APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KALELOOLA SAHIB (PLAINTIFF), APPELLANT,

v.

NUSEERUDEEN SAHIB (DEFENDANT), RESPONDENT.*

1894. October 1. November 23.

Muhammadan law—Wakf—Charitable and religious trusts—Perpetuities, rule against.

A Muhammadan, by an instrument in writing, dedicated certain movable and immovable properties for the upkeep of her husband's tomb and "for the daily, "monthly and annual expenses of the aforesaid mausoleum, such as lighting, "frankincense, flowers, and the salaries of repeaters of Koran and readers of "benedictions, &c., as well as for the annual fatheha ceremonies of the deceased "and after my death for my annual fatheha ceremony." It was found that a travellers' inn was erected by the endower of the property as an appurtenance to the tomb, and that the performance of the ceremonies necessarily involved the distribution of charity, and that the lights at the tomb were of use to passers-by:

Held, on appeal reversing the judgment of DAVIES, *J.*, that the instrument was not a valid wakf and was void as contravening the rule against perpetuities.

APPEAL against the decree of Mr. Justice Davies sitting on the Original Side of the High Court, in civil suit No. 199 of 1892.

Suit to recover, with mesne profits, certain land, the property of Ghousee Begam Sahiba, deceased, whose heir the plaintiff was. The defendant was in possession of the properties in suit under an instrument, dated 20th December 1886 and executed by the deceased whereby she purported to impress them with certain trusts of a religious character and appointed the defendant to be the superintendent of the same. The plaintiff averred that the instrument above referred to was void for among other reasons those stated in paragraphs 13 and 14 of the plaint as follows:—

"That the said endowment or wakf of properties in schedule "A aforesaid is entirely invalid and void under the Muham-"madan law, as the object or purpose thereof is entirely illegal "and sinful."

"That the same (endowment or wakf) is also void by reason "of its having been brought about by the defendant while the "endower was in a state of deep mental affliction as aforesaid."

* Original Side Appeal No. 17 of 1894.

KALELOOLA SAHIB v. NUSEERUDEEN SAHIB.

Srinivasaraghavachariar for plaintiff.

Sundaram Sastri for defendant.

DAVIES, J.—The matter in dispute in this case is the property of the late Ghousee Begam Sahiba, the widow of the late Prince Oomduth-ud-Dowlah Bahadur. It is admitted that she was the absolute owner of the properties and that the plaintiff is her sole heir, being the son of her brother. She died on the 4th of June 1892, leaving, as alleged by the plaintiff, jewels and other movable properties of the value of about Rs. 8,000, the details of which are given in the schedule B to the plaint. Several years before her death, that is on the 20th of December 1886, she made an endowment of certain immovable properties worth, according to the plaint, Rs. 16,000, together with movables worth Rs. 2,500 for the upkeep of her husband's tomb and for ceremonies connected therewith, including ceremonies to be performed for herself after her death. The plaintiff alleges that this endowment is not a valid endowment according to the Muhammadan law and that he as heir is therefore entitled to the properties which are the subject of endowment, as well as to the movables, of which the deceased lady was possessed at the time of her death. The defendant, who married a daughter of the late Prince Oomduth-ud-Dowlah Bahadur, the mother being one Moham, was appointed Muttuvalli or manager of the endowment by the deceased lady. He contends that the endowment was a valid endowment binding on the plaintiff, who also acquiesced in it at the time when it was made, that as to the property left by the deceased at the time of her death, it consisted of but a few articles worth only Rs. 300, of which the deceased lady made a gift to his daughter, and that consequently the plaintiff is entitled to nothing. The following are the issues framed in the suit:—

First.—Is the deed of endowment void for the reasons stated in paragraphs 13 and 14 of the plaint?

Second.—If not altogether void, is it valid for more than one-third of the estate of the deceased as being executed during her death illness?

Third.—Is plaintiff estopped from disputing the validity of the endowment by reason of his having attested the document which he admits having done?

Fourth.—Is the suit barred by the law of limitation?

Fifth.—Is defendant in possession of all the properties mentioned in schedule B and is plaintiff entitled to the same? and

Sixth.—To what relief, if any, is plaintiff entitled?

