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prior decision on this point was an exercise of jurisdiction and as final as its determination of any other point in the case. It proceeded no further with the inquiry on that particular point; but this course was one not in the way of declining jurisdiction, or failing to exercise it, but one of the exercise of jurisdiction, and necessitated because the particular subject was exhausted by its determination. As authority, the Court's jurisdiction was retained; as an exercise of authority it had reached its legal termination. The decision of a question of *res judicata*, as of limitation or the like, raised in a case is not, even though wrong, a failure, or a cause of failure, to exercise jurisdiction, any more than a wrong decision on the whole litigation. We agree with the previous decision of this Court in *Hari Bhikáji* v. *Náro Vishvanáth*(1), and discharge the rule with costs.

Rule discharged.

(1) I. L. R., 9 Bom., 432.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1887. *March* 11.

AMRUTLA'L KA'LIDA'S, (PLAINTIFF), v. SHAIK HUSSEIN, MAHOMED EBRA'HIM, AND SHUMSUDIN, (DEFENDANTS).*

Mahomedan law—Wakfnámá—Wakf—Perpetuity—Ultimate trust in favour of charity.

M., the father of the three defendants, executed an instrument purporting to be a *wakfnámá* in favour of his heirs and descendants, generation after generation. The office of *mutwáli* he reserved for himself for life, and, in the event of his death, he appointed his wife and youngest son (Mahomed Ebráhim) *mutwális*, with certain powers of delegation, upon the following conditions:—The said *mutwális* having received the annual income of the property, and having defrayed the expenses of repairs and the taxes, &c., were to divide the balance into four equal shares, and to make over one share to his son Shumsudin and his descendant after descendant for their expenses; one share, in like manner, to his son Shaik Hussein; one share, in like manner, to his son Mahomed Ebráhim; and as to the remaining share, to pay one-half thereof to his wife, Ashábibi, for expenses; and one-half thereof to his sister, Shábanbibi, for expenses. The deed then proceeded:—

"If any one from among my heirs and (? or) descendant after descendant should die, then the said *mutwális* shall make his or her funeral outlays accord-

* Suit No. 415 of 1886.

ing to our custom and usage; and as to what may remain as a balance, they shall duly distribute and give the same to my heirs and descendants according to the book of God. Further as follows:—May God forbid it! If from among my heirs and descendants there shall be left no one surviving, then, as regards the income of the whole of the property endowed for religious and charitable purposes, the same, for the sake of God, is duly to be distributed and given to Mahomedan *fakirs* and indigent people." Then followed a direction that the property was not to be sold or mortgaged.

On the 25th February, 1883, the first two defendants mortgaged the properties comprised in the *wakfnámá* to the plaintiff for Rs. 3,000. The plaintiff brought the present suit against the said two defendants to enforce the mortgage. The third defendant was made a defendant at his own request, and alleged that the mortgage had been made without his consent. He submitted whether, having regard to the terms of the deed, the plaintiff had any claim as mortgagee; and he contended that in no case could the mortgage operate, except against the shares of the first two defendants. The plaintiff contended that the *wakfnámá* was invalid, and that upon the death of M. the property comprised in it devolved upon his three sons as his heirs, and also that, assuming the *wakfnámá* to be valid, the first two defendants took an estate of inheritance under it, which they were at liberty to alien and mortgage.

Held (following *Fátmábibi* v. *The Advocate General of Bombay*[1]) that the deed of the 17th May, 1871, was valid as a *wakfnámá*.

Semble, that the mortgaged property being *wakf*, the plaintiff acquired no right under his mortgage which would extend beyond the life-time of his mortgagors. In such property no one has any interest as the heir of the appropriator. It is neither the subject of ownership, nor inheritable, but each object of the charity who brings himself or herself within the terms of the endowment is entitled to receive the benefit which the founder has marked out for him.

SUIT to recover Rs. 3,990 with interest, and, in default of payment, for foreclosure and possession or sale of certain premises mortgaged by the first two defendants to the plaintiff by an indenture of mortgage dated the 25th February, 1885.

The suit was originally filed in September, 1886, against the first two defendants only; and prayed for the above-mentioned relief as against them. By an order dated 16th November, 1886, the third defendant, Shumsudin, was made a party defendant. All three defendants were the sons of one Miyá Bundu, deceased. The first two defendants did not file any defence.

