THE QUESTION OF INTEREST IN CANADA.

Edited by Syed Mumtaz Ali
(Courtesy of the Canadian Society of Muslims)

(The late Syed Mumtaz Ali, Barrister at Law and Solicitor, passed away in Canada on July 16, 2009 at the age of eighty two. He was the first Muslim lawyer in Canada and late President of The Canadian Society of Muslims. He was renowned among Sufi circles and played a significant role in developing and promoting the application of Muslim personal/family law in Canada as part of the larger system of Alternate Dispute Resolution.)

(Part I of this article is based on excerpts from *A Digest of Moohummadan Law* by Neal B.E. Baillie. Baiilie's *Digest* was compiled and translated from authorities in the original Arabic containing the doctrines of Hanafi code of jurisprudence. The language of the English translation may seem somewhat archaic for the reason that it was done in the very early days of the inception of the British rule in India. I have decided to leave the original wording intact. The the digest is chiefly based on *Fatawa Alamgiri*, but Baillie freely quotes from other authorities such as *Hidaya* and its two celebrated commentaries, the *Kifayah* and *Inayah*) – Editor.

Part I

The Essential Nature of the Canadian Realty Mortgage Involving Interest and the Question of Its Permissibility under the *Shariah*.

Notwithstanding the stringency of the rules for preventing riba or the taking of any interest on the loan of money, methods are found for evading them, and still keeping within the letter of the law. It had always been considered lawful to take a pledge to secure the repayment of a debt. Pledges were ordinarily of movable property, and when given as security for a debt, and the pledge happened to perish in the hands of the pawnee, the debt was held to be released to the extent of the value of the pledge. Land, though scarcely liable to that incident was sometimes made the subject of pledge; and, whether the pledges were moveable or immovable, the pawnee might be authorized to make use of it, so that if it were injured in the use he would not be responsible. The permission might, however, be withdrawn at any time, and when it was a matter of agreement that the pawnee should derive some benefit from the use of the pledge, some device was necessary to prevent the withdrawal of the permission. For this purpose, a condition was added that whenever the pawner should prohibit the use of the pledge, the prohibition should operate as a renewal of the permission, so long as the debt remained unpaid. Though, strictly speaking, pledges could be lawfully taken only as security for

a debt, it appears that they were sometimes given as security for a loan; and if permission was given to the lender to make use of the pledge, as in the case of land, to sow it and appropriate the produce, he would thus be enabled to derive some benefit from the loan, which, though held to be abominable (i.e., *mukrooh*), was still within the strict letter of the law. The moderate advantage to be derived in that way does not seem to have satisfied the money lenders, *and the expedient of a sale with a condition of redemption was adopted, which was called Bye-al-wufa, and very nearly resembles an English mortgage.* Some account of it is given at the end of the third Chapter of this Supplement (i.e., p.807); and it will be seen that there were two leading opinions regarding it. One of these treats it as a 'pledge', and the other as a 'sale'. The authorities in the Text, which are those cited in the *Fatawa Alamgiri*, seem to lean to the former opinion, while the author of the*Hidayah* appears to treat it as an ordinary sale. It is important to observe that no allusion is made in the first mentioned authorities to any period of repayment in the condition for resale, while in one of the commentaries on the *Hidayah* express mention is made of a meal (mead) or time of payment, and the author adds: "The *wufa* is binding at its fixed period, as if when the period has passed without payment, the *wufa* would be no longer binding and the sale would become absolute." This inference I ventured to make in the Introduction to my work on Sale, and it is confirmed by the description of the*Bye-bil-wuffa*, as it is termed, in the Preamble to Regulation 1 of 1798 of the Bengal Code. Since then there has been a decision to the same effect by the Privy Council, which is reported in the thirteenth volume of Moore's Indian Appeals, p. 566

In the *Bye-al-wufa*, without a fixed term of payment, the *wufa* would be no more than an engagement to do what is implied in every pledge, and the seller would apparently be entitled to redeem at any time on repayment of the money borrowed, while the purchaser would, as in an ordinary *kurz*, have an equal right to demand his money whenever he pleased, and would apparently be liable for rent if he made any use of the land without the permission of the seller (1).

