

A HISTORY OF THE EARLY ISLAMIC LAW OF PROPERTY

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# A HISTORY OF THE EARLY ISLAMIC LAW OF PROPERTY

*Reconstructing the Legal Development, 7th–9th Centuries*

BY

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## INTRODUCTION

The present study is dedicated to an analysis of positive solutions adopted by Muslim jurists active in the first centuries of Islam regarding civil liability (Chapter One), several special types of sale, i.e. 'trust sales' as called by the later Hanafis and *salam* or *salaf* (Chapter Two), and the prohibition of *ribā* (Chapter Three). The purpose of the analysis is twofold.

First, I believe that this study will contribute to a more precise understanding of some of the positive rules which have hitherto remained unclarified. Although there are numerous studies of the Islamic law of property, fundamental rules such as the prohibition of *ribā* remain enigmatic. It may be helpful to consider the difficulties. Chehata is known for emphasizing the fact that law is a social phenomenon conditioned by the time and place in which it develops. He considered it imperative to go back to the early sources and trace the evolution of a given rule step-by-step across the centuries.<sup>1</sup> He carried this out in some of his works, in particular *Etudes de droit musulman* (1971) and *Etudes de droit musulman 2* (1973).

Chehata's attempt to justify the positive solutions was not very successful for two reasons. First, he did not have at his disposal the *Āthārs* of Abū Yūsuf and al-Shaybānī, or the *Muṣannafs* of 'Abd al-Razzāq al-Šan'ānī and Ibn Abī Shayba, which record many reports that contain important information on the earliest stage of Islamic positive law. The earliest sources that he consulted were the works of al-Shaybānī, such as the *Aṣl* and the *Jāmi' al-ṣaghīr*, which are essentially compendia of the doctrine of the earliest Hanafis (Abū Ḥanīfa, Abū Yūsuf and al-Shaybānī). Second, he wished to present Islamic law as a legal system comparable to Anglo-Saxon and Roman law.<sup>2</sup> It is probably for this reason that he sometimes attempted to justify positive solutions by applying concepts peculiar to the Western systems. For example, he justifies the Hanafī rule prohibiting the resale of a personal property that a person has purchased before he takes

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<sup>1</sup> See, for example, Chehata, *Etudes*, 76.

<sup>2</sup> Chehata, *Etudes*, 13.

possession of it by explaining that this rule serves the same function as the maxim, “Possession is equivalent to a title with respect to a personal property (*En fait de meubles, la possession vaut titre*),” as prescribed by article 2279 of the French Civil Code and adopted in other Western legal systems: suppose that *B* resells what he bought from *A* to *C* before *B* takes possession of it, and that subsequently *B* sells it to *D* after *B* takes possession of it. The Hanafis regard the resale to *D* as valid, while they declare the resale to *C* to be null and void. According to Chehata, this solution seeks to protect *D*, who believes that *B*, who possesses the object, has the right to dispose of it, like the above-mentioned maxim.<sup>3</sup>

But this reasoning is dubious, because whenever a person sells an object which he does not own, the Islamic rule is that the true owner can demand that the buyer restore it: that is to say, whatever the cause by which a person possesses an object belonging to another may be, a third person who purchases it from the possessor is never protected against the eviction from the true owner. In addition, we find the following example in the *Jāmiʿ al-kabīr* of al-Shaybānī: *E* sells his slave to *F*, who then rents or lends in a loan for use the slave to *E* without taking possession of the slave. Subsequently the slave dies while in *E*’s possession. Al-Shaybānī rules that the rent or the loan for use is null and void, and adds that *E* is exempted from payment of rent even if the slave is alive [and subsequently delivered to *F*].<sup>4</sup> This example indicates that the rule is that a person who has acquired an object cannot make a legal act with regard to it in whatever manner before he takes possession of it. We need not reason that the Hanafi rule prohibiting the resale of an object that a person has purchased before taking possession seeks to protect a third party.

Among recent important contributions to the understanding of the early Islamic law of property is Wichard’s *Zwischen Markt und Moschee*. As its title suggests, Wichard tries to present the Hanafi law of sale as an attempt to accommodate religious or moral norms to social and economic reality. Although he advances interesting and excellent explanations of the early Hanafi understanding of certain rules, he leaves many questions unanswered. To take again the example

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<sup>3</sup> Chehata, “Acte,” 40–41.

<sup>4</sup> Shaybānī, *Kabīr*, 240.

of sale, he writes: if the object of a sale is specified and no term of delay is stipulated, the object immediately belongs to the buyer. Therefore the seller cannot sell the object to a third person, but he can continue to use it, so long as the buyer does not demand that he deliver it. In such a case, the Hanafis prescribe that the object perishes at the seller's risk, that is to say, the buyer can take back the price he has paid in the event that the object perishes while in the possession of the seller. Such a buyer is therefore in the same situation as a pledgee whose credit is secured by an object belonging to the debtor, who reserves the right to use it.<sup>5</sup> This is an acute observation, and the legal devices (*hiyal*) that Wichard cites indicate that the Hanafis recognized that this rule could serve the same purpose as a pledge. It is sufficient for Wichard to show the economic function that the Hanafis expected a rule to fulfill. But several rules concerning the object that remains in the possession of the seller cannot be justified by such an understanding, as will be shown (see Chapter One, Section 3, 4). One thing is to know how later jurists understood and applied a specific rule; another is to know how it was formed.

The same is true of Horii, who closely examines numerous cases of legal devices applied, among others, to transactions. In her *Die Gesetzlichen Umgehungen im islamischen Recht (hiyal)* and "Reconsideration of Legal Devices (*Hiyal*) in Islamic Jurisprudence: The Ḥanafīs and their 'Exits' (*Makhārij*)," she successfully demonstrates that legal devices constitute an integral part of the Hanafi legal system, which did not cease to grow in the ninth and tenth centuries through the efforts of the Hanafi jurists to interpret individual rules and to demarcate their application. Her thesis suggests that the doctrine of even the early Hanafis does not necessarily retain the ancient layer of the Hanafi rules, which had been established by the Iraqi jurists prior to the Hanafis.

One of my main concerns is the formation of individual solutions regarding civil liability, several special types of sale, and the prohibition of *ribā*. In clarifying this process, I keep one point in mind. It concerns the authenticity of opinions attributed to the Prophet, the Companions or the Successors. The primary sources that I mainly use in this volume are works of al-Shaybānī (132–89/750–805), in

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<sup>5</sup> Wichard, *Zwischen Markt*, 130–31.

particular the *Aṣl*, the *Jāmiʿ al-ṣaḡhīr* and the *Jāmiʿ al-kabīr*, for the doctrine of the earliest Hanafis. As for the doctrine of Mālik, the *Muwaṭṭaʿ* of Mālik (d. 179/795) and the *Mudawwana* of Saḥnūn (b. 160/777–8; d. 240/855) are by far the most important sources. For the legal opinions attributed to the Prophet, the Companions and the Successors, I rely on the *Muwaṭṭaʿ*, the *Āthārs* of Abū Yūsuf (d. 182/798) and al-Shaybānī, the *Muṣannafs* of the Yemeni traditionist ʿAbd al-Razzāq al-Ṣanʿānī (126–211/744–827) and the Kufan traditionist Ibn Abī Shayba (159–235/775–849) who moved to Baghdad, and the *Mudawwana* of Saḥnūn extensively. The works of al-Ṭaḥāwī (d. 321/933) and the *Sunan al-kubrā* of al-Bayhaqī (d. 458/1066) contain some important materials otherwise unavailable.<sup>6</sup> As the basis for reconstructing the early history of Islamic jurisprudence, a question remains as to whether these sources are authentic or not.

As is well known, this subject is a matter of controversy.<sup>7</sup> For example, Motzki has concluded that the materials collected in the *Muṣannaf* of al-Ṣanʿānī “originated in the course of the first half of the second/eighth century” and that their “authenticity can be considered ensured” by analyzing their transmitters and the biographical sources.<sup>8</sup> But Calder is skeptical. He writes, “I should be unwilling to concede its early date until the form, the content, and the organization of its hadith are compared systematically with similar material in early juristic texts and in the standard (apparently later) collections.”<sup>9</sup> Calder regards as unconvincing the recovery of the history of Meccan *fiqh* by Motzki, who, he says, puts unrestrained trust on the *Muṣannaf*.<sup>10</sup>

For this reason, I consider it to inappropriate to judge *a priori* the authenticity or otherwise of an opinion. For example, in numerous places, I quote the opinions of Ibrāhīm al-Nakhaʿī (d. 95/713–4 or

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<sup>6</sup> I also used *Kitāb fi al-fiqh* possessed by Asad Library in Damascus (MS, no. 10735), but few of its materials are otherwise unavailable. Although there is no mention of its author in the catalogue of the library, it is probably the Maliki jurist Muḥammad b. Aḥmad b. ʿAbd Allāh b. Naṣr al-Dhuhlī (279–367/893–978). See Sezgin, *Geschichte*, 1:476–77.

<sup>7</sup> For the survey of these controversies, see Berg, *Development*, 6–64.

<sup>8</sup> Motzki, *Origins*, 58–72. Citation from p. 72.

<sup>9</sup> Calder, *Studies*, 194.

<sup>10</sup> Calder, *Studies*, 194–95. His critique is directed to *Anfänge*, the original German version of Motzki’s *Origins*. For Motzki’s refutation against Calder, see Motzki, *Origins*, xvi.

96/714–5) from the *Āthārs* of Abū Yūsuf and al-Shaybānī, and the *Muṣannaḡs* of ‘Abd al-Razzāq al-Ṣan‘ānī and Ibn Abī Shayba. These opinions are transmitted by Ḥammād b. Abī Sulaymān (d. 120/737–38), Abū Ḥanīfa (d. 150/767) and Sufyān al-Thawrī (d. 161/778), among others. In principle, I withhold judgment as to whether or not the historical Ibrāhīm al-Nakha‘ī advanced an opinion attributed to him in these compilations. I assume only that such an opinion existed during or before the lifetimes of these transmitters. But I do assume that a dissident opinion preceded an authoritative opinion, particularly when the latter is embodied in a Prophetic hadith. For example, the Prophet is reported to have prohibited the sale of an object that a person does not own.<sup>11</sup> But the Medinan jurist al-Qāsim b. Muḥammad (d. 101/719–20, 102/720–1, 106/724–5, 107/725–6 or 112/730–1) is reported to have seen no harm in such a sale.<sup>12</sup> We can safely say that this opinion existed before the Prophetic hadith was put into circulation, since it is improbable, if not impossible, that a learned jurist would advance an opinion that diametrically contradicts a Prophetic hadith. In this way, I will demonstrate that the doctrines expressed in the statements and reports attributed to the Successors reflect the formative stage of doctrines cited “in early juristic texts and in the standard (apparently later) collections,” and remove the doubt of Calder.

The second purpose of the present study is to determine, through the analysis of the individual rules, why and how the doctrine of Abū Ḥanīfa in Iraq and that of Mālik b. Anas in Medina were transformed into the Hanafi and Maliki schools, respectively.

Referring to ‘ancient schools of law,’ Schacht writes: “This term implies neither any definite organization nor a strict uniformity of doctrine within each school, nor any formal teaching, nor again any official status, nor even the existence of a body of law in the Western meaning of the term.”<sup>13</sup> But on the next page he writes that the central idea to the ancient schools of law was “‘living tradition of the school’ as represented by the constant doctrine of its authoritative representatives.”<sup>14</sup> According to Schacht, the ‘living tradition’

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<sup>11</sup> San‘ānī, *Muṣannaḡ*, 8:38, no. 14212; Ibn Abī Shayba, *Muṣannaḡ*, 4:316, no. 20492.

<sup>12</sup> Ibn Abī Shayba, *Muṣannaḡ*, 4:443, no. 21902.

<sup>13</sup> Schacht, *Introduction*, 28.

<sup>14</sup> Schacht, *Introduction*, 29.

has a retrospective aspect and a synchronous aspect. Retrospectively, it is reflected in ‘practice’ (*ʿamal*) or ‘well-established precedent’ (*sunna māḍiyya*), which was found in the teaching of “those whom the people of each region recognized as their leading specialists in religious law, whose opinions they accepted, and to whose decisions they submitted.”<sup>15</sup> The synchronous aspect of the living tradition is represented by the consensus of the scholars in a region. Such consensus was originally “anonymous, that is to say, it was the average opinion of the representatives of a school that counted.”<sup>16</sup> But later on, living tradition was projected backwards to some great figures of the past, and “[t]he Kufians were the first in attributing the doctrine of their school to Ibrāhīm al-Nakhaʿī.”<sup>17</sup> The doctrine attributed to him had little to do with that of the historical Ibrāhīm. “It rather represents the stage of legal teaching achieved in the time of Ḥammād ibn Abī Sulaymān (d. 120/738), the first Kufian lawyer whose doctrine we can regard as fully authentic.”<sup>18</sup>

Schacht writes also:

The religious specialists of each geographical unit in the central parts of the Islamic world had developed a certain minimum agreement on their doctrines, and by the middle of the second century of the hijra many individuals, instead of working out independent doctrines of their own, began to follow the teaching of a recognized authority in its broad outlines, while reserving to themselves the right to differ from their master on any point of detail.<sup>19</sup>

This allegiance to a master such as Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī and Mālik brought about the transformation of the ancient schools of law into the Hanafi and Maliki schools. Schacht attributes the cause of this transformation to “the extensive literary activity of the followers of Abū Ḥanīfa, particularly of al-Shaybānī, in Iraq, and of the followers of Mālik in North Africa, together with other factors, some of them accidental . . .”<sup>20</sup> Melchert, who accepts

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<sup>15</sup> Schacht, *Introduction*, 29–30.

<sup>16</sup> Schacht, *Introduction*, 31.

<sup>17</sup> Schacht, *Introduction*, 31.

<sup>18</sup> Schacht, *Introduction*, 31.

<sup>19</sup> Schacht, *Introduction*, 57.

<sup>20</sup> Schacht, *Introduction*, 57.

Schacht's thesis about the 'ancient schools of law,' writes, "In the ninth century, the old regional schools were largely redefined as personal schools; that is, collections of jurists who upheld the teaching of one man."<sup>21</sup>

Hurvitz criticizes Schacht's thesis. First, he observes that the definition of the term 'region' is ambiguous: "This obfuscation of the schools' geographical boundaries makes it difficult to treat the 'ancient schools' as concrete historic entities."<sup>22</sup> Second, he asks, what is "the nature of the bond that united members of the 'ancient schools.'" . . . "Was it a shared legal doctrine? A common jurisprudential approach? A widely accepted intellectual and spiritual leadership?"<sup>23</sup> As for a shared legal doctrine, he quotes Schacht's argument and concludes that "we can eliminate the possibility that common positive doctrine (*furū'*) in a given locality united the members of 'the ancient schools'."<sup>24</sup> After rejecting the two remaining candidates, Hurvitz writes:

Thus, the notion of transformation of *madhāhib* from regional to personal is problematic because there is little that substantiates the existence of regional *madhāhib* in the first place. The second problem with this notion of shift is that groups of masters and disciples already existed, even during 2nd/8th century.<sup>25</sup>

Hallaq expands upon Hurvitz's argument. He maintains that a closer examination of the sources that Schacht relied on to formulate his thesis, especially the works of al-Shāfi'ī and al-Shaybānī, reveals that when these authors refer to the Iraqis (*al-'Irāqīyūn*) or the Medinans (*ahl al-Madīna*), they in fact refer to the doctrine of a handful of particular jurists, such as Abū Ḥanīfa, Ibn Abī Laylā and Mālik.<sup>26</sup> Then he demonstrates that in each region, and even in each later school there was no doctrinal uniformity; individual jurists had distinct doctrines.<sup>27</sup> "Such distinctly individual doctrines as we have

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<sup>21</sup> Melchert, *Formation*, 32.

<sup>22</sup> Hurvitz, "School," 43.

<sup>23</sup> Hurvitz, "School," 43.

<sup>24</sup> Hurvitz, "School," 43.

<sup>25</sup> Hurvitz, "School," 45.

<sup>26</sup> Hallaq, "From Regional," 6–7.

<sup>27</sup> Hallaq, "From Regional," 7–10.

enumerated pervaded the jurisprudence and law of Kufa, regarded by Schacht as the locus of a regional school.” Hallaq adds, “[N]ot one of our sources, either of the early or the later period, even hints at the presence in this city of a collective, anonymous doctrine. This is because no such doctrine ever existed.”<sup>28</sup> He repeats, “Our evidence has shown that it is false to speak of regional, geographical schools. They simply did not exist.”<sup>29</sup> “All that existed were individual jurists each of whom espoused a legal doctrine that had no binding authority over those who chose to adhere to, or apply, them.”<sup>30</sup>

To the extent that we rely on the biographical sources, the arguments of Hurvitz and Hallaq regarding ‘ancient schools of law’ or ‘regional schools’ are more persuasive than those of Schacht and Melchert. But the fact that different jurists in a city held different opinions does not necessarily preclude the existence of a regional school of law. To illustrate this point of view, let us take two examples.

The first example is the order of priority according to which a person may serve as guardian in marriage. The Hanafis divide the *‘aṣaba* (the agnates, i.e. the male relatives whose relation to a person is traced without intervention of a female) of a ward into classes, which, in order of priority, are: 1. the ascendants and descendants of the ward; 2. the agnate descendants of the ward’s father; 3. the agnate descendants of the ward’s grandfather, and so on. The rule is that a higher class excludes a lower class, so that the father, who is included in the first class, excludes the brothers, who are included in the second class. The rule that determines the order of priority within each of the classes below the first class is that a descendant closer to one of the ward’s ascendants (the father, the grandfather etc.) excludes a more remote descendant. As for the first class, the earliest Hanafis are divided. Abū Ḥanīfa and Abū Yūsuf in one version hold that a descendant excludes an ascendant, so that the son (on the condition that he is adult and sane) becomes the guardian to the exclusion of the father. Al-Shaybānī holds that an ascendant is given priority over a descendant. Abū Yūsuf in another version

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<sup>28</sup> Hallaq, “From Regional,” 10.

<sup>29</sup> Hallaq, “From Regional,” 19.

<sup>30</sup> Hallaq, “From Regional,” 21.

maintains that the father and the son can independently conclude a marriage for the ward.<sup>31</sup> This is therefore a case of disagreements within the Hanafi school. Nevertheless, they all give the priority to the ascendants and descendants of a ward over the other agnates. This distinguishes their doctrines from that of the Malikis, which divides the *ʿaṣaba* of a ward into classes, which, in order of priority, are: 1. the agnate descendants of a ward; 2. the ward's father and his agnate descendants; 3. the ward's grandfather and his agnate descendants, and so on.<sup>32</sup>

The second example concerns pre-emption (*shufʿa*). On the one hand, many Iraqi jurists reportedly extended the right of pre-emption to a neighbor, and Prophetic hadiths to that effect were put into circulation in Iraq.<sup>33</sup> On the other hand, in Medina, the doctrine put into the mouth of the Prophet and some of the Companions limits the right of pre-emption to co-owners.<sup>34</sup> Therefore, we can oppose the Iraqi doctrine to the Medinan doctrine.

Thus, with respect to positive law, existence or non-existence of a regional school depends on the level of doctrine.

The question that Schacht raised about how personal schools of law, i.e. the Hanafi and Maliki schools, came to predominate respectively in Iraq and the Hijaz deserves a closer examination. Hallaq does not present an answer to this question, but he writes instead:

But it is safe to assume that the reasons had little to do with methodological or purely juristic considerations. Given the underdeveloped nature of the science of *uṣūl al-fiqh* at the time, methodological consciousness was still rudimentary, at least insofar as the lower rung of the legally-interested—the followers, so to speak—were concerned. Be that as it may, there was certainly nothing in the doctrines of these leading scholars, or in their image as authority figures, to bind their followers to them.<sup>35</sup>

<sup>31</sup> Samarqandī, *Tuhfa* (1964), 2:204–05; *ibid.* (1414), 2:149; Kāsānī, *Badāʿiʿ* (1402), 2:250; *ibid.* (1418), 3:376–80; Ṭaḥāwī, *Mukhtaṣar*, 169.

<sup>32</sup> Saḥnūn, *Mudawwana*, 2:161–62; Ibn ʿAbd al-Barr, *Kāfi*, 232.

<sup>33</sup> Sanʿānī, *Muṣannaḥ*, 8:78–79, nos. 14383–89; Ibn Abī Shayba, *Muṣannaḥ*, 4:519–21, nos. 22708–22.

<sup>34</sup> Sanʿānī, *Muṣannaḥ*, 8:79–80, nos. 14391–95; Ibn Abī Shayba, *Muṣannaḥ*, 4:522, nos. 22735–40; Mālik-Yaḥyā, *Muwattaʿa*, 3:376–78; *ibid.*, tr. Bewley, 293a, no. 35.1, 1–3.

<sup>35</sup> Hallaq, “From Regional,” 20–21.

Admittedly, the science of *uṣūl al-fiqh* had not yet been developed in the lifetime of Abū Ḥanīfa. However, al-Khaṭīb al-Baghdādī cites a report that states, “If you want *āthār* or hadith, go to Sufyān, but if you want legal niceties (*daqā’iq*), you must go to Abū Ḥanīfa.”<sup>36</sup> It is highly probable that here the perspective of later generations has been projected back to Abū Ḥanīfa. Nevertheless it is possible to imagine that the skillfulness with which Abū Ḥanīfa dealt with legal cases impressed contemporary jurists and laymen and that he was regarded as the most authoritative jurist in his time for that reason. The same holds true for Mālik, whose doctrine al-Shaybānī and al-Shāfi‘ī identified with the Medinan doctrine.

I am not suggesting that Abū Ḥanīfa and Mālik themselves elaborated a whole system of law: whatever their contribution to the system may have been, part of it must have been created by other jurists active before or during their respective lifetimes. My hypothesis is twofold. First, Abū Ḥanīfa and Mālik were the authoritative representatives of the systems that later took their names, in other words, they emerged as systematizers of the existing rules that had been established prior to them. Second, the jurists active in the first decades of the eighth century, i.e. before Abū Ḥanīfa and Mālik stood out as authoritative jurists in Iraq and Medina respectively, had established the abstract rules that characterize the Islamic law of property, such as the prohibition of *ribā* or the prohibition of ignorance (*jahl*, *jahāla*) and uncertainty (*gharar*). This is to say, in the lifetime of Abū Ḥanīfa and Mālik, it is his skillfulness in applying these rules to individual cases, i.e. “legal niceties” that determined a jurist’s reputation.

I will verify the first hypothesis by examining rules governing civil liability and special types of sale, and how the earliest Hanafis and Mālik elaborated their doctrine on usurpation and the earliest Hanafis produced the concept of direct agency based on the rules governing civil liability and special types of sale respectively.

Why usurpation and direct agency? Anyone who compares the opinions and reports recorded in the *Āthārs* of Abū Yūsuf and al-Shaybānī, and in particular, in the *Muṣannaḥs* of ‘Abd al-Razzāq al-Ṣan‘ānī and Ibn Abī Shayba, with the rules mentioned in the classical legal texts cannot help but be impressed by the diversity of these

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<sup>36</sup> Cited in Juynboll, *Muslim Tradition*, 120.

opinions and reports. Although we may be tempted to posit the existence of a prototype of Islamic law that gradually grew in quality and quantity to become classical law, I maintain that a great number of the diverse opinions advanced regarding various issues disappeared at some point during the generation of the Successors and that of Abū Ḥanīfa in Iraq and of Mālik in Medina. At the same time the bulk of the rules derived from the surviving rules laid the foundation of the system of Abū Ḥanīfa or Mālik, and their followers. What brought about the disappearance of the ancient opinions was the introduction of new principles, many of which were embodied in Prophetic hadiths. As is well known, Islamic law in general, and the law of property in particular, are characterized by many stringent Divine restrictions imposed in a paternalistic vein. If these restrictions were introduced in the course of the first centuries A.H. (contrary to the traditional Muslim view), then those jurists who failed to accommodate various customary transactions to these restrictions, which were introduced because of religious considerations, would prove to be unsuccessful. To be successful, it was also necessary for jurists to establish a consistent system: if the *fatwās* that a jurist issued or the opinions that he transmitted to his disciples frequently contradict one another, his disciples will leave him in search of another master whose doctrine is more consistent. Making a consistent system would not have been an easy task: remember that in the end jurists elaborated the science of *uṣūl al-fiqh* to systematically deduce positive rules from the four 'sources' (*uṣūl*). In my view, the systems of Abū Ḥanīfa and Mālik were successful because they made it possible to achieve this difficult task. In support of this argument, I will examine the process by which the rules regulating usurpation (Chapter One) and direct agency (Chapter Two. For the definition of which, see p. 122–23) were formed and elaborated, because they seem to have been introduced as late as the first decades of the second century A.H. To substantiate this inference, let us compare the chapter headings of the *Āthār* and the *Jāmiʿ al-ṣaghīr* of al-Shaybānī. The *Āthār* is a collection of statements attributed to the Successors, the Companions and the Prophet. It contains numerous statements attributed to Ibrāhīm al-Nakhaʿī that were transmitted to Abū Ḥanīfa via Ḥammād b. Abī Sulaymān. The *Jāmiʿ al-ṣaghīr* is essentially a compendium of the doctrine of Abū Ḥanīfa, together with the opinions of Abū Yūsuf and al-Shaybānī on topics about which they disagree with Abū Ḥanīfa.

When we compare the chapter headings of the two works, we find that several topics mentioned in the *Jāmiʿ al-saghīr* are not found in the *Āthār*, such as suretyship (*kafāla*), transfer of debt (*hawāla*), agency (*wakāla*), acknowledgement of debt (*iqrār*), settlement (*sulḥ*), and usurpation (*ghaṣb*). Statements attributed to the Successors about suretyship, transfer of debt, acknowledgement of debt and settlement are recorded in the *Muṣannaḥ*s of al-Ṣanʿānī and Ibn Abī Shayba, who record no report about agency. As for usurpation, the *Muṣannaḥ* of Ibn Abī Shayba records only one statement attributed to al-Shaʿbī (d. 104/722–3, 105/723–4 or 109/727–8) about it:

Abū Bakr—Wakīʿ—Sufyān—[Sulaymān] al-Shaybānī—al-Shaʿbī: he said, regarding a person who took foodstuffs belonging to another person, i.e. usurped it (*fī rajul akhadha taʿām li-rajul, yaʿnī ghaṣaba-hu*), “He must [return] similar one (*alay-hi mithlu-hu*).”<sup>37</sup>

The phrase, “i.e. usurped it”, which seems to be added by Ibn Abī Shayba or one of those who figure in the *isnād*, may suggest that the legal concept ‘usurpation’ was introduced at some point in time. In fact, in later Hanafī and Malikī texts, hardly any statement is attributed to Successors, Companions, or to the Prophet on the subject of usurpation and direct agency. We can safely assume that the concepts of usurpation and direct agency were introduced in Iraq and Medina by the generation that followed the Successors, the youngest of whom include Qatāda (d. 117/735–6) and al-Zuhrī (d. 124/741–2): in other words, these concepts were introduced shortly before Abū Ḥanīfa (b. ca. 80/699; d. 150/767) and Mālik (b. between 90 and 97/708 and 716; d. 179/795) stood out as representative jurists in their respective regions. Therefore usurpation and direct agency must have been the best tests to measure the ability of a jurist or a group of jurists who sought to create a new religious law without losing touch with social realities and the existing legal tradition. I will argue, in the first two chapters, that the rules adopted by Abū Ḥanīfa or his immediate disciples regarding usurpation and direct agency were based on existing rules that had been espoused by their Iraqī predecessors as well as inspired by norms embodied in Prophetic hadiths. I will argue also that the same is true of rules adopted by Mālik with regard to usurpation.

<sup>37</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:559, no. 23115.

As for the second hypothesis, namely that the jurists active in the first decades of the eighth century had established the abstract rules that characterize the Islamic law of property, I will verify it, in Chapter Three, through the analysis of the prohibition of *ribā*. In the times of Abū Ḥanīfa and Mālik, the prohibition had been crystallized into Prophetic hadiths. But a closer examination of the early sources will reveal that at least part of the rules that Abū Ḥanīfa or Mālik explained as an application of the prohibition were introduced no earlier than 75/694–5 to regulate specific transactions. This indicates that these rules were abstracted to be embodied in the Prophetic hadiths in the first decades of the eighth century C.E., i.e. before Abū Ḥanīfa and Mālik stood out as authoritative jurists in their respective regions.



## CHAPTER ONE

### CIVIL LIABILITY

Schacht writes, “Questions of liability form one of the most intricate subject matters in the Islamic law of obligations.”<sup>1</sup> It is common to every legal system that questions of liability are delicate and complicated, for they are reduced to the question of determining who is responsible for the loss that has been occasioned, so that the interests of the parties are in acute conflict. As in any other legal system, in Islamic law the criteria by which the attribution of liability is determined depend on values of its jurists and of the Muslim society at large. This may explain why many scholars have studied the subject, including Emile Tyan (1926), Jacques el-Hakim (1964), Muṣṭafā Aḥmad al-Zarqā’ (1967–68), ‘Alī al-Khafif (1971), Chafiq Chehata (1973), Wahba al-Zuhaylī (1982) and Muḥammad Aḥmad Sarraj (1990).

But these authors, who rely mainly on the classical legal texts, do not pay due attention to the historical process by which the system of liability was formed. In the following pages I will try to trace the development of the system of liability that results from torts and the possession of an object by closely examining the legal texts dating mainly from the eighth or ninth centuries. In Section 1, I define the term ‘*ḍamān*’ which is at the center of the system of liability, and summarize the theory of the jurists from about the eleventh century onwards. In Section 2, I examine the theory of the earliest Hanafis and their Iraqī predecessors regarding the liability that results from what was later called ‘indirect cause’ (*tasabbub* or *tasbīb*). Section 3 deals with the positive solutions adopted by the Iraqī and Medinan jurists on the subject of *ḍamān* in pledge, hire, the sale of a specific object and usurpation. Their close examination will shed light on how Muslim jurists elaborated a unique system of liability.

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<sup>1</sup> Schacht, *Introduction*, 147.

*Section 1 Generality of ḍamān and its attribution*

The concept of *ḍamān* denotes who is liable for a loss occasioned in a wide range of cases, e.g. when an object is destroyed or a man is killed or injured due to a human act or by a natural disaster; or a man who suffers damage or loss as a result of acting in reliance upon someone; or a man whose property is confiscated as a consequence of false testimony. To take some examples, if *A* destroys an object belonging to *B*, and the object is a fungible thing, *A* must provide *B* with an object of the same kind; if it is not fungible, *A* must pay to *B* the value of the destroyed object as assessed on the date of destruction. In such a case, *A*'s liability for the damage is expressed as “*al-ḍamān ‘alā A.*” But this expression is also used in other contexts. According to the Hanafis and Shafi‘is, if the specified object of a sale perishes due to a natural cause before it is delivered to the buyer, the buyer is exempt from payment of the price. In this case the jurists say, “*ḍamān* is attributed to the seller (*al-ḍamān ‘alā al-bā’i*)” to express that the object perishes at the seller’s risk. Likewise, according to the majority opinion, if an object that an artisan receives from his client for processing perishes due to a natural cause, in principle, the artisan must provide his customer with an object of the same kind if it is a fungible thing; if it is not fungible, the artisan must pay the customer its value as assessed on the date on which the artisan received it. Also in this case the jurists say, “*ḍamān* is attributed to the artisan (*al-ḍamān ‘alā al-ṣāni*).”

If damage to a human body is caused deliberately (*‘amd*) and as a result of a direct assault, the victim or his heirs can choose retaliation (*qiṣāṣ*) or payment of blood-money (*diya*) in the form of cash or camels. If the damage is caused by accident (*khaṭa*), quasi-deliberately (*shibh ‘amd*), or as a result of an indirect assault (whether done deliberately, quasi-deliberately or by accident), blood-money is no longer optional. Strictly speaking, blood-money claimed in case of injuries other than homicide (*mā dūna al-naḥs*) is called *arsh* or *diya*.<sup>2</sup> But the term *ḍamān* is also used.

Although *ḍamān* is a comprehensive concept, fewer damages are covered by *ḍamān* than by the civil liability as we conceive. First,

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<sup>2</sup> Emile Tyan, “*Diya*,” in *EI*, new edition, 2:340b–343a; Robert Brunschwig, “*‘Ākila*,” in *EI*, new edition, 1:337b–340a; Aḥmad Muḥammad ‘Assāf, *Aḥkām*, 2:538–39.

there is no *damān* with regard to mental anguish. Second, a person who owes *damān* is liable only to the extent of the primary damage. He is not required to make up for secondary damage or lost profits. With regard to damage to a thing, his liability does not go beyond supplying another object of the same kind or providing compensation for the decrease in value due to the damage. This is because the Muslim jurists tend to avoid uncertain and subjective judgments, e.g. about the extent to which a person who caused damage is liable for secondary damages. The following examples illustrate this point of view.

(1) Al-Shaybānī states as follows in his *Amālī*: *A* said to people referring to *B*, “Do business with this slave who belongs to me (*bāyīʿū ʿabdī hādihā*).” Subsequently *B* engaged in commerce with them and incurred heavy debts. Subsequently, it was established that *B* was a free person or that *A* manumitted him before *A* told people to do business with *B*. According to Abū Ḥanīfa, the creditors have two options: first, they can demand that *B* pay his debts; second, they can demand that *A* pay the debts that *B* owes to them within the limit of *B*’s value if he were a slave; this is because *A* deceived people, even though he did not guarantee *B*’s debt, for had *B* been a slave, he would have been sold to satisfy the creditors. If, however, *A* said to people, “Do business with this man, whom I have authorized to do business (*bāyīʿū hādihā. Fa qad adhintu la-hu fī al-tijāra, fa-bāyīʿū-hu*),” without saying that *B* was his slave, the creditors can demand nothing from *A*, because *A* did not say that *B* was his slave.<sup>3</sup>

What is the source of the difference of solution between the case in which *A* said that *B* was his slave and the case in which he did not mention *B*’s status? According to Abū Ḥanīfa (or possibly al-Shaybānī), “this is because *A* deceived people, even though he did not guarantee for *B*’s debt, for had *B* been a slave, he would have been sold to satisfy the creditors.” The rule underlying this statement is that if a slave who has been authorized by his owner to do business (such a slave is called *maʿdhūn* or *maʿdhūn la-hu fī al-tijāra*) becomes insolvent, the slave may be sold to satisfy his creditors unless his owner pays his debts. Therefore Abū Ḥanīfa seems to have reasoned as follows: in the former case the creditors can demand that *A* pay *B*’s debt because it is clear that *A*’s statement caused them to

<sup>3</sup> Shaybānī, *Amālī*, 56–57.

make a transaction with *B*, for *A* made them believe that *B* would be sold to satisfy them in the event that *B* became insolvent; in the latter case they may not hold *A* responsible because other reasons may have prompted the creditors to make a transaction with *B*, for *A*'s statement does not necessarily imply that *B* is a slave. But al-Sarakhsī (d. 483/1090 or 490/1096) gives a different explanation to the following solution adopted by Abū Ḥanīfa.

(2) A female slave *C* tricked *D* into marrying her, saying that she was a free person, and as a result, *D* paid her a dower larger than normally given to a female slave. Subsequently she gave birth to *D*'s child. Abū Ḥanīfa holds that the marriage is canceled [on *D*'s demand] and that *D* can demand that *C* pay him the same amount of money as he has paid to her owner to recover his child, when she is manumitted.<sup>4</sup>

Abū Ḥanīfa would have explained his solution as follows: it is obvious that *D* decided to marry *C* because of the latter's false statement, for he paid a dower larger than normally given to a female slave. This is why *D* can demand that *C* compensate him for the loss that he incurred as the result of her false statement. However, commenting on this solution, al-Sarakhsī states:

He can demand that the female slave pay the value of his child when she is manumitted, because she deceived him when she married him, causing him to believe that she was a free person. *Ḍamān* due to fraud (*ḍamān al-gharar*) is similar to *ḍamān* based on a security (*ḍamān al-kafāla*), for she guaranteed to him that the child would belong to him when she affirmed that she was free in concluding the marriage contract. *Ḍamān* based on a security is due when she is manumitted.<sup>5</sup>

Whether a man is born as a free person or as a slave depends on whether his mother is a free person or a slave. If a free woman who is married to a free person gives birth to a child, the child is free and his father is the husband of his mother. If a female slave who is married to a free person gives birth to a child, his father is the husband of his mother, but the child is at the same time a slave belonging to his mother's owner. Taking these rules into account, al-Sarakhsī reasoned as follows: to make *C* indemnify *D* for the loss

<sup>4</sup> Shaybānī, *Hujja*, 3:193–94.

<sup>5</sup> Sarakhsī, *Mabsūṭ* (n.d.), 5:116; *ibid.* (1421), 5:110. The case on which al-Sarakhsī comments is slightly different from the case cited here.

incurred through redemption, Abū Ḥanīfa invoked a legal fiction: by declaring herself to be a free person, *C* promised to realize the same profit as *D* would have earned if she were a free person, e.g. to have a free child. Because *C* was engaged to give a free child to *D*, he has the right to make *C* compensate him for the expenses incurred by him to redeem his child. It is not clear why al-Sarakhsī assimilates liability arising from fraud to liability based on a security. But I surmise that he wanted to base *C*'s liability on a firmer ground, than the causal relationship between *C*'s false statement and the loss that *D* incurred, because strictly speaking *C*'s false statement is at most only one of the causes that led to *D*'s loss, for *D* would not have incurred the loss if he had chosen not to redeem his child. It could even be said that his choice was the immediate cause of the loss.

The doctrinal development of *ḍamān* is ultimately reduced to the jurists' search for a theory or a system that justifies making someone provide compensation for damage or loss for which he has not declared himself liable. For example, if someone engages in a sale transaction according to which he is to pay 5 dinars, he owes 5 dinars to the seller because he declared his intent to this effect, subject to the condition that the seller transfers ownership of the object to him. But if the object perishes in its entirety due to a natural cause before the buyer takes possession of it, the jurists are divided over the question about whether or not the buyer is exempt from the payment of 5 dinars. The buyer does not intend to pay 5 dinars if he cannot take possession of it; thus we are dealing with a problem of *ḍamān*. Therefore, if jurists cannot advance a persuasive ground why the buyer is liable, he will be exempt from *ḍamān*. As will be demonstrated, Muslim jurists were originally hesitant to assign liability to anyone unless they caused damage or loss in the most direct and immediate way or acted in a way that was likely to cause damage or loss. The later jurists went further to establish a narrower conception of the causal relationship, if the basis of liability is a destructive act (*itlāf*, see pp. 20–21). Certainly jurists introduced concepts of liability arising from possession of an object and sporadically took recourse to the fictitious "*ḍamān* based on a security" to cover damage or loss due to causes other than destruction, but they did not elaborate a theory to cover secondary damage or lost profits. This is reflected in their tripartite system of *ḍamān*. For example, the Maliki jurist al-Qarāfī (d. 684/1285) divides the causes of damage or loss that give rise to *ḍamān* into three groups:

- (1) Direct ‘assault’ (*udwān*) such as homicide, arson, destruction of a house and consumption of foodstuffs.
- (2) Indirect cause (*al-tasabbub li-l-ittlāf*), e.g. (a) someone digs a hole on land belonging to others, or land that he owns for the purpose of killing an animal; subsequently an animal belonging to others falls into the hole and dies; (b) someone starts a fire near a field and the field products are burned; (c) someone makes a false charge against someone else, as a result of which the latter’s property is confiscated by the authority; or (d) someone gives a false testimony or destroys a document to make someone else lose his right.
- (3) The third cause is “the possession of an object which is not based on a fiduciary relationship (*wadʿ al-yad allatī laysat bi-muʿtamana*),” i.e. a possession whose author (possessor) is liable for any loss of the possessed object unless it is attributed to an act of its owner. If a possession is based on a fiduciary relationship, the possessor is not liable for any loss whether the loss is attributed to a natural cause or to a third person.<sup>6</sup>

Direct cause and indirect cause are often classified under the rubric of ‘destruction’ (*ittlāf*). In the following pages, I will try at first to reconstruct the original theory of the indirect cause (Section 2). Then I will examine in details the positive rules concerning the *damān* arising from possession (Section 3).

### *Section 2 Indirect cause*

According to the classical theory, direct cause refers to an act that leads directly to damage or loss of an object. The Hanafi jurist al-Kāsānī (d. 587/1191) observes that damage is said to be the result of “direct cause (*mubāshara*)” when it is occasioned by “bringing a tool in contact with the destroyed object (*iṣāl al-āla bi-maḥall al-talaḥ*);” and he says that damage is said to be the result of “indirect cause (*tasabbub*)” when it is occasioned by “an act performed with an object that in the ordinary course of events leads to the destruction of

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<sup>6</sup> Qarāfi, *Furūq*, 2:206–08.

another object (*al-fīl fī mahall yufdī ilā talaf ghayri-hi ‘ādatan*).<sup>7</sup> The distinction is exemplified by the cutting of a rope a lamp is hanging on: the act of cutting is the direct cause of the destruction of the rope, while it is the indirect cause of the destruction of the lamp.<sup>8</sup> One who makes a direct cause is called *mubāshir*, and one who makes an indirect cause is called *mutasabbib*. The reason why this distinction is important is that the *mubāshir* is liable for the damage or loss unconditionally, whereas the *mutasabbib* is liable only when the act is illegal, or deliberate, i.e., he intends to cause damage or loss, or foresees that damage or loss will result from his act.<sup>9</sup>

The later Hanafi jurists understood the causal relationship very narrowly. Thus, if someone splits a skin, with the result that a solid oily substance conserved in it spills out and melts in the sun, he is not liable for the loss of the oily substance, which is attributed to the sunlight. Likewise, if someone throws the corpse of a sheep into the river, and after a short pause, the corpse is carried down stream and eventually destroys a watermill, he is not liable for the damage, because it is attributed “not to the person who threw the corpse, but to the stream.”<sup>10</sup>

The classical theory may be summarized as follows:

- (1) If the initial act qualifies as a direct cause, the performer is unconditionally liable for the damage or loss.
- (2) If the initial act qualifies as an indirect cause, the performer is liable for the damage or loss only if the initial act was illegal or performed deliberately.
- (3) If there is no causal relationship between the initial act and the damage or loss, the performer is not liable.

When and how were the classical theory and, in particular, the concepts of “direct cause” and “indirect cause” formed? Tyan, who dedicated the most detailed analysis to the question of liability arising from destruction, argued as follows: the Aquilia law<sup>11</sup> prescribed a

<sup>7</sup> Kāsānī, *Badā’i’* (1402), 7:165; *ibid.* (1418), 10:70–71.

<sup>8</sup> *Majalla*, art. 888; Tyan, *Système*, 202; Cardahi, *Droit et morale*, 1:324.

<sup>9</sup> Jacques el-Hakim, *Dommage*, 103; Zarqā’, *Madkhal*, 2:1044–47.

<sup>10</sup> Tyan, *Système*, 156; Berger-Vachon, “Contribution,” 5–6.

<sup>11</sup> The Aquilia law was enacted in 286 B.C. or around the turn of the third century B.C. in the Roman Republic. Articles 1 and 3 of it provide about the tort.

sanction against an offense only when it was caused ‘*corpore et corpori*,’ i.e., by physical contact. Similarly, the *Institutes* of Justinian opposes damage caused ‘*corpore et corpori*’ to damage that was not caused ‘*corpore et corpori*.’ “Ayant eu, à n’en pas douter, ces textes sous les yeux, puisqu’ils étaient en application en Syrie, notamment, lors de la conquête musulmane,” Muslim jurists, who were eager to place restraints on the application of retaliation,<sup>12</sup> must have been inspired by the Roman law when they ruled that only when a homicide is committed by *mubāshara* (i.e. ‘*corpore et corpori*’) is the offender subject to retaliation.<sup>13</sup>

In addition to Tyan’s assertion that the Muslim jurists were familiar with the Roman texts, his argument is dubious, for the terms ‘*mubāshara*’ and ‘*tasabbub*’ do not appear in the earliest legal texts, as he suggests,<sup>14</sup> and he does not demonstrate how these terms came to be used in the Muslim legal texts.

To clarify how and when the concepts of “direct cause” and “indirect cause” were formed, I will first examine the positive solutions adopted by the earliest Hanafis and their Iraqi predecessors, and I will then try to establish how the classical theory took shape.

### 1. *The Iraqi doctrines*

I will now examine the positive solutions adopted by the earliest Hanafis and their Iraqi predecessors regarding the liability of a person who digs a well on a public road in which a passer-by or an animal falls and is killed, a person whose animal injures someone, and a person whose wall collapses and injures someone. To determine liability, the later Hanafis ask whether or not the initial act led to the damage or loss by a direct cause (*mubāshara*) or by an indirect cause (*tasabbub* or *tasbīb*). Upon closer examination, however, the earliest legal texts reveal that the early jurists including the earliest Hanafis did not take into consideration the existence or non-existence of a close causal relationship between an initial act and the damage or loss arising from it in deciding whether or not the one who performed the act is liable.

<sup>12</sup> For the retaliation, see Tyan, *Système*, 84–100.

<sup>13</sup> Tyan, *Système*, 206–07.

<sup>14</sup> Tyan writes that the jurists, in particular those of “the period we can call classical (fifth and sixth centuries) speak of *mubāshara* and *tasabbub*.” Tyan, *Système*, 205.

*Injuries caused by a structure*

Abū Yūsuf writes as follows: *A* employed *B* to dig a well along a public road without obtaining permission from the authority (*sulṭān*). If *C* subsequently falls in it and is killed, *A* is liable for *C*'s death and payment of blood-money is incumbent upon his *‘āqila*.<sup>15</sup>

The liability assumed by a person who builds a structure illegally, as in this case, is based upon the Prophetic hadith, "A person who places something outside his limit is liable [for the blood-money] if it injures someone (*man akhrajā min ḥaddi-hi shay’an fa-aṣāba insān, fa-huwa la-hu dāmin*)."<sup>16</sup> The rule that a person who places a structure along a public road or outside his estate is liable for the damage it causes is also ascribed to ‘Alī, Shurayḥ and al-Ḥasan al-Baṣrī.<sup>17</sup>

According to later jurists, this Prophetic hadith exemplifies the principle that a person who commits an illegal act is liable for damage or loss it causes in the ordinary course of events, or in other words, if the act is the indirect cause of the damage or loss. In fact, we have seen that al-Qarāfī gives as an example of indirect cause the digging of a well on the estate of another, following which an animal falls into the well and dies. As noted, the Hanafī jurist al-Kāsānī defines 'indirect cause' as "an act performed with an object that in the ordinary course of events leads to the destruction of another object."<sup>18</sup> That the later Hanafī jurists understood the causal relationship very narrowly, as suggested by this definition, has been best illustrated by the cases of a person who splits a skin containing a solid oily substance, and a person who throws the corpse of a sheep into the river.

However, there seems to be no such close causal relationship between the digging of a well and the death of an animal or a man. In fact, al-Sarakhsī reasons as follows, regarding the case in which a passer-by falls into a well that was dug illegally and dies: the "cause (*sabab*)" that led to the damage is the weight of the person who fell into the well: the digging of a well was merely a "condition (*shart*)"

<sup>15</sup> Abū Yūsuf, *Kharāj* (1981), 318. *‘Āqila* is "the group of persons upon whom devolves, as the result of a natural joint liability with the person who has committed homicide or inflicted bodily harm, the payment of compensation in cash or in kind." Robert Brunschvig, "‘Āqila," *EL*, new edition, 1:337b–338a.

<sup>16</sup> Ṣan‘ānī, *Muṣannaf*, 10:74, no. 18407.

<sup>17</sup> Ibn Abī Shayba, *Muṣannaf*, 5:398–99, nos. 27344, 27348–49, 27353–54.

<sup>18</sup> Kāsānī, *Badā’i’* (1402), 7:165; *ibid.* (1418), 10:70–71.

that contributed to the damage, for the victim lost thereby the “grip (*maska*)” that kept him in contact with the ground. But inasmuch as no one can be made liable for the victim’s weight, the person who dug the well is held liable metaphorically (*majāzan*).<sup>19</sup> The fact that al-Sarakhsī is forced to take recourse to such a scholastic reasoning suggests that the existence or non-existence of a close causal relationship was originally irrelevant to the question of whether or not the person who dug the well is liable. I will demonstrate this by considering the following reports.

(1) Ibrāhīm al-Nakha‘ī reportedly said: ‘Amr b. al-Ḥārith dug a well along a public road and a donkey fell into the well and was killed. People complained to Shurayḥ (d. between 76 and 80/695 and 700), saying, “Oh Abū Umayya [viz. Shurayḥ], is the well liable (*a-‘alā al-bi’r ḍamān*)?” Shurayḥ said, “No, ‘Amr b. al-Ḥārith is [liable].”<sup>20</sup> A version of this report recorded in the *Sunan* of al-Bayhaqī adds a statement attributed to Ibrāhīm al-Nakha‘ī, “The well was [dug] along the road without entitlement (*wa-kānat al-bi’r fī al-ṭarīq bi-ghayr ḥaqq*).”<sup>21</sup>

(2) Al-Sha‘bī (d. 104/722–3, 105/723–4 or 109/727–8) reportedly said: ‘Amr b. al-Ḥārith dug a well in front of the entrance to the house of a certain ‘Usāma. Subsequently the well filled up with rainwaters, and a horse fell into it and was killed. When people brought the case before Shurayḥ, he held ‘Amr liable, saying “I make you liable for this once (*innamā uḍammīnu-ka marratan wāḥidatan*).”<sup>22</sup>

These reports, which seem to refer to the same event, allude to the tension between two bases of liability. In report (1), when the people asked, “Oh Abū Umayya, is the well liable?” they seem to have intended to hold the owner of the house (“‘Usāma” in report (2)) in front of which the well was dug liable, for Shurayḥ responded, “No, ‘Amr b. al-Ḥārith is [liable].” Taken literally, the question, “Oh Abū Umayya, is the well liable?” may be understood as implying that no one is liable for the accident. But the plaintiffs must have asked Shurayḥ if the owner of the house was liable. Why did they not hold ‘Amr liable? This is certainly because of the principle embodied in the Prophetic hadith, “There is no liability in case of

<sup>19</sup> Sarakhsī, *Mabsūṭ* (n.d.), 27:14–15; *ibid.* (1421), 27:17.

<sup>20</sup> Šan‘ānī, *Muṣannaḥ*, 10:73, no. 18404.

<sup>21</sup> Bayhaqī, *Sunan*, 8:111.

<sup>22</sup> Abū Yūsuf, *Āthār*, 222, no. 985.

[killing by] a well.”<sup>23</sup> The exact meaning of this hadith is suggested in the statement attributed to ‘Amr b. Dīnār (d. 125/742–3 or 126/743–4, over 70 years old), “There is no liability in the case of [killing by] a stallion, there is no liability in the case of a mine, there is no liability in the case of a well (*al-bīʿr jubār*).”<sup>24</sup> As will be demonstrated, the Prophetic hadith, “There is no liability in the case of killing by an animal,” means that neither the owner nor the possessor of a tame animal (i.e. an animal that is not likely to cause damage) is not, in principle, liable for any injury or death caused by the animal. Therefore, the statement “there is no liability in the case of [killing by] a well” also means that a person who digs a well is not liable for the damage it causes, because empirically a well is not likely to cause damage. The question then arises: on which ground did the plaintiffs intend to hold the owner of the house liable? I infer that their claim was grounded on the presumption that the owner of the house benefited from the well, for example, by drawing water from it. Moreover, the owner of a house has a right to make a temporary use of the space (*fināʿ*) around his house or to dig a well there.<sup>25</sup> In this connection, it is interesting to note that Abū Yūsuf writes as follows: a merchant told his employee to sprinkle water on a public road, and, as a result, a person died. Abū Yūsuf writes that the merchant is liable, because “the benefit of sprinkling belongs to the person who issued the order (*manfaʿat al-rashsh li-l-āmīr*).”<sup>26</sup> That is to say, because the merchant benefits from the sprinkling of water, he is liable for damage arising from it. The same principle could be invoked for the liability of the owner in report (1). As I will demonstrate in Section 3, this principle plays a crucial role in the rule-system for liability based on possession.

