Khalil Ahamad Khan vs Malka Mehar Nigar Begum And Ors. on 27 October, 1953

Equivalent citations: AIR1954ALL362, AIR 1954 ALLAHABAD 362

Author: V. Bhargava

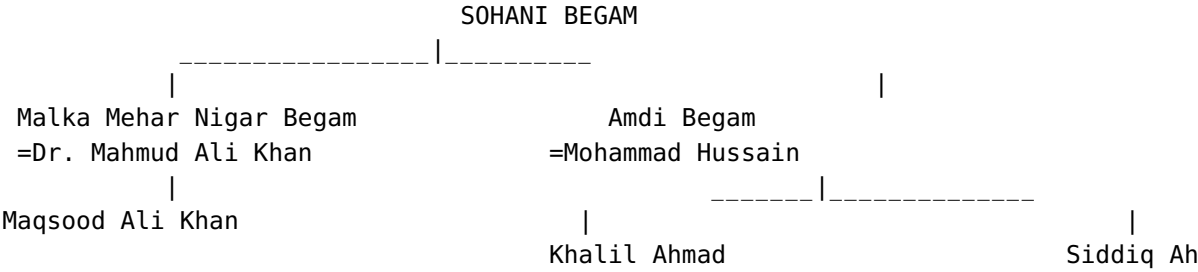
Bench: V. Bhargava

JUDGMENT

Malik, C.J., V. Bhargava And Chaturvedi, JJ.

1. These two appeals were referred to a bench of five Judges by a Division Bench of thi

2. The appeals arise out of two suits relating to a 'wakf' created by Sohani Begam. A s



On the 23rd of March, 1929, Sohani Begam executed a 'wakf alal aulad' under which she co

3. On the 14th of December, 1943, Sohani Begam died and disputes arose between Malka Me

4. The suit was resisted by Khalil Ahmad on the grounds, among others, that the wakif w

5. The objections were, however, overruled and the plaintiff's suit was decreed.

6. Malka Mehar Nigar Begam thereupon filed a second suit, out of which the First Civil

7. Khalil Ahmad filed the two appeals in this Court and one of the points that was argu

8. The learned Judges thought that the matter needed careful consideration and as there

9. The first suit was filed on the 29th of January, 1944 i.e. within a month and a half

10. On or about the 1st of August, 1948, Malka Mehr Nigar Begam migrated to Pakistan. a

11. The U.P. Ordinance was followed by Ordinance 27 of 1949 of the Government of India
"The Central Government may, by notification in the official Gazette, appoint a perso

"Evacuee property" under this Ordinance was defined in Section 2(i) as meaning any prope

'11(1) Where any evacuee property which has vested in the Custodian is property in tru

(2) In respect of any 'Wakf-alal-aulad--

(a) Where the mutwalli is an evacuee, the property forming the subject-matter of the wak

(b) Where not all the beneficiaries are evacuees, the rights and interests of such of th

12. Malka Mehar Nigar Begam, it is said, was declared an evacuee under Section 19 of th

13. After the First Civil Appeals were filed in this Court an application was made on b

14. Reference is made to Section 7 of the Administration of Evacuee Property Act that i

"46. Save as otherwise expressly provided in this Act, no civil or revenue court shall h

(d) in respect of any matter which the Custodian General or the Custodian is empowered b

The argument is that after the Custodian has declared the property, subject-matter of th

15. To our minds there is a great fallacy behind this argument. The Custodian was never

16. A case might arise where, on a person becoming an evacuee the Custodian Judicial ma

17. Learned counsel for the appellant argued at some length the question whether the la

18. We have carefully examined the trust deed with learned counsel and have found that

19. In the second deed dated the 29th of November, 1938, the first portion while the la

20. On the view taken by us that Khalil Ahmad was not the 'mutwalli' he cannot claim to

21. The appeals, therefore, have no force and must fail and are dismissed with costs

Kidwai, J.

22. The facts of the case have been fully stated in the referring order and it is not necessary for me to repeat them, beyond giving a brief resume in order to bring out the points which call for decision.

23. On the 22nd March 1929, Sohani Begum, a Sunni Muslim, governed by the Hanafi Law, created a wakf appointing herself the first mutwalli. During her lifetime only certain small specified allowances were to be paid and the rest of the income was to be disposed of at her discretion. After her death her sole surviving daughter, Malka Mehar Nigar Begam, was to be the mutwalli. The allowances to members of the family were liberalised and certain charities such as Fatihas, Maulud Shareef, Giarwhin Shareef, the education and maintenance of paupers, were specified but it was left to the discretion of the mutwalli as to how much of the income was to be spent on which of the charities. The mutwalli was to get a certain remuneration (haq-ul-khidmat) and she could not be called upon to account. After the death of Mehar Nigar Begum the District Judge would appoint that person from among the descendants of the wakifs two daughters Mutwalli whom he considered fit. The expenses to be incurred by such a Mutwalli were specified with precision and he was made accountable for the entire income.

24. On 29th March 1938 Sohani Begum executed another deed, which she called a supplementary wakf deed, because, according to her, it was "necessary that a few particulars mentioned in the said wakf deed be amended." She purported to exercise this power of amendment by virtue of the fact that she was the wakif and the Mutwalli. Among the provisions of this second deed are the following :

> "Secondly, that after my death, my daughter Malka Mehar Nigar Begam will not be Mutwalli. In her place my daughter's son Khalil Ahmad Khan, son of Mohammad Hosein Khan born of Ahmadi Begum deceased -- whom I have adopted also like my own son will be Mutwalli like myself; and he will have all those powers which are enjoyed by me, or which would have been enjoyed by Malka Mehar Nigar Begam if she would have been allowed to remain as Mutwalli."

"Fourthly, that all those powers which would have been enjoyed by Malka Mehar Nigar Begam as Mutwalli after my. death will now be transferred in their entirety to Khalil Ahmad Khan, e.g. rupees twenty-five per month which were given to Malka Mehar Nigar Begum by way of haq-ul-khidmat will now be given to Khalil Ahmad Khan, as a Mutwalli after my death, and not to her (Malka Mehar Nigar Begam)."

"Fifthly, that the conditions laid down in the said wakf deed about the office of the Mutwalli relating to Mehar Nigar Begam, will now be considered relating to Khalil Ahmad Khan in place of her, whether those conditions were to be acted upon during her lifetime or on her death."

25. Sohani Begum died on the 14th December, 1943, and on 29th January, 1944, Malka Mehar Nigar Begam instituted a suit for a declaration that she was the duly appointed Mutwalli of the wakf created by her mother. Khalil Ahmad Khan resisted the suit on the basis of the second deed but the learned Civil Judge of Malihabad at Lucknow decreed it on the 20th October 1944 holding, on the authority of AIR 1936 Oudh 213 (FB) (A) that the wakif, not having reserved for herself that power in the deed, could not change the Mutwalli. First Civil Appeal No. 123 of 1944 filed by Khalil Ahmad Khan is directed against this decree.

26. In the meanwhile Khalil Ahmad Khan had realised some rent from various tenants of the endowed property and he was occupying one of the wakf houses. Accordingly, having already established her right to the tauliat, Malka Mehar Nigar Begam instituted another suit on the 13th February 1945 against Khalil Ahmad Khan and claimed a decree for possession over the wakf properties and for money wrongfully realised by the defendant. This suit was decreed on the 28th May, 1945, First Civil Appeal No. 95 Of 1945 is directed against this decree.

27. When the appeals came up for hearing Misra and Chandiramani JJ. were of opinion, for the reasons given in their order, that the question whether the wakif can change the Mutwalli nominated in the deed of wakf without having reserved to himself the power to do so, should be considered once more and referred the two appeals to a Full Bench. Accordingly the present Full Bench was constituted.

28. While the two appeals were pending in this Court Malka Mehar Nigar Begam emigrated to Pakistan on or about the 1st August 1948. In the meanwhile a Receiver of the properties had been appointed and he drew the attention of the court to this event. Thereupon the Deputy Custodian of Evacuee Property at Lucknow was added as a party to the appeals but his petition for the discharge of the Receiver and for delivery of possession over the property to him was refused.

29. At the hearing of the appeals a preliminary objection was taken on behalf of the Deputy Custodian that, Malka Mehar Nigar Begam, having become an evacuee, the civil Courts had been deprived of jurisdiction to decide questions as to her rights in property.

30. The law governing Evacuee Property at the time that these appeals came up for hearing is to be found in the Administration of Evacuee Property Act (31 of 1950). It was contended that by Section

46 there is a bar to the jurisdiction of the civil court :

> "(a) to entertain or adjudicate upon any question whether property or any right to or interest in any property is not evacuee property; or ... ...
>
> (d) in respect of any matter which the Custodian General or the Custodian is empowered by or under this Act to determine."

31. It was pointed out that, in the case of a wakf-al-aulad by reason of Section 11(2)(a) of the Act :

> "where the Mutwalli is an evacuee the property forming the subject-matter of the wakf shall vest in the Custodian subject to the rights of the beneficiaries under the wakf, if any, who are not evacuees."

32. It was, therefore, contended that, Mehar Nigar Begam being admittedly an "Evacuee", the question whether the property covered by Sohani Begum's wakf was evacuee property or not depended upon whether Mehar Nigar Begam was its Mutwalli or not. Though, therefore, the question whether that property is or is not evacuee property might not be directly involved in these appeals, it is nevertheless involved by necessary implication, since the result of holding that Mehar Nigar Begam is not the Mutwalli would be to hold that the property covered by the wakf cannot vest in the Custodian as evacuee property. Thus, it is contended, that the case is covered by Clause (a) of Section 46 or, if not, by that clause, at least by Clause (d).

33. Section 11 only provides what is to happen to the wakf property in case the Mutwalli is an evacuee. It does not make any provision for a determination of the question as to who is an evacuee or what is the property of that evacuee. In the present case it is not disputed that Malka Mehar Nigar Begam is an evacuee but it still remains to be determined whether she has any right or interest in the wakf of Sohani Begum even by the application of Section 11(2)(a) of the Administration of Evacuee Property Act (31 of 1950). In order to ascertain how and by which authority this is to be determined and what the jurisdiction of the Custodian is we have to look elsewhere in the Act.

34. In approaching this aspect of the matter it must be remembered "that it is settled now that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred but such exclusion must either be explicitly expressed, or clearly implied. It is also well settled that even if jurisdiction is so excluded the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure" -- 'Abdul Majid v. P. R. Nayak', AIR 1951 Bom 440 at p. 446 (B).