The sale which is in use among men in our times as a contrivance for *riba*, and to which they have given the name of *Bye-al-wufa*, (2) is in fact a pledge, and therefore, in terms of its legal effect, the thing sold is in the hands of the purchaser as (just like) a pledge in the hands of the pawnee; he is not its proprietor, nor is he free to make use of it without the permission of its owner; he is responsible if he eats or destroys the fruit of a tree so sold to him; and his debt , when the *wufa* is for a debt, is extinguished if the thing should perish in his hands; but he is not responsible for the loss of an increase if it should perish without his act; and the seller may reclaim the thing sold when he pays his debt.

According to us, there is no difference between this transaction and a pledge in any of its effects or consequences. (3) To this effect decisions have been given by the Siyyid Aboo Shoojaa of Samarkand, and the Kazi Ali As Soghdee in Bokhara, and many other learned men. And the form of the transaction is this: the seller says of the purchaser, "I have sold you this thing for the debt due to you by me, on condition that when I pay the debt, the thing is mine;" or thus: "I have sold you this for so much, on condition that when I give up to you the price, you will give up to me the thing." And what is valid is that the contract which passes between them, if it be

in words of sale, is not a pledge. (4) It is then to be considered if the two parties have mentioned a condition of cancellation in the sale, and if so, the sale is invalid. And even if they should not have mentioned this in the sale, but have both, in expressing themselves**,** used the word sale with a condition of *wufa*, or have expressed themselves as in the case of a lawful sale, but with the meaning that the sale is not to be binding or obligatory, the result is the same. Where , again, sale is mentioned without any condition, and the stipulation is then mentioned after the manner of a mutual promise, (5) the sale is lawful, and the *wufa* binding as a promise.

A case is given in the *Nasfeeut* of a person who sold a mansion for a fixed price by *Bye-al-wufa***,** and mutual possession having been taken; then let the mansion to the purchaser on the conditions of a valid *ijrauh*, or lease, under which possession was taken. In such circumstances, it being asked if the purchaser was liable for rent, the answer was in the negative (Renz, pp. 270-285). (6) A person sells an orchard to another by *Bye-al-wufa*, and mutual possession having been taken, the purchaser makes an absolute sale of it to a third party, to whom he gives delivery, and then withdraws. In such circumstances, the original seller may litigate the matter with the third party, and reclaim the orchard from him. And in like manner, if all the parties should die leaving heirs, the heirs of the original proprietor may require a release of the property from the hands of the heirs of the second purchaser, who may then have recourse to the heirs of the first purchaser for the price paid then reclaim the restoration of the property from the hands of the heirs of the second purchaser, who may then have recourse to the heirs of the first purchaser for the price paid to him to the extent of the assets in their hands, and the heirs of the first purchaser may then reclaim the restoration of the property, and retain it on account of the debt to their ancestor until that be paid. In the *Futawa of Abu'l Fuzl*, a case is mentioned of an orchard which was in the hands of a man and woman, and the latter having sold her share to the former on condition that he should restore it to her on repayment of the price, and the man having subsequently sold his own share, it was asked if the woman had a right of pre-emption; and the answer was, that if the sale a *Maamilut* (7) sale she had such a right, whether her share of the orchard were in her own hands or in the hands of the man. Thus in the *Moheet* and in the *Atabeeak* it is said that a *Bye-al-wufa* and a *Maamilute* sale are one. (8)

Part II

Application of Imam Abu Hanifah's Ruling To India (and Canada)

Before we expand our discussion under this context, it seems advisable to take into consideration the following basic points:

In books on *Fiqh* (Muslim Jurisprudence) the Traditions (*Ahadith*), scholars and jurists generally speak of two varieties of *Riba* (interest). Imam Razi also deals with interest under two divisions:

1) *Riba Nasi'a*, that is on credit; also known as *Riba-al-jihiliyya*, and
2) *Riba Fadl,* that is on cash, also known as *Riba-al-Naqd or Riba-al-Bai'.*

Riba Nasi'a is the same as was prevalent in the pagan days, that is to say, a creditor advanced a certain loan on which he exacted his interest every month; the principal remaining intact. On or after the expiry of the time fixed for repayment, he would demand his dues from the debtor. If the latter was unable to pay, a certain addition was made to the principal as a 'consideration' for the 'easing time' allowed for repayment.

