difference of opinion on the point between Abû

(1) P. 242.

(2) *Mohammud Sadik* v. *Mohammud Ali and others*, 1 Sel. Rep., 17 *supra*.

Yusuf and Mohammed.(1) On the question whether a *wakf* in favour of one's self is valid or not, there was a difference between Imâm Abû Yusûf and Mohammed, and consequently the author goes fully into it, and proves on the authority of the Prophet that a *wakf* may validly be created with a reservation by the settlor of the primary interest for himself. The doctrine again is misconstrued upon the authority of a footnote by the translator, and it is supposed that a man must, in order to create a valid *wakf*, reduce himself to absolute poverty. It is a gloss by Hamilton upon the text and upon the precept of the Prophet which has not been recognised by the Mahommedan lawyers themselves.(2) "A provision for one's self," said the Prophet, "is tantamount to an act of charity," whether he dedicates the whole of his property, or only a portion thereof. The reservation of the income of the *wakf* in whole or in part is considered as a pious and meritorious act. The word *sadakah* has been translated into *alms-giving*, and it is chiefly due to this that the Courts of Justice have been misled. The ground upon which a dedication in favour of one's self is held to be valid is that it is a pious act, *viz.*, to provide the means of support for one's self. Considering how unstable fortunes and wealth have been at all times in the East, it was laid down by the Hanafî Jurists as a precept that when a man placed his property in the custody of God for the benefit of mankind, he might constitute himself as one of the beneficiaries or the sole beneficiary of that of which God was the trustee. The learned Judges further thought that a settlement in favour of children could only be made by the word *sadakah*. It is clear from the authorities already cited that this view is absolutely opposed to the recognised and accepted principles of the law.(3)

Misconstruction of the word *sadakah*.

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(1) The *Hedâya* is not a work of *fatâwa* or decisions, but only deals with principles of general Mussulman jurisprudence and questions on which Abû Hanîfa, Abû Yusuf and Mohammed were in disagreement. *It does not discuss the subject of wakfs in favour of one's children as there was absolutely no difference on that point;* see Arabic *Hedâya* (printed with the *Rifâya*), Vol. II, p. 900, where the validity of such a *wakf* is taken for granted.

(2) See Baillie's Digest, p. 593, which shows that a man need not make himself a pauper before he can reserve the usufruct for himself.

(3) See *ante*, pp. 217-224.

The case of *Fatima Bibi* v. *Ariff Ismailjee Bham*(1) was not argued at all, and was decided by the learned Judge on the authority of *Abdul Ganne Kasam* and *Mahomed Hamidulla Khan*. *Fatima Bibi* v. *Ariff Ismailjee Bham.*

One of the learned Judges (Tottenham, J.) who decided the case of *Mahomed Hamidulla Khan* had afterwards to consider a similar question in *Lachmipat Sing* v. *Amir Alum*,(1) in which he seems to have, to some extent, modified his former opinion. In *Lachmipat Sing's* case the *wakfnâmah* provided for the payment of the settlor's debts, for the support of a mosque, for the performance of certain funeral ceremonies of his ancestors and for the maintenance of his descendants. It was not, therefore, "a *wakf solely* and *exclusively* for the worship of God." The learned Judge in dealing with this *wakf* expressed himself in these terms :— *Lachmipat Sing* v. *Amir Alum.*

"The next question is, whether or not the *wakf* is a valid one according to Mahommedan Law. There has always been a good deal of controversy in the Courts as to what is essential, and as to what will invalidate a *wakf*. On the one hand, it has been contended that no *wakf* is valid unless it is solely and wholly for pious and charitable purposes enduring throughout all time, and, on the other hand, there have been those who considered that what is practically a perpetual provision for the dedicator's family may be a valid *wakf*."

"The fact that the Subordinate Judge, who tried this case, is himself a Mahommedan gentleman of considerable attainments in Arabic learning, entitles his opinion to peculiar weight in a case of this nature, and he appears to have entertained no doubt, whatever, as to this *wakf* being of a thoroughly legitimate character as to its constitution and objects. And singularly enough, the only matter which strikes us as one in respect of which, with reference to the decisions of the Courts, makes [*sic*] the character of this alleged *wakf* at all doubtful, is the very one which the lower Court has treated as one as to which there could be no dispute as to its being a proper object of *wakf*. For, in the *wakfnâmah*, there is express provision for the maintenance of the dedicator's male descendants, in addition to the strictly pious and religious objects for which the *wakf* purports to have been made. But the Bombay High Court has, by a Full Bench, decided that, to constitute

(1) [1882] 9 Cal. L. R., 74.

a valid *wakf*, there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes; see *Abdul Ganne Kasam* v. *Hussein Miya Rahimtulla.*(1) The view has been endorsed by a Division Bench of this Court in the case of *Mahomed Hamidulla Khan* v. *Budrunnissa Khatun.*"(2)

"This definition might seem to exclude from judicial recognition a *wakf* of which one object is a provision for the family of the creator of it."

"The lower Court, however, easily disposes of this question by the observation that 'it is quite evident, and there is no necessity to quote any authority on the subject, that a *wakf* for one's self and for one's children is valid.'"

"In the Bombay case, the Judges, after considering all the available authorities on this question, held that the balance was in favour of the dictum to which they gave effect; and this too was what the Division Bench, of which one of us was a member, decided in the case of *Mahomed Hamidulla Khan* v. *Budrunnissa Khatun.* In that case the alleged *wakf*, which we declined to recognize, had for its object nothing connected with the worship of God or religious observances, and provided only in a very remote contingency for the poor. It was simply a perpetuity for the benefit of the dedicator's daughter and her descendants so long as any should exist."

Lachmipat Sing v. *Amir Alum.*

"The *wakfnâmah* now before us is of a very different character, and having regard to the passage in it reciting the fact of dedication, we think that without saying whether or no we are prepared on further consideration to adopt to the full the ruling above mentioned, we can treat this *wakf* as actually fulfilling the condition described, for the maker of the *wakf*, after reciting the whole of his property of every kind, proceeds to declare that all has been endowed by him for the expenses of the *musjeed* and the tombs of the holy personages of his family, the servants of the *Asthánd*, and for performing the *urs* and *fateha* at the tomb."

"These are the objects of the *wakf*, and they are all distinctly religious. They also involve to some extent charity to the poor."

(1) [1882] I. L., 9 Cal., 176; for the *Wakfnâmah* see *Appendix*.
(2) [1881] 8 Cal. L. R., 167.

" We are disposed to hold this, therefore, to be a valid *wakf* within the purview of the rulings quoted. "

The distinction which was drawn between the case in question and *Mahomed Hamidulla Khan* was more apparent than real. In the main the dedication was for the descendants of the *wâkif*, coupled with the payment of certain expenses for the *masjid*, *etc.*, and yet the *wakf* was held to be valid. It was supposed that the provision in respect of the latter lent substance to the provision as to the former.

The Subordinate Judge, however, who was a Mahommedan versed in his own law, had held that the very provision which appeared to the High Court doubtful was the one about which there could possibly be no dispute.

Amrutlall Kalidass v. *Shaik Hussein Mahomed Ebrahim*.

The authority of these three cases has been discussed with considerable clearness and ability by Mr. Justice Farran in the case of *Amrutlall Kalidass* v. *Shaik Hussein Mahomed Ebrahim and another*.(1) That learned Judge very properly observes :—

" The authority of the cases of *Mahomed Hamidulla Khan* v. *Lutful Haq* and of *Fatima Bibi* v. *Ariff Ismailjee Bham*, is much weakened by the fact of the Judges, who decided those cases, treating what, at most, is but an expression of opinion in *Abd ul Ganne Kasam* v. *Hussain Miya Rahimtulla* as a decision, and by the doubt thrown upon them by the Court in deciding *Lachmipat Sing* v. *Amir Alum*, in which one of the Judges, who decided the former of the two cases, sat. The case of *Fatima Bibi* v. *The Advocate-General* was not referred to in either of them, nor in the later case. "

Abdul Ganne Kasam v. *Hussein Miya Rahimtulla*.

I now come to the case of *Abdul Ganne Kasam* v. *Hussein Miya Rahimtulla*. Neither in that case, nor in the Calcutta cases which have followed it, was there any reference to Ryan, C. J.'s decision in the case of *Doe dem Jaun Bibi* v. *Abdollah Barber*. No original authority was cited. Various analogies derived from other systems of law were imported into the discussion, but the principles of the Mahommedan Law, deducible from recognised law-works, were noticeable by their absence.

The learned Judges drawing a conclusion from the decision of their Lordships of the Privy Council in *Jewan Dass Sahoo* v. *Shah Kubeer-ood-deen Ahmed* (which had nothing to do with the ques-

(1) [1887] I. L., 11 Bom., 499.

tion under discussion in the Bombay High Court) say as follows :— "In that case it was held that according to the Mahommedan Law, it is not necessary, in order to constitute a *wakf* or endowment to religious and charitable uses, that the term *wakf* be used in the grant, if from the general nature of the grant such tenure can be inferred. We think that the converse of this proposition holds good, namely, that it is necessary, in order to constitute a *wakf*, that the endowment should be to religious and charitable uses, and that it is not sufficient that the mere term *wakf* should be used in the grant. To hold otherwise would be to enable every person by a mere verbal fiction to create a perpetuity of any description." With respect it must be stated that the reasoning is fallacious and ignores the express provisions of the Mahommedan Law.

Nizam-ud-din Gulam and others v. *Abdul Gafur and others.*

In the case of *Nizamuddin Gulam and others* v. *Abdul Gafur and others*,(1) the Bombay High Court (Birdwood and Parsons, JJ.) apparently accepted the principle that a Mahommedan could make a valid *wakf* of his property in favour of his descendants, but they held that inasmuch as there was "no express provision at all for the ultimate application of the property to any religious or charitable object," the settlement was invalid. Here, again, not a single original authority is referred to. The real question is lost sight of, the principle of the Mahommedan Law is misunderstood, and the case is decided upon inferential reasoning founded upon two earlier decisions which hardly support the view taken by the Judges.

Ayesha Bibi v. *Gholam Hyder Khan.*

The case of *Fatima Bibi* v. *The Advocate General*(2) was followed in the Calcutta High Court in the cases of *Ayesha Bibi* v. *Gholam Hyder Khan*,(3) and *Phudia Bibi* v. *Haji Mahommed Kazim Isphahanee*.(4)

Pathukutti v. *Avathalakutti.*

In the case of *Pathukutti* v. *Avathalakutti* (5) the *wakf* was to take effect on the contingency of the settlor having no issue. If she had issue the property was to go to them absolutely; if not, it was to be *wakf*. It might be said that in this case there was no valid dedication under the Mahommedan Law.

(1) [1889] I. L., 13 Bom., 264.
(2) [1881] I. L., 6 Bom., 42.
(3) Decided, 19th Novr. 1883.
(4) Decided 31st March 1884.
(5) [1888] I. L., 13 Mad., 66.

In the case of *Murtazai Bibi* v. *Jumna Bibi*,(1) the parties were Shiahs and the endower was a Shiah. Under the Shiah Law when a *wakf* is in favour of a specified class of people, such as the *wâkif's* family or descendants, the ultimate unfailing purpose must be expressly designated. This is one of the points of difference between the *recognised* Hanafî law and the *recognised* Shiah law. In the *wakfnâmah* in *Murtazai Bibi's* case the poor were not mentioned, and the case could have been decided on that point. But the learned Judge who decided the case was probably not aware of this difference, and derived the law from Hanafî cases. *Murtazai Bibi* v. *Jumna Bibi.*

The *Hedâya* is held responsible for all the present confusion on the subject of *wakf*. But it must be remembered that Hamilton did *not* translate the original work as it exists in the Arabic language. At his instance the Arabic *Hedâya* was rendered into Persian by some Moulvis of Calcutta, who interpolated passages into the Persian version probably with the object of elucidating the meaning of the author, the effect of which, however, has been to confuse the subject. Often, important sentences have been left out, which wholly detracts from the value of the translation. It is upon this so-called translation that the decisions are based. With reference to Hamilton's rendering and gloss, Mr. Neill Baillie, the paraphrasist of the *Fatâwai Alamgiri*, speaks thus:—"Mr. Hamilton has unnecessarily restricted the legal meaning [of the word *wakf*] to appropriations of a 'pious or charitable nature'." *Hedâya.*

And having regard to the meaning usually attached by English lawyers to the words "charitable" and "pious," nobody who has studied Mahommedan Law will question for a moment the correctness of Mr. Baillie's comment.

Critically examined, however, there is no difference between the *Hedâya* and any of the other works on Mahommedan Law. In the *Hedâya*, the law of *wakf*, as already stated, is dealt with most meagrely; and the subject of *wakfs* on one's "children and *nasl*" is not discussed at all; for with regard to the validity of such *wakfs*, there was no dispute between Abû Yusuf and Mohammed. The matter on which they were at issue, *viz.*, the validity of a *wakf* in favour of one's self, is considered at some length. But all the commentaries, like the *Fath-ul-Kadîr*, the *Ghâit ul-Bayân*, etc., treat fully of the subject.

(1) [1891] I L., 13 All., 261.

The text of the *Hedâya.*

The text is as follows :—

"Abû Hanîfa (may the mercy of God be with him), has said that the right of the *wâkif* is not extinguished in the property dedicated unless the Judge makes a decree or the *wakf* is made dependant on the death of the *wâkif;* therefore [according] to him the *wâkif* should say thus, 'when I die, my house will become *wakf* in this way.' According to Abû Yusuf (may the mercy etc.), the right [of property] is extinguished by the mere declaration of the *wâkif.*(1) Mohammed (may the mercy, etc.) says the right of the *wâkif* is not extinguished until a *mutwalli* is appointed and the property delivered to him."

The recognised rule.

"[And] the author (God be pleased with him) says that *wakf* literally means detention, as when they say when tying-up an animal, 'I have tied it up,' the [two] expressions meaning the same. In law, it signifies according to Abû Hanîfa, the tying-up of the substance of a property in the ownership of the *wâkif* and the devotion of its usufruct, amounting to an *'aâriat* (commodate loan). [Then] it is said(2) that as the usufruct of a thing is non-existing and as the giving in charity of a non-existing thing is not valid, *wakf* is not lawful according to Abû Hanîfa, and this is mentioned in the *Asl.*"

"But it is most correct, that *wakf* is lawful according to him [Abû Hanîfa] though not absolute—same as an *'aâriat.*(3) According to the Two [disciples] it means the tying-up of the substance of a thing under the rule of the property of Almighty God, so that the proprietary right of the *wâkif* [therein] becomes extinguished and [it] is transferred to Almighty God for any purpose by which its profits may be applied to [the benefit of] His creatures. Consequently a *wakf* is absolute, nor can it be sold, nor given, nor inherited."

"And [thus] the word [*wakf*] comprehends both meanings [*i.e.*, that put upon it by Abû Hanîfa and that put upon it by his disciples]. Accordingly, preference should be given to the one which is founded on proof. The Disciple's views are based [*firstly*]

(1) That is "I have constituted this as *wakf*"; see the *Bahr-ur-Râik*, Appendix.

(2) *i.e.*, "some have said."