The third defendant, Shumsudin, in his written statement admitted the mortgage to the plaintiff. He, however, alleged that by a *wakfnámá*, or deed of endowment, dated 17th May, 1871,

(1) I. L. R., 6 Bom., 42.

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Miyá Bundu, (the father of the three defendants), gave the property in question, together with three other properties, to his heirs and descendants for religious and charitable purposes, and declared that the office of *mutwáli* should be held by his wife Ashábibi and the second defendant, with power to delegate the said office to whomsoever they should choose; and he further declared that, after deducting all outlays in respect of the said properties, the said *mutwális* should divide the annual income thereof into four regular shares, and make over one of such shares to each of the three sons and their respective descendants for their expenses, and out of the remaining share pay half thereof to his widow, Ashábibi, and the other half to his sister, Shábanbibi; and it was by the said *wakfnámá* further declared that, if none of the heirs of the settlor should survive, the income of the whole of the property should be distributed among Mahomedan *fakirs* and indigent people; and, further, that the said properties should not be sold or mortgaged by any one; and that, if any one should seek to do so, then the claim should be null and void.

The said Ashábibi died in June, 1875, and by his will, dated the 2nd February, 1876, the said Miyá Bundu appointed the first defendant to be a *mutwáli* after his decease, in the place of the said Ashábibi, together with the second defendant.

Shábanbibi died on the 9th September, 1877, and Miyá Bundu, the settlor, died on the 1st January, 1881. After his death the first and second defendants undertook the management of the properties settled by the said deed, but they afterwards delegated the office of *mutwáli* thereof to the third defendant; and he alleged that for the four years preceding this suit he had managed the said properties in accordance with the said deed.

The third defendant further alleged that on the 25th February, 1883, the first and second defendants, without his consent and in spite of his remonstrances, purported to mortgage the property in question to the plaintiff; and he submitted to the Court whether, having regard to the terms of the deed, the plaintiff had any, and, if so, what claim as mortgagee. He further submitted that in no case could the said mortgage operate, except against

the shares of the first and second defendants in the said property; and that the said mortgage was inoperative against him and the share belonging to him. He, lastly, alleged that the moneys borrowed by the first and second defendants on the said mortgage were not for the benefit of the *wakf*.

At the hearing the following issues were raised :—

1. Whether the document dated the 17th May, 1871, was executed as alleged by the third defendant.

2. Whether, having regard to the terms and true legal effect of the said document, the plaintiff has any and, if so, what claim as mortgagee upon the properties in the plaint mentioned.

3. Whether the sum of Rs. 3,000 is due from the first and second defendants to the plaintiff.

4. Whether the sum of Rs. 3,000 was borrowed by the first and second defendants for the benefit of the said *wakf*.

5. Whether the plaintiff is entitled to any and what relief.

8. Whether the third defendant had not knowledge of, and is not bound by, the provisions of the said mortgage.

P. M. Mehtá and *Lang* for the plaintiff.

Macpherson, (Acting Advocate General), and *Russell* for the third defendant.

The following authorities were referred to :—*Fátmábibi* v. *The Advocate General of Bombay* (1); *Abdul Ganne Kásam* v. *Hussen Miyá Rahimtullá*(2); *Phate Sáheb Bibi* v. *Dámodar Premji* (3); *Mahomed Hamidulla Khán* v. *Lotful Huq* (4); *Luchmiput Singh* v. *Amir Alum*(5).

24*th March*, 1887. FARRAN, J. :—The facts in this case are not disputed. On the 17th of May, 1871, one Miyá Bundu Muckay executed an instrument in writing, which was duly registered, purporting to be a *wakfnámá* in favour of his heirs and descendants, generation after generation. The office of *mutwáli* he reserved for himself during his life-time, and in the event of

(1) I. L. R., 6 Bom., 42.
(2) 10 Bom. H. C. Rep., 7.
(3) I. L. R., 3 Bom., 84
(4) I. L. R., 6 Calc., 744.
(5) I. L. R., 9 Calc., 176.