As to the *Riba* cash or *Riba Fadl*, it consisted of an exchange of like kinds of commodities or of those kinds which resemble each other. In the Prophetic Traditions, however, only *Riba* of this kind is discussed. According to the legal injunctions emanating from such traditions, it is prohibited to exchange (1) gold, (2) silver, (3) wheat, (4) barley, (5) dates, or (6) salt with less or more quantities of the same kind. But this prohibition does not apply where the two commodities of exchange vary in kind. In such cases it is permissible to sell a smaller quantity of one commodity in exchange for a larger or even equal quantity of another commodity, provided always that (i) the sale is not on credit, and (ii) delivery of the commodities is affected on the spot. The point, however, is as to whether the above mentioned principle applies only to the six commodities which are specially mentioned, or whether it applies to all commodities. There is a difference of opinion among the legal scholars on this point. Jurists who do believe in 'analogy' (*Qiyas* – i.e., reasoning and deduction by analogy), extend the operation of the *riba* regulations to other commodities, for instance, to all cereal corns. Those who do not believe in 'analogy' and attach importance to the 'letters' of the law, consider *Riba* regulations to apply only to these six commodities and not to others over and above these six.

It was in regard to interpretations of this nature that scholars were confronted with the difficult task of resolving such questions. In this context, it may be mentioned in passing that even the second Khalifa Umar (*r.a*.) is reported to have made remarks to the effect that the Holy Prophet passed away so soon after the *Riba* injunctions were proclaimed that the Companions of the Prophet did not get the opportunity to have certain issues relating to *Riba* clarified by referring to the holy Prophet (pbuh) for directions in the matter. It is to be noted that there are only eight verses of the Qur'an which deal with *Riba* or interest and they were revealed around the time of the conquest of Mecca, and the first pronouncement of the *Riba* prohibition was made in the sermon of the Prophet (pbuh) delivered on the occasion of his last Hajj. There are only forty Traditions dealing with matters related to interest.

In the light of this background information, we can see why the great legal minds of Islamic jurisprudence had always been and still continue to interpret the various detailed aspects of the basic principle of the law of *Riba* in order to suitably adapt the application of those same principles to the changing circumstances and evolving needs of human activities involving trade, commerce, industry and financial and monetary transactions. It seems some new development or other or yet another innovative mechanism or financial instruments of commercial transaction seem to be coming up all the time for public use, and for this reason the need for new legal rulings relating to the newly invented commercial modes become more and more urgent and crucial. Such a need was acutely felt by Maulana Ilyas Burni (*r.a*.) in the early days of economic developments and social reforms in India. Chairing the *Muslim Educational Conference* held in Aligarh, India, in 1937, he gave a keynote Presidential address

on the need for reforming the Muslim Society of India. Dealing with the matter of Interest in the course of his speech, he stressed the point that in modern times (even then) financial and/or monetary transactions had become an indispensable part of the commercial life, so much so that no business, be it trade, commerce, industry, agriculture, or any other economic activity, was possible without the involvement of money transactions in some form or another. An excerpt of his speech appears in the book *Qawle Tayyah*, edited by Muhammad Abdul Aleem.

"There are two ways of dealing in money he says: 1) (investment by way of) partnership and 2) loan funding or credit financing. Partnership may generate profit for their partners, which would depend on the size of the total profit of the partnership. The amount of partner's profit will, of course, fluctuate with the fortunes of the partnership, but in the case of interest, however, the lender must be paid interest at a pre-determined, fixed rate, regardless of whether the business to whom the money is lent makes a profit or suffers a loss. Profit in any shape or form is permissible and *Riba* is not. In the case of commercial interest (of the modern variety), however, there are different views and differences of opinion among the jurists. On the one hand, a large section of scholars holds it forbidden while, on the other hand, a smaller section would prefer to hold it legally permissible on the ground that, in their opinion, (the modern variety of) commercial interest does not fall squarely within the legal definition of '*Riba*'. Scholars of this smaller group further argue that even if it does fall within the defined parameters of *Riba*, such commercial interest (because of its very special and different nature or quality) ought to be held permissible under the Muslim law. Interestingly enough, (there is another amusing twist to the prevailing practice among the Muslim public, in that) all seem to accept the legal prohibition of both paying and receiving *Riba*, but (due to some strange prevailing social customary thinking), paying interest is not regarded as severely reprehensible as taking or receiving interest. As a matter of fact, in practice, people do not seem to care much about imposing any serious kind of social taboo whatsoever on paying interest. Consequently, the Muslim public does not seem to have any qualms in borrowing money and paying interest on it, but here lies the irony of the situation in that those who lend money on interest are ridiculed by the same people, namely, those who borrow it. As a result (of this mind-set), we see large amounts of money that accrue as bank interest on savings deposited with the banks remain unclaimed. Such abandoned amounts of money are then given away by banks to such institutions who use it for the propagation of unIslamic purposes. As to the likely reasoning that since the people who borrow money do so under difficult circumstances which force them to attend to their crucial needs and necessities in this manner, whereas those who lend do not face such a stressful situation and consequently, so goes the argument that in a relative manner, lenders' decisions to lend is a voluntary decision, whereas the poor borrower's decision is a decision made under coercive economic demands. (This argument would also hold that, for this reason different public attitudes in respect to borrowing and lending are, therefore, justifiable. In this context, it must be borne in mind that the Islamic law permits borrowing money on interest in cases of absolute *necessity (zaroorat)* and extreme *need (ihtiaj)*. Two answers to this argument are also likely: 1) Firstly, that not all borrowing is done under dire conditions and difficult circumstances. 2) Secondly, that as an alternative to an interest bearing loan, one could arrange an interest free loan. In order to comply with