(3) The words in the translation of Hamilton "the appropriator is held to be at liberty to resume it, and the sale or gift of it is consequently lawful," do not occur in the original.

on the precept of the Prophet, who told Omar when he was desirous of consecrating his land of *Samâgh*, 'consecrate its substance, and it will not be sold, nor given, nor inherited.' *Secondly*, on the necessity that a *wakf* should be absolute, so that its reward may accrue in perpetuity to the *wâkif*; and this can be attained [only] by the extinguishment of the *wâkif's* property [in it], and constituting it Almighty God's,(1) example of which is given in the *Shar'aa* [the law] like that of a mosque. Therefore, it will be constituted like that.''(2)

It will be noticed that throughout this passage there is not a single word justifying the inference that ''the dedication must be *solely to the worship of God.*'' Hamilton translates (جعله لالله تعالى) which means '' constitutes it Almighty God's [property]'' by the words '' dedicating it *solely* to God.'' The Arabic expression has been freely paraphrased in the Persian version from which his translation was made, but even his rendering does not warrant the conclusion arrived at by the learned Judges in *Abdul Ganne Kasam*, that a *wakf* means a dedication '' solely to the *worship* of God.''(3)

In page 911, at the end of the Gloss, in the Chapter on *Wakf*, the author of the *Kifâya*(4) distinctly lays down that '' the *Fatwa* in all these matters is according to the Disciples [and not with Abû Hanîfa] by notoriety and custom, and on this is the *Ijmâ'a-ul-ummat*(5) (concordance of the universality of the people.)'' Comment of the *Kifâya*.

It is unnecessary to quote authorities in support of the proposition that the views of Abû Hanîfa on these questions have never been recognised as law among the Hanafîs. I shall give only the references to some, such as the *Fatâwai Alamgiri*,

(1) Or, ''to Almighty God''

(2) *That is*, the legal consequence is the same.

(3) In the Persian translation (Mss. copy in the Calcutta High Court) the Arabic expression has been rendered thus:—

از ملک خود بیرون کند و صرف برای خدایتعالی گرداند

''should take it out of his own ownership and make it over absolutely to God the Great.'' Hamilton has omitted the first part of the sentence and only translated the second and has thus wholly missed the meaning of the Persian version, which points to absolute transfer of the right of property from the endower to God and not to the purpose of the dedication.

(4) See Morley's Dig., Vol. I, Introd., p. cclxix.

(5) For *Ijmâ'a-ul-ummat* as one of the fundamental bases of jurisprudence, see Introduction, *ante*.

Fatâwai Kâzi Khân, Himâdia, Fathul-Kadîr, Ghâit ul-Bayân, Sharh-i-Tahtâwi, etc.

Commenting on the passage in the *Hedâya* where Hamilton has introduced the words "dedicating it solely to God," the author of the *Kifâya* has this:—"The Disciples say that examples of the absoluteness of *wakf* are given in the *Shar'aa* (the law) such as a mosque; for they say the constitution of a mosque is absolute by *consensus;* and that is withdrawal of the right [of property] for some beneficial purpose from one's self without [the subject of the *wakf*] entering into the property of anybody else. But whatever purpose of divine approbation he may have intended, it will be tied up for that purpose. It is so in all *wakfs*."(1)

And again, according to the Disciples, "the meaning of *wakf* is the extinguishment of the right of property towards God Almighty; consequently the thing dedicated will be tied up in the ownership of God on condition that its usufruct will be applied to His creatures. So that a dedication of property to Almighty God means a constitution of its profits for human beings."(2)

Misconstruction of the *Hedâya*.

Even according to Abû Hanîfa, a *wakf* does not mean "the dedication of property to the *worship of* God" or to "charity," in the English sense of the word, solely or otherwise, for according to the *Kifâya*, Abû Hanîfa held *wakf* to mean, "the tying-up of the substance in the ownership of the *wâkif*, and the devotion of its profits on the poor *or on any purpose among good purposes*."(3)

I will give here another passage from the *Hedâya* which has been subjected to misconstruction. "According to Abû Hanîfa and Mohammed (may God's mercy be with them), a *wakf* is not completed until the *wâkif* constitutes its ultimate benefit (*lit.* its end) for an object not liable ever to failure. But Abû Yusuf (may the mercy of God be with him) declares that if the *wâkif* names an object which is liable to failure, the *wakf* would [nevertheless] be lawful, and after the extinction of that object it would be for the poor, though they may not have been named [at all]. The contention of Abû Hanîfa and Mohammed is that, as *wakf* means the extinguishment of the right of property [of the *wâkif*] without

(1) *Hedâya* printed with the *Kifâya*, Vol. II, p. 889.
(2) *Ibid*, p. 895.
(3) ان الوقف حبس العين على ملك الواقف و التصدق بالمنفعة على الفقر او على وجه من وجوه الخير.

a transfer to anybody else permanently, like emancipation, if an object is named likely to fail, it will not answer the purpose intended thereby; like a temporary sale, a temporary *wakf* is invalid." "Whilst Abû Yusuf (may the mercy of God be with him) contends that the motive of [creating] a *wakf* is to obtain the approval of the Almighty, and that may be obtained in many ways, for it may be obtained sometimes by dedicating to an object which is liable to become extinct and sometimes by dedicating to an object which may continue for ever, *so that a wakf in either case is lawful.* Some have said *perpetuity* is a condition required by *consensus.* But Abû Yusuf has declared that it is not necessary, to mention perpetuity [or a continuing object] [at the time of *wakf*] for he says the words *wakf* and *sadakah* [pious offering] convey the meaning of perpetuity, as I have already stated, and [also] because in *wakf*, like emancipation, there is an extinction of right without a transfer of right [to anybody also]. AND it is, therefore, laid down in the Book [*Mukhtasar-ul-Kudûri*] that though the poor be not named in a *wakf* yet they will take [on failure of the objects named]. AND THIS IS CORRECT."(1)

The whole of the last few lines has disappeared in Hamilton's translation.

Hamilton's translation of the *Hedâya* partial and incorrect.

That the rule laid down by Abû Yusuf is the accepted doctrine has already been shown from quotations from all the recognised works of law, such as the *Fatâwai Alamgiri, Fatâwai Kâzi Khân, Fath ul-Kadîr, Radd ul-Muhtâr, Ghâit ul-Bayân, Tas-hîl,* &c., and it is unnecessary therefore to go over the same ground again at any length.(2) It may be convenient, however, to recapitulate as briefly as possible the accepted principles on this branch of the question :—

(1) That a *wakf* is valid and lawful by *consensus.*

(2) That it becomes absolute and operative, according to Abû Yusuf, immediately on the declaration of the *wâkif*, in other words immediately upon his signifying the *factum* of the dedication.

(3) That no particular words are necessary to create a *wakf.* So long as it is evident from the context or the conduct of the *wâkif* that a permanent dedication or settlement is intended, it is enough.

(1) *Hedâya* printed with the *Kifâya*, Vol. II, p. 895.
(2) See *ante*, pp. 282-288.

4) That a *wakf* may be made by a Moslem in favour of any object whether terminable or otherwise not regarded as sinful in the Mussulman Law.

(5) That where a *wakf* is made for objects that are terminable or liable to extinction, the ultimate benefit will continue for the 'poor,' even though it may not have been destined for them expressly.(1)

It would seem from the language used in some of the cases that it is thought the introduction of the word 'poor' in the case of a *wakf* in favour of one's posterity, is for the purpose of giving a "semblance of charity" to the dedication. This conception appears to underlie almost all the decisions under review. That notion, however, it will be seen, is founded on an erroneous apprehension of the principles of Mahommedan Law. Under that Law, perpetuity, express or implied, is a necessary condition in a *wakf*. The *wâkif* must relinquish his right in the property *for ever*. And it must be consigned to the custody of God *for ever*. But it is not necessary that either the word *perpetuity* should be mentioned, or that it should be stated in express terms that the dedication is for ever. If the *wakf* is in favour of an object of an unfailing or permanent character, the dedication is valid and binding without the mention of the word *perpetuity*. If it is in favour of an object or objects, which, in the course of nature, must come to an end at some time or other, and if the dedication is made with the word *wakf* or any of its equivalents like *sadakah*, then according to the recorded and recognised doctrine, the law will presume that the ultimate reversion is to the poor "who never fail," unless some other object of a permanent character is mentioned. According to Mohammed, if the purpose is of a failing character, such as a *wakf* for one's *nasl* (posterity), then either the word *sadakah* (which will necessarily give the reversion to the poor) or the poor should be expressly mentioned. The object, therefore, of introducing the word 'poor' is not to give validity to a *wakf* in favour of descendants, *but to fulfil the requirements of permanency*. If the poor are mentioned in a *wakf* in favour of descendants, as the ultimate beneficiaries, the *wakf* is valid not only according to Abû Yusuf and Mohammed, but according to all the schools, Hanafî, Shâfeî, Mâliki, and the Shiah. If the poor are *not* mentioned, the law presumes it

Principle underlying the law of *wakf*.

(1) See the *Bahr-ur-Râik*, *post*, p. 785.

and supplies the omission according to the accepted Hanafî doctrines. Thus, according to the recognised Hanafî Law, a *wakf* in favour of objects liable to fail is as lawful as a *wakf* in favour of permanent objects; the former as much secure *kurbat*, "approach to God," as the latter.

Wakf in favour of one's self.

And a provision for one's children and kindred is considered so pious, that where a dedication is made for the poor, "commencement should be made with the *wâkif's* descendants, then his kindred, then the neighbours, and then his fellow towns-people."(1)

I come now to another passage of the *Hedâya* which has been subjected to an equal degree of misconstruction, namely, where the difference between Abû Yusuf and Mohammed about the validity of a *wakf* in favour of one's self is discussed.

"If the *wâkif* constitute the income of the *wakf* for himself or reserve the governance of it for himself, it is valid according to Abû Yusuf (may God's blessings be with him)."

"I (may God be pleased with me) say that there are two [distinct] subjects [or sections] mentioned, *viz.*, the reservation of the usufruct for one's self, and, secondly, constituting one's self *mutwalli* thereof."

"The first is valid according to Abû Yusuf, though not so by analogy according to Mohammed. Such is the opinion of Hillâl of Rai, and has been adopted by Shâfeï. Some say that this difference between the two is founded on the difference between them as to the necessity of seisin and separation; whilst others say that their difference is with respect to the present case only. And this difference exists whether the *wâkif* reserves a part of the income only for himself during his life, and after his death for the poor, or the whole for himself during his life to go to the poor after his death.(2) If, also, a man were to make a *wakf* reserving the whole or part of the income for his *ummahât-ul-awlâd* [pl. of *umm-ul-walad*, mother of his child, *viz.*, a bondswoman who has borne him a child], or his *muddabars* [slaves to whom he has given a conditional grant of freedom] during their lives, and after their death to the poor and indigent, some say that this is lawful by *consensus*. Whilst others say that in this case also there is the same differ-

(1) *Fath-ul-Kadîr*, Vol. II, p. 641; Comp. Tahtâwi (Egypt Ed.), Pt. II, p. 533.

(2) That is to say Abû Yusuf holds it valid, whilst Mohammed apparently does not.

Wakf in favour of one's self. —contd.

ence [between Abû Yusuf and Mohammed], and this is correct,(1) for his reserving the income for their use for their lives is the same as if he conditioned it for his own use. Mohammed's argument is this: a *wakf* is an act of bounty in the shape of a transfer of the property [to God], as I have stated before, and consequently to reserve the whole or part of the income [of one's *wakf*], for one's self would make that transfer void, as a *tamlîk* [transfer] to one's self is not right,(2) as if a man made a *conditional sadakah*(3) [pious offering] or reserved a part of a mosque for himself. Abû Yusuf bases his opinion upon what is related from the Prophet (may God's blessings be with him), that is, that he used to eat out of the income of his own pious offerings, in other words, his own pious *wakfs*; as the *wâkif* cannot lawfully eat the same without a condition to that effect [the Prophet's consuming the same], shows that it is lawful for the *wâkif* to reserve the produce for himself. *Secondly*, as I have said before, *wakf* implies the extinguishment of the proprietary right in the *wakf* by its transfer to Almighty God with the object of approaching Him, so if one conditions that a part or the whole [of the income] should be for him [during life], it would mean his obtaining for himself [an interest] in what belongs to God; and not that he reserves to himself what [before] was his own; and it is lawful to reserve an interest in the property which is transferred to God; thus, if a man were to build a *khân* (caravanserai) or a reservoir, or [dedicate] a piece of land for a cemetery, and condition that he should reside [in the *khân*] or drink water out of the reservoir or be buried in the cemetery, it would be lawful. *Thirdly*, the motive in *wakf* is a desire to approach [God], and to expend the income of the *wakf* upon one's self is an act of piety by which an approach is obtained, for the Prophet has declared 'a man's provision for himself is an act of charity.' ''

Kifâya.

The *Kifâya* commenting on this passage says, "if the *wâkif* constitute the produce or the governance of the *wakf* for himself, it is lawful. As regards the first, *viz.*, the reservation of the income by the *wâkif*, it is lawful according to Abû Yusuf, and the Jurists

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1) The author means to say that the fact of there being a difference is correct.

(2) The property being already his, he cannot transfer it to himself.

(3) *Sadakah-munfaza*, charity given to a poor man with a condition that a portion will be the giver's property.

of Balkh are agreed thereon, and Sadr us-Shahîd has declared that the *Fatwa* is in accordance with the rule of Abû Yusuf.''(1)

No difference regarding the validity of a *wakf* in favour of one's descendants.

Throughout all these discussions in the *Hedâya* or anywhere else there is not the least trace of a difference of opinion as to the validity of a *wakf* in favour of one's descendants. There is a difference as to a dedication with a reserve of interest in favour of one's self; there is also some slight difference of opinion on the question whether a man may lawfully make a dedication in favour of his slaves (for that is tantamount to a dedication in favour of one's self), *but there is no difference of opinion as to the validity of a wakf in favour of one's children and descendants. All the Jurists, all the schools, are agreed thereon.*

Fatima Bibi v. *Advocate-General.*

The principles of the Mussulman Law, it is submitted, were rightly apprehended in the case of *Fatima Bibi* v. *The Advocate-General.*(2) In this case, West, J., said as follows :—''If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a *wakf* is not made invalid by an intermediate settlement on the founder's children and their descendants.'' [It must be noted that this is by consensus, without any difference of opinion between Abû Yusuf and Mohammed; according to Abû Yusuf, the law will presume the ultimate dedication to an unfailing purpose from the use of the word *wakf*.]

The learned Judge then goes on to say that ''the benefits they [the descendants] successively take, may constitute a perpetuity in the sense of the English Law, but according to the Mahommedan Law that does not vitiate the settlement, provided the ultimate charitable object be clearly designated.'' This, again, is according to Mohammed and not Abû Yusuf. Apparently, the learned Judge overlooked the difference between the two, and the fact that Abû Yusuf's rule is the recognised law in the Hanafî world. Still there is some basis for the view which he has expressed in the passage last quoted, whereas the other cases are in conflict with the whole body of Moslem jurists and the principles contained in Mahommedan law-books.

(1) *Hedâya* printed with the *Kifâya*, Vol. II, p. 901.

(2) [1881] I. L., 6 Bom., p. 42; In the case of *Jugutmoni Chowdhrani* v. *Romjani Bibee* [1882], I. L., 10 Cal., 533), it was also thought that the ultimate purpose should be *expressly* mentioned.

Perpetuity, the essence of a *wakf*.