The exchange between the plaintiffs and Shurayḥ, who responded in the negative to the question of the plaintiffs, suggests that Shurayḥ’s

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<sup>23</sup> Ṣanʿānī, *Muṣannaf*, 10:65–66, nos. 18373–75; Bukhārī, *Ṣaḥīḥ*, zakāt, 66; *ibid.*, tr. Siddiqī, 2:336.

<sup>24</sup> Ṣanʿānī, *Muṣannaf*, 10:65, no. 18372.

<sup>25</sup> Shaybānī, *Aṣl*, 4:517. *Fināʿ* refers to the interior courtyard of a house. For this concept, see Hakim, *Arabic-Islamic Cities*, 27–29.

<sup>26</sup> Abū Yūsuf, *Kharāj* (1981), 318; *ibid.*, tr. Fagnan, 248. Al-Shaʿbī is reported to have held a fuller who sprinkled water outside his estate liable when someone slipped on the water and was injured. Ṣanʿānī, *Muṣannaf*, 10:73, no. 18402. But it is not clear whether al-Shaʿbī adopted this solution on the same ground as Abū Yūsuf or he took into consideration the illegality of the fuller’s act.

decision was based on an unfamiliar idea to the plaintiffs, i.e. a person who does an illegal act is liable for the damage arising from the act, even if it is unlikely to cause damage. This is suggested also by Shurayh's statement in report (2), "I hold you [viz. 'Amr] liable for this once." As will be indicated, the owner of a leaning wall is liable for damage caused by it once he has become aware of the danger it presents. Therefore the statement seems to have been intended to hold the owner ("Usāma" in (2)) liable for an accident that would occur the next time on the same ground.

I conclude, from the foregoing arguments, that the principle embodied in the Prophetic hadith, "A person who places something outside his limit is liable [for the blood-money] if it injures someone" was contrary to the traditional view according to which one is held liable only if his act is likely to cause damage or loss, i.e. he can foresee that damage or loss will result from his act. We will see that even the earliest Hanafis were reluctant to generalize the principle introduced by the middle of the eighth century, which held a person who does an illegal act liable for the damage or loss that arises from it, regardless of foreseeability.

#### *Injuries caused by an animal*

The Prophet is reported to have said, "There is no liability in the case of killing by an animal (*mā qatala al-ʿajmāʾ jubār*),"<sup>27</sup> or "There is no liability in the case of injuries by an animal (*al-ʿajmāʾ jubār bi-jarhi-hā*),"<sup>28</sup> or "There is no liability in case of animal (*al-ʿajmāʾ jubār*)." <sup>29</sup> That is to say, the owner or possessor of an animal is not liable for the damage it has caused by itself. Tyan attributes this principle to the tendency of Muslim jurists to consider civil as well as penal liability strictly personal: because an animal is a living thing that possesses free will, its owner is not responsible for any damage it causes.<sup>30</sup> However, I disagree with this interpretation, because this principle does not apply to any damage caused by any animal. Consider the following points.

<sup>27</sup> Ṣanʿānī, *Muṣannaf*, 10:66, no. 18375.

<sup>28</sup> Ṣanʿānī, *Muṣannaf*, 10:67, no. 18377.

<sup>29</sup> Shaybānī, *Āthār*, 75b; Ṣanʿānī, *Muṣannaf*, 10:65, nos. 18373–74.

<sup>30</sup> Tyan, *Système*, 240.

First, the owner of a vicious animal is, in principle, liable for the injury it causes. Tyan refers to this rule, but he explains it as an exception to the principle that there is no liability for damage caused by an animal.<sup>31</sup> But this rule is attributed to a number of Iraqi jurists prior to the earliest Hanafis. Thus Shurayh,<sup>32</sup> al-Sha‘bī<sup>33</sup> and Ibrāhīm al-Nakha‘ī<sup>34</sup> are reported to have stated: if someone enters a house with the permission of its residents, and a vicious dog belonging to the residents injures him, they are liable for the injury. But if someone enters a house without their permission, they are not liable for the injury. The Basran traditionist Qatāda is reported to have said that the owner of a vicious dog is liable for any injury it causes outside his house.<sup>35</sup> Therefore, the principle “No liability in the case of an animal” was, from the beginning, limited to damage caused by a tame animal.

Second, there are cases in which the possessor of a tame animal, i.e. ‘animal’ as in the above-cited Prophetic hadiths, is liable for the damage it causes. I will examine such cases, relying mainly on the *Aṣl* of al-Shaybānī, who considers four hypotheses.

(1) In the first hypothesis, the possessor is riding on the animal on a public road (*ṭarīq al-muslimīn*). According to al-Shaybānī, (a) if the animal tramples on and kills someone with its forefoot or hind legs, while running, the possessor is liable for the death, so that his ‘*āqila*’ is liable for the payment of the blood-money, while he must perform an expiatory act (*kaffāra*). The death is treated as if it had been caused by “the hand of the man (*bi-yad al-rajul*).” (b) The possessor is liable for neither an injury the animal causes while standing on its hind legs, nor an injury caused by its tail.<sup>36</sup>

Why do cases (a) and (b) have different solutions? Al-Shaybānī says, with regard to case (a), that the limbs of the animal are assimilated to the hands of the rider, that is to say, the animal is under the rider’s control. Conversely, in case (b), the animal that is standing on its hind legs is not under the control of the rider. And he cannot control its tail in either situation. To the Kufan jurist Ibrāhīm

<sup>31</sup> Tyan, *Système*, 245–46.

<sup>32</sup> Ibn Abī Shayba, *Muṣannaḥ*, 5:430–31, no. 27710.

<sup>33</sup> Ibn Abī Shayba, *Muṣannaḥ*, 5:430, no. 27706.

<sup>34</sup> Ibn Abī Shayba, *Muṣannaḥ*, 5:430, no. 27709.

<sup>35</sup> Ṣan‘ānī, *Muṣannaḥ*, 10:75, no. 18412.

<sup>36</sup> Shaybānī, *Aṣl*, 4:496–98.

al-Nakha'ī is attributed the same point of view. He reportedly stated that the rider of an animal is “liable for [damage caused by] the forefoot, but not liable for [damage caused by] the hind legs”:<sup>37</sup> the rider controls the forefoot of the animal, but not its hind legs.

However, Ibrāhīm is also credited with a statement to the effect that if a horse kills someone while it is out of the rider’s control, the rider is liable for the death, since “he is assimilated to a person who shoots an arrow at a bird and kills someone with it.”<sup>38</sup> The underlying idea here appears to be that a person who has created a dangerous situation is liable for the damage resulting from it. Conversely al-Shaybānī seems to have reasoned as follows: on the one hand, the act of the animal is not assimilated to that of the rider. On the other hand, he is presumed not to have foreseen that a tame animal would cause damage. This seems to be why al-Shaybānī does not make the rider liable.

(2) The second hypothesis deals with a person who makes an animal stop (*awqafa*) on a public road or in a house without the permission of the owner of the house. In the *Aṣl*, al-Shaybānī makes the person who causes an animal to stop liable if the animal kills someone whatever the nature of the assault on the victim.<sup>39</sup> Al-Sha‘bī is reported to have said that a person who stops his animal on a public road is liable for any damage it causes.<sup>40</sup> Al-Shaybānī explains his position as follows:

In any situation in which a rider would be liable for damage, he [viz. the person who stops an animal] is liable too, because he stops [the animal] in a place that he does not own and where he is not authorized to stop it. It is permitted to ride [an animal] on a public road, but not to [make it] stop there.<sup>41</sup>

That is to say, the condition under which a person who has committed an illegal act (e.g. stopping an animal on a public road) is liable for eventual damage is more relaxed than in the case of a person who has committed no illegal act (e.g. the person who rides an animal on a public road). Al-Shaybānī continues: if the owner of an animal stops it in a house that belongs to him but which he

<sup>37</sup> Ṣan‘ānī, *Muṣannaf*, 10:69, no. 18387.

<sup>38</sup> Ṣan‘ānī, *Muṣannaf*, 10:69, no. 18387.

<sup>39</sup> Shaybānī, *Aṣl*, 4:499.

<sup>40</sup> Ṣan‘ānī, *Muṣannaf*, 10:69, no. 18386.

<sup>41</sup> Shaybānī, *Aṣl*, 4:499.

is leasing, without the permission of the lessee and the animal injures the lessee, he is liable for the injury.<sup>42</sup>

The same idea is at the basis of the solution cited in the *Amālī* of al-Shaybānī: *A* made an animal belonging to *B* stop on the road. Before the animal could move, someone stumbled over it and was killed. Even if *B* had been able to move the animal but failed to do so, *A* (rather than *B*) is liable for the death, for unlike a human being “an animal cannot [usually] cause damage if it has been stopped on a road (*al-bahā'im lā tajnī bi-wuqūfi-hā fī al-ṭarīq*).”<sup>43</sup> I have noted that the principle, “There is no liability in the case of killing by an animal,” applies only to a tame animal that is not likely to injure someone. This is why *B* (the owner of the animal), even if he deliberately left the animal as it was, is not liable for the death it caused. Therefore, al-Shaybānī here takes into consideration the illegality of the act of stopping an animal on a public road to hold *A* liable, even though the animal is unlikely to cause damage. But the reasoning of al-Shaybānī implies that if *A* stopped a vicious animal, *B* would be held liable for damage caused by it for having failed to remove it. This suggests that the illegality of an act is not a self-evident ground for liability even for al-Shaybānī.

(3) Third, al-Shaybānī considers the liability of a person who possesses an animal and releases it on a public road. He envisages four cases.

- (a) If the animal injures someone who is in front of it, the possessor is liable, but he is not required to perform an expiatory act.<sup>44</sup>
- (b) Once the animal inclines to the right or the left, the possessor is no longer liable, for “it has departed from its original position (*qad taghayyarat 'an ḥālī-hā*).”<sup>45</sup>
- (c) If the animal begins to walk after a short pause, the possessor is no longer liable.<sup>46</sup>
- (d) If someone pushes the animal, he is liable for any injury it causes immediately after that (*fī fawri-hā*).<sup>47</sup>

<sup>42</sup> Shaybānī, *Aṣl* (MS), 19b.

<sup>43</sup> Shaybānī, *Amālī*, 54.

<sup>44</sup> Shaybānī, *Aṣl*, 4:499.

<sup>45</sup> Shaybānī, *Aṣl*, 4:499; idem, *Amālī*, 54.

<sup>46</sup> Shaybānī, *Aṣl*, 4:499.

<sup>47</sup> Shaybānī, *Aṣl*, 4:499.

Al-Ḥasan al-Baṣrī (b. ca. 22/642–3; d. 110/728) and Ibn Sīrīn (b. 34/654–5; d. 110/728–9) are reported to have held that a person who possesses an animal and releases it is not liable for any damage it causes, without making any subtle distinctions.<sup>48</sup> Ḥammād and al-Ḥakam [b. Ayyūb] are credited with the opinion that if the possessor of an animal releases it and it injures someone without having moved from its place, he is not liable.<sup>49</sup> Certainly this implies that once the animal has moved from the original place, the possessor is not liable. Only al-Shaʿbī is reported to have held a person who releases his animal liable.<sup>50</sup>

(4) The fourth hypothesis refers to the possessor who stops an animal on his estate. Al-Shaybānī holds that he is not liable for any damage the animal causes, because it is permitted for him to stop it there.<sup>51</sup> The same view is attributed to Sufyān al-Thawrī.<sup>52</sup> Similarly, according to Abū Ḥanīfa, if a person enters an estate with or without the permission of its owner, and he falls into a well or is injured by an animal that belongs to the owner of the estate, the owner is not liable for the injury.<sup>53</sup>

Whereas hypothesis (4) presents no difficulty, it is difficult to harmonize the solutions adopted in hypotheses (2) and (3): in hypothesis (2) the owner of an animal is always liable, for, according to al-Shaybānī, he has committed an infraction by stopping an animal on the public road. By analogy, the same solution appears to be adopted with respect to hypothesis (3), for it seems that the act of releasing an animal on a public road is not different from the act of stopping it there from the point of view of legality: if it is illegal to stop an animal on the public road, it should be also illegal to release an animal there. But al-Shaybānī hesitates to make the person who releases his animal fully liable: rather he makes the person liable only if the animal injures someone else while it remains in the situation in which it was when released. In other words, he is liable only when the animal can be considered to be under the control of the person who released it. This reasoning echoes the solution to

<sup>48</sup> Ibn Abī Shayba, *Muṣannaf*, 5:401, no. 27381.

<sup>49</sup> Ibn Abī Shayba, *Muṣannaf*, 5:401, no. 27383.

<sup>50</sup> Ibn Abī Shayba, *Muṣannaf*, 5:401, no. 27382.

<sup>51</sup> Shaybānī, *Asl*, 4:500.

<sup>52</sup> Ṣanʿānī, *Muṣannaf*, 10:68, no. 18384.

<sup>53</sup> Shaybānī, *Amāli*, 52.

hypothesis (1), where al-Shaybānī makes the rider liable only when it is possible to assimilate the limbs of the animal to “the hand of the man [viz. the rider] (*bi-yad al-rajul*).”

Is al-Shaybānī reluctant to deem it illegal to release an animal on a public road? If so, why? One answer to this question is suggested in his *Āthār*. He states here: if a riderless or unaccompanied animal that has been hitched (*muta‘alliqā*) tramples someone to death, the possessor is not liable for the death.<sup>54</sup> He mentions this rule after stating that Ibrāhīm transmitted the Prophetic hadith, “There is no liability in the case of damage caused by an animal. . .” We have seen, however, that al-Shaybānī adopts a contrary solution with regard to hypothesis (2) by invoking the illegality of the act of stopping an animal on a public road. He changed his position. We do not know why he did so, but I suspect that he was influenced by the principle represented in the Prophetic hadith, “A person who places something outside his limit is liable [for the blood-money] if this injures someone.” It is not far-fetched to assimilate stopping an animal on a public road to placing a structure there. On this assumption, we can explain why a person who stops an animal, which is in principle harmless, is liable for any damage it causes, just as a person who places a structure outside his estates is liable for any damage it causes, whether or not the damage could have been foreseen. However, in arguing the liability of a person who released an animal on a road, al-Shaybānī hesitated to invoke the illegality of his act, probably because he could not disregard the traditional view that did not take into consideration the legality of an act in arguing the liability of its performer.

In this context, it is revealing to cite two conflicting opinions of Mālik regarding a person who stops an animal on a public road, both of which are recorded in the *Mudawwana*.

(a) According to Ibn al-Qāsim (d. 191/806), Mālik said, regarding the case of a person who stops his animal to make a purchase in a shop, that he is not liable for any damage the animal causes, “because he did what is permitted to him, and when he did what is permitted to him, what his [tame] animal damages gives rise to no liability (*kāna mā aṣābat al-‘ajmā’ jubār*).”<sup>55</sup>

<sup>54</sup> Shaybānī, *Āthār*, 75b.

<sup>55</sup> Saḥnūn, *Mudawwana*, 4:516.

(b) When Saḥnūn asked, on another occasion, Ibn al-Qāsim if a person who stops his animal on a public road, where it is not permitted to him to do so, is liable for any damage the animal causes according to Mālik, Ibn al-Qāsim responded affirmatively. Saḥnūn asks this question immediately after asking about the liability that follows from the digging of a well on a public road.<sup>56</sup>

It is certain that report (a) antecedes report (b), because we should infer that the solution adopted in report (b) is based on the principle embodied in the above-cited Prophetic hadith, “A person who places something . . .,” although Ibn al-Qāsim does not refer to this or any similar hadith in his discussion of the case of the digging of a well on a public road. Mālik may have changed his position so that the result for a person who stops an animal would be the same as that for a person who digs a well.

#### *Collapse of a leaning wall*

Al-Shaybānī states, regarding a wall that falls on someone:

If a wall belonging to someone leans or is on a large road and [collapses and] kills someone else, its owner is not liable for the killing, on the condition that he built the wall on his estate and not on the road, and that the weakening and collapse of the wall are not attributed to an act performed by him (*mā ḥadatha min wahni-hi wa-suqūṭi-hi shayʿ min ghayr ʿamali-hi*). If, however, the people who lived along the road or other people warned him [of the danger of collapse] or asked him to demolish it, but he nevertheless took no action until the wall collapsed and killed someone, he is liable for the death, and the payment of the blood-money is incumbent on his *ʿāqila*.<sup>57</sup>

It is clear that al-Shaybānī holds the owner of the wall liable only if he was aware of the likelihood that damage would take place. The pre-condition of a warning of the danger of the collapse of the wall is necessary to create the irrebuttable presumption that the owner was aware of the likelihood. The same point of view is attributed to several Iraqi jurists prior to al-Shaybānī. Qatāda (b. 60/679–80; d. 117/735–6) is reported to have said that if witnesses testified before the owner of the wall that it was leaning prior to the moment it fell on a man and killed him, the owner is liable.<sup>58</sup> Likewise Shurayḥ

<sup>56</sup> Saḥnūn, *Mudawwana*, 6:445.

<sup>57</sup> Shaybānī, *Aṣl*, 4:508.

<sup>58</sup> Saḥānī, *Muṣannaḥ*, 10:71, no. 18397; Ibn Abī Shayba, *Muṣannaḥ*, 5:423, no. 27631.

is reported to have said, regarding a leaning wall, “If they give testimony in his presence, he is liable.”<sup>59</sup>

The following solutions in the *Aṣl* of al-Shaybānī point to another condition required for holding the owner liable, i.e., he was able to prevent the damage from taking place. First, if a leaning wall is jointly owned by co-heirs, and witnesses inform only one of them of the danger of collapse, he who is thus warned is not liable for damage by analogical reasoning (*qiyās*), because he cannot demolish the wall by himself. By way of *istiḥsān*, however, al-Shaybānī makes him liable for the payment of a share of the blood-money proportional to his share in the wall.<sup>60</sup> Second, if the possessor of a leaning wall is a pledgee,<sup>61</sup> a lessee<sup>62</sup> or a borrower,<sup>63</sup> he is not liable for damage caused by its collapse, because he does not have the right to demolish the wall.<sup>64</sup>

Furthermore, al-Shaybānī states: if witnesses inform the owner of a wall of the danger of collapse, he is no longer liable for damage arising from the collapse of the wall once he has sold it before he demolishes it, and the buyer is not liable either unless witnesses inform him that the wall is dangerous.<sup>65</sup> It follows that the victim is not indemnified. Why is the former owner (the seller) not liable, despite the fact that he was aware of the danger of collapse and lost the right to demolish the wall voluntarily, unlike a pledgee, a hirer or a borrower, who does not have the right to do so? I infer that the owner of the wall is liable for damage caused by it only to the extent that he is profiting from the wall. This explains why he is no longer liable after he transfers ownership of the wall (although this solution is not acceptable to us).

In sum, al-Shaybānī holds the owner of a leaning wall liable for damage caused by its collapse if he was aware of the likelihood that damage would take place and deliberately failed to prevent it despite his ability to do so by demolishing the wall, only to the extent he

<sup>59</sup> Ṣan‘ānī, *Muṣannaḥ*, 10:70–71, no. 18395. See for a statement to the same effect, Ibn Abī Shayba, *Muṣannaḥ*, 5:423, no. 27629.

<sup>60</sup> Shaybānī, *Aṣl*, 4:509–10.

<sup>61</sup> Shaybānī, *Aṣl*, 4:509.

<sup>62</sup> Shaybānī, *Aṣl* (MS), 19b.

<sup>63</sup> Shaybānī, *Aṣl* (MS), 19b.

<sup>64</sup> Shaybānī, *Aṣl*, 4:509–510.

<sup>65</sup> Shaybānī, *Aṣl*, 4:509.

was profiting from it. However, al-Kāsānī writes, explaining the solution adopted by al-Shaybānī:

The ground on which *ḍamān* is incumbent [on the owner of the wall] is that he committed an infraction, which at the same time constitutes *tasbīb* that leads to the destruction, by his failure to demolish the wall, despite the fact that he was asked, and was able, to do so (*fa-sabab wujūb al-ḍamān huwa al-ta'addī bi-'l-tasbīb ilā al-ittilāf bi-tark al-naqd al-mustaḥaqq ma'a al-qudra 'alā al-naqd*).<sup>66</sup>

This explanation is faithful to the classical theory of liability, according to which a person is held liable for damage arising from his act if two conditions are met: that the act was the indirect cause of the damage; and was illegal or performed deliberately. In this case, according to al-Kāsānī, the owner's act met the two conditions, because he "committed an infraction, which at the same time constitutes *tasbīb*," i.e. an indirect cause. But his explanation is dubious in two respects.

First, it appears forced to consider the act of leaving a leaning wall as it stands an indirect cause of the type defined by al-Kāsānī, i.e. "an act performed with an object that in the ordinary course of events leads to the destruction of another object." Al-Shaybānī takes into consideration whether or not the owner foresaw that his wall would cause damage, rather than the objective existence or non-existence of a close causal relationship between his act and the damage, in arguing for the owner's liability. Second, according to al-Kāsānī, once the owner decides to leave the leaning wall as it stands, he will not be exempt from liability for eventual damage if he sells the wall, contrary to the above-cited solution adopted by al-Shaybānī. In contrast, al-Shaybānī holds liable a person who sets an illegal structure for the death caused by it after he has sold it.<sup>67</sup> Clearly al-Shaybānī here takes into consideration the illegality of his act. Conversely, he does not consider the act of leaving a leaning wall as it is to be illegal.

### *Synthesis*

The original theory of the Iraqi jurists concerning what the later jurists called 'indirect cause' can be summarized as follows:

<sup>66</sup> Kāsānī, *Badā'ī* (1402), 7:283; *ibid.* (1418), 10:369.

<sup>67</sup> Shaybānī, *Asl*, 4:506–07.

- (1) The owner of a dangerous thing, such as a leaning wall or a vicious animal, is liable for any damage it causes, on the condition that he is aware of the likelihood that it will cause damage and takes no measure to prevent the occurrence of damage despite an ability to do so. A solution adopted by al-Shaybānī with respect to damage caused by a leaning wall suggests that owners are liable for the damage to the extent that they own it, i.e. are profiting from it.
- (2) The case of an object not likely to cause damage is subject to different rules. Originally, a person who builds a structure; digs a well without entitlement; or releases a tame animal on a public road was not liable for any damage caused by the structure, the well or the animal, as indicated by the Prophetic hadiths, “There is no liability in the case of a well” or “There is no liability in the case of an animal.” Subsequently, the principle embodied in the Prophetic hadith, “A person who places something outside his limit is liable [for the blood-money] if it injures someone” was applied to make a person who creates an illegal structure liable for any damage arising therefrom. This principle made it possible to hold liable a person whose illegal act actually led to damage for that damage, even if the act is not likely to cause any. However, at least a majority of the Iraqi jurists, including the earliest Hanafis, were reluctant to generalize this principle to hold a person liable where his illegal act is not likely to cause damage. Al-Shaybānī could hold liable a person who releases a tame animal on a public road only when the animal was still under his control.
- (3) In either case, for the early jurists including the earliest Hanafis, the judgment as to whether or not a close causal relationship exists between the initial act and the eventual damage or loss is irrelevant to the question of whether or not the one who performed the act is liable.

## 2. *The later Hanafī doctrine*

Although it is difficult to trace the development of the doctrine of liability, it is certain that the terms ‘direct cause’ and ‘indirect cause’ appear neither in the works of Abū Yūsuf or al-Shaybānī, nor in those of al-Ṭaḥāwī (b. 229/843–4, 230/844–5, 238/852–3 or 239/

853–4; d. 321/933).<sup>68</sup> As far as I know, they are mentioned for the first time in the *Mukhtaṣar* of al-Qudūrī (b. 362/972–3; d. 428/1037). He refers, for example, to the cases in which the digging of a well or the placing of a stone led to a fatal accident, which he calls “the killing by indirect cause (*al-qatl bi-sabab*).”<sup>69</sup> A century later, ‘Alā’ al-Dīn al-Samarqandī (d. 539/1144–5) wrote in his *Tuhfat al-fuqahā’*, regarding the case of a person who dug a well, into which a passer-by fell and died, “It is held by *ijmā’* that he is liable for the payment of the blood-money but is not condemned to retaliation, because he caused the killing indirectly (*musabbib li-’l-qatl*) rather than directly (*laysa bi-mubāshir*), for [the digging of] a well is not an act of killing.”<sup>70</sup> The later jurists employ similar expressions to justify the positive solutions, invariably drawn intact from the earliest Hanafis.<sup>71</sup>

We have seen that for the earliest Hanafis the existence or non-existence of a close causal relationship was irrelevant in deciding whether or not someone is liable for his act. They hold a person liable in the case in which a person causes damage by physical contact. If there is no physical contact, they posit several individual hypotheses in which they hold a person liable if no close causal relationship exists between his initial act and the damage. The later Hanafis introduced the concept of the indirect cause to cover any liability engaged in such hypotheses.

I think that the later Hanafis were influenced by theology, for two reasons. First, Islamic theological terminology is reminiscent of the Hanafī concepts of causal relationship, as represented by the terms ‘indirect cause’ (*tasabbub*) and ‘direct cause’ (*mubāshara*). It was the Mu‘tazilī theologians who introduced the theological terminology. Abū Hudhayl (d. 226/840–1) is reported to have stated, “A man produces in the outer world acts by the means of *asbāb* that he generates in himself (*al-insān yaf‘alu fī ghayri-hi al-af‘āl bi-’l-asbāb allatī yuḥdithu fī nafsi-hi*).”<sup>72</sup> The initial act is called ‘*fī’l mubāshir*,’ insofar as he generates it in himself. At the same time, in its capacity as *asbāb*

<sup>68</sup> Ṭaḥāwī, *Mukhtaṣar*, 250–54.

<sup>69</sup> Qudūrī, *Mukhtaṣar*, 3:143.

<sup>70</sup> Samarqandī, *Tuhfa* (1964), 3:130; *ibid.* (1414), 3:104.

<sup>71</sup> See, for example, Sarakhsī, *Mabsūṭ* (n.d.), 27:6–22; *ibid.* (1421), 27:7–24; Kāsānī, *Badā’i’* (1402), 7:164–67, 271–83; *ibid.* (1418), 10:70–75, 344–69; Marghīmānī, *Hidāya*, 4:191–95.

<sup>72</sup> Ash‘arī, *Lehren*, 403.

it gives rise to other acts.<sup>73</sup> Al-Ash‘arī, using the Mu‘tazilī concept of ‘*asbāb*,’ writes as follows: a human body is as an aggregate of atoms.<sup>74</sup> As the act of an atom does not reach beyond itself, a man cannot create his act. It is God who creates the act “directly” (*‘alā jihat al-ikhtirā’ wa-’l-ibtidā’*).<sup>75</sup> An act is attributed to a human being by ‘acquisition’ (*kasb*).<sup>76</sup> He understands the causal relationship narrowly, as the later Hanafis do. Second, al-Taḥāwī was a contemporary of al-Ash‘arī (b. 260/873–4; d. 324/935–6), founder of the orthodox theology bearing his name, while al-Qudūrī was born in 362/972–3, less than a half century after al-Ash‘arī died. That is to say, the concepts of ‘*tasabbub*’ and ‘*mubāshara*’ seem to have been introduced into the Hanafī doctrine during the lifetime, or shortly after the death of al-Ash‘arī.

The introduction of these theological concepts engendered confusion in the Hanafī doctrine. Various cases of liability based originally on different ideas were put together under the rubric of indirect cause. Some were in accord with the definition of indirect cause, such as the releasing of an animal. Others were not, such as the digging of a well. We have seen al-Sarakhsī advance a scholastic argument to explain the case of the digging of a well as an example of indirect cause.

### 3. *The Medinan doctrine*

So far we have examined exclusively the Iraqī doctrine. The reason for this is that almost all the solutions regarding liability arising from what the later jurists would call indirect cause that are mentioned in the *Mudawwana* are attributed to Mālik; and these cases and their solutions are almost identical with those envisaged and advanced by the Iraqī jurists.<sup>77</sup> It is likely that Mālik learned from the Iraqī doctrine.

<sup>73</sup> Gimaret, *Doctrine*, 401–02.

<sup>74</sup> Gimaret, *Doctrine*, 94–95.

<sup>75</sup> Gimaret, *Doctrine*, 403–04; Gimaret, *Théorie*, 79–85.

<sup>76</sup> Gardet, “Kasb,” *EI*, new edition, 692a–94a.

<sup>77</sup> Saḥnūn, *Mudawwana*, 6:179, 444–48.

*Section 3 Ḍamān arising from possession*

To return to al-Qarāfī's classification of causes of *Ḍamān*, he writes that the third cause is "the possession of an object that is not based on a fiduciary relationship (*wadʿ al-yad allatī laysat bi-mu'tamana*),"<sup>78</sup> which is usually called '*yad Ḍamān*' (possession entailing *Ḍamān*). In the context of *Ḍamān*, possessions of an object may fall into two classes, *yad Ḍamān* and *yad amāna*.

A person whose possession qualifies as *yad Ḍamān* is liable for damage or loss unless it is attributed to the owner. Al-Qarāfī writes as follows:

The third cause [which gives rise to *Ḍamān*] is possession that is not based on a fiduciary relationship. The expression 'not based on a fiduciary relationship' is better than the expression 'illegal possession' (*al-yad al-ʿādīyya*), since 'illegal possession' may apply to thieves or usurpers etc., but within the rubric of 'possessions entailing *Ḍamān*' fall also those possessions that do not involve aggression (*ʿudwān*) and even those that are based on the permission of the owner, such as the buyer's taking possession of the object or its lawful retention by the seller: *Ḍamān* (risk) remains with the seller before the object is delivered to the buyer, and it passes to the buyer at the moment of delivery, if there is no aggression [from either party].<sup>79</sup>

Al-Qarāfī mentions theft and usurpation as examples of *yad Ḍamān*. The principle that a person who takes possession of an object by an illegal act is liable for the damage or loss it suffers is, at first glance, unobjectionable. In fact, all the jurists unanimously espouse this principle. But it is doubtful that the possession of a thief or usurper is *yad Ḍamān* simply because he first takes possession of the object by an illegal act. As will be demonstrated, in certain circumstances a thief or a usurper can enjoy the *usus* of the object, according to the Hanafis and Malikis, and he may acquire *fructus* produced by the object, according to the Malikis. Why can a person who illegally takes an object belonging to another benefit from it? This is one of the main themes of this section.

As for a person who takes possession of an object by a contract other than a sale, his possession in principle is *yad amāna*. The Maliki

<sup>78</sup> Qarāfī, *Furūq*, 2:206–08.

<sup>79</sup> Qarāfī, *Furūq*, 2:207. He writes: "*Ḍamān* (risk) remains with the seller before the object is delivered to the buyer, and it passes to the buyer at the moment of delivery." But this is contrary to the majority view of the Malikis. See p. 78.

jurist Ibn Rushd al-Jadd writes that Mālik classified into three groups objects the possession of which is transferred from the owner to another person without entailing transfer of ownership.

(1) Deposits (*wadāʿ*<sup>ʿ</sup>, sg. *wadāʿa*) and *baḍāʿ*<sup>ʿ</sup> (sg. *bidāʿa*)<sup>80</sup> are delivered exclusively for the sake of the owner. The possessor of such an object is a *muʿtaman* (‘trustee’) and his claim that the object was lost while in his possession due to a natural cause is, in principle, accepted without making him swear an oath. Exceptionally when his claim is dubious, he is asked to make an oath.

(2) Non-fungible objects lent in a loan for use (*iʿāra*) and pledges (*ruhūn*, sg. *rahn*) are delivered exclusively for the sake of the possessor, who is liable for the loss of an object which is concealed from view (*mā yughāb ʿalay-hi*), unless he establishes that the loss was due to a natural cause. Conversely, his claim that an object that he possessed was lost as a result of a natural cause is accepted with oath, if the object is not concealed from view (*mā lā yughāb ʿalay-hi*), unless it is established that his claim is false.

(3) Merchandise in a *qirād* (*muḍāraba*) and a hired object are delivered for the sake of the both parties. They are treated in the same manner as deposits or *baḍāʿ*<sup>ʿ</sup>, because the owner obtains more benefit than the possessor, for had he not wanted to deliver them, he would not have done so.<sup>81</sup> *Qirād* is a kind of commercial association, whereby the investor entrusts capital (*raʿs al-māl*) to an agent. The latter is supposed to buy goods with the capital and to make a profit by reselling them. The profit is distributed between the investor and the agent according to the pre-determined proportion, after the same amount of money as the capital is deducted. Losses incurred in the commercial activities of the agent are the responsibility of the investor.

That is to say, in principle, it is the owner who assumes the risk of loss due to a natural cause, but the onus of proof may lie on the possessor, if the possessor alone benefits from the possession. The Hanafis also make, in principle, the owner assume the risk of loss. There are two important exceptions to this rule. First, the Hanafis and Malikis hold an artisan (*ṣāniʿ*) or an employee working for the

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<sup>80</sup> This refers to merchandise delivered on the basis of *ibḍāʿ*, a contract whereby a merchant (*mubḍiʿ*) entrusts his merchandise to another person (*mubḍāʿ ilay-hi*), so that the latter takes care of it. At the end of the transaction the latter hands over the proceeds to the former without demanding a commission.

<sup>81</sup> Ibn Rushd al-Jadd, *Bayān*, 9:113–14.

public (*ajīr mushtarak*) liable for the damage or loss suffered by the object he receives from his customer, unless he establishes that the damage or loss occurred as a result of a natural cause. Conversely, a person who works for an individual (such a person is called ‘*ajīr khāṣṣ*’) is not liable for the damage or loss that occurs in the object he receives from the employer, unless he has committed a transgression (*ta‘addī*, see below) or a negligence (*tafrīt*, see below).<sup>82</sup> Mālik explains why an artisan is liable as follows: a person hands over an object to an artisan not because he prefers or trusts him, but because he has no choice but to do so. If the artisan were not held liable for the damage or loss that occurs to the object he receives, he would not be diligent in taking care of it. It is necessary to hold him liable in view of “the public interests (*maṣlahat al-nās, maṣlahat al-‘amma*).”<sup>83</sup> Yahyā b. Sa‘īd (d. 143/760–1, 144/761–2 or 146/763–4) is reported to have said that one caliph after another used to make artisans liable.<sup>84</sup> Second, the Hanafis hold a pledgee liable for the loss of the pledge up to the limit of the amount of debt, as will be explained below (see 2).

The condition under which a ‘trustee’ (*amīn* or *mu’taman*, one whose possession is *yad amāna*) is liable for the loss of an object he possesses is that he commits *ta‘addī* or *tafrīt*. What is the meaning of *ta‘addī* and *tafrīt*? For the later Hanafis, Shafi‘is and Hanbalis, *ta‘addī* signifies doing something deliberately without entitlement or in disregard of the right of others, such as digging a well or stopping an animal on a public road, as we have seen (although such acts are not called *ta‘addī* in the early texts). Likewise, if a person who receives an object based on a contract keeps it or uses it in a manner contrary to custom or in violation of the contract, he is said to have committed *ta‘addī*.<sup>85</sup> The Maliki jurist Ibn ‘Arafā (d. 803/1401) defines *ta‘addī* as “benefiting from the property of another person without entitlement without the intention to acquire ownership of its substance, or destroying it or part of it without the intention to acquire ownership [of its substance] (*al-intifā‘ bi-milk al-ghayr bi-ghayr haqq dūna qaṣd tamalluk al-raqaba aw itlāfu-hu aw ba‘di-hi dūna qaṣd al-tamalluk*).”<sup>86</sup>

<sup>82</sup> Shaybānī, *Ṣaḥīh* (1406), 448–49.

<sup>83</sup> Ṣaḥnūn, *Mudawwana*, 4:388.

<sup>84</sup> Ṣaḥnūn, *Mudawwana*, 4:388–89.

<sup>85</sup> For a more detailed explanation of *ta‘addī*, see Maḥmaṣṣānī, *Naẓariyya*, 1:173–76; Muḥammad Aḥmad Sarrāj, *Damān*, 144.

<sup>86</sup> Ibn ‘Arafā, *Hudūd*, 2:468.

Bearing in mind that the meaning of the term differs from one school to another and has undergone an important change in Iraq, I will translate it as ‘transgression.’

*Tafriṭ* means failing to fulfill one’s obligation, as illustrated by the following examples.

(1) Mālik was asked about the following case: *A* instructed *B* to purchase a female-slave for 50 dinars, but *B* paid 60 dinars for her and brought her to *A* without informing *A* that he had purchased her for 10 dinars more than *A* had told him to pay. Subsequently *A* had intercourse with her and made her pregnant. Mālik said that *A* does not have to pay *B* 10 (i.e. 60–50) dinars, because *B* committed *tafriṭ* (*li-anna-hu farraṭa*).<sup>87</sup>

(2) Mālik said, regarding a case concerning an employment, “If he [viz. employee] has not finished his work, he committed *tafriṭ* (*farraṭa*) and did not expend effort to the extent that he was required to do so (*lam yajtahid al-ijtihād alladhī kāna yalzamu-hu*).”<sup>88</sup>

These examples show that *tafriṭ* overlaps with transgression in the sense of a violation of an obligation. I will translate the term ‘*tafriṭ*’ as ‘negligence.’

To this point, transgression and negligence imply intention. If someone unconsciously commits an act which if done intentionally would constitute transgression or negligence, we are dealing with ‘*khaṭa*’ (mistake). For example, suppose that a dyer receives some cloth from his customer for dying. If he intentionally dyes it a color different from that which the customer instructed him to do, he has committed a transgression. If he does so unintentionally, he has made a mistake. As far as *ḍamān* arising from *yad amāna* is concerned, however, “the damage or loss in property is compensated for, whether caused intentionally or by mistake (*amwāl al-nās tuḍmanu bi-’l-’amd wa-’l-khaṭa*).”<sup>89</sup> This may be why the jurists almost exclusively envisage cases in which the damage or loss was caused intentionally.

Why is a possessor who has committed a transgression or negligence liable for the damage or loss that takes place subsequently? Scholars are divided over this issue. Schacht and Chehata are of the opinion that the liability arising from transgression or negligence is reduced to liability arising from destruction (*itlāf*), whereas al-Sanhūrī

<sup>87</sup> ‘Utbī, *Mustakhrāja*, 8:182.

<sup>88</sup> Ibn Rushd al-Jadd, *Bayān*, 8:413.

<sup>89</sup> Ibn Rushd al-Jadd, *Bayān*, 8:485.

understands it as contractual liability. In his *Introduction to Islamic Law*, Schacht writes:

The depositary and other persons in a position of trust (*amāna*; such a person is called *amīn*) are not liable for accidental loss, but they lose this privileged position through *ta'addī*, illicit acts which are incompatible with the fiduciary relationship, such as using the deposit, whether the loss is caused by the unlawful act or not. The concept of *ta'addī*, however, is not restricted to the doctrine of liability, it means tort in general; in other words, liability arising from non-performance of a contract is reduced to liability arising from a tort—a trace of archaic legal reasoning.<sup>90</sup>

Schacht's interpretation is dubious. On the one hand, as he remarks, there are cases in which a trustee is liable "whether the loss is caused by the unlawful act or not" (but this is not always the case, as will be indicated). On the other hand, for the later jurists, indirect cause in destruction means "an act performed with an object which usually leads to the destruction of another object," as al-Kāsānī puts it.<sup>91</sup> It follows that we cannot hold that the liability of a trustee is based on the same principle as that of a person who commits a destructive act, unless different kinds of transgression are being imagined.

Chehata, who supported Schacht but examined the positive solutions more closely than he did, concluded that if a person takes possession of an object based on a contract, he assumes no special obligation of custody, with the exception of the sale of a specific object. For example, a hirer, who violates the clause placing restraints on the manner in which he can use the object, is not liable, if it could not be foreseen that the violation would cause damage or loss. That is to say, with respect to liability, a hirer is put in the same situation as a person who possesses an object belonging to another person without a contract.<sup>92</sup> Likewise, if a hirer commits a transgression, but subsequently keeps the hired object in an appropriate place, he is not liable for its loss due to theft or confiscation by a monarch. That is to say, for the hirer to incur liability for the loss of the object, it is necessary that the transgression he has committed leads to the loss without the intervention of an extraneous cause. In other words, the hirer is treated in the same manner as a third

<sup>90</sup> Schacht, *Introduction*, 147–48.

<sup>91</sup> Kāsānī, *Badā'ī* (1402), 7:165; *ibid.* (1418), 10:70–71.

<sup>92</sup> Chehata, *Etudes* 2, 82–83.

party who performs an act, which as the indirect cause leads to damage.<sup>93</sup> For Chehata, transgression merely creates presumption that the act led actually to the loss, but the presumption is rebuttable.<sup>94</sup>

But Chehata fails to refer to cases in which a possessor who violates an instruction given by the owner is necessarily liable for eventual loss of the object. For example, we will see that the Hanafī and Maliki jurists make liable a hirer of an animal who goes beyond the place specified in the contract, whatever the cause of the eventual death of the animal may be, until he returns the animal to the owner in its original state. In addition, some of the examples Chehata invokes in support of his arguments lend themselves to a different interpretation. As for the above-cited case in which the hired object was stolen or confiscated, it is possible to infer that the hirer is exonerated simply because the thief or the monarch is liable as *mubāshir* (one who causes damage or loss by direct cause). That is to say, the thief or the monarch occludes the liability of the hirer.

Al-Sanhūrī's arguments are based on a more detailed examination of the positive solutions. He writes as follows: transgression is defined as default (*taqṣīr*) in paying the due attention required of an ordinary person in performing an obligation arising from a contract.<sup>95</sup> When a trustee commits a transgression, for example, by refusing to return the object without a good reason, his possession becomes *yad ḍamān*, so he is liable for its loss even if it is the result of a natural cause.<sup>96</sup> Although al-Sanhūrī's descriptions of the positive solutions are more detailed than those of Chehata, I could find no clear evidence to substantiate his thesis in the examples he cites. Moreover, the Hanafī rule is that a *ḍāmin* (one whose possession is *yad ḍamān*) is exempt from payment of rent for use of the object. The Maliki rule is that if the owner makes a *ḍāmin* pay the value of the object the *ḍāmin* is exempt from payment of rent. How can we justify these rules if the *ḍāmin* is liable for not having performed his obligation arising from the contract?

Neither Schacht, nor Chehata, nor al-Sanhūrī takes into consideration the process according to which the system of liability was formed. I have suggested that the report in which Shurayḥ held

<sup>93</sup> Chehata, *Études* 2, 93.

<sup>94</sup> Chehata, *Études* 2, 92.

<sup>95</sup> Sanhūrī, *Maṣādir*, 6:149.

<sup>96</sup> Sanhūrī, *Maṣādir*, 6:182–183.

liable ‘Amr, who dug a well in front of Usāma’s house, indicates that the principle that takes the illegality of an act into account to hold its performer liable for eventual damage was newly introduced (see pp. 24–26). I will demonstrate that despite the introduction of this principle the rule that a person who earns profits from an object assumes the risk of its damage or loss laid at the heart of the system of liability during the eighth century. For this purpose I will examine the positive solutions regarding pledge, *ijāra*, the sale of a specific object and usurpation. The first three contracts seem to have been the leading cases with respect to which the theory of *yad ḍamān* and *yad amāna* was formed. The Hanafi and Maliki solutions regarding usurpation later served as the model for the theory of *yad ḍamān* and *yad amāna*. In order to examine these solutions, it is first necessary to define *fructus* and *manfa‘a* in order to specify what is meant by ‘profits’ in the context of arguments about liability.

### 1. Fructus and manfa‘a

When an object suffers a physical change or produces something else, the terms ‘decrease’ (*nuqṣān*) or ‘increase’ (*namā‘*; *ziyāda*, pl. *zawā‘id*) is used to refer to these changes. The term ‘decrease’ is used when an object has been partly damaged or lost, or its value has diminished due to a physical change. According to the Hanafi jurist al-Sarakhsī, ‘increase’ is divided into ‘attached increase’ (*ziyāda muttaṣila*) and ‘separate increase’ (*ziyāda munfaṣila*).

(1) Attached increase is subdivided into two groups:

- (a) “An [attached] increase that is not produced from the principal (*ziyāda ḡhayr mutawallida min al-‘ayn*),” e.g. dyestuff used to dye cloth and clarified butter and honey used to make *sawīq* (a kind of mush made of wheat or barley).
- (b) “An attached increase that is produced from the principal (*al-ziyāda al-muttaṣila allatī hiya mutawallida min al-aṣl*),” e.g. the growth of a slave or an animal, and recovery from an illness.

(2) Separate increase is subdivided into two groups:

- (a) “A distinct object produced from the principal (*‘ayn mutawallida min al-aṣl*),” such as gain (*kasb*) and proceeds (*ḡhalla*).
- (b) “A separate increase produced from the principal (*al-ziyāda*

*al-munfaṣila allatī hiya mutawallida min al-aṣl*),” such as milk of cattle, fruit of a tree, babies of an animal or of a female slave, *arsh* and *ʿuqr* of a female slave (i.e. the dowry paid when intercourse occurs without a valid matrimonial tie, on the condition that the intercourse is not subject to a *ḥadd* punishment as a *zinā*).<sup>97</sup>

The Maliki concept of increase is hardly different from that of the Hanafis.<sup>98</sup>

“Gain” mentioned in 2 (a) designates mainly things or profits obtained by a slave through labor, collecting, hunting or commercial transactions. The elements included in “proceeds” differ from one jurist to another, but the rent earned by leasing land or a slave, and yield (*rayʿ*) from land are included in “proceeds.”

“A separate increase produced from the principal” mentioned in 2 (b) includes what we call *fructus naturales*, although *arsh* and *ʿuqr* of a female slave will be classified as *fructus civiles*. Hereafter I refer to them as *fructus*. The Maliki jurists divide them into two subgroups: (i) a baby of a female-slave or an animal, the shoots of a tree, etc. Ibn Rushd al-Jadd defines this group as “what follows the principal in form and natural disposition (*mā kāna ʿalā ṣūrati-hi wa-khūlqati-hi*)”; (ii) fruit on a tree, milk or wool of cattle, etc. Ibn Rushd al-Jadd defines this group as “what does not follow the principal in form and natural disposition.”<sup>99</sup> But this division is of no practical importance for the Malikis as well as for the Hanafis.

For the Hanafis and Malikis *manfaʿa* is defined as “a temporary benefit that is derived from an object through use of it (*al-fāʿida al-ʿarāḍiyya allatī tustafādu min al-aʿyān bi-ṭarīq istiʿmālī-hā*),” such as living in a house, wearing clothes, or riding an animal.<sup>100</sup> It is important to note that according to the ancient concept, *manfaʿa* includes also fruit on a tree, milk and wool of cattle etc., i.e. what Ibn Rushd al-Jadd describes as “what does not follow the principal in form and natural disposition.”<sup>101</sup>

<sup>97</sup> Sarakhsī, *Mabsūṭ* (n.d.), 13:103–04; *ibid.* (1421), 13:121–22.

<sup>98</sup> See, for example, ʿAbd al-Wahhāb, *Maʿūna*, 2:1161–62; Ibn Rushd al-Jadd, *Bayān*, 11:66.

<sup>99</sup> Ibn Rushd al-Jadd, *Bayān*, 11:65–66.

<sup>100</sup> ʿAlī al-Khafif, “Manāfiʿ” 97. In a broad sense, *manfaʿa* includes service (*amal*) by a free person.

<sup>101</sup> See, for example, Ibn Abī Shayba, *Muṣannaḥ*, 5:15, no. 23267; 7:287, no.

When jurists refer to the principle embodied by the Prophetic hadiths, “A person cannot draw profit from an object the risk of which he does not assume (*lā ribh mā lam yudman*)”<sup>102</sup> or “Profit is concomitant with risk (*al-ghalla bi-’l-ḍamān*,<sup>103</sup> *al-kharāj bi-’l-ḍamān*)”<sup>104</sup> in discussing liability, they use “profit” to mean primarily *manfa‘a*; gain and proceeds, which for them derive from *manfa‘a*; and the profit earned by selling an object.

## 2. Pledge

I turn now to the Iraqi and Medinan doctrines on the attribution of risk (*ḍamān*), *fructus* and *manfa‘a*, and the effect of disposal of a pledge.

### Ḍamān, *fructus* and *manfa‘a*

The Hanafi jurists hold that risk remains with the pledgee up to the amount of the pledge. For example, when the pledge is totally destroyed by a natural cause, (1) if the value of the pledge is equal to or greater than the amount of debt, the debt is extinguished and the pledgee is not required to compensate for the difference. (2) If the value of the pledge is smaller than the amount of debt, the debt is extinguished up to the value of the pledge and the pledgee has the right to demand that the debtor pay the balance of the debt.<sup>105</sup> In other words, the possession of a pledge is *yad ḍamān* to the extent of the amount of debt, and *yad amāna* with regard to whatever exceeds the amount of debt.

These rules are attributed to Ibrāhīm al-Nakha‘ī, who is reported to have said:

If [the value of] the pledge is greater [than the amount of debt], then it perishes with what is secured by it (*dhahaba bi-mā fī-hi*) [viz. the debt

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36143; Ibn ‘Abd al-Barr, *Tamhīd*, 2:324. Ibn Abī Laylā regarded fruit on a tree as *manfa‘a*. Sarakhsī, *Mabsūṭ* (n.d.), 11:149, *ibid.* (1421), 11:160.

<sup>102</sup> Abū Yūsuf, *Āthār*, 181–82, no. 828; Ṣan‘ānī, *Muṣannaḥ*, 8:39, no. 14215; Ṣaḥnūn, *Mudawwana*, 3:234; Bayhaqī, *Sunan*, 2:237.

<sup>103</sup> Ṭaḥāwī, *Sharḥ*, 2:208; Ibn Ḥanbal, *Musnad* (n.d.), 6:80, 116, 161; *ibid.* (1411), 9:361–62, no. 24568; 425–26, no. 24901; 9:507, no. 25331.

<sup>104</sup> Shāfi‘ī, *Ikhtilāf*, 200–01; Ṭaḥāwī, *Sharḥ*, 2:208; Tirmidhī, *Sunan* (buyū‘, 53), 2:376–77, nos. 1303–04; Nasā‘ī, *Sunan* (buyū‘, 15), 7:254–55.