35. In the present case the jurisdiction of the civil Courts is sought to be ousted on the basis of the two clauses of Section 46 which have already been quoted. What is forbidden by Clause (a) is an adjudication as to whether any property or any right or interest in property is evacuee property. In the present case the court is not called upon to determine whether the right of Mehar Nigar Begam in the Sohani Begum wakf is evacuee property or not but whether she had any right to the office of

Mutwalli of that wakf. It may be that, if her claim to be Mutwalli is upheld, one of the consequences that follow will be that the Custodian will be entitled to declare the wakf property to be evacuee property and that, by the operation of the relevant law, the property will vest in the Custodian but that is not what the civil court is called upon to adjudicate. Clause (a) of Section 46, therefore, does not provide a bar to the jurisdiction of the civil court.

36. We have now to see whether Clause (d) of Section 46 provides any such bar. In order that Clause (d) may apply it must be shown that the question raised in these appeals is one which the Custodian General or the Custodian is empowered by the Act to determine.

37. There is no specific provision in the Act empowering the Custodian General or the Custodian to determine the status of any individual in relation to property as distinct from the nature of the property. There is no provision in Act 31 of 1950 which would authorise either of the two officers named to determine who is the Mutwalli of a particular wakf. Under Sections 7 and 8 it might be declared that a particular property is evacuee property and the reason for this declaration might be that the property is a part of a wakf of which the Mutwalli is an evacuee but that is not the same thing as determining that the evacuee has a right to be the Mutwalli of the wakf.

38. In this connection I may refer to the following remarks of Rajamannar C. J. in --'M.B. Namazi v. Deputy Custodian of Evacuee Property, Madras', AIR 1951 Mad 930 at p. 934 (C) :

> "There is, however, one thing about which I am not quite clear. The Ordinance no doubt declares the order of the Custodian declaring any property to be evacuee property as final. That might be so in one sense, i.e. if any property belongs to a person who has been declared to be an evacuee within the meaning of the definition in the Ordinance, then the Custodian's order would be final. But, does the finality amount to an adjudication on title in case there is any dispute? Take for instance the case where a property is declared to be evacuee property on the assumption that it belongs to A who is an evacuee. Does it meant that some one else cannot say that the property really does not belong to the evacuee but belongs to himself who is not an evacuee? I am inclined to hold that the order of the Custodian or the notification under Section 7 of the Ordinance is not final, in case of disputed title."

39. Moreover in 'Ebrahim Aboobaker v. Tek Chand', AIR 1953 SC 298 (D), it has been laid down that "the inquiry under Section 7 is a condition precedent to the making of a declaration under Section 8 and the right of the Custodian to exercise dominion over the property does not arise until the declaration is made."

Accordingly before the Custodian could notify the property as evacuee property he had to follow the procedure laid down in Section 7 and in the rules framed under the Act.

40. Under Section 7 and Rule 6, if the Custodian had prima facie grounds for believing that any property was evacuee property he had to issue notices to persons interested and then to hold an enquiry. It is only after notice is issued that any person claiming an interest in the property can file

objections and it is only then that the Custodian can make an enquiry and give his decision. Thus the issue of a notice under Section 7 is sine qua non of an enquiry by the Custodian, and until notices have been issued it cannot be said that there is any matter which the Custodian General or the Custodian is empowered by or under the Act to determine.

41. It is admitted that in the present case no notices have been issued nor has any declaration been made. The effect of a declaration that Mehar Nigar Begam is or is not the Mutwalli will, therefore, not be to interfere with or impinge upon, the jurisdiction of the Custodian General or the Custodian and Section 46(d) also cannot bar the jurisdiction of the civil Court.

42. It was urged that in the present case Mehar Nigar -had already become an evacuee under U.P. Administration of Evacuee Property Act (10 of 1948), U.P. Administration of Evacuee Property Ordinance (I of 1949), Central Administration of Evacuee Property Ordinance (27 of 1949), which Act 31 of 1950 has replaced. It was consequently urged that by reason of Sub-section (2) of Section 8, the property must "be deemed to be evacuee property declared as such within the meaning of this Act". Even the Acts and Ordinances referred to required an investigation to be made, however summary it might be, before the property vested in the Custodian and it is no one's case that any such enquiry was ever made by the Custodian or that he issued any declaration to the effect that the property was evacuee property.

43. The matter might also be considered from another aspect. In the present case the civil court has already made an adjudication that Malka Mehar Nigar Begam is the Mutwalli of the wakf. The person aggrieved by this decision had a right to appeal from it. Accordingly before there was any question of any evacuee law he filed an appeal in the Chief Court of Avadh, which thus became seised of the case. Upon the amalgamation of the Chief Court of Avadh and the High Court of Allahabad this Court became seised of the matter. The question that arises is whether the Custodian General or the Custodian is or can by necessary implication be deemed, by the provisions of the various Administration of Evacuee Property Acts, to be empowered to dispose of such appeals.

44. In a case like the present the civil court has already adjudicated upon the rights of the parties. In appeal the correctness of this decree is in question. Although under the provisions of the Code of Civil Procedure the appellate Court may pass any decree which the trial Court might have passed, the appellate decree is not an independent adjudication of rights but it will merely be substituted for the decree already passed. There is no provision in the various Evacuee Acts, and Ordinances which even impliedly prohibit a Court of appeal from determining the correctness of an adjudication already made.

45. Again a decree having already been passed the party aggrieved had a right of appeal and has appealed. To hold that the appellate Court cannot proceed to decide the appeal would mean that the aggrieved party would be deprived by the retrospective operation of the law relating to the administration of evacuee property of a right already possessed by it. In the absence of a very clear provision to that effect in the Statute, this would be against all the canons of interpretation.

46. I would, therefore, hold that the preliminary objection is not sustainable and should be rejected. I shall proceed now to consider the appeal on the merits.

47. The sole question for determination in this appeal is whether the wakif can change the mutwalli nominated by him when making the appropriation without having reserved that power for himself.

48. Mr. Niamatullah for the appellant contended :

> (i) that Quazi Abu Yusuf, one of the principal disciples of Imam Abu Hanif, has clearly stated that a wakif can always change the mutwalli of a wakf without expressly reserving such a power even to the extent of removing a mutwalli to whom possession has already been delivered, and that there is no authoritative opinion to the contrary in a case such as the present in which the mutwalli nominated is to take possession after the death of the wakif;
>
> (ii) that, even if it be assumed that Imam Mohammad, the other leading disciple of Imam Abu Hanif, has expressed a contrary view, the opinion of Abu Yusuf should prevail since the entire law relating to wakfs is based upon his rulings and also because it is more in accordance with reason;
>
> (iii) that, according to the established principles of Islamic Law, a mutwalli is entitled to nominate his successor by will and the nomination is, like every other will, always revocable at the pleasure of the mutwalli. Indeed a mutwalli cannot nominate another person to enter into possession in his lifetime unless he be on his deathbed and the same rules apply to such a nomination as to wills.

49. Sir Iqbal Ahmad for the respondents did not consider it necessary to refer us to any authoritative text book on this subject. He cited certain decisions of various Indian High Courts and contended that the Islamic law is such an archaic system that it is unnecessary and unprofitable to consider it in the light of rational principles. It is sufficient to find out what the decisions have established and to abide by those decisions on the principle of stare decisis.

50. There can be no doubt that if the exact point which is now in dispute before us has already been decided by various High Courts in one particular manner over a long course of years, it would be contrary to principle to unsettle the law by adopting a new view on the subject, unless, of course, the view taken by the decisions is opposed to fundamental principles. If, however, the exact point now raised has not been decided, or even if there are only one or two such decisions of a comparatively recent date, we would not be justified in invoking the aid of the principle of stare decisis in support of any particular view.

51. As to the contention of Sir Iqbal Ahmad that the Islamic Law is not amenable to the rational application of principles, it only shows his ignorance of the very fundamentals of that law. Ever since the Second Khalifa, Umar, issued his directions to his Governors and Kazis, "Kiyas", which signifies the logical deductions to be drawn from established principles has been considered to be one of the

principal sources of Islamic law and Imam Abu Hanifa himself attached the greatest importance to this source preferring it even to those so-called Hadith which he considered to be opposed to reason and as such of doubtful authenticity.

52. Indeed it was obviously impossible for the law giver or the expounders of the law or the commentators to lay down the law for every possible contingency. It, therefore, became, necessary, as new points arose for decision, to draw logical inferences from established principles. Thus the Islamic Law continued to develop at the hands of jurists in the same manner as the English Common Law developed at the hands of Judges. Of course, as time passed and a subject was more and more thoroughly thrashed out, the law became settled and it would be fraught with mischief -- on the principle of stare decisis to depart from that settled law, particularly in such matters as marriage, divorce, legitimacy and inheritance. It was for this reason that in dealing with a question of maintenance in which a lower court had relied upon a surah of the Quran and Syed Ameer Ali's interpretation of it, which was at variance with the interpretation placed upon it by the Hidaya, a high authority on Sunni law, and the Imameea, a high authority on the Shia law, their Lordships of the Privy Council say in -- 'Aga Mahomed Jaffer Binda-neem v. Koolsom Bee Bee', 24 Ind App 196 (PC) at p. 204 (E) :

> "But it would be wrong for the courts on a point of this kind to put their own construction on the Kuran in opposition to the express ruling of commentators of such antiquity and such high authority."

53. Of course with the increase of enactments touching all the fields of human activity, the scope of the Islamic personal law is being more and more curtailed. Nevertheless new points may arise, and have arisen, even during the past 25 years. The next matter that might be classified, therefore, is the preference to be given to various authorities which also clarify the position as to how far rules of logical deduction may be applied.

54. The present case is governed by the principles enunciated by Imam Abu Hanifa and his two disciples, Imam Mohammad and Quazi Abu Yusuf the latter of whom occupied the post of Quazi-ul-qazzat (or Chief Justice) of Baghdad during the reign of Harun-ul-Rashid. In the matter of wakfs the theory propounded by the master himself has not been accepted and when ever there has been a difference of opinion which jurists have been called upon to consider it is in the opinions of Abu Yusuf and Imam Mohammad.

55. It may be said at the outset that Abu Yusuf's objective was to facilitate the creation of wakfs and to validate them as far as possible while Imam Mohammad, though he too upheld wakfs, always attempted to reconcile the rule relating to wakfs with the principles relating to other subjects, e.g. gifts, ownership of property, etc.

56. It is also necessary to explain that much reliance has been placed by later writers on the opinion of the contemporaries of the three great masters and their immediate successors as well on the opinions of the jurists (Sheikhs) of Balkh and Bokhara. This is so because, after the decline of the empire of Baghdad, the centre of learning shitted to the courts of Spain, Balkh and Bokhara. Spain

devoted greater attention to what may be called the modern sciences, literature and art, but the learned men of Balkh and Bokhara pursued the study of the Sheriat with zeal and energy and greatly developed the original system left by Abu Hanifa, Abu Yusuf, Imam Mohammad and their immediate successors. Their reasoning and their conclusions accordingly carry great weight. Since then there have been very few such eminent jurists that their authority can displace that of the earlier lawyers.

