CHAPTER XII.

PUBLIC AND QUASI-PUBLIC WAKFS.

SECTION I.

GENERAL OBSERVATIONS.

AMONG *wakfs* in which the affluent (*aghniâ*) and indigent (*fukarâ*) are equally interested may be mentioned the following :—

(1) Mosques and prayer-grounds (*musallas*).
(2) *Imâmbaras.*
(3) *Rouzahs* (mausolea) and *dargâhs.*
(4) *Khânkâhs.*
(5) *Caravanserais* and *musâffir-khânèhs* (travellers' houses).
(6) Colleges and schools (*madrassas* and *maktabs*).
(7) Hospitals and dispensaries.
(8) Reservoirs, cisterns, aqueducts, roads, bridges, &c.
(9) *Rubâts* or hostels and rest-houses.
(10) Cemeteries.(1)

In these *wakfs*, the rich and the poor, the affluent and the indigent, are equally entitled to participate. But the *wâkif* may specially consecrate such institutions or places for the poor, in which case these alone would be entitled to derive benefit therefrom. For example, a school may be dedicated for the education of the children of the poor, or a hospital for the relief of the sick and ailing among them, and so on.(2)

In the case of *lungar-khânèhs*(3) and similar institutions which are primarily intended for the poor, the affluent have, *primâ facie*, no title to benefit therefrom. But the *wâkif* may condition otherwise.

Mosques are too well-known to require any detailed descrip- Mosques
tion. The word *masjid* is derived from *sijda*, devotion, and

(1) This is by no means exhaustive.
(2) A burial ground for the poor or homeless strangers is called *gôr-i-gharibân*
(3) A place where doles of food are distributed to the poor.

means a place of devotion or a place where prayers are offered to the Almighty.

A very fair description of an ordinary mosque is given by Herklot in his *Qanoon-i-Islâm*. *Musallas* are prayer-grounds, and the word is derived from the word *salât*, or prayers. In India, they are generally called *Idgâhs* or *namâz-gâhs*, and consist of a plot of ground set apart for the performance of the daily prayers or the Id prayers.

An *Imâmbâra* literally means the house of the *Imâm*. It is a building consecrated to services held in honour of the martyrdom of Hussain, and is generally a Shiah institution, though many Sunnis also erect and maintain *Imâmbâras*. In Persia, an *Imâmbâra* is generally called an *Imâmzâda* or *mash-had*.

In India, the tombs of saints or holy personages are generally called *dargâhs*. In Persia and Western Asia they are called *rouzahs*, like the *rouzah* of the Caliph Ali, that of Imâm Ali bin Mûsa ar-Razâ at Meshed, and so on.

Khânkâhs. A *Khânkâh*, sometimes also called *Khângâh*, is defined by Richardson to mean a monastery or religious structure built for the Eastern Sûfis or Dervishes.

Meninski defines the word thus, "*domus propter Deum extructa in usum sophorum aut religiosorum, cœnobium.*"

In the *Burhân-i-Kâté* and the *Majâlis-ul-'Aârifin* it is defined as a place where *dervishes* and other seekers after truth congregate for religious instruction and devotional exercise.

It is, ordinarily speaking, an institution for the lodgment of religious devotees, travellers and mendicants.

In Western Asia, they are sometimes called *rubâts* and are used generally for housing pilgrims, dervishes, &c.

In India, *Khânkâhs* have generally sprung up in the following way :—A *dervish* or a person who, by leading a pious life, has won the esteem and veneration of the neighbourhood, or a *sûfi* of particular sanctity has settled down in some locality. So long as he has not attained sufficient importance, his place of abode is called a *takia*. But when he is a man of importance or has attained sufficient eminence, it is designated an *âstâna*. His pious life and religious ministrations attract public notice, disciples gather round him, and a place is constructed for their lodgment. And the humble *takia* grows into a *Khânkâh*. After the death of the holy

Khânkâhs and Tombs.

personage, the spot where he is buried becomes a shrine and an object of pilgrimage not only for his disciples, but for people of distant parts, both Mussulmans and Hindoos, and is designated either as a *dârgâh* or *âstâna* or *rouzah*. Such are the shrine and *Khânkâh* of Shah Kubeer Dervish, to which I shall refer again later.

And grants have been made by pious chiefs and sovereigns to these holy men for their maintenance and the maintenance of their descendants in perpetuity and the performance of pious acts.

There are a number of *dargâhs* in India. Some of the most noted ones in Southern India are mentioned by Herklot.(1) Of the others, the most important are those at Ajmir(2) and at Futtehpur Sikri (near Agra). There is a celebrated *dargâh* in the suburbs of Calcutta called *Moula Ali ki dargâh*, where votive offerings of all kinds are made. The tomb of the famous poet, Shaikh Ali Hazîn, is also regarded as a shrine not only by Mussulmans but also by Hindoos

Rest-houses for *ghâzis* or soldiers engaged in holy warfare are also called *rubâts*.

Section II.

Mosques and Musallahs.

Prayer-grounds.

"The proprietary right of the *wâkif* in a building or ground set apart for prayers becomes extinguished either on the declaration of the *wâkif* that he has constituted it a mosque or *musallah* or consecrated it for worship, *or* on the performance of prayers therein or thereon."(3)

Every ground set apart for prayers is not necessarily a *musallah* and subject to the rules governing a mosque. A *musalla* is a place where funeral prayers or the prayers of the two Ids are usually offered. In such cases only the place where the congregation gather and the worship is performed that is governed by the rules governing a mosque. But a piece of ground may be specially dedicated for the performance of public prayers, and though there is no building thereon, if prayers have been habitually performed

(1) Herklot's *Quanoon-i-Islam*. (2) The mausolea of Muin ud-dîn Chishti.
(3) *Radd ul-Muhtâr*, Vol. III, p. 571.

thereon, it is *wakf* and subject to the rules governing a mosque.(1)

Dedication of a mosque.

According to the *Multeka*, the performance of prayer is equivalent to consignment. But in the *Zakhîra* it is stated that the prayer must be congregational, *salât-bi'l-jamâ'at*, which is unanimously regarded as tantamount to delivery. So that when a person erects a building with the object of dedicating it as a mosque and permits people to offer prayers therein, without declaring that he has constituted it into a mosque, and prayers are offered there *bi'l-jamâ'at* (congregationally), the mosque becomes irrevocably dedicated.

"When a mosque is erected or set up inside a dwelling-house or residence (*dâr*), and permission is granted to the public to come and pray, and a pathway is also made or set apart for their egress and ingress, the dedication is good by general consensus. If a pathway is not indicated, in that case, according to Abû Hanîfa, the dedication is not sufficient. But according to Abû Yusuf and Mohammed, it is good, and the pathway will be implied by the permission to pray, and *this is correct.*"

The approved doctrine.

The public do not acquire any right in a private mosque without special permission.

Need not be express.

Acknowledgment or declaration of the *wâkif* sufficient evidence of a *wakf*.

Accordingly, if a man were to build a mosque inside his house, it will not become a public mosque, subject to the rules governing a *public* religious institution, *unless permission has been once granted to outsiders to come and pray.* It is not necessary that such permission should be given in *express* terms, but, without an actual or constructive permission, a mosque created within a private building will not become a public mosque so as to entitle the public, or any section of the public, to claim the use of it. At the same time, though the public may have no right in a private mosque, it may constitute a good *wakf* so as to exclude the rights of the heirs over it. *Where prayers have been once offered it is not necessary to prove an express dedication.* The very fact of the prayers being offered in it will imply a valid and good dedication.

According to Abû Yusuf, the *kawl* alone of the *wâkif*, or a declaration on his part that the land or premises is dedicated, is sufficient :—For example, if he were to declare that a particular building is constituted into a mosque, it would be a valid dedication, even though prayers may not have been offered in it. "This

(1) *Sharh-Multeka.*

is the accepted doctrine," says the author of the *Radd ul-Muhtâr* "as stated in the *Durr-ul-Munteka*, the *Durrar*, the *Vikâyah* and other authorities, and we decide according to it."(1)

When the structure does not bear the shape of a mosque, or when there is no evidence of a declaration on the part of the *wâkif* that he has constituted the building into a *masjid*, and the evidence of dedication depends on the performance of prayers within it, some lawyers have held such prayers should be with *azân*(2) and *ikâmat*.(3) The reason of this condition is stated in the following terms :—"As delivery of possession in the case of a *wakf* is deemed necessary, though Abû Yusuf holds a contrary opinion, the nature of the delivery depends in each case upon the nature of the specific thing, for example, the delivery of a cemetery is by the burial of *one* person ; of a tank or reservoir by *one* person drinking there ; a guest-house (*musâffir-khânèh*, traveller's house) by *one* wayfarer or traveller alighting there. Similarly, as the purpose of a mosque is that people should pray there in *jamâ'at*,(4) it is required that where there is no express dedication, prayers should have been offered there with the *azân* and *ikâmat*." Principle.

But when one man acts both as *muezzin*(5) and *imâm*(6) his praying alone is sufficient. Prayers offered once in a mosque constitute a valid dedication.

If prayers are offered once in a mosque it is sufficient to constitute a good dedication. But should the *wâkif* alone pray in it, that would not be sufficient unless there is a declaration.

In the *Fatâwai Kâzi Khân* it is stated that, "the delivery of possession as regards a *masjid* is complete when only one person has prayed in it with *azân* and *ikâmat*. Prayers offered by one person in a mosque is sufficient to constitute it a public mosque devoted to the worship of God, for a mosque belongs to the Deity and there affixes to it a right of the Mussulmans in general, and one person can be a proxy for the establishment of the right of the Creator and the public.....According to Abû Yusuf consignment is not necessary for the validity of any dedication, whether it be a mosque or any other *wakf*. Therefore, if a person erect a Accepted doctrine.

(1) *Radd ul-Muhtâr*, Vol. III, p. 572.
(2) The call to prayers.
(3) The standing-up for prayers.
(4) In assemblies.
(5) The person who calls to prayers.
(6) One who leads the prayers.

mosque and give permission to people to pray therein, it becomes complete."(1)

Consignment without prayers sufficient.

Should a mosque be consigned to a *mutwalli* but no prayers be offered therein, it would be a valid dedication.

Dedication of a cemetery, &c.

When a person has erected a public reservoir, fountain or cemetery according to Abû Yusuf, "whose opinion we follow," the *wakf* cannot be revoked. The burial of even one man in a cemetery is sufficient to constitute it a *wakf*, so the staying of one *musâffir* (traveller) *in a musâffir-khânèh* makes the *wakf* irrevocable.(2)

General result of the principles.

The general result of the above principles may be summed up in the following terms:—Where effect has once been given to a dedication in the mode which is natural to the particular dedication, the *wakf* is complete and irrevocable. For example, the special purpose of a mosque is that people should perform their devotions there; of a cemetery, for dead persons to be buried there; of a reservoir or tank, to supply water to those who use it, &c., so according to the accepted doctrine of Abû Yusuf, even where there is no evidence of an express dedication in words, if it appears that one single individual (other than the consecrator) has offered his prayers at the place, or one single person has been buried in the cemetery, or one person has drunk at the fountain, the dedication for the specific purpose must be regarded as complete. Such use of the subject of the *wakf* being in conformity with its avowed or ostensible object should be considered as conclusive of the dedication.

"A person has a piece of land and permits people to pray thereon without any restriction or limitation as to the time of prayer or the number of people who should pray there. After his death that land will not form a portion of his inheritance. But if the permission was limited to a particular occasion or to a fixed period of time, the land will continue to be his inheritable property, for the limitation of time or occasion rebuts the presumption of absolute *wakf*."(3)

---

(1) *Fatâwai Kâzi Khân*, Vol. II, p. 206.
(2) *Radd ul-Muhtâr*, Vol. III, p. 572.
(3) *Ibid*, p. 571.

A place where the *namâz-Id*(1) or *namâz-i-janâza*(2) is usually performed is subject to the rules of a *masjid* according to Kâzi Khân and the author of the *As'aâf*.(3) Principle.

If a person were to say "this room of mine I have set apart for supplying oil to the lamps of a certain mosque," and add nothing further—then, according to Fakîh Abû J'aafar, the room becomes *wakf* for the mosque in question, if it is made over to the *mutwalli*, and the *Fatwa* is according to this opinion.(4)

If a person were to make a *wakf* of his land to a mosque and consign it to the *mutwalli* of the mosque, it is lawful and cannot be revoked. If a person were to bestow money for building a mosque or for the "affairs" or for the support of the mosque it is valid upon its delivery to the trustee.

If a person were to consecrate his house for a mosque or for the benefit of Mussulmans, it is lawful, and the *Fatwa* is according to this.

A *wakf* for the repairs of mosques and graves is lawful, for it implies perpetuity. A *wakf* for the repairs of mosques, &c.

A sovereign cannot give any portion of the land acquired by treaty and negotiation to be converted into a mosque without the consent of the owners, but he can give any portion of the land acquired by war, provided it does not interfere with the right of way possessed by any individual.

If a person erect a mosque but appoint nobody as the *mutwalli* thereof, the *towliat* or governance remains vested in him. This is according to Hillâl and Nâtiki and is the accepted rule.

The *Ahl-i-mahalla*, *i.e.*, the people of the quarter may lawfully enlarge or reconstruct a mosque and supply it with better articles at their own expense, but not at the expense of the mosque unless the Kâzi's permission is obtained to that effect. Should the *Ahl-i-mahalla* wish to improve the mosque, with or without the consent of the Kâzi, the heirs of the *wâkif* will not have any right to object unless it is patently contrary to the wishes of the *wâkif*. Rights of the congregation.

---

(1) Prayers offered on the occasion of the two Id festivals, being, *viz.*, the *Id ul-fitr* and the *Id-ul-uzha* or *Bairam*.

(2) Funeral prayers.

(3) *Radd ul-Muhtâr*, Vol. III, p. 571.

(4) *Ibid*, p. 572; *Surrat-ul-Fatâwa*.

Private places of worship.

Frequently, rooms are reserved in private residences for family prayers, or for the performance of the Moharram ceremonies. Such rooms cannot be regarded as specifically consecrated so as to constitute a *wakf* to exclude the rights of the heirs. In many cases, however, distinct apartments are set apart for the performance of the religious ceremonies, like Kerbelai Mohammed's Imâmbara in Calcutta. Often, they have an entrance separate from that of the private residence, and in all respects fulfil the conditions laid down by Kahastâni, who declared that, where the mosque was so intermixed with the private property or residence of the *wâkif* as to render differentiation necessary, the *wakf* premises should be distinctly indicated. In these cases, there can be no question as to the apartments constituting a valid *wakf*. As a matter of principle, however, the law disfavours the dedication by way of *wakf* of one portion of a private residence, whilst the other portion is in the occupation of the *wâkif*. For example, the dedication of the upper or lower storey of a building as a mosque is not considered valid, *unless owing to the crowded condition of the locality, it has become customary to constitute such mosques.* Both Abû Yusuf and Mohammed recognised the lawfulness of such dedications in Bagdad and Rai, on account of the dense population of those cities in that century. It must not be inferred from the above, that there is any bar to the temporary conversion, or use, by any person, of a portion of his private residence as a place for family prayers or religious worship. The rule is, that unless certain conditions are complied with, the apartments will not be subject to the law of *wakf* and will continue to form the private property of the individual, the one condition chiefly requiring attention being that the portion dedicated is capable of being differentiated from the rest of the residence; when such can be done, the *wakf* is valid.

But where the whole building is constituted *wakf* for a mosque, imâmbara or madrassa, and a portion of the building is used for the specific purpose of the *wakf*, and the remainder for the use of the servitors of the institution, or for letting out to people as a source of income to the *wakf*, the dedication is valid. The mere fact of the *wâkif* occupying some portion of the building as *mutwalli* will not affect the validity of the *wakf*.

In the *Hedâya* it is stated that Abû Yusuf and Mohammed have held the dedication of the central hall of a house for the pur-

pose of a mosque to be valid. In the *Radd ul-Muhtâr* the statement is subjected to the condition that in order to be valid means of egress and ingress should be provided.

In many places it is usual to build mosques or mausoleums so as to be able to let the ground-floor or the outer portions to shopkeepers, the rent being applied for the maintenance of the institution. In fact, in such instances, the shops form the only endowment attached to the mosque or mausoleum. The existence of these secular buildings does not affect, as has been sometimes supposed, the validity of the *wakf* or the nature of the religious structure.

The existence of secular buildings attached to the mosque does not affect the religious structure.

When any portion of the building is allotted for the residence of the survitors, such servitors have no right to let their rooms to others. They can reside in such rooms so long as they are in the service of the mosque; but they cannot allow another person to reside in those rooms for hire or otherwise without the permission of the *mutwalli*. If the service is hereditary, their successors have the same right and no more. The *Radd ul-Muhtâr* says that "as the servitors of a mosque or *madrassa* cannot assign their allowances to others, so they cannot assign their rooms."

The right of the servitors.

A mosque does not belong to any particular sect. It is open to all Mussulmans to go in and offer their adoration to the Almighty. Suppose a Hanafî erects a mosque; the Shâfeïs, the Mâlikis and the Hanbalis may pray there equally with the members of the Hanafî sect. Nor is there any objection to a Shiah going and praying there according to his own ritual. The Hanafî *mutwalli* cannot prevent any person, so long as he is the worshipper of God, and does not interrupt or disturb the worship of others from coming and offering his adoration to the Almighty. This view of the law was given effect to in the case of *Ata-Ullah* v. *Azim-Ullah*,(1) where the Allahabad High Court held that a mosque, being dedicated to God, is for the use of all Mahomedans, and cannot be lawfully appropriated to the use of any particular sect.

A mosque open to all sects of Moslems.

(1) [1889], I. L., 12 All., 494.

A Sunni Mahomedan belonging to any one of the four sects(1) may validly perform his devotions under the leadership of a member of another sect.(2)

Leadership in prayers of a free-thinker valid.

According to the *Fatâwai Alamgiri*, "the *imâmate* (leadership in prayers) of freethinkers and heretics is valid."(3) The same principle is laid down in the *Radd ul-Muhtâr*.(4) But the *Alamgiri* adds that it is not lawful to offer prayers behind a *mushabbaha* (one who believes God to be like a man, in other words, an anthropomorphist), a Jahmi,(5) or a Râfizi."(6) In short, freethought (*hawa*), which does not amount to *kufr* (denial of the unity of God and the messengership of the Prophet) does not disqualify one from *imâmate*, "and it is lawful to pray behind a freethinker . . . . so it is stated in the *Khulâsa*, and that is correct, and the *Badâya* says the same."(7)

There is no prohibition, therefore, to a Sunni praying behind a Shiah, and *vice versâ*, but practice does not recognise it; and among the Shiahs some of the legists have gone so far as to declare praying behind a Sunni illegal. Nor is this exclusiveness confined to some Shiah legists, for *ultra*-Sunnis hold a similar opinion regarding a Shiah officiating at their prayers. In spite of the barriers created by bigotry between the two sects, it is frequent for a Shiah to go into a mosque dedicated by a Sunni, or a Sunni to go into a mosque where Shiahs usually pray, and perform his prayers according to his own ritual, even when the Sunnis or the Shiahs, as the case may be, are engaged in their prayers. There is nothing illegal in his so doing, nor can the *mutwalli* of the mosque turn him out *so long as he does not interrupt or disturb the worship of the others*.

Every Moslem entitled to pray in a mosque according to his own ritual.

According to the Hanafîs and the Shiahs, the prayers of the congregation are not commendable unless the imâm (the persor who leads the prayers) is well-conducted and leads a pure life

(1) See Introd., p. 13.

(2) See the observations of Mahmood, J., in *Queen-Empress* v. *Ramzan* [1885] I. L., 7 All., 461. See also *Fazl Karim* v. *Haji Mowla Buksh* [1891], L. R., 18 I. A., 59; s. c., I. L., 18 Cal., 448; and *Abdus Subhan* v. *Korban Ali* [1908], I. L. 35 Cal., 294.

(3) *Fatâwai Alamgiri*, Vol. I, p. 116.

(4) *Radd-ul-Muhtâr*, Vol. I, pp. 585-586.

(5) A follower of Jahm-ibn-Safwân, who denied all free will.

(6) *Lit. à deserter*, name given to a body of Shiahs who deserted Zaid bin Ali bin Hussain; See *short History of the Saracens*, p. 156.

(7) *Fatâwai Alamgiri*, Vol. I, p. 116.

According to the Shâfeïs, Mâlikis and Hanbalis, the imâm's conduct has no effect upon the prayers of the congregation.

But though some members of one sect may go and pray in a mosque whilst members of another sect are engaged in their devotions, there cannot be two *azâns* (calls to prayer) nor two *jamâ'ats* (assemblies) at one and the same time in that mosque.

But there cannot be two *azâns* or two congregations.

The Sunnis offer their prayers with the hands folded in front, whilst the Shiahs perform their devotions with their hands held straight down by their side. Both practices are based upon certain traditions accepted by one sect and rejected by the other.

Mode of performing prayers.

The Shâfeïs, Mâlikis and Hanbalis raise their hands when pronouncing the *takbîr* (*viz.*, the words "*allaho-akbar*, God is great") during a certain part of the prayers. This gesture is called *raf'aa-ed-dain*, 'raising of the hands.' They also pronounce loudly the word *âmîn* or amen after the first chapter of the Koran has been recited by the imâm, which is not regarded as correct by the Hanafîs. This practice is called *âmîn-bi'l-jahr*.

The Hanafîs regard both these practices as irregular. They pronounce the word *âmîn* softly, and raise their hands during the *takbîr* not higher than above the ears.

These small differences in ritual have given rise to considerable disputes in India. A large section of the Sunnis in India have, chiefly on doctrinal matters, become non-conformists or *ghair-mukallid* (from *taklîd*, conformity). They profess to follow no particular Imâm, but to act according to all four. They incline, however, towards Shâfeïsm, and call themselves *'Aâmil-bi'l-Hadîs*, "followers of the traditions." In practice, they adopt *raf'aa-ed-dainisim* and *âmîn-bi'l-jahr*. The ignorant Hanafîs object to these innovations, and hence the disputes. They refuse to pray after an *'aâmil-bi'l-hadîs* imâm, or to allow the *'aâmil-bi'l-hadîs* to offer prayers in a mosque, usually used by Hanafîs. Both these points have been settled in favour of the *'aâmil-bi'l-hadîs*.

In the case of *Fuzlul Karim* v. *Haji Moula Buksh*,(1) their Lordships of the Privy Council have decided that an imâm does not become disqualified from leading at prayers owing to his having adopted the *'aâmil-bi'l-hâdîs* doctrines.

(1) [1891], L. R., 18 Ind. App., 59; s. c., I. L., 18 Cal., 448, *supra*.

The *'aâmil-bi'l-hadîs* support their practice by a reference to certain *hadîses* given in the *Sahîh-ul-Bokhari* and *Sahîh-ul-Muslim*.(1)

Colleges, schools, hospitals, dispensaries, &c., stand on the same footing as mosques and other religious institutions. From an English point of view, they would be regarded, generally speaking, as secular endowments. But, in the Mussulman Law there is no distinction between purely religious institutions and others. All are treated on the same footing.

Application of the endowment of a mosque which has become deserted.

"In the *Khulâsa*, Chapter on *Wakf*, third section, it is stated that the Sâhib-i-Manah [the author of the *Manah*] was asked with regard to such a *wakf* as this: 'a mosque has become ruined and part of it has come down, and the people of the *mahalla* (where it is situated) do not need it, and near to it is a mosque, can the remaining portions of the ruined mosque be sold and applied for the benefit of the other mosque?' The answer was, 'the matter must be referred to the Kâzi.'"

"In the *Kinia* it is laid down that when a reservoir or a mosque has become ruined, and people have abandoned it, the Kâzi has the power of authorising the application of the proceeds arising from the sale of the materials to another reservoir or mosque. And it is also stated there, that when there are two ruined mosques, and nobody knows who were the dedicators of the two, the Kâzi has the power of directing the application of the one to the other for the purpose of reconstruction. If the consecrators are known and have left their heirs, they might give the sanction themselves."

"In the *Khânièh* (*i.e.*, *Fatâwai Kâzi Khân*) it is laid down that when the mosque has become ruined, and the people of the locality do not require it, the matter should be taken before the Kâzi that he may authorise the sale of the materials and the application of the proceeds to another mosque." . . . . . "When a *wakf* [building] has become ruined, and there is no income forthcoming to repair or re-erect it, some have said the *wâkif*, and if he be dead, his heirs, may resume it, but Sadr-ush-Shahîd in his *Fatwa* has stated that this opinion is questionable and against principle."(2)

(1) *Bokhari*, pp. 19 and 108; *Jâm'aa-ul-Tirmizi*, p. 38; see Appendix.
(2) *Surrat-ul-Fatâwa*, p. 432.

According to the *Radd-ul-Muhtâr*, where a mosque has fallen into ruin, and it is not known who had erected it, the *ahl-i-mahalla* can sell the materials, presumably with the sanction of the Kâzi, and apply the proceeds to the building of another mosque. A well can be dug in a mosque if it is to its benefit. The *wâkif* cannot let for hire for his own purposes any portion of the mosque premises. When a mosque has ceased, the *wâkif* cannot make use of it for any other purpose. "No profit should be derived from a mosque, nor can it be leased or turned into a private abode."

According to Abû Hanîfa and Abû Yusuf, the land which has once been dedicated to a mosque continues *wakf* even though it has become waste and the building has fallen into ruin; and the *Fatwa* is according to their opinion.(1) And Abû Yusuf further holds that, with the permission of the Kâzi, the ruined or waste portion may be sold and applied towards the construction or maintenance of any other mosque nearest to the disused mosque. "And the same principle is applicable to every other religious or charitable institution."(2) According to the *Surrat-ul-Fatâwa*, the *Fatwa* is according to Abû Yusuf. The *cy-près* doctrine.

"According to the *Sharh-Multeka*, when the purpose of a trust fails, it is lawful to apply the income of the trust-property to an object nearest in its nature to the original purpose, *jins-i-karîb*. For example, if the object of a *wakf* is a reservoir, the income may be applied to a tank or canal; if it is a mosque, the income is to be applied to another mosque, or to fasting, prayers, etc."(3)

Shams ul-Aïmma al-Halwâni has declared that when a *hauz* (reservoir) or mosque becomes ruined, and nobody uses it, the Kâzi can direct the application of its materials to another *hauz*, or mosque. "In these times," says the author of the *Radd*, "it is essentially necessary to adopt the views of Imâm al-Halwâni, who authorises the Kâzi to give permission to apply the materials belonging to a mosque, which has fallen into ruin, to another which is in use."(4)

---

(1) *Hâwi*. By *consensus* the *Fatwa* is with Abû Yusuf.