<sup>105</sup> Marghīnānī, *Hidāya*, 4:128.

is extinguished, too]. If [the value of] the pledge is smaller [than the amount of debt], the excess is returned to him (*rudda 'alay-hi al-faḍl*) [viz. the pledgee can demand that the debtor pay the balance of the debt].<sup>106</sup>

Sufyān al-Thawrī is reported to have said, “We follow it.”<sup>107</sup> Reports with the same or almost the same wording are attributed to Shurayḥ<sup>108</sup> and Ibn Sīrīn.<sup>109</sup> Al-Ḥasan al-Baṣrī is also credited with the statement, “A pledge perishes with what is secured by it.”<sup>110</sup>

The general rule regarding *yad amāna* is that the possessor is liable for the eventual loss suffered by the possessed object if he commits a transgression or a negligence. According to al-Qudūrī, “If the pledgee commits a transgression, he is liable in the same manner as a usurper is, and he is required to pay its entire value [if the pledge is totally lost].”<sup>111</sup> Use of the pledge by the pledgee without the permission from the pledgor constitutes a transgression. But Qāḍī Khān (d. 592/1196) writes that the pledgee is no longer liable after he ceases to use it: he divides the use of an animal handed over as a pledge into three categories. (1) If the animal dies while the pledgee is riding it with permission from the pledgor, the pledgee is not liable and the debt is not extinguished. (2) If the animal dies while the pledgee is riding it without permission from the pledgor, the pledgee is required to pay its value. (3) If the animal dies after the pledgee gets off it, the debt is extinguished up to its value, whether or not the pledgee has obtained permission to ride the animal from the pledgor.<sup>112</sup> As will be shown, a person who hires an animal and then commits a transgression is liable for any damage or loss suffered by the animal even after the transgression ceases. The liability of the pledgee appears to be based on the presumption that the act of riding the pledged animal led to its death. This is why the pledgee is

<sup>106</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:239, no. 15041. For the reports to the same effect, see Ibn Abī Shayba, *Muṣannaḥ*, 4:526, no. 22788; Abū Yūsuf, *Āthār*, 196, no. 884; Shaybānī, *Āthār*, 103b; *Kūtab fi al-fiqh*, 17 (9b).

<sup>107</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:239, no. 15041.

<sup>108</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:238–39, no. 15037; Ibn Abī Shayba, *Muṣannaḥ*, 4:525, no. 22778; 527, no. 22796.

<sup>109</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:526, no. 22784.

<sup>110</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:238–39, no. 15037; Ibn Abī Shayba, *Muṣannaḥ*, 4:526, no. 22780.

<sup>111</sup> Qudūrī, *Mukhtaṣar*, 2:65.

<sup>112</sup> Qāḍī Khān, *Fatāwā*, 2:601.

no longer liable after he gets off the animal. In other words, the ground for his liability is destruction.

According to the Hanafis, *fructus* produced by a pledge, such as a child born by a female slave, milk produced by a sheep or a goat, dates collected from palms, *uqr* paid for a female slave, or *arsh* paid for injury to a slave, all belong to the pledgor, but they are pledged for the debt along with the principal.<sup>113</sup> The same view is ascribed to Sufyān al-Thawrī and al-Ḥasan b. Ḥayy.<sup>114</sup>

Regarding the case in which the pledge produces *fructus* other than *arsh* and then the pledge itself (principal) or the *fructus* perish, totally or partially, the Hanafī rule (hereafter rule [a]) is as follows: the amount of the debt is divided into two parts, in proportion to the value of the principal as evaluated on the date of its delivery and the value of the *fructus* as evaluated on the date on which the pledge is redeemed. Therefore, if the *fructus* perish by the date of redemption, the totality of debt is secured by the principal.<sup>115</sup>

Rule [a] is reduced to two rules: the first (hereafter rule [b]) is that when more than one object is pledged for a debt, the amount of the debt is divided into parts in proportion to the respective value of the objects at the moment of delivery, each part being secured by each pledge.<sup>116</sup> For example, if an object (*A*) worth 20 dinars and another object (*B*) worth 4 dinars are pledged for a debt of 18 dinars, the amounts secured by *A* and *B* are respectively 15 ( $= 18 \times 20 / 24$ ) dinars and 3 ( $= 18 \times 4 / 24$ ) dinars. It is obvious that rules [a] and [b] have in common that they divide the amount of the debt into two parts in proportion to the value of the pledged objects. We have seen that the risk of loss in a pledge remains with the pledgee up to the amount of debt secured by it. Therefore, if the value of *A* becomes 12 and the value of *B* becomes 2, the pledgee can demand that the debtor pay only 8 dinars.

The second rule (hereafter rule [c]) is that the possession of *fructus* by the pledgee is *yad amāna* (possession on the basis of a fiduciary relationship).<sup>117</sup> To demonstrate that rule [a] implies rule [c], sup-

<sup>113</sup> Jaṣṣāṣ, *Mukhtaṣar*, 4:290; Kāsānī, *Badā'ī* (1402), 6:152, 156–57; *ibid.* (1418), 8:200–03, 222.

<sup>114</sup> Jaṣṣāṣ, *Mukhtaṣar*, 4:290.

<sup>115</sup> Ṭaḥāwī, *Mukhtaṣar*, 94–95; Kāsānī, *Badā'ī* (1402), 6:156–57; *ibid.* (1418), 8:222–23.

<sup>116</sup> Samarqandī, *Tuhfa* (1964), 3:48; *ibid.* (1414), 3:46.

<sup>117</sup> Samarqandī, *Tuhfa* (1964), 3:42; *ibid.* (1414), 3:42.

pose as follows: an object worth  $p$  dinars is pledged for a debt of  $d$  dinars. The object subsequently suffers partial loss and its value is reduced to  $px$  ( $0 \leq x < 1$ ) dinars. Meanwhile, the object produces *fructus* several times, some of which retain their original value, while others increase or decrease in value. Let  $f$  represent the total value of these *fructus*, as evaluated at the moment of their birth, and let  $f_y$  represent their value as assessed on the date on which the pledge is redeemed. Let us now calculate, according to rule [a], the amount of money ( $s$ ) that the pledgee can demand from the debtor according to two hypotheses: (1) according to the hypothesis that the pledge produces *fructus*; (2) according to the hypothesis that the pledge produces no *fructus*.

(1) If the pledge produces *fructus*, that part of the debt which is secured by the principal is  $\frac{pd}{p + f_y}$ , whereas that part of the debt which is secured by the *fructus* is  $\frac{fd_y}{p + f_y}$ , according to rule [a].

(i) If  $p \geq d - f_y$ , remembering that the principal perishes at the pledgee's risk within the limit of its value, the amount of money that the pledgee can demand that the debtor pay corresponding to the principal is

$$s_{1p} = \begin{cases} 0 & (0 \leq x \leq \frac{p-d+f_y}{p+f_y}) \\ \frac{pd}{p+f_y} - p(1-x) & (\frac{p-d+f_y}{p+f_y} < x < 1) \end{cases}$$

whereas the amount of money that the pledgee can demand that the debtor pay corresponding to the *fructus* is

$$s_{1f} = \frac{fd_y}{p+f_y}$$

Thus we obtain, as the total amount of money that the pledgee can demand

$$s_1 = s_{1p} + s_{1f} = \begin{cases} \frac{fd_y}{p+f_y} & (0 \leq x \leq \frac{p-d+f_y}{p+f_y}) \\ d - p(1-x) & (\frac{p-d+f_y}{p+f_y} < x < 1) \end{cases}$$

(ii) If  $p < d - fy$ ,  $s_{1p} = \frac{pd}{p + fy} - p(1-x)$  and  $s_{1f} = \frac{fdy}{p + fy}$ . Thus we obtain

$$s_1 = s_{1p} + s_{1f} = d - p(1-x)$$

(2) If the pledge does not produce *fructus*,

(i) if  $p \leq d$ , the amount of money that the pledgee can demand that the debtor pay is

$$s_2 = \begin{cases} 0 & (0 \leq x \leq \frac{p-d}{p}) \\ d - p(1-x) & (\frac{p-d}{p} < x < 1) \end{cases}$$

(ii) If  $p < d$ ,  $s_2 = d - p(1-x)$

(3) Therefore we obtain

(i) If  $p \geq d$ , taking into consideration the inequity  $\frac{p-d}{p} \leq \frac{p-d+fy}{p+fy}$

$$s_1 - s_2 = \begin{cases} \frac{fdy}{p+fy} \geq 0 & (0 \leq x < \frac{p-d}{p}) \\ \frac{fdy}{p+fy} - \{d - p(1-x)\} \geq 0 & (\frac{p-d}{p} \leq x \leq \frac{p-d+fy}{p+fy}) \\ 0 & (\frac{p-d+fy}{p+fy} < x < 1) \end{cases}$$

Note that the minimal number of  $\frac{fdy}{p+fy} - \{d - p(1-x)\}$  is 0 when

$$x = \frac{p-d+fy}{p+fy}.$$

(ii) If  $d - fy \leq p < d$ , then

$$s_1 - s_2 = \begin{cases} \frac{fdy}{p+fy} - \{d - p(1-x)\} \geq 0 & (0 \leq x < \frac{p-d+fy}{p+fy}) \\ 0 & (\frac{p-d+fy}{p+fy} \leq x \leq 1) \end{cases}$$

(iii) If  $p < d - fy$ , then  
 $s_1 - s_2 = 0$

Therefore, according to rule [a] the amount of money that the pledgee can demand in the case in which the pledge produces *fructus* is necessarily equal to or greater than the amount of money that he can demand in the case in which the pledge does not produce any *fructus*. In other words, the possession of *fructus* is *yad amāna*. Conversely, if *fructus* perish at the pledgee's risk, the amount of money the pledgee can demand can be smaller than the amount that he can demand if the pledge does not produce any *fructus*. A single example will suffice to demonstrate this: suppose that an object worth 20 dinars is pledged for a debt of 18 dinars and that it produces *fructus* of 4 dinars, and the *fructus* totally perish, while the principal remains intact. According to rule [a], the pledgee can demand that the debtor pay him 18 dinars. However, if the *fructus* were treated in the same manner as the principal, the pledgee could demand only 15 dinars. In other words, the pledgee can suffer a loss from the possession of *fructus*. This seems to be why the possession of *fructus* is *yad amāna*.

As for the *manfā'a* of a pledge, the Iraqi jurists disagreed regarding the right of the pledgee to it.

(1) Abū Hurayra (d. 57/676–7, 58/677–8 or 59/678–9) is reported to have narrated that the Prophet said, "If a camel is pledged, it can be ridden. If a sheep is pledged, its milk can be drunk. Whoever rides or drinks must pay the expenses to keep the pledge."<sup>118</sup> In this hadith, there is no indication of who may drink milk or ride. The Hanafis hold that it is the pledgee who is supposed to do so,<sup>119</sup> although they consider the hadith to have been abrogated, as will be indicated below. Al-Shāfi'ī states that it is the pledgor who has the right to benefit from a pledge by making a slave work, leasing an animal, collecting the fruit on a tree, or shearing the wool from a sheep, but that he must return the sheep to the pledgee in the evening.<sup>120</sup>

<sup>118</sup> Ibn Abī Shayba, *Muṣannaf*, 5:15, no. 23267; 7:287, no. 36143. A hadith to the same effect is recorded in Bukhārī, *Ṣaḥīḥ*, rahn, 4; Ṭahāwī, *Sharḥ*, 2:251–52.

<sup>119</sup> Ṭahāwī, *Sharḥ*, 2:252; Jaṣṣāṣ, *Mukhtaṣar*, 4:299, 308.

<sup>120</sup> Muzanī, *Mukhtaṣar* (1393), 98; *ibid.* (1419), 137.

(2) Some jurists are reported to have held that the pledgee must pay for the use of the pledge. Ibrāhīm al-Nakha'ī is credited with the statement, “If the pledgee uses the pledge, it offsets [his credit] to the extent [of the value of the use] (*idhā intafa'a min al-rahn bi-shay' qāṣṣa-hu bi-qadr dhālika*).”<sup>121</sup> And he is also credited with the statement, “Proceeds are part of the pledge (*al-ghalla min al-rahn*),” regarding a person who receives a house or a slave and earns rent for them.<sup>122</sup> Likewise, al-Sha'bī is reported to have said, regarding a pledgee who received a female slave as a pledge and made her nurse a baby: the pledgee owes equivalent wages,<sup>123</sup> or the wages offset the debt.<sup>124</sup> To Ibn Abī Laylā is attributed the opinion that if the pledgee rents the pledge, the rent contract is valid and the rent is assigned to payment of the debt.<sup>125</sup>

(3) Al-Sha'bī<sup>126</sup> and Shurayḥ<sup>127</sup> are reported to have disapproved of the pledgee's benefiting from the pledge. It is reported that when Shurayḥ was asked what “drinking *ribā* (*shurb al-ribā*)” means, he responded that it refers to the case of a person who receives a cow as a pledge and drinks its milk.<sup>128</sup> A similar statement is ascribed to Ibn Mas'ūd (d. 32/652–3): a man came to him and said that he had ridden a horse that he had received as a pledge. On hearing this, Ibn Mas'ūd said, “The back you rode is *ribā* (*mā aṣabta min zahri-hā fa-huwa ribā*).”<sup>129</sup> It is reported that al-A'mash (b. 60/679–80 or 61/681; d. 148/765) related the statement of Abū Hurayra cited in (1) to Ibrāhīm al-Nakha'ī, who disapproved of benefiting from a pledge.<sup>130</sup> The Hanafis hold the same view.<sup>131</sup> Does a pledgee who benefits from (i.e. uses or rents) a pledge have to pay for it? Curiously, even the Hanafis are not explicit on this point. But the Hanafis hold that if the pledgee rents the pledge to a third person without the consent of the pledgor, the rent belongs to the pledgee, who must

<sup>121</sup> Ibn Abī Shayba, *Muṣannaf*, 4:337, no. 20735.

<sup>122</sup> Ibn Abī Shayba, *Muṣannaf*, 4:337, no. 20736.

<sup>123</sup> Ṣan'ānī, *Muṣannaf*, 8:245–46, no. 15073.

<sup>124</sup> Ibn Abī Shayba, *Muṣannaf*, 4:337, no. 20734.

<sup>125</sup> Sarakhsī, *Mabsūṭ* (n.d.), 21:108; *ibid.* (1421), 21:104.

<sup>126</sup> Ṣan'ānī, *Muṣannaf*, 8:244, no. 15068.

<sup>127</sup> Ṣan'ānī, *Muṣannaf*, 8:244–45, no. 15069.

<sup>128</sup> Ṣan'ānī, *Muṣannaf*, 8:244–45, no. 15069; Bayhaqī, *Sunan*, 6:39.

<sup>129</sup> Ṣan'ānī, *Muṣannaf*, 8:245, no. 15071.

<sup>130</sup> Ṣan'ānī, *Muṣannaf*, 8:244, no. 15066.

<sup>131</sup> Kāsānī, *Badā'ī* (1402), 6:146; *ibid.* (1418), 8:183, 186.

give it as *ṣadaqa*.<sup>132</sup> This rule suggests that the pledgee who uses the pledge is exempt from payment of rent. We will return to this point.

What is the relationship between and among these positions? The explanation of al-Ṭaḥāwī is suggestive in this regard. He writes regarding the position referred to in (1):

This was our position at the stage when *ribā* was still lawful, when the Prophet prohibited neither an interest-bearing loan nor an exchange of unequal goods. But after the Prophet subsequently prohibited *ribā* and prohibited any interest-bearing loan, the ulama unanimously made the pledgor rather than the pledgee pay any expenses arising from the pledge and prohibited the pledgee from using the pledge.<sup>133</sup>

Al-Ṭaḥāwī writes also that the Prophet at first permitted a pledgee to milk an animal that he received as a pledge, and that the expenses required to maintain it were considered, fictitiously, to be compensated for with the milk.<sup>134</sup> It is not certain whether or not his explanation corresponds to historical fact, but it may reflect the process by which it came to be prohibited for a pledgee to make use of the pledge. However, the Hanafis substantially permit the pledgee to use the pledge. Although the Hanafis are not explicit on whether or not a pledgee must pay for the *manfā'a* he enjoys (i.e. use of the pledge), they exempt those who are in the same situation as he is from payment for the *manfā'a*. For example, if a person hires an animal and travels beyond the destination specified in the contract, he does not owe any extra-rent. Likewise, if a person usurps an object and makes use of it, he does not have to pay for its use. The same rule should apply to a pledgee, who uses the pledge illegally. If so, we can say that the Hanafis do permit the pledgee to use the pledge for the following reason: on the one hand, the pledge perishes at the risk of the pledgee within the limit of the amount of debt. On the other hand, if the value of a pledge is a little more than the amount of the debt, the pledgee, who assumes a small additional risk of loss with respect to that part of the pledge which exceeds the amount of the debt, can use the pledge for nothing. If the value of a pledge is less than the amount of debt, the pledgee can use it without assuming any additional risk.

<sup>132</sup> Sarakhsī, *Mabsūṭ* (n.d.), 21:108; *ibid.* (1421), 21:104; Samarqandī, *Tuhfa* (1964), 3:43; *ibid.* (1414), 3:42.

<sup>133</sup> Ṭaḥāwī, *Sharḥ*, 2:252.

<sup>134</sup> Ṭaḥāwī, *Sharḥ*, 2:252.

Since the value of a pledge usually is little more or less than the amount of debt, the Hanafis did not abandon the ancient Iraqī doctrine authorizing the pledgee to use a pledge gratis despite the introduction of the prohibition of *ribā*, as explained by al-Ṭaḥāwī. There may be an economic explanation for their position. As noted, some Iraqī jurists are reported to have held that the benefit that the pledgee obtains from the pledge offsets part of the debt that it secures. Suppose that this rule applies to the case in which a creditor receives land as a pledge and cultivates it. According to this rule, the amount of rent that he owes to the pledgor is subtracted from the debt. But if the pledgee does not use the land, he can demand that the pledgor (more exactly the debtor) pay the total amount of the debt. Whether or not the pledgee chooses to cultivate the land depends on the expected value of its yields and the expenses (including the rent) he must pay for it, but this rule is likely to discourage the pledgee to cultivate the land. If he chooses not to cultivate the land, the land may be abandoned until it is returned to the pledgor or transferred to someone else. The Hanafis may have taken this point into consideration. In this context it is suggestive to refer to the rule according to which *ʿushr* is levied on *ʿushr* land that has been pledged.<sup>135</sup> Whether the land is or not abandoned also concerns the interest of the state.

To turn to the Malikis, they distinguish the following cases.

(1) The case in which the pledge is in the possession of a pledgee is subdivided into two cases:

- (a) If the pledge is an object that is not concealed from view, such as land, a house or an animal, the risk of loss remains with the pledgor, unless the pledgee commits a transgression or is negligent.
- (b) If the pledge is an object that is concealed from view, such as gold, silver, jewelry or cloth, so that it is not clear how it was lost, the Malikis disagree. Some hold that the pledgee is, in principle, liable, but that he is exonerated from liability if he establishes that the loss was not a result of his act. Others hold that the pledgee is always liable.<sup>136</sup> The

<sup>135</sup> Samarqandī, *Tuhfa* (1964), 3:45; *ibid.* (1414), 44; Marghīnānī, *Hidāya*, 4:131.

<sup>136</sup> ʿAbd al-Wahhāb, *Maʿūna*, 2:1156–57; Saḥnūn, *Mudawwana*, 5:298; Ibn al-Jallāb, *Tafīr*, 2:259; Ibn ʿAbd al-Barr, *Kāfi*, 412–13.

first is the majority view, adopted by Ibn al-Qāsim, ‘Abd al-Malik b. Mājīshūn (d. 212/827–8), Aṣḥabagh (d. 225/839–40) and Ibn al-Mawwāz (d. 269/883 or 281/895). Ashhab (d. 204/820) adopted the second view. Both opinions are attributed to Mālik.<sup>137</sup>

(2) If the pledge is in the possession of a third person, the risk of its loss remains with the pledgor.<sup>138</sup>

What is the meaning of the disputes referred to in (1) (b)? As will be demonstrated, the Maliki jurists tend to regard *ḍamān* as an effect of ownership. In accord with this tendency, the majority of the Malikis maintain that the risk of loss remains with the pledgor (i.e. the owner), although they place the burden of proof on the pledgee who claims that the loss resulted from a natural cause. The second view may originally have been inspired by the idea embodied in the statement attributed to the Prophet<sup>139</sup> and Ibn a-Musayyab,<sup>140</sup> “If it [viz. the pledge] perishes, his [viz. the pledgee’s] right is not extinguished. It perishes at the risk of its owner, who receives its proceeds and assumes its loss (*innamā halaka min rabb al-rahm, la-hu ghunumu-hu wa-‘alay-hi ghurmu-hu*).” As will be noted below, if a pledge is of an animal or trees, the *fructus* produced by it, such as the wool and milk produced from an animal or the dates harvested from date palms, belong to the pledgor, and the pledgor can demand that the pledgee pay rent in circumstances such as when the latter rides the pledged animal. Therefore both the pledgee and the pledgor benefit from the pledge. Conversely, if a pledge is gold, silver, jewelry or cloth, the pledgee alone benefits from it by possessing it as a security, since it does not produce any *fructus* or proceeds for the pledgor insofar as it is in the pledgee’s possession. This may be why the pledgee assumes the risk of its loss, in accordance with the above-cited statement attributed to the Prophet and Ibn a-Musayyab. If so, the majority of the early Malikis modified the ancient Medinan view according to which *ḍamān* is attributed to a person who profits from an object, and regarded *ḍamān* as one of the effects of ownership.

<sup>137</sup> Bājī, *Muntaqā*, 5:244.

<sup>138</sup> ‘Abd al-Wahhāb, *Mā‘ūna*, 2:1157.

<sup>139</sup> Ibn Abī Shayba, *Muṣannaf*, 4:526, no. 22791; Shāfi‘ī, *Umm*, 3:167; Muzanī, *Mukhtaṣar* (1393), 101; *ibid.* (1419), 139–40.

<sup>140</sup> Ṣan‘ānī, *Muṣannaf*, 8:237–38, no. 15034; Bayhaqī, *Sunan*, 6:40.

Mālik states, regarding *manfa'a*: it is forbidden to stipulate that the pledgee can use the pledge if the debt originates from a loan, for such a stipulation would make it an interest-bearing loan (*salaf jarra manfa'a*). If the debt originates from a sale, there is no harm in authorizing the pledgee to use a house or land that has been pledged. As for an animal or cloth, it is prohibited to authorize the pledgee to use it unless a period of time is set for using it, for it is uncertain in what state it will be returned to the pledgor.<sup>141</sup>

According to the Medinan jurists, consideration for *manfa'a*, i.e. rent, belongs to the pledgor, as embodied in the above-cited statement, "If it [viz. the pledge] perishes, his [viz. the pledgee's] right is not extinguished. It perishes at the risk of its owner, who receives its proceeds and assumes its loss." Ibn al-Qāsim states that if someone receives a house or a slave as a pledge and he leases it, the rent is not pledged.<sup>142</sup> That is to say, the rent should be delivered to the pledgor. In the *Mustakhrāja* of al-ʿUtbī, ʿĪsā b. Dīnār (d. 212/827–8) is cited as saying that the rent of a pledged orchard, house or slave is, in principle, not included in the pledge, but a stipulation to that effect is permitted.<sup>143</sup> ʿAbd al-Wahhāb writes: because it is not the *manfa'a* of an object, but its substance (*ʿayn*), that is pledged, the rent paid for a pledge is not pledged. The pledgor can demand the payment of rent if the pledgee rides a pledged animal.<sup>144</sup> But it is not always clear who is supposed to conclude a rent contract with regard to a pledge. In the *Mudawwana*, Mālik is quoted as stating that if the pledgee rents the pledge at the request of the pledgor, the pledge is valid.<sup>145</sup> In the *Bayān* of Ibn Rushd al-Jadd, Mālik is quoted as saying that the pledgee has the right to rent a pledge like a slave or a house, rather than the pledgor.<sup>146</sup>

Mālik states, regarding *fructus*: if date palms are pledged, the dates on them belong to the pledgor and are not included in the pledge.<sup>147</sup> Likewise wool produced by a sheep, or its milk or butter is not

<sup>141</sup> Saḥnūn, *Mudawwana*, 5:317.

<sup>142</sup> Saḥnūn, *Mudawwana*, 5:304.

<sup>143</sup> ʿUtbī, *Mustakhrāja*, 11:63.

<sup>144</sup> ʿAbd al-Wahhāb, *Māʿūna*, 2:1161–62.

<sup>145</sup> Saḥnūn, *Mudawwana*, 5:317.

<sup>146</sup> Ibn Rushd al-Jadd, *Bayān*, 11:28.

<sup>147</sup> Mālik-Yaḥyā, *Muwattaʿa*, 4:6, no. 1486; *ibid.*, tr. Bewley, 300b, 36.11; Saḥnūn, *Mudawwana*, 5:301.

pledged.<sup>148</sup> Conversely, if a female slave is pledged and gives birth to a child while in the possession of the pledgee, the child is pledged along with her, just as in the sale of a female slave her child is sold with her if it is in the womb on the date of the sale.<sup>149</sup>

*Disposition of a pledge*

The Hanafi and Maliki rules concerning the sale of a pledged object are as follows: according to the Hanafis, neither the pledgor nor the pledgee can sell the pledge by himself. If one of them sells it without the consent of the other, the validity of the sale depends on whether or not the other party ratifies it. If he does ratify it, the sale is valid and the price substitutes for the pledge.<sup>150</sup> Mālik holds as follows: if the pledgor sells the pledge without the consent of the pledgee, the validity of the sale depends on the ratification of the pledgee. If he ratifies the sale, it is valid and the price should be delivered to him. If he refuses to ratify it, the sale is invalid. According to Saḥnūn, however, this rule applies only when the price is lower than the amount of the debt; otherwise the pledgee cannot cancel the sale, because the debt can be paid.<sup>151</sup> Mālik says, regarding the case in which the pledgee sells the pledge or pledges it to secure the debt he owes to a third person, that the pledgor can cancel the sale or the sub-pledge and take back the pledge wherever it is found.<sup>152</sup> Thus, there is little difference between the Hanafi and Maliki rules.

As for the manumission of a pledged slave, the Hanafi rules are as follows: the manumission is valid and the pledgee cannot object to it. But (1) if the pledgor has sufficient means, he must satisfy the pledgee without delay, if the debt has come due. If the debt has not been due, the pledgor must provide the value of the pledge as a substitute for the slave. (2) If the pledgor does not have sufficient means, the slave must provide the pledgee with service equivalent to his value as assessed on the date of the manumission. The manumitted slave in his turn can demand that his ex-master repay his

<sup>148</sup> Saḥnūn, *Mudawwana*, 5:304.

<sup>149</sup> Mālik-Yahyā, *Muwattaʿ*, 4:6, no. 1486; *ibid.*, tr. Bewley, 300b, 36.11; Saḥnūn, *Mudawwana*, 5:301.

<sup>150</sup> Shaybānī, *Kābīr*, 262; Shaybānī, *Aṣl*, 5:90; Samarqandī, *Tuhfa* (1964), 3:43; *ibid.* (1414), 3:43.

<sup>151</sup> Saḥnūn, *Mudawwana*, 5:298–99, 319.

<sup>152</sup> Saḥnūn, *Mudawwana*, 5:317.

value. If his value is less than the amount of the debt, the pledgee can demand that the pledgor compensate him for the deficit.<sup>153</sup> The rule that the manumission is valid is ascribed to some Iraqi jurists.<sup>154</sup> In particular Ḥasan b. Ṣāliḥ (b. 100/718–9; d. 169/785–6) is reported to have said that the slave is not required to work for the pledgee.<sup>155</sup>

The rule that manumission is valid looks strange. The purpose of the rule that the sale of the pledge by the pledgor is invalid unless ratified by the pledgee is doubtless to safeguard the interest of the pledgee. Why do the Iraqi jurists not protect him when the pledgor manumits the slave? One possible explanation is that manumission is a recommended act. But it seems more plausible to reason as follows: if the pledgor has sufficient means, there is no harm in manumitting the slave, as indicated with reference to case (1). The problem arises when he does not have sufficient means (case (2)). If he does not manumit the slave, he will have the obligation to feed the slave, which is not only a burden to him, but also makes it difficult to satisfy the pledgee. This may be why he can manumit the slave and make the slave work to satisfy the pledgee on his behalf, for the pledgee would not have accepted as a pledge a slave who was unable to work and therefore was worthless as security.

Ibn ‘Abd al-Barr (d. 463/1070) explains the Maliki opinion as follows: if the pledgor satisfies the pledgee at the moment of the manumission, the manumission is valid; otherwise it does not take effect until the pledgor satisfies the pledgee.<sup>156</sup>

### 3. Ijāra

*Ijāra* is a contract in which someone transfers the *manfa‘a* of an object or service in return for payment.<sup>157</sup> According to the Hanafi jurist al-Samarqandī, *ijāra* is divided into rent (*ijāra ‘alā al-manfa‘a*), such as a rent of a house, a shop, land, a slave, an animal for riding or transport, clothes, jewelry or a receptacle,<sup>158</sup> and employment (*ijāra*

<sup>153</sup> Shaybānī, *Kabīr*, 265; Ṭaḥāwī, *Mukhtaṣar*, 93.

<sup>154</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:460–61, nos. 22089–90.

<sup>155</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:461, no. 22090.

<sup>156</sup> Ibn ‘Abd al-Barr, *Kāfi*, 415.

<sup>157</sup> Qarāfi, *Furūq*, 1:187.

<sup>158</sup> Samarqandī, *Tuhfa* (1964), 2:476; *ibid.* (1414), 2:347.

‘*alā al-‘māl*’) for fulling, shoemaking, transport etc.<sup>159</sup> Lease of immovable or an animal for riding or transport is often called *kirā’*.

On the following pages I will first examine the solutions concerning *ḍamān*, i.e. the attribution of risk or liability for damage or loss that takes place in the object that a hirer possesses on the basis of the contract. I will then consider the special liability of an employee.

### *Rent*

As will be shown, the Iraqi and Medinan jurists distinguished between liability arising from violation and liability arising from destruction. What is the significance of this distinction from a practical point of view? How was the distinction introduced? To answer these questions, I will analyze the positive solutions adopted by the Iraqi and Medinan jurists.

Let us begin with the case in which the object a hirer possesses in an *ijāra* suffers damage or loss. Some of the positive solutions adopted by al-Shaybānī indicate that the hirer is liable on the ground of violation of the contract or destruction, whereas the later Hanafis blur the distinction. Let us examine some of these positive solutions.

(1) If a person who hires clothes for one day and one night lends them to a third person, he is liable for any damage or loss in the clothes, for “he violated [the contract] and became *ḍāmin* (*khālafa fa-ṣāra ḍāmin*)” by lending the clothes to a third person.<sup>160</sup>

(2) A person hires a tent for the purpose of travel from Kufa to Mecca. If he leaves for Mecca without bringing the tent with him, he is liable for any damage to the tent and is exempt from payment of rent, “because he violated [the contract] when he left it [viz. the tent], and the *ḍamān* was attributed to him (*li-anna-hu khālafa hīna khalafa-hu wa-waqa’a ‘alay-hi al-ḍamān*). The same is true if a person hires a tent for the purpose of travel from Kufa to Mecca, but remains in Kufa without returning the tent to the owner, and the tent is lost.”<sup>161</sup>

(3) A person borrows an animal in a loan for use and travels beyond the destination specified in the contract. He then brings the animal back to the starting point, but it dies before he returns it to

<sup>159</sup> Samarqandī, *Tuhfa* (1964), 2:482; *ibid.* (1414), 2:352.

<sup>160</sup> Shaybānī, *Aṣl* (MS), 27b.

<sup>161</sup> Shaybānī, *Aṣl* (MS), 46b.

the owner. Abū Ḥanīfa reportedly held that the borrower is not liable for the death of the animal. But he later changed his position, arguing now that the borrower is not exempt from liability until he returns the animal to the owner, for “he has become *ḍāmin* when he violated [the contract].” The rent of an animal is subject to the same rule. Abū Yūsuf and al-Shaybānī adopt the same position.<sup>162</sup> In addition, al-Shaybānī states that the hirer does not owe any rent for the period after he travels beyond the specified destination, for “he has become *ḍāmin*.”<sup>163</sup>

In these cases, in which the term “violated (*khālafā*)” is used, two points are noteworthy. The first point is that for the hirer to be liable for damage or loss suffered by the object he possesses, it is not required that there was a likelihood that the violation would lead to damage or loss of the object. In case (2) the risk to the tent would be greater if the hirer took it to Mecca rather than leave it at home at Kufa. In case (3) Abū Ḥanīfa (second position), Abū Yūsuf and al-Shaybānī make the hirer liable for loss suffered even *after* the violation has ceased. The second point is that in cases (2) and (3) the hirer is exempted from payment of rent. In particular, note that in case (3) he is exempt from the date on which he violates the contract. Al-Shaybānī writes, with regard to case (1), that the hirer is exempted from payment of rent even if the clothes suffer no damage or loss.<sup>164</sup>

In the following case, in which the hirer clearly violates the contract, al-Shaybānī assimilates him to a usurper, who is unconditionally liable for damage or loss suffered by the usurped object until he restores it to the owner.

(4) A person hired a house for one month, but continues to live there after the month passed. Meanwhile the house suffered damage, but it is not known when the damage took place: the owner claims that the house was damaged after the one month had passed (i.e. after the term of the contract had expired), while the lessee claims that it was damaged before the contract came to end. Al-Shaybānī states that if neither the owner nor the lessee can establish his claim, the lessee is exempt from liability on the condition that he swears. Al-Shaybānī also assimilates the lessee to a usurper

<sup>162</sup> Shaybānī, *Aṣl* (MS), 31a.

<sup>163</sup> Shaybānī, *Aṣl* (MS), 39a.

<sup>164</sup> Shaybānī, *Aṣl* (MS), 27b. See also Karābisī, *Furūq*, 2:144.

(*ghāṣib*).<sup>165</sup> This indicates that if it is established that the damage took place after the term of the contract had expired, the lessee is liable for the damage, whatever its cause, in accordance with the rule governing usurpation (see p. 98).

In the two following cases, a person hires a slave and violates the contract, and he is exempt from payment of rent, as in cases (2) and (3).

(5) A person who hires a slave to make him work in Kufa cannot take him outside of Kufa. If he does so, *damān* is attributed to him and he is exempt from payment of rent.<sup>166</sup>

(6) Likewise, if a person hires a slave for a specified work but makes the slave do another work, he becomes *ḍāmin* and is exempt from payment of rent.<sup>167</sup>

In the following case, the term '*ta'addā*' (rather than '*khālafā*') is used to justify the liability of the hirer.

(7) A person hires an animal and beats it to death. Abū Ḥanīfa holds that the hirer is liable for the death of the animal unless the owner has authorized him to beat it. Abū Yūsuf and al-Shaybānī hold as follows, by way of *istiḥsān*: if he beats it "in the way in which people beat it and in a spot in which they beat it (*kamā yaḍribu al-nās fi al-mawḍi' alladhī yaḍribūna fi-hi*)," he is not liable, but if he "transgresses (*ta'addā*)," he is liable.<sup>168</sup>

Abū Ḥanīfa seems to have reasoned that the hirer is liable for the death of the animal because the beating of an animal is a destructive act that the later Hanafis would call a 'direct cause' (*mubāshara*). Abū Yūsuf and al-Shaybānī seem to have reasoned that the owner implicitly authorized the hirer to beat the animal, so long as the hirer observes the limits imposed by social custom; if he transgresses the limits, he becomes liable.

What is the difference between the two concepts, 'violate' and 'transgress'? As for 'violate' or 'violation,' the later as well as the early Hanafis use the term in connection with a person who acts in disregard of the limit imposed by a contract. For instance, according to al-Samarqandī, if a person hires an animal and loads on it items more harmful than those designated in the contract, he has

<sup>165</sup> Shaybānī, *Aṣl* (MS), 21b.

<sup>166</sup> Shaybānī, *Aṣl* (MS), 55b.

<sup>167</sup> Shaybānī, *Aṣl* (MS), 55b.

<sup>168</sup> Shaybānī, *Aṣl* (MS), 30b.

violated the contract.<sup>169</sup> According to al-Sarakhsī if a person with whom an animal was deposited mates it without the authorization of the owner, he is liable for its eventual death, “because he becomes a violator when he does a thing other than what he was instructed to do (*li-anna-hu mukhālīf ḥīna atā bi-ghayr mā umira bi-hi*).”<sup>170</sup> For the later Hanafis, the term ‘transgress’ or ‘transgression’ refers to an action performed deliberately without entitlement or without regard for the rights of others, whether such an entitlement or rights are stipulated in a contract, prescribed by law, or endorsed by custom. Al-Kāsānī mentions, as an example of transgression, the act of deliberately causing damage to an object belonging to another.<sup>171</sup> Al-Samarqandī writes that the hirer of an animal who brings it to a place other than the destination designated in the contract has committed a transgression.<sup>172</sup> This act constitutes also a violation.

Therefore, the concept of transgression is wider than that of violation. However, the distinction between the two concepts is of little practical importance for later jurists as far as liability is concerned. For example, for them, “What is established by custom is equivalent to what is established by stipulation (*al-thābit bi-’l-’urf ka-’l-thābit bi-’l-shart*),”<sup>173</sup> or “What is known amongst merchants is equivalent to what is fixed by stipulation between them (*al-ma’rūf bayna al-tujjār ka-’l-mashrūṭ bayna-hum*).”<sup>174</sup>

For the earliest Hanafis and some of their Iraqi predecessors, however, transgression is different from violation in two respects. First, a hirer who violates the contract is exempt from payment of rent, as noted, whereas a hirer who commits a transgression is not. Second, for the hirer to be liable, it is not necessary that the violation of a contract is likely to cause damage, as noted, whereas transgression is an act that by its nature is likely to cause damage. The first point is also illustrated in the following case.

(8) Al-Shaybānī writes, regarding a person who hired a tent and used a lamp in it, with the result that the tent was damaged (alphabets are mine):

<sup>169</sup> Samarqandī, *Tuhfa* (1964), 2:489; *ibid.* (1414), 2:358.

<sup>170</sup> Sarakhsī, *Mabsūt* (n.d.), 11:126; *ibid.* (1421), 11:136.

<sup>171</sup> Kāsānī, *Badā’i* (1402), 4:211; *ibid.* (1418), 6:56.

<sup>172</sup> Samarqandī, *Tuhfa* (1964), 2:482; *ibid.* (1414), 2:351–52.

<sup>173</sup> Sarakhsī, *Mabsūt* (n.d.), 15:173; *ibid.* (1421), 15:195. For a similar legal maxim, see *Majalla*, art. 43.

<sup>174</sup> *Majalla*, art. 44. Ibn Rushd al-Jadd writes, “*al-’urf ka-’l-shart*.” Idem, *Muqaddamāt*, 2:466.

I hold as follows:

(a) If he lighted a lamp in the manner that people customarily do (*kamā yusrīju al-nās*), *ḍamān* is not attributed to him.

(b) If he transgressed (*ta'addā*), I require him to pay compensation to the extent of the damage he caused to the tent (*ḍammantu-hu bi-hisāb mā afsada-hu min-hu*). He owes rent so long as it is possible to live in the remaining part of the tent. If the tent burned down or the remaining part is not fit for habitation, he is liable for the loss and exempt from the payment of rent for the period after the date on which he assumed *ḍamān* (*mundh yawm lazima-hu al-ḍamān*). The same rule applies if he made a fire.

(c) If the owner stipulated that it is prohibited for the hirer to light a lamp or make a fire in the tent, the latter cannot light a lamp or make a fire in the tent.<sup>175</sup>

In case (b), the hirer who destroyed part of the tent continues to owe rent for what remains of the tent. In contrast, al-Shaybānī states, with respect to case (3), that if a person hires an animal and travels beyond the destination designated in the contract, he does not owe rent beginning from the date of the violation and thereafter. If in case (b) the transgression by the hirer of the tent were treated in the same manner as violation of contract as in case (3), he would be completely exempt from payment of rent beginning from the date of the transgression.

Why is a person who hires an object and violates the contract exempt from payment of rent? According to the earliest Hanafis this is because “the *ḍamān* was attributed to him [viz. the hirer of a tent in case (2)]” or “he [viz. the hirer of an animal in case (3)] has become *ḍāmin*,” i.e. he assumes the risk of loss. This is in accordance with the opinion attributed to al-Sha‘bī,<sup>176</sup> Ibrāhīm al-Nakha‘ī<sup>177</sup> and Ḥammād b. Abī Sulaymān<sup>178</sup> with respect to the case of the hirer of an animal who travels beyond the destination specified in the contract. For example, Ibrāhīm is reported to have said about such a hirer, “He is *ḍāmin*, and does not owe payment of rent for what he has violated (*huwa ḍāmin wa-lā kirā’ fī-mā khālafā*).”<sup>179</sup>

<sup>175</sup> Shaybānī, *Aṣl* (MS), 46b.

<sup>176</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:213, no. 14931.

<sup>177</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:288, no. 20155.

<sup>178</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:211, no. 14925.

<sup>179</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:288, no. 20155.

The idea underlying this opinion is easy to detect. We have seen that the Iraqī jurists, according to whom the pledgee assumes the risk of loss of a pledge, originally permitted him to make use of the pledge for free, whereas the Medinan jurists, according to whom the pledgor assumes the risk, prohibited the pledgee from benefiting from the pledge. The idea underlying these rules is expressed in the statement attributed to the Prophet, “A person cannot profit from an object the risk of which he does not assume (*lā ribh mā lam yudman*).” By rewriting this maxim as, “Profit is concomitant with risk (*al-ghalla bi-’l-ḍamān, al-kharāj bi-’l-ḍamān*),” as put into the mouth of the Prophet, it is possible to infer that if a person hires an animal but violates the contract by going beyond the destination, then after the violation he is made to assume the risk of loss in return for enjoying its *manfaʿa* gratis. The same idea is discerned in the report according to which Ibrāhīm instructed, with respect to a person who entrusts someone with selling his merchandise, “he [viz. the person who was entrusted] should be given wages in order that he assumes the risk of loss (*yuʿṭā ʿalay-hi al-ajr li-kay yaḍmana-hā*).”<sup>180</sup>

However, this opinion is by no means acceptable for us: is it not unjust that a hirer who violates the contract is exempt from the payment of extra rent for the period after the violation? Why did the Iraqī jurists prior to the earliest Hanafis adopt such an opinion? This question is closely related to the second aspect of the difference between transgression and violation, i.e., a transgression, by definition, is likely to cause damage or loss, whereas a violation may not be. The difference may be deduced from cases (7) and (8), where transgression is described as an act that is not consistent with the way ordinary people customarily do things. More explicit in this regard is the opinion attributed to Sufyān al-Thawrī, who is reported to have said: if someone hires an animal and there is no clause stipulating the weight that it may bear and the period of the contract is not specified, he is not liable, if “he does not exceed the limit of what people deem to be an appropriate load (*lā yataʿaddā mā yarā al-nās anna-hu yuḥmalu*).” He adds, “If he [viz. the owner] stipulates something, he [viz. the hirer] does not have to observe it (*fa-in sammā shayʿan lam yaʿuddu-hu*).”<sup>181</sup> That is to say, the violation of con-

<sup>180</sup> Sanʿānī, *Muṣannaḥ*, 8:221, no. 14966. For a similar report, see *ibid.*, 8:221, no. 14964.

<sup>181</sup> Sanʿānī, *Muṣannaḥ*, 8:212, no. 14929.

tract is not taken into account if it is not likely to cause damage or loss. This opinion indicates, at the same time, that Sufyān did not accept the concept of violation as a basis on which to assign liability to the hirer. Why did the Hanafis and some of their Iraqī predecessors invoke the principle that an object perishes at the risk of a person who benefits from it?

Clearly, they allowed the hirer of an object who violates the contract to benefit from it gratis in order to make him liable, not *vice versa*. In other words, they first reached the solution that the hirer should pay compensation for eventual damage or loss suffered by the object once he has violated the contract, and they then sought to justify this solution. In my view, they reasoned as follows: the rent of an animal for the purpose of travel is often accompanied with a certain danger, in particular when the destination is a remote place. As the act of traveling beyond the specified destination can add to the level of danger, the hirer deserves a sanction, i.e. he should assume liability for any damage or loss the animal suffers subsequently. But the difficulty of establishing that the act of traveling beyond the specified destination actually exposed the animal to danger forced the Iraqī jurists to take recourse to the principle that an object perishes at the risk of the person who benefits from it, as a result of which the hirer is exempt from payment of rent.

In support of my suggestion, we may cite the view of Abū Ḥanīfa with respect to the effect of a sublease. According to Abū Ḥanīfa, there is no harm in subleasing a house to a third person, unless he is likely to cause more harm to the house than the lessee would.<sup>182</sup> Al-Sarakhsī adds that if the lessee subleases it in return for a rent higher than the original rent, he must give the difference as *ṣadaqa*.<sup>183</sup> Likewise, if a person hires a horse and subleases it in return for a rent higher than the original rent, the sublease is valid, but he must give the difference as *ṣadaqa*.<sup>184</sup> A person who hires a slave can sublease the slave for the purpose of making him render service (*khidma*), and he is not liable if the slave dies due to a natural cause while in the possession of the sublessee.<sup>185</sup> Ibrāhīm al-Nakhaʿī, Ibn Sīrīn,

<sup>182</sup> Shaybānī, *Aṣl* (MS), 12b.

<sup>183</sup> Sarakhsī, *Mabsūṭ* (n.d.), 15:130–31; *ibid.* (1421), 15:145–46.

<sup>184</sup> Shaybānī, *Aṣl* (MS), 12b.

<sup>185</sup> Shaybānī, *Aṣl* (MS), 55b.

Shurayḥ, al-Sha‘bī and Ḥammād are reported to have disapproved of a person who hires a slave and subleases him for a rent higher than the original rent.<sup>186</sup> That is to say, they do not disapprove of a sublease itself.

However, Abū Ḥanīfa maintains, exceptionally, that if a person hires an animal for traveling and subleases it, he has violated the contract and is liable for the payment of the value of the animal if it then dies as a result of natural causes.<sup>187</sup> The reason why Abū Ḥanīfa makes an exception here is not clear, but it is possible to infer as follows: on the one hand, the owner of the animal will not rent it for the purpose of travel unless he trusts in the hirer, for the animal will be exposed to a certain danger. The owner presumably does not consent to sublease of the animal to a third person. On the other hand, it is difficult for the owner to establish that the third person was likely to cause damage to the animal. This is why Abū Ḥanīfa decided to make a hirer who rents the animal to a third person assume liability.

What is the exact nature of this liability? If it was introduced originally in order to create a presumption in favor of the owner, it is theoretically possible for the owner to hold liable a hirer who violates the contract because of the hirer’s destructive act, if the owner can establish that the act of the hirer was likely to cause damage or loss. There are a few examples in which the earliest Hanafi jurists adopt this solution. The following is one such example: a person who hired an animal to carry 10 *makhtūms* (dry measure, pl. *makhātīm*) of wheat from Kufa to Hira loaded it with 15 *makhtūms*, “as the result of which the animal died (*‘aṭibat al-dābba min dhālika*).” Abū Ḥanīfa, Abū Yūsuf and al-Shaybānī all make the hirer pay one-third of the value of the animal and the full stipulated rent.<sup>188</sup> The ground upon which the hirer in this example is held liable is destruction, for if he had been liable for having violated the contract, he would have to pay the entire value of the animal and be exempt from payment of any rent.<sup>189</sup> They may have been unwilling to let the con-

<sup>186</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:223, no. 14973.

<sup>187</sup> Shaybānī, *Aṣl* (MS), 55b.

<sup>188</sup> Shaybānī, *Aṣl* (MS), 41b. For a solution to the same effect, see *ibid.*, 30a–b.

<sup>189</sup> Ibn Abī Laylā and Zufar hold that the lessee must pay the total value of the animal. Kāsānī, *Badā’i‘* (1402), 4:213–14; *ibid.* (1418), 6:61. But it is not clear whether or not they hold the hirer liable on the ground of violation.

cept of violation cover those cases in which it is easy for the owner to establish that a violation was likely to cause damage or loss, because to make the hirer assume the risk of loss with regard to what he possesses amounts to exempting him from payment of rent.

An additional example is the earlier opinion of Abū Ḥanīfa with respect to case (3): if someone borrows an animal and travels beyond the designated destination, and brings the animal back to the starting point, he is no longer liable for subsequent damage the animal suffers. This is certainly because it is obvious that the violation (traveling beyond) did not cause the damage (although we might think that the violation may have been a remote cause of the damage). This solution suggests that Abū Ḥanīfa (or possibly some Iraqi jurists prior to him) originally introduced the concept of liability arising from violation to create a presumption in favor of the owner for whom it is difficult to establish that the violation committed by the hirer was likely to cause damage. But he later changed his position to make the hirer who violates the contract assume absolute liability. This position was reiterated by Abū Yūsuf and, in particular, al-Shaybānī, who holds such a hirer liable in cases (1), (2) and (4), where the violation presumably was not likely to cause damage or loss.

Mālik also distinguishes between liability arising from destruction and liability arising from violation, although he employs the term “transgression (*taʿaddī*)” as the ground of both liabilities. Let us begin with liability arising from destruction. There are several cases in which a hirer who commits a transgression is liable only when the transgression is likely to cause damage.

(1) According to Mālik, if a person hires a slave for sewing but makes the slave do a different work, and the slave dies, then the hirer is liable only when the work is so dangerous that it is likely to cause the death of the slave.<sup>190</sup>

(2) Mālik states about slaves who conclude an employment contract with someone and die while they are working based on the contract.

The person who employed them is not liable for what afflicted them (*laysa ʿalā man istaʿjara-hum ḍamān mā aṣāba-hum*), even if the slave owners say, “We did not tell them [viz. the slaves] to conclude an employment contract by themselves.” But if a slave is employed for dangerous

<sup>190</sup> Saḥnūn, *Mudawwana*, 4:434.

work so that wages several times greater [than the stipulated wages] should be paid for it, e.g. for digging muddy ground or demolishing walls, the employer is liable for the death of the slave on the condition that the slave was not authorized [to make such an employment]. This is the way we do things (*wa-huwa al-amr 'inda-nā*).<sup>191</sup>

That is to say, a person who makes a slave belonging to someone else perform labor without obtaining the permission of the slave owner is liable for eventual damage, if the work is likely to cause damage; otherwise, the employer is not liable for eventual damage if he does not obtain the permission of the slave owner. This rule is attributed also to the Medinan authority Rabī'a b. Abī 'Abd al-Raḥmān (d. 136/753–4), who is reported to have said:

Whoever employs a slave and requires him to engage in labor that is potentially fatal is liable [for eventual damage] (*kull man ista'jara 'abd fi gharar al-ijāra fī-mā yukhshā min al-talaḥ, fa 'alay-hi al-damān*), even if the slave was authorized to conclude an employment contract. This is because the slave is authorized only within the limits of custom and to the extent that there is no fear of accident.<sup>192</sup>

What is the nature of the liability of the hirer in cases (1) and (2)? Although the hirer is liable only if his act was likely to cause damage, the next two cases suggest that the hirer is held liable on the ground of violation of contract, rather than destruction.

(3) A person hired a camel and committed a transgression by making it carry a load heavier than the weight specified in the contract. Subsequently, the animal was exhausted and eventually died. Mālik states: if the excess weight placed on the camel by the hirer was one *raṭl* or two, or a weight that was not likely to occasion its death, the owner can demand the payment of extra rent, but he cannot hold the hirer liable for its death. If the weight was such that it was likely to lead to the death of the camel, the owner has the choice between (i) demanding that the hirer pay its value as calculated on the date on which he committed the transgression, and (ii) making him pay the extra rent in addition to the stipulated rent, relinquishing the demand that he pay its value.<sup>193</sup>

<sup>191</sup> Saḥnūn, *Mudawwana*, 4:430.