the *Shariah* all a potential borrower has to do is not set up any predetermined rate or terms for paying interest to the lender. (But this need not necessarily become a bar or a deterrent for the borrower to show his gratefulness in other legitimate ways such as, for instance), the borrower could legally pay an extra amount (which is not fixed or predetermined at the time the loan was negotiated) in addition to the amount of principal owed to the lender at the time of repayment of the loan – voluntarily, of his own accord and at his own initiative. Ways and means of making such interest free loans could be found and this could make the availability of interest free loans easier (without penalizing the lender for his kind-heartedness, religious piety and social conscientiousness).

Two authorities may be cited in support of the above proposition.)
(1) It is stated in *Tabqat Ibn Sa'd*, that on one occasion a prominent Companion of the holy Prophet (pbuh), Abdullah Ibn Umar, borrowed two thousand Dirhams from someone. At the time of repayment of the two thousand Dirham principal, Abdullah Ibn Umar paid the lender an extra two hundred Dirhams. Seeing the hesitation of the lender in accepting the extra two hundred, Abdullah Ibn Umar nicely explained the legal permissibility of offering and accepting the amount over and above the owed principal by persuading the lender to accept, simply by politely and nicely insisting vocally, "This is for you."
(2) (*Fatawa-e Alamgiri* also deals with this matter on page 524 (vol 4) where it is stated that Imam Muhammad, the well known jurist, clearly declares his position on this point by stating clearly in his famous and authoritative work *kitab-al-Sarf*, that there is no danger in a borrower sending a gift to the lender.)

"Even from a purely academic point of view, scholars of (modern) economics have also expressed differing opinions. Some economists consider it to be useful, while the others hold it to be harmful. Both of them, however, hold that profit is preferable to interest. Now that interest has become such a necessary and unavoidable component of all kinds of commercial transactions and business activity, it seems extremely difficult to get rid of it and do without it.

"Modern modes of commerce and business were not known in earlier or ancient times, although it is an old established rule (and without a doubt, it remains intact even today) that *Riba* in any shape or form is forbidden. With this in mind, some people with sympathetic attitude and with considerations of a general economic welfare of the Muslim community at large, are trying to find ways and means of bringing the use of the prevailing form of (modern commercial) interest within the limits and bounds of legal permissibility. Otherwise, failing this, on the one hand, it will be bad (harmful) for the Muslims to boycott modern commercial banks and, on the other hand, it will be even worse to knowingly and deliberately flout the *Shariah* injunctions forbidding interest. (As things stand at the present,) what seems to be the most disastrous of all disasters is the tragic lot of those who cannot seem to find a way to escape the ruinous (treadmill of paying) interest (through their collective proverbial nose).

"(The author reiterates that although *Riba* is undoubtedly explicitly forbidden, the question of whether the prohibition of *Riba* applies to commercial bank loan transactions, seems to be still lingering on in a limbo.) A ppealing to religious scholars, (he also brings it to the attention of all

concerned) that it would be advisable to have this matter settled urgently and decidedly by a legal ruling which can be issued only by the consensus of religious scholars."