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his death he appointed his wife, Ashábibi, and his youngest son, the second defendant Mahomed Ebráhim, *mutwális*, with powers of delegation, upon the conditions following :—The said *mutwális* having received the annual income of the property, and having defrayed the expenses of repairs and the taxes, &c., were to divide the balance into four equal shares, and to make over one share to his son Shumsudin and his descendant after descendant for their expenses; one share in like manner to his son Shaik Hussein, &c.; one share, in like manner, to his son Mahomed Ebráhim; and as to the remaining share, to pay one-half thereof to his wife, Ashábibi, for expenses and one-half thereof to his sister, Shábanbibi, for expenses. The deed then proceeded:

"If any one from among my heirs and (? or) descendant after descendant should die, then the said *mutwális* shall make his or her funeral outlays according to our custom and usage; and as to what may remain as a balance, they shall duly distribute and give the same to my heirs and descendants according to the book of God. Further as follows :—May God forbid it! If from among my heirs and descendants there shall be left no one surviving, then, as regards the income of the whole of the property endowed for religious and charitable purposes, the same, for the sake of God, is duly to be distributed and given to Mahomedan *fakirs* and indigent people."

Then followed a direction that the property was not to be sold or mortgaged. On the same day, Miyá Bundu Muckay made another *wakfnámá* of the only other immoveable property he possessed in favour of his daughter-in-law and charity. Besides the above properties he left at his death about Rs. 1,500 in cash and some household furniture. He managed the properties till he died in 1881. His wife and sister predeceased him, and by his will he appointed his second son, Shaik Hussein, *mutwáli* in the place of his deceased wife. His three sons survived him, and are defendants in this suit. Mahomed Ebráhim and Shaik Hussein acted as *mutwális* of the properties, comprised in the *wakfnámá* above set out, for about one and a half year after the death of their father. They then deputed Shumsudin to take up the management for them. Since the father's death the

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net rents have been divided between the three brothers, who all live separately. Mahomed Ebráhim has one son. Shaik Hussein has a daughter. Shumsudin is without issue.

On the 25th February, 1883, Mahomed Ebráhim and Shaik Hussein mortgaged the four properties, comprised in the *wakf-námá*, to the plaintiff to secure the sum of Rs. 3,000 and interest. The present suit is brought to enforce that mortgage against the defendants, Mahomed and Shaik Hussein. The defendant Shumsudin was made a defendant at his own request, and has filed a written statement. The other defendants have not appeared, and the suit as to them has been heard *ex parte*. It is not alleged that the mortgage money was raised for the purposes of the *wakf*. The plaintiff had no notice of the *wakf-námá* other than the notice to be inferred from the document being registered when he advanced his money to the first and second defendants. The plaintiff contends that the *wakfnámá* is invalid, and that upon the death of Miyá Bundu the properties comprised in it devolved upon his three sons as his heirs; and also that, assuming the *wakfnámá* to be valid, the defendants, Mahomed Ebráhim and Shaik Hussein, took an estate of inheritance under it which they were at liberty to alien and mortgage. The defendant Shumsudin questions both of these contentions These are the real issues in the case.

The settlement which Miyá Bundu made of his property creates a perpetuity of the worst and most pernicious kind, and would be invalid on that ground, unless it can be supported as a *wakfnámá*, by which, according to Mahomedan law, a perpetuity can be created for certain purposes. In the case of *Abdul Ganne Kásam* v. *Hussen Miyá Rahimtulla*(1) this Court expressed a strong opinion that such a settlement as the above, where there was no expressed ultimate trust in favour of charity, was void, and could not be upheld as *wakfnámá*, inasmuch as to constitute a valid *wakf* the endowment must be to religious and charitable uses. This expression of opinion was followed in *Mahomed Hamidullá Khán* v. *Lotful Huq*(2), and applied to a settlement in which there was an express ultimate trust in favour of charity. It was held that as the

(1) 10 Bom. H. C. Rep., 7. (2) I. L. R., 6 Calc., 744.

