CHAPTER V.

THE SHIAH LAW RELATING TO *HIBA* OR GIFTS.

SECTION I.

MUSHÂ'A AND SEISIN ACCORDING TO THE SHIAH DOCTRINES.

According to the Shiahs, the gift of *mushâ'a* or a share in joint and undivided property is lawful,(1) "and seisin of it is to be taken," adds the *Sharâya*, "in the same way as seisin in sale," that is, "by mere surrender or vacating by the donor." And the *Mabsût* says "in our *mazhab*," *i.e.*, according to our doctrines, "the gift of a share of a property whether partible or not, is absolutely valid."

The character of the seisin, as stated before, when dealing with the Hanafi Law, must depend on the nature of the thing given.

Authority to take possession sufficient.

And the same view is laid down by the Allâmah in his *Tahrîr-ul-Ahkâm*. Mere surrender or delivery of symbolical possession is sufficient in all cases of gift, where the subject is immovable; where it is movable, manual or physical possession seems to be required *so far as the nature of the article permits. Authority to take possession is equivalent to delivery of possession.*

Under the Shiah Law there is no question, that if a thing is given to two persons *jointly*, and they take possession *jointly*, each donee becomes the proprietor of the portion given to him. If, again, only one of them should accept the gift and take possession while the other refuses, the gift to the acceptor would be valid.

As under the Hanafi Law, acceptance is a necessary condition to the validity of a gift. "The contract of *hiba*," says the *Sharâya*, "requires declaration and acceptance with seisin or taking possession."

Declaration is the expression of an intention or wish on the part of the donor to transfer to the donee the right of property by way of a *hiba*. But the contract is not valid, unless the person who makes the transfer is "of full age, sound understanding and

(1) *Mirza Kasim Ali* v. *Mirza Mahommed Hassan* [1832], 5 Sel. Reports, 213.

unrestrained in the use of his property," in other words, is *sui juris*, capable of understanding the nature of his act, and does not labour under any "inhibition."

Gift of a debt under the Shiah Law.

A discharge or release given by the creditor to his debtor is equivalent to the gift of the debt, and this is valid both under the Sunni and Shiah Law. Owing, however, to the difficulty of obtaining physical or actual possession of a debt or *chose in action*, some Shiah lawyers, among them the author of the *Sharâya*, have held that a debt, or rather the right to recover a debt, cannot be assigned to a third person. Other jurists, especially the Shaikh, (the author of the *Mabsût*,) have held the contrary view, and there can be no question that upon the basis of correct analogy and the recognised practice, which has obtained for centuries among Shiah communities of making valid assignments of *choses in action*, a debt or a right depending on the obligation of another may validly be given or assigned by the obligee or creditor to a third party gratuitously, without any consideration, that is, by way of *hiba*.(1) In the case of *Nawab Amjad Ali Khan* v. *Mohamdi Begum*,(2) the gift was of Government Promissory Notes. Considered analytically, the gift of the notes amounted in fact to a gift of the right to receive the interest on the money, for which the notes formed the securities. Though the parties were Shiahs, there was no question raised in that case, that such a gift was invalid, because it was the gift of a right to receive periodically the accruing interest. The only ground upon which the gift was impugned, was, that the donor had reserved a life-interest in the income, and that such reservation was invalid under the Mahommedan Law. It follows, therefore, that the assignment of a *chose in action*, or a right in reversion, is as valid under the Shiah as under the Hanafi Law.

Seisin may be actual or constructive.

According to the Shaikh and the authors of the *Sarâir*, *Ghunia*, *&c.*, seisin may be either actual or constructive.

(1) Under the English Common Law, the benefit of a contract cannot be assigned (except by the Crown), so as to enable the assignee to sue in his own name. The origin of this restriction was attributed by Coke to a desire on the part of the founders of English Law to discourage maintenance and litigation; "but," says Pollock, "there can be little doubt that it was in truth a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor;" Pollock on Contract, p. 224.

The view held by some of the Shiah lawyers against the transfer of *choses in action* or the assignment of a contract may also be said to be a logical consequence of their view regarding the principle of seisin.

(2) Supra.

The authority to take possession in order to be effective must be such as would enable the donee to do so, or give some sort of dominion over the property. As already mentioned, the mere handing over to his wife by a person of certain deposit notes signed by the Agent of a Bank acknowledging the receipt of sums of money as deposit bearing interest and not in a form which would entitle the bearer of the notes to the debts created thereby as transferee thereof, has been held not to amount to a transfer of the debts so as to give the donee any dominion over them or enable her to recover the money secured by the notes.(1)

Release of a debt.

According to the author of the *Sharâya* and his disciples, who belong to the literal school of interpretation, a release or discharge does not require, for effectuation, the acceptance of the donee; whilst the progressive school, represented by the Shaikh, Ibn-Zuhra, Shaikh Murtaza and others, hold with the Hanafis that the assent of the debtor or the obligor is necessary to the validity of the discharge. And this view seems conformable to the rules of equity. A discharge is a mere declaration on the part of the creditor of his intention not to enforce the obligation against the obligor. But the expression of an intention not to enforce a liability, which may have the effect of precluding the creditor from enforcing his claim, would not necessarily preclude the debtor from insisting upon the creditor to accept the payment of the debt. Obligation has been defined by an English writer to mean the relation that exists between two persons, of whom one has a private and peculiar right to control the other's actions, by calling upon him to do or forbear some particular thing.(2) The same definition may be applied to the term *'akd* of the Arabian jurists. It implies a relation which, whilst giving a certain right to one person over another, often creates a corresponding liability against him in favour of that other. Proceeding upon the basis of this conception, the Hanafi jurists have held that the "gift" of a debt, *i.e.*, the release of it, to the debtor is complete without his acceptance, though it is reversed by his rejection; but this is correct only with respect to the principal debtor, for the gift of a debt to the surety is not complete without his acceptance, though it is reversed by his rejec-

(1) *Agha Mahommed Jafer Bindamin* v. *Koolsoom Beebee* [1897], I. L., 25 Cal., p. 9 supra.

(2) Pollock, p. 3.

tion. If the creditor releases the principal debtor from his debt, or gives it to him and he accepts, both he and the surety are released, but if he do not accept, he is not released.(1) This principle is enunciated with great clearness in the *Jawâhir* as well as the *Ghunia*.(2)

Section II.

Limited Estates under the Shiah Law

Although under the Hanafi Law, when the words of the grant purport to create an absolute estate in the grantee it cannot be cut down by subsequent words derogating from the original grant, the jurists of that school recognise the validity of limited estates in a qualified form(3) under the name of *'aâriat* (*commodatum*) which in effect is the transfer to the donee (called in such cases *musta'ir*) of the right to hold the property for the enjoyment of the usufruct. The lawfulness of such grants was accepted by the Allahabad High Court *in the matter of Khalil Ahmed and another*.(4)

The Shiah Law recognises to the fullest extent the lawfulness of limited estates.

Limited estates under the Shiah Law.

A grant to *A* limited to his life is valid, the subject-matter of the gift reverting to the donor or his heirs upon *A's* decease. So also a grant to *A* for life, and after him to another for his life will take effect as giving a life-estate to *A*, and after him a life-estate to the other person, after which the property would revert to the donor or his heirs. Similarly, a grant may be made to *A* for life and then to *B* absolutely, or a grant may be made to *A* for life and then to *A's* children absolutely. There is some difference of opinion as to whether only the children living at the time of the grant will take the remainder absolutely, or any children born to *A after* the grant will take also. The approved opinion seems to be that *all* the children will take, whether living at the time of the grant or born afterwards. But where a grant is to *A* for his life and to his children for *their* lives, only the children living at the time of the grant will take with rights of survivorship.(5)

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(1) *Fatâwai Alamgiri*, IV, pp. 535, 536.

(2) See *post*, p. 187

(3) See *ante*, p. 54.

(4) [1908], I. L., 30 All., 309.

(5) *Jawâhir-ul-Kalâm*; none of these principles is affected by any dicta in *Tagore* v. *Tagore* [1868], 9 B. L. R., 377, or *Peake* v. *Robinson*.

A grant to *A* for his life and then to *B* for his life, and thereafter to *A's* children absolutely is equally valid.

According to the author of the *Sharâya* a grant to *A* and his (عقب) *'akab* ("one who comes after him") would give only a life-estate to *A*, as the term *'akab* does not indicate a person and conveys no definite meaning. According to the *Saráir* and other works, such a grant would give an absolute estate to *A*.

Prince Suleiman Kadr v. *Darab Ali Khan.*

But when a gift is made to *A* for his life and after his death to his *heirs*, or if it is made in these terms, "the usufruct should be given to *A* during his lifetime and after him to his heirs,"(1) the grant would convey merely a life-interest to *A* and the absolute estate to *A's* heirs. In the case of *Prince Suleiman Kadr* v. *Darab Ali Khan*(2) their Lordships of the Privy Council gave expression to a *dictum* which might, perhaps, be supposed to imply a non-recognition of limited estates, but the view suggested was founded entirely on Sunni authorities and no reference appears to have been made to the provisions of the Shiah Law on the subject.

A gift to *A* and his children generally, *awlâd* or *farzandân*, or to his children *naslan b'ad nasl batnan b'ad batn*, "generation after generation, line after line," will convey to *A* an estate in fee the words "children after children, generation after generation," being words of description and not of limitation.

Definition of *Hiba*.

When a grant is made with the word *hiba* it implies, generally speaking, the grant of an absolute estate, for *hiba* is defined to be an act, by which one person transfers to another, gratuitously, without the motive of *kurbat*, i.e., of pleasing God, accompanied by immediate transfer, constructive or actual, the entire and absolute property (*milk*) in a certain thing. Such a transfer in the Arabic language is also constituted by the words *an-nahila* (a present) and *al-'atîa*. In Hindustani, the word *'atîa* is equivocal, and so are the words *dêna* and *bakhshnâ*. When grants are made with these words, the intention of the grantor must be examined from the context of the deed of gift and surrounding circumstances, *viz.*, whether he intended an absolute gift or to convey only a limited estate.

Powers of the life-tenant.

The life-tenant or the holder of an estate for a term has the right of letting the property for any period not exceeding his own

(1) *Jawâhir-ul-Kalâm.*
(2) [1881], L. R., 8 I. A., 117, see p. 122.

interest, provided there are no limitations on his power or his mode of enjoyment. He is bound, however, to return the property on the expiration of the period of his interest in proper order, natural deterioration and the lawful enjoyment of the same excepted.

As under the Hanafî Law, the donor may reserve a life-interest in the usufruct of the property, so long as that reservation does not interfere with the vesting of the property in the donee. For example *A* may grant a tenanted house to *B*, conditioning that during his lifetime he should receive the rent thereof. The principle enunciated in *Nawab Amjad Ali Khan* v. *Mohamdi Begum*(1) is in accordance with this rule.

Rukba.

As already explained, *rukba* is a generic name for all limited estates under the Shiah Law. It includes both an *'umra* (a life-grant) and a *sukna* (right of habitation). When the usufruct of a property is given to another limited to the life of the donee it is generally called an *'umra*. When a house is given for residential purposes, it is called a *sukna*. Under the Hanafî Law both these will come under the head of an *'aâriat*, but whereas an *'aâriat* is resumable at the will of the donor or his heirs, an *'umra* or *sukna* is operative for the fixed term and cannot be resumed. "And the grant is not invalidated by the sale of the property" for the purchaser takes it subject to the grant.(2)

Servitudes in general.

A person is entitled under the Shiah Law to create other limited rights over his property. For example, a person may give to another a right of way over his land for a term, without giving rise to a perpetual easement, or may authorise him to take water from his cistern, &c. Such limited rights are also called *rukbas* in a restricted sense. The word *rukba* used in this connection implies a servitude.

Settlements in favour of individuals or any particular "purpose,"(3) either made without limitation of time or for a definite period are known as *hubs*.(4) They may be in favour of one individual or more, or in favour of a succession of individuals or purposes. When the *hubs* is for an indeterminate period, it comes to an end on the death of the settlor (*hâbis*). If it is for a determinate length of time, it comes to an end only on the expiration of the period

(1) [1867], 11 Moo. I. A., p. 517.

(2) *Sharâya-ul-Islâm*, chapter on *Sukna*.

(3) *E.g.*, *A* may settle his house on *B* or on *B* and after him on *C*, or on a mosque, or "assign his bondsman for the service of a family"; *Sharâya-ul-Islâm*, p. 241.

(4) *Hubs* means literally "tying up."

when it becomes part of the settlor's heritage.(1) A *hubs* may be created either directly or by means of trustees; but the legal incidents are identical in either case.

In the case of *Banoo Begum* v. *Mir Abed Ali*(2), the High Court of Bombay emphatically recognised the validity of limited estates under the Shiah Law.

The settlor or grantor of a limited estate has the power during its subsistence of dealing with the deferred interest "by way of sale, gift and otherwise" provided there is no interference with the particular estate.(3) As already remarked, the purchaser's or donee's right is subject to the previously-created estate.

Gifts to infants.

Where a gift is made to a minor, according to the Hanafi Law, the possession of any person in whose protection the infant is living is sufficient. Among the Shiahs there are two divergent views. According to the author of the *Sharâya* possession should be taken on behalf of the minor by a person legally authorised to do so, or by the Judge. According to the Shaikh (the author of the *Mabsût*) and the Usûli jurists, the possession of any person who is a guardian *de facto* is sufficient. But even, according to the *Sharâya* where possession has been obtained and held on behalf of a minor by a person other than the father or the grandfather (or their executors) who are the guardians *de jure*, the Court will not allow the gift to be invalidated.(4)

Gift to minors.

The reciprocal consent of the parties and the delivery of the object into the hands of the donee suffice to validate a gift.

There is no particular formula prescribed for the purpose of constituting a gift. If the act or declaration of the donor unequivocally explains his intention it is sufficient. Thus the following words, "I have given," "I have made a present," "I have yielded the full proprietorship of such an object to such a person," may be used for the constitution of a gift.

The validity of a gift is established if the donor declares that he has made the gift and has delivered the thing to the donee, even if the object in question has remained in the possession of the donor.(5)

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(1) *Sharâya-ul-Islâm*, p. 241.

(2) [1907] I. L., 32 Bom., 172.

(3) *Ibid.*

(4) The point has been decided in accordance with this rule by the Calcutta High Court.

(5) *Jawâhir-ul-Kalâm* chap. on *Hiba*.

If the thing given is in the hands of the donee at the time of the contract no further seisin is necessary. Where delivery of possession not necessary.

Nor is express transmutation necessary in the case of a gift by a father or grandfather to an infant child, for their possession is tantamount to the minor's possession, such "persons being qualified to constitute a gift and receive it in the name of the infant donee."

Where the donee is a minor, and cannot himself take possession of the subject of the gift, the donor may nominate trustees to whom the property should be delivered in trust for the minor.

As under the Sunni Law, in considering the question of delivery of possession the relationship of the parties must be kept in view. For example, if a husband makes a gift of a house or landed property to his wife and continues to reside in the house or to realise the rents and profits of the estate, the gift will not be invalidated on that ground, for those acts are explainable by the relationship of the donor and the donee.(1) Similarly, if the father were to make a gift of his business to his minor son and to continue to manage it for him or an uncle were to give some property to a nephew and were to continue to be supported by the donee, the gift would not be invalid on that account.

Again, as under the Sunni Law the delivery of seisin must depend on the nature of the subject of the gift. For example, a gift of things contained in a box would be complete by delivery to the donee of the key of the receptacle, of immovable property in the occupation of tenants either by the delivery of the title-deeds or by requisition to the tenants to attorn to the donee,(2) of zemindari rights by mutation of names in the Collectorate Register.(3)

As already stated, the Shiah Law does not recognise the objection founded on *mushâ'a, viz.*, that the subject of the gift should form part of a property capable of division. Where a gift is made to two different donees, they do not become conjoint possessors; each becomes proprietor of the part that is given to him, when both have accepted the gift. Where the acceptance is by one of the donees Gift of *mushâ'a* valid.

(1) See *Humera Bibi* v. *Najm-un-Nissa Bibi* [1905], I. L., 28 All., 147, and the cases cited there; see *ante*, p. 122.

(2) *Ibrahim* v. *Shaik Suleman* [1884], I. L., 18 Bom., 146.

(3) *Sajjad Ahmad Khan* v. *Kadri Begum* [1895], I. L., 18 All., 1.

only, the gift is valid with regard to him but inoperative as regards the one who has refused.

A father may validly give preference to one or more of his children over the others by making a gift, "but such gift constitutes an act from which it is recommended to abstain."

Power of revocation.

A gift made to the direct ascendants, in the first degree, of the donor and to one's descendants and accepted by them is irrevocable.

The irrevocability of a gift to blood-relations other than parents and children is likewise admitted. Married couples are in the same position as relations by consanguinity.

A gift made to a stranger is revocable, so long as the thing given is in existence in specie.

Where the object given has perished, the gift cannot be revoked. In like manner a gift cannot be revoked if anything has been received in exchange for it, though the exchange should be of little value.

A gift is also irrevocable, if the subject-matter of the gift has been sold for whatever price or otherwise alienated by the donee.

A sale by the donor of the subject-matter of the gift, after transfer of possession has taken place (expressly or constructively) is null, if the donee be a relative by consanguinity. Similarly, if the donee be a stranger (*i.e.*, not a relative by consanguinity) if he had given anything in exchange for the gift.

But where the gift is to a stranger without consideration even though possession may have been transferred, the gift is annulled by the sale. According to some jurists the gift remains valid with the donor's right to revoke it; but the former opinion, says the author of the *Sharâya*, seems more correct.

Sale by the donor of the thing given remains valid if the gift is annulled for illegality.

The two preceding principles are applicable to a sale by an expectant heir of property belonging to his ancestor, whom he believes to be alive, for the sale would be valid if it should appear that the ancestor was actually dead at the time.

A gift is constituted from the time of the seisin or transfer and not from the date of the contract, that is, all the legal incidents and the rights and obligations arising from the gift accrue from the date when the donee takes possession of the thing given.