The editor of *Qawle Tayyab*, from which the above passages from the 1937 speech of Maulana Burni are reproduced, brings the subject up to date by indicating that the question of commercial interest in the context of its application to India, a non-Muslim country, has since been settled by religious scholars of our time. He then proceeds to reproduce excerpts (as a lengthy footnote) from a discussion and the legal ruling of Maulana Manazer Ahsan Gilani (*r.a.*), an eminent scholar, a graduate of Darul Uloom Devbund, India and a former professor, Head of the Dept. of Theology in the Osmania University of Hyderabad Deccan. Reproduced here below is that excerpt which was originally taken from *'Islami Ma'ashiat'*, an authoritative work by Maulana Gilani (.).

Economic Relations of Muslims with non-Muslim Residents of non-Muslim Countries.

(a) Legal Ruling on Transactions Involving Interest, Gambling, etc.

In the case of a transaction which takes place in a non-Muslim country where both parties, a Muslim and a non-Muslim, happen to be living and, as a result, money or property changes hands from the non-Muslim into the hands (i.e., possession) of the Muslim party under such circumstances that the transaction is regarded lawful under the laws of the non-Muslim country but unlawful under the Islamic law, the question arises: *Can or does the Muslim party acquire rights of ownership in such money or property?*
The answer is yes, he can and he does.

(The line of reasoning goes like this): In the eyes of the Muslim law, a Muslim who acquires *possession* of lawful property instantly acquires *ownership* too (i.e., by acquiring mere possession of it). As the subject of this transaction, money or property, is neutral (*mubah*) and permissible (*ja'iz*), possession of such property is also lawful. Since (as a matter of legal principal) mere possession is sufficient for acquiring (proprietary) ownership rights, the Muslim party, having become the lawful *possessor* of such property, also becomes its lawful *owner* under these circumstances.

(In short, Imam Abu Hanifah regards money transactions involving interest between a *Harbi* (a non-Muslim living in a non-Muslim country) and a Muslim, as permissible under the Muslim law.) The Hanafi maxim, "There is no interest between a *Harbi* and a Muslim," which has found its way (and a rightful place) in the general books on *Fiqh*, is based on (and reflects) this well known point of view (or legal ruling) of Imam Abu Hanifah. In other words, this is just one (provision or a) section of the Muslim International Law. Being unaware of (or unacquainted with) the real (meaning, intention and) purport of this legal provision, members of the general public become extremely perplexed (because of the extraordinary nature of its impact on the application and enforcement of the general prohibition of *Riba*). For, on the surface, it seems only reasonable to them that the law should be made applicable to everyone and everywhere.

(With such approach and attitude of mind,) making *Riba*/interest permissible, in this way, for Muslims residing in non-Muslims countries does not make sense to the general public. But the truth (and the fact) of the matter is that such a transaction with a *Harbi* is not really a transaction of interest at all, to start with.

Here is the translation from an Urdu book entitled *Hayat Maulana Gilani, r.a.* by Mohammad Zafir-al-din Maftahi and published by Maulana Yousuf Academy, Benares, India (pg. 323) 1989:

We accept and act upon many legal rulings (ijtihadat) of Imam Azam and Abu Hanifa, r.a. In this matter (of interest in non Muslim countries), I have emphatically adopted Abu Hanifa's ruling because I felt that there is no harm in doing this.

He also stated that it is common knowledge that, in India, non-Muslims collect interest from Muslims. Consequently a large portion of the wealth of Muslim people has been, and still is, being transferred into the coffers of the non-Muslim population. This kind of one-way traffic has economically crippled the Muslim community.

(He continues by saying that) in view of this situation, if we (Muslims) make it lawful for Muslims to receive interest from non-Muslims on the authority of an Abu Hanifah's ruling, then how can it be considered a major crime? Economic balance can be established and maintained only in this manner.

(To elaborate this point, Maulana discusses the difficult issue of slavery in this context. He states that) it was completely against the nature and the sense of decency of the holy Prophet to see fellow humans taken as slaves. However, since slavery had been so deeply entrenched in the Arab way of life before the advent of Islam, the holy Prophet allowed it to continue. Rather than risk complete social upheaval in the prevailing system, he insisted that slaves be given a code of legal rights that gave them the best treatment heretofore unheard of.