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settlement was in favour of the daughter of the settlor and her descendants before (if ever) the property was to be applied in charity, it could not be said to be an endowment for religious and charitable purposes. The Court in that case followed what they considered to be the conclusion to be drawn from the Hedaya in preference to the views expressed by Mr. Baillie in his Digest of Mahomedan Law. The law was again considered in *Luchmiput Singh* v. *Amir Alum*(1), where the Court held that, when the primary purpose of the endowment is charity, it is not invalidated by a provision for the maintenance and support of the family and descendants of the settlor. The decision, or rather expression of opinion, of this High Court in *Abdul Ganne Kásam* v. *Hussen Miyá Rahimtullá* is there cited as laying down the proposition that, in order to constitute a valid *wakf*, there must be a dedication of the property *solely* to the worship of God, or to religious or charitable purposes. Though the word 'solely' does occur in the judgment of this Court, and is used in the marginal note as expressing its result, I think that the more correct effect of the judgment is summed up in the passage at the foot of page 13 of the report; where, referring to the decision of the Privy Council in *Jewun Doss Sahoo* v. *Sháh Kubeer-ood-deen*(3), the Court say: "In that case it was held that, according to the Mahomedan law, it is not necessary, in order to constitute a *wakf*, or 'endowment to religious and charitable uses,' that the term *wakf* be used in the grant, if from the general nature of the grant such tenure can be inferred. We think that the converse of this proposition holds good, namely, that it is necessary, in order to constitute a *wakf*, that the endowment should be to religious and charitable uses, and that it is not sufficient that the mere term *wakf* should be used in the grant. To hold otherwise would be to enable every person by a mere verbal fiction to create a perpetuity of any description." The Court were not considering the case of the appropriator reserving for himself and his descendants (pauperised by the act of endowment) a sufficient provision for his and their maintenance and support. The view of the Court, if that case had been before them, would,

(1) I. L. R., 9 Calc., 176. (2) 10 Bom. H. C. Rep. at p. 13.

(3) 2 Moore's Ind. App., 390.

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I think, judging from the reasoning at the beginning of page 13, have been in favour of the validity of such a provision. The Judges in deciding *Mahomed Hamidullá Khán* v. *Lotful Huq*[1] also treat the judgment of this Court in the same case as going further than I think the judgment, read as a whole, warrants. The case of *Fátmá Bibi* v. *Ariff Ismáilji*[2] follows the ruling in *Mahomed Hamidullá Khán* v. *Lotful Huq*. The deed of endowment in it was very similar to the one before me. It arose on the Original Side of the Calcutta High Court, and was decided by Wilson, J., and apparently the decision was not appealed from.

The conclusion, which is properly deducible from the above cited cases, is, I think, that where the primary and general object of the endowment is for the furtherance of religious or charitable purposes, or for the worship of God, such endowment is valid, although the *wakfnámá* may also provide for the support of the family and descendants of the founder; but that, where the *wakfnámá* has for its real object nothing connected with the worship of God or religious observances, and provides only in a very remote contingency for the poor, such remote provision does not validate a perpetuity for the benefit of the dedicator's children and their descendants so long as any such exist. That conclusion, if applied to the *wakfnámá* with which I have to deal, would, no doubt, invalidate it. A different view was, however, expressed by Mr. Justice West in *Fátmábibi* v. *The Advocate General of Bombay*[3]. "If," says that learned Judge, "the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a *wakf* is not rendered invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take, may constitute a perpetuity in the sense of the English law; but, according to the Mahomedan law, that does not vitiate the settlement, provided the ultimate charitable object be clearly designated." In support of that proposition he relies on *Muzhurool Huq* v. *Puhráj Ditarey Mohapattur*[4], *Doyal Chund Mullick* v. *Syud Keramut Ali*[5] and *Delroos Banoo* v. *Nawáb Suyud Ashgur*[6] and on the opinion

(1) I. L. R., 6 Calc., 744.
(2) 9 Calc. Rep., 66.
(3) I. L. R., 6 Bom., 42, at p. 53.
(4) 13 Calc. W. R. Civ. Rul., 235.
(5) 16 Calc. W. R. Civ. Rul., 116.
(6) 15 Beng. L. R., 167.

