

No. 16.—Summary of the contents of the notes of Argument as contained in Appendix VIII to the Memorial.

1. A Wakf is essentially different from a gift. Therefore the condition requiring the absence of perpetuity in gift does not involve the consequence that a similar condition is necessary in Wakf, that is to say, that condition does not require that Wakf likewise should be free from the objection of perpetuity.

2 Reason for perpetuity being void in sale or gift according to Mahomedan Law.

3 and 4. Reasons against perpetuity in English Common Law do not apply to Mahomedan Law, which is founded wholly on Religion and is absolutely mixed up with it. If perpetual *Suwab* can be obtained by means of a perpetuity, there is no objection to a perpetuity. The best use of property is to make it conducive to *Suwab*. All Mahomedan institutions have religious notions for their foundation, e.g., Gifts, Sales, Wills, and Wakfs.

5. Difference between a Gift and a Wakf. Wakf is for consideration.

6. Wakf is a kind of *Sudka*. Distinction between *Sudka* of lands and Wakf of lands. The motive in both is to obtain *Suwab*, and *Suwab* is the consideration in both, but in *Sudka* the lands are transferred, and in Wakf the lands are tied up.

7. What is a *Sudka*.

8. In *Sudka* there is a consideration which consists of *Suwab*. Promise of God to give *Suwab* is sufficient consideration.

9. Text of the Koran on *Suwab*.

10. The motive in making *Sudka* is to get *Suwab*. The object of *Sudka* might be the rich as well as the poor. In *Zakat* or poor rate, the rich and certain relations cannot participate.

11. To make *Sudka* is not obligatory but praiseworthy : but to give *Zakat* is obligatory.

12. A Mahomedan is free to dispose of property provided the right of heirs does not fetter him. When is the right of heir a fetter?

13. A Mahomedan in health is able to make any disposition of his property even if it involves perpetuity.

14. Bearing of indebtedness on the right to make Wakf.

15. The institution called Wills is based on traditions and religious considerations similar to those which constitute the foundation of Wakf.

16. Distinction between the motive of a Wakf and its object : confusion of ideas guarded against. Hamilton's mistake that the object must be pious and charitable, corrected by Baillie.

17. Correct view of motive and object. The motive is to get *Suwab*, and the object must be such as is calculated to bring *Suwab*, not according to natural religion or a universal code of morality, but according to the religious belief of the Mahomedans.

18. Mr. Hamilton's incorrect translation of Aboo Huneefa's definition of Wakf, as involving *Sudka*, is the foundation of the mistake that the object and purpose of a Wakf must be pious and charitable. Correct translation of Aboo Huneefa's definition of Wakf given.

19. To arrive at a correct notion of Wakf, you must find out upon what point relating to Wakf, Mahomedan Lawyers are agreed and wherein they differ. New element of divergence should not be introduced. There is perfect unanimity in regard to what ought to be the motive of a Wakf and its object: and this unanimity arises because the perception of the motive and object is based on the Mahomedan religion, which is common to all. Wakf itself involves perpetuity according to the agreement of all.

20. Wakf, according to Aboo Huneefa, involves *Sudka* of profits upon the poor or upon any of the many ways of *Khyr* or means for obtaining future reward.

21. Wakf, after it has been made, is, according to Aboo Huneefa, permissible but not obligatory. Reason for its not being obligatory consists not in its being liable to the objection of perpetuity but consists of principles which are fairly traceable to, and which fairly arise out of, the Mahomedan Law.

22. Reasons which induced Aboo Huneefa to hold that Wakf is not obligatory even after it has been made, refer to the text of the Traditions of the Prophet, as construed by him.

23. Futher elucidation of those reasons.

24. Substance of the argument of Aboo Huneefa set forth in other words.

25. How, according to Aboo Huneefa, a Wakf after it has been made, could be rendered obligatory so that it becomes no longer capable of being avoided—decree of the Kazy in a *Moojtahid-fee* matter.

26. Aboo Huneefa agrees with Aboo Yusoof and Mahomed as regards the motive of a Wakf and its object.

27. Aboo Huneefa's objections are negatived by Aboo Yusoof and Mahomed.

28. One argument of Aboo Huneefa, based on a Text of the tradition of the Prophet, namely, there is no detention of property from rules of inheritance—refuted.

29. Another objection of Aboo Huneefa, based on another text

of the tradition of the prophet—*viz.*, that the prophet sold Wakf property—refuted.