Consequently by using this precedent, (Maulana puts forth the argument that) if we follow Abu Hanifah's ruling (that says it is legally permissible for Muslims to receive interest from non-Muslims who live in India), then Maulana says that there is nothing wrong with that. So, how can this be considered to be an unlawful act? To balance the financial advantage accruing to non-Muslims in such situations, we maintain that Muslims living in India should also be allowed to charge and collect interest from non-Muslims. We have the ruling of Imam Azam as our legal authority to support our position in this respect.

-(Intricacies of International Law and International Relations, the practical difficulties of enforcing Muslim laws in non-Muslim countries and the realities of life as they relate to sovereignty of foreign states (governments) are matters of extremely delicate nature. (One could argue, quite justifiably, that where significance of such matters seem to escape the proper and deserving attention of even the experts e.g., jurists, legislators scholars, who are supposed to have a legal bent of mind, wisdom of the world, and an incisive sight to grapple with such issues, is it realistic to expect that an ordinary man on the street, that proverbial

'reasonable man of common sense' (that cherished creature of legal mythology) would be able to understand such complex issues?) – *Editor*

(b) Legal Ruling on the Question of Interest in India (and Canada)

On the basis of the above, certain Hanafi scholars have issued legal opinions holding it quite lawful for Muslims to enter into transactions involving interest with non-Muslims living in India, a country which is governed by non-Muslims. The most prominent among such religious scholars is Hazrat Shah Abdul Aziz Muhaddith Dehlavi. His favourable ruling is recorded in more than one place in his famous collection of rulings known as *Fatawa-e Aziziah*. Also worthy of special note is the fact that this ruling was issued by him at a time when the so-called 'emperors' of the Moghul dynasty were still the official occupants of the Red Fort palace. They were the rulers only in names, but despite their official status, and despite the fact that their real and effective control, power and authority of governing had come to an end for all practical intents and purposes, Shah Sahib had no hesitation in issuing that ruling and proclaiming it openly for all the Muslims of India.

Now, some people, lacking the needed aptitude to appreciate and understand finer points of law, might easily be lured into a (*quasi* logical) notion that the permissibility of acquiring property through interest bearing transactions between a *Harbi* and a Muslim, also, would automatically apply to property acquired under such other transactions as theft, fraud, robbery, etc. committed in a non-Muslim country. The argument advanced in such a case would be that as property coming into the hands of a Muslim through an interest bearing transaction with a non-Muslim is regarded neutral and permissible. Property acquired by theft, fraud, or robbery should also be accorded the same treatment. The answer to this apparent dilemma (of the simpleton mind) can be given simply by stating that the special treatment of money acquired though interest bearing transactions of that special kind are made permissible, only because such transactions are lawful and permissible under the laws of the non-Muslim country, whereas theft, fraud and robbery are unlawful and punishable transactions even under the laws of the non-Muslim country (be it India or Canada). As a matter of fact, the Hanafi ruling under discussion does contain a *proviso* stating in effect that "such a transaction should *not be in violation* of a treaty or agreement between a Muslim and the non-Muslim government." The treaty or agreement mentioned here refers to an agreement or covenant entered into between a Muslim resident of the non-Muslim country to obey the local laws of the non-Muslim country, (be it by way of the terms of residency permit, citizenship, immigration or visiting or travelling visa.). Now, breach of an agreement, an undertaking or a promise is an offence under the Muslim law. Acquiring money through theft, fraud or robbery, for instance, would therefore, being in violation of such a special agreement to obey the law of the non-Muslim country, be unlawful both under the Muslim law as well as under the laws of the non-Muslim country. In other words, the former, namely, the interest bearing transactions, are *lawful* but the latter, namely, theft, fraud, or robbery, are *unlawful* in the non-Muslim country. Because of this difference, each of these two kinds of transaction therefore receive a different treatment. (To sum up) when without any violation of an agreement with the non-Muslim country, a Muslim acquires possession of property/money belonging to a non-Muslim resident of a non-Muslim country, under the Muslim law such a Muslim becomes lawful owner of it – immediately upon

taking possession of that property which is 'neutral', 'innocent' or 'defect-free' property. It is difficult for anyone to come up with any viable or cogent argument under the Muslim law to prove unlawfulness of such property for the reason that this legal doctrine of Abu Hanifah has become so well established that it is practically irrefutable. For this reason, I demand (by way of a challenge) of all those who wish to refuse to accept Abu Hanifah's legal position in this respect, to provide, if they can, any sustainable legal argument, be it from the Holy Qur'an or the Prophetic Traditions, or the legal consensus of scholars (*ijma'*) or legal analogical deduction (*Qiyas*), to support their own contrary proposition that the property of a *Harbi* is not "neutral". Secondly, the main point is brought home to us all (nicely and it is beautifully reflected in the short and concise) Qur'anic phrase: ***"Do not be unjust to others nor suffer injustice from others."***