As a matter of fact, no analogy drawn from English Law with regard to trusts and settlements can assist in the comprehension of the Mahommedan Law relating to *wakfs*. The Mussulman Law relating to trusts or consecrations is founded on the ordinances of the Prophet, and the practice of his Companions and early Disciples based on those rules. Under the English Law a perpetuity is bad. Under the Mussulman Law, *without any difference*, perpetuity is an essential element in the constitution of a *wakf*. A consecration for one's family and posterity is, in the Mussulman religion and law, a charitable and pious purpose in the strictest sense of the term. But as one's descendants are liable to become extinct at some time or other, the law requires that, in order to ensure perpetuity, the reversion should be to an unfailing object. Under the recognised Hanafi Law, such reversion need not be in express terms, for if no other object is mentioned, in whose favour the *wakf* will take effect upon the extinction of the *wâkif's* descendants, the law itself will supply the omission, and the *wakf* will be for the poor.

English doctrine of perpetuity inapplicable to the Mussulman Law.

Having regard to the difference in the standpoints of the English and the Mussulman lawyer, it is not surprising that the former, imbued with the doctrine of the English Law against perpetuities, should find it difficult to comprehend the Mahommedan Law relating to *wakf* in favour of one's family or the principle upon which it is founded.

The whole experience of judicial administration justifies the above observations: whilst the Government is acutely anxious to protect and preserve, in the public interests, family *wakf*, the Courts of Justice have taken an exactly opposite course.

The judgment of the Calcutta High Court in *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhry*(1) has been affirmed by the Judicial Committee of the Privy Council. The authorities in support of family benefactions were brought on this occasion to their Lordship's notice. With regard to them they remark as follows:—"The opinion of that learned Mahommedan lawyer (referring to the dissenting Judge in the case of *Bikani Mia*) (2) is founded, as their Lordships understand it, upon texts of an abstract character, and upon precedents very imperfectly stated.

(1) [1894] I. L., 22 Cal., 619; s. c. L. R., 22 I. A., 76.
(2) [1892] I. L., 20 Cal., 116.

For instance he quotes a precept of the Prophet Mahomet himself to the effect that 'a pious offering to one's family, to provide against their getting into want, is more pious than giving alms to beggars.' 'The most excellent of *sadakah* is that which a man bestows 'upon his family.' And by way of precedent he refers to the gift of a house in *wakf* or *sadakah*, of which the revenues were to be received by the descendants of the donor Arkan. His other old authorities are of the same kind."

"As regards precedents, their Lordships ought to know a great deal more in detail about them before judging whether they would be applicable at all. They hear of the bare gift and its maintenance, but nothing about the circumstances of the property except that in the case cited the house seems to have been regarded with special reverence—or of the family, or of the donor."

Examination of the judgment of the Judicial Committee in *Abul Fata Mahomed Ishak* v. *Rasamayi Dhur Chowdhry*.

It is submitted that those very precedents, which appeared meagre or imperfect to their Lordships, form, as has already been attempted to be shown in these pages, the foundation on which the Mahommedan Law relating to *wakf* is based; and it is upon those precedents that Mussulman communities throughout the world(1) have moulded their practice and their religious and social life for centuries.

(1) In the Art. by Professor Kresmárik (already referred to) in the *Zeitshrift der Deutschen Morgenländischen Gesellschaft*, p. 554, §§. 24, the validity of *wakfs* in favour of the founder's children and descendants is expressly recognised. Professor Kresmárik says "we have several times alluded to the lawfulness of a *wakf* in which it is conditioned that the income shall belong to the founder during his life time, and after his death to his children and their descendants, and after the extinction of his posterity shall be devoted to pious purposes. This class of *wakf* is in Turkey called *awlâdiyyéh-wakf* from the Arabic word *walad*, plural *awlâd* meaning children." Then after giving the opinions of Mohammed and Hillâl, and the doctrine of Abû Yusuf recognised as law on the point, he goes on to say, "it would be a mistake to assume that there is any legal difference between *awlâdiyyeh wakf* and *wakfs* for other pious purposes; or that the descendants of the *wâkif* are vested with any other rights over the *wakf* than the right to the income or benefits." "The Mahommedan Jurists," adds the Professor, "also insist that the *wakfs* in favour of children and children's children and ultimately for the poor are not to be regarded as legacies; they are ordinary *wakfs*; and the beneficiaries, they declare, live on God's property. The holder (inhaber) of an *awlâdiyyeh-wakf* is equally obliged to guard the integrity of the *wakf* as any other *mutwelli* and is responsible for any damage thereto." He cites authorities both Arabic and Turkish to show that such *wakfs* are absolutely valid in the Mussulman Law. A passage from the *Bazâzia* is of special importance. "When a person makes a *wakf* in favour of his *awlad* and the *awlâd* of his *awlâd* in perpetuity so long as the posterity lasts, and after them for the poor it is lawful, and it is not a legacy for his children for they only eat out of the property of Almighty God, according to the condition in the *wakf*."

Their Lordships observe:—"As regards precepts which are held up as the fundamental principles of Mahommedan Law, their Lordships are not forgetting how far law and religion are mixed up together in the Mahommedan communities; but they asked during the argument how it comes about that by the general law of Islâm, at least as known in India, simple gifts by a private person to remote unborn generations of descendants, successions that is of inalienable life-interests, are forbidden; and whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settlor says that they are made as *wakf*, in the name of God, or for the sake of the poor. To those questions no answer was given or attempted, nor can their Lordships see any. It is true that the donor's absolute interest in the property is curtailed and becomes a life-interest, that is to say, the wakfnama makes him take as mutwali or manager. But he is in that position for life; he may spend the income at his will, and no one is to call him to account. That amount of change in the position of the ownership is exactly in accordance with a design to create a perpetuity in the family, and indeed is necessary for the immediate accomplishment of such a design."

Difference between *hiba* and *wakf*.

The keynote to their Lordships' judgment is to be found in this passage; they cannot understand the difference between "simple gifts," to use their expression, and "*wakfs*," nor were counsel able to explain it to them. One important point of difference may be pointed out. Under the Hanafî (Sunni) Law, when a gift is made the donee takes an absolute interest in the subject of the grant; he has absolute power of disposition over it and can enjoy it in any way he likes and deal with it in any manner he chooses. And accordingly any restriction on, or derogation of, his right by the creation of life-interests is held to be invalid. In a gift or *hiba*, the donee is a human being; in a *wakf* (for whatever purpose made so long as it is not immoral), the donee is the Almighty God. In *hiba*, the object is to pass the property from one human being to another; in a *wakf*, the object is to keep the property in the custody of the Almighty(1) for the benefit of mankind; and, therefore, if the original purpose named at the consti-

(1) See the case of *Mohammed Sadik* v. *Mohammed Ali*, supra, 1 Sel. Reports, 17.

tution of the *wakf* fails, the benefit is applied to other purposes of a like nature. If a *wakf* is for specific individuals, and they come to an end, it is applied to the relief of the poor and needy. Again, in the case of a *hiba* the dominion over the subject passes from one human being to another; in the case of a *wakf* the right of property is absolutely extinguished. If the grantor or appropriator were to remain in possession, it would be only as a trustee. He may be turned out any moment for breach of the conditions of the consecration. The beneficiaries have no right in the property; they are only entitled to the benefit of the trust to the extent specified in the *wakf*.(1)

Difference between *hiba* and *wakf*—contd.

"Their Lordships," the judgment continues, "have endeavoured to the best of their ability to ascertain and apply the Mahommedan law, as known and administered in India, but they cannot find that it is in accordance with the absolute, and as it seems to them extravagant, application of abstract precepts taken from the mouth of the Prophet. Those precepts may be excellent in their proper application. They may, for aught their Lordships know, have had their effect in moulding the law and practice of *wakf*, as the learned Judge says they have. But it would be doing wrong to the great law-giver to suppose that he is thereby commending gifts for which the donor exercises no self-denial, in which he takes back with one hand what he appears to put away with the other; which are to form the centre of attraction for accumulation of income and further accessions of family property; which carefully protect so-called managers from being called to account; which seek to give to the donors and their family the enjoyment of property free from all liability to creditors; and which do not seek the benefit of others beyond the use of empty words."

In making these remarks their Lordships, it is submitted, did not sufficiently keep in view the principle underlying the Mahommedan doctrine of family benefactions, that a provision for one's family and descendants is an act of piety, more pious than giving to strangers. And it is very probably owing to this circumstance that the law enunciated in the works of Mussulman writers seemed

Error in the comprehension of the underlying principle.

(1) The remarks of Professor Kresmárik (see *ante*) have an important bearing on the author's view of the law.

to their Lordships an "extravagant application of abstract precepts taken from the mouth of the Prophet."

The above quoted passages give rise to the following considerations, which are submitted without in any way impugning the authority which must always attach to the utterances of the Judicial Committee :—

Are Courts of Justice competent to inquire into the origin of, or reason for, any law recognised and accepted among any community subject to British rule, the enjoyment of which has been guaranteed to them as well by statute as by Royal Proclamation ? Are they not bound to administer the law as they find it ? Is it not their duty to ascertain what the law is as received, recognised and acted upon by the general body of the community ? And if they are entitled to consider what was in the mind of the Lawgiver, are they competent to rely upon their own *à priori* reasoning and pre-conceived notions, without any regard to his recorded sayings and acts as understood by his followers all over the world ?

In the cases to which reference have been made in this chapter, the Courts had to find what the developed Mahommedan Law of Wakf was, as accepted by the generality of Mussulman lawyers and jurists, and to administer the same, although it might have appeared to them that in some respects it was inconsistent with the law on the subject of *gift*. It is respectfully submitted it is not competent to Courts of Justice to refuse to administer the law as they find it, until it is ascertained to be in direct contravention of the statutory enactments of the State.

If the enunciation means that a *wakf* purely in favour of one's descendants is not valid, then it must be respectfully submitted that the views expressed by their Lordships are opposed to the Mahommedan Law and the general *consensus* of Mahommedan nations.

Recognition of the Mussulman Law by the Judicial Committee.

The Mahommedan subjects of His Majesty are, however, grateful to their Lordships for condemning in express terms the contention that cases relating to *wakf* should not be governed by the Mahommedan Law. Their Lordships say :—"Among the very elaborate arguments and judgments reported in *Bikani Mia's* case, some doubts are expressed whether cases of this kind are governed by Mahommedan Law; and it is suggested that the decision in *Ahsanullah Chowdhry's case* displaced the Mahommedan Law in

favour of English Law. Clearly the Mahommedan Law ought to govern a purely Mahommedan disposition of property."

Although in the judgment in *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhry* there are many observations of a contentious character and in conflict with the Mussulman Law which have naturally caused a widespread feeling of alarm among the Mussulmans as a *direct* interference with their religious institutions, it is respectfully submitted that those observations are limited, and were in fact intended to be limited, to the special facts of the case. For some of the provisions of the deed were of such a vicious character that it was easy to presume that the *wakf* in question was not for the maintenance of the family, or to prevent them from falling into poverty, but was created only with the object of forming a centre for accumulation of income and aggrandisement; that in reality the founders had no pious object in its constitution.

Principle deducible from the judgment.

Taking their Lordships' judgment as it stands, two principles are deducible from it. The first of these appears to be that for the constitution of a valid *wakf* it is not necessary that the property should be *solely* dedicated for pious uses. Under this head their Lordships say as follows :—"Some authorities go so far as to hold that for a valid *wakf* the property should be solely dedicated to pious uses. On that point, however, this Board in *Ahsanullah Chowdhry's case* adopted the opinion of Mr. Justice Kemp to the effect that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*." When a *wakf* of this kind is attempted to be created, there must be some present provision of a substantial, and not merely of an illusory, character for some pious uses, but those pious uses presumably need not be of a character which would be considered as such by a non-Moslem.

According to the enunciations of the Judicial Committee, therefore, where it is proved that a substantial portion of the income is devoted to or is likely to be spent on purposes, which, according to the law or customs and usages of the Mahommedans, are pious and meritorious, or in the performance of ceremonies and the distribution of charities on occasions regarded as sacred, the dedication will be valid.(1)

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(1) *Phulchand* v. *Akbar Yar Khan* [1896], I. L., 19 All., 211.

As a necessary corollary from the above, it follows that when the portion of income set apart for religious or general pious purposes is such as to indicate that the *wakf* was not altogether illusory, nor designed merely for the aggrandisement of the *wâkif's* family, the consecration will be valid, though the rest of the income may be devoted for the maintenance of the *wâkif's* descendants.(1) In another case where the *wakfnâmah* provided in the first instance for the support of the descendants and kindred of the grantor who might be in want and in need of support, and directed that the surplus of the income of the property dedicated should be applied to purposes regarded as "undoubtedly religious," the dedication was held to be valid.(2) Of course the application of this principle will depend on the idiosyncrasies of individual judges, and it remains to be seen how it will work in practice.

The views expressed in *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhry* have more or less been adopted in subsequent decisions with the result that the administration of the Mussulman Law of *wakf* has become a matter of some difficulty not depending on recognised rules but on individual opinions proceeding on hypothetical considerations.(3)

For example in *Deoki Pershad* v. *Inaitullah*(4) the Allahabad High Court held that the fact that the grantor of a *wakf* (meaning thereby the *wâkif* or endower) has in the deed constituting the same made some provision for the maintenance of his kindred and descendants will not render the *wakf* invalid. Whilst in another case, the same Court held that a mere charge for some charitable purposes on the profits of an estate strictly settled on the family of the settlors in perpetuity and not dedicated in substance to charitable uses is not sufficient to constitute a good and valid *wakf*.(5) As I have already pointed out, this view proceeds upon the notion that a *wakf* in favour of the settlor's family is not valid, a notion wholly opposed to the Mahommedan law.

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(1) See *Mahommed Israil Khan* v. *Sushti Chunder Ghose*, supra.

(2) *Deoki Pershad* v. *Inaitullah* [1892], I. L., 14 All., 375.

(3) See *Fazlur Rahim Abu Ahmud* v. *Mahomed Obedul Alim Abu Ahsan* [1903], I. L., 30 Cal., 666, and *Mahommad Anwar Ali* v. *Razia Bibi* [1904], I. L., 21 All., 320.

(4) [1892] I. L., 14 All., 375.

(5) *Mohammed Munawar Ali* v. *Rasulan Bibi* [1904], I. L., 21 All., 329.

In a case(1) which has already been cited in connection with another branch of the subject, the Allahabad High Court laid down if I may venture to say, very correctly, that in determining whether a disposition of property made by a Mahommedan is or is not a valid *wakf*, the intention of the *wâkif* may be interpreted by reference to custom prevailing at the time the *wakf* was made, and proceeding upon the cases decided by the Judicial Committee,(2) it added that if there is found to be a substantial dedication of the property dealt with to charitable uses, that dedication will constitute a valid *wakf*.

In *Mohammed Azizuddin Ahmed Khan* v. *The Legal Remembrancer, N.-W. P. & Oudh*(3) a Mahommedan apparently belonging to the Hanafî sect (though in the report he is called by the general and vague term of "a Sunni Mohammedan") had executed and registered a document which purported to be a deed of *wakf*, but never acted upon it and retained possession until his death of the property dealt with by the deed, which property subsequently passed to his two sons by inheritance. The learned Judges held that under the circumstances no valid *wakf* of the property mentioned in the deed was constituted.

They also laid down that, according to the "law of Sunni Mahommedans," it is essential to the validity of a *wakf* that he *wakif* should actually divest himself of possession of the *wakf* property.

This latter view, as I have already pointed out, is opposed to the recognised Hanafî doctrine. If the intention to create a *wakf* is clear from all the surrounding circumstances the mere fact that the *wâkif* retained possession of the property dedicated will not affect the validity of the *wakf*.