<sup>192</sup> Saḥnūn, *Mudawwana*, 4:430.

<sup>193</sup> Saḥnūn, *Mudawwana*, 6:163; 'Utbī, *Mustakhrāja*, 9:120. See also, Saḥnūn, *Mudawwana*, 4:473. The same solution is adopted with respect to a loan of a non-fungible thing (*'ariyya*). Saḥnūn, *Mudawwana*, 6:163.

(4) Ibn al-Qāsim states, with regard to a slave or a minor who concludes an employment contract with someone without the permission of his master or guardian: “If the employer made them engage in work that was likely to cause their death (*idhā ’sta’malahumā ‘amalan ya’tabāni fī-hi*),” the master of the slave can choose to demand that the employer pay whichever is greater, the stipulated wages or the equivalent wages, or to demand that the employer pay the value of the slave as calculated at the moment when the employer made the slave work. He cannot demand both the wages and the value of the slave (as for the guardian of the minor, he can demand payment of the blood-money in addition to whichever is greater, the stipulated wages or the equivalent wages).<sup>194</sup>

In these two cases the hirer/employer is required to pay the value of the object or slave as valued on the date on which he committed the transgression, rather than on the date on which it perished, if the owner seeks compensation from him. In addition, if the owner opts for the payment of the value, he cannot demand payment of rent or wages. The idea underlying this solution is to attribute the risk to the hirer once he does an act that is likely to cause damage to the object. We may surmise that the onus of proof lies on the owner who claims that the hirer/employer did such an act. Be that as it may, unlike the Hanafis’ liability based on the ground of violation, the liability as conceived here by the Medinans is not absolute. Conversely, the following solution indicates that the mere fact of violation permits the owner to hold the hirer liable unconditionally. Mālik states in the *Muwattaʿa*:

The practice in our community regarding the case of a person who hires an animal for a journey to a specified place and travels beyond (*yataʿaddā*) that place and further is to give a choice to the owner of the animal. If he wants to take extra rent calculated in proportion to the distance overstepped, he may do that and the animal should be restored to him, in addition to the stipulated rent. If he wants, he can demand payment of the value of the animal as calculated at the place where he began to exceed [the specified place], when the animal was rented for one way.<sup>195</sup>

Taken literally, this text means that if a person hires an animal and travels beyond the specified destination, the owner can demand that

<sup>194</sup> Saḥnūn, *Mudawwana*, 4:429–30.

<sup>195</sup> Mālik-Yahyā, *Muwattaʿa*, 4:11, no. 1480; *ibid.*, tr. Bewley, 302b, 36.15.

he pay its value even if the hirer brings it back. But the later Malikis do not understand the text in this way. Al-Zurqānī writes that the owner has this option only when the animal has physically changed or its market value has changed; otherwise, he can demand only payment of rent for the period after the transgression.<sup>196</sup> Al-Bājī writes, regarding the case in which the hirer continues to possess the animal in violation of the contract: if the hirer detains the animal for one month, or one year, according to different opinions, the owner can choose to make the hirer pay the stipulated and extra rent, or to make him pay the value of the animal. He also writes, “The hirer usurped not the substance (*raqaba*), but the *manfāʿas* (*manāʿif*) of the animal. However, because the sale of the animal constitutes one of its *manfāʿas*, the hirer is liable for the payment of its value, for the owner has lost the opportunity to sell it.”<sup>197</sup>

In the above-cited text from the *Muwattaʿ*,<sup>198</sup> however, Mālik imposes no condition on the claim of the owner to demand that the hirer pay the value of the animal. The same is true of the opinion that Ibn al-Qāsim and Ibn Wahb attribute to Mālik in the *Mudawwana*.<sup>198</sup> In addition, immediately after the above-cited text, Mālik states: if the agent in a *qirād* (*mudāraba*, *commenda*) purchases an object which the investor forbade him to purchase and makes a profit by reselling it, the investor has the choice between distributing the profit according to the pre-determined shares, and demanding that the agent return the amount of the capital.<sup>199</sup> That is to say, if the agent ignores the instruction of the investor, the latter can cancel the contract and make him return the amount of the capital, whether or not the capital decreased. By analogy to this solution, the owner of the animal can choose to make the hirer pay the value of the animal even if it has suffered no damage or decrease in value.

Conversely, Saḥnūn writes that the seven Medinan jurists (Ibn al-Musayyab, al-Qāsim b. Muḥammad, ʿUrwa b. al-Zubayr, Abū Bakr b. ʿAbd al-Raḥmān b. al-Ḥārith b. Hishām, Khārīja b. Zayd b. Thābit, ʿUbayd Allāh b. ʿAbd Allāh b. ʿUtba b. Masʿūd, and Sulaymān b. Yasār) and other Medinan jurists held that if the animal suffered

<sup>196</sup> Zurqānī, *Sharḥ*, 4:11.

<sup>197</sup> Bājī, *Muntaqā*, 5:265. For a similar explanation, see, for example, Saḥnūn, *Mudawwana*, 5:357.

<sup>198</sup> Saḥnūn, *Mudawwana*, 4:482.

<sup>199</sup> Mālik-Yaḥyā, *Muwattaʿ*, 4:11–12, no. 1480; *ibid.*, tr. Bewley, 302b–03a, 36.15.

no damage, the owner must receive the animal and the payment of extra rent, in addition to the stipulated rent.<sup>200</sup>

It is obvious that according to Mālik it is not necessary that the transgression committed by the hirer was likely to cause damage, in order that the hirer is liable for the damage. In this regard, the other Medinan jurists apparently concur with Mālik. On what ground do they hold the hirer liable? Why does Mālik permit the owner to demand that the hirer pay the value of the animal regardless of whether or not damage actually took place, unlike the other Medinan jurists?

The Maliki definition of transgression suggests an answer to the first question. As noted, Ibn ‘Arafa defines transgression as “benefiting from the property of another person without entitlement without the intention to acquire ownership of its substance, or destroying it or part of it without the intention to acquire ownership [of its substance] (*al-intifā‘ bi-milk al-ghayr bi-ghayr ḥaqq dūna qaṣd tamalluk al-raqaba aw itlāfu-hu aw ba‘di-hi dūna qaṣd al-tamalluk*).”<sup>201</sup> Where the hirer begins to benefit from the animal beyond the limit specified in the contract, the Medinan jurists gave the owner the choice between demanding that the hirer pay extra rent, and making him assume the risk of loss in return for enjoying the *manfa‘a* gratis, in view of the principle embodied in the Prophetic hadith, “Profit is concomitant with risk.” I infer, however, that this solution was first introduced, as in Iraq, to enable the owner to hold liable the hirer who violated the contract in view of the difficulty for the owner to establish that the violation was likely to cause damage, the condition required to make the hirer liable on the ground of destruction. The hire of an animal for the purpose of travel is an example of such a case.

The argument is supported by the Medinan rules concerning sublease. On the one hand, Mālik disapproves of the sublease of an animal on the ground that the owner rents it, in general, to someone in view of “his trustworthiness and diligence in custody (*li-amānati-hi wa-ḥifẓi-hi*).”<sup>202</sup> On the other hand, Mālik allows the lessee of a house to sublease it to another person for a greater rent, on the condition that the sublessee is not more harmful to the house than

<sup>200</sup> Saḥnūn, *Mudawwana*, 4:483.

<sup>201</sup> Ibn ‘Arafa, *Ḥudūd*, 2:468.

<sup>202</sup> Saḥnūn, *Mudawwana*, 4:416–17.

the original lessee. For example, a person who takes a lease on a house to practice fulling there cannot sublease it to an ironsmith or a miller, for their activity is more harmful to the house than fulling; otherwise, the sublease is permissible.<sup>203</sup> Mālik is not consistent. Surely the owner of a house does not lease it to just anyone, but chooses a person whom he trusts, just as in the case of the rent of an animal. Why does Mālik differentiate between a house and an animal?

Recall that Abū Ḥanīfa adopts the same solution: he permits the sublease of a house, while he prohibits the sublease of an animal for traveling. I argued that, on the one hand, the owner of an animal will not rent it for travel unless he trusts in the hirer, for the animal is exposed to some danger. The owner would not consent to its sublease to a third person for the same reason. On the other hand, it is difficult for the owner to establish that the third person was likely to cause damage to the animal. This seems to be why Abū Ḥanīfa decided to attribute absolute liability to a person who subleases the animal to a third person. The same is true of the Medinan doctrine before Mālik, for we read in the *Mudawwana*:

Ibn Wahb—Mālik, Yūnus b. Yazīd and Ibn Abī Dhī'b—Ibn Shihāb [al-Zuhrī]: he was asked about a person who hires a house and subsequently subleases it for a greater sum of money than the original rent; he said that there is no harm in this. Ibn Wahb—a certain number of scholars—Abū al-Zinād, Nāfi' and 'Aṭā' b. Abī Rabāḥ: a similar report. Some of them stated that the same rule applies regarding [the sublease of] an animal and a ship. Ibn Wahb—al-Layth [b. Sa'd]—Yaḥyā b. Sa'īd: he had heard some Medinans say that there is no harm in taking an increase [viz. the difference between the original rent and the rent for sublease] in slaves, ships and houses. Ibn Wahb—al-Layth: Yaḥyā b. Sa'īd was asked about a person who hires land and subsequently subleases it with increase; he responded that this is subject to the same rule.<sup>204</sup>

Let us consider the sentence, “Some of them stated that the same rule applies regarding [the sublease of] an animal and a ship.” It is not clear whether other jurists exclude an animal and a ship from this rule or simply did not mention the rule concerning the sublease of an animal or a ship. I am inclined to the former interpretation, because this is the position of Mālik, as far as the animal is con-

<sup>203</sup> Saḥnūn, *Mudawwana*, 4:515.

<sup>204</sup> Saḥnūn, *Mudawwana*, 4:417, 515–16.

cerned. On this assumption, it is possible to infer that other Medinan jurists introduced the presumption that the sublease of an animal or a ship is likely to cause damage or loss, for the sublessee may take away the object, in which case it is usually difficult for the owner to establish the cause of damage or loss. Conversely, because a house does not move, it is not difficult for the owner to establish the cause of damage or loss.

The second question is more difficult to answer, but we will see that most of the positive solutions adopted by Mālik and the Malikis concerning the sale of a specific object and usurpation are reduced to the principle that the attribution of risk is one of the effects of ownership. This principle may have inspired Mālik, who permits the owner to transfer ownership of the hired object to the hirer who assumes risk of it.

Now we are in a position to compare the Iraqi and Medinan doctrines. On the subject of the liability of a hirer, the earliest Hanafis and some of their Iraqi predecessors distinguished between liability arising from transgression (*ta'addī*) and liability arising from violation (*mukhālafā*) of contract. Transgression is an act that goes beyond the limit imposed by social custom and is by nature likely to cause damage or loss. Therefore the liability arising from transgression is reduced to that arising from destruction. Conversely, for a person who hires an object and violates the contract to be liable, it is not required that the violation is likely to cause damage or loss in the object. The Medinan jurists prior to Mālik also knew the same distinction, although Mālik uses the term 'transgression' indiscriminately to express both types of liability. In both Iraq and Medina, the leading case with respect to which the concept of liability arising from violation of contract (to use the Hanafi term) was introduced was the rent of an animal for traveling. Because it is difficult for the owner to establish that the hirer's going beyond the destination designated in the contract was likely to cause damage or loss, the Iraqi and the Medinan jurists made the hirer assume the risk of loss, in return for which they exempted him from payment of extra rent.

#### *Special liability of an employee*

Who assumes the risk of loss that occurs in an object that an employee receives on the basis of an employment contract? Both the Hanafis and Malikis distinguish, for this purpose, 'an employee working for

the public' (*ajīr mushtarak*), called also 'artisan' (*ṣānīʿ*), from 'an employee working for a particular person' (*ajīr khāṣṣ*).

As for the former such as a fuller and a dyer, I have already remarked that Mālik takes the public interests (*maṣlaḥat al-nās, maṣlaḥat al-ʿamma*) into consideration to make an artisan liable for the loss of an object he receives from his customer unless he establishes that the cause of the loss is not attributed to his action. The earliest Hanafis are divided over his liability. We read in the *Jāmiʿ al-ṣaghīr*:

[Abū Ḥanīfa held that] any employee working for the public is liable for the loss he causes (*ajīr mushtarak dāmin li-mā janat yadu-hu*), whether or not he violated the contract. He is not, however, liable for a loss that is not attributed to his act, but he cannot demand wages. Conversely, Abū Yūsuf and al-Shaybānī stated that he is also liable for loss [that is not attributed to his act].<sup>205</sup>

Why did Abū Yūsuf and al-Shaybānī put a heavier liability on an employee working for the public? They must have had the same idea as Mālik. It is suggestive, from this point of view, that 'Alī is credited with two contradictory opinions: on the one hand, he reportedly held liable a tailor, a dyer and so on, "as precaution for people (*iḥtiyātan li-l-nās*)."<sup>206</sup> On the other hand, he reportedly dismissed claims against a fuller and a dyer (*kāna lā yuḍamminu al-qaṣṣār wa-lā al-ṣabbāgh*).<sup>207</sup> This suggests that the special liability for an employee working for the public was introduced at some point in time.

As for employees working for a particular person, the Hanafis hold them liable, in general, only on the ground of destruction.<sup>208</sup> But they adopt an exceptional rule with respect to a person employed for transportation. Al-Shaybānī states that Abū Ḥanīfa held as follows: if a person has been employed to carry a jug from the Euphrates and it falls on the way and breaks, the employer (i.e. the owner of the jug) is given the choice between making the employee pay its value as calculated at the starting point without paying him wages, and making the employee pay its value as calculated at the place where it was broken; in the latter case the employer owes to the employee part of the wages, in proportion to the distance that he

<sup>205</sup> Shaybānī, *Ṣaghīr* (1406), 448.

<sup>206</sup> Ṣanʿānī, *Muṣannaḥ*, 8:217, no. 14948. For a similar report, see Bayhaqī, *Sunan*, 6:122.

<sup>207</sup> *Kitāb fī al-ḥiḳh*, 25 (13b).

<sup>208</sup> Kanawī, *Nāfiʿ*, 446; Shaybānī, *Ṣaghīr* (1406), 449; Qudūrī, *Mukhtaṣar*, 2:95.

had covered.<sup>209</sup> This seems to have been a later opinion of Abū Ḥanīfa, for al-Kāsānī writes, regarding a cargo damaged or destroyed while in the possession of the person who has been employed to transport it: “Abū Ḥanīfa is reported to have stated (*nuwiya ‘an Abī Ḥanīfa*) that it is not optional for him [viz. the employer, i.e. the owner of the cargo] to make the employee compensate him for its value at the place where it was damaged or destroyed.”<sup>210</sup> This is to say, Abū Ḥanīfa permits the employer to hold the employee liable only when the ground is destruction, probably by creating the presumption that the cause of damage or loss be attributed to the employee. This is why the employer can demand that the employee pay the value of the object as calculated at the time and place of damage or loss. Conversely, Abū Yūsuf and al-Shaybānī give the employer an option. Al-Kāsānī writes:

The solution, which gives [the employer] an option in accordance with the principle adopted by Abū Yūsuf and al-Shaybānī, is more acceptable [than the solution of Abū Ḥanīfa], because there are two grounds for liability, i.e. *ḍamān* and destruction (*itlāf*). Therefore he [viz. the employer] has the choice between making the employee pay the value of the cargo as calculated at the moment when the employee took possession of the cargo, and making him pay its value as calculated at the moment when he destroyed it.<sup>211</sup>

Al-Kāsānī also remarks that Abū Yūsuf and al-Shaybānī give the employer “the choice between making him [viz. the employee] liable on a contractual basis and making him liable because of destruction (*al-khiyār in shā’a ḍamma-na-hu bi-’l-‘aqd wa-in shā’a bi-’l-itlāf*).”<sup>212</sup> Al-Kāsānī writes, in another locality, that Abū Yūsuf and al-Shaybānī do not hold the employee liable if the loss was irresistible.<sup>213</sup>

The solution of Abū Yūsuf and al-Shaybānī seeks to safeguard the interests of the employer by forcing the employee to pay sufficient attention to prevent the object from being damaged or lost. This does not make it clear why the employer has to pay wages to the employee if he chooses to hold the employee liable on the ground of destruction. Is this because the destruction by the employee is

<sup>209</sup> Shaybānī, *Ṣaghīr* (1406), 448.

<sup>210</sup> Kāsānī, *Badā’i* (1402), 4:212; *ibid.* (1418), 6:58.

<sup>211</sup> Kāsānī, *Badā’i* (1402), 4:212; *ibid.* (1418), 6:57–58.

<sup>212</sup> Kāsānī, *Badā’i* (1402), 4:212; *ibid.* (1418), 6:58.

<sup>213</sup> Kāsānī, *Badā’i* (1402), 4:210; *ibid.* (1418), 6:55.

presumed rather than established? In my view, there is an economic explanation for their solution: it permits the employer to demand that the employee pay him whichever is more of the cost price for which the employer acquired the object, and the amount that the employer would earn by reselling it, i.e. the value of the object at the time and place where it has been destroyed minus the wages for the employee. If the employer could do nothing more than demand that the employee pay the latter amount in accordance with the former opinion of Abū Ḥanīfa, he could suffer a loss because of fluctuation in the value of the object. If the employer could demand that the employee pay him its value at the time and place of destruction without paying him wages, he would earn more than he could earn if the object were transported intact to that place and sold there, for in this case he would have to pay wages to the employee. The solution adopted by Abū Yūsuf and al-Shaybānī is the most equitable from an economic point of view.

According to the Malikis, a person who is employed for the purpose of transportation is held liable, in general, only on the ground of destruction. Exceptionally, when the object consists of foodstuffs, he is, in principle, liable for the damage or loss that occurs to the object. To be exonerated from this liability, he has to establish that the damage or loss has been due to an external cause.<sup>214</sup>

#### 4. *Sale of a specific object*

The subject dealt with on the following pages is the attribution of *ḍamān* in the sale of a specific object. Muslim jurists unanimously affirm that ownership of the specific object transfers to the buyer at the moment the contract is concluded. But to whom is *ḍamān* attributed if the object is partially or totally lost before the buyer takes possession of it? Jurists envisage four cases according to the cause of the loss: destruction by the seller, loss due to a natural cause, destruction by a third person, and destruction by the buyer. Therefore this problem is not limited to the attribution of risk, but I call it so for the sake of convenience. I begin by presenting the Hanafi rules and demonstrate the process by which they were formed by the Iraqi jurists prior to Abū Ḥanīfa. Then I will examine the Maliki doc-

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<sup>214</sup> Ibn ‘Abd al-Barr, *Kāfi*, 375–76.

trine. In discussing the attribution of risk, jurists assume that the contracting parties stipulate no delay for the delivery of the object, because it is prohibited to delay the delivery of a specific object. The jurists discuss cases in which the object is not delivered to the buyer for some reason before the contractual session (*majlis*, *majlis al-‘aqd*) is over.

### *The Iraqi doctrines*

Chehata examined the Hanafi rules about the attribution of risk in the greatest detail, based mainly on the works of al-Sarakhṣī and al-Kāṣānī.<sup>215</sup> But he failed to explain these rules systematically, because the Hanafi authors on which he relied do not transmit accurate information on the original Hanafi rules. Wichard also dedicates some pages to this issue.<sup>216</sup> But he does not thoroughly analyze the rules regarding partial loss and *fructus*, nor does he examine the solutions mentioned in the *Jāmi‘ al-kabīr* of al-Shaybānī.

I begin by analyzing the solutions that al-Shaybānī adopts in the *Aṣl* and the *Jāmi‘ al-kabīr* regarding the attribution of risk, *fructus* produced by the object and their loss. Then by comparing these solutions with the opinions attributed to his Iraqi predecessors, I will reconstruct the doctrinal development in Iraq on the subject of the attribution of risk in the sale of a specific object. Finally I will conclude with a brief reference to the thesis of Chehata.

In his *Aṣl*, al-Shaybānī discusses several cases in which a slave who is the object of a sale has his hand cut or paralyzed after the sale was concluded but before the buyer takes possession of him.

(1) Someone bought a slave from another for 1000 dirhams. Before the buyer took possession of the slave, the seller cut his hand. The buyer is given the choice between taking possession of the slave, in which case he owes half the price, and canceling the sale. What the seller destroyed of the slave was lost from him, *ḍamān* not being attributed to the seller (*ma ‘stahlaka al-bā’i‘ min-hu fa-innamā huwa shay’ dha-haba min-hu laysa fī-hi ‘alā al-bā’i‘ ḍamān*). The price is reduced in proportion to the decrease in the value of the slave, i.e. half the stipulated price, since his hand represents half of his value.

(2) If the hand of the slave was paralyzed due to a natural cause, the buyer is given the choice between taking possession of the slave,

<sup>215</sup> Chehata, *Etudes* 2, 9–14, 27–30, 49–60.

<sup>216</sup> Wichard, *Zwischen Markt*, 127–31.

paying the total price; and canceling the sale on the ground of the defect that occurred in the slave.

(3) If a third person cut the hand of the slave, the buyer is given the choice between taking possession of the slave, paying the total price, in which case he can make the third person pay half the value of the slave; and canceling the sale.

If the buyer makes the third person pay half the value of the slave, he must give the difference, if any, between the half his value and half the price as *ṣadaqa*, because this represents the profit he gained from what would not have been lost at his risk (*li-anna-hu ribh mā lam yudman*).

If the buyer cancels the sale, the seller can make the third person pay half the value of the slave. He must then give the difference, if any, between half the value of the slave and half the price as *ṣadaqa*, because the slave's hand was cut while he belonged to another person.

(4) If it is the buyer who cut the hand, the act of cutting is assimilated to taking possession of the slave.<sup>217</sup>

Let us call these rules 'rule [1]', 'rule [2]' and so on. They raise questions about the moment at which the risk passes from the seller to the buyer, the transfer of ownership and the meaning of destruction by the buyer. By answering these questions, I will interpret these rules systematically.

I take up first the question of the attribution of risk and the transfer of ownership. The Maliki jurist Ibn Rushd al-Ḥafīd (d. 595/1198) writes about the role of delivery in his *Bidāyat al-mujtahid*:

Those who say that possession (*qabḍ*) is a condition of validity of the contract or of its being binding, or in whichever way you wish to convey this meaning, attribute the risk to the seller until the buyer takes possession of the object (*kāna al-ḍamān 'inda-hu min al-bā'ic ḥattā yaqbiḍa-hu al-mushtarī*). Those who maintain that the attribution of risk is one of the binding effects of sale that has been concluded and has become binding say, "The contract has passed to the risk (*ḍamān*) of the buyer."<sup>218</sup>

The solution referred to in the first sentence is adopted by the Hanafis, and the solution referred to in the second sentence is adopted by the Malikis. According to this explanation, for the Hanafī jurists, the risk remains with the seller until delivery, for ownership has not yet definitely transferred to the buyer. This understanding is endorsed by the later Hanafis. Al-Sarakhsī writes, "The object remains in the

<sup>217</sup> Shaybānī, *Aṣl*, 5:265–66.

<sup>218</sup> Ibn Rushd al-Ḥafīd, *Bidāya*, 2:185; *ibid.*, tr. Nyazee, 2:221–22.

*ḍamān* of ownership of the seller (*ḍamān milk al-bāʿiʿ*), so that if it perishes it is lost to the detriment of his property.” He adds that this situation is assimilated to the case in which “the contractual session is not concluded or the seller reserves the right to unilaterally cancel the contract.”<sup>219</sup> That is to say, if the object perishes before the delivery, ownership, in a sense, has not been transferred to the buyer, so that he does not owe the payment of the price. Al-Kāsānī also writes, “The ownership of the buyer has not been consolidated and could revert to the seller by cancellation (*milk al-mushtarī lam yakun mustaqirran bal kāna muḥtamilan li-ʿl-ʿawd ilā milk al-bāʿiʿ bi-ʿl-faskh*).”<sup>220</sup>

These explanations are based on two principles: the first is that ownership is transferred to the buyer at the moment of contract. This is indicated in the third paragraph of rule [3], where we read, “while he [viz. the slave] belonged to another person,” i.e. the buyer. The second principle is that the attribution of risk is one of the effects of the ownership. Therefore, to justify the solution that the risk remains with the seller until the delivery is effectuated, the later Hanafis such as al-Sarakhsī and al-Kāsānī reason that ownership of the object once transferred to the buyer can revert to the seller. This reasoning is, however, dubious in two respects.

The first relates to the attribution of risk. Indeed, by assuming that the risk remains with the seller prior to the delivery, it is possible to justify the solution that the sale is cancelled if the object is totally lost before the delivery. But this assumption is at variance with the positive solutions proposed by al-Shaybānī. According to this assumption, in case of partial loss the price must be reduced in proportion to the magnitude of the decrease in value the object suffers. Indeed, this is true of rule [1], according to which the price is reduced in proportion to the decrease in the value of the slave caused by the seller. But according to rules [2] and [3], the buyer owes the entire price, although he is not responsible for the damage to the slave, except that he can unilaterally cancel the contract. Why is the price not reduced? Is it that if the buyer maintains the contract in spite of the partial loss suffered by the object, ownership and with it risk pass to the buyer at the moment of the contract?

<sup>219</sup> Sarakhsī, *Mabsūṭ* (n.d.), 13:171; *ibid.* (1421), 13:203.

<sup>220</sup> Kāsānī, *Badāʿiʿ* (1402), 5:239; *ibid.* (1418), 7:227.

Al-Sarakhsī responds to this question as follows: on the one hand, the slave’s limbs are a quality (*wasf*) of his substance (*asl*). Therefore, if his hand is cut, he retains his name (i.e. identity) as a slave. On the other hand, the price in a sale is a consideration for the substance of the object, rather than for the quality. It follows that if the slave’s limbs are damaged or lost due to a natural cause, the price is not reduced. But if the damage is caused by the seller (as in rule [1]), the limbs constitute a “kind (*jins*),” so that that part in the contract which corresponds to the limbs is cancelled and the price is reduced.<sup>221</sup> It seems that al-Sarakhsī means by “kind” a substance distinct from the slave himself. Al-Kāsānī advances the same argument when he speaks of “decrease in quality (*nuqsān wasf*)” in order to justify rules [2] and [3].<sup>222</sup>

Thus, if the object is partially damaged or lost due to a natural cause (as in rule [2]), the risk remains with the seller, but the price is not reduced, insofar as the identity of the object is maintained. For example, because a slave is still called slave if he loses one of his hands by accident, the buyer cannot demand a reduction of the price. Chehata explains the arguments of the Hanafis as follows: because it is difficult to evaluate the decrease in value, the Hanafis decided not to take into account the decrease to reduce the price. But if the seller causes the decrease, the Hanafis do not hesitate to evaluate the decrease despite the difficulty of evaluating, taking the gravity of the seller’s act into consideration.<sup>223</sup>

Neither the arguments of the later Hanafis nor the explanation of Chehata are convincing, for two reasons. First, the rule is that a person who cuts the hand of a slave belonging to another owes the half of the value of the slave, as is indicated in the first and the third paragraphs of rule [3]. This is to say, the value of a slave who loses one of his hands is considered to have decreased by half. If a slave were injured at the risk of the seller, the rule would be that the buyer could demand that the seller reduce the price of the slave by half. Second, al-Shaybānī cites the following example: land worth 500 dirhams and date palms on it worth 500 dirhams were sold in a single sale for 1000 dirhams, but all of date palms or one-half of

<sup>221</sup> Sarakhsī, *Mabsūt* (n.d.), 13:171; *ibid.* (1421), 13:203.

<sup>222</sup> Kāsānī, *Badāʾiʿ* (1402), 5:283; *ibid.* (1418), 7:328.

<sup>223</sup> Chehata, *Etudes* 2, 28.

them were destroyed by a flood or a fire. According to al-Shaybānī, the buyer is given the choice between maintaining the contract and canceling it. If he maintains it, he owes the entire price, i.e. 1000 dirhams. In this case, however, the price is distributed in proportion to the value of each object, as calculated at the time of the delivery. That is to say, if the date palms were totally destroyed, the entire price belongs to the landowner; if one-half of the date palms were destroyed, i.e. the remaining date palms are worth 250 dirhams, 1000 dirhams are divided in the ratio of 2 to 1 (i.e. 500 to 250), the former going to the landowner and the latter to the owner of the date palms.<sup>224</sup> This example shows that the buyer owes the payment of the entire price even if the value of the destroyed object is known.

Therefore rules [2] and [3] cannot be explained by the assertion that the risk remains with the seller until the buyer takes possession of the object. These rules are easy to explain on the assumption that ownership and risk pass to the buyer at the moment of the contract, except that he can cancel the contract. The problem with this assumption is that it does not account for rule [1]. According to this assumption, if the seller cuts a hand of the slave and the buyer maintains the contract, the buyer must pay the price and can demand that the seller pay half the value of the slave, as inferred from rule [3]. But according to rule [1], the price is reduced to half and the seller is not required to compensate the decrease of the slave in value.

The second dubious point in the Hanafi reasoning (see p. 79) relates to the moment of the transfer of ownership. The Hanafis (as well as the other schools) prescribe that in the sale of a specific object, ownership transfers from the seller to the buyer at the moment of the contract. For example, the Hanafi jurist al-Qudūrī (d. 428/1037) writes, “A sale is concluded by [the concurrence of] the offer and the acceptance,”<sup>225</sup> and “When the offer and the acceptance are made, the sale becomes binding . . .”<sup>226</sup> The Hanafi jurist Ibn Nujaym (d. 970/1563) writes, “The buyer owns the object by [the concurrence of] the offer and the acceptance.”<sup>227</sup> As has been mentioned,

<sup>224</sup> Shaybānī, *Kabīr*, 261.

<sup>225</sup> Qudūrī, *Mukhtaṣar*, 2:3.

<sup>226</sup> Qudūrī, *Mukhtaṣar*, 2:4.

<sup>227</sup> Ibn Nujaym, *Ashbāh*, 347.

the third paragraph of rule [3] confirms this understanding. But we read, in rule [1], “What the seller destroyed of the slave was lost from him (*wa-mā ’stahlaka min-hu al-bā’i’ fa-innamā huwa shay’ dhahaba min-hu*).” Taken literally, this sentence indicates that, in this case, ownership was not transferred to the buyer.

When, after all, does ownership of the object transfer to the buyer? The following example may give an answer to this question: the seller of a slave kills him after the buyer has taken possession of the slave. To argue for the liability of the seller, al-Shaybānī distinguishes two cases. First, if the buyer was instructed to take possession of the slave by the seller, the buyer must pay the seller the stipulated price, while the seller must pay the buyer the value of the slave, as estimated at the moment of the murder. Second, if the buyer was not instructed to take possession of the slave by the seller, “the buyer’s obligation to pay the price is extinguished (*baṭala al-thaman ‘an al-mushtarī*).”<sup>228</sup> This sentence may support the explanation of the later Hanafis that ownership of the object once transferred to the buyer at the moment of contract can revert to the seller, if it is assumed that the consent of the seller to deliver the object is a condition necessary for the definitive transfer of ownership to take effect. This enables us to justify this example and rule [1], for the fact that the seller destroyed the object suggests that he did not intend to deliver the object.

To summarize the foregoing arguments: rules [1] – [4] mentioned by al-Shaybānī in the *Aṣl* are based on two principles: first, ownership and with it risk normally transfer from the seller to the buyer at the moment of contract. Second, if the seller does not consent to delivery of the object, ownership does not transfer. I will test these principles by applying them to other solutions adopted by al-Shaybānī in his *Aṣl* and *Jāmi’ al-kabīr* mainly regarding *fructus* and their loss.

The following example mentioned in the *Aṣl* is deducted from the first principle: land and the date palms on it were jointly sold. Subsequently, the date palms bore fruit, which perished due to natural causes before the buyer took possession of them. According to al-Shaybānī, if the date palms or the land also suffered partial loss, the buyer can unilaterally cancel the sale, but if he chooses to maintain it, he must pay the full price. If neither the date palms nor the

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<sup>228</sup> Shaybānī, *Kabīr*, 253.

land suffered any loss, the sale is maintained and the buyer must pay the full price.<sup>229</sup> He explains these solutions as follows:

The fruit found on the date palms at the date of the sale is different from that produced thereafter, since the fruit found on the date palms [at the date of the sale] is included in the principal (*ʾaṣl*) that is the subject of the sale and represents a certain percentage of the price. As for the fruit produced after the sale, it is increase (*zīyāda*) produced from the date palms, while the date palms along with the land represent a certain percentage in the price [to the exclusion of the fruit produced after the sale].<sup>230</sup>

That is to say, the fruit produced after the sale is not included in the sale itself, but belong to the buyer as *fructus* produced by the date palms he has acquired in the sale. It follows that their loss does not entail the reduction of the price.<sup>231</sup>

How about the second principle that if the seller does not consent to delivery of the object ownership does not transfer? To test its validity, I will examine the positive solutions that al-Shaybānī adopts in his *Jāmiʿ al-kabīr* regarding the case of a seller who refuses to deliver the object. Al-Shaybānī states there as follows.

(a) A female-slave is sold and the buyer takes possession of her without the consent of the seller. Then she becomes pregnant and gives birth to a child while in the possession of the buyer. If, subsequently, the buyer pays the seller the price before the seller takes back the mother and the child, the delivery is valid and the buyer can no longer cancel the sale for defect [that existed prior to the sale] in her: he can do nothing more than demand a reduction of the price. The magnitude of the reduction is  $\frac{p(x-y)}{x}$ , whereby  $p$  is the stipulated price of the female-slave,  $x$  is her value without the defect, and  $y$  is her actual value. The child does not represent any percentage in the price.<sup>232</sup> Here the buyer can no longer cancel the

<sup>229</sup> Shaybānī, *Aṣl*, 5:263.

<sup>230</sup> Shaybānī, *Aṣl*, 5:264.

<sup>231</sup> Wichard writes that this solution derives from two principles. First, “Profit is concomitant with risk.” Second, the object of a sale perishes at the risk of its possessor (*Besitzer*). Indeed, before delivery the buyer possesses neither the principal nor the *fructus*, but as the *fructus* belongs to the buyer, he is considered to possess them, so that their loss is attributed to his risk. Wichard, *Zwischen Markt*, 130. But he presents no substantive explanation for the reason why the buyer is regarded as a possessor only as far as the *fructus* are concerned.

<sup>232</sup> Shaybānī, *Kabīr*, 250–51.

sale because the rule is that the buyer of a specific object can no longer cancel the sale for defect if the object has produced *fructus* while in his possession.<sup>233</sup>

The solution is easily explained if we assume that ownership of the female-slave transfers to the buyer at the moment of the contract, while the child belongs to the buyer as *fructus* produced by the principal (the female-slave) who has been acquired by the buyer. The solution may contradict the principle that if the seller does not consent to the delivery of the object ownership does not transfer to the buyer. But we can remove the contradiction if we assume that by the subsequent payment of the price by the buyer ownership of the female-slave transfers to the buyer retroactively.

(b) The buyer of a female-slave takes possession of her without the consent of the seller, and she later becomes pregnant and gives birth to a child while in the buyer's possession. Subsequently, the seller takes back the mother (female-slave) and the child from the buyer who refuses to pay the price.<sup>234</sup> Al-Shaybānī proposes the following solutions about the mother or the child who dies while in the possession of the seller.

(i) If it is the mother who died, the buyer is given the choice between maintaining the sale to take possession of the child and canceling the sale. The amount of money he owes to the seller if he maintains the sale is calculated as follows: the stipulated price is divided in proportion to the value of the mother on the date of contract and the current value of the child, and the buyer owes the amount of money corresponding to the child.

(ii) If it is the child who died, the buyer is given the same choice as in case (i). But if he maintains the sale, he owes the full price.<sup>235</sup>

The solution adopted with respect to case (ii) is reduced to the solution adopted with respect to case (i), for the current value of the child is null. What is the rationale of these solutions? Al-Sarakhsī explains it as follows:

The principle in dividing the price is to take into consideration the value of the mother as estimated at the moment of the contract and the value of the child as estimated at the moment of delivery, for an

<sup>233</sup> Rayner, *Theory*, 336–37.

<sup>234</sup> Shaybānī, *Kabīr*, 250. Here the seller exercises the right of retention. See Sanhūrī, *Maṣādir*, 6:235.

<sup>235</sup> Shaybānī, *Kabīr*, 251.

increase [viz. child] becomes an object of the contract by the delivery (*li-anna al-zīyāda innamā taṣīru maqṣūda bi-'l-qabḍ*).<sup>236</sup>

Al-Sarakhsī also states that the principal becomes the object of the contract as the immediate effect of the contract.<sup>237</sup> Although his explanation is in accordance with the solutions adopted with respect to cases (i) and (ii), it is tautological. As far as I know, there is no satisfactory explanation for this principle in the Hanafi legal text.

Can we justify two solutions adopted with respect to cases (i) and (ii) on the assumption that ownership does not transfer so long as the seller refuses to deliver the object, exercising the right of retention? It is possible to justify the solution in case (ii) with this assumption: because ownership of the female-slave transfers to the buyer on the date of (the second) delivery, the child, who died before then, is not taken into account in calculating the amount of money that the buyer owes. But it is difficult to justify the solution in case (i). Why can the buyer maintain the sale after the object (the female-slave) has been totally lost? Has the seller always been required to deliver the principal, with the result that when a *fructus* was produced it became the subject of the sale? In my view, the only plausible explanation susceptible to justify the two solutions is that the rules governing a pledge are applied to the sale of a specific object. There are two reasons why I adopt this explanation. First, the Kufan jurist Ibrāhīm al-Nakha'ī is reported to have stated:

When the person who buys an object says, “Hand it over to me,” and the seller says, “No, [I do not] until you give the price to me,” the object is assimilated to a pledge. If it perishes, it is lost from the property of the seller (*fa-in halaka, fa-huwa min māl al-bā'ī*).<sup>238</sup>

This statement is persuasive. By exercising the right of retention, the seller presses the buyer to pay the price. He is therefore assimilated to a pledgee.

Second and more important, the solutions adopted by al-Shaybānī with regard to the loss of the principal or *fructus* in the sale of a specific object can be justified by applying the rules that regulate the loss of a pledge or the *fructus* produced by it. As noted, regarding the case in which a pledge produced *fructus* other than *arsh* and

<sup>236</sup> Sarakhsī, *Mabsūṭ* (n.d.), 13:186; *ibid.* (1421), 13:220.

<sup>237</sup> Sarakhsī, *Mabsūṭ* (n.d.), 13:187; *ibid.* (1421), 13:221.

<sup>238</sup> Ibn Abī Shayba, *Muṣannaf*, 4:289, no. 20162.

the principal or the *fructus* perished, totally or in part, the Hanafis apply two rules: first, the debt is divided into two parts in proportion to the value of the principal, as estimated at the moment when the pledge was delivered, and that of the *fructus*, as estimated on the date of redemption; second, the principal perishes at the risk of the pledgee within the limit of the amount of money secured by it. We have also seen that the first rule implies that the *fructus* perish at the risk of the pledgor (see pp. 48–51).<sup>239</sup>

Let us try to apply these rules, *mutatis mutandis*, to the sale of a specific object. Note, in particular, that the sale takes effect by the concurrence of the offer and the acceptance, whereas the pledge becomes binding and takes effect when the object is delivered. Suppose that an object worth  $a$  dinars is sold for  $p$  dinars. Then its value is reduced to  $ax$  dinars due to partial loss it suffers, while it produces several times *fructus*, some of them keeping their original value, others increasing or decreasing in value for one reason or another, before the buyer takes possession of the principal and the *fructus*. Let the total value of these *fructus* as estimated on the date on which the principal and the *fructus* are delivered be  $f$ . As the stipulated price ( $p$ ) is divided into two parts in proportion to the respective values of the principal at the moment of the contract and the *fructus* at the moment of delivery, we obtain

$$p = p_a + p_f$$

whereby  $p_a = \frac{a}{a+f} p$  and  $p_f = \frac{f}{a+f} p$

As we assume that the principal perishes at the seller's risk, the sum that the buyer owes to the seller is

$$s = p_a x + p_f = \frac{ax + f}{a + f} p$$

This is in accordance with the solutions adopted in cases (i) and (ii). As for the solution for case (i), in which  $x = 0$ , we obtain

$$s = \frac{f}{a + f} p$$

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<sup>239</sup> See also Ṭaḥāwī, *Mukhtaṣar*, 94–95; Kāsānī, *Badā'ī'* (1402), 6:156–57; *ibid.* (1418), 8:222.

That is to say, the stipulated price is divided in the ratio of the value of the mother (female slave) as estimated on the date of contract to the current value of the child, and the buyer owes the amount of money corresponding to the child. This is exactly the solution for case (i). As for case (ii), in which  $x = 1$ , we obtain

$$s = p$$

This is to say, the buyer owes the entire stipulated price. This is exactly the solution for case (ii).

In brief, the rule governing the attribution of risk in the sale of a specific object is that the principal perishes at the risk of the seller who exercises the right of retention, while the *fructus* perish at the risk of the buyer. This rule implies that ownership of the principal definitively transfers to the buyer at the moment of the contract.

What happens if it is the seller who destroys the object? In the *Aṣl al-Shaybānī* mentions rule [1], i.e. the buyer can choose to take possession of the slave, paying half the price, or to cancel the sale. There are two possible explanations for this rule. The first explanation is, as mentioned, that ownership of the slave does not transfer to the buyer when the seller implicitly expresses his will to refuse to deliver the object by cutting the hand of the slave: if the buyer maintains the sale, he owes half the stipulated price, for the value of the slave has been reduced to half of his original value by the loss of one hand. The second explanation is that loss suffered by the slave is at the seller's risk: he assumes the risk of loss by refusing to deliver the slave without good reason, how much the more so when he injures the slave. As far as the loss of the principal is concerned, both explanations are possible.

But the following cases are more in accordance with the second explanation than with the first.

(c) If the buyer causes a defect in a shirt or ring he has purchased while the seller is wearing it, or in an animal that he has purchased while the seller is riding it, any subsequent loss to the object (the shirt, the ring or the animal) is attributed to the seller (*halaka min al-bāʿi*), regardless of whether or not the seller subsequently refuses to deliver the object.<sup>240</sup>

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<sup>240</sup> Shaybānī, *Kabīr*, 260.

Indeed, it is not impossible to justify this solution by the first explanation: once the seller refuses to deliver the object (as inferred from his act of using it), ownership does not transfer to the buyer until the seller delivers it. However, the phrase “any subsequent loss to the object is attributed to the seller” supports the second explanation: once the seller retains the object for his own sake, just as a pledgee retains the pledge for his own sake, it perishes at his risk until such time as delivery takes place. He is assimilated to a pledgee, who possesses the pledge to secure his credit, i.e. for his own sake.

(d) Land and the date palms whose total value is 2000 dirhams are sold jointly for 1000 dirhams. Then the date palms bear dates worth 1000 dirhams, and the seller consumes all of them before delivery. Al-Shaybānī states: as the value of the dates represents one-third of the total value of the objects, the buyer owes 666  $\frac{2}{3}$  dirhams, i.e. two-thirds of the stipulated price,<sup>241</sup> except that the buyer has the right to unilaterally cancel the contract.

This solution can be explained by the second explanation as follows: as noted, as far as the *fructus* are concerned, the risk is originally attributed to the buyer. However, because the seller refused to deliver the dates by consuming them, the risk passed to him. Therefore the dates are treated in the same manner as a principal, so that the amount of money the buyer owes to the seller ( $s$ ) is determined as follows: if neither the principal nor the dates suffered any loss, the stipulated price (1000 dirhams) would be divided into two parts in proportion to the respective values of the land and the palms (2000 dirhams) as estimated at the moment of the contract, and the value of the dates (1000 dirhams) as estimated at the moment of their birth. Then the latter part perishes at the risk of the seller. Thus we obtain

$$s = \frac{2000 \cdot 1 + 1000 \cdot 0}{2000 + 1000} \times 1000 = 666 \frac{2}{3} \text{ dirhams}$$

If we apply the first explanation to this case, the solution is as follows: the seller does not refuse to deliver the land and the date palms, and ownership therefore transfers to the buyer at the moment of the contract. Thus, the buyer owes 1000 dirhams, i.e. the stipulated

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<sup>241</sup> Shaybānī, *Asl*, 5:260–61.

price, but he can demand that the seller pay him 1000 dirhams, i.e. the value of the dates that belong to the buyer when the seller consumes them. In short, the buyer owes nothing.

As regards the attribution of risk and the transfer of ownership, I conclude that the principles underlying rules [1] – [3] mentioned in the *Aṣl* of al-Shaybānī, and the solutions given to cases (a) – (d), are as follows: first, ownership always transfers to the buyer at the moment of the contract. Second, if the seller does not refuse to deliver the object, the risk passes to the buyer at the moment of the contract. Third, if the seller refuses to deliver the object, either by retaining it for his own sake (e.g. exercising the right of retention or using it) or by destroying it, the risk remains with the seller, while the risk of loss in *fructus* passes to the buyer. Fourth, if the seller refuses to deliver the *fructus*, the risk of their loss is assigned to him. However, three questions remain to be answered. Let us consider them in the following.

The first question relates to the meaning of *ḍamān* as al-Shaybānī conceives it. In rule [1] we read, “What the seller destroyed of the slave was lost from him, *ḍamān* not being attributed to the seller (*ma ṣṭahlaka al-bāʿi min-hu fa-innamā huwa shayʿ dhahaba min-hu, laysa fī-hi ʿalā al-bāʿi ḍamān*)” (see p. 77). I have concluded that the seller assumes the risk when he refuses to deliver the object. By argument *in contrario*, if a third person destroys the object, while the seller does not refuse to deliver it, *the object perishes at the buyer’s risk* (although the buyer can claim compensation for the damage or loss from the destroyer). This is actually the rule that al-Shaybānī adopts (rule [3]), where the buyer cannot demand a reduction of the price because of the damage to the slave caused by a third person. However, in rule [3] we also read, “If the buyer makes the third person pay half the value of the slave, he must give the difference, if any, between the half his value and half the price as *ṣadaqa*, because this represents the profit he earned from what would not have been lost at his risk (*lī-annah-hu ribḥ mā lam yuḍman*).” (see p. 78). The last phrase means that *the object perishes at the seller’s risk*.

How can we harmonize this contradiction? Although the later jurists indiscriminately employ the term ‘*ḍamān*’ or its derivatives and the expression like “the object has been lost from the seller’s property” to designate the attribution of risk, al-Shaybānī classifies the attribution of risk to the seller into two categories. The first, represented by the expression, “It [viz. the object] has been lost from the

seller's property," refers to the case in which the seller is responsible for the delay of delivery, e.g. by exercising the right of retention, whether the object is partially or totally lost. The second, expressed by the term *'damān'* or its derivatives, refers to the case in which the seller is not responsible for the delay of delivery, and the object is totally lost. Conversely if the object is partly lost while the seller is not responsible for the delay of delivery, the object perishes at the buyer's risk, as illustrated by rules [2] and [3]. That is to say, if, due to a natural cause, the value of the object decreased to 1% of its original value, the buyer who maintains the contract must pay the entire stipulated price (although he has the right to cancel the contract). But if the object is totally lost, he owes nothing. Why does al-Shaybānī adopt this system?

To answer this question, let us examine the Iraqi doctrines about the attribution of risk in the sale of a specific object. Ibrāhīm al-Nakhaṣī is reported to have said, "If it [viz. the object] perishes, it is lost from [the property of] the seller." He adds:

If the seller says to the buyer, "I will hand it over to you," and the buyer says, "Leave it as it is until I give you the price," the object is assimilated to a deposit. If it perishes, it is lost from [the property of] the buyer.<sup>242</sup>

Likewise, with regard to the case in which the seller offers the object to the buyer, and the buyer does not receive it, al-Nakhaṣī reportedly held that the object is lost "from the property of the buyer (*min māl al-mushtarī*)."<sup>243</sup> Qatāda is reported to have held a similar view.<sup>244</sup>

To other jurists is attributed the opinion that a seller who is not responsible for the delay of delivery assumes the risk of loss. Commenting on this statement attributed to Ibrāhīm al-Nakhaṣī, Sufyān al-Thawrī (b. 97/715–6; d. 161/778) is reported to have stated, "As for our colleagues (*aṣḥāb-nā*), they say, 'No, until he [viz. the buyer] takes possession of it [viz. the object]'.<sup>245</sup> "Our colleagues" seems to refer to Sufyān's Kufan contemporaries. With regard to the same statement, Maṣmar is reported to have said, "As regards the case in which both parties were silent, Ḥammād (d. 120/737–8),

<sup>242</sup> Ibn Abī Shayba, *Muṣannaf*, 4:289, no. 20162.

<sup>243</sup> Ṣanʿānī, *Muṣannaf*, 8:47, no. 14245.

<sup>244</sup> Ṣanʿānī, *Muṣannaf*, 8:47, no. 14244.

<sup>245</sup> Ṣanʿānī, *Muṣannaf*, 8:47, no. 14245.

Ibn Shubruma (d. 144/761–2) and others saw nothing [attributed to the buyer’s risk] until he takes possession of it.”<sup>246</sup> To al-Ḥasan al-Baṣṭī and Ibn Sīrīn is attributed the statement: “*Ḍamān* is attributed to the seller until the buyer takes possession of it.”<sup>247</sup> This appears to mean that the object perishes at the seller’s risk, whatever the cause of its loss may be (unless attributable to the buyer). If so, the term ‘*Ḍamān*’ is used here to designate the attribution of risk to the seller even in the case in which the seller is in no way responsible for the delay in delivery. This is reminiscent of the above-cited sentence from the *Aṣl*, “What the seller destroyed of the slave was lost from him, *Ḍamān* not being attributed to the seller.”

In principle, al-Shaybānī sides with the opinion attributed to Ibrahīm al-Nakhaṣī, but he adopts the opinion espoused by Sufyān al-Thawrī, al-Ḥasan al-Baṣṭī and Ibn Sīrīn only in case of total loss. Why does he adopt such an ambiguous position? One possible answer to this question is suggested in the hadīths cited in the *Āthār* of Abū Yūsuf and al-Shaybānī, and the *Muṣannaḥ* of al-Ṣanʿānī. We read, for example, in the *Āthār* of Abū Yūsuf:

The Messenger of God appointed ʿAttāb b. Abī Asīd as governor of Mecca. He said, “I send you to the people of God, so prohibit them [from doing] four things: earning a profit from an object the risk of which one does not assume, selling what has not yet been delivered (*bayʿ mā lam yuqbaḍ*), and stipulating two clauses in a sale and a *salaf*.”<sup>248</sup>

The last phrase “and stipulating two clauses in a sale and a *salaf*” should be interpolated as “and stipulating two clauses in a sale, and combining a sale and a *salaf*,” following similar hadīths recorded in the *Muṣannaḥ* of al-Ṣanʿānī,<sup>249</sup> the *Āthār* of al-Shaybānī,<sup>250</sup> the *Mudawwana*,<sup>251</sup> *Kitāb fi al-fiqh*<sup>252</sup> and the *Sunan al-kubrā* of al-Bayhaqī.<sup>253</sup> Let the first two rules that the Prophet gave to ʿAttāb be rule [a] and rule [b]. Logically speaking, by combining the two rules, we generate a rule that attributes the risk to the seller until the delivery

<sup>246</sup> Ṣanʿānī, *Muṣannaḥ*, 8:46–47, no. 14243.