Dealing with these issues *seriatim*, the first is whether the deed of endowment is void for the reasons stated in paragraphs 13 and 14 of the plaint. The reasons there stated are that the endowment is invalid, as the objects or purposes thereof are entirely illegal and sinful, being contrary to, and prohibited by, the Muhammadan law, and that it is void as having been brought about by the undue influence of the defendant at a time when the endower was in a state of deep mental affliction. The second ground may at once be dismissed. There is no evidence to show that the defendant exercised any undue influence over the deceased. Her husband had died in 1881, and after his death she had erected his tomb and had herself performed ceremonies thereat; and it was on the eve of her departure on a pilgrimage to Mecca that she entrusted the defendant with the sole management thereof, as it was impossible for her in the circumstances to continue it herself. As to the first ground, it will be best first to set forth terms of the endowment as they appear in the deed of endowment A, dated the 20th of December 1886. After reciting the properties which were made the subject of the wakf consisting of a house and its site valued at Rs. 10,000, a garden valued at Rs. 6,000 and the ground upon which the mausoleum of Prince Oomduth-ud-Dowlah Bahadur and its connected buildings were built together with articles of movable property appertaining to the tomb, such as grave cloths, incense burners and so on valued at Rs. 2,500, the deed proceeds as follows :—"I have "appointed Mahomed Nuseeroodeen Khan, son-in-law of the "deceased Junnath-ma-ab (may he be in paradise) as the Muttuvalli "of the aforesaid three immovable properties and the movable "articles. It is required that the aforesaid Muttuvalli shall, out "of the income of Kasmahal and the ground of Narayana Pillai's "garden, which I have delivered into his possession, after deducting "the expenses of repairs and taxes relating to the endowed build-"ings, &c., spend so much of what remains as he may consider fit, or "as the funds may permit, for the daily, monthly and annual ex-"penses of the aforesaid mausoleum, such as lighting, frankincense, "flowers and the salaries of Hafizes (repeaters of the Koran) and "Daroodies (readers of benediction, &c.), as well as for the annual

KALEELOOLA SAHIB v. NUSEERUDEEN SAHIB.

"Fatheha ceremonies of the deceased (may he be in paradise); and "after my death, he should also spend for my annual Fatheha cere-"mony." It then provides for the continuance of the management in the family of the defendant and for the removal of any manager who shall be guilty of mismanagement, ending up by declaring the property to be inalienable. Now, the plaintiff's case is that a *wakf* of this nature to be valid must be a dedication of property to the service of God in such a way that it may be beneficial to man, in other words it must be for a religious and charitable purpose. This is no doubt the accepted law in the case of public *wakfs*. See McNaghten's Muhammadan law, Book I, Chapter X, *Abdul Ganne Kasam* v. *Hussen Miya Rahimtula*(1), *Mahomed Hamidulla Khan* v. *Lotful Huq*(2) and Syed Ameer Ali's Law relating to gifts, trusts, &c., among the Muhammadans (*Tagore Law Lectures*, 1884, page 179). It is contended that in this case the endowment is neither for religious nor for charitable purposes, as none of the objects stated is a lawful religious object, the building of mausoleums over graves, the sprinkling of flowers and frankincense thereat, the repeating of the Koran, &c., at the grave and the lighting thereof being all prohibited by the Muhammadan law, and there being no provision for any charitable object. As regards the latter contention, there is good evidence to show that, in the performance of the religious ceremonies, charitable objects are also involved. It is proved that on the occasion of the annual ceremony at the grave, alms are given to the poor either in money doles or in cooked food, and it is also proved that among the buildings attached to the mausoleum there is an inn for travellers where they may halt and rest. This was erected by the deceased lady, the endower herself and with perhaps a twofold object, for the defendant says that sometimes rest-houses are built by the side of tombs for the benefit of the soul of the deceased, so that the travellers' repose may be communicated to him. So that it cannot be said that there was no charitable object in this endowment. Of course the plaintiff has denied the existence of the charities referred to, but beyond his denial there is nothing to establish their non-existence. The only witness on behalf of the plaintiff who speaks to this matter is his fourth witness who, while agreeing with him in denying the existence of the

(1) 10 Bom., H.C.R., 7, 13. (2) I.L.R., 6 Calc., 744, 747.

travellers' inn, admits that at the annual ceremonies the poor are fed, while on the defendant's side the existence of the travellers' inn is proved beyond all doubt as well as the fact of alms being given to the poor. It is argued for the plaintiff on the strength of the cases (*Fatmabibi* v. *The Advocate-General of Bombay*(1) and *Pathukutti* v. *Avathalakutti*(2)), and that these objects, if they exist, should have been expressly set forth in the deed of endowment; but as it is clear from the evidence that the travellers' inn was erected by the endower of the property as an appurtenance to the tomb and that the performance of the annual ceremonies entailed as a matter of course the distribution of charity, it was unnecessary to specify these matters in detail. Finding then, that there were charitable purposes in view, the arguments addressed to the Court with the object of showing that the present endowment offended against the law of perpetuities must fail.