Dedication for the maintenance of a tomb.

Under the English law, a dedication for the purpose of maintaining a tomb has been held to be invalid as being in contravention of the rule against perpetuities.(4) This doctrine has been imported by the Madras High Court into the decision of cases arising under the Mahommedan law which recognises, in distinct terms, the validity of dedications for the maintenance of tombs, sepulchres and mausoleums. In the case referred to, a Mussulman lady by an instru-

(1) *Phul Chand* v. *Akbar Yar Khan* [1896], I. L., 19 All., 211, supra.

(2) *Mohammed Ashanulla Chowdhry* v. *Amar Chand Kundu*, supra, and *Abul Fata Mahommed Ishak* v. *Rasamaya Dhur Chowdhry*, supra.

(3) [1895] I. L., 15 All., 321.

(4) *Neo* v. *Neo*, L. R., 6 P. C., 381.

ment in writing dedicated certain movable and immovable properties for the up-keep of her husband's tomb and "for the daily, monthly and annual expenses of the aforesaid mausoleum, such as lighting, frankincense, flowers, and the salaries of repeaters of the Koran and readers of benedictions, etc., as well as for the annual *fateha* ceremonies of the deceased," and after her own death for her annual *fateha* ceremony. It was found that a traveller's inn was erected by the endower of the property as an appurtenance to the tomb, and that the performance of the ceremonies necessarily involved the distribution of charity, and that the lights at the tomb were of use to passers-by. Under the Mahommedan Law there could not be the faintest doubt that the *wakf* in this case was absolutely valid. The Madras High Court, nevertheless, held that the instrument did not create a valid *wakf*, and that it was void as contravening the rule against perpetuities.(1)

In *Bibi Jan* v. *Kalb Hossain*(2) it appeared that a Mahommedan lady of the Sunni sect had dedicated certain properties "to God and charitable and religious purpose" and provided out of the income for the celebration of the birth of Ali Murtaza (the fourth Caliph of Islam), the observance of the Moharram and the death-anniversaries (*Fateha Barsi*)(3) of the members of the *Wâkif's* family, the upkeep of the *tazias*(4) and the repairs of the Imambara. In a suit by her heirs to have the *wakf* declared invalid, the High Court of Allahabad held that the dedication was not illusory; that there was an intention of creating a substantial *wakf* for pious and charitable purposes and that the objects for which the *wakf* was created were valid. The learned Judges added that the keeping of *tazias* was a pious and religious ceremony not restricted solely to the Shia sect.

(1) *Kaliloola Rakib* v. *Nuseeruddeen Sahib* [1894], I. L., 18 Mad., 201.

(2) [1908] I. L., 31 All., 136.

(3) Annual ceremonies observed both among Shias and Sunnis at the anniversaries of the death of people at which prayers are offered and blessings invoked for the soul of the deceased.

(4) Symbols of the biers of the Imam-martyrs.

CHAPTER XJ

THE OBJECTS OF A WAKF.—(Continued.)

SECTION I.

WAKF IN FAVOUR OF ONE'S CHILDREN AND DESCENDANTS.

Principles of construction.

ACCORDING to all the jurists, when a *wakf* is constituted in favour of the *wâkif's* descendants, and they are mentioned in general terms, or when three generations are mentioned, the trust takes effect in their favour so long as they exist. For example, if a man were to say, 'this land of mine is a *wakf* for my children,' using the term *awlâd* or *farzandân*, the term being general, it will endure for the benefit of his descendants so long as they are in existence. And so long as a single descendant of the *wâkif* is in existence, no portion of the usufruct will go to the poor.

Similarly, if he were to say, "this *wakf* is for my child and the child of my child and the child of the child of my child" (using the word in the singular, but mentioning three generations), the effect would be the same.

This is clear from the following passage in the *Fatâwai Alamgiri* :—

"And if a man should say 'this is a *wakf* for [original, *upon*] my child and for the child of my child and for the child of the child of my child,' mentioning three generations, the income is to be expended upon his *awlâd* (children) for ever, so long as there are any descendants, and is not to be applied to the poor; while one remains, the *wakf* is to them, and the lowest among them, the nearer and more remote being alike, unless the *wâkif* say in making the *wakf*," the nearer is nearer,' or say, 'on my child, then on the child of my child,' or say, 'generation after generation' (*batnan-b'aad-batn*), when a beginning must be made with them with whom the *wâkif* has begun."(1)

"Or if he should say, 'this my land is a *wakf* or a pious *mowkoofa* on my children' (*awlâd*), all generations are included on

(1) After the *Fatâwai Kâzi Khân*; *Fatâwai Alamgiri*, Vol. II, p. 474.

account of the general character of the name; but the whole is to the first generation while any remains, and when they are exhausted, to the second, and, when they are exhausted, to the third and fourth and fifth, all these generations participating in the division, and the nearer and more remote being alike."(1)

This principle is given in identical terms in the *Fath ul-Kadîr*.

It would be otherwise if he said 'this is a *wakf* for my child (*walad*),' using the singular expression, or even if he said 'my child's child,' unless he extended his meaning by other expressions, indicating that though the term was used in the singular, or though only two generations were mentioned, his intention was to give the proceeds to his descendants so long as they happen to be in existence.

Principles of construction.

The *Fatâwai Alamgiri* states further that if a person were to say, 'this my land is a *mowkoofa* as a pious offering on my child (*walad*),' the produce is for the child of his loins, males and females taking equally, and so long as there is in existence one child of his loins, the produce is to him or her only. When there no longer remains one of the first generation (*batn*), the produce is to be expended on the poor, nothing being allowed to the child of a child. But if he had no child of his loins at the time of the settlement, and there was then a child of a son, the produce is to the son's child, none of the generations below him participating with him; the child of a son, in the event of there being no child of the loins, thus coming into his place. The child of a daughter is not included, according to the approved traditions,.....which is correct; this is according to the *Fatâwai Kâzi Khân*. If, after this, he should have a child of his loins, the future produce is to be expended on such child according to the *Zakhîra*. And when there is no child of the first and second generations, but there happens to be a third, a fourth and any lower generation, according to the *Muhît* the third generation, and those below them, participate together, even though there should be many of them."

And then comes the significant passage, "all the rules stated in respect of a *wakf* in favour of his child" [meaning the child

(1) *Fatâwai Alamgiri*, Vol. II, p. 474; after the *Muhît-us-Sarakhsi*.

of the endower] are applicable to a *wakf* in favour of the 'child of such an one' [meaning another person]."(1)

So also in the *Radd ul-Muhtâr*:—

"But if a man were simply to say that it was a *wakf* for his *walad*, then the daughter's children will not be included, for *walad* by itself means his own child,....though it includes in the language of custom the son's children, owing to the fact that the son's children are descended from the *wâkif*."(2)

But there is considerable divergence of opinion regarding the exclusion of daughter's children when two generations are mentioned.

The *Fatâwai Alamgiri*, quoting the *Muhît-us-Sarakhsî*, states that "If one were to say, 'this my land is a pious offering and a *wakf* (*sadakah-mowkoofa*) on my child and the child of my child,' the child of his loins, and the child of his child in existence on the day of the settlement, and those who are born afterwards, are included, and the two generations participate in the produce, but none below them are included, nor the children of daughters, according to the approved traditions (*Zâhir-ur-Rawâyèt*); and the *fatwa* is in accordance with it."(3)

According to Imâm Mohammed, the term *walad-ul-walad*, "child's child" or "children's children" includes daughter's children. The subject has been discussed at some length in the *Radd-ul-Muhtâr*(4) where the author states that eminent jurists like Khassâf, and Ibni Himâm have held the contrary, *viz.*, that in such a *wakf* the children of daughters are not to be excluded. Khassâf, in fact, says there is no warrant for the doctrine of exclusion except a statement of Abû Hanîfa which is applicable to the case of a bequest. Kâzi Khan(5) also says that Khassâf has held in accordance with the opinion of Imâm Mohammed that daughter's children are included in the benefit of such a *wakf*. In another place he lays down the following rule:—When a person says this is [*a wakf*] for my *awlâd* and their *awlâd*,

(1) *Fatâwai Alamgiri*, Vol. II, p. 474, the authority cited for the last enunciation being the *Zakhîra*.

(2) *Radd ul-Muhtâr*, Vol. III, p. 672.

(3) *Fatâwai Alamgiri*, Vol. III, p. 474; after the *Muhît-us-Sarakhsi*. Comp. the *Bahr-ur-Râik*; see Appendix. The word "*awlâd*" is a general term and includes all descendants whether descended through males or females.

(4) Vol. III, p. 672.

(5) *Fatâwai Kâzi Khân in loco*.

in all such cases it will include the children of sons and the children of daughters, and *this is correct.*''(1)

"Allâmah Shaikh Ali al-Mukaddasi [the author of the *Hâwi*, who died A. H., 600], has laid down that if a man were to make a *wakf* in favour of his *walad* and the *walad* of his *walad*, in such a case his own children, the children of his sons and the children of his daughters will be included. And Khassâf and Kâzi Khân have adopted this view.''(2)

So in the *Fath ul-Kadîr*, "if a person were to say 'this is a *wakf* on my *walad* and the *walad* of my *walad* (child of my child) and then on the poor,' in this all the children of his loins participate, the children of his daughters alike with the children of his sons. And Hillâl and Khassâf have accepted and Kâzi Khân has held it to be correct.''(3)

It may be taken, therefore, that the view expressed in the *Fatâwai Alamgiri* represents only one set of opinions, whilst Khassâf's doctrine appears to be supported by a greater weight of authority.

Kâzi Khân states these principles shortly thus :—If a person make a *wakf* of his land for his *walad* (issue of his loins), and after him or her for the benefit of the poor, without mentioning that upon his or her death, it will go to his or her issue, in such a case, according to the jurist Abu'l Kâsim, upon the death of such *walad*, the produce will go to the poor. If he says, "this is a *wakf* for my *walad* and my *walad's walad* and after them for the poor,'' according to Abu'l Kâsim, the produce will be applied to his children and children's children, and on the death of the last surviving of the *wâkif's* children's children, the produce will go to the poor and not to the descendants in the third degree. But if he were to say "for my *walad* and my *walad's walad* and my *walad's walad's walad*,'' so that the third generation is [expressly or impliedly] included, the produce would be applied to his descendants in perpetuity, as long as any of them be surviving, and it will not be given to the poor so long as any

Mention of three generations equivalent to perpetuity.

(1) *Fatâwari Kâzi Khan*, Vol. II, p. 253.

(2) "Khassâf is an Imâm whose worth has been testified to by Shams-ul-Aimma Halwâni who has declared that Khassâf's views are adopted everywhere.'' —*Ibid*, p. 672.

(3) *Fath ul-Kadir*, Vol. II, p. 643.

of his descendants, however low, may be in existence. *When the wâkif has mentioned three generations, it will be applied to his descendants always, so long as they are in existence, and the near and remote will be equally entitled to the benefit thereof, unless the wâkif has provided that the nearer shall be preferentially entitled, or has said "line after line" or "for my children and after them for their children,"* and so on. In such cases the commencement of the division will be made as provided for by the *wâkif*."(1)

In other words, when a man makes a *wakf* for his (or anybody else's) child (*walad*)(2) and does not mention that after the death of that child it will enure to the benefit of succeeding generations, on the extinction of the first generation, the *wakf* will go to the poor. But if he uses the term *awlâd, farzandân, nasl, 'akab* or *khalaf*, the *wakf* is for his descendants, male as well as female, in perpetuity. When a *general term of this character is used, no further condition is necessary.* Similarly, if he mentions three generations as the recipients of the benefit of the *wakf*, it is tantamount to his declaring that it is a perpetual *wakf* in favour of his descendants, and will be applied to their benefit as long as any of them is alive.(3)

A general term is equivalent to saying 'so long as his posterity lasts.'

If a *wakf* is made in favour of children specifically named, the others not named will be excluded.

Wakf in favour of children specifically named.

A *wakf* in favour of *A*, and after him for his children (generally) will include all the children, both male and female. Similarly, if a person make a *wakf* for his own children (*awlâd*) both males and females will be included.

If a man were to say, "this *wakf* is for my children and *their* children and *their* children's children" those of his children who were living at the time of the creation of the *wakf*, or who are born afterwards, and their children would take, but not the children of those children who had died before the *wakf*.

But if he said, "the *wakf* is for my child or children and for my child's child or children's children and for *their* children's children," then the children of those children who had died before

(1) Same in the *Hâwi* and the *Durr-ul-Mukhtâr*; *Radd ul-Muhtâr*, Vol. III, p. 677, see *post*.

(2) *Walad* has usually a collective signification and means children.

(3) Comp. the *Majm'aa ul-Anhar*, Part II, p. 641.

the creation of the *wakf* would participate; for the term "my children's children" refers to all his grandchildren, not merely to the children of those children who are entitled to participate in the *wakf* at its inception.(1)

Validity of a *wakf* in favour of one's descendants.

It must be noted that these principles proceed on the validity of *wakfs* in favour of one's family and descendants and show the utter untenability of the position assumed by the Indian tribunals in declaring against them. The application of the rules depend on the intention of the *wâkif* as deducible from the language used by him.

When a *wakf* is made in the following terms, "This *wakf* is in favour of my children that are born and for my *nasl*," any children born afterwards will be included; but if the term, *their nasl*, had been used the after-born children of the *wâkif* would not have been included.(2)

If the *wâkif* were to say, "it is for my *walad* who are born and for their *nasl* and for all my *walad* who may be born hereafter," his after-born children will take but not their children. If he were to say, "it is for my *walad* who are born and their *nasl* and for the *nasl* of those that are born subsequently," the children of the after-born children will take though not their parents.

Wakf in favour of the children and the poor.

When a *wakf* is in favour of children without any right of survivorship, as each child dies his interest goes to the poor, for the interest of each is separate. But the case is different where there is a right of survivorship or joint tenancy implied from the nature of the grant. For example, if a man were to make a *wakf* in favour of his children and then for the poor; it is clear that the intention of the donor was that the *wakf* should continue for the benefit of the *wâkif's* children so long as any one of them was living, and it is only on their failure that the *wakf* should go to the poor; consequently when each child dies his interest goes to the survivors, or his or her child as the case may be.(3)

Right of survivorship.

If a man were to make a *wakf* in favour of his wife and his children, upon her death her interest will not devolve upon his child by her alone but will go to all his children, unless there is any

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(1) *Radd ul-Muhtâr*, III, p. 678. (2) *Fath ul-Kadir*, Vol. II, p. 644.
(3) *Radd ul-Muhtâr*, Vol. III, p. 680.

provision to the contrary making her interest descendible to *her* children.(1)

If the *wakf* is made "for my sons," or "for my brethren," the females will be included. If a man were to say, "the *wakf* is for my daughters," and he has only sons, the *wakf* will be applied to the benefit of the poor, until a daughter is born to him, or it is shown that the expression had been used by mistake, and though he used the term daughters he meant sons or both.(2)

If a *wakf* is made generally without any specification regarding the proportion in which the males and females of each line should take the produce, the distribution should take place in the usual proportion of two for each male and one for each female.(3)

The word *nasl* includes all descendants on the male as well as the female side.(4)

The word *'akab* or *khalaf* includes descendants through males; *'Akab and khalaf.* *âl, jins*, and *ahl-ul-bait* of the *wâkif* include those persons who are related to him through the father or grandfather or any other male ancestor. And *kârâbatdâr, arhâm* and *ansâb* of the *wâkif* include all those people who are related to the deceased from any ancestor, male or female. The highest ancestor to which the line would be carried is the person who first adopted Islâm.