<sup>247</sup> Ṣanʿānī, *Muṣannaḥ*, 8:47, no. 14246.

<sup>248</sup> Abū Yūsuf, *Āthār*, 181–82, no. 828.

<sup>249</sup> Ṣanʿānī, *Muṣannaḥ*, 8:41, no. 14222.

<sup>250</sup> Shaybānī, *Āthār*, 96a.

<sup>251</sup> Saḥnūn, *Mudawwana*, 3:234.

<sup>252</sup> *Kitāb fi al-fiqh*, 5 (3b).

<sup>253</sup> Bayhaqī, *Sunan*, 5:340.

is effectuated (hereafter rule [c]): on the one hand, rule [a] forbids the buyer from earning a profit by reselling the object if it perishes at the seller's risk; on the other hand, rule [b] forbids the buyer from reselling the object before he takes possession of it; hence rule [c]. I infer that rule [c] was superimposed on the ancient doctrine represented by Ibrāhīm al-Nakha'ī.

Rule [c] posed, however, a problem, for the buyer, who must pay the entire price for an object if most of it has been lost, is exempt from any payment if the loss is complete. Al-Shaybānī or more probably one of his Iraqi predecessors solved this problem by giving the buyer the option to cancel the contract. The second question that must be answered (see p. 89) relates to the nature and origin of this right mentioned in rules [1], [2] and [3]. Al-Shaybānī holds that the buyer has this right unless he destroys the object. In my view, this right derives from the option for defect (*khiyār al-ʿayb*), as suggested in rule [2]. According to the Hanafis, the buyer who finds a defect that causes a reduction of the price among the merchants and of which the seller did not inform him has the right to unilaterally cancel the contract, whether the defect had existed before the contract or occurred after the contract and before delivery. I imagine that in Iraq the option originally operated only for a pre-existing defect, as the Malikis hold. Some Iraqi jurists apparently extended this application because they wanted to harmonize the traditional rule about the attribution of risk of partial loss and the newly introduced rule that was widely accepted by the Kufan or Iraqi contemporaries of Sufyān al-Thawrī.

The third and final question remaining to be explained relates to rule [4]: "If it is the buyer who cut the hand, the act of cutting is assimilated to taking possession (*iqṭidā'*) of the slave." Chehata observes that the destruction deprives the buyer of the right to cancel the contract if the object is subsequently lost while in the possession of the seller due to a natural cause, as a sanction against his destructive act.<sup>254</sup> But his observation is contradicted by the following examples cited in the *Jāmi' al-kabīr* of al-Shaybānī.

(1) Suppose that the buyer of cloth or an animal causes a defect in the object while it is in the possession of the seller, and subsequently the object is lost. (a) If the seller does not refuse to deliver

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<sup>254</sup> Chehata, *Etudes* 2, 14.

it before it is lost, the buyer must pay the price, i.e. it perishes at the buyer's risk. (b) If the seller refuses to deliver it before it is lost, the buyer must compensate the seller for the decrease in its value that the buyer has caused. This solution implies that the object perishes at the seller's risk.

(2) If the buyer causes a defect in a shirt or ring that he has purchased while the seller is wearing it, or in an animal that he has purchased while the seller is riding it, the subsequent loss of the object (the shirt, the ring or the animal) is attributed to the seller, regardless of whether or not the seller subsequently refuses to deliver the object.<sup>255</sup> The seller must have the right to demand that the buyer make up for the defect that the latter causes to the object.

Therefore, rule [4] applies only to the case in which the seller always keeps the object on behalf of the buyer. Only in this case, the destruction is assimilated to the taking of possession. This rule is reminiscent of a rule that regulates the option for defect: if an object is damaged after the buyer takes possession of it, he can no longer cancel the contract, exercising the option for defect.<sup>256</sup>

I have explained rules [1] – [4] mentioned in the *Aṣl* of al-Shaybānī. To summarize, the risk of loss is attributed to the seller in two cases: first, when the seller refuses to deliver the object either by retaining it for his own sake or destroying it. Originally, the risk of loss was attributed to the seller only in this case. Second, when the seller is not responsible for the delay of delivery, the risk of loss is also attributed to the seller if the object is totally lost before delivery. This rule was introduced based on the principle that prohibits someone from profiting from an object the risk of which is not attributed to him, and the prohibition of the resale of an object one has not taken possession of. If, alternatively, the object is partially lost, the risk is attributed to the buyer, who must pay the full price if he maintains the sale. Clearly the rule regulating the case of partial loss and the rule regulating the case of total loss contradict one another. To harmonize the two rules al-Shaybānī or more probably some Iraqi jurist prior to him applied the option for defect that enables the buyer to cancel the contract in case of partial loss that occurs in the object after the contract and before delivery.

<sup>255</sup> Shaybānī, *Kabīr*, 260.

<sup>256</sup> Rayner, *Theories*, 338.

Before turning to the Medinan doctrine, we should mention the thesis of Chehata. Relying on the works of the later Hanafi jurists, he writes as follows:

*S'agissant d'une responsabilité qui naît de l'état délictueux dans lequel la partie contractante s'était mise en inexécutant son contrat, il va de soi que la partie contractante doit répondre tout autant de son fait matériel que de toute perte fortuite survenue à la suite de l'inexécution.*<sup>257</sup>

That is to say, the seller is under the obligation to deliver the object at the moment when the sale is concluded (it is prohibited to stipulate a delay in delivery insofar as the object is specified). The seller who does not fulfill this obligation is liable for eventual damage or loss to the object whatever its cause may be. Chehata writes also as follows: as the liability arises from a contract, the amount of money that the seller must provide for compensation is fixed at the same amount as the stipulated price. But in case of partial loss, the seller is not liable, because it is difficult to evaluate the decrease in value of the object.<sup>258</sup> If the seller destroys the object, his liability is based also on the contract. In this case, the Hanafis authorize the buyer to demand a reduction of the price in proportion to the magnitude of the decrease. They overcome the difficulty of evaluation, taking into consideration the gravity of the responsibility of the seller.<sup>259</sup> As for partial or total destruction of the object by the buyer before delivery, according to the Hanafi principle that ownership transfers definitively to the buyer upon delivery, the buyer should be liable for his tort, and is required to pay the value of the object. But the Hanafis also here take into consideration the contract to make him pay the stipulated price.<sup>260</sup> Finally, the buyer has the right to cancel the contract when the object is partially lost or damaged due to a cause that is not attributed to him. The reason for this is as follows: the Hanafis hold that if 'the unity of a contract' (*ittiḥād al-ṣafqa*) is lost, a contract is no longer binding. As partial damage to the object causes the lack of the unity of a contract, the buyer can cancel the contract.<sup>261</sup>

<sup>257</sup> Chehata, *Etudes* 2, 59. See also, idem, "Concepts," 93.

<sup>258</sup> Chehata, *Etudes* 2, 28.

<sup>259</sup> Chehata, *Etudes* 2, 28.

<sup>260</sup> Chehata, *Etudes* 2, 55.

<sup>261</sup> Chehata, *Etudes* 2, 27.

Chehata assumes that the concept of contractual liability as understood in Western law exists in Islamic law. Indeed, his concept may explain some of the solutions adopted by the Hanafis. But there are three rules that cannot be explained in this way. First, if the object is only partially damaged due to a natural cause, the buyer must pay the full price insofar as he maintains the contract. According to Chehata, the Hanafis are reluctant to permit the buyer to demand a price reduction, because it is difficult to evaluate the amount of the reduction. But I have cited an example that contradicts this explanation. Second, the seller assumes the risk of loss even if he refuses to deliver the object by exercising the right of retention, i.e. he does not violate the contract. Third, the *fructus* produced by the object perish at the risk of the buyer. If the seller is liable for the loss of the principal on the basis of the contract, he must be also liable for the loss of the *fructus*.

#### *The Medinan doctrines*

Ibn al-Qāsim states that if foodstuffs are sold, but perish before delivery, then:

(1) According to Mālik, the following rules apply when the foodstuffs perish as a result of a natural cause.

- (a) If the price is fixed at one dirham per *qafīz* and the foodstuffs perish before they are measured, “the loss is from the seller (*muṣībatu-hu min al-bāʿi*).”<sup>262</sup> Therefore the buyer owes nothing, so that he can take back the money he has paid to the seller.<sup>263</sup>
- (b) If the foodstuffs are sold *en bloc* (*juzāfan*), they perish at the risk of the buyer. He must pay the full price.<sup>264</sup>

(2) According to Mālik, the following rules apply when the seller destroys the foodstuffs.

- (a) If the price is fixed at one dirham per *qafīz*, the seller must supply the same measure as is stipulated.
- (b) If the foodstuffs are sold *en bloc*, the seller must compensate the buyer for their value in gold or silver, because Mālik

<sup>262</sup> Saḥnūn, *Mudawwana*, 4:94.

<sup>263</sup> Saḥnūn, *Mudawwana*, 4:95.

<sup>264</sup> Saḥnūn, *Mudawwana*, 4:94–95.

said to Ibn al-Qāsim, “A person who destroys a bag of foodstuffs [i.e. *en bloc*] must pay its value in gold or silver.”<sup>265</sup>

(3) The following rules apply when a third person destroys the foodstuffs.

- (a) If a bag of foodstuffs is sold by measure and a third person destroys the foodstuffs before the seller measures them, the seller can demand that the destroyer pay the value of the foodstuffs, while the seller must supply foodstuffs to the buyer in accordance with the contract, after measuring them.
- (b) If the measure of the foodstuffs is known, the buyer can demand that the destroyer supply him the same measure of foodstuffs.<sup>266</sup> This implies that the buyer owe the entire price to the seller.

The principle here is that ownership and with it risk pass from the seller to the buyer at the moment when the object is specified, as indicated in the above-cited text from the *Bidāyat al-mujtahid* of Ibn Rushd al-Ḥafīd (see p. 78). If foodstuffs are sold by measure or weight, they are not specified until measured or weighed. Therefore if the foodstuffs are sold for such-and-such dirhams per *qafīz* and the seller destroys them before measuring them, they perish at the seller’s risk. He is therefore not obligated to indemnify the buyer. Conversely, if foodstuffs are sold *en bloc*, for example, as a bag of foodstuffs, foodstuffs kept in a warehouse, or a pile of foodstuffs in a shop, the foodstuffs are specified without being measured or weighed. Therefore, if they perish as a result of a natural cause, the buyer must pay the price. If the seller destroys the foodstuffs while they are still in his possession, the seller can demand that the buyer pay the price, but the seller must pay their value to the buyer, for what the seller destroyed belonged to the buyer (but the buyer seems to be exempt from payment of the difference between the price and the value of the foodstuffs if the former is higher than the latter).

When did this principle originate? Although it is not attributed to any jurist prior to Mālik in the *Mudawwana* or any other sources, it is sound to assume that the principle was unanimously accepted in

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<sup>265</sup> Saḥnūn, *Mudawwana*, 4:95.

<sup>266</sup> Saḥnūn, *Mudawwana*, 4:95.

Medina in the lifetime of Mālik, since it is inconceivable that no rule existed regarding so rudimentary an issue as the attribution of risk in the sale of a specific object.

The principle that the attribution of risk is one of the effects of ownership is exemplified in the following case brought before Saḥnūn for consultation. A slave who was not present at the contractual session was sold “by description (*‘alā al-ṣifa*),” i.e. the attributes he should possess were defined, and it was stipulated that the risk passes immediately to the buyer. Asked if this contract was valid, Saḥnūn responded affirmatively. Then asked if the buyer could propose to the seller that the contract be revoked by agreement, he answered as follows:

This is not permitted, for the slave has been made the subject of the contract which has taken effect and, at the same time, the obligation of the buyer to pay the price is due (*yakūnu al-‘abd qad adrakat-hu al-ṣafqa wa-tamma al-bay‘ fī-hi wa-wajaba al-thaman ‘alā al-mushtarī daynan ‘alay-hi*). If, in this case, the seller revokes the contract, his claim is offset by the slave of whom he has not yet taken possession (*fusikha daynu-hu fī ‘abd lam yaqbiḍ-hu*). If *ḍamān* is attributed to the seller on the date on which the slave is bought and the seller then proposes to the buyer to revoke the contract, there is no harm in it, for if *ḍamān* is attributed to the seller, he has no credit against the buyer, so that it does not happen that a claim is extinguished by something which belongs to the buyer.<sup>267</sup>

According to the Malikis, the contracting parties of the sale of an object that is not present at the contractual session can determine by agreement at whose risk the object perishes.<sup>268</sup> According to Saḥnūn, when the risk is attributed to the buyer, “the contract has taken effect.” In this case, to revoke the contract amounts to offsetting the seller’s credit against the buyer by the seller’s obligation to deliver the slave, which violates the general prohibition of *‘al-dayn bi-’l-dayn* (obligation against obligation).<sup>269</sup> Alternatively, when the risk is attributed to the seller, the buyer does not owe the price, because the contract has not yet taken effect.

To repeat, the Malikis regard the attribution of risk as one of the effects of ownership. We have already seen this principle applied in the solutions regarding a pledge. It will play a central role in their theory regarding usurpation.

<sup>267</sup> ‘Utbī, *Mustakhrāja*, 7:493.

<sup>268</sup> Ibn Rushd al-Jadd, *Bayān*, 7:493.

<sup>269</sup> Schacht, *Introduction*, 146.

Finally, the Medinan jurists and the Malikis permit the buyer to resell the object before he takes possession of it unless the object is foodstuff.<sup>270</sup> This is to say, the buyer, who assumes the risk of loss, can earn profit by reselling the object.

### 5. *Usurpation*

Muslim jurists unanimously require a person who usurps an object belonging to another person to return it to the owner (often called *al-maghṣūb min-hu*, i.e. the deprived person) and hold him liable if he fails to do so. As will be explained, al-Shāfi‘ī takes the illegality of usurpation into consideration to make the usurper liable for any loss that the object suffers before he returns it to the owner and to attribute any profit drawn from the object to the owner. For the same reason al-Shāfi‘ī declares any disposition of the object by the usurper to be invalid. The Hanafi and Maliki rules are different from the rules of al-Shāfi‘ī in many respects: they agree with al-Shāfi‘ī in making the usurper absolutely liable for any loss suffered by the object, but unlike al-Shāfi‘ī, in certain cases they permit a usurper to profit from the usurped object and they do not necessarily regard dispositions by a usurper as invalid. I will explore how they arrived at this system which at first glance seems to be abnormal or even unjust, by examining in detail the positive solutions that they adopt regarding the loss of the usurped object, *fructus* and *manfā‘a* produced by it, and its dispositions.

As noted in the Introduction, the legal concept of ‘usurpation’ seems to have been introduced in Iraq and Medina by the generation succeeding to the Successors, although the term ‘*ghaṣb*’ appears in Q. 18:79, where we read, “After them a certain king who seized on every boat by force (*wa-kāna warā‘a-hum malik ya’khudhu kull safīna ghaṣban*).”<sup>271</sup> There is no chapter or section dedicated to usurpation in the *Āthārs* of Abū Yūsuf and al-Shaybānī, the *Muwatta‘* or the *Muṣannaḥ* of al-Ṣan‘ānī and Ibn Abī Shayba, whereas the rules regulating it are established in the works of al-Shaybānī and the *Mudawwana*. This suggests that the legal concept of usurpation and the rules regulating it appeared and were formed in a short period

<sup>270</sup> Mālik-Yaḥyā, *Muwatta‘*, 3:296–97; *ibid.*, tr. Bewley, 264a.

<sup>271</sup> Translation by A. Yusuf Ali.

of time during or just before the lifetimes of Abū Ḥanīfa in Iraq and of Mālik in Medina.

It is interesting to note, in this context, that there were disputes over whether a thief amputated for his crime is or is not liable for the loss of the stolen object. The Kufan jurist Saʿīd b. Jubayr (b. 46/666–7; d. 95/714) is reported to have denied his liability, saying, “Cutting off takes the place of payment (*kufiya bi-ʿl-qaṭʿ ghurman*).”<sup>272</sup> Ibn Sīrīn is reported to have stated, “He is not liable if he had his hand cut off, unless the object is found [in his possession].”<sup>273</sup> Similar statements are attributed to al-Shaʿbī.<sup>274</sup> The Hanafis adopt the same position, invoking the Prophetic hadith: “The thief is no longer liable once a *ḥadd* punishment has been applied to him.”<sup>275</sup> To the contrary, al-Ḥasan al-Baṣrī,<sup>276</sup> Ḥammād b. Abī Sulaymān,<sup>277</sup> and ʿAṭā<sup>278</sup> are reported to have held the thief liable. Both opinions are attributed to Ibrāhīm al-Nakhaʿī.<sup>279</sup> The Malikis hold the thief liable only when he is in a financial ease.<sup>280</sup>

These disputes suggest that a thief who is not punished by amputation was unanimously held liable for the loss of the stolen object. However, as noted, no statement attributed to these jurists concerning the nature of his liability is extant, with the sole exception of a statement attributed to al-Shaʿbī, according to which a person who “took (*akhadha*) foodstuffs belonging to another” must return similar foodstuffs.<sup>281</sup> The task was left to the following generation to establish the rules regulating the civil liability of a person who robs another of his property. The legal concept of usurpation was introduced in this context.

<sup>272</sup> Ibn Abī Shayba, *Muṣannaf*, 5:476, no. 28131.

<sup>273</sup> Saʿānī, *Muṣannaf*, 10:219, no. 18899; Ibn Abī Shayba, *Muṣannaf*, 5:475, no. 28127; Ṭabarī, *Tahdhīb*, 107.

<sup>274</sup> Saʿānī, *Muṣannaf*, 10:219, no. 18898; Ibn Abī Shayba, *Muṣannaf*, 5:475, nos. 28125–26; Shaybānī, *Āthār*, 82b; Ṭabarī, *Tahdhīb*, 107.

<sup>275</sup> Ṭahāwī, *Mukhtaṣar*, 269–70; Ṭabarī, *Tahdhīb*, 102; Ibn Rushd al-Ḥafīd, *Bidāya*, 2:452; *ibid.*, tr. Nyazee, 2:544; Rāzī, *Tafsīr*, 10:234. Shaybānī refers to no Prophetic hadith. *Āthār*, 82b.

<sup>276</sup> Ibn Abī Shayba, *Muṣannaf*, 5:476, no. 28130; Ṭabarī, *Tahdhīb*, 109.

<sup>277</sup> Saʿānī, *Muṣannaf*, 10:219, no. 18900; Ṭabarī, *Tahdhīb*, 109.

<sup>278</sup> Ṭabarī, *Tahdhīb*, 107–08.

<sup>279</sup> Shaybānī, *Āthār*, 82b; Ṭabarī, *Tahdhīb*, 107, 109.

<sup>280</sup> Ibn Rushd al-Ḥafīd, *Bidāya*, 2:452; *ibid.*, tr. Nyazee, 2:544; Ṭabarī, *Tahdhīb*, 110.

<sup>281</sup> Ibn Abī Shayba, *Muṣannaf*, 4:559, no. 23115.

*The Hanafi doctrine*

There are two definitions of usurpation in the Hanafi school. (1) According to al-Kāsānī, Abū Ḥanīfa and Abū Yūsuf defined it as “removal of the possession of the owner from a valuable object in a public and oppressive way by an action with regard to the object (*izālat yad al-mālik ‘an māli-hi al-mutaqawwim ‘alā sabīl al-mujāhara wa-’l-mughālaba bi-fīl fi al-māl*).”<sup>282</sup> “An action with regard to the object” means “the carrying away of the usurped object from one place to another (*taḥwīlu-hu wa-naqlu-hu min makān ilā ḡhayri-hi*).”<sup>283</sup> (2) Al-Shaybānī holds that the condition “by an action with regard to the object” is not necessary for usurpation to take place. For example, if someone lives in a house or cultivates land belonging to another person without the permission of the owner, al-Shaybānī considers it usurpation, whereas Abū Ḥanīfa and Abū Yūsuf do not, since the house or the land is not removed and remains in its original place.<sup>284</sup> But al-Ṭaḥāwī writes that Abū Yūsuf sides with al-Shaybānī to hold that a house can be the subject of usurpation.<sup>285</sup>

It is not clear from where the difference in the definitions comes, but I think that my inference regarding rent applies to usurpation. To repeat, on the one hand, the concept of ‘violation’ (*mukhālafā*) was introduced at first to attribute to a person who hires an animal for the purpose of travel the risk of any damage or loss suffered by the animal after he travels beyond the destination stipulated in the rent contract, in view of the difficulty for the owner to establish that the violation was likely to cause damage or loss. On the other hand, by applying to this case the principle that a person who assumes the risk of loss of an object is entitled to profit from it, the Hanafis and their Iraqi predecessors exempted the hirer from payment of extra rent. From this I have inferred Abū Ḥanīfa and probably some of his precursors were not willing to allow the concept of violation to cover those cases in which it is easy for the owner to establish that a violation was likely to cause damage or loss, because to make someone assume the risk of what he possesses is tantamount to permitting him to enjoy *manfa‘a* of the object for nothing.

<sup>282</sup> Kāsānī, *Badā‘ī* (1402), 7:143; *ibid.* (1418), 10:3.

<sup>283</sup> Ṭaḥāwī, *Mukhtaṣar*, 118. See also, Ghunaymī, *Lubāb*, 2:189.

<sup>284</sup> Kāsānī, *Badā‘ī* (1402), 7:143; *ibid.* (1418), 10:3–4; Qudūrī, *Mukhtaṣar*, 2:189.

<sup>285</sup> Ṭaḥāwī, *Mukhtaṣar*, 118.

The same line of reasoning seems to apply to usurpation. Suppose that a person forcibly seizes land belonging to another: on the one hand, if he assumes the risk of loss, he owes no rent to the owner. On the other hand, land is rarely lost due to a natural cause, and if, for example, he causes damage to the land by cultivating it, it is not difficult for the owner to establish that the cultivation caused damage to the land to hold him liable on the ground of destruction. These considerations may have led Abū Ḥanīfa to hold that land cannot be the subject of usurpation. Conversely, al-Shaybānī may have taken it for granted that a person who begins to possess an object in an illegal manner is absolutely liable for its loss. We have seen al-Shaybānī adopt a similar solution regarding the case of a person who hires an object and violates the contract. For example, if a person hires a tent for the purpose of travel from Kufa to Mecca and leaves for Mecca without bringing the tent with him, al-Shaybānī holds him liable for any damage to the tent, even though it may be safer to keep the tent at home at Kufa (see p. 59).

The following are the fundamental rules applying to usurpation.

(1) If the usurped object remains physically and legally in the same status that it was in prior to usurpation, or suffers partial loss, but retains its utility, the owner can do nothing more than require that the usurper return it.<sup>286</sup>

(2) If the usurper destroys the object or it is lost due to a natural cause totally or to the extent that it loses all of its utility, the owner can do nothing more than demand that the usurper compensate him for the loss by supplying an object of the same kind, quality and quantity, if it is fungible (*mīthlī*), or by paying the value of the usurped object as estimated on the date of usurpation, if it is non-fungible (*qīmī*).<sup>287</sup> By performing what the owner requires him to do, the usurper “proves to have been the owner of the usurped object or acquires its ownership retroactively from the date of the usurpation (*yamlīku al-maghṣūb min waqt al-ghaṣb bi-ṭarīq al-zuhūr aw bi-ṭarīq al-ʾisnād*),” as al-Samarqandī puts it.<sup>288</sup> Al-Sarakhsī also writes, “When the usurper pays the value [of the usurped object], fictitious, rather than real, ownership belongs to him retroactively from the date of

<sup>286</sup> Samarqandī, *Tuhfa* (1964), 3:113; *ibid.* (1414), 3:91; Kāsānī, *Badāʾiʿ* (1402), 7:148, 151, 155; *ibid.* (1418), 10:24–25, 48, 50.

<sup>287</sup> Samarqandī, *Tuhfa* (1964), 3:120; *ibid.* (1414), 3:96; Ṭaḥāwī, *Mukhtaṣar*, 117.

<sup>288</sup> Samarqandī, *Tuhfa* (1964), 3:120; *ibid.* (1414), 3:96.

usurpation (*idhā damina al-ghāṣib al-qīma istanada ḥukm al-milk ilā waqt al-ghaṣb lā ḥaḳīqat al-milk*).<sup>289</sup>

I will examine here the rules concerning estimation of the amount of money the usurper owes in case of total or partial loss, attribution of *fructus* and *manfaʿa*, and dispositions by the usurper, to demonstrate that they are mostly borrowed from other institutions such as pledge, hire, the sale of a specific object and unauthorized agency. It will also be clear that the explanation given by al-Samarqandī and al-Sarakhsī, namely that ownership of the object can be attributed retroactively to the usurper, is spurious, even as a theoretical or instrumental explanation. For the sake of convenience, the following arguments are based on the assumption that the usurped object is non-fungible.

The later Hanafis hold as follows with regard to the amount of money that the usurper owes if the usurped object suffers loss due to a natural cause while in the possession of the usurper.

(1) In case of total loss, the owner can demand that the usurper pay the value of the object as evaluated at the moment of usurpation, as noted.<sup>290</sup>

(2) In case of partial loss, the owner can demand that the usurper restore the object and compensate him for the decrease in value (as estimated at the moment of usurpation) that the object has suffered due to the loss.<sup>291</sup>

Two questions arise in connection with these rules. First, if the object has been totally lost, the amount of money that the usurper must pay is the estimated value of the object on the date of its usurpation. Why is it that the Hanafis do not permit the owner to choose whichever date he likes to estimate its value, as the Shafiʿis do? Al-Kāsānī answers this question as follows: the usurper has become liable as a result of the usurpation. At that time, he was obligated to restore the object to the owner, or, failing to do so, he was obligated to pay its current value. So long as the ground on which he is liable does not change, his liability does not change, either.<sup>292</sup> To sustain this explanation, we must assume that his pos-

<sup>289</sup> Sarakhsī, *Sharḥ*, 100–01.

<sup>290</sup> Samarqandī, *Tuḥfa* (1964), 3:120; *ibid.* (1414), 3:96; Ṭaḥāwī, *Mukhtaṣar*, 117.

<sup>291</sup> Kāsānī, *Badāʾiʿ* (1402), 7:155; *ibid.* (1418), 10:50; Ṭaḥāwī, *Mukhtaṣar*, 117; Qudūrī, *Mukhtaṣar*, 2:189–90.

<sup>292</sup> Kāsānī, *Badāʾiʿ* (1402), 7:151; *ibid.* (1418), 10:39.

session of the object following the usurpation is not considered illegal. In fact, al-Kāsānī writes, “The transgression [that the usurper committed] consists in removing [the possession by the owner], rather than in continuing [his own possession] (*al-ta’addī fī al-izāla lā fī al-ithbāt*).”<sup>293</sup> This explanation sounds strange. As the usurper does not cease to be under the obligation to restore the object to the owner, it sounds more reasonable to regard the continued possession by the usurper as illegal. The second question is related to the first question. Why can the owner demand that the usurper compensate him for partial loss if he makes the usurper restore the object that has been partially lost? Is it not more logical to exempt the usurper from liability for any loss that is not attributed to his action according to al-Kāsānī, who asserts that the possession of the usurper following the usurpation is not transgression? As will be indicated, in such a case the Malikis do not make the usurper compensate the owner for the decrease in value due to partial loss. A plausible answer to this question is that the Hanafis regarded the Maliki solution as unjust and rejected it by way of *istiḥsān*.

In my view, these questions can be answered by assuming that the rules regarding usurpation are mostly borrowed from those regulating the attribution of risk with regard to rent, pledge or the sale of a specific object. As for the first question, I maintained that the rule that the owner cannot demand payment of rent once the hirer travels beyond the destination specified in the contract is based on the principle that a person who assumes the risk of loss of an object (*viz.* the hirer) may profit from it. By applying this principle to usurpation, the first question is answered as follows: on the one hand, if the owner were given the right to choose whichever date he likes after the usurpation to estimate the value of the usurped object and to make the usurper pay it, he could profit from fluctuation in the value of an object that perishes at the risk of another person, *i.e.* the usurper. On the other hand, it is out of the question to allow the owner to demand only payment of an amount smaller than the value of the object on the date of its usurpation. It follows that the amount of money that the owner can demand would be equal to the value of the object at the moment of usurpation. We have also

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<sup>293</sup> Kāsānī, *Badā’i’* (1402), 7:143; *ibid.* (1418), 10:7.

seen al-Shaybānī prescribe regarding the case in which a third person cut the hand of the slave while in the possession of the seller and the buyer chooses to maintain the sale of the slave: “If the buyer makes the third person pay half the value of the slave, he must give the difference, if any, between the half his value and half the price as *ṣadaqa*, because this represents the profit he gained from what would not have been lost at his risk.”

It is easy to answer the second question by assuming that the Hanafis are applying the rule regarding the attribution of risk in a pledge or the sale of a specific object. We have seen that the risk of loss is attributed to a pledgee within the limit of the amount of debt or to a seller who refuses to deliver the object. This is why the amount of money that the debtor owes to the pledgee is reduced to the extent of the decrease in value due to the loss suffered by the pledge and the buyer can demand a reduction of the price in proportion to the decrease in value due to the loss suffered by the object. By the same logic, the usurper who possesses the object he has usurped for his own sake assumes the risk of loss. This is why the owner can demand that the usurper compensate him for the decrease in value of the object.

When *fructus* are produced from the usurped object or the usurper earns a rent for it, can the owner demand delivery of the *fructus* or the rent? Can he make the usurper compensate him if they are lost for some reason? Can the owner make the usurper pay rent if the latter uses the object or if he does not use it? By examining the rules regarding these topics I will demonstrate that they are borrowed from the corresponding rules that govern pledge, rent or the sale of a specific object.

According to the Hanafis, *fructus* belong to the owner, whether or not the usurped object is returned to the owner. But the possession of the usurper is *yad amāna*, i.e. *fructus* perish at the owner’s risk. Unless the usurper consumes them, commits a transgression against them or refuses to deliver them despite the demand of restoration from the owner, he is not liable for their loss.<sup>294</sup>

These rules raise two questions. First, why do *fructus* belong to the owner whether or not he makes the usurper compensate him for the

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<sup>294</sup> Ṭaḥāwī, *Mukhtaṣar*, 117; Qudūrī, *Mukhtaṣar*, 2:194–95; Sarakhsī, *Mabsūṭ* (n.d.), 17:177; *ibid.* (1421), 17:206.

value of the object? As noted, the Hanafis, such as al-Samarqandī and al-Sarakhsī, hold that once the usurper has paid the value of the object at the owner's request, it belongs to the usurper retroactively from the moment of usurpation. According to this explanation, *fructus* belong to the usurper (in fact, this is the solution of the Malikis, as will be shown). Al-Sarakhsī explains this anomaly as follows:

When the usurper pays the value [of the usurped object], fictitious, rather than real, ownership belongs to him retroactively from the date of usurpation. This is why the usurper retains the gain (*kasb*) acquired by the slave [whom he usurped], but not the child [of the female-slave that he usurped], since fictitious ownership is sufficient for the usurper to retain the gain, whereas it is not sufficient for him to retain the child.<sup>295</sup>

This is a tautology that explains nothing. In my view the Hanafis do not advance a persuasive answer to this question.

Second, why is the possession of the usurper *yad amāna*? Al-Sarakhsī answers this question as follows: although *fructus* are not in the possession of the owner, he can receive them at any time if the usurper keeps them in his house and does not refuse to deliver them. Therefore, unless the usurper commits an act that would make him liable for fortuitous loss, for example, “rejecting the taking possession by the owner (*mufawwīt li-yad al-mālik*)” by refusing to deliver the *fructus* despite the demand of the owner, the usurper is not liable.<sup>296</sup> This explanation echoes the above-cited statement of al-Kāsānī, “The transgression [that the usurper commits] consists in removing [the possession of the owner], rather than in continuing [the possession].”<sup>297</sup>

In sum, al-Sarakhsī and al-Kāsānī assert that the usurper is presumed to possess the object for the sake of the owner and that, for this reason, he is not liable for the loss of *fructus*. But we have already seen that the usurper is liable for partial loss that occurs to the usurped object. It is difficult to harmonize the two rules, one about the loss of *fructus* and the other about partial loss of the principal.

The two questions, however, are easy to answer if we compare them with the rules regulating *fructus* produced by a pledge or the specific object of a sale. As indicated, *fructus* produced by a pledge

<sup>295</sup> Sarakhsī, *Sharḥ*, 100–01.

<sup>296</sup> Sarakhsī, *Mabsūṭ* (n.d.), 11:54; *ibid.* (1421), 11:59.

<sup>297</sup> Kāsānī, *Badāʾiʿ* (1402), 7:143; *ibid.* (1418), 10:7.

belong to the pledgor, while the pledgee's possession of them is *yad amāna*. Likewise, *fructus* produced by the object of a sale while in the possession of the seller belong to the buyer, and the seller's possession of them is *yad amāna*. The same rules are applied to the case of a usurper.

The rules governing *manfā'a* also are similar to those governing pledge and rent.

(1) When the usurper enjoys *manfā'a* of the usurped object, e.g. by living in the usurped house, he does not owe rent, whether he restores it or pays its value to the owner.<sup>298</sup>

The Hanafis base this rule on the idea that “*manfā'as* do not enjoy the status as property except by virtue of a contract (*al-manāfi' lā ta'khudhu ḥukm al-māliyya illā bi-'l-'aqd*).”<sup>299</sup> Abū Zahra writes:

An object that legally can be put in use is called ‘a valuable thing’ (*māl mutaḡawwim*), since the Lawgiver recognized its essential value and permitted its use in any manner. It is inviolable and protected, so that a person who commits a transgression against it is made liable, and is required to pay its value or supply a similar object, depending on the situation.<sup>300</sup>

According to such an understanding, *manfā'a*, which is in itself not a thing, cannot be made the subject of indemnification if someone enjoys it without a contract. El-Hakim invokes “*l'attachement des juristes de l'Islam à l'existence d'un dommage stable, concret et en quelque sorte matérialisé pour faire naître un droit à la réparation. Or la perte de la jouissance est bien loin de présenter ces caractères.*”<sup>301</sup> Johansen writes, “Without a contract of tenancy or share-cropping (*muzāra'a*) the use does not represent a commodity value and is not warranted. Therefore, the unauthorized use (*ghaṣb*) of land does not entail the obligation to pay rent.”<sup>302</sup>

But the idea that *manfā'a* is not a thing is not self-evident. The Shafi'is, the Hanbalis and the Malikis regard *manfā'a* as property.<sup>303</sup> Once again, it appears that a usurper can enjoy *manfā'a* of the usurped object because he is liable for its fortuitous loss. Remember the prin-

<sup>298</sup> Ṭaḡāwī, *Mukhtaṣar*, 118; Qudūrī, *Mukhtaṣar*, 2:195; Johansen, *Islamic Law*, 38.

<sup>299</sup> Šarakhsī, *Mabsūṭ* (n.d.), 11:27; *ibid.* (1421), 11:29.

<sup>300</sup> Abū Zahra, *Milkīyya*, 53.

<sup>301</sup> Hakim, *Dommage*, 170.

<sup>302</sup> Johansen, *Islamic Law*, 38.

<sup>303</sup> 'Alī al-Khaṭīf, “Manāfi',” 99.

ciple embodied in the Prophetic hadith, “Profit is concomitant with risk.”

(2) The rule governing the case in which *manfāʿa* is materialized is exemplified by the following statement of al-Shaybānī:

The usurper of a slave made him work to earn proceeds (*ghalla*). If this causes a decrease in the slave’s value, the usurper must make up for the decrease. He then must give whatever remains of the proceeds as *ṣadaqa*. The usurper of land sowed one *kurr* [of seed] on it and the sowing caused a decrease in its value. If the land has produced three *kurrs* [of crop], the usurper must give what remains as *ṣadaqa* after deducting the decrease [in value of the land] and the same quantity of seed as he sowed.<sup>304</sup>

Here it is assumed that the usurper of a slave returned the slave to his owner, for otherwise he would be required to pay the entire value of the slave rather than to compensate for the decrease of the slave in value. The same is true of the usurper of land. It is noteworthy that the proceeds or the crop belong to the usurper, because the usurper is required to give them as *ṣadaqa*. We have seen, however, that *fructus* produced by the usurped object belong to the owner, even if the usurper pays the value of the object to the owner. Why the difference between proceeds and *fructus*? Al-Sarakhsī suggests an answer to this question, citing the case of a usurper who rents the usurped object to a third person and receives rent. According to al-Sarakhsī, the rent does not belong to the owner but to the usurper because it is the usurper who created the obligation to pay rent by concluding a hire contract.<sup>305</sup> But it is more plausible that the difference derives directly from understanding the principle “Profit is concomitant with risk” as operating only with regard to *manfāʿa*, gain (*kasb*) and proceeds (*ghalla*), to the exclusion of *fructus* (by which I mean *fructus naturales*). For example, as noted, on the one hand, the Hanafis substantially permit the pledgee to benefit from a pledge by using it gratis or earning rent for it (although they make him give the rent as *ṣadaqa*) in accordance with the ancient Iraqi doctrine. On the other hand, they attribute *fructus* produced by the pledge to the pledgor (see pp. 48, 52–4).

<sup>304</sup> Shaybānī, *Ṣaghīr* (1302), 109. *Kurr* is a measure unit.

<sup>305</sup> Sarakhsī, *Mabsūt* (n.d.), 15:138; *ibid.* (1421), 15:154–55.

Nevertheless, the following example indicates that the earliest Hanafis held an idea similar to that of al-Sarakhsī: someone usurps a slave, who then “rents himself (*ājara nafsa-hu*).” If the usurper takes the wages that the slave received from his employer and consumes them, Abū Ḥanīfa holds that the usurper is not required to compensate the owner, whereas Abū Yūsuf and al-Shaybānī make him compensate. If the owner of the slave finds the wages intact, they unanimously permit the owner to demand their delivery.<sup>306</sup> For Abū Ḥanīfa wages have a mixed nature. In one sense they are assimilated to *fructus*, for they belong to the owner. In another sense they are assimilated to *manfāʿa*, for the usurper is not liable for having consumed them. Abū Yūsuf and al-Shaybānī assimilate them to *fructus*, probably because the usurper does not contribute to the production of proceeds (wages), since it is the slave himself who concluded the contract.

I have called into question the theory of the later Hanafis according to which by paying the value of the object at the moment of usurpation, the usurper acquires its ownership retroactively. I will now show the additional evidence that indicates that the earliest Hanafis did not adopt such a theory. Let us first consider the solution mentioned in the *Aṣl* of al-Shaybānī: if someone usurps a slave belonging to another person and sells him, the sale is suspended (*mawqūf*).<sup>307</sup>

Generally speaking, a suspended contract becomes valid retroactively, i.e. from the date of conclusion if affirmed, and becomes inexistent (*bāṭil*) retroactively if rescinded by a person who has the right to affirm or rescind it. We have seen a similar rule applied with respect to a pledge: the sale by the pledgor becomes valid retroactively if affirmed by the pledgee and the sale by the pledgee becomes valid retroactively if affirmed by the pledgor. But we can also explain the solution mentioned in the *Aṣl* by assuming that two principles governing contracts concluded by an agent are applied to the sale by a usurper.

(1) Contracts are divided into two groups according to whether or not the agent must profess that he is acting on behalf of the principal in order for the contract to take effect in relation to the principal.

<sup>306</sup> Shaybānī, *Ṣaḡhīr* (1406), 445.

<sup>307</sup> Shaybānī, *Aṣl*, 5:90.

(i) Al-Samarqandī writes, “As for any contract in which it is not necessary for the agent to profess at the time of contract that he is acting on behalf of the principal, and it suffices for him to conclude it in his own name, such as sales, purchases, *yjāras* etc., its effects accrue to the agent.”<sup>308</sup> *Ijāras* include rent and employment.

(ii) Al-Samarqandī writes that in the case of marriage, redemption (*khulʿ*), divorce for consideration, reconciliation on the subject of retaliation, manumission for consideration, *kitāba* etc., it is necessary for the agent to profess that he is acting on behalf of the principal in order for these contracts to take effect in relation to the principal.<sup>309</sup> Al-Sarakhsī writes about agency in a donation: an agent is a messenger (*saḡīr*) or a narrator (*muʿabbir*). For the donation to take effect, it is necessary that the agent profess that he is acting on behalf of the donor (principal), as the result of which the donation is regarded as an act not of the agent but of the principal.<sup>310</sup> He also states that the same is true of the other gratuitous dispositions, such as manumission.<sup>311</sup>

(2) Al-Sarakhsī writes concerning an unauthorized agent (*fudūḡī*):

As for a contract that would have been validly concluded if he [viz. the unauthorized agent] had been authorized by the principal beforehand, its validity rests on his affirmation. If the principal affirms the contract, it is treated as if the principal had authorized him [viz. the unauthorized agent] beforehand.<sup>312</sup>

The unauthorized agent is a person who does an act on behalf of another person without obtaining the latter’s permission.<sup>313</sup> Let us apply the two principles to a sale by the usurper, although the usurper is not regarded as an unauthorized agent, since he sells the usurped object on his own behalf.

<sup>308</sup> Samarqandī, *Tuhfa* (1964), 3:325; *ibid.* (1414), 3:235.

<sup>309</sup> Samarqandī, *Tuhfa* (1964), 3:325; *ibid.* (1414), 3:235. *Kitāba* or *mukātaba* is a contract concluded between a slave and his owner according to which the slave acquires his freedom in consideration, typically a future payment of a stipulated amount of money in installments. The difference between manumission in consideration and *kitāba* is that in the former the slave becomes free on the spot or on the date designated by his owner, whereas in the latter the slave is not freed until he pays all the amount of money stipulated in the contract.

<sup>310</sup> Sarakhsī, *Mabsūt* (n.d.), 19:92; *ibid.* (1421), 19:105.

<sup>311</sup> Sarakhsī, *Mabsūt* (n.d.), 19:94; *ibid.* (1421), 19:109.

<sup>312</sup> Sarakhsī, *Mabsūt* (n.d.), 5:15; *ibid.* (1421), 5:15.

<sup>313</sup> Muḡammad Zakī ‘Abd al-Barr, “‘Aqd,” 129.

Suppose that the usurper of an object sells it to a third person. It is sound to assume that he sells it in his own name. On this assumption, the sale would be validly concluded between the buyer and the owner if the owner had authorized the usurper to sell it, in accordance with the first principle. Then according to the second principle, if the owner subsequently affirms the sale, it takes effect in relation to the owner.

As noted, the solution mentioned in the *Aṣl* regarding the sale of a usurped slave can also be explained by applying the rule regarding the sale of a pledge by the pledgee. But we can explain the following text in al-Shaybānī's *Jāmi' al-ṣaghīr* (numbers are mine) only by applying the above-mentioned principles governing contracts concluded by an agent:

- (1) (i) If someone usurps a slave and sells him, and, subsequently the slave-owner makes the usurper compensate him for the value of the slave, the sale is valid. But (ii) if the usurper manumits the slave before the slave-owner makes him compensate him for his value, the manumission is not valid. (2) If someone who usurps a slave sells the slave to another, who then manumits the slave, and then the slave-owner affirms the sale, the manumission is valid according to Abū Ḥanīfa and Abū Yūsuf, whereas al-Shaybānī holds that the manumission is not valid.<sup>314</sup>

Why, in case (1), is the sale by the usurper maintained if the usurper pays the value of the slave to the owner, whereas the manumission cannot be affirmed? As for the sale, al-Sarakhsī states that this is because by paying the value the usurper retroactively acquires ownership of the slave, as noted.<sup>315</sup> According to this logic, however, the manumission declared by the usurper would take effect retroactively when the usurper pays the value of the slave to the owner. But this is not the case. Al-Sarakhsī explains this apparent anomaly as follows: when the usurper pays the value of the slave, the usurper retroactively acquires fictitious ownership, which is sufficient to make a sale by the usurper valid retroactively from the moment of the contract, but not the manumission declared prior to compensation.<sup>316</sup> Al-Marghīnānī (d. 593/1197) writes that this is “because ownership

<sup>314</sup> Shaybānī, *Ṣaghīr* (1406), 465.

<sup>315</sup> Sarakhsī, *Sharḥ*, 101.

<sup>316</sup> Sarakhsī, *Sharḥ*, 101.

of the usurper in it [viz. the usurped object] is imperfect, for it is acquired retroactively or by necessity (*li-anna milka-hu al-thābit fī-hi nāqīṣ li-thubūti-hi mustanadan aw ḍarūratan*).<sup>317</sup>

These explanations are hardly persuasive. Let us try to justify the solutions adopted in the case of a usurper who disposes of the usurped object by comparing them to dispositions by an unauthorized agent.

(i) As noted, if the usurper sells the object without disclosing the owner, the validity of the sale is suspended until the owner affirms or rescinds it. Logically speaking, the usurper who acquires by then ownership of the object by paying its value to the owner takes his place and can choose between affirming and rescinding the sale. It stands to reason, however, that the usurper is not allowed to break his word and rescind the sale. It follows that the sale becomes valid automatically and definitely.

In this connection, it is revealing to refer to the case of a person who performs an act that he is not authorized to perform. If a minor concludes an onerous contract and comes of age before his guardian affirms or rescinds it, the minor can elect to affirm or rescind the contract, because the guardian had the right to affirm or rescind the contract to protect the minor whose judgment is considered not to be legally mature. Conversely, an onerous or gratuitous contract concluded by a slave automatically becomes valid when he is manumitted, because the right to affirm or rescind the contract is given to the slave-owner to safeguard his own interests, which now are not taken into account.<sup>318</sup> It is clear that the case of the usurper is assimilated to that of the slave: because it is not appropriate to permit the usurper to break his word, any sale concluded by the usurper is automatically affirmed when he acquires ownership of the object.

(ii) When a person usurps a slave and manumits him, we can safely assume that the usurper manumits him in his own name, saying, "I manumit you," or without disclosing the true owner, simply saying, "You are free." According to the first principle the manumission would not be valid, even if the usurper had been authorized by the owner to manumit the slave. It follows that neither the owner nor the usurper who subsequently takes his place can affirm the

<sup>317</sup> Marghīnānī, *Hidāya*, 4:19. For similar explanations, see also ‘Aynī, *Bināya*, 11:238; Zayla‘ī, *Tabyīn*, 5:231.

<sup>318</sup> Sarakhsī, *Mabsūṭ* (n.d.), 19:45; *ibid.* (1421), 19:51–52.

manumission, according to the second principle. I could find no Hanafi rule regarding the case of a person who receives a slave as a pledge and manumits him without permission from the pledgor.

The solutions for case (2) are also best explained by assuming that the principles governing a contract concluded by an unauthorized agent are applied: Abū Ḥanīfa and Abū Yūsuf seem to have reasoned that, as noted, when the slave-owner affirms the sale concluded by the usurper, the sale is considered to be valid from the moment of its conclusion. Therefore, the buyer has manumitted a slave that belonged to him. This is why Abū Ḥanīfa and Abū Yūsuf consider the manumission valid. Al-Shaybānī seems to have reasoned that at the moment the buyer manumitted the slave, he belonged to the deprived person. Therefore the buyer manumitted the slave as an unauthorized agent. Since he must have manumitted him on his own behalf, the manumission is definitely invalid, and is not susceptible to affirmation.

In the foregoing arguments I have demonstrated that the rules regulating the rights and liabilities of the deprived person and the usurper are borrowed from other contracts or institutions, such as pledge, rent, the sale of a specific object and unauthorized agency. This is predictable. As noted, hardly any opinion concerning usurpation is ascribed to jurists prior to Abū Ḥanīfa. The main rules on this subject must have been formed in a short period of time, probably during or just before the lifetime of Abū Ḥanīfa, in imitation of rules that had already been established. Once formed, however, the possession of a usurper was regarded as the prototype of *yad ḍamān*. We have already seen al-Shaybānī assimilate the lessee of a house who continues to live there after the termination of the contract to a usurper (see pp. 60–61).

### *The Maliki doctrine*

The Maliki jurist Ibn ʿArafa (d. 803/1401) writes, “Usurpation is the taking of an object, rather than its *manfaʿa*, belonging to another illegally and by force but without causing a fear of death.”<sup>319</sup> The rights that the deprived owner has against the usurper vary depending on the state in which the object is found.

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<sup>319</sup> Ibn ʿArafa, *Hudūd*, 2:466.

(1) So long as the object is in its original state, having suffered no physical or legal change, the owner can do nothing but demand its restoration.<sup>320</sup>

(2) If the object itself or its utility has been totally lost, the usurper is liable. The owner can demand that the usurper compensate him for the loss by supplying an object of the same kind, quality and quantity when it is a fungible thing or by paying the value of the usurped object when it is non-fungible.<sup>321</sup>

(3) If the object has suffered partial loss and its utility is partly lost, or if the object has been disposed of but is still restorable, the owner can choose between demanding that the usurped object be restored and demanding that the usurper pay its value.<sup>322</sup>

I will examine the Maliki rules concerning estimation of the amount of money the usurper owes in case of total or partial loss, attribution of *fructus* and *manfá'a*, and dispositions by the usurper. In brief, these rules are reduced to the question: who is the owner of the object, whether real or fictitious?

When the owner demands that the usurper pay the value of the usurped object, estimation must be made of its value on the date of usurpation. Regarding a person who usurps a slave and kills him, Mālik states that the amount of money the usurper owes is the value of the slave on the date of usurpation, even if his value is greater on the date of the murder.<sup>323</sup> The solution is easily explained by the principle that the owner can elect to claim his ownership of the object or to transfer its ownership to the usurper retroactively. This is why, if the owner chooses to make the usurper pay the value of the usurped object, which in this case is his sole option, the value is estimated on the date of usurpation, regardless of its fluctuation until the date on which he makes the usurper compensate him: the usurper, who killed his own slave, is not responsible to the deprived person, i.e. 'the ex-owner.'

The solutions for the case of partial loss are easily explained by the same principle.

<sup>320</sup> 'Abd al-Wahhāb, *Mā'ūna*, 2:1214–15.

<sup>321</sup> Ibn 'Abd al-Barr, *Kāfi*, 428–29; Ibn al-Jallāb, *Tafri'*, 2:274–75.

<sup>322</sup> Ibn 'Abd al-Barr, *Kāfi*, 428–29, 433.

<sup>323</sup> Saḥnūn, *Mudawwana*, 5:342.

(1) Ibn al-Qāsim discusses the case in which a usurped female slave suffers partial loss. The owner can elect to demand that the usurper pay her value on the date of the usurpation or that he restore her. If he opts for the latter, he cannot make the usurper compensate him for the decrease in her value. Ibn al-Qāsim justifies this solution as follows:

This is because the usurper became liable on the date of usurpation. What subsequently assailed her is a natural disaster, for which the usurper is not responsible. He is only liable for her value because of the usurpation, for what assailed her is not attributed to his act. He is liable for her value if she dies. If a defect occurs in her, such as the loss of eyesight, a hand, a leg and so on, the owner is asked, "Receive her value on the date of usurpation, or take back your female slave. In the latter case, you have nothing except her."<sup>324</sup>

(2) If the usurper injures a female slave that he usurped, causing a decrease in her value, the owner is also given the two options, but in this case he can make the usurper compensate him for the decrease if he chooses restoration.<sup>325</sup>

In case of partial loss, if the owner opts for her restoration, she has always belonged to the owner (deprived person), so that any decrease that she suffered in value is at his risk. This is why the owner cannot demand that the usurper compensate him for the decrease in value of the usurped slave, unless the decrease is caused by the destructive act of the usurper.