57. As has been stated earlier Mr. Niamatullah contended that on matters of wakf Abu Yusuf's opinions carry preponderating weight but this contention is not borne out by the authorities. In important matters there is a consensus of opinion. In many matters of secondary importance preference has been given, so far as India at least is concerned, to the opinions of Imam Mohammad and in others to those of Abu Yusuf.

58. In -- 'Abdul Kadir v. Salima', 8 All 149 (F), at p. 152 Mahmood J. expressed an opinion which was adopted by the Full Bench verbatim in the following words:

> "Both Imam Abu Hanifa and Imam Mohammad were purely speculative jurisconsults, who spent their lives in extracting legal principles from the traditional sayings of the Prophet; but Quazi Abu Yusuf, whilst equally versed in traditional lore, had, in his position as Chief Justice of the Empire of the Khalifa Harun-ul-Rashid the advantage of applying legal principles to the actual conditions of human life, and his dicta (especially in temporal matters) command such high respect in the interpretation of Muhammadan law, that whenever either Imam Abu Hanifa or Imam Muhammad agrees with him, his opinion is accepted by a well-understood rule of construction."

59. In -- 'Bikani Mia v. Shuk Lal Poddar', 20 Cal 116 (G), at pages 171-173, Amir Ali J., in his dissenting judgment brings out the fact that in many matters relating to wakfs the opinion of Abu Yusuf has prevailed over that of Imam Mohammad though the point there raised was as to the validity of a wakf for the benefit of one's descendants in respect of which the learned Judge was of the opinion that it was valid.

60. In -- 'AIR 1936 Oudh 213 (FB) (A)', one of the points raised was whether delivery of possession was necessary in order to complete a wakf and the Full Bench held that, on this point, the opinion of Abu Yusuf was to be preferred and that the wakf was completed merely by a declaration that the property was wakf neither the appointment of a Mutawalli nor delivery of possession being necessary. This opinion was, however, based on a full consideration of other authorities on a marginal note in the Hidaya, Vol. II, by Moulvi Abdul Hai of Lucknow who said "on the ground that the dictum of Abu Yusuf is 'more reasonable according to the learned' and Fatwa is given in accordance with this view". It must be remembered that on the second point, namely, "whether any change in the terms of wakf or in the person of Mutawallis can be made by the wakif, where no such power has been reserved by him in the deed of wakf, after the wakf has been created", which is the very point arising in this appeal, the Full Bench did not accept the view of Abu Yusuf but preferred that of Imam Mohammad.

61. In -- 'Wajid All Khan v. Sakhawat Ali Khan', 15 Oudh Cas 127 (H), the question was whether the wife could refuse her person to her husband once cohabitation had taken place if the prompt dower was not paid. Lindsay, J. C. quoted from the most authoritative text books and concluded that in respect of the matters in question the opinion of Imam Abu Hanifa prevailed over that of the two disciples although the latter were agreed between themselves.

62. Amir Ali discusses with reference to authorities the preference to be given to the opinions of Abu Hanifa, Abu Yusuf and Imam Mohammad in the case of differences of opinion between them on any point at pages 14 to 17 of Volume I of his Mohammadan Law (4th Edition): He concludes:

> "But, although the respective authority of the masters is sometimes enunciated in rather wide terms, a careful study of the law shows that considerable latitude is left to the Judge to follow the rule 'which is most consistent with justice, the changed conditions of society, the requirements of particular localities and the needs of the inhabitants'. And, accordingly, although in doctrinal matters and in what may be called ecclesiastical discipline, the opinion of Abu Hanifa is supreme, there is no hard and fast rule regarding secular questions, on some his pronouncement is accepted as furnishing the governing principle, in others that of the Disciples if they agree in differing from him. Where the Disciples differ among themselves and there is no express statement of Abu Hanifa on the point to incline the balance it is open to the Judge to accept and give effect to the exposition most consistent with the requirements of justice. In some cases where even Abu Hanifa agrees with one, individual opinion of the other is accepted and enforced.
>
> Again in certain matters the doctrine of one is regarded by consensus as of greater authority than that of the other. And when there is no general agreement with regard to a particular exposition, in some localities the views of Abu Yusuf are accepted, in others those of Mohammad."

Again, at page 258, Amir Ali says:

> "The next submission is that it is a mistake to suppose that in the Hanafi system the views of Imam Abu Yusuf are more authoritative in all matters than those of Imam Mohammad.
>
> In dealing with the Hanafi Law it should always be remembered that when there is a difference of opinion between Imam Abu Yusuf and Imam Mohammad, "the Mussulman Judge is at liberty to adopt either of the two decisions which seems to him the more consonant with reason", are consistent with the requirements of the times. And this rule applies to divergence of opinion among all the jurists.
>
> In the Durr-ul-Mukhtar it is stated first that the Hanafi Judge is authorised to decree either according to Abu Yusuf or Mohammad; and again that when there are two "correct" doctrines in respect of any particular question it is lawful to pass a decree

> and give a Fatwa according to either of them. On this the comment of the Radd-ul-Mukhtar is both instructive and important. After explaining that it is allowable for a Hanafi Judge to pass a decree according to the opinion of either Abu Yusuf, Mohammad or any other Hanafi Imam, as they are all followers of the Imam (Abu Hanifa, the founder of the school)."

He then points out, on pages 259 and 260 that on the primary points relating to wakfs there is a consensus of opinion and that on the subsidiary points the decision is sometimes according to the view of Abu Yusuf and sometimes according to that of Imam Mohammed.

63. The same view is taken by Sulaiman C. J., in -- 'Mt. Anis Begam v. Muhammad Istafa Wall Khan', AIR 1933 All 634 (I) in which he followed Amir Ali's exposition of the law relating to the preference to be accorded to the opinion of one or other of the great Masters of the Hanafi school. At p. 636, he says :

> "Presumably, what he meant was that ordinarily the opinion of the majority has been accepted. But it would be easy to cite instances in which the opinion of Imam Abu Hanifa alone has prevailed, particularly in matters of prayer and ritual, or of Imam Yusuf in matters of worldly affairs, or of Imam Mohammad in matters of inheritance."

64. Again at pages 636 and 637 he says :

> "Different doctors have followed different rules-of preference. Those who are more orthodox and, generally speaking, more ancient in many cases preferred the solitary opinion of Abu Hanifa to even the joint opinion of his disciples. There are later text-book writers who have preferred the opinion of two as against that of one. But such rules are helpful only when there is no clear consensus. In the early days when new points arose and the decision, had to depend on an inference drawn from other Patwas or from analogy, it was open to the learned doctors to prefer one opinion over the other which they considered more correct and consonant with the other principles, inasmuch as the three Imams were not law-givers but merely interpreters of the law.
>
> But if one finds a question well thrashed out and in later centuries a particular interpretation adopted by the leading doctors and textbook writers it would not be proper for us in the twentieth century to go behind such a consensus of opinion and decide a point contrary to such opinion, on the ground that the majority of the three Imams favoured that view in the earlier centuries. Such a course of action would unsettle the Muhammadan law. Rules of preference were for the guidance of ancient jurists, and they are of no help when there is a clear preponderance of authority in support of one view. It would be too late now to resort to such rules in support of a new conception as to how a point ought to have been decided, though contrary to accepted opinion. Maulvi Abdul Hai of Lucknow, the most renowned and learned

Hanafi jurist of his time, has in his Introduction to Sharah Wiqayah dealt with this matter at considerable length.

A good deal of that matter which is to be found in Radd-ul-Mukhtar is summarised in Sir Abdur Rahim's Muhammadan Jurisprudence at pages 187-8, which can be conveniently referred to. He has rightly pointed out that there is no accepted rule that when there is a difference of opinion amongst the founders of schools and their disciples, opinion or ruling of a lawyer ought to be given according to the opinion of Abu Hanifa, even if all his disciples differ from him; and in the absence of any dictum of his in accordance with the opinion of Abu Yusuf, then Muhammad, then Zufar and then Hasan Ibn Ziyad. If the authorities were examined it will generally be found that in some matters the solitary view of Abu Hanifa has been preferred whereas in other matters the view of Abu Yusuf, Muhammad or Zutar has been followed.

According to Al-Hawi the correct rule was that in cases of difference of opinion regard should be had to the authority and reasons in support of each view and the one which has the strongest support should be followed. "But according to the modern interpretation of Taqlid as above stated a lawyer of the present day should, in such cases, accept the view which according to the jurists of the fourth, fifth and sixth degrees is correct and has been acted upon. But if in any case the later doctors have not adopted in clear language any one of the conflicting opinions, the law is to be ascertained by proceeding on the view which is most in accord with the habits and affairs of Men."

"The Radd-ul-Mukhtar, Volume I, page 73, states that if on any matter no clear answer from any one of the early jurists were to exist, and the later doctors have one opinion, then that should be adopted; but if they differ, then the view of the majority of those on whom well known doctors like Abu Hanifa, Abu Jafar Abul Lais, Tahawi and others have relied should be accepted. And if a clear answer were not to exist from any one of these later jurists, then the Mufti should consider the question carefully and try his best to arrive at a correct conclusion so that he may be relieved of the charge of not having considered it fully."

65. The same view has been taken by Malik J. (now C. J.) in -- 'Mahomed Yasin v. Rahmat Ilahi', AIR 1947 All 201 at p. 206 (J).

66. These doctrines are by no means new but have always been recognised under the Sunni Hanafi Law. Even the greatest of jurists was not a law-giver but only an interpreter of the law and there was nothing sacrosanct in his opinion. Thus it was open to other jurists to form an opinion of their own and if there was a certain measure of agreement between later jurists even that would be considered to be the correct exposition of the law.

67. Thus the contention that the views of Abu Yusuf must prevail in all matters relating to wakfs cannot be said to be an established doctrine. We are thrown back in a matter of this kind upon a

consideration of principles and the logical deductions to be drawn from these principles.

68. As I have already said there are a number of points of primary importance with regard to wakfs upon which there is a consensus of opinion. Some of these points in so far as they have a bearing on the question in issue before us may be stated.

69. The first principle is that by the creation of a wakf all the right, title and interest of the wakif, as proprietor, ceases, and the property passes to the implied ownership of the Almighty in such a manner that its profits may revert to, or be applied for the benefit of His creatures --vide Baillie's Digest of Mohammadan Law, Book IX, Chapter I, Ameer Ali's Mohammadan Law (4th Edition), Volume I, page 279, Tyabji's Mohammadan Law (3rd Edition) Section 457, page 537.