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of Baillie in his work on Mahomedan law. In *Delroos Banoo* v. *Náwab Suyud Ashgur*(1) the main purpose of the *wakfnámá* was the support of an *imámbára* and, therefore, religious. Only a small maintenance was reserved for the appropriator. In *Doyal Chund Mullick* v. *Syud Keramut Ali*(2) the sole object of the appropriation, so far as it came in question for the purposes of the decision, was religious and charitable. In *Muzhurool Huq* v. *Puhráj Ditarey Mohapattur*(3) the revenues were appropriated to the support of a mosque and certain religious offices; and it was directed that from the remaining profits the expenses of the marriage, burial, and circumcision of the members of the family of the *mutwáli* were to be defrayed. The endowment was upheld. These cases are not of themselves directly opposed to the conclusion deducible from the later authorities which I have above referred to. The decision in *Fátmábibi* v. *The Advocate General of Bombay*(4) is, however, irreconcileable with it.

Doe dem. Jaun Beebee v. *Abdollah Barber*(5), also referred to by West, J., is a case of considerable importance. The opinion of the Court *moulvis* was taken before the judgment was given by Ryan, C.J., and the original authorities were referred to. The deed of endowment, which is rather obscurely translated as set out in the report, apparently provides for the repairs of a mosque, the payment of the salary of the *mowuzz* in the *khattab*, and the expenses connected therewith during *Ramazánn* and the *Eed*, and the maintenance of certain members of the family of the appropriator. The appropriator reserved to himself the right of dealing with the produce, or part of it, during his life-time. The endowment was upheld. The judgment determined that the facts of the appropriator and *mutwáli* being one and the same person, and of the appropriator having reserved part of the property so appropriated to her own use for life, did not invalidate the endowment; upon these points giving the preference to the opinion of Aboo Yoosuf above that of Mahomed. The opinions of the *moulvis* were expressed upon the first and third questions propounded to them, *viz.*, (1) whether, according to Mahomedan law, an endowment to charitable uses is valid, when

(1) 15 Beng. L. R., 167.
(2) 16 Calc. W. R. Civ. Rul., 116.
(3) 13 Calc. W. R. Civ. Rul., 235.
(4) I. L. R., 6 Bom., 42.
(5) Fulton, p. 345.

qualified by a reservation of the rents and profits to the donor himself during his life; (3) whether the endower can lawfully constitute himself mootuwullee or trustee in the following terms:—"To the first question: There is a difference of opinion between Aboo Yoosuf and Mahomed, touching the *wuqf* or consecration of lands, with a reservation, and setting a part of any portion of the profits and produce thereof for the support of the *wuqueeff* or consecrator. Aboo Yoosuf considers the act legal, and Mahomed deems it illegal. The legal opinions of most of the learned, uphold the opinion of Aboo Yoosuf, which is to be found in the *Chulpee* or commentary of the Shurrai Vakyah, the Futtawah Aulumgeeree, the Kházee Khánn, and the Kaffee. To the third question: It is lawful for the *wuqueef* or consecrator to become mootuwullee or procurator, and to reserve the profits of part of the consecrated land for his own use and his descendants, as will be found in the Hedayah, Kházee Khánn, and the Aulumgeeree(1)."

(1) The *moulvis* cited in support of their opinion from the Aulumgeeree, p. 495, in print:

"Whenever a *wuqf* is made of land or other property and the party making the same reserves the whole of the profits thereof to himself, or a part only during his own life, and after that for the use of the poor, herein Aboo Yoosuf has said: 'This *wuqf* is right,' and the learned of Bulluck (a town in Tooran) have decided conformably to this opinion of Aboo Yoosuf's, and the decisions are in conformity therewith, for to induce persons to make *wuqfs*. The like is to be found in the Sogral and the Nesaub and also in the Moojmuraul only."

From the *Chulpee* in print, the commentary of the Sherra Vekyah, p. 254:

"In the opinion of Aboo Yoosuf it is right or lawful for the *wuqf* or consecrator to direct the profits to his own use and to make himself mootuwullee, but not right in the opinion of Mahomed.

"The Moofti of Sakullain and Sudder Shyeed have said: The *futtawahs* or decrees are in conformity with the words of Aboo Yoosuf's only."

From the Kaufee, in manuscript, sheet 588:

"The *wuqueeffs* directing the profits of the *wuqf* to his own use is right in the opinion of Aboo Yoosuf and the Musshaik Shaiks of Bulluck, and the decrees are consonant with that only."