If a man were to say, "this is a *wakf* for my *walad* and for my *nasl* in perpetuity and that should any one of them die, his or her share should go to his *nasl*," in such case the entire produce would be divided among all the *wâkif's* children and *nasl;* and the shares of those among them who are dead will go to their children.(5)

If a person were to make a *wakf* in favour of his children, and make no provision declaring that upon the death of any one of them his or her share should go to his or her children, such share or interest will merge in the general produce and will be divided among

(1) *Wajiz ul-Muhit.*

(2) From the *As'aâf.* The reason given is that according to the Arabic idiom when males and females both co-exist the use of the plural form of the masculine noun includes the feminine, so that though the word 'son' in the singular refers only to a male child, the word 'sons' includes female children as well, when both sons and daughters co-exist. The converse case, however, does not hold good.

(3) *Radd ul-Muhtâr*, Vol. III, p. 679.

(4) *Ibid*, p. 682; *Majm'aa ul-Anhar*, Part II, p. 611.

(5) *Ibid*, p. 679.

the beneficiaries for the time being.(1) If the *wâkif* were to make a condition that upon the death of any of his descendants, his or her share should go to his or her *nasl*, in that case it would devolve upon all the children of such deceased descendant, and should any of the children be dead, the children of such child would take his or her share. Should he say nothing about the devolution of the share of deceased descendants, or should he say that the share of such deceased descendant should go to a higher class, and one of that class is surviving, in both these cases, the entire produce will be divided among the surviving beneficiaries for the time being among the descendants of the *wâkif*, and will not go to the poor so long as any of the posterity of the *wâkif* is living.(2)

Preference to propinquity.

If a man were to say that when one of his descendants dies, his share should go to other descendants of the same degree, in that case the nearest in blood would be preferred to one more remote; and if there be none of that degree, the share would merge in the general produce. For example, if a person die leaving him surviving sister's children and paternal uncle's children, the latter would take his share in preference to the former, being of the same degree though remoter in blood.

If a person were to make a *wakf* in favour of his children according to their number and their legal shares, and were also to provide therein that the female children should get no share, unless they are widows, and that after the children, the *wakf* should be for their children, and their children's children and their descendants, *on condition, that if any one of them should die leaving children, his or her share should go to such children*, the aforesaid condition would refer to all.(3)

Farzand includes daughters.

If a man were to say "this is a *wakf* for my *farzand*,"(4) and he also has daughters living at the time, the daughters will be included; because when a person has got sons and daughters they are mentioned in the masculine gender, "and, so also, even should the children be all daughters."

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(1) *Radd ul-Muhtâr*, Vol. III, p. 679.

(2) *Ramz ul-Hakâik*; *Radd ul-Muhtâr*, Vol. III, p. 679; see *post*.

(3) *Radd ul-Muhtâr*, Vol. III, p. 671.

(4) The Persian word *farzand* means a son, but in the common acceptation of the term, especially in its plural form, it applies to both male and female offspring.

When a masculine term is used collectively it includes females.

If a person were to make a *wakf* in favour of his children, and after that upon their children and so on, generation after generation and provide also that should any one of them die leaving children, then his or her share should go to his or her child, and if such person should die before becoming entitled to a share in the rents and profits, leaving him surviving a child, the latter will take his place and become entitled at the distribution of the profits to the share of his parent.

If the *wâkif* were to die leaving him surviving several children, *A*, *B*, *C*, *D*, and *E*, and then *A* were to die leaving certain children, the share of *A* would go to his children, in accordance with the conditions laid down by the *wâkif*. But supposing *B* were then to die, leaving several children and grandchildren by a predeceased child. The question arises would such grandchildren be entitled to share in the interest of *B* along with his children ? Sabki has answered this question in the negative. He holds that *B's* share should go entirely to the children, and the grandchildren should be excluded. On this point Khassâf agrees with him. But Khassâf holds that upon the death of the last surviving member of the first group, *viz.*, the children of the *wâkif*, the rule will cease to operate ; that is, if *E*, the last surviving son of the *wâkif*, were to die leaving a child, his share will not go to his child, but the entire income will be divided among the grandchildren of the *wâkif*, that is, members of the second class, the same rule applying as in the previous case, *viz.*, the share of each member of this class upon his death, will descend to his children until the class is exhausted, when the distribution would take place according to the number of the third class. According to Khassâf, therefore, the members of each class take *per capita*. According to Sabki, the distribution is *per stirpes*. He holds that, as the members of each class die, their shares descend to their children respectively. Jalâl Suyûti differs from both Khassâf and Sabki. He holds that when any member of one class dies, leaving children and grandchildren by a deceased child, the grandchildren and children share in the interest of their grandparent, that is, the grandchildren take the share of their parents, the distribution being *per stirpes*.(1)

Distribution *per stirpes*.

(1) *Radd ul-Muhtâr*, Vol. III, p. 672 ; *Majm'aa ul-Anhar*, Part II, p. 641.

The author of the *Ashbáh* agrees with Sabki, and is followed by all moderns.

The result is, that when the adjunct '*waw*' ('and') is used between the lines, then after the extinction of each line the distribution begins again, but when the word *summa* ('then') is used the division continues *per stirpes* throughout. And this view is apparently adopted by the majority of Shâfeï lawyers and some of "our own (Hanafîs)." The consensus of opinion is, that when a person dies during the lifetime of his father, leaving him surviving a child, that child takes his father's share in the interest of the grandfather but acquires no interest in that of his uncle.(1)

Principle.

Wakf for lineal descendants.

If a person were to make a *wakf* for his *lineal* descendants, the children of daughters will not be included, unless those children are the offspring of husbands, who are the lineal descendants of the *wâkif*. If a woman were to make a *wakf* for her *ahl-ul-bait* or her *jins*, her children will not be included unless the father of the children belongs to her *kowm* or tribe.

Principle.

If a man were to make a *wakf* for his or anybody else's descendants, without mentioning the order in which they should enjoy the income of the *wakf*, the near and the remote will take equally, in other words, the division will be *per capita*. For example, if a man were to say, "I make this *wakf* in favour of Zaid's descendants in perpetuity as long as his line lasts," Zaid's children and grandchildren will be entitled to share equally, and there will be no difference between son's children and daughter's children; they will take equally.

This principle applies where no order of succession is indicated by the specification of the line or generation (*batn*). Where the order of the line is not given, by mentioning "generation after generation" (*batnan-b'aad-batn*), the rents and profits will be divided equally among all the descendants, male as well as female, living at the time of the distribution, the one lower in degree getting the same share as the one nearest. And as each person among them dies his share merges in the *wakf* estate, and the entire usufruct is divided among the beneficiaries living at the time of the division. If the succession of lines is given, that is, the *wakf* is in favour of the descendants, "generation after generation" (*batnan-b'aad-batn*),

(1) *Radd ul-Muhtâr*, Vol. III, p. 672; *Maj'aa ul-Anhar*, Part II, p. 641.

in that case it would imply that the nearer line or class takes first and after them the "line" next after.(1)

If a man were to declare that the *wakf* was in favour of the sons of his *awlâd*, or his *akriba* or his brethren, the females will be included. Inclusion of females.

Where a *wakf* is constituted in favour of a child (*walad*), and after him for the poor, the child who may be in existence at the time the produce comes into being enters into the benefit of the *wakf*, whether he was born at the time of the creation of the *wakf* or after it.

Similarly, if the words were to this effect, "this is a *wakf* for my child, and any other child that I may have, and when they fail, upon the poor." And the *Fatâwai Alamgiri* goes on to add, "when a man has made use of these words, though he have no child at the time, the *wakf* is valid; and the produce, when there is any, is to be divided among the poor. If a child should be born to the *wâkif* after the division, the subsequent produce is to be expended on this child so long as he lives; and when there is no surviving child, it is to be expended on the poor."

When a trust is created in favour of one's children (*awlâd*), a right is established only in favour of "children of known paternity" (*nasab*). "Hence if there be a child who is not of known paternity, but whose paternity is known on the word of the appropriator, such child is not included." Children of known paternity included.

"As already stated, if one should say 'I have made this *wakf* on my *children*,' and he has only one child at the time of the produce, half of it will be for that child and half for the poor.' But if the words were 'on my child,' and he has only one, the whole of the *wakf* is for the child. So also when he has had several children, but only one is surviving."

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(1) Khassâf; Mr. Baillie's note will be of interest in this connection.

"It appears from these cases that when two or three generations are mentioned separately and then joined by the word 'and,' all the generations participate together unless there is something to indicate that one generation is to take in succession to another when the first would have an estate for life in possession and the other estates in tail, as it is termed in England. There seems to be no reason for a different construction if the settlement were on a person and his children. But "with" denotes conjunction as well as 'and.' A settlement on a person with children, or *bafurzundan* as it would be in Persian, ought therefore, it would seem, to be similarly construed, that is, to him and them jointly." See S. D. A. Reports, Calcutta, for 1853, p. 648.

Shaikh Imâm Abû Bakr Mohammed ibn Fazl has declared that when a *wakf* is in favour of two children *and when they die then on their children*, upon the death of one of them leaving issue, his share of the profits will be given to the poor until such time as the other son of the *wâkif* also is dead, when the entire *wakf* will be devoted to the benefit of the grandchildren, *unless the wâkif has provided that, upon the death of any one of the immediate beneficiaries, the produce will go to the surviving issue of the deceased.*(1) So also in the *Fatâwai Alamgiri.*(2)

Reservation of a right of survivorship.

Principle.

When a person makes a *wakf* of his land for his descendants (*awlâd*) and destines its ultimate appropriation for the poor, upon the death of each beneficiary the entire produce will go to the survivors, and it is only upon their failure that the benefit of the *wakf* will accrue to the poor. *So long as any of the descendants are surviving nothing will be given to the poor.*

" When a man has made a *wakf* for his son and for his children and for his children's children in perpetuity so long as any one among his descendants is alive, Abu'l Kâsim says the produce will be divided among the *wâkif's* son's children *per capita*, the female and male taking equal shares. And when he was asked regarding the children of daughters, he said they would be entitled, because they are the *awlâd* of his *awlâd.*"

Wakf in favour of *awlâd* or descendants.

If he should say, " This my land is a pious *wakf* on my children (*awlâd*)," all generations are included on account of the general character of the name; but the whole is to the first generation while any remain; and when they are exhausted, to the second; and when they are exhausted, to the third and fourth and fifth, all these generations participating in the division, and the nearer and more remote being equal.(3) If he should say, " I have dedicated it on my children," and he has only one child at the time of the produce, half of it will be for that child and half to the poor. But if the words were " on my child," and he has only one, the whole of the *wakf* is for that child. So, also, when he has had several children and they have failed leaving only one remaining.

" If a man were to make a *wakf* with the words, 'a *wakf* on my two children, and when they fail then upon the children of both,

(1) Kâzi Khân. (2) *Fatâwai Alamgiri*, Vol. II, p. 479.
(3) *Fatâwai Alamgiri*, Vol. II, p. 479.

and the children of the children of both for ever so long as there are descendants,' and one of the children were to die leaving a child, half of the produce is to be expended on the surviving child and half on the poor; but when the second of the children of the *wâkif* dies, the whole of the produce is to be expended on the children of the two, and the children of the children of the two. If he were to say, 'This property is a pious *wakf* on the needy of my children,' and there is only one needy child among them, the half of the produce is to be expended on him and half on the poor."

In all these instances the conclusion turns on the intention of the *wâkif*. If he intended that the benefit should go to several children, in that case if there is only one child, he would only receive half the income. But if his intention were that his children should be the primary beneficiaries, the entire benefit would go to the one child.

In connection with this subject, however, it must be remembered that "the object of the *wakf* depends on custom (*'urf*), and if a person were to make a *wakf* for his children, and his children's children with the intention that whosoever among them may be surviving should take the whole of the produce, the entire produce would go to his descendants, though there be only one."(1)

If a person were to create a *wakf* in favour of his *nasl*, or *zurriat* (both words meaning progeny), the children of his sons and the children of his daughters would be included, whether near or remote.

In the case of *Shaikh Kasimodin* v. *Nawab Mir Sayad Alam Khan*,(2) the Bombay High Court held that the term *ahfâd* being a term of the largest and most general signification, included the descendants of males as well as females.

When a *wakf* is made by a person who is not suffering from a mortal disease and the *wâkif* declares that the distribution of the income should be according to the *Farâizullah* (the divine law) among his children, the division will take place among all the beneficiaries, without distinction of sex, in equal proportions.

When a *wakf* is made in favour of consanguine and uterine brothers, they take equally.

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(1) *Radd ul-Muhtâr*, Vol. III, p. 672.
(2) [1886], I. L., 10 Bom., 119.

Principle relating to distribution of the proceeds of a *wakf*.

When a *wakf* is made in favour of children, the income is to be divided among them equally. This is according to Abû Yusuf and "the *Fatwa* is with him." A condition in the *wakfnâma* giving to one child a greater interest than the other, or to the sons more than the daughters is sinful, as it is sinful to make any difference in gifts. This is the opinion of all leading jurists.

Shaikh Nûr ud-dîn Mukaddasi, Mufti of Cairo, and Shaikh ul-Islâm Mohammed Tahtâwi, Shâfeï Muftî of Egypt, have given decisions to the same effect, that is, when the *wâkif* makes a *wakf* in favour of a class, all persons belonging to that class take equally whether they belong to the same sex or not, or whether they differ in their "roots." For example, when it is in favour of brothers, consanguine and uterine brothers take together and not according to their shares under the law of succession. Similarly, if a man were to say that in case of his dying without issue, the *wakf* would endure to the benefit of his relatives belonging to the class nearest to him in degree, and he dies leaving only one paternal uncle's son and two paternal uncle's daughters, the male and female cousins take the income in equal shares. The meaning, therefore, of the expression *Farâiz-ullah* is not that the division should be according to their shares under the law of inheritance, but according to the rule laid down by the Prophet in which he declared that no preference should be shown in gifts; and consequently the donees will take equally.(1)

Principle.

When a man makes a *wakf for the sons of A, excepting the sons residing abroad*, and then some of the sons leave the city or country, they lose the right and do not recover it on their return to the country. Similarly, if a *wakf* is made for the children of *A*, engaged in the pursuit of learning, and some of them give up their studies, they lose all interest in the *wakf* and do not recover it on resuming their studies, unless in all these cases the *wâkif* has declared that they would get back their interest on their return.

The beneficiaries not entitled to partition.

When a *wakf* is made in favour of two or more individuals, they are not entitled to a partition of the property in proportion to their share of the profits. The *mutwalli*, however, has the power to make such arrangements as he deems necessary, consistently with the provisions of the *wakf*, for the due cultivation of the *wakf* lands or occupation of the *wakf* premises.

(1) *Radd ul-Muhtâr*, Vol. III, p. 672.

When a *wakf* is created in favour of one's children and on their extinction in favour of the poor, it is lawful. Hillâl(1) declares that the children of the children will participate in the benefit of the *wakf* if they be in existence at the time when the produce or income becomes distributable, whether they were or were not in existence at the time of the dedication. This view has been accepted by the jurists of Balkh.(2) Accordingly, when a person declares the *wakf* to be in favour of his children and grandchildren *all of them who happen to be in existence at the time the produce comes into being or becomes distributable, will participate in its benefit.*

A *wakf* in favour of the *wâkif's* progeny valid.