(2) The *Bahr* explains thus the difference between Abû Hanifa and Abû Yusuf on one side and Mohammed on the other:—"According to Mohammed the articles in the disused mosque go to the *wâkif*, but the mosque and land remain *wakf* perpetually as Abû Yusuf holds, and cannot revert to the *wâkif* or his heirs to become their heritable property."

(3) *Radd-ul-Muhtâr*, Vol. III, p. 574.

(4) *Ibid.*

"When there are two *wakfs* and of both the *wâkif* is the same and the purpose the same, but owing to certain calamities the income of one has diminished, whilst from the other a balance is left [over and above the expenditure], the Judge has the power to direct that the allowances of the servants of the first *wakf* may be made up from the balance of the income of the second." But the Kâzi is not invested with this power, if the purpose of the two *wakfs* is different. "For example, if a man make two dedications for a mosque, one for its building and the other for the imâm and the muezzin, and, owing to a decrease in the profits of the second *wakf*, the imâm and muezzin cannot be employed, then it is lawful for the Hâkim, in consultation with the leading people of the *mahalla*, to direct that the allowance of these officers should be paid out of the balance left from the *wakf* for the building, provided the *wâkif* is one and the same." The *mutwalli*, though he be the trustee of both endowments, cannot of his own motion apply the balance of the proceeds of one *wakf* for the maintenance of the people provided for in the other. He must apply for and obtain the sanction of the Judge.

"In the thirteenth section of the *Jâm'aa-ul-Fusûlain*, it is laid down that when a person says his house or his room is for lighting such a mosque, and no more—that house or room will become *wakf* for the mosque." . . . . "In the *Wâkiât-ul-Hisâmi* it is stated that if there are already funds for the lighting of the mosque, and it be considered desirable to apply the income of the house or room dedicated to building a minaret for giving *azân*, so that people may hear the call to prayers better, they may do so, but if it is not needful it should not be done."(1)

Where several *wakfs* are attached to one mosque, the *mutwalli* or manager may keep the income of all together, in fact keep a joint account, and if one shop attached to the masjid has fallen into disrepair, there is no objection to its being repaired with the income of another shop belonging to the same mosque.

If a person were to make a *wakf* or a piece of land for the purpose of erecting a mosque, he cannot afterwards resume or sell it, neither can it be inherited, because this ground is altogether alienated from the right of the individual and appertains solely to God. The reason of this is, that all things whatever are originally

(1) *Surrat-ul-Fatâwa*, p. 435.

the property of the Almighty. When, therefore, the individual relinquishes his right in the ground, it reverts to its original state, and his power over it terminates in the same manner as a master's power over a bondsman terminates in consequence of emancipation and cannot be resumed.

Section III.

Dedication for Aqueducts, Inns, &c.

Dedications for aqueducts, inns, cemeteries, &c.

According to Abû Yusuf, a dedication to any object of utility is effectuated by the *kawl* or word of the *wâkif*, as in the case of a mosque. For example, when a person erects an aqueduct for Mussulmans, or an inn for the occupation of travellers, or a caravanserai or constitutes his land into a cemetery, the dedication becomes complete upon the declaration of the *wâkif*, and all his right of property ceases therein.(1) "According to Mohammed, it abates when people have used the aqueduct or have occupied the inn or caravanserai, or buried in the cemetery, and it is sufficient if one person do so."(2) The rule is the same as to wells and cisterns, and if they are delivered to a superintendent, the dedication is valid in like manner. It is stated in the *Mabsût* that the *Fatwa* is according to the Disciples by general consensus, in other words, the dedication may be effectuated in either way, *viz.*, by the actual declaration of the *wâkif* or by delivery, in other words, by the use of the place by a single person.

Any one can drink from the wells and cisterns and water his cattle and camels at them, and also use the water for ceremonial ablutions. In the use of all such objects of utility as abovementioned, there is no difference between the rich and the poor, and it is lawful for all alike to put up at inns and caravanserais and to drink from aqueducts and bury in a cemetery. But the income of a mansion appropriated for *ghâzîs* or religious warriors can be taken only by those of their number who are necessitous. When a mansion is dedicated for the residence of pilgrims, mere wayfarers have no right to occupy it, and when the days of the season have

(1) According to Abû Hanifa, the right of the *wâkif* ceases, on the Judge making a decree, or, if the appropriation is by way of a bequest upon the death of the *wâkif*. This is not accepted.

(2) *Fatâwai Alamgiri*, Vol. II, p. 554.

passed, it should be let and kept in repair out of the rent, and the surplus, if any, distributed among the poor.

Dedication of a road or way.

A road or way is validly dedicated by the owner of the land declaring in the presence of witnesses that he has constituted it as such. But those lawyers who consider consignment necessary to the completeness of a *wakf* require that one person should pass over the way, in order that it may serve as evidence of user. According to Hillâl, the same rule applies to a bridge. Declaration alone (according to Abú Yusuf), or user by one individual extinguishes the right of private property over such objects.(1) And the *Fatwa* is on this.

A burial-ground.

"When a body has been buried in the ground, whether for a long or short time, it cannot be exhumed without some excuse. But it may lawfully be exhumed when it appears that the land was usurped, or another is entitled to it under a right of pre-emption.

" Auzjundi being asked with regard to a masjid for which there no longer remained a congregation and all around it had gone to decay, whether it was lawful to convert it into a cemetery, answered 'No :' and being asked with regard to a cemetery, in a village, where it had gone to decay, and there remained in it no traces of the dead, not even bones, whether it was lawful to sow the land and take its produce, answered 'No,' for in legal effect it is still a cemetery."

Cemeteries.

" A man makes his land a cemetery or an inn—the *kharâj* abates, if the land were *kharâji*, and this is correct."

" When a woman has made a cemetery of part of her land, divesting herself of the property and has buried her son in it, but the piece of land is unfit for a cemetery by reason of an overflow of water upon it, and she wishes to sell the land, if it be still in such a state that people desire to bury their dead in it, she cannot sell it, but if they have no such desire she may."

A cemetery or graveyard is consecrated ground and cannot be sold or partitioned. Even lands which are not expressly dedicated but are covered by graves are regarded as consecrated and consequently inalienable and non-heritable. But when a place is found not to be a *makbara* (a burial-ground), but only one or two bodies are buried there, the actual spot where the bodies lie buried is con-

(1) *Fatâwai Alamgiri*, Vol. II. p. 556.

secrated.(1) Whether a place is a *makbara* or not depends on the number of persons buried there, or evidence of dedication derived from the testimony of witnesses or reputation.

"When there is no fund or other means to repair a mosque with, a portion of the land or the outer premises may be leased for a term to raise money for the repairs."(2)

Application of the funds of a mosque. *The Ahl-ul-mahalla.*

"No portion of the funds of the mosque should be spent for its ornamentation unless a provision to that effect has been made by the *wâkif*.(3) But the *ahl-ul-mahalla* (*i.e.*, people of the locality where the mosque is situated), may do so at their own expense."(4)

"The paraphernalia of the K'aaba is a *wakf* on the K'aaba, even until they are torn to pieces, so that no article can be removed unless lawfully disposed of by the *mutwallis* for the purposes of the shrine. And this principle applies to [all] mosques, &c."

"It is lawful to make a *wakf* of lands or property for the maintenance and preservation generally of mosques, *rubâts*, and other pious charitable institutions."(5)

"A dedication in favour of a mosque is absolutely lawful according to Abû Yusuf, for a mosque exists forever until the Day of Judgment, and can never revert to private proprietorship even though it be ruined and wholly disused, nor can its material be taken to any other mosque, and on this is the *Fatwa*."(6)

"It is allowable for *Zimmis* [non-Moslems] to enter the holy shrine of the K'aaba, the sacred temple at Jerusalem, and all mosques for the purposes of work and other proper purposes, but their going to the *mihrâb*(7) of the mosque or the *maiza*(8) is objectionable."(9)

"All acts of indecency within the precincts of a mosque are forbidden, nor must one wash himself or expectorate or indulge in indecent talk or take instruments of war inside it. But a soldier may go in and offer his prayers and leave directly."(10)

---

(1) See *Mir Nur Ali* v. *Majidah* [1831], 5 Sel. Report, p. 136.
(2) *Radd-ul-Muhtâr* after the *Hâwi*.
(3) *Ibid*
(4) *Ibid*.
(5) *Ibid*.
(6) *Ibid*, see *post*.
(7) The principal place in a mosque where the imâm stands, a kind of high altar.
(8) The place for religious ablutions.
(9) *Radd-ul-Muhtâr* after the *Hâwi*.
(10) *Ibid*.

"It is not proper for any person to enter a mosque unless he is clean. The gate of a mosque should not be kept closed at any time. If there is fear of theft, and there is no gate-keeper, there is no objection to keep the doors closed at other than prayer-times."(1)

Compulsory acquisition of land for enlarging a mosque.

"If a mosque requires enlargement, and there is a piece of land adjacent to it which the owner refuses to sell, it is lawful to take it from him on payment of its proper price, whether he be willing or not."(2)

"Nothing belonging to a mosque should be given away, not even grass or old articles, such as mats (unless they can fetch no price), but should be sold for some value to be applied for the purposes of the mosque."(3)

The *ahl-ul-mahalla* or "people of the quarter."

The *ahl-ul-mahalla* can pull down a mosque and reconstruct it in better style, or improve it in any other way, and supply superior articles; but this they can only do with their own money, but *not* with the money of the *wakf*, unless the sanction of the Kâzi is obtained beforehand. This is stated in the *Khulâsa*. The *ahl-ul-mahalla* can also construct reservoirs for drinking and washing (*Wuzû*) provided the consecrator is not known; otherwise his prior permission must be obtained. His heirs, however, cannot raise objections to any improvement which the *ahl-ul-mahalla* may propose to effect in the mosque."(4)

"The *ahl-ul-mahalla* can, with the sanction of the Kâzi, sell the materials of a disused and ruined mosque and build another with the proceeds thereof."

"A mosque is the property of God. The statement in the *Hedâya* is founded on weak authority." A mosque, therefore, cannot be resumed or treated as private property.

"In the *Bazâziah* it is laid down that the *wâkif* cannot derive any benefit from the hire of any portion of the building of the mosque."

"Though a mosque may be ruined and be never used, still it is a mosque, for ever consecrated to the eternal worship of God until

---

(1) *Radd-ul-Muhtâr*, Vol. III, p. 575.
(2) *Ibid.*
(3) *Hâwi.*
(4) *Ibid.*

the Day of Judgment, according to Abû Hanîfa and Abû Yusuf, and on this is the *Fatwa*, as is stated in the *Hâwi-ul-Kûdsi*."(1)

"When a mosque is so utterly ruined that it cannot be used or the people have abandoned praying in it, according to Abû Yusuf, it and all articles appertaining to it will be applied *with the sanction of the Kâzi* to another mosque."

"The same principle applies to all such institutions. In other words, when no benefit can be derived from a disused *langar-khâ-nèh*, well, cistern, &c., the materials or any thing appertaining to them will be applied to the nearest mosque, *langar-khânéh*, &c. This doctrine is universally accepted as stated in the *Durrar*." Application of the funds of a disused *wakf*.

"But whether a mosque has become ruined or dilapidated, or the people have no further need, owing to another mosque close by, still it will not revert to the ownership of the *wâkif*, nor will it be lawful to take it or its property to another mosque and on this is the *Fatwa* as stated in the *Hâwi-ul-Kûdsi*."(2) "And so it is in the *Mujtaba*, in the *Bahr* and in the *Fâth-ul-Kadîr*. And in the *As'aâf* it is stated that Abû Hanîfa and Abû Yusuf are in accord." Application of the funds of a disused mosque.

The author of the *Radd-ul-Muhtâr* discusses more fully the doctrine enunciated in the *Hâwi* that, according to Abû Yusuf's views, the ruined mosque or articles devoted to it, or property dedicated for it, cannot be applied to another mosque. He states first, that in the *Bahr ur Râik*,(3) the *Multaka* and the *As'aâf*, it is expressly laid down that when a building or cistern or reservoir is ruined or abandoned, it may be applied with the leave of the Kâzi to another object nearest in character, *e.g.*, a mosque to a mosque, a well for a well, &c. Then he goes on to say, that this may seem inconsistent with the views of Abû Yusuf on which is the *Fatwa*, but he says in Abû Yusuf's rule there is no *restriction*. "And in the *As'aâf* and the *Fatâwai Kâzi Khân* it is laid down that it is permissible. And Syed Imâm Abû Shujâ'a was asked 'whether it was lawful to apply the income of a *langar-khânèh* which had become disused to another close by?' He answered, 'yes, as in the case of a mosque which has become ruined and the people of the Discussion of the rule.

(1) *Radd-ul-Muhtâr*, Vol. III, p. 574.
(2) *Ibid.*; the Kâzi has the power to permit these acts to be done.
(3) P. 575.

village have given up praying there. The matter should be taken to the Kâzi and his leave obtained, and thereupon it would be lawful.' In the *Zakhîra* it is stated from Shams-ul-Aimma al-Halwâni that he was asked a similar question as to an abandoned mosque, and he answered in the affirmative. And Shaikh ul-Imâm Amîn ud-din ibn Abd-ur-'ulaâ, Shaikh ul-Imâm Ahmed ibn Yunus ash-Shibli, Shaikh Zain ibn Nujâim, Shaikh Mohammed al-Wafâi and others have given *Fatwas* to the same effect'' . . .

The *Fatwa*. . . . . "It is sufficient to rely on the *Fatwa* of Imâm Abû Shuja'a and Imâm Halwâni, especially in these days when it is frequent for the care-takers, embezzlers, and other dishonest people to steal and usurp the property of disused mosques, &c.''(1)

In the *Hâwi* it is stated (by way of an example) that when one reservoir has become destroyed and there exists no need for it, the *wakfs* attached to it will be applied in support of other reservoirs.

Application of the endowment of a disused mosque, &c.

It is laid down in the *Khulâsa*, that when a mosque or reservoir has fallen to ruin and there is no further need for them, the inhabitants having left the neighbourhood, the *wakfs* attached to them will be applied to other mosques or reservoirs.(2) For the same reason, if the sovereign or his delegate were to withdraw a piece of land from the *Bait-ul-Mâl* and grant it to an individual for the construction of a canal for the use of the public, and subsequently, owing to the depopulation of the country, there exists no need for such a canal, the grantee does not acquire the land as his private property; he will hold it subject to the condition of storing water for the use of flocks and cattle. According to the Shâfeïs he would take it absolutely.

The *Nahr* states thus the result of the above principles:— According "to us"(3) when the beneficiaries of a particular appropriation have ceased to exist, the proceeds arising therefrom will be applied to a *wakf* of the same nature. Consequently, the *wakfs*

(1) *Radd-ul-Muhtâr*, Vol. II, p. 642.

(2) When the Sovereign or Imâm (the chief of the commonwealth) withdraws a piece of land from the Public Treasury (*Bait-ul-Mâl*), that is, makes it revenue free and *designates the purpose to which the income derivable from it should be applied*, it becomes *wakf*. Mere withdrawal of land from the *Bait-ul-Mâl*, or declaring it rent-free, does not render it necessarily *wakf*, though it resembles in its nature a *wakf*.

(3) Meaning the Hanafis.

of one mosque will be applied to the support of another mosque and of a reservoir to another reservoir. To withdraw land from the *Bait-ul-Mâl* is analogous to the creation of a *wakf*. And, therefore, when land is thus withdrawn and given to a person for the construction of a canal for the use of the public, it will on the failure of the canal be applied to the watering of the flocks and cattle and similar objects. Application of the endowment of a disused mosque, &c.—contd.

If the cattle belonging to a *wakf* become unfit for work, the *mutwalli* is entitled to remove and sell them.

Things belonging to the mosque but not needed may be sold by the *mutwalli* with the sanction of the Judge where there is one.

When a village, in which there exists a brick-built well or reservoir, has become completely depopulated, the materials of that reservoir or well may, with the sanction of its *wâkif*, or, in his absence, of the Kâzi, be used for the building of another well or reservoir in a contiguous village.

When anything is dedicated to a mosque which afterwards becomes ruined, the subject of the dedication does not revert to the grantor or his heirs, but will be used for the nearest mosque.

When the subject of the *wakf* is unfit for the purpose for which it is intended, the *wakf* will be avoided. For example, if a piece of land be dedicated for a cemetery, and a corpse be even buried in it, but if it afterwards appear that the place is unfit for a burial-ground, and people are unwilling to use it as such, the dedicator may sell it, for the place is not suited for the purpose for which it is intended, and that circumstance would avoid the *wakf*.

If a land dedicated to some "good" purpose has become uncultivated, and owing to its distance from town no person is willing to take a lease thereof, and no profit can be derived from it, nor can any building be raised upon it, such land may be sold according to Kâzi Khân, with the sanction of the Kâzi and its proceeds applied to other meritorious purposes.

If a road or path which leads to a mosque becomes dilapidated, it can lawfully be repaired with the funds of the mosque, when it is the only mode by which the members of the congregation can gain access to the mosque. Similarly, if a *langar-khâneh* is created on the banks of a river and people have access to it only by means of a bridge, and the bridge becomes dilapidated, it may be repaired out of the funds of the *langar-khâneh*.

SECTION IV.

PRINCIPLES APPLICABLE TO CASES WHERE THE PRIMARY OR INTERMEDIATE OBJECTS HAVE FAILED.

In connection with the foregoing subject, it must be remembered that the failure or non-existence of the initial or primary object of a *wakf* does not, under the Hanafî Law, affect the operative character or validity of the *wakf*, or avoid it. So also the failure or extinction of the intermediate objects only accelerates the ultimate reversion, but does not cancel or avoid the *wakf*.

The *cy-près* doctrine in Mussulman Law.

Consequently, when a *wakf* is made in favour of children that are unborn, or of any other non-existing object, it is valid.(1)

"When a *wakf* is made in favour of Zaid's children (and Zaid has no children existing at the time), or to a *masjid* which has not been erected, the appropriation is valid, and the rents and profits will be applied to the support of the poor, until children are born to Zaid, or the mosque is erected. This is according to the *'Imâdia*. In the *Nahr ul-Fâik* it is stated further, that when the object for which the consecration is made has not come into actual existence, but the purpose can be carried into effect, the rents and profits will be applied to that purpose so far as it is possible to do so. For example, when a man makes a grant for the support of the students of a madrassa which has not been erected, if lectures are given to students in any other building, such students will be entitled to support from the *wakf*."

"The object of a *wakf* may be non-existent," says the *Radd-ul-Muhtâr*, "in two ways:—*Firstly*, the beneficiary may be non-existing when the *wakf* is made, when it is called *wakf munkat'aa-ul-awwal* (*cut off initially*); and *secondly*, the persons, for whom the *wakf* is made, may cease to exist after the creation of the *wakf*, when it is called *wakf munkat'aa-ul-wasat* (*cut off in the middle*). Examples of both classes of cases are given by Kâzi Khân, *e.g.*, a man makes a *wakf* for the children born of his loins, if he has no children at the time, it is a *wakf munkat'aa-ul-awwal*, and the rents and profits will be applied to the benefit of the poor." "If children are born to him afterwards, then the rents and profits will be paid to them."(2)

---

(1) *Radd-ul-Muhtâr*, Vol. III, p. 641; *Fatâwai Kâzi Khân*, Vol. IV, p. 87.
(2) *Radd-ul-Muhtâr*, Vol. III, p. 641.

"Similarly, as stated in the *As'aâf*, when a settlement is made in favour of one's *walad* (child), and there is no *walad* existing at the time, but there is a grandson, the income of the *wakf* will be given to the grandchild until a child is born to the *wâkif*."

"An example of the second or *wakf munkat'aa-ul-wasat* arises in this way :—a *wakf* is made in favour of two sons and *after them* in favour of their children and children's children, and subsequent thereto one of the sons dies leaving him surviving the other son, it is a *wakf munkat'aa-ul-wasat*. In this case, half of the rents and profits will go to the surviving son and the remainder to the poor and indigent, and when the surviving son dies the entire rent and profits will be given to *his* children,(1) for the *wâkif* has reserved the interest of the *wakf* for the grandchildren only after the demise of both the sons. But should it appear that the intention of the *wâkif* was that the surviving son should take the entire benefit, or the interest of the deceased son should descend to his issue, effect would be given to such intention."

Intention of the *wâkif* to be strictly regarded.

"The *Khairiyèh* states the law somewhat differently, *viz.*, where the object of the *wakf* is not existing or ceases to exist, the rents and profits will be applied to purposes nearest the object for which the donor intended the *wakf*. This view, however, is not according to 'us' (that is, Hanafî doctors), but represents Shâfeï doctrines. According to the Shâfeïs, where a *wakf* is made in favour of lineal descendants and they fail, the *wakf* will be applied to other people 'nearest' to the *wâkif*."(2) According to the Hanafîs, it will be given to the poor.

"When a man makes a *wakf* of his property,—a moiety in favour of his poor kindred, and a moiety in favour of the indigent generally, it has been held that the relatives, in case of indigence, will be entitled to a share in the other moiety."

"Ibrâhîm ibn-Yusuf and Ali ibn-Ahmed al-Fârsi and Abû J'aafar Hindwâni are in agreement on the point. And it is stated in the *Nahr*, that the same is the view of the Kâzi ul-Kuzzât Maulâna Ali al-Halabi, who wrote his *Risâlat-ul-Kubrâ* about the period when Maulâna Mohammed Shah Bâderna's rule came to an end. And in the *Fatâwai Kâzi Khân* it is laid down that, according to the approved doctrine, when a *wakf* is made in favour of an

(1) *Radd-ul-Muhtâr*, Vol. III, p. 641.
(2) *Ibid.*

individual *and* the poor generally, if that person subsequently becomes poor he is entitled to participate in the *wakf* for the poor."

Hanafi Law—Distribution of a *wakf* to a wife and son.

"According to Kâzi Khân, if a man were to make a *wakf* of his land, a moiety in favour of his wife and the other in favour of his son Zaid, with a condition that upon the wife's death, her moiety should be *wakf* for his (the grantor's) children, Zaid would be entitled to participate in that moiety also as one of the children. The wife's moiety would therefore go to Zaid and the rest of the *wâkif's* children, and Zaid's moiety would be for him alone. There is no difference of opinion on this point."

The *cy-près* doctrine in the Mahomedan Law.

Mere vagueness or uncertainty will not lead to the failure of a *wakf*, for in such a case the law does itself supply the defect by declaring that the trust should be in favour of such objects as approach nearest in character to the intended object of the *wakf*; or, even when that is not expressed, be applied to the support of the poor and needy. In the absence of explicit directions on the part of the *wâkif*, the Judge has the power of framing a scheme by himself or in consultation with the beneficiaries, for the administration of the *wakf*. The principle, therefore, laid down in *Morice* v. *The Bishop of Durham*,(1) which has been occasionally endeavoured to be applied to *wakfs*, is not applicable to trusts or consecrations under the Mahomedan Law. For the *cy-près* doctrine is carried to the utmost limit in the Moslem system, and the failure of the original purpose does not in any case cause the failure of the *wakf*.

The poor are the ultimate beneficiaries in every *wakf*.

The poor form, by necessary implication of the law, the ultimate beneficiaries of every *wakf* created in favour of individuals or the descendants of the *wâkif*. Where, therefore, the primary object fails, such failure instead of voiding the *wakf* "only accelerates" the ultimate application.

Again, where the dedication is to a religious or charitable institution, which, in course of time, ceases to exist, the property so dedicated, instead of reverting to the grantor or his heirs, should be applied, as already pointed out, to some other religious or pious institution, similar in character to the one which has failed, or to any other object by which benefit may accrue to human beings.

(1) 10 Vesey, p. 399.

CHAPTER XIII.

The Income of the Wakf Estate, How to be Applied.

The *Fatâwai Alamgiri* citing the *Hâwi li'l-Kudsi*, says (1) "the income of the *wakf* property is to be expended, in the first place, on necessary repairs, whether the *wâkif* has made it a condition or not, and next, if nothing else has been specified, on such things as are nearest to the principal object [*lit.* the building], in other words, on such objects as are most essential to the general purpose or policy of the dedication, as, for instance, in providing an imâm for a mosque and a professor for a college, to the extent of their needs, then on the attendants (*lit.* man for lighting lamps and spreading carpets), and so forth, to carry out the purpose. But if anything else has been specified, the income must be applied to that immediately after the repairs."

The *Durr-ul-Mukhtâr* states the rule in identical terms.

Similarly, in the *Hedâya* it is laid down, "that it is incumbent that the income of the *wakf* should, in the first instance, be expended in its repairs [or maintenance], whether the *wâkif* has made a condition to that effect or not, inasmuch as his object was that the income should form a perpetual fund, and as a perpetual income cannot be derived from the *wakf* property unless it is maintained in proper condition, this is a necessary concomitant to it." Application of the income of a *wakf*.

The *Radd-ul-Muhtâr* states as follows:—"The rents and profits arising from a property which is constituted *wakf* must first be applied towards its preservation and maintenance and the payment of the wages of the care-taker or custodian."

"The income of the *wakf* must be first applied in keeping the property in a proper condition so as to yield a permanent income. If the *wakf* property consists of fruit-bearing trees, a portion of the income must be spent in buying new plants. So, also, if it is land, which without irrigation will not yield any crops, the first charge

(1) *Fatâwai Alamgiri*, Vol. II, p. 468.

on the income must be to do the needful for that purpose ; so it is stated in the *Muhît* and the *Fatâwai Kâzi Khân.*''(1)

In case of immovable property, therefore, all expenses incidental to its due maintenance in proper condition according to its nature, must be first paid out of the income ; the wages of persons entrusted with its preservation and management stand on the same footing. The balance is to be applied for the purposes of the *wakf*. If the *wakf* is in favour of individuals, such as the *wâkif's* children, it is to be applied to their benefit or given to them as the case may be, in accordance with the provisions of the *wakfnâmah*. If there are no express provisions, the application will be in accordance with the general design of the *wakf*. If the intention of the *wâkif* was that his children should be supported with the income of the *wakf*, it will be done according to his wishes.

Similarly, in the case of a *wakf* for any other purpose. The general design of the trust should be kept in view, even when the particulars are not sufficiently defined.(2)

Disbursements from *wakf* property.

''For example, if a dedication is made for a *madrassa* and nothing further is said, the residue of the rents and profits after deducting the cost of maintaining the building shall be applied to maintain the proper staff of teachers. When the dedication is to a mosque, the balance shall be applied to the employment of the usual servants and the supply of the usual articles of furniture, &c., necessary for the performance of the worship, even though the *wâkif* should not have mentioned it.''

The primary object should be to maintain the purpose for which the dedication is made. If a dedication is made to a mosque and the salary set apart for the imâm is not sufficient to employ one, the provision made by the donor should be set aside and a reasonable allowance should be made for that purpose. A mosque once dedicated should not be allowed to lie useless. The result is that, in the first place, the cost of maintaining the *wakf* should be defrayed from the income, and after that, each object should take precedence in accordance with its relative importance. But if the expenses are specified by the *wâkif*, care will be taken to carry out his wishes with due regard to the primary object of keeping up the *wakf*.

