valable et la condition est exécutoire. De même si quelqu'un en faisant wakf sa propriété met la condition que le produit de ce wakf serve à payer ses propres dettes, le cas échéant, le wakf est valable et la condition est exécutoire.'

Chapter iv. is entitled—'Des conditions mentionées par les instituants des wakfs.'

'Sect. Ire.—Des conditions dans les wakfs en faveur des enfants, des parents et des voisins.'

This section deals with the institution on the clear assumption that a provision for the benefit of the founder himself and his descendants is an 'œuvre pie within the meaning of Art. 77, and it, and indeed the whole book, would seem to support the view of the institution taken by Mr. Justice Ameer Ali.

As I have said before, I think the matter one of considerable importance; and as I know that it is considered of vital importance by the Mahomedan community in India, I have thought it worthwhile to draw attention to these facts and authorities in order that when the matter is again brought before the Judicial Committee, as will certainly be the case, the counsel who argue it, and the judges who decide it, may, if they please, be in a position to ascertain how such a question would be dealt with by a Mahomedan Court in a Mahomedan country.

W. C. PETHERAM.

No. 10.—Appendix II to the Memorial; being a Report of the Proceedings in the House of Lords, dated the 29th June, 1896, in regard to the question of the Validity of Wakf according to Mahomedan Law. (A reprint of an Extract from the Parliamentary Report No. 6 for August, 1896, from pages 55, 56, and a part of 57 of Volume VII, No. 8, of a Publication entitled "India.")

Imperial Parliament, June 29th, House of Lords, Mussulman Law in India.

LORD STANLEY OF ALDERLEY rose to ask whether the Secretary of State for India was aware of the alarm prevailing among the Mussulman subjects of her Majesty in India, owing to a recent decision of the Judicial Committee of the Privy Council in the case of Abdul Fata Mahomed Ishak and others *versus* Russomoy Dhar Chowdry and others, the effect of which was to abrogate an important branch of the

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Referered to in paragraph 5, page 3, of the Memorial.

Mussulman law—namely, that relating to family wakfs, or the law relating to the creation of benefactions for the endower's family, with the reversion for the general poor; whether it was not the fact that the full enjoyment of their law and religious usages and institutions, so far as they did not conflict with any statutory enactment, has been guaranteed to the Indian Mussulmans by her Majesty's Proclamation. The law in question related to one of their most cherished institutions, upon which depended the prosperity of their principal families, which had rendered important services to the State in times of danger; whether it was not the fact that numerous memorials had been presented to the Indian Government against this judicial decision; and whether they have not prayed for a declaratory Act declaring the validity of the law which had been held to be invalid; and what steps the Government propose to take to redress the wrongs inflicted by this decision of the Privy Council. The noble lord said that he regretted having to differ from the opinions of the noble lord (Lord Hobhouse), and he regretted having been told by him that he thought this question of wakfs was dead, since it was as lively as ever, and the noble lord might have remembered that "the evil that men do lives after them." The notice on the Minutes had been prepared about last July, at which time memorials against the Privy Council judgment had been sent in to the Indian Government. This notice had been put on the Minutes in August and September last, so that there had been ample time for obtaining some of these memorials. He would, perhaps, be told that no memorials had been received at the India Office. This was most likely, if they had not been asked for, and after the notice last September, they ought to have been asked for; and the Indian Office ought to be ready with an answer to the question as to these memorials. The Mussulmans, however, were not the only persons aggrieved by the attitude recently taken by the Indian Administration, with regard to family settlements. The Hindus also had reason to complain of a decision in what was called the Tagore case. He had always felt the highest respect for the Judicial Committee of the Privy Council, and he voted against his inclination and against a Resolution moved in 1872 by the late Earl Stanhope, and supported by the noble Marquis now at the head of the Government, on the occasion of the appointment of the late Sir Robert Collier to a seat on that Bench, because of the high opinion that was entertained at the time of the judicial capacity of that learned gentleman. He did not remember ever having read or heard of anything to diminish the judicial reputation of Sir Robert Collier during all the time that he sat in the Privy Council. During that debate in 1872 the noble