When a *wakf* is constituted in favour of the *wâkif's* child and his *nasl* (progeny), the "*wakf*," says the *Fatâwai Alamgiri*,(3) "is valid, and the males and females of his children and children's children are included: the near and the remote, the children of sons and the children of daughters, the free and bond, being all equal, although the shares of the bondsmen belong to their masters."...

"And if he should say, 'I have made it a *wakf* on my child and my *nasl*,' and he has a grandchild at the time, but a child of his loins is born to him after the *wakf*, they both enter into the right. So also if he should say, 'this my land is a pious *mowkoofa* on my children that have come into being,(4) and on my *nasl*,' a child subsequently born would enter by means of the word *nasl* according to the *Fatâwai Kazi Khan*. If he were to say this land is a pious *wakf* 'on my children that have come into being and *their nasl*,' the children in being and their *nasl* would enter, whether the *nasl* were in being or not, but none of his children who are not in being, nor their *nasl*, would be included. So also if he were to say, 'upon my children in being, and their children,' and should there afterwards be born to him a child of his loins, that child would not be included. And if he were to say, 'upon my

(1) Hillâl ibn Yahya ibn Muslim Basri died in the year 456 A. H. He was a disciple of Yusuf ibn Khâlid Basri who himself was a disciple of Abû Hanîfa. Some say he received his legal education under Abû Yusuf and Zuffar. He was called Râwi because he followed implicitly the usages of the people of Kûfa; *Radd ul-Muhtâr*, Vol. III, pp. 676-680.

(2) Whose views are adopted in India.

(3) P. 475, quoting the *Hâwi*.

(4) In the original (مخلوقين) meaning "created," which includes a child in the womb, see *post*.

children that have come into being, and on the children of their children, and their *nasl*,' his children in being and their children and the children of their children forever, while there are any *nasl* or descendants, are included."..... Principle.

Again—"If a man not suffering from death-illness were to say 'I have made this my land a pious *mowkoofa* to Almighty God for ever, for my children and the children of my children, and the children of their children, and their *nasl* for ever, so long as there are *nasl*,' every child that he had at the time of the *wakf* and every child born to him thereafter before the existence of the produce, and every child of the child for ever, enters into the benefit of this consecration, and if any of them should die before the existence of the produce, the share of the person so dying becomes extinguished; but if the death should not occur till after the existence of the produce, the person dying would have acquired a right to his share, which would pass to his heirs; the higher and lower generations sharing equally, unless it had been said in making the *wakf* that a beginning was to be made with the higher generation, and then the generation below it. In that case, if all of the higher generation but one person should die, the whole would go to that person alone, to the exclusion of the generation below."..... (1)

And if one were to say, 'for my child and child of my child for ever so long as there is any *nasl*,' without saying *batnan-b'aad-batn*, but adding 'as often as one dies his share of the produce is to his child,' the produce would, before the death of any of them, be among the whole of the children and children's children and their *nasl* equally, and if one of them should die leaving a child, the share of the person so dying would go to his child, who would thus have his father's share in addition to that appointed for himself by the *wâkif*." (2)

It is clear, therefore, that when a dedication is made in favour of "the children and the progeny" (*walad* and *nasl*), and at the time there is only one grandchild but subsequently a child is born to the *wâkif*, both will participate. Similarly, if a person were to declare a *wakf* to be in favour of his children who are in existence, and for his *nasl*, children born after the *wakf* will be included as his *nasl*.

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(1) *Fatâwai Alamgiri* Vol. II, p. 476, after the *Zakhira* and *Muhit*.
(2) *Ibid*, according to the *Khulâsa*.

When a person makes a *wakf* in favour of his *infant* (*saghîr*) children, in that case such of his children alone will be entitled to share as were infants at the time of the *wakf*, for though infancy is a quality which ceases, yet it is such a quality which never comes into existence again, and it is therefore tantamount to specifying the children by name. Principle.

If a dedication is made for a child, and there is born to the *wâkif* another child, within six months from the date when the produce of the *wakf* came into existence,(1) this latter child will share with the former in such produce. If the child is born after six months, it will not share with the first in the produce, as the presumption is that it was not in being at the time the produce came into existence. If a person were to make a *wakf* for his child at a time when he has no issue and no child is born to him within six months from the time the produce came into existence, such produce also, as already stated, would go to the poor, though subsequent accretions would go to the child. Principle.

A *wakf* in favour of the poor how to be applied.

"When a *wakf* is made for the indigent, upon whom should the produce be spent?" Nâtiki has declared that 'if the *wâkif's* children or descendants happen to fall into indigence it should be first applied for them; then upon his relations; then upon his emancipated bondsmen; then upon his neighbours; then upon the inhabitants of the city where the *wâkif* lived having regard to the nearness and proximity of their residence to where the *wâkif* lived' and children and females will be included in the distribution among neighbours."(2)

"If a man were to make a *wakf* on so-and-so (naming him) and his children, and he rejects, his rejection does not affect the right of the children whether they be minors or adults."(3)

SECTION II.

WAKF IN FAVOUR OF THE KINDRED OF THE WÃKIF.

Wakf in favour of the *akriba* or kindred.

The term *âl*, *jins* and *ahl-ul-bait* of the *wâkif* include those persons who are related to him through the father or the grand-

(1) The time when cultivation takes the shape of grain is regarded as the time when the produce is in existence.

(2) *Fath ul-Kadir*, Vol. II, p. 649.

(3) *Ghâit ul-Bayân*, Chap. on *wakf*.

father or any other male ancestor. And *karâbatdâr, zu-karâbat, arhâm* and *ansâb*, include those people who are related to the deceased through any ancestor male or female. The highest ancestor to which the line would be carried is the person who first adopted Islâm.

Abû Yusuf and Mohammed have said, that by *karâbat* is to be understood every one related to a person through a common ancestor "up to the farthest back in Islâm" either on the father's or the mother's side, and whether within the prohibited degrees or not, and that the near and the remote are alike in this respect, whether the word be in the singular or the plural. But according to Abû Hanîfa, when the settlement is made in the singular, as for instance, "on my *karâbat* or on a person of my *karâbat*," it is the nearest of the relatives within the prohibited degrees that enters into the benefit of the *wakf*, while if the settlement be in the plural, as for instance, "on persons of my *karâbat* or on my *akriba*" (relatives), the whole of those above-mentioned are included as the words are applicable to two or more. With regard to the meaning of the words "most remote ancestor in Islâm," some say that it is the most remote who adopted the Mussulman religion, but others, the most remote ancestor since the promulgation of Islâm whether he adopted the faith or not. *The views of the Disciples are recognised as the law on the subject.*

If a man were to say, "this is a *wakf* for my *akriba, ahl-ul-bait*, etc., according to the Disciples, even if there be only one of this class the trust will take effect."

Poverty has reference to the time of distribution.

When a man makes a *wakf* for his poor relatives, the poverty has reference to the time when the income becomes distributable. But the recipient of the benefaction must be one who has no relation legally liable to maintain him or her, for example, a husband, a father, or any other person subject to the same obligation.

Principle.

When a *wakf* is made in favour of one's children or relations, all those who are existing at the time when the produce comes into existence, though born after the creation of the *wakf*, are entitled to share.

What has been said as to a person's *akriba* and *zav'-il-karâbat* is equally applicable to his *arhâm* and *zav-il-arhâm* and *ansâb* and *zav-il-ansâb*—all these terms implying the same thing.

When a person has said, "This is a pious *mowkoofa* on the poor of my kindred or the poor of my children and after them on the indigent," the settlement is valid, and the persons entitled are those of them who are poor at the time when the produce comes into existence, according to Hillâl, whose opinion "we" (the Hanafis) approve and the *Fatwà* is in accordance with it. Similarly, if instead of "the poor," the words of dedication were "the indigent and the needy of my kindred." "If one after making a *wakf* on the needy of his *kindred*, and then on the poor, should die leaving a poor son, Abû Yusuf holds that the son would not come within the meaning of kindred, and this seems correct. When there are poor of a *wâkif's* kindred in another city than that in which he resides, the produce is not to be sent to them, but is to be divided wholly among those of his own city, though if the superintendent should send any of it away to them he would not be considered as committing a breach of trust."(1)

The meaning of the word *sâleh*.

A *wakf* to those who are *sâleh* (pious) includes those men who are pure, and nobody doubts them or makes any imputation against them, and they follow the path of rectitude, use no evil expressions, are not drunkards and do not revile good women, and are truthful and honest, "these are the *sâleh*, men of purity and goodness."

A *wakf* to the "nearest" among all mankind.

If a man were to make a *wakf* for "those who are nearest to him among all mankind," and after them for the poor, and he has a child, a father and a mother, or a father or a mother, *then the produce will go to the child*, though it be a female, for she is nearest to the *wâkif*. And after the child to the poor, and not to the parents, because the *wâkif* did not state "to the nearest and then to the nearest." If the *wâkif* has no child, but only parents, the produce will go to them equally. If the *wâkif* left a mother and brothers, the produce will be given entirely to the mother. If he leaves paternal and maternal grandfathers and brothers, the brothers will take the whole produce.(2)

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(1) See Baillie's Dig., p. 587.

(2) Some jurists hold the paternal grandfather would take the entire produce, being supposed to stand in the place of the father.

"When a person has made a settlement on the nearest of men to him and after that to the indigent and has a son or a father, he enters into the benefit the *wakf*, though if his words were 'on the nearest of men among my *kardbat*' would not enter into it. And if he has a son or a daughter and both r

If the *wâkif* has a daughter's daughter and son's son's son, the daughter's daughter as the nearest will be entitled to the benefit solely.

But when a man makes a *wakf* on the nearest of his *karâbat*, in that case his parents and children will not share as they are not included in the term *karâbat*.

If a person were to declare, "I make a *wakf* for my *akârib* on condition that the distribution should commence with the one nearest in the *naṣab* (consanguinity) or *karâbat* (relationship), and after him for one who is nearest to him and so on," and the *wâkif* has two brothers and two sisters, the distribution will commence with the brothers or the sisters of the full blood and then with those who are uterine. And if one of them is consanguine, and the others uterine, the uterine will take first. This is according to Abû Hanîfa. According to the Disciples they will share equally. A maternal uncle and aunt are preferred to a consanguinous or uterine brother of the father. So a full paternal uncle is preferred to a consanguine or uterine brother or sister of the mother. A full paternal uncle and aunt are preferred to a maternal uncle and aunt. This is according to Abû Hanifa. According to the Disciples, they take equally. *In both these cases the views of the Disciples are accepted as law.*

The same rule is applicable to the offspring as to the "roots," bearing in mind that, according to the Disciples, there is no difference whether they are connected through males or females or through one side or the other, *viz.*, the father's side or the mother's side.(1)

The word *karîb* (near) is not confined to the *karâbat* alone. Therefore, if a man, instead of saying "the *wakf* is for one nearest to me among my *karâbat*," were to say "the *wakf* is for one *nearest*

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the son or daughter alone is entitled and on their death the produce belongs to the indigent and not to the parents; while if he leave his parents only, the produce is to them in halves, and if either should die his or her half would pass to the poor. In like manner, if he have ten sons and one of them should die, his share goes to the indigent. And if he has a mother and brothers or a mother and grandfather, the produce is to her alone to the exclusion of the others, she being the nearer. The same is true of the father also. And a father is nearer than a son's son, but a son's son is preferred to a full brother and a daughter's daughter to a son's descendant in a lower grade. So also a daughter's daughter's daughter is preferred to a full sister;" Baillie, p. 588.

(1) *Fatâwai Kâzi Khân in loco.*

to me among all people,'' this would include both *karâbat* and *ghair karâbat*, and consequently parents and children will be included in the *wakf* as they do not fall in the category of *karâbat*.

If a man were to say, '' this *wakf* is for my children, and if any of them should die, his share shall go to one of his degree, the nearer being preferred to the one more remote,'' and there are *wâkif's* sister's children and paternal uncle's descendants, the share of the deceased beneficiary would go to the *wakif's* paternal uncle's descendants and not to the children of the *wâkif's* sisters. This is contrary to the *Fatwa* in the *Khairiyèh* in which the *wâkif's* sister's children are preferred.

A person may create a *wakf* lawfully in favour of his kindred (*karâbatdâr* or *karâbat* or *zû-karâbat*), and no preference will be given to males over females. And in the *Ziâdât* it is stated that the grandparents and grandchildren will participate in the benefit of the trust.(1) A wife, however, is not included in the term *karâbat* or *akriba*.(2)

If a person declare his property to be *wakf* for his *nearest* kindred and he has a consanguine sister and daughter's daughter's daughter, the *wakf* will be in favour of the latter, for she is nearest in blood to the *wâkif* being his own descendant, however low in degree.

When a *wakf* is in favour of the poor kindred, such kindred as are in indigent circumstances will alone be entitled to share in its benefit. With reference to the question who are indigent and who are not, the *Fatâwai Alamgiri* states the principle in the following terms :—

Test of indigence according to the *Alamgiri*.

According to the *Hâwi* the approved doctrine is that all persons who are the legitimate recipients of the *zakât* or the poor rates, must be regarded to be *poor* (for the purposes of the *wakf*). A person possessed of only a dwelling-house and a servant (in the original, bondsman) is held to be poor, and properly entitled to receive the *zakât*, as well as the benefit of a *wakf* for the poor.(3) ''So also when with this, he has a sufficiency of clothes without

(1) *Radd ul-Muhtâr*, Vol. III, p. 681.

(2) [1872] *The Advocate-General* v. *Fatima Sultani Begum*, 9 B. H. C. R., 19.

(3) *Fatâwai Alamgiri*, Vol. II, p. 484, "according to the *Zakhîra*.

anything superfluous, or house-furniture that cannot be dispensed with."(1)

But if he have an excess above his clothes and furniture, which excess equals 200 dirhems, he is to be accounted rich (*i.e.*, not a pauper) and will not be held entitled either to the *zakât* or to the benefit of a *wakf*.(2)

So also if he have two dwelling-houses or two slaves and the superfluous house or slave is of the value of 200 dirhems, he is to be accounted rich with regard to the illegality of participating in *zakât* or *wakf*, but not so as to render him liable to the former. And, though the surplus above his dwelling-house, or the surplus above his clothes, or his furniture should not each by itself be of the value of 200 dirhems, yet if all taken together are of that value, he is rich, and cannot lawfully participate either in *zakât* or in *wakf*.(3) And if he have land of the value of 200 dirhems, though the income from it be insufficient for his maintenance still he is "rich," according to what is approved.(4) Though he should have plenty of property not immediately available, or debts owing to him by other persons, he may be allowed to take of the *zakât* or the *wakf*, for he is in the condition of a way-farer (*ibn-us-sabîl*); yet if he can borrow, it is better for him to do so than to receive from a charity."(5)

Test of indigence.

"Every one who is entitled to maintenance from another, and who may take it without his consent or the order of a Judge, or to whom the Judge may award it out of the property of an absent person,—and every person, the profits of whose property are so mixed up with those of another that neither can be accepted as a witness for the other, is accounted rich in respect of *wakf*, on the strength of the wealth of his maintainor or person with whom he is so connected, and of this, parents and children and grand-parents are examples. But persons, who though entitled to maintenance from another, yet cannot take it without his consent, or the order of a Judge, and to whom the Judge cannot assign maintenance against another during his absence, and persons,

(1) According to the *Fatâwai Kâzi Khan*.

(2) "This is the doctrine of our masters (may the peace, &c.) according to the *Muhît*."