The Maliki rules about *fructus* are explained by the principle that they belong to the person who owns the principal.

(1) Ibn Rushd al-Jadd states: Mālik prescribes as follows about "what follows the principal in form and natural disposition," such as a baby born of an animal or a female slave. If the principal (an animal or a female slave) gives birth to a *fructus* (baby) while in the possession of the usurper before it perishes, the owner cannot demand both the payment of the value of the principal and the delivery of the *fructus*. If he opts for the value of the principal, he must give up his claim to the *fructus*. If he opts for the *fructus*, he must give up his claim to the value of the principal.<sup>326</sup>

<sup>324</sup> Saḥnūn, *Mudawwana*, 5:354.

<sup>325</sup> Saḥnūn, *Mudawwana*, 5:354. For the same solution, see 'Utbī, *Mustakhrja*, 11:247.

<sup>326</sup> Saḥnūn, *Mudawwana*, 5:355; Ibn Rushd al-Jadd, *Muqaddamāt*, 2:497.

This solution is easy to understand. If the owner (deprived person) retroactively transfers ownership of the principal to the usurper from the moment of usurpation, *fructus* produced subsequently belong to the usurper; if the owner claims ownership of the principal, *fructus* belong to him, for the principal proves to have always belonged to the owner.

(2) According to Ibn Rushd al-Jadd, no opinion is ascribed to Mālik about “what does not follow the principal in form and natural disposition,” such as fur or milk of an animal, rent and so on. Ibn al-Qāsim states that they are subject to the same rule as in (1).<sup>327</sup>

The Maliki rules on *manfa'a* are as follows.

(1) Asked about the case of a person who steals an animal and rents it to a third person before it dies, Mālik responded as follows. The thief is liable for the payment of its value, but he is not required to deliver to the owner the rent that he received from the hirer, for “if I gave the rent to the owner, I would have to give him rent in the case of a thief who simply uses it. [But this solution is unacceptable,] because the thief is liable.” He added that the thief and the usurper are different from the hirer and the borrower in a loan for use.<sup>328</sup> That is to say, the same rule applies to a usurper.

This solution is also easy to explain by assuming that the thief or the usurper retroactively acquires ownership of the animal from the moment of theft or usurpation.

(2) Mālik requires a person who lived in a house that he usurped or a person who cultivated land that he usurped to pay rent.<sup>329</sup> Ibn al-Qāsim also states that the scholars whom he trusts hold that the owner can demand that the usurper pay rent if the latter cultivates the land or lives in the house that he usurped, but that otherwise he cannot do so.<sup>330</sup> Regarding a person who usurps an animal or a slave, Mālik is credited with two solutions: (i) he permitted the owner to demand that the usurper pay rent;<sup>331</sup> (ii) he held that the usurper who used the animal for several months before he restored it to the owner did not owe rent to the owner. He adopted the same solution

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<sup>327</sup> Saḥnūn, *Mudawwana*, 5:355. There are disputes among the later Malikis on this point. Ibn Rushd al-Jadd, *Muqaddamāt*, 2:497.

<sup>328</sup> Saḥnūn, *Mudawwana*, 5:359.

<sup>329</sup> Saḥnūn, *Mudawwana*, 5:359.

<sup>330</sup> Saḥnūn, *Mudawwana*, 5:356.

<sup>331</sup> Saḥnūn, *Mudawwana*, 5:356.

about the usurper of a slave.<sup>332</sup> Referring to solution (ii), Ibn al-Qāsim justifies the difference between a house or land and an animal or slave by stating that as far as the usurper of an animal or a slave is concerned, the rent that the usurper owes is offset by the expenses that the usurper has paid to support them.<sup>333</sup>

According to the theory that if the usurped object is returned to the owner it is considered not to have ceased to belong to the owner, the usurper would owe rent to the owner, at least in the case in which the usurper used it. But this solution is not adopted with respect to an animal and a slave according to solution (ii). Although the explanation given by Ibn al-Qāsim is in itself plausible, it is at variance with the Maliki rule that the pledgee who rides the animal owes rent to the pledgor.<sup>334</sup> By analogy to solution (ii) the pledgee should not be required to pay rent.

In my view, the differentiation between the usurpation of an animal or a slave, on the one hand, and that of a house or land on the other hand, may have originally derived from a reasoning similar to that which I used to explain the differentiation between the sublease of an animal and that of a house (see pp. 71–73): in view of the difficulty for the owner to establish the cause of damage if an animal or a slave is usurped and taken away and subsequently damaged, some Medinan jurists decided to attribute the risk of loss to the usurper. This led to the solution that the owner cannot demand that the usurper pay rent for *manfā'a*, if the usurper enjoys it, because of the principle, “A person cannot profit from an object the risk of which he does not assume.” Conversely, they enabled the deprived owner to demand that the usurper of a house or land pay rent, for it is not difficult for the owner to establish that the usurper caused damage to the object. In other words, I infer that the Medinan jurists held a usurper of a house or land liable on the ground of destruction up to some point in time. This is reflected in the differentiation between the usurpation of an animal or a slave, on the one hand, and that of a house or land on the other hand.

The later Malikis are divided over this question. Ibn Rushd al-Jadd mentions five opinions. The first is that the usurper never owes

<sup>332</sup> Saḥnūn, *Mudawwana*, 5:356.

<sup>333</sup> Saḥnūn, *Mudawwana*, 5:359.

<sup>334</sup> ‘Abd al-Wahhāb, *Ma‘ūna*, 2:1161–62.

rent to the owner. The second is that he always owes rent. The third opinion distinguishes between two cases: if the usurper earns a rent for the usurped object, he is required to hand over the rent to the owner. If the usurper does not rent it, he does not owe rent to the owner. The fourth opinion is that in case of use or rent the usurper owes rent or hands over the rent he received, and that otherwise he does not. The fifth distinguishes between whether or not the object is an animal, as Mālik did in one of the opinions attributed to him.<sup>335</sup>

Finally, the rules regarding dispositions by the usurper are in accordance with the Maliki doctrine according to which by paying the value of the usurped object the usurper acquires ownership of it retroactively from the date of usurpation. Mālik holds as follows:

(1) If the usurper sells the object to a third person and it remains in its original state as on the date of usurpation, the owner can choose to demand that the buyer restore it or to affirm the sale. In the case of affirmation, the owner can demand that the usurper (seller) hand over the price. The owner cannot demand payment of the value of the object either from the usurper or the buyer. The change in its value due to fluctuation does not affect this rule.<sup>336</sup> It is clear that the usurper is assimilated to an unauthorized agent.

(2) If the object does not remain in its original state, e.g. it has suffered partial loss or produced *fructus*, the owner is given three options: making the usurper pay its value, affirming the sale in order to demand that the usurper hand over the price that he received, or requiring the buyer to restore the object.<sup>337</sup> When the owner chooses to make the usurper pay its value, the value is assessed on the date of usurpation, certainly because ownership transfers to the usurper retroactively from the date of usurpation.<sup>338</sup>

I have examined the positive solutions adopted by Mālik and the Malikis regarding the estimation of the usurped object, attribution of *fructus* produced by it and *manfā'a*, and sale of it. Most of them are reduced to two principles. First, by paying the value of the usurped object on the date of the usurpation the usurper retroac-

<sup>335</sup> Ibn Rushd al-Jadd, *Muqaddamāt*, 2:497.

<sup>336</sup> Saḥnūn, *Mudawwana*, 5:345, 348.

<sup>337</sup> Saḥnūn, *Mudawwana*, 5:344–45.

<sup>338</sup> Saḥnūn, *Mudawwana*, 5:342, 352.

tively acquires ownership of it from that date; and that otherwise it has always belonged to the owner. Second, the attribution of *damān* and that of *fructus* are effects of ownership. The process by which the concept of usurpation was introduced is discernible only in the disputes about whether or not the usurper is liable for payment of rent. The Medinan or Maliki doctrine on usurpation is highly artificial and we get the impression that it was made in a short period of time. The Medinan jurists may have been urged to forge a set of rules governing usurpation under the influence of the Iraqi doctrine.

*The doctrine of al-Shāfiʿī*

It is interesting to refer to the doctrine of al-Shāfiʿī, who created an entirely new theory of usurpation. His theory is based on the idea that a usurper who has committed an illegal act can never benefit from the usurped object. To demonstrate this point of view, he argues as follows. A person who has damaged an object belonging to another must compensate the owner for the difference between its original value and its current value, without the owner losing his right to the object. If we take this solution into consideration, we cannot maintain that if the usurper damages the object with the result that it loses its utility, thereby disobeying God, the owner is deprived of any of his rights. In view of the principle prescribed by God and over which there is no dispute among the Muslims, namely that the owner of an object continues to own it unless he expresses his will to transfer its ownership while he is still alive, no one cannot substantiate an opinion contrary to this.<sup>339</sup>

From this premise al-Shāfiʿī draws the following conclusions, which are far more equitable for us than those of the Hanafis and Malikis.

(1) First, al-Shāfiʿī permits the owner to demand that the usurper pay the highest value of the usurped object if it is not in the same status as it was in at the moment of the usurpation. To illustrate this point, he considers the following example: a female slave worth 100 dirhams was usurped. Subsequently, as the result of education and growth, her value rose to 1000 dirhams while in the possession of the usurper, and then fell to 100 dirhams, for some reason, at which point in time the owner found her. The owner can demand that the usurper restore her and pay 900 dirhams, i.e. the difference

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<sup>339</sup> Shāfiʿī, *Umm*, 3:245–46.

between her highest value in the period during which she was in the possession of the usurper, and her current value. This case is assimilated to that in which the value of a female slave worth 1000 dirhams on the date of usurpation has fallen to 100 dirhams on the date on which the owner finds her. Likewise, in the case in which the usurper sells her and then she dies, the owner can demand that the usurper pay her highest value during the period between the date of usurpation and the date on which she died. Because the usurper was always under the obligation to restore her to the owner, he is required to pay the highest value if he cannot restore her.<sup>340</sup>

(2) Al-Shāfi'ī treats *manfā'a* and *fructus* in the same manner. According to him, the owner can demand that the usurper of an animal pay the equivalent rent corresponding to the period between the usurpation and its restoration to the owner, if the animal has yielded, or might yield, proceeds. The same solution applies to the case in which the usurper of a house lives there or might live there, and to the case in which the usurper of an object uses or might use it. But if the usurper rents it and receives a sum of money, the owner can demand that he pay whichever is greater of the equivalent rent and the sum that he received. In these cases the principle "Profit is concomitant with risk" does not operate. If it did, the usurper could profit from the usurped object. But this is not permitted, for this principle applies only to an owner. The Messenger of God decided to permit a person who assumes risk to profit from his possession of an object only when God deems it lawful for him to benefit from it.<sup>341</sup>

As for *fructus*, al-Shāfi'ī states: if a usurped female slave gives birth to a child, the usurper is under obligation to deliver him (and her) to their owner. It follows that the usurper must compensate the owner for the value of the child if he dies before restoration, whatever the cause of his death may be.<sup>342</sup> The Shafi'ī jurist al-Shīrāzī generalizes this solution, writing that in the case of loss of *fructus* produced under the possession of the usurper, he is liable for payment of their value.<sup>343</sup>

(3) According to al-Shāfi'ī, the owner cannot affirm the sale of a usurped object concluded between the usurper and a third party,

<sup>340</sup> Shāfi'ī, *Umm*, 3:246.

<sup>341</sup> Shāfi'ī, *Umm*, 3:249.

<sup>342</sup> Shāfi'ī, *Umm*, 3:248.

<sup>343</sup> Shīrāzī, *Muhadhdhab*, 1:370.

for on the date of the sale the usurper did not own it nor was he authorized by the owner to sell it.<sup>344</sup> Likewise, if a usurper acquires ownership of a slave that he usurped by succession or sale from the owner, after the usurper sold the slave to a third party, the sale between the usurper and the third party is null and void and cannot be affirmed, since the usurper sold an object that he did not have the right to sell.<sup>345</sup>

#### *Section 4 Conclusion*

In the original Iraqi system of liability arising from destructive act, there was only one basis on which someone was liable for damage caused by his action, apart from destruction by physical contact (*mubāshara*, as the later jurists would call it): if a person performs an act that is likely to cause damage or loss and it does in fact lead to damage or loss, he is in principle liable. Despite the introduction of the principle embodied in the Prophetic hadith, “A person who places something outside his limits is liable [for the blood-money] if it causes injury to someone,” jurists did not immediately generalize the principle to regard the illegality of an act as a sufficient ground for holding a person who performs an illegal act liable for eventual damage or loss resulting from it.

Meanwhile, in the first half of the eighth century the principle was established that a person who profits from an object assumes the risk of loss and *vice versa*. This principle was embodied in the Prophetic hadiths, “A person cannot profit from an object the risk of which he does not assume,” and “Profit is concomitant with risk.” The eighth-century Iraqi jurists used this principle to determine to whom the risk of loss in a pledge or a specific object that remains in the hands of a seller is attributed. They also invoked this principle to justify the solution that a person who hires an animal for the purpose of travel and violates the contract by traveling beyond the specified destination assumes absolute liability for anything that occurs to the animal subsequently: by exempting the hirer from payment of rent corresponding to the period following the violation, i.e. by

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<sup>344</sup> Shāfi‘ī, *Umm*, 3:246–47.

<sup>345</sup> Shāfi‘ī, *Umm*, 3:252.

permitting him to enjoy *manfa'a* of the animal for nothing, they were able to hold the hirer liable. They no doubt applied this principle first to this case because it was difficult for the owner to establish that the act of traveling beyond the specified destination was likely to cause damage or loss to the animal. Whatever the case may have been, it was not long before they extended this principle to other cases of a possessor who violates the contract by virtue of which he begins to possess an object in general.

The rules relating to pledge, rent, the sale of a specific object elaborated on the basis of this principle, and those governing unauthorized agency were synthesized to form the cluster of the Hanafi rules governing usurpation, which, as a legal concept, seems to have been introduced for the first time in the first half of the eighth century.

The Medinan doctrine took a similar course as far as rules governing liability on the ground of destruction, pledge and rent are concerned. Mālik and probably his Medinan contemporaries inherited these rules, but by combining with them the principle that the attribution of risk is one of the effects of ownership, while giving the deprived owner the right to attribute ownership of the usurped object to the usurper retroactively from the date of usurpation if the object is not in the same status as it was in prior to the usurpation in return for the payment of its value on that date, they elaborated consistent, but artificial rules governing usurpation.

## CHAPTER TWO

### SPECIAL TYPES OF SALE AND THE ORIGIN OF DIRECT AGENCY

The purpose of the present chapter is twofold. First, I will reconstruct the original functions of several special types of sale, i.e. *murābaḥa*, *tawliya*, *ishrāk* and *salam* (or *salaf*) and the process by which they were redefined. Second, I will clarify the process by which the Hanafi concept of direct agency was formed.

#### *Section 1 Direct agency*

Agency (*wakāla*) is a very important institution in the commercial activities, and we find a chapter dedicated to it in any standard legal book. The concept of direct agency has attracted the attention of several modern Arab authors in the context of comparative law. Before clarifying their interest in this subject, let us define direct agency and indirect agency, and then describe the outlines of the rules concerning their validity and effects.

In modern times, when there are expanding needs for commercial activities, if an agent duly authorized by the principal acts within the limits of the agency, he can establish a direct contractual relationship between a third party and the principal, while he acquires no rights and liabilities, at least if he makes it clear that he acts as an agent. It should be noted, at this stage, that such a direct contractual relationship also could be established by a messenger (*rasūl*, *saḥr* or *muʿabbir*; cf. the Roman *nuntius*), who acts as an intermediary in full accord with the instructions given by the principal.

There are disputes, among Muslim jurists, over whether or not an agent who is empowered to form an agreement and its terms can establish such a direct contractual relationship between the third party and the principal, when he discloses the principal, or even when he does not do so. If he can establish such a direct relationship, we speak of direct agency. As will be noted, in certain cases the Hanafis (and the Shafis) provide that the effect (*ḥukm*) of a contract

accrues to the third party and the principal, while the rights and liabilities (*huqūq*, sg. *haqq*) associated with it are created between the third party and the agent (I will mention below the examples of ‘effect’ and ‘rights and liabilities’). We also speak of direct agency in such a case. If, conversely, the contract creates the effect and the rights and liabilities only between the third party and the agent, who is required to transfer the benefits of the contract to the principal, we speak of indirect agency. The Hanafis classify the legal acts susceptible of agency into three groups, according to the condition under which an agency is established and who acquires the effect or the rights and liabilities associated with them.

(1) Marriage,<sup>1</sup> gratuitous manumission (*‘itq* or *‘itq ‘alā ghayr māl*),<sup>2</sup> repudiation<sup>3</sup> and contracts in which a person relinquishes his right in consideration, such as repudiation in consideration,<sup>4</sup> redemption (*khulʿ*), manumission in consideration (*‘itq ‘alā māl*),<sup>5</sup> *mukātaba* (or *kitāba*)<sup>6</sup> or reconciliation over retaliation,<sup>7</sup> can be the subject of agency only when the agent discloses to the third party the name of the principal. In such a case, the effect of the contract and the rights and liabilities arising from it belong to the principal.<sup>8</sup>

(2) Contracts that take effect only when the object is delivered, such as donation,<sup>9</sup> *ṣadaqa*,<sup>10</sup> loan of a fungible thing (*qard*, *mutuum*),<sup>11</sup> loan for use (*‘arīyya*),<sup>12</sup> bail<sup>13</sup> or pledge,<sup>14</sup> are subject to the following rules.

<sup>1</sup> Sanhūrī, *Maṣādir*, 5:193; Abū Zahra, *Milkiyya*, 387; Muḥammad Yūsuf Mūsā, *Amwāl*, 374.

<sup>2</sup> Abū Zahra, *Milkiyya*, 387; Marwazī, *Kāfi*, 19:109.

<sup>3</sup> Abū Zahra, *Milkiyya*, 387.

<sup>4</sup> Sanhūrī, *Maṣādir*, 5:193; Abū Zahra, *Milkiyya*, 387; Muḥammad Yūsuf Mūsā, *Amwāl*, 374.

<sup>5</sup> Sanhūrī, *Maṣādir*, 5:193; Abū Zahra, *Milkiyya*, 387; Muḥammad Yūsuf Mūsā, *Amwāl*, 374.

<sup>6</sup> Sanhūrī, *Maṣādir*, 5:193; Abū Zahra, *Milkiyya*, 387; Marwazī, *Kāfi*, 19:109. For the definition of *mukātaba* or *kitāba*, see p. 109, note (309).

<sup>7</sup> Sanhūrī, *Maṣādir*, 5:193; Muḥammad Yūsuf Mūsā, *Amwāl*, 374.

<sup>8</sup> Sanhūrī, *Maṣādir*, 5:193; Abū Zahra, *Milkiyya*, 387; Muḥammad Yūsuf Mūsā, *Amwāl*, 374; Marwazī, *Kāfi*, 19:109; Shaḥāta, “Naẓariyya,” 355.

<sup>9</sup> Shaḥāta, “Naẓariyya,” 354; Sanhūrī, *Maṣādir*, 5:196–99; Abū Zahra, *Milkiyya*, 387; Chehata, “Concept de représentation,” 440–41.

<sup>10</sup> Shaḥāta, “Naẓariyya,” 354; Sanhūrī, *Maṣādir*, 5:196–99; Abū Zahra, *Milkiyya*, 387.

<sup>11</sup> Shaḥāta, “Naẓariyya,” 354; Sanhūrī, *Maṣādir*, 5:196–99; Abū Zahra, *Milkiyya*, 387; Chehata, “Concept de représentation,” 437–40.

<sup>12</sup> Shaḥāta, “Naẓariyya,” 354; Sanhūrī, *Maṣādir*, 5:196–99; Abū Zahra, *Milkiyya*, 387; Chehata, “Concept de représentation,” 438–39.

<sup>13</sup> Shaḥāta, “Naẓariyya,” 354; Sanhūrī, *Maṣādir*, 5:196–99.

<sup>14</sup> Shaḥāta, “Naẓariyya,” 354; Sanhūrī, *Maṣādir*, 5:196–99.

(a) If the agent of a person who receives the object, e.g. a donee, a bailee or a pledgee, discloses the principal, the effect and the rights and liabilities arising from the contract accrue to the principal; otherwise they accrue to the agent, who is required to transfer the benefits of the contract to the principal.

(b) The agent of a person who delivers the object, e.g. a donor, a bailor or a pledgor, is free to or not to disclose the principal. In either case, the effect and the rights and liabilities of the contract accrue to the principal.

(3) Regarding sale and *ijāra* (rent and employment), the Hanafi jurists disagree as to whether or not an agent is required to disclose the principal, but the majority view is that the principal is free to permit or forbid the agent to disclose him, and that the agent can elect whether or not to disclose the principal, unless the principal forbids him to do so. If the agent discloses the principal, the effect and the rights and liabilities of the contract accrue to the principal. In most cases, however, the agent is supposed not to disclose the principal, i.e. he is supposed to act in his own name. In such a case, the effect of the contract accrues to the principal, but the rights and liabilities of the contract accrue to the agent.<sup>15</sup>

Consider the examples of an agent appointed to sell an object belonging to the undisclosed principal and an agent appointed to purchase an object for the undisclosed principal. When the agent sells the object (on the assumption that he observes the instructions given by the principal), the effect of the contract, i.e. the alienation of ownership of the object and the acquisition of the price, accrues to the principal, that is to say, ownership of the object transfers directly from the principal to the buyer and the price belongs to the principal. The rights and liabilities of the sale include the obligation to deliver the object, which is incumbent upon the agent; it is the agent who has the right to require the buyer to pay the price; if the buyer discovers a defect in the object, it is to the agent that the buyer must express his will to cancel the contract.<sup>16</sup> If an agent purchases an object, ownership of the object transfers directly from the seller to the principal, and the price belongs to the seller. But it is

<sup>15</sup> Chehata, "Représentation," 538–42; Sanhūrī, *Maṣādīr*, 5:200–05, 221–27; Muḥammad Yūsuf Mūsā, *Amwāl*, 372–73; Badr, "Tendance," 382–83.

<sup>16</sup> Sanhūrī, *Maṣādīr*, 5:211, 222, 225; Chehata, "Représentation," 538–40; Badr, "Tendance," 382–83.

the agent who can demand that the seller deliver the object; it is the agent who is required to pay the price; if the agent discovers a defect in the object, he, rather than the principal, can exercise the option for defect to cancel the sale, unless he has delivered the object to the principal.<sup>17</sup> The Shafi'i jurists adopt a similar position.<sup>18</sup> The Maliki and Hanbali jurists hold that the effect and the rights and liabilities of the contract accrue to the principal, whether or not the agent discloses the principal.<sup>19</sup>

Several modern Arab scholars have been attracted to the rule that admits direct agency in the contracts that fall within the rubric (3), in particular sale, even when the agent does not disclose the principal, in other words, when the third party does not know his name or even his existence. This is significant because in the West, Roman law ignored direct agency. Al-Sanhūrī writes that Islamic law, which allows direct agency, even when the agent does not disclose the principal, is comparable to the most developed stage of the Western legal system.<sup>20</sup> Badr writes that direct agency is a manifestation of the objective tendency that characterizes Islamic law. By allowing direct agency Muslim jurists tried to satisfy the desire of the agent and the principal, insofar as direct agency does not cause damage to a third party and does not threaten the security of transactions.<sup>21</sup> He adds that Islamic law does not consider the obligation to be based on a subjective bond between the contracting parties, but rather to be an objective effect accruing to the property of the principal, whether disclosed or undisclosed.<sup>22</sup>

Apart from the seeming modernity of the agency in Islamic law, what is the origin of the concept of direct agency in a sale? As noted, Badr explains that Muslim jurists formed the rules governing agency in accordance with the presumed desire of the principal and the agent. We assume, for example, that a principal appoints an agent for the purchase of an object in an attempt to spare time and effort, and that the agent may want to be exempted from any inconvenience arising from ownership of the object. Direct agency, as conceived by the majority of the Hanafis, appears to meet these objectives.

<sup>17</sup> Sanhūrī, *Maṣādir*, 5:205–06, 224–26; Badr, “Tendance,” 388.

<sup>18</sup> Sanhūrī, *Maṣādir*, 5:205–06; Badr, “Tendance,” 388.

<sup>19</sup> Sanhūrī, *Maṣādir*, 5:206–07.

<sup>20</sup> Sanhūrī, *Maṣādir*, 5:207.

<sup>21</sup> Badr, “Tendance,” 383–84.

<sup>22</sup> Badr, “Tendance,” 392.

This explanation, although plausible, is difficult to confirm or to refute. Regarding Hanafi agency, Chehata proposes a more technical explanation: on the one hand, a contract, which ultimately represents an expression of one's will, is a source of rights and liabilities that are binding only on the agent and the third party who expressed their wills. On the other hand, it is not the contracting parties, but the law that gives effect to a contract, such as the transfer of ownership, "and the fact [of concluding a contract] which is reputed to derive from the person who has ordered it, can therefore produce its legal effects in that very person (*et ce fait, réputé être celui de la personne qui l'a ordonné, pourrait alors produire ses effets de droit, chez cette même personne*)".<sup>23</sup> This explanation is too artificial. Equally unconvincing is the argument that a contract is a source of rights and liabilities that are binding only on the agent who made the contract, for one may just as easily say that the rights and liabilities arising from a contract are binding on the principal, who instructed the agent to express his will.

In my view, there is an *historical* explanation for the rules concerning agency for sale. To begin with, direct agency in a sale, as conceived by the Malikis, clearly originated in the brokerage (*samsara*; a broker is called *dallāl* or *simsār*), for two reasons. First, brokerage seems to have existed before the Islamic period.<sup>24</sup> Therefore it is plausible that it provided a model for the agency. Second and more important, the Maliki positive rules regulating brokerage coincide with those regulating agency in a sale in general. To demonstrate this point, consider the following statement attributed to Mālik cited by the Maliki jurist al-Barādhī'ī (d. 386/996).

As for what itinerants (*tawwāfūn*), such as cattle dealers (*nakhkhāsūn*) and whoever usually sells to the public, sell by auction, they do not assume any responsibility for defect or eviction (*istihqāq*). Rather, one [viz. the buyer] pursues the owner of the merchandise (*al-tibā'a 'alā rabbi-hā*), if the merchandise is found [in the possession of the buyer]; otherwise one does not pursue the owner. If the object is returned because of a defect, the broker (*simsār*) is required to return the remuneration (*ju'l*) to the seller [viz. the principal].<sup>25</sup>

<sup>23</sup> Chehata, "Concept de représentation," 442. See also, idem, "Représentation," 545–46; idem (Shahāta in Arabic), "Nazariyya," 354.

<sup>24</sup> The term '*simsār*' derives from the Latin 'sensal.' C.H. Becker and G.S. Colin, "Dallāl," in *EI*, new edition, 9:614b.

<sup>25</sup> Barādhī'ī, *Tahdhīb* (MS Tunis), 166a–b; *ibid.* (MS Paris), 160b.

Ibn Farḥūn (d. 799/1397) adds:

The same is true of those who sell in a shop to the public in return for remuneration, of those who are employed to attract customers, and of a person who is in charge of selling by auction the items included in an estate. If an object sold by one of them proves to be a stolen article or a defect is found in it, they are not responsible.<sup>26</sup>

Juristically speaking, the Malikis regard these sellers as agents. For example, the Maliki jurist active in Tunis, Abū al-ʿAbbās al-Abyānī (d. 352/963–4 or 361/971–2) defines the broker (*simsār*) as an agent for the sale of goods and receipt of the price.<sup>27</sup> The Maliki jurists hold that whether or not an agent discloses the principal, the effect and the rights and liabilities arising from a contract concluded by the agent accrue to the principal.<sup>28</sup> The examples of sale mentioned in the above-cited texts meet this condition. It seems that for the Malikis, the rules regulating brokerage served as a model for the rules regarding agency in a sale.

As for the Hanafī rules, it is doubtful that the rules governing agency in a sale derive from brokerage, because they seem to have inherited from some of their Iraqī predecessors a reluctance to declare brokerage to be lawful. On the one hand, several Iraqī jurists such as al-Ḥasan al-Baṣrī (b. ca. 22/642–3; d. 110/728),<sup>29</sup> Qatāda (d. 117/735–6),<sup>30</sup> Ayyūb,<sup>31</sup> Ibn Sīrīn (b. 34/654–5; d. 110/728–9)<sup>32</sup> and al-Shaʿbī (d. 104/722–3, 105/723–4 or 109/727–8)<sup>33</sup> are reported to have seen no harm in a *bayʿ al-qīma* (lit. “sale at market value”). This is a contract in which a person (*A*) says to another (*B*), “Sell this at such-and-such amount of money, and take the difference.”<sup>34</sup> Although we have little information on its nature, we may surmise that in a *bayʿ al-qīma* the middleman (*B*) is supposed to sell the object that the

<sup>26</sup> Ibn Farḥūn, *Tabṣira*, 2:328.

<sup>27</sup> Abyānī, *Masāʾil*, 21.

<sup>28</sup> Sanhūrī, *Maṣādir*, 5:206–07.

<sup>29</sup> Sanʿānī, *Muṣannaf*, 8:234–35, no. 15020.

<sup>30</sup> Sanʿānī, *Muṣannaf*, 8:234, no. 15018.

<sup>31</sup> Sanʿānī, *Muṣannaf*, 8:234, no. 15018. This Ayyūb is probably the Basran jurist Ayyūb b. Abī Tamīma Kaysān al-Sakhtiyānī (66 or 68–131/685 or 687–748). Ibn Ḥajar, *Tahdhīb*, 1:251–52.

<sup>32</sup> Sanʿānī, *Muṣannaf*, 8:234, no. 15018; Bukhārī, *Ṣaḥīḥ*, ijāra, 14.

<sup>33</sup> Sanʿānī, *Muṣannaf*, 8:234, no. 15019.

<sup>34</sup> Sanʿānī, *Muṣannaf*, 8:234–35, nos. 15018–20. For similar reports, see Bukhārī, *Ṣaḥīḥ*, ijāra, 14.

principal (A) entrusts with him for a price higher than designated by the principal, the difference being remuneration or commission. Consider, on the other hand, the Prophetic hadith transmitted by the *isnād*: Ma‘mar and Sufyān al-Thawrī (d. 161/778)—Ḥammād b. Abī Sulaymān (d. 120/737–8)—Ibrāhīm al-Nakha‘ī—Abū Hurayra and Abū Sa‘īd al-Khudrī (d. 74/693–4) or one of them: “Whoever employs someone should specify his wages (*man ista‘jara ajīran, fa-l-yusammī la-hu ijārata-hu*).”<sup>35</sup> This seems to be why the Hanafis and some of their Iraqī predecessors disapproved of brokerage, in which a broker acts on his own initiative rather than as an employee, and demands a remuneration or commission that is not fixed.<sup>36</sup> It is therefore improbable that the Hanafī rules governing the agency in a sale have their origin in brokerage.

In the following, I will demonstrate that the Hanafī direct agency originates in the *murābaḥa*, which, according to the later Hanafīs, is included in the rubric of ‘trust sales.’

### Section 2 Trust sales (buyū‘ al-amāna)

The Hanafī jurist al-Kāsānī classifies *murābaḥa* and *tawliya* as ‘trust sales’ (*buyū‘ al-amāna*), and writes, “[this is] because the buyer places trust in the seller with regard to the amount of money the seller gives the buyer as the cost price [for which he acquired the object], without making the seller produce witnesses or making him swear.”<sup>37</sup> The Hanafī jurist al-Marghīnānī defines *murābaḥa* as “transfer of ownership of an object that one has acquired in the original contract at a surcharge on the cost price.”<sup>38</sup> The Shafī‘ī jurist al-Shīrāzī (d. 476/1083) is more concrete:

<sup>35</sup> San‘ānī, *Muṣannaḥ*, 8:325, no. 15024. I follow al-A‘zamī, the editor of San‘ānī, *Muṣannaḥ*, to read as “*fa-l-yusammī*” instead of “*fa-laysa*.”

<sup>36</sup> It is said, “Later it was the West which monopolized questions of brokerage.” G.S. Colin and C.H. Becker, “Dallāl,” in *EI*, new edition, 2:102b–103a. Cf. Sarakhsī, *Mabsūṭ* (n.d.), 15/115; *ibid.* (1421), 15:128.

<sup>37</sup> Kāsānī, *Badā’i‘* (1402), 5:223; *ibid.* (1418), 7:180. See also Ibn Nujaym, *Baḥr*, 6:116.

<sup>38</sup> Marghīnānī, *Hidāya*, 3:56. See also Samarqandī, *Tuḥfa* (1964), 2:132–33; *ibid.* (1414), 2:105–06.

*Murābaḥa* means the sale [of an object] in which the seller refers to the cost price (*ra's al-māl*, literally 'capital') and the percentage of profit. For example, the seller says, "The cost price of this object was 100 dirhams and I will sell it for 100 dirhams and 1 dirham profit per 10 dirhams."<sup>39</sup>

Here the surcharge is defined as a percentage of the cost price, but there is no harm in defining it as a fixed amount.<sup>40</sup> The cost price of a *murābaḥa* includes expenses (*nafaqa*) on services, e.g. for fulling or sewing, rent for transport, foodstuffs and clothes for an acquired slave etc., in addition to the price for which the seller purchased the object.<sup>41</sup>

*Tawliya* is resale at the cost price, without any profit or loss for the seller.<sup>42</sup> The rubric of 'trust sales' may include *wadī'a* or *muwāḍa'a* and *ishrāk*. *Wadī'a* is resale at discount from the cost price. *Ishrāk* is a *tawliya* with regard to a share of an item: if the seller who has purchased an item for *a* dirham resells  $100x\%$  ( $0 < x < 1$ ) of it for *ax* dirham, it is an *ishrāk*.

What is the purpose of these sales? According to al-Marghīnānī *murābaḥa* and *tawliya* serve certain social needs, for a person who is not accustomed to commercial transactions needs to rely on merchants to obtain goods at a reasonable price. This is why these sales are based on trust, i.e. they are intended to prevent a fraud.<sup>43</sup> Al-Kāsānī writes that the buyer in a *murābaḥa* or a *tawliya* trusts the statement of the seller with regard to the cost price without making him produce witnesses or making him swear; thus, it is necessary to safeguard the interests of the buyer in case of fraud.<sup>44</sup>

In an ordinary sale (sometimes called *musāwama* or *mukāyasa*) the seller does not designate either the cost price or the profit. The buyer agrees to the sale at his own risk, and he may not cancel the sale or require the seller to compensate him for any loss he suffers, if the seller sells the object at price much higher than he paid for it. But in a *murābaḥa*, the seller must designate the cost price and the

<sup>39</sup> Shīrāzī, *Muhadhdhab*, 1:288.

<sup>40</sup> Samarqandī, *Tuhfa* (1964), 2:133–34; *ibid.* (1414), 2:106.

<sup>41</sup> Samarqandī, *Tuhfa* (1964), 2:138; *ibid.* (1414), 2:110; Qudūrī, *Mukhtaṣar*, 2:33; Nawawī, *Minhāj*, 2:78.

<sup>42</sup> Samarqandī, *Tuhfa* (1964), 2:132; *ibid.* (1414), 2:105; Ibn Qudāma, *Kāfi*, 2:99.

<sup>43</sup> Marghīnānī, *Hidāya*, 3:56. For a similar explanation, see Kawhijī, *Ẓād*, 2:84.

<sup>44</sup> Kāsānī, *Badā'ī* (1402), 5:223; *ibid.* (1418), 7:180. For a similar explanation, see Samarqandī, *Tuhfa* (1964), 2:133; *ibid.* (1414), 2:106.

profit. On this basis the buyer agrees to the sale, so that he can cancel the sale in the case of fraud by the seller in his statement. It is assumed that the seller will not dare to make a false statement if he takes into consideration the possibility of cancellation. This is why the Hanafis regard *murābaḥa* and *tawliya* as a sale that seeks to protect a buyer who is not accustomed to commercial transactions.

Most modern scholars, such as al-Sanhūrī, al-Maḥmaṣṣānī and Rayner, accept the explanation of the Hanafis.<sup>45</sup> Dib, who has made a detailed analysis of trust sales, argues as follows: in general fraud by itself confers no right on the contracting parties, especially the buyer. Only when flagrant misrepresentation (*ghabn fāḥish*, *ghubn fāḥish*) reaches a certain amount in addition to fraud by the seller can the buyer rescind the sale. This is because only in such a case is it clear that the buyer made a mistake about the price or the object and that the contract was not formed in a normal way. Trust sales are an exception to this rule. Because the buyer is less vigilant than in an ordinary sale and the fraud of the seller is particularly unethical considering the trust the buyer puts in his statement, jurists give the deceived buyer the right to rescind the contract or to make the seller compensate him for the difference between the sum he paid on the basis of the stated cost price and the sum calculated on the basis of the true cost price, even if the difference is small.<sup>46</sup>

However, it is doubtful that trust sales were originally intended to safeguard the interests of the buyer, for three reasons. First, as far as I know, jurists other than the Hanafis do not explain the purpose of trust sales. It is interesting to note, in this connection, that the Malikis and Hanbalis refer to *bayʿ al-istisāl* or *bayʿ al-istiʿmāna*, a sale that obviously is intended to safeguard a buyer who is not accustomed to commercial transactions. According to the Maliki jurist Ibn Rushd al-Jadd, this is a sale in which the seller or the buyer acknowledges that he has no idea of the market value of the object and asks the other party (when he is the buyer) to pay the same amount of money as he would pay to others in return for it, or (when he is

<sup>45</sup> Sanhūrī, *Maṣādir*, 2:154–55; Maḥmaṣṣānī, *Nazarīyya*, 2:427; Rayner, *Theory*, 233–34.

<sup>46</sup> Dib, *Essai*, 169–73. For flagrant misrepresentation, see Muḥammad Yūsuf Mūsā, *Amwāl*, 404–09; Rayner, *Theory*, 194–95. It has been remarked that the Hanafi school (and the other schools, though to a lesser degree) is in general not willing to make of fraud by word a cause of cancellation of a contract. Linant de Bellefonds, *Traité*, 1:358–59; Maḥmaṣṣānī, *Nazarīyya*, 2:427.

the seller) to receive the same amount of money that he would receive from others in return for it.<sup>47</sup> It need not surprise us that there was more than one institution that served the same purpose. But how can we explain the fact that Ibn Rushd al-Jadd in his description of *murābaḥa* and *tawliya* does not assume that the buyer knows little about commercial transactions?<sup>48</sup>

Second, one engages in *murābaḥa* or *tawliya* only when the contracting parties agree to it, i.e., they are not formed automatically as would be necessary to protect the buyer who knows little about the market. However, it is sufficient for a buyer who fears that the seller may deceive him to ask the seller to designate the original cost so that he may subsequently rescind the sale on the ground of fraud. The question arises: why are *murābaḥa* and *tawliya* understood as a type of sale distinct from an ordinary sale, rather than as a variation of an ordinary sale which is characterized only by the seller's statement of the cost price and the profit? Are there any other features peculiar to *murābaḥa* or *tawliya*?

Third, and most importantly, there are a number of rules that cannot be explained if we assume that these contracts seek to safeguard the buyer. For example, al-Shaybānī writes that (1) if the seller in a *murābaḥa* resells the object for the cost price and a surcharge without informing the buyer that the original seller caused damage to the object the buyer who subsequently discovers this has the choice between affirming and rescinding the contract. On the other hand, he also writes that (2) a *murābaḥa* is valid and binding if the seller does not inform the buyer of the existence of a defect which took place while in the hands of the seller due to some natural cause. How can we harmonize the two solutions on the assumption that the rules governing a *murābaḥa* are intended to safeguard a relationship of trust between the seller and buyer? In both these examples, the buyer purchases an object for a price which may be higher than its market value. Why is he protected in case (1), but not in case (2)?

Some contemporary scholars have speculated about the possible economic functions of a *murābaḥa*. Udovitch writes, "A buyer, for example, may have been willing to pay a retailer who was at hand

<sup>47</sup> Ibn Rushd al-Jadd, *Muqaddamāt*, 2:139.

<sup>48</sup> Ibn Rushd al-Jadd, *Muqaddamāt*, 2:125–37.

a fixed surcharge on the cost of certain commodities in order to save himself the trouble of obtaining them from a wholesaler who may have resided at some distance.”<sup>49</sup> He alludes also to “the tantalizing possibilities that it serves as a form of commission sale” and writes, “This possibility is supported by the fact that one is allowed to acquire goods on credit and then resell them on a *murābaḥa* basis, with the surcharge of either a fixed sum or a fixed rate of profit based on the purchase price.”<sup>50</sup> Abdullah Saeed defines the *murābaḥa* more explicitly as a sale in which the seller promises to buy some goods that he does not own from a third party (original seller) for the buyer at the price which the seller pays for it plus a profit margin known both to the seller and to the buyer.<sup>51</sup> I think that Abdullah Saeed is right as far as the original *murābaḥa* is concerned. However, al-Jazīrī, on whom Abdullah Saeed relies for this definition, does not write that the seller sells what he has not yet owned.<sup>52</sup> Al-Jazīrī writes elsewhere that an object that one does not own cannot be the subject of a sale except in a *salam*.<sup>53</sup> In fact, the Prophet is reported to have stated, “Do not sell what you do not have (*wa-lā tabīʿ mā laysa ʿinda-ka*),”<sup>54</sup> and a hadith reads, “The Messenger of God prohibited the sale of an object that one does not own but permitted the *salam* (*nahā rasūl Allāh ʿan bayʿ mā laysa ʿinda al-ʿinsān wa-rakḥḥaṣa fī al-salam*).”<sup>55</sup> To substantiate Abdullah Saeed’s thesis, it is necessary to show that prior to the introduction of the Prophetic hadiths or possibly despite them, a *murābaḥa* could be formed before the seller acquired the object.

The resale of what a person does not own is technically called a *muwāṣaḥa* (‘detailed description’), for the buyer describes in detail what he wants the seller to acquire for him.<sup>56</sup> It is generally prohibited. Among those jurists who are reported to have disapproved of it are Ibn ʿUmar (d. 73/692–3),<sup>57</sup> Masrūq (d. 62/681–2 or 63/682–3),<sup>58</sup>

<sup>49</sup> Udovitch, *Partnership*, 221.

<sup>50</sup> Udovitch, *Partnership*, 221–22.

<sup>51</sup> Abdullah Saeed, *Islamic banking*, 76.

<sup>52</sup> Al-Jazīrī, *Madhāhib*, 2:278–80.

<sup>53</sup> Al-Jazīrī, *Madhāhib*, 2:164.

<sup>54</sup> Ibn Abī Shayba, *Muṣannaf*, 4:316, no. 20492.

<sup>55</sup> Kāsānī, *Badāʾiʿ* (1402), 5:146–47; *ibid.* (1418), 6:568.

<sup>56</sup> Sanʿānī, *Muṣannaf*, 8:42, no. 14223.

<sup>57</sup> Sanʿānī, *Muṣannaf*, 8:43, no. 14229; Ibn Abī Shayba, *Muṣannaf*, 4:443, no. 21900.

<sup>58</sup> Ibn Abī Shayba, *Muṣannaf*, 4:316, no. 20493.

al-Ḥasan al-Baṣrī,<sup>59</sup> Qatāda,<sup>60</sup> Ibn al-Musayyab (b. 15/636–7; d. 93/711–2 or 94/712–3),<sup>61</sup> Ibrāhīm al-Nakha‘ī,<sup>62</sup> Ṭāwūs,<sup>63</sup> al-Zuhrī<sup>64</sup> and Jābir b. ‘Abd Allāh (d. 73/692–3, 77/696–7 or 78/697–8, 94 years old).<sup>65</sup> But the very fact that many jurists are reported to have forbidden a *muwāṣafa* suggests that it was commonly practiced. In fact, one of ‘the seven Medinan jurists’ al-Qāsim b. Muḥammad (d. 101/719–20, 102/720–1, 106/724–5, 107/725–6 or 112/730–1) is reported to have seen no harm in a *muwāṣafa*.<sup>66</sup> The Medinan traditionist Ja‘far b. Burqān al-Kilābī (d. 150/767–8, 151/768–9 or 154/770–71, 44 years old) is reported to have stated, “We used to deem it one of the best sales (*mā kunnā narā-hu illā min aḥsan al-buyū‘*),” before al-Zuhrī disapproved of the sale of what one does not own.<sup>67</sup> Al-Sha‘bī is also reported to have stated, “There is no harm in it, [but] he [viz. the buyer] is free to cancel [the sale],” when ‘Abd al-Malik b. Iyās asked him about the following case: a person (*A*) went to another (*B*) to buy an object *B* did not own. Then when *B* bought it, *B* demanded that *A* take delivery of it.<sup>68</sup> This may reflect the stage in which the prohibition of *muwāṣafa* came to be widely accepted.

I will attempt to recover the original functions of *murābaḥa*, *tawliya* and *ishrāk*. I ignore *wad‘a*, however, for it is rarely referred to in the legal sources or hadith collections.

### 1. *Murābaḥa*

I have noted above that the profit in a *murābaḥa* can be defined as a fixed surcharge or as a percentage of the cost price. But Ibn al-Qāsim in the *Mudawwana* states, “If it is sold by ‘eleven-tenths’ (*ashra aḥad ‘ashar*), the rules I mentioned regarding a *murābaḥa* applies,” after

<sup>59</sup> San‘ānī, *Muṣannaf*, 8:42, no. 14225; *ibid.*, 8:43, no.14228; Ibn Abī Shayba, *Muṣannaf*, 4:316, no. 20497; *ibid.*, 4:443, nos. 21899, 21901.

<sup>60</sup> San‘ānī, *Muṣannaf*, 8:43, no. 14228.

<sup>61</sup> San‘ānī, *Muṣannaf*, 8:42, no. 14223; Ibn Abī Shayba, *Muṣannaf*, 4:316, no. 20496; *ibid.*, 3:442, no. 21898.

<sup>62</sup> San‘ānī, *Muṣannaf*, 8:42, no. 14224; Ibn Abī Shayba, *Muṣannaf*, 4:443, no. 21904.

<sup>63</sup> San‘ānī, *Muṣannaf*, 8:42, no. 14226; Ibn Abī Shayba, *Muṣannaf*, 4:443, no. 21903.

<sup>64</sup> San‘ānī, *Muṣannaf*, 8:42–43, no. 14227.

<sup>65</sup> San‘ānī, *Muṣannaf*, 8:43, no. 14229.

<sup>66</sup> Ibn Abī Shayba, *Muṣannaf*, 4:443, no. 21902.

<sup>67</sup> San‘ānī, *Muṣannaf*, 8:42–43, no. 14227.

<sup>68</sup> Ibn Abī Shayba, *Muṣannaf*, 4:316, no. 20494.

considering a case relating to a resale with a surcharge of 100 dirhams.<sup>69</sup> This is to say, an ‘eleven-tenths’ sale is distinguished from *murābaḥa*. ‘Eleven-tenths’ sale is the literal translation of the Persian ‘*dah yāzdah*.’ The Shafi‘i jurist al-Shīrāzī and the Hanafi jurists al-Sarakhsī and Ibn al-Humām (d. 861/1457) suggest that this name comes from reselling an object on the basis of the cost price and a one-tenth profit. If the surcharge is two-tenths, it will be a ‘twelve-tenths sale’ (*bay‘ dah davāzdah*).<sup>70</sup> The Persian origin of *murābaḥa* is further suggested by a hadith in which Ibn ‘Abbās (d. 68/686–8) disapproves of *murābaḥa*, saying, “This is a sale of the Persians (*wa-dhāka bay‘ al-‘ājim*).”<sup>71</sup>

We can infer therefore as follows: in Medina, *murābaḥa* originally meant resale at the cost price with a fixed surcharge. Subsequently another type of resale was introduced, i.e. a resale at the cost price with a surcharge defined in terms of a percentage to the cost price. This resale was of Persian origin, and both transactions came to be called *murābaḥa* indiscriminately. Something similar may have occurred in Iraq. In a report recorded in the *Muṣannaf* of Ibn Abī Shayba, the Kufan jurist Sa‘īd b. Jubayr expressed his disapproval of eleven-tenths or twelve-tenths sale. On hearing this, a certain Bukayr b. ‘Atīq asked him, “What can I do?” Sa‘īd said, “Say, ‘I bought this at such-and-such a price, so I sell it at such-and-such a price’,”<sup>72</sup> i.e. at a fixed price. This report may suggest that a resale with a fixed surcharge was distinguished from an eleven-tenths or twelve-tenths sale. Although the report does not identify the name of the transaction that Sa‘īd permitted, it is reasonable to assume that it was *murābaḥa* following the above-cited statement of Ibn al-Qāsim. Why, however, did Sa‘īd b. Jubayr disapprove of an eleven-tenth or twelve-tenths sale?

It is not just Ibn ‘Abbās and Sa‘īd b. Jubayr who are reported to have disapproved of an eleven-tenths or twelve-tenths sale. The same view is attributed to Masrūq<sup>73</sup> and ‘Ikrima (d. 105/723–4, 80

<sup>69</sup> Saḥnūn, *Mudawwana*, 4:235.

<sup>70</sup> Sarakhsī, *Mabsūṭ* (n.d.), 13:91; *ibid.* (1421), 13:108; Shīrāzī, *Muhadhdhab*, 1:288; Ibn al-Humām, *Fath*, 5:254.

<sup>71</sup> Ṣan‘ānī, *Muṣannaf*, 8:232–33, no. 15011; Ibn Abī Shayba, *Muṣannaf*, 4:413, no. 21574; Bayhaqī, *Sunan*, 5:330.

<sup>72</sup> Ibn Abī Shayba, *Muṣannaf*, 4:413, no. 21575. To Masrūq is ascribed a similar statement. Ibn Abī Shayba, *Muṣannaf*, 4:414, no. 21579.

<sup>73</sup> Ibn Abī Shayba, *Muṣannaf*, 4:414, no. 21579.

years old).<sup>74</sup> Ibn ‘Umar is reported to have disapproved of a twelve-tenths sale, regarding it as *ribā*.<sup>75</sup> But Ibrāhīm al-Nakhaṣī,<sup>76</sup> Ibn Sīrīn<sup>77</sup> and Shurayḥ<sup>78</sup> are reported to have seen no harm in it. The statement ascribed to Ibrāhīm, “We used to disapprove of it, but nowadays we see no harm in it”<sup>79</sup> seems to reflect the historical fact that the eleven-tenths or twelve-tenths sale, which were at first considered illegal, came to be legalized. If so, why did the Iraqi jurists first disapprove of an eleven-tenths or twelve-tenths sale, and why did they change their position? To answer these questions, let us take up again the statement ascribed to Sa‘īd b. Jubayr, “Say, ‘I bought this at such-and-such a price, so I sell it at such-and-such a price.’” There are two possible interpretations for this statement. To illustrate the first possibility, consider the case of a person who purchased an object for 100 dirhams and resells it for 110 dirhams. In this case, the statement, “I sell it at a surcharge of 10 percent” is equivalent to the statement, “I sell it for 110 dirhams.” Sa‘īd may have preferred the latter expression, which is clearer than the former.

