Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussammat Mujib-un-Nisa and Others v. *Abdul Rahim and Abdul Aziz (Representatives of Ulfat-un-nisa deceased), from the High Court of Judicature for the North-West Provinces, Allahabad; delivered 8th December* 1900.

Present at the Hearing:

LORD HOBHOUSE.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR RICHARD COUCH.
SIR FORD NORTH.

[*Delivered by Lord Robertson.*]

The Appellants were the Plaintiffs in a suit before the Subordinate Judge of Meerut, and by their plaint they prayed that it should be declared that a deed executed in October 1889 by Munshi Syad Mehrban Ali, deceased, is a valid deed of wakf. The property affected by this instrument is said to be worth Rs. 400,000. The Plaintiffs are, respectively, wives and daughters of the deceased, for whom certain provisions are made in the deed. The Defendants were two of his sisters, for whom no provision was made in the deed. Both sisters are now dead, and only one of them, Ulfat-un-nisa, is now represented on the Record in pursuance of an Order in Council of the 7th August 1900 which struck off the representatives of the other sister, Sharif-un-nisa, under circumstances set out in that Order.

Of the several issues settled by the Subordinate Judge two only have been argued in this Appeal. The first question is raised by the Defendants' plea that the deed founded on not having been

legally registered cannot be admitted in evidence and cannot affect the property. The second question is raised by the Defendants' contention that having regard to the terms of the deed itself, the property did not become a wakf property. Both questions have been considered by their Lordships.

The question about registration turns on the Act III. of 1877. The deed in dispute being an instrument of gift of immoveable property, it came under Section 17 of the Act, and registration under the Act was accordingly, by Section 49, indispensable in order to render it receivable as evidence of the transaction which it purported to record, and to enable it to affect the immoveable property comprised therein. The question is, was it lawfully registered? It was *de facto* registered, but the history of that registration requires to be examined.

The deed as ultimately presented for registration and registered consists of two parts, of which the former part is dated 16th October 1889 and contains the deed of endowment and conditions, while the latter part is headed "Supplement or Detail of the Endowed Pro-"perty," and consists of these particulars. It appears that at first the Munshi who executed the deed, or his advisers, had not adverted to the requirements of Section 21 of the Registration Act; and as the deed as at first presented for registration did not contain "a description of" the "property sufficient to identify the same," the Registrar, on 16th October 1889, declined to register, but returned the deed "for correction "and compliance with" those statutory provisions. The deed had been presented on behalf of the Munshi by Saiyid Habib-ul-lah, who held his power of attorney. On 24th October 1889 the supplement or detail of the endowed property was added, so as to render the deed registrable, and on that day the deed so completed was executed by the Munshi. On 4th Novembe

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1889, that deed of endowment (*i.e.* the completed deed) was presented for registration by the same Saiyid Habib-ul-lah. In the interval between the execution of the completed deed and its presentation to the Registrar the Munshi died. The legal question now to be considered turns on this last fact. The narrative however may be completed by mentioning that the Registrar accepted the deed and registered it, recording in writing that the man who had executed it and whose attorney presented it for registration was dead. The minute of this proceeding is on p. 142 of the Record.

It was not attempted on the part of the Appellant to justify the registration of the deed, as regularly done in accordance with the Act. The departure from the Act is indeed palpable, and the only question is whether it invalidates the registration. The Act by Section 32 enacts that every document to be registered under it, whether such registration be compulsory (as in the present case) or optional (as in the case of other classes of instruments), shall be presented by some person executing or claiming under the same, or by the representative or assign of such person, or by the agent of such person, representative or assign, duly authorised by power of attorney. Now the case in hand is that of a person who when he presented the deed for registration (as he says he did) on 4th November 1889 stood in no other relation to the deed than that, before the death of the person executing it, he had held his power of attorney. It is perfectly plain not merely from the general law but from the terms of this Section 32 itself that, after the man's death, the only attorney who would have had any *locus standi* would have been the attorney of the representative or assign of the deceased. It has been suggested however, that the error of the Registrar was a defect in his procedure only and accordingly under Section 87