This is contrary to the case of a bequest, the right to which accrues to the legatee at the moment of the testator's decease, though the transfer may take place afterwards. Power of revocation —contd.

In case of a contest between the donor and the donee, the donor purporting to have in fact constituted the gift but alleging that he has not delivered it, his declaration will be accepted, but if the donee affirm that the object was legally delivered to him, the donor will have to establish his statement by proof.

So also if a person were to say "I gave him and made him the proprietor of it," and then deny having delivered possession. For, it is possible that he may have made the second statement (*i.e.*, "made him the proprietor of it") by way of re-affirmance of the first, (*i.e.*, "I gave it to him,") and may not mean to imply actual transfer.

In case of a revocation no indemnity is due to the donor, if the object constituting the gift has suffered any injury.

Where the donor revokes a gift after the thing given has attained in *itself* any increase in integral value, the augmentation accrues to him.

When the increase or accretion, after the gift, can be separated from the original subject of the gift, it belongs to the donee, but any accretion before the seisin of the donee is the right of the donor in case of revocation.

A gift made without any reserve is always presumed to be made gratuitously.

Should the donee on his side give anything to the donor, the gift would be irrevocable.

A gift made on condition that the donee should make some present or offer some gratuity or service to the donor, is valid; the gift will be revocable only if the donee do not fulfil the condition imposed.

Where the present or gratuity which the donee must give, or the benefit which he must render, is not definite, he is free to fix it according to his own wish, and the acceptance by the donor of such present or gratuity from the donee makes the gift irrevocable.

The donee in the cases mentioned in the preceding paragraphs cannot be compelled to give the present which has been fixed upon; he has the right to refuse it, but in that event the donor preserves the power of revoking the gift.

If in the preceding case, the refusal of the donee has caused the revocation of the gift, he is not held responsible for the destruction or depreciation of the object given; for he has dealt with a thing the proprietorship of which has been legally transferred to him.

There is some difference of opinion regarding the power of revocation possessed by the donor in the case of a gift of a piece of cloth, which, subsequent to the gift, has been dyed by the donee. Those lawyers who hold that the use by the donee of the subject-matter of the gift debars the right of revocation, are of opinion that the dyeing of the cloth puts an end to that right; others, who do not hold that view, think dyeing not to be an impediment to revocation, but that the donee only becomes entitled to the value of the dye and to retain a lien over the cloth for such value.

Gift in death-illness.

A gift made during a serious illness is valid if the donor recovers; if he dies it is valid only with the consent of the heirs, and if they refuse, it is valid only to the extent of one-third of his estate.

Section III.

Gift of a Debt under the Shiah Law.

As regards the gift of a debt to the debtor himself, I have already pointed out the difference between the author of the *Mabsût*, unquestionably the greatest of the Shiah jurists, and the author of the *Sharâya*. The difference is not a subject of mere antiquarian interest, for in one instance at least it has given rise to considerable practical results.(1)

The author of the *Mabsût* says—"When some person has a *mâl* owing from another, and makes a *hiba* of the same to that other, it is an *ibrâ* (release) by the word *hiba*. And whether, for the validity of a release, the acceptance of the person released is requisite or not, there is a difference of opinion. One body [of jurists] holds that for the validity of an *ibrâ*, such acceptance is necessary; and so long as the person released does not accept it the release is not valid; and when not accepted, the right remains intact. And this view is correct [*lit.* strong], in my opinion, for

(1) See Vol. II, p. 444.

when one person has a right against another, to discharge it is to confer an obligation; but nobody can be compelled to accept an obligation, otherwise [the result will be that] though he does not accept, he will be forced to accept. [For that reason also] in the case of a gift of *'ain* (specific property) it is required that there should be acceptance; and without acceptance a *hiba* is not valid. Another body says that the *ibrâ* is valid, whether the person who is liable accepts it or rejects it."(1)

Gift of a debt —contd.

Similarly, the jurist Abû Zuhra states in the *Ghunia*, that "if a person were to make a gift to another of what is due to him, that is a release by the word *hiba*; it is necessary, however, that the person from whom the debt is owing should consent to such discharge, for a discharge is conferring an obligation on the debtor, and there is no compulsion in the acceptance of a mere obligation."(2)

The author of the *Sharâya*, on the other hand expresses a different opinion. He states that the gift of a debt to the debtor himself is valid and operates as a release, and "in release (*ibrâ*), acceptance (by the donee) is not a condition according to the correct view."(3) The "correct view" seems to be his own opinion. The author of the *Jawâhir*, after giving the dicta from the *Mabsût*, the *Ghunia*, the *Sarâir*, the *Intisâr*, and other works of high repute both among the Usûlis and the Akhbâris, says that the opinion of the Mohakkik(4) refers only to cases where the obligation is

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(1) اذا كان له في ذمته لرجل مال فوهبه له ذلك كان ذلك ابرآء بلفظ الهبة و هل من شرط صحة الابرآء قبول المبراء ام لا قال قوم من شرط صحته قبوله ولا يصح حتى يقبل و مالا يقبل فالحق ثابة بحاله و هو الذي يقوي في نفسي الان في ابرآئه اياه من الحق الذي له عليه منة عليه ولا يجبر على قبول المنة فاذا لم يعتبر قبوله اجبرناه على ذلك كما نقول في هبة العين له انها لا تصح الا اذ يبذل و قال قوم انه يصح شاء من عليه الحق او ابى *

(2) اذا وهب لم يستحقه في الذمة كان ذلك ابراء بلفظ الهبة و يعتبر قبول من عليه الحق لانه في ابرائه منه منة عليه ولا يجبر على قبول المنة *

(3) *Sharâya-ul-Islâm*, p. 242.

(4) The author of the *Sharâya-ul-Islam*.

Gift of a debt —contd.

one-sided; for example, where one person owes to another a sum of money, the creditor may release or discharge the debtor, and, in order to effectuate such a discharge, the acceptance of the donee (the debtor) is not a condition precedent. But when the creditor has also certain obligations to perform, his discharge of the debtor (without the debtor's consent) would not absolve him from the liability to which he is subject. For example, if *A* agrees to pay to *B* 500 dirhems, on the condition that *B* should supply him for five years with the fruit of his garden, unless the contract is put an end to by mutual consent, a release by *B* to *A* in respect of the 500 dirhems, would not absolve *B* from the liability of supplying the fruit for the period agreed upon. Again, suppose *A* contracts to serve *B* for five years on condition of receiving a monthly stipend of five dirhems, and *B* without the consent of *A* and before the expiration of the period, declares that he has no need for the service of *A*, in such a case he would not be absolved from the liability of paying the stipend fixed upon for the full period.

Viewed in the light in which the author of the *Jawâhir* puts it, the opinion of the author of the *Sharâya* would seem to be little different from that of his great predecessor, for the Shaikh and his disciples only say that a discharge cannot be given effect to against the will of the obligor; he may accept it or reject it; his acquiescence is tantamount to acceptance.

CHAPTER VI.

THE LAW OF GIFTS ACCORDING TO THE SHÂFEÏ DOCTRINES.[1]

A GRATUITOUS transfer of property is called a gift. When such a transfer is made with the object of receiving reward in another world, it is a *sadakah ;* when made with the object of testifying respect for the donee, it is a *hadia* or present. The condition, essential to the validity of a *hiba*, is that there should be an offer on the part of the donor and acceptance on the part of the donee in terms, although in the case of a present, it is not necessary that the offer or acceptance should be express ; it is sufficient if the object is brought by the donor, and the donee takes possession thereof. A gift may be constituted by the use of the following expressions :—" I wish you to inhabit this house of mine, and after your death it will go to your heirs ;" " I wish you to inhabit it " (this is according to the doctrine embraced by Shâfeï in his second period) ; or finally by saying " after your death it will revert to me." On the subject of the validity of a gift made in the following terms, Shâfeï held a different view in his second period from that which he entertained before ; " I grant you the usufruct of this house for life," or " I make a gift of it to you for life, that is to say, in case of your pre-decease, it will revert to me, and in case of my pre-decease, it shall be irrevocably yours." However, in our time both opinions of the Imâm are equally in force in " our school," and whilst some regard such gifts as valid, others hold them invalid. The former opinion is preferable. Shâfeï doctrines.

Anything which may form the subject of sale or barter may form the subject of gift ; but every object not subject to sale, such as a thing usurped or unknown, or an animal that has escaped is not capable of being made the subject of a gift. The gift of a debt involves the remission of the debt ; if it is made to the debtor it is What may form the subject of a gift.

(1) The following principles are taken chiefly from the *Minhâj-ut-Tâlibîn* but are by no means exhaustive.

valid; but if made to a third person, it is open to question. According to some, it is valid.

As for the proprietorship of the object given, it is only transferred when the donee takes actual possession of the subject of the gift, with the donor's consent. When one of the parties dies between the making of the gift and the taking of possession, his heirs are placed in his position.

It is laid down by the traditions that parents, provided they are not notoriously bad characters, have the power to divide their property equally among their children by donations *inter vivos* without distinction of sex, though others hold that they should not thus destroy the effect of the rule relating to succession.

Revocation. A father has the right of revoking a gift made by him to his children, provided the donee has not irrecoverably disposed of the object received. So also other ascendants with respect to gifts made to grandchildren and their descendants. But where the donee makes a disposition which leaves the right of proprietorship intact, like mortgage, conditional gift (at least so long as possession has not passed), conditional enfranchisement, or even, according to "our doctrine," a contract of lease, the right of revocation is not lost. In case the donee should have lost the proprietorship of the object beforehand and should recover it subsequently, the right of revocation is not revived, and if, in the meanwhile, there has been an accretion to the subject of the gift, the revocation can only take effect if the increment has become incorporated with the object, but not where the increment exists separately. A revocation may be made in the following terms: "I revoke my gift," or "I reclaim the object," or "I wish the object to become my property again," or "I wish to break my gift," but it cannot be made impliedly by a subsequent disposition of the thing given, such as by sale, *wakf*, gift to another person or enfranchisement.

If a gift is made with the express stipulation that there should be no consideration, the right of revocation is not accorded to any one but the ascendants, whereas a gift with no such stipulation is supposed to have been made without hope of consideration if the donee is in any way inferior in social position to the donor, and even if he is superior. "Our doctrine" goes still further; it accepts the same principle if the two persons are

quite equal. Where a consideration is obligatory, but has not been settled at the time of the contract, it must be of the value of the thing given ; and, under these circumstances, the donor has the right to revoke the gift if the donee neglects to pay the consideration.

The validity of a gift made on condition of a fixed consideration is permitted ; the gift must, however, be considered like a sale ; but, according to "our doctrine," a gift made on the especial condition of an unfixed consideration is null and void.

In the case of a present made to another, the thing in which it is delivered is considered as part of the present, and where it is customary need not be returned, *e.g.*, the basket that contains dates is not returned. Otherwise the package remains in the hands of the donor, and the donee can make no other use of it than in using it for that specific purpose.

CHAPTER VII.

THE HANAFI LAW RELATING TO *WAKF* OR TRUSTS.

SECTION I.

GENERAL OBSERVATIONS.

Origin of *wakf*.

THE law relating to Trusts or *wakf* is by far the most important branch of the Mahommedan Law. The doctrine has been recognised and enforced in the Mussulman system from the earliest times. Historically its origin is traced to the direct prescriptions of the Prophet.(1) "The validity of *wakfs*," says the *Ghâit ul-Bayân*, "is founded on the rule laid down by the Prophet himself under the following circumstances, and handed down in succession by Ibn 'Auf, Nâf'è and Ibn Omar as stated in the *Jâm'aa ut-Tirmizi*. Omar had acquired a piece of land in (the canton of) Khaibar, and proceeded to the Prophet and sought his counsel, to make the most pious use of it, (whereupon) the Prophet declared, 'tie up the property (*asl* or *corpus*) and devote the usufruct to human beings, and it is not to be sold or made the subject of gift or inheritance; devote its produce to your children, your kindred, and the poor in the way of God.' In accordance with this rule Omar dedicated the property in question, and the *wakf* continued in existence for several centuries until the land became waste." The author of the *Fath ul-Kadîr*, a work of great authority among the Sunnis, states that the law of *wakf* has its origin with the Prophet himself, who, besides having prescribed the above rule to Omar, is reported to have declared that all human actions end with the life of the individual, except such benefactions as are perpetual in their character; and that, in accordance with these principles, trusts or dedications were frequent in the lifetime of the Prophet and the early centuries of Islâm. The author gives examples of such

(1) "Imâm Shâfeï has stated that according to his knowledge the institution of *wakf* did not exist among the people of the *Jâhilyèt* (the Ignorance);" (*Jâhilyèt* is the designation applied to the pre-Islamic period); the *As'aâf*.

wakfs, some of which were in existence at the time when he was writing his work, *e.g.*, the *wakf* by the Prophet himself of a piece of land which he had acquired in the canton of Khaibar for the support of travellers ; the *wakf* of Omar of the land called *Sammâgh* in the same canton for his children, kindred, and the poor; of Zubair ibn Awwâm(1) for his daughter ; of Arkam in favour of his son; of Abû Bakr(2) in favour of his children ; of S'aad ibn Abî Wakkâs(3) of his lands in Medîna and Egypt for his children " which still exists ; " and of Osmân(4) of his lands called *Baruah*, " which still continues."(5)

The doctrine of *wakf* is thus interwoven with the entire religious life and social economy of the Mussulmans.

Trusts in the Mussulman system may, for the sake of convenience, be divided under three heads, *viz.*, public, *quasi*-public and private. This will probably indicate the division adopted by the Arabian jurists, who group *wakfs* or trusts under the following three heads, *viz.* :— The classification of *wakf*.

(*a*) Trusts in favour of the affluent and indigent alike.

(*b*) Trusts in favour of the affluent and then for the indigent.(6)

(*c*) Trusts in favour of the indigent alone.

Trusts for public works of utility which are dedicated to the public at large, though classed under the first head, have a distinctive name. They are called *wakfs* for *masâlih-ul-'aâmma*, and differ in one feature from other *wakfs*. For example, a bridge constructed by a private individual and dedicated as a public highway for the *people at large* without any restriction, comes under the direct control or supervision of the Sovereign (Sultan) and his representative, the Kâzi, whereas in the case of other trusts the Kâzi can interfere only at the instance of some of the beneficiaries. So is the case of a *Masjid-ul-Jâm'aa*, the public mosque, whether erected by the Sovereign or a private individual, which is peculiarly under the supervision of the Kâzi.

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(1) A nephew of the Prophet.

(2) The first Caliph.

(3) The conqueror of Persia under the Caliph Omar.

(4) The third Caliph.

(5) See *post*, Chapter on the *Moukoof alcibim*.

(6) *Radd ul-Muhtár*, Vol. III, p. 552 ; according to the *As'aâf* the Prophet created seven *wakfs* in Medina.

These *masâlih-ul-'câmma* I designate as public *wakfs*. But there is a large body of trusts which without being public trusts, partake something of that character. I have thought it expedient to include them under the head of *quasi*-public *wakfs*.

By *quasi*-public *wakfs*, therefore, I mean those trusts, the primary and initial object of which is, partly, to provide for a general pious purpose, and partly, for the benefit of particular individuals or class of individuals which may be the settlor's family.

By private *wakfs*, I mean those trusts, the primary object of which is to make a provision for private individuals, including the *wâkif's* family or relations.

Definition of *wakf*.

Wakafa literally means "I have bound up or detained" and is applied to the tying up of animals, such as a horse or camel. Technically or as the Arabian jurists put it, "in the language of the law," it signifies the dedication or consecration of property, either in express terms or by implication, for any charitable or religious object, or *to secure any benefit to human beings*.(1) To use the curt but expressive language of the Moslem lawyers a dedication to any good purpose [*wujûh-ul-birr-wa'l-ihsân* of the Shiahs, or *wujûh-ul-khair wa'l birr* of the Hanafis(2)] is a *wakf*. The terms *birr* and *khair* include all good and pious acts and objects.(3) To make a provision for one's self is regarded by Hanafi lawyers as an act of *khair*, for the Prophet declared a man giving subsistence to himself as giving charity,(4) and settlements upon one's family are approved of and regarded as lawful by all the schools.

Hanafi Law.

Mohammed Sadik v. *Mohammed Ali and others*.

In the case of *Mohammed Sadik* v. *Mahommed Ali and others*,(5) the Law Officers of the Sudder Dewanny Adawlut stated that *wakf* according to the opinion of Abû Yusuf and Mohammed (which on this point is adopted as law) implies *the relinquishment of the proprietary right in any article of property such as lands, tenements and the rest*;(6) *and consecrating it in such manner to the service of God that it may be of benefit to men, provided always that the thing appro-*

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(1) *Hed.* II (Ar.), p. 887; *Ghâit-ul-Bayan*; *Fath ul-Kadir in loco.*
(2) *Durr-ul-Mukhtâr*, p. 410.
(3) *Hed.* II (Ar.), p. 888, see *post.*
(4) *Ibid*, p. 891.
(5) Sel. Rep. I., p. 17.
(6) *Waghaira*; this does not mean such like things but other objects.

priated be at the time of appropriation the property of the appropriator." This definition I shall explain fully later on.

Abû Hanîfa's opinion.

According to Abû Hanîfa, the legal meaning of *wakf* is the detention of a specific thing in the ownership of the *wâkif* or appropriator, and the devoting of its profits in charity on the poor or other good objects(1) in the manner of an *'aâriat* or commodate loan,(2) but not being absolute in its nature, it is revocable by the *wâkif*, and he is at liberty to dispose of it according to his own will. Abû Hanîfa, further, thought that the right of the appropriator was extinguished only after the Judge had made his decree, and the mode in which such a decree could be obtained, as suggested by Abû Hanîfa, was for the dedicator to deliver the subject of the *wakf* to the *mutwâlli* or curator and then demand it back on the ground that the *wakf* was not binding [on him], whereupon the Judge would pronounce his decree holding the dedication to be obligatory, and it would then become so.

This primitive and unpractical notion was never accepted as law among his followers. In the *Fâth ul-Kadîr*, Abû Hanîfa's notion on this point has been combated and refuted by *hadîses* (traditions) from the Prophet himself.(3)

Abû Yusuf's rule recognised as law.