The second possibility is that Sa‘īd required that for the resale to be valid the seller actually own the object intended for resale, as suggested in his statement, “Say, ‘I bought this at such-and-such a price, so I sell it at such-and-such a price.’” That is to say, Sa‘īd prohibited an eleven-tenths or twelve-tenths sale because the seller had not yet acquired the object at the moment when the resale was concluded. A report recorded in the *Sunan al-kubrā* of al-Bayhaqī may be invoked to confirm this interpretation. ‘Ubayd Allāh b. Abī Ziyād or ‘Ubayd Allāh b. Abī Yazīd, who heard Ibn ‘Abbās prohibit an eleven-tenths or twelve-tenths sale, referred to the possibility that the prohibition applies only in the case of a seller who designate the cost price at the moment of payment, rather than when he says, “This belongs to you by virtue of an eleven-tenths or twelve-tenths sale.”<sup>80</sup> This report raises the question about whether the seller

<sup>74</sup> Ibn Abī Shayba, *Muṣannaf*, 4:414, no. 21580.

<sup>75</sup> Ṣan‘ānī, *Muṣannaf*, 8:232, no. 15010.

<sup>76</sup> Ṣan‘ānī, *Muṣannaf*, 8:233, no. 15013; Ibn Abī Shayba, *Muṣannaf*, 4:414, no. 21577.

<sup>77</sup> Ṣan‘ānī, *Muṣannaf*, 8:233, no. 15012; Ibn Abī Shayba, *Muṣannaf*, 4:414, no. 21577.

<sup>78</sup> Ṣan‘ānī, *Muṣannaf*, 8:233, no. 15013; Ibn Abī Shayba, *Muṣannaf*, 4:414, no. 21578.

<sup>79</sup> Ibn Abī Shayba, *Muṣannaf*, 4:414, no. 21576.

<sup>80</sup> Bayhaqī, *Sunan*, 5:330.

does not designate the cost price before the moment of payment because he has not acquired the object and therefore does not know the cost price at the moment of the contract, or he does not designate it even though he has acquired the object and knows it. Although it is impossible to determine which the case is, I prefer the first possibility. It seems curious that the buyer does not ask the seller to designate the cost price even though the seller has already acquired the object and therefore knows the cost price.

I infer the following. In practice an eleven-tenths or twelve-tenths sale, or a *murābaḥa* could be concluded whether or not the seller had acquired the object. Subsequently a transaction concluded before the seller has acquired it came to be prohibited, while only a resale of an object that the seller has acquired at the cost price with a surcharge was considered lawful. I will substantiate my inference by analyzing the positive rules concerning a *murābaḥa* described in the *Aṣl* of al-Shaybānī and in the *Mudawwana*. As will be demonstrated, the rules in the *Aṣl* best fit the assumption that at the moment when the seller acquires the object *after* a *murābaḥa* has been concluded, its ownership transfers directly to the buyer, whereas the rules in the *Mudawwana* are based on the assumption that the seller in a *murābaḥa* sells what he has acquired.

*The doctrines of al-Shaybānī and the Iraqi jurists*

The Hanafis prohibit the sale of an object that one does not own and the resale of an object one has purchased but not yet taken possession of, with the sole exception of *salam*. For this reason Hanafis argue about *murābaḥa* on the premise that the seller possesses the object, as indicated in its definition by al-Marghīnānī, “Transfer of ownership of an object that one has acquired in the original contract at a surcharge on the cost price.”<sup>81</sup> However, it is easier to explain the positive rules regulating the *murābaḥa* as mentioned in the *Aṣl* of al-Shaybānī, on the assumption that the *murābaḥa* is concluded *before* the seller acquires the object through the ‘original sale’ (which is formed later in time than the *murābaḥa*). To demonstrate this point, let us compare the rules governing the *murābaḥa* with those governing the case of the object of an ordinary sale that suffers loss or

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<sup>81</sup> Marghīnānī, *Hidāya*, 3:56. See also Ṭaḥāwī, *Shurūṭ*, 143.

damage, or produces *fructus* while in the possession of the seller (see pp. 77–89). The numbers in column one are those which appear in the published edition of the *Aṣl*, but the letters of the alphabet have been added by me. “Owner (*mawlā*) [of the slave]” refers to the original seller, i.e. the seller in the original sale. “Seller” and “buyer” mean respectively the seller and the buyer in a *murābaḥa*.<sup>82</sup>

<i>Murābaḥa</i>	Ordinary sale
<p>2 (a) If a slave that someone has purchased is injured in an accident or loses his eyesight, or a defect (<i>‘ayb</i>) occurs in an animal, foodstuff or a piece of cloth that he has purchased, there is no harm in reselling it through a <i>murābaḥa</i>.</p> <p>Just as the fact that a piece of cloth that has become yellow or dirty decreases in value does not prevent it from being sold in a <i>murābaḥa</i>.</p> <p>(b) Natural loss of the proceeds (<i>ghalla</i>) produced by a slave (<i>khādīm</i>), an animal, a house or a slave (<i>‘abd</i>)<sup>83</sup> [viz. the object of the original sale] does not prevent the principals from being sold in a <i>murābaḥa</i>, for the proceeds are not the subject of the sale (i.e. <i>murābaḥa</i>).</p> <p>3 (a) If the owner causes a defect in the slave [viz. the object of the original sale], the seller cannot sell the slave in a <i>murābaḥa</i>, unless he informs the buyer of what happened.</p>	<p>If the object has been partly damaged due to a natural cause, the buyer can choose to maintain or cancel the contract. If he maintains it, he cannot demand a reduction of the price unless the seller has refused to deliver the object.</p> <p>If the proceeds produced by the object have been lost due to a natural cause, the sale is binding, and the buyer may not demand a reduction of the price.</p> <p>If the seller has partly destroyed the object, the buyer can choose to maintain or cancel the contract. If he maintains it, he can demand a reduction of the price in proportion to the magnitude of decrease in value of the object.</p>

<sup>82</sup> Shaybānī, *Aṣl*, 5:146–48. See also, Shaybānī, *Ṣaghūr* (1406), 346–48.

<sup>83</sup> The difference between a *khādīm* and a *‘abd* is not clear. The former may refer to a domestic slave, whereas the latter may refer to a labor slave.

<i>Murābaḥa</i>	Ordinary sale
<p>(b) The same rule applies to the case in which a third person causes a defect, for he is required to compensate for the decrease in value. If he causes the defect with the consent (<i>idhn</i>) of the owner, his act is identified with that of the owner. If the seller sells the slave in a <i>murābaḥa</i> without informing the buyer of what happened, the buyer has the right to affirm or rescind the contract.</p> <p>(c) In the cases in which the buyer has the right to affirm or rescind the contract, he loses this right if he totally or partially destroys the object. The contract is now binding on him, and he may not demand a reduction of the price.</p> <p>4 (a) If a female slave, a sheep, a cow or a camel gives birth to a child, or if a tree bears fruit, there is no harm in selling them in a <i>murābaḥa</i>, and the child or the fruit should be delivered to the buyer.</p> <p>(b) If it is the owner who destroys these <i>fructus</i>, the seller cannot sell the object in a <i>murābaḥa</i>, unless he informs the buyer of what happened.</p> <p>5. If a child [whom a female slave gave birth to] has died or the fruit has been lost due to a natural disaster, the seller can sell the principal in a <i>murābaḥa</i> without informing the buyer of what happened, just as in the case in which the value of the principal has decreased due to a natural cause.</p>	<p>If a third person has partially destroyed the object, the buyer is given the right to maintain or cancel the contract. If he maintains it, he cannot demand a reduction of the price, but he can demand that the destroyer make up for the decrease in the value of the object.</p> <p>When the buyer totally or partially destroys the object, the contract is binding on the buyer, even if a defect existed in the object at the moment of delivery. The buyer cannot demand a reduction of the price.</p> <p><i>Fructus</i> produced by the principal belong to the buyer. They do not affect the validity and terms of the contract.</p> <p>If the seller has destroyed the <i>fructus</i>, the buyer can elect to maintain or cancel the contract. If he maintains it, he can demand a reduction of the price.</p> <p>If the <i>fructus</i> have been lost due to a natural cause, the contract is binding on the buyer, who cannot demand a reduction of the price.</p>

In case 2 (a) the rule is that if the decrease in the value of the object is due to a natural cause, the price in the *murābaḥa* is calculated on the basis of the cost price, and the decrease in value is not taken into account. In other words, the risk of loss is attributed to the buyer. This rule is similar to the corresponding rule in an ordinary sale, except that the buyer in an ordinary sale has the right to cancel the sale, whereas such a right is not mentioned with respect to a *murābaḥa*. As regards also cases 2 (b), 3 (c), 4 (a) and 5, it is obvious that a *murābaḥa* is subject to the same rules as an ordinary sale.

It is difficult to understand the meaning of the rule mentioned in cases 3 (a) and 4 (b), “the seller cannot sell the object in a *murābaḥa*, unless he informs the buyer of what happened,” for it is not clear whether or not the seller can offer a *murābaḥa* on the basis of the cost price in the original sale without any reduction of the price. The meaning of this rule is suggested by the rule that if the seller in the original sale spontaneously reduces the original price after a *murābaḥa* has been concluded, the price of the *murābaḥa* is also reduced accordingly.<sup>84</sup> We infer from this rule that in cases 3 (a) and 4 (b), where the price in the original sale is automatically reduced, the price in the *murābaḥa* is affected accordingly. It follows that the rule “the seller cannot sell the object in a *murābaḥa*, unless he informs the buyer of what happened” amounts to saying that only if the seller offers the buyer the price calculated on the basis of the reduced price in the original sale is the *murābaḥa* valid. This rule coincides with the rule adopted in the case of partial destruction by the seller in an ordinary sale, except that the buyer in an ordinary sale has the right to cancel the contract.

The same coincidence is observed in case 3 (b) in which a third person causes a defect in the object without the consent of the original seller, and the seller informs the buyer of this event. In this case the price is not reduced, but the buyer in a *murābaḥa* can make the third person compensate him for the decrease in the value of the object due to the destruction. The same rule is adopted in an ordinary sale, except that here also the buyer can elect to cancel the contract.

Thus, we find striking similarities between the rules regulating what occurs to the object of a *murābaḥa* after the original sale was made

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<sup>84</sup> Marwazī, *Kāfi*, 13:99.

and before the buyer takes delivery of the object, and the rules regulating what occurs to the object of an ordinary sale after it was concluded and before the buyer takes delivery of the object, on the condition, it should be emphasized, that the seller in a *murābaḥa* informs the buyer of what occurred to the object if the seller is required to do so. Indeed, the right to cancel the contract conferred upon the buyer in an ordinary sale with respect to cases 2 (a), 3 (a), (b) and 4 (b) is not given to the buyer in a *murābaḥa*, but I have inferred that this right derived from the option for defect, which originally operated with respect to a defect that existed prior to the contract and was later extended to the case of a defect that occurs after the contract and before delivery (see p. 92). Therefore, the case in which the seller in a *murābaḥa* has acquired the object but has not yet delivered it to the buyer (whether it remains in the hands of the original seller or has passed to the hands of the seller) is assimilated to the case in which an ordinary sale was concluded between the original seller and the buyer, who has not yet taken delivery of the object. This assimilation would be easily justified, in the Hanafi view, by assuming that the buyer affirms, with the consent of the seller, the (original) sale that the seller has concluded with a third party (the original seller): as noted, when *A* affirms, with *B*'s consent, a sale that *B* concluded with a third party, *B* is treated as if he had acted as an agent for *A*.

In fact, the rules governing a *murābaḥa* are reminiscent of the Hanafi rules governing a sale concluded by an agent who does not profess that he is acting on behalf of the principal. As noted, in such a sale, (1) the effect of the contract (e.g. transfer of ownership) belongs to the principal, whereas (2) the rights and liabilities arising from the contract are created between the agent and the third party, that is to say, they are the contracting parties to the original sale. Let us illustrate these points.

(1) In case 2 (a), it is the buyer who bears the risk of loss. This is easily explained by assuming that the seller is a 'trustee' (*amīn* or *mu'taman*, see pp. 38–40) who possesses the object that belongs to the buyer. In case 3 (b), the third person who causes a defect in the object while in the possession of the seller is responsible to the buyer for the decrease in value. This solution also indicates that ownership of the object is considered to have transferred directly from the original seller to the buyer at the moment of the conclusion of the original sale.

(2) The following cases cited in the *Jāmi' al-kabīr* of al-Shaybānī indicate that the contracting parties to the original sale are the third party (original seller) and the seller in a *murābaḥa* rather than the buyer: *A* sells his house, worth 3000 dinars, to *B* for 3000 dinars and *B* takes possession of it. Then *C* acquires the house (i) exercising the right of pre-emption against *B*, or (ii) through a *murābaḥa* that he concludes with *B*. Subsequently *A*, who “has become sick (*marīḍa*),” reduces the price of the sale between himself and *B* to 2000 dinars. On the assumption that later *C* inherits *A*, while *B* does not, al-Shaybānī adopts the following solutions: (i) if *C* has exercised the right of pre-emption to purchase the house for 3000 dinars, *C* cannot demand that *B* pay back 1000 dinars; alternatively, (ii) if *C* has purchased the house from *B* through a *murābaḥa*, *C* can demand the reduction of the price of the *murābaḥa* in proportion to the amount of the reduction in the original sale between *A* and *B*.<sup>85</sup>

The rule underlying the solutions given to cases (i) and (ii) is that dispositions made by one who “has become sick,” or technically, who suffers from ‘death-sickness’ (*marad al-mawt*) are valid only insofar as they do not diminish the value of his property if they are made in favor of one of his heirs.<sup>86</sup> The term ‘death-sickness’ in its technical sense signifies a true sickness as well as certain circumstances which “cause a fear of death (*mukhawwif*)” and which in fact lead directly to death (sometimes expressed by the phrase “the sickness from which one died (*al-marad alladhī māta fi-hi*)”). For example, a prisoner who has been sentenced to death, a soldier on the battlefield, and a voyager on a ship struck by a storm are all considered to suffer from a death-sickness if they die in these situations.<sup>87</sup> Taking this rule into consideration, it can be concluded that in case (i) *C* is considered to have purchased the house from *A*, who, suffering from death-sickness, is prohibited from making a gratuitous disposition in favor of *C*, who later proved to be one of his heirs. In case (ii), *A* concluded the original sale with *B*, in whose favor *A* was authorized to make a gratuitous disposition to the extent of one-third of the estate (i.e. 1000 dinars), because *B* proved not to be an

<sup>85</sup> Shaybānī, *Kabīr*, 312.

<sup>86</sup> Yanagihashi, “Doctrinal Development,” 354–56.

<sup>87</sup> Taḥāwī, *Mukhtaṣar*, 159–60; Sachau, *Muhammedanisches*, 349; Coulson, *Succession*, 262–63; Yanagihashi, “Doctrinal Development,” 326–27.

heir.<sup>88</sup> The rule is that bequests and gratuitous dispositions by a person suffering from ‘death-sickness’ for a non-heir that individually or jointly do not exceed one-third of the estate are valid without the permission of the heirs.<sup>89</sup> Subsequently *B* sold the object in a *murābaḥa* to *C*, who was a third party to the original sale.

Thus, al-Shaybānī treats a *murābaḥa* in the same manner as a sale that has been concluded by an unauthorized agent and subsequently is affirmed by the principal. However, this treatment leads to a curious rule: al-Shaybānī states, with regard to case 2 (a), that the seller may offer a *murābaḥa* over a slave without informing the offeree (the would-be buyer in the *murābaḥa*) that the slave lost his eyesight while in the seller’s possession, even though the value of the slave has considerably decreased. Of course, the offeree is not obliged to accept the offer. But is it not unjust that the buyer who was not aware of the accident may not cancel the contract, whereas if he had been informed of it, he would not have agreed to the *murābaḥa*? Al-Shaybānī himself was not convinced of this solution, because he reportedly stated in *Nawādir Hishām*,<sup>90</sup> “This solution applies only when the decrease due to the defect is negligible. If the decrease due to the defect is such that it is considered fraudulent [to sell the object at the cost price plus a surcharge], he should not sell it [viz. the object] in a *murābaḥa* (*in naqasha-hu al-‘ayb qadra mā lā yataghābanu al-nās fi-hi lam yabi‘-hu murābaḥatan*).”<sup>91</sup> Also Zufar (b. 110/728–9; d. 158/774–5), one of the disciples of Abū Ḥanīfa, was not satisfied with this solution when he prohibited a *murābaḥa* in such a case unless the seller informs the buyer that the defect occurred after he took delivery of the object from the original seller.<sup>92</sup> Why did al-Shaybānī in the *Aṣl* overlook such an injustice?

<sup>88</sup> Yanagihashi, “Doctrinal Development,” 354.

<sup>89</sup> Yanagihashi, “Doctrinal Development,” 354–56.

<sup>90</sup> Hishām b. ‘Abd Allāh al-Rāzī was a pupil of Abū Yūsuf and al-Shaybānī. Horii, *Gesetzlichen Umgehungen*, 21–22.

<sup>91</sup> Sarakhsī, *Mabsūt* (n.d.), 13:79; *ibid.* (1421), 13:94.

<sup>92</sup> Sarakhsī, *Mabsūt* (n.d.), 13:79; *ibid.* (1421), 13:94. Al-Sarakhsī justifies the rule mentioned in case 2 (a) as follows: the part which was lost (e.g. the eyesight of a slave), being but an attribute (*wasf*), has no corresponding part in the price, which is the consideration for the principal (*aṣl*) of the object. As long as the principal is remaining, therefore, there is no reduction of the price, on the condition that the loss is not due to the act of the seller. Sarakhsī, *Mabsūt* (n.d.), 13:79; *ibid.* (1421), 13:94–95. For similar justifications, see Kāsānī, *Badā’i‘* (1402), 5:223; *ibid.* (1418), 7:180; Marghīnānī, *Hidāya*, 3:58. We have seen the same argument regarding the attribution of risk in the sale of a specific object. See pp. 79–80.

In my view, this rule and the other rules governing the *murābaḥa* are best explained by assuming that (1) they originated at a time when a *murābaḥa*, or an eleven-tenths or twelve-tenths sale, used to be concluded before the seller acquired the object, and that (2) in such a *murābaḥa* the seller, who purchases the object in his own name, acted as an agent for the buyer. It follows, for example, that when the seller purchases the object of the *murābaḥa* its ownership transfers immediately to the buyer, with the result that the defect or the loss suffered by accident while in the possession of the seller is the responsibility of the buyer, who can demand a reduction of the price from neither the original seller nor the seller. Al-Shaybānī retains these ancient rules, although he takes it for granted that the seller has acquired and taken possession of the object when he concludes a *murābaḥa*.

There is additional evidence to suggest that a *murābaḥa* used to be made before the seller acquired the object. First, I have mentioned the report in which Ibn ‘Abbās disapproves of an eleven-tenths sale and the comment on it by ‘Ubayd Allāh b. Abī Ziyād (or Yazīd) (see pp. 134–35). Second, to Ibn ‘Umar is attributed the statement: “A twelve-tenths sale is *ribā* (*bayʿ dah dawāzdah ribā*).”<sup>93</sup> If a *murābaḥa* is concluded before the seller acquires the object, he can safely earn the profit represented by the surcharge on the cost price without assuming risk of loss. I imagine that this is why a twelve-tenths sale was considered to constitute *ribā*. Conversely it is difficult to account for this statement if we assume that a *murābaḥa* may not be concluded until the seller has acquired and taken possession of the object, for the seller will not offer a *murābaḥa* if the value of the object rises after its acquisition, and if its value declines few people will agree to buy the object in a *murābaḥa*.

Nevertheless, the merit of the original *murābaḥa* is obvious. Suppose, for example, that *A* is a local merchant dealing with cloth or slaves and *B* is a merchant engaging in a long-distance trade. If *A* can sell to *B* cloth or a slave that he has not yet acquired in a *murābaḥa*, it will be beneficial to both of them. *A* can safely earn a certain percentage of the cost price for which he will acquire the object designated in the contract. *B* can take advantage of the knowledge and the experience of *A* to obtain the objects safely and at a reasonable cost.

<sup>93</sup> Ṣanʿānī, *Muṣannaf*, 8:232, no. 15010.

Finally, let us say a word about two principles that may have originated in the *murābaḥa*.

(1) The first relates to direct agency, one of the main themes of this chapter. I have indicated that the rules governing a *murābaḥa* resemble those governing a sale concluded by an agent without disclosing the principal. As noted, no statement attributed to any of the Companions or the Successors concerning such agency is extant, whereas a number of statements are attributed to the Companions and Successors on the subject of the *murābaḥa*. Therefore, it is likely that the *murābaḥa* served as a model for the Hanafī rules regarding agency in sale and other onerous contracts. I discuss here an additional example of similarity between a *murābaḥa* and a sale concluded by an agent who does not disclose his principal.

This example relates to the case of a seller who gives as the cost price an amount of money greater than the sum that he actually expended: according to Abū Ḥanīfā and al-Shaybānī, a buyer who has been thus deceived has the right to affirm or rescind the contract; however, in case of affirmation, he cannot demand a reduction of the price. Unlike Abū Ḥanīfā and al-Shaybānī, Abū Yūsuf holds that the buyer can demand a reduction of the price to the price calculated on the basis of the sum that the seller has actually expended.<sup>94</sup>

This opposition parallels the difference between the solution adopted by Abū Ḥanīfā and al-Shaybānī and the solution adopted by Abū Yūsuf with regard to the case of a person who was appointed as an agent for purchase and violated the instructions of the principal. According to the majority of the Hanafīs including Abū Ḥanīfā and al-Shaybānī, such an agent is considered to have purchased the object on his own behalf.<sup>95</sup> As an example, if an agent who is instructed to purchase a slave purchases one-half of the slave and manumits him, al-Shaybānī declares the manumission to be valid to the extent of one-half of the slave, because it belongs to the agent. Abū Yūsuf holds that the manumission is invalid, because ownership of the slave is suspended until the principal chooses between affirming and rescinding the purchase by the agent.<sup>96</sup> In addition, contrary to the majority of the Hanafīs, Abū Yūsuf holds that most of the rights and liabil-

<sup>94</sup> Shaybānī, *Aṣl*, 5:155; Shāfiʿī, *Umm*, 3:93.

<sup>95</sup> Samarqandī, *Tuhfa* (1964), 3:324; *ibid.* (1414), 3:234; Sarakhsī, *Mabsūt* (n.d.), 19:44; *ibid.* (1421), 19:50.

<sup>96</sup> Sarakhsī, *Mabsūt* (n.d.), 19:44; *ibid.* (1421), 19:50.

ities of a sale are created between the third party and the principal if the agent follows the instruction of the principal.<sup>97</sup>

Let us apply the reasoning of Abū Ḥanīfa and al-Shaybānī and that of Abū Yūsuf with regard to the case of a seller in a *murābaḥa* who makes a false statement concerning the cost price. According to Abū Ḥanīfa and al-Shaybānī, when the seller violates the *murābaḥa* by making a false statement, the seller resells what he purchased on his own behalf in a sale that the buyer believes to be a *murābaḥa*. If, in this case, the buyer can demand that the price be reduced to the sum calculated on the basis of the true cost price, this amounts to enabling him to impose a new sale on the seller. Abū Ḥanīfa and al-Shaybānī do not support this, but they permit the buyer to rescind the sale (that he believed to be a *murābaḥa*) because of the fraud by the seller. According to Abū Yūsuf, when the seller concludes the original sale, the effect and the rights and liabilities arising from it accrue to the buyer. This is why the buyer can demand a reduction of the price, but cannot rescind the *murābaḥa*. Thus the seller is treated as if he were a mere messenger for the buyer. Therefore the case of a seller who makes a false statement on the cost price resembles that of a messenger who embezzles part of the sum that the principal handed over to him, which fact does not affect the validity of the sale.

I surmise that historically the view of Abū Ḥanīfa and al-Shaybānī on the one hand, and the view of Abū Yūsuf on the other hand, with respect to the case of an agent who violates the instructions of his principal, originated in their respective solutions to the case, among others, of the seller in a *murābaḥa* who makes a false statement on the cost price.

(2) The second principle that may have one of its origins in *murābaḥa* is the one prohibiting the sale of an object that one does not own. We find the following report in the *Muṣannaf* of Ibn Abī Shayba: Ibn ‘Abbās disapproved of “a sale causing quarrelling (*bay‘ al-mushāqqā*), i.e. the *murābaḥa*.”<sup>98</sup> We can easily understand why the original *murābaḥa* often led to disputes between the contracting parties, for neither the cost required to acquire the object nor the state in which the object will be on the date on which delivery falls due was known

<sup>97</sup> Chehata, “Représentation,” 542–43, 545–46.

<sup>98</sup> Ibn Abī Shayba, *Muṣannaf*, 4:481, no. 22288.

at the moment of the contract. The principle prohibiting the sale of an object that one does not own may have been introduced to regulate the *murābaḥa* among others.

*The Medinan doctrine*

As noted, the eleven-tenths or twelve-tenths sale was of Persian origin and was transmitted to the Hijaz. It is not clear when it arrived there, but in the *Mudawwana* almost all the rules governing *murābaḥa* are ascribed to Mālik and in particular to Ibn al-Qāsim. They are far more faithful to the principle that the seller must own the object at the moment of a *murābaḥa* than al-Shaybānī, whose solutions retain almost intact the residual influence of the original *murābaḥa* (the eleven-tenths or twelve-tenths sale) that was supposed to be concluded before the original sale. It is helpful to compare the solutions of Mālik and Ibn al-Qāsim with the corresponding solutions of al-Shaybānī.

(1) Someone purchases an object, and subsequently a defect occurs in it. Ibn al-Qāsim states that he cannot resell it in a *murābaḥa* unless he informs the buyer of what happened to the object.<sup>99</sup> Al-Shaybānī does not require the seller to mention the existence of the defect.

(2) Ibn al-Qāsim holds that a seller who caused a decrease in the value of the object cannot sell it in a *murābaḥa* unless he informs the buyer of what he did.<sup>100</sup> A corresponding rule is not mentioned in the *Aṣl*. But we can infer the solution al-Shaybānī would adopt with respect to such a case: by causing a decrease in the object, the seller is considered to have violated the *murābaḥa*, and the buyer can choose to purchase the object in an ordinary sale or not to purchase it.

(3) Asked about the case in which someone purchased an animal, which gave birth to a baby while in his possession, Ibn al-Qāsim responded that he cannot resell only the animal (the principal) in a *murābaḥa* unless he informs the buyer that it gave birth to a baby, “because fluctuation of the market value is a *fawt* for Mālik, and this is more than it.” He adds that it is not permitted to sell the animal and the baby jointly in a *murābaḥa* for the same reason.<sup>101</sup> “*Fawt*” means that an object has changed so much, physically or in its legal status by a sale or any other legal act, that it is no longer

<sup>99</sup> Saḥnūn, *Mudawwana*, 4:227–28.

<sup>100</sup> Saḥnūn, *Mudawwana*, 4:240–41.

<sup>101</sup> Saḥnūn, *Mudawwana*, 4:228.

considered to be in its original state. Al-Shaybānī holds that the occurrence of *fructus* does not prevent the object together with the *fructus* from being sold in a *murābaḥa*, the price of which is calculated on the basis of the cost price.

It seems that the *murābaḥa* as conceived of by Ibn al-Qāsim is always based on the cost price the seller expended for the acquisition of the object, without increase or decrease. To take an example, if someone purchased an object worth 100 dirhams for 100 dirhams and the original seller damaged it reducing its value to 80 dirhams, its price in a *murābaḥa* is, according to the Hanafis, set at 80 dirhams plus the stipulated surcharge. For Ibn al-Qāsim, in order for a *murābaḥa* to be valid, the price should be still calculated on the basis of 100 dirhams, i.e. the cost price. This is to say, in case of defect, the price is likely to be higher than its current value. This is why the seller must inform the buyer of any circumstance that caused a decrease in the value of the object: the buyer can choose to or not to purchase it. The rule regarding the case of a seller who neglects this requirement is indicated in the following examples.

(4) A person who purchased an object in a credit sale must inform the buyer of this fact if he wishes to resell it in a *murābaḥa* for cash. According to Ibn al-Qāsim, if the seller fails to do so, the *murābaḥa* is canceled. But if the object has suffered change while in the buyer's possession, the *murābaḥa* becomes binding on the buyer, who must pay in cash its value as calculated on the date of delivery. Saḥnūn adds that it is prohibited for the seller to demand a surcharge on the value.<sup>102</sup>

The general rule governing an invalid (*fāsid*) contract is that if, subsequent to its execution, it becomes impossible to recover the original state, the contract is replaced with an equivalent one, with the intended legal effect of the contract being maintained. For example, if the object of an invalid sale is delivered to the buyer and then suffers a physical or legal change, the rule is that the original contract becomes valid in the sense that the transfer of ownership of the object to the buyer is confirmed, whereas the price is replaced with the market value of the object at the moment of delivery to the buyer.<sup>103</sup> In accordance with this rule, the buyer has to pay the

<sup>102</sup> Saḥnūn, *Mudawwana*, 4:229–30.

<sup>103</sup> Linant de Bellefonds, *Traité*, 1:106, 113–14.

value of the object. It is obvious that Ibn al-Qāsim applies this rule to this case.

(5) A person who purchased an object for 100 dirhams resells it in a *murābaḥa* for 180 dirhams, falsely stating that he purchased it for 150 dirhams, with a surcharge of 30 dirhams. Subsequently, the object was totally destroyed, and the buyer learned that he had been deceived. The solution to this case is as follows: in accordance with the rule regulating an invalid sale, the buyer owes to the seller the value of the object on the date of delivery. However, on the one hand, as the buyer agreed to purchase the object at the cost price and 20 percent surcharge ( $= 30/150$ ), he is considered to have agreed to pay no less than 120 ( $= 100 \times 1.2$ ) dirhams. On the other hand, the seller expressed his desire to sell it at no more than 180 dirhams. Therefore, three cases are distinguished: first, if the value of the object is less than 120 dirhams, the buyer owes 120 dirhams; second, if the value is more than 120 dirhams and less than 180 dirhams, the buyer owes the value of the object; third, if the value is more than 180 dirhams, the buyer owes 180 dirhams.<sup>104</sup> In either case, Abū Ḥanīfa and al-Shaybānī make the buyer pay 180 dirhams.

(6) A person, who purchased an object for 100 dirhams, resells it in a *murābaḥa*. Subsequently, the original seller reduces the price by 20 dirhams. Asked about this case, Mālik responded as follows: if the seller in the *murābaḥa* reduces the price in proportion to the reduction in the original sale, the *murābaḥa* is binding on the buyer. If the seller refuses to reduce the price in this way, the buyer can choose to affirm or rescind the *murābaḥa*. In case of affirmation, he cannot demand a reduction of the price, “because the *murābaḥa* is made as a *mukāyasa*.”<sup>105</sup> “*Mukāyasa*” here means an ordinary transaction in which each of the contracting parties tries to make his own profit at the expense of the other.<sup>106</sup> Al-Shaybānī, who apparently is faithful to the Iraqi traditional view on the *murābaḥa* (or the eleven-tenths or twelve-tenths sale), holds that a reduction of the price in the original sale automatically affects the price in the *murābaḥa*.

<sup>104</sup> Ṣaḥnūn, *Mudawwana*, 4:237–38. For the sake of convenience, I have changed the numbers that appear there.

<sup>105</sup> Ṣaḥnūn, *Mudawwana*, 4:236.

<sup>106</sup> See for example, Ṣaḥnūn, *Mudawwana*, 4:259.

In the doctrine of Ibn al-Qāsim and Mālik nothing remains of the economic functions observed in the original *murābaḥa*. The only purpose of the *murābaḥa* is to ensure that the price the buyer owes is reasonable.

## 2. *Tawliya*

The Hanafī jurist al-Marghīnānī defines *tawliya* as the resale of an object at the cost price for which the seller acquired it.<sup>107</sup> But some reports collected in the early sources suggest that the original *tawliya*, i.e. the *tawliya* as it had been before it was redefined primarily by the Iraqī jurists active prior to Abū Ḥanīfa, was different from the *tawliya* thus redefined in two points. First, the seller in the original *tawliya* (hereafter simply *tawliya*) could claim a share of the profit, i.e. the difference between the price in a *tawliya* and the price for which the buyer subsequently resells the object. Second, a *tawliya* could be concluded before the seller acquires the object. I will consider the two points.

### *Tawliya* as a partnership

First, some reports indicate that the seller in a *tawliya* could claim a share of the profit earned through the resale of the object by the buyer. The following report is recorded in the *Muṣannaḥ* of al-Ṣanʿānī: someone sold an object “reserving a share in it (*wa-ʾstathnā fi-hi shirkān li-nafsi-hi*)” and made a lawsuit about the sale before the Yemeni qadī Maʿmar b. Rāshid al-Azdī (d. 152/769, 153/770 or 154/771), who disapproved of a sale in which “Your left hand sells to your right hand.” Al-Ṣanʿānī adds that al-Ḥasan al-Baṣrī explained this expression as meaning, “You sold an object through a *tawliya*, having an interest in it [lit. entering in it] (*wallayta shayʾan wa-dakhalta fi-hi*).”<sup>108</sup>

What does the expression “reserving a share in it” mean? It may mean that the seller has a share of the object. But I am inclined to take it as meaning, “having a share of the profit,” for [Sulaymān?] al-Taymī is reported to have quoted his father as stating: “I disapprove of someone saying, ‘I sell you [an object], but a half of it

<sup>107</sup> Marghīnānī, *Hidāya*, 3:56.

<sup>108</sup> Ṣanʿānī, *Muṣannaḥ*, 8:261, no. 15147.

belongs to me (*abī‘u-ka hādhā wa-lī nişfu-hu*).’ No, he should say, ‘I sell you a half of it (*abī‘u-ka nişfa-hu*).’<sup>109</sup> There is no doubt that the second expression refers to *ishrāk*, the transfer of a share, which I will examine later. If the seller has purchased an object for  $a$  dinars, *ishrāk* implies that he sells a  $100x\%$  share of the object for  $ax$  dinars to someone, who resells the object at  $b$  dinars, with the difference, i.e. dinars being distributed between the seller and the buyer in the ratio of  $1 - x : x$ . Therefore, the net profit for the seller is  $(b - a)(1 - x)$  dinars. If we assume that the expression “I sell you [an object], but a half of it belongs to me” is equivalent to the expression “I sell you a half of it” from an economic point of view, we must understand the former expression as meaning that the seller has a one-half share of the profit. It is not clear why Iraqi jurists came to disapprove of a *tawliya* in which the seller is entitled to a share of the profit earned through the resale of the object by the buyer, but I infer that this is due to the repeatedly invoked principle that one cannot profit from an object the risk of which one does not assume. According to this principle, as a person who sells an object in a *tawliya* presumably does not assume the risk of loss after he delivers the object to the buyer, he cannot claim a share of the profit earned through its resale. This seems to be why *ishrāk* was introduced to substitute for *tawliya*.

An anecdote in the *Muwatta‘a* compiled by al-Shaybānī may reflect this process. A certain ‘Alā’ b. ‘Abd al-Raḥmān b. Ya‘qūb is quoted as having stated that his grandfather Ya‘qūb narrated as follows:

When I was selling cloth during the reign of ‘Umar b. al-Khaṭṭāb, ‘Umar said to me, “The Persians cannot sell in our suq, for they hold a different belief from ours and are dishonest in weighing and measuring.” I went to see ‘Uthmān b. ‘Affān and asked him, “What do you think of an easy prey?” He said, “What is that?” I said, “I know a place where someone sells cloth at such a low price that he can hardly make a profit. What do you think if I buy it on your behalf and then resell it on your behalf (*ashtarī-hi la-ka thumma abī‘u-hu la-ka*)?” He said, “OK.” I went and bought cloth and returned to the house of ‘Uthmān, where I left it behind. When he came home and saw the folded cloth, he said, “What is this?” They said, “Ya‘qūb brought this

<sup>109</sup> Ṣan‘ānī, *Muṣannaf*, 8:261, no. 15145. I could not identify al-Taymī, but Azami refers to a certain al-Taymī as one of the students of Anas b. Mālik. Azami, *Studies*, 49–50.

cloth.” He said, “Summon him to me.” When I came, he asked, “What is this?” I said, “This is what I talked to you about.” He said, “Have you examined them?” I said, “I am convinced that it will satisfy you, but I am afraid of the retainer of ‘Umar.” He said, “Sure.” So I went, accompanied by ‘Uthmān, to ‘Umar’s retainer. ‘Uthmān said, “Ya‘qūb sells my cloth, so don’t hinder him.” They said, “Yes.” Then I brought the cloth to sell it in the suq [of the Arabs] and it did not take long before I put the proceeds [of the sales] in a bag and brought them back to ‘Uthmān, accompanied by the original seller of the cloth. I said to ‘Uthmān, “Please count what belongs to you.” He counted and much money belonged to him. I said to ‘Uthmān, “I did not harm anyone in this transaction.” He said, “May God reward you,” and he was satisfied. I said, “I know another place similar to or more profitable than this.” He said, “Could you do it again?” I said, “If you want.” He said, “Yes, please.” I said, “All right, as I want to make a profit (*innī bāghin khayran*), conclude an *ishrāk* with me (*fā-ashrik-nī*) [next time].” He said, “All right, between you and me.”<sup>110</sup>

It is difficult to decide with certainty what the transaction between Ya‘qūb and ‘Uthmān legally was. Al-Shaybānī comments as follows:

There is no harm in two persons entering into a partnership for a credit sale (*yashtarikū al-rajulān fī al-shirā’ bi-’l-nasī’ā*), even if one of them contributes no capital, on the condition that the profit is distributed between them in the same proportion as the loss. If one of them [*A*] undertakes the purchase and sale, while the other partner [*B*] does not have a greater share than *A*, this is not permitted, since *A* profits from an object the risk of which is born by his partner.<sup>111</sup>

He regards the transaction between Ya‘qūb and ‘Uthmān as a partnership for a credit sale in which one partner (Ya‘qūb) has no share of the profit, while the other partner (‘Uthmān) bears the risk and earns the entire profit. Al-Shāfi‘ī and Ibn Rushd al-Jadd do not accept this interpretation. They state that Ya‘qūb acted as an agent in a *muḍāraba*.<sup>112</sup> This interpretation is based on the principle prohibiting the sale of an object that one does not own, which was self-evident for al-Shāfi‘ī and Ibn Rushd al-Jadd. But their interpretation is unacceptable for two reasons. First, Ya‘qūb was not entitled to the profit earned by reselling the cloth. This is contrary to the

<sup>110</sup> Mālik-Shaybānī, *Muwatta’*, 283, no. 803.

<sup>111</sup> Mālik-Shaybānī, *Muwatta’*, 283, no. 803.

<sup>112</sup> Shāfi‘ī, *Umm*, 7:108; Ibn Rushd al-Jadd, *Muqaddamāt*, 3:6–7. For the definition of *muḍāraba*, see p. 39.

*muḍāraba*, in which the agent is supposed to have a share of the profit. Second, in a *muḍāraba*, all the effect and the rights and liabilities arising from transactions undertaken with the property of a *muḍāraba* are created between the agent and a third party, whereas this does not seem to be the case in this anecdote: Ya‘qūb said to ‘Uthmān, “I buy it on your behalf and then resell it on your behalf,” and paid the original price to the original seller in the presence of ‘Uthmān. These indicate that it is ‘Uthmān who acquired the effect and the rights and liabilities arising from the original sale.

The transaction between Ya‘qūb and ‘Uthmān may have been a *tawliya*, for the last statement of Ya‘qūb, “conclude an *ishrāk* with me [next time]” seems to mean that he wanted to conclude an *ishrāk* in the future rather than a *tawliya*, in which he would be entitled to no share of the profit. Needless to say, it is speculative to infer the nature of a contract cited in a single anecdote. In addition, it may be misleading to identify such a contract with one of the contracts sanctioned by later jurists. But it is certain that the idea underlying this statement is that a person who has no share in an object (and therefore does not assume the risk of loss) is not entitled to the profit earned from it.

It is interesting to cite two reports in the *Muṣannaḥ* of al-Ṣan‘ānī that allude to the existence of a customary *tawliya* in which the seller reserves a share in the object itself.

Two persons brought a case to Shurayḥ. One of them sold a sheep to the other for 20 dirhams, remaining a co-owner in it [viz. the sheep] (*wa-huwa sharīk fī-hā*). Subsequently the buyer resold it [to a third person] for 21 dirhams, and retained the amount of money for which he purchased it [viz. 20 dirhams] and the one dirham. Then they brought this case to Shurayḥ. He said to the seller, “You wanted a *ribā*, but it did not increase to your benefit (*inna-ka aratta al-ribā fa-lam yarbū la-ka*).” [According to Shurayḥ] He was a co-owner (*sharīk*) only as regards the one dirham.<sup>113</sup>

Although it is not indicated that this sale was a *tawliya*, we may assume so for two reasons. First, it is recorded in the same chapter in the *Muṣannaḥ* of al-Ṣan‘ānī as the above-cited lawsuit about a sale that was brought before the Yemenī qādī Ma‘mar b. Rāshid al-Azdī. Second, if the seller had acquired the object for no less than 20

<sup>113</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:260, no. 15142.

dirhams, say  $a$  dirhams, he would receive  $20 - a + x$  dirhams, if he has a  $100x\%$  share ( $0 < x < 1$ ) of the one dirham (the difference between the price of the sale and that of the resale by the buyer) following Shurayḥ's decision. Therefore,  $a$  must be equal to 20 or at most less than  $20 + x$  in order that the seller can earn any profit. If, alternatively, the seller had acquired the object for less than 20 dirhams, it would be hardly conceivable that he demand a share of the profit earned through the resale by the buyer in addition to the difference between the cost price and the price in the sale. Therefore we may assume that  $a$  is equal to 20 and therefore, this sale was a *tawliya*.

On this assumption, it is clear that by "remaining a co-owner in the sheep" the seller intended to earn a profit even if the buyer resells the sheep for an amount lower than 20 dirhams, i.e. the cost price. However, Shurayḥ permitted the seller to claim a share only of the profit earned through the resale of the sheep. Why did Shurayḥ regard it as "ribā," i.e. unlawful gain, that the original seller retains a share of the sheep? Let us try to answer this question.

To begin with, the merit of retaining a share is obvious. Suppose that the seller and the buyer in a *tawliya* agree to distribute the profit in the ratio of  $y : 1 - y$ , without the seller retaining a share of the sheep. Following Shurayḥ, only if  $b > a$  is the seller entitled to  $(b - a)y$  dinars as his share of the net profit, where  $b$  is the price for which the buyer resells it. If, however, the seller retains a  $100z\%$  share of the object in addition to  $a$  dinars that he requires the buyer to pay for the object, he will gain  $bz$  dinars even if  $b < a$  (negotiations might set  $z$  at a low percentage). The problem with such an agreement is easily detected by comparing it with a rule governing a *muḍāraba*. In a *muḍāraba* the profit is distributed between the investor and the agent according to the pre-determined proportion, after the same amount of money as the capital is deducted. Therefore, if the agent could make no profit, the investor earns nothing. In view of this rule, it is logical to limit the seller in a *tawliya* (by which the buyer is made responsible for the deficit arising from resale because he must pay the cost price to the seller), to a share of any profit, for otherwise the seller can earn even if the buyer resells the object at a price lower than the cost price (the price in the *tawliya*).

The following report seems to reflect the same idea: Ibn Sīrīn disapproved of a transaction in which "you sell an object retaining one-fourth of it, so long as it is in its original state (*tabī'a sil'ata-ka mā*

*kānat wa-tashtariku fi-hā bi-'l-rub'*).<sup>114</sup> The meaning of this statement, in particular “*mā kānat*” that I translate as “so long as it is in its original state” is not clear, but in my view it means that the seller cannot claim a share of the object, unless he pays expenses to increase its value by improving it (e.g. by conversion) or transporting it from one place to another where it sells at a better price.

*When is a tawliya concluded?*

Let us now turn to the second point, which is, a *tawliya* could be concluded before the seller took possession of the object. Ibn Ṭāwūs is reported to have narrated that his father Ṭāwūs stated, “There is no harm in a *tawliya*, it is well-known (*maʿruf*),” and that Ibn Sīrīn stated, “No, until it [viz. the object] is taken possession of and measured.”<sup>115</sup> This statement attributed to Ibn Sīrīn implies that Ṭāwūs used to deem it lawful to make a *tawliya* before the seller takes possession of the object, or possibly even before he acquires it. Al-Shaybānī states, “Ibn Sīrīn did not disapprove of it [viz. *tawliya*]. Subsequently he disapproved of it.”<sup>116</sup> Taking into consideration the statement Ibn Ṭāwūs reportedly narrated from Ibn Sīrīn, I infer that Ibn Sīrīn changed his position and prohibited a *tawliya* from being concluded before the seller takes possession of the object.

The statement, “A *tawliya* is a sale (*al-tawliya bayʿ*)”, which is attributed to several Iraqī jurists such as al-Ḥasan al-Baṣrī,<sup>117</sup> Ibn Sīrīn,<sup>118</sup> al-Ḥakam [b. Ayyūb],<sup>119</sup> Ibn ʿAmr al-Salmānī al-Murādī al-Kūfī (Kufan jurist. d. 72/691–2, 73/692–3 or 74/693–4) and al-Shaʿbī<sup>120</sup> may be invoked in support of this inference. The meaning of this statement is discussed by al-Zuhrī, who is reported to have stated, “*Tawliya* is a sale, therefore don’t conclude a *tawliya* before you take possession [of the object].”<sup>121</sup> I surmise that this “al-Zuhrī” is one of what Juynboll calls “the Iraqī Zuhri’s,” i.e. those Iraqīs who were addressed as “al-Zuhrī,”<sup>122</sup> rather than the Medinan jurist Ibn Shihāb

<sup>114</sup> Ṣanʿānī, *Muṣannaḥ*, 8:260, no. 15143.

<sup>115</sup> Ṣanʿānī, *Muṣannaḥ*, 8:49, no. 14255.

<sup>116</sup> Shaybānī, *Hujja*, 2:710.

<sup>117</sup> Ṣanʿānī, *Muṣannaḥ*, 8:48, no. 14254. See also, Shaybānī, *Hujja*, 2:709–10; Ibn Abī Shayba, *Muṣannaḥ*, 4:389, no. 21298.

<sup>118</sup> Ṣanʿānī, *Muṣannaḥ*, 8:48, no. 14254.

<sup>119</sup> Ṣanʿānī, *Muṣannaḥ*, 8:48, no. 14254.

<sup>120</sup> Shaybānī, *Hujja*, 2:709; Ibn Abī Shayba, *Muṣannaḥ*, 4:389, no. 21299.

<sup>121</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:389, no. 21300.

<sup>122</sup> Juynboll, *Muslim Tradition*, 155–56.

al-Zuhrī, because the Medinan jurists unanimously declared it lawful to resell what someone has purchased before taking possession of it unless it is foodstuff,<sup>123</sup> and they unanimously excluded the resale of foodstuffs in a *tawliya* from the prohibition of resale of foodstuffs before the seller takes possession, based on a Prophetic hadith that was widely accepted in Medina.<sup>124</sup>

As noted, the prohibition of the sale of an object that one has not taken possession of was widely accepted in Iraq by the middle of the eighth century. It is not clear whether the jurists redefined the *tawliya* as a sale in order to explain the prohibition of a *tawliya* of an object that the seller has not taken possession of, or conversely whether the jurists applied the prohibition to a *tawliya*, which they had defined as a sale. But I am inclined to the second interpretation, because, as demonstrated, the Iraqi jurists, who at first regarded the *tawliya* as a kind of partnership, came to treat it as a variation of an ordinary sale that is characterized only by the seller's statement of the cost price in view of the introduction of the principle that a person cannot profit from an object the risk of which he does not assume.

Whatever the case might have been, it is clear that this statement, which is a truism for the later jurists, was intended to counter the view permitting a *tawliya* to be concluded before the seller takes possession of the object. There is no clear evidence to show that a *tawliya* was concluded before the seller acquired the object, rather than before he took possession of it. But as a *tawliya* used to have the same function as a partnership in which the profit earned through the resale of the object by the buyer could be distributed between the seller and the buyer, it is reasonable to assume that it could be concluded prior to the original sale in which the seller acquired the object.

#### *Tawliya and direct agency*

I have inferred that the rules regulating an agency in which the agent purchases an object without professing that he is acting on behalf of the principal have part of their origin in the *murābaḥa*. Although the term '*tawliya*,' which means literally 'subrogation' or 'placing in charge,' suggests that it may also served as a model for

<sup>123</sup> Mālik-Yahyā, *Muwattaʿ*, 3:296–97; *ibid.*, tr. Bewley, 264a.

<sup>124</sup> Ṣanʿānī, *Muṣannaf*, 8:49, no. 14257; Mālik-Yahyā, *Muwattaʿ*, 3:328.

direct agency, there is little direct evidence to substantiate this suggestion. But the solution of Abū Ḥanīfā regarding the case of a seller who makes a false statement as to the cost price deserves to be examined.

Abū Ḥanīfā holds that the buyer who has thus been deceived cannot rescind the *tawliya*, but that he can demand that the seller reduce the price to the cost price.<sup>125</sup> How can we explain this solution? Dīb has advanced the following explanation: *tawliya* subsists in the subrogation of the seller by the buyer in relation to the original seller. Thus, if the buyer of a *tawliya* owes a greater price than the cost price on affirmation, the constitutive element of a *tawliya*, i.e. the subrogation, disappears. This is why the price is reduced to the cost price.<sup>126</sup> Al-Sarakhsī gives substantially the same explanation.<sup>127</sup>

At first glance, this explanation lacks persuasiveness. According to it, when there is a false statement by the seller in a *murābaḥa*, the price must be reduced because the *murābaḥa* subsists in reselling an object at cost price with a predetermined surcharge. But Abū Ḥanīfā permits the buyer to elect to affirm or rescind the *murābaḥa*, while refusing to permit the buyer who elects to affirm it to demand a reduction of the price. This is inconsistent and should be explained. Nevertheless, I would prefer to concede the possibility that the solution of Abū Ḥanīfā is a residue of the original *tawliya*, in which the buyer takes the place of the seller, in the sense that the buyer acquires the effect and the rights and liabilities arising from the original sale. According to this, the false statement on the price by the seller, who serves as a mere messenger, does not affect the validity of the original sale. I used a similar argument to justify the solution of Abū Yūsuf regarding the case of the seller in a *murābaḥa* who makes a false statement on the cost price (see pp. 144–45).

Although there is no evidence in Iraqi legal opinion to substantiate this point of view, a Prophetic hadith transmitted by a number of Medinans can be invoked in support of it. The Prophet is reported to have stated that the transfer of ownership of foodstuffs is lawful if made by transfer of share (*shirk*), *tawliya* or cancellation by mutual agreement (*iqāla*), before the seller takes possession of them.<sup>128</sup> Why

<sup>125</sup> Shaybānī, *Aṣl*, 5:161.

<sup>126</sup> Dīb, *Essai*, 141.

<sup>127</sup> Sarakhsī, *Mabsūṭ* (n.d.), 13:86; *ibid.* (1421), 13:102; Wichard, *Zwischen Markt*, 264.