does not invalidate the act of registration. To their Lordships the error appears to be of a more radical nature. When the terms of Section 32 are considered with due regard to the nature of registration of deeds it is clear that the power and jurisdiction of the Registrar only come into play when he is invoked by some person having a direct relation to the deed. It is for those persons to consider whether they will or will not give to the deed the efficacy conferred by registration. The Registrar could not be held to exercise the jurisdiction conferred on him, if, hearing of the execution of a deed, he got possession of it and registered it; and the same objection applies to his proceeding at the instigation of a third party, who might be a busybody. Now it seems to their Lordships that when the deed was presented on 4th November 1889 it was presented by a volunteer, and the Registrar's minute shows that he proceeded to register at the request of one whom he knew to derive his power of attorney from a dead man. Nor is it possible to treat this action of the Registrar as compliance with the request made on 16th October 1889, when the principal was alive. Not only had the deed in fact been executed afresh on 24th October but it was presented afresh on 4th November, as the minute itself bears; and even assuming the continuity of the proceeding, the death of the applicant brought it to an end. The Registrar indeed did not merely disregard Section 32, for he proceeded to accept the admission of the alleged attorney as a good admission of the execution of the deed, although Section 34 requires in the case of a decease the admission of the representative or assign.

Their Lordships were referred to two decisions of this Committee in support of the Appellants' contention. Neither case gives any countenance to the view that the absence of any party legally

entitled to present a deed for registration is a defect in procedure falling under Section 87. In both those cases the Registrar was throughout moved by a person having title and was exercising his jurisdiction. The difference is in their Lordships' judgment vital. They therefore hold the registration of this deed to have been illegal.

Their Lordships have, however, considered the question, whether, even assuming it to have been registered, the deed is, according to its terms, a valid deed of wakf. It will be so, if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family.

The deed begins with a statement that the grantor has always devoted a portion of his income to religious and charitable purposes as seemed proper and expedient to him at the time. He goes on to say that, as he has no male issue and it is incumbent on every one not to neglect to secure benefit of his soul in the next world, he wishes to establish a perpetual, lasting and continuing charity, so that the charitable expenses may in future be defrayed without any difficulty or obstacle in his lifetime and also after his death. Hence "in order to secure "benefit and honour in the next world I have of "my free will and accord, without coercion "or compulsion and while in a sound state of "body and mind, made a family endowment "(wakf khandani) to seek nearness to God." He goes on to say that he has withdrawn his proprietary possession from the property the subject of endowment and has brought it into his possession as mutawalli, "which I can hold "during my life under the terms of this docu-"ment. Its income and profit shall after "defraying its necessary expenses according to "the provisions hereafter made in this document

" be applied to charitable purposes." No one was by reason of his getting any maintenance to have right to exercise proprietary acts nor should the endowed property be liable to be attached or sold in satisfaction of personal debts of any mutawalli or recipient of allowance, because it being an endowed property all the rights of the mutawalli and those for whom maintenance allowances have been fixed are to exist only for their personal maintenance. A detail of the property (wakf khandani) which was " the sub-" ject of the family endowment under this deed " and the conditions attached thereto " was then given.

The conditions follow the detail of the property and are ten in number.

The 1st appoints the donor himself to act as mutawalli and he is to use the income of the endowed property " in the way I shall think " proper, according to the provisions of the " Muhammadan law and the conditions of this " document."

No. 2 provides for one of his wives and thereafter one of his daughters, and after their deaths some direct descendant, being successively mutawalli.

No. 3 fixes Rs. 300 a month as the allowance of the mutawalli for his or her own expenses and those of his or her children.

No. 4 gives maintenance allowances to the wives and daughters of the donor.

The 5th and 6th purposes are as follows:— " Whatever are the necessary expenses such as the " salaries of the servants for the endowed pro-" perty the expenses of visitors, marriages, deaths, " presents, offerings and other charitable purposes, " like those of schools &c., at this time, they shall " during the time of my superintendence be " defrayed by me during the term of my superin-" tendence and afterwards by every mutawalli, " subject to the provisions of this deed, of his

" own authority and according to his own " wishes."