Marquis (the Prime Minister) had blamed the parsimony of Mr. Gladstone's Government, which had given too low a salary for the Privy Council Judgeships, and if the salaries then fixed were still insufficient, he hoped her Majesty's Government would make them such as to secure a first-rate man for the next appointment to the Judicial Committee. He could not help thinking that the decision of the Privy Council, to which he was now calling attention, was likely to jeopardise the reputation of the Judicial Committee. Some decisions might err from the judges not being sufficiently informed on the subject before them, but in this case the decision quoted several very good authorities, but only for the purpose of disregarding them. Syed Ameer Ali was an authority before he became a High Court judge at Calcutta. The judgment quoted from him frequently, and its reasons for differing with him were, to say the least, extraordinary. The judgment said: "The opinion of that learned Muhammadan lawyer is founded, as their lordships understand it, upon texts of an abstract character, and upon precedents very imperfectly stated. For instance, he quotes a precept of the Prophet Muhammed himself, to the effect that 'A pious offering to one's family to provide against their getting into want is more pious than giving alms to beggars.'" Further on the judgment said: "These precepts may be excellent in their proper application. They may, for aught their lordships know, have had their effect in moulding the law and practice of wakf as the learned judge says they have." This last sentence ought to have run as follows: "These precepts, as their lordships very well knew, had moulded the law and practice of wakf." This point, as to which the Court professed ignorance, was proved by language. The judgment used the word "Muhammadan" instead of Mussulman" as to communities. He did not complain of this, since it was an ordinary English phrase; but as a matter of fact, the adjective "Muhammadan" was never used in any Mussulman country or language except with reference to and to describe the law founded by the Prophet, which was named "Sheriat i Muhammadiyeh," so that Muhammadan law was correct, and a Muhammadan community an incorrect expression. Besides the precepts quoted by Syed Ameer Ali, other sayings of the Prophet showed that he recommended charity to the family and dependents of a man in preference to more distant poor. Abu Hurairah said a man came to his Highness (to ask about alms and charity) and said, "I have got one dinar," he said, "expend it upon yourself;" the man said, "I have got another dinar," the Prophet said, "expend that upon your children." The man said, "I have got another dinar." He said, "expend that upon your relations, your women, father and mother."

He said, "I have got another dinar." The Prophet said, "expend that upon your servants." The man said, "I have got another dinar." He said, "You know best the condition of the person most worthy of it, and whoever you know to be so give it." (Mishcat ul Musabih, Calcutta, 1809, Volume I., page 455). This judgment of the Judicial Committee appeared to have gone wrong, because it failed to be distinguished between gifts and wakfs. Gifts in perpetuity, it said, were forbidden by Mussulman law: this is true; but the essence of wakf was its perpetuity. The judgment quoted an opinion of Mr. Justice Farran which showed this: That judge had described a settlement as "a perpetuity of the worst kind which would be invalid on that ground unless it can be supported as an okfnameh." The Privy Council judgment was very near arriving at a correct interpretation and decision when it declared:—Whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settler says that they are made as wakf, in the name of God, or for the sake of the poor. To these questions no answer was given or attempted, nor can their lordships see any." They ought to have seen the answer for the judgment mentioned in the law book "Hedaya." This book was translated and published by order of the Bengal Government in 1791, and a new edition of it was published in 1870. This authority said (page 234):—"An appropriation (or wakf) is not complete according to Hanifa, unless the appropriation destine its ultimate application to objects not liable to become extinct; as when for instance a man destines its application ultimately to the use of the poor (by saying I appropriate this to such a person, and after him to the poor), because these never become extinct." So that when the judgment said, "Their lordships agree that the poor have been put into this settlement merely to give it a colour of piety, and so to legalise arrangements meant to serve for the aggrandisement of a family," their lordships appeared to have been ignorant of what was laid down in a law book that was one of the best known in India, and to have imputed to the settlers as a colourable regard for the poor what was in fact a legal technicality. Whatever fault might be found with this judgment, the merit of great candour must be conceded to it. It stated that this Board in Ahsanulla's case adopted the view of Mr. Justice Kemp to the effect that provision for the family out of the grantor's property might be consistent with the gift of it as wakf. It also cited the judicial opinion of Mr. Justice Ameer Ali in Bikani Meah's case, a dictum of Sir Raymond West in the Bombay High Court, and a decision of Mr. Justice Farran in the same Court—all these contrary to this judgment. Mention had often

been made of those who were *Plus Royalistes que le Roi.* In this case the India Office appeared to pose as a more strenuous supporter of Mussulman law than the Indian Mussulmans or the Turks of Constantinople, by denying the legality of such wakfs. The last time he was at Constantinople, which was six or seven years ago, before these cases had arisen in India, he had heard of similar wakfs, or family appropriations in Constantinople, and a few days ago he met a Turkish diplomatic agent who had confirmed the existence of many such Wakfs at Constantinople. Some writers said that Mussulman law was not sufficiently elastic, and that it was only suited to primitive communities. The Indian Administration and the Privy Council Judges were in these cases endeavouring to deprive that law of the elasticity it did possess; and with regard to the latter accusation, all the practices of the Liverpool Produce Exchange were forbidden in Mishcat ul Musabih. He had lately read a French historian's comment on judicial decisions during the reigns of the Stuarts, and their base subservience to the Government. He thought that a future historian reading the Privy Council judgment and the communication he had received from the India Office would infer similar pliancy on this occasion. For his own part he would be more inclined to impute obstinacy than pliancy to the noble lord who had delivered the judgment. But whether the legal or executive officials in India were at fault in this matter, it would be easy to remedy it, if the Secretary of State would order a Declaratory Act to be passed in the sense petitioned for in some of the memorials. He thought he had shown that the judgment of the Judicial Committee was not in accordance with Mussulman law, neither was it in accordance with Christian law. When their lordships so lightly dismissed the precepts quoted by Mr. Justice Ameer Ali, they might have remembered that there was not much difference between them and the eighth verse of the fifth chapter of the 1st Epistle of Paul to Timothy. "But if any provide not for his own and especially for those of his own house, he hath denied the faith and is worse than an infidel." Perhaps, as St. Paul lived 600 years earlier, the Privy Council judges who thought the precepts of the Prophet too old, would think still less of St. Paul's precept. A case had, however, been decided this year in one of Her Majesty's Law Courts in London, by which a will leaving some thirteen thousand pounds to the poor had been upset. It was true that this was due to a technicality, but the satisfaction with the decison had been general, because the testator had left five relations unprovided for, one of whom was in the work-house, and two others on the verge of it. He now came to the last two paragraphs of the Notice—questions addressed to the Under Secretary for India, as to what steps