To come now to the further question whether the other purposes were not religious on the ground that they were opposed to the Muhammadan law, a number of authorities were quoted from ancient texts. Thus, to prove that it was unlawful to erect a monument over a grave, the *Mishcat-ul-mashabih* was quoted. In a translation of this work from the original Arabic by Captain A. N. Mathews, printed at Calcutta in 1809 at chapter VI, part I, "on burying the dead," the Prophet is reported to have said that tombs must be low and made with unburnt bricks, and in a Persian work *Shurhai-safar-us-Saadat*, printed in the Afzulul-matba Press at Calcutta (in the Hijri year 1252) at page 349, it is said "thou shalt not raise grave, nor shalt thou construct "it with stones, granite and bricks, nor shalt thou harden it with "compounded chunam and mud, or otherwise than that. Thou "shalt not construct a building or tomb over the grave. These "are altogether invented acts and are contrary to the precedents "laid down by the Prophet." As opposed to these texts there is quoted for the defendant an extract from another Persian work the *Madaraj-un-naboowah*, printed in the Muzhurul-Ajaib Press (in Hijri year 1271), in which at page 410 it is said: "It is stated in "*Mattabil-ul-Moumoneim* that (the learned persons of) former times "considered it a lawful pleasure (any indifferent action, which "incurs neither praise nor blame) to superstruct the graves of holy

(1) I.L.R., 6 Bom., 42. (2) I.L.R., 13 Mad., 66.

KALEELOOLA SAHIB v. NUSEERUDEEN SAHIB.

"persons and the renowned learned, so that people may perform "pilgrimage and take rest therein, and also they may sit under "their shelter. That has been transcribed from *Mafathih-i-shurhai* "*Masabeeh*. The author of it had said that he had seen the graves "in Bokhara having buildings of cut bricks. It had been approved "by Ismail-i-Zahid (Ismail the pious) who is one of the distin-"guished law officers (lawyers or theologians)." This passage would, however, seem to refer only to the tombs of saints or sages and not to those of private individuals however lofty their station in life may have been. So that it would seem that the Prophet did disapprove of the erection of stately sepulchral monuments. But it is contended that there is a difference between things sinful and things merely disapproved, and that in the texts quoted for the plaintiff it is not said that the erection of such structures is sinful and therefore forbidden as such. It is an admitted fact that now-a-days it is a common practice of Muhammadans all over the world to have substantial tombs erected over their graves. The defendant's fifth witness says that all the graves of Muhammadans of respectable class in this city have tombs built over them. The Moulvi who appears as tenth witness for the plaintiff, while he allows the existence of this practice, declares it to be illegal, and he even goes to the length of stating that the well-known Taj Mahal at Agra, which is a monument over a grave as well as the erections over the Prophet's tomb at Medina are contrary to law. "Such monuments of Mus-"sulman piety or magnificence exist in all Muhammadan coun-"tries and in none more than in Hindustan," (*see* Introduction to Hamilton's Hedaya, page LXXIII); and although in primitive times there may have been a moral precept against them, there can be no doubt that in the present time they have been sanctified by long use and custom. It would unsettle the minds of the whole of the Muhammadan community in India, if such a well-established practice were now declared to be illegal and no Court of Justice in India, where the approved customs of any race are recognized and accepted as law, would be justified in making such a declaration.