(1) *Radd-ul-Muhtâr*, Vol. III, p. 598.
(2) *Durr ul-Mukhtâr in loco.*

"In the application of the proceeds, the first thing to which attention should be directed is the maintenance of the *wakf*. Should the entire income be necessary to put the *wakf* buildings or property in repair, it may be so applied, and in the case of a mosque, no person, not even the imâm or muezzin should get any salary until the repairs are made." [This passage shows the importance which is attached to the maintenance and preservation of the *wakf*. The primary object of the *wakf* being the perpetual consecration of the property for meritorious or pious purposes, the law insists that the first duty of the curator should be to preserve the building in a state of repair, and if it is in such a condition that it is likely to fall into ruin, the income is to be applied primarily to its restoration and repair.] "If anything remains over after defraying the cost of repairs, it should be given to those whose discharge would cause injury to the *wakf*. After this has been done, the other matters connected with the *wakf* should be carried into effect with due regard to their relative importance. Those people from whose dismissal no injury would accrue(1) will not get any portion of their allowance until the absolutely necessary repairs are completed. But when those people do work for the *wakf* they will get their proper wages, though not the allowance fixed in the *wakfnâmah*."(2) This refers to a case where the income is not sufficient to defray the cost of urgent repairs as well as the full allowance of the servants of the *wakf* or of the beneficiaries.

Maintenance of the *wakf*.

"When the *wâkif* has provided that after defraying the cost of repairs and maintaining the institution, the surplus should be distributed among the poor or the beneficiaries, it is nevertheless incumbent on the *mutwalli* to deduct every year a certain sum from the income for repairs, even though there is no immediate need for it—so as to enable him to provide a fund therefor; for it may so happen that, owing to some unforeseen contingency, there may not be any income at the time."

The mode in which a *wakf* building ought to be used.

"If a house is made *wakf* for another person, he is entitled only to the income arising therefrom but not to occupy it. Similarly, the person for whose occupation the house is made

(1) Such as the supervisor, the *kâtib* (writer) and rent-collector.

(2) According to the *Nahr-ul-Fâik*, the *Ashbâh* holds they ought to get their fixed salary.

Kazi's discretion.

wakf is not entitled to its income." The correctness of this doctrine appears to have been doubted, and in any case the Kâzi would have it in his discretion to authorise any act which may be beneficial to the *wakf*. The principle, however, which is deducible from the above doctrines is, that the beneficiaries cannot, of their motion under any circumstance, change the nature of the dedication.

In the *Sharh-Wahbânieh* by Sharnibilâlièh, it is stated that among the persons considered necessary for the maintenance of a *wakf* are included, the superintendent, the *imâm* (who leads the prayers), the *khatîb* (who reads the *khutba*), the *muezzin*, whether the *wâkif* has made a condition to that effect or not, after the repairs. The *Bahr-ur-Râik* holds the door-keeper and care-taker of a mosque whose duty it is to keep it clean as necessary adjuncts of a mosque.

If there are any debts on the *wakf* property, the *mutwalli* should, either by leasing the property or in any other reasonable manner, liquidate such debts.

If there is no income at all accruing from the *wakf*, and the endowed property is going to ruin, the Kâzi has the power to authorise the *mutwalli* to let temporarily the whole or any portion of it, and with the proceeds thereof to repair it. Where the income of the *wakf* premises is not sufficient to cover the outlay on its maintenance, or when the *wakf* is falling into ruin, and there is every probability of its dissolution, and the income is not sufficient to cover the cost of repairs, the Kâzi has the power of directing that it may be sold and with the proceeds thereof certain other property may be purchased subject to the same trust.

This doctrine is laid down by Abû Yusuf and it will be acted upon as long as it is possible to do so. If it is impossible to sell the *wakf* property or to apply the proceeds of the sale for the beneficiaries or for the benefit of the poor, in that case only effect would be given to the doctrine of Mohammed, that where the purpose has failed absolutely, the property should revert to the heirs of the donor.

"When a *wakf* is made for students *and the wakf is small*, only poor students will be supported. But generally the word 'student' implies want, and when a *wakf* is made for students in general, it is confined to indigent students alone, for students are

almost all in straitened circumstances. Similarly, the *wakf* of a Koran in a masjid and books in a madrassa is generally confined to the poor, unless it can be shown that the books are not available." According to the *Khulâsat-ul-Waknièh*, however, in the case of a *wakf* of books or of a *wakf* to students, the poor stand in the same category as the well-to-do. It further lays down the principle that such *wakfs* may be looked upon from two points of view :—that the poor and rich are equal as in the case of *mussâffir-khânèhs*, cemeteries, tanks, &c., the benefit of which is shared by all alike. "In respect of the benefit arising out of these objects of *wakf*, custom makes no difference in the position of an indigent and a well-to-do person. In the case of a *wakf* of books, the rich student stands in the same position as the poor regarding the difficulty of obtaining some of the books ; and it must be remembered that the object is to benefit all." This seems to be the generally accepted doctrine.

Wakf in favour of students.

If a *wakf* is made of books for a specified place, their use will be restricted to that place, and the books will not be allowed to be taken away from there. And if it is for students, then every student is entitled to make use of them, but cannot remove them from the place. In matters relating to the use of a *wakf* the provisions made by the *wâkif*, if legal, should be followed. The jurists look upon the conditions imposed by the *wâkif* as conditions imposed by the law (the *Nass*). But in order that any restrictive condition may be binding, it must be satisfactorily proved that the *wâkif* really and intentionally imposed the same.

"When the *wakf* is in favour of individuals, the building cannot be enlarged without their consent." In other words, the beneficiaries of a trust have a right to be consulted in any alteration in the character of the *wakf* as may be likely to entail serious expenditure.

"If a house is made *wakf* for the dwelling of another, the duty of keeping it in repairs devolves on him. If he has no means, the Kâzi may let it for a while, and with the rent thereof repair the same."(1)

House dedicated for the residence of another.

If the person for whose residence the house has been dedicated agrees to pay rent whilst it is undergoing repairs, the

(1) Comp. the *Durr-ul-Mukhtâr*, p. 414.

Kâzi may leave him in occupation. If it is the *mutwalli* himself who is entitled to reside in the *wakf* and he fails or cannot keep it in repairs, the Kâzi has the power to compel him or to appoint another curator *pro tem* to carry out the repairs. But after the work has been done and its cost fully disbursed, the house should be restored to the person for whose habitation it was dedicated.(1)

When a *wakf* building is falling into ruin, the *mutwalli* is not entitled of his own authority to sell the trees planted within it for the purpose of repairing the house, but he can hire out the house, and with the rent thereof repair the building.

(1) Comp. the *Durr-ul-Mukhtâr*, p. 414.

CHAPTER XIV.

GENERAL PRINCIPLES.

SECTION I.

THE POWERS OF THE WÂKIF.

IT is lawful for the *wâkif* to reserve the governance of the *wakf* for himself during life; this is by consensus. He can also lawfully reserve for himself the usufruct for life according to Abû Yusuf "and the *Fatwa* is thereon."(1)

It is also lawful for the *wâkif* to make a condition to the effect that the *wakf* premises may be exchanged for other property or that it may be sold, and the proceeds thereof invested for the purposes of the *wakf* in other lands or investments with the income of which the objects of the trust may be carried out. And the new property will become subject to the same rules as the former whether he has made a condition to that effect or not.(2)

The power of altering investments or changing the property.

As regards the power to exchange the *wakf* property for other property, in other words to alter the investment, the rule is divisible under three heads: (i) if the donor has reserved to himself or to the *mutwallis* generally the power of making the exchange, in such a case, the exchange may be made without any question; (ii) if no power is reserved, but the property yields no profit, in that case an "exchange" may be made with the sanction of the Kâzi; (iii) if it is merely for the advantage of the *wakf* to make the exchange, in such a case the "exchange" is not lawful unless the exchange or alteration is necessitated by altered conditions of the locality or it is to the manifest advantage of the *wakf*. The main object to be kept in view is the permanent maintenance of the dedication.

---

(1) *Durr-ul-Mukhtâr*, p. 415; *Radd-ul-Muhtâr*, Vol. III, p. 598; Comp. *Doe dem. Jaun Beebee* v. *Abdollah Barber*, supra.

(2) Baillie, p. 597; *Fatâwai Alamgiri*, Vol. II, p. 494.

With regard to the question whether the property dedicated yields any profit or not, the test generally laid down is whether it yields enough for its "repairs" or upkeep.

The early lawyers attached great importance to the dedication of land or immovable property (*'akâr*) for the purposes of a *wakf*.as ensuring perpetuity, and it is often declared, therefore, that when land is "exchanged" it should be for land. But there is no rule of law to prevent, under the conditions of modern life, the investment of the proceeds of a *wakf* property in other forms of "trust securities."(1)

The *wâkif* can lawfully reserve for himself the power of altering the investment, and in the *Fatawâi Kâzi Khân* it is laid down that "this is correct, and in another place that it is correct, *bi'l-ijmâ'a* (by consensus)."

Condition of exchange lawful.

When there is a condition in the *wakf* "that the *wâkif* may exchange the land for other land as he pleases and that the land so obtained shall become *wakf* instead of the first," both the dedication and the condition are lawful according to Abû Yusuf, and so also when there is a condition "that he may sell and make an exchange for the price;" and the *Fatwa* is in conformity with it.

When the *wâkif* reserves to himself the power of altering the investment he may appoint an agent for the purpose, but if he should bequeath the power to an executor, the executor of such executor cannot exercise it. And if the power is reserved to another and himself, the other cannot exercise it singly, but the endower himself may lawfully do so. When the power to "exchange" is given to "every one that may preside over this *wakf*," it is lawful, and every president (*mushrif*)(2) may exercise the power. But when the endower has declared "on condition that such an one shall have the power of exchanging," the person authorised cannot exercise the power after the death of the *wâkif* without an express condition to that effect. The *kyyum*

(1) The following passage in the *Nahr-ul-Fâik* quoted in the *Durr-ul-Mukhtâr* shows in fact that there is no limitation to the discretion of the Judge: "if the order for change is made by a just Judge (*Kâzi-ul-jimnah*), even if it be for [investment in] *dirhems* and *dinârs* (money) there is no fear of loss [to the *wakf*.]"

(2) The *mushrif* is the person who is vested with supervisatorial functions over the *wakf*; his powers are larger than those of the ordinary *mutwalli* or *Kyyum*.

or administrator has no power to exchange unless expressly authorised to do so. And when it is made a condition that *he* may exchange, the endower may also exercise the power without a similar condition in his favour.

Ordinarily, after the "exchange" has once been made in accordance with the power specifically reserved, it cannot be made a second time, unless there are words indicative of an intention that the *wâkif* or the person to whom he reserves the power may alter the investment according to his discretion whenever he thinks fit.

When there is no provision in the *wakf* regarding *istibdal* or alteration of the trust-property or even when the *wâkif* has made a condition against it, the Judge has the power of directing a change. And this is one of the exceptions to the rule that the prescriptions of the *wâkif* are absolute and must be strictly carried out.(1)

When a man has said, "My land is a pious *mowkoofa* to Almighty God for ever, on condition that I may *employ* the produce as I please," he may lawfully do so. But if he should give it to the indigent, or employ it in pilgrimage, or bestow it upon a particular individual, he cannot reclaim it. And in like manner, if he should say, "I have given it to such a one," he has no power to reclaim it. He may give it to one set after another, but he cannot apply the proceeds to his own purposes. It would be different if he had said "on condition that I may *give* it to whomsoever I please."(2)

Conditions made by the *wâkif*.

Where a *wakf* is made subject to a condition that the *wâkif* shall have the power of giving the produce to whomsoever he pleases, the *wakf* is lawful; and he shall have the power of doing whatever he likes with the income during his lifetime, but he cannot make any disposition respecting it to continue binding after his death, nor can he apply the income to his own purposes (*lit.* cannot eat of the produce himself). His doing so, however, will not *avoid* the *wakf*. But he may bestow it on anybody he likes. A man makes a *wakf* of his estate on condition that the

(1) *Durr-ul-Mukhtâr*, p. 415; see *post*.

(2) The difference lies in the Arabic expressions. What has to be borne in mind is the condition relating to the application of the proceeds laid down by the *wâkif* at the creation of the *wakf*, as even he cannot depart therefrom.

administrator may give the produce as he pleases, this is lawful; and he may give it to both rich and poor. If the *wâkif* at the time of dedicating his property were to say, "on condition that such an one (some other person, generally referring to the *mutwalli*) may give the produce to whomsoever he pleases," it is lawful; and the power may be exercised by that person either during the lifetime of the appropriator or after his death, and the person so authorised may give the income to his own child and descendants, and also to the child and descendants of the *wâkif*, but not to himself.

[It is not clear what the effect would be, if the person authorised were to take the profits of the *wakf* estate himself. The *Fatâwai Alamgiri* goes on to say that "the power does not pass out of his hands on his saying 'I have given the produce to myself.'" A mere declaration may not have the effect of destroying the power, but will not an unlawful application of the income to his own use amount to breach of trust?]

The *Radd-ul-Muhtâr* adds that, according to those jurists(1) who hold a man cannot make a *wakf* in his own favour, if the *mutwalli* were to give the proceeds of the property dedicated to the *wâkif*, it would not be lawful. But this doctrine is not now recognised as the law; for the rule universally observed is that a person may validly make himself the first beneficiary of the trust. According to this rule "upon which is the *Fatwa*," the *mutwalli* may give the usufruct lawfully to the *wâkif*.

"If a person were to say, 'my land is a pious *wakf* for the sons of such a one on condition that I may select of them whom I please,' it would be as he has said, and he may select as he pleases or give the whole to one; and if he were to say, 'I make no selection this year,' it would be lawful, and the produce would be [divided] among them all equally. And if he were to say 'on condition that I may deprive whom I please among them,' and he were to deprive them all but one, it would be lawful; and though *by analogy* he should not be able to deprive them all, he has that power also, *on a favourable construction.* But he cannot restore those whom he has deprived and the *wakf* would be for the poor. If he were to say 'I have deprived them of the produce of this year,' they have no right in that year's produce and it passes to the poor."(2)

Conditions that may be imposed by the *wâkif*.

(1) Those who follow the doctrines of Imâm Mohammed.

(2) See *Fatâwai Alamgiri*, Vol. II, pp. 495 to 504; Baillie, p. 595, *et seq.*

If a man were to constitute a *wakf* in favour of the mother of his children (*umm-ul-walad*),(1) subject to the condition that if she marries after his death she is to have nothing, and she does marry but is subsequently divorced; in these circumstances she has nothing, unless it were provided that in the event of her being divorced, she should be restored to the benefit of the *wakf*. In like manner, when a *wakf* is for the sons of such a one except those who go out of the city, and some of them go out but return again, or when it is for the benefit of the sons of such a one who are acquiring knowledge, and some of them abandon their studies which afterwards they resume, the parties continue to be deprived of the benefit of the *wakf*, in the absence of any condition to the contrary. And if one should make his land a *pious wakf* on his child and *nasl* forever, and after them on the poor with a condition that any of them, who may leave the sect or doctrine of Abû Hanîfa for that of Shâfeï shall lose the benefit of the *wakf*, those abandoning the sect will be deprived of its benefit.(2)

Similarly, if he had said when any one of them shall leave the doctrine of the Sunnis and become a heretic he shall be excluded and one of them does so, he is to be excluded. A man and woman are on the same footing and when it is made a condition that if one should depart from the established doctrine he is to be excluded; and one of them does so and then returns, he is not to be restored to the benefits of the *wakf* without an express condition to that effect. In like manner, when a particular doctrine has been specified and there is a condition that if anyone should depart from it, he is to be deprived of the benefit of the *wakf*, regard must be had to the condition. So also, when the condition is "that if any of my kindred go from Bagdad he is to have nought," respect must be had to the condition, except that in this case if he were to return to Bagdad, he would be restored to the benefits of the *wakf*.(3)

Among the prescriptions of the *wâkif* that must be respected, Khassâf has mentioned a condition that the *mutwalli* shall not let the lands, and if he does let them, (without the sanction of the Kâzi) the lease shall be void. If the *wâkif* makes a condition

Prescriptions of the *wâkif*.

(1) *Umm-ul-walad* is the designation given to a female bondswoman who bears a child to her master, and thus becomes enfranchised.

(2) *Fatâwai Alamgiri*, Vol. II, p. 504

(3) *Ibid*.

that he shall not enter into an agreement for gardening or cultivation on the basis of a division of produce, or provides that when the *mutwalli* lets the land he shall be removed from the office, in such cases if he should act contrary to the conditions he is to be removed and the Kâzi shall appoint another, whom he can trust to carry out the condition.

Power to alter the beneficiaries.

The *wâkif* can reserve to himself, at the time of the dedication, the power to alter the beneficiaries of the trust by either adding to their number or excluding some, or to increase or reduce their interest in it. He cannot do so afterwards. "The *wâkif*," says the *Radd ul-Muhtâr*, "has no power to alter or change the conditions (provisions) of a *wakf*, unless he has expressly reserved to himself the power of doing so."(1) If he has reserved to himself the power of adding to the beneficiaries or removing any person from that category, or of removing the *mutwalli* from his office, it would be lawful for him to do so. No alteration, however, can be made in the nature or character of the *wakf*. Similarly, it is not lawful for the *mutwalli* to go beyond the conditions laid down in the *wakfnâmah*.

A condition in the *wakfnâmah* to the effect that the *mutwalli* shall have the power of increasing the allowance of anybody or reducing it or adding anybody or removing anyone is lawful. "At the same time, the *maslahat-ul-wakf* (the policy of the *wakf*) is to be kept in view."(2) "If a person," says Kâzi Khân, "in good health were to make a *wakf* of land for the indigent and deliver it over to a *mutwalli*, and at the time of his death direct his executor to pay out of the proceeds thereof so much to so-and-so, that would not be valid, for he had parted with his right over the proceeds at the time of the *wakf*. But he can do so, if at the time of dedication he reserved to himself the power of giving directions for the application of the proceeds."

The powers of the *wâkif*.

Nor can the *wâkif*, who devotes property to any meritorious or pious uses and transfers the proprietary right therein to the Almighty, take it back at his pleasure from the *mutwalli* whom he has constituted God's proxy and give it to another person, unless on

(1) Comp. *Hedaitoonnissa* v. *Afzal Hossain*, 2 All. H. C. R., 420.

(2) *Maslahat* here means the policy or purpose. What is intended to be conveyed is undoubtedly this, that in any alteration which may be made, the original purpose or object or policy of the trust shall *not* be ignored.

the creation of the trust he reserved to himself in express terms the right to do so.

If a person were to declare, that if necessary the *wakf* land may be sold and the proceeds invested in other property, all the incidents of *wakf*, as already stated, would attach to the new property, which will be subject to the same conditions as the original property.(1)

In carrying out the provisions of the trust the intention of the consecrator must be solicitously regarded, and in case his meaning is not distinct, recourse should be had to evidence to explain the meaning, and the inferential shall be considered equally with the actually expressed.(2)

Conditions laid down by the *wâkif* are equivalent to the prescriptions of the Law.

When the language is upon the face of it unequivocal and unambiguous, no outside evidence will be let in for the purpose of altering or modifying the intentions of the *wâkif*. For example, if the *wâkif* has declared in unequivocal language that he endows certain property for his children who are females, no evidence will be admitted to show that he also intended to include males. But where, from the language of the *wakf* itself, it can be inferred that he meant to include the males, though using the word 'females,' they would participate with the female children. In understanding, however, the meaning of the donor from the actually expressed words, consideration should be paid to the circumstances of the particular case and the customary use of language among the people.

If the words are capable of two meanings, the construction most consistent with the intention of the *wâkif* should be adopted.

SECTION II.

THE SUPERVISORY FUNCTIONS OF THE KÂZI.

"IN the Chapter on *Wakf* in the *Inâm-ul-Mufti 'aala Jawâb ul-Mustafti*, it is laid down that the observance of the provisions laid down by the *wâkif* are obligatory, for the jurists hold such rules to be equivalent to the *Nass*, *viz.*, rules laid down by the Lawgiver."

The Kâzi's authority to interfere with the *wâkif's* directions.

---

(1) *Radd-ul-Muhtâr*, Vol. III, p. 599.
(2) *Ibid*, Vol. II, p. 644.

Conditions inconsistent with the nature of the *wakf*.

But the Kâzi, and, in certain cases, the *mutwalli*, are entitled to override any condition made by the *wâkif* which is inconsistent with the nature of the *wakf* or opposed to the requirements of the very object for which the *wakf* is constituted. For example, if there is a condition to the effect that the Kâzi shall not remove the *mutwalli* appointed by the *wâkif* or his successors in office, the Kâzi would nevertheless be entitled to remove any *mutwalli* who proved himself unfit or committed misfeasance or misbehaved himself in the trust. Or, if it is stated in the *wakfnâmah* that the *mutwalli* shall not grant a lease of the *wakf* property for more than one year, and it appears that no person is willing to take a lease for a year, the Kâzi has the power to authorise the *mutwalli* to let the land for more than a year. Or, if the *wâkif* has declared that no alms should be given to the indigent who derive their subsistence from a certain mosque, the *mutwalli* is empowered nevertheless to give alms to such people. Or, if he has provided that the person for whom the *wakf* is constituted shall get fixed rations daily, the *mutwalli* may, with the consent of the beneficiaries, commute the same into money payment.(1) The beneficiaries may even ask for commutation.

The Kâzi is also authorised to increase the pay of the imâm, if it is insufficient, and if the officer is learned and religious, *i.e.*, deserving.

The several exceptions to the rule declaring that the prescriptions of the *wâkif* must be strictly carried out, are stated at length in the *Ashbâh-wan-Nazâir*. Their purport has already been given, but they may be summarised here with advantage.

The Kâzi's supervision.

"(1) Should the *wâkif* make a condition that the Kâzi shall not have the power of dismissing the *Nâzir* or *mutwalli*, the Kâzi nevertheless will have the power of dismissing a *mutwalli* who has been found to be untrustworthy or incompetent. And in the *Bahr-ul-Râik* it is laid down that even if the *wâkif* were to make a condition that the King or Kâzi shall not interfere in the management of the *wakf*, still the Kâzi will have his superintendence over it, for his supervision is above everything.

"(2) If the *wâkif* has made a condition that the *wakf* property shall not be leased for more than a year, and it appears that nobody

---

(1) *Radd-ul-Muhtâr*, Vol. II, p. 601.

is willing to take a lease for one year only, or if it appears that it is to the advantage of the beneficiaries that the property should be let for a longer term, the Kâzi has the power of authorising the grant of a lease for a longer term, but the *mutwalli* has no power to do so of his own authority.

"(3) If he has made a condition that so much grain should be bestowed on the beggars asking for alms at the door of his mosque, the condition may be varied, and the alms may be bestowed on such beggars as do not ask for alms there.

"(4) If he has made a condition that cooked food should be bestowed on the recipients, the *mutwalli* will have the power of giving them the value thereof, and the recipients can even ask for payment in cash.

"(5) If the *imâm* is a learned and pious man, and the allowance fixed by the *wâkif* for him is not sufficient, the Kazi has the power of increasing it.

The power of increasing the emolument of the *imâm* includes the salary of all such persons whose withdrawal would be to the injury of the *wakf*. For example, if a *mutwalli* or a *muezzin*, or a professor in a college, or door-keepers and such like cannot be entertained for the remuneration fixed, the Kâzi has the power of increasing their salaries or wages; and this view is supported, says the author of the *Radd-ul-Muhtâr*, by the statement in the *Bazâziah* that when an *imâm* or *muezzin* cannot be employed on the prescribed salary, the judge can increase the emolument from the profits of the *wakf* (1) in consultation with people of integrity (or respectable people) of the neighbourhood (*ahl-us-salâh min ahl-ul-mahalla*).(2) But in fixing all emoluments he should keep in view the customary remuneration (*ujr-ul-misl*).

The Kâzi, however, cannot create a (new) *wazifa*, in other words new offices in respect of a trust-property, without a condition to that effect by the *wâkif*.

This, again, is subject to an important qualification. The author of the *Radd-ul-Muhtâr*, commenting on the text in the *Durr-ul-Mukhtâr*, says, "be it noted(3) that the invalidity regarding the creation of new offices is confined to the absence of

(1) *Radd-ul-Muhtâr*, Vol. III, p. 647. (2) After the *Kinia*.
(3) In the original, "Know."

necessity (مقيد بعدم ضرورة)), as is stated in the *Fatâwai* of Shaikh Kâsim; for whenever necessity arises, and it becomes advisable to employ the services of a new officer for any work such as the collection of tithes or rent or giving evidence before the *Diwân*,(1) the matter should be placed before the Kâzi, and the need (for such employment) should be established before him, and he would appoint a fit and proper person for the purpose, and fix for him the customary remuneration, or give the *nâzir* (the *mutwalli*) permission to the same purpose."(2)

Although the *mutwalli* has no power to appoint new servants or to increase the stipends of those already in service, yet where the consecrator has not fixed the stipends or allowances, he has a general discretion subject to the control and direction of the Judge. In this connection the following passage in the *Fatâwâi Kâzi Khân* is of importance. It says, "if a person were to make a *wakf* of rest-houses for the poor (travellers), and it becomes necessary to appoint a servitor to keep them clean and open the doors, the *mutwalli* may engage one even allotting a room for his services."(3)

"(6) If there is a condition to the effect that the *wakf* property shall never be changed, should the Kâzi deem it advisable he has the power to authorise the same."(4)

The Judge's discretion regarding the alteration of the *wakf* property is controlled by the consideration that the new property or investment ensures the permanent maintenance of the consecration and is to its benefit. At one time this discretion seems to have been so capriciously exercised as to give rise to serious abuse; and accordingly, says Mufti Abû S'aûd in his *M'aarûzat* "in 951 of the Hegira an august Edict (*al-amr ush-sharîf*) was issued with the approval of the Sadr-ush-Sharîyàh(5) declaring that no alteration (exchange) of *wakf* property should take place without the sanction of sovereign authority."(6)

[All this is by way of example and is by no means exhaustive.]

---

(1) The Exchequer or Court.

(2) *Radd-ul-Muhtâr*, Vol. III, p. 646.

(3) *Fatâwai Kâzi Khân*, Vol. IV, p. 222.

(4) *Surrat-ul-Fatâwa*, p. 420; Comp. the *Ashbâh-wan-Nazir*, p. 308, 7th exception.

(5) The Chief Justiciary, prototype of the modern Shaikh-ul-Islâm.

(6) *Durr-ul-Mukhtâr*, p. 416; *Radd-ul-Muhtâr*, Vol. III, p. 603.