the Government of India would take. A correspondence had been going on in the *Moslem Chronicle* of Calcutta showing the interest taken in this question. A pleader, Mahomed Mustafa Khan, had written a letter, dated May 11th, from the Vakil's Library, High Court, in the *Chronicle* of May 23rd last. This letter repudiated the views urged in another letter of Mr. Iradut Ullah in the *Chronicle* of May 9th. After pointing out that for a Mussulman to propose to repeal divine law by human legislation would be apostacy, he ended his letter in the following words, and he entreated the noble earl to give his attention to them: "The wakf question, however, stands on a different footing, and its administration by our Courts has, to a great extent, certainly been unsatisfactory. Even here our Courts profess to expound the Muhammadan law, but we say 'No,' this is not our law, and we have now appealed to the Government to put our Courts right by legislation. But the difference in the two legislations proposed is that, while in the wakf question we want an Act confirming the Muhammadan law disturbed by our Courts, Mr. Iradut Ullah wants an Act disturbing Muhammadan law heretofore rightly administered." These few words summed up the whole question. It would be preposterous if the answer were that the India Office could not interfere, after the Secretary of State had interfered with the Government of India in an unprecedented manner by a Mandate to alter the cotton duties, in order to redeem the electioneering pledges which he had incautiously given to Lancashire.

THE EARL OF ONSLOW: It is the fact that full enjoyment of their law and religious usages and institutions has been guaranteed to the Mussulman population of India by Her Majesty's Proclamation; but the case to which the noble lord has called attention was decided by the Privy Council strictly in accordance with the Mussulman law. It was a case in which a remainder to the poor was inserted merely for the purpose of perpetuating a bequest to the family of a testator, and in accordance with the Mussulman law it was held by the Privy Council not to be valid. The noble lord asks whether it is not the fact that numerous memorials have been presented against this decision. The India office is not aware that any memorials have been presented, and it is quite certain that they were not numerous. It may be that the parties in this case may have presented a memorial, but no others are known of. The Government of India does not purpose to take any steps to redress the wrongs which the noble lord imagines to have been inflicted by the decision; and if any representation is made on the subject, it should be to the local government, who will be able to introduce legislation.

The LORD CHANCELLOR: My lords, I cannot allow this occasion to pass without entering a protest against the precedent set by the noble lord. It is quite within his right, if he thinks proper, to ask Her Majesty's Government whether they mean to alter the law; but to argue a judgment of the Privy Council—a matter over which I may point out, your lordships have no jurisdiction at all —and to use such language as the noble lord has thought it right to use—namely, that the judges have altered the law, and that wrongs have been inflicted by their decision—appears to me neither a decorous treatment of the highest legal tribunal of the land nor a very desirable precedent to set; and, further, it is not calculated, I think, to add to the dignity and impressions which the Judgments of the Privy Council make in those places where observations such as those of the noble lord are likely to do more mischief than good. (Hear, hear.) The noble lord must assume that this is the law, because when once a decision has been given by the highest Court of Appeal it becomes the law of the land. Therefore, the noble lord's course should be to alter the law and not to make observations on the character of a judgment which may do no little harm in the country affected. (Hear, hear.) I want to say this, further, that when the noble lord examines the judgment and comments upon it and reasons with it he is in this difficulty. I am making this protest because I was not a party to this judgment. If I had been I should have refused to have said a word, and I do not suppose that any one of the learned judges sitting in this House who were parties to that judgment would condescend to argue with the noble lord whether their judgment was right or wrong after they had once delivered it. (Hear, hear.) They would tell the noble lord to look at the judgment and read it and—may I add!—understand it—(laughter and cheers)—before he comments upon it.

LORD STANLEY OF ALDERLEY said he understood the noble and learned lord to say that the Privy Council made the law. For that reason it was justifiable to ask that Her Majesty's Government should alter it.