(3) According to the *Fatâwai Kâzi Khân*.

(4) According to the *Khazânat-ul-Muftiïn*.

(5) *Fatâwai Alamgiri*, Vol. II, p. 485.

the profits of whose property are so distinguishable from those of another that each may be accepted as a witness for the other—are not to be accounted rich on the strength of the wealth of their maintainors; and of this, brothers and sisters and other relations within the prohibited degrees are examples."(1)

"When a poor woman has an affluent husband she is not to *receive* from a *wakf* constituted for the poor, but a poor man although he has an affluent wife may participate in its benefits."(2)

Kâzi Khân lays down the following rule on the subject, which, however, he says, must vary with the changing circumstances of the times. A person is called *fakîr* (indigent) who has only a lodging (and nothing more), and he would be entitled to *zakât* (poor's rate or religious alms) as well as to the benefit of a *wakf* (for the poor). Similarly, a person who has only a lodging, but no wherewithal for subsistence, though he may have an attendant, is a *fakîr*. A person, who has only a few necessary raiments and nothing else, is a *fakîr*. Kâzi Khân.

According to Abû Yusuf, the owner of a piece of land which is worth 200 dirhems, though its income may not be enough for his support, is not indigent; but Mohammed ibn-Shahna, and Mohammed ibn Makâtil of Rai would regard him as a *fakîr*. "The words of Abû Yusuf, however, are words of caution, and the saying of Ibn-Shahna contains much elasticity." The author goes on to say, that a person ostensibly possessed of means, but who, through having been overtaken by some calamity, cannot have the immediate use of such property, may be regarded as an indigent. He also adds that a person who, with the exception of a debt owed by an insolvent, owns no other property, will be regarded as an indigent. *Radd ul-Muhtâr.*

From these statements it is clear that the question whether a person is or is not an indigent, is dependent upon special circumstances and cannot be answered without reference to the requirements and exigencies of the society among whom the question arises. Conclusion.

When a *wakf* is made for the indigent kindred of the *wâkif* and one of his kinswomen gives birth to a child within six months

(1) *Fatâwai Alamgiri*, Vol. II, p. 485, after the *Muhit*.
(2) *Ibid.*

of the date upon which the produce of the *wakf* comes into existence, such child will not be entitled to a share in it, for a child *en ventre sa mère* cannot be regarded as coming under the category of indigent kindred. Such child will be treated in the same way as a kinsman, who was *ghanî* (affluent) at the time the produce came into existence and became indigent afterwards. This person though not entitled to a share in that produce, will participate in all future income.

When a *wakf* is clearly intended for more than one person comprehended in a class, and there is only one person of that class existing, he will take half of the produce and the remainder will go to the general poor. If, however, it appears *primâ facie* that the whole benefit is intended for persons of that class, independently of their number, such person will take the entire benefit. For example, if a *wakf* is made for the benefit of the indigent among the posterity of *A*, and there is only one such person in existence, the entire income of the *wakf* will go to that person. But if the *wakf* was created for the paupers among the posterity of *A*, and there happens to be only one, he takes half of the produce, while the remainder goes to the poor in general.

Principle.

Meaning of the term "orphan."

A *wakf* made for the orphans of one's kindred is subject to the same principles. An orphan or *yateem* means an infant child who has no father living, though the mother and the grandfather may be alive. The condition of orphanage ceases on the attainment of puberty. In the absence of any indications of puberty, the completion of the 15th year is regarded by Abû Yusuf as the age of majority. Abû Hanîfa holds that the completion of the 19th year is the age of majority for men and the 17th year for women, whilst Zuffar is of opinion that the age of majority should be the same in both cases, namely, the completion of the 18th year.

Age of majority.

If a person make a *wakf* of his property for his poor kindred, will the *mutwalli* be authorised after the *wâkif's* death to give a share of the produce to his indigent grandson? Most of the jurists have answered this question in the affirmative and the Fakîh Abû Lais has stated that in the *Ziâdât* Imâm Mahommed has held the same view, though apparently Abû Hanîfa and Abû Yusuf have held otherwise.(1)

(1) In the *Fatâwai Alamgiri*, preference is apparently given to the views of Abû Hanîfa and Abû Yusuf :—

A *wakf* for the kindred residing in a particular locality.

Where a *wakf* is made for the benefit of the *wâkif's* kindred residing in a particular locality and after them for the poor, would the kindred be deprived of the benefit of such *wakf* if they leave their residence? Fakih Abû Bakr of Balkh has declared that if the *wâkif's* kindred, who are constituted the beneficiaries of the *wakf*, are limited in number and capable of being specified, in that case their right to the benefit of the *wakf* is ambulatory and will go with them wherever they go. But if they cannot be specified and are not limited in number, in that case the right of any one of the kindred who leaves the locality will drop and the entire produce will be distributed among those living on the spot, and when none of them is in existence, it will go to the poor. And Abû Lais has stated that should any one of the kindred (so leaving the place), return to that locality, the right would revive.

Should a *wakf* be made for one's *akriba* but the words *their descendants* be not added, still they would be included, as the descendants of *akriba* are also *akriba*.

If a person make a *wakf* for his *akriba* and after them for their descendants, these will not share in the benefit of the *wakf* until the first stock is exhausted.

A *wakf* with a discretion to the trustee.

A person makes several dispositions by will and creates a *wakf* of his land for the poor and authorises his executor "to give to whomsoever *he* likes and whatever *he* likes," in such a case it is lawful for the executor of the *wakf* to give to his parents, his wife and kinsmen, if they are poor or in need, and it will, in the main, be regarded as a *wakf* for the poor.

Wakf in favour of neighbours.

When a man has made a *wakf* for his neighbours, the produce ought to be expended, according to analogy, on all who live adjacent to him, but, on a liberal construction, it is for those who assemble together with him and come to the *masjid* or place of worship of the *mahallah* or quarter, and *this is approved*. "Re- Principle

"In a *wakf* on '*karîb*' the produce is divided according to heads, the young and the old, the male and the female, the poor and the rich being all alike, because the noun is equally applicable to all. But neither the father of the appropriator nor the children of his loins are included, nor his grandfather, according to the approved traditions (*Zâhir-ur-Rawâyèt*). A man makes a settlement on the needy of his *karâbat* and then dies. Question.—Can the *mutwalli* give any portion of the produce to a son of the *wâkif's* son when poor? According to Abû Hanîfa and Abû Yusuf he cannot, for the child of a child according to them is not included in the term *karâbat*." There can be no question that the views of Abû Lais are accepted by the Hanafîs.

sidence is the condition, according to the plain doctrine of Abû Hanîfa, whether the resident be proprietor or not, and this also is correct. When the resident is not the proprietor, the benefit of the *wakf* is to the resident and not to the proprietor." The neighbours, whether Moslem or infidel, male or female, free or *mukâtib*, minor or adult, are entitled, and the produce is to be divided among them according to the number of heads, the superintendent being responsible if he give more to some than to others.

If, among the endower's neighbours, there are some who have gone to another *mahallah*, selling their houses to other persons who have come into them after the ripening of the crops, but before they are gathered, these are to be regarded as neighbours who are such at the time of the division of the produce. And if a person should make a *wakf* on his neighbours when residing in one house, but should remove to another even though it be a merely rented house, and *reside* therein until his death, the produce will go to his last neighbours. "And if a man, after making a *wakf* on his neighbours, should remove to Mecca and die there, the produce would belong to his neighbours in Mecca if he had taken a house there, but if he had gone on a pilgrimage only, it would belong to his neighbours in his own city." If a man have two mansions, in one of which he resides and in the other of which he keeps his merchandise, the produce is for the neighbours of the house in which he lives. If he have two mansions and a wife in each, the neighbours of both are entitled to the produce, though he should die in one of them. So also, though one of the houses be in Basrah and the other in Kûfa, he having a wife in each. And if a person should make a *wakf* for the poor of neighbours without referring to himself, as, for instance, by omitting to say, "my neighbours," it would be the same as if he had said "my neighbours." If a man should fall sick and be removed by his son to another *mahalla* or village and die there, his first neighbours would be entitled, this being no proper removal. But if a woman inhabiting a mansion should make a *wakf* on her neighbour and afterwards marry and be taken to the house of her husband and die there, her neighbour are those of her husband. So also, when a man has married a woman and removes to her house, his neighbours are changed to hers, unless he has left his furniture in his own house, when they say his neighbours are those who were so before his removal.

When it is not known who are a man's neighbours, the produce is not to be divided until witnesses testify to the house in which he died and then a distribution is to be made among the neighbours of that house. "And if a neighbour should claim as being poor and the fact of his poverty is not known, he must be put to the trouble of producing witnesses to prove it."

SECTION III.

GENERAL PRINCIPLES OF CONSTRUCTION.

When a man makes a *wakf* and constitutes himself *mutwalli* thereof during his lifetime, and declares that after his death his son *A* shall be the *mutwalli*, and after him the fittest and worthiest of his children, the latter "his" refers to *A*, and not to the *wâkif*.

If the *wakf* is for Zaid and 'Amr and his children, the pronoun "his" refers to 'Amr.

Principle of construction.

If a man constitute a *wakf* for his children and *such of his children's children as are male*, the qualification refers to the grandchildren and not to the children.

"*Q.*—A person makes a *wakf* for his son named Hassan and for his children (*awlâd*), that may be born subsequently, and after them for their children that may be male, and after them for his children that may be female and for their children. After the constitution of the *wakf*, another son is born to the *wâkif* whose name is Mohammed, and subsequently Hassan dies. Does the first *his* refer to Hassan or to the *wâkif*, so as to include Mohammed in the *wakf*?"

"*A.*—The Hanafî Mufti of Egypt, whose name is Moulâna Shaikh Hassan Sharnibilâlièh, anwsers the question thus, 'the pronoun 'his' refers to the *wâkif*, and the *Khairiyèh* adds this is most consistent with the intention of the *wâkif*; and it has been decided that when a word is equivocal in its meaning and is capable of a double construction, the construction most consistent with the intention of the settlor should be adopted; for in the case put, if the pronoun is held to refer Hassan, the *wâkif's* own child will be excluded.'"(1)

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(1) *Radd ul-Muhtâr*, Vol. III, p. 669.

"The expression *inshâ-Allah* 'if God pleases' is a proviso, an '*istisnâ*,'(1) but it is not equivalent to *illa* (unless)." According to the Shâfeïs, a proviso refers to the whole document and not to the immediate provision only. According to the Hanafîs, it refers only to the last condition, provided it can be separated from the other conditions, *otherwise to all*. For example, if a man were to say "I make my house *wakf* for my children and my garden for my brothers, but should they go away it shall cease," the proviso refers to the condition regarding the brethren.

But if he had said, "I make this house *wakf* for my children and children's children, but if they go away it will cease to be *wakf*," the proviso would be general. Among the Hanafîs, if a person were to make the possession of a qualification a necessary condition to receive the benefits of a *wakf*, the qualification would refer to the persons in immediate connection with whom the condition is mentioned. But, if it is clear that the qualification refers to all, it will have effect given to it generally. For example, if a person were to make a *wakf* for his indigent children and his children's children, the qualification of indigence is restricted to the children alone. But if he said the *wakf* is for his children's children who are indigent, it refers to both.(2)

According to the Shâfeïs, the qualification would refer to all in any case.

If a person should constitute some portion of his property a *wakf* by way of a pious offering for Abdullah and Zaid, the income will go to these as tenants in common, and when one of them dies, his share would go to the poor, and upon the demise of both of them the entire rent and profits would be given in charity. Similarly when a *wakf* is in favour of a class (*kowm*), the rents and profits will be divided among them, according to their number as tenants in common. And on the death of any one of them his share will be given in charity to the poor. When the appropriation is made in favour of "the children of Abdullah," without mentioning a number, the children of Abdullah will take as joint-tenants, and so long as there is any issue of his living, nothing is to be given in charity to the poor. When two persons are named, *e.g.*, Zaid and

(1) When the settlor makes use of the expression "Inshâ-Allah," in connection with any provision, it must be regarded as precatory.

(2) *Radd ul-Muhtâr*, Vol. III, p. 669.

'Amr, and it is provided that Zaid should get a half and 'Amr two-thirds, the whole is to be divided into seven parts, as in the case of the increase (*awl*) in inheritance, of which three are to be given to Zaid and four to 'Amr. When a settlement is made in the following terms :—"to Zaid a half and to 'Amr a third," each is to have the portion mentioned for him and the remainder is to be divided equally between them. When the *wâkif* makes the settlement in these words—"My land is a *wakf* for Zaid and 'Amr and to Zaid out of it a third or a hundred dirhems," and is silent as to the other, Zaid shall get what is mentioned for him, "and the remainder is for him of whom nothing has been said." And so in all other cases where one is named and silence is preserved with regard to the other. When the *wâkif* has provided that each of the beneficiaries should get a specific sum, and owing to loss of income none of them can get the exact amount, the actual income will be divided in proportion to their respective allowances. But, when the income more than covers the allowances, the excess shall be shared by them equally.(1)

When the dedication is for a class of persons (*kowm*) and they all reject it, the produce is for the poor.(2) But where only some reject it, the whole of the produce shall go to those who do not reject, if the designation under which the settlement is made is generic and the term applies to them all; but if the name is inapplicable to them, the share of those who reject passes to the poor. Thus when the *wâkif* has said "to the children of Abdullah" and some of them reject, the whole is for those that accept. But if he were to say "to Zaid and 'Amr," and Zaid rejects, his share passes to the poor.(3) Principle.

A person claiming an interest in a *wakf* created for the poor relatives of the *wâkif*, on the ground that he (the claimant) is a poor relation, is bound to prove his right, *first*, that he is a *karâbatdâr*, and *secondly*, that he is poor. He cannot subject the *mutwalli* to affirmation.(4)

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(1) *Radd-ul-Muhtâr*, Vol. III, p. 670.
(2) *Ibid.*
(3) *Ibid*, p. 671.
(4) A wife is not included in the term *akriba*; *Advocate-General* v. *Fatima Sultâni Begum* [1872], 9 B. H. C. R., 17 supra.

The principle, upon which persons who leave a certain locality are precluded from participating in the benefit of a *wakf*, does not apply to a case like the following :—"A man makes a *wakf* for his poor relations residing at Bagdad, and some of them go and live at Kûfa and after a while they come back to Bagdad, [on their return] they regain their right to share in the benefits of the *wakf*." The reason of this is that their condition should be regarded at the moment when the distribution takes place, as their poverty forms the basis of their claim and the object of the *wâkif* is to help his poor relatives.

Principle.

When a man makes a *wakf* for his descendants, and after the *mutwalli* has been dividing the produce among certain of his descendants, another person establishes his right also to a share as one of the descendants of the *wâkif*, he will be entitled to recover the past share if the *mutwalli* has divided the shares without the sanction of the Kâzi. The *mutwalli's* position in such a case is like that of an executor who, after paying some of the creditors, divides the remainder of the testator's estate among the poor, and subsequently thereto arises another creditor who establishes his claim. Such creditor is entitled to proceed against the executor for the satisfaction of his debt.(1)

The *Mutwalli's* liability.

