CALCUTTA HIGH COURT

Shuk Lal Poddar

Vs

Bikani Mia

(W C Petheram, C.J. Prinsep and Trevelyan, JJ Ghose and A Ali, JJ.)

01.08.1892

JUDGMENT

Ameer Ali, J.

1. The question raised in this reference is of such vital importance to the Mahomedans of India and so materially affects their law and religion, the enjoyment of which has been guaranteed to them by the British Government, that I must state at some length the reasons that have compelled me to differ from my colleagues.

2. The facts of the case are as follow:

One Bikani Mia, a Mahomedan inhabitant of Dacca, shortly before his departure in 1874 on a pilgrimage to Mecca, executed a wakfnama in respect of a considerable portion of his property and registered the document in accordance with the law.

The deed recites that the executant was in the full possession of his sense and power of understanding," that he was not indebted to anybody, that the property to which it related was acquired by Bikani himself, and that he had an "exclusive right, ownership and possession therein.

3. The executant then goes on to say--

I now think it advisable to lay down, according to our Mahomedan shara, certain rules in respect of the properties mentioned in the schedule given below, whereby my name and memory may be perpetuated for ever, my sons and daughters and their descendants may be decently maintained out of the income of those properties, and the properties may not suffer in consequence of disputes among my sons and daughters aforesaid or their descendants. Therefore, on the terras laid down in the following rules and paragraphs, I do hereby make a permanent wakf of the undermentioned properties in favour of my two sons, viz., Sriman Abdul Rahaman Mia and Sriman Abdul Sobhan Mia, my four daughters, viz., Srimoti Moni Bibi, Srimoti Chuni Bibi,

Srimoti Akkal Bibi, and Srimoti Adar Bibi, and any wife Srimoti Panna Bibi, and after them the successive descendants of my said sons and daughters, and on their death, i.e., in the case of all my said sons and daughters, and their descendants dying issueless, in favour of the poor, the indigent and the beggars residing in the town of Dacca. Taking the said wakf properties out of my (personal) ownership and possession, I hold them in possession as mutwalli under the terms of this wakf. As long as I shall live I myself shall continue to be the mutwalli, and as such shall do everything according to the terms of the said wakf. On my death my two sons Sriman Abdul Rahaman Mia and Sriman Abdul Sobhan Mia shall, as hereinafter provided, be appointed mutwallis in my place.

4. Paragraph 1 runs thus:

I or any one among my wife, sons and daughters and their successive descendants, viz., those in whose favour a permanent wakf of the aforesaid properties has been made, shall never to competent to possess or in any manner waste any portion of the wakf properties mentioned in the wakfnama. After my death whoever may be the mutwalli shall, out of the net income or balance remaining after payment of the sudder revenue of the aforesaid properties and the collection" charges, spend Rs. 50 annually in the name of Allah (i.e., for religious purposes), and pay Rs. 100 annually to my eldest son Sriman Abdul Rahaman Mia, Rs. 100 annually to my younger son Sriman Abdul Sobhan Mia, Rs. 50 annually to each of my said daughters, and Rs. 50 annually to my said wife. Beyond these they shall not be entitled to get or take a cowrd; whatever balance may remain after meeting the aforesaid expenses shall be added to the wakf funds as deposit money. And after the death of my said wife the sum of Rs. 50 payable to her shall in the above manner be deposited with the aforesaid funds. On the death of any of my sons or daughters aforesaid, the money payable to him or her shall be divided among his or her sons and daughters in the proportions laid down in the Mahomedan law of inheritance. But if any such person die without leaving any son, daughter, son's son, or any other descendant, then the amount payable to him or her shall be credited to the estate.

5. The rest is not material for the purposes of this reference.

6. Paragraph 3 runs as follows:

Every year the mutwalli for the time being shall in the name of God give away Rs. 50 (fifty rupees) in charity to the poor. One student must always be maintained, and in this the mutwalli shall never fail.

7. In paragraph 4 he provides for the appointment of the mutwallis, and says that they (after his sons) one after another should be selected from among the members of his family, and that no

outsider should be appointed to that office. I may here observe that under the Mussulman Law, the endower has the power to lay down any rule he likes as to the superintendence of his benefaction; and even without such a condition, the Kazi cannot appoint a stranger unless there is nobody competent or trustworthy in the wakif's family.

8. In paragraph 5 he provides as follows:

After my death the aforesaid mutwallis shall be competent to spend any amount of money they think proper for the sake of my salvation, and nobody shall be competent to raise any objection in respect thereof.

9. The general scheme of the document shows that upon the death of each son or daughter without issue, or on the extinction of any branch, the allowance payable to him or to her or to such branch would immediately become available for the general purposes mentioned in paragraph 5.

10. Bikani returned from Mecca a few months after, and has, since his return, become largely indebted to various money-lenders of Dacca, who have obtained money decrees against him, and who now seek, in these suits, to attach and sell the properties covered by the wakfnama, on the allegation that the deed of wakf was illegal and was executed by Bikani with the object of defrauding his creditors.

11. The defence in the main is that the wakfnama was executed bond fide and duly registered, and that it is legal and binding according to the Mahomedan Law. It may be stated here in passing that the plaintiffs have only money-decrees against Bikani; and it does not appear that any portion of the property was hypothecated to any of them for his loan.

12. Two of the issues framed by the Subordinate Judge before whom the case came on for trial in the first instance were:

Fourth.--Was the wakf in question a merely colourable transaction in fraud of creditors, or a real bond fide and legally valid one?

Fifth--Has the wakf been noted upon?

13. It is necessary to set out verbatim what the Subordinate Judge says with respect to these two questions. He expresses himself as follows:

It does not appear from the evidence that at the time of making the wakf Bikani owed more than Rs. 2,000 to his creditors. Although the wakf estate contained the most valuable and important properties of Bikani, still it is clear from the evidence, which has not been contradicted, that he

had at the time secular properties worth much more than Rs. 2,000. The properties were not only sufficient to clear his debts, but also to support himself and his family without any help from the wakf estate. I am therefore of opinion that Bikani did not create the wakf with the object of defrauding his creditors. There is no force in the argument that the deed might have been got up with the intention of defrauding future creditors, who might make advances to him in ignorance of the existence of that deed. Shortly after the execution of the deed Bikani went on a pilgrimage to Mecca, which in all probability he had in contemplation when making the settlement. It is moreover in evidence that he was then a very old man of infirm health, and had very little hopes of returning home alive.

The journey being a very distant one, it is but natural for a man of Bikani's age to entertain such apprehensions with regard to his existence. It seems to me, therefore, more probable that Bikani, before his departure for Mecca, wanted to make some provision for his children, and with that object executed the deed of wakf, and that, to ensure perpetuity, certain pious acts were enjoined to be performed at such trifling expenses as every Mahomedan would do without making any kind of endowment : 8 Weekly Reporter, 312.

14. From the above it is clear that in the Subordinate Judge's opinion the wakf was executed bona fide without any fraudulent intention. But he proceeded to add--

The ultimate reversion to the poor and needy on failure of descendants is such a remote contingency that under the circumstances of the case to be detailed hereafter, I am not prepared to say that Bikani while making the wakf was at all actuated by a pious motive to render some benefit to the poor.

15. Apparently, the Subordinate Judge decided upon the construction of the document that where the endower's descendants receive any portion of the income, the endowment does not constitute a valid wakf under the Mahomedan Law, although all the proceeds go ultimately to the general poor. In this view he made a decree in favour of the plaintiffs. The District Judge on appeal held that to all intents and purposes the deed in question was practically a deed of family endowment," but he added that there was an endowment in prasenti of Rs. 50, and also an additional endowment for the support of a talib-ul-ilem," and looking to the conduct of the appropriator after the deed had been executed, he thought that that portion of the deed had been practically acted upon, and was intended to be carried out from the commencement.

16. He accordingly upheld the deed so far, saying--

I think the appellant is fairly entitled to have released from attachment a portion of the property of which the assets would be about Rs. 75 per year, i.e., Rs. 50 for religious purposes and Rs. 25

for the support of a student who, I may here observe, has always been maintained by the appellant, if not from the date of the wakfnama, still for a very considerable period. The decree of the Subordinate Judge will therefore be modified, and there will be declared a valid charge on the property of the wakf to the extent of Rs. 75 per annum.

17. The defendant appealed specially to this Court, and the Division Bench before whom the case came on for hearing, finding the principles of Mahomedan Law laid down in Rasamaya Dhur Chowdhuri v. Abut Fata Mahomed Ishak I.L.R. 18 Cal. 399 in conflict with those expressed in Meer Mahomed Israil Khan v. Sashti Churn Ghose I.L.R. 19 Cal. 412, referred the following question to the Fall Bench, "whether the disposition of the grantor's property was a valid wakf of the property dealt with by the deed."

18. The case has been elaborately argued on both sides. Mr. Hill for the appellants contended that under the Mahomedan Law the wakf was valid. The Officiating Advocate-General (Mr. Woodroffe) argued that "the law to be applied in this case is not the Mahomedan Law." He contended that the endowments constituting the members of the endower's family as the recipients of the charity mentioned in Mahomedan Law-books are "only the learned lucubrations of the Mahomedan casuists, and never got beyond their studies." He cited a number of cases from the commencement of the Sudder Court to the present day to show that no case of this kind ever came into Court until the year 1881; and further contended that the Courts have recognised such wakfs only as are for purely charitable and religious purposes in the restricted sense in which those words are understood in English Courts of Justice.

19. The first question, therefore, which one has to consider is whether the disposition in question is to be discussed upon the basis of the Mahomedan Law, or of any other system of law.

20. 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 Mahomedans. In the case of Jewan Doss Sahoo v. Shah Kubeerooddeen Ahmed 2 Moo. I.A. 390 the defendant 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 Mahomedan Law. And every case before and since has proceeded upon the same principle. Whilst on this point, I would refer to the words of LEVINGE and Steer, JJ., in Zohorooddeen Sircar v. Baharoollah Sircar W.R. 1864, 185 (186).

21. Apart, therefore, from the question whether such a wakf is a religious institution or not, it seems to me it would be contrary, not only to the principles of "justice, equity, and good conscience," which we have to administer in these Courts, but also to "immemorial and recognised practice," --to apply to the decision of the present case any principle other than that of

the Mahomedan Law.

22. The next question is, what is the Mahomedan Law on the subject? Mr. Woodroffe refused to refer to any work on Mahomedan Law; he said that they were "the mere lucubrations of casuists," and he took his stand upon the decided cases. This certainly does not seem to be a correct position, for it would hardly be right to pretend to decide a case according to Mahomedan Law, and yet wholly to ignore the works in which that law is to be found. From the year 1798 to 1884, we find not only translations of Mahomedan Law works cited, but original authorities quoted at the Bar and referred to by the Bench. In the case of Khajah Hossein Ali v. Shahzadee Hazara Begum 12 W.R. 344, 49 : 4 B.L.R. A.C. 86, Kemp, J., as well as PEACOCK, C.J., on appeal, referred to and relied upon the Fatawa Alamgiri; and in the case of Mullick Abdool Guffoor v. Muleka I.L.R. 10 Cal. 1112, GARTH, C.J., referred to the same work and the Durr-ul-Mukhtar.

23. Mr. Morley points out in his Digest (Vol. I, Introduction, page ccxxvii) the sources from which the Mahomedan Law is derived. He shows that the Mussulman Law is founded (1) on the Koran; (2) on the precepts of the Prophet; and (3) on the decisions of the leading disciples. The direct precepts and practice of the Prophet form part, so to speak, of the Statutory Law of Islam, 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 Mahomedans, and how impossible it is to dissociate the one from the other.

24. In page clxxxiii he says:

The laws of the Hindus and Mahomedans are part and parcel of their religion and believed by them to be of divine revelation.

25. And in another place (page clxxxvi) he adds:

In considering the propriety of altering or abrogating the Hindu or Mahomedan Laws, all preconceived notions of the relative excellence of the English and native systems of jurisprudence should be taken as secondary considerations. 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.

26. The institution of wakfs, 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. 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 decendants; 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 Mishkat;1 showing what the Prophet considered "piety and charity" to mean:

"The Apostle of God said, 'When a Mussulman bestows on his family and kindred, for the intention of rewards, it becomes alms, although he has not given to the poor, but to his family and children.'" "The Apostle of God said, 'There is one Dinar which you have bestowed in the road 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 Dinar in point of reward which you gave to your family." "The Apostle of God said, "The most excellent Dinar which man bestows is that which he bestows upon his own family; and a Dinar spent upon quadrupeds, in the road of God, which is combating for the faith, and a Dinar which a man bestows upon his friends, in the road of God.'" "Omm Salma says," I said to the Prophet, is there any good tidings for me of rewards, for my bestowing on the sons of Abu 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.

27. These precepts are also given by Kazi Khan in his decisions known as the Fatawa Kazi Khan, and by Imam Zailye in substantially the same terms as in the Fath-ul-Kadir, and are considered as binding on Mahomedans.

28. In Muslim and Bokhari (see Morley's Digest, Introduction, pages ccliii and ccliv) 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 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.

To give money to free a slave, to give alms to the poor, to give to your children and kindred are all Sadakah.

29. It is unnecessary to multiply these quotations. A reference to any book on Mahomedan religion or law will show that the words "charitable purposes" are not used in Mussalman Law in the restricted sense in which it has been attempted to use them in the English Courts of Justice.

30. As regards the early wakfs, the Fath-ul-Kadir gives numerous examples of them, and as I have given the passage in extenso in the case of Meer Mahomed Israil Khan I.L.R. 19 Cal. 412 I will not repeat it here. Imam Zailye corroborates and supports the statements contained in the Fath-ul-Kadir, and gives a copy of the deed of 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)

31. In the earliest collection of decisions called the Fatawa Baramika (those delivered by Imam Abu Yusuf, who was the Chief Judge of Bagdad under the Caliph Harun-ul-Rashid), it is laid down that a wakf is lawful in favour of any object, and will, after its extinction, inure in favour of the poor, -- the ultimate beneficiaries of all benefactions.

32. The next collection of decisions now extant in order of date is the Fatawa Hawi, quoted in the Fatawa Alamgiri as "the holy Hawi." Its author Kazi Jamaluddin Ahmed, who died in A.H. 600, was a celebrated lawyer and Kazi of Ghazni (in Afghanistan). In it we find the following rule:

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 istihsan; and this also would be the case when a man makes a wakf on the condition that he should

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out of it, and feed others with it, during his lifetime, and, upon his death, his child shall have the same privileges, 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 Abu Yusuf says, and Fatwas are given in accordance with the same.

33. Of the Fatawa of Kazi Khan, who lived about the same time as the author of the Hawi, Morley speaks thus:

The Fatawa Kazi Khan, or collection of decisions of the Iman Fakhr-ad-Din Hasan Ben Mansur al-Uzjandi al-Farghani, commonly called Kazi Khan, who died in A.H. 592 (A. D. 1195), is a work held in the highest estimation in India, and indeed is received in the Courts as of equal authority with the Hidaya of Burhan-ad-din Ali, with whom Kani Khan was a contemporary : it is replete with cases of common occurrence, and is therefore of great practical utility, the more especially as many of the decisions are illustrated by the proofs and reasoning on which they are founded.

34. In the Fatawa Kazi Khan, in the chapter "on the wakf of a man on himself, his children, his kindred, and his neighbours," the rule is thus stated:

And Khassaf (3) 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 be for me so long as I live, and after me for my children and children's children and their descendants in perpetuity so long as my posterity exists, and on their extinction for the poor] it is lawful.

35. The authority of Kazi Khan can hardly be disputed, and his decisions have been frequently quoted in the Sudder and Supreme Courts, e.g., see Doe d. Jaun Beebee v. Abdollah Barber (Fulton, 345) in the Kiniat-ul-Munia A.C. 1259 (see Morley's Digest, Introduction, page cclxxxvi) the same principle is laid down.

36. In the Zakihrat-id-Fatawa (see Morley's Digest, Introduction, page cclxxxv), a collection of decisions prepared about the end of the thirteenth century, and frequently referred to by the Law officers of the Sudder Court, there is the following:

It is laid down in the book Ajnas by Natifi (4) that if a man makes a wakf, and lays down in it with respect to himself that he should, during his life time, 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 would be valid according to Abu Yusuf, may the mercy of God be on him, and it will not be 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 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.

37. In the Khazanat-Mul-uftiin, an important collection of decisions of the year 1339 frequently referred to by the Law officers in this country (see Macnaghten's Principles and Precedents of Mahomedan Law, pages 332, 342, &c), the Fatwa is given thus:

If any one says 'I make a wakf of this land of mine in favour of my 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 forever, 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.

38. In the Fatawa Durr-id-Mukhtar (1660), which, as I have already pointed out, is a great authority in this country, the same principle is laid down:

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 [i.e., then for his children, and then for his children's children], it is lawful according to the Second [Iman Abu Yusuf], and the Fatwa is in accordance with it. And if he should add (thereto) a third generation, it would include his Nasl (posterity) in general.

39. The Radd-ul-Mukhtar (a commentary on the Durr-ul-Mukhtar by Moulana Mohammed Amin, written about the end of the 17th century and quoted in this country as the Shami), commenting on the above passage, "if a person fixed the usufruct for himself during his life time and thereafter and thereafter, it will be lawful according to the Second [Abu Yusuf], and on this is the Fatwa," says as follows:

It is lawful to reserve the produce of a wakf for one's self. According to Abu Yusuf, the words (thereafter and thereafter) which the wakif mentions has 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 us to the validity of the wakf on such children; whatever difference there is, refers to the reservation by the wakif of the whole of the produce for himself daring life, but none as to the lawfulness of the dedication in favour of the wakif's children.

40. In the Majmaa-ul-Anhar, another collection of decisions compiled towards the end of the last century, it is laid down: "There is absolutely no difference between any lawyers about the validity of wakfs in favour of one's awlad (children or descendants),"

41. The same principle is laid down in the Fatawa-al-Ankirawi of which Mr. Morley speaks as follows:

The Fatawaal-Ankirawi, by the Shaikh-ul-Islam Muhammad Benal Husain, who died in A.H. 1098 (A.D. 1686), is according to the doctrine of Abu Hanifa, and is a work of great authority.

42. The Fath-ul-Kadir, a work of the highest authority, frequently quoted by the Law officers (See Fulton, 345), by Kamal-ud-din Mohammed-as-Siwasi, a lawyer of Irak, who died in 1456, expressly enunciates the validity of such wakfs.

43. In page 858 of the printed copy there is a passage which is worthy of note:

And when any one among the recipients of the benefaction dies, and the wakif has made no mention of what would become of his share (in the usufruct) upon his decease, in that case the usufruct will be divided among the (wakif's) surviving children every year, and will be given to both the affluent and the indigent among them, unless he has provided that the wakf is for the needy of (his children).... It must be known (literally, know) that when he (the wakif) mentions

(in the wakf) his children and kindred, the wakf is valid for the affluent (and indigent) among them, unless ho has specified that it is for the needy of them alone, as I have already mentioned; but if it is for others than they, etc.

44. The Bahr-ur-Raik (see 1 Sel. Rep. 18) (1562), a work of great authority in this country, states that "there is absolutely no difference of opinion regarding wakfs in favour of descendants."

45. But of all the works on Mahomedan law which possess an interest for those who are charged with the administration of justice in this country, the most important is the great Code which was compiled in India, in the reign of Aurungzeb Alamgir, by Indian Judges and Muftis, barely a hundred years before the establishment of British rule. Of the Fatawa Alamgiri, Mr. Morley, writing in 1850, speaks as follows:

Of the collections of decisions now known in India, none is so constantly referred to, or so highly esteemed, as the Fatawa-al-Alamgiri; and although, as has been stated, the Patawa Kazi Khan is reckoned to have an equal authority with the Hidaya, it is neither so generally used, nor so publicly diffused, as the Fatawa-al-Alamgiri. The latter work from its comprehensive nature is applicable in almost every case that arises involving points of Hanafi Law, and is on that account produced and quoted as an authority, almost every day, in the Courts in India. The Fatawa-al-Alamgiri was commenced in the year of the Hijrah 1007 (A.I). 1666), by order of the Emperor Aurungzeb Alamgir, by whose name the collection is now designated.

46. This Code has been cited and followed not only in the old Sudder and Supreme Courts, but also in the High Court of Calcutta. As I have already mentioned, Kemp, J., decided the case of Khajah Hossein Ali v. Shahazadee Hazara Begum 12 W.R. 344 S.C 498 : 4 B.L.R. A.C. 86 upon the law laid down in that work, and in Mullick Abdoul Guffoor v. Muleka I.L.R. 10 Cal. 1112, 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 Section II, Chapter III, Volume II, page 471, Calcutta Edition (Baillie's Digest, second edition, page 576), the recognized law as to the validity of wakfs in favour of one's self and one's children and descendants is discussed in detail. In Chapter IV, page 495 (Baillie's Digest, second edition, page 596), relating to conditions in wakfs, the subject is dealt with by way of reservations or conditions. In other words, decisions are quoted to show that a man may make a wakf either directly constituting himself and his descendants the recipients of the benefaction with an ultimate reserve for the poor; or may make 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 Translation would show what is laid down in the 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 Mohamed, the disciple of Abu Hanifa, in

accordance with Shiah notions, that the endower could not reserve any benefit for himself, was never followed, and that decisions have always been in accordance with the rule laid down by Abu Yusuf.