70. The second agreed principle is that the wakif may reserve the 'tauliat' for himself and in that case he possesses all the powers of a Mutwalli -- vide Ameer Ali's Mohammadan Law (4th Edition), Volume II, page 440 where he collects all the authorities.

71. It is also agreed that "If any person appointed as a Mutwalli dies, or refuses to act in the trust, or is removed by the Court or if the office of Mutwalli otherwise becomes vacant, and there is no provision in the deed of wakf regarding succession to the office, a new Mutwalli may be appointed :

(a) by the founder of the wakf;

(b) by his executor (if any);

(c) if there be no executor, the Mutwalli for the time being may, subject to the provisions of Section 205 below, appoint a successor on his death;

(d) if no such appointment is made, the Court may appoint a Mutwalli:

-- vide Mulla Mohammadan Law, 13th Edition, Section 204, page 190.

72. If a Mutwalli has the right to nominate his successor, he cannot without the sanction of the Quazi, resign and appoint another person in his lifetime, though he may appoint a deputy or agent. The successor must be appointed by will or during marz-ul-maut, and like all wills the appointment so made is revocable at the pleasure of the Mutwaili: vide MacNaghtan's Principles and Precedents of Mohammadan Law, Chapter X, Section 6, -- 'Sayad Abduia Edrus v. Sayad Zain Sayad Hasan Edrus', 13 Bom 555 (K).

73. Bearing these principles in mind I come now to consider the actual point raised in these appeals.

74. Apart from the modern test book writers and the decisions of Courts, the only original authority placed before us was the Fatwai Alamgiri also known as the Fatwai Hindi which was compiled by a body of jurists acting under Sheikh Noyan in the reign of the Emperor Aurangzeb Alamgir in the 17th century of the Christian era. It has, however, been necessary to find out the opinions of other

commentators.

75. The passage in the Patawai Alamgiri is as follows : (Here follows text which is omitted) Fatawai Alamgiri, Volume II, page 481, book on wakfs, Chapter V which has been translated by Syed Ameer Ali (at page 458, Volume I, 4th Edition of his Mohammadan law) as follows :

> "A person having made a wakf of his property and having transferred it to a curator desires to take it back from his hands; if he has 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 Mohammad and not otherwise. But according to Abu Yusuf he may do so (in either case i.e. whether he has reserved the power or not). And the jurists of Balkh decide according to Abu Yusuf and the jurist Abu Lais has adopted the same view. The jurists of Bokhara decide according to the rule of Mohammad 'and the Patwa is thereon': so in "Muzmirat."

76. The Radd-ul-Muhtar accepts the opinion of Mohammad on the basis of Tashik-ul-Kuduri of Allama Kasim. It explains that the reason for the difference of opinion between Abu Yusuf and Mohammad is that the former holds the Mutwalli to be the representative of the wakif who accordingly has power to discharge him while the latter holds the Mutwalli to be the representative of the beneficiaries so that the wakif has no power to remove him.

77. At page 426 of Volume I (4th Edition) Ameer Ali quotes the following from the Radd-ul-Muhtar :

> "Nor can the wakif who devotes property to any meritorious or pious uses and transfers the proprietary right therein to the Almighty, take it back at the pleasure from the Mutwalli, whom he has constituted God's proxy and give it to another person, unless on the creation of the trust he reserved to himself in express terms the right to do so."

78. The Durr-ul-mukhtar basing itself on Ashbah states: (Text omitted) and it is said therein (Ashbah) that the wakif has absolute power to remove a Mutwalli and Fatwa (decision) is according to this." It, however, adds some notes which greatly detract from the opinion thus expressed.

79. The first note is based on the opinion of Ibn Abideen Shami and is as follows: (Text omitted):

> "(The wakif has absolute power to remove the Mutwalli). Whether the Mutwalli is corrupt or not and whether the Mutwalli has reserved the power of removing him or not. And this is the opinion of Abu Yusuf because according to him the Mutwalli is the representative (vakil) of the wakif and Mohammad's opinion is opposed to this as is stated in the Bahr because according to him the Mutwalli is the representative of the faquirs (the beneficiaries)."

80. The second note is as follows: (Text omitted):

"(and what is stated in Ashbah as being the decision in respect of the removal of the Mutwalli) is not accepted in "Tajvis" which states that the fatwa (decision) is, according to the opinion of Mohammad that is that if the wakif has not made it a condition that he can remove the Mutwalli then he cannot remove him. And Allama Kasia has also accepted this in "Tasheeh-Quduri" and Ibn Nujim the author (of Ashbah) has so written it in his articles and this matter is a disputed one between the learned -- some have accepted the opinion of Abu Yusuf and some of Imam Mohammad and it is also written in "Bairi" that the opinion of the learned differs in this matter. Allama Shami writes that in his opinion the difference is due to the principle that according to Imam Mohammad the property must be delivered to a Mutwalli and accordingly so long as the Mutwalli does not stipulate in the deed that he has power to remove the Mutwalli he does not retain the right to remove the Mutwalli. And according to Abu Yusuf delivery of possession to a Mutwalli is not necessary to validate a wakf and consequently he retains the supervision (vilayat) of the wakf property and can remove the Mutwalli. In this matter the difference between the learned is due to this."

81. Another note, after detailing the differences of opinion sums up the matter thus :

"And a body of the learned has accepted the opinion of Imam Abu Yusuf and the author of the Fath-ul-Kadeer considers the to be the better opinion but many of the learned have accepted the opinion of Imam Mohammad and the Patwa is according to that opinion."

82. In the Hedaya it is stated -- vide Hamilton's translation, Volume II, Book XV "Appropriations"-

"If a person appropriates land, with a reserve of his authority, over it, it is lawful, according to Abu Yusuf -- one author remarks that Kadooree has expressly declared this. Such also is the opinion of Hillai, and it is indeed, the generally accepted opinion. Hillai mentions it in treating of appropriations. Some doctors allege that if the appropriator particularly stipulates a reservation of authority over the lands, the authority remains to him accordingly; but not unless it be particularly stipulated by him.

Our modern doctors, however, consider it very doubtful whether this be an opinion of Mohammad, because it is a tenet of his that delivery into the hands of a procurator is essential to the validity of an appropriation; and where such delivery takes place, the appropriator can no longer possess any authority over it.

According to the tenets of Aboo Yoosaf, on the other hand, the delivery to a procurator is not essential and consequently the authority remains with the appropriator, although he should not have so stipulated.

What was mentioned above concerning the opinion of Mohammad that "where delivery to the procurator takes place, the appropriator can no longer retain any authority over the appropriation" applies to a case where the appropriator had not stipulated any reservation to himself at the first; for, if he had stipulated this at the time of making the appropriation, his authority is not rendered void by delivery to a procurator; because as his authority continues where he stipulates a right of authority on behalf of author, it follows that, where he stipulates it on behalf of himself, it continues a fortiori--

"The arguments in support of the opinion of Abu Yusuf, (which is the most generally recognised doctrine) are twofold, First the procurator enjoys his authority, only on behalf of the appropriator, in consequence of his reservation; and it is impossible that the appropriator himself should not be possessed of any authority, at the same time but another person enjoys an authority ' held on his behalf --Secondly, the appropriator stands in a nearer relation to what he - appropriates than any other person, and it is consequently proper that he possesses no authority over it; in the same manner as where a person builds a mosque, in which case the business of repairing it, as well as the appointment of all officers etc. appertain solely to him; or as where a person emancipates a slave, in which case the will appertains solely to him as he stands in a nearer relation to the slave than any other person."

83. Ameer Ali also quotes the following passage from Surrat-ul-Patwa -- vide his Mohammadan Law, 4th Edition, Volume I, page 425 :

"In the chapter on wakf in the Khazanat-ul-Fatwa it is stated the Saheb-ul-Manah (the author of Manat-ul-Ghaffar) was asked about a deed of wakf in which there was a condition to the effect that the vilayat of the trust should appertain only to the wakif's male descendants, but now a deed has been discovered bearing a prior date, in which the tauliat was given to his male as well as his female descendants; the question was which deed should be acted upon. The Saheb-ul-Manah answered if the wakif in the first deed or at the time of the dedication reserved to himself the power of altering any of the provisions regarding the management etc. of the wakf, in that case the second deed should be acted upon, that is the deed in which the tauliat is restricted to his male lineal descendants. But, if he reserved to himself in the original wakf no such power, in that case the first deed of wakf, viz., which there is no restriction should be acted upon."

84. In his Principles and Precedents of Mohammadan Law in the Chapter relating to Precedents of Endowments MacNaghten quotes the following passage from 'the "Khazanat-ool-Moortian."

"He who makes the appropriation has the patronage of the endowment; after him his executor unless they are excluded by being or becoming profligate in which case they will be. deprived of patronage, which will be vested elsewhere; but it will revert to them should they revert to virtue, and if, after having appointed a superintendent, the

> founder desires to remove him, he is at liberty to do so, and assume the superintendence himself."

85. A consideration of the original authorities thus reveals a considerable divergence of opinion. Abu Yusufs opinion was definite and clear and according to him even a Mutwalli to whom possession had been delivered could be removed at the pleasure of the wakif. He would go to the extent of holding that, even if the wakif stipulated that he would have no power to remove the Mutwalli, the stipulation would be void and he would still have the power -- see Baillie's Digest of Mohammadan Law, 1865 Edition, p. 592. This is so because according to Abu Yusuf the Mutwalli who enters into office during the lifetime of the wakif is not in reality the Mutwalli (who is the wakif himself) but is only his deputy or agent and his authority terminates with the death of wakif unless it has been expressly provided that it is also to continue afterwards -- see Baillie's Digest of Mohammadan Law, 1865 Edition, page 592.

86. The Radd-ul-Mukhtar clearly brings out the real principle in the passage which I have already quoted. It is that the property is in law vested in the Almighty but since the Almighty himself cannot appoint its superintendent or manager, the deed by which the property is conveyed to the Almighty must be looked to to determine the manager.

87. Indeed, it being agreed on all hands that once the wakf is complete, the wakif retains no right, title, or interest in the property except such as is reserved by the deed, it would be against the fundamental conception of ownership to allow the wakif still to interfere with the arrangements made in the deed itself for the management of the property. Of course, if the wakif has reserved a right to change the Mutwalli or the scheme of management, he will be acting in accordance with the deed itself in exercising that power.

88. Further all the authorities refer to the provisions relating to the appointment of a Mutwalli as a condition ('shart') of the wakf and it is distinctly provided that none of the conditions ('shariat') of a wakf, once it is completed, can be altered unless such a power has been reserved. There is no reason why the condition relating to the appointment of a Mutwalli should be treated on a different footing.