According to Abû Yusuf, *wakf* is the detention of a thing in the implied ownership of Almighty God, in such a manner that its profits may be applied for the benefit of human beings, *and the dedication when once made, is absolute, so that the thing dedicated can neither be sold, nor given nor inherited.* Mohammed, the fellow-disciple of Abû Yusuf, agrees with him on this point, but he thinks that the right of the *wâkif* does not cease in the property until he has appointed a *mutwâlli* or curator and delivered it into his hands.

According to Abû Yusuf, the dedication becomes absolute and the right of the person making it becomes extinguished by the mere fact of his declaration that he dedicates it, or has dedicated

(1) *Hed.* II (Ar.), p. 891 ; see also the *Khazânat-ul-Mufiïn.*

(2) *Ibid*, p. 887. *'Aâriat* is resumable at the will of the lender. Mr. Baillie's note on this subject is worth inserting here.

"This does not mean that the profits are merely to be lent ; but that the objects of the *wakf* are to have the same benefit from it as if the subject of it were lent to them in the manner of an *'aâriat*, when they would have the use of it, or, in other words, its profits or usufruct, for their own benefit so long as it remained in their possession," Baillie's Lig., 2nd Ed., p. 557.

(3) *Fatâwai Alamgiri*, Vol. II, p. 454 ; see *post.*

it.(1) This rule of law laid down by Abû Yusuf is in force among all the Hanafî jurists. The great Digest prepared under the command of Aurangzeb expressly declares that, on the question of the completion of the *wakf*, "decrees in this country are given according to the doctrine of Abû Yusuf." Mohammed's views were adopted only by some of the Bokhariot schoolmen and have no application in any other part of the Sunni world.(2)

SECTION II.

CONDITIONS RELATING TO THE WAKIF.

Conditions necessary for creating a valid *wâkif*.

"The same conditions which are essential for the validity of mere acts of bounty," says the *Fath ul-Kadîr*, "are requisite to the valid constitution of a *wakf*, that is, the *wâkif* must be free, must be adult, and must be possessed of understanding." "It is also a condition," adds the author, "that it should not be dependent for its operation upon a contingency which may or may not happen."..."For example, if a man were to say 'this land of mine will become dedicated if my son arrives at home on such a day,' the land will not become dedicated even should the son arrive on that day."(3)

As a general rule, it may be stated that all persons who are competent to make a valid gift are also competent to constitute a valid *wakf*. The consecrator must be (*a*) free, *i.e.*, not a slave; (*b*) must be sane; and (*c*) must be adult, in other words, must

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(1) In the case of *Doe dem. Abdoollah Barber* v. *Jaun Beebee* [1845], Fulton, p. 345, the learned Judges distinctly said that, according to the modern doctrine of Mahommedan jurists and lawyers, Abû Yusuf's opinion on this point is considered better Law.

(2) *Tas-hîl.* Mr. Baillie has entirely misconstrued the passage in the *Fatâwai Alamgiri* (Vol. II., p. 455), in saying that decisions are both ways. The passage in question affords no warrant for that construction. It runs thus:—"According to Abû Yusuf, the right of the *wâkif* becomes extinguished immediately on the declaration, and that also is the opinion of the three Imâms [Mâlik, Shâfeï and Ibn Hanbal] and of the bulk of the learned, and is followed by the Jurists of Balkh, and on that is the *Fatwa*; so in the *Fath ul-Kadir* and *Munieh*. And on that is the *Fatwa*, so says the *Sirâj-ul-Wahâj* also."

"Mohammed said that the right is not extinguished until the *wâkif* consigns the property to a trustee, and the *Sirâjia* says the *Fatwa* is thereon; and so also the *Khulâsa*." As I shall show later on, the law laid down by Abû Yusuf is in force universally among the Hanafî Sunnis.

(3) See *post*.

have attained that age when, according to his personal law, it would be presumed he has acquired sufficient discretion or understanding to comprehend the nature of his act.

Capacity of the *wâkif*.

All the schools are agreed respecting the capacity of the *wâkif*. "And of the *wâkif*," says the *Sharâya*, "it is required that he be of full age, sound understanding, and unrestrained in the use or disposition of his property." So the *Fatâwai Alamgiri*,— "among the conditions (of *wakf*) are understanding and puberty (on the part of the *wâkif*) as a *wakf* by a boy or an insane person is not valid." But the action of a mere imbecile is not absolutely invalid. "If a person who is imbecile," says the *Radd ul-Muhtâr*, "makes a *wakf* upon himself and after him upon some other purpose which does not fail, it is valid according to Abû Yusuf, but the latter will take effect only upon its being sanctioned by the Judge."

Where, therefore, a person, who, without being absolutely *non compos mentis*, is so weak in intellect, that he cannot understand the nature of his acts, makes a *wakf* in his own favour with remainder in favour of others, such *wakf* is valid so far as the settlement on himself is concerned, and with regard to the remainder it would be valid with the sanction of the Judge.

Any person who is sane and adult may constitute a *wakf*. But the same circumstances which may avoid a gift, *viz.*, undue influence (*ikrâh*), fraud, or want of comprehension may avoid a *wakf*. In the case of *Nawab Asghur Ally* v. *Delroos Banoo Begum*,(1) the appellant had, in the year 1852, executed a *wakfnâmah* dedicating all her properties for certain pious purposes. Upon a suit by the respondents to remove her from the management of the *wakf* on the ground of misfeasance, the High Court held as follows :— *Nawab Asghur Ali* v. *Delroos Banoo Begum.*

"The Judge holds that the defendant cannot now be allowed to say that she misunderstood the effect of the words she used or of the acts by which she consummated the *wakf*, and under ordinary circumstances no doubt a person would be rightly presumed to have known the consequence of his own deliberate act, but in this case the matter is somewhat different. The defendant is a *pardanashin* Mahommedan lady, unable to read and write and

(1) [1875], 15 B. L. R., 167.

Nawab Asghur Ali— Delroos Banoo Begum v. contd.

generally ignorant as are most of her class; she has been examined, and she swears positively that she did not understand the meaning of the deed which she executed. She admits her wish to keep her estate for the purpose of perpetuating certain ceremonies in memory of her mother, and out of the hands of her legal heirs, and that to this end she, by the advice of her confidential servant Ali Jameen, signed a deed which she was told would have that effect. She swears positively that the *tauliatnamah* was only read over to her in Persian, a language which she did not understand, and that she had no idea of divesting herself by it of her proprietary rights. No evidence has been given to rebut this statement; only one witness to the *tauliatnamah*, 'Abdool Azeez (summoned by the defendant), has been examined, and he does not prove that the deed was ever read to the Begum, in Hindustani, a language which she understood, or that its purport was explained to her. Her own acts have been, from the first, absolutely inconsistent with a knowledge that she had divested herself of her rights as proprietor by the *tauliatnamah*. From a time shortly after its execution we find her dealing with the property just as if it were still her own, selling, buying, borrowing, granting mukurrari leases and exercising all the usual rights of ownership, and making everything as public as possible by registering the documents affecting these conveyances. I find, moreover, that long after the *tauliatnamah* was executed (namely, in 1871), the Collector of the 24-Pergunnahs gave pottahs to Delroos Banoo Begum, and treated her as the proprietor of her estate, and this is a further argument in favour of the property never having been considered an endowment for public purposes under Regulation XIX of 1810. It is, moreover, hardly likely that had Delroos Banoo Begum known what was the real effect of making a *wakf*, she would have headed her receipts for rents paid by the ryots with her name as mutwalli and a description of the estate as a *wakf* mehal, and still have gone on disposing of the property at her pleasure, and as if she had made no *wakf* at all. From first to last, as it seems to me, her acts denote a person endeavouring to make such an arrangement of her property as would defeat the claims of her heirs and permit of the estate being retained for particular purposes, but always considering that she still retained the right to do what she pleased with the property so long as she lived."

But when a *wakf* has been created by a formally registered document by a person who is *sui juris*, and there is no reason to suppose that the settlement has been brought about by undue influence or fraud, it will not be set aside. Nor, when a *wakf* is created in express terms, can the *wâkif* turn round afterwards and say that he did not know the meaning of the word *wakf* or that he did not intend to create a *wakf*.(1) In *Fatima Bibi* v. *The Advocate-General*,(2) it appeared that the plaintiff, a Mahommedan lady of the Sunni sect, by an indenture dated the 16th of November 1866, conveyed all her properties in trust for the purposes set forth in the deed, primarily for herself and her children and other descendants and ultimately for the poor. In 1881 she desired to revoke the trust. Upon a case stated under section 527 of the Code of Civil Procedure, West, J., held as follows :—

A *wakf* by a *sui juris* person.

Fatima Bibi v. *The Advocate-General.*

"A *wakf* must be certain as to the property appropriated, unconditional and not subject to an option. It must too have a final object which cannot fail, and this object, it seems, must, according to the better opinions, be expressly set forth. In the deed now in question it is set forth, and the reserve to the plaintiff for her life of the annual profits does not invalidate it, as such a consequence arises only when there is a provision for the sale of the *corpus* of the property and an appropriation of the proceeds for the donatrix. In the case of *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ali*, a dedication of property in *wakf* was declared invalid on the ground that the donatrix, an illiterate woman, though a wealthy one, had not really known what she was doing in endowing the imambarah. The imambarah was within her own house, she had appointed herself joint mutwalli and her co-mutwalli had died. The property had never been treated as dedicated to a public religious establishment within the meaning of Act XX of 1863. Everything went to show that there had not been a true dedication, but the learned Judge, who pronounced the decision of the Court, said that if the instrument of *wakf* had been 'really and knowingly executed by the lady defendant, it would have bound Delroos Banoo Begum without the power of revocation.' In the present case the direct ownership of the property was completely parted with. There was, it is said, a want of discretion on the part of the plaintiff,

(1) See *post*.

(2) [1882], I. L., 6 Bom., 42.

and certainly a dedication made by a girl of fourteen is not to be upheld without enquiry, but here the transaction was never questioned by the plaintiff's husband during his life, and the plaintiff herself has for fifteen years confirmed her own early act by a continued acceptance of the profits of the estate from the trustees. She cannot now say with any reason that the dedication was invalid on account either of its ceremonial defects or of a want of an effectual accompanying volition."

Islâm not necessary to create a *wakf*.

Islâm is not a necessary condition for the constitution of a *wakf*. Any person of whatever creed may create a *wakf*, but the law requires that the object for which the dedication is made should be lawful according to the creed of the dedicator as well as the Islâmic doctrines. Divine approbation being the essential element in the constitution of a *wakf*, if the object for which a dedication is made is sinful, either according to the laws of Islâm or to the creed of the dedicator, it would not be valid. Consequently, a Moslem cannot make a dedication in favour of an idol, a non-Moslem place of worship, or any other object which is held as unlawful or sinful in his law, nor can a non-Moslem validly make a dedication for a Moslem place of worship. But in either case the dedication may be effectuated by the consent of the heirs after the decease of the *wâkif*. The *Fatâwai Alamgiri* lays down the rule in a rather bald fashion :—" If a *Zimmi* should give his mansion as a *Masjid* or place of worship for Mussulmans and construct it as they are accustomed to do, and permit them to pray in it, and he should then die, it would become the inheritance of his heirs."(1) Stated in this form the rule is unintelligible, but the principle is explained, as I have mentioned above, in the *Fath ul-Kadîr*. No person has a right to withdraw a portion of his property which would devolve upon his heirs, for purposes considered as sinful in his creed without the assent of the heirs whose rights are interfered with. Such assent may be given either at the time of the dedication or after the inheritance has opened. But where an object is not sinful according to the laws of the dedicator (if non-Moslem) and is lawful according to the laws of the Moslems, the *wakf* is valid by *consensus*. For example, if a Christian were to make a dedication for a building, where the Almighty God may be worshipped according to the rites of Islâm (without

(1) *Fatâwai Alamgiri*, Vol. II, p. 526.

interfering in any way with his own residence), such a dedication would be valid. Similarly, if a Moslem were to make a dedication for Unitarian worship, such a *wakf* would (I submit), be in conformity with the principle enunciated in the *Fath ul-Kadîr*.

According to the *Bahr-ur-Râik*, it is lawful for a Moslem to create a *wakf* in favour of the non-Moslem poor and destitute. Similarly he can endow a school for the education of non-Moslem children and *vice versâ*.

Wakfs created by an apostate from Islâm.

There is some difference of opinion about the validity of a *wakf* created by an apostate from Islâm. According to the jurist Ibn Shahna, all *wakfs* created by him in favour of the poor or for pious purposes of a *general* character remain operative. But *wakfs* created in favour of individuals, against the interests of heirs, are voided. According to others, all *wakfs* created previous to apostacy are avoided, and such property becomes on his death part of his inheritance to which the right of heirs attaches. Should he, however, return to Islâm before his death, the *wakfs* come into operation again.

But the *wakf* made by an apostate after his apostacy is valid.(1)

If a woman were to make a *wakf* and then apostatise, her *wakf* would not be voided.(2)

Section III.

The Subject-matter of the Dedication.

The subject-matter of the dedication must be the lawful property of the *wâkif* at the time the *wakf* is made, that is, he must be in a position to exercise dominion over it.(3) Consequently, if a *wakf* is made by a person of some property which he has unlawfully acquired, it would be invalid, although he may subsequently purchase it from the lawful owner.(4) So also, when a man makes a *wakf*, for certain good purposes, of land belonging to another, and then becomes the proprietor of it, the *wakf* is not lawful; but it would become validly dedicated if ratified by the

The subject-matter of *wakf* must be the property of the *wâkif*.

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(1) *Bahr-ur-Râik; Radd ul-Muhtâr*, Vol. III, p. 557.

(2) *Sharh-i-Tahtâwi*.

(3) *Fatâwai Alamgiri*, Vol. II, p. 457; I construe المعلوم as meaning property of which the person purporting to dedicate it is in lawful possession.

(4) *Sharh-i-Tahtâwi*; *Fatâwai Alamgiri*, Vol. II, p. 457.

proprietor. Accordingly, when a person purports to make a *wakf* of property which does not belong to him, and such *wakf* is subsequently ratified by the true owner, the dedication is valid.

When a person makes a bequest of some property to another, and the legatee, prior to the death of the testator and before the legacy has vested in him, makes a *wakf* thereof, it is invalid.

Similarly, if a person were to buy a property with an option on the part of the seller (to cancel the sale) and to make a *wakf* thereof, and the seller were then to confirm the sale, the *wakf* nevertheless would not be valid, according to the *Bahr-ur-Râik*, or, if the donee of a piece of land were to make a *wakf* of it before he has obtained possession, and were then to get possession, the *wakf* would not be valid according to the *Fath ul-Kadîr*.

In other words, a *wakf* of property before the full proprietary right has vested in the person appropriating is not valid. There are certain exceptions, however, to this rule.

Vakf of roperty in hich the *âkif* has ot full roprietary tle.

"If possession were taken of land given by an invalid gift, and it were then made a *wakf*, it would be lawful according to the *Bahr-ur-Râik*, the donee being responsible for its value. And if one were to purchase a house by an invalid sale, take possession, and then make a *wakf* of the same in favour of the poor, the *wakf* would be lawful and operative according to the *Fatâwai Kâzi Khân*, with the responsibility for its value to the seller; but if the *wakf* were made before taking possession it would not be valid according to the *Muhît*."

"When a man buys land by a valid sale, and makes a *wakf* of it before taking possession and paying the price, the matter is in suspense until he pays the price and takes possession when the *wakf* is lawful; but if he were to die without leaving any property, the land would be sold and the *wakf* would be voided says Fakih (the Jurist) Abu'l Lais. And if a right is established in the property after the creation of the *wakf*, or if it is claimed by a person under a right of pre-emption after the *wakf* by the buyer has been made, the *wakf* is void according to the *Nahr-ul-Fâik*."(1)

ıkf of *ɔperty ɔject* to a se or rtgage is id.

It is not necessary that the entire subject-matter of the *wakf* should be actually in the possession of the *wâkif* at the time of the *wakf*, for the consecrator may validly include in the *wakf* any

(1) *Fatâwai Alamgiri*, Vol. II, p. 457.

property which he may subsequently acquire.(1) Nor is it necessary that the property which is dedicated should be entirely free from the rights or claims of other parties. Accordingly, a property which is leased to tenants, or which is under mortgage, or held in pledge, can be validly dedicated.(2)

Freedom from rights of others not a condition.

It is not a condition, "says the *Fatâwai Alamgiri*," that the property dedicated should be free from the rights of others (*hakk-ul-ghair*) as in the case of pledge and bailment, so that if one were to give a lease of his land and were then to make a *wakf* of it before the expiration of the term, the *wakf* would be binding according to its conditions, and the contract of lease would not be voided, but on the expiration of the term the land would revert to the purposes to which it was dedicated. In like manner, if a man were to mortgage his land, and then dedicate it before redeeming it, the *wakf* would take effect (لزم الوقف), but the land would not be withdrawn in the same way from the mortgage and if it should remain for years in the hands of the mortgagee and then be redeemed, it would revert to the uses for which it was made *wakf*. And if the mortgagor should die before redemption, yet if he should leave sufficient inheritance to redeem the land, it is to be redeemed and the *wakf* would take effect. But if he should not leave enough for that purpose, the land may be sold and the *wakf* would become void. In the case of a lease, when either the lessor or lessee dies the lease becomes void, and the *wakf* immediately takes effect; so in the *Fath ul-Kadîr*."(3)

When the land is sold for the payment of the mortgage-debt, the *wakf* is not voided in its entirety; the *wakf* attaches to the balance of the sale-proceeds after the payment of the debt.

The passage in the *Durr-ul-Mukhtâr*(4) is as follows:—"And the *wakf* is void of a mortgagee who is insolvent (ﻣﻌﺴﺮ) and of a person whose debts surround his assets and who consecrates his pro-

(1) *Sautayra*, p. 388.