(7) The author of the *Zawâhir-ul-Jawâhir*, which is a commentary on the *Ashbâh-wa'n-Nazâir*, adds another exception to the general rule regarding the absoluteness of the *wâkif's* prescriptions. He says, "if the *wâkif* were to declare that the superintendent (*mushrif*) appointed by him should have sole charge of the *wakf*, and the Judge were to consider it expedient to associate some one else with him, it would be lawful to do so," as in the case of an executor.(1)

(8) Tahtâwi states on the authority of Sirâj Hanouti(2) that there is a further exception; *viz.*, if the *wâkif* were to lay down that the *wakf* property was not to be leased for more than a certain rent fixed by him, and the ordinary rent was higher than what he had fixed, his direction must be departed from.

(9) In early times, the reading of the Koran over the graves of deceased persons was, in accordance with the views of Abû Hanîfa, regarded by some as objectionable. And, accordingly, it is stated in the *Ashbâh-wa'n-Nazâir* that if the *wâkif* made a condition that the Koran should be recited over his or any body else's grave, that condition should not be obeyed.

Imâm Mohammed, however, has held it to be permissible that the Koran should be read over graves; and its lawfulness is "the accepted doctrine."(3)

In India, it is the common practice to employ readers of the Koran to recite it over the graves of deceased persons.

One jurist has attempted to lay a restriction on the power of altering the investment, by imposing a condition that the thing for which the *wakf* property is exchanged, or the new investment should be of the same nature as the former property. The author of the *Radd-ul-Muhtâr*, however, holds that there should be no such restriction, as it is essential to see which investment is most profitable. For example, a man may have made a *wakf* of shops, and it may be more profitable to invest in land the proceeds arising from the sale of such shops, as yielding

(1) *Viz.*, as the Judge has the power, when he deems it expedient, of associating a co-executor with an executor appointed by the testator, he has the power of joining a *co-mutwalli* with a *mutwalli* appointed by the *wâkif*; *Durr-ul-Mukhtâr*, p. 416; *Radd-ul-Muhtâr*, Vol. III, p. 602.

(2) A well-known jurist flourished in the 16th century of the Christian era.

(3) *Radd-ul-ul-Muhtâr*, Vol. III, p. 602; Comp. *Biba Jan* v. *Kalu Hossain* [1908], I. L., 31 All., 136.

a larger income for the purposes of the *wakf*. Or he may have consecrated a piece of land for cultivation; but in the course of time owing to change of conditions it may be more profitable to build houses or shops on it. In such cases the *mutwalli* is empowered to alter the mode of user.(1)

Hence, when the power is vested in the *mutwalli* or the *wâkif* to dispose of the *wakf* property and invest the proceeds in other property similarly subject to the conditions of *wakf*, there should be no such restriction as to insist that the new property should be of the same character or nature as the former property.

The proceeds of *wakf* property may be invested in *dirhems* and *dinârs*.(2) It must be remembered, however, that when an investment takes the form of actual money, there is a possibility of the fund being wasted, and therefore it is undesirable to keep the proceeds of a *wakf* in that shape. If, however, it is in a shape from which profit can accrue without loss to the *corpus*, as in the case of Government Securities, the investment is lawful.

Not only has the *wâkif* the power of reserving to himself the power of removing beneficiaries but he may validly make at the time of dedication conditions for excluding, in certain eventualities, particular beneficiaries or class of beneficiaries from the benefit of the trust; or he may provide that certain persons or class of person for reason assigned by him shall not participate in it or be appointed as *mutwalli*.(3) For example, if he were to declare that abjuration of Islâm should cause a divestment of interest in the *wakf* or a particular person should not derive any benefit from it, owing to his misconduct, it would be valid; and his wishes will have effect given to them.

As the right to participate in the benefits of a *wakf* is not acquired by virtue of inheritance, Act XXI of 1850 does not affect these provisions of the Mussulman Law.

---

(1) *Fatâwai Kázi Khân*, Vol. III, p. 222.

(2) See the *Radd-ul-Muhtâr*, Vol. III, p. 600.

(3) *Radd-ul-Muhtâr*, Vol. III, p. 600; *As'aáf*, p. 89, Cairo Ed. See *Khajah Salimullah* v. *Abul Khair Mustafa* [1909], I. L., 37 Cal., 263.

Section III.

The Conditions in Wakf.

A *wakf* with an option.

When a dedication is made subject to the exercise of an option on the part of the *wâkif*, according to Abû Yusuf, "the *wakf* as well as the condition" are valid, provided there is a determinate period fixed, within which the option should be exercised. For example, if a man were to say, "I constitute this house as *wakf*, but I shall have an option to set it aside within three days," if the option is not exercised, the *wakf* becomes absolute after three days, but if the time is uncertain and wanting in specificness, the *wakf* is invalid.

The jurist Abû J'aafar holds that in such a case the *wakf* should be considered as valid, and the condition void (*bâtil*). Hillâl and Mohammed hold that the reservation of an option invalidates the *wakf* itself, whilst Yusuf ibn Khâlid declares that the *wakf* is valid in all cases, the condition alone being void. And this seems to be the generally received doctrine.(1)

If a person were to make a dedication for a specific period of time, say, for a day, or a month, without any additional words, it would take effect as a lawful *wakf in perpetuity*. But if he were to say that it will be a *wakf* for a particular month, and on the expiry of that month, the *wakf* will be void—in such a case, the dedication would be void *ab initio*.

Contingent *wakf* void.

If a man were to say "when to-morrow comes my land will become a pious *wakf* (*sadakah-mowkoofa*)" or "when I become its *mâlik*, the land will be *wakf*," it is unlawful, for the creation of a *wakf* cannot be made dependent on the happening of a contingency.

A *wakf* for a limited period takes effect as a *wakf* in perpetuity.

If a person were to say, "my land will be *wakf* after my death for a certain number of years," it will take effect after the death of the declarant as a *wakf in perpetuity*.

If a man were to say, "my land is a pious *wakf* (*sadakah-mowkoofa*) on this condition, that I shall have the power of revoking it whenever I chose," according to Hillâl, such a *wakf* is invalid. Yusuf ibn Khâlid, however, holds that the *wakf* is valid, and the condition void. And Abû Yusuf is of opinion that where the time for the exercise of the power is prolonged and undefined, the *wakf* itself is invalid.(2)

(1) *Fatâwai Kâzi Khân*, Vol. IV, p. 199.

(2) This view is adopted as law by the sect.

Similarly, if a man were to say, "I consecrate this land on the condition *that it remain my property*, and I shall have the power of selling it whenever I like, and of dedicating the proceeds thereof,"—such a *wakf* is invalid.

A conditional *wakf*.

When a *wakf* is created conditionally, it is valid, *e.g.*, if a person were to say, "this land is *wakf*, if it is mine," in that case if the land was his property at the time, it would constitute a valid *wakf*.

Divergence between Hanafî and Shâfeï doctrines.

According to the Hanafîs, the *wakf* of property belonging to another is validated by the ratification of the real owner; not so according to the Shâfeïs.

Power of conversion reserved at time of dedication.

If a man were to say, "this land of mine is *mowkoofa* for God in perpetuity on condition that I shall have the power to sell it, and with its price to buy another piece of land which will then become *wakf*, subject to the same incidents as the original *wakf*," both *wakf* and condition are valid according to Hillâl and Abû Yusuf. *And this is correct.*"(1)

Kâzi may authorise sale when advantageous for the *wakf*.

The *wâkif* can alter the investment only when the power of sale has been expressly reserved. In the absence of any such power, the Kâzi, if he deem it expedient, may authorise the sale of the *wakf* property and a re-investment of the proceeds in any shape conducive to the proper maintenance of the *wakf*.(2)

"The author of the *Manah* was asked regarding a house consecrated in favour of a mosque, whether it would be lawful for the Kâzi to direct its sale if he was of opinion that with the price thereof another piece of land may be purchased, which would bring considerably more profit to the *wakf*. The author of the *Manah* answered 'the question is for the Kâzi to decide judicially, so that if he considers deliberately that such sale and investment are for the benefit of the *wakf*, it is lawful,' and this is according to the opinion of Kâzi Imâm Abû Yusuf."(3)

Sale or exchange of *wakf* property when authorised.

"In the *Fatâwa's-Sirâjia* it is stated that when the sale or exchange of a *wakf* property is distinctly advantageous to the *wakf*, the Kâzi may direct it. For example, if no income is derived from the property, and somebody is anxious to purchase it, and in lieu thereof is willing to give such land or house as would yield an

(1) *Radd-ul-Muhtâr*, Vol. III, p. 600.
(2) *Ibid.*
(3) *Surrat-ul-Fatâwa*, pp. 420, 421.

income for the *wakf*, in that case the exchange is authorised according to Abû Yusuf as well as Mohammed."

"Where the *wakf* property yields an income, but some person is desirous of exchanging it for another property yielding a much larger income, *e.g.*, if the *wakf* property is a *bazaar* situated in a lane and the person anxious to take it is willing to exchange it for a *bazaar* situated in a better place; in such a case, but not otherwise, the exchange is lawful according to Kâzi Abû Yusuf, &c.; on this is the practice."(1)

"In the commentary of Nâzim-Wahbâni it is stated upon the authority of the *Muhît* and Kâzi Khân, &c., that according to Imâm Mohammed the *mutwalli* is authorised to exchange for a better and more productive piece of land the one dedicated, if it has deteriorated in productive powers."(2)

"In the *Tâttima* it is reported from Hishâm and Mohammed, that when a *wakf* [property] is in such a condition that the beneficiaries cannot derive benefit therefrom, the Kâzi is authorised to sell it and with its price to buy another, and this power nobody else can exercise excepting the Kâzi."(3)

"And in the *Siyar-i-Kabîr* it is stated that although some jurists have held the change of *wakf* property not to be lawful, according to Abû Yusuf it is lawful; and in the *Muhît* it is stated that the following question was put to Shams-ul-Aïmma Halwâni, 'whether when the *wakf* of a mosque [property consecrated to a mosque] becomes useless and cannot yield an income, the *mutwalli* can sell it and in its stead buy another?' He answered, 'yes, it is lawful.' He was then asked, 'whether it would be lawful to do so when the property does yield an income, but with its price a better property can be purchased.' He answered, 'yes, it would be lawful.' Though some of the jurists hold against exchange or sale of *wakf* property, I have already stated that we conform to the rule laid down by Abû Yusuf."(4)

---

(1) *Surrat-ul-Fatâwa*, pp. 420, 421.

(2) In all instances where a *mutwalli* is spoken of as having the power of selling or exchanging a property which does not yield an income or of making a better investment, unless such power is reserved in the *wakfnâmah*, it must be exercised with the sanction of the Judge.

(3) *Surrat-ul-Fatâwa*, p. 421.

(4) *Ibid*, pp. 422, 423.

"If the *wâkif*," says the *Fath-ul-Kadîr*, "has made a condition to the effect that he should have the power of exchanging the land dedicated, and the land for which it is exchanged would become dedicated in place of the other, such a condition is valid according to Abû Yusuf, Hillâl and Khassâf; and this is *istehsân* (a liberal or equitable interpretation of the law)."

"If he has made a condition to the effect that the *mutwalli* should have the power of changing the investment during his (the *wâkif's*) own lifetime, the *mutwalli* will not have the power of making the change after the *wâkif's* death."

Alteration of the subject of a *wakf*.

"In the *Fatâwai Kâzi Khân* it is stated that the rule laid down by Abû Yusuf and Hillâl is correct. So has Ansâri declared that such a condition is lawful, but it cannot be sold [by the *mutwalli*] without the sanction of the Judge. And when this matter is brought before the Judge, and it appears to him necessary for the benefit of the *wakf* (that the investment should be changed), he should give the sanction"....."A condition for the alteration of the investment is lawful according to Abû Yusuf, and *this is approved;* and in the *Fatâwai Kâzi Khân*, it is stated that there is *Ijmâ'a or consensus* on the part of the universality of jurists on the lawfulness of a reservation of power to the *wâkif* to change the investment, both condition and *wakf* being valid. Without such condition he will not have the power to make the change [unless authorised by the Kâzi]. In other words, if he has reserved the power at the time of dedication, by *consensus* he can exercise the power at any time himself; but when he has not reserved such power, then he must have recourse to the Kâzi for the necessary permission.....In the *Mukhtasar-ul-Kudûri* it is stated the *nass* (express dictum of Law) is on the rule laid down by Abû Yusuf."(1)

The general result of the authorities seems to be that the *wâkif* may lawfully change the *wakf* property, in other words, alter the investment provided he has reserved, at the time of dedication, power to that effect. Otherwise, no alteration can be effected without the leave of the Kâzi or Judge, who has the power to authorise a change of investment whenever he considers it beneficial for the *wakf*.

(1) *Fath-ul-Kadîr*, Vol. II, p. 639.

Among the conditions which the *wâkif*, under the Hanafî Law, may lawfully make at the time of dedication is one which has already been given at another place, *viz.*, that the *wâkif* may provide for the payment of his debts with the income of the property.(1)

Powers of the *wâkif* regarding the governance of the trust.

" In the Chapter on *Wakf* in the *Khazânat-ul-Fatâwa* it is stated that the Sâhib-ul-Manah (the author of the *Manah-ul-Ghuffâr*) was asked about a deed of *wakf* in which there was a condition to the effect that the *wilâyèt* of the trust should appertain only to the *wâkif's* male descendants, but now a deed has been discovered bearing a prior date, in which the *towliat* was given to his male as well as female descendants ; the question was which deed should be acted upon [in regard to the *towliat*]. The Sâhib-ul-Manah answered, if the *wâkif* in the first deed or at the time of dedication reserved to himself the power of altering any of the provisions regarding the management, &c., of the *wakf*, in that case the second deed should be acted upon, that is, the deed in which the *towliat* is restricted to his male descendants. But if he reserved to himself in the original *wakf* no such power, in that case the first deed of *wakf*, *viz.*, in which there was no restriction, should be acted upon."(2)

" In the *As'aâf* it is stated that the *wâkif* cannot go beyond the conditions laid down at the time of dedication."

" In the *Fawâid* it is stated from Khassâf that when there are two contradictory conditions made by a *wâkif*, the second is to be acted upon, unless it is beyond his powers."

" When there are two contradictory provisions in a *wakfnâmah*, the one which follows will be given effect to, according to us [Hanafîs] as the last condition overrides the first."

With reference to the principle that when there are two contradictory conditions in a *wakfnâmah*, the second has effect given to it in preference to the first, the *As'aâf*(3) gives examples of it. For example, if in the beginning of the *wakfnâmah*, the *wâkif* declares

(1) *Fath-ul-Kadîr*, Vol. II, p. 638.

(2) *Surrat-ul-Fatâwa*, p. 425.

(3) The *As'aâf* is the work of Allâmah Burhân-ud-din Ibrâhim Trâbulusi, *i.e.*, of Tripoli. Of this work Moulâna Mohammed Amin, the author of the *Radd-ul-Muhtâr*, speaks thus :—" Should the exigencies of this world make it necessary for any individual to study the law of *wakf*, he should study the *As'aâf*, as it is the greatest authority on the subject."

Powers of the *wâkif*—contd.

that the subject-matter of the *wâkf* shall not be "sold nor given in gift or become the property of anybody," and subsequent to that declares that it will be lawful for the *mutwalli* to sell the property, and with the proceeds thereof to purchase another property, which will be substituted for the original *wakf*, in such a case the sale of the *wakf* will be valid, and the second condition will override the first. Or, if he were to say first, that the *mutwalli* may sell the *wakf* property and purchase something else in its stead and afterwards declare that it shall not be sold or given in gift, then it will not be sold. But, when the two conditions are not contradictory, and it is possible to give effect to both of them, then it will be incumbent to carry out both, for the conditions of the *wâkif* are like the *nass* (express dictum of the Law). When there are general provisions and after them come the details, these (unless otherwise apparent on the document) will apply to the last condition, according to "us."

According to the Shâfeis, these details refer to all the conditions, if the connection is with an "and" (*waw*); but only to the last condition, if the connection is with "then."

The Kâzi's powers.

As already stated, the Kâzi has the power of associating a *mutwalli* with the one appointed by the *wâkif* even though the *wâkif* may have made a condition against it, should the Kâzi consider it would be beneficial for the trust to do so.

Miscellaneous.

When a person makes a dedication by a deed, and afterwards says he does not know what is contained therein, or that he did not intend to create an irrevocable *wakf*, in such case, if it appears from the evidence of witnesses or otherwise, that the document was either read by or explained to the person, and that he fully understood its purport, his denial will be of no avail. "And this principle does not apply to *wakf* alone but to sales and all other transactions."(1)

A *wakf* created with a knowledge of its effect absolutely binding.

A person, intending to make a *wakf* of his lands in a particular village, gives instructions at the time of his death for the preparation of a document therefor. The writer, however, by mistake leaves out certain plots of lands. If at the time of reading the document, the *wâkif's* attention is not called to the omission, but he says that

(1) وهذا لا يختص بالوقف بل البيع وسائر التصرفات يكون كذلك

Fatâwai Kâzi Khân in loco; see *Fatima Begum* v. *The Advocate-General* [1881], I. L., 6 Bom., 42.

he dedicates all that is contained in that village, the *wakf*, according to the jurist Abû Lais, will take effect with reference to all the lands. The same principle applies to a dedication made in health. The essential point to consider is whether he intended to adhere or not to his expressed intention of dedicating all his lands.(1)

In the *Khazânat-ul-Muftîn*, it is stated that when a person has made a *wakf* in favour of certain specific individuals, without designating any ultimate trust of a permanent character, and has not had the document (*sick*) of *wakf* sealed by the Kâzi, he may, if he falls into poverty, apply to the Kâzi to allow him to revoke the *wakf* "so as to relieve him of his poverty." The impressment of the seal of the Kâzi is equivalent to the registration of a document in British India.

When a *wakf* is made of land, everything appertaining to the land, such as tenements, roads, ghauts, trees, &c., attached to, or on the land, passes under it, but not partible produce. When land is dedicated for a cemetery, whilst big trees and buildings are on it, they will not be included in the *wakf*, although it may have been stated in the *wakfnâmah* that the dedication is "with all appurtenances and rights."

If there are fruit-bearing trees on the land or a *hammâm* attached to the premises dedicated, and the dedication is made with the expression "with all appurtenances and rights belonging thereto," they will be included in the *wakf*.

Wakf for digging graves for the poor.

A *wakf* for digging graves for the poor and providing shrouds is valid.

An opinion has been expressed by Imâm Ali as-Sughdi that a *wakf* in favour of Sufis is not valid. But this view is contradicted by other jurists. And the Shams-ul-Aïmma has stated that a *wakf* is valid for all who are needy and indigent, and that when a *wakf* is made for a large body of people, it should be taken as referring to the poor and indigent among them; and if the *wakf* is general in its terms so as to include both rich and poor alike, the persons or the class of persons for whom the benefit is intended should be distinctly indicated, or it must appear from the words of the *wâkif* that though the terms are general, the intention is that indigence should furnish the claim to share in the benefit. For example, if the *wakf* is for orphans generally, it is valid, and its benefit shall

(1) *Fatâwai Kâzi Khân in loco.*

be applied to the poor among them. Hence, a *wakf* is valid for the lame and paralytic and the blind, the readers of the Koran, lawyers, traditionists, &c., and it will be expended on the poor among them, for indigence is clearly inferrible from these words. As the blind, the lame, those who devote themselves to study and such like, cannot apply themselves to obtain a livelihood, hence, indigence or want is their normal condition. And, accordingly, a *wakf* in favour of Sufis also is valid, for they are generally very poor and lead a life of austerity.(1)

(1) *Radd-ul-Muhtâr*, Vol. III, p. 665.

CHAPTER XV.

THE GOVERNANCE OF THE WAKF.

SECTION I.

THE MUTWALLI.

"THE *wâkif* may lawfully reserve the *wilâyèt* (the management of the trust) for himself; this is according to Abû Yusuf; and Hillâl also has said the same. And the Sâhib-ul-Hedâya [the author of the *Hedâya*] states this is the approved doctrine."(1)

Wâkif may reserve the governance for himself.

"In the *Fatâwai Kâzi Khân* it is stated that, according to Mohammed as given in his *Siyar-i-Kabîr*, the *wâkif* will not be the trustee unless he has reserved the trusteeship for himself at the time of consecration; but according to Abû Yusuf consignment is not necessary in the case of the *wâkif*, so even when he does not [expressly] reserve the trusteeship for himself, he will still be the trustee. What I have stated is also laid down in the *Zakhîra* and *Tâtimma*,(2) and the Sâhib-ul-Hedâya has mentioned that this is the approved doctrine in our *Mazhab* [school]."(3)

"The *wâkif* is primarily entitled to appoint a *mutwalli* for the management of the trust. If he is honest and just, he has a title superior to that of the Kâzi to nominate a trustee, for though he has parted with the property, and his right in it has become extinguished, still he has a right to see that its proceeds are applied according to the terms of the consecration."

"He has a better title to appoint a *muezzin* and *imâm* for a mosque than the congregation, unless his appointment is objectionable on the ground that the persons nominated by him are unfit.

---

(1) *Fath ul-Kadîr*, Vol. II, p. 640; see also the *Durr-ul-Mukhtâr*, the *Fatâwai Alamgiri*, &c.

(2) Two works of great authority; see *Doe dem. Jaun Beebee* v. *Abdollah Barber* [1838], 1 Fulton's Reports, p. 345.

(3) *Fath ul-Kadîr*, Vol. II, p. 640.

So it is stated in the *Nawâzil* and Abû'l Lais says the *Fatwa* is thereon."(1)

Similarly, in the *Radd-ul-Muhtâr* :—It is lawful for the *wâkif* to reserve the *towliat* (the governance of the trust) for himself. And where a *wakf* has been created, but the *wâkif* has appointed no trustee or *mutwalli* for the administration of the *wakf*, nor has expressly reserved the *towliat* for himself, the office would nevertheless appertain to him *quâ wâkif*.(2)

Power of appointing the *mutwalli* rests primarily with the *wâkif*.

He has the power of appointing a *mutwalli* during his lifetime whenever he likes. Should he die without making any express appointment, the power devolves upon his executor. "If there is no executor, then the right of appointing a *mutwalli* is in the hands of the Judge."(3)

"If the *mutwalli* appointed by the *wâkif* dies in his lifetime, the power of appointing another *mutwalli* rests with the *wâkif* and not in the Kâzi."(4)

So also in the *Fusûl-ul-'Imâdia*. "In the *Sughra* it is stated that when the *mutwalli* is dead, and the *wâkif* is alive, the power of appointing another *mutwalli*, appertains to the *wâkif* and not to the Kâzi. And if the *wâkif* is dead, it appertains to his executor in preference to the Judge. But if the *wâkif* leave no executor, then the Kâzi is empowered to appoint a *mutwalli*. . . . So in the *Khassâf*."(5)

Women eligible for a *towliat*.

Any person who is trustworthy and otherwise qualified to discharge the duties of the office may be appointed *mutwalli*. "In this respect men and women are alike," *i.e.*, a woman may be appointed a *mutwalli* in the same way as a man.(6) Sectarian and religious differences form no disqualification, and accordingly, the fact that a person is a Shiah does not disqualify him for the super-

(1) *Surrat-ul-Fatawa*, p. 425.

(2) *Radd-ul-Muhtâr*, Vol. III, p. 594 ; *Fatâwai Alamgiri*, Vol. II, p. 543 ; *Advocate-General* v. *Fatima Sultani Begum* [1872], 9 Bom. H. C. R., 19.

(3) *Radd-ul-Muhtâr*, Vol. III, p. 594 ; *Durr-ul-Mukhtâr*, p. 241.

(4) *Surrat-ul-Fatâwa*, p. 425.

(5) *Fusûl-ul-'Imâdia*, p. 237.

(6) *Radd-ul-Muhtâr*, Vol. III, p. 595 ; *Doe dem. Jaun Beebee* v. *Abdollah Barber*, 1 Fulton's Reports, 345 ; *M. S. Hyati Khanum* v. *M. S. Kulsum Khanum*, 1 Sel. Rep., 217 ; *Hussaini Bibee* v. *Hussain Sharif* [1868] 4 Mad. H. C. R., 23. When a woman is appointed a *Mutwalli* and a salary is attached to the office, "she will not be required to do more than her sex permits ; and she is entitled to discharge the duties to which she cannot personally attend by deputy or proxy."

intendence of a *wakf* made by a Sunni.(1) So long as a person can discharge the duties of the trust personally or through a deputy, he or she is qualified to hold the office of *towliat*.

"The office of *mutwalli* is an office of personal trust, and a person who cannot discharge the duties of the trust personally, nor be responsible for their due discharge, cannot appoint a deputy."(2)

Where the *mutwalli* has to perform religious duties.

But where the *mutwalli* has to perform religious duties or spiritual functions in connection with the *wakf*, which, as regards men, can only be performed by a man, a woman cannot be appointed to the office. For example, if the *mutwalli* is also the superior of a religious establishment, and, as such, has to officiate on occasions of religious festivals, a woman is precluded by her sex from holding the *towliat*.(3) Such superiors in India are called *sajjâda-nashins*. [*Sajjâda* is the carpet on which prayers are offered; and *nashîn* is the person seated thereon.] "The *sajjâda-nashîn* is not only a *mutwalli* but also a spiritual preceptor. He is the curator of the *dargâh* where his ancestor lies buried, and in him is supposed to continue the spiritual line (*silsila*). These *dargâhs* are the tombs of celebrated *dervishes*, who, in their lifetime, were regarded as saints. Some of these men had established *khânkâhs* where they lived, and their disciples congregated. Many of them never rose to the importance of a *khânkâh*, and when they died their mausolea became shrines or *dargâhs*. These *dervishes* professed esoteric doctrines and distinct systems of initiation. They were either *sufis* or the disciples of Miân Roushan Bâyezid, who flourished about the time of Akbar, and who had founded an independent esoteric brotherhood, in which the chief occupied a peculiarly distinctive position. They called themselves *fakîrs* on the hypothesis that they had abjured the world, and were humble servitors of God: by their followers they were honoured with the title of *shah* or king. Herklot gives a detailed account of the different brotherhoods and the rules of initiation in force among them. The preceptor is called the *pîr*,—the disciple, the *murîd*. On the death of the *pîr* his suc-

Dargâhs.

(1) *Doyal Chund Mullick* v. *Syud Keramat Ali* [1873], 16 W. R., p. 116. A person convicted of any ordinary offence, as defamation, abusive language, &c., is not considered unfit.

(2) *Piran Bibi* v. *Abdul Karim* [1891], I. L., 19 Cal., 203.

(3) *Shah Imam Bukhsh* v. *Beebee Shahee* [1835], 6 Sel. Reports, 22; see also *Mujawar Ibram Bibi* v. *Mujawar Hossain Sharif* [1880] I. L., 3 Mad., 95.

cessor assumes the privilege of initiating the disciples into the mysteries of *dervishism* or *sufism*. The relationship which exists between a *pîr* and his *murîds*, as I understand the theory and practice of *dervishism*, is a spiritual and personal one."(1)

The appointment of a *sajjâda-nashîn*.