89. Again if the opinion of Abu Yusuf were allowed to prevail, it would permit the wakif to change not only a particular Mutwalli but even the entire scheme of management laid down in the deed constituting the wakf. This would almost certainly affect the wakf itself at least to the extent of substituting the discretion of one person or a set of persons for another and of providing remuneration (Haq-ul-Khidmat) to one person instead, of another as has happened in the present case.

90. Of course if the deed does not provide the rules for the appointment of a Mutwalli nor does it nominate a Mutwalli, some authority must be given the power to nominate him since the owner of the property, the Almighty Himself, cannot do so. In such a case it may reasonably be presumed that the wakif who has gone so far as to deprive himself of the property, in the person best qualified to see that a proper Mutwalli is appointed and he is given the right of doing so. This is not interference with the scheme of wakf or its conditions: it only provides a means of removing a lacuna which does

not affect the validity of the deed but fills up a gap. There is nothing in this which conflicts with principle and it may be noticed that the accepted view is that if the Kazi has removed a Mutwalli appointed by the wakif on the ground of misfeasance or misconduct, and appointed another in his place, the wakif no longer possesses the power of removing the Mutwalli.

91. As has been stated earlier, Abu Yusuf was anxious to encourage persons to create wakfs and, with this end in view, he offered full facilities to wakifs but there is no reason not to accept as binding the opinion of Imam Mohammad based, as it is, on the general principles of the Islamic Law relating to the ownership of the property, particularly when it has been accepted not only by a large body of Jurists thoroughly imbued with the spirit of the Shariat but also by modern commentators who have made a particular study of the subject -- vide Ameer Ali's Mohammadan Law, 4th Edition, Volume I, page 453, MacNaghten Principles and Precedents of Mohammadan Law, Chapter X, Section 5; Wilson's Anglo-Mohammadan Law, 6th Edition, Notes to Section 327 at page 365; and Abdur Hahim's Mohammadan Jurisprudence, page 309.

92. No doubt the example given in the Fatawai-Alamgiri related to a case in which possession had actually been delivered to a Mutwalli nominated. Nevertheless the authorities to which I have referred -- some of them older than the Fatawai Alamgiri -- deal with the matter generally as a part of the subject of removal of Mutwallis and make no distinction between the removal of a Mutwalli to whom possession has already been delivered and one who will enter into possession after the death of the wakif.

93. Further the same reasoning would apply to the Mutwalli nominated in the deed itself as the successor of the first Mutwalli.

94. The right to appoint a successor by will is the right of the Mutwalli but this right can-not be exercised in disregard of the limitations contained in the deed, of wakf. Sohani Begam, as Mutwalli, could, therefore, not disregard those provisions in appointing her successor. In her capacity as wakif too her powers are restricted as has been shown above. She could, therefore, not substitute Khalil Ahmad Khan for her daughter Mehar Nigar Begam.

95. The older decisions upon which Sir Iqbal Ahmad relied are not really in point. The oldest ease upon which reliance was placed was --Hidait-un-nissa v. Syed Afzal Hossein', 2 N.W. P.H.C.R. 420 (L). That was a case of a Shia under the law relating to which school the wakif is functus officio once he has created a wakf --vide Mulla's Mohammadan Law, notes to Section 204 at page 191 of 13th Edition. Although the Sunni authorities were discussed they were not applicable and the learned Judges proceeded on the analogy of English law assuming that proprietary possession is transferred to the Mutwalli as in the case of trusts, and that consequently it was in accordance with reason and justice that the wakif should not be permitted to take the endowed property into his possession. This case is thus of no assistance.

96. 'Gulam Hussain Saib Sayad v. Ali Ajam Tadallah Saib', 4 Mad HCR 44 (M), was also a Shia case. In that case the property was in fact transferred to the ownership of the person nominated as Mutwalli and his heirs and it was directed that he should spend a part of the proceeds on certain

charitable objects and keep the rest of the income for himself. In these circumstances it was held that the person designated as Mutwalli could not be removed. This case again is no authority for the proposition advanced by Sir Iqbal Ahmad.

97. 'Advocate General v. Fatima Sultan Begam' 9 Bom HCR 19 (N) was also a case of a Shia and the remarks of the learned Judges as to the Sunni law were in the nature of obiter dicta.

98. In 'Mohideen Saib Maghribi v. Ghulam Mahomed Ali', AIR 1916 Mad 116 (O) which was also a Madras case, no question arose as to whether the wakif could remove the Mutwalli without reserving to himself that power in the deed.

99. The next case to which reference was made was -- 'Mt. Nimatul Nissa v. Hafizul Rahman', AIR 1933 Oudh 261 (P) which was decided in 1933. In that case the real question discussed was as to the right of a wakif to alter by a subsequent deed the disposal of the profits of the wakf property for purposes other than those which he had originally designated. He did not remove any Mutwalli nor did he make any directions as to the appointment of a Mutwalli which conflicted with what was contained in the earlier deed. The learned Judges said :

> "even a casual glance at the two deeds is sufficient to show that the latter deed imposes new conditions and introduces new provisions which are in direct contravention of the provisions contained in the earlier deed."

This case again is of no assistance for a decision of the point involved in the present case.

100. In AIR 1936 Oudh 213 (FB) (A) which was decided in 1936 one of the points raised was the exact point which we are called upon to decide. The learned Judges before whom the case originally came up for hearing noticed that the opinion of the Muslim Jurists on this question was not unanimous and that, on other point there was a conflict of opinion. They accordingly referred four questions for decision by a Full Bench, the second of which was framed as follows :

> "Whether any change in the terms of wakf or in the personnel of the mutwallis can be made by the wakif, where no such power has been reserved by him in the deed of wakf, after the wakf has been completed?"

101. The judgment of the Full Bench was delivered by Ziaul Hasan J., who discusses this question at pages 217 and 218 of the report. He states it as his opinion that it is settled law that the terms of the deed of wakf cannot be altered after the dedication has been completed. He relies upon Amir Ali and Tayabji as well as -- 'Abdul Wahab v. Sughra Begam', AIR 1932 All 248 (Q) for this purpose and concludes :

> "The learned counsel for the parties in fact agree that the terms of a deed of wakf cannot be altered without the wakif having reserved such power to himself. I must, therefore, answer this question in the negative."

102. Thus, though this case directly decided the question now involved against the appellant's contention, it did so on the basis of the agreement between the counsel and it treated a condition relating to the appointment of a Mutwalli on exactly the same footing as other conditions of the deed. Indeed it did not deal with the question raised except in accordance with general principle. It was because of the doubts entertained by Misra and Chandiramani JJ. with regard to this decision that the present case was referred to a Full Bench.

103. The next case to be considered is --'Siddiq Ahmad v. Syed Ahmad', AIR 1945 Cal 418 (R). In that also the exact point raised in the appeal arose for decision. The learned Judges notice the difference of opinion on the subject between the highest authorities and lay down the principle that all that is required of modern courts is to see "which of the two opinions, if any, has been accepted by the later commentators who are of recognised authority in India, and if we find that they have consistently adopted one particular view to the exclusion of the other, it would be presumptuous on our part to attempt at this day to decide the point on the basis of original authorities by the application of any general rule of interpretation."

104. The learned Judges then referred to the views of the Fatawai Alamgiri, the Radd-ul-Muhtar, the Surrat-ul-Fatawa, Baillie's Digest of Mohammadan Law and Wilson's Anglo-Mohammadan Law, without even referring to the authorities which take a contrary view, and after referring to cases to which I have already referred concluded by concurring with the view taken in AIR 1936 Oudh 213 (FB) (A).

105. There can be no doubt that this authority is one directly in point although the discussion is not as complete as it might be, since authorities in support of the other view do not seem to have been considered. -- 'Abdul Sobhan v. Wasin Bhuyia', AIR 1950 Dacca 10 (S) simply followed AIR 1945 Cal 418 (R).

106. I have also considered the case of --'Ali Asghar Hasan v. Pariduddin Hasan', AIR 1947 All 261 (T) but with all respect to Misra end Chandiramani JJ., I cannot find anything in this decision which might be said to take a view in the slightest degree at variance with the view taken in AIR 1936 Oudh 213 (FB) (A). The question that raised was whether a wakif who had appointed himself a Mutwalli could resign office and appoint another Mutwalli in his place and the learned Judges held that he could.

107. Thus of all the cases to which reference has been made only the cases of AIR 1936 Oudh 213 (FB) (A)', AIR 1945 Cal 418 (R): AIR 1950 Dacca 10 (S) support the contention of Sir Iqbal Ahmad and they are all recent cases. Moreover the case of AIR 1950 Dacca 10 (S) does not discuss the matter at all. The learned Judge delivering the principal judgment in the case of AIR 1936 Oudh 213 (A) did not feel it necessary to go into the question in any detail in view of the agreement of the learned counsel for the parties and the discussion in the case of AIR 1945 Cal 418 (R) reveals that the authorities which support the contention of the appellants in the present case were not considered. Nevertheless there are no decisions to the contrary and the support which these cases give strengthen the contention of the respondents, though they would not, if they had stood alone, invite the application of the principle of stare decisis.

108. The conclusion at which I have accordingly arrived is that it was not open to Sohani Begam to change the Mutwalli whom she had nominated in the deed to succeed herself. The appointment of Mehar Nigar Begam by the deed of wakf must, thereture be deemed to be subsisting and the appointment of Khalil Ahmad Khan by the supplementary deed of wakf is bad in law and cannot take effect. I would accordingly dismiss both these, appeals.

109. Khalil Ahmad applied C. M. An. No. 989 1952 for an order directing the Receiver to pay him a sum of Rs. 1265/8/11 alleged to have been spent by him in the performance of certain ceremonies prescribed by the deed of wakf for the Mutwalli. According to the petition itself these ceremonies were performed during the pendency of these appeals, i.e. after it had been held by the lower court that Khalil Ahmad Khan was not the Mutwalli. They were not performed with the sanction of the Court. Indeed the petition makes it clear that the Court had directed the Receiver to perform them. In these circumstances there was no justification for Khalil Ahmad Khan for performing the ceremonies and he is not entitled to be reimbursed for any money which might have been spent by him on them -- a matter upon which we have no evidence before us. C. M. An. No. 989 also, therefore, be dismissed.

Agarwala, J.