(2) *Durr-ul-Mukhtâr*, p. 416; *Rada ul-Muhtâr*, Vol. III, p. 605; *Fatâwai Alamgiri*, Vol. II, p. 458; *Fath ul-Kadîr*, Vol. II, p. 460; *Durr-ul-Mukhtâr*, p. 419; *Tashîl; Ghâit-ul-Bayân*. The *Radd ul-Muhtâr* says:—"The *wakf* of leased property, according to the *Bahr*, is valid, and on the expiration of the term or the death of either the lessor or lessee it would be applied to the purposes of the *wakf*."

(3) *Fatâwai Alamgiri*, Vol. II, p. 458; *Fath ul-Kadîr*, Vol. II, p. 638.

(4) *Durr-ul-Mukhtâr*, p. 417.

perty whilst suffering from a mortal illness, contrary to the case of one [a debtor] who dedicates in health if it is made before the issue of a fiat of inhibition. So if he has made a condition that his debts should be discharged out of the income of the *wakf* it is valid. And if he has made no such condition [even] then his debts would be paid out of the balance of the income which remains after discharge of his requirements without extravagance. Should the *wâkif* have made the *wakf* in favour of any person other than himself, the income will be specially for such person. So in the *Fatâwai-Ibn* (*u*) *Nujaim*....But in the *M'arâzât* (Ordinances of Mufti Abû S'aûd) it is stated that a question was submitted to him regarding the validity of a *wakf* made by a person who, in order to escape from his debts (هرب فی الدیون)(1) made a *wakf* on his children, and he (the Mufti) answered such *wakf* is not correct and will not be operative, and the Kâzis are prohibited from giving effect to such a *wakf*."(2)

The same principle is stated in almost identical terms in the *Bahr-ur-Râik* and, according to Tahtâwi, there is absolute consensus on the subject. The rule enunciated was given effect to in the case of *Shahzadee Hazara Begum* v. *Khaja Hossein Ali Khan*,(3) where it was held that the existence of a mortgage at the time at which the endowment was made does not render the endowment invalid under the Mahommedan Law.

(1) In the *Majmu'a Jadida*, this is given as هرب عن الدین ; the *Zeitschrift*, &c., p. 528.

(2) "This edict," says Tahtâwi, "was issued by our Lord the Sultan" (of Turkey) "along with the one prohibiting the hearing of claims after the lapse of fifteen years." Evidently the council of the Sultan used to issue edicts for the better administration of the law.

(3) [1869], 12 W. R., 498. In this case, Peacock, C. J., after quoting the passage from the *Fatâwai Alamgiri* given in the text, said as follows:—"As I understand this passage, it is intended to point out that if after the mortgage the mortgagor endows the land and dies previously to redemption leaving sufficient assets, the heirs are bound to apply these assets to the redemption of the mortgage, so that the endowment may take effect free from the mortgage by the application of the other assets of the endower." Referring to the passage dealing with the circumstance of the mortgagor not leaving sufficient assets the Chief Justice said as follows:—"The meaning of that, as I understand it, is that the land will be liable to be sold by the mortgagee and the endowment rendered void, that is, the mortgagee will have power to enforce the mortgage by the sale of the land, if necessary, and the endowment will be rendered void as against the purchaser under the mortgage. It does not, as I understand, mean that the endowment will be rendered void as against the heirs of the endower."

The voidance of the lease on the death of the lessor or the lessee is a natural consequence of the principle of the Hanafî Law, which holds that a lease or *ijâra* cannot last beyond the lifetime of the lessor or the lessee. In India, however, where leases are often of a permanent character the principle stated in the text does not apply. It follows that where a piece of land which is already leased in perpetuity is dedicated, the *wakf* would at once take effect, and the rent reserved under the lease would be applied to the purposes of the *wakf* without interfering with the *mouroosi* right of the lessee.

Wakf of property subject to a lease.

Lands leased for a fixed period (*al-arz-ul-muhtak-kira*) stand on a different footing. In such cases the *wakf* would remain, as it were, in abeyance during the existence of the lease, without interfering with the possessory right of the lessee. For example, if a man were to dedicate a piece of land, which he has already leased to another, for the purpose of building thereon a mosque, or for any other purpose which would interfere with the possession of the tenant or lessee, the carrying out of that purpose would be postponed until the lessee has given up possession. But where the purpose has not that effect, in other words, where, though the property is dedicated, the rents and profits arising therefrom are only to be devoted to the objects of the *wakf*, there is no such postponement, and the *wakf* takes effect at once.

Wakf of a person placed under inhibition.

The *wakf* of a person who has been placed under "inhibition" by the Judge is not valid. The proceeding of "inhibition" may be likened to a proceeding in bankruptcy. The Kâzi is authorised, at the instance of the creditors of a person, or any of his relatives or friends, upon proof of prodigality, want of mental capacity, or reckless borrowing, to place him under "inhibition,"—to declare him incapable of contracting further debts or engaging in any transaction, and to appoint a curator of his estate or business or trade. When such a *fiat* has been made against a person, he is said to be a *mahjûr*. A *wakf* by a *mahjûr* is invalid. So long as a person has not been declared a *mahjûr* by the Kâzi, he has absolute power, if *sui juris*, to deal with his property in any way he likes.

The effect of a *wakf*.

The effect of a consecration or *wakf* of a property by its owner is to extinguish absolutely and for ever all his rights therein. The act of consecration, which is irrevocable in its character, trans-

fers the property for ever into the legal ownership of the Almighty for the benefit of His creatures. Thenceforth the *wâkif* has no power to deal with it in any way or burden it or create any charge over it. In short, it is no more his to deal with. Should the *wâkif* constitute himself the *mutwalli*, any dealing of his, prejudicial to the interests of the *wakf*, is a misfeasance, and the Kâzi or Judge, on proof thereof, would be bound to remove him. He cannot even borrow for the benefit of the *wakf* without the sanction of the Judge.

Consequently, any liabilities contracted by the *wâkif after the wakf is created*, cannot affect the *wakf*, and subsequent creditors have no right to question the consecration.

But though no act of the *wâkif subsequent* to the *wakf* affects its validity, if any right was attached to the property *before* it was dedicated, the consecration would not defeat that right. If the property was already mortgaged, and the mortgagor has no other assets from which the debt can be satisfied, the property in question would be sold, and the proceeds would be applied to the payment of the debt.

The rule as regards the consecration or endowment of property held in mortgage or pledge has already been stated. But simple creditors for whose debts the property is not hypothecated or charged have no right to question the validity of a *wakf* created by a person "in health" and not in insolvent circumstances so as to give rise to the inference of fraud.

Wakf by a person who dies heavily involved in debt.

But when the *wakf* is made *in extremis*, or when the person is labouring under an illness which ends fatally, and the *wâkif* leaves no assets from which his debts can be satisfied, in other words, dies insolvent, the Kâzi has the power to direct the payment of the deceased's debts out of the *wakf* property.

With regard to the rights of those creditors, for whose debts no portion of the property dedicated is mortgaged, and the *wakf* is made by a person "in health," who is involved in debt the authorities to some extent differ.

According to the *Fatâwai Kâzi Khân*, the *Fath ul-Kadîr*, the *Zakhîra*, the *Anf'aa-ul-Wasâil*, the *Surrat-ul-Fatâwa* and other authorities [unsecured] "creditors have no right in the property of their debtors." And a person, who has only a money-claim against another and has not taken the precaution to get the

property of his debtor hypothecated for his debt, has no right to question a *wakf* made by the debtor.

The text in the *Fath ul-Kadîr* is as follows :—

"In the *Fatâwai Kâzi Khân*, it is laid down, that if a man labouring under a death-illness make a *wakf* and his debts surround [exceed] his assets, the property will be sold and the *wakf* will be set aside ; this is contrary to the case of a *wakf* made by a person in health, although he may be immersed in debt, so that it exceeds his assets ; the *wakf* in such a case is valid nevertheless, and the creditors cannot ask it to be cancelled if the *wakf* has been made before the *fiat* of the Kâzi, declaring him to be a *mahjûr* ; such a *wakf* is valid by *consensus*, for creditors(1) have no claim in the property of their debtor whilst in health."(2)

The text in the *Surrat-ul-Fatâwa* is as follows :—

"In the *Durrar wa'l Ghurrar*,(3) Chapter on *Wakf*, it is laid down that if a person labouring under a death-illness make a *wakf* of his house, and it be found that his debts exceed his assets. [lit. he is surrounded in debt], the house will be sold and the *wakf* will break ; . . . . . so it is stated in the Chapter on *Wakf* in the *Khazânat-ul-Muftiïn*."

Wakf of a person who is involved in debt.

"In the *Zakhîra*, it is laid down that when a man, who is largely indebted and has a piece of land worth 100,000 dirhems, makes a *wakf* thereof, and, with the object of throwing his creditors into difficulties, settles the produce of the *wakf* on himself, and witnesses prove that he is insolvent, the *wakf* will be valid, so will the testimony. The validity of the *wakf* is founded on the fact that the *wâkif* has a right over the property [in other words, if the property is not hypothecated, the creditors(4) have no right to question the disposition.] . . . . . .

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(1) Meaning unsecured creditors.

* في فتاوي قاضيخان مريض وقف يد عليه ديون محيط بماله - يباع وينقض الوقف الى قوله و هذا بخلاف ما لو وقف المديون الصحيح و عليه ديون تحيط بماله - وقفه صحيح - لا ينقضه ارباب الديون اذا كان قبل الحجر بالاتفاق لانه لم يتعلق حقهم بالعين في حال الصحة

Comp. The *Zeitschrift der Deutschen Morgenländischen Gesellschaft* (1891), p. 527, Art. by Prof. Kresmárik on *wakf*.

(3) An important and well-known authority.

(4) Unsecured.

. . . Any balance of the produce remaining over after providing for the subsistence of the *wâkif* can be taken by the creditors, for the produce is the property of their debtor(1) . . .

And in the Chapter on *Wakf* in the *Anf'aa-ul-Wasâil*, it is stated that if a *marîz* [person labouring under a death-illness] make a *wakf* of his house, and he be so heavily involved in debt that his liabilities *surround* his assets, the house will be sold, and the *wakf* will be set aside. But if the debtor makes a *wakf* in health, and he is so involved in debt that his liabilities *surround* his assets, the *wakf* is nevertheless obligatory, if made before an order of inhibition by the Kâzi. And this is by *consensus*, and the creditors will have no right to set it aside, for they have no claim in the property of their debtor in health [that is, in the case of a *wakf* made by a person in health]. So it is stated also in the *Fath ul-Kadîr ;* and the reference in the *Anf'aa-ul-Wasâil* to the *Zakhîra* supports it.''(2)

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(1) من وقف الدرر و الغرر مريض وقف داره و عليه دين محيط بماله فانه يباع الدار و ينتقض الوقف * (كذا في) وقف خزانة المفتين و في الذخيرة رجل عليه ديون و له ضيعة تساوى عشرة آلاف درهم فوقها و شرط غلاتها لنفسه قصداً منه المماطلة و شهد الشهود على افلاسه جاز الوقف و جاز الشهادة اما جواز الوقف لمصادقة ملكه و جواز الوقف مع هذا الشرط قول ابي يوسف و اما جواز شهادة فلانها صدق لان الرقبة خرجت عن ملكه فان فضل شيء من قوته من هذ الغلات فللغرماء ان ياخذوه منه لان الغلات بقيت على ملكه *

(2) من وقف انفع الوسائل مريض وقف داره و عليه ديون محيط بماله فانه تباع الدار و ينتقض الوقف و اما لو وقف المديون الصحيح عليه ديون تحيط بماله فان وقفه لازم لا ينقضه ارباب الديون اذا كان قبل الحجر بالاتفاق لانه لم يتعلق حقهم بالعين في حال صحته كما في فتح القدير و يؤيده ما في انفع الوسائل معزياً الى الذخيرة *

According to the *M'arûzât* of Mufti Abû S'aûd, however, if a person is so heavily involved in debt as to be absolutely insolvent, and *with the object of defrauding his creditors consecrates his property*, the Kâzi has the power of not recognising the *wakf*, and of compelling him to sell the property and pay his debts, so far as possible, with the proceeds of the same.

After commenting on the statement in the *Durr ul-Mukhtâr*, "*that the wakf* of an insolvent mortgagor is void," the author of the *Radd-ul-Muhtâr* proceeds thus:—"This is a mistake; such a *wakf* is not *bâtil*; for in the *As'aâf* and other works it is laid down that if a person, after mortgaging a property and delivering it(1) to the mortgagee, were to dedicate it, it would be valid, and if he is possessed of [other] means, the Kâzi would constrain him to discharge the debt; but if he have no means, then the Kâzi would declare the *wakf* cancelled, and the property would be sold for the payment of the debt. Similarly, if the mortgagor die and leave other assets from which the debt can be satisfied, the *wakf* will be maintained, otherwise the property consecrated may be sold, and the *wakf* cancelled. So it is stated in the *Fath ul-Kadîr* also." *Wakf* by a person involved in debt.

"And if a person make a *wakf* in *marz-ul-mout* and die so involved that his debts *surround* his assets, in that case the property will be sold and the *wakf* will be cancelled . . . . This is different from the case of a *wakf* made in health by a person against whom no inhibition has issued. The *wakf* of such a person is valid, though it may have been made with the object of throwing the creditors into delay, as he has dealt with his own property, so it is stated in the *Anf'aa-ul-Wasâil* from the *Zakhîra*. In the *Fath ul-Kadîr*, it is stated that such *wakf* is obligatory, when it is made before inhibition, and by *consensus* the creditors will have no right to set it aside, for creditors have no right in the property of their debtor during his lifetime unless hypothecated to them; and in the *Khairiyèh* the *Fatwa* is given on this basis, and it is stated there that Ibn (u) Nujaim decreed accordingly. But as I shall show from the *M'arûzât* there is a difference [of opinion]"

. . . . . .

"If the *wâkif* has made a *wakf* on himself and made a condition that his debts should be satisfied out of the income, the

(1) There is no hypothecation under the Mahommedan Law without seisin.

wakf is valid *with* the condition,(1) as Ibn (u) Nujaim has decreed, and the author [of the *Durr ul-Mukhtâr*] says, that if the *wakf* is made on another with the same condition, both the *wakf* and the condition are valid." . . . . "Even if the *wâkif* make no such condition but the *wakf* is in his favour, any balance (over and above his necessary expenses) will be applied towards the payment of his debts. But if the *wakf* is on another, the produce will be given to him. So it is stated in the *Fatâwa* of Ibn (u) Nujaim(2) . . . . . "In the *M'arûzât*(3) of Mufti Abû S'aûd it is stated that he was asked—'when a person makes a *wakf* on his children to escape his creditors and has no other property from which the debts can be satisfied, is such *wakf* valid,' he answered, 'no, it will not be valid or obligatory, and the Kâzi has the power of not recognising such a *wakf* by a person who is absolutely sunk in debt to the extent of his assets' . . . .

Dedication by an insolvent *wâkif* acting fraudulently.

"What I have stated from the *Zakhîra* and the *Fath ul-Kadîr* is in conflict with this view, unless you restrict it to the *wakf* of a debtor making a *wakf* in death-illness. And in the *Fatâwa-ul-Ismâilia* it is stated that the Kâzi has the power of not enforcing such a *wakf* and of constraining him to sell the property and pay his debts, and this is what Moulâna Abû S'aûd states, and his enunciation seems approved."(4) This applies to the case of an insolvent debtor acting fraudulently.

The rule enunciated in the *M'arûzât* of Mufti Abû S'aûd and the *Fatâwa-'l-Ismâilia* can be reconciled with the principle laid down in such high and recognised authorities as the *Fatâwai Kâzi Khân*, the *Fath ul-Kadîr*, the *Zakhîra*, &c., with the light of the statement contained in the *Tanwîr ul-Absâr*, which is to this effect, "the *wakf* of a person whose debts *surround* his assets should be maintained either by giving him time to pay off his debts or appointing a manager to realise the rents and profits and to pay the debts therewith."(5) If it be wholly impossible to

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(1) In the case of *Luchmiput Sing* v. *Shah Amir Alum* [1881], 9 Cal. L. R., 176, the *wakfnâmah* contained a provision to that effect, and it was held valid.

(2) Also called *Fatâwa-'z-Zainiyéh*; see Morley's Dig., Vol. I, Introd., p. cclxxxvii.

(3) Comp. the *Zeitschrift der Deutschen Morgenlandischen Gesallschaft* (1891), p. 528.

(4) *Radd ul-Muhtâr*, Vol. III, pp. 611-612.

(5) *Ibid*; *Durr-ul-Mukhtâr*, in loco.

discharge it by that process, the Judge in that case has the option of directing the sale of the property consecrated. It follows from this that the *wakf* of a person involved in debt is not *ipso facto* void; it is only voidable if he acts fraudulently to defeat his creditors.

The *wakf* of a person involved in debt is not void.

In this connection it must be observed that the poor, who are the ultimate beneficiaries of every *wakf* made in favour of individuals, cannot be parties to any fraud, and, therefore, if possible, should not be prejudiced.

27 Eliz., c. 4, did not apply to India beyond the limits of the Presidency Towns, and section 53 of the Transfer of Property Act, which embodies the rule contained in section 2 of the English Statute, does not affect the provisions of the Mahommedan Law.(1) And, consequently, when a person, who is not in insolvent circumstances, makes a *wakf* of any portion of his property, his subsequent creditors have no right to question that *wakf*, nor can a *subsequent* purchaser for consideration of the property in question, seek to set aside the *wakf*,—for, once dedicated, the property ceases to belong to the *wâkif*, and he can no more burden it or sell it than if he were an absolute stranger.

Principle.

It must be remembered also that a *wakf* is *not* a gratuitous transfer of property. It is a transfer to the legal ownership of the Almighty for substantial consideration, *viz.*, His reward, which is obtained the moment the *wakf* is created. As will be seen afterwards, a *wakf* takes effect like the emancipation of a slave. *There is no power of revocation nor can there be any reserve;* and neither the *wâkif* nor any person deriving title from him can say afterwards that he had no intention to make a binding and irrevocable *wakf*.(2)

A *wakf* is a transfer of property for consideration.