Accordingly, the appointment of a child of tender years as *sajjâda-nashîn* would seem to be opposed to the constitution of the office. There is one instance, however, in which a boy of nine or ten years of age was appointed a *sajjâda-nashîn* by the last holder of the office, the work of initiation, &c., during his minority, being entrusted to a disciple or *khalîfa* (vice-gerent). In this case the office was hereditary in the family, and apparently there was no other member qualified to perform the spiritual duties. "The appointment of a *sajjâda-nashîn* of a *dargâh* must, to a large extent, however, be regulated by the practice followed in the particular *dargâh* or neighbouring *dargâhs*. Herklot describes the custom in vogue in the *dargâhs* existing in Southern India. And, so far as I am aware, that is consistent, with the practice prevailing in other parts of India, *viz.*, that upon the death of the last incumbent, generally on the day of what is called the *sium* or *teja* ceremony (performed on the third day after his decease), the *fakîrs* and *murîds* of the *dargâh*, assisted by the heads of neighbouring *dargâhs*, instal a competent person on the *gaddi*; generally the person chosen is the son of the deceased, or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the lifetime of the incumbent. But in every case the person installed is supposed to be competent to initiate the *murîds* into the mysteries of the *tarîkat* (*the holy path*)."(2)

Similarly, if the *wakf* relates to an institution where services special to one sect or one religion are held, a member of another sect or creed would not ordinarily be appointed for the *towliat* of such an institution.

"A *mutwalli*," says the *Hâwi*, "can delegate the trust to another on his death-bed like an executor."(3)

---

(1) *Piran Beebee* v. *Abdul Karim*, supra.
(2) *Ibid.*
(3) Comp. the *Durr-ul-Mukhtâr*, p. 421.

In the absence of any provision in the trust-deed as to the mode of succession, or of any evidence of usage, the *mutwalli* may, on his death-bed, nominate his successor, and such nomination will be valid without any judicial order. But in order that the nomination may be effective, it is necessary that the person so appointed should be adult and possessed of understanding. All the authorities are agreed that a minor cannot lawfully be appointed a *mutwalli*. The *Fatâwai Alamgiri* lays down the principle thus :— Succession to the *mutwallishîp*.

" And it is a condition to the validity (of the appointment of a *mutwalli*) that he should be adult and possessed of understanding ; and thus it is stated in the *Bahr ur-Râik*." A *mutwalli* must be *sui juris*.

So also in the *Radd-ul-Muhtâr* ; " the conditions necessary to the validity [of the appointment] are puberty (*bulûgh*) and understanding (*'aakl*)."(1)

But when the office of *mutwalli* devolves upon a minor by virtue of a provision in the trust-deed, for example, if the *wakf-nâmah* provides that the *towliat* should be confined to the male descendants of the *wâkif* or the members of a particular family, and it happens that at some time the person on whom the office devolves by virtue of this provision is a minor, in such a case the appointment will remain in abeyance until he attains *majority*, when the *wilâyèt* (*mutwallishîp*) would be transferred to him.(2) Devolution of *mutwallishîp* under the provisions of the trust-deed.

So, also, when the *towliat* is hereditary in a family, and the last incumbent appoints his minor son on his death-bed to be the *mutwalli*, the Kâzi shall not remove him, but appoint another to discharge the duties of the office during his minority.(3)

" In the *Anf'aa-ul-wasâil* it is written from the *Wakf* of Hillâl that if the *wâkif* has said thus, 'the *wilâyèt* is for my children,' and he leaves both adult and minor children, the Kâzi should appoint somebody in the place of the minors, or he may place the adult to represent the minors." Appointment of a minor.

But a minor cannot be appointed by a *sanad* [of the Kâzi] whether he is appointed by himself or with another, for by his incapacity he is unable to superintend the affairs of the *wakf*, nor can he appoint a deputy in his place.

(1) *Radd-ul-Muhtâr*, Vol. III, p. 595.
(2) *Ibid.*
(3) *Ibid.*

"If the *wâkif* appoints a minor as *mutwalli*, and no adult is associated with him, the Kâzi shall appoint some person to do the work until the minor attains majority. If there is an adult associated with the minor, the Kâzi may appoint some person to represent the minor and act jointly with the *co-mutwalli*, or may empower the adult *mutwalli* to act for the minor."(1)

Freedom and Islâm are not necessary conditions.(2)

Appointment of a bondsman and of a non-Moslem.

The *Radd-ul-Muhtâr*, after stating that puberty and understanding on the part of the *mutwalli* are necessary qualifications to a valid appointment, goes on to say "freedom and Islâm are not requisite. So if a minor is made an executor, according to *kyâs* (analogy),(3) it would be absolutely void; according to *istehsân* (liberal interpretation of the law), it would remain inoperative only so long as he is a minor; and when he attains majority the *wilâyet* (trusteeship) would revert to him. If the person appointed be a bondsman, the appointment would be valid both according to *kyâs* and *istehsân* for he possesses the personal capacity..... which the minor does not. The same is the case of a *zimmi* (non-Moslem fellow-subject). And should the Kâzi remove the bondsman from the *wilâyet*, he would not recover it on emancipation; nor the other on his adopting Islâm," which is different from the case of a minor.

It will be seen from this that although a bondsman or a non-Moslem fellow-subject may be appointed a *mutwalli*, it is in the discretion of the Kâzi to remove him if he considers that the appointment is prejudicial to the interests of the trust or is opposed to the wishes of the beneficiaries or that it is not expedient to have a person professing another faith as administrator of the endowment.

So also in the *Fatâwa-'l-Ankariwia*:—

When the *towliat* has devolved on a minor, an adult should be appointed to discharge his duties.

"Q.—If the *wâkif* has made a *wakf* with this condition that its governance shall belong to his children, and among his children are both major and minor, to whom is the *towliat* to be given.

A.—The Kâzi shall appoint somebody in place of the *saghîr* (the infant) and if he likes he may appoint the adult children as the *kâim-mukâm* (deputy) of the minors."(4)

(1) *Radd-ul-Muhtâr*, Vol. III, pp. 595, 596.
(2) *Ibid*, from the *As'âaf*.
(3) *i. e.*, Logically.
(4) *Fatâwa-l-Ankariwia*, Vol. II, p. 217.

"If the *towliat* has been entrusted [by the *wâkif*] to a boy, his *towliat* will remain in abeyance [or ineffective] until he attains majority when the trust will be made over to him."(1)

"If the *wâkif* appoints as *mutwalli* a person who is absent, the Kâzi has the power of nominating in his place another for the time-being, and when the *mutwalli* appointed by the *wâkif* arrives the trust will revert to him."(2)

As already mentioned it is only when the *wâkif* has made a condition at the time of dedication before the delivery of the property to the *mutwalli*, that he reserves to himself the power of removing the *mutwalli* or changing the property, that he may do so, but not otherwise.

If a person create a *wakf* and appoint another as the *mutwalli* thereof, and also make it a condition that such *mutwalli* shall not have the power of appointing by *testament his successor*, *such condition* would be valid.(3)

When a person makes a *wakf*, and at the time of his death appoints a person to be his executor without mentioning anything about the *wakf*, such executor shall nevertheless be the *mutwalli* of the *wakf*.(4)

If a man in health(5) were to make a *wakf* of his land for the poor and consign the same to a *mutwalli*, and subsequently at the time of his death, were to tell his executor to give out of the produce of the land, certain shares to so-and-so, and to do whatever the executor thinks best with it, and the executor acts up to the *wâkif's* instructions it will not be valid, for the *wakf* was complete from the outset, and the *wâkif* had no power to make any alteration unless he reserved the power to himself.

Section II.

The Appointment of the Mutwalli.

Appointment of the *Mutwalli*.

As already observed the power of appointing a *mutwalli* rests primarily with the *wâkif* and, in his absence, with his

(1) *Surrat-ul-Fatâwa in loco.*

(2) *Fatâwa-'l-Ankariwia*, Vol. II, p. 217, from the *As'aâf*.

(3) *Ibid*, Vol. III, p. 636; so also in the *Wajiz-ul-Muhit*, see *post*.

(4) *Durr-ul-Mukhtâr*, p. 421, and *Radd-ul-Muhtâr*, Vol. III, p. 634; *Fusûl-ul-'Imâdia*, p. 226.

(5) *I.e.*, when not suffering from any fatal illness which causes his death.

wasî or executor, "*because he is the wâkif's locum tenens.* It is only in the absense of an executor that the power of appointing a *mutwalli* to the *wakf* devolves on the Judge,(1) and a derivative executor or in other words the executor's executor has the same powers as the executor.(2)

A *mutwalli* appointed in general terms or whose appointment is not limited to the life-time of the *wâkif* stands in law in the same position, so far as the *wakf* is concerned, as an executor. And it is in consequence of this view that he is given the power of appointing on his death-bed or when suffering from a mortal illness, a successor.(3)

If the *wâkif* were to appoint two persons to be *mutwallis* of a *wakf* after his death, and one of them were to die appointing the other as his executor in the matter of the *wakf*, the survivor would be entitled to act as the sole *mutwalli*.(4)

An executor appointed only with reference to, or in respect of, the *wakf* properties would be a general executor, though Abû Yusuf differs in this view from the other jurists. According to the *As'aâf*, if a man were to appoint first a *mutwalli*, and then an executor (in respect of the same *wakf*), both would be *mutwallis* unless their duties are specified. The mode of specifying the functions is stated in this manner :—"The *wâkif* says, 'such piece of land of mine is *wakf* and so-and-so is the *mutwalli* thereof, and, as regards the rest of my property, so-and-so is the *wasi*.' In such a case the persons appointed have separate functions."

Advocate-General v. *Fatima Sultani Begum.*

In the case of the *Advocate-General* v. *Fatima Sultani Begum*(5) it was held that, according to Mahommedan Law, the appropriator has a right to reserve the superintendence of the *wakf* to himself or appoint some one else. But when he has specified the class from whom the manager is to be selected, he cannot disregard his own trust-deed and appoint a person not answering the proper description he has indicated by the provisions of the *wakfnâmah*, and his right of nomination of the person to succeed to the management on his death must be confined to the class mentioned in the *wakf*-

(1) *Durr-ul-Mukhtar*, p. 421.
(2) *Radd-ul-Muhtar*, Vol. III, p. 633.
(3) *Durr-ul-Mukhtar*, p. 421.
(4) *Fatawai Kazi Khan*, Vol. IV, p. 276.
(5) [1872] 9 Bom. H. C. Reports, 19, *supra*.

nâmah. This *dictum* must, however, be accepted with some qualification. If the *wâkif* at the time of dedication has reserved to himself the power of altering the class from whom the manager should be selected, his appointment of a person "not answering the description in the *wakfnâmah*" will not be invalid. The term *akriba*, though more properly confined to relations by blood, will, when the context shows that it was intended to be used in a wider sense, be so extended as to include relations by affinity, but the wife or widow of the founder is not included among his *akriba*.

Meaning of the term *akriba*.

Abû Yusuf holds that if a *wâkif* were to appoint a *mutwalli* during his lifetime, without mentioning that such appointment should continue in force after his death, the *mutwalli* would vacate his office on the death of the *wâkif*. The rule of law, however, is, that when an appointment is made without mentioning its duration, it does not cease on the death of the appointor.

If a person make a *wakf* during his lifetime, but do not appoint a *mutwalli* thereof even when death comes upon him, but appoint an executor, such executor will be the executor as well as the *mutwalli* of the *wakf*. This is according to Abû Yusuf and the *fatwa* is according to him. If, however, the *wâkif* appointed a *mutwalli* for the *wakf* during his lifetime, his executor will not be the *mutwalli* of the *wakf*.

In *Shah Ghulam Rahmutullah Sahib* v. *Mohammed Akber Saheb*,(1) the Madras High Court enunciated the recognised principle of Mahommedan Law, that when property is devoted to religious charitable purposes, it is usual for the appropriator to lay down rules for succession to the office of trustee, and upon those rules whether they are in writing or have to be inferred from evidence of usage, the question of succession depends. Should no rules be laid down, the power of appointing is vested in the appropriator during his life, and upon his death, it is vested in his executor; or, should he have left no executor, in the magistrate and sovereign power, that is to say, in the Court.(2)

(1) [1864], 1 Mad. H. C. R., p. 63.

(2) *Mohammed Sadik* v. *Mohamed Ali*, 1 Sel. Rep., p. 17; *Mohammed Kessori* v. *Mohammed Shah Kiyamuddin*, 5 Sel. Rep., p. 133; *Advocate-General* v. *Fatima Sultani Begum*, supra; *Phate Sahib Bibi* v. *Damodar Premji* [1879], I. L., 3 Bom., 84; *Agha Mahomed Eusoof Mushadee* v. *Abdool Hossain Khan*, S. D. A., 1857, p. 640; *Het Koonwar* v. *Chutterdharee Singh* [1870], 13 W. R., 396.

When the *wâkif* has provided that the appointment to the *tawliat* shall be made by his children,—and among his children, there are some who are minors, the Kâzi may authorise those who are adults to make the appointment on behalf of the minors as well as their own, or may associate some person with them to represent the minors.

In the *Anf'aa-ul-Wasâil* it is stated from Khassâf, that when a person has made a *wakf* of two pieces of land, and appointed two *mutwallis*, and subsequently at the time of his death appoints Zaid as his executor, Zaid will be a *mutwalli* with them; and if Zaid appoints 'Amr as his executor, 'Amr's position will be the same as that of Zaid.

If a person were to appoint two executors one after the other without removing the first, both of them would become executors, for "among us" (meaning the Hanafis), an executorship does not fall to the ground of itself. The appointment of a second *mutwalli* by the Kâzi is different from the appointment of a second *mutwalli* by the *wâkif*, for in the latter case both appointments are valid; but when two appointments are made by the Kâzi, the second appointment invalidates the first provided the first *mutwalli* becomes aware of the second appointment. "It is not expedient to appoint to the office of *mutwalli* one who is a seeker after it, but it is not unlawful."

If the *wâkif* has appointed no *mutwalli*, and the Kâzi has appointed one, the *wâkif* has no power to remove the person appointed by the Kâzi.

The Kâzi's power to appoint a *mutwalli*.

When the *wâkif* dies without appointing a *mutwalli* or leaving an executor, in that case the Kâzi will have the power of appointing the superintendent of the *wakf*.

Similarly, if the last incumbent in the office of *mutwalli* dies without appointing his successor or an executor, the appointment rests with the Kâzi; the *fatwa* is according to this principle and the Allâmah Kâsim has decided according to it.

The last *mutwalli* has the power of nominating his successor only when the *wâkif* has made no provision regarding the office. If the *wâkif* has declared that the office shall descend in the lineal male line in a particular family, none of the incumbents will have the power of changing the course of descent. Or, if the *wâkif* has

declared that after *A*, *B* shall succeed to the office, *A* has no power to appoint *C*.(1)

"So long as there is a relative of the *wâkif* qualified for the office, a stranger should not be appointed *mutwalli*,(2) for a relative is more benevolently disposed [towards the *wâkif*], and it is [generally] the intention of the *wâkif* that a relative should be appointed."

The right of members of the *wâkif's* family to the office of *towliat*.

"This dictum is from Hâkim in the *Kâfi*, and he has made it *Nass* (absolute) thus :—'So long as among the descendants of the *wâkif* or among the people of his family (*ahl(u)-bait*) there is to be found any qualified [for the office] a *mutwalli* shall not be appointed from strangers. When no qualified person is found among them, and the *towliat* is entrusted to a stranger, and subsequently a member of the *wâkif's* family is forthcoming who is qualified for the office, it shall be given to him.' The result of this is, that the descendants of the *wâkif* shall be preferred (for the office of *mutwalli*) even though the *wakf* may not be for them, as in the case of a *wakf* for a mosque or for others."

Preferential right of the members of the *wâkif's* famify.

Similarly, it is laid down in the *Wajiz-ul-Muhît* :'So long as a descendant of the *wâkif* or a member of his family (*ahl(u)-bait*) is living and is qualified for the *towliat*, the Kâzi should not appoint a stranger. If there is no one among his descendants or his family qualified for the office, in that case the Kâzi may appoint an outsider. But when after such appointment, a qualified person among them is forthcoming, the trust should be assigned to him." The principle is repeated in similar terms in the *Fatâwa'l-Ankarawia*, the *Fusûl-ul-Imâdia* and the *Fatâwai Alamgiri*. The author of the *Radd-ul-Muhtâr* goes on to add :—

"In the *Hindieh*(3) it is stated from the *Tahzîb*, that when there is any one among the descendants or kindred of the *mowkoof-alaih* qualified [for the office] it is preferable to appoint him. From the term *mowkoof-alaih* are clearly meant the descendants of the *wâkif* [as the objects of the trust] and therefore this dictum is not contradictory of the one above [from the *Kâfi*]. Again, the use of the word 'preferable,' shows that the appointment of a stranger in the pre-

(1) *Mohammad Sadik* v. *Mohamed Ali*, supra ; *Jâm'aa-ul-Fûsulain*.

(2) *Durr-ul-Mukhtâr*, p. 421, also *Advocate-General* v. *Fatima Sultani Begum*, supra ; *Radd-ul-Muhtâr*, Vol. III, p. 636.

(3) The *Fatâwai Alamgiri* is so-called having been compiled in India.

sence of a descendant of the *wâkif* is not invalid. This view is not contradictory to what is stated in the *Jâm'aa-ul-Fusûlain*, which amounts to this, that should the *wâkif* make a condition to the effect that his children and children's children should be the *mutwallis* of the *wakf* in succession to each other, in that case the Kâzi has no power to appoint an outsider without finding any breach of trust on the part of the *wâkif's* descendant, and should the Kâzi appoint an outsider to the office of *mutwalli*, in supersession of a descendant of the *wâkif* without any lawful reason, such person shall not become *mutwalli*. This refers to a case where the *wâkif* has made such a condition, but the present discussion relates to a case where the *wâkif* has made no such provision." "And what is stated from the *Khairiyèh* at the end of the chapter on *wakf* leads to the result that such an appointment [*i.e.*, the appointment of a stranger] will be absolutely invalid, and this (no doubt) is the meaning of *la-ej'aalo*, so this must be considered. And in the *Khairiyèh* there is also a *Fatwa* that it is not necessary for a person among the *ahl-ul-wakf* [people from among whom a *mutwalli* should be selected] to be qualified thus; if his disqualification is removed afterwards, it is sufficient [that is, he should then get the office]. And this is clear. [But] then it must not remain concealed, that all this relates primarily to a case where any of the descendants of the *wâkif* or his *ahl-ul-bait* is found to be fit."

In the *Fusul-ul-Imâdia* it is stated that the author's father(1) was asked whether, if the *wâkif* had made a condition that the *towliat* should be confined to his descendants, the Kâzi could appoint a stranger—he answered, 'no.'

When an outsider may be appointed as *mutwalli*.

But when there is no fit and proper person to be found among the descendants or relatives of the *wâkif* an outsider may be appointed; and a descendant or relative of the *wâkif* succeeding to the office of *towliat*, if he proves himself unworthy or commits a breach of trust, can be removed, and, in the absence of any other member of the *wâkif's* family qualified to take his place, an outsider can be appointed, "for when the *wâkif* himself can be removed for breach of trust, *à fortiori* other people can be removed also for misbehaviour."(2) In a case where a descendant or relative or a neighbour of the *wâkif* is not willing to accept the office without

(1) Himself a great jurist. (2) *Fatâwai Alamgiri*, Vol. II, p. 505.

a salary, and an outsider is willing to accept it without remuneration, the Kâzi should see whose appointment would be most beneficial to the *wakf*, and who is fittest for the appointment.(1)

The law distinctly lays down that so long as a fit and proper person can be found among the members of the *wâkif's* family or among his relatives, the Judge should not appoint a stranger. Is the same rule applicable to an appointment by a *mutwalli* who holds the office with general powers. The Calcutta High Court has answered it in the negative. It has held that when a *mutwalli* suffering from a death-bed illness appoints a successor, his nomination is not necessarily restricted to the founder's family.(2)

The appointment of the *mutwalli*.

If an appointment has once been validly made, no other person can be appointed so long as the former appointment lasts.

A *mutwalli* cannot give up the office of *tawliat* of his own motion; he must obtain the permission of the Kâzi to retire from his office. Some jurists appear, no doubt, to have expressed an opinion that a *mutwalli* can resign his post in favour of another, but they have also held that the latter will not become *mutwalli* until his appointment has been sanctioned by the Kâzi, who is not bound to appoint him to the office.

The appointment of the *mutwalli*.

If a *mutwalli* resigns his post in favour of another in lieu of some pecuniary consideration, and the latter is not appointed by the Kâzi, he can proceed against the quondam *mutwalli* for the money paid to him, though such "payment was illegal." Those who hold such payments to be legal are a few modern jurists, but it is against the true construction of the law and absolutely immoral.(3)

It would appear, that at one time attempts were frequent on the part of the servitors of charitable endowments to discharge their duties by substitutes. The allowance fixed for the officers were drawn by them, whilst a small honorarium was given to their substitutes. The legality of such conduct seems to have given rise to considerable discussion among the early Mussulman

(1) *Radd-ul-Muhtâr*, Vol. III, p. 636.

(2) *Sheikh Amir Ali* v. *Syed Wazir Hyder* [1915]. 9 Cal. W. N., 876. This ruling, however, does not seem quite consistent with the principles of the Mussulman Law.

(3) *Radd-ul-Muhtâr*, Vol. III, 636. See *Shah Mohinuddin* v. *Elahee Buksh* [1866], 6 W. R., 277.

jurists; but the more modern lawyers are generally agreed in opinion that the appointment of a substitute is not lawful unless there is any just reason for it. A female *mutwalli*, who is, by reason of her sex, unable to discharge all the duties of her office, is authorised to appoint a deputy. Similarly, where the disqualification is temporary, and is caused by illness or absence "on lawful grounds," the work may be performed by a substitute appointed by the superintendent or the Kâzi. Where such appointment is made, the substitute is entitled either to the whole allowance or a portion thereof in accordance with the arrangement made between him and the incumbent. Ibn Shibli has stated in his *Fatâwa*, that when a *mutwalli* has become incapable from weakness to superintend the work personally, he may appoint a substitute or deputy to help him in the management, but the responsibility will continue to rest with him, and the substitute will only obtain his allowance from the *mutwalli*.(1)

The power of the *mutwalli* to appoint his successor.

The *mutwalli* cannot, however, assign or transfer the office to any one, or appoint another during his lifetime, unless his own powers are "general."(2) Should he in his lifetime and in health appoint another in his place, the appointment will not be lawful and valid, unless the *mutwalli* has obtained the *towliat* with that condition, "in a general manner." In that case the *mutwalli* so appointing another person in his place will not be able to remove the latter, unless the *wâkif*, whilst confiding the trust empowered him to assign the same to another, *and also to remove the trustee.*

The restriction mentioned above refers to the appointment of a permanent and substantive successor, who would occupy the position and exercise the full powers of the *mutwalli*, in fact succeed him in the office. And not to the appointment by the *mutwalli* of a *kâim mokâm* or substitute in his place. The appointment of a successor to take his place absolutely can only be made by the *mutwalli* on his death-bed or in death-illness.(3) "This restriction does not apply to the appointment of a deputy or agent." And in the *Fath* [*ul-Kadîr*] it is stated that the *mutwalli* is empowered to

(1) See also *Mohimuddin Ahmed* v. *Elahee Buksh*, supra.

(2) *Radd-ul-Muhtâr*, Vol. III, p. 637. In the case of *Wahid Ali* v. *Ashraf Hossain* [1882], I. L., 8 Cal., 732; s. c., 10 C. L. R., p. 529, the meaning of the word "general" was not considered at all.

(3) *Durr-ul-Mukhtâr*, p. 421.

appoint such persons as deputies, as are able to discharge the duties connected with the office, or which are incumbent on the *mutwalli*. The *mutwalli* has the power of removing his deputy and appointing another in his place. If the *mutwalli* becomes insane, the appointment of his deputy becomes vacated of itself; and the Kâzi becomes entitled to appoint a substitute for the *mutwalli*. This applies to all cases, both where the *mutwalli* has been appointed by the Kâzi or by the *wâkif*.

Where the appointment of the *mutwalli* is "general" the *mutwalli* has the power of assigning the trust to another, not otherwise. In the *Fatâwai Alamgiri* the principle is given thus:— "A *mutwalli* may at his death commit his office to another in the same way as an executor may commit his to another. But when the appropriator has assigned some particular property for the *mutwalli*, it does not belong to the person to whom the office has been bequeathed; and the matter must be submitted to the Judge in order that he may assign for him the hire or salary of similar work, unless the *wâkif* had assigned the allowance for every *mutwalli*; so in the *Fath-ul-Kadîr*. And if the *mutwalli* were to intend to appoint another in his place in *his own lifetime and in good health*, it would not be lawful, unless the consignment (*tafwîz*) was made to him in a general manner (علي سبيل التعميم); so in the *Muhît*."(1)

As regards the meaning of the expression "in a general manner" the author of the *Radd-ul-Muhtâr* explains it as follows:— "It means that if the *wâkif* or Kâzi were to make a condition at the time of appointing the *mutwalli*, that he should have the power of transferring the trust to another and substituting that other in his own place by a *sanad-i-wakf* or *wasiat*, should necessity arise for it, such a condition would carry with it the power, on the part of the *mutwalli*, to appoint another *mutwalli* during his lifetime, or in death-illness."(2) Meaning of the term "general."

If the appointment of the *mutwalli*, or the assignment to him of the trust, is not general in its nature (علي سبيل التعميم) as stated above, in other words, when the *mutwalli* does not possess general powers, he cannot assign the trust to another "in health," whilst capable of discharging the functions of the office; but if there

(1) *Fatâwai Alamgiri*, Vol. II, p. 508. (2) *Radd-ul-Muhtâr*, Vol. III, p. 637.

are no provisions in the *wakfnâmah* regulating the mode of succession, he can appoint a successor in death-illness.(1) The reason of this is stated by Kâzi Khan to consist in the fact that the *mutwalli* is in the position of an executor, and like an executor he has the power of appointing on his death-bed another executor in his place to perform the functions which appertain to him. As an executor has no power to resign the executorship which he has once accepted, without the permission of the Kâzi, so a *mutwalli* cannot withdraw from a trust without such permission. The appointment of another *mutwalli* by one who does not possess general powers, without the leave of the Kâzi, is tantamount to a withdrawal of the incumbent from office, yet he remains responsible, unless the appointment or transfer of the trust is subsequently confirmed by the Kâzi.

A *mutwalli* possessing general powers can alone appoint a successor "in health."