110. Appeal No. 123 of 1944 is a defendant's appeal arising out of a suit for a declaration to the effect that the plaintiff-respondent was the duly appointed mutwalli of the waqf properties given in schedule A attached to the plaint and was entitled to manage the same. The facts briefly stated are as follows :

111. One Srimati Sohani Begum, a Sunni Muslim, executed a deed of waqf-alal-aulad on the 22nd March, 1929, in respect of the properties in dispute appointing herself the first mutwalli of the waqf for her lifetime and nominating her daughter Malka Mehar Nigar Begum, plaintiff-respondent No. 1, to be the next mutwalli after her death. The deed provided for certain maintenance allowances to be paid to certain persons. The relations between Sohani Begum and Malka Mehar Nigar Begum deteriorated and on the 29th November 1938, Sohani Begum executed a supplementary deed of waqf by which the nomination of Malka Mehar Nigar Begum as the next mutwalli under the deed of 1929 was cancelled and in her place Khalil Ahmad, son of Ahmadi Begum, another daughter of Sohani Begum was appointed as mutwalli after Sohani Begum's death. The maintenance allowances and the amounts for charities provided for in the original deed of waqf were also substantially altered. Sohani Begum died on the 14th December 1943 and Khalil Ahmad Khan entered into possession of the property as Mutawalli basing his title on the supplementary deed of waqf. Malka Mehar Nigar Begum instituted the suit which has given rise to the present appeal on the 29th January 1944 for the declaration as already mentioned.

112. Her case was that the supplementary deed of wakf was invalid because Sohani Begum having already exhausted her power of the appointment of mutawalli in the deed of wakf of 1929 and not having retained any power to make alterations in the deed of wakf of 1929 had no right thereafter to alter the succession to the mutawalliship and also the allowances by way of maintenance and charity which had already been made in the deed of wakf.

113. The defence in the main was that the supplementary deed of wakf by which the defendant was nominated as the successor of Sohani Begum in the office of mutawalli was valid.

114. The court below held that the supplementary deed of wakf was invalid and decreed the suit. Against this decree the defendant has come up in appeal to this court.

115. After the passing of the decree by the court below Malka Mehar Nigar Begum took possession of the property and began to discharge the functions of a mutawalli till her migration to Pakistan along with her son Maqsood Ali Khan on 1st August, 1948. During the pendency of this appeal an application was made for the appointment of a Receiver. Accordingly, a Receiver of the wakf properties was appointed by the late Chief Court. On the 24th of June 1949 the Administration of Evacuee Property U.P. Ordinance No. 1 of 1949 came into force under which all the properties belonging to or vested in evacuees to Pakistan vested in the Custodian. This Ordinance was replaced by the Government of India Ordinance No. 27 of 1949 which in its turn, was replaced by Act 31 of 1950.

116. A preliminary objection has been taken by the learned counsel for the respondents that Section 46 of the Administration of Evacuee Property Act, 31 of 1950, bars the hearing of the appeal. Section 45 runs as follows :

> "Jurisdiction of civil courts barred in certain matters : Save as otherwise expressly provided in this Act, no civil or revenue -courts shall have jurisdiction.
>
> (a) to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property; or
>
> (b) to entertain or adjudicate upon any question whether any person is or is not an intending evacuee; or
>
> (c) to question the legality of any action taken by the Custodian-General or the Custodian under this Act; or
>
> (d) in respect of any matter which the Custodian-General or the Custodian is empowered by or under this Act to determine."

117. This has to be read with the definition of 'Evacuee Property' and Section 11 of the Act, which are as follows :

> "Section 2(f) "Evacuee Property" means any property in which an evacuee has any right or interest (whether personally or as a trustee or as a beneficiary or in any other capacity).
>
> Section 11(1). Where any evacuee property which has vested in the Custodian is property in trust for a public purpose of a religious or charitable nature, the property

shall remain vested in the Custodian only until such time as fresh trustees are appointed in the manner provided by law, and pending the appointment of fresh trustees the trust property and the income thereof shall be applied by the Custodian for fulfilling, as far as possible, the purpose of the trust.

Explanation : In this sub-section 'property in trust for a public purpose of a religious or charitable nature' includes a public waqf and the expression 'trustee' includes a mutwalli of such waqf.

2. In respect of any Wakf-alal-aulad

(a) Where the mutwalli Is an evacuee, the property forming the subject-matter of the wakf shall vest in the Custodian subject to the rights of the beneficiaries under the waqf, if any, who are not evacuees :

(b) Where not all the beneficiaries are evacuees, the rights and interests of such of the beneficiaries as are evacuees shall alone vest in the Custodian."

118. It is urged that as Malka Mehar Nigar Begum plaintiff, is admittedly an evacuee, the question whether she is the mutwalli of the waqf property is to determine whether that property is evacuee property, and therefore Clause (a) of Section 43 of the Act comes into operation. Further, it is urged that the matter falls under Clause (d) of that section also, inasmuch as the Custodian General or the Custodian is empowered by the Act to determine whether a certain property is evacuee property or not, and when the evacuee property consists of wakf-alal-aulad property of which the evacuee is the mutwalli, the Custodian General or Custodian will have to determine whether the evacuee is the mutwalli of such property. It is, therefore, urged that Clauses (a) and (d) of Sections 46 bar the hearing of the appeal.

119. There are two answers to this objection:

120. First, that Section 46 does not apply to pending actions. When the Act came into force the present appeal was pending. It is a settled principle of interpretation of a statute that presumably it operates prospectively upon facts which come into existence after the enactment came into force. -- 'Bourke v. Nutt', (1894) 1 QB 725 (U). In the absence of an intention to the contrary, a statute does not affect vested rights. -- 'Lauri v. Renad', (1892) 3 Ch 402 at p. 421 (V). The right of appeal is a vested right and is not taken away by an enactment unless its retrospective operation is expressly or impliedly provided for. -- 'Colonial Sugar Refining Co. v. Irving', (1905) AC 369 (W). It is further well settled that even where a statute affects vested rights, it is not construed so as to affect pending actions, unless the language is express or compellingly implicatory. -- 'United Provinces v. Atiqa Begum', AIR 1941 PC 10 (X). I can see nothing in Section 46 or any other part of the Act to make it obligatory upon the Court to hold that that section applies to pending actions.

121. Secondly, the Custodian-General or the Custodian is empowered to determine whether a property is or is not evacuee property under Section 7 of the Act, only when a notice has been given

as prescribed in that section. There is no other provision in the Act authorising them to determine whether a certain property is evacuee property or not. Admittedly the Custodian has not given any notice as prescribed in Section 7 and consequently he has no jurisdiction to determine whether the property in dispute is or is not evacuee property. It was urged that under the U.P. Ordinance No. 1 of 1949, which in terms was replaced by Government of India Ordinance 27 of 1949, which itself was replaced by the present Act, no notice was necessary to be given and all property which was evacuee property vested in the Custodian automatically, and once such property had vested under Ordinance No. 1 of 1949, it remained vested even under the present Act by virtue of Clause (2) of Section 8.

But this position also does not help the respondent. It is true that under paragraph 5 of the Ordinance No. 1 of 1949, a property which, was evacuee property vested in the Custodian automatically and by virtue of Clause (2) of Section 8 of the present Act it will be deemed to be evacuee property, declared as such, within the meaning of the Act and shall be deemed to be vested in the Custodian automatically and shall continue to so vest. But in a case of dispute who is to determine whether the property has vested in the Custodian? The Custodian cannot, because the Act does not give him the power to determine such a question. Obviously it is the civil Court which must determine that question. Therefore, in such a case also Clauses (a) and (d) cannot bar the jurisdiction of the civil Court, Clause (a) in my opinion does not come into operation when notice under Section 7 has not been given, because before such notification is given there is no question of any authority deciding whether the property is evacuee property. The civil court in such an event decides merely whether the property can be claimed by a certain person as owner or mutwalli or in any other capacity and not whether it is an 'evacuee property'. The law could not have contemplated that even though the Custodian has acquired no jurisdiction to determine whether a certain property is evacuee property, the civil courts should not entertain suits of title with respect to such property.

122. I should, not, however, be assumed to assent to the proposition that in a case instituted after the commencement of the Act, even after notice under Section 7 of the Act has been published and the Custodian has acquired jurisdiction, to decide whether the disputed property is evacuee property, or in other words, whether the evacuee is interested in such property as owner or in any other capacity as mentioned in Section 2(f) read with Section 11, still the civil court can decide substantially the same matter as a question of title. If this were allowed, Section 46 could always be avoided and rendered nugatory.

123. On behalf of the appellant it was urged that even if Malka Mehar Nigar Begam was the mutwalli, the waqf property was not evacuee property under the Act. This argument is, however, not tenable.

124. The Administration of Evacuee Property Act is a special Act and evacuee property has a special meaning. "Evacuee Property" as defined in Section 2(f) means any property in which an evacuee has any right or interest (whether personally or as a trustee or as a beneficiary or in any other capacity). The words "or in any capacity" include the capacity of a mutwalli. It is true that a mutwalli is merely a manager of the waqf property and has no vested rights in the property itself. -- 'Vidya Varuthi Thirthaswamlgal v. Baluswami Ayyar', AIR 1922 PC 123 (Y); -- 'Mt. Allah Rakhi v. Shah Mohammad

Abdur Rahim', AIR 1934 PC 77 (Z). But as he has a right of management of the property, it cannot be said that he has no 'interest' in the property. This position has been made perfectly clear by the provisions of S. 11 of the Act which deal with public waqfs and waqfs-alal-aulad. The explanation to Section 11 shows that in a public waqf the expression 'trustee' includes a mutwalli of such waqf and so also in respect of a waqf-alal-aulad it is clearly provided that the waqf property becomes evacuee property where the mutwalli thereof is an evacuee, it follows, therefore, that if Malka Mehar Nigar Begum, is the Mutwalli of the waqf property in dispute, the waqf property is evacuee property and vests in the Custodian under Section 11 of the Act.

125. It was further urged by learned counsel for the appellant that Section 46 cannot affect the jurisdiction of the High Court, though it may affect the jurisdiction of the lower courts and in this connection reliance was placed upon a decision of the Bombay High Court in -- 'P. R. Nayak v. Bejan Dadiba Bharucha', AIR 1951 Bom 403 (Z1). There is a fallacy in this argument. Section 46 does not affect the jurisdiction of a High Court to issue a writ under Article 226 of the Constitution and Nayak's case relied upon by the learned counsel refers to the jurisdiction of the High Court under Article 223. Powers of the High Court in hearing an appeal from the decision of a lower court are the same as of the lower courts and if a law bars the jurisdiction of the civil courts from entertaining any suit, the High Court's power to decide the appeal is also affected.