Then as to the ceremonies that are to be performed, under the deed of endowment, at the tomb of the deceased Prince Oomduth-ud-Dowlah, it is contended also on the authority of old texts that they are, one and all, illegal. The recital of the Koran,

&c., at the grave, the lighting of lamps there, the strewing of flowers and the sprinkling of frankincense are, it is said, all condemned. The following are the authorities quoted:— In the *Shurhai-safar-us-saadat* already referred to, it is said at page 350, "He (the Prophet) directed abstinence from erecting mosques "on the top of the grave, or lighting lamps upon them. He pro- "nounced curse (of God) upon the perpetrator thereof;" and again at page 352, "There was no practice for persons to congregate, "out of time, for prayers, and read the Koran, or repeat Khatams "(benedictions) either at the grave or elsewhere. All these are "invented and abominable acts." In the *Madaraj-un-naboowah* also referred to before, it is said at page 410 "it is prohibited to "light lamp at the grave. . . . But this gathering of people, "especially on the third day, and other grand observances . . . . "are abominable and prohibited," and at page 411, "but inasmuch "as, to sit around the grave and repeat (the Koran and the bene- "diction) at it is abominable." At page 149 of the same work, it is said "it is mentioned by Sheikh Abdul-kareem-i-saloosy that "should the reader of the Koran, while reading it, have the object "that its virtue should be for the dead, it will not reach him." Against these texts there are quoted for the defendant extracts from the Arabic work *Fathuva-i-aulum ghiri*, printed in the Education Press, in Calcutta in Hijri year 1243, wherein at page 233 it is said "repeating the Koran near the graves is not abominable "with Mahomed (may blessings of God be upon him). And our "(spiritual) sages have adopted it from his saying (if it is asked) "whether any benefit is derived by it? It is an adopted doctrine "(to say) that benefit is really derived from it. In this manner, "it is mentioned in *Muzmerath;*" and at page 529 it is stated "to place flowers and sweet basils upon the graves is good, and "if alms are given of the value of the flowers it is better." It is so in *Gharaib*. In the *Madaraj-un-Naboowah* already referred to, it is said at page 149 "Khazhi Hussain has decided that to make "contract for repeating the Koran at the grave is permissible. It "is just as making contract for calling out for prayers and teaching "the Koran" and at page 410 it is said "to light lamps at the "graves is forbidden, except when any work is done under it or "any road goes near it." And lastly an extract was quoted from *Thufseer-i-Futhhool Azeez* (commentary in Hindustani on the Koran), printed in the Mohammadi Press, Bombay, wherein at

KALEELOOLA SAHIB v. NUSEERUDEEN SAHIB.

page 168 it is said "and the assistance rendered by the living "persons to the deceased in this state, approaches them readily, "and the dead, on such occasion, expect impatiently help from "this side (of the world), and they suppose themselves as if they "are still alive. For this reason, it is mentioned in the holy tra- "ditional sayings (of the Prophet) about the circumstances in the "grave that the Mussulman person says there "leave me, so that "I may pray (to God)." And it is also mentioned that "a de- "ceased man in this state is like a drowning person, as if expect- "ing (some one) impatiently who would attend to his complaint. "At this time, alms, prayers and *fatheha* (prayers for the souls "of the dead) become very useful to him. And, therefore, most of "the people exert themselves in such sort of works up to one year, "especially for forty days after death. And the soul of a dead "person, during the days shortly after his death, also visits the "living people in their dreams, as well as in their waking state "and relates its condition." It will be seen that on every point except the lighting up of the grave, there is a conflict of authority in the texts quoted, that by the one set of authorities quoted for the defendant it is lawful to recite the Koran at the grave (even the Moulvi for the plaintiff admits this, provided the recital is not in a loud tone), to strew flowers and sprinkle frankincense there, and that it may also be lighted, if the light is of use to passers-by or to carry on work. It is stated that the lights at the tomb in this case being in a frequented place are of use to passers-by. I am therefore unable to find any proof that the practices referred to are in any way illegal. They are also proved to be of every day practice. Defendant's second and third witnesses say that there are very many tombs in Madras where these things are done. Defendant's fifth witness says that strewing flowers on graves is permitted, and so is frankincense to attract angels near them. At Medina, which he has visited, the Prophet's grave is lighted up with a thousand lights and scented wood is burnt. "All the Muhammadan people of this city, who can afford it," he says, "have the Koran read by their graves." In the face of these facts, it would be absurd to hold that any of the practices are repugnant to the Muhammadan law, when every Muhammadan performs them. What were considered "grand" observances in the days of the Prophet may well have become common place now. It has been held in *Meer Mahomed Israil Khan* v. *Sashti*

Churn Ghose(1) that the words "charitable" and "religious" must be taken in the sense in which they are understood in the Muhammadan law. Mr. Justice Ameer Ali in that case observes at page 427 that the words "piety" and "charity" have a much wider signification in Mussulman law and religion than perhaps in any others; and it would be very difficult to say in this case that from a Muhammadan point of view the objects of the endowment are not both pious and charitable.