" With reference to a *mutwalli* appointed in a general manner," it is further explained " the meaning of the term (العموم) ' general ' is thus explained in the *Anf'aa-ul-Wasâil* :—' that the *wâkif* appoints a *mutwalli* and places him in his own place and constitutes him his successor, and authorises him to assign the trust to whomsoever he likes, in such a case the *mutwalli* can transfer the trust either in health or death-illness. ' "

" If the *nâzir*, (supervisor, meaning the *mutwalli*) without the condition, during *marz-ul-mout* entrusts the *towliat* to another, it is valid; but if he assigned it in health, it would not be valid, as is stated in the *Tattima*, &c., and the reason of this is, that he is in the position of an executor, ... and as an executor can assign the executorship by testament, a *mutwalli* may also do so. And it is right to hold that the powers of a *kyyum* (curator) and executor are co-extensive. And this is different from an act done in health, for a *kyyum* in health is like a deputy (*wakîl*), and a *wakîl* has no power of delegating his powers."

With reference to this subject, the *Surrat-ul-Fatâwa* is distinct. " If the *wâkif* has provided that the *mutwalli* shall have the power of assigning the trust to another, in such a case an assignment of the *towliat*, whilst the *mutwalli* is in health, is valid, otherwise not. But even without such power, if the assignment is made in *marz-ul-mout* it is valid ; so it is stated in the

(1) Taken from the *Anf'aa-ul-Wasâil.*

Kinia and *Tattima*. And if the *mutwalli* has once appointed another in his place by virtue of the power reserved to him by the *wâkif*, he cannot remove the person so appointed, unless the *wâkif* gave him the power of appointing as well as discharging. Tartûsî in his *Anf'aa-ul-Wasâil* has laid down the same rule . . . . I was asked with reference to a *mutwalli* who had been appointed by his predecessor by virtue of the power given to the latter, and who had died leaving the trust in the hands of a third person, whether the *hâkim* could give the *towliat* to somebody else. I answered that if the *mutwalli* had assigned the trust *in health*, the appointee would hold the trust for the life-time of the *appointer*; but upon his decease the Kâzi would have the power of appointing."(1)

I take it that this refers to a case where the *mutwalli*, who had been appointed by virtue of a power given to his predecessor by the *wâkif*, did not possess the power himself also; in other words, if the power was only personal to the first *mutwalli*. But whether he had the power or not, if he appointed a successor on his death-bed it would be lawful.(2)

If the *wâkif* on his death-bed was to say to another, "You shall be in my place with reference to this *wakf*," or if he was to say that "my children will have the same powers as myself with respect of this *wakf*," this in fact would be vesting them with all the powers he possesses. And I take it that in such cases the executor of the *wâkif's* children will have the power of appointing a *mutwalli inter vivos*. This question was not considered properly in the case of *Wahid Ali* v. *Ashraf Hossein*.(3) An appointment made on death-bed.

"But the *wâkif* may condition that so-and-so is the *mutwalli* of this *wakf*, but that he will not have the power of

(1) *Surrat-ul-Fatâwa*, p. 440.

(2) *Ibid*; See also *Fatâwai Kâzi Khan*, Vol. IV, p. 219. In the case of *Khajah Salimullah* v. *Abul Khair M. Mustafa*, supra, the Calcutta High Court has laid down that when a *mutwalli*, who did not appear to possess such general powers as would enable her to appoint a successor whilst physically fit to carry on the duties of the trust, did in fact transfer it to another, the Statute of Limitation ran from the date of such appointment against a person claiming a preferential right to the governance of the *wakf*; and "his title to the office" would become barred under Article 120 of the second schedule of the Limitation Act if the office was not hereditary. If it was hereditary, it would become barred under Article 124.

(3) Supra.

leaving the trust by *wasiat* to another; and such condition is lawful."(1)

"The *wâkif* may lawfully condition that so-and-so will be the *mutwalli* of the *wakf*, but that neither he nor any other *mutwalli* shall have the power of leaving the trust by *wasiat* to another."(2)

When a condition is made in the *wakfnâmah* that upon the death of each *mutwalli*, the power of appointing his successor shall rest with the Judge, a *mutwalli* cannot appoint a successor to himself either in health or in illness. And upon the decease of each incumbent, the Kâzi shall appoint a successor.

The *wâkif* has the power of removing the *mutwalli* only when he has reserved a power to that effect.

As regards the power of the *wâkif* to remove a *mutwalli* whom he has appointed there is a difference of opinion between Abû Yusuf and Mohammed. Abû Yusuf holds that the *wâkif* is absolutely entitled to remove the *mutwalli* appointed by himself, whether he has reserved the power or not. Mohammed differs, holding that it is only when the *wâkif* has reserved the power that he can remove the *mutwalli*, without any misfeasance, and the *Fatwa* is according to Mohammed's view.(3)

The difference between Abû Yusuf and Imâm Mohammed is fully stated in the *Fatâwai Alamgiri*. "A person having made a *wakf* of his property and after having transferred it to the curator (*Kyyum*) desires to take it back from his hands; if he made a condition for himself in the *wakf* that he should [have the power to] discharge the curator and take back the property, in that case he may do so according to Mohammed and not otherwise. But according to Abû Yusuf he may do so [in either case, *i.e.*, whether he has reserved the power or not]. And the *Mashâikh* (Jurists) of Balkh decide according to Abû Yusuf and the Jurist Abû Lais has adopted the same view. The *Mashâikh* of Bokhâra decide according to the rule of Mohammed, and the *fatwa* is thereon; so in the *Muzmirât*"(4)

The *Radd-ul-Muhtâr* explains the reason of the difference. Abû Yusuf holds the *mutwalli* to be a deputy (*wâkil*) of the *wâkif*

---

(1) *Wajiz-ul-Muhit.*

(2) *Ibid.*

(3) *Radd-ul-Mukhtâr*, Vol. III, p. 638. See the case of *Hidayatunnissa* v. *Afzal Hossein*, 2 N.-W. P. Rep., p. 240; also *Golam Husain* v. *Aji Ajum Tadallah*, 4 Mad. H. C. R., 44.

(4) *Fatâwai Alamgiri*, Vol. II, p. 505.

and consequently the *wâkif* has the power at any time to discharge him. According to Mohammed the *mutwalli* is a deputy of the beneficiaries, and that, therefore, the *wâkif* has the power to discharge him only when he has reserved it expressly at the time of the dedication.(1)

And it adds, that according to the *Tashîh-ul-Kudûri* of Aliâmah Kâsim this is the rule on which decisions are passed.

The doctrine which is given in the *Durr-ul-Mukhtâr* on the authority of the *Ashbâh* that "the *wâkif* has *absolute* authority to discharge the *mutwalli*,(2) and the *Fatwa* is thereon," does not represent the view recognised as binding by the compilers of the *Fatâwai Alamgiri* or the author of the *Radd-ul-Muhtâr*.

The officers of the *wakf* have no power to remove the *mutwalli*.(3)

The *mutwalli* may resign his office with the "knowledge" of the *wâkif* or of the Kâzi ;(4) in other words with their sanction but he can not do so of his own accord.

The *wâkif* may give the power to the *mutwalli* to increase or reduce the allowance of the *wazîfadars*(5) (persons receiving stipends) according to his discretion or to remove or add to the *wazîfadars*.

Directions of the *wâkif* regarding the devolution of the trust.

If a person were to make a *wakf* and appoint 'Abdullah the *mutwalli* thereof and declare that upon 'Abdullah's death, Zaid shall be the *mutwalli*, 'Abdullah has no power to devise the *mutwallishîp* to another, and Zaid will be the *mutwalli*, notwithstanding any appointment made by 'Abdullah. And Allâmah al-Hanouti has held that when a person has declared that the *toulíat* of any *wakf* should be given to the "most discreet of his descendants, and one of them, being the *mutwalli* for the time, appoints his son-in-law as the *mutwalli* and dies, the *towliat* shall nevertheless go to such person among the descendants of the *wâkif* as fulfils the condition in the *wakfnâmah*." Any appointment contrary to the terms of the *wakf*, or conditions laid down by the *wâkif*, is invalid.

---

(1) *Radd-ul-Muhtâr*, Vol. III, p. 63.
(2) *Durr-ul-Mukhtâr*, p. 421, Hooghly Ed.
(3) *Ibid* ; Comp. *Meher Ali* v. *Golam Nujuff* [1870], 11 W. R., 333.
(4) *Ibid* ; *Radd-ul-Muhtâr*, Vol. III, p. 638.
(5) *Radd-ul-Muhtâr*, Vol. III, p. 639.

As already stated the servitors of the mosque cannot remove the *mutwalli*, though the *mutwalli* can remove them for unfitness or misconduct or other fault.(1)

Mussulman jurists draw a distinction between public and private trusts. For example, in the case of a mosque, the congregation, according to the accepted rule, have no power to appoint a *mutwalli* whereas in the case of a private trust made in favour of specific individuals, the beneficiaries are permitted to nominate a trustee.

This is the rule I gather from the statements in the *Fatâwai Kâzi Khan* and other works of authority.

In the *Fatâwai Kazi Khan* occurs first the following passage :—"A person makes a valid *wakf* in favour of a particular mosque and [appoints] a *kyyum* (superintendent) for it; and then the *kyyum* dies, whereupon the *ahl-ul-masjid*(2) assemble and appoint in his place a *mutwalli*(3) without the order of the Kâzi; and this *mutwalli* proceeds [in the original, stands up] to repair the mosque with the income of the *wakf;* the *mashâikh* (the jurists) have differed regarding this *towliat*. But the most correct doctrine is that it is not valid, for the power of appointing a *kyyum* appertains to the Kâzi. But if this *mutwalli* (so appointed) had spent any money out of the income of the *wakf* over the repairs of the mosque he would not be liable; if he, however, leased the *wakf* and spent the money himself, it would not be lawful and he would be guilty of breach of trust."(4)

Wakf in favour of specific individuals.

"But where the *wakf* is in favour of specific individuals (*arbâb-m'alumain*, or known persons) limited in number, and they appoint a proper person of integrity without the order of the Kâzi, it would be valid but it is preferable to lay the matter before the Kâzi to appoint a *kyyum*. They (the jurists) or some of them say, however, that in these times it is preferable not to bring the matter before the Kâzi, as the Kâzis of our times have betrayed avarice (*atmâ'a-ul-fâsida*). Nevertheless, the congregation of the

(1) This is the approved doctrine; *Zâhir-ur-Rawâyat*; *Tâtâr Khânwh*.

(2) The people of the mosque, *i.e.*, congregation.

(3) *Towliat* is the office; it means governance, trusteeship, superintendence.

(4) In the original, "if this *mutwalli* belongs to the category of people of integrity (*Ahl-us-Salâh*) and is not a *fâsik* (a man of bad behaviour)." *Ahl-us-Salâh* really means virtuous people, worthy of trust.

mosque have not the power to appoint a *mutwalli* or *kyyum*, without informing the Kâzi and obtaining his sanction to the appointment."(1)

The author of the *Radd-ul-Muhtâr* says, "the result of what is stated in the *Tâtâr Khânieh* is that if the devotees or congregation of a mosque agree in appointing a man as *mutwalli*, for the administration of the mosque (*li-masâlih-il-masjid*), it is valid according to the ancient jurists, but it is most preferable to obtain the sanction of the Kâzi. The moderns, are, however, unanimously of opinion that 'in these days' it is preferable not to inform the Kâzi, for it is known how covetous they are of the property of *wakfs*. In the same way, when a *wakf* is in favour of individuals limited in number they may appoint a *mutwalli* from among people of integrity."

Principle.

As I understand the principle, the *dicta* which prohibit the appointment of a *mutwalli* by the congregation, refer to endowments of a public nature like a *masjid* and similar institutions in which the public at large or the Mussulman public generally are interested. But when a dedication is in favour of particular people whose number is ascertainable, the modern Moslem jurists have recognised the validity of an appointment by the beneficiaries. The *Fatâwai Alamgiri*, after stating the views of the older jurists concerning such appointments, says :—

"It is stated from Shaikh ul-Islâm Abûl Hasan that all the *mashâikhs* (jurists) declare that if the beneficiaries were to appoint a *mutwaili*, it would be as valid as if the appointment was made with the permission of the Kâzi."

The same principle is given in the *Radd-ul-Muhtâr* and the *Wajîz-ul-Muhît*.

---

(1) *Fatâwai Kâzi Khan*, Vol. IV, p. 216. In later times during the convulsions which afflicted the Islâmic world consequent upon internecine struggles and the invasions of the pagan Mongols and the Christian Crusaders, the high standard of judicial morality certainly declined. But the lofty ideal of Moslem justice and the adequacy, not to say elasticity, of its conceptions can be gathered not only from the treatise of Mâwardi—"the Hugo Grotius of Islâm"—on political law called the *Ahkâm-us-Sultanat*, but also from the chapters on "the Duties of the Kâzi" in recognised works of authority, which well deserve translation. In one respect the Mussulman Jurists appear to be in advance of the modern thinkers of Christendom, for the founder of the Hanafi school admitted the right of women to hold judicial office.

When the *wâkif* has appointed *nâzirs*(1) to exercise a supervisory control over the *mutwalli*, and vested them with the power of removing him for misfeasance or misconduct, they will have also the power of appointing his successor, although this latter power may not be expressly given to them in the deed of *wakf*.

If the *wâkif* were to appoint a *mutwalli*, but there is no indication that the appointment should continue in force even after his (the *wâkif's*) death, the *mutwalli* would be discharged upon the happening of the *wâkif's* death.

The *Mutwalli.*

The *Radd-ul-Muhtâr* states the principle thus :—When a *mutwalli* is appointed by the *wâkif*, he will become discharged on the death of the *wâkif*. This is according to Abû Yusuf's rule on which is the *fatwa*, for such a *mutwalli* is merely an agent on behalf of the *wâkif*. But when the *wâkif* appoints a *mutwalli* "for his life and after his death," such *mutwalli* will not become discharged in consequence of the *wâkif's* death.

When the *wâkif* himself holds the office of *mutwalli*, and is found guilty of misfeasance or breach of trust, he can be removed, whether there is a condition to that effect in the *wakfnâmah* or not. Unfitness to carry out the duties of the trust is a cause for removal from office.

Wâkif may be removed from the governance of the trust if guilty of misfeasance.

"If the *wâkif* has reserved the *wilâyèt* in his own hands, and he proves himself dishonest, the Kâzi has the power of removing him in the interests of the *cestuis qui trustent*, just in the same way as he has the power of removing a dishonest executor."(2)

A fortiori he has the power of removing a *mutwalli* for breach of trust, and he may do so even though the appropriator should have made a condition that there should be no such power.

But the malversation or breach of trust must be proved; mere imputation is not sufficient to justify his removal. If a *mutwalli*, with funds in his hands, neglects to repair the *wakf* premises and allows it to fall into disrepair, it amounts to a breach of trust, for if he knowingly and intentionally causes damage or loss to the *wakf*, or if he misdeals with the trust-property he must be removed from his office.

---

(1) Supervisors.

(2) *Radd-ul-Muhtâr*, Vol. III, p. 596; *Surrat-ul-Fatâwa*, p. 420; *Fatâwai Alamgiri*, Vol. II, p. 505.

The *Fath ul-Kadîr* is very distinct on the point. "The Kâzi has the power of doing so even if the *wâkif* has made a condition to the effect that in case of breach of trust on his part, neither the Kâzi nor the Sultan will have the power of removing him."(1)

In the *Jâm'aa ul-Fusûlain*, it is stated that "when a *mutwalli* has been appointed by the *wâkif* or by any of the constituted Judges, he cannot be removed without any of those causes which justify his removal, that is, manifest breach of trust or misfeasance and the like causes. In the terms 'like causes' appear to be included incapacity to discharge the duties of the office as well as immorality."(2)

The dismissal of the *mutwalli*.

The Kâzi cannot remove a *mutwalli*, whether appointed by the *wâkif* or himself, merely on the complaint of the beneficiaries but can do so upon proof of misfeasance or breach of trust.(3)

But though the Kâzi has no power to remove the *mutwalli* merely upon the complaint of the beneficiaries, yet upon receiving a complaint, if he consider it to be *bonâ fide* and reasonable, he can associate another trustworthy person with the *mutwalli* and fix a remuneration for him, either out of the allowance of the *mutwalli* or from the general funds.

Similarly, the Kâzi has no power to remove an executor appointed by the deceased merely on the complaint of anybody without proof.

Responsibility of the *mutwalli*.

Any loss sustained by the *wakf* through the wilful neglect of the *mutwalli* shall be made good by him. It is doubtful, however, whether a gratuitous *mutwalli* would be liable for any loss which is occasioned, merely through neglect, to the *wakf*.

"The *mutwalli*," says the *Fath-ul-Kadîr*, "is also liable to be removed if he is proved to be addicted to drunkenness and such like vices."(4)

If a *mutwalli* takes up his abode in the *wakf* building without any provision to that effect in the deed of dedication or without the permission of the Judge, his conduct amounts to misfeasance.

The *mutwalli* should ordinarily be chosen from among the relatives of the *wâkif*. If, among his relatives or neighbours, no

(1) *Fath-ul-Kadir*, Vol. II, p. 640.
(2) *Radd-ul-Muhtâr*, Vol. III, p. 597.
(3) *Jâm'aa ul-Fusûlain*; *Radd-ul-Muhtâr*, Vol. III, p. 597.
(4) *Ibid*, Vol. III, p. 640.

person can be found willing to undertake the work of *tawliat* without a remuneration, and there is an outsider willing to do so, then his appointment would depend upon the Kâzi's discretion, and he must judge who is the best person to be appointed.(1)

Persons who get an allowance from the *wakf* shall not be deprived of their *wazifa*, unless they are proved to be guilty of some offence which entails this penalty.(2)

It has been held by the Calcutta High Court that the sale of an office to which are attached religious duties is void under the Mahommedan Law.(3)

An attempt to "sell or alienate the allowance or to create a charge upon it has been regarded as misconduct sufficient to pass the *wazîfa* or allowance, if hereditary, to the children of the *wazîfadar*."(4) Upon this principle, the insolvency of the *wazîfadar* would lead to the same result.

If a person, who is allowed to reside in the *hujra* or a room of the mosque either in lieu of his services or in addition to his salary, lets it without permission of the *mutwalli*, he renders himself liable to dismissal.

Beneficiaries can not assign their interest.

When an allowance is fixed for a person in the *wakfnâmah* and it is declared that upon his death such allowance shall go to another, if the person for whom the allowance is fixed assigns his interest to a third person, upon the decease of the original beneficiary, the allowance shall go to the person appointed by the *wâkif*, and not to the assignee of the original beneficiary.(5)

No beneficiary is entitled to substitute another in his place, but he may appoint another person to receive his allowance.(6)

A student who has been absent for three months may not be deprived of his room and allowance on account of his absence alone.

In the *Ashbâh* it is laid down that if the sovereign himself were to appoint a person as a teacher who is not competent, he may be removed, *for the act of the Sultan must not be unreasonable or improper.* "A king appointing an incompetent person," says the

(1) *Radd-ul-Muhtâr*, Vol. III, p. 636.
(2) *Ibid*, 597.
(3) *Sarkum Abu Torab Abdul Waheb* v. *Rahaman Buksh* [1896], I. L., 24 Cal., 83.
(4) *Radd-ul-Muhtâr*, Vol. III, p. 597.
(5) *Ibid.*
(6) *Ibid.*

Bazâziah, "does two wrongs, *first*, that by appointing an incompetent person, he does an injustice to a competent person; and, *secondly*, that he does an injustice to the public by appointing one who was not entitled to the office."

"In the *Fath-ul-Kadîr* it is laid down that when a *mutwalli* becomes totally insane, and the insanity lasts for a year, he will become discharged of himself; but when he recovers, he will get back the *towliat*. The *Nahr* says on this point, that, he will get back the appointment only in case the *mutwalli* is one who holds the appointment by virtue of the provisions of the deed of *wakf*; but this rule does not apply to a *mutwalli* appointed by the Kâzi." In other words insanity will lead to his removal, and he will not get back the post on recovery.

"A *mutwalli* who is trustworthy and has not been proved to be guilty of any fault, cannot be removed even by the Sultan."

"When a *mutwalli* has been lawfully appointed by the Kâzi and subsequent thereto the Sultan appoints another, the former appointment will take effect and not the latter."

"If the *wâkif* has empowered the *mutwalli* to appoint a successor, the Kâzi has no power to interfere with an appointment made in virtue of that authority, and the *fatwa* is on this."

"In the Book on *Wakf* by Nâsihi it is stated that where a *wakf* is created in favour of a body of people, and the *mutwalli* does not or cannot fulfil the provisions made by the *wâkif* for the benefit of the *cestuis qui trustent*, he ought to be removed and another appointed in his place."(1)

Powers of the *wâkif's* descendants.

In the absence of a *mutwalli*, the power of nomination and appointment of an *imâm* and *muezzin* to a mosque, is given to the *wâkif's* descendants and the members of his family preferentially to others. This is the view stated in the *Ashbâh*.

In the matter of building and repairing a mosque the person who has erected the mosque and his descendants, are preferred to the congregation or outsiders. This is according to the *Anf'aa-ul-Wasâil*.

(1) The author adds that if the *mutwalli* is addicted to *alchemy*, that is a desire to convert a baser metal into gold he should be removed, for this avarice might lead to breach of trust. Generally, the purport of this passage is that if the *mutwalli* is given to gambling or habits of a kind which might be prejudicial to the interests of the *wakf* he should be removed.

If the *wâkif* makes a condition that the administration should devolve on "the most intelligent" (أرشد) it implies the most intelligent among his descendants; and according to a *Fatwa* of Moulâna Abû S'aûd, if there are two of them equally intelligent, both should be associated together in the office. In the *Nahr*,(1) however it is stated from the *As'aâf* that if the *wâkif* has declared that the *towliat* should be for the most qualified (أفضل) among his children, and there are two equally qualified, the *towliat* shall go to the one who is the oldest in age, and in this there will be no distinction of sex. And if among the two, one is very pious and the other is best acquainted with the affairs of the *wakf* and its management, the *towliat* should be given to the latter, if he is trustworthy. The author of the *Radd-ul-Muhtâr* adds that the *dictum* in the *Nahr* particularises the view of Abû S'aûd, for it declares that when excellence is required to be joined with intelligence, and there are two equally intelligent and virtuous, regard is to be paid to age. And according to the *Bahr* (after the *Zahîria*) if all the descendants are equal in integrity and piety, in learning and uprightness and age, the one who is best acquainted with the affairs of the *wakf* and is most capable of discharging the duties connected with the trust, whether male or female, is to be preferred. According to the *Bahr*, *rushd* or intelligence refers to the ability to perform the work and honestly to discharge the duties of the office.(2) In the *As'aâf* also it is stated that when two of the descendants are equally qualified, so far as the qualities of the mind are concerned, the *towliat* will go according to seniority; and the fact that one is a male and the other a female will make no difference. But the person best acquainted with the business of the *wakf* will be preferred, though in the *Fatâwa-'l-Ismailia* there is a *dictum* to the effect that where two people are equally qualified in all respects a male is to be preferred to a female.(3)

Competency in the person to be appointed.

(1) *Nâhr-ul-Fâik.* (2) *Radd-ul-Muhtâr*, Vol. III, p. 666.

(3) In the case of *Wahed Ali* v. *Ashruf Hossain* [1882] (I. L., 8 Cal., 732; s. c., 10 C. L. R., 529), the Calcutta High Court has held that "the office of a *mutwalli* is a trust which a woman, equally with a man, is capable of undertaking, but it is a personal trust, and the office may not be transferred, nor the endowed property, to any person whom the *mutwalli* for the time being may select," unless, as already stated, the *wâkif* has vested the *mutwalli* with general powers of appointing another in his stead; see also *Piran* v. *Abdul Karim*, *infra*. But although a woman may become a *mutwalli* and discharge the duties connected with the office by a deputy, it has been held by the Madras High Court in *Muja-*

When the *wâkif* declares that the *towliat* should be vested in the "fittest" among his children, and there is no fit person to be found among them, the Kâzi has the power to appoint a stranger to the office until such time as a proper person among the *wâkif's* descendants can be found. If among the children there is a properly qualified person and he is absent, and there is no one else among them to take his place until his return, the Kâzi has the power to appoint a stranger to be his substitute until he returns to take up the office. If there are two children, one more qualified than the other, the one who is the fitter of the two should take the office, and after him should come the other.(1)

The words *nâzir, kyyum* and *mutwalli* used separately, convey one and the same meaning, *viz.*, the administrator of a trust. But it often happens that at the time of appointing a *mutwalli*, the *wâkif* also appoints a *nâzir* or a supervisor over the *mutwalli*. The *nâzir*, however, has no power to spend any portion of the money of the *wakf*, for that work is entrusted to the *mutwalli*; his duties are simply of a controlling and supervising character, and the *mutwalli* cannot make disbursements, without the knowledge or permission of the *nâzir*. The same principle applies to a *nâzir* appointed over an executor; as a matter of fact, the principles which apply to the duties of *mutwallis* and *nâzirs* in the case of *wakfs* are taken from the principles of the law relating to the duties of executors. The powers of the *Nâzir*.

The builder of a mosque is the person who has a preferential title to appoint the officers, such as *imâm, muezzin*, &c., for the service thereof, and this is the approved doctrine. If the person appointed by the *wâkif* is incompetent or unfit, the congregation have a right to select a more fit person. Will their appointment, however, take effect without the sanction of the Kâzi? I take it that an application should have to be made to the Kâzi for the removal of the incompetent servitor and the appointment of the person selected by the congregation.

In a case where the plaintiff as the *de facto sajjâdanashîn* of a *durgah* sued to recover possession of certain property alleged

---

war Ibram Bibi v. *Mujawar Hossain Sheriff*, I. L., 3 Mad., 95, that she is not competent to perform the duties of a *mujâvir* of a *durgah* which are not of a secular nature; see also *Hussaini Bibee* v. *Hussain Shariff*, 4 Mad. H. C. Reports, 23.

(1) *Radd-ul-Muhtár*, Vol. III, p. 666; the same principles are given in the *Fatáwa-'l-Ankariwia*, &c. Fitness includes piety says the *Fusúl-i-Imâdia*.

by him to have been improperly alienated by his predecessor, and it was contended by the defendant that the plaintiff was not entitled to maintain the action as he was not appointed either by the last incumbent or the Kâzi, and his appointment was invalid, it appeared that he had been installed in office by a large body of Mussulmans including the disciples and *sajjâdanashîns* of neighbouring shrines. The Calcutta High Court held that the appointment was valid, being in accordance with the Mahommedan law as also the general practice.(1)

Property purchased by the *mutwalli* out of the *wakf* funds becomes *wakf* without any express declaration, subject to the same conditions as the original trust-property. But it may be sold or exchanged for some other property, in case there is any need for it, and such other property, would be *wakf* similarly.

he stiends of ie sertors and udents.