126. This leads us to a consideration of the main point in the appeal as to the validity of the supplementary deed of waqf. It was conceded before us by the learned counsel for the appellant that a wakif has no power to vary or alter the conditions of a duly created wakf in so far as they relate to the beneficiaries. But it was strongly urged that a wakif has full power to vary or alter the order of succession to the office of mutwalli. In the alternative it was conceded that at least in cases in which the nomination of the mutwalli in the deed of waqf is by way of a testamentary bequest, that is to say, in so far as the deed of waqf provides for the nomination of a mutwalli after the wakif's death the provision can be varied or altered by the wakif during his life time in the same manner as he can alter any other testamentary disposition. I am of opinion that where the wakif has appointed a person other than himself as mutwalli of a waqf during his lifetime and has laid down an order of succession to the mutwalli so appointed, the wakif has in fact parted with all the power of the appointment of a mutwalli which he possessed, and cannot therefore cancel, vary or alter the provision. But where in the deed of waqf the wakif has appointed himself as a mutwalli for life and has made a provision for appointment of mutwalli after his death, he can cancel, vary or alter the provision relating to his own appointment, as well as the provision relating to the appointment after his death.

127. Certain propositions of law are well settled and are beyond dispute.

128. The term 'waqf' literally means 'detention'. According to Abu Hanifa, it is the detention of a specific thing in the ownership of the wakif or appropriator, and the devoting or appropriating of its profits or usufruct "in charity on the poor or other good objects". According to the two disciples, Abu Yusuf and " Muhammad, wakf signifies the extinction of the appropriator's ownership in the thing dedicated and the detention of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied "for the benefit of mankind". (Balilie, pages 557, 558. Hedaya,

231, 234.) Under the Mussalman Wakf Validating Act, 6 of 1913, Waqf means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable. A waqf 'inter vivos' is completed, according to Abu Yusuf, by a mere declaration of endowment by the owner. According to Muhammad, a waqf is not, complete unless, besides a declaration of waqf, a mutwalli is appointed by the owner and possession of the endowed property is delivered to him. Abu Yusuf's view was followed by all the High Courts in India, -- 'Doe Dem Jaun Beebee v. Abdoliah Barbar', (1833) Fulton 345 (Z2); --'Ma E Khin v. Maung Sein', AIR 1925 Rang 71 (Z3); -- 'Muhammad Ibrahim v. Bibi Mariam', AIR 1929 Pat 410 (Z4); -- 'Muhammad Said v. Mt. Sakina Begam,' AIR 1935 Lah 626 (25); --'Zaffar Hussain v. Mahomed Ghiasuddin', AIR, 1937 Lah 552 (Z6); -- 'Pathu Kutti Umma v. Nedungadi Bank Ltd.', AIR 1937 Mad 731 (Z7); -- 'Abdul Rajak v. Jimbabai', 14 Bom LR 295 at pp. 300-301 (Z8); -- 'Husseinbhai v. Advocate-General of Bombay', AIR 1920 Bom 152 (Z9); --'AIR 1936 Oudh 213 (FB) (A); -- 'Zainab Bi v. Jamalkhan', AIR 1951 Nag 428 (Z10), except the Allahabad High Court, -- 'Muhammad Aziz-Ud-din v. Legal Remembrancer to Governmet', 15 All 321 (Z11); -- 'Muhammad Yunus v. Muhamad Ishaq', AIR 1921 All 103 (212); -- 'Muhammad Shan v. Muhammad Abdul', AIR 1937 All 255 (Z13), but a recent Pull Bench decision of that. Court, overruling the previous decisions, has adopted Abu Yusuf's view -- 'AIR 1947 All 201 (J).

This controversy is, however, immaterial for our purposes. Whether a waqf is complete when the declaration of waqf is made or when a mutwalli is appointed and possession is delivered to him, it is clear that the appointment of a mutwalli may be made either along with the declaration of waqf or subsequently. The right to appoint a mutwalli must naturally vest in the founder of the waqf. He has the power to lay down a scheme for the administration of the waqf and for the succession to the office of mutwalli. He may nominate the successors by name or indicate the class together with their qualifications, from whom the mutwalli may be appointed, and may invest the mutwalli with power to nominate a successor after his death or relinquishment of office, -- 'Ghazanfar v. Mt. Ahmadi Bibi', AIR 1930 All 169 (Z14); --'Shah Gulam v. Mahommad Akbar Sahib', (1875) 8 Mad HC 63 (Z15).

If any person appointed as mutwalli dies, or refuses to act in the trust, or is removed by the Court, or if the office of mutwalli otherwise becomes vacant, and there is no provision in the deed of waqf regarding succession to the office, a new mutwalli may be appointed by the founder of the waqf -- 'Rugghan v. Mt. Dhanno', AIR 1927 All 257 (Z16); or by his executor, if any. The wakif may appoint himself as the mutwalli of the waqf, or may nominate some one else as mutwalli. He may appoint a mutwalli on his death bed -- 'Abdul Razak v. Ali Baksh', AIR 1946 Lah 200 (Z17), AIR 1945 All 544 (?), or by Will succeed him. It cannot be disputed that where a mutwalli is appointed on death bed or by will, the appointment can be cancelled -- 'Sayed Abdula Edrus v. Sayad Zain Sayad Hasan Edrus', 13 Bom 555 (K). An appointment to take effect after one's own death is testamentary and like any other bequest may be altered at any time -- 'AIR 194S Cal 13 (?)'. In short the wakif has complete power of disposal over the office of Mutwalli.

129. Disposal of the office of mutwalli may be absolute or limited. It may be 'in presenti' i.e., during the lifetime of the wakif or it may take effect on his death.

130. Suppose the wakif says "I appoint 'A' as mutwalli of the waqf for my lifetime," or suppose he says, "I appoint myself as mutwalli for my lifetime," Here the disposal of the office of mutwalli is only limited in duration i.e., up to the lifetime of the wakif. The wakif or his executor still retains the power of appointment of a mutwalli to take effect after the wakifs death.

131. Suppose the wakif says "I appoint 'A' as mutwalli of the wakf and on his death, his eldest son shall be the mutwalli and so on for ever". Here the office of mutwalli has been disposed of 'in praesenti' and for ever.

132. Again, suppose a wakif says, I appoint 'B' to be mutwalli of wakf on my death. Here the appointment of 'B' as mutwalli is an appointment to take effect not 'in praesenti' but on the wakifs death. This is a testamentary disposal of the office of mutwalli.

133. The distinction between the disposal of the office of mutwalli 'in praesenti' and on the wakifs death must be clearly borne in mind. It is a vital distinction.

134. Now there is no controversy so far as the revocation of the disposal of the office of the mutwalli after one's death is concerned, if the disposal is by means of a separate document. Such a document is a will which can always be revoked by the testator.

135. suppose now that in the very same deed by which the wakf is declared, wakif says, I appoint myself as mutwalli for my lifetime, and I appoint 'B' to be mutwalli on my death. What is the nature of the disposition of the office of mutwalli, which is to take effect on the wakifs death? Can it be anything else than a testamentary disposition of the office of mutwalli? Does it make any difference if this testamentary disposal of the office of mutwalli instead of being embodied in a separate document is embodied in the deed of wakf itself? The nature of a disposition or transfer of property or office has to be judged by its incidents and not by the mere circumstance that it is embodied in a particular document. One document may contain both a transfer 'inter vivos' as well as a testamentary bequest. In such a case the document in truth consists of two distinct kinds of transactions, both of which are governed by separate incidents.

In -- 'Chandmal v. Lachhmi Narain', 22 All 162 (Z18-19), there was a document which contained provisions which were to take effect during the lifetime of the executrix and also provisions which were to take effect on the executrix's death. Probate was applied for of the document as a will. It was contended that since the document contained provisions which were to take effect during the lifetime of the executrix, it was not a will. The court held that:

> "Such portions of the document as are a declaration of the intentions of the executrix with respect to her property which she desired to be carried into effect after her death amount to a will, notwithstanding that the same document contained other provisions which she desired should be carried into effect during her lifetime".

The court referred to the case of -- 'Cross v. Cross', (1843) 8 QB 714 (Z20) where it was held that "there was no objection to one part of an instrument operating in presenti as a deed and another in

future as a will."

No one questions the proposition that the terms of a declaration of wakf regarding the disposal of the beneficial interest in the property which is the subject-matter of the wakf cannot be altered or cancelled by the wakif unless he has reserved to himself the power to do so in the deed of wakf.

136. There is certainly a controversy among the Jurists as to whether the terms of a deed of wakf relating to the office of mutwalli can be altered or cancelled without a power to that effect being reserved in the deed of wakf. According to Abu Yusuf, since the mutwalli is a 'Deputy' of the wakif his appointment can always be cancelled by the wakif even if he has not expressly reserved that power to himself in the deed of wakf. According to Mohammad, the wakif has no such power, unless he expressly reserves to himself such power in the deed of wakf. But what is of importance is the fact that this controversy between the two disciples is confined to the disposal of the office of mutwalli by the wakif 'in presenti' and not at all to the disposal of the office to take effect on wakifs death. Mohammad never said that a nomination of a mutwalli to take effect after the wakifs death could not be cancelled. There is not a single text to this effect. We are really not concerned with this controversy in the present case, as in our case the question is not at all with regard to the disposal of the office of mutwalli during the wakifs lifetime but on her death.

137. Let us now look into the original texts to see if the above statement is correct.

138. The Patawai Alamgiri (Baillie's translation, p. 602) refers to the controversy between Abu Yusuf and Mohammad.

> "A man having appropriated his estate & delivered up possession of it to the administrator, desires to take it out of his hands. If he made it a condition in the wakf that he should have the power to discharge the administrator and withdraw the wakf from his hands, he may lawfully do so; otherwise he cannot according to Mohummud; but according to Abu Yoosuf he can; the Sheikhs of Bulkh deciding with the latter and those of Bookhara with the former with whom is the Futwa."

It is clear that what is being considered here is the case when the wakif has "delivered up possession to the administrator", i.e., has appointed a mutwalli 'in praesenti' end not a case of an appointment in future on the wakifs death. Indeed the Putwa Alamgiri makes it clear that an appointment of a mutwalli to take effect after the wakifs death can be revoked by him.

> "If he should make no appointment of kuyim or administrator till the approach of death and then appoint an executor, the person appointed would be executor With regard to his property and administrator of his wakf. But if after that he should appoint another executor, the second person would only be executor for the property and not administrator of the wakf. If, however, he should say 'I have revoked every appointment of executor made by me, governance of the wakf would be to the new executor and the former mutwalli or superintendent would be discharged."

The Radd-ul-Muhtar accepts the opinion of Mohammad and explains the reason for the difference between the two views.

> "Abu Yusuf holds the mutwalli to be a deputy (wakif) of the wakif and consequently the wakif has the power at any time to discharge him.

According to Mohammad the mutwalli is a deputy of the beneficiaries, and that, therefore, the wakif has the power to discharge him only when he has reserved it expressly at the time of dedication."

The Radd-ul-Muhtar adds (Amir Ali's Mohammadan Law, Vol. I, p. 458) that: "According to the Tashih-ul-kunuri of Allamah Kasim this is the rule on which decisions are passed."