47. The Fatawa Alamgiri was substantially the Mussulman Code of India, and the law derived from it, or from authorities quoted in it, has been recognized and given effect to by the Courts of Justice ever since the establishment of the British power in this country.

48. From the promulgation of Islam 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 is necessary or not; but so far as the validity of a wakf constituting one's family or children the recipients of the benefaction, in whole or in part, is concerned, there is absolutely no difference. A wakf is a permanent benefaction for the good of God's creatures: the wakif may bestow the usufruct, but not the property, 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 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 is applied to relieve the wants of the endower's children and descendants and kindred in the first place (see Baillie's Digest, 2nd Ed., 593). When a wakf is created constituting the family or descendants of the wakf 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 in made), but simply to impart permanency to the endowment. When the wakif's descendants fail, it must come to the poor. So it is an enduring benefaction--an act of ibadat or warship, to use the language of the Jawahir-ul-Kalam,--an act by which kurbat or "nearness" is obtained to the Deity, according to the Bahr-ur-Eaik.

49. Mr. Woodroffe contended that, as in none of the Sudder Court cases was there any question relating to wakfs in which the family was the recipient of the benefaction, therefore such wakfs must be recent inventions. I cannot accept this as correct. I have already pointed out that from the lifetime of the Prophet down to the introduction of British rule in this country such wakfs were

never doubted, and if we turn to pages 337 to 342 of Macnaghten's Principles and Precedents of Mahomedan Law, we find fatwas of the Law Officers given in proceedings before the Court dealing with the distribution of the income among the descendants of the grantees, and nobody seems to have dreamt of raising any objection to the validity of wakfs for the maintenance of the endowers' descendants. The value of these precedents is shown by the fact that they were acted upon in the old Sudder Court itself [see Wasik Ali Khan v. Government 5 Sel. Rep. 363 (O); 427 (N)],

50. One other remark is necessary on the point. The grants referred to in Macnaghten's Precedents were not of a posthumous character. Every one who knows anything of Indian Mahomedan life must be aware how shrines have sprung up. A holy personage, a dervish, a sufi, comes and settles in a particular place, has becomes the spiritual guide (the Pir) of the people of the neighbourhood. Calibacy being discountenanced by the precepts of Mahomedanism, these men are always married and have families. Grants are made to them for their own support and the support of their families. During his lifetime his place of abode is called either a takia or an asthana; after his death the place where he is buried becomes a dargah or shrine. His descendants take not only the rofits of the lands granted to them, but also the offerings made by his disciples at his shrine.

51. Again, in considering the absence of cases in the Select Reports bearing on the present question, two facts must be borne in mind, (1) that the Select Reports contain only selected cases, and (2) that from the year 1765 to 1864 the Mahomedan law Officers were in existence. Though deprived of their judicial functions of 1793, they continued to be the expounders of the Mahomedan law. From 1773 of 1864 the registration of documents was in the hands of the Kazis; but they were conveyancers as well, and they did the work not for Mahomedans only. The Mahomedan Law Officers were the real adjudicators of questions of Mahomedan law. In the majority of cases they decided the disputes without the parties having recourse to the Courts of the Company with its interminable delays and complications,--its plaints, its answers, its replications and rejoinders. In case of wakfs for the support of the wakif's family, where the rules regarding the application of the income of the estate and the successor to the mutwalliship were laid down in precise terms, there was hardly much room for dispute; and when any dispute arose they were settled by the Fatwa of the Mufti or the Kazi out of Court. So long as the Law Officers remained and until 1864, only two classes of cases, speaking in general terms, came before the Courts : one relating to the nature of grants made to individuals by Mahomedan Sovereigns and Chieftains under the designation of madadmash or Inam Altamagha (maintenance grants), and the other relating to questions of succession to the office of mutwalli in certain public institutions of a religious character. It is absurd to suppose that though their law and their religion recognised in explicit terms the lawfulness of wakfs constituting one's children and descendants as the

immediate recipients of the benefaction, though the Mahomedan Code of India, the Fatawa Alamgiri, contained minute regulations concerning the same, there existed no such institution among the Mussulmans, and that they never availed themselves of the provisions of he law to create such wakfs.

52. Coming now of the cases, Moohummud Sadik v. Moohummud Ali 1 Sel. Rep. 17 (O); 23 N. (1798) the question was whether the son of an executor was entitled to remove a mutwalli appointed by the latter; and that question gave rise to another subsidiary one, viz., whether the Mutwalli, in the absence of any special provision, was entitled to bequeath the trust by will. In delivering their Fatwa, the Muftis prefaced it with the definition of a wakfs as given by Abu Yusuf and Mohamed: "That wakf, according to the opinions of Yusuf and Mohamed (which on this point are adopted as law), implies the relinquishing the proprietary right in any article of property, such as lands, tenements, and the rest; and consecrating it in such manner to the service of God that it may be of benefit to men : provided always that the thing appropriated be, at the time of appropriation, the property of the appropriator, as is specifically stated in the Bahar-ur-Raik.

53. I am unable to accept the suggestion made by the learned Counsel for the respondents, that this Fatwa shows that a wakf must, from its inception, be for indigent strangers. The definition is taken from the Bahar-ur-liaik, and I have already shown from that work that a wakf on one's descendants is valid without any difference.

54. In the case of Hya-on-nissa v. Mofukhir-ul-Islam 1 Sel. Rep. 107 (O); 140 (N), the only question before the Court related to the right of succession to the office of Sujjadanashin of a religious establishment, and as it appeared that the succession was confined, under the royal grant, to the lineal descendants of the grantee, it was held in accordance with the Fatwa of the Law Officers that the respondent was entitled to the office, Hya-on-nissa, though a lineal descendant, being disqualified by her sex from officiating Sujjadanashin.

55. In the case of Hyatee Khanum v. Koolsoom Khanum 1 Sel. Rep. 214 (O); 285 (N) the sole question was whether a wakf of an undivided share of a certain property was valid or not under the Mussulman law. One Mohammed Taki being in possession of certain lands appropriated them to the endowment of a mosque at Rangpur and executed a deed to the plaintiff, his wife, entitled Tumlik-o-towliatnamah to the following effect:

I being in possession of Mouzahs Kubdee, etc., as sole proprietor hereby endow a mosque with them, and confer the trusteeship on my wife, Hyatee Khanum, to defray with their profits the charges of the establishment. Of the surplus which may remain after defraying these charges the trustee shall reserve to herself 91/2-annas; and the remainder be shared by my other wives. The

trustee shall appoint all officers, and may bequeath the trusteeship to whom she pleases. If she name nobody to succeed to it, it shall devolve after her death on any worthy son or grandson of mine, excepting Ali Nuki, whom I debar and disinherit.

56. The wakf was, in the first instance, in favour of a family mosque and for the support of the endower's two wives. It appeared that Mohammed Taki was entitled only to a fractional share of the lands, and the Law Officers, in accordance with the rule of Abu Yusuf and differing from Mohammed, held that the wakf or endowment took effect as regarded Mohamed Taki's share, and the case was decided accordingly. In the opinion of the Law Officers (as given in the report) occurs the following expression: "the deed by which the estate was assigned in trust for pious uses by Mohammed Taki is valid." Mr. Woodroffe based a somewhat strong argument upon these words. He contended that the use of the word "pious" in connection with a mosque showed that a wakf for such purposes only could be regarded as pious. I have examined the original record in this case, and I find that there is no such word as pious in the Fatwa at all. The words are "Mohammed Taki having made a wakf under (tahat) a mosque and Imambara and given its towliat to Hyatee Khanum, appellant, effect should be given to it."

57. In the case of Kulb Ali Hoosein v. Syf Ali 2 Sel. Rep. 110 (O) : 139 (N) (1814) the question was as to the meaning of a madad mash tenure, viz., whether it was an absolute grant to the donee or by way of a wakf. The contested lands had been granted to one Durwesh Hossain, ancestor of the defendant, "for the support of religious mendicants and students and the repairs of mosques and other edifices," and the superintendence was always to be in the hands of Durwesh Hossain and his descendants. The Court, acting under the Fatwa of its Law Officers, held that though the term wakf was not used in the grant, yet having regard to the nature of the objects the grant did not give Durwesh Hossain or his heirs the power of alienation. In their Fatwa (as given in the report) the Law Officers stated that--

The appropriation of land or other property to pious and charitable purposes is sufficient to constitute wakf without the express use of that term in the grant.

58. That case has no bearing on the present question. There is not a word in the judgment or in the Fatwa to warrant the inference that, besides the objects mentioned in the document of grant to Durwesh Hossain, a wakf may not be created for any other object. I may add that the original record of this case is missing, and have, therefore, been unable to verify the above passage.

59. In the case of Qadira v. Kubeeroodeen Ahmud 3 Sel. Rep. 407 (O) : 543 (N) (1824) there was exactly the same question. A grant had been made by the Emperor Alamgir to a saintly person of the name of Shah Kubeer Durwesh who had established a khankah. One of the descendants, Shah Shumsoodeen, alienated portions of the property, partly in favour of

Mussummat Qadira, and partly in favour of one Jewun Doss Sahoo. Upon Shumsoodeen's death, Kubeeroodeen was appointed Sujjada-nashin, and, as it was a royal grant, his appointment was confirmed by Government. He, thereupon, sued Qadira and Jewun Doss Sahoo in two separate suits for the recovery of the properties conveyed to them respectively by Shumsoodeen. The case of Qadira came up to the Sudder Court, and was decided in August 1824. The case of Jewun Doss Sahoo went up to the Privy Council, and was decided in December 1840. In both cases it was held that, though the term wakf was not used in the grant, yet, having regard to the general purpose for which it was made, the royal intention was that it should be a perpetual and inalienable property in the nature of a wakf,,

60. In the case of Abul Hasan v. Haji Mohammad Masih Karbalai 5 Sel. Rep. 87 (O) : 104 (N) (1831), the sole question was whether a verbal endowment of a cemetery corroborated by circumstances was valid or not. It was held to be valid, and the endower was declared incompetent to alienate it.

61. In the case of Muhammad Kasim v. Muhammad Alum 5 Sel. Rep. 133 (O) 159 (N) (1831), the only question was whether, upon a division of joint property among several brothers, a piece of property acquired by one of them exclusively and dedicated by him could form the subject of partition. There was no other question in the case. But it will be observed that the dedication was to a Pir. A Pir (see Herklot's Qanoon-i-Islam, page 282) is a saintly individual who teaches his disciples (murids) religious truths. As I have said before, they all marry and have families. So a dedication to a Pir, called a Pirottur grant, is a wakf for the support of the Pir and his family, and after them for the poor generally.

62. In the case of Wasik Ali Khan v. Government 5 Sel. Rep. 363 (O) : 427 (N) (1831), the only question involved was whether a curator or mutwalli could be removed by the Judge or the ruling power "if he be suspected or if it be for the good of the trust."

63. The case Imam Bukh v. Bibi Shahu 6 Sel. Rep. 22 (O) : 24 (N) (1835) has no bearing on the question I am discussing. In that case the point at issue was whether certain lands appertaining to a dargah were heritable or alienable, and whether the respondent, a female, could hold the office of Sujjada-nashin. The Sudder Court decided the latter point against the lady on the authority of a case given in page 343 of Macnaghten's Principles and Precedents.

64. The next reported case in order of date is that of Doe d. Jaun Beebee v. Abdollah Barber (Fulton, 345) (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 the repairs of the mosque, etc., and other expenses connected therewith in Ramzan and the Eed should be defrayed from the produce. By paragraph 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.

65. 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 performances 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 nobody said that the provision for the maintenance of the family invalidated the wakf. It has been argued at the bar that the wakf was for the support of specific individuals then in existence, but a careful study of the document shows that that notion is not well founded. The word "hereditable" in the first paragraph, the power of increasing the number of the persons receiving maintenance, the appointment of mutwallis one after another for the purpose of carrying out the directions in the wakfnama, 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 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 Mahomedan law that the wakif had reserved the usufruct for herself. And the case was decided on the Fativa of the Law Officers founded on well-known authorities, following the rule laid down by Abu Yusuf, who has always been the Hanafi guide in these questions, and who has been so recognised as such by the Sudder Court itself.

66. The case of Abdoolla v. Rejesri Dossea 7 Sel. Rep. 268 (O) : 320 (N) (1846) is the first reported case regarding a loan upon wakf property, and has no bearing on the present question. Nor have the cases in the Sudder Dewany Adawlut Decisions. In the case of Khodabundha Khan v. Oomutul Fatima S.D.A. (1857) 235 (1857) the sole question for determination turned upon the construction of a Shiah Will. The testator had provided for the performance of certain religious acts after his death, and had further provided that after defraying the expenses thereof the surplus should belong to one Janee Khanum and after her death to the executor. There was no mention of the word wakf in the document. Such a case is expressly provided for in the Sharaya. The learned Judges, "on the interpretation of the wording of the Will," held that it was an absolute devise in favour of Tussuduck Hossain (the executor), subject to certain trusts and the life-interest of Janee

Khanum in the surplus profits.

67. In Dairymple v. Khoondkar Azeeful Islam S.D.A. (1858), 586 the only question was whether a mutwalli could grant a permanent lease. The learned Judges, who had not the document before them, expressed an opinion that--

Where the property is altogether wakf, i.e., when the whole of the profits are devoted to religious purposes, we think the above to be the correct ruling.

68. [The ruling referred to being a Hindu case in which it was held that a shebait could not grant a lease beyond his life.]

69. "But," added the Judges, when the office of mutwalli is hereditary and the incumbent has a beneficial interest in the property, we look upon it as an heritable estate burdened with certain trusts, the proprietary right of which is vested in the mutwalli and his heirs. In such a case there appears no sufficient reason why the incumbent should not exercise a right possessed by other proprietors to grant leases even in perpetuity.

70. Here the learned Judges had in view a case where the property was not wholly and absolutely dedicated, and where the mutwalli had distinctly a beneficial interest in the corpus. There is nothing to show that the Judges intended to imply that an absolute dedication constituting the members of a family as the recipients of the benefaction would not be a good wakf.

71. In the case of Bibee Kuneez Fatima v. Bibee Saheba Jan 8 W.R. 313 (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, Judges (Kemp and Glover, JJ.) considered two points, (1) the right of the plaintiff to sue, and (2) 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 plaintiff; they were all in fact Madad Maash grants. Kemp, J., dealing with 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 discussing 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.

72. As regards the sanads (which Kemp, J., takes care to add were copies or copies of copies), he gives the substance of one of them:

That the grantee, i.e., Syud Mahomad Mir, had a large family to support, and had to defray the

expenses of a 'khankah' 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.

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 tehsil to refrain from exacting the same from the grantee. For this indulgence, the grantee was requested to give the grantor the benefit of his prayers. The grantee was to enjoy the profits after paying the jama fixed, via., 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.

73. To my mind it is perfectly dear that in using the terms "religious" or "charitable" in the passage above quoted, Mr. Justice Kemp used them in the Mahomedan 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 shown 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 khankah 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 he whole purport of his judgment.

74. In the case of Khajah Hossein Al v. Shahzadee Hazara Begum 12 W.R. 344 : S.C. 498; 4 B.L.R. A.C. 86 (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 Mahomedan law. In the course of his decision 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 entirely from the Fatawa Alamgiri. He showed, quoting Harington's Analysis, that Fatwas or law decisions "are given primarily according to Abu Yusuf, and next according to Imam Mahomed." I have not been able to find in the records of the High Court the wakfnama in this case, but a portion of it is quoted in MARKBY, J.'s judgment, and throws sufficient light on the subject under discussion.

In this document, "says Mr. Justice MARKBY," 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 states as follows:

Consequently, for the sake of the maintenance of Khajah Hossein Ai, 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 authorised to take care and to assist the travellers and the poor. He is to attend the fatihas of shabebarat, the mohurrum and 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 net proceeds of taluk Lot Belsar and from the produce of the gardens, for his personal expenses as well as for his family, i.e., his grandfather and mother.

75. 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 and to assist the travellers and the poor. He was "to attend to the fatihas of shabebarat, the mohurrum, and the eeds," the usual Mahomedan festivals, "and to allow such expenses as are for solemnizing the above festivals." There was no specific dedication for those purposes.

76. 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 towliatnama, that such is the case.

The performance of certain ceremonies at the great Mahomedan 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 Mahomedan Law.

77. It was contended upon Mr. Justice Kemp's words, "the primary object of every wakf is to provide for the poor," that where that is not the case the wakf is not valid. The learned Judge was pointing out 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 Mahomedan 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 facts 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, pages 585, 586, where the subject of wakf on one's descendants is treated.

78. 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 Khajah Hossein Ali and his family, though the deed contained discretionary directions about helping the poor and performing the usual family festivals. To my mind 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.

79. In the case of Muzhurool Huq v. Puhraj Ditarey Mohapattur 13 W.R. 235 (1870), the plaintiff sued to obtain possession of certain lands which he had purchased with notice that they were wakf. The special appellant had intervened in the suit alleging that he was the mutwalli under the wakfnama. The Judge in the Court below had decreed the suit on the ground (1) that the lands had not been endowed by the plaintiff's vendor, and (2) 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:

Looking to the terms of the deed," he said, "it has all the characteristics of a valid endowment

under the Mahomedan law. The primary objects for which the lands are endowed, and which are the objects which all Mahomedans 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 Muazzin, 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 Muzhurool 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.

80. 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 Mahomedan 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 Mahomedan 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-existant object. *******

81. Here again he 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 case of Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28, but that passage deals with the question which he was discussing from two aspects, both of which are provided for in the Fatawa Alamgiri, an authority upon which that learned Judge relied considerably. In the Fatawa Alamgiri, Volume II, page 495 (see Baillie's Digest, 2nd Edition, page 595), 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 Abu Yusuf, and the Sheikhs of Balkh have adopted his opinion, and the Fatwa is in conformity with it." 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 appropriated, 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 an appropriation 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.

82. Here the appropriation is either in general terms or is expressly for the poor, with a 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 wakf to go to the poor (meaning indigent strangers) on the extinction of his descendants,

83. In page 474, Volume II of the same work (Baillie's Digest, 2nd Edition, page 576) it is laid down, however, that a man may make a wakf of himself:

A man says my land is a sadakah mowkoofa5 on myself. Such an appropriation is lawful according to what is approved. 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 Abu Yusuf. And if one should say my land is mowkoofa on such a one and after him upon me, or should say Upon me and Upon such a one, or upon my slave and upon such an one, the approved opinion is that it would be valid.

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

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 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 Zahir Rewayat; 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 shild 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 mote remote being alike unless the appropriate. 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' (bat nan baad batn), when a begin ning must be made with them with whom the appropriator has begun.

84. In these cases the wakf is upon himself or upon his children and afterward on the poor.

85. Mr. Justice Kemp affirms both these principles. In the first part of the passage under reference, he recognises the Mussulman law given in page 591 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 con fined 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 profit 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 Alamgiri. In the second pal he points out that "a person may make an endowment settling lands of 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 Mahomedan law being that the profits of the land endowed should be endowed for a purpose which always remains in existence. Here there is no reference to a "charge of certain items" upon the profits an estate dedicated for some specific purposes. The principle is state in the clearest terms that a person may make an endowment "settling land 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 Abu Yusuf and Mohammed we: 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 Mahomedan law. If his words are studied with some care, it will be four that he enunciated the recognised rules of Mahomedan law, viz., that the endower may make an appropriation and condition that he and his family 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.

86. The case of Doyal Chund Mullick v. Syud Keramut Ali 16 W.R. 116 has no bearing on the present discussion, but it is important in one respect. It shows that again Kemp, J., went to the Fatawa Alamgiri (Baillie's Digest, old Edition, page 551, 2nd Edition, page 559) for the chief elements of wakf, and that he used the expression "seeking for nearness" in exactly the sense in which Mahomedan lawyers use it.

87. So far there is nothing to show that the Courts were disinclined to recognise as valid wakfs in favour of one's descendants. On the contrary, all the indication is on the other side. For the first time in 1881, seventeen years after the abolition of the Law Officers, in the case of Mahomed Hamidulla Khan v. Lotful Huq I.L.R. 6 Cal. 744 : 8 C.L.R. 164, it was held that a wakf an the members of one's family was invalid.

88. In deciding that case the learned Judges supposed Baillie and Macnaghten to be in conflict. But this view is certainly not correct. Principle 4, Chapter X of Macnaghten's Principles and Precedents of Mahomedan law, shows that an endowment may be made in favour of the children of a person and on their failure for the poor. In page 338 and page 341 cases are given which refer distinctly to wakfs for the support of particular families, The quotation in page 342 from the khazanut-ul-Muftiin is emphatic. Nor is there anything in the Hedaya 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 Hedaya with many interpolations and omissions. Mr. Hamilton in translating the Persian version into English rendered the word wakf into "appropriation;" but as every "appropriation" cannot be regarded as wakf, he took care to add in a foot-note that it meant appropriations of a pious or charitable nature. The learned Judges decided the case before them upon the authority of that foot-note, construing it in the trictest English sense. There is no warrant in the Hedaya itself for that view. In the Hedaya a wakf is defined thus: "in law, it signifies, according to Abu Hanifa, the tying up of the substance of a property in the ownership of the wakif and the demotion of its usufruct, amounting to an ariat.... 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 wakif [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."