30. Another objection of Aboo Huneefa refuted, *viz.*, that the Wakf property must necessarily remain in the ownership of the Wakf, otherwise how could the conditions laid down by him to regulate the Wakf, be held valid.

31. Aboo Huneefa's view that Wakf, after it has been made, is not obligatory, has not been recognised and received as correct Mahomedan Law.

32. Aboo Yusoof and Mahomed support their views that Wakf, after it has been made, is obligatory by citing authority and by reasoning from analogy. The authority is the direction of the prophet to Oomur, his companion, to make Wakf of *Samgh*.

33. Wakf is obligatory after it has been made, according to the two disciples, in order to enable the Wakif to receive *Suwab perpetually*.

34. Wakf of the prophet and of Abraham and of the companions constitute precedents which are authority of a binding nature.

35. It is the duty of the *Mujtahid* and *Imam* to see the relevancy and force of authority so as to deduce rules of action in regard to Wakf or in regard to any other question. The *Mookullids* or followers are not allowed to test the conclusion of the *Imam* and *Mujahid*, inasmuch as their indifferent and scanty knowledge on the subject is not calculated to lead them to a correct decision. This is a well-settled principle of Jurisprudence. Sell's faith of Islam shews how vast should be the extent of a *Moojtahid's* knowledge and information, and how complicated are the rules of the science of Jurisprudence or *Ilm-i-Oosool*. Conflict between conscience and conduct should be avoided.

36. Difference between Mahomed and Aboo Yusoof. Mahomed says the object should be expressly perpetual, and Aboo Huneefa supports him.

37. Aboo Huneefa found difficulty only at the beginning. After a Wakf becomes obligatory he agrees with one or other of his disciples.

38. Aboo Yusoof's view. For the validity of a Wakf the object stated need not be perpetual, because *Suwab* is sometimes derived from a thing not perpetual. Wakf itself involves the idea of perpetuity, and after the failure of the object, the profits should go to the poor.

39. According to Aboo Yusoof, a Wakf is good when it is on the man's children or on his Oommi Walud. This is a direct and positive authority of the Imam in favor of the proposition submitted; and such an authority cannot be disregarded without affront to the Mahomedan Religion and without in effect repealing the Mohamedan Law.

40. The object of Wakf, according to all the three Imams, must be of a nature capable of yielding *Suwab*. In addition to that element, Aboo Huneefa and Mahomed require that the object mentioned should be perpetual. Aboo Yusoof does not require that the object mentioned should be perpetual. Therefore it is a good Wakf when it is made on children and descendants, and on their failure to the poor. The ruling in I.L.R., 13 Mad. Ser., page 66, and 10 Bomb. High Court, page 7, having not, therefore, laid down the correct law, the Judges were misled by Hamilton's mistake; and Johnson's Dictionary and Wilson's Glossary were not calculated to explain the real meaning of the *Hedaya*: I.L.R., 6 Cal. Series, page 744, deals with the tradition of the prophet. This tradition was not cited by Aboo Yusoof to shew the validity of a Wakf on children, on which question there was no difference, but to shew the validity of a validate Wakf on one's self, because Mahomed differed from him on this question.

41. Another point of difference between Aboo Yusoof and Mahomed is how a Wakf is constituted.

42. In this matter, Aboo Huneefa sides with Mahomed.

43. Another point of difference between Aboo Yusoof and Mahomed is whether a man can make Wakf on himself, and can appoint himself a *Mootwally*.

44. Reasons assigned for Aboo Yusoof's view: the object in making Wakf is to get *Suwab*, and that is obtained by maintaining one's self.

45. Aboo Huneefa probably agreed with Mahomed in holding that a man cannot make Wakf on himself.

46. Aboo Yusoof's view is the governing authority, and therefore a Wakf on one's self and his children is lawful. Wakf is an institution which should be encouraged.

47 and 48. A mistake in Hamilton corrected.

49. Wakf on one's children and thereafter on the poor is valid without difference: Aboo Yusoof validates Wakf on one's self and the owner can appoint himself a *Mootwally*.

50. Mahomed subordinates *Suwab* to other considerations, when he lays down that Wakf on one's self is not valid: Aboo Yusoof subordinates other considerations to *Suwab* when he validates such a Wakf.

51. The whole of the Law of Wakf is based on the theory of *Suwab*.

52 and 53. Authorities cited in support of the proposition advanced in paragraph 51.