139. But Darrul-Muhtar, on the other hand, which is also of equally high, authority, accepts the view of Abu Yusuf that the wakif has absolute authority to discharge the mutwalli and the Futwa is thereon, vide Amir Ali's Mohammaddan Law, Vol. II, p. 458.

140. The Hidaya accepts Abu Yusuf's view and gives reasons for its acceptance, vide Hamilton's translation, Vol. II, Book XV.

> "The arguments in support of the opinion of Aboo Yoosuf, (which is the most generally recognised doctrine) are two-fold. First the procurator enjoys his authority, only on behalf of the appropriator, in consequence of his reservation; and it is impossible that the appropriator himself should not be possessed of any authority, at the same time but another person enjoys an authority held on his behalf. Secondly, the appropriator stands in a nearer relation to what he appropriates than any other person, and it is consequently proper that he possesses an authority over it; in the same manner as where a person builds a mosque, in which case the business of repairing it, as well as the appointment of all officers etc., appertains solely to him; or as where a person emancipates a slave, in which case the will appertains solely to him as he stands in a nearer relation to the slave than any other person."

Amir Ali quotes a passage from Surrat-ul-Fatwa as follows:

> "In the chapter on wakf in the Khazanat-ul-Fatwa it is stated that the Sahab-ul-Manah (the author of Manat-ul-ghaffar) was asked about a deed of wakf in which there was a condition to the effect that the vilayat of the trust should appertain only to the wakif's male descendants but now a deed has been discovered bearing a prior date, in which the tauliat was given to his male as well as his female descendants; the question was which deed should be acted upon. The Saheb-ul-Manah answered if the wakif in the first deed or at the time of the dedication reserved to himself the power of altering any of the provisions regarding the management etc., of the wakf, in that case the second deed should be acted upon, that is the deed in which the tauliat is restricted to his male lineal descendents. 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 is no restriction should be acted upon."

141. Apparently Sahab-ul-manah followed Mohammed's view, but it does not appear that Sahata-ul-manah had in mind the question whether an appointment of a mutwalli to take effect after the wakif's death could be revoked or not. The deeds referred to by him are not clear on the point.

142. Macnaghten in his 'Principles and Precedents of Monammadan Law accepts Abu Yusufs view, where he quotes from "Khazanat-ool-Mooftian":

> "If after having appointed a superintendent, the founder desires to remove him, he is at liberty to do so, and assume the superintendence himself."

Thus there is a great divergence of Juristic opinion even, on the question, whether the wakif can revoke the appointment of a mutwalli 'in praesenti'. It will be noticed that in all the authorities quoted above (with the possible exception of sahab-ul-manah) the question always was of the removal of a mutwalli appointed in praesenti by the wakif.

143. Certain general observations are also to be found in the text books. Thus in the Asaaf it is slated that "the Wakif cannot go beyond the conditions laid down at the time of the dedication." To the same effect are statements in the text books of modern commentators, e.g., Amir Ali and Tayabji. These general observations cannot possibly refer to provisions of a deed of wakf which are in the nature of a will, because such, provisions cannot be considered to be the conditions of the deed which takes effect in praesenti. They have reference to the terms of the wakf relating to the beneficiaries and may be taken to refer even to the terms of a wakf relating to the appointment of a mutwalli in praesenti. To apply them to the provisions of a wakf in the nature of a will is to take away from the wakif a right, which, he undoubtedly possesses of revoking a testamentary provision.

Suppose, the deed of wakf contained a testamentary disposition about property other than that comprised in the wakf. Nobody would question that such provisions of the deed could be revoked by the wakif. Again, suppose the deed of wakf contained a provision that the mutwalli shall be the wakif himself for his life and further contained a provision that 'B' shall be the executor of the wakif's non-wakf property. Under the Mohammadan Law 'B' would be the mutwalli of the wakf property after the wakif's death. Can it be denied that the wakif could revoke the provision about the executor & thus, in effect cancel his appointment as mutwalli of the wakf property after the wakif's death? Why should, therefore, the provision of a deed of wakf that 'B' shall be the mutwalii after the wakif's death, which provision obviously is in the nature of a will, be not liable to be revoked by the wakif?

144. That the term relating to the appointment of a mutwalli after the wakif's death partakes of the scheme relating to the appointment of mutwalli cannot alter the fact that the term is testamentary in its nature and thus revocable. In my judgment, there is no sound reason for holding that such a term cannot be revoked by the wakif.

145. So far as the text books are concerned, therefore, there was never a question of the removal of a mutwalli to take office after the wakif's death. Even if we accept Mohammad's view. It does not affect the question at issue in the present case.

146. Several decisions of the Indian Courts were cited before us.

147. The oldest decision cited before us by Sir Iqbal Ahmad is the case of -- '2 N. W. P. H. C. B. 420 (L)'. It was a Shia case and the law applicable was quite different. It is well known that under that law the Wakif is functus officio once he has created a wakf, vide Mulla's Mohammadan Law, Section 204, at page 191 of 13th edition. Moreover, in this case it was assumed that the proprietary possession was transferred to the mutwalli and on this basis it was held that the wakif could not take back the endowed property into his own possession. This case can be of no help to the respondents.

148. '4 Mad H. C. R. 44 (M)', was also a Shia case. Certain lands, choultries, and moveable property had been by instrument in writing given to the brother of the donor and his heirs for the purpose, in perpetuity, for keeping in repair the choultries and affording strangers the charities of shelter, and, if circumstances permitted food also, as well as for supplying the wants of the donees with clauses restraining alienation by them. Subsequently the donor removed the donees from the possession of the property donated. It was held that in such a case the donees could not be removed from their office of mutwalliship, unless the power to remove them were reserved at the time of endowment. This was really a case of gift rather than that of a wakf. If it was a case of waqf, the office of mutwalli was given away by the wakif 'in praesenti'. It was not a case of cancellation of the nomination which was to take effect after the wakif's death.

149. '19 Bom HCR 19 (N)', was also a Shia case and the remarks relating' to the principles of Sunni Law were 'obiter dicta'. The attention of the learned Judge in that case was not drawn to the fact that the appointment of mutwalli after one's death was in the nature of a testamentary disposition of the office of mutwalli.

150. In -- 'AIR 1916 Mad 116 (O)', the question now under consideration was not considered at all.

151. In -- 'AIR 1932 All 248 (Q)', the question was of altering the terms of the waqf in connection with the allowances reserved in the wakf for the beneficiaries. It was held that unless power was reserved in the deed of wakf such terms could not be varied. This proposition has not been disputed by any party in the present case.

152. In -- 'AIR 1933 Oudh 261 (P)', the real question for decision was whether a wakif could alter by a subsequent deed the terms of a wakf relating to the disposal of the profits of the wakf property. There was no question of removal of any mutwalli in that case. This case, therefore, is of no assistance to the respondents.

153. The next case is of importance and it is because of this that the present case has been referred to this Pull Bench. In -- 'AIR 1936 Oudh 213 (FB) (A)', which was decided in 1936, a wakif had executed a deed of wakf in respect of three shops of which he was in possession as a usufructuary mortgagee.

Under this deed, he constituted himself as the first mutwalli. His daughter and daughter-in-law were appointed to be joint mutwallis after his death. A few months later the wakif executed another deed of waqf revoking his first deed and making a wakf of his residential house and five shops including one shop which had formed the subject-matter of the first waqf. Under this deed he constituted his daughter-in-law as sole mutwalli and directed that her daughter was to succeed to her. There was also a change in the interests of the beneficiaries of the wakf. Several questions were raised and two of them were (1) whether the waqf was valid at all as it was in respect of a right of usufructuary mortgage, and (2) whether any change in the terms of the wakf or in the personnel of the mutwallis could be made by the wakif, where no such power had been reserved by him in the deed of wakf after the wakf had been completed.

These questions were referred to a Full Bench. The Full Bench was of opinion that the rights of the usufructuary mortgagee could not be made a waqf of and therefore the waqf was bad and must fail. On the 2nd question the Full Bench held that no such change could be made unless a power had been reserved by the wakif in the deed of wakf. It may be observed that the question of change in the terms of the waqf relating to beneficiaries and the personnel of the mutwalli was considered together as if both parts of the question were governed by the same law. Indeed, as the question was not material for the decision of the case, the counsel for the parties agreed to the answer of the Full Bench on this part of the case. The Full Bench stated that "the learned counsel for the parties in fact agree that the terms of a deed of wakf cannot be altered without the wakif having reserved such power for himself."

154. Thus in my opinion this case is not of any great assistance to us in deciding the point under consideration.

155. The next case cited before us is -- 'AIR 1945 Cal 418 (R)', In this case again no distinction was made between the removal of a mutwalli who has been appointed in praesenti and the removal of a mutawalli whose appointment was to take effect after the wakif's death. The distinction was not brought to their Lordships' notice.

156. The last case cited is -- 'AIR 1950 Dacca 10 (S)', which simply follows 'Abdul Wahab's case'. One case on which reliance was placed by both the parties may also be mentioned and that is -- 'AIR 1947 All 261 (T)'. In this case it was held that when the wakif had appointed himself as mutwalli for his lifetime, he could resign his office and appoint another mutawalli in his place. This case does help the appellant to some extent, but not much.

157. Thus none of the cases cited by the learned counsel for the respondents, is of much assistance to us in the decision of the point under consideration.

158. But this opinion does not conclude the matter in favour of the appellant. In the original deed of wakf the beneficiaries during the life time of the next mutawalli, i. e, Mehar Nigar Begam and during the lives of the subsequent mutwallis were different. In the supplementary deed of wakf by substituting Khalil Ahmad Khan in place of Malka Mehar Nigar Begam, the wakif hot only made a change in the office of the mutwalli but also changed the rights of the beneficiaries, at least as

regards the period during which they were to enjoy those benefits. The periods of the lives of Malka Mehar Nigar Begam and of Khalil Ahmad Khan could not be one and the same. The terms relating to the beneficiaries are so in extricably woven with the rights of the mutwallis that it is not possible in the present case to separate the term relating to the appointment of the mutwalli after the wakif's death from the term relating to the beneficiaries. Consequently the supplementary deed of wakf must be held to be invalid as a whole.

159. The appeal, therefore, must fail and I would accordingly dismiss it with costs.

160. P. A. No. 95 of 1945 arises out of a suit filed by Malka Mehar Nigar Begam after she had established her right in the previous suit claiming a decree for possession over the wakf property and for money wrongfully realised by the defendant during the time he acted as Mutwalli. This suit was also decreed by the Court below and in this appeal also the same questions arise for decision as in appeal No. 123 of 1944. For the same reasons, this appeal must be dismissed with costs.

161. I agree with the order proposed to be passed by my learned brother Kidwai, J. with regard to Civil Miscellaneous Application No. 989 of 1952.