89. The definition given by the Disciples has been adopted for the Fatwa [as is stated in Moohummud Sadik v. Moohummud Ali 1 Sel. Rep. 17 (O) : 23 (N). his 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 meritori-tis 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 Hedaya is an elementary work, taught in schools, and deals with questions on which Abu Hanifa, Abu Yusuf, and Mohammed were in disagreement. It does not deal with the subject of wakfs in favour of one's children, as there was absolutely no difference on that point. In page 900 of the Arabic Hedaya printed with the Kifaya), Volume II, the validity of such a wakf is taken for granted.

90. The learned Judges incorporate Hamilton's foot-note into the text, and then say "Abu Hanifa undoubtedly in II Hedaya, page 334, points out that the appropriation, that is wakf, must be to some charitable purpose." 'They evidently think the Heddya to be a work by Abu Hanifa, and they impute to him a statement which is not to be found in the text. They construe the words charitable purpose' "in the foot note as meaning charity to the poor; they forget that a charitable purpose in Mussulman law includes benefactions for the support of one's family; and that Abu Hanifa himself, as stated in the Kifaya (a commentary on the Hedaya, see Morley's Digest Introduction, page cclxix) held wakf to mean the tying-up of the substance in the ownership of the wakif, and the devotion of its profits on the poor or on any purpose among good purposes." They hold that a wakf may be constituted for the benefit of the endower's family, but they think that it can only be done by the use of the word sadakah, forgetting that sadakah only means charity, and that according to the Mussulman law a provision for one's family is the best of charities, and that Baillie points out it is not necessary to use the term sadakah when the word wakf is used. They again rely upon a foot note by the translator in holding that a man must make himself a pauper before he can constitute himself the recipient of his benefaction. This view is wholly opposed to the Mussulman law, as will be seen on a reference to Baillie's Digest, p. 593, which shows that a man need not make himself a pauper before he can reserve the usufruct for himself.

91. Some parts of the judgment, however, would indicate the general conclusion of the Judges to have been that under the guise of a wakf the donees took an absolute interest in the estate in proportion to their respective shares, in which case their decision would not affect the present question. That case clearly proceeded on several mistakes, and one of the learned Judges, who decided it, subsequently resiled to some extent from the position he took up there.

92. The case of Fatima Bibee v. Ariff Ismailjee Bham 9 C.L.R. 66 (1882) was not argued at all, counsel for the defendant leaving the construction of the documents in the hands of the Court. And the learned Judge, acting on such materials as the plaintiffs counsel had placed before him, set aside the wakfnamas, which seems to have been the object of the parties.

93. In Luchmiput Singh v. Amir Alum I.L.R. 9 Cal. 176 (1882), the wakf was for the performance of family ceremonies, for the payment of the wakfs debts, and the maintenance of

his lineal descendants. The wakf was held to be valid. The following passage from the judgment is worthy of consideration:

The fact that the Subordinate Judge who tried this case is himself a Mahomedan 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 object. And singularly enough the only matter which strikes us as one in respect of which, with reference to the decisions of the Courts, makes 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 wakfnama, 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. 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.

94. After referring to the cases of Abdul Ganne Kasam v. Hussen Miya Rahimtula 10 Bom. H.C. 7 and Mahomed Hamidulla Khan v. Lotful Huq I.L.R. 6 Cal. 744 : 8 C.L.R. 164 they say:

The wakfnama 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 not 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.

95. In the case of Phate Saheb Bibi v. Damadar Premji I.L.R. 3 Bom. 84 (1879), a portion of the dedicated property was said in execution of a decree against one of the beneficiaries; another beneficiary sued to set aside the sale; the only question was whether the right of suit belonged to the heirs or descendants of the settlor or to the mutwallis. The Court (WEST and PINHEY, JJ.) held that the right of suit belonged to the mutwallis.

96. In Fatma Bibi v. The Advocate-General of Bombay I.L.R. 6 Bom. 42 (1881), and Amrutlal Kalidas v. Shaik Hossein I.L.R. 11 Bom. 492 (1887) the wakfs were for the settlors and the settlors' descendants, and the poor as the ultimate recipients were expressly designated. The Bombay High Court in both these cases held the wakf to be valid. In the latter case, Farran, J., pointed out that the learned Judges who had decided Mahomed Hamidulla Khan v. Lotful Huq I.L.R. 6 Cal. 744 : 8 C.L.R. 164 and Fatima Bibee v. Ariff Ismailjee Bham 9 C.L.R. 66 had taken for a decision what was a mere obiter in Abdul Ganne Kasam v. Hussen Miya Rahimtula 10 Bom. H.C. 7.

97. In the case of Jugatmoni Chowdhrani v. Romjani Bibee I.L.R. 10 Cal. 533 (1884), Field, J., pointed out the "essentials" to the creation of a valid wakf. He said, in the first place, the appropriator must destine its ultimate application to objects not liable to become extinct; secondly, that the appropriation must be at once complete; thirdly, that there be no stipulation in the wakf for a sale of the property and the expenditure of the price on the appropriator's necessities; and, fourthly, that there must be perpetuity.

98. In the case of Nizamudin Gulam v. Abdul Gafur I.L.R. 13 Bom. 264 there was no express provision at all for the ultimate devolution of the property to any religious or charitable object; and the learned Judges (following the cases of Fatma Bibi and Amrutlal) declared that the grant in wakf could not therefore be upheld. The sole ground upon which they proceeded to hold against the wakf was, that there was no express ultimate trust. The case of Fatma Bibi was followed in this Court in Ayesha Bibi v. Golam Ryder Khan (on settlement of issues), 19th November 1883, and Phudia Bibi v. Mohammed Kazem Isphahanee (31st March 1884); both unreported.

99. In the case of Pathukutti v. Avathalakutti I.L.R. 13 Mad. 66 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. Under the Mahomedan law of all the schools this wakf was bad from its inception, and the learned Judges held so. But Mr. Justice Ayyar supported his arguments against the validity of the wakf before him by a reference to the Calcutta case of Mahomed Hamidulla Khan v. Lotful Huq I.L.R. 6 Cal. 744 : 8 C.L.R. 164. The learned Judge's reasoning, however, does not lend any support to the idea that he adopted the conclusion arrived at in the Calcutta case. From the judgment it is clear that the inclination of Mr. Justice Ayyar's mind was that if the wakf had been out-and-out for the children of the settlor, and the poor had been expressly mentioned, it would have been valid.

100. In the case of Murtazai Bibi v. Jumna Bibi I.L.R. 13 All. 261 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 wakif's family or descendants, the ultimate unfailing purpose must be expressly designated. This is one of the points of difference between the recognised Hanafi law and the recognized Shiah law. In the wakfnamah 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 Hanafi cases.

101. Such was the state of the case-law on the subject of wakfs constituting the endower's family as the recipients of the benefaction, until the decision of their Lordships in the Privy Council in Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28.

There were two cases in the Calcutta High Court holding such wakfs to be invalid--one of them wholly unargued; the other proceeding on some clear mistakes and evidently doubted in a subsequent case, by one of the learned Judges who had decided it; two reported cases including the decision of McDONELL and MACPHERSON, JJ., in Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28 indicating that such a wakf would be valid if the unfailing object was designated; two Bombay cases holding such wakfs to be valid, and a third substantially endorsing the same view. (I do not refer to the unreported cases in this Court nor to the case of Abdul Ganne Kasam, as it has not been accepted by the Bombay High Court in Fatma Bibi v. The Advocate-General and in Amrutlal v. Sheik Hossein, and because what has been considered as a decision in that case was plainly obiter). This can hardly be called a course of decisions such as has been imagined.

102. But, says the Advocate-General, the Privy Council has repealed the Mahomedan law. This contention, in my opinion, is wholly unfounded. The case of Mahomed Ahsanulla Chowdhry v. Amar Chand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28 was a somewhat peculiar one.

103. In the wakfnama executed by the father of the appellant Mahomed Ahsanulla Chowdhry, the property was made wakf in the following terms:

I hereby appropriate and dedicate as fisabilillali wakf, in the manner provided in the paragraph mentioned below, the properties now in question and other property there described, fordefraying the expenses of the brick-built musjid of my grandfather Jorip Mahomed Chowdhry, at my own family dwelling-house in the village of Paragulpore, and of the two madrassas at my own ancestral homestead, and my lodging house in the town of Chittagong, and sadir warid (persons coming and going), and I pray to God that He may in His mercy accept and preserve the same for ever being applied to those purposes.

104. It will be seen that this is a direct dedication to the purposes named. It was open to the endower under the Mahomedan law to have adopted two courses, both regarded as legal and valid, viz., either to create a wakf directly constituting his descendants the immediate recipients of the benefaction and on their extinction making the general poor the recipients thereof, or to endow the properties in favour of some general pious object, reserving the usufruct for himself and his descendants so long as they existed. Instead of adopting either of these courses, the endower in this particular case chose a devious method. In the paragraph laying down the rules for the administration it was provided that the purposes for which the dedication was made should be performed according to custom. There is no indication, however, of what the customary expenses were. There was no provision that, on the extinction of the family, it would be applied for the purposes stated in the preamble or to any other purpose. Had the wakf been in general terms, Abu Yusuf's rule would have been applicable, and on the failure of the family the

entire income would have been applicable to it. But as the expenses for these purposes had been already fixed, if a stranger ever became mutwalli on the extinction of the family, he would not be bound to spend more. Their Lordships accordingly say:

There is not a word said about increasing the amount spent on charitable uses beyond the expenditure which was according to custom. Their Lordships cannot find that the deed imposes any obligation on the grantor's male issue, or on any other person into whose hands the property may come, to apply it to charitable uses, except to the extent to which he had himself been accustomed to perform them.

105. I venture to think that this sentence contains the pith of the judgment in that case. Their Lordships carefully abstained from laying down any general rule. They say in express terms:

Their Lordships do not attempt in this case to lay 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. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India.

106. This sentence shows clearly that they did not countenance the views expressed by the Calcutta High Court in the two decisions to which I have referred. On the contrary, what follows is, to a large extent, destructive of the ratio decidendi in Mahomed Hamidulla Khan v. Lotful Huq I.L.R. 6 Cal. 744 : 8 C.L.R. 164. In Mahomed Ahsanulla Chowdhry v. Amar Chand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28 the wakf having been directly in favour of certain religious purposes named, the provision about the maintenance of the family could come in only under the rules given in the Fatawa Alamgiri, Volume II, page 495 (Baillie's Digest, 2nd edition, page 596), which Kemp, J., evidently had in view in the case of Muzhurool Huq v. Puhraj Ditarey Mohapattur 13 W.R. 235. Their Lordships accordingly say:

On the one hand their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as wakf. On this point they agree with, and adopt the views of, the Calcutta High Court stated by Mr. Justice Kemp in one of the cases--Mughurool Huq v. Puhraj Ditarey Mohapattur 13 W.R. 235. After stating the conclusion of the Court, that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after those primary objects, that learned Judge says: '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 which after they

lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law.

On the other hand they have not been referred to, nor can they find, any authority showing that according to Mahomedan 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.

107. To my mind there is nothing in the above remarks to justify the inference that their Lordships intended to repeal the Mahomedan law. In the last two lines of the above-quoted passage they gave expression, as it seems to me, to what the Mahomedan law lays down, viz., that every wakf in favour of objects liable to failure (jihat-i-munkataa), such as a man's family, "must at some period of time or other" enure to the benefit of the poor, unless some other continuing object is named. But learned Counsel contended that in using the words "at some period of time or other," the Privy Council meant "some fixed or certain or determinate period of time." I cannot concur in this view, for in the first place it is impossible to say when the descendants would die off and in the next place a wakf cannot be made to take effect at a future period however fixed. For example, if a man were to say this property would be dedicated for the poor twenty years hence, in the meantime so-and-so should have the usufruct of it, such a dedication is, under the Mussulman law, invalid, as it is suspensive upon a time when the property may not be in the endower at all. He may have died in the meantime, and the property may have passed from him to his heirs. This in different from a testamentary wakf, because, a man has a disposing power over his property until his death. I do not think, therefore, that their Lordships intended to convey what Mr. Woodroffe contends for. As I said before, to my mind they expressed in their own words what the Mussulman law lays down.

108. Mr. Arathoon's argument, to which the Privy Council refer in their judgment, was somewhat unfortunate. A family settlement does not import a charitable gift to the poor, but a wakf constituting a family or any specified object or class (jihat-i-muyyin), as the recipients of the benefaction, according to the recognized and accepted Hanafi doctrine, imports the ultimate gift to the poor "though they be not named," "for wakf like sadakah implies that."

109. But the other argument of learned Counsel, viz., that a wakf in which the endower's children are the recipients of the benefaction would change the rules of succession among Mahomedans, deserves some attention, as it is evidently founded on an erroneous apprehension of the Mussulman law. A Mussulman has an absolute disposing power during his lifetime over all his properties, ancestral or self-acquired. He can make a gift of the whole of it to any person, heir or non-heir, or give wholly or partially the usufruct by wakf to any one he chooses [see the Fath-ul-Kudir, the Alamgin, and the Tahtawi, Volume II, page 528]. In the one case, the donee takes the substance, in other words, the property absolutely; in the other case, he takes the interest in the

usufruct, the corpus remaining absolutely tied up in the custody of the Almighty for the benefit of other beneficiaries. In the one case the property is transferred to the donee; in the other, to God from whom the grantor had received it; in either case the right of the donor becomes extinguished for ever. A wakf, however, being religious in its nature stands upon a different footing from a transfer to an individual.

110. I prefer not to make any observation on the case of Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399, as I understand it is an appeal to Her Majesty in Council.

111. Before dealing with the case under reference, it seems to me necessary to clear away certain impressions regarding the respective opinions of Abu Hanifa, Abu Yusuf, and Mohamed, which have formed the subject of elaborate arguments at the Bar. There is absolutely no difference between them as to the obligatoriness of a wakf or as to the validity of a wakf in favour of one's own or anybody else's family or descendants. The only dispute among them is (a) as to when and how it becomes binding and obligatory. Abu Hanifa thought a wakf to be revocable so long as the endower had not obtained the imprimatur of the Kazi or "death came upon him," when it would become irrevocable. Abu Yusuf and Mohamed held that it was irrevocable, binding and obligatory (lazim) from the moment the consecration was made; but they differed as to how and when it should become operative. Abu Yusuf ruled that the wakf became binding upon the mere declaration of the dedication. Mohamed thought that it was not irrevocable until the property had been consigned to a mut-walli. With reference to these different views, Tahtawi says, "no one has accepted the opinion of the Imam (Abu Hanifa), some few have followed Mohamed, but the universality of lawyers have adopted Abu Yusuf's rule. 'The Manah, the Fath-ul-Kadir, etc., all say the Fatwa is with Abu Yusuf. The Alamgiri says that "the lawyers of Balkh follow Abu Yusuf, and we. (meaning the Indian Judges) decree accordingly." 1 have given here the epitome of the dicta contained in the law-books, without burdening my judgment with quotations.

112. There are three other points upon which Abu Yusuf and Mohamed differ to which attention must be called. Mohamed says (b) the property dedicated if partible, should be divided off, i.e., that it must not be mushaa; (c) that the endower should reserve no interest in the usufruct: on this point, the principal point of difference between the Shiahs and the Hanafis, who form the bulk of the Indian Mahomedans, he agrees with the Shiahs; and (d) that the ultimate unfailing object must be expressly designated. On all these points Abu Yusuf differs from Mohamed. With reference to (d) Abu Yusuf ruled that the word wakf implied perpetuity and the inclusion of the poor, and that when a wakf is created in favour of an object or class of objects liable to failure, on its or their execution, the wakf would be for the poor, "even though they be not named." A reference to any standard work would place the matter beyond the shadow of a doubt.

113. As regards the other matters, Abu Yusuf ruled that "the wakf of Mushaa" was valid, and that

the endower could lawfully reserve for himself the usufruct or indeed "make a wakf on himself," and all the Mahomedan lawyers and Judges "have followed Abu Yusuf." In India "the fatwa," says the Alamgiri, "is with Abu Yusuf." And the British Indian Courts themselves have accepted and followed, under the guidance of their Law Officers, the rule of Abu Yusuf in (a), (b) and (c).

114. In the case of Deo d. Jaun Beebee v. Abdollah Barber Fulton, 345, the Calcutta Supreme Court held that the wakif may lawfully reserve the usufruct for himself, and that consignment was not necessary to the validity of a wakf. In the case of Hyatee Khanum v. Koolsoom Khartum 1 Sel. Rep. 214 (O) 285 (N); the Sudder Court held that the wakf of Mushaa or an undivided share in a certain property was valid. It seems to me the Indian Courts are bound to conform to the rule of Abu Yusuf with reference to (d) also, in accordance with the express practice and authority of Mussulman Judges and lawyers for ages.

115. But even that question does not arise in the case under reference, for here the poor are expressly designated as the ultimate recipients of the wakf created by Bikani.

116. The First Court has held, as I have already stated, that this wakf was not executed with any intention to defraud creditors, that the man was old and infirm, and was going away on a pilgrimage from which he had little hope of returning alive, and that he intended to make a provision for his family with a remote reservation for the poor. Here lies, in the Subordinate Judge's opinion, the gravamen of the charge. In the latter part of his judgment he makes the following observation:

I doubt that Bikani ever seriously thought of the total extinction of his descendants and of a probable contingency of a reversion to the poor. Bikani returned home from Mecca within a few months after the execution of the wakf deed. Hardly anything was done during that period to give effect to the deed. On his return he did not even get his name registered as mutwalli, but all along continued to recover the profits of the properties in his personal capacity, ignoring the wakf altogether, and even confessed before some respectable pleaders that he had no mind to give any effect to the deed.

117. If Bikani created a valid wakf, his subsequent intention or conduct has nothing to do with the question. But as a good deal of discussion has taken place on the subject of sham dedications and nominal or pretended wakfs, I feel bound to state in precise terms what appears to me to be the Mahomedan law, especially as the Transfer of Property Act leaves untouched the Mussulman law relating to dispositions of property. The Mussulman law supplies ample safeguards against fraud. It declares that if a property which is already mortgaged to another is made wakf, it must be redeemed with the other assets of the mortgagor (if he dies without having released it). If it cannot be so done, the wakf must be set aside. The Mussulman law provides that if a man

immersed in debt, in other words, a person in insolvent circumstances, makes a wakf, in order to delay his creditors and has no other means to pay his debts with, the wakf will not be recognised. But when a person, who is not in insolvent circumstances, or against whom no fiat of inhibition has issued from the Kazi, makes a wakf, his disposition is immediately operative and his right in the property drops for ever, Radd-ul-Muhtar, Volume III, page 610, Fath-ul-Kadir, Volume II, page 640; Surat-ul-Fatawa, etc. Thenceforth he is an absolute stranger to it. The property is not his any more. As I understand the expression "nominal" or "pretended" in connection with a transfer, it means this, that whilst the transferor purports to transfer his property, in reality he does not. If the property ostensibly changes hands, it is held by the transferee subject to a secret trust in favour of the original proprietor. But this is not applicable to a wakf if the Mahomedan law is to be applied. The moment a wakf is made, the right of the owner in the subject of the consecration drops absolutely; it is transferred to the Almighty and the wakif has no power of revocation. If he makes a wakf, knowing the effect of his acts, he cannot say afterwards that he did not intend making a wakf, or that he had some other secret design in view and never intended to part with his property. No hidden or secret reservation is allowed. If at the time of the consecration he expressly says : I make a wakf on condition that it shall remain my property, or I shall deal with it as I like, or I may sell it when I like and apply the proceeds to my use," the law regards it as void. But in any other case, if the wakif himself is the mutwalli and misdeals with the property or acts contrary to the provisions of the wakf, the Kazi is empowered to remove him on the complaint of any of the beneficiaries, even though he may have made a condition that he shall not be removed.

118. It must be remembered that in Mahomedan law and Mahomedan law-books there is no distinction between a wakf for a man's family and a wakf for any other purpose. They all stand on the same footing. The mutwalli (whether the wakif himself or anybody else) has no interest in the wakf beyond that which is expressly provided for at the time of dedication. He has no power of sale, mortgage or lease (without the sanction of the Judge), and is; just in the same position as the manager of a minor's property. Nor have the recipients of the benefaction any interest beyond what is expressly given in the wakfnama. They have no beneficial interest of any kind in the corpus, nor in the income beyond what is provided in the deed. I fail, therefore, to see how the conduct or acts of a manager (be he the wakif himself) can affect the wakf. If the question were whether a wakf deed was executed at the time it purports to be, or whether a wakf was created at the time alleged, no doubt the conduct of the wakif subsequent to such alleged dedication would be material, but that is not the case here, In the present case it has been found by the lower Court that the man executed the deed and duly registered it. He went away with little or no hope of returning, leaving the management in the hands of his sons. He had done apparently all that he could to complete the transfer at the time. His subsequent conduct cannot, under the Mahomedan

law, be allowed to affect the wakf.