When a *wakf* is made by a person in favour of the people of his *bait* or house, every one is entitled who is connected with him by ancestry "to the most remote of them in Islâm," without distinction of creed or sex, or the nature of the relationship. "The Moslem and non-Moslem, the male and female, the prohibited and the unprohibited, the near and the remote, are all alike in this respect. The remotest ancestor, however, is not included. But the child and parents of the *wâkif* are included, though not the children of his daughters and sisters, nor the children of any other females besides these, except when married to paternal nephews of the *wâkif*." As-Sarakhsi has stated in his commentary on the *Siyâr Kabîr*, that the words "people of the house" when they occur in deeds of *wakf* or wills are to be construed according to the intention of the testator. If by "house" he intended his residence, "the people of his house" should be taken as meaning those who reside in family with him and are maintained by

Principle.

"People of the house."

(1) *Radd ul-Muhtâr*, Vol. III, p. 672.

him, though there may not be any of his *karâbat* or kindred among them; and if by "house" he meant *nasab*, then the people of his house are all the recognised children of his father. Imâm Ali as-Sugdi, however, maintains that if the person has a house of *nasab* like the Arabs, the words "people of his house" would mean the descendants of his ancestors, (lit. the children of his fathers,) though they should not be residing in family with him; "but if he have no house of *nasab*, they are those living in family with him and maintained by him and none others, though they should be of his kindred, and this is approved." When a *wakf* is made on the "people of the house," "those in existence are included, and those who may come after them, of their children and children's children."(1)

When a person uses the expression *âl* or *jins*, it is in effect the same as "on the people of my house," and there is no speciality in favour of the poor, unless the *wakf* is made specially for them. The phrase "on the poor of them" is like "on those who become poor," and consequently "the produce is for him who is poor at the time, though he were rich when the settlement was made and it is not restricted to those who were rich and have become poor." If a woman should make a settlement "on the *ahl* (people) of her house" or "on her *jins*," her mother and her child would not be included.(2)

If a man should say "on the *ahl* of 'Abdullah," it would be for his wife specially, according to Abû Hanîfa. Hillâl, however, has said, "We think it better to make it include all free persons of his family living together with him in his house: *and this is approved.* But slaves are not included, nor 'Abdullah himself nor persons of his family living in another house." Approved doctrine as to the meaning of *Ahl*.

A'yâl comprehends every one maintained by a person whether living in his house or not, and *hasham* is synonymous with *a'yâl*. By *'akab* are to be understood all those who are connected with a person through his father, and the children of daughters are not included except females whose husbands are among these. And if one should make a *wakf* on Zaid and his *'akab*, Zaid himself being

(1) *Fatâwai Alamgiri*, Vol. II, p. 490.

(2) The *dictum* in the *Fatâwai Alamgiri* that "when a woman makes a settlement on the *ahl* (people) of her house or on her *jins*," her mother and her child would not be included, is explained further on.

alive and having children, these would have nothing, for the child of a man cannot be called his *'akab* except after his death.(1)

Application of a *wakf* in favour of the indigent.

The following rules are laid down in the *Alamgiri* relating to the distribution of the income of a *wakf* for the poor kindred :— 1. It is to be expended in the first place on the poor of his children and his kindred and the surplus only given to strangers. 2. Poverty on the day of the produce coming into existence is not to be regarded but rather poverty on the day of distribution. 3. The nearest in kindred are first to be supplied, and then the more remote, that is, the child of the loins has priority, and after him the child of a child, then the third generation, and then the fourth and lower generations. If none of these remain, or there is a surplus after satisfying them, it is to be bestowed on the more remote of the poor kindred beginning here also, with the nearest among them. 4. That to each person to whom a portion is given something less than 200 dirhems be given, that is, when the *wakf* is for the poor generally and some of the kindred are in need. But if the *wakf* be for the poor of a person's kindred, the whole produce is to be distributed among them, though the share of each should exceed 200 dirhems.

Beginning must be with the *wâkif's* descendants and kindred.

When an appropriator has appointed the produce for debtors or travellers, or "in the way of God," as for pilgrimage, and some of his children or kindred fall into want, no part of it is to be given to them, unless the child or the relative be a debtor, or a traveller or a pilgrim when also a beginning is to be made with them.

When a man makes a *wakf* on some of his children, and mentions that the *wakf* should be during his life and after his death, the words, "after his death" does not, according to the most authentic report, constitute a legacy to an heir, but bears the construction of a perpetuity.(2)

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(1) *Fatâwai Alamgiri in loco.*

(i) *Karâbat literally means* relationship, but is often used to imply related.

(ii) *Karâbatdâr* and *zu-karâbat* mean one who is related.

(iii) *Zavi*, plural of *zu.*

(iv) *Akriba*, plural of *karîb*, next of kin, people nearly related.

(v) *Arhâm* plural of *rahm*, womb; technically means uterine relations.

(vi) *Fakîr* and *miskîn*, both words are applicable to indigent people, but a *fakîr* may be possessed of some property, the whole of which must not amount to more than a *nisâb*; a *miskîn* has no property or habitation; *Hed.*, Vol. I. p. 54.

(2) *Fatâwai Alamgiri*, Vol. II, pp. 474-475.

When a *wakf* is made in favour of Zaid and his children and after them in favour of the poor, and Zaid were to declare that the *wakf* was in favour of 'Amr and the poor, his declaration would not affect the interests of the children or the poor. But the rents and profits will be divided equally among Zaid and the children in existence at the time, and half of Zaid's share would be given to 'Amr.

If 'Amr died before Zaid, his share would be given during the lifetime of Zaid to the poor. Should Zaid die before 'Amr, his interest in the profits would cease.

If the *wakf* be for Zaid and the poor, and Zaid were to make a declaration in favour of 'Amr instead of himself, in that case the rents and profits will be divided equally between Zaid and 'Amr, and when Zaid dies, the entire rents and profits will go to the poor. If 'Amr dies during the lifetime of Zaid, half of Zaid's share will be given to the poor. For when Zaid has declared himself entitled only to a moiety and 'Amr to the remaining moiety, in that case 'Amr's half only goes to the poor.(1)

When a *wakf* is in favour of *A* and his descendants, on the extinction of *A's* posterity the *wakf* will be for the poor as already stated, whether they are expressly named or not. If *A* refuses to take any benefit under the *wakf*, the produce will be given to his children existing at the time. If he has no children, the *wakf* will be applied in relieving the needy. If afterwards any child is born to *A*, the profits will be given to such child.(2)

If *A* as well as his children existing at the time refuse to take any benefit under the *wakf*, it will go to the poor; but their rejection does not bind the succeeding generations.

If a *wakf* is in favour of *A* and after him for *B*, and they both reject, it will go to the poor absolutely.(3)

Principle.

As a general rule, it may shortly be stated that the poor form by necessary implication of the law, the ultimate beneficiaries of every trust created in favour of individuals or classes of individuals. The failure of the primary object or objects of the trust does not avoid the trust, but only accelerates its ultimate application to the poor.

(1) *Radd ul-Muhtâr*, Vol. III, p. 669.
(2) *Ibid.*
(3) *Ibid*, p. 670.

The Madras High Court in view of the Privy Council rulings(1) declaring that a *wakf* in favour of the *wâkif's* descendants is "illusory" and, therefore, not valid has held in effect that a *wakf* partly for "charitable" purposes and partly for the *wâkif's* heirs will not be void, because the latter is not a illegal purpose of a *wakf*; but the *wakf* will be valid and the whole income will be devoted for the valid purposes.(2)

Meaning of the word *fakîr*.

I have already explained the meaning of the word *fakîr* according to the various authorities. The definition which is adopted for the *Fatwa* is one not derived from any particular authority, but generally from a comparison of the meaning of all; and the effect is, as stated in the *Anf'aa-ul-Wasâil*, that any person who according to the exigencies of the society in which he lives is in poor and needy circumstances, or has not the wherewithal to support himself and his family for more than a few days, is indigent. Kâzi Khân puts it tersely, that a person entitled to the *zakât* (obligatory alms) is also entitled to the benefits of a *wakf* for the poor.

Principle.

A *wakf* created for the purpose of relieving the needs of the *wâkif's* descendants, &c., when they fall into indigence, is lawful.(3)

A *wakf* generally for the poor or for the indigent, or for the relief of those of the *wâkif's* kindred or descendants who fall into want, will be applied in providing them with food and raiment; and if homeless, in housing them.

Kâzi's discretion.

If there are no provisions in the *wakfnâmah* for carrying out the purposes of the trust, the Kâzi or Judge has absolute discretion to frame a scheme.(4)

When a *wakf* is made for an undefined number of people, such as for the poor generally, Mohammed says, at least, 10 must be fed or supported; according to Imâm Abû Yusuf, 100; others, again, have held that the number ought to be 40 or 80. But the *Fatwa* is that the fixing of the number should be left to the Judge with due regard to the circumstances of the *wakf*.

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(1) See *ante*, p. 344.

(2) *Muthukana Ana Ramanadhan Chettiar* v. *Vada Levvai Marakayar* [1999], I. L., 34 Mad., 12.

(3) *Radd-ul-Muhtâr*, Vol. III, p. 670.

(4) *Kiniat-ul-Munia*.

SECTION IV.

A *Wakf* CREATED IN DEATH-ILLNESS.

When a *marîz* (a person labouring under a death-illness) makes a *wakf* of his property in favour of his children and children's children in perpetuity so long as his *nasl* exists, upon the death of the testator (according to all the jurists), the *wakf* will not be valid in favour of the heirs, but will be valid (according to Abû Hanîfa, Abû Yusuf, Zuffar and Hassan), in favour of the non-heirs, *i.e.*, the grand-children, in respect of one-third of the estate, "for the *wakf* of a *marîz*, is like a will and is valid so far as the third of the estate extends when it is in favour of a non-heir."(1) *Wakf of a marîz.*

"When a person in death-illness makes a *wakf* of his land for his child and his child's child and leaves no other property besides it, one-third of the land becomes *wakf* for the benefit of the child's child, whether assented to by the heirs or not, and the other two-thirds form the property of the heirs, if the *wakf* is disallowed by them, but if it is allowed by them the produce of the two-thirds will be divided between the child and the child's child equally."(2)

Example.—A woman in a death-illness makes a *wakf* for her two daughters and after them for their daughters and their daughter's daughters and so on, and on failure of their issue for the purposes of a mosque. She dies leaving her surviving the said two daughters and a sister(3) who does not consent to the *wakf*. In such a case the *wakf* will be valid respecting one-third of her estate and the remaining two-thirds will be divided among the heirs, in proportion to their legal shares. The income of the one-third, which is *wakf*, will also be divided among the heirs in proportion to their shares until the death of the two daughters, when the produce will go exclusively to their children. Similarly, if the *wâkif* had said, "I devise by way of *wakf* the produce of this land after fifty years to my children's children," it would be valid. The reason is that, though a testamentary *wakf* in favour of an heir is not valid, it is A *wakf* in favour of heirs during death-illness.

Testamentary *wakf*. Principle.

(1) *Radd ul-Muhtâr*, Vol. III, p. 610; *Durr-ul-Mukhtâr*, p. 410; practically there is *consensus* of opinion on this point.

(2) *Ibid.*

(3) The sister takes a share with the daughters under the Sunni Law, but not under the Shiah doctrines.

valid in favour of his or her children, and accordingly when the other heirs do not consent,—the one-third, with reference to which the *wakf* would be valid, if not made to an heir, will be set apart and its produce will be distributed among all the heirs, the immediate beneficiary included, and upon his or her death, the produce of this one-third will be divided among his or her children.

Wakf during last illness.

As already stated, a dedication by a person during his last illness is valid to the extent of one-third of his estate, unless it is assented to by his heirs. When the *wakf* exceeds the one-third and is not assented to by the heirs, it is void as to the excess. If some of the heirs assent to it, it is valid to that extent beyond the third.(1) Accordingly, when a person makes his land "a pious *wakf* to Almighty God, for his child and child's child and his *nasl* for ever, so long as there are any, and after them for the necessitous," and this land falls within a third of his property, its *produce* will be divisible among all his heirs according to their shares in his heritage; and, accordingly, if he leave a wife and children, an eighth will be given to his wife, or if he leave both parents and children, a sixth is to be given to his parents,—the remainder, in either case, being divisible among the children, in the proportion of two shares to a male and one share to a female. This is the case when the *wâkif* has left children of his own and no grandchildren. But when he leaves him surviving both children and grandchildren, the other circumstances of the case being the same, the produce is to be divided according to the number of the children and grandchildren, *i.e.*, *per capita*, and the portions of the children in this division are to be divided among them according to the rules of inheritance, and the portions of the grandchildren are to be divided among them equally. And when "the children of the loins" are exhausted, the produce will be divided among the grandchildren and their *nasl*, the widow and parents taking nothing. If the land in question "does not come out" of the third of the *wâkif's* estate, but the *wakf* thereof is assented to by the heirs, it is lawful in respect of the whole property dedicated, and its income will be divided among the children in equal shares (without any preference of the male over the female), to the exclusion of the wife and the parents who will take nothing. But if the heirs do not assent to the dedi-

If assented to by heirs, valid as to whole.

Otherwise as to one-third.

(1) *Surrat-ul-Fatâwa*, p. 418 (Mss.).

cation, it will take effect with respect to the portion forming one-third of the *wâkif's* estate, and the income will be divisible among all the heirs according to the rules of inheritance; and on the extinction of the *wâkif's* descendants the produce of that portion will be given to the poor.(1)

Wakf during last illness with legacies.

When a *wakf* is created during the last illness and legacies are also made, they will have operation given to them out of one-third of the estate.(2)

If one should say "The produce of this my land is to be given after my death to the child of 'Abdullah and his *nasl*," it is a bequest of the produce. And in like manner, when one has said "Detain it after my death on the child of 'Abdullah," this expression constitutes a bequest of the produce.

A death-bed *wakf* in favour of descendants.

To summarise—When a *wakf* is made by a man in his *death-illness* in favour of his own child, and the child of his child, and their posterity (*nasl*), the *wakf* in favour of his own children is not valid (they being his heirs), but it is valid as regards the grandchildren. So long as there is a child of the *wâkif* living, the produce is to be divided *per capita* among the children and the grandchildren. The shares falling to the lot of the children being, however, given to all the *heirs* of the *wâkif*, so that if besides children there is any other heir of the *wâkif*, he or she would participate in the children's share. For example, the *wâkif* leaves four sons, two grandsons and a wife, and the income from the *wakf* is 600 dirhems, it will be divided "according to the number of heads." The children's share will be 400 dirhems. This sum will be divided among all the *wâkif's* heirs, including the widow. [It must be remembered that the grandchildren are not heirs.] Should some of the children of the *wâkif* die, the income will be divided among the surviving children and grandchildren *per capita*, and the shares of the surviving children will be given to all the surviving heirs of the *wâkif* and to the heirs of those heirs of the *wâkif* who were alive at the time of his death.

Similarly, if a *wakf* is made by a person to take effect after his death in favour of his children, children's children and their *nasl*,

(1) *Surrat ul-Fatâwa*, p. 416 (Mss.); *Fatâwa Alamgiri*, Vol. II p. 480. These provisions show that *wakfs* in favour of one's family or descendants are absolutely valid under the Mahommedan Law.

(2) *Radd ul-Muhtâr*, Vol. III, p. 671.

the *wakf* in favour of the children will not be valid, they being heirs, but will be valid in respect of the others. The division will be as in the case of a death-bed *wakf*.

In these cases the *wakf* does not take effect in favour of the children in consequence of its being made either in death-illness or as a testamentary disposition. But where the *wakf* is made "in health," as a disposition *inter vivos*, it takes effect in favour of the children, as stated before.(1)

(1) By a person "in health" is meant a person not suffering from a fatal malady which ends in death.