Having disposed of the alleged illegality as regards the objects of the endowment, the next contention for the plaintiff is that the endowment of movable property is invalid. This objection does not appear to have been taken in the pleadings, nevertheless it is no doubt a fact that movable, and therefore perishable, properties are ordinarily not fit subjects for endowment. But there is an exception to this rule when the movables are appurtenant to the immovable property. (*See* Hamilton's Hedaya, Vol. II, pages 342–344.) In an Arabic work *Shurhai—Vakaya*, Vol. II, printed in the Anwar-i-Mohammadi Press (in the Hijri year 1302) at page 418, it is said, "and the endowment of lands is valid, but "not of movables. With Mohamed, endowment of movables that "are usually endowed is valid, such as hatchet, spade, adze, saw, "coffin, its cloth cover, mud pots and copper pots and the Koran. "Most of the doctors of law act upon this in other countries;" and the plaintiff himself admits that in this case all the movables endowed are kept at the tomb of the deceased Prince Oomduth-ud-Dowlah and are appurtenant thereto. This objection therefore also fails. Another objection was also taken at the hearing, though it was not seriously pressed, viz., that the plaintiff should have been chosen as the Muttuvalli of the endowment in preference to the defendant who is a stranger. Admitting for the sake of argument that defendant is a stranger, there is no clear law prohibiting his appointment. For the plaintiff is quoted page 507 of *Fathava-i-aulum ghiri*, previously referred to, wherein it is said "and really the ruler (Judge) cannot appoint a manager, "out of strangers, when there may be (a person) amongst the "family of the endower competent for it. If a competent person "amongst them is not forthcoming, and a stranger is appointed, "and if a competent person is found amongst the relatives

(1) I.L.R., 19 Calc., 412.

KALBLCOLA SAHIB v. NUSEERUDEEN SAHIB.

"afterwards, he should cause the same to be reverted to the rela-"tives of the endower." For the defendant, on the other hand, is quoted a text from *Ruddul Mohthar*, an Arabic work, in which at page 448, it is said "in spite of the existence of the donor's chil-"dren, who are competent, if a stranger is appointed it is justi-"fied." This objection, therefore, also fails, no allegation being made that the endowment is not properly managed by the defendant. This disposes of the first issue.

With regard to the other issues the learned Judge held that the suit was not barred by limitation, that the plaintiff was not estopped by reason of his having attested the deed of endowment and having acquiesced in its provisions and that the deed was not executed during the death illness of the executant. He also decided the fifth and sixth issues against the plaintiff.

The result is that the plaintiff's suit is dismissed with costs.

The plaintiff preferred this appeal.

Mr. *H. G. Wedderburn* for appellant.

Sundaram Sastri and *Kumarasami* for respondent.

JUDGMENT.—The plaintiff is the sole heir of the late Ghousee Begam Sahiba, widow of the late Prince Oomduth-ud-Dowlah Bahadur. This lady died on 4th June 1892, and by an instrument, dated 20th December 1886, she endowed certain immovable and movable properties for the upkeep of her husband's tomb and for ceremonies connected therewith including ceremonies to be performed for herself after her death. The sole question argued in this appeal is whether an endowment for such a purpose is a valid *wakf* under Muhammadan law. Other pleas have been abandoned.

The objects of the endowment as stated in the deed are "for the "daily, monthly, and annual expenses of the aforesaid mausoleum, "such as lighting, frankincense, flowers, and the salaries of Hafizes "(repeaters of the Koran) and Daroodies (readers of benediction, "&c.), as well as for the annual Fatheha (prayers for the dead) "ceremonies of the deceased (may he be in paradise); and after my "death for my annual Fatheha ceremony."

The learned Judge held that none of the above practices were illegal under Muhammadan law. He pointed out that, though there were texts disapproving of such practices, there was a distinction between things sinful and things merely disapproved;—that as a matter of fact such practices were not uncommon either in India or in other Muhammadan countries, and that at Medina itself the

Prophet's grave was lighted up with a thousand lights and scented wood burnt. On these grounds he held that, though there were moral precepts against such practices, they had at the present time become sanctioned by long use and custom. To the objection that the endowment was not for any charitable object, he pointed out that, as a matter of fact, alms were given to the poor, and there was an inn for travellers, &c.