119. The wakfnama in the present case contains three distinct provisions; it provides (1) for certain allowances in favour of the endower's children and wife; (2) it provides for the disbursement of Rs. 50 in the way of God, and of a further like sum in charity to the poor; and (3) it provides that the balance of the income should form part of the wakf fund arid be expended in good acts for the benefit of his soul. The Judge in the Court below has found that so far as the second provision is concerned, the deed of wakf has been carried into effect; not only has Rs. 50 been spent on charity, but a student has been maintained "if not from the outset, at least for a considerable time." The maintenance of the student apart from the almsgiving Co the poor shows that the Judge is not right in thinking that the Rs. 50 mentioned in paragraph 3 is the same sum as mentioned in paragraph 1. The very objects are different, one is in "the way of God," which means "the support of religion," the other for alms to the poor. The members of the family cannot get more than what has specifically been reserved for them; out of the balance, in any case not less than half the income, a portion is given to purposes which would be denominated charitable in the English sense, the remainder is to be spent in pious acts for the good of the soul of the endower, who according to the Subordinate Judge, went to Mecca with no hope of returning alive.

120. But it is said the preamble shows that he had no pious motive, for the first object he mentions is the perpetuation of his name. This argument proceeds upon a misapprehension of the inner life of the people whose law we have to administer. Among the Mussulmans, it is the general practice to invoke the names of their deceased ancestors at certain religious festivals, especially the Shab-e-barat, commonly called the Shubrat, to spread flowers and light candles or chiraghs over the grave of the deceased, to have the Koran recited, particularly if the family is possessed of means, on the spot where he died. Herklot in his Qanoon-i-Islam describes the ceremonies performed at the time of Shubrat or Shab-e-barat. In the month of Ramazan, on one of the nights believed to be the "night of excellence" mentioned in the Koran, "when the angels and the spirit descend to the earth at the command of their Lord," it is usual to offer fatihas, for the dead; also in Rajjab, the month of "the Ascension." If the deceased was a saintly individual, besides the usual fatihas, Urs is performed on the anniversary of his death. In the wakfnama in the case of Shah Amir Alum, these were the ceremonies provided for. Nothing is more bitter or agonising to a Mussulman than the idea of having nobody left to offer up fatihas prayers, niaz, etc., for him after death. His name is "perpetuated" in these pious acts and in the alms which are distributed on these occasions. This is what a Mussulman understands by the words "for the perpetuation of my name," "for keeping my name alive," etc.

121. This wakfnama is totally different from the wakfnama in the case Mahomed Ahsanulla

Chowdhry v. Amar Chand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28. To hold that a wakf, the benefaction of which is bestowed wholly or in part on the wakif's family and his descendants is invalid, would have the effect, in my opinion, of sweeping away an important branch of the Mussulman Law, with which are associated and intermixed the dearest religious interests of the people.

122. For all the reasons I have given above, I am of opinion that the wakfnama in question created a valid endowment, and that these appeals should be allowed and the suits dismissed with costs in all the Courts.

123. There seems to be another difficulty in the plaintiffs' suits. It is not quite clear whether all the persons interested in the wakf have been made parties; certainly the Talib-ul-ilm is not a party. 1 am inclined to think these suits fall within the purview of the ruling of their Lordships in Bishen Chand Basawut v. Nadir Hossain L.R. 15 I.A. 1 : I.L.R. 15 Cal. 329, and ought to be dismissed on that ground also.

Ghose, J.

124. The plaintiffs in these cases are creditors of one Haji Bikani Mia. In execution of the decrees obtained by them against Bikani, they attached certain properties as belonging to him, but this was opposed by Bikani upon the ground that he had on the 4th Aughran 1281 (1874) dedicated the properties as wakf, and that he had since been holding them as mutwalli. This opposition succeeded, whereupon the creditors brought the suits from which the appeals before us have arisen, upon the ground that the deed of wakf propounded by Bikani was a nominal transaction, that he was holding the properties as owner, and that therefore the properties were liable to be sold for satisfaction of their decrees. The suits were defended by Bikani, upon the ground that the said deed did constitute the properties as valid wakf according to the Mahomedan Law, and that it was a bond fide transaction.

125. Both the Courts below decreed the suits. The Subordinate Judge distinctly found that Bikani had no pious object in view, that the wakf was but a device to perpetuate the property in his family, and that, notwithstanding the deed, Bikani held the property, not as mutwalli but as owner, and that the endowment was but nominal. The District Judge in appeal considered the case not exactly in the same way as the Subordinate Judge did. He treated the questions raised as mixed questions of law and fact, but in the result came to the same conclusion as the Subordinate Judge. He held that there was no intention of a conveyance to pious uses at all; that the trust was in complete abeyance from 1281 (1874) to 1293 (1886), when the deed was produced for the first time to save the property from creditors; that Bikani never professed to act as a mutwalli; that there was no substantial dedication to charitable uses at some time or other; that to all intents

and purposes the deed was practically a deed of family endowment, and that the pious acts done by Bikani, as indicating a compliance with the objects stated in the deed, were such as would be commonly performed by all pious and well-to-do Mahomedans. The Judge however held, with reference to the provision made in the deed for pious purposes, that the properties were subject to a charge of Rs. 75 a year, and that they should be sold subject to such charge. I should here mention that in dealing with the question of law on the subject, the Judge relied upon and guided himself by the decision of the Judicial Committee in the case of Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28 and a, decision of this Court (Tottenham and Trevelyan, JJ.) in the case of Rasumaya Dhur Chowdhuri v. Abut Fata Mahomed Ishak I.L.R. 18 Cal. 399.

126. On appeal to this Court, a Divisional Bench (Petheram, C.J., and HILL, J.) being of opinion that there was a conflict between two decisions of this Court, one by Mr. Justice Tottenham and Mr. Justice Trevelyan, in the case of Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 396 already referred to, and the other by Mr. Justice O'Kinealy and Mr. Justice Ameer Ali, Meer Mahomed Israil Khan v. Sashti Churn Ghose I.L.R. 19 Cal. 412, as bearing upon the question of the validity of the deed of wakf in question according to the Mahomedan Law, has referred the case to a Full Bench, with special reference to the question: "Whether the disposition of the grantor's property made by the deed of the 4th Aughran 1281, (Ante p. 118) was a valid wakf of the property dealt with by the deed."

127. The case has been argued at great length before us, and various questions as bearing upon the Mahomedan Law, and the conclusions arrived at by the District Judge in appeal have been discussed by the learned Counsel on either side.

128. I should here premise that the case before us is not between two Mahomedans, but between a Hindu, who is the creditor, and a Mahomedan, the debtor. Section 37 of Act XII of 1887 provides as follows:

Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Mahomedan Law in cases where the parties are Mahomedans, and the Hindu Law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished.

(2) In cases not provided for by Sub-section (1) or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.

129. This case is governed by the 2nd clause of the section, and the Court has here to act

according to 'justice, equity, and good conscience."

130. Cases often occur in our Courts where the parties to a suit are of different persuasions, and one of them relies upon the particular law which governs him as the inception of his title, and the Court has to consider that law. Take, for example, a case like this : a Hindu creditor attaches certain property for satisfaction of his decree obtained against a Mahomedan; a Mahomedan female thereupon claims the property as being in her possession in lieu of dower, she being his wife. If the creditor questions her status as a wife, the Court has to determine the question whether the parties were married according to the Mahomedan Law. So in the case where a property seized in execution is claimed by a Mahomedan as under a gift from the debtor, a Mahomedan, the Court has to determine whether the gift is valid according to the Mahomedan Law. But while the Court goes into these questions, it does so, not because the Mahomedan Law applies to the Hindu, but because "justice, equity and good conscience" require that they should be considered. In like manner in the case before us, we have to consider whether the property which the creditor desires to sell is still the property of Bikani, and as such is liable to be sold for his debts, or whether he has made a valid dedication of it as wakf, and as such it is inalienable.

131. Before considering what may be the effect of the findings arrived at in this case by the Lower Appellate Court, it will be necessary to see what may be the Mahomedin Law on the subject so far as it bears upon the particular case before us.

132. According to Abu Hanifa, the great Oracle of Mahomedan Jurisprudence, as Mr. Hamilton describes him to be in his preliminary discourse on the Hedaya, wakf (quoting from Hamilton's translation of the Hedaya, Volume II, Book XV, page 33d) "signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall still continue, and the advantage of it go to some charitable purpose in the manner of a loan." There is a difference of opinion as to whether Hanifa considered wakf to be valid; and we find it stated that "the most approved authorities however declare it to be valid according to him, but since (like a loan) it is not of an absolute nature, the appropriator is held to be at liberty to resume it, and the sale or gift of it is consequently lawful." But according to his disciples (Abu Yusuf and Abu Mahomed), Hedaya, page 335, "wakf signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to his creatures." " The two disciples there-' fore," so says the Hedaya, " hold appropriation to be absolute; and consequently that it cannot be resumed, or disposed of by gift or sale, and inheritance also does not obtain with respect to it."

133. The Hedaya then gives (pages 335--337) the respective arguments of Abu Hanifa and his two disciples; it is unnecessary to refer to them at any length, but it may be useful to refer to one

of the arguments of the two disciples. And it is this...." There is a necessity for the appropriation being absolute, in order that the merit of it may result for ever to the appropriator; and this necessity is to be answered only by the appropriator relinquishing his right in what he appropriates, and dedicating it solely to God, which dedication, as being agreeable to law in the same manner as that of a mosque, must therefore be made in the same mode."

134. There was, however, a difference of opinion between the two disciples in a most important matter in this connection; Abu Yusuf asserting that "the right of property is extinguished upon the instant of his saying 'I have appropriated' "(and such is also the opinion of Shafei)," because that is a dereliction of property, in the same manner as a manumission "; Mahomed, on the other hand, maintaining that "it is not extinguished until he appoint a procurator, and deliver it over to him, and decrees are passed upon this principle: "The reason of this, says Hedaya (page 337)," is that the right of God cannot be established in an appropriated article but by implication, in the consignment of it to his creature; (as a transfer to the Almighty, who is himself the proprietor of all things, although it cannot be effected actually and expressly, yet it may be so dependently), it therefore becomes subject to the rules of divine property dependently, and consequently resembles Zakat and alms gift."

135. The Hedaya refers to another difference of opinion between Hanifa and Mahomad on the one hand, and Abu Yusuf on the other, and that is with regard to the question whether the appropriation is valid unless the appropriator destines the ultimate application to objects not liable to become extinct. (Hedaya, page 341). Abu Yusuf maintained that "where the appropriator names an object liable to termination (as if he were to say 'I have appropriated to Zeyd') it is valid, and after the death of Zeyd it passes as an appropriation to the poor, although the appropriator had not named them. The argument of Hanifa and Mahomed upon this point is that appropriation requires an extinction of right of property, without a transfer of it, and as this, like manumission, is of perpetual nature, it follows that if a thing be appropriated to a finite object, the appropriation is imperfect, whence it is that an appropriation is rendered void by making it temporary in the same manner as a sale is made void by limiting its duration." The argument of Abu Yusuf in this connection was that "the design of the appropriator is to perform an act of piety acceptable to God, and this is fully answered in either case; because piety on some occasions may consist in the appropriation to a terminable object, and it may at other times consist in the appropriation of a thing to an interminable object; the appropriation is valid in both instances."

136. The Hedaya deals with another matter, in which there also existed a difference of opinion, and that is in regard to the question whether the reservation by the appropriator of the whole or part of the property appropriated during his own lifetime of his Amwalid (slave who has borne her master a child) or Moddabir (slave who has been promised emancipation) is valid. Abu Yusuf

was of opinion that such reservation was lawful, while Mahomed was of a contrary opinion : he held it to be unlawful, and the Hedaya states (page 349) "such is the opinion of Hillal Kazi and Shafei ". The argument in favour of Mahomed's opinion is stated to be--

That appropriation is a gratuitous act, effected in the transfer of property to God, by delivering over the thing appropriated to a mutwalli or procurator; (for a transfer to the Almighty, who is himself the proprietor of all things, although it cannot be effected actually and expressly, yet it may be so dependency); and the reserving of the whole or part of the income arising from it to his own use is repugnant to this, because the delivery cannot be made to himself. The case therefore resembles the reserve of an alms gift, and also the reserve of a part of a masque : in other words, if a person were to assign certain property to the poor, stipulating at the same time that his right in part of it shall continue, the alms under such a condition are unlawful; or if the founder of a mosque stipulate that his right in a part of the mosque shall continue, this opposes the legality of the whole foundation : and so also in the case in question.

137. The arguments of Abu Yusuf on the point were as follows:

First.--The prophet was accustomed himself to consume the revenue arising from what he had appropriated. Now the use would not at any rate be lawful, unless the appropriator had previously stipulated it for himself at the time of appropriation; the prophet consuming the revenue, therefore, argues that it is lawful for an appropriator to reserve that to his own use.

Secondly.--Appropriation implies the owner of a property destroying his right in that property by a transfer of it to God, under some pious intention (as was formerly stated), and such being the case, where an appropriator reserves a part or the whole of the revenue arising from what he appropriates to his own use, it follows that, in so doing, he reserves to himself a thing which is the property of God (not that he reserves to himself what is his own), and a person's reserving to himself a thing which is the property of God is lawful; thus if a man build a caravanserai, or construct a reservoir or give ground for a burial place, reserving to himself the right of residing in the caravanserai, or of drinking water out of the reservoir, or of interment in the burial place, it is lawful, and so likewise in the case in question.

Thirdly.--The design in appropriation is the performance of an act of piety; and piety is consistent with the circumstance of a person reserving the revenue to his own use, as the prophet has said A man giving a subsistence to himself is giving alms.

138. With reference to the last passage just quoted, Mr. Hamilton makes the following observation:

As where (for instance) a man appropriates the whole of his property, thus reducing 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.

139. I have thought it necessary to refer at some length to the Hedaya, which is a book of great authority among the Mahomedans, as also to the arguments of the learned doctors on the subject, in order to see what is the true foundation upon which a wakf, I mean valid wakf, depends; and that is, as I understand it, the dedication solely to God with a pious intention, and the total relinquishment of the wakifs right in the property appropriated.

140. It will be observed that some of the Imams were so very particular about this that they held that the ultimate application of the income of the property dedicated must be expressly to objects not liable to extinction, that the appropriator must sever all connection with the property, and that the reservation by him of the income for his own use or for the use of his own people during their lives is invalid.

141. Baillie in his Digest of Mahomedan Law treats the subject very nearly in the same manner as the Hedaya does. The book is a translation of the Fatawa Alamgiri, and that treatise in Book 9, Chap. 1, after giving the meaning of wakf according to Abu Hanifa, states:

According to the two disciples, wakf is the retention of a thing in the implied ownership of Almighty God, in such a manner that its profits may revert to or be applied for the benefit of mankind, and the appropriation is obligatory, so that the thing appropriated can neither be sold, nor given, nor inherited. In the Ayoon and Yutuma it is stated that the Fatawa is in conformity with the opinion of the two disciples.

142. And then, in speaking of what is called the piliars of wakf, the Fatawa-Alamgiri says (quoting from Baillie) that "the cause or motive is a seeking for nearness;" and Baillie, with reference to this passage, in his note at the foot of page 559 (2nd Edition), says 'that it is intended to refer to Almighty God.' And we find it stated at page 576 in the chapter entitled 'of the proper objects of appropriation,' that:

An appropriation for the rich alone is not lawful. An appropriation for travellers is lawful; but it is to be applied to the poor among them, exclusively of the rich. And if one should say to perform, the hujj every year with the produce, or 'to bestow every year in charity instead of my sins of omission' or 'to pay my debts', it would be lawful, if the ultimate destination were a perpetuity for the poor.

143. And lower down in the same page it is said "In the Book of wakf by Hullal, it is stated that an appropriation for the paralysed is valid, and should be applied to the poor among them,

exclusively of the rich."

144. In Macnaghten's Principles of Mahomedan Law, in the chapter "on endowments" at page 69, it is stated:

An endowment signifies the appropriation of property to the service of God, when the right of the appropriator becomes divested and the profits of the property so appropriated are devoted to the benefit of mankind.

145. The conclusions I have drawn from an examination of the Hedaya are, I think, supported by the passages in Baillie and Macnaghten I have just referred to, and are consistent with certain other passages in Baillie, as also in Durr-ul-Mukhtar, Fatawa Kazi Khan, and Fath-ul-Kadir (hooks not translated or published in English), which have been brought to our notice by the learned Counsel for the appellant. And in the translation of a portion of the Tahtavi which has been supplied to me by a senior translator of the High Court, I find it stated, with reference to a text favouring a wakf in favour of the rich and then in favour of the poor, that 'a wakf in favour of the rich exclusively is invalid, because kurbat (an approach to God) is required initially, and there can be no wakf unless there is benefaction. This is what is given in the Bahr-ur-Raik from Tartusi."

146. Bearing in mind the principles I have deduced from the Mahomedan Law authorities, let us see how the subject has been dealt with by our Courts from time to time, how have they understood what is a dedication solely to God, and what is a pious intention according to the Mahomedan law.

147. In the case of Moohummud Sadik 1 Sel. Rep. 17 (O); 23 (N), decided in the year 1798, the law officers, who were consulted, gave their opinion by stating "that wakf according to the opinions of Yusuf and Mahommed (which on this point are adopted as law) implies the relinquishing the proprietary right in any article of property, such as lands, tenements and the rest; and consecrating it in such manner to the service of God that it may be of benefit to men; provided always that the thing appropriated be, at the time of appropriation, the property of the appropriator, as is specially stated in the Bahr-ur-Baik."

148. The question which the learned Judges in that case had to consider was indeed different from the one which is now before us, but I think it may be useful to refer to the opinion of the law officers which was given and accepted in that case.

149. In the case of Hyatee Khanum v. Koolsoom Khanum 1 Sel. Rep. 214 (O) 285 (N), it appears that a deed of wakf purported to dedicate a certain property for the purposes of a mosque, and it provided that after defraying the charges of the establishment in keeping up the

mosque, the surplus of the profits should be divided between the trustee, who in that case was the wife of the endower, and his other wives. The law officers who were consulted in that case treated this deed as a deed for pious uses. The precise question which was discussed in that case by the learned Judges was somewhat different, but the wakf was upheld as regards that share of the property which it was held the endower had a right to dedicate. It will be observed that the primary object of the wakf in that case was religious, and it was only the surplus left after defraying the charges of the mosque that were to be shared by the trustee and the other widows of the endower.

150. The next case that I desire to refer to is that of Doe d. Jaun Beebee v. Abdollah Barber Fulton, 345 decided in 1838. The deed of wakf in that case states in the first place that the endower grants and disposes of the property appropriated as a pious dedication to please God, who is above all, on the following conditions:

I will appropriate as much of the produce thereof as is required for my own use unto the said purpose, after defraying the revenue and taxes thereof, and the remainder to here-dunble and charitable purposes, and ray several relatives, that is, my grandson and granddaughter and daughter-in-law and daughter's son and daughter's daughter who are now receiving maintenance, living together united in meals, shall continue to receive the same in like manner, and the power of increasing or decreasing the number of incumbents according to the increase or decrease in the produce will remain with me, and the repairs of the mosque, and salary of the mowuzz in the khattab, and other expenses connected therewith in the season of the Ramazan Mabareke and the Eed shall be defrayed from the produce, and the person, who is hereafter appointed mutwalli, will enjoy the same powers as I myself possess. (Fulton, 346.)

151. The document then provides that the endower shall continue mutwalli as long as he lives, and also provides for the appointment of succeeding mutwallis, and in the third paragraph it states "after my decease, neither my heirs nor the mutwalli will have the smallest right to sell or give away or transfer the above-mentioned lands in any manner; whatsoever part thereof is expended in hereditable, charitable and benevolent purposes, shall be disbursed under my own control and direction;" and it then winds up by saying, "these few words are therefore written by way of a voucher of a pious donation to serve as a binding and decisive document when occasion requires."

152. The first, and I may say the main question, which was raised in that case, was as regards the construction of this document: whether it was a will or a deed of wakf. Ryan, C.J., thought it right to refer certain questions for the opinion of the Law officers of the Court. The first question that was referred was "whether, according to Mahomedan law, an endowment to charitable uses is valid, when qualified by a reservation of the rents and profits to the donor himself during his

life." The third question was "whether the endower can lawfully constitute himself mutwalli or trustee," and the fifth question was "whether the instrument in question was a will or deed of endowment." To the first question the Law officers answered as follows:

There is a difference of opinion between Abu Yusuf and Mahommed touching the wakf or consecration of lands with a reservation and setting apart of any portion of the profits and produce thereof for the support of the wakif or consecrator, Abu Yusuf considers the act legal, and Mahommed deems it illegal. The legal opinions of most of the learned uphold the opinion of Abu Yusuf which is to be found in the Chulpee or Commentary of the Shurrai Vakyah, the Fatawa Alamgiri, the Kazi Khan and the Kaffi.

153. The answer to the third question was--

It is lawful for the wakif or consecrator to become mutwalli or procurator and to reserve the profits of part of the consecrated lands for his own use and his descendants, as will be found in the Hedaya, Kazi Khan, and the Alamgiri.