In order that the *entire wakf* may be valid, it is necessary, however, that the *wâkif* should not be suffering from a mortal illness at the time of the dedication. In other words, the *wakf* of a person suffering from a mortal illness, from which he dies, takes effect as a bequest and operates with reference to one-third of his property. But the *wakf* of a person made during an illness from which he eventually recovers is valid with respect to the whole.

Wakf by a person suffering from a mortal illness.

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(1) See s. 2, cl. d.
(2) *Ramz-ul-Hakâik.*

Principle.

"The *wakf* of a person suffering from a death-illness," says the *Radd ul-Muhtâr*, "takes effect like the *hiba*(1) of a person in that condition, *i.e.*, the *wakf* will operate as regards one-third of his estate. If the heirs, however, consent, it will take effect with reference to the whole. If some of the heirs consent it will take effect in proportion to their shares." So also in the *Fath ul-Kadir*, "'a *wakf* made in *marz-ul-mout*, takes effect,' says Tahâwi, 'like a *wasiat*'" (a testamentary disposition.)

Kâzi Khân following Imâm Abû Bakr Mohammed Ibn-ul-Fazl states that *wakfs* are of three kinds in relation to the state in which they are made:

(1) Those made in health (*i.e.*, to which operation is given in health).

(2) Those made whilst suffering from a mortal malady.

(3) Those made with the object of taking effect after death.

"Transmutation of proprietary right is necessary in the first, but *not* in the third, for that is testamentary in its nature; but the second is like the first, though it takes effect with reference to the third of the estate of the *wâkif*, like a gift made in death-illness."

Wakf made in death-illness.

If a person suffering from a death-illness were to make a *wakf* of his house, it would be lawful and valid if it does not exceed one-third of his estate, but if it exceeds one-third and the heirs consent, it would be valid in its entirety; but if the heirs do not consent, the *wakf* would be avoided as regards the excess over a third. If some of the heirs consent, and the others do not, the *wakf* in excess of the one-third would be valid in proportion to the shares of the assenting heirs. If one of the non-assenting heirs sells his share in the portion of the property respecting which the *wakf* is disallowed, and subsequently it is discovered that the *wâkif* has left other properties besides, so that the *wakf* can be valid in its entirety with reference to the property dedicated, owing to its forming less than one-third of the entire estate of the *wâkif*, the sale by the heir would not be set aside, but he would have to pay the price thereof for the purchase of other property to be added to the *wakf*.

Testamentary *wakf* revocable.

It has already been stated that a *wakf* is irrevocable. Once the dedication is made by word or in writing, the proprietary

(1) *Durr-ul-Mukhtâr*, p. 417.

right of the dedicator becomes extinguished for ever, and he cannot any more deal with the property in any shape.(1) The mere declaration of the owner that he dedicates the property or has already dedicated it is enough to divest his proprietary right therein. Thenceforth it is absolutely inalienable and unheritable.(2) *But a wakf made by a person to take effect after his death, or what is called a wakf by way of a·wasiat (wakf-bi'l-wasiat) is revocable at any time before his death.* " And like all testamentary dispositions," says the *Fath ul-Kadîr*, " a *wakf* declared to come into operation after the death of the *wâkif* may be revoked by him at any time before his death ; but if not revoked, it will be operative in respect of a third of the estate unless assented to by the heirs, when it will take effect in its entirety." Principle.

This principle is stated in the clearest terms in the *Ghâit-ul-Bayân*. According to the Disciples " a *wakf* may be made in health or in sickness." . . . " If the person making it is suffering from an illness of which he dies, it will take effect in respect of one-third of his estate like a testamentary *wakf*."

Section IV.

Sadakah—Its Meaning.

The word *sadakah* occurs so frequently in works dealing with Mahommedan Law, and has such an important bearing on the constitution of a *wakf* that an exact apprehension of its meaning is necessary to a proper understanding of the rules relating to dedications in the Islâmic system. *Sadakah* or pious donations.

Richardson in his Dictionary translates it as meaning an " alms-gift " and also as " property dedicated to pious uses." Hamilton, the translator of the Persian version of the *Hedâyah*, evidently thought that the word meant 'alms,' to the poor; and this error has influenced all subsequent conceptions.

As a matter of fact, the word *sadakah* has a much larger meaning in the Mussulman system. It means, properly speaking, a *pious act* :—" a smile in a neighbour's face is *sadakah* ; to help the weary is *sadakah*." Probably, the only expression by which it can be construed is the word *charity* in its broadest sense.

(1) *Ghâit-ul-Bayân ; Fath ul-Kadir*, Vol. II, p. 638.
(2) For other authorities, see *post*.

The legal meaning of *Sadakah*.

In the Mussulman Law, however, *it means an offering or gift made with the object of obtaining the approval of the Almighty, or a reward in the next world.* For example, a present to a friend is not a *sadakah* because there is no pious intention. But if a gift be made with the object of relieving his wants or to provide against his falling into indigence, it is a *sadakah*. A donation, therefore, with the object of obtaining the reward or approbation of the Almighty is a *sadakah*. If the purpose itself is pious, whether the gift is made primarily with the intention of obtaining the Almighty's reward or not, still it is *sadakah*, for the Almighty will bless the act whether the person doing it did it with that motive or not. For example, *the making of provision for one's self or for one's children against future want, is a pious act.* If one makes such a provision the Almighty will bestow His reward even if the person did not at the time think of such reward. As a matter of fact, among Mussulmans no dedication is created, or offerings made, without the intention (*niat*) being formulated in the mind, "I do this with the object of approaching the Almighty."

The meaning will be clear from the following examples:—

"To give to one's child or wife is a *sadakah* according to the Prophet's precept reported by S'aad ibn Abi Wakkâs."(1)

In the Mussulman system, there is an obligation, in some cases legal, in others semi-legal or moral, to provide for the maintenance of parents, descendants and kinsfolk in general. It is also an obligation that a person should so provide for himself that he may not fall into want and become a burden to society or his people. The principle underlying these conceptions, which are wholly foreign to all Western systems, are directly traceable to the rules enunciated by the Prophet.

Sadakah or pious donations—its meaning.

"It is reported by S'aad bin 'Aâïfir who received the tradition from al-Lais, who again received it from Abdur Rahmân bin Khâlid bin Musâfar, who again received it from Shahâb, who received it from Ibn ul-Mus'aib from Abû Huraira, that the Prophet of God (may the blessing, &c.), declared that the best of pious offerings is a provision for one's self, so that he may not fall into need, and the [giving of] *sadakah* should commence with those whose subsistence is obligatory on you."(2)

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(1) Bokhâri, p. 806.

(2) Bokhâri, p. 806. I have omitted the authorities both here and in Muslim, tracing the Ordinances to the Prophet. Concerning Bokhâri's authority, see Morley's Dig., Introd., p. ccliii.

"The Prophet of God has declared that a pious offering to one's family [to provide against their getting into want] is more pious than giving alms to beggars."(1) Pious offering to one's family.

"Said the Prophet of God, when a Moslem bestows on his family and kindred, with the object of earning the approval of the Almighty, it is *sadakah*, although he has not given to the poor, but to his family and children."

"The most excellent of *sadakah* is that which a man bestows upon his family." . . .

"The greatest *sadakah* in point of reward is that which you give to your family."

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

"Giving alms to the poor has the reward of one alms; but that giving to kindred has two rewards."(2)

"The piety of all acts depends upon a pious motive, *viz.*, a desire to obtain the Almighty's reward . . . A man who with a pious motive provides the means of subsistence for his family, is giving charity, and the Prophet of God has declared that it is a holy act."(3)

"And the Prophet has declared, that a man giving subsistence to his family is giving *sadakah*."

"And the Prophet of God declared that whatever subsistence you give to another will meet with God's approbation and reward from the Almighty; a provision for your wives will be rewarded."

"In giving charity, commence with those whose maintenance is obligatory on you." *Sadakah* or pious donations—contd.

"Support of one's self and his children and family is the first duty and necessity."

"The *Prophet of God declared, 'in giving charity begin with those who are bound to you and of whom you are in charge.'* "

"Zainab, the wife of Ibn Mas'aûd, came one day and asked the Prophet, who were the best entitled to receive her charity. The Prophet of God declared 'thy husband and thy children are most entitled to receive thy charity.' "

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(1) Nisâi, Chapter on *Sadakah on one's relations*, p. 413.
(2) *Miskhât-ul-Masâbih*, Vol. II, p. 491.
(3) Bokhâri.

"Zainab, the daughter of Umm-i-Salma, says the Prophet directed her to support her relations, for that was charity, and God would give her His reward therefor."

In the *Sahîh-i-Muslim*,(1) occur the following traditions recognised as authentic and binding throughout the Sunni world.

"The Prophet of God declared, that whatever a man spends, the most pious of expenditure is that with which he provides for the maintenance of his children and family and against their future want."

"The Prophet of God declared, 'that which you spend to provide for the maintenance of your family and against their future want, has greater reward than that which you spend to provide for the maintenance of others.'"

"*The Prophet of God declared to one of the Faithful, 'in charity commence with yourself, and your family and your kindred and if there is a balance give to those round about you.'*"

"Abû Talha asked the Prophet upon whom or for what purpose should he dedicate a valuable property he possessed. The Prophet of God answered, 'consecrate it for thy kindred,' and he did so."

"The Prophet of God declared, that a Mussulman providing means of subsistence for his family is doing a pious act, and it is *sakadah*."

"A Moslem came and informed the Prophet that he had a *dinâr*, and asked what should he do with it? The Prophet answered, 'provide for thy wants with it.' He said he had another; the Prophet answered, 'provide for the needs of thy family therewith.' He said he had another. He was told to give it to the poor."(2)

It will be seen from these authorities, which are regarded as binding on the whole Sunni world, that provision for one's family and descendants is an absolute act of charity.

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(1) A work of great authority, see Morley's Dig., Introd., p. ccliv.

(2) For further traditions, see *post*.

CHAPTER VIII.

The Constitution of a Wakf—Hanafi Rules.

Section I.

General Principles.

How a *wakf* may be constituted.

There is no essential formality or the use of any express phrase or term requisite for the constitution of a *wakf*. Where a dedication is intended the law will give effect to it, in whatever language it may be expressed or in whatever terms the wish may be formulated. *And a wakf may be made either verbally or in writing.*

Principles.

When the word *wakf*, or any of its synonyms in vogue, is used in making the consecration, the law fixes upon it all the legal incidents of a permanent and valid dedication. It is only when such words are not used that reference is made to the intention of the donor. But when the intention to make a *wakf* is apparent, or can be inferred from the general tenor of the deed, or from the conduct of the donor, or from the nature of the object in favour of which the grant is made,(1) or from surrounding circumstances at large, it will constitute a valid and binding *wakf*, though the word *wakf* might not have been used.(2)

Evidence of intention when necessary.

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(1) *Piran* v. *Abdul Karim* [1892], I. L., 19 Cal., p. 203. In this case the dedication was made in these terms :—

و سيواي موضع كنتوا كه مختص براے خرچ خانقاه منها كرده متعلق سجاده نشين گردانيديم *

"Excepting mouzah, &c., which having deducted I have made over to the *Sajjada-nashin* specifically for the expenses of the *Khankah*." It was held that these words constituted a valid *wakf*.

(2) The paraphrase by Mr. Neil Baillie of a chapter in the *Fatâwai Alamgiri*, headed thus: "Words by which an appropriation is completed and those by which it is not completed," has given rise to an impression among English lawyers that there are set phrases or formulæ by which alone a *wakf* can be constituted, and if these expressions are not used, the *wakf* is not valid. It will be seen from the text that this idea is erroneous.

Some of the expressions by which a *wakf* may be constituted.

In the *Fatâwai Kâzi Khân* the subject is dealt with thus :— "Some of the terms by which *wakf* may be constituted are the following :—

"If a man were to say 'this my land is *sadakah*,' and add nothing more, the land would be dedicated as a charitable dedication for the poor." (Here the word *wakf* is not used at all, but as *sadakah* means a pious offering, and "the poor are always with us," it is sufficient to constitute a valid dedication).

"Or, if he were to say simply 'this land of mine is for a permanent object' (*wajjah abdi*), it would constitute a *wakf*." (*Wajjah* implying a pious or charitable purpose, and *abdi* meaning permanency, the intention of the donor is sufficiently evidenced). "Where the purpose is designated, and it is declared or implied that it should take effect in perpetuity, it is sufficient to constitute a valid dedication."

"Or, if he were to say 'this land of mine is consecrated, and I have consecrated it,' its effect is the same as if he had expressly said he had made it a *wakf*."

Principle.

No object need be mentioned when the term *wakf* used.

The *Siraj-ul-Wahâj* states that, "when a person constitutes a *wakf generally*, without designating the object to which it should be applied, it is lawful—and this is correct," and then goes on to add that there are several words which are express in their meaning, and the use of which clearly constitutes a *wakf*, because they convey in themselves the intention to dedicate, for example, *wakafto*, *haramto*, *habasto*, *sabalto*, &c. "I have dedicated," "I have consecrated," "I have tied up," "I have given in the way (of God)." These terms are express in their signification, and when a dedication is made by such words it is complete, as the intention is apparent.

Examples of express terms.

But where any expression is used which does not ordinarily convey the meaning of permanent dedication, it must be seen what the intention of the donor is, and this is to be gathered from the nature of the object in favour of which the trust is created or from surrounding circumstances. For example, if a man says "I give this property to this mosque," the fact that the grant is made to a mosque shows that it is for a permanent pious purpose, or if he were to say, "I give this property to the poor," the same result would follow.

This rule is given in almost similar terms in the *Fath ul-Kadîr*(1):—"If a man were to say, 'I give this land to the poor,' it would constitute a valid *wakf* for the poor are always existing, and hence the intention of the donor is clear that he means the income of the property should be applied permanently to the benefit of the indigent."

Constitution of *wakf* by expressions other than *wakf* and its synonyms.

According to the *Wajîz ul-Muhît*, "if a man were to say 'this my land is *mowkoofa* (dedicated)' or '*muharrama*' (consecrated) or '*mahboosa*' (tied up), it would constitute a valid *wakf* according to Abû Yusuf, and *this is most correct*, for he (the *wâkif*) has mentioned *wakf* unrestrictedly, and an unrestricted *wakf* is for the poor by custom and practice, and what is customary is as if conditioned, &c."

لو قال ارضي هذه موقوفة او محبوسة او محرمة عند ابي يوسف رح تصير وقفاً و هو الاصح لانه ذكر الوقف مطلقا والوقف المطلق يكون على الفقراء عرفاً و عادةً و المعروف كالمشروط *

According to the *Fatâwai Alamgiri* "if a person were to say, 'I have made this my land consecrated,' or 'it is consecrated,' it would create, says the Jurist Abû J'aafar,(2) a valid *wakf*, according to Abû Yusuf, as if he had said *wakf*," (for the word "consecrated," *muharrama*, which may also mean "forbidden to others," carries with it the signification that the property is set apart for a charitable purpose).

In case of ambiguity the intention of the *wâkif* is to be enquired into.

The compilers of the *Fatâwai Alamgiri* add further, "and the Jurist Abû J'aafar says that 'detained and given as a *sadakah*' is equivalent to saying 'given as a *sadakah* and made *wakf*.'" And further—"if a person were to say 'this my land is a way, (*sabîl*) and he is in a place where such expressions are commonly known to imply *wakf*, the land would become *wakf*. If the expressions are not known to have that meaning, he shall be called upon to explain; and if he say that he meant *wakf*, they are to be applied according to his intention. If he say that he meant *sadakah*, or had no particular meaning, they are to be taken as a vow, and the land or its price should be given away as a pious gift."(3)

How intention is to be gathered.

(1) A work of great authority in India, frequently quoted in the *Fatâwai Alamgiri* and also by the Law Officers in the case reported in 1 Sel. Rep., p. 17, and referred to in Fulton's Reports, p. 345; see Morley's Dig., Introd., p. ccilxx.

(2) Often called Hindavi, the Indian.

(3) *Fatâwai Alamgiri*, Vol. II, p. 461.

In case of ambiguity, therefore, if the *wâkif* be alive, he would be the person to explain his meaning, but if he be dead, his intention is to be gathered from the surrounding circumstances, and the evidence of the manner in which the proceeds of the property have been applied.(1) If a man were to say simply, "Buy out of the produce of this my mansion every month ten dirhems worth of bread, and distribute it among the poor," according to the *Fatâwai Alamgiri* this is sufficient to constitute a dedication of the house for that purpose.

Use of the word *Sabîl* or *Râh-i-Khudâ* sufficient to create a *wakf*.

According to the *Hâwi*,(2) "if a man were to say 'this land and this house of mine is in the nature of a *sabîl* (path to God), and he is in a country where *sabîl* implies a *wakf*, it will become an absolute *wakf*.'" *Sabîl*, however, is now universally recognised to mean *wakf*. *Sabîl* or *sabîl-illâh* (way of God) is equivalent to the phrase, *Râh-i-Khudâ* (the path of God) in vogue in India.

A declaration to the effect, 'I have given the produce of this land to the poor' or any other charitable object, or 'I have given this house to the poor,' coupled with words prohibiting alienation and devolution by inheritance would, by consensus, constitute a *wakf*.(3)

No express words necessary to create a *wakf* so long as intention is clear.

The same principle is reiterated in the *Radd ul-Muhtâr*. "There are twenty-six expressions given by way of example in the *Bahr* [*ur-Râik*] by which *wakf* may be constituted; and many others are given in the *Fath ul-Kadîr*," . . . . . "but no express word is necessary to constitute a *wakf* so long as it is clear that the intention of the donor is to devote the usufruct of the property permanently to a good object; . . . . *e.g.*, if a man were to say, 'give so much out of the income of this my house to buy bread with for the poor,' that is sufficient to create a *wakf*." Similarly, if a man were to say 'I have set apart this property' or 'assigned it,' or 'deducted it from my other properties.'"

"In the thirteenth section of the *Jâm'aa-ul-Fusûlain*, it is stated that if a person were to say, 'this room or this house is for'

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(1) *Fatâwai Kâzi Khân*, Vol. IV, p. 74.

(2) A work of great authority, frequently quoted in the *Fatâwai Alamgiri*. by Kâzi Jamâl ud-din Ahmed bin Mohammed bin Nûh al-Kabisi of Ghazni, died in A. H. 600.