6. " The surplus income of the endowed " property remaining after the payment of the " Government revenue, the village expenses, the " expenses of the mutawalli, the salaries of the " servants and stipend holders and others &c., " shall accumulate and the money accumulated " shall be invested in the purchase of other pro- " perties which shall also appertain to the " endowed property and shall themselves be " wakf property. The income of that also shall " in conformity with the 5th paragraph be spent " along with the income of the endowed " property."

By the 7th condition the mutawalli is to have a discretionary power, with reference to the increase or decrease in the income of the endowed property, to increase or decrease the fixed allowances or fix a new allowance. No one was to have a right on the ground of relationship &c. to prefer a claim for increase or decrease or for a new allowance, or a claim against the mutawalli for the time being for rendition of accounts.

The 8th condition forbids sale and mortgage except in certain specified cases.

The 9th condition relates to the contingency of a son being born to the donor after the execution of the deed. He is to be the mutawalli, with the aid of a munsarim during minority. He is to have Rs. 300 a month for his expenses, " and shall be authorised to spend " all the net profits of the endowed property " according to his discretion in purchasing pro- " perty and making addition to the endowed " property, in the erection of houses, in per- " forming shadioghammi, joyous and mourning " ceremonies and in other necessary and charitable " matters." It was to be optional to him to create new allowances, to reduce, enhance or put a stop to the allowances of the persons

receiving allowances. No other recipient of allowances or relatives was to have power to take account from the mutawalli.

The 10th (and last) condition declares that "if (which God forbid!)" none of the donor's male or female heirs be in existence at any time, the authority for the time being shall have power to take the endowed property into and under his own possession and superintendence, use its income remaining after the payment of its cost of maintenance for the donor's spiritual benefit in such matters as might according to Muhammadan faith and Hanati sect, to which the donor belonged, be valid and for the benefit of the Muhammadans. "I have therefore executed "this deed of family endowment in order that "the same may serve as evidence and be of "use."

The deed thus closes, as it began, by describing itself as a deed of family endowment. The donor contemplates, it is true, that his own liberality to religious and charitable purposes shall continue in future generations, but this is only (as it turns out) to an uncertain and discretionary amount, and as an incident of the family endowment. When the deed is examined and collated, and its professions tested by its effective provisions, it proves to be, what it calls itself, a "family endowment," pure and simple. Indeed the theory of the deed seems to be that the creation of a family endowment is of itself a religious and meritorious act, and that the perpetual application of the surplus income in the acquisition of new properties to be added to the family estate is a charitable purpose. It is superfluous in the present day to say that this is not the law.

The part of the deed which was most relied on by the Appellants is the general statement or declaration with which it opens. The words particularly founded on are those in which the

testator declares that "the income and profit "of the endowment shall, after defraying its "necessary expenses according to the provisions "hereafter made in this document, be applied to "charitable purposes." The reference to the subsequent part of the document carries us forward to the conditions where those general intentions are put into concrete and effective shape. Now the 5th and 6th conditions express in clear and definite language the manner in which the testator works out the ideas adumbrated in the words which have been quoted, and they place beyond dispute the relative positions of charity and family endowment in the testator's scheme. The 5th condition provides for the payment of what it calls necessary expenses and among those it expressly enumerates "offerings and other charitable purposes, "like those of schools, &c. at this time." The 6th condition deals with the surplus income after those "expenses" are paid, and dedicates that income to the purchase of other properties; and the income of the new properties is to follow the same course as the income of the original estate. The amount to be applied under the 5th head is in the absolute and uncontrolled discretion of the mutawalli and no one has a right to demand an account.

On the terms of the deed itself, therefore, their Lordships hold that the property is not in substance dedicated to charitable purposes but on the contrary is dedicated substantially to the maintenance and aggrandisement of the family estates for family purposes. The deed therefore could not be supported as constituting a wakf.

Their Lordships will humbly advise Her Majesty that the Appeal should be dismissed and the Appellants must pay the costs of the Appeal.