154. And the answer to the fifth question was this paper is a deed of wakf and not a will." It would appear that the Law officers referred in support of their answers among others, to a passage in the Fatawa Alamgiri which runs thus:

Whenever a wakf is made of land or other property, and the party making the same reserves the whole of the profits thereof to himself or a part only during his own life and after that for the use of the poor, herein Abu Yusuf has said, 'this wakf is right,' and the learned of Bulluck (a town in Turan) have decided conformably to this opinion of Abu Yusuf, and the decisions are in conformity therewith, for to induce persons to wakfs. The like is to be found in the Sograh and the Nesaub, and also in the Moojmuraul only.

and then referring to the Chulpee and some other books, it was stated that--

In the opinion of Abu Yusuf it is right or lawful for the appropriator or consecrator to direct the profits to his own use and to make himself mutwalli, but not right in the opinion of Mahommed.

155. The Chief Justice held that the deed in question was a wakf and not a testamentary devise; and then upon the question whether the appropriator and the mutwalli could be one and the same person, and whether the appropriator could reserve a part of the property so appropriated to his own use for life, the Chief Justice in the first place referred to the conflicting opinions of Abu Yusuf and Mahommed, and then held that upon the authorities quoted by the Moulvis, the opinion of Abu Yusuf should be considered as the better law and sanctioned by the more recent authorities. The Court accordingly held that the wakf was good. It will be observed that there

could be no doubt that the intention of the appropriator was pious, and there were various expenses which were enjoined for the repairs of the mosque, the salary of the mowuzz, and for the Ramzan and Eed festivals. The several members of the family who were to be maintained were expressly mentioned, and the deed does not bestow the income of the property to the descendants generation after generation, but the appropriation of a part of the income was confined expressly to certain individuals therein named. This could not possibly have the effect of creating a perpetuity in favour of the family, but upon the demise of the individuals named, the whole property would go to charitable purposes.

156. In the case of Jewun Doss Sahoo v. Shah Kubeer-ood-deen 2 Moo. I.A. 390 decided by the Judicial Committee, it would appear that the grant was a Royal grant, and the produce was to be applied to charitable purposes. The deed that the Judicial Committee had to consider is the same as was the subject-matter of controversy in the case of Qadira before the Sudder Dewany Adalut 3 Sel. Rep. 407 (O); 543 (N), and having referred to the Hedaya and after considering the conflicting opinions of Abu Yusuf and Mahommed, and also referring to certain Fatwas and the decision of the Sudder Dewany Adalut in the case of Kulb Ali Hoosein v. Syf Ali 2 Sel. Rep. 110 (O); 139 (N), where the Fatwa of the Law officers was to the effect "that the appropriation of land or other property to pious and charitable purposes is sufficient to constitute wakf without the express use of that term in the grant," the Judicial Committee held that the endowment being a perpetual wakf, any alienation of the property was invalid.

157. In the case of Khodabundha Khan v. Oomutul Fatima S.D.A. (1857), 235 the testator had during his lifetime allotted two-thirds of his property among certain heirs, and in regard to the remaining one-third he provided by a deed that from the proceeds the expenses of religious acts which it was incumbent upon him to perform, and which he had omitted, as well as those in connection with the Imambara, should he performed; and the executor was enjoined to perform such religious acts; and then after making certain provisions by way of pensions to certain parties, he provided that the plus should belong to Mussumat Janee Khanum, and after her demis, to Tussuduck Hossain. The learned Judges held that this was an absolute devise in favour of Tussuduck Hossain subject to certain trusts and a life interest in Janee Khanum and that the deed did not create a wakf, for, as they observe, referring to the case of Moohummud Sadik l Sel. Rep. 17 (O); 23 (N), "that the word wakf imports property to which the appropriator has relinquished his right and which is consecrated in such a manner to the service of God that it may be of benefit to men."

158. In the case of Dalrymple v. Khoondkar Azeezul Islam S.D.A. (1858), 586 it was held that "if an endowment be wholly wakf, i.e., if all the profits arising therefrom are devoted to religious purposes, the mutwalla is not competent to grant a lease extending beyond his lifetime. But if the

office of mutwalli be hereditary and he has a beneficial interest in the endowed property, such property must be considered as heritable property burdened with certain trusts." And in the case of Khaja Surwar Hossein v. Khaja Syed Hossein Khan S.D.A. (1858), 1028, where a question was raised whether the property, the subject-matter of the suit, was wakf or not, the learned Judges defined the words "wakf property" thus: "Property devoted to the deity on relinquishment of proprietary right;" and they held that the party from whom the plaintiff in that case claimed held the property subject only to certain trusts, and they referred to the case of Moohummud Sadik in the first volume of the Select Reports.

159. The next case that I shall refer to is Bibee Kuneez Fatima v. Bibee Saheba Jan 8 W.R. 313 (315). There was an ayma grant by a certain Mogul Emperor at a quit-rent. The learned Judges (Kemp and GLOVER, JJ.) in delivering judgment in the case made the following observations: "Now it is very clear that this is not a grant constituting a wakf. There is no dedication of properties solely to the worship of God or to any religious or charitable purposes." And they held that the grant was to an individual in his own right and for the purpose of furnishing the means for the subsistence of the grantee and nothing further, although the consideration for the grant was the charitable disposition of the grantee and the expenses which he apparently voluntarily incurred in supporting poor students, and food and shelter to travellers.

160. In the case of Khajah Hossein Ali v. Shahzadee Hazard Begum 12 W.R. 344 S.C. 498 : 4 B.L.R.A.C. 86 where the deed of wakf provided for the performance of certain ceremonies at the great Mahomedan festivals for the relief of the poor and the travellers, and where after payment of the expenses to be incurred for these purposes, and of the Government revenue, the residue was to be expended in the maintenance of certain specified relatives, it was held that it was a good wakf; and Mr. Justice Kemp, after referring to the conditions in the deed, observed as follows:

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 Mahomedan law.

161. In the case of Muzhur-ool-Huq v. Puhraj Ditarey Mohapattur 13 W.R. 235 decided by Kemp and JACKSON, JJ., where the endowment was made for the purpose of supporting a mosque, feeding travellers, educating poor students, and so forth, and where it was provided that from the remaining profits, the expenses for marriages, burials, and circumcisions of the members of the family of the mutwalli were to be provided, the wakf was held to be valid, and Kemp,,)., in delivering the judgment of the Court, observed as follows:

We are of opinion that the mere charge upon the profits of the estate of certain items which meet

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 Mahomedm 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 Mahomedan 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.

162. It will be observed that in the deed in question, provision was made for the expenses of marriages, burials, and circumcisions of the members of the family of the mutwalli. This I take it was a provision confined to a certain number of individuals and the charges in respect of which "must," as stated by Kemp, J., "in the course of time necessarily cease, leaving the whole of the profits intact for the original purposes for which the endowment was made "; and the learned Judge expressly remarked that the main object of the Mahomedan law is that the profits of the land should be endowed for a purpose which always remains existent. This is a decision upon which, as will be seen hereafter, the Judicial Committee, in the recent case of Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28, expressly relies.

163. In the case of Doyal Chand Mullick v. Syud Keramut Ali 16 W.R. 116, where the endowment was created for keeping up a mosque and for certain charitable purposes, and the deed provided that the appropriator's son and son-in-law should appropriate his goods and chattels to the performance of the religious and charitable purposes mentioned, and to the maintenance of his widow and two female slaves, and that they should share the balance between themselves, it was held to be a valid wakf; and Glover, J., in delivering judgment, says among other matters:

There might possibly be some question as to whether all the arrangements made by the testator in the wasiutnama come under the denomination of wakf, using the word in its strictest sense as something appropriated to works of religion.

164. And further on he says, referring to Baillie's Digest upon the matter, and to the fact that a mosque was to be erected and so forth, that "that would be a proper object of Mahomedan faith, and therefore a proper object of wakf, for it would be a seeking for nearness."

165. In the case of Abdul Ganne Kasam v. Hussen Miya Bahimtula 10 Bom. H.C. 7, Melvill, J., in delivering judgment, after referring to the authorities on the subject, observes as follows:

We think that the balance of authority is strongly in favour of the conclusion 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.

166. And later on he says:

We think 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.

167. There the deed of wakf provided that during the lifetime of the appropriators, they should live on the property with their families and children, and that they should not be allowed to sell the property, and that when any of the appropriators should die, his wife and children should remain in the house, and so on. This deed was held to be invalid.

168. In the case of Fatma Bibi v. The Advocate-General of Bombay I.L.R. 6 Bom. 42, where a certain Mahomedan young lady conveyed property to trustees upon trust, upon the condition that during her lifetime the trustees should pay the rents and profits to her for her sole and separate use, and after her death to her children, grandchildren and other descendants for ever; that the rents and profits only were to be distributed and the corpus was to be kept intact; and that on failure of descendants, the rents and profits should be expended in charitable purposes, such as expenses of poor pilgrims and so forth, it was held by West, J., to constitute a good wakf and as such irrevocable. This case, no doubt, is in favour of the contention of the appellant. On turning, however, in this connection to the decision of the Judicial Committee in the case of Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28, it would be seen that their Lordships regarded some of the observations by West, J., in the case of Fatma Bibi as extra-judicial.

169. The next case that I should like to refer to is that of Mahomed Hamidulla Khan v. Latful Huq I.L.R. 6 Cal. 744 : 8 C.L.R. 164. The deed in this case was to the effect that the appropriator had made a wakf of a certain property in favour of her daughter and her descendants, and also her descendants' descendants how low soever, and when they no longer exist, then in favour of the poor and needy. This settlement was held not to create a valid wakf, and the learned Judges held that to constitute a wakf there must be a dedication of the property solely to the worship of God or to religious and charitable purposes.

170. In the case of Luchmiput Singh v. Amir Alum I.L.R. 9 Cal. 176, the deed of wakf contained a provision that certain debts should in the first place be paid, and in the second place, the

property should be applied towards the religious uses created and the maintenance of the settlor's grandsons and their male issues. It was held that the wakf was not valid, and that if the object of the endowment was to make" a provision for the family, it would be invalid.

171. In the case of Amrutlal Kalidas v. Shaik Hossein I.L.R. 11 Bom. 492, where the wakf was in favour of the appropriator's heirs and descendants, generation after generation, and where it was provided that the mutwalli, after defraying the expenses of repairs and taxes, etc., was to divide the balance among the sons and their descendants and certain other individuals, with the further provisions that if any amongst his heirs and their descendants should die, his share of the profits should be distributed among the other heirs, and that in the event of his heirs and descendants failing altogether, the income was to be distributed and given to fakirs and indigent people, FARRAN, J., after referring to the previous cases upon the point in page 499, made the following observations:

The conclusion which is properly deducible from the above cited cases is, 1 think, that where the primary and general object of the endowment is for the furtherance of religious or charitable purposes or for the worship of God, such endowment is valid, although the wakfnama may also provide for the support of the family and descendants of the founder; but that where the wakfnama has for its real object nothing connected with the worship of God or religious observances, and provides only in a very remote contingency for the poor, such remote provision does not validate a perpetuity for the benefit of the dedicator's children and their descendants so long as any such exist. That conclusion, if applied to the wakfnama with which I have to deal, would no doubt invalidate it.

172. The learned Judge then referred to the view expressed by WEST, J., in Fatma Bibi v. The Advocate-General of Bombay I.L.R. 6 Bom. 42, and to the authorities relied upon by him, and upon those authorities he held that the wakf in question was valid.

173. In the case of Nizamudin Golam v. Abdul Gafur I.L.R. 13 Bom. 264, a Mahomedan settled his property in wakf on his own descendants in perpetuity without making an express provision for its ultimate devolution to any charitable or religious object. It was held that the deed did not constitute a valid wakf adopting the view expounded by Hanifa and Mahommed.

174. In the case of Pathukutti v. Avathalakutti I.L.R. 13 Mad. 66, which came on before three Judges, MUTTUSAMI Ayyar, Parker, and Shepherd, JJ., and where the deed conveyed the property to the appropriator's husband on trust upon condition that he should maintain the settlor and her children out of her income, and hand over the property to her children on their attaining majority, and in the event of the settlor's death without leaving children, with the income of the property to have kathom recited in a mosque, give food to the mollahs, and where the settlor

reserved to herself an option of dealing with the property as a special fund for the maintenance of her children, if any, it was held that this did not create a valid wakf. Ayyar, J., observes-

The criterion is whether from the contents of the document it could reasonably be inferred that a wakf or an endowment for religious and charitable use was intended. It should also be borne in mind that the creation of a perpetuity, except for and in connection with the ultimate destination of property to such use, would be open to objection.

175. And later on he says--

It seems to me that unless the ultimate application of the property to religious or charitable use can be predicated with certainty from the deed of settlement, it cannot be laid that one essential ingredient, namely, application to charity, is not wanting and that a valid wakf is created.

176. In the case of Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28, which came before the Judicial Committee, the deed purported to dedicate certain properties for defraying the expenses of a brick-built musjid and two madrassas and a lodging-house belonging to the appropriator, and it provided that the grantor's three sons should be appointed mutwalli in gradation of rank; that the mutwalli, after defraying the expenses of the mosaref and the necessary collections of the zemindari, should take from the residue his monthly allowance, pay over the allowance due to the naib-mutwalli, naib-ul-mamab and his daughters as specified in the schedule, and continue to perform the stated religious works according to custom, and keep his eye to the legitimate objects of the mosaref; that the surplus that might be left after meeting the above-mentioned expenses should be added to the wakf estate; that the persons getting monthly allowances should have no power to assign or charge them in any manner; and that the mutwalli should have the power to increase or decrease the allowances of the members of the family as well as their own salaries. The Judicial Committee observed as follows:

Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a 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. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of the grantor's descendants, is an illusory gift, a point on which there have been conflicting decisions in India. On the one hand their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as wakf. On this point they agree with and adopt the views of the Calcutta High Court stated by Mr. Justice Kemp in one of the cited cases. Muzhurool Huq v. Puhraj Diptarey Mohapattur 13 W.R. 235.

177. And then their Lordships referred to the following portion of that learned Judge's judgment:

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 which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law.

178. Their Lordships further observed--

On the other hand they have not been referred to, nor can they find, any authority showing, according to Mahomedan 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.

179. And they proceeded to add--

Their Lordships therefore look to see whether the property in question is in substance given to charitable uses.

180. Then, with reference to the particular deed before them, they observed as follows:

There is a great deal in the deed which is designed for aggrandisement of the family property and for keeping it perpetually in the hands of the family. The provisions for accumulation in paragraph 4, the attempt to save salaries? from alienation and from creditors in paragraph 5, the provisions for appointment of male issue as mutwallis in paragraph 3, coupled with the allowances to other mala issue and to wives and daughters of such issues in paragraphs 7 and 8, all indefinite in point of duration, and, as their Lordships think, intended to be commensurate with the existence of the family; the direction in paragraph 7 that new mutwallis should bring all the private acquisitions into a settlement,--all these things point to the same end, the mere use of property available for the family.

181. And later on they say:

If indeed it was shown that the customary uses were of such magnitude as to exhaust the income or to absorb the bulk of it, such a circumstance would have its weight in ascertaining the intention of the grantor. But the Court in the execution proceedings considered that the charitable outlays which he contemplated were of small amount compared with the property. The Subordinate Judge in this suit does not deal with the matter. The High Court says that the plaintiff has carefully withheld evidence as to value, and believes it was much more than he represented. For all that appears there is no reason to suppose that the charitable use would absorb more than a devout and wealthy gentleman might find it becoming to spend in that way.

182. The conclusion at which their Lordships arrived was that the deed in question did not constitute a valid wakf.

183. This decision by the Privy Council was followed in the case of Rasamaya Dhur Chowdhry v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399 by Mr. Justice Tottenham and Mr. Justice Trevelyan, and that is one of the two cases referred to in the referring order. The language and the contents of the deed, which the learned Judges had to consider in that case, were to some extent similar to the terms of the deed now before us; and the Court after reviewing all the previous cases on the subject held that the deed did not constitute a valid wakf.

184. There are two other cases recently decided in this Court, one, Piran v. Abdool Karim I.L.R. 19 Cal. 203, which, however, does not really touch the question we have to consider in this case; and the other, the case referred to in the referring order, Meer Mahomed Israil Khan v. Sashti Churn Ghose I.L.R. 19 Cal. 412. In this latter case the facts were that two Maho-medan ladies were owners of a certain taluq. They purported to make a wakf of that property by a deed. One of the ladies subsequently died; thereupon the other became under the terms of the deed the mutwalli. She entrusted the management at first to her husband, and after his dismissal, to the first two defendants in the suit by an am-mukhtarnama. The property was leased out afterwards to the third defendant, who was a brother of the first two defendants. It appears that the zemindar recovered a rent decree due on account of the taluq against Kamrunnissa, and the decree not having been paid up, the taluq was sold in execution of the decree at a time when Kamrunnissa was dead, and was purchased by the first three defendants in the name of the fourth. Thereupon a suit was brought by Kamrunnissa's husband, it being alleged that the conduct of the defendants in allowing the property to be sold and in purchasing it themselves was in breach of the fiduciary position in which they stood, and that, therefore, they were not entitled to retain it, and that the sale itself was a fraudulent one. Ameer Ali, J., differed from the District Judge as to whether there existed a fiduciary relationship between the plaintiff and the defendants, and whether the fiduciary relation that had existed between Kamrunnissa and the defendants had come to an end upon her death. Upon both these points the learned Judge held for the plaintiff, and he was of opinion that it did not lie in the mouths of the defendants to say that their fiduciary relationship was one of a personal character, and that therefore, whether there was an actual fraud on the part of the defendants or not, the plaintiff as representing the endowment was entitled to demand a reconveyance just in the same way as Kamrunnissa could if she had been alive. Having thus decided the case in favour of the plaintiff, the learned Judge proceeded to consider whether the view taken by the Judge of the Court below as to the effect of the wakf was correct or not. With great deference to the learned Judge I should say that he was not called upon, regard being had to the conclusion that he had already arrived at, to discuss the question of Mahomedan law that was raised in the case, and upon which the District Judge had no doubt expressed an opinion. But

however that may be, the learned Judge did go into the question, and after considering various treatises on Mahomedan law, he held that the deed of wakf was a valid one. So far as the deed which came up before the learned Judges in that case is concerned, I may be permitted to say that the conclusion at which they arrived at is unassailable, but there are various observations in the judgment, the propriety of which has been questioned before us, but which I think I am not called upon in this case to discuss.

185. I have now referred to all the cases which seemed to me to bear upon the question that has been raised in the case now before us, and I think I may say that all the cases, with the exception of the two cases decided by West, J., and Farran, J., respectively, and with the exception perhaps, of the case in Fulton's Reports, all the other cases take but one view, viz., that the primary object of the endowment must be either religious or charitable, and that the intention must be a pious intention in the sense in which that expression is ordinarily understood, and not an intention to benefit the settlor's family only. If the primary object be either religious or charitable, I take it that the dedication is solely to God with a pious intention, and that it has the effect of totally extinguishing the wakif's right in the property dedicated.

186. So far as the case in Fulton's Reports is concerned, there was a pious intention, and although the appropriator reserved to himself the power of appropriating for his own use whatever amount he might require, still the remainder was to be applied to charitable and religious purposes, as also to the maintenance of the members of the family named therein. This was not, as I understand it, in perpetuity, and the whole of the proceeds would in no distant time go to charitable and religious purposes.

187. The deed of the 4th Aughran 1281 which is now before us, in the preamble, sets out distinctly what is the main object of the endowment. The settlor states, "I now think it advisable to lay down, according to our Mahomedan sharah, certain rules in respect of the properties mentioned in the schedule given below, whereby my name and memory may be perpetuated for ever, my sons and daughters and their descendants may be decently maintained out of the income of those properties, and the properties may not suffer in consequence of disputes among my sons and daughters aforesaid or their descendants." He then says that he makes a "permanent wakf of the undermentioned properties in favour of my two sons, etc., and after them the successive descendants of my said sons and daughters, and on their death in favour of the poor, the indigent and the beggars residing in the town of Dacca." In paragraph 1 the appropriator says, "after my death whoever may be the mutwalli shall, out of the net income or balance remaining after payment of the sudder revenue * * * spend Rs. 50 annually in the name of Allah (i.e., for religious purposes) and pay Rs. 100 annually to my eldest son, Rs. 100 annually to my youngest son, Rs. 50 to each of my said daughters, and Rs. 50 annually to my said wife." The deed then

states that the balance is to be added to the wakf fund; that after the death of his wife, the Rs. 50 payable to her is to be added to the wakf fund; and that on the death of any of the sons and daughters, the money payable to the deceased is to be divided among his or her children according to Mahomedan law, but that in the event of any such person dying with out issue, the amount payable to him or her is to be credited to the wakf estate. It then provides that none of the persons to whom an allowance is made shall be competent to transfer his or her allowance, and that the said allowance should not be attached or sold in execution of any decree for anybody's debt.

188. The next paragraph provides that the mutwalli for the time being shall use his name as mutwalli on the Mofussil, Hazuri, and Court papers connected with wakf properties; and after meeting out of the income of those properties the expenses mentioned above, he shall purchase immoveable property with the balance that may accumulate for the benefit of the wakf.

189. The third paragraph provides that whoever will be the mutwalli shall in the name of God give away Rs. 50 in charity to the poor, and that one student must always be maintained.

190. The next paragraph provides for the appointment of mutwallis, and says that none except some one or other among the children of the sons and daughters shall be mutwalli, and that no outsider shall be appointed as such; and the fifth and last paragraph winds up by saying that after his death the mutwallis shall be competent to spend any amount of money they think proper for the sake of his salvation.