(3) *Fatâwai Alamgiri*, Vol. II, p. 461; *Bâhr-ur-Raik*; 2 Sel. Rep., p. 110.

lighting such a mosque,' and add nothing further, it would constitute a valid *wakf*, for such a purpose is sufficient.''(1)

The decision, therefore, of their Lordships in the Privy Council in the case of *Jewan Dass Sahoo* v. *Shah Kubeer-ood-deen*(2) only gave expression to what is laid down and enunciated in the Mahommedan Law. In that case the grant or firman(3) by which the endowments were created contained no mention of the word *wakf*. On the contrary, the grant purported to be made as '*Inam Altamgha maddadmaâsh*,' which primarily conveys individual proprietary rights. It was accordingly contended on behalf of the defendant that the properties which formed the subject of the grant did not constitute an inalienable *wakf*. Their Lordships in the Privy Council in dealing with the case endorsed the views of the *Sudder Dewany Adawlut*(4) in the following terms :— *Jewan Dass Sahoo* v. *Shah Kubeer-ood-deen.*

"After referring to this case and the opinions of the law officers, the *Sudder Dewany Adawlut* in the case of *Mussumut Qadira* v. *Shah Kubeer-ood-deen* (3 Mac. Sud. Dew. Ad., 407) appear to have determined that notwithstanding the use of the words "Inam" and "Altumgha" in the royal grants and the mention therein of the persons upon whose petition the grants were made, yet as these grants appeared clearly to have been made (as expressed in the petitions) for the purpose of maintaining a charitable institution, the persons named were not to be *Mussumut Qadira* v. *Shah Kubeer-ood-deen.*

(1) *Surrat-ul-Fatâwa*, p. 455 ; (MSS., Patna Oriental Library).

(2) [1840], 2 M. I. A., 390.

(3) The firman of Alamgir ran as follows :—

"As it has come to the knowledge of His Majesty that agreeably to a sunnud furnished by the Hakims, certain Mouzas situated in Sircar Behar have been appropriated for the purpose of meeting the charges of fakirs and students of the Madrassa, and the *Khankah* and Musjid of Moolla Dervish Hossain, son of Moolla Gholam Ali, and the aforesaid individual is hopeful for the royal munificence and favour, His Majesty's royal commands are that in the event of the aforesaid mouzas being in the occupation and enjoyment of that individual, the whole of these mouzas shall continue as they formerly were, at a jumma of 15,000 dams from (such a date) in the character of a *maddadmash* (aid for subsistence), according to the tenor of the grant, and in order that he may apply the produce of these lands to meet the charges of the students of his Madrassa and Musjid ; and the present and future Hakims, the Amils, &c., are enjoined to relinquish the mouzahs in question to that person's occupation, to deem them *maâfi* (exempt from taxes) and blotted with the pen in every respect, and not to require of him a fresh sunnud annually. Should that individual occupy anything in any other way, they are not to countenance him.''

(4) [1845], *Musst. Qadira* v. *Shah Kubeer-ood-deen*, 3 Sel. Rep., p. 407.

considered proprietors; that the establishment (Khânkâh)(1) was the real donee and the persons named were only *Mutwâllis* of the Khânkâh; that a *Mutwâlli* has no right to alienate, and that, consequently, the transfer by gift or otherwise by Shah Shama-oo-deen was illegal."

"This decision," their Lordships continued, "is in accordance with the doctrine laid down in the *Hedâyah*, Book XV, of *wakf* or appropriation, Hamilton's Translation, Vol. II, page 334, where it is said, '*wakf*,' in its primitive sense means 'detention.' In the language of the law (according to Hanifa), it signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue, and the advantage of it go to some charitable purpose in the manner of a loan. According to the two disciples '*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, therefore, hold appropriation to be absolute, though differing in this, that Abû Yusuf holds appropriation to be absolute from the moment of its execution, whereas Mohammed holds it to be absolute only on the delivery of it to a *Mutwalli* (or procurator), and consequently, that it cannot be disposed of by a gift or sale, and inheritance also does not obtain with respect to it. Thus the term '*wakf*' in its literal sense comprehends all that is mentioned both by Hanifa and by the two disciples."

"Again (page 344) it is said, upon an appropriation becoming valid or absolute, the sale or transfer of the thing appropriated is unlawful according to all lawyers; the transfer is unlawful because of a saying of the Prophet, 'Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable.'" And their Lordships accordingly held that, "according to the Mahommedan Law, it is not necessary in order to constitute a *wakf*, or endowment to religious and charit-

(1) A *Khânkâh* is a religious monastery, a place where religious services are held, *dervishes* lodged, indigent travellers fed. It will be seen that the original grantee was a *mulla* or priest, and the grant was apparently made to him not only for his support and the support of his descendants, but also with the object of maintaining in perpetuity an institution for the lodgment of religious devotees, travellers and mendicants.

able uses, that the term *wakf* should be used in the grant, if from the general nature of the grant such tenure can be inferred."

The word *wakf* used by itself *is sufficient in every case to constitute a valid permanent dedication, for that is its express meaning in law.* So that, as already stated, either where no object is designated, or where an object is mentioned, which is liable to failure, the *wakf* will, nevertheless, be valid and binding, and the property dedicated will, in the first case, be applied to the poor, and in the second case will be applied to them on failure of the object named, though they (the poor) may not have been mentioned in the deed nor the word *sadakah* used at all. The word *wakf* sufficient by itself. Principle.

The *Fatâwai Alamgiri* says—

"Though no mention be made of *sadakah* (اگر لم یذکر الصدقة) yet if *wakf* is mentioned as by a person saying 'This my land is *wakf*,' or, 'I have made this my land *wakf*,' the land would be a *wakf* for the poor according to Abû Yusuf...." "And Sadr ush-Shahîd and the jurists (*moshâikh*) of Balkh have declared that 'decrees are given on the opinion of Abû Yusuf; and *we*(1) *decree according to it, also from regard to custom.*'"(2)

"And if he should say, 'it is appropriated to Almighty God for ever.' it would be lawful, though the word *sadakah* be not mentioned, and would be a *wakf* for the poor. The word *wakf* alone or in combination with *habs*, establishes a *wakf* according to the approved opinion, which is that of Abû Yusuf."

So also in the *Fatâwai Kâzi Khân*;(3) "if a man were to say, 'this my land is made *wakf*' (*mowkoofa*), and give its boundaries, and say nothing more, this, according to Abû Yusuf, is a valid dedication for the poor."

"Or, if he were to say, 'this land of mine is *wakf*,' the effect is the same."

"Or, if he were to say, 'this land of mine is *wakf*, for a pious object.'"

"If he says, 'this land is *mowkoofa* for God in perpetuity,' it will create a valid *wakf*, though he may not have used the word '*sadakah*,' and it will be a *wakf* in favour of the poor; and should

(1) *i.e.*, the Jurists of India.

(2) This passage shows clearly that in India the rule laid down by Abû Yusuf on the point under discussion is the law applicable to the Hanafî Sunnis; see also Vol. II, p. 460.

(3) *Fatâwai Kâzi Khân*, see Vol. IV, p. 202.

Expressions by which a valid *wakf* is created.

he even not have used the words 'in perpetuity,' it will still be a valid *wakf* and the produce will be applied to the benefit of the poor.''

''Similarly, if the *wâkif* merely said, 'this is *mowkoofa* for the sake of God,' or '*mowkoofa* for obtaining *sawâb* (reward) of God.' ''

''So also if he say, 'this land of mine is *mowkoofa* for the sake of charity and piety (على وجه البر و الخير)' or for both, it will be a valid *wakf* for the poor.''

''If a man were to say, 'this land of mine is *wakf* for the purposes of *jehad* (religious fighting), or for supplying shrouds to the dead, or burying them, or digging graves, or for any act of charity or piety which may be perpetual,' it would form a valid *wakf* for that purpose.''

''If a *wâkif* were to declare a particular property to be a *wakf* for travellers, it is lawful, for travellers never cease; and its benefits will be applied to those who are poor among them and not to the rich.''

''Or, if he were to say, 'it is for the lame, decrepit or maimed,' it would be valid (for these people are never wanting in the world), and it will be applied to the poor among them.''

The term *wakf* used by itself sufficient.

The *Durr-ul-Mukhtâr* says ''if a man were to say 'this land or this house of mine is for the poor,' or is a *wakf* for so-and-so *in the way of God*, or 'for a good purpose' it is sufficient.'' ''And according to Abû Yusuf the word *mowkoofa* [past participle of *wakf*] is sufficient, and [Sadr-ush] Shahîd says 'we give *fatwas* universally according to this:' ''(1)

In India, in order to accentuate the fact of consecration, it has become usual to add the words ''in the way of God'' to the word ''*wakf*,'' *e.g.*, to make the dedication in the following terms: ''I make this *wakf* in the way of God for so-and-so.''

''If a *specific* thing,'' says the *Tas-hîl* ''be made *wakf* by the word *wakf*, it is valid, and upon the death of the *mowkoof alaih* its produce will go to the poor, and on this is the *fatwa*.''

According to the *Wajîz-ul-Muhît*, if a man were to say, 'this my land is *mowkoofa*,' and do not use the words '*sadakah* in perpetuity' or 'on the poor,' it constitutes a valid *wakf* according to Abû Yusuf, and *this is correct*.''(2)

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(1) P. 410: See also the comment on this passage in the *Radd ul-Muhtâr*.
(2) *Wajîz-ul-Muhît*, p. 351.

Expressions by which a valid *wakf* is constituted.

According to the *Ghâit-ul-Bayân* also, "if the *wâkif* does not use the word *sadakah*, but simply uses the word *wakf*; for example, if he were to say, 'this land of mine is *mowkoofa*,' or 'this land of mine is *wakf*,' or 'I have made this *mowkoofa*,' or 'I have made this *wakf*;' such *wakf* according to Abû Yusuf, will be for the poor alone. And the Mashâikhs of Balkh decide according to Abû Yusuf's enunciations."

لولم يذكر الصدقة و ذكر الوقف فان قال ارضي هذه موقوفة او قال ارضي هذه وقف او قال جعلت ارضي هذه موقوفة او قال ارضي هذا وقفا فان هذا يكون على الفقراء في قول ابي يوسف رح خاصة فكان مشايخ بلخ يفتون بقول ابي يوسف رح *

Similarly, the word *sadakah* conjoined to the word *wakf* or its derivatives (like *mowkoofa*, i.e., dedicated) will constitute a valid and binding *wakf*. For example, if a man were to say, 'this my land is a *sadakah mowkoofa*, detained and perpetual during my life and after my death,' or 'this my land is a *sadakah*, detained and perpetual during my life and after my death,' or if he should say 'a *sadakah* dedicated and perpetual,' it would be lawful. Or if he should say, 'a *sadakah* dedicated or a *sadakah* detained,'(1) without saying 'perpetual,' the land would become a *wakf*, "according to all who consider *wakf* lawful, because a perpetual *sadakah* is established which does not admit of cancellation. The words, 'This my land is a *sadakah* dedicated to what is good,' or 'to good purpose,' also amount to a *wakf*."

Or, if a man were to say, my land is *sadakah* (charity) for God,' or '*wakf* to Almighty God,' it would become *wakf*. So also if he were to say, 'my land is assigned in the *way* of Almighty God,' or 'to seek the reward of Almighty God;' or if he were to say, 'my land is *wakf* for a good purpose,' it would be as lawful as if he had said a *sadakah wakf*."

"If he say, 'this land of mine is *sadakah mowkoofa* or *mowkoofa sadakah*,' and say nothing more, it will be a valid *wakf* (according to Abû Yusuf, Mohammed and Hillâl), and the benefit will go to the poor in perpetuity."

(1) *Mahboosatan* from *habasa*, means literally detained; its exact signification, however, is "being rendered inalienable;" *mowkoofa* is the participle of *wakafa*.

Expressions by which a *wakf* may be constituted.

"If a man say, 'this land of mine is *sadakah mowkoofa* for such a person,' it will be valid and the result will be that the ultimate beneficiaries will be the poor, for they are the lawful ultimate recipients of every pious offering, but the produce will be given to the person mentioned during his lifetime."

"If a person were to say, 'this my land is *sadakah mowkoofa* for such a person in perpetuity,' or that 'it is for my *child* in perpetuity,' the same result would follow, the mention of the words 'in perpetuity' not making any difference."

"And if a man were to say, 'this my land is dedicated, consecrated and detained,' or, 'dedicated, detained, and consecrated, not to be sold, inherited or given by gift,' all these words would create a *wakf* according to the received doctrine and the opinion of Abû Yusuf."(1)

Having regard to all these dicta on a point about which there is absolute *consensus* on the part of the jurists, one finds it difficult to understand whence the idea was derived which finds expression in the case of *Mahomed Hamidulla Khan* v. *Budr-un-nissa Khatun*(2) that a *wakf* in favour of one's children cannot be constituted without the use of the word *sadakah*.

Hamidulla Khan v. *Budr-un-nissa Khatun.*

In that case, the consecration was made in the following terms:—

"I have made *wakf* of the remaining 4 annas in favour of my daughter Budr-un-nissa and her descendants, and also her descendant's descendants how low soever, and when they no longer exist, then in favour of the poor and needy; such *wakf* is good, legal, valid and effectual and of the nature of a lasting permanent act of charitable endowment, the same being as good in my lifetime as after my demise, and the same being precluded from *tumulluk* and *tamlik*.(3) After payment of the Government Revenue and Collector's charges, etc., and after deduction of the Mutwalli's *towliut* right from the proceeds of all the above endowment properties, the surplus, whatever it may be, shall be divided as follows:—*i.e.*, 4 annas share be given to Jamila Khatun *alias*

(1) *Fatâwai Alamgiri* after the *Mabsût*.

(2) [1880], 8 Cal. L. R., p. 164. In this case the learned Judges seem to have thought that the *Hedâya* had been written by Abû Hanîfa, *who had died nearly four centuries before the work was penned!*

(3) *i.e.*, from being owned (as private property) or being transferred.

Dhone Bibee and 4 annas to Budr-un-nissa, inasmuch as 4 annas has been endowed in favour of the said ladies, etc."

So far as the constitution of the dedication went, nothing could be more distinct and explicit than the declarations contained in the above *wakfnâmah*; the grantor expressly excluded all right of dominion over the property settled, which was intended to serve as a permanent provision for Budr-un-nissa and her descendants so long as there were any in existence; and on their failure, he provided that the benefit of the *wakf* should accrue to the poor and the indigent. It will be seen that the terms of the settlement were in strict conformity with the provisions of the Mahommedan Law.

Erroneous conclusion of the High Court.

Upon a suit by Mahomed Hamidulla Khan to set aside a sale of a portion of the dedicated property in execution of a decree, on the ground that it was *wakf*, and consequently inalienable, the High Court held (*a*) 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; (*b*) that when a settlement under the Mahommedan Law is made in favour of a particular person and his descendants in perpetuity, and on their failure in favour of the poor and needy, such settlement is only valid as a *wakf*, when the word *sadakah* is used in the deed of settlement.

As regards the first principle laid down by the High Court, I shall discuss it more fully in a later chapter.

As regards the second, *viz.*, the necessity for the use of the term *sadakah* where it is intended to create a trust for one's family or descendants, the question is set at rest by a reference to the express directions of the law.(1)

SECTION II.

CONDITIONS RELATING TO THE CONSTITUTION OF A WAKF.

Principle. Declaration extinguishes the right of the *wâkif* in the property.

As already stated, no formality is required to be gone through for the purpose of creating a valid *wakf*. It is enough if the donor declares that he constitutes a property *wakf* or has constituted it a *wakf*. That declaration fixes upon the property purported to be dedicated all the character of a legal and binding *wakf*, extinguishes the title of the donor, vesting it in the Almighty

(1) See *post*.

(whatever the object to which it is dedicated), and makes it irrevocably inalienable and non-heritable. In the *Sirâj-ul-Wâhaj*,(1) it is laid down as follows :—" Abû Yusuf has declared that a *wakf* is valid whether the property be *mushâ'a* (a share of a joint property) or whether it be consigned or not, whether perpetuity be mentioned or not, and the right of the donor becomes extinguished by his merely stating that he has made it *wakf* or makes it *wakf*, for *wakf* is on the same footing *as emancipation, and on this is the Fatwa.*"

Wakf is completed by the mere declaration of the dedicator.

فقال ابو يوسف يجوز مشاعا كان لو مقسوما سلمه الى المتولى و لم يسلمه اشترط او لم يشترط و يزول الملك بمجرد القول لان بمنزلة الاعتاق و عليه الفتوى *

And in the *Ghâit-ul-Bayân* the same principle is given in the following words :—" The right of property is extinguished according to Abû Yusuf by the mere declaration, that is, according to him, by merely saying 'I have made this *wakf*,' the right of property [in the donor] becomes extinguished."

قوله يزول بالقول عند ابي يوسف رح اى يزول الملك عن وقف بمجرد قوله وقفت عندہ *

So also the *Fath ul-Kadîr* :—" According to Abû Yusuf the *wakf* becomes complete by mere declaration, and if no object is mentioned, it becomes a *wakf* for the poor . . . . and when the *wakf* has become valid for the poor by implication, no further mention of perpetuity is needed, for that purpose never fails, and Sadr ush-Shahîd says that all the jurists decide according to Abû Yusuf, and *we also decide according to him.*"(2)

Principle.

Perpetuity is a necessary condition to the constitution of a valid *wakf*, but it is not necessary that it should be expressly mentioned. In other words, the intention must be, either by implication or by express declaration, to dedicate the property permanently, but it is not necessary that the dedication should be primarily or expressly for a continuing object. If a dedication is made with the term *wakf*, *habs*, &c., the intention to part with the property permanently is apparent upon the face of the declar-

(1) A work of great authority in India; quoted by the Law Officers in the case in Fulton's Rep., p. 345; see also 1 Sel. Rep., p. 17, &c.