The salaries of the *imâm*, *khatîb*, *muezzin*, &c., which have already become due, will be paid on the death of any one of them to their heirs. In the case of a *wakf* in favour of children, the heirs of the deceased beneficiaries are entitled to share in the rents and profits, which have been realised and are therefore distributable, or which are accruing.

If a student absents himself from the Madrassa, he does not lose his former allowance which has already accrued due, nor his future allowance, "if he has absented himself in the pursuit of learning (with the permission of his master without severing his connection with his *madrassa*), or has been absent for fifteen days only on lawful grounds, that is, in search of livelihood; or has gone on *hajj*, but has not been away for more than three months."

Leave is allowed to the servitors of a *wakf* on lawful grounds, and they do not lose their allowance whilst on leave unless a deputy is appointed to officiate for them during their absence.

The Kâzi has no power to fix allowances not provided for by the *wâkif*, but he can determine the amount of the allowances provided for by the *wâkif*. If there is a provision that the *mutwalli* should fix the amount, the Kâzi has no power. The Khair ur-Ramli has stated in his commentary on the *Bahr*, that the restriction on the powers of the Kâzi refers to a case where the *wâkif* has expressly stated that the *wakf* is not public in its nature, and the Kâzi shall have no authority over it. "This, of course, refers to *wakfs*

(1) *Piran* v. *Abdul Karim* [1891], I. L., 19 Cal., 203, *supra*.

created by private individuals. Royal *wakfs* are clearly subject to the jurisdiction of the Kâzi."

In fixing the salary of the *mutwalli*, regard should be paid by the Kâzi to the customary allowance at the time.

In the *Durr-ul-Mukhtar* it is stated that "by the tenth to the *mutwalli* the customary allowance is meant "(العشر للمتولي اجر المثل المراد من). On this passage the comment in the *Radd-ul-Muhtâr* is as follows :—"Some jurists have explained that the allowance (or remuneration) which should be given to the *mutwalli* is a tenth [of the net income], but the correct view is that the tenth (عشر) means اجرالمثل (customary remuneration, *lit.* remuneration of his like) so that if what is customary is more than the tenth, he should receive it ;" *viz.*, that the remuneration should be fixed on that basis. In other words, the customary remuneration would be the standard for fixing the allowance of the *mutwalli*, but generally speaking it should not exceed the one-tenth of the income. But this rule restricting the remuneration ordinarily to one-tenth of the income does not apply to cases where the *mutwalli* or *sajjâdanashîn* has a beneficial interest in the income of the endowed properties.(1)

The *wâkif* can fix any amount for stipend.

Of course, the *wâkif* can fix any amount, and even if it be more than one-tenth it would be valid ; but if he fixes too low a sum, the Kâzi has the power upon the application of the *mutwalli* to fix a proper salary.

Powers of the Judge to increase the salary of officers

The *mutwalli* has no power to increase the allowance of the *imâm* or *khatîb*. The Kâzi has the power to increase the allowance, provided in his discretion it is necessary to do so for the benefit of the mosque, or when it is impossible to obtain a proper man to discharge the duties on account of the low salary fixed by the *wâkif*. And this principle applies to the appointment of every servant, *e.g.*, a *muezzin*, *mudarris* (teacher), &c. If these men cannot be had on the salaries fixed by the *wâkif*, the Judge has the power of increasing their salaries from the balance of the fund. The Kâzi has also the power of making provisions regarding the application of the balance

(1) *Mohiuddin v. Sayiduddin* alias *Nawab Meah* [1890], I. L., 20 Cal., 810. In the *Secretary of State for India v. Mohiuddin Ahmad* [1900], I. L., 27 Cal., 674, it was held that the *Sajjadanashin* was not liable to income-tax in respect of such moneys as he draws from the *Khankâh* properties for his own maintenance and that of his family.

of the income, in consultation with the members of the *wâkif's* family or the beneficiaries.

If a person is appointed *mutwalli*, and he acknowledges another to be the *mutwalli* instead of himself, the latter will be entitled only to a share in the income of the acknowledgor during his lifetime. Upon the death of the acknowledgor the effect of the acknowledgment ceases, and the *tawliat* goes with all its adjuncts to the person designated by the *wâkif*.

The *mutwalli* cannot encumber *wakf* property.

The *mutwalli* is not entitled under any circumstance to create any incumbrance by way of mortgage upon the *wakf* property without the sanction of the Kâzi, nor can the beneficiaries hypothecate the *wakf* property. Accordingly, if the *mutwalli* mortgages the *wakf* property and the mortgagee takes possession of the same, he will be liable for the customary rent thereof.

In the same way, if a *mutwalli* sells certain *wakf* lands, and subsequently the sale is set aside by the Kâzi, the purchaser, if he takes possession of the said lands, will be liable for mesne profits, calculated upon the customary rates.

"If a *mutwalli* were to mortgage a *wakf* property, his act would amount to a breach of trust and he ought to be removed. The mortgagee should not take possession of the property mortgaged to him, and if he does so he will be liable for damages."

"In the *Kinia* it is laid down that it is not lawful for the *mutwalli* to borrow for the purposes of the *wakf* even in case of necessity without leave of the Kâzi. If he is away from the Kâzi, he must borrow on his own credit. So also in the *Khazânat-ul-Muftiin*."(1)

"In the *Ashbâh-wan-Nazâir* it is stated that the Sâhib-ul-Manah [*i.e.*, the author of the *Manah*] was asked regarding a *nâzir* (*i.e.*, *mutwalli*) who had borrowed money on the *wakf* property and spent it over the beneficiaries (*lit.*, those deriving sustenance from it), and he had been since dismissed, and the debts were still due, whether the second *mutwalli* was bound to pay such debts out of the *wakf* property. The Sâhib-ul-Manah answered that a *mutwalli* has no power to borrow money to spend on the beneficiaries; but he can for necessities, such as repairs and such like matters, borrow with the leave of the Kâzi. . . . And, therefore, the dismissed *mutwalli* will be liable (personally) for the debts contracted and not the *wakf* property."(2)

(1) *Surrut-ul-Fatâwa*, p. 436. (2) *Surrut-ul-Fatâwa*, p. 440.

Similarly, in the *Radd-ul-Muhtâr*;—a *mutwalli* cannot contract debts for the *wakf* unless they are made in consequence or in pursuance of the directions given by the *wâkif*. The *mutwalli* cannot create any charge on the *wakf* estate or incur liabilities for which the *wakf* estate might be liable, unless such charge is created or debt is incurred under express powers given by the *wâkif*. This restriction does not apply to the powers of the executor, for it is lawful for him to contract debts for the necessaries of the minors confided to his charge, and the infant and his estate would be liable for such debts as are incurred *bonâ fide* by the executor for the infant. But the *wakf* cannot under any circumstance, in the absence of a provision in the *wakfnâmah* to that effect, be made liable for any debt contracted by the *mutwalli* on his own responsibility. A debt contracted by the *mutwalli* is his personal debt. Should it become necessary to incur a debt for the *wakf* or to create a charge on the estate, the *mutwalli* can only do so with the sanction of the Kâzi previously obtained.(1) This principle does not refer to such debts which owing to the exigencies of society, must necessarily be contracted from day to day for the due discharge of the work of the trust; for example, a debt to the oilman for the oil to light the mosque, to the baker to supply bread for the students of a *madrassa*; all these can only be paid at periodical intervals. Such necessary debts must be paid out of the income of the *wakf*.

Debts contracted by the *mutwalli*

Section III.

Powers of the mutwalli.

If the *mutwalli* has advanced money to the *wakf* estate for the purpose of protecting the interests of the *wakf*, he can repay himself out of the profits of the *wakf* property coming into his hands. But when the *mutwalli* has any claim against the *wakf* estate for advances made by himself, he has to establish such claim by valid proof, otherwise it will not be maintainable. The *mutwalli* is, therefore, bound to keep clear and distinct accounts of his expenses with vouchers and other proofs; in which case a claim for any credit given by the *mutwalli* to the *wakf* would be maintainable, and such advances will be liquidated out of the rents and profits of the *wakf*

(1) *Radd-ul-Muhtâr*, Vol. III, p. 649. According to Abû Laîs: See *seq.* On The Creation of Incumbrances on Wakf Property.

property. But the *wakf* estate cannot be *charged* with any debt either to the *mutwalli* or anybody else, without the sanction of the Kâzi previously obtained.

It is lawful for a *mutwalli* with the income of a *wakf* to erect shops, houses, &c., which may yield profit to the *wakf*, as all this is for the benefit of the *wakf*. All properties purchased by the *mutwalli* out of the proceeds of the *wakf* become part of the *wakf* and are subject to the same legal incidents as the original *wakf* estate. And the *mutwalli* will not be entitled to dispose of them without the sanction of the Kâzi.

If the rules laid down by the *wâkif* are not ascertainable, *mutwalli* must follow the practice of his predecessor.

If the directions of the *wâkif*, or the rules for the administration of the trust cannot be ascertained, the *mutwalli* should ascertain the practice of his predecessors and act accordingly. The *mutwalli* is not entitled to undertake any expenditure utterly inconsistent with the original character of the *wakf*, for example, a *mutwalli* of a mosque is not entitled to purchase cloth from the funds of the mosque and distribute the same among the poor ; and if he does so, he will be liable to pay the money from his own pocket.

If a *mutwalli* contracts a debt for the purchase of necessary articles for the mosque, when there is no money of the mosque in hand, in other words, if he has purchased goods for the *wakf* intending to pay for the same on realising the rents thereof, or if he has paid for the same from his own pocket, he is entitled to pay the debt when the rents come into his hands or recoup himself as the case may be.

If a person find a " trove " belonging to the *wakf*, the *mutwalli* may give something out of the same to the finder if he is poor.

If some portion of the building of the *wakf* is so dilapidated as to endanger the safety of others, and the neighbours insist upon the *mutwalli* repairing the same, and it happens that the *mutwalli* has no funds wherewith to repair the building, he can, with the permission of the Kâzi, contract a debt for that purpose. Debts can be incurred by the *mutwalli* only when there are no *wakf* funds in his hands to meet the requirements of the *wakf*. The *mutwalli* is authorised to deduct from the *wakf* income any sums spent by him legitimately for the purposes of the *wakf* out of his own pocket.

If a person make a *wakf* of his lands for the poor, without specifically providing for the cost of repairs or cultivation, the income will nevertheless be first employed in paying the *kharâj* or

tax, and then for the payment of the cost of collection, maintenance, repair, cultivation and such like matters, and the residue (after defraying the said costs) will be applied for the poor, *e.g.*, if the *wakf* consists of lands covered with date-trees, the *mutwalli* should first pay the expense of planting new date-trees and keeping up the old ones, for making walls and dams, so that the fruit-trees may not be exhausted or killed. If any portion of the land dedicated is unculturable, the *mutwalli* should take from the income the expense of rendering it fertile. If barns for storing grain, or reservoirs for storing water be necessary for the irrigation of the lands, the *mutwalli* is entitled to spend a portion of the income for that purpose. If the *wakf* land is contiguous to the city, and it is more profitable for the *wakf* that it should be let to tenants than be used for cultivation, the *mutwalli* may erect buildings for tenants or let the land to them without the buildings.(1)

Mohammed says, that if the *wakf* lands become unculturable and cease to yield any income, and the *mutwalli* can, with its price, get another piece of land yielding more profit, it is proper that he should do so; that is, he should [with the requisite permission,] sell the land and with its price buy another piece. But if the land is far away from towns, so that buildings will not yield any profit, he may not erect buildings. Abû J'aafar has held that when the *wâkif* has made no provision regarding the mode in which the land should be used, the *mutwalli* is authorised to use the land to the best advantage for the *cestui qui trust*, but he cannot give a long lease without the sanction of the Kâzi.

Discretionary trusts.

If a man were to make a *wakf* of some property and declare that the *mutwalli* may give the income thereof to whomsoever he likes, or may apply the proceeds thereof according to his discretion, it is lawful,—and the *mutwalli* may give it to both rich and poor.

Mode of disbursement when proof of custom wanting.

Though in the case of these discretionary trusts, the administration of the *wakf* is left to the discretion of the trustee, still "the power is accompanied with a duty and meant to be exercised," and the Kâzi will compel the *mutwalli* to apply the income properly.

"In the *Manah* it is stated from the Jurist Zain ibn Nujaim that where there is an old existing *wakf*, but its deed is lost and the *mutwalli* is unable to find out the mode in which the produce

(1) *Fatâwai Kâzi Khân*, Vol. IV, p. 216.

should be spent on the beneficiaries, he should ascertain the usage of his predecessors and how they made the application, and proceed in accordance therewith."(1)

If there is no proof forthcoming as to who are entitled to the benefit of a *wakf*, or as to the mode of disbursement followed by the *mutwallis* of former times, the *wakf* should be applied for the benefit of the poor.

In the *Anf'aa-ul-Wasâil* it is stated from the *Zakhîra* that where there is an old existing *wakf*, but the person dedicating it is not known, and some person is in possession of it under the title of being *mutwalli* and he asserts that the *wakf* in question is for a particular purpose, and he produces witnesses in support of his assertion, and there is no proof to the contrary, that assertion will be accepted. But when the purpose is known or the conditions laid down by the *wâkif* are ascertainable, such testimony will not be admitted.(2)

"A *wakf*" says the *Radd ul-Muhtâr* "may be established without any evidence of the *wâkif's* declaration. This is the doctrine laid down by Abû Yusuf; and the jurists of Balkh, such as Abû J'aafar and others, follow this view; Khassâf also has adopted it. In the *Khairiyéh*, it is stated that where there is an old *wakf*, known by reputation to be *wakf* and the *wâkif* is unknown, should a wrongdoer get possession of it, the *mutwalli* can establish his claim, according to the approved doctrine, by the testimony of two witnesses; and the *Jâm'aa-ul-Fusûlain* has followed this view."(3)

Evidence of reputation may establish a *wakf*.

So also in the *Fatâwai Kâzi Khân:* a *wakf* may, according to the jurists of Balkh, be validly established by evidence of reputation. If the dedication is one within the knowledge of the general public, as a matter of notoriety, "like the *wakf* of 'Amr ibn al-'Aâs" (the Amru of European history), it can be established by the testimony of witnesses, or it may be established by the evidence of user for the purposes of dedication.

It is not necessary that the endowment should be in writing, or that the property should be delivered over. A verbal declaration of the intention to create an endowment is sufficient if made in the

(1) *Surrat-ul-Fatâwa*, p. 442.
(2) *Ibid.*
(3) *Radd-ul-Muhtâr*, Vol. III, p. 645.

presence of witnesses.(1) Although the witnesses to the fact depose vaguely, yet their evidence, if corroborated by circumstances, is legally sufficient.(2)

The *wakf* of a property which is wrongly described in the *wakf-nâmah is operative*, if it is clear what was intended to be conveyed in trust. If the description, however, is so uncertain and indefinite as to render it impossible to find out what was intended to be conveyed, the *wakf* will not take effect.

"The Sâhib-ul-Manah was asked the following question with reference to the effect to be given to a *wakf*: A man makes a *wakf* in favour of the poor and indigent and executes a deed of *wakf* properly sealed and signed and attested. After his death a number of people testify to the effect that the ultimate purpose was destined [by the *wâkif*] for a specified purpose (and not for the poor). Will such testimony be accepted and acted upon? The Sâhib-ul-Manah answered—'If the deed of *wakf* purports to be prior in date to the condition alleged by the witnesses no effect should be given to such testimony. But if the *wâkif* had reserved to himself in the *wakfnâmah* the power of altering and cutting down the terms, then regard is to be paid to the credibility of the witnesses.'"(3)

A person makes a *wakf* for the habitation of his *wife* in the *wakf* building, and then dies. The widow afterwards re-marries. She loses her right of habitation, and even if the second husband divorces her, she does not recover the right.

When a house is dedicated for the habitation of certain individuals they cannot partition the dwelling among themselves. But when a dedication is made for the residence of the members of a certain family, only those who are *mahram*(4) to each other may reside in it, unless the dwelling is divided into apartments or rooms with doors, where a female may live with her husband without being subjected to the intrusion of a *ghair-mahram* living in the same house. For example, if a house is dedicated for the

---

(1) *Doe dem. Jaun Beebee* v. *Abdollah Barber*, supra: *Sharbo Narain Singh* v. *Ally Buksh Shah*, 2 Hay, 415; *Abul Hasan* v. *Haji Mohammad Masih Karbalai*, 5 Sel. Rep., 8. See also *Dalrymple* v. *Khoondkar Azeezul Islam*, S. D. A., 1858, p. 586; *Shoojat Ali* v. *Zumeer-ooddeen* [1865], 5 W. R., 158.

(2) *Surrat-ul-Fatâwa*, p. 424.

(3) *Radd-ul-Muhtâr*, Vol. III, p. 650.

(4) People within the prohibited degrees.

residence of a family consisting of two married sons and two married daughters, in order that the husbands of the married daughters may be able to live in the same house, there must be separate rooms set apart for the sons and daughters respectively.

Case Law. Breach of trust does not alter the nature of the trust.

A breach of trust on the part of the *mutwalli* cannot alter the essential nature of the trust, or convert endowed property into the personal property of the manager.(1) A grant should be construed according to the intention of the founder, and not according to the strict interpretation of any particular word: the word "inam" being indiscriminately applied to personal grants and religious endowments.(2)

A religious office.

Under the Mahommedan Law a religious office cannot be claimed by right of inheritance. Where a grant has been made for the maintenance of a religious office the members of the grantee's family have no right at his death to a division amongst them of the income derivable from the land. The right to the income of such land is inseparable from the office for the support of which the land was granted.(3) They may, however, under the provisions of the grant be entitled to maintenance out of the income.

Succession to the management of an endowment.

Where property has been devoted by a Mahommedan to religious and charitable purposes, the determination of the question of succession depends upon the rules laid down by the *wâkif* on the constitution of the *wakf* whether such rules are embodied in writing or are to be inferred from evidence of usage. Where the custom has always been for the incumbent to appoint a successor, thus indicating the will of the endower on the subject, the Court should not find in favour of any rule of succession by primogeniture solely from the circumstance that the persons appointed were usually the eldest sons.(4)

The Bombay High Court has, in conformity with the Mahommedan Law held that, although a *wâkif* has a right to reserve the management of the *wakf* in his own hands or to appoint some one else thereto, yet when he has specified the class from amongst which the manager is to be selected he cannot afterwards name a person

(1) See *Asheerooddeen* alias *Kalla Miah* v. *Drobomoyee* [1876], 25 W. R., 557.
(2) *Ibid.*
(3) *Jaafar Mohiuddin Sahib* v. *Aji Mohiuddin Sahib*, 2 Mad., 19.
(4) *Gulam Rahmutulla Sahib* v. *Mohammed Akber Sahib*, 8 Mad., 63. See also *Syed Abdulla Edrus* v. *Syed Zain Sayad Hassan Edrus* [1888], I. L., 13 Bom., 555.

as manager not answering the proper description. After the death of the *wâkif* the right to nominate a manager vests in his executors, or the survivor of them for the time being.(1)

SECTION IV.

THE LEASE OF WAKF PROPERTY.

Lease of *wakf* property.

The limitation with regard to the duration of a lease imposed by the earlier jurists in respect of *wakf* property has been, says the *Radd-ul-Muhtâr*,(2) departed from by the moderns (*mutâkherîn*). And the rule now stands in a much more elastic form than when it was first enunciated.

The power of the *mutwalli* to grant leases.

In the *Fâtawai Kâzi Khân*(3) which is one of the earlier authorities, it is stated(4) in substance that "where the *wâkif* has made no provision in the document of *wakf*(5) [about the grant of leases in respect of the *wakf* property] the *mutwalli* has a discretion to do what is proper and to the advantage of the poor(6) [in other words the beneficiaries] subject to the condition that he should not lease a house for a longer term than one year, for a long lease is apt to give rise to the idea that the lessee is the owner. And he may not give a longer lease of land than is necessary for purposes of cultivation. Should the *wâkif* have imposed a condition that the land shall not be leased for more than one year and people are not willing to take such a short lease, and it is to the advantage of the beneficiaries to lease the property for a longer period, the *kyyum* (the *mutwalli*) cannot act contrary to the condition in the *wakf* and give a longer lease unless he submits the matter before the Kâzi who can sanction a longer lease on the ground that it is to the advantage of the *wakf*, for the Kâzi is the supervisor over [the interests of] the poor, the absent and deceased persons."

"And should the *wâkif* have provided in the document of *wakf* that the *mutwalli* shall not grant a lease for more than a year un-

(1) *The Advocate-General* v. *Fatima Sultani Begum*, supra.

(2) Vol. III, p. 614.

(3) Vol. IV, p. 273.

(4) On the authority of the Jurist Abû J'aafar.

(5) *Sikk-ul-wâkf*.

(6) This is explained in the *Radd-ul-Muhtâr*, as applicable to all beneficiaries, see *post*.

less it is for the advantage of the poor [the beneficiaries], in which case he [the *mutwalli*) may do so himself [*i.e.*, of his own authority] if he considers it expedient, and it does not require being taken to the Court of the Kâzi, for the *wâkif* has [already] given him the power."

"In case the *mutwalli* has created a lease for five years,(1) Shaikh Abu'l Kasim of Balkh has declared that it would not be valid over a year unless some need has arisen for expediting the rent;(2) but says the jurist Abû Bakr Mohamed bin al-Fazl that he does not consider such a lease should be held to be void, but the *Hâkim* (Judge) should take note of it and if it is to the injury of the *wakf* he should cancel it."

"Abu'l Hassan Ali as-Sugdi has expressed the same view. And it is stated from the Jurist Abû Lais that where the *wâkif* had imposed no condition against a lease being granted for more than a year, he permitted it to be given for three years irrespective of the question whether the property was house or land. It is reported from Imâm Abû Hafs Bokhari that he permitted the lease of land for thee years. But there is a difference of opinion regarding [the effect of] a lease for more than three years; the majority of the jurists of Balkh have held that such a lease is not valid, whilst others have declared that it is to be submitted to the Kâzi so that he may cancel it and this doctrine the Jurist Abû Lais has adopted."(3)

In the *Durr-ul-Mukhtar*(4) the rule is given in a more compendious form. "Any condition imposed by the *wâkif* regarding the leasing of *wakf* property must be followed and the *kyyum* (*mutwalli*) cannot act contrary to it, but the Kâzi may, for to him appertains the supervision over the interests of the poor, the absent and deceased people. So where the *wâkif* has left indeterminate the period for which a *wakf* property may be leased, some (jurists) have said the *kyyum* has a general discretion as to the length of the term; whilst others have said the limit should be one year in

(1) This assumes, I take it, that the power of leasing is reserved in the deed of *wâkf*.

(2) *Ta'aajil-ul-ujrat*, evidently meaning that the whole rent for the period is paid in advance.

(3) *Fatawâi Kâzi Khân*, Vol. IV, pp. 273-4.

(4) P. 418.

all cases. And the *fatwa* (1) is with regard to a year for [the lease of] houses and three years in respect of land unless expediency is opposed to this, and expediency varies according to time and locality."(2)

The author of the *Radd-ul-Muhtâr* in commenting on the above passage makes an important statement on the authority of the *Fatâwai Kâri-ul-Hedâya*, "when the repairs of the *wakf* premises cannot be effected without letting [some portion of] it, the matter must be placed before the Judge who can direct the grant of a lease long enough for that purpose."(3)

If the *wâkif* has made a condition that no lease shall be granted for more than one year, and it appears that a long lease is good for the trust-estate, in that case, as already stated, the *mutwalli* should apply for leave to the Kâzi to grant a longer lease and should act according to the Kâzi's directions.

Similarly, where the *wâkif* has made a condition that the *mutwalli* shall not grant a long lease of the *wakf*, and people are not willing to take a short lease thereof, and it is to the advantage of the *wakf* that a long lease should be given, the *mutwalli* should prefer the matter before the Kâzi, who, if he deems necessary, can make an order to that effect, "for the Kâzi is the guardian of the poor." If the *wâkif* has made a condition that the *mutwalli* shall not grant a long lease unless he deems that it would be productive of great benefit to the *cestui qui trust*, the *mutwalli* can give the lease in case of necessity, without reference to the Kâzi.(4)

Discretion of the Kâzi.

Thus the Kâzi, as the general superintendent of all charities, in his capacity of the representative of the Sultan, has the power of empowering the *mutwalli* to grant leases for a longer period than provided for by the *wâkif*. But where the *wâkif* has given no directions he can authorise the grant of a lease for any term which may, in his discretion, be advantageous to the *wakf*.(5)

Jurisdiction of the Civil Courts.

The principal court of original civil jurisdiction under the British Government in India, is vested, generally speaking, with

(1) *I.e.*, Decrees are made in accordance with this view.

(2) *Durr-ul-Mukhtâr*, p. 418.

(3) Vol. III, p. 614.

(4) *Hedâya*, Vol. II, p. 888; *Fath-ul-Kadîr*, Vol. II, p. 6; *Ramz-ul-Hakâik*; *Fatâwai Alamgiri*, Vol. II, p. 641.

(5) "The Kâzi is the curator and guardian of the interests of persons who are dead or absent or unborn, of the poor, the indigent, as well as the custodian of the property of a deceased person and of things which are picked up."

the powers exercised by the Kâzi, though in a recent case(1) the Calcutta High Court has extended the power to the Court of a Subordinate Judge.(2) Accordingly, the application for sanction should be made to the District Judge, if the property is situated in the mofussil, or to the Judge on the Original Side of the High Court, if it is within a Presidency town. It is not necessary to bring a suit for obtaining such sanction; it will be granted upon a proper application made by the *mutwalli*. If there are *Nâzirs*, their consent should be obtained as a condition precedent to the application.(3) If the *wakf* is of a public nature, notice should be given to the beneficiaries in any mode the Judge directs, either by advertisements in newspapers or by posting it up at the institution to which the *wakf* property belongs.(4)

Where the trustees of a certain mosque without obtaining the sanction of the Judge sold the lands in dispute, which formed part of the trust-property, to the plaintiffs in order to raise money to meet the expenses of litigation and the repair of the mosque, it has been held that the sale was not merely voidable but void.(5)

As the Indian Trustees' Act (XXVII of 1866), and the Trustees' and Mortgagees' Powers Act (XXVIII of 1866), are not applicable to Mahommedans, the following additional rules need attention.

"If an executor or guardian leases the property belonging to his ward without the proper customary rent, or if a *mutwalli* acts in that manner in respect of *wakf* property, in all such cases, according to the illustrious Imâm Abû Bakr Mohammed bin Fazl, the lessee will be regarded as a *ghâsib* (embezzler); but Khassâf

---

(1) *Nimai Chand Addya* v. *Golam Hossein* [1909], I. L., 37 Cal.; 179.