191. Now, no doubt, in this deed the word wakf is used, and there is a provision in the first paragraph to spend Rs. 50 in the name of Allah, and in the third paragraph the mutwalli should give away Rs. 50 in the name of God in charity to the poor, and that one student should be maintained; but the question is what was the true intention of Bikani Mia when he executed the deed of the 4th Aughran 1281. Was his intention to dedicate the property solely to God or to create a perpetuity in the family? The Court of First Instance, as I have already observed, came to a distinct finding that the endowment was nominal. The learned Judge for reasons somewhat different from those given by the Court of First Instance has arrived at the same conclusion. He has referred to various circumstances indicating what the intention of Bikani Mia was, and one of the arguments used by him is that there was no substantial dedication to charitable uses. In this latter respect, I take it, he has only followed the decision of the Privy Council in the case of Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28, but whether he is right in this or not, it seems to me that the Judge has come to a finding that the intention of the grantor was not a pious intention, and that the document was never intended to be used, and was never acted upon, as a valid wakf. I take it that the learned Judge has come to this conclusion upon the internal evidence afforded by the deed itself, and with reference to the acts

of Bikani himself subsequent to the execution of the deed. If the question in every case is one of intention, I think that the conclusion arrived at by the Judge cannot be assailed. The deed was, according to the Judge, really a family settlement with a charge upon it to the extent of Rs. 75 a year for charitable purposes, and that charge the Judge has upheld. I desire here to point out that many of the observations made by the Judicial Committee in the case of Ahsanulla will fit in this case; and I fail to see how, if the Privy Council were right in that case (and it must be taken that they were right), we can hold that the deed before us created a valid wakf.

192. It was strongly contended before us by the learned Counsel for the appellant that a settlement of property by way of making provision for one's support and for the support of his descendants, how low soever, is itself a pious and charitable act according to the Mahomedan law, and therefore the deed in question cannot be set aside upon the ground that there was no pious object in view, there being a contingent reversion to the poor; and certain passages from some of the Mahomed in Law Treatises, especially Book IX, Chapter III, Sections 2 and 3 of Baillie's Digest, were quoted before us in support of that position.

193. These passages might possibly support this view, but that is not the view which has been accepted in our Courts, at any rate in this side of India ever since the year 1798 down to the present time. In two or three cases only, no doubt, the wakf was affirmed when there was provision made for the support of the settlor and the members of his family; but, as I have already observed, in those cases the persons to be maintained out of the produce of the property were distinctly mentioned, and the property was not to go down to the descendants, how low soever, leaving the poor a very remote contingent reversion. Abu Yusuf, in one of the arguments which I have already referred to, said that piety was consistent with the circumstance of a person reserving the revenue to his own use, because the prophet had said, "a man giving subsistence to himself was giving alms." I understand this passage to mean that when a property is really dedicated to God, a man might reserve the revenue thereof for his own use during his lifetime, and the decision of Mr. Justice Kemp in Muzhurool Huq v. Puhraj Ditarey Mohapattur 13 W.R. 235 is, I think, consistent with this argument. However that may be, it seems to me that the case is different where a person consecrates his property not really to God, reserving to himself and to certain persons named the income thereof during their lifetime, but with a view of benefiting himself and his descendants only, ties up the property in such a manner that the income would go to him and to his heir in perpetuity, the reversion to the poor being mentioned simply to enable the settlor to describe the settlement as wakf. And in this respect it seems to me that we have to guide ourselves by the interpretation which the expression "pious intention" has received for a long series of years in our Courts; and it is too late now to disturb the rulings upon that point.

194. In the case of Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 :

L.R. 17 I.A. 28, already referred to, before the Privy Council, Lord Hobhouse is reported in the course of argument to have expressed himself thus:

There is no trace in these oases of the doctrine that a man's gift to his own family is itself a pious use.

195. And Lord WATSON is reported to have said:

There must be complete dedication to makes a wakf, the deed must not give a mere spes successionis.

196. In the case of Deedar Hossein v. Zuhoor-oon-Nissa 2 Moo. I.A. 44(477), where the question was one of succession according to the Imamiah law, the Judicial Committee, with reference to Section 15, Regulation IV of 1793, observed as follows:

If each sect has its own rule according to the Mahomedan law, that rule should be followed with respect to litigants of that sect. Such is the natural construction of this regulation, and it accords with the just and equitable principle upon which it is founded, and gives effect to the usages of each religion which it was evidently its object to preserve unchanged; we see no doubt, therefore, that we ought to interpret the Regulation of 1793 to adopt the usage or law of each sect, unless there be a course of judicial decision or established practice to the contrary.

197. In the case of Chotay Lall v. Chunnoo Lall I.L.R. 4 Cal. 744 (755), with reference to the question of the Hindu law that was raised in the case, the Judicial Committee said:

Their Lordships think that after the series of decisions which have occurred in Bengal and Madras it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts; and they agree in the observations which are to be found at the end of the judgment of the High Court, that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions unless indeed it is manifestly opposed to law and reason, They do not think this rule is opposed to the spirit and the principle of the law of Mitakshara; on the contrary, it appears to them to be in accordance with them.

198. And in the judgment in the same case in this Court, Couch, C.J., observed (14 B.L.R. 235 (253)):

Certainly when we have the various decisions of the Sudder Court here upon the law which is applicable in this suit, and the decision of the High Court at Madras upon a similar law, in which no substantial difference can be pointed out with reference to this question, we ought not to unsettle the law which appears to have been received on this side of India for the last 50 years on account of the opinion of a Judge of the High Court at Bombay, however learned he may be. The

consequences at the present time would be most serious. Courts ought always to bear in mind that it is no light matter to reverse a series of decisions which must have been acted upon for many years and have been regarded as declaring what was the law.

199. That being the view which both the Privy Council and this Court have expressed more than once, 1 do not think it would be right now to unsettle the law as it has been adopted here for a long series of years, merely because there may be texts in the Mahomedan books which favour the idea that a settlement upon one's self and his children in perpetuity is a pious act.

200. There is one other matter to which I should like to refer in this connection, although, perhaps, in the view I have already expressed, it may not be necessary to do so, and it is this-- Bearing in mind that the plaintiff is a person of a different persuasion from the defendant, and that the Mahomedan Law according to Act XII of 1887, Section 37, is not to be applied in this case strictly, but tempered by the rule of justice, equity, and good conscience, is it right that we should give effect to this deed so as to deprive the creditor of his remedy? It will be observed that there is no disposition of the proceeds of the property during the settlor's lifetime. It is only after his death that the income is to be partly applied to the payment of fixed allowances and to the small charities mentioned, and the balance is to be accumulated to the credit of the Trust Fund. It seems to me that, at any rate, so far as the proceeds of the property during the lifetime of Bikani Mia are concerned, they are seizable by the creditor for the satisfaction of his debt, and it seems to be a matter for serious consideration whether in a case like this, where a person, in the name of wakf, makes provisions for his family in perpetuity and enjoys the property himself, as before, as owner, it would be just, equitable, or consonant with good conscience that the settlement should be a protection against the claim of a creditor of a different persuasion.

201. In the view I have expressed, 1 am of opinion that these appeals should be dismissed.

202. As regards the cross-objection to the decree of the District Judge relating to the charge of Rs. 75 a year upon the property of Bikani Mia, I think that it should be disallowed. By the deed of the 4th Aughran 1281, Bikani did create a valid charge in favour of the poor and students to the extent of the amount just mentioned; and there is no reason why this charge should not be affirmed.

Trevelyan, J.

203. In the first place I think that no question of law really arises in these second appeals. There can be no doubt upon the authorities quoted to us at the bar that if it appears from the evidence in the case and the conduct of the supposed wakif that he never had any real intention to create a wakf, no such wakf can he held to be created, although he may have purported to create one.

Apart from the other authorities cited, Mr. Ameer Ali at page 349 of his Tagore Law Lectures applies to wakfs the principle applied to Hindu endowments in the case of Gunga Narain Sircar v. Brindabun Chunder Kur Chowdhry 3 W.R. 142, and I agree with him in thinking that it is so applicable. It was there held that the tests of a bona fide or a nominal endowment are: "how did the founder treat this property, or how have his descendants treated it; has the income of the endowed lands been continuously applied to the object of dedication?"

204. The Court of First Instance has held very clearly that the alleged wakif had no intention of creating a wakf, and that the document was a nominal one, i.e., a mere sham.

205. This he has held from the conduct of the alleged wakif about the time of the execution of the wakfnama. The District Judge on appeal has not said that he agrees with this finding, but he nowhere says that he dissents from it. He says that the excuse given by the appellant for not registering his title as mutwalli is a very lame one, and also says that as the income consists in part of rents of houses and lands in Dacca, it is difficult to conceive of an individual who really intended to make a wakf, being unable to produce a single scrap of paper to show his outlay and accounts. Mr. Hill suggested that these observations in the judgment were not intended as the Judge's own observations, but as the contentions of the respondent before him. I do not agree to this. I think they are his observations with reference to the contentions which are there set forth. I am borne out in this view by the sixth ground of appeal which shows how the judgment was first understood by the legal advisers of the appellant. With regard to what was done by Haji Bikani Mia, the Judge says:

The evidence in fact shows that much that is relied on as indicating a compliance with the objects stated in the deed are acts which are commonly performed by all pious and well-to-do Mahomedans without any coercion.

206. The Judge finds that the portion of the deed as to Rs. 50 for the poor and as to the provision for a student has been acted upon, and was intended to be carried out from the commencement. As I understand the Judge's findings of fact, this was the only portion which was intended to be carried out. As he in effect finds that the main portion of the deed was never intended to be acted upon, and that the appellant never treated himself as mutwalli, but only made those gifts as any other pious Mahomedan would do, I do not think that the Judge ought to have given any effect to the deed, and he ought not to have made the charge which be has made. The circumstances of the High Court case to which he refers were entirely different. In that case the Judges gave full effect to the deed so far as in law it could be given effect to, and acted on the assumption that the donor intended to make the gift which by the deed he purported to make. On the facts found by the Judge, I think ho ought to have dismissed in toto the appeals to him. Having regard to the recent Privy Council decisions it is clear that we are not entitled in second appeal to disturb in any way

findings of fact. Although in consequence of the findings of fact the question referred does not, in my opinion, arise in this case, and therefore it would not be necessary to express an opinion on it, it is right that we should consider it, as my learned colleagues do not all take the view that Mr. Beighton intended to determine the questions of fact, in the way in which I think he has determined them. The question referred to the Full Bench by the Division Bench is whether the disposition of the grantor's property under the deed of the 4th Aughran 1281 was a valid wakf of the property dealt with by the deed. The learned Judges, who referred this case, give as their reason for referring it, that they are unable to reconcile the case of Meer Mahomed Israil Khan v. Sashti Churn Ghose I.L.R. 19 Cal. 412 decided on the 18th of March last by Mr. Justice O'Kinealy and Mr. Justice Ameer Ali, with the judgment of Mr. Justice Tottenham and myself in Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399. In his judgment in the case to which I have referred, Mr. Justice Ameer Ali points out that the facts in the case before Mr. Justice Tottenham and myself do not bear the least analogy to the case before him.

207. He, however, makes observations in that case which are calculated to throw a doubt upon the views expressed in the judgment of Mr. Justice Tottenham and myself.

208. The terms of the wakfnama in the present case do not, I think, resemble those of the wakfnamas in either of the cases cited, and after hearing the argument in this case, 1 think it would have been possible for the referring Bench to have decided this case without referring any question to the Full Bench. Although the learned Judges, who referred this case, have not expressed the point (if any) upon which they differ from either of the cases mentioned in their order of reference, I understand that this reference has been made in consequence of the conflict between Mr. Justice Ameer Ali's observations and those made by Mr. Justice Tottenham.

209. I agree in thinking that, having regard to the decision of the Privy Council in Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28, and to the decisions of this Court, the wakfnama in the present case cannot be treated as containing valid provisions, and I hold accordingly. I need not refer to the cases, as they are discussed at length by my learned colleagues.

210. There can be no doubt that in questions of Mahomedan and Hindu Law alike, the course of the decisions of the Privy Council and of this Court must first be considered. Attempts to disturb the decisions by reference to texts and the vernacular writings of ancient lawyers tend only to unsettle the law and to disturb the rights of persons who have acted according to the decisions of the Court. The Mahomedan lawyers of this day would be more likely to advise their clients and draw instruments in accordance with the view taken by this Court, than with regard to ancient futwas and text-books.

211. In a Hindu case, Hori Dasi Dabi v. The Secretary of State for India in Council I.L.R. 5 Cal. 228 (242), Mr. Justice LOUIS Jackson says:

I confess that it seems to me to be among the advantages for which the people of this country have in these days to be thankful, that their legal controversies, the determination of their rights and their status, have passed into the domain of lawyers, instead of pundits and casuists, and in my opinion, the case before us may very well be decided on the authority of cases without following Sreenath, Achyatanand and others through the mazes of their speculations on the origin and theory of gift.

212. I would respectfully appropriate these observations to the present case.

213. As I have said, I agree in thinking that the present wakfnama is invalid. I also agree in thinking that it is unnecessary to decide the question whether a gift to a man's descendants for ever is good, provided there be a subsequent gift to the poor or for other religious or charitable purposes. I use the word "charitable" in the English sense, as that is the sense in which it is used in the decisions in English Courts and in the translations into English. We have been invited to use the word "charitable" in what is called the Mahomedan sense, i.e., to use a word in another language which may mean another thing.

214. All I need say as to this question is, that after a long argument in this case I see no reason to depart from the decision at which I recently arrived in the case of Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399. I think that the cases cited clearly show that under the law as administered by this Court a wakf is only valid if its substantial object is for a religious or charitable purpose.

215. I need only add with reference to the question as to whether any number of titles are dependent on wakfnamas of that description, that there is no evidence of such fact before us, that it has not been asserted at the bar, and that I have no such experience.

216. In my opinion this appeal should be dismissed with costs, and the cross objection should be allowed with costs.

Prinsep, J.

217. These five second appeals have been referred to a Full Bench by an order of Petheram, C.J. and Hill, J. of the 4th May last.

218. The cases admittedly will be governed by the same judgment.

219. It is stated in the order of reference that "the only question" which has been argued "before

the learned Judges," and as it is admitted "that the only question in these cases, is whether the deed, dated the 4th Aughran 1281 (Ante p. 118), and executed by the defendant Haji Bikani Mia, constituted the properties with which it dealt wakf properties within the doctrines of Mahomedan Law."

220. The reason for the reference is said to be that the case of Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399, decided by Mr. Justice Tottenham and Mr. Justice Trevelyan on the 24th February 1891, and the unreported case of Meer Mahomed Israil Khan v. Sashti Churn Ghose I.L.R. 19 Cal. 412, decided by Mr. Justice O'Kinealy and Mr. Justice Ameer Alion the 18th March last, are contradictory, and that as the learned Judges "are unable to reconcile the case last cited with that of Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399 they refer to the Full Bench the question whether the disposition of the grantor's property made by the deed of the 4th of Aughran 1281, was a valid wakf of the property dealt with by the deed."

221. The terms of the original order of reference, which did not leave the appeals for the final decision of the Full Bench, but made that decision dependent entirely on an answer to the question submitted, were not in accordance with the rules of this Court, and in this respect the order of reference was amended in the course of the argument of the learned Counsel for the appellant so as to leave the decision of the appeals to the Full Bench. But even as the cases thus amended were before the Full Bench, the reference was not in accordance with the rules of this Court. Those rules run thus:

I. Whenever one Division Court shall differ from any other Division Court upon a point of law or usage having the force of law, the case shall be referred for decision by a Full Bench.

II. If the question arise in an Appeal from Appellate Decree, the Court referring the case shall state the points upon which they differ from the decision of a former Division Court, and shall refer the appeal for the decision of a Full Bench.

222. It has, however, been found convenient, in order to attain the object of the decision of cases by a Full Bench, to consider any point referred regarding which diametrically contrary opinions have been expressed by two Division Benches. Such cases have, however, become rare of late years. If therefore the two cases mentioned in the order of reference were contradictory and could not be reconciled, there would, in my opinion, in the absence of any special circumstances, be no valid objection to the hearing of these cases by the Full Bench. The object of references to a Full Bench is to settle the law for the local Court, until it shall have been otherwise enunciated by a Superior Court such as that of their Lordships of the Privy Council. It is so expressed by Peacock, C. J. in Prosunno Coomar Pal Chowdhry v. Koylash Chunder Pal Chowdhry B.L.R.

Sup. Vol. 759 (768) : 8 W.R. 428 (434). In the case before us, in my opinion--and I express it with some hesitation and with every respect to that of the learned Judges who have made this reference-- the reference cannot properly fulfil such an object. The case of Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399 is now under appeal to Her Majesty in Council. The transcript of the record in that case was forwarded to England early in September last, and before the vacation, so that an early decision of that appeal may be shortly expected. Even, therefore, if the law were unsettled by two contradictory decisions, it is undesirable that the settlement of the point at issue should be complicated by a third decision of greater authority, probably, than either of those two decisions but in itself not unlikely to be set aside by a Superior Court, by the hearing of the appeals to be considered by the Full Bench. It is not proper that we should criticize the law laid down by a Division Bench of this Court which is under appeal to Her Majesty in Council, and more particularly when an early delivery of the judgment of that Superior Court may be expected. Personally, therefore, on this ground alone, I should have preferred that these cases should not be heard by a Full Bench. Some of my colleagues, however, pressed for the trial, and I was therefore unwilling to offer any opposition.

223. But on another ground I think that the matter has not been properly brought before the Full Bench, and may state that this objection did not become apparent until the facts of the two cases said to be contradictory had become known in the course of the arguments of learned Counsel. For this reason I did not think it necessary to offer any objection on this ground. In the latter of the two cases, Ameer Ali, J. pointed out that the facts of the case of Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399 do not bear the least analogy to the case under trial before him. The learned Judges who have referred the appeals now before us held that they were contradictory. But after a careful consideration of these cases, I have no doubt that the opinion expressed by Ameer Ali, J. is correct, and that the two cases are not contradictory because the judgments delivered proceeded on different grounds.

224. In the case of Meer Mahomed Israil Khan v. Sashti Churn Ghose I.L.R. 19 Cal. 412 it was not absolutely necessary to consider whether the property in suit was wakf. The fiduciary relation held by the defendant entitled the plaintiff to a reconveyance of the property whatever its character as wakf or not as wakf. The Court, however, proceeded afterwards to consider whether the property was wakf. And as it was pointed out by the learned Advocate-General, the remarks of the learned Judges on this part of the case were not essential to the, decision. In the case of Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399, it was held that there was no dedication, as the Court found that the alleged appropriator never really intended to give up his proprietary right in the particular property. The deeds in the two cases were, moreover, of an entirely different character and expressed in entirely different terms. If the Court trying the later case had differed from the view of the law in the earlier case on any point raised

also before it, I apprehend that the learned Judges would have abstained from setting themselves in opposition, but would, as usual, have submitted the particular point for decision by a Full Bench.

225. Under such circumstances, in order to bring this reference strictly within the terms of the rules of this Court, the referring Bench should have pointed out which of these two cases was on all fours with the case then before them, and they should then have expressed an opinion that the judgment in that case enunciated the law in a manner in which they did not agree.

226. The case of Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399, which is now under appeal to Her Majesty in Council, bears a resemblance to the present case, and argument has been addressed to us by learned Counsel to show that the law on which that judgment proceeded is erroneous, and is not in accordance with the Mahomedan Law which this Court is bound to administer in such cases. This in itself would, I think, make it undesirable and indeed improper for us to express any opinion in anticipation of the result of the appeal to a superior Court.

227. On behalf of the appellant it has been contended that it is the function of a Full Bench to express its opinion on any point of law even if that opinion be contrary to the law laid down by their Lordships of the Privy Council, and that this Court would be bound to follow such enunciation of the law. I cannot for one moment accede to this proposition, for it is entirely contrary to the object for which under our rules Full Benches formed of a larger number of Judges than the Ordinary Benches of this Court are constituted. Instead of settling the law, an attempt to re-open a matter already finally Settled by the highest Court would only create confusion. To assert or to exercise such a power on the part of a Full Bench would moreover amount to the gravest judicial indiscretion.

228. Mr. Woodroffe for the respondents in reply pointed out that, with the knowledge of the fact that the point of law argued in this case and raised in Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399 was now under appeal and would shortly be considered by their Lordships of the Privy Council, the decision of this Full Bench contrary to the opinion expressed in the former case would not be to carry out the real object of references to a Full Bench, but would be an attempt to dictate to the Privy Council a view of the law which a larger number of Judges than that constituting the Bench in the case under appeal entertain, and thus in some degree to embarrass the decision of the appeal in that case. As I have already stated, it is for considerations of such a character that I personally should have preferred to postpone the trial of these cases until the decision of the appeal now before their Lordships of the Privy Council.

229. The matter for our decision in these appeals is simply whether the deed of the 4th Aughran

1281 constitutes a valid wakf such as is binding under the Mahomodan Law.

230. The suits have been brought by decree-holders seeking to attach and sell property covered by this deed in execution of decrees obtained against the grantor who has constituted himself the mutwalli, the attachment of this property in execution of those decrees having been removed on the objection of the debtor that the property is not his personal property, but wakf and inalienable.