We may at once say we do not think the fact that the Muttuvalli has dispensed certain charity in connection with this tomb can at all affect the case. The object of the trust must be judged from the terms of the instrument, and there is not a word in exhibit A to indicate any charitable purpose, or purpose for the benefit of mankind. The objects indicated are of a religious character. (See *Pathukutti* v. *Avathalakutti*(1) and *Fatmabibi* v. *The Advocate-General of Bombay*(2)).

Admitting that the practices referred to by the learned Judge are not uncommon, and may have become to a certain extent sanctioned by usage, we must point out that the evidence on record fails to show that the expenses for such observances either at Medina or elsewhere come from endowments of the nature of *wakf*. There is nothing to show that the expenses are not paid for by the contributions of the faithful or by the voluntary offerings of the families of those who desire to commemorate their deceased ancestors.

It is urged by the learned counsel that the object of this endowment though in a sense religious is not *for the advancement of religion*, and that unless it is intended to benefit mankind by the advancement of religion, it is not a valid *wakf*. It is pointed out that McNaghten, Chapter X, defines an endowment as the appropriation of property to the service of God when the right of the appropriator becomes divested and the profits of the property so appropriated are devoted to the benefit of mankind, and in the appendix to that work we are referred to two decisions—the first of the Bengal Sudr Adawlat of 6th December 1798, in which it was held that *wakf* implies the relinquishing the proprietary right in any article of property and consecrating it to the service of God that it may be of benefit to man, *Moohummud Sadik* v. *Moohummud Ali*(3); the other a decision of 21st February 1857 (*Syed Khodabundha Khan*

(1) I.L.R., 13 Mad., 66. (2) I.L.R., 6 Bom., 42.
(3) 1 S.D.A., Beng., 17.

KALEELOOLA SAHIB v. NUSEERUDDEN SAHIB.

v. *Musst. Oomutul Fatima*(1)), in which it was held that inasmuch as *wakf* implied consecration for the above purpose, the provisions for reading the Koran at and lighting the tomb of a testator did not create a valid *wakf* (McNaghten, App. to Madras reprint, 423).

In Baillie's Muhammadan law, Chapter III, regarding the proper objects of appropriation, we find (page 576, 2nd edition) that the appropriation of an estate for those who may read at a tomb is not regarded as valid.

A great many cases were quoted to show the nature of *wakf*, but none of them bear directly upon the present point. They go to show the nature and requisites of a valid *wakf*, and that whatever be the interposed interests, the appropriation must be for an ultimate charitable trust which will not fail. The question here is whether the ultimate object is for a charitable purpose at all. (Vide *Abdul Ganne Kasam* v. *Hussen Miya Rahimtula*(2), *Fatmabibi* v. *The Advocate-General of Bombay*(3), *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*(4), *Nizamudin Gulam* v. *Abdul Gafur*(5), *Abdul Gafur* v. *Nizamudin*(6), *Mahomed Hamidulla Khan* v. *Lotfut Huq*(7), *Luchmiput Singh* v. *Amir Alum*(8), *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu*(9), *Bikani Mia* v. *Shuk Lal Poddar*(10).

In *Luchmiput Singh* v. *Amir Alum*(8), the deed directed that the manager should in the first place pay certain debts and afterwards apply the property for the expenses of the musjid and the tomb of the holy personages of the settlor's family, the servants of a certain Asthana, and for performing *urs* and *fatcha* at the tomb, as well as for the maintenance of the settlor's grandsons and their male issue. The Subordinate Judge (a Muhammadan gentleman) held that the endowment was valid, but the only question raised in appeal was whether the provisions for the payment of debts and maintenance invalidated the *wakf*. The question now in issue was not discussed.