(2) *Fath ul-Kadir*, Vol. II, p. 632.

ation and whatever be the purpose named, the law will apply it, on failure of the objects designated, to other unfailing objects. If a *wakf* is not made in such express terms, the nature of the object must be taken into consideration and the intention gathered from circumstances.

The *Radd ul-Muhtâr* is very explicit on this point. "Abû Yusuf holds the declaration of *wakf* to be like a declaration respecting the emancipation of a slave. *Accordingly, he does not consider delivery or separation necessary.* According to him the *wakf* becomes binding and operative on mere declaration القول بمجرد like a declaration for emancipation, for the extinguishment of the right of property is common to both . . . It is stated in the *Durrar* [*ul-Ahkâm*] that 'it is correct that perpetuity is a condition by consensus, but according to Abû Yusuf its mention is not necessary'" . . . "and if a man were to say 'I make this dedication for my children' and add nothing further, *it is valid.*"

"Some have said that the mention of perpetuity is required in such a case by most jurists excepting Abû Yusuf; [but] according to him the mention of the word *wakf* or *sadakah* implies perpetuity, and consequently it is stated in the 'Book' [*Mukhtasar-ul-Kudûri*] that such a *wakf* is valid, and after the failure of the children it will be for the poor though they are not named, and *this is correct.*"

قوله و جعله ابو يوسف كالاعتاق ... فلذلك لم يشترط القبض و الافراز الخ اي فيلزم عنده بمجرد القول كالاعتاق بجامع اسقاط الملك قال في الدرر و الصحيح آن التابيد شرطٌ اتّفاقاً لكن ذكرهُ ليس بشرط عند ابي يوسف .....لو قال وقفت على اولادي ولم يزد جاز الوقف...الى قوله و قيل ان التابيد شرطٌ بالاجماع الا ان عند ابي يوسف لا يشترط ذكرهُ لان لفظ الوقف و الصدقة مبنيٌ عنه و لهذا قال وفي الكتاب و صار بعدها للفقراء و ان لم يسمّهم و هذا هو الصحيح *

So also the *Ghâit-ul-Bayân.* "Abû Yusuf has said that *wakf* is valid whether it is *mushâ'a* or partitioned, delivered to the *mutwalli* or not, and whether he has mentioned perpetuity or not... and Abû Yusuf bases his view on the rule laid down by the Prophet, who only declared to Omar to tie up the property and apply

Abû Yusuf's rule on this point the recognised law.

its usufruct to human benefit, and did not make delivery a condition for the validity of the *wakf*."

قال ابو يوسف رح يجوز مشاعاً كان او مقسوماً سلمه الى المتولي
لم يسلمه شرط التابيد او لم يشترط - الى قوله و وجه قول ابي
يوسف رح ان النبي صلى الله عليه و سلم امر عمر رض بالوقف ولم
يامره بالتسليم فعلم ان التسليم ليس بشرط *

"Perpetuity," says the *Fatâwai Alamgiri*, "is also among the conditions of *wakf* according to all opinions, though according to Abû Yusuf the mention of it is not a condition, and *this is correct.*(1) A man dedicates his mansion for a day, a month or any specified time without further addition, the *wakf* is valid and perpetual. But if he should say, 'This my land is a *sadakah mowkoofa* for a month and when the month has expired the *wakf* would be void,' the *wakf* would be void immediately according to Hillâl, because perpetuity being a condition, limitation to a particular time is not lawful.(2) If one should say, 'This my land is a *sadakah mowkoofa* after my death for a year,' without further addition, the *wakf* would be lawful in perpetuity for the benefit of the poor, for the words have the meaning of a bequest.(3) And if one should say, 'This my land is a *sadakah* dedicated to such an one after my death for a year, and when the year has expired the *wakf* is void,' it would be a bequest after his death to the person referred to for a year, and then it would become a legacy to the poor and its produce would be distributed among them. But if he should say, 'My land is dedicated to such an one for a year after my death,' without further addition, the produce would be to him for a year and then it would revert to the heirs."(4)

The recognised rule regarding the complete effectuation of a *wakf*.

The *Tas-hîl* is to the same effect:—"it (*viz.*, the subject of the *wakf*) can neither be sold nor given by gift nor inherited; only its produce is to be spent; and it will come out of [or be excluded from] the property of the *wâkif*, according to Abû Yusuf, by the

(1) After the *Kâfi*; *Fatâwai Alamgiri*, Vol. II, p. 459.

(2) After the *Fatâwai Kâzi Khân*, Vol. IV, p. 83 (MSS. Copy belonging to the Asiatic Society.)

(3) After the *Muhît-i-Sarakhsi*.

(4) After the *Fatâwai Kâzi Khân*. The distinction between the two classes of cases arises from the use of the word *sadakah* in one and not in the other; *Fatâ-*

mere declaration, for *wakf* means the extinguishment of the right of property of the *wâkif*, and it is not *tamlîk* [transfer of property]; it is therefore lawful without delivery, like emancipation. And the Jurists of Irâk decide accordingly . . . . Abû Yusuf has held a *wakf* to be valid without mention of perpetuity, so that when a person has made a *wakf* on some object that is liable to failure, according to Abû Yusuf, it will be lawful, and after failure of that object, it will be for the poor, and will not become the property of his heirs, and *this is correct.*''

لا يباع ولا يوهب ولا يورث ولكن لينفق ثمرته الى قوله فيخرج عند ابو يوسف رح بمجرد القول لان الوقف اسقاط ملك الواقف لا تمليك فصح بدون التسليم كالاعتاق وبه يفتي مشائخ العراق الى قوله يجيز ابو يوسف رح بلا ذكر تابيد حتى لو وقف على جهة يتوقف انقطاعها يصح عنده و يكون بعدها للفقراء لا ملكاً للورثة في الصحيح *

General consensus on the point.

And the *Ramz-ul-Hakâik*, after stating the origin of *wakfs* adds, ''Besides the incidents of a *wakf* are that it cannot be sold nor can it be given by gift, nor can it be inherited, and [if no other object is specified], its produce will be spent on the poor, and relatives and travellers, and the *wâkif* may also eat thereof. . . . And according to Abû Yusuf, merely saying that 'I have made this property *wakf*' is sufficient to extinguish the proprietary right of the *wâkif*, for by that the property is assigned over to God like the emancipation of a slave; and in this view the other three Imâms agree, [*viz.*, Shâfeï, Mâlik and Ibn Hanbal]. . .'' ''' And,' says Abû Yusuf, 'that even if an object is mentioned that is likely to fail, still the *wakf* will be valid, and after the extinction of the object named, the produce will be applied to the poor even if the poor are not mentioned.' ''

Wakf is like emancipation.

''Abû Yusuf has laid down that a *wakf* comes into operation, immediately on the declaration of the person making the dedication, that he has constituted a particular property *wakf* or constitutes it *wakf*, just like emancipation.''

The recognised rule.

Thus, according to the principle laid down by Abû Yusuf, the declaration of *wakf* stands on the same footing as a declaration of emancipation, *and takes effect absolutely the moment the declaration is made.*

Elucidation of the principle.

The meaning of this rule has, it is submitted, escaped the attention of the Law Courts in India. The principle, however, is really this: when a person emancipates a bondsman, he cannot make any revocation, nor can he afterwards say that he had no intention to emancipate at all or to emancipate absolutely. The moment he pronounces the words or declares "I emancipate this slave," the law fixes the status of freedom upon the bondsman. Once the words are pronounced, neither the emancipator nor his heirs, creditors, or assignees can question the absoluteness of the emancipation. No question of intention arises; for the law presumes an absolute and unqualified intention from the declaration.

Absolute and irrevocable.

Similarly, once a particular property is dedicated, the right of the *wâkif* is extinguished for ever. He cannot turn round and say afterwards that he had no intention of creating a *valid wakf*; nor can his heirs, or creditors, or other persons deriving title from him say that it was a 'pretended' *wakf*; that at the time of making the dedication he had no intention of making a 'real' *wakf*.

Perpetuity not necessary to be mentioned.

If the *wakf* is in favour of an object recognised as lawful by the Mahommedan Law and religion, the *wakf* is irrevocable, absolute, and beyond question.

This is emphatically the Mussulman Law according to all the sects and schools.

"The correct principle is that *mention* of perpetuity is not a necessary condition . . ." According to Abû Yusuf "if a dedication is made in favour of specific individuals, it is lawful, and upon their decease, the income would be applied for the benefit of the poor."

In India this rule is binding as laid down in the *Fatâwai Alamgiri*, for the Indian Jurists have followed the Jurists of Balkh who are in accord (according to the *Wajîz-ul-Muhît*) with those "of Khorâsân and Irâk," in other words, with the other Hanafî jurists all over the world, excepting the Bokhariots. According to the *Wajîz-ul-Muhît* also, "the mention of perpetuity" or of "a permanent object" is not necessary, for "if a man were to say 'this my land is *wakf* or *sadâkah wakf* for some specific individual or for some specific object or for certain of his poor relatives or for certain orphans,' though he may not mention perpetuity, still, according to Abû Yusuf, it will constitute a legal *wakf*."

"Or, if the *wâkif* were to say, 'this my land is *mowkoofa* for so-and-so, or for my child,' the *wakf* is valid, according to Abû Yusuf, although the word *abad* (perpetuity) is not mentioned, and so long as the specific individual is alive, the income of the property will be applied for his benefit, and after his death it will be spent on the poor."

و ان قال ارضي هذه موقوفة على فلان او على ولدي جاز الوقف و ان لم يذكر عند ابي يوسف و الغلّة لفلانٍ ما دام حيًّا فاذا مات يصرف الغلة الى الفقراء *

But, if instead of simply, "*mowkoofa*" he were to say *sadakah mowkoofa*, it would be valid according to Abû Yusuf as well as Mohammed, though perpetuity (*i.e.*, a perpetual object) had not been mentioned.

So also in the *Jouharat-un-Nayyirèh*, "Abû Yusuf has declared that even where an object has been named, which is liable to fail, the *wakf* is valid, and after the failure of that object, it will be for the poor though they may not have been named, . . . *and this is correct.*"

و قال ابو يوسف رح اذا سمّى جهة تنقطع جاز و صار بعده للفقراء و ان لم يسمهم و هذا هو الصحيح *

According to Abû Yusuf, like the term *wakf*, the term *sadakah* implies perpetuity and the two are convertible, and he therefore holds that though the poor may not be mentioned, the profits will go to them on failure of other objects. The mention of *sadakah* is to mention perpetuity.

The recognised rule.

In short, any term which implies perpetuity is sufficient to create a *wakf*. For example, the mention of the poor, or *sadakah-mowkoofa* for God, *mowkoofa* for benevolence (*ihsân*), or charity (*khair*), or for *jehâd* (holy warfare), shrouds, cemeteries, etc., is sufficient. When a *wakf* is created for a specific individual or class of individuals by any term which, like *wakf* or *sadakah*, implies a dedication of the *corpus*, or shows that the property has been permanently parted with, it is valid and binding according to Abû Yusuf, and upon their extinction the produce will be applied to the poor, for the ultimate recipients of all *wakfs* are the poor, and they never fail—"and Sadar-ush-Shahîd has stated [that the *Fatwa* is thereon] and the Jurists of Balkh give *Fatwas*

according to this opinion, and *we* [*also*] *decide according to that view.*"(1)

Fatâwât Kâzi Khân.

According to Kâzi Khân, explicit declaration that a *wakf* is created is sufficient to constitute a *wakf*. When a *sadakah-mowkoofa* is made for a limited period without any mention that on the expiration of that period, the subject-matter of the *wakf* should revert to the appropriator, it takes effect as a *wakf* in perpetuity, for, according to custom, the term *wakf* implies and includes the poor, and that amounts to an actual dedication. But where a condition is made that it should revert to the donor, the condition is *bâtil* or void according to Abû Yusuf.(2) The *Raddul-Muhtâr* says—

Radd ul-Muhtâr— The recognised rule.

"The ultimate purpose of a *wakf* must, according to all, be for an object which never fails. According to Abû Yusuf such an object need not be mentioned, for when a *wâkif* makes a dedication for a *specific* object and does not mention to what purpose of a permanent character it should be applied, on failure of the initial trust, the property will go to the poor, as they are the ultimate recipients of all *wakfs* when no other purpose is specified, and the universality of jurists have adopted this view and the *Fatwa* is thereon . . . . and in the *Durrar* it is stated *this is correct* . . ."

And again "if a *wakf* is made for a specific object (*e.g.*, one's descendants) and nothing further is mentioned, it is valid according to Abû Yusuf, and after the extinction of that object it will go to the poor—and this opinion is followed by the Sâhib-ul-Hedâya, as also in the *Muntaka*, the *Nikâya*, etc. .... and the Sadr-ush-Sharâya has stated that the *Fatwa* is thereon."(3)

Summation of the authorities.

To sum up the result of the authorities :—according to all the jurists "perpetuity is a necessary condition," but according to the acknowledged and accepted view, "on which the *Fatwa* is," *viz.*, the rule laid down by Abû Yusuf, it is not necessary to mention it, at the time of dedication ; in other words, though all the jurists insist that the property should be dedicated permanently and the right of the donor therein parted with for ever, accord-

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(1) *Fatâwai Alamgiri*, Vol. II, p. 460.

(2) Hillâl holds that it will hold good for the period specified. This is in accordance with the Shiah doctrine.

(3) *Radd ul-Muhtâr*, Vol. III, p. 565.

ing to Abû Yusuf it is not necessary that the word *tâbîd* or *abad* (perpetuity) should be mentioned, or that the object in favour of which the dedication is primarily made should be of a continuing and permanent character—for

قال ابو يوسف رح اذا سمى جهة تنقطع جاز و صار بعدها للفقراء ان لم يسمهم *

"Abû Yusuf has said that when he [the *wâkif*] has named a purpose liable to failure it is valid; and after its failure, it will be for the poor, though they are not named."

And

يجيزه ابو يوسف رح بلا ذكر تابيد حتى لو وقف على جهة لموقف انقطاعها يصح عنده و يكون بعدها للفقراء لا ملكا للورثة فى الصحيح *

"Abû Yusuf holds a *wakf* to be valid without mention of perpetuity, so that when a *wakf* is made in favour of an object liable to failure it is lawful according to him, and after the failure of the object it will go to the poor and not become the property of his heirs, and *this is correct.*"(1) For, there are many objects that are liable to failure which are as pious in their nature as objects that are continuing. This is the real meaning of the following passage in the *Ghâit-ul-Bayân* :—

قوله و هو موفر عليه اى التقريب الى الله تعالى موفر على جعل الوقف بجهة ينقطع كما هو موفر على جعله بجهة لا ينقطع يعنى يصل التقريب بهذا الوجه الى قوله كما يصل بذلك الوجه *

But when a *wakf* is made in favour of "a specific object liable to failure," and any term is used in the dedication signifying that it is permanent in its character, *e.g.*, *sadakah* or *fi-sabîl-illâh* ("in the way of God"), the *wakf* is valid not only according to Abû Yusuf, but also according to Mohammed, who considers the mention of perpetuity, or the mention of some object of a perpetual character necessary. The *Radd ul-Muhtâr* quoting the *Fatâwai Kâzi Khân* (cited as *Khânieh*) says :—"and if a man were to say that a property was dedicated as a pious offering (*mowkoofa-sadakah*), and add nothing further, it is lawful according to Abû

Dedication in favour of an object liable to failure.

(1) *Ghâit-ul-Bayân.*

Yusuf as well as Mohammed and Hillâl . . . . and when an object has been specified, it is lawful according to Abû Yusuf, and after its extinction it will go to the poor, and the *Hedâya* has held this *to be correct*, and the texts are thereon, as in *Kudûri*, *Multeka* and *Nikâya*, and others.

و لو قال موقوفة صدقة او صدقة موقوفة و لم يزد جاز عند ابي يوسف و محمد و هلال ..... و الصحيح الجواز لان محل الصدقة في الاصل الفقراء فلا يحتاج الى ذكرهم و لان انقطاع لهم و لا يحتاج الى ذكر الابد ايضا الخ فهذا صريح في ان التصريح بالصدقة تصريح بالتابيد فيجوز عندهما بلا خلاف ..... فلو عين جاز عند ابي يوسف ثم بعد انقطاعه يعود الى الفقراء كما صححه في الهداية و عليه المتون كالقدوري و الملتقي و النقاية و غيرها *

The *Sirâj-ul-Wahâj* states that, "Abû Yusuf says if a person make a dedication in favour of an object liable to failure, it is valid, and after its extinction, the *wakf* will be for the poor, though they may not be named, *e.g.*, if one were to say 'I have constituted this, *sadakatan mowkoofatan l'illah-ta'âla abadan* (*wakf as a pious offering for God in perpetuity*) on the child of so-and-so and his child's child,' and do not mention the poor or indigent, for when he has consecrated it to God, it is in perpetuity, as what is dedicated to God is spent on the poor; thus his saying as above is as if he had mentioned them."

قال ابو يوسف اذا سمى جهة تنقطع جاز و صار بعدها للفقراء و ان لم يسمهم و ذلك مثل ان يقول جعلتها صدقة موقوفة لله تعالى ابداً على ولد فلان و ولد ولده ولا يذكر الفقراء ولا المساكين او ذلك لانه اذا جعلها لله فقد ابدها لان ما يكون لله فهو ينصرف الى المساكين فصار كما لو ذكرهم *

Similarly, in the *Tas-hîl*—"if a man were to say 'I make this property *mowkoofa-sadakah* (a charitable *wakf*) for (*'ala, on*) so-and-so, its produce will be for such person for his life and after his death it will be spent for the poor."

موقوفة صدقة على فلان و الغلة له ما دام حياً فاذا مات يصرف الى الفقراء *

Upon the authorities it is perfectly clear that, under the Hanafî Law "perpetuity," express or implied, is a necessary condition to the constitution of a *wakf*, but its mention is not necessary at the time of dedication. Nor is it necessary that the dedication should be primarily for a *permanent* or *continuing* object. The term *wakf* and its equivalents imply perpetuity. And, accordingly, it has been laid down in the clearest terms that even when the *wakf* is, in the first instance, in favour of an object which is likely to fail, the *wakf* is not void on that ground, *but the reversion would be applied for the benefit of the poor.* If a *wakf* is created for a *limited* period, the limitation as to time is void, and the *wakf* takes effect as a perpetual dedication. Principle

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Section III.