231. Both the lower Courts have given decrees in favour of the plaintiffs, The Subordinate Judge, as a Court of First Instance, found from the conduct of the grantor and the terms of the deed itself, that it was not the intention of the grantor to make a valid wakf; that he never seriously thought of the total extinction of his descendants and of the probable contingency of a reversion to the poor; that he never gave any effect to the wakf, but continued to enjoy the property as before, and even confessed, before some respectable pleaders, that he had no mind to give any effect to the deed. The Subordinate Judge accordingly found that the endowment was nominal and no bar to the attachment and sale of property in execution of the decrees against the debtor. The District Judge in appeal practically affirmed the decree of the first Court; he modified it in so far as to hold that a valid charge on the property was created by the deed to the extent of an allowance of Rs. 75 only on behalf of the poor and students. The District Judge followed the judgment in the case of Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399, finding that the terms of the document in that suit were singularly like those of the document before him, and he added that in fact the preamble is almost word for word identical.

232. The terms of the District Judge's judgment have raised some doubt whether he found in concurrence with the first Court that the intention of the grantor was not to constitute a valid wakf under the Mahomedan law. There is no doubt that he does not differ from the first Court in this respect, and in some passages of his judgment it would seem that he was inclined to concur. His attention, however, seems to have been principally directed to the consideration of the Mahomedan law in construing the terms of the deed before him. The argument was distinctly raised before the District Judge on appeal by the respondent in support of judgment of the first Court, and is set out in his judgment. The learned Judge seems to have confined his attention to what he considered the only point in the case, having reference to the judgment of the Privy Council in Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28, namely, whether there was a substantial dedication to charity in the case before him. His finding is that there was no such dedication, and inasmuch as the learned Judge expresses no dissent from the finding of the first Court that it was not the intention of the grantor to create a valid wakf under the Mahomedan law, 1 am of opinion that it muse be held that, although expressed in a somewhat different form, the finding of the District Judge was in accordance with that of the first Court.

233. In this view I think that there is no point of law arising in these second appeals, and that the decrees of the District Judge should be affirmed and the appeals dismissed on this ground.

234. The opinion which I have expressed seems to render it unnecessary that I should proceed further to discuss the other questions which have been argued before this Full Bench for eight days, in the course of which there has been considerable discussion on complicated points of Mahomedan law, and their application to cases such as that brought by the plaintiffs in these suits. For this reason, and more especially as my opinion already expressed is not that accepted by some of my other colleagues, I think it desirable that I should proceed further with these cases.

235. The matters discussed, and on which our opinion has been desired, raise the question what is a valid wakf under the Mahomedan law. The extreme position contended for, on the one side, is that it is competent to the proprietor of immoveable property to create a wakf, that is, a religious endowment declaring that during his lifetime and that of his lawful heirs, such persons shall in turn be mutwallis of such property, having absolute control over all income derived therefrom, but that in default of such persons, the estate should go to the poor; the dedication of the proprietorship to God, so as to divest the appropriator and the ultimate bestowal on the poor or some such object, on failure of the descendants of the appropriator being sufficient to constitute a wakf.

236. I think, however, that it is unnecessary to enter into any minute consideration of what may or may not be a valid wakf under the Mahomedan law, as obtained from the learned Doctors, because I find that that law has been settled by our Courts by a long course of decisions, commencing from 1798, and that it is only in recent times, as I shall presently show, that there has been any tendency to question the law so laid down.

237. The first reported case on this subject is that of Moohummud Sadik v. Moohummud Ali 1 Sel. Rep. 17 (O); 23 (N), decided by the Sudder Dewany Adawlut on the 6th December 179H. The object of the grant in that case was the maintenance of a durgah, and of the buildings and lands attached thereto, the grantee and his heirs having been appointed for the superintendence of this duty. There is no question that the object of this wakf was strictly religious. The next case Hya-on-nisa v. Mofukhir-ol-Islam 1 Sel. Rep. 106 (O) : 140 (N), decided on the 17th September 1805, related also to an establishment strictly of a religious character. In Meer Nusrut Ali v. Meer Casim Ali 1 Sel. Rep. 108 (O); 143 (N) decided on the 17th September 1805, a religious endowment was set up, but it was found that there was no assignment for pious purposes, the property being heritable, and consequently partible amongst all the heirs of the alleged grantor. In Hyatee Khanam v. Koolsoom Khanum 1 Sel. Rep. 214 (O); 285 (N), decided on 4th September 1807, the endowment was for the maintenance of a mosque, and the wife of the appropriator was

appointed mutwalli, with direction to defray the charges of the establishment out of the profits of the particular property, and it was further provided that, out of the surplus remaining after defraying such charges, she should reserve to herself a 91/2 annas share, and that the other wives were to share in the balance. This was held to be a valid endowment so far as the particular share of the appropriator in these properties. In Kulb Ali, Hoosrin v. Syf Ali 2 Sel. Rep. 110 (O); 139 (N)] the wakf was for pious and charitable purposes, such as the support of religious mendicants and students, and the repairs of mosques and other public edifices, the general superintendence being confided to a certain person and his heirs and successors for ever. The subject of the grant in Radira v. Shah Kubeerooddeen Ahmud 3 Sel. Rep. 407 (O); 543 (N), was the well-known religious establishment at Sasseram, and the object of the wakf was strictly religious and charitable within the meaning accepted by us. It may be mentioned here that it is only owing to the meaning of this term that the difficulty in a great measure has arisen.

238. The case subsequently came before the Judicial Committee of the Privy Council on appeal.

239. In Abul Hasan v. Haji Mohammad Masih Karbalai 5 Sel. Rep. 87 (O); 104 (N), decided on the 17th February 1831, the endowment was for a cemetery, a monastery and a shrine, for strictly public or religious purposes. In Muhammad Kasim v. Muhammad Alum 5 Sel. Rep. 133 (O); 159 (N), decided on the 30th July 1831, the endowment was of a religious character, the land being dedicated as pivotar, that is, for the worship of a saint In Shah Imam. Bukhsh v. Beebee Shahee 6 Sel. Rep. 22 (O); 24 (N)], decided on the 5th March 1835, the object of the wakf was the maintenance of a durgah. In chronological order the next case is that of Deo d. Jaun Beebee v. Abdollah Barber Fulton, 345, decided in the lute Supreme Court in March 1838. I propose to refer to this case later on, and will therefore proceed to the next case in order of time, that of Jewun Doss Sahoo v. Shah Kubeer-ood-deen 2 Moo. I.A. 390, decided by their Lordships of the Privy Council in 1840, and in that case the object of the endowment was the maintenance of the well-known khankahat Sasseram, a religious and charitable establishment which formed the subject of one of the cases in the Select Reports already referred to. In Moulvee Abdoolla v. Rajesri Dossea 7 Sel. Rep. 268 (O); 320 (N), decided on the 19th July 1846, the endowment was also of a religious character, namely, the maintenance of a mosque. In Bindersoondree Dassea v. Meheroonnissa Khatoon S.D.A. (1853), 69, decided on the 20th January 1853, a claim was set up that a certain portion of the land in suit was wakf, but it was found that there was no documentary evidence that the land was uniformly appropriated as wakf, and no property can be considered as such unless it be satisfactorily established that it has been specially so appropriated. In Hajee Nooroollah v. Meer Waris Hossem S.D.A. (1853), 411 the parties were found to be holding separate shares of a certain land, calling it wakf, while they used it for their own private purposes. The claim made that the lands were wakf was disallowed. In Khajeh Sirwar Hossem Khan v. Shumsoonnissa Begum S.D.A. (1853), 558, decided on the 28th June 1853, the grant

declared a joint right in all the lineal descendants of the appropriator to share without any actual division of the proceeds of the property with the duties attaching to them as regards the maintenance of the tomb, and it was declared that all such persons were entitled to share according to their rights of inheritance under Mahomedan Law in the proceeds of the endowed property, and all must be held to have an interest in the general administration of the endowment. The real object of the wakf was, as I understand it, the performance of certain duties in regard to the maintenance of a tomb, and the moneys given to the descendants of the appropriator were burdened with this duty. It was only after a due discharge of this duty that they would properly appropriate the income of the endowed property to their own private use. In Mhodabundha Khan v. Oomutul Fatima S.D.A. (1857) 235, decided on the 21st February 1857, the deed which was set up as constituting a wakf was declared to constitute an absolute devise to one Tussuduck Hossain, subject to certain trusts and a life interest of Janee Khanum on the surplus proceeds of the property, and it was further declared that this deed did not create a wakf in the sense in which that term is used in Mahomedan Law, for that term, as ruled in Moohummud Sadik v. Moohummud Ali 1 Sel. Rep. 17(O); 23 (N) (a case already cited by me), imports property in which proprietary right is relinquished, and which is consecrated in such manner to the service of God that it may be of benefit to men. The learned Judges of the Sudder Court also held that, in interpreting the deed, the intention of the person executing it must be looked to, and that to do so, all parts of it should be considered in relation to each other, so as, if possible, to form one consistent whole."

240. In Agha Mahomed Eusoof Mooshadee v. Abool Hossein Khan S.D.A. (1857) 640, decided on the 22nd April 1857, the object of the endowment was stated to be solely for religious purposes, for a mosque, an imambara, and for repairing a tomb of the grantor's ancestors, and the appropriator then appointed himself superintendent or mutwali. The only question raised in that case was the right of succession to the office of mutwali. In Dalrymple v. Khoondkar Azeezul Islam S.D.A. (1858), 586, decided on the 31st March 1858, it was held that where an endowment is wholly, wakf, that is, where the whole of the profits are devoted to religious purposes, the mutwalli has no authority to grant a lease extending beyond the period of his own life, but if the office of mutwalli is hereditary and the incumbent has a beneficial interest in the heritable estate, the property is vested in the mutwalli and his heirs. And it was further held that in such a case the mutwalli might exercise the right to grant leases even in perpetuity. In the same reports, at page 1218, in Mahomed Munnoo Chowdree v. Hajra Beebee S.D.A. (1858), 1218 decided on the first July 1858, there was apparently some interest for the family of the alleged endower. The Court found that the plaintiffs do not style the land sued for by them wakf of which the proprietary right has been relinquished, and which has been consecrated in such a manner to the service of God that it might be of benefit to men; that they assert that it was their heritable property, the profits

being appropriated to the service of the musjid; in other words, that it was an estate of inheritance charged with certain trusts. The case was remanded for retrial by the lower Court in order to determine the nature of the property claimed, whether it be strictly endowed, or whether it was heritable property subject or not to certain trusts. If it was the former, it was held by the Court that its alienation by sale would, of course, under the Mahomedan Law, be illegal; if of the latter description, that it would be heritable and capable of being sold. In Bibee Kuneez Fatima v. Bibee Saheba Jan 8 W.R. 313, decided on the 8th August 1867, the grant recited that in consideration of the charitable disposition of the grantor and the expenses which he voluntarily incurred in supporting poor students, in giving alms to mendicants and food and shelter to travellers, the grantor remitted in the future payment of cesses and requested the grantee to give the grantor the benefit of his prayers. This was held not to constitute a valid wakf, as there was no dedication of properties solely to the worship of God or to any religious or charitable purposes.

241. The next case is that of Khajah Hossein Ali v. Shazadee Hazara Begum 12 W.R. 344 : S.C. 498 : 4 B.L.R.A.C. 86), decided on the 25th August 1869. From the terms of the deed, as set out in the judgment of Mr. Justice MARKBY, it appears that the object of the wakf was the care of travellers and the poor, the maintenance of certain specified Mahomedan festivals, and afterwards for the personal expenses of the appropriator as well as for his family. The main, if not the only, issue in that case was simply whether the property under mortgage was a proper subject of wakf under the Mahomedan Law; and this was allowed, no question being raised, nor indeed could be properly raised, as to the validity of the wakf in other respects. The primary and substantial object of the wakf was of a religious and charitable character. The next case is that of Muzhurool Huq v. Puhraj Ditarey Mohapttur 13 W.R. 235, decided on the 2nd March 1870, and this case is deserving of special mention, because a portion of the judgment has been quoted with approval by their Lordships of the Privy Council. In describing the wakf it was stated that the "primary objects with which the lands are endowed under the Mahomedan Law, and which is the only object, are to support the mosque and to defray the expenses of worship conducted in that mosque. It is first provided that from the profits of the endowed lands the mosque will 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 Muazzun, 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 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."

242. The judgment proceeds in these terms:

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 Mahomedan Law. A person may make an endowment settling land 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 Mahomedan 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.

243. In this case the family of the mutwalli was provided for after the religious and charitable purposes for which the wakf was created had been satisfied, or, to repeat the words of the judgment. "This (that is the application of funds to the family) was to be done after the primary objects for which the endowment was made were fully accomplished." In Doyal Chund Mullick v. Syud Keramut All 16 W.R. 116, in which case Mr. Justice Kemp was again one of the Judges, decided on the 30th June 1871, the same view was taken. The object of the appropriation was stated to be "the setting apart of a piece of land for the ultimate site of a mosque and for the present use of Mahomedans as a place of meeting on the great festivals of their religion where the Koran might be read and charitable doles made," and these objects were held to constitute a valid wakf when accompanied by a solemn dedication to God. The next case on the subject is that of The Advocate-General v. Fatima Sultani Begum 9 Bom. H.C. 19 decided on the 21st February 1872. The wakfnama is described as reciting that the appropriator had built a mosque in Bombay, and "declares that he thereby makes a legal, firm and clear endowment of the whole and every part of his garden, etc., in favour of the mosque, and that such endowment is made in such way that whatever income derived from the garden, etc., there may be remaining, after deducting their expenses, shall be expended in making the necessary repairs and in defraying the expenses of the mosque, and if after defraying such expenses there should be any surplus, then that surplus should be expended in defraying the expenses of the mourning of the founder, the chief of the martyrs." It then provides that the guardianship of the mosque rests with the endower during the term of his natural life, and after his decease it rests with any one of his relations who may be intelligent and of good reputation, provided he shall be resident in Bombay, otherwise the guardianship shall rest with any Shiraz merchant of good reputation. The suit related to the appointment of a mutwalli, but the wakfnama shows that the endowment was strictly for religious and pious purposes, although the appropriator and his descendants were in turn appointed mutwallis, and as such to attend to the distribution of the proceeds of the endowment.

Similarly in Abdul Ganne Kasam v. Hussen Miya Rahimtula 10 Bom. H.C. 7 it was held on the 31st January 1873, that to constitute a valid wakf there must be a dedication of the property solely to the worship of God or to religious and pious purposes. The deed in that case which created a wakf of certain property in favour of the donors and their family and children did not constitute a valid wakf.

244. The next case is that of Mahomed Hamidulla Khan v. Lotful Huq I.L.R. 6 Cal. 744 : 8 C.L.R. 164, decided on the 2nd February 1881. In that case there was an assignment of a share of certain properties for a mosque and its expenses, and out of the remainder, specified shares were stated to have been made wakf in favour of each of two daughters and their respective descendants in turn so long as they existed, and on their failure these properties were to be applied to the poor and needy. It was held that the shares of the properties given to these daughters and their descendants did not constitute a valid wakf, and they were made liable to sale for the debts of the ladies. The other share in the properties which was given for the maintenance of the mosque remained untouched. In Luchmiput Singh v. Amir Alum I.L.R. 9 Cal. 176 decided on the 3rd July 1882, the wakf was created for the expenses of a musjid and a tomb, the servants of a certain Asthan and for performing certain worships at the tomb, and certain relations of the appropriator were appointed mutwallis. Provision was also made that certain debts should be first paid, and it was declared that the manager should afterwards apply the property towards the religious uses created and the maintenance of the settlor's grandsons and their male issues, and it was held that the subject of the wakf first stated, that is, for the maintenance of the mosque and the tomb, were all distinctly religious, and, to some extent, involved charity to the poor; and further, that the subsequent direction that the manager should maintain the future male descendants of the wakif did not necessarily change its character. The wakf was accordingly maintained.

245. In Jayatmoni Chowdrani v. Ramjani Bibee I.L.R. 10 Cal. 533, decided on the 22nd February 1884, the wakf was for the purpose of the maintenance of the mosque and a madrassa, and the proceeds from the property appropriated were divided into three portions-- 1/3rd for the expenses of the maintenance for the mosque, 1/3rd for the maintenance of the madrassa, and the remaining 1/3rd for the maintenance of the mutwalli. The wakf in this case also was confirmed.

246. Of the other cases decided by this Court, it is necessary only to mention the two cases cited in the order of reference. We have, moreover, two cases decided by the Madras High Court to which special reference is unnecessary.

247. There are, next, two cases decided by the Bombay High Court. The first was decided by WEST, J.--Fatmabibi v. The Advocate-General of Bombay I.L.R. 6 Bom. 42. The other case was decided by FARRAN, J.--Amrutlal Kalidas v. Shaik Hussein I.L.R. 11 Bom. 492--in which the

last-mentioned case was followed. In reference to these cases which proceed on a somewhat different principle from all the cases previously cited, and support the argument on behalf of the appellant in the cases now before us, their Lordships of the Privy Council in Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 (510) : L.R. 17 I.A. 28 (37) point out that "the observations of Mr. Justice West are of an extra-judicial character, as the case in which they were uttered did not raise the question." There is, lastly, the decision of the Judicial Committee of the Privy Council in the case last mentioned, in which the intention of the appropriator in the creation of the wakf was held to be of vital importance in deciding whether the deed set up constituted a valid endowment, and it was held in that case that as there was no reason to suppose that the charitable uses provided for by the deed would absorb more than a devout and worthy Mahomedan gentleman might find it becoming to spend in that way, there was no indication of any intention to constitute a valid wakf.

248. In the case of Doe d. Jaun Beebee v. Abdollah Barber Fulton, 345 the matter to which the attention of the Court was directed was the objection taken that the deed did not constitute a valid wakf, but was rather a will and executed under the name of wakf as a device to divert the order of inheritance under the Mahomedan Law. The Court, it will be observed from the terms of the first question put to the Law Officers, regarded the endowment as one to charitable uses, but doubted whether it was valid when qualified by a reservation of the rents and profits to the donor during his life. The opinion of the Law Officers on this and on the other questions referred goes somewhat upon the terms of those questions. No doubt the Mahomedan Law Officers consulted pronounced it to be a valid wakf. But no objection was taken, nor was the question considered by the Court itself that a settlement of that nature was not a dedication to God or for the service of man in so far as it provided in the present instance for the maintenance of the appropriator and his family with an obligation to apply an undefined portion of the proceeds to certain religious purposes. It is noteworthy, too, that in the deed in that case power was given to the appropriator to increase or decrease the number of those who were, as members of the family, entitled to receive maintenance according to the increase or decrease in the produce. I did not therefore regard this case as any serious interruption to the current of cases decided by the Sudder Dewany Adawlut. So far, then, it appears from all the cases in our reports, commencing in 1798, to the present time, with the exception of the two cases in the Bombay High Court and the case in Fulton's Reports which can be distinguished, that the primary and substantial object of every wakf which was recognized as constituting a valid endowment, was the maintenance of some religious institution or to carry out some charitable purpose in the ordinary signification of that term. Whenever there was provision made for any other object, such as the support of the appropriator or any member of his family, it was always of a subsidiary character, and in such cases it was regarded as constituting a special charge on the proceeds of the endowed land after

the original object was satisfied.

249. There is no case in which a wakf was allowed in which the primary object was the maintenance of the appropriator and his family and his descendants except in one of the cases cited in which the wakf was disallowed. Having regard, then, to the current of decisions which have settled the law at least on this side of India, I should not be prepared to adopt any new view of the law unless it were laid down by some higher authority than one of our Indian Courts. I would quote here the remarks of their Lordships of the Privy Council in Chotay Lall v. Chunnoo Lall I.L.R. 4 Cal. 744 (755), "that after the series of decisions which has occurred in Bengal and Madras, it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts," and "that the Courts ought not to unsettle a rule (of inheritance) affirmed by a long course of decisions, unless, indeed, it is manifestly opposed to law and reason." The view of the Mahomedan law pressed on us at the hearing of these appeals is certainly new to our Courts, and I may say that I have no recollection during a long experience of its ever having been addressed to me. It certainly has never found any place in any of our reports, nor can we find that in any of our reports were wakfs founded on the principles which we are asked to adopt ever brought before our Courts. It is almost impossible to account for the absence of any such case, if the view now pressed on us has been extensively recognized and adopted; for cases are constantly arising in which endowments as wakf are set up in bar of execution of decrees for debt against the attachment and sale of properties held by a Mahomedan.

250. It has been stated that if the law as hitherto laid down be adopted, it will affect numerous large and valuable estates, but no authority has been given for this statement, and I am certainly not aware of any such cases. It seems to me rather that if the law be changed it would have a very serious effect on titles acquired on the strength of the hitherto recognized law in this respect founded generally on sales in executions of decrees held by our Courts in which claims as wakf have been disallowed. The only effect upon existing titles of a re-affirmance of what appears to me to be the existing law laid down by the Courts would be to operate as a warning to persons holding estates under such settlements that such estates cannot be protected by a given religious or charitable dedication from the usual legal liability for debts incurred by them.