Similarly no question appears to have arisen regarding the validity of a similar endowment in *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan*(11), but in that case the *fatchas* to be

(1) S.D.A., Beng., (1857), 235. (2) 10 Bom. H.C.R., 7. (3) I.L.R., 6 Bom., 42.
(4) I.L.R., 11 Bom., 441. (5) I.L.R., 13 Bom., 264. (6) I.L.R., 17 Bom., 1.
(7) I.L.R., 6 Calc., 744, 748. (8) I.L.R., 9 Calc., 176. (9) I.L.R., 17 Calc., 498.
(10) I.L.R., 20 Calc., 116. (11) 15 B.L.R., 167.

performed were those of Mahomed and the twelve Imams, and the expenses of the first ten days of the Mohurrum, &c. The ceremonies there to be performed were at the tomb of the saints and not at the settlor's own tomb. In that case the decision in *Syed Khodabundha Khan* v. *Musst. Oomutul Fatima*(1) that a provision for the lighting of the testator's own tomb and reading of the Koran was invalid was referred to.

It was urged that in the construction of a deed of *wakf* the words "charitable" and "religious" must be taken in the sense in which they are understood in Muhammadan law, and we were referred to the judgment of Mr. Justice Ameer Ali in *Meer Mahomed Israil Khan* v. *Sashti Churn Ghose*(2). In that case, however, the question was whether a provision for the settlor's children and kindred was a charitable and religious act, and the learned Judge held that according to the Muhammadan law it was.

The result therefore of an investigation of the authorities seems to be that endowments purely for purposes like the present seem to be against the principles of Muhammadan law, and that in such cases when *wakfnamahs* for such purposes have been upheld, the dedication has had relation to the tombs of saints only and has been intermixed with charitable purposes either for the poor or for the settlor's own kindred.

In the absence of any express authority showing that a dedication for ceremonies at a private tomb—and for that purpose only—is valid under Muhammadan law, we do not think we ought to uphold the deed. It creates a perpetuity of the most useless description which would certainly be invalid under English law. The observance of these ceremonies may be considered by the Muhammadans as a pious duty, but it is certainly not one which seems to fall within any definition of a charitable duty or use. These observances can lead to no public advantage, even if they can solace the family of the lady herself. The case bears a close analogy to one in which a Roman Catholic has devised property for masses for the dead, which has been held to be invalid in India on grounds of public policy irrespective of any territorial law, *Colgan* v. *Administrator-General of Madras*(3). A similar bequest in a Chinese will has also been held to be invalid in an appeal to the Privy Council from the Supreme Court of the

(1) S.D.A., Beng., (1857), 235. (2) I.L.R., 19 Calc., 412.
(3) I.L.R., 15 Mad., 424, 446.

KALEELOOLA SAHIB v. NUSEERUDEEN SAHIB.

Straits Settlements, *Yeap Cheah Neo* v. *Ong Cheng Neo*(1). Had it been shown that such perpetuities were recognised as valid under Muhammadan law, we should have felt constrained to uphold the deed; but in the absence of such proof, we think the general rule of public policy should prevail.

We must reverse the decree of the learned Judge and direct that a decree be passed in plaintiff's favour as prayed. As the point is a new one, we shall make no order as to costs.

Ramanujachariar, attorney for appellant.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, and Mr. Justice Shephard.

1892. September 15. 1893. November 23. 1894. December 14.

PICHUVAYYANGAR (DEFENDANT No. 1), PETITIONER,

v.

SESHAYYANGAR (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 206—*Amendment of decree—Power of Court of First Instance after appeal.*

In a suit for land with mesne profits the District Munsif delivered judgment for the plaintiff and recorded therein a finding that he was entitled to mesne profits as from a certain date, it having previously been arranged that the amount, if any, awarded for mesne profits should be determined in execution. In the decree no mention was made of the date from which the mesne profits were to be calculated, but it was stated merely that the amount was to be determined in execution. The case went on appeal before the District Judge, who modified the decree in certain particulars unconnected with mesne profits. With a view to execution the plaintiff applied to the Court of First Instance to bring the decree into conformity with the judgment. The Court having made an order accordingly, it was objected in the High Court on revision that the order was made without jurisdiction:

Held, that the jurisdiction of the Court of First Instance to amend the decree under section 206 was ousted by the confirmation of his decree on appeal.

PETITION under Civil Procedure Code, section 622, praying the High Court to revise the order of S. Dorasami Ayyangar, District Munsif of Valangiman, dated 28th December 1889, and made on civil miscellaneous petition No. 1037 of 1889.

In the last-mentioned petition the plaintiff in original suit No. 137 of 1886, on the file of the District Munsif, applied under Civil

---

(1) L.R., 6 P.C., 381. * Civil Revision Petition No. 364 of 1891.