(A Prophetic tradition reported by Abdullah Ibn Abbas also lays down the general principal: "Loss should neither be inflicted nor suffered" – *Ibn Majah*.

(I might also mention in passing that even more recently (Sept. 1993) a legal ruling was pronounced in the book *Halal wa Haram* by Khalid Saifullah Rahmani of India, published by Darul Isha'at, Sabil-al-Salam, Belaur Barracks, Hyderabad, where, in discussing this question, he refers to the fact that: "According to Abu Hanifah, acquisition of property in *Darul Harb* (a non-Muslim country) through such contracts (i.e., which are unlawful under the *Shariah*, but lawful under the laws of the non-Muslim country) is legally permissible.") – *Editor*

Notes

1. From *Fut Al*., chapter xx, vol iii, p. 268, of abominable sale. As there are different opinions with regard to the legality of the *Bys-al-wufa*, I think it proper to give all that occurs on the subject in the *Futawa Alumgeeree*. This sale is the common form of mortgage in use in India where it is usually styled *Bye-bil-wufa*.

2. *Wufa* means the performance of a promise, and the *Bye-al-wufa* is a sale with a promise to be performed. The nature of the promise is explained a little further on.

3. This is the opinion of one section of the learned, who think that the transaction is to be regarded in all respects as a pledge according to the intention of the parties, who, though they say sale, mean pledge (*Kifayah*, vol iii., p. 820).

4. This is the opinion of another section of the learned, who consider that the transaction should be treated as a sale in some respects; that is, to the extent of conferring on the purchaser the right of using the property, but not that of selling or giving it away (*Hidayah* as explained by the *Inayah*, vol. iv. P. 152).

5. Arab *Muwaidut*. In an authority cited in the *Kifayah* (vol. iii, p. 820) in nearly the same terms, instead of this word, the word *Imeead* is used, which is an inflection from the same root, and is commonly employed in India to signify the time or fixed period for the performance of a Promise. And after the words 'the sale is lawful,' the passage proceeds thus: 'and the *wufa* is binding at its fixed period, for periods in engagements are binding; and this period is so, from regard to the necessities of men.'

6. if a person should borrow *Dirhams* and deliver an ass to the lender, to use him for two months till the *Dirhams* were repaid, or a mansion to inhabit it, the case would be like an invalid lease, and if the lender should make use of the ass or mansion, he would be liable to the time of the use, and there would be no pledge (*Fut. Al*., v. p. 633).

7. From, *Umul*, Practice.

8. The *Bye-al-wufa* is called in the *Hidayah*, *Moutad*, which means practiced or accustomed, vis. In Samarkand and neighbourhood, as explained in the *Kifayah* (vol. iii., p. 820). There are four different opinions regarding the *Bye-al-wufa*. The first treats it as a pledge, as already mentioned; the second treats it as a lawful sale; of this opinion was the author of the *Hidayah*, as inferred by the commentator in the *Inayah*, from his referring to the *Moutad* as a lawful sale. It may be observed in passing, that the translation of the *Hidayah* (vol. iii, p. 433) gives but an imperfect rendering of the Arabic text. According to the third opinion, the *Bye-al-wufa* is an invalid sale; and according to the fourth, it is entirely void. The *Bye-al-wufa* as now in use in the British territories in India, and sanctioned by the regulation of the British Government, contains a stipulation, that if the sum borrowed be not repaid (with or without interest) by a fixed period, the sale shall become 'absolute', and it is stated in the preamble to Regulation 1 of 1798 that it had long been prevalent practice to lend money on the mortgage of landed property with such a stipulation. And it is probable that it was the prospect of forfeiture in the event of non-payment at the fixed period that originally led to its adoption as a device for evading the prohibition against *Riba*.