Conditions relating to the constitution of a wakf—(contd.)

In order that a *wakf* should become operative or binding, it is *not* necessary under the Hanafî Law that the property should be actually delivered by the *wâkif* to a trustee. Delivery of seisin is not necessary in *wakf* as it is in *hiba*. The mere declaration of the *wâkif* is sufficient to constitute the property *wakf*, and the *wâkif* from that time forth is a mere trustee. He may be a trustee for himself, that is, he may reserve during his lifetime the income of the property for his own benefit; but whilst the law allows him, in case he makes a condition to that effect, to use the income of the property in whole or in part during his lifetime, the property is nevertheless a trust-property in his hands. He can neither sell it, nor mortgage it, nor burden it, nor deteriorate it in any way; and if he does so, the beneficiaries and reversioners would be entitled to have the property taken out of his hands and consigned to a *mutwalli*, to realise the rents and profits and to make over the balance to the *wâkif* after deducting expenses.(1) Delivery of possession not necessary according to the Hanafî Law.

"Though, according to Mohammed, consignment of the dedicated property and separation of it [from the other properties of the *wâkif*] are necessary to the completion of a *wakf*, according to Abû Yusuf, the *wakf* becomes absolute and binding, like emancipation, on the mere declaration of the *wâkif*, and his right therein

(1) *Fath ul-Kâdir*, Vol. II, p. 340.

Fatwa according to Abû Yusuf.

becomes extinguished at once. And in the *Khulâsa* it is laid down that the jurists of Balkh decide according to the rule laid down by Abû Yusuf, and Sadr ush-Shahîd has stated that the *fatwa* is according to him; and in the *Fath ul-Kadîr* it is mentioned that Abû Yusuf's opinion is the accepted doctrine; and in the *Munièh* it is stated that the *fatwa* is with Abû Yusuf, and this is the rule accepted by the jurists of Balkh. But the Bokhâriots have adopted Mohammed's opinion. And in the *Sharh-i-Vikâyah* and the commentary of Mulla Khusru [the *Durrar-ul-Akhâm*] it is laid down that the *Fatwa* is with Abû Yusuf. In some places, it is mentioned in the *Khânièh* [*Fatâwai Kâzi Khân*(1)] that the *fatwa* is with Mohammed . . . . But in the *Muhît* it is laid down that the universality of our jurists have adopted the rule laid down by Abû Yusuf—and *this is correct.*''(2)

Hanafî doctrine—

Delivery of possession not necessary to complete a *wakf.*

The question whether, in order to constitute a valid *wakf*, it is necessary to make over possession to a *mutwalli* was considered at great length in the case of *Doe dem. Jan Bibee* v. *Abdoollah Barber*, decided in the Supreme Court of Calcutta by Ryan, C.J., and Grant, J.

The judgment of the Chief Justice is of great importance, and I therefore give it *in extenso.*

Doe dem. Jan Bibee v. *Abdoollah Barber.*

"It is not necessary to state the facts of this case as proved at the trial; the whole matter in dispute between the parties being now narrowed to the construction that is to be put on this instrument of the 1st March, 1832. It is contended, on the part of the lessor of the plaintiff, that this instrument must be taken as a gift in contemplation of death, and that as such only one-third of the property can pass, and that the representatives of the plaintiff are entitled to recover the remaining two-thirds in the present action. It is also stated that, as an endowment or appropriation to religious uses, it is defective in several particulars, which the Mahommedan Law requires to make such instruments valid and binding.

"First.—It is said that, according to Mahommedan Law, an appropriator for religious uses cannot reserve for his life to his own use part of the property so appropriated as the present instrument purports to do.

(1) Kâzi Khân himself was a jurist of Bokhâra.

(2) *Surrat-ul-Fatâwa*, p. 430.

"Secondly.—That a delivery to a *Mutwalli* is essential to the validity of an appropriation; that in this case there was no such delivery, but the appropriator constituted herself the *Mutwalli* during her life. *Doe dem. Jan Bibee* v. *Abdoolla Barber.* (contd.)

"Thirdly.—It has also been objected that a female, who is in this instance the appropriator and *Mutwalli* during life, cannot, according to Mahommedan Law, act as *Mutwalli*.

"For the defendant it is contended—

"First.—That the instrument is *wakf* and not a testamentary paper.

"Secondly.—That the whole of the property passed under it, and that according to Mahommedan Law, it is a valid endowment or appropriation of property to the service of God, and that consequently the verdict should remain as it now stands for the defendants.

"Upon the first question that has been raised, namely, whether this paper is to be considered as a *wakf* or consecration, or in the nature of a testamentary paper, the Court entertains no doubt. The reason given by the Moulvies is the commonsense view of the nature of the instrument. They say this paper is a deed of *wakf*(1) or consecration, because, say they, the *wâkif* or consecrator herself writes, 'she has consecrated certain lands in her lifetime,' and then states at the conclusion, '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.' The Moulvies add, this would have been a Will if she had said that the *wakf* should take place after her death, or if she had made the *wakf* when labouring under the illness which terminated life.

"It is equally clear and without dispute that a female may act as *Mutwalli*. It is hardly necessary to cite authorities for this proposition. The note in Mr. Macnaghten's book, p. 343, points out the distinction between the *Guddy Nasheen* (or superior of an endowment) and the *Mutwalli*, and adds, the office of trustee, *i.e.*, *Mutwalli*, may be held by a woman, and the duties may be discharged by proxy. In *Mussumaut Hyatee Khanum* v. *Mussumaut Koolsoom Khanum*(2) it is stated that it is legal for a female to be

(1) A translation of the deed of *wakf* in this case is given in the Appendix.
(2) 1 Sel. Rep., p. 285.

Doe dem. Jan Bibee v. Abdoollah Barber. (contd.)

a trustee according to all the authorities of the law. (See also the *Fatâwai Alamgiri*).

"Upon the two remaining points which have been raised, namely, that the appropriator and *Mutwalli* are one and the same person, and secondly, that the appropriator has reserved part of the property so appropriated to her own use, for life, more doubt and difficulty exists. It will be seen from the *Hedâya* that on both these points opposite opinions have been entertained by great authorities. The work to which I refer is, I think, worthy of more respect than Mr. Advocate-General is willing to bestow upon it. I think Mr. Hamilton in his preliminary discourse shows the value of the book as a guide to Mahommedan Law, and which appears to have been compiled about the close of the 12th century. The work principally leans to the doctrine of Hanifa, or his principal disciples. Two of the most distinguished of those disciples were Abû Yusuf and Mohammed, and it is their differences of opinion in the book of the *Hedâya*, to which I have already referred, that has given rise to the questions whether this instrument is a valid appropriation according to Mahommedan Law.

"Mohammed considers an appropriation with a reserve to the use of the appropriator during life illegal, and he also considers the assignment and delivery to the *Mutwalli* or procurator essential to the validity of an appropriation. Abû Yusuf, on both these points, is at variance with Mohammed. After obtaining all the information we are able to collect through the means of our Moulvies and a reference to authorities, we are of opinion that the opinion of Abû Yusuf on both these points must be considered as the law now prevailing and sanctioned by the more recent authorities.

"The translator of the *Hedâya* (who is some authority) seems to incline to Abû Yusuf's opinion by his note at page 351, and in the text, on the point whether an assignment and delivery to a *Mutwalli* is essential to the validity of the gift, it is stated that Abu Yusuf's is the more generally received doctrine.

"But we have directed our Moulvies to give their opinions on these points and to cite their authorities, which authorities, whether in print or manuscript, we have directed our interpreter to translate. From the authorities they have cited, although they commence with stating the difference of opinion between the

two learned disciples of Hanifa, we think it clearly appears according to the modern doctrine of Mahommedan decisions and lawyers that Abu Yusuf's opinion on this point is considered the better law.

"Some of the authorities which they cite are in print, and one in particular, which supports the doctrine of Abu Yusuf, I need hardly say, is of great authority in Mahommedan Law, I mean the *Fatâwa Alamgiri* which is a collection of opinions and precedents of Mahommedan Law compiled by Shaik Noyan and other learned men by command of the Mogul Emperor Aurungzebe. This compilation was made about, I presume, the close of the 17th century, and is of course received as an authority for the present state of the law."(1)

The following questions were referred to the Moulavies of the Court :—

1st Question.—Whether, according to Mahommedan Law, an endowment to charitable uses is valid, when qualified by a reservation of rents and profits to the donor himself during his life ?

2nd Question.—Whether delivery of the property is essential to render an endowment valid, according to the rule which governs other gifts ?

3rd Question.—Whether the endower can lawfully constitute himself Mootuwullee or trustee ?

4th Question.—Whether a female can lawfully be Mootuwullee ?

5th Question.—Whether the instrument in question is a will or a deed of endowment ?

To these questions the following answers were delivered by the Moulavies of the Court and duly filed—

To the first question—

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. Abû 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 Chulpee or commentary of the Shurh Vekâyah, the Fatâwa Aulumgeeree, the Kâzi Khân, and the Kaffee.

To the second question—

Abû Yusuf does not consider the consignment and delivery of consecrated real property to the Mootuwullee as necessary to render the *wakf* or consecration legal. In this opinion Mahommed differs, but the practice is in accordance with the opinion of Abû Yusuf, as written in the Mooneeah, Futhul Kuddeer, Seraj-ul-Wahaj, Hedâyah, and Veekyat-ul-Rawahij.

To the third question—

It is lawful for the *wakif* or consecrator to become Mootuwullee or Procurator, and to reserve the profits of part of the consecrated land for his own use and his descendants, as will be found in the Hedâyah, the Kâzi Khân, and the Alumgeeree.

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(1) Grant, J., concurring, the rule obtained by the plaintiff was discharged.

To the fourth question—

It is lawful for a female to act as Mootuwullee, and qualified to become, as is to be found in the Fatâwa Aulumgeeree and other Fatâwas or text-books.

To the fifth question—

This paper is a deed of *wakf*, or consecration. From the tenor of this paper we are of opinion that it is an instrument of *wakf*, and not a testamentary paper because the *wâkif* or consecrator herself writes that "she has consecrated certain lands in her lifetime," and that she states at the conclusion of the instrument thus :—"Therefore I have delivered these few lines in the nature of an instrument of *wakf*." This would then have been a Will if she had said that the *wakf* should take effect upon her death, or if she had made the *wakf* with the illness that terminated her life,—in those cases this paper would have come under the guidance of the law touching Wills.

The following authorities were cited by the Moulavies on this occasion :—

In support of the first question—

From the Aulumgeeree in print, page 195, from line 10 to 12. "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 Abû Yusuf has said, "This *wakf* is right," and the learned of Bulluck (a town in Tooran) have decided conformably to this opinion of Abû Yusuf's and the decisions are in conformity therewith, for to induce persons to make *wakfs*. The like is to be found in the Sagrah and the Kesaub, and also in Moojmuraul—only.

From the Chulpee in print : the commentary of the Sharh Vekaya, page 245, from line 27 to line 28.

In the opinion of Abû Yusuf, it is right or lawful for the *wâkif* or consecrator to direct the profits to his own use and to make himself Mootuwullee, but not right in the opinion of Mahommed—only.

The Mooftee of Sakullian and Suddar Shaheed have said, the Futawas or decrees are in conformity with the words of Abu Yusuf's—only.

From the Kaffee in MSS. sheet 568 from the 5th to part of the 6th line.

The *wakif's* directing the profits of the *wakf* to his own use is right in the opinion of Abû Yusuf and the Masshâikh (Shaikhs) of Bulluck, and the decrees are consonant with that—only.

From the Kâzi Khân in print, page 251, from line 2nd to part of line 5th.

It is not right in the opinion of Heelall for the *wâkif* to stipulate in making a *wakf* that he shall appropriate the profits thereof to himself during his life, but is right in the opinion of Abû Yusuf, and the Masshâikh of Bulluck have followed the opinion of Abû Yusuf, and said "such *wakf* and such reservation are both right," and Sudder Shuheed has said, the decrees are in conformity with the opinion of Abû Yusuf—only.

In support of the second question—

From the Kâzi Khân in print, page 212, from the 2nd to the 3rd line.

In the opinion of Abû Yusuf it is not necessary to deliver over possession to Mootuwullee, therefore the *wâkif* is entitled to become Mootuwullee, although he does not expressly reserve that to himself, and the Masshâikh of Bulluck have followed this opinion of Abû Yusuf—only.

From the Aulumgeeree in print, page 455, from line 13th to line 14th.

The property of the *wâkif* in the *wakf* is severed from him by his saying, "I have made a *wakf* thereof," according to the opinion of Abû Yusuf and the opinion of the three Emaums (leaders) Mallick, Shafee, and Ahmud, son of Haumbul, and the opinion of most of the learned, is in conformity, with that and also with the Masshâikh of Bulluck, and it is written in the Mooneeah "that the decrees are

consonant with that," and the like is to be found in the Futah-ul-Kuddeer, which says that the decrees are agreeable to that opinion, and also in the Seeraj-ul-Wahauj—only.

From the Veekahut-ul-rewahij in MSS., page 197, from the 7th to the 8th line.

In the opinion delivered by Abû Yusuf, the right is severed on bare declaration—only.

The authorities in support of the answer to the third question are to be found above.

The authorities in support of the fourth question are—

From the Aulumgeeree in print, page 504, line 15th.

In that respect men and women are equal,

Those in support of the answer to the 5th question are—

From the Aulumgeeree, page 455, from the 6th to the 7th line.

If a *wakf* is made to take effect upon the *wâkif's* death, saying, "upon my death I make a *wakf* of my house to so-and-so, and then the *wâkif* dies, the *wakf* is right as to one-third—only.

In the said book and page, from line 9th to line 10th.

"If the party appropriates the *wakf* to operate upon his death, during his illness, of which he eventually dies, the direction therein is that above—only."

The subje of the *wa* must be certain.

The absence of uncertainty in the subject-matter of the *wakf* is also a condition,—not uncertainty in the object for which the dedication is made. Uncertainty in the object does not lead to the invalidation of the *wakf*, it only accelerates the application of the subject of the *wakf* to its ultimate object, *viz.*, the support of the poor, for they never fail.

But the *subject* of the *wakf* must not be uncertain.(1) Accordingly, if a person were to dedicate a portion of his land without specifying it, the *wakf* would not take effect unless it can be gathered from attendant circumstances what he intended to convey, when the *wakf* will be valid upon the basis of *istehsân*.(2)

Principle Must not depende on a con tingency

The doctrine of tanjiz.—The dedication must also not be dependent for its operation upon a contingency which may or may not occur. A condition, however, to which operation can be given immediately will not render a *wakf* void. Examples of the distinction between these two provisions of the law are given at great length in most of the law-books, and I would quote some passages here to render the meaning clear.(3)

Exampl of a con gent *wa*

For example, "if a person were to say," says the *Fatâwai Alamgiri* quoting the *Fath ul-Kadîr*, "If my son arrives, my house is a *sadakah wakf* for the poor," and the son should arrive, never

(1) *Fatâwai Alamgiri*, Vol. II, p. 458; *Radd-ul-Muhtâr*, Vol. III, p. 560.

(2) Liberal interpretation; *Fatawai Alamgiri*, Vol. II, 466.

(3) *Durr-ul-Mukhtâr*, p. 410; *Radd-ul-Muhtâr*, Vol. III.

theless, the house does not become *wakf*.(1) Or, if a person were to say, 'This my land is a *sadakah* if such an one please,' and the person referred to should indicate his pleasure, still the *wakf* would be void.(2)"

But when the condition is capable of immediate ascertainment or operation, the *wakf* is valid. For example, "if a man were to say, 'if this house be my property it is appropriated as a pious offering,' the appropriation is valid if the house be actually his property at the time of speaking, for the suspension is here on a condition that is actually fulfilled, and there is no contingency."(3) Another instance is thus given :—"A man loses his property and says, 'If I find it, by God I will make a *wakf* of my land,' and he finds the property, it is incumbent on him to make a *wakf* of his land for the benefit of those to whom it is lawful for him to pay *zakât* or poor rates, and if he should make it for those to whom it is not lawful for him to pay *zakât*, the *wakf* would not be valid nor would he be released from his vow."(4) And again :—"If a man were to say, 'if I die of this disease, I have made this my land *wakf*,' it is not valid whether he dies or recovers. But if he should say, 'if I die of this disease make this my land *wakf*,' it is lawful, for this amounts to the conditional appointment of a mandatory, which is legal."(5)

"But Shams-ul-Aimma Sarakhsi has stated at the end of his [chapter on] *Wakf*, that a *wakf* dependent on death is valid. And in the *Mukhtasar* [*-ul-Kudûri*] it is mentioned that where a *wakf* is made conditional upon the *wâkif's* decease, *e.g.*, if he were to say 'when I die this house will become *wakf* for this purpose,' it will be valid.(6)

Testamentary *wakf* valid.

But whilst a man can validly make a dedication in his own favour, he cannot reserve to himself the power of selling the property dedicated and applying the proceeds to his own use.

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(1) So also in the *Surrat-ul-Fatáwa*.
(2) After the *Muhît*.
(3) *Fatâwai Kâzi Khân*, Vol. IV, p. 84.
(4) *Sirájia*.
(5) *Jouharat-un-Nayeréh*.
(6) *Surrat-ul-Fatâwa*, 435: in fact this is a testamentary *wakf*.
(6) *Fatâwai Alamgiri*, Vol. II, p. 459, after the *Nahr-ul-Fáik*; *Durr-ul Mukhtâr*, p. 410; *Radd-ul-Mukhtâr*, Vol. III, p. 599.

Nor can a *wakf* be made for a determinate period.

Principle. A *wakf* cannot be revoked.

Where a *wakf* is made in favour of a lawful purpose and the *wâkif* reserves to himself the option of revoking the *wakf*, "the *wakf* is valid and the option void" by general consensus. According to Abû Yusuf, a short option, say, for three days, does not invalidate the *wakf*; if the option is not exercised within that time, the *wakf* becomes absolute.