From the Kházee Kháun, in print, p. 251:

"It is not right, in the opinion of Heelloll, for the *wuqueef* to stipulate, in making a *wuqf*, that he shall appropriate the profits thereof to himself during his life, but it is right in the opinion of Aboo Yoosuf, and the Musshaik of Bulluck have followed the opinion of Aboo Yoosuf and said: Such *wakf* and such reservations are both right; and Sudder Shreheed has said: The decrees are in conformity with the opinion of Aboo Yoosuf only."

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The Chief Justice sums up thus:—"Mahomed considers an appropriation with a reserve to the use of the appropriator during life illegal, and he also considers the assignment and delivery to a mootuwullee or procurator essential to the validity of an appropriation. Aboo Yoosuf, on both these points, is at variance with Mahommed. After obtaining all the information we are able to collect through the means of our moulavies and a reference to authorities, we are of opinion, that the opinion of Aboo Yoosuf on both these points must be considered as the law now prevailing and sanctioned by the more recent authorities"(1). This judgment is decisive to the effect that the views of Aboo Yoosuf have been adopted upon the points at issue by Mahomedan jurists in preference to those of Mahomed.

Mr. Baillie's statement of the law is clear. He says: "Mr. Hamilton has unnecessarily restricted the legal meaning of *wakf* to appropriations of a 'pious or charitable nature' (Hedaya, Vol. II, note, p. 334); and he has been followed by Sir William Macnaghten, who renders the word by 'endowments.' But it will be seen hereafter that the term is more comprehensive, and includes settlements on a person's self and children," p. 549, note 3; see, too, Introduction, p. xxxvi, where he says: "With regard to its objects, two conditions are required. There must be some connection between them and the appropriator; and they must be of such a nature that, taken together, they can never fail. The poor are held to answer both these conditions, because they are supposed to be connected with everybody, and because 'there will always be poor in the land.' * * * * * One class of appropriations I have designated by the name of 'settlements,' to distinguish them from 'endowments,' which have hitherto been supposed by English writers to be the only proper objects of appropriation. These are appropriations by a person for the benefit of himself, his children, kindred, or neighbours. Thus, a man may settle his land 'on himself, and *after* him, on such an one, and *then* upon the poor.' * * * So, also, if he should say, 'upon my child, and child of my child, and child of the child of my child,' the produce is to be expended on his children for ever, so long as there are any descendants." According to Mr. Baillie, the *wakf* is valid, though

(1) 1 Fulton at p. 360.

a purpose is mentioned which may fail, for in that case the rent or produce would revert to the poor, which must be supposed to be the appropriator's design, though he should fail to mention it—p. 553, Introduction, p. xxxvi. Book IX on appropriations is only an amplification of the above quoted introductory passage. It is founded on the work which forms the basis of Mr. Baillie's Digest, the Alamgiri. *In his view, settlements of* almost any description may be created, provided there be an ultimate remainder in favour of charity or religion to ensure their perpetuity. The logical deductions from the arguments of Aboo Yoosuf are responsible for this wide extension of the term *wakf.* Mahomed would confine it to its more legitimate purposes.

The question which I have to determine is whether the wide interpretation which Baillie has given to grants in *wakf,* or the more limited interpretation given to it by Hamilton and Macnaghten and other writers, ought to prevail. Baillie's views have been adopted in *Fátmábibi* v. *The Advocate General of Bombay*(1). They have been dissented from in *Abdul Ganne Kásam* v. *Hussen Miyá Rahimtullá*(2), but the decision did not turn upon that dissent, and, in fact, in that case there was no ultimate dedication to charity at all.

The author of the Hedayah does not himself come to any conclusion between the arguments of Mahomed and those of Aboo Yoosuf; but a careful perusal of Book XV of that work on *wakf,* leads, I think, to the inference that neither of the disciples contemplated the creation of a *wakf,* which, keeping up a fund in perpetuity for the benefit of the family of the appropriator, only employed a nominal ultimate remainder to the poor as a means of imposing fetters upon the enjoyment of property which the Mahomedan law did not in other ways permit. The three arguments of Aboo Yoosuf, given at page 350, are hardly consistent with the foundation of a *wakf* with that object. No doubt if a man can reserve for his own use a life-interest in land which is the property of God, he can logically reserve a similar interest

(1) I. L. R., 6 Bom., 42. (2) 10 Bom. H. C. Rep., 7.