251. It has been contended by the learned Advocate-General that in the decision of this and other similar matters, involving a consideration of the Mahomedan law, and equally Hindu law, in which our Courts have been required to observe such laws, if one of the parties be not of one of those religious, the Courts in applying such special law should be guided by principles of justice, equity, and good conscience. It is unnecessary, perhaps, to express any opinion on this point for the purposes of the appeals before us in view of the conclusion at which I have arrived. But it is a matter for serious consideration whether under what may be termed a family settlement,

providing that, on default of any member of such family, the proceeds of the property under settlement should go to the poor or to any other charitable or religious purposes, the members of such family should by a strict application of the Mahomedan law be exempt from being compelled to pay their lawful debts and thus be assured of a regular certain income.

252. I have discussed the question connected with the Mahomedan law to be administered by our Courts relating to wakf, because considerable argument has been addressed to us on this point, but, as I have already stated, on the main questions the appeals must fail, since on the findings of the District Judge, no second appeal lies, and it becomes unnecessary, in my opinion, to answer the question referred to us.

253. In regard to the objection raised by the respondent to the order of the District Judge, allowing a charge of Rs. 75 for the poor and students, I find that such a charge was allowed by the Judges of this Court in Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28, and was not set aside by their Lordships of the Privy Council in the judgment as reported in L.R. 17 Ind. App., 28. I see no reason, therefore, to disallow it in these appeals.

W. Comer Petheram, C.J.

254. The plaintiff's in this suit are the holders of a decree against the defendant Haji Bikani Mia for Rs. 3,448 2 annas 8 pies and interest, and in execution of it attached certain properties as belonging to him and being in his possession. Upon this, he applied for the release of the property, on the ground that it does not belong to him, but is a portion of a wakf estate of which he is the mutwalli.

255. The application was allowed, the property released, and the present action brought to set aside the order of release and to obtain a declaration that the property is liable to attachment and sale in satisfaction of the plaintiffs' decree.

256. The question is whether a deed executed by Bikani Mia, on the 4th of Aughran 1281 (19th November 1874), and registered by him in the Registry of Dacca, was effectual to create a valid wakf of the properties dealt with by it, and so to render them inalienable. The instrument in question was executed shortly before Bikani Mia set out on a pilgrimage to Mecca, and at the time of its execution he was in possession of sufficient property, over and above that dealt with by the instrument, to satisfy all debts which he had incurred or for which he was liable at the time.

257. After reciting the reasons for its execution the instrument proceeds:

I do hereby make a permanent wakf of the undermentioned properties in favour of my two sons, my four daughters, and my wife, and after them the successive descendants of my said sons and daughters and their descendants, and on their death, i.e., in the case of my said sons and daughters dying issueless, in favour of the poor and indigent and the beggars residing in the town of Dacca. Taking the said wakf properties out of my ownership and possession I hold them in possession as mutwalli under the terms of this wakf. As long as I shall live, I myself shall continue to be the mutwalli, and as such shall do everything according to the terms of the said wakf. On my death my two sons, Sriman Abdul Rahaman Mia and Sriman Abdul Sobhan Mia, shall, as hereinafter provided, be appointed mutwallit in my place.

258. The instrument then provides that the mutwallis shall always be selected from Bikani Mia's descendants, that after his death the mutwallis shall be competent to spend any amount of money they think proper for the sake of his salvation, and that after his death they shall in every year give away Rs. 50 in charity and maintain one student; that they shall pay Rs. 50 a year to the wife, and Rs. 100 a year to each of the two sons, and Rs. 50 to each of the four daughters and to the descendants of each of these six persons until they are exhausted, and that the residue of the income shall be accumulated by the mutwallis for the purpose of increasing the wakf estate.

259. The Subordinate Judge, before whom the suit came in the first instance, decreed it on the ground that the transaction was a nominal one, and could not have been made with any real intention that it should be acted upon.

260. The District Judge has, as I understand his judgment, considered the question solely with reference to the construction of the deed, and has come to the conclusion that it created a valid wakf or endowment to the extent of Rs. 75 a year, that being the amount specifically allotted to charities, and that, subject to a charge for that amount, the properties are alienable, notwithstanding the execution of the instrument by the owner. From his decree the defendant appealed to this Court, and the plaintiff filed a cross-objection to the allowance of the charge for the Rs. 75 a year. The appeal came before a Division Bench which consisted of Mr. Justice Hill and myself, and upon the argument the plaintiff relied on the judgment of Tottenham and Trevelyan, JJ., in the case of Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak I.L.R. 18 Cal. 399, in which case, as 1 understand the judgment, the Division Bench held that a wakf or consecration must be for the benefit of a body which from its nature cannot fail, i.e., for the public or for some class of the public, and that though the consecration may be subject to a condition by which the usufruct of the consecrated estate is reserved partially and/or temporarily for the benefit of particular individuals, such condition or reservation must not be of such a character as to render the grant for the benefit of the permanent body inoperative and illusory, and that a condition that the whole income of the consecrated estate should be paid to the

members of a particular family so long as any member of it remained in existence, would have that effect.

261. The defendants relied on the judgment of O'Kinealy and Ameer Ali, JJ., in the case of Meer Mahomed Israil Khan v. Sashti Churn Ghose not yet reported I.L.R. 19 Cal. 412. In that case, as I understand the judgment, the Division Bench held that, "A wakf or consecration may be for the benefit of a body of beneficiaries, which must from its nature be permanent, but such body may be made up of different classes which may enjoy the income in shares or one after the other, and some of which may from their nature be of only temporary duration; but if there is included in the entire body of beneficiaries some class which from its nature cannot fail, the wakf is valid, and the property inalienable from the date of the wakf or dedication."

262. We were unable to reconcile the principles laid down in these two cases, and we thought, and I think still, that the present case must be decided in accordance with one or other of those principles, and that the only course open to us was to refer the matter to the decision of a Full Bench. We accordingly referred to this Bench the question whether the disposition of the grantor's property made by the deed of the 4th of Aughran 1281 was a valid wakf of the property dealt with by the deed,

263. The reference was afterwards amended by us at the suggestion of some of the Judges of this Bench by adding the words, "we also refer the decision of the Special Appeal to the Full Bench," and this Bench is now called upon to answer the question referred to it by the Division Bench and to dispose of the appeal.

264. The Mahomedan law-books which have been principally relied on in the argument are the Hedaya, which was written about 1196, and was translated by Mr. Hamilton at the request of Warren Hastings, and the Fatawa Alamgiri which was commenced in 1656 by order of the Emperor Arungzeb, and parts of which were translated into English by Mr. Baillie, and form the book known as Baillie's Digest. A description of these two books and of their value as authorities will be found in the Introduction to Morley's Digest, pages 267 and 289. The subject of wakf is dealt with in Book 15 of the Hedaya, Volume II, page 334, Hamilton's Translation, and Book IX, Chapters 1, 2, 3, 4, 5 and 6 of Mr. Baillie's work. If we were called upon to decide the question as to which the two Division Benches of this Court have differed, upon what we find in the Mahomedan books alone, I think it would be very difficult to arrive at a conclusion, as there are passages in the books which may be cited in support of either view; but this part of the law has been the subject of many judicial decisions in our own Court, and is, I think, concluded by the judgment of the Judicial Committee in the case of Mahomed Ahsanulla Chowdhry v. Amarchand Kundu I.L.R. 17 Cal. 498 : L.R. 17 I.A. 28. In that case the deed is not set out in full in the report, but Lord Hobhouse in delivering the judgment of the Committee describes it as follows:

At the outset of the deed the grantor adverts to his age and his coming death, and says : I hereby appropriate and dedicate as 'fisabillilah' wakf in the manner provided in the paragraphs mentioned below--the properties now in question and other property there described--for defraying the expenses of the brick-built musjid of my grandfather, Jorip Mahomed Chowdhry, at my own family dwelling-house in the village of Paragulpore, and of the two madrassas at my own ancestral homestead, and my lodging-house in the town of Chittagong and sadir warid (persons coming and going), and I pray to God that He may in his mercy accept and preserve the same for ever for being applied to those purposes.

The paragraphs mentioned below' are 13 in number.

Paragraph 1 appoints the grantor's three sons to be mutwallis of the wakf properties in a gradation of rank, and it contains some vary elaborate instructions respecting the management of the property.

Paragraphs runs as follows;--

The mutwalli after payment of the proper expenses of the mosaref and the necessary costs of collections of the zemindari and the salaries of mookhtars and other servants and the expenses of litigation and the like, and all other charges which may be incurred on the occurrence of any peril or emergency, out of all kinds of income and profits of the endowed properties, according to the long-standing practice, shall take from the residue his own monthly allowance, pay over the allowance due to the naib mutwalli and naib-ul-maniab and my daughters as specified in the schedule, and continue to perform the stated religious works according to custom. He shall, having regard to the provisions contained in the first paragraph, keep his eye to the legitimate objects of the musaref, and not commit extravagance and waste or practise fraud in connection therewith. The balance that may be left after meeting the above-mentioned expenses shall be kept in a proper, that is to say, a safe place under the supervision and management of all the three persons.

The schedule provides Rs. 100 per month for the first mutwallis, Rs. 90 for the second, Rs. 80 for the third, and Rs. 30 for the daughters.

Paragraph 3 provides for the succession of mutwallis in case of retirement or death. It is very inartificially expressed, and in some contingencies might be difficult to apply. But for its bearing on the construction of the deed, it is sufficient for their Lordships to say that in their judgment it was meant by its framer to provide for a perpetual succession of some of the male members of his family as mutwallis, to be appointed either by existing mutwallis, or by a Committee, or by an officer of Government.

Paragraph 1 provides for the addition to the wakf of surpluses occurring under paragraph 2.

Paragraph 5 declares that the persons getting monthly allowances shall have no power to assign or charge them, and that creditors shall have no claim against them.

Paragraph 7 declares that if 'the mutwallis' have sons exceeding three in number, for those who are not mutwallis, the mutwallis shall fix a monthly allowance. Those persons are to live on their own earnings in professions, trades or service; but when any one becomes a mutwalli, he is to bring into the wakf all the property he has got.

Paragraph 8 provides that if 'any one' dies leaving no sons, his wife and daughter shall receive allowances. It then continues--'It shall be competent to the mutwallis, having regard to the income and expenditure of the wakf properties, to proportionately increase or decrease these allowances as well as their own salaries and those of the other salaried persons, and no one shall be able to raise any objections to the same.

265. The Committee held that the disposition made by such a deed was not a bond fide dedication and did not render the property inalienable, as its real object was not a charitable one, but was to make arrangements for the aggrandisement of the family and to make the property inalienable, and it being established that a settlement for these purposes is not valid as a wakf according to Mahomedan law, it must follow that the wakif's family cannot themselves be the primary object of the settlement, as, if it were, the natural effect and object of such a settlement would be to keep the estate in the family and so to provide for the maintenance and aggrandisement of the family, and on the authority of this case I think that it must now be held to be settled law that a wakf or consecration must be in the first instance for the benefit of a body which from its nature cannot fail, i.e., for the public or for some class of the public, and that though the consecration may be subject to a condition by which the usufruct of the consecrated estate is reserved partially and/or temporarily for the benefit of particular individuals, such conditions or reservation must not be of such a character as to render the grant for the benefit of the permanent body inoperative or illusory. 'I do not, however, think it necessary in the present case to express any opinion whether a condition that the whole income of the consecrated estate should be paid to the members of a particular family, so long as any member of it remained in existence, would have the effect of rendering the grant for the benefit of the permanent body inoperative or illusory. This is the question upon which their Lordships of the Privy Council declined to decide; it is one of great importance, and upon which Mr. Justice Ameer Ali informs me many titles in India depend. A perusal of the Mahomedan books which I have mentioned has created in my mind the impression that at the time when they were written such dispositions were treated as valid, and I think that at the present time the weight of authority, as far as the decisions of the Courts established by the English Government are concerned, is in favour of their validity,

and as it has been argued on behalf of the plaintiffs that their view is supported by the current of authority, I think it well to see what the decisions on this question have been, though in the result I do not propose to express any opinion upon it.

266. In the month of March 1838 the case of Doe d. Jaun Beebee v. Abdollah Barber Fulton, 345 was decided by Sir E. RYAN, C.J., and Grant, J., after consultation with the Mahomedan Law officers; the material parts of the deed in that case were as follows:

First.-- Whereas the aforesaid lands subject to rent are situated in the Town of Calcutta, I will appropriate as much of the produce thereof as is required for my own use unto the said purpose, after defraying the revenue and taxes thereof, and the remainder to hereditable and charitable purposes and my several relatives, that is, my grandson and granddaughter and daughter-in-law and daughter's son and daughter's daughter, who are now receiving maintenance, living together united in meals, shall continue to receive the same in like manner, and the power of increasing or decreasing the number of incumbents according to the increase or decrease in the produce will remain with me, and the repairs of the mosque and salary of the Mowuzz in the Khattab and other expenses connected therewith, in the seasons of the Ramasan Mabareke and the Eed, shall be defrayed from the produce, and the person who is hereafter appointed mutwalli will enjoy the same powers as I myself possess.

Second.--I will continue mutwalli as long as I live, and on my decease my daughter's son Abdollah, son of Shaikh Joomun, inhabitant of Calcutta, will become mutwalli; after the said Abdollah, one from among my relations who is the most fit and possesses integrity, temperance, intelligence and respectability, and appears most deserving.

Third.--After my decease, neither my heirs nor the mutwalli will have the smallest right to sell or give away or transfer the above-mentioned lands in any manner; whatsoever part thereof is expended in hereditable and benevolent purposes, shall be disbursed under my own control and direction.

267. The Court held that the appropriation was valid and the property inalienable. In the case of Fatma Bibi v. The Advocate-General of Bombay I.L.R. 6 Bom. 42, Mr. Justice West held that a deed, the material portion of which is as follows, constituted the property dealt with by it wakf and inalienable:

1. Upon trust during the lifetime of the plaintiff, to pay the rents and profits of the said premises to the plaintiff for her sole and separate use, without power of anticipation.

2. Upon trust after the death of the plaintiff, to pay the rents and profits of the said premises to such one or more exclusively of the others or other of the children or grandchildren or other

descendants of the plaintiff, at such age or time or respective ages or times if more than one, in such shares and with such future and executory or other trusts for the benefit of the said children or grandchildren or other descendants, or some or one of them, with such provisions for their maintenance and education either at the discretion of the trustees or trustee for the time being of the said indenture, or of any other person or persons, and upon such condition with such restrictions and in such manner as the plaintiff should by deed or mill appoint, and, in default of any such direction or appointment, and so far as no such direction or appointment should extend, upon trust to pay the said rents and profits to and amongst the children or grandchildren and other descendants of the plaintiff for and during the term of their natural lives or the life of any of them, in such shares and proportions and in such manner for their maintenance or education, or otherwise as the said trustees or trustee for the time being should think fit. Provided always, and it was by the said indenture agreed and declared, that its object was to make such a settlement of the said premises that the rents and profits thereof should alone be divisible amongst the children, grandchildren and other descendants of the plaintiff for ever.

3. In the event of there being no children, grandchildren or other descendants of the plaintiff, or, there being such, in the event of such child or other descendants dying without leaving any child or children, upon trust to stand possessed of the said premises and of the rents and profits thereof in trust for the said Mahomed Ali bin Mahomed Ameen Rogay and his heirs to be devoted by them to charitable uses according to the law of Mahomedans, either in paying the expenses of poor and indigent pilgrims going to Mecca, establishing charitable institutions, in donations to and building mosques, in payment of the funeral expenses (or marriage expenses) of poor people, in sinking wells or constructing tanks, or in such other manner as the said Mahomed Ali bin Mahomed Ameen Rogay, his heirs, executors or assigns should think fit.

268. In the case of Amrutlal Kalidas v. Shaik Hussein I.L.R. 11 Bom. 492 Mr. Justice Farran held that a deed the material portions of which are as follows constituted the property wakf and inalienable:

The third defendant Shumsudin in his written statement admitted the mortgage to the plaintiff. He, however, alleged that by a wakfnama or deed of endowment, dated 17th May 1871, Miya Bundu (the father of the three defendants) gave the property in question, together with three other properties, to his heirs and descendants for religious and charitable purposes, and declared that the office of mutwalli should be held by his wife Asha Bibi and the second defendant, with power to delegate the said office to whomsoever they should choose : and he further declared that after deducting all outlays in respect of the said properties, the said mutwallis should divide the annual income thereof into four regular shares, and make over one of such shares to each of the three sons and their respective descendants for their expenses, and out of the remaining share

pay half thereof to his widow Asha Bibi, and the other half to his sister Shaban Bibi; and it was by the said wakfnama further declared that, if none of the heirs of the settlor should survive, the income of the whole of the property should be distributed among Mahomedan fakirs and indigent people : and further, that the said properties should not be sold or mortgaged by any one; and that if any one should seek to do so, then the claim should be null and void.

269. In the case of Mahomed Hamidulla Khan v. Lotful Huq I.L.R. 6 Cal. 744 : 8 C.L.R. 164 Mr. Justice Morris and Mr. Justice Tottenham held that a deed of which the material portions are as follows did not create a valid wakf, and that the property was alienable:

I have assigned eight annas of the above-mentioned endowed properties for the mosque built by me, and the expenses thereof. Out of the remaining eight annas, I have made wakf of four annas in favour of Mussumat Jamila Khatun alias Dhun 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. I have made wakf of the remaining four annas in favour of my daughter Bibi Budrunnessa and her descendants, as also her descendants' descendants how low soever, and when they no longer exist, then in favour of the poor and needy. * * * After payment of the Government revenue and the collection charges, etc., and after deduction of the mutwalli's towliat right from the proceeds of the above-mentioned endowed properties, the surplus whatever it may be, shall be divided as follows: i.e., four annas thereof shall be given to Jamila Khatun alias Dhun Bibi, and four annas thereof to Budrunnessa Bibi, inasmuch as four annas share has been endowed in favour of each of the said ladies, etc. Golam Sharuff appointed his wife Nosima Bibi as the first mutwali : on her death, the mutwallis were to be Dhun Bibi and Budrunnessa Bibi, the first defendant, both of whom will get the towliat right in two equal shares. One of the male descendants of each of these two Mussumats, so long as such descendants may continue to have offspring, shall be appointed as mutwalli of the endowed properties, and each of the two mutwallis so appointed shall get the towliat right in two equal shares.

270. There are many expressions to be found in the various cases on this subject, which indicate that, of late years at all events, the opinion of many of the Judges has been that only such dispositions of property as would come within the meaning of charitable dispositions in the ordinary English meaning of the words, would constitute valid wakf, but I believe the four cases I have cited are the only ones in the books in which the question is decided whether a reservation of the income of the consecrated estate for the benefit of a family so long as it existed would render the grant for a charitable purpose inoperative and illusory; and inasmuch as in three out of these four cases it was held that the dedication was valid, notwithstanding the reservation, it seems to me that at the present time the weight of authority is in favour of that view.

271. It now remains to consider whether the consecration in the present case was for the benefit of a body which from its nature cannot fail, and if it were, whether the reservations out of the grant for its benefit are of such a character as to render the grant itself inoperative or illusory. I think that the disposition of the wakf property which the grantor intended to effect by this deed was not for the benefit of the poor of Dacca, which is the permanent body mentioned in the deed, but was merely for the aggrandisement of his own family and to render the property inalienable. I think that his intention as shown by the deed was that the sum of about Rs. 75 only should be expended in charity--of about Rs. 400 in the maintenance of the family, and that the remainder should be accumulated with the object of creating a great estate, and if this view of the meaning of the deed is correct, it is manifest that its object could not have been to benefit the poor. It is said that the meaning of the clause which gives the mutwallis power to spend whatever they might think fit for the benefit to the. grantor's soul is in effect a power to spend the whole income, after deducting the Rs. 400, upon the poor, but reading the deed as a whole, I cannot think that such was the grantor's meaning. I think his intention was to create a great family estate, and I do not think such a purpose is one for which a valid wakf can be created within the doctrine laid down by the Judicial Committee of the Privy Council. My answer to the first question referred to this Bench is that the disposition of the grantor's property made by the deed of the 4th Aughran 1281 was not a valid wakf of the property dealt with by the deed, and as that is, in my opinion, the only question in these appeals, I think that the appeals should be dismissed and the cross-objections allowed with costs in all Courts.

272. According to the opinion of the majority of the Judges, the result will be that the appeals will be dismissed with costs and the cross-objection will also be dismissed, that is, the order of the District Judge relating to the charge of Rs. 75 a year on the property of Bikani Mia will be maintained with costs in proportion.

1 For the value and authority of this work, see Morley's Digest, Introduction, p. cclviii. I quote from Captain Matthew's Translation, Vol. I. p. 453 (1823) 2 "He [Akam] 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 Islam, and it was in this house that he asked people to embrace Islam. A large number of people embraced Islam in this house, of whom Omar Ibn-ul-Khattab was one, and the house was therefore called the house of Islam. 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 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 Hisham, son of Aas, and by the slave of Hisham,

son of Aas. 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."

(3) A Distinguished Kazi of Irak who flourished just after Abu Ysuf; see Morley's Digest, introduction, page cclxv.

(4) A celebrated Kani of Irak recognized as a great authority in this country.

5 Mowkoofa, past participle of wakf; Mr. Baillie translates this word as "settled" but I prefer to follow the original, as the word "settled" is mis-leading.