(2) *Shama Churn Roy* v. *Abdul Kabeer* [1898], 3 Cal. W. N., 158; *In the matter of Woozatunnessa Bibee* [1908], I. L., 36 Cal., 211. The Mussulman Jurists themselves restrict this jurisdiction to the Chief Kâzi (the Kâzi-ul-Kuzzât). For example, it is stated that the power of sanctioning alteration of investments or change of *wakf* property, granting longer leases than ordinarily allowed by law or provided for in the *wakfnâmah* and similar acts is vested only in the Chief Kâzi.

(3) In the matter of the Act XXVII and Act XXVIII of 1866, and in the matter of a *wakfnâmah*, dated the 30th of May 1896, before Stephen, J., 14th and 25th August, 1902 Calcutta.

(4) *Ibid.*

(5) *Shama Churn Roy* v. *Abdul Kabeer*, supra. For the liability of the superintendent of a mosque and board of directors respectively, see the *Advocate-General of Bombay* v. *Abdul Kadir Jitaker* [1894], I. L., 18 Bom., 40.

holds that he will not be treated as a wrong-doer, but will be liable for the proper customary rent. And the *Fatwa* is according to this latter view." So also in the *Surrat-ul-Fatâwa ;* " If a *mutwalli* leases a *wakf* property for below its real rent, the tenant will be liable to pay the proper rent (*ujr-ul-misl*, customary rent), and on this is the *Fatwa.*"(1)

A lease given by a *mutwalli* is not cancelled by his death.

The lessee of a *wakf* property.

The lessee of *wakf* properties can plant trees or make erections on the land leased to him, provided such act does not in any way injuriously affect the property, but he cannot dig a reservoir or tank ; even the *mutwalli's* permission would justify his doing only such acts as are beneficial to the trust-property.(2)

The lessee can remove such erections as he has built with his own money, provided their removal does not damage the property. If it does, the lessee will not be entitled to remove such erections.

Regarding erections on *wakf* lands, the following rules are applicable :—

" If the *mutwalli* of the *wakf* erects the building, with the property of the *wakf* or the income of the trust-property, the building becomes the property of the *wakf*, whether the erection be for the *wakf* or for himself, or whether it was erected generally without any specific purpose. If the erection was made with his own money or materials for the *wakf*, or *generally*, then also it belongs to the *wakf* property, unless the *wâkif* himself is the *mutwalli* and the erection is made without any expressed purpose, in which case it remains his property, as is stated in the *Zâkhira.* If the *mutwalli* erects the building with his own money *for his own especial purpose and keeps evidence of the fact that it is erected for such purpose out of his own funds*, it will remain his property, and this is what is stated in the *Kinia* and *Mujtaba.*"

When a person, other than the *mutwalli*, erects a building on *wakf* property, for the use of the *wakf* (though temporarily and with the object of taking it back), if the erection is made with the permission of the *mutwalli*, it becomes *wakf*. The same is also the case when the erection is made without the *mutwalli's* permission, but for the use of the *wakf* ; but, where the building is erected for

(1) *Surrat-ul-Fatâwa*, p. 436. (2) *Radd-ul-Muhtâr*, Vol. III, p. 616.

the private purposes of the person erecting it, or where it is made generally without any expressed object, it will be lawful for him to remove it, provided no loss accrues to the *wakf* property in the removal. In the *Fatâwai Kâzi Khân*, it is stated that if a person were to plant trees in a mosque they become the property of the mosque. If a *mutwalli* were to lease the *wakf* lands to his father or son,(1) it would not be valid unless the rent is higher than is usually current, as in the case of an executor, who cannot sell the property of a minor unless at a higher price.

"In the Chapter on *Wakf* in the *Manah* it is stated, that where a man has dedicated a house in favour of his children in perpetuity so long as his posterity lasts, and one of his sons gives a long lease of it to another, and that person under colour of that lease erects a building in the house, if the person giving the lease is not the *mutwalli*, then the lease is void, and the lessee would be entitled to recover from him any money spent on the premises. If the person granting the lease is the *mutwalli*, then the lessee would be liable to pay the *proper* rent for such period as the Kâzi may fix."

Section V.

The Creation of Incumbrances on Wakf Property (Istadânat.)

When once a dedication has been duly effected, the right of the person making the *wakf* in the property dedicated "drops" absolutely. Thenceforth the property is "tied-up" in the ownership of the Almighty, and nobody has a right to deal with it in any shape—neither the *wâkif*, nor his heirs, nor the beneficiaries under the *wakf*.(2) In other words as *wakf*, all right of proprietorship ceases, and the property cannot be alienated or transferred by sale or gift, nor is it subject to the rights of inheritance.(3)

Alienation of *wakf* property illegal.

---

(1) The principle includes any relation or connection.

(2) *Fatâwai Alamgiri*, Vol. II, p. 454; *Radd-ul-Muhtâr*, Vol. III, p. 656; *Hedâya*, Vol. II, p. 888; *Futh-ul-Kadîr*, Vol. II, p. 454. "Where property is endowed, that is made *wakf*, by the proprietor and as such devolves on his widow as trustee or *mutwalli*, it cannot be sold in satisfaction of a claim against him"; *Fegredo* v. *Mahomed Mudessur* [1871], 15 W. R., 75.

(3) *Hedâya*, Vol. II, p. 888; *Fatâwai Alamgiri*, Vol. II, p. 454; *Fath-ul-Kadîr*, &c., &c.

A *wakf* made *inter vivos*, that is, which is not dependent for its operation upon the death of the testator, cannot be revoked, nor is it affected by the subsequent misconduct or misdealing of either the *wâkif* himself, or those responsible for carrying out his behests, so as to render the property alienable, or to destroy the character of inalienability impressed on it by the constitution of *wakf*.(1)

As regards the power of borrowing on account of the *wakf* so as to make it liable, the Mussulman Law is absolutely clear and explicit. Once the dedication has been made, neither the *wâkif* nor the *mutwalli* has any power to burden the property in any shape or character unless the founder has expressly reserved authority to the trustee to borrow "for" the *wakf* in cases of emergency. In the absence of any such provision, he can only do so with the sanction of the Judge.

Istadânat or the power of borrowing.

The law is thus laid down in the *Fatâwai Kâzi Khân*. "When a demand is made on the *Kyyum* for land-revenue (*Kharâj*) or any other tax (*jabâya*) and he has at the time nothing from the income of the *wakf* (*ghallat-ul-wakf*), the Jurist Abu'l Kâsim says that if the *wâkif* had authori ed him to borrow, it would be lawful for him to do so; but if the *wâkif* had given no such directions and he borrows, he will have to pay it out of his own property and cannot have recourse [for repayment] to the income of the *wakf*."

"And the Jurist Abû Lais (may the peace, etc.), has declared that, in case any contingency arises which compels him to borrow, he must do so with the order of the *hâkim* (the Judge); he can then have recourse to the income, for the Kâzi [alone] has the power of borrowing (*istadânat*) for a *wakf*."

"And Nâtiki has stated that when the *mutwalli* intends to borrow to buy with the money [borrowed] seed for cultivation, if he does it with the order of the Kâzi, it is lawful according to all, for the Kâzi has the power to borrow for a *wakf*, and if he were to authorise the *mutwalli* to borrow, his order would be valid—but the *mutwalli* has no power to contract debts [of his own authority]."(2) * * * * should the *Kyyum* desire to pledge [or mortgage] the [property of the] *wakf* for any debt it would not be valid, for that would be tantamount to an avoidance of the *wakf*.(3) And

(1) *Hed* Vol. II p. 888.

(2) *Fatâwai Kâzi Khân*, Vol. IV, pp. 217-8.

(3) *T'aatil-ul-wakf* may also be rendered "make the *wakf* useless."

as it is unlawful for the *mutwalli*, so it is unlawful for the *ahl-ul-masjid* (the congregation), [in other words the beneficiaries of the trust].(1) And if the *Kyyum* mortgages a house belonging to the *wakf* and the mortgagee resides in it, the jurists have held that he would be liable for the customary rent whether the house is in a condition to yield a rent or not."(2) And again, " if there be not in the hands of the *Kyyum* any of the income of the *wakf*, he must place the matter before the Kâzi so that he may order the *Kyyum* to borrow on [account of] the *wakf* for its benefit.(3) But the *Kyyum* cannot borrow without the order of the Kâzi. And the meaning of borrowing is that there is no income of the *wakf* [in the hands of the trustee] and hence it is necessary to obtain a loan and incur debts."(4)

The same rule is given in the *Durr-ul-Mukhtâr*.(5) " It is not lawful to borrow and create debts (*istadânat*) on a *wakf* except when it becomes necessary for its benefit such as repairs or for buying seeds for cultivation. In those circumstances it is lawful under two conditions, *viz.*, *first*, the sanction of the Kâzi, but if he is far from the Kâzi, he may borrow of his own authority, and *secondly*, if it be not possible to lease the property and spend the rent thereof (for the required purposes)."

Commenting on the passage in the *Durr-ul-Mukhtâr* " it is not lawful to create a debt (*istadânat*) on the *wakf*," the author of the *Radd-ul-Muhtâr* says as follows :—" that is, if it is not under the directions of the *wâkif*." In other words, if the *wâkif* has *expressly* provided that the *mutwalli* shall have power to borrow on the security of the *wakf* property for the purposes of the *wakf*, the matter is not open to discussion. But when there is no such provision and the *mutwalli* has not been specifically empowered to that effect, his position is different from that of an executor.(6)" If the *mutwalli* contracts debts, he is responsible for them, excepting under certain specified conditions.... Abu'l Lais has stated, and his doctrine is accepted, that when the contracting of the debt is un-

The *Mutwalli* cannot borrow on the *wakf* property except with the sanction of the Judge.

(1) This shows that the beneficiaries of all trusts, under the Mussulman Law, stand on the same footing.

(2) *Ibid*, p. 218.

(3) *Islâh* with a *sâd*.

(4) *Fatâwai Kâzi Khân*, Vol. IV, p. 221.

(5) P. 423, Hooghly Ed.

(6) *Radd-ul-Muhtâr*, Vol. III, p. 649.

avoidable (*i.e.*, there is absolute necessity for it), in that case the *mutwalli* may do so with the sanction of the Kâzi, unless he is far away, for the Kâzi is the general supervisor of the affairs of the Mussulmans. Some have said that the *mutwalli* has absolute discretion in the matter of repairs. But the first doctrine is the one recognised by the (Hanafi) school."

Commenting further on the passage "The first condition is, the sanction of the Kâzi"—the author of the *Radd-ul-Muhtâr* goes on to say—"When the (the *mutwalli*) applies for sanction, obviously it should not be entertained without proof (of necessity]" * * * * "'When it is not possible to give a lease of the property,' here the term lease is general and includes leases both for short and long periods, or made up of successive short periods, so that if there is a possibility of giving a lease there should be no borrowing on the *wakf*."

The same rule is laid down in the *Fath-ul-Kadîr*, the *Bahr-ur-Râik* and other works of authority and is the recognised law.

From these statements two principles are deducible in order to justify the borrowing, *firstly*, that there is an actual necessity for the *wakf* which cannot be otherwise met either from its current income or by leasing the property; and, *secondly*, that the Kâzi after an examination of the evidence in support of the necessity, specially sanctions the contraction of the loan by the *mutwalli*.

As a general rule, therefore, private alienation, temporary or absolute, by mortgage, or otherwise of *wakf* lands, even though for the repair or other benefit of the endowment, is illegal according to the Mussulman Law.(1)

In certain cases of *debutters* made by Hindus it has been held that a mere nominal endowment will not prevent alienation,(2) and the same principle has been attempted to be applied to *wakfs* created

---

(1) *Moulvee Abdulla* v. *M. S. Rajesri Dosea* [1846], 7 Sel. Rep., 268; S. D. A., 1846, p. 266; and see *M. S. Qadira* v. *Shah Kubeer-ood-deen Ahmud*, 3 Sel. Rep., 407; *Abdul Hasan* v. *Haji Mohammad Masih Karbalai*, 5 Sel. Rep., 87; *Kulb Ali Hoosein* v. *Syf Ali*, 2 Sel. Rep., 139; *Moulvee Abdoolla* v. *Ramzoo Dye*, S. D. A., 1847, p. 192; *Jewaun Doss Sahoo* v. *Shah Kubeer-ood-deen* [1840], 2 Moo. I. A., 390; s. c., 6 W. R., 3; *Syud Asbeeruddeen* alias *Kalla Meah* v. *Sreemutty Drobo Moyee* [1876], 25 W. R., 557, supra; *Doyal Chand Mullick* v. *Syud Keramat Ali* [1871], 16 W. R., p. 116; see also *Shoojat Ali* v. *Zumceroodin* [1866], 5 W. R., 158.

(2) *Puddo Nundan Burral* v. *Kalee Coomar Ghose*, S. D. A., 1852, p. 331; *Gunga Narain Sircar* v. *Brindabon Chunder Kur Chowdhry*, 3 W. R., p. 142.

Nature of a *wakf*.

by Mahommedans. These attempts have, no doubt, been founded on an erroneous comprehension of the Mahommedan Law. As pointed out already, the word "nominal" like the word "pretended" conveys the idea, that though an endowment is purported to be created, in reality the donor never parts with the property.

Under the Mussulman Law, when an endowment is made in terms, with a full knowledge of the meaning and effect of the word *wakf*, there can be no reservation, or *arrière pensée*. The law *detaches* the proprietary right of the donor from the subject of dedication; and, therefore, once the *wakf* is made in express terms it cannot be said to be a *nominal* dedication under the Mussulman Law.

Grants to an individual in his own right for the purpose of supplying means of subsistence have been held not to be *wakf*. It must, however, be remarked that the nature of the grant would be modified by the circumstances of the special case. Where the grant is not absolutely to the grantee, and it appears that it is meant to provide means of subsistence to his descendants, the Mussulman Law will regard it as a valid *wakf*. Again, where the grant is made to a person under the name of *wakf* and no mention is made of any further trust, it will nevertheless be effectual in creating a trust for the poor after the decease of the grantee; and his heirs will have no right of property over the subject of the grant.

In one case it was held by the Calcutta High Court that when a heritable estate was burdened with a trust, *viz.*, the keeping up of a saint's tomb, it may be alienated subject to the trust.(1) The judgment itself is extremely meagre, and neither the facts nor the nature of the document appears in the report. It is difficult to imagine the principle on which the learned Judges proceeded. In fact the case does not appear to have been argued before the learned Judges who laid down this far-reaching dictum. The first question in such a case was to consider whether the estate was heritable. If there was an actual dedication as *wakf*, it is submitted it would not be heritable. If there was no express constitution of the estate as *wakf*, but the trust had been created expressly for the purpose of maintaining the saint's tomb, the legal effect was absolutely the same. But if the property had

(1) *Fulloo Bibee* v. *Bhurrut Lall Bhukut* [1868], 10 W. R., p. 313.

been treated all along as heritable, in that case *only* the principle laid down, in the case referred to, could apply, and the property could be alienated subject to the trust.

The English doctrine against perpetuity is not recognised by the Mussulman Law; and, accordingly, where a property is burdened with a trust which is ostensibly lasting in its character, such property is considered to be tied up for that purpose, and consequently inalienable and non-heritable. In this connection, the remarks of their Lordships of the Privy Council in *Bishen Chand Basawat* v. *Syed Nadir Hossein*(1) are important. *Futtoo Bibi* v. *Bhurrut Lall Bhukut.*

In the case of *Dalrymple* v. *Khoondkar Azeezul Islam*(2) the Sudder Court held that if an endowment be wholly *wakf*, a *mutwalli* is incapable of granting a lease extending beyond the period of his own life; if, however, the office is hereditary, and the *mutwalli* has a beneficial interest in the endowment, they would look upon the property as an heritable estate burdened with certain trusts, the proprietary right of which is vested in the *mutwalli* and his heirs, and he can exercise the right possessed by other proprietors, of granting leases even in perpetuity. In this case the document of *wakf* was not before the Court, but apparently the office of *mutwalli* was hereditary, and the members of the family had a beneficial interest in the usufruct. At least the learned Judges assumed it to be so and chose to call the "endowment" a heritable estate burdened with certain trusts. By these expressions they did not mean to exclude the "endowment" from the general category of *wakfs*; they simply expressed, perhaps in somewhat inaccurate terms, the reasons which induced them to hold the lease valid. Whether such an estate is called "a heritable estate burdened with certain trusts," or a *wakf*, the usufruct of which is descendible among the *wâkif's* heirs, the result is the same.

Where the property is dedicated in the first instance for *strictly* religious purposes, the mere charge of certain items which must in time cease, does not render the dedication invalid.(3) Nor does the mere stoppage of religious services start limitation against a *wakf*.(4)

(1) [1887], L. R., 15 I. A., p. 1.
(2) S. D. A., 1858, p. 586.
(3) *Muzhoor-ul-Huq* v. *Puhraj Ditarey Mohaputtur*, 13 W. R., 235.
(4) *Doyal Chand Mullick* v. *Syud Karamat Ali*, supra.

Lands occupied by tombs.

Lands belonging to a Mahommedan, which are occupied by tombs, cannot be sold in execution of a decree.(1) Nor can a *makbara* or burial-ground be alienated, for it is *wakf* from its nature.(2) A general dedication of land for the purpose of a cemetery establishes *wakf*, and excepts the same from descent to the heirs.(3) It has been held, however, that the mere existence of tombs on a piece of land, unless it is constituted into a *makbara*, does not prohibit partition, except as to the actual spot covered by the tombs.(4)

Where land has been used as a graveyard, although the ownership of the soil may be vested in another, members of the family of the dead who are in the habit of performing certain religious services at their tombs, have a right to obtain an injunction restraining such owner from obstructing them. The ground in which human relics are entered are for ever sacred; the permission to bury in the land, granted as it must be subject to the custom of the people whose dead are buried on the spot, carries with it the right to perform all customary rites.(5)

Where certain *inaam* land, granted for the service of a *masjid*, was attached in satisfaction of a decree obtained by a mortgagee of the property against the descendants of the original grantee who had mortgaged it to him, it was held that by the Mussulman Law the mortgage was illegal and void, as land appropriated to religious purposes could not be sold or mortgaged by any of the descendants of the original proprietor; and the Court agreed that the attachment should be raised.

The Mutwalli has no power of mortgaging the *wakf* property without the sanction of the Judge.

The *mutwalli* may, however, under special circumstances, pledge the *wakf* property either wholly or partially, *with the sanction of the Kâzi*, as previously stated, and may even alienate a portion of the property. But any such act done without the permission of the Kâzi is wholly void and inoperative.

Under the Mussulman Law the authorisation or sanction of the Judge is a condition precedent and the earlier cases in the British Indian Courts have almost invariably given effect to this rule.

(1) S. D. A., Beng. Sum. Cases, p. 40, 21st Novr., 1842.
(2) 5th December, 1846, S. D. A., N.-W. P., p. 250.
(3) 5 S. D. A. Rep. (Beng.), p. 136, 30th July, 1831.
(4) Sel. Rep., 204, Bom. S. A., 1839.
(5) *Ram Narayan Bellary* v. *Rustam Khan* [1901], I. L., 26 Bom., 198.

In *Moulvee Abdoollah* v. *Rajesri Dossea and another*,(1) which is the leading case on the subject, the plaintiff (who was the appellant in the Sudder Court) sued as the *mutwalli* of a mosque for the rents of certain lands attached thereto. The defendant, Rajesri Dossea, pleaded that one Mahomed Ufzul, the late superintendent, borrowed from her husband 51 rupees for the repairs of the mosque, and mortgaged to him the rents of 8 cottahs and a tank for three years, providing in the deed of mortgage, dated 9th Jeyt 1219 that the debt was to bear interest at 1 per cent. per mensem for those years, and that at the expiration of three years, if the debt was not paid off, the rent of the 8 cottahs 5 sicca rupees per annum should be sold to him for the debt, and the rent for the tank, or 1 rupee per annum, paid to the superintendent for the expenses of the mosque. She contended that as the debt had been incurred by Mahomed Ufzul for the repairs of the mosque, and the mortgage had not been cleared off, the engagement was binding on his successor, the present plaintiff. The first Court decreed the plaintiff's suit on the ground that the mortgage was created for the benefit of the mosque by the late incumbent and was therefore valid, but it was dismissed by the Lower Appellate Court. On appeal by the plaintiff, the Sudder Court held, in accordance with the *Fatwa* of the Law Officers, that the alienation, by mortgage, of land, devoted to religious purposes, and of the produce of such land, was invalid, and that the fact of the land being mortgaged for the repair or other benefit of the mosque did not affect the case.

Moulvee Abdoollah v. *Rajesri Dossea and another.*

Necessity no ground for alienation.

In *Nimai Chand Addya* v. *Golam Hossein*,(2) however the Calcutta High Court has expressed a view in conflict with all the previous decisions. In this case the *mutwalli* had created a mortgage without the sanction of the Judge in order to save the property from a threatened sale by the Collector. The mortgage included some personal properties of the *mutwalli* which were also in jeopardy. Upon an action by the mortgagee to enforce the mortgage the Subordinate Judge held that as no sanction had been obtained as provided by the Mussulman Law, it was void as against the *wakf* property. The High Court on appeal considered that as some of the authorities gave a certain discretion to the *mutwalli*

(1) *Supra.* (2) [1909], I. L., 37 Cal., 179, *supra.*

in case the Judge happened to be at a distance, "retrospective approval" was effective in validating a transaction from which a benefit had accrued to the *wakf*. On this point the learned Judges expressed themselves as follows:—"the texts, however, to which we have referred, indicate plainly that the consent of the Cadi is essential whenever he is available, and if so, there is no reason why approval subsequent to the transaction should not be treated as effective in the same manner as approval prior to the transaction. It is but rational to hold that the approval of the Cadi was deemed requisite primarily with a view to make sure that the loan was necessary, and in this view approval, antecedent or subsequent, ought to be equally effectual."

Speaking with respect, the view here expressed misses the principle underlying the rule of Mussulman Law. According to all the authorities the validity of a transaction creating a burden on a *wakf* depends on the *prior* sanction of the Judge, which is essential in every case and not as is said in the judgment merely "whenever he is available." The qualification of the law implied in these words, it is respectfully submitted, is not warranted by the authorities for even the statement that when the *mutwalli* is at a distance from the Judge he may act of his own authority does not vary the law; it only throws the responsibility on the *mutwalli* himself. *Ex post facto* sanction was never contemplated by the Mussulman jurists. For the permission of the Judge was made an absolute condition to see not only that the loan was necessary, but also whether it was proper, that the terms were not onerous and there was no other mode of meeting the necessity. The facts of the case which led the Court to give a number of directions contrary to the terms of the mortgage show that it was not a transaction essentially for the benefit of the *wakf*, or that it was such that a Judge in view of the interests of the trust could have sanctioned without serious consideration. Again, there was nothing to show that the Judge was at such a distance that the matter could not have been submitted for his sanction. Even under English Law the previous sanction of the Court is essential to the validity of a transaction creating a charge on trust-property.

Under the Mussulman Law when a charge has been validly created on a *wakf* property, the income alone is liable for its repayment; the property itself can under no circumstance be

alienated or sold for its discharge. In other words the income only is hypothecated for the debt.(1)

When the sale of *wakf* property is set aside on the ground that it was not alienable, and it has happened that in the interval erections have been made by the purchaser, he would be entitled to remove those erections provided they can be separated from the *wakf* property without injury to it. In the case of erections that can be so removed, as also in the case of trees planted by the purchaser, the Kâzi may, in his discretion, direct a legitimate compensation provided the erections distinctly add to the value of the *wakf* property. If the erections have been made by pulling down the original *wakf* building, or the trees are planted from grafts taken from the *wakf* property, the purchaser is not entitled to receive any compensation for them. He is only entitled to recover back from *his* vendor the value paid by him.

No alteration made in a *wakf* building by the purchaser or anybody else can change the character of the *wakf*. The purchaser will be liable for any loss occasioned to the *wakf* by his alterations or additions to the *wakf* building, and for restoring it to its original condition, but he will not be entitled to any compensation on account of any improvement, unless those improvements are distinctly separable.

The purchaser will not be entitled to remove any erection made by him, if from such erections an advantage accrues to the *wakf*. For example, a man makes a better oven for preparing bread in place of an old one, he cannot remove it, nor is he entitled to any compensation for it. But if he fixes lamps he can remove them, or if they are left, he is entitled to compensation.

The purchaser is entitled to recover from his vendor the value of the building at the time when the sale is set aside and not the price paid by him. For example, if a man purchases a house for ten thousand dirhems and lives in it, and the house has become dilapidated he is not entitled, when the sale is set aside, to the price which he paid for it. If the value has increased, the purchaser would be entitled to receive the enhanced price.

---

(1) *Radd-ul-Muhtâr*, Vol. III, p. 649, Comp. *Narayan* v. *Chintmon* [1881], I. L., 5 Bom., 393 ; the *Collector of Thana* v. *Hari Sitaram* [1882], I. L., 6 Bom., 546 ; *Pillian* v. *Sannadhi* [1903], I. L., 27 Mad., 465 ; *Narain Chand Addya* v. *Golam Hossain*, supra.

General principles : right to sue.

The applicability of sec. 539 of the old Civil Procedure Code (Act XIV of 1882) to suits for recovery of *wakf* property improperly alienated was discussed in the case of *Kazi Hassan* v. *Sagun Balkrishna.*(1) The plaintiffs sued to recover possession of certain lands, upon the allegation that those lands had been granted in *wakf* to their ancestor and his lineal descendants to defray the expenses for, or connected with, the services of a certain mosque, and that their father (defendant No. 3) and cousins (defendants Nos. 4 and 5), who were *mutwallis* in charge of the said property, had illegally alienated some of the *wakf* property, and had also ceased to render any service to the mosque, whereupon they (the plaintiffs) had been acting as *mutwallis* in their stead. They, therefore, claimed to be entitled as such to the management and enjoyment of the lands in dispute. It was contended by the defendant (*inter alia*) that the plaintiffs could not sue in the lifetime of their father (defendant No. 3), he not having transferred his right to them.

The Court held that the plaintiffs were entitled to sue to have the alienation made by their father and cousins set aside and the *wakf* property restored to the service of the mosque. They were not merely beneficiaries, but members of the family of the *mutwallis*, and were the persons on whom, on the death of the existing *mutwallis*, the office of *mutwalli* would fall by descent, if, indeed, it had not already fallen upon them, as alleged in the plaint, by abandonment and resignation.

When a suit is brought to set aside an alienation made to a stranger, such a suit by the worshipper at a mosque can be maintained and does not fall within section 539 of the Civil Procedure Code (Act XIV of 1882). The section is only applicable where there is an alleged breach of trust created for a public, charitable, or religious purpose, and the direction of the Court is necessary for the administration of the trust. As against strangers, section 539 does not apply.(2)

(1) [1905], I. L., 24 Bom., 170.
(2) *Ibid.*