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for his descendants so long as they exist, but the benefit to the cause of charity arising from such a disposition is extremely limited, and the reason assigned for allowing a life-interest to be reserved is as an inducement to the making of endowments. If I were at liberty to draw my own deduction from the sayings of Hanifá and the two disciples, and to decide in the light of modern jurisprudence between the conflicting opinions of the latter, I should, without doubt, give the preference to the view of Mahomed, and refuse to press the arguments of Aboo Yoosuf to their legitimate conclusion; but what I have to do is to decide according to Mahomedan law, as laid down in their works of authority. As to the Alamgiri Futawee, Ryan, C.J., says at page 360 of the report: "Some of the authorities which they (the *moulvis*) cite are in print, and one in particular, which supports the doctrine of Aboo Yoosuf, I need hardly say is of great authority in Mahomedan law. I mean the Futawee Aulumgeeree, which is a collection of opinions and precedents of Mahomedan law compiled by Shaik Noyan, and other learned men by command of the Mogul Emperor Aurangzebe. This compilation was made about, I presume, the close of the seventeenth century, and is of course received as an authority for the present state of the law."

I have not been able to refer to the original work upon the question before me, but Mr. Neil Baillie's work is said by the author to be almost a reproduction of it in English.

The authority of the cases of *Mahomed Hamidullá Khán* v. *Lotful Huq*(1) and of *Fatimá Bibee* v. *Ariff Ismáiljee*(2) is much weakened by the fact of the Judges, who decided those cases, treating what, at most, is but an expression of opinion in *Abdul Ganne Kásam* v. *Hussen Miya Rahimtullá*(3) as a decision, and by the doubt thrown upon them by the Court in deciding *Luchmiput Singh* v. *Amir Alum*(4), in which one of the Judges, who decided the former of the two cases sat. The case of *Fátmábibi* v. *The Advocate General*(5) was not referred to in either of them, nor in the later case. I, there-

(1) I. L. R., 6 Calc., 744.

(2) 9 Calc. Rep., 66.

(3) 10 Bom. H. C. Rep., 7.

(4) I. L. R., 9 Calc., 176.

(5) I. L. R., 6 Bom., 42.

fore, feel myself at liberty to follow the decision of West, J., and to hold that the instrument of the 17th May is valid as a *wakfnámá*.

Consistently with the idea of *wakf* property it could hardly be held that the plaintiff acquired any rights under his mortgage which would extend beyond the life-time of his mortgagors. In such property no one has any interest as the heir of the appropriator. It is neither the subject of ownership, nor inheritable, but each object of the charity who brings himself or herself within the terms of the endowment is entitled to receive the benefit which the founder has marked out for him. In the absence of the children of the mortgagors I cannot, however, possibly decide the question against them. I find on the issues—

(1) In the affirmative and for defendant No. 3. (2) That the plaintiff under his mortgage is entitled to the whole interest of the defendants 1 and 2 in the mortgaged premises, *viz.*, to receive during their life-time two-thirds of the net income of the same, there being no finding as to whether he is entitled to receive such two-thirds of the net income after their deaths and while their respective descendants continue. (3) In the affirmative and for the plaintiff, the amount being the sum mentioned in the decree. (4) In the negative and for defendant No. 3. (5) In the affirmative and for plaintiff. (6) In the negative and for defendant No. 3. Decree for the plaintiff against the defendants 1 and 2 for the sum of Rs. 3,990 with interest thereon at the rate of 12 *per* cent. *per annum* from the 25th September, 1886, until judgment and costs. Interest on judgment at 6 *per* cent. In the event of the said sum with interest and costs not being paid to the plaintiff on or before the 24th day of September, 1887, the plaintiff to be at liberty to apply for a final decree for the sale of the interest of the defendants 1 and 2 in the premises comprised in the mortgage of the 25th February, 1885. The plaintiff to pay the costs of the third defendant, and to be entitled to recover any costs which he may so pay from the defendants 1 and 2 as plaintiff's costs of this suit. Further directions and further costs reserved with liberty to apply.

Attorneys for the plaintiff:—Messrs. *Tyabji and Dáyábhái.*

Attorneys for the defendant:—Messrs. *Craigie, Lynch, and Owen.*