54 and 55. Islam is not a condition to the validity of Wakf: still a Wakf depends on the idea of *Koorbut* or *Suwab*.

56 and 57. Conclusive instance that the theory of *Suwab* must regulate the validity of a Wakf and not the idea of perpetuity. If a Moslem becomes an apostate, his Wakf falls to the ground.

58. What is the idea of *Suwab*? To what object should it relate to be useful? *Suwab* is obtained by the doing of any act of self-denial with a pure motive.

59. Acts conducive to *Suwab* must be ascertained from the Mahomedan Law. Validity of a Mahomedan Wakf could not be ascertained by reference alone to *Suwab* according to Zimmee ideas; when a Zimmee Wakf does not depend solely on the Zimmee ideas of *Suwab*, but must also involve the Islamic idea of *Suwab*, then how can a purely Mahomedan Wakf exclude the Islamic idea of *Suwab*?

The Mahomedan Law is immutable.

60. In a Wakf the *Suwab* from the *moonfaut* or *profits* reverts to the owner.

61. What acts or objects are productive of *Suwab* according to the Mahomedan Law as laid down by authorities accepted by approved Text-writers.

The *Hedaya* has not left undetermined the question whether Aboo Yusoof's view is the governing authority. According to the *Hedaya*, the view of Aboo Yusoof is the governing authority.

62. I.L.R., 11 Bomb. Series, page 492, laying down that the *Hedaya* does not decide between Aboo Yusoof and Mahomed, is therefore wrong.

63 to 65. Notice of further authorities of the same character as in paragraph 61 and which are accepted by similar Text-Writers.

66. The authorities stated in paragraphs 61 and 63 to 65 constitute precedents for Wakf, and have been received and accepted as binding in the school which governs this case. They denote acts by which *Suwab* is obtained.

The Mahomedan Law is Divine in its origin, and, therefore, decision of British Indian Courts to the contrary are not to be taken as the Mahomedan law. The sources of the Mahomedan Law pointed out. Constructions of the divine texts by *Moojtahids* and *Imams* and the evolution of the Mahomedan Law as expounded by them is binding on conscience and conduct. The *Kazy* must decide according to what is so binding. The British Legislation has preserved the Mahomedan Law of Wakf to the Mahomedans, and that law is as laid down by Aboo Yusoof. The Privy Council have in effect nullified Aboo Yusoof's Rule and thus repealed the Mahomedan Law. The authority of Text-writers has been noticed by Mr. Morley.

67. The Mahomedan Law strictly guards against the admission

of decrees unsupported by the Koran or the *Soonnat* or the opinions of Mahomedan Doctors.

68. The Privy Council decisions dealing with Hindu Law texts of ancient sages lay down how those texts are to be construed, and how the construction ought to be approached: "Nothing at variance with religion is likely to have flowed from such a source." "Nothing from any foreign source should be introduced; nor should courts interpret the text by the application to the language of strained analogies." "Approaching this somewhat delicate subject with an unfeigned desire to decide it in harmony with the religious feelings of the Hindus, &c."

Again, "The duty of a European Judge is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district, &c., &c."

69. Summary of argument and propositions established.

No. 17.—Appendix VIII to the Memorial; being Notes of argument of Maulvi Mahomed Yusoof, B.A., B.L., Khan Bahadoor, in support of the validity of Wakfs on one's self and his descendants according to the Mahomedan Law.

1. The rule against perpetuities has no connection with the law of Wakf, and Wakf cannot be controlled by that rule, because that rule has reference to the law of Gifts, and the law of Wakf is not a branch of the law of Gifts. So far as gifts are concerned, the Mahomedan Law is not open to the objection that it contravenes the rule against perpetuities, and it is not my contention that, under the Mahomedan Law of Gifts, property could be tied down for an indefinite period. On the contrary, if a gift is made, the property becomes vested in the donee absolutely and immediately, and he becomes the owner, and obtains full power of disposal.

2. So also in the case of a sale. You cannot sell property without making it vest absolutely in the purchaser. As in the case of an ordinary gift the property vests in the donee so also in the case of a sale. Any attempt to regulate succession to an estate sold or given in gift, or to attach a condition to its tenure, is void under the Maho-

* Referred to in paragraph 11, page 6; para. 12, page 7; para. 15, page 9; para. 16, page 9; para. 17, page 10; para. 18, page 10; para. 19, page 11; para. 20, page 11; para. 29, page 14; and para. 30, pages 15 and 16 of the Memorial.