<sup>128</sup> Mālik-Yaḥyā, *Muwaṭṭaʿ*, 3:297, no. 1386; *ibid.*, tr. Bewley, 264a. See also, Saḥnūn, *Mudawwana*, 4:81; Saḥʿānī, *Muṣannaḥ*, 8:49, no. 14257.

can the buyer of foodstuffs resell them in a *tawliya* before he takes possession of them, in spite of the Medinan principle that prohibits the resale of foodstuffs by a person who has purchased them before he takes possession?<sup>129</sup>

I infer that the rule is based on the idea that the buyer in a *tawliya* takes the place of the seller in the strict sense of the word. As I will demonstrate later, when an *ishrāk* is concluded under certain conditions, the buyer is treated as one of the contracting parties of the original sale concluded between the original seller and the seller in the *ishrāk* (the original buyer). Since the *ishrāk* is a *tawliya* with respect to a share of the object and they are mentioned side by side in the above-mentioned Prophetic hadith, we may infer that according to the Medinan jurists once a *tawliya* is concluded, the buyer takes the place of the seller with respect to the effect and the rights and liabilities arising from the original sale. If so, we can infer that a *tawliya* originally used to serve the same purpose as an agency for purchase in which the agent professes that he is acting on behalf of the principal. However, it is speculative to justify the solution of Abū Ḥanīfa by invoking a Medinan rule.

There may be also a practical reason for this interpretation that the buyer in a *tawliya* takes the place of the seller if we suppose that a penniless merchant concludes a *tawliya* in which he is engaged to acquire an object for the buyer: the merchant will purchase the object on credit, because he is penniless. If, in this case, the rights and liabilities associated with the original sale are created between the original seller and the merchant, the original seller runs the risk of being unpaid or only partly paid in the event that the merchant is insolvent, even though he has been indemnified against the buyer in the *tawliya*. But if the buyer takes the place of the merchant (i.e. the buyer acquires the rights and liabilities arising from the original sale), the original seller is relieved from such a risk. Certainly, there is no evidence to indicate that a seller in a *tawliya* usually was penniless. But it is conceivable that such a transaction satisfied the desire of a penniless merchant and the original seller.

#### *Tawliya in the Maliki doctrine*

The Maliki jurist Ibn ‘Arafa (d. 803/1401) defines the *tawliya* as “transfer of an object that a person purchased to a person other

<sup>129</sup> Mālik-Yahyā, *Muwattaʿ*, 3:296–97; *ibid.*, tr. Bewley, 264a.

than the [original] seller for the original price [in exchange for the debt he owes to the transferee] (*tasyīr mushtarīn mā 'shtarā-hu li-ghayri bā'ī-i-hi bi-thamani-hi*).<sup>130</sup> I have added the interpolation following another Maliki jurist al-Tasūlī (d. 1258/1842–3), who defines 'tasyīr' as "a contract to give an immovable, a movable or anything else as a substitute for an existing debt (*'aqd 'alā daf' aṣl aw 'arḍ aw ghayri-hā fi dayn sābiq*)."<sup>131</sup> A case of such a *tawliya* is cited in the *Mustakhrāja* of al-'Utbī: *A* has a credit of 10 dirhams against *B*, who purchased from *C* wheat for which he has not yet paid the price and the delivery of which has not yet been completed. Upon this *A* demands that *B* sell him the wheat in a *tawliya*, with the price being offset by *A*'s credit against *B*. Mālik sees no harm in this.<sup>132</sup> We imagine that *B*, who was unable to pay his debt to *A*, was forced to transfer the wheat that he had purchased from a third person (*C*).

### 3. *Ishrāk*

The Hanafi jurist al-Samarqandī defines *ishrāk* as "a *tawliya* sale with respect to a share of the object, say half, a third etc. (*bay' al-tawliya fi ba'd al-mabī', min al-nisf wa-'l-thulth wa-ghayr dhālika*)."<sup>133</sup> For example, if a person purchases an object for 10 dinars and sells one-half of the object for 5 dinars, it is an *ishrāk*. I have mentioned the possible reason why in Iraq *ishrāk* was introduced to substitute for *tawliya*. But *ishrāk* is not explained in any detail in the Hanafi works. This is almost certainly because it was entirely replaced by several forms of partnership (*sharika, shirka*), in both theory and practice. For the Hanafis, *ishrāk* is simply a sale of a share, but one that can be distinguished from an ordinary sale only by the fact that the buyer demands no surcharge.

Such an understanding of the *ishrāk* is reflected in the following examples. First, *B* purchased an object from *A* and took possession of it. Then *B* sold a share of the object to *C* in an *ishrāk*, and *B* and *C* paid the price of the original sale to *A*. Subsequently *B* and *C* restored the object to its true owner at his request. In such a case, *C* can demand that *B* pay back the amount of money that *C* paid

<sup>130</sup> Raṣṣā', *Sharḥ*, 2:381.

<sup>131</sup> Tasūlī, *Bahja*, 2:284.

<sup>132</sup> 'Utbī, *Mustakhrāja*, 7:316.

<sup>133</sup> Samarqandī, *Tuhfa* (1964), 2:133; *ibid.* (1414), 2:105.

to *A*, while *B* in his turn can require *A* to pay back the entire price of the original sale.<sup>134</sup> Second, regarding a similar case of an *ishrāk* concluded in the presence of the original seller at the moment of the original sale, whereby the seller declares, during the contractual session, that the original seller will be responsible for any defect or eviction in the object, Abū Ḥanīfa holds that the declaration is invalid, because “the *sharika* [viz. *ishrāk*] is a sale (*al-sharika bayʿ*).”<sup>135</sup> In Abū Ḥanīfa’s view, it is the seller in the *ishrāk* who is responsible for a defect or eviction to the buyer: suppose, for example, that the original buyer, who buys the object for three dinars, resells one-third of it in an *ishrāk*, and he and the buyer in the *ishrāk* jointly pay three dinars to the original seller. If, subsequently, the buyer finds a defect in the object that is still in the state in which it was at the moment of the original sale (i.e. at the moment of the *ishrāk*), the buyer can cancel the *ishrāk* and require the seller (rather than the original seller) to return one dinar; the seller in his turn can cancel the original sale and require the original seller to pay back three dinars. The two examples show that Abū Ḥanīfa regards an *ishrāk* as a sale separate from the original sale.

In Medina, where the theory of partnership was less developed than in Iraq, some rules show that an *ishrāk* can create a partnership, in which the seller acts on behalf of the buyer. Mālik states, regarding the case where a seller who has purchased foodstuffs resells a share of them in an *ishrāk*: (1) if the buyer pays that part of the original price which corresponds to the transferred share before the foodstuffs are measured, the *ishrāk* is valid only when the payment is deferred to the same date as the date of payment in the original sale; (2) if the foodstuffs have been measured, the *ishrāk* is valid whether it is stipulated that the buyer pays the price on the spot or on credit. If the buyer pays the price on the spot, the *ishrāk* is regarded as ‘an independent sale’ (*bayʿ mustaʿnaf*) of the original sale.<sup>136</sup>

As indicated, with regard to the sale of a specified object, ownership transfers to the buyer when the object is specified (see p. 96). Therefore in case (2) the seller resells a share of the object that he owns. Underlying the solution adopted with respect to case (1) is the

<sup>134</sup> Shaybānī, *Hujja*, 2:710.

<sup>135</sup> Shaybānī, *Hujja*, 2:711. The statement of the same wording is attributed to Sufyān al-Thawrī. Ṣanʿānī, *Muṣannaf*, 8:48, no. 14254.

<sup>136</sup> Saḥnūn, *Mudawwana*, 4:80.

idea that in order for an *ishrāk* to be valid by virtue of which a share of the foodstuffs that the seller purchased is sold to the buyer before they are measured, it is necessary that both the seller and the buyer are regarded as the buyers in the original sale. This is why the condition is required that the payment in the *ishrāk* should be deferred to the same date as the date of payment in the original sale.

If the price in the original sale is reduced after an *ishrāk* has been concluded, the price of the *ishrāk* is automatically reduced proportionally.<sup>137</sup> In contrast, we have already seen Mālik's view of what happens when the price in the original sale is reduced after a *murābaḥa* has been concluded, i.e. (1) if the seller in the *murābaḥa* reduces the price in proportion to the reduction in the original sale, the *murābaḥa* is binding on the buyer; (2) if the seller refuses to reduce the price in this way, the buyer can elect to affirm or rescind the *murābaḥa*.<sup>138</sup> The solution adopted with respect to *ishrāk* seems to assume the existence of a partnership between the seller and the buyer.

Furthermore, if an *ishrāk* is concluded in the presence of the original seller at the moment of the original sale, whereby the seller declares, during the contractual session, that the original seller will be responsible for any defect or eviction in the object, the Medinan jurists hold that the declaration is valid.<sup>139</sup> In general, if the buyer has disposed of the object by resale, donation or manumission (if the object is a slave), the seller is no longer responsible for any defect or eviction.<sup>140</sup> Therefore, in this case, the share has transferred directly from the original seller to the seller and the buyer in the *ishrāk*.

Finally, let us examine the process by which the Malikis transformed *ishrāk* into the *ʿinān* partnership (*sharikat ʿinān*). Ibn Abī Zayd al-Qayrawānī (d. 386/996–7) cites a statement of Muḥammad b. al-Mawwāz (d. 269/883 or 281/895) and Ibn Ḥabīb (d. 238/853): if a person (*A*) stands by another person (*B*) who is buying merchandise, without intervening in the sale and, after the sale “he [viz. *A*] demands that he [viz. *B*] let him [viz. *A*] enter with himself [viz. *B*]

<sup>137</sup> Saḥnūn, *Mudawwana*, 4:236.

<sup>138</sup> Saḥnūn, *Mudawwana*, 4:236.

<sup>139</sup> Shaybānī, *Hujja*, 2:711; Mālik-Yaḥyā, *Muwattaʿ*, 3:328–29, no. 1418; *ibid.*, tr. Bewley, 275b, 31.41, no. 86; cf. ʿUtbī, *Mustakhraja*, 8:55; Ibn Rusḥd al-Jadd, *Bayān*, 7:138–39.

<sup>140</sup> Linant de Bellefonds, *Traité*, 1:341; Ruxton, *Maliki Law*, 164.

(*ṭalaba al-dhukhūl ma‘a-hu*),” Mālik holds that *B* must transfer a share through an *ishrāk* (*yushriku*) to *A*, if *B* intended to resell the object.<sup>141</sup> Ibn Abī Zayd adds that Ibn Ḥabīb writes that Mālik gives a merchant the right to demand that another merchant dealing with the same goods as he does transfer a share of them in an *ishrāk*; and that Ibn ‘Umar is reported to have rendered judgments to that effect.<sup>142</sup> Ibn al-Mawwāz and Ibn Ḥabīb justify the rule that merchants have such a right as follows: “I admit this because I fear that if it were not for the rule, people would injure one another. Therefore the rule contributes to public welfare.”<sup>143</sup> The reason why this rule “contributes to public welfare” is that were it not for this rule, merchants would concur one with another, which would cause a rise in the market price. Rather than prohibiting merchants from intervening in the transactions of other merchants, the Maliki jurists give them the right to demand that the latter accept their offer of an *ishrāk*.

But an *ishrāk* may be beneficial for both the seller and the buyer. Suppose, for example, that a local merchant buys goods (e.g. foodstuffs) in a suq. If he resells them in the same suq or elsewhere nearby, he can make only a small profit. But if he has a long-distance trader as a partner, he can make a greater profit. The *ishrāk* seems to have served also such a purpose: the local merchant sells the goods in an *ishrāk* to the long-distance trader, who resells his own share and that of the local merchant in a distant place for a good price. The difference between the price in the resale and the price for which the local merchant acquired the goods is the profit, which is distributed according to their respective shares.

Note that so far the name of the contract created by an *ishrāk* is not mentioned. But Ibn Rushd al-Jadd writes about the *‘inān* partnership:

As for the *‘inān* partnership, it is a partnership with respect to a specific object . . . It is in general permitted among people when they agree on it. It is binding on the suq merchants (*ahl al-aswāq*) with respect to whatever they purchased for trade (*tijāra*) without auction (*‘alā ghayr al-muzāyada*), if it is foodstuff found in the suq of foodstuffs destined for

<sup>141</sup> Ibn Abī Zayd, *Nawādir*, 7:334. For a similar report, see ‘Utībī, *Mustakhrāja*, 12:49.

<sup>142</sup> Ibn Abī Zayd, *Nawādir*, 7:335.

<sup>143</sup> Ibn Abī Zayd, *Nawādir*, 7:335.

traders (*ahl al-tijāra*) dealing with this kind of item. There is no dispute over this point . . . As for that which he [viz. a suq merchant] purchased for his house or shop, it is not included in the partnership (*sharika*), even if someone is present at the purchase. There is no dispute over this point.<sup>144</sup>

It is obvious that the partnership created by an *ishrāk* according to Mālik Ibn Rushd calls here *‘inān* partnership. Ibn al-Qāsim states, “I did not hear of it [viz. *‘inān* partnership] from Mālik, and I am not aware of any of the scholars of the Hījaz who knew of it.”<sup>145</sup> As far as I know, Ibn Abī Zamanayn (d. 399/1008–9) was the first Maliki jurist to define the *‘inān* partnership.<sup>146</sup>

#### 4. Conclusion

I have examined the original forms and the doctrinal development of what the later Hanafis called ‘trust sales.’

(1) The positive rules regulating the *murābaḥa* cited in the *Aṣl* of al-Shaybānī indicate that the original *murābaḥa* or eleven-tenths or twelve-tenths sale was usually concluded before the original sale and that at the moment when the seller acquired the object its ownership transferred to the buyer in the *murābaḥa*, whereas the rights and liabilities associated with the original sale were created between the original seller and the seller in the *murābaḥa*. With the introduction of the prohibition of the sale of an object that one does not own, the Hanafi jurists construed the function of the original *murābaḥa* into one of the direct agency in which the agent does not disclose the principal.

(2) The original *tawliya* was different from the *tawliya* as defined by the later jurists in two points: first, the seller could claim a share of the profit earned through the resale of the object by the buyer. This is to say, the original *tawliya* was similar to the original *murābaḥa*, in the sense that the seller in these sales requires the buyer to pay him a certain commission or remuneration. In the former, it is defined

<sup>144</sup> Ibn Rushd al-Jadd, *Muqaddamāt*, 3:37. For the Maliki *‘inān* partnership in a different way, see Udovitch, *Partnership*, 145–46. For the Hanafi *‘inān* partnership, see *ibid.*, 119–41.

<sup>145</sup> Saḥnūn, *Mudawwana*, 5:68, cited in Udovitch, *Partnership*, 146.

<sup>146</sup> He describes it as, “two persons has a share in an object, the share of one of them not being superior to that of the other partner.” Ibn ‘Abd al-Rafī‘, *Mu‘in*, 2:530.

as a surcharge on the cost price for which the seller acquires the object; in the latter, it is defined as a percentage of the object or a percentage of the profit earned by reselling the object. Second, it may have been possible to conclude it before the seller acquired the object.

The introduction of two principles, i.e. the prohibition of the sale of an object that one does not own, and the prohibition of profiting from an object the risk of which one does not assume, forced the Hanafi jurists to redefine the *tawliya* as a trust sale. The original *tawliya* may have served as a model for direct agency in which the agent discloses the principal, although there is little clear evidence to substantiate this thesis.

(3) *Ishrāk* was introduced as a substitute for the original *tawliya*. It is almost neglected in the Hanafi works, whereas the Malikis discuss it in some detail. Mālik maintains that an *ishrāk* can create a partnership between the seller and the buyer retroactively from the moment of the original sale. It led to the formation of the Maliki *‘inān* partnership.

### Section 3 *Salam*

*Salam* or *salaf* is a sale in which the buyer (*muslim*, *musallim*, *muslif*, *musallif*) prepays the price (*ra’s al-māl*, ‘capital’) to the seller (*muslam ilay-hi*, *musallam ilay-hi*, *muslaf ilay-hi*, *musallaf ilay-hi*) for the object (*muslam fī-hi*, *musallam fī-hi*, *muslaf fī-hi*, *musallaf fī-hi*) to be delivered by the end of a specified date. The Hanafis and Hanbalis prefer the term ‘*salam*,’ while the Malikis and Shafi‘is prefer the term ‘*salaf*.’ The positive rules governing *salam* are often complicated. The most important reason for this is historical. While some of the older rules that originated in the commercial practices were retained, new rules, some inspired by principles alien to the customary *salam*, were added later.

I begin by enumerating the points of discussion among the jurists. I will then discuss various types of *salam* that the jurists bear in mind when they discuss positive solutions. The main part of this section is dedicated to analyzing the disputes among the jurists over validity of contract, warranty against defect, and a variety of rules regarding performance and cancellation of contract. Through the analysis of these disputes I will argue that the nature of the *salam* changed

in the course of the eighth century C.E. At first, the seller in a *salam* could serve as a middleman for the buyer, and the jurists took into consideration the process by which the seller acquires the object to safeguard his interests. Later they came to treat the *salam* as an independent contract, disregarding the process of the seller's acquisition of the object.

### 1. *Issues over which jurists are divided*

The jurists unanimously permit a *salam* for what is measured or weighed, relying, among others, on the well-known hadith in which Ibn 'Abbās states:

The Prophet arrived in Medina, where they used to undertake *salam* in dates for a period of two or three years. The Messenger of God said, "He who undertakes a debt [of *salam*] should do it through a determined price, a determined weight, and for a determined period."<sup>147</sup>

The majority of the jurists permit a *salam* in goods that can be determined by description and number, but they disagree over the question about whether or not animals and slaves can be determined by description.<sup>148</sup> Be that as it may, since the object of a *salam* is usually something measured or weighed, I exclude from my consideration here a *salam* for other items.

There are many issues over which jurists are divided.

(1) In a *salam*, payment, by definition, is made first, with the object to be delivered later. *Salam* is therefore subject to the prohibition of *ribā* of delay, the guidelines for which vary from one school to another.

(2) Although the jurists unanimously hold that the price and the kind, and the quality and the quantity of the object must be determined at the moment of the contract, this rule was not always followed in practice.

(3) The majority opinion holds that payment should be made at the moment of the contract, but the Malikis are not so stringent on this point as the other schools are.

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<sup>147</sup> Bukhārī, *Ṣaḥīḥ*, *salam*, 2. For a hadith of slightly different wordings, see Ibn Māja, *Sunan*, *tijārāt*, 59.

<sup>148</sup> Marghīnānī, *Hidāya*, 3:71–72; Shaybānī, *Aṣl*, 5:13; Jaṣṣāṣ, *Mukhtaṣar*, 3:11–12; Saḥnūn, *Mudawwana*, 4:2–3; Muzanī, *Mukhtaṣar* (1393), 90; *ibid.* (1419), 127; Ibn Qudāma, *Kāfi*, 2:110.

(4) There are two main issues with respect to the date of delivery:

(a) The jurists disagree over whether or not an immediate *salam* (*salam ḥāll*), i.e. a *salam* in which no period of delay is stipulated, is valid.

(b) When a period of delay is stipulated, there are two sub-issues.

(i) Is it necessary to specify the date of delivery, or is it permitted to determine the period of delay by naming either the season or events such as cutting or harvesting? (ii) Is there any minimum period of delay?

(5) Is it permitted to accept a pledge or a surety in a *salam*?

(6) The Hanafis hold that for a *salam* to be valid it is necessary that items of the kind specified in the contract do not cease to exist from the time of the contract until the date on which the performance falls due. For the other schools, it suffices that items of the kind specified exist in the market on the date on which the performance falls due.

(7) In case of defect, the majority of jurists apply to a *salam* the rules for an ordinary sale, whereas Abū Ḥanīfa and Abū Yūsuf adopt rules that are more favorable to the seller.

(8) The jurists disagree as to whether or not a partial cancellation is permitted.

(9) They disagree about the rule regulating the case in which the subject matter disappears from the market.

(10) They disagree about the validity of accord and satisfaction made before or after the end of the specified period.

Apart from issues (1) and (10), which seem to have appeared as a result of the introduction of rules alien to *salam*, these issues are critical for our effort to recover the original forms of *salam* and their economic functions. I will examine these issues in details. First, however, it will be useful to refer to the various types of *salam*.

## 2. Various types of *salam*

*Salam* is an exception to the rule that prohibits someone from selling an object that does not belong to him. Its lawfulness is established, *inter alia*, from the text of Q. 2:282, “O you who believe, when you contract a debt for a fixed term, write it down (*yā ayyuhā alladhīna āmanū, idhā tadāyantum bi-dayn ilā ajal musammā fa-ktubū-hu*).”<sup>149</sup>

<sup>149</sup> Ibn Abī Shayba, *Muṣannaf*, 4:483, no. 22312; Bayhaqī, *Sunan*, 6:18; Marghīnānī, *Hidāya*, 3:71.

It is not certain, however, that this verse in fact refers to a *salam*, and if so, it is not clear what type of *salam* it is.

The legal texts mention the following items as the possible subject matter of a *salam*: clay (as a drug), copper, iron, arsenic, sulfur, alum, lead, quicksilver, brass, wool, fur, stones for construction, bricks, gypsum, lime, arsenic, firewood, timber, wood for construction, olibanum, mastic, glue, resin, fish, birds, fodder, honey, milk, butter, head, feet, fat of animals, meat, living animals, walnut, wheat, barley, sorghum, beans, date, silk, linen, cloth, leather, parchment, glass vessel, blade of a sword or knife, paper, pearl, precious stones, chrysolite, sapphire, goosefoot, ambergris, henna, rose, indigo, woad, aromatic plants, drugs. Thus many products including manufactured goods can be the subjects of a *salam*, but foodstuffs are most often mentioned. Some of the rules regulating a *salam* appear to be connected with particular objects, especially foodstuffs.

With respect to the relationship between the seller and the buyer, *salam* can be divided into several types.

Type A: A *salam* of fruit and vegetables to be harvested in a specified orchard or village is discussed in some details in the *Mudawwana*.<sup>150</sup> This is doubtless a *salam* concluded between a merchant and a cultivator or a landowner. The sentence in the above-cited hadith attributed to Ibn ‘Abbās, “they used to undertake *salam* in dates for a period of two or three years” seems to refer to this type of *salam*. Ibn Ṭāwūs is reported to have stated that *salam* should be concluded with only those who possess cultivated land or a date orchard.<sup>151</sup> The advantages of such a *salam* for the contracting parties are clear. The seller can sell his products at a stable price over several years. The buyer can purchase them at a price lower than their anticipated market price.

The *salam* of hides as mentioned by Ibn al-Humām falls within this type of *salam*.

There are countless items that can be the subject matter of a *salam*. In most cases the seller acquires the subject matter on several occasions. Does the seller of hides slaughter 1000 heads of cattle on the date on which performance becomes due and deliver the hides to the buyer? The same is true of fish, cloth, herbs, wood and honey.<sup>152</sup>

<sup>150</sup> Saḥnūn, *Mudawwana*, 4:5–6, 8–9.

<sup>151</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:7, no. 14075.

<sup>152</sup> Ibn al-Humām, *Fath*, 5:332.

In this connection, consider the hadith in which Ibn ‘Abbās states, “I bear witness that God made lawful and permitted a guaranteed *salam* (*al-salaf al-madḡmūn*) for a term, for God says, ‘when you contract a debt for a fixed term’ [Q. 2:282].”<sup>153</sup> The term “a guaranteed *salam*” signifies that the object is not specified and that if the object that the seller intends to deliver to the buyer is lost for some reason, the seller must provide a substitute.<sup>154</sup> Later jurists take it for granted that the object is guaranteed: thus the expression “guaranteed *salam*” may have appeared when a *salam* of items from a specified place still was the rule or at least was not rare.

Type B: Several rules are best explained with reference to a *salam* in which the seller serves as a middleman for the buyer, with the difference between the expenses the seller spends to acquire the object and the price of the *salam* being a commission or a remuneration for the seller. For example, al-Ḥasan al-Baṣrī is reported to have said, “Don’t buy it [viz. the object of a *salam*] at a higher price or at the same price as the capital [of the sale].”<sup>155</sup> This is to say, the seller is expected to buy the object only if he can earn the difference between the price of the *salam* and the expenses for which he acquires the object.

In this context, consider the following examples: one of the Companions Ibn Abī Awfī is reported to have stated, “We used to undertake *salam* for wheat and dried grapes with the Nabataeans from Syria (*Nabīṭ min ahl al-Shām*), while the Prophet was among us.”<sup>156</sup> Graf writes about the Nabataeans, “Just before the dawn of Islam, ‘Nabataean’ merchants (the *Nabīṭ* or *Anbāt*) from Syria were active in Medina.”<sup>157</sup> Al-Layth b. Sa‘d is reported to have stated, “The Medinans used to conclude a *salam* and give money to camel-owners to buy wheat and dried grapes. The camel-owners then left for Syria or Egypt with the money, and transported and provided [wheat and dried grapes].”<sup>158</sup> Ibn ‘Umar is reported to have stated, “I wanted someone to receive from me one dinar in exchange for

<sup>153</sup> San‘ānī, *Muṣannaf*, 8:5, no. 14064.

<sup>154</sup> For a case in which a guaranteed *salam* is opposed to a *salam* in a specified object, see Saḥnūn, *Mudawwana*, 4:7.

<sup>155</sup> Shaybānī, *Hujja*, 2:624.

<sup>156</sup> Ibn Abī Shayba, *Muṣannaf*, 4:482–83, no. 22305. See also, Bayhaqī, *Sunan*, 6:25–26; Ṭabarī, *Ikhtilāf*, 94.

<sup>157</sup> D.F. Graf, “Nabaṭ,” in *EI*, new edition, 7:834b.

<sup>158</sup> Jaṣṣāṣ, *Mukhtaṣar*, 3:6.

wheat (*ṭaʿām*) that he would bring to me from Syria.”<sup>159</sup> Although the term *salam* does not appear in this report, it is clear that Ibn ʿUmar is talking about a *salam*. We may infer that in these examples the seller were supposed to purchase the object for a price lower than the price of the *salam*.

A *salam* in which a short period of delay, such as two or three days, is stipulated may be included in this type. This inference is supported by examples of *salam* in which goods are exchanged for goods of the same kinds. For example, the Medinan jurist Rabīʿa argues about the exchange of pieces of cloth on a delayed term.<sup>160</sup> Such a transaction may have had little to do with actual commercial activities: he may have simply wanted to cover all the possible questions relating to the price and the object. But it is also possible that such a *salam* did have an economic meaning. Suppose, for example, that a long-distance merchant brought cloth from a place remote from the city in which he wants to sell it and wishes to purchase cloth that is a special product of the city. Indeed, he might appoint an agent to sell his cloth and acquire local cloth. He may achieve the same purpose by bartering with a local cloth merchant, for example through a *salam* in which a long-distance merchant sells his cloth for local cloth that a local merchant gives him within a short period (e.g. by the departure of the long-distance merchant).

Type C: The following is the most important type of *salam* envisaged in the legal texts written from the ninth century onwards. The Hanafi jurist al-Sarakhsī states, “The price stipulated in a *salam* is usually smaller than the market price of the object.”<sup>161</sup> It follows that the seller usually does not pay the price to buy the object of the *salam*, but he intends to make use of it as capital, as indicated in the following statement by the Hanafi jurist Ibn al-Humām: “Most of them receive the price to make a profit with it, and pay the expenses for his family from the gain (*kasb*) earned with the price, and acquire gradually the object of the *salam*.”<sup>162</sup>

The seller uses the price (capital) to buy items other than the object of the *salam*, and makes a profit by reselling them. By repeat-

<sup>159</sup> Sanʿānī, *Muṣannaḡ*, 8:5, no. 14062.

<sup>160</sup> Saḥnūn, *Mudawwana*, 4:131.

<sup>161</sup> Sarakhsī, *Mabsūṭ* (n.d.), 12:130; *ibid.* (1421), 12:154. For a similar statement, see *ibid.* (n.d.), 12:126; *ibid.* (1421), 12:149.

<sup>162</sup> Ibn al-Humām, *Fath*, 5:332.

ing this process he recovers the difference between the price in the *salam* and the amount of money he will pay to acquire the object of the *salam*, thus earning a net profit. This is what al-Marghīnānī bears in mind when he writes, “It is imperative to stipulate the date [on which the *salam* is to be performed] so that the seller may acquire the object and deliver it.”<sup>163</sup> It is likely, however, that at any moment, the total amount of his debts exceeds the amount of cash he possesses. The Hanafī jurist al-Kāsānī points a seller in such a situation when he writes, “*Salam* is a sale of insolvents (*mafātīs*).”<sup>164</sup> Likewise the Hanbali jurist Ibn Qudāma (d. 620/1223) writes that a *salam* is allowed “for the benefit of insolvents (*fi haqq al-mafātīs*).”<sup>165</sup> In short, this type of *salam* functions as a means of financing.

The origin of this type of *salam* is suggested in the term ‘*salaf*’ used by the Malikis and Shafī‘is, which means at the same time a loan. As will be noted, interesting-bearing loans were prohibited (see p. 214). In addition, “A loan is considered to have fallen due even if a term was stipulated (*al-qard ḥāll wa-in kāna ilā ajal*),”<sup>166</sup> so the lender has the right to demand at any time that the borrower repay what he borrowed. It is sound to assume that *salam* could be undertaken as a substitute for an interesting-bearing loan. It is interesting to cite the statement ascribed to the Medinan jurist al-Zuhrī, “A concession was made for *salam* because the market price fluctuates, so that you cannot know in advance whether or not it will be unfavorable for you (*innamā rukhkhīṣa fi al-tastīf li-anna al-as‘ār takhtalīfu, lā tadrī a-yakūnu ‘alay-ka am lā*).”<sup>167</sup> As noted, the later jurists understood that the seller in a *salam* of this type will usually suffer a loss, but he has a chance to cover the loss by investing the *salam* price in other transactions. In view of the social need for *salam*, it had to be tolerated. This statement reflects that general attitude.

Type D: Ibn al-Qāsim states that Mālik declared valid a *salam* in which the buyer prepays one dinar for fifteen *ṣā‘*s of wheat, and the seller promises to provide one *ṣā‘* every day for fifteen days.<sup>168</sup> One

<sup>163</sup> Marghīnānī, *Hidāya*, 3:73.

<sup>164</sup> Kāsānī, *Badā‘ī* (1402), 5:212; *ibid.* (1418), 7:144.

<sup>165</sup> Ibn Qudāma, *Mughnī*, 4:195.

<sup>166</sup> Ibn Abī Shayba, *Muṣannaf*, 4:324, no. 20578. See also, Kāsānī, *Badā‘ī* (1402), 7:396; *ibid.* (1418), 10:600.

<sup>167</sup> San‘ānī, *Muṣannaf*, 8:6, no. 14069.

<sup>168</sup> ‘Utbī, *Mustakhrāja*, 7:206. For a similar statement of Mālik, see *ibid.*, 7:109; Ibn Abī Zayd, *Nawādir*, 6:66.

*ṣāʿ* is equivalent to four *mudds*. According to the Shafiʿis a poor husband is obliged to supply his wife with one *mudd* of foodstuffs per day, a husband of average income one and a half *mudds*.<sup>169</sup> Therefore this *salam* is concluded between a retailer and an individual for the sale of foodstuffs for consumption. A *salam* of this type also could serve as a form of financing.

Type E: The contract of manufacture (*istiṣnāʿ*) can be regarded as a sort of *salam*.<sup>170</sup> The Hanafi jurist al-Kāsānī explains it as follows: a client asks an artisan, such as a shoemaker or a brass founder, to transform raw material possessed by the artisan into an object specified by the client, in exchange for which the client pays such-and-such an amount of money.<sup>171</sup>

As will be shown, juristic disagreements over numerous issues regarding a *salam* can be reduced to the difference between the types of *salam* (in particular A, B and C) the jurists bear in mind when they discuss them.

### 3. *Conditions of validity*

I will now examine issues (1)–(5) enumerated above, pertaining to the validity of a *salam*. I will consider issue (6) in 5 in connection with the case in which the subject matter disappears from the market.

#### *The price and the object in relation to the prohibition of ribā of delay*

As noted, in a *salam* contract the payment is by definition made first, with the object to be delivered later. *Salam* contract is therefore subject to the prohibition of *ribā* of delay. The Hanafis prohibit a *salam* in which an item sold by measure is sold for an item sold by measure, and a *salam* in which an item sold by weight is sold for an item sold by weight.<sup>172</sup> But they permit a *salam* in which dinars or dirhams are used to pay for an item that is sold by weight, although dinars and dirhams are normally exchanged in weight, since, according to the early Hanafis, there is need for such a *salam*.<sup>173</sup> The Malikis prohibit a *salam* in which gold is sold for gold or silver, a *salam* in

<sup>169</sup> Shīrāzī, *Tanbīh*, 207; Nawawī, *Minhāj*, 3:426.

<sup>170</sup> Schacht, *Introduction*, 155; Shaybānī, *Ṣaḥīḥ* (1406), 324.

<sup>171</sup> Kāsānī, *Badāʾiʿ* (1402), 5:2; *ibid.* (1418), 6:84.

<sup>172</sup> Samarqandī, *Tuḥfā*, 2:10/2:11; Kāsānī, *Badāʾiʿ* (1402), 5:214; *ibid.* (1418), 7:151.

<sup>173</sup> Sarakhsī, *Mabsūṭ* (n.d.), 12:121; *ibid.* (1421), 12:142. See also p. 247.

which silver is sold for gold or silver, and a *salam* in which foodstuffs are sold for foodstuffs either of the same kind or of different kinds.<sup>174</sup> But a *salam* in which gold is sold for gold or silver for silver, i.e. a loan, is permitted, insofar as it contains no interest.

*Ignorance of the price and the object*

Jurists are unanimous in requiring that the species, the quality and the quantity of the price<sup>175</sup> and the object<sup>176</sup> are known at the moment of contract. This is in accordance with the general rule that prohibits any ignorance (*jahl*, *jahāla*) regarding the object, the price, and the terms of contract in an onerous contract. However, some reports recorded in the early sources allude to a contrary practice.

(1) The Companion Abū Saʿīd al-Khudrī reportedly said:

It constitutes *ribā* to determine [the quantity of the object in] a *salam* based on the market price. You must designate how much [you buy] with your dirhams. Increase with the dirhams as much as you can (*al-salam kamā yaqūmu min al-sīr ribā, wa-lākin tusammī bi-darāhimi-ka kaylan maʿlūman, wa-ʿstakthir bi-hā mā ʿstataʿta*).<sup>177</sup>

I surmise that “the market price” mentioned here signifies the price of the object on the date on which the delivery falls due, for two reasons. First, there must be no harm in setting the price in a *salam* at the market price of the object on the date of contract, since the market price on this date is known. Second, a certain Abū ʿUbayda is reported to have stated that his father prohibited the sale of foodstuffs at “the threshing floor price (*sīr al-baydar*),”<sup>178</sup> i.e. at the price at the moment of harvest.

However, one may object to this interpretation, for the following reason. As will be mentioned, one of the essential elements of a *salam* is that the price is actually paid at the moment of the contract. If the price is determined on the basis of the market price of the object

<sup>174</sup> Ibn Rushd al-Jadd, *Muqaddamāt*, 2:31–32.

<sup>175</sup> Qudūrī, *Mukhtaṣar*, 2:43; Samarqandī, *Tuhfa* (1964), 2:8; *ibid.* (1414), 2:9; Ibn Rushd al-Ḥafīd, *Bidāya*, 2:203; *ibid.*, tr. Nyazee, 2:242; ʿAbd al-Wahhāb, *Maʿūna*, 2:987; Nawawī, *Minhāj*, 2:103; *ibid.*, tr. Van Den Berg, 147.

<sup>176</sup> Qudūrī, *Mukhtaṣar*, 2:43; Samarqandī, *Tuhfa* (1964), 2:10; *ibid.* (1414), 2:10–11; Ibn ʿAbd al-Barr, *Kāfī*, 337; ʿAbd al-Wahhāb, *Maʿūna*, 2:987; Nawawī, *Minhāj*, 2:107–08; *ibid.*, tr. Van Den Berg, 148–49; Ibn Qudāma, *Kāfī*, 2:111; Bahūtī, *Kashshāf*, 3:297–98.

<sup>177</sup> Sanʿānī, *Muṣannaḥ*, 8:7, no. 14072. See also, Bayhaqī, *Sunan*, 6:25.

<sup>178</sup> Bayhaqī, *Sunan*, 6:25.

on the date on which the delivery becomes due, how can one determine the price to be paid at the moment of contract? The answer to this objection is suggested in the sentence included in the above-cited statement, “You must designate how much [you buy] with your dirhams.” This sentence prohibits a contract in which the price owed by the buyer is fixed, but the quantity that the seller must provide is not known. To illustrate this point, let us take the case of a *salam* in which the buyer pays 100 dirhams for wheat. If the seller is required to provide nine-tenths of the quantity of wheat that he can acquire for 100 dirhams when the performance falls due, he serves as a middleman for the buyer, the difference between 100 dirhams and the cost price for which he acquires the wheat being a commission or remuneration. If the seller is required to provide eleven-tenths of the quantity of wheat that he can purchase for 100 dirhams, this *salam* is equivalent to a loan with a 10 % interest.

The following report recorded in the *Muṣannaf* of al-Ṣan‘ānī also appears to refer to a transaction in which the price is determined on the basis of the market price of the object on the date on which the performance falls due.

(2) The Basran traditionist and jurist Ibn Sīrīn reportedly disapproved of a buyer who “determines the price as more than or less than the market price [of the object], stating, ‘It belongs to me whatever the market price may be (*kāna yakrahu an yashtariya min al-rajul wa-yashtarīta ‘alay-hi bi-akthar aw bi-aqall min al-sīr, yaqūlu “huwa lī kayfa mā qāma min al-sīr”*)’.”<sup>179</sup>

Although no specific term is used to refer to this transaction, al-Ṣan‘ānī includes this report in the chapter entitled “no *salaf* except for a determined period.” This may be because it shares a common feature with the *salam*: the object is to be delivered in the future. Why is it not called *salam*? This may be because the essential element of a *salam*, the prepayment of the price, is absent. Indeed it is conceivable to imagine that the seller paid at the contractual session the expected market price of the object, to be liquidated on the date of delivery. It is more likely, however, that the payment was made in exchange for delivery.

If so, what is the economic meaning of such a transaction? In my view, if the price in a *salam* is greater than the market price of the

<sup>179</sup> San‘ānī, *Muṣannaf*, 8:6–7, no. 14070.

object, such a transaction serves economic aims similar to those of the original *murābaḥa* or the eleven-tenths or twelve-tenths sale. In the original *murābaḥa*, I argued above, the difference between the price in the original sale and that of the *murābaḥa* was a remuneration for the seller, who serves as an agent for the buyer. Here also the difference between the price in this transaction and the market price may have been the seller's commission or remuneration. As for the case in which the price is equal to the market price, such a transaction may serve the same purpose as the original *tawliyya*: the seller is supposed to have a share of the profit earned through the resale of the object by the buyer. The same reasoning may be valid for a case in which the price is smaller than the market price: the loss that the seller incurs from the *salam* is expected to be covered by his share of the profit earned through the resale of the object by the buyer.

*Payment of the price at the contractual session*

The Hanafi rule is that a *salam* is invalid if the price is unpaid at the contractual session.<sup>180</sup> The Shafi'is<sup>181</sup> and Hanbalis<sup>182</sup> adopt the same position. According to later jurists, the reason for this solution is that delay in the payment of the price violates the general prohibition of 'al-dayn bi-'l-dayn,' i.e. 'obligation for obligation' or 'credit for credit' (to be exact, the term 'dayn' refers to the object of an obligation or credit): as the delivery of the object is by definition delayed, the price must be received before the contractual session is over to avoid 'al-dayn bi-'l-dayn.'<sup>183</sup> However, the rule that a *salam* is invalid if the price is not paid before the contractual session is over is different from that which applies to an ordinary sale: indeed according to the majority view it is prohibited to stipulate a delay in both the delivery of the object and the payment of the price because of

<sup>180</sup> Qudūrī, *Mukhtaṣar*, 2:44; Shaybānī, *Hujja*, 2:613; Samarqandī, *Tuhfa* (1964), 2:9; *ibid.* (1414), 2:10. The stipulation to allot the credit the buyer has against the seller as the price of a *salam* is invalid, making the *salam* invalid to the extent of the amount of the credit. Shaybānī, *Ṣaḡhūr* (1406), 323.

<sup>181</sup> Ramlī, *Nihāya*, 4:179–80; Muzanī, *Mukhtaṣar* (1393), 90; *ibid.* (1419), 127; Shīrāzī, *Muhadhdhab*, 1:300.

<sup>182</sup> Khiraqī, *Mukhtaṣar*, 56; Ibn Qudāma, *Kāfi*, 2:115.

<sup>183</sup> Sarakhsī, *Mabsūt* (n.d.), 12:144; *ibid.* (1421), 12:172; Ramlī, *Nihāya*, 4:179–80; Ibn Qudāma, *Kāfi*, 2:115; Wichard, *Zwischen Markt*, 142. Al-Ramlī explains that delay in the payment of the price adds to the uncertainty of a *salam*, which is essentially an aleatory contract. Ramlī, *Nihāya*, 4:179–80.

the prohibition of ‘*al-dayn bi-’l-dayn*,’ and such a stipulation renders the contract invalid. But if one of the parties who is required to perform his obligation (to deliver the object or to pay the price) before the contractual session is concluded fails to do so, with the result that either party has a *dayn* against another party (‘*al-dayn bi-’l-dayn*’), this does not affect the validity of the contract.<sup>184</sup> Moreover in the case of non-performance, the other party does not have the right to unilaterally cancel the contract (some jurists deem valid a clause stipulating that the contract is canceled if the price is not paid).<sup>185</sup> It is therefore doubtful whether the prohibition is the true reason why non-payment of the price causes a *salam* to be invalid.

Although the true reason is difficult to detect, we know that contracts re, such as donation,<sup>186</sup> *ṣadaqa*,<sup>187</sup> loan of a fungible thing (*qard*, *mutuum*),<sup>188</sup> loan for use (*ʿāriyya*)<sup>189</sup> and pledge,<sup>190</sup> are subject to the same rule: they take effect only when the object is delivered. The same rule applies to *salam*. Sufyān al-Thawrī is reported to have said, “A *salam* takes effect only with receipt [of the price] (*lā yakūnu salaf illā bi-’l-qabd*).”<sup>191</sup> In addition, al-Shaybānī states as follows regarding the agency in a *salam*.

(1) *A* appoints *B* as his agent for *sale* of wheat in a *salam*. If *A* remains in the contractual session until *B* receives the price, the *salam* is valid. The price belongs to *A*, who is required to deliver wheat, “because he is a party to the sale contract (*li-anna-hu waliya ṣafqat al-bayʿ*),” rather than *B*. If, alternatively, *A* leaves the contractual session before *B* receives the price from the buyer, the *salam* becomes invalid in relation to *A*.<sup>192</sup>

(2) *A* appoints *B* as his agent for *purchase* of wheat in a *salam* and gives *B* dirhams as the price. If *B* gives the dirhams to the seller in a *salam*, the *salam* takes effect in relation to *A*. Thus *A* can demand

<sup>184</sup> Ibn Abī Zayd, *Nawādir*, 6:69.

<sup>185</sup> Shalabī, *Madkhal*, 631; Aḥmad Ibrāhīm Ibrāhīm Bey, “Uqūd,” 719.

<sup>186</sup> Ṭaḥāwī, *Mukhtaṣar*, 138; Qudūrī, *Mukhtaṣar*, 2:171; Aḥmad Ibrāhīm Ibrāhīm, “Iltizām,” 2 (1932), 608–09.

<sup>187</sup> Ṭaḥāwī, *Mukhtaṣar*, 138.

<sup>188</sup> Kāsānī, *Badāʾiʿ* (1402), 7:394–95; *ibid.* (1418), 10:596; Aḥmad Ibrāhīm Ibrāhīm, “Iltizām,” 3 (1933), 230–31.

<sup>189</sup> Sarakhsī, *Mabsūṭ* (n.d.), 11:134; *ibid.* (1421), 11:143–44.

<sup>190</sup> Samarqandī, *Tuhfa* (1964), 3:37; *ibid.* (1414), 3:38; Ghunaymī, *Lubāb*, 2:54.

<sup>191</sup> Sanʿānī, *Muṣannaḥ*, 8:91, no. 14443.

<sup>192</sup> Shaybānī, *Aṣl*, 5:77.

that the seller deliver wheat to *A*.<sup>193</sup> Note that in order for the *salam* to be valid it is not required that *A* (the principal) is present to the contractual session, or that *B* professes that he is acting on behalf of *A*.

As noted, the contracts re concluded by an agent are subject to similar rules:

- (1) If the agent of a person who *receives* the object, e.g. donee or pledgee, discloses the principal, the effect and the rights and liabilities arising from the contract accrue to the principal; otherwise they accrue to the agent, in other words, the contract is invalid in relation to the principal.
- (2) The agent of a person who *delivers* the object, e.g. donor or pledgor, is free to or not to disclose the principal. In either case the effect and the rights and liabilities of the contract accrue to the principal.<sup>194</sup>

If “dirham” is replaced with “object,” the rules governing the agency in a *salam* are similar to those that govern the agency in the contracts re. Why is a *salam* treated in the same manner as the contracts re? One possible explanation is that this rule derives from a type B *salam*. As noted, al-Ḥasan al-Baṣrī is reported to have said, “Don’t buy it [viz. the object of a *salam*] at a higher price or at the same price as the capital [of the sale].”<sup>195</sup> According to this, if the price for which the seller can acquire the object is higher than the price of the *salam*, he can cancel the contract, returning to the buyer the same amount of money as the price. That is to say, this type of *salam* can be an interest-free loan. This may be the original reason why a *salam* is binding only when the buyer delivers the price. But this explanation poses a problem, because the jurists of the four Sunni schools of law explain it with the type C *salam* in mind.

I am inclined to an explanation that suggests this rule seeks to protect the buyer. As noted, for the Sunni jurists, who bear a type C *salam* in mind, “*Salam* is a sale of insolvents,” i.e., there is always

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<sup>193</sup> Shaybānī, *Aṣl*, 5:76. See also, Karābisī, *Furūq*, 2:54; Sarakhsī, *Mabsūt* (n.d.), 12:209; *ibid.* (1421), 12:251; Samarqandī, *Tuhfa* (1964), 3:319; *ibid.* (1414), 3:230; Ghunaymī, *Lubāb*, 2:143.

<sup>194</sup> Shaḥāta, “Naẓariyya,” 354; Sanhūrī, *Maṣādir*, 5:196–99; Abū Zahra, *Milkiyya*, 387; Chehata, “Concept de représentation,” 438–39.

<sup>195</sup> Shaybānī, *Hujja*, 2:624.

a danger that the seller will be unable to perform his obligations. This may be why the Hanafis, Shafi'is and Hanbalis permit the buyer to unilaterally cancel the contract by refusing to pay the price. By so assuming, we can justify the solutions adopted by al-Shaybānī regarding cases (1) and (2). When the seller appoints an agent, it is crucial for the buyer to know who the principal is, i.e. who is legally obligated to perform the contract, for he would not conclude a *salam* with a seller who is in financial straits. Conversely, when the buyer appoints an agent, the seller may ignore the name or even the existence of the principal (buyer), for the payment of the price, which is the sole obligation of the buyer, is performed during the contractual session.

The position of the Maliki jurists is as follows:<sup>196</sup>

- (1) There are disputes about the validity of a clause stipulating a delay in the payment of the price: some hold that such a clause makes the contract invalid; others hold that a clause stipulating a delay of no more than three days does not affect the validity of the contract, but that if the delay exceeds three days, the contract becomes invalid. The former opinion is the same as the Hanafi opinion, and the latter opinion is the same as the Maliki opinion with respect to an ordinary sale.<sup>197</sup>
- (2) Cases in which no delay is stipulated can be subdivided into two classes.
  - (a) If the delay in the payment of the price does not exceed three days, it does not affect the validity of the contract. This rule applies to an ordinary sale.
  - (b) If the delay exceeds three days, some Malikis hold that the delay does not affect the validity of the contract, irrespective of the species of the price. This rule applies to an ordinary sale. Others hold that if the price is money, the contract becomes invalid; otherwise the delay does not affect the validity of the contract.

How can we explain the position of those jurists who distinguish between money and other items with respect to case (2) (b)? In my

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<sup>196</sup> Ibn Rushd al-Jadd, *Muqaddamāt*, 2:28. See also, Saḥnūn, *Mudawwana*, 4:38; Ibn Abī Zayd, *Nawādir*, 6:68–69; Ibn al-Jallāb, *Tafīr*, 2:135; ‘Abd al-Wahhāb, *Ma‘ūna*, 2:988.

<sup>197</sup> Saḥnūn, *Mudawwana*, 4:220.

view, they bear a type C *salam* in mind, when they discuss the validity of a *salam* in which money is paid. As noted, a type C *salam* is intended to serve as a means of financing. In such a *salam*, the seller needs there to be a minimum period during which he can recover the difference between the price in the *salam* and the amount of money he will expend to acquire the object of the *salam*. By each day the payment of the price is delayed, there is a smaller chance of recovering the difference. This appears to be why a *salam* becomes invalid if the delay in payment exceeds three days.

What if only part of the price is delivered at the contractual session? The Hanafis,<sup>198</sup> the Shafi'is,<sup>199</sup> and some Hanbalis<sup>200</sup> prescribe that the contract is valid only to the extent of the amount of the money paid to the seller. For example, if the buyer pays 7 dinars in a *salam* in which it was agreed that the buyer is to pay 10 dinars, 30 % of the contract becomes invalid, that is to say, the seller is required to provide 70 % of the quantity of the object stipulated in the contract. This solution is exceptional; for the usual rule is that a contract is indivisible.<sup>201</sup> Sufyān al-Thawrī is quoted as having said, "The sale [viz. *salam*] is invalid, for the contract is indivisible (*li-anna al-ʿuqda wāḥida*)," regarding the case in which the buyer of a *salam* said, "I pay you [viz. the seller] fifty dirhams now, and the payment of the remaining fifty is delayed for a month."<sup>202</sup> The reason why the Hanafis, the Shafi'is and some Hanbalis adopt such a solution may be that they take into consideration the benefit that the seller can enjoy by receiving partial payment. As noted, a type C *salam*, which they bear in mind, serves as a means of financing. Because to declare a *salam* in which all the price is not paid on the spot invalid amounts to depriving the seller of a means of financing, they may have deemed it more appropriate to partially maintain the contract. The Malikis<sup>203</sup> and other Hanbalis<sup>204</sup> deem the entire contract invalid.

<sup>198</sup> Marghīnānī, *Hidāya*, 3:75.

<sup>199</sup> Ramlī, *Nihāya*, 4:180.

<sup>200</sup> Ibn Qudāma, *Kāfi*, 2:115.

<sup>201</sup> Chehata, *Théorie*, 104–05.

<sup>202</sup> Sanʿānī, *Musannaf*, 8:90–91, no. 14442.

<sup>203</sup> Mawwāq, *Tāj*, 4:514.

<sup>204</sup> Ibn Qudāma, *Kāfi*, 2:115.

*Date of delivery*

There are two issues relating to the date of delivery. (1) The first is to know whether or not an immediate *salam* (*salam ḥāll*), i.e. a *salam* in which the buyer can demand the delivery at any moment, is valid. (2) The second issue is divided into two sub-issues: when a period of delay is stipulated, (a) is it necessary to specify the date of delivery, or is it permitted to determine the period of delay by naming the season or events such as cutting or harvesting? (b) Is there any minimum number of days for the period of delay?

(1) Jurists disagree about the validity of an immediate *salam*. The Shafi'is and some Malikis deem it valid. According to the Shafi'is, if a *salam* with delay (*salam mu'ajjal*, i.e. an ordinary *salam*) is lawful, an immediate *salam* is all the more lawful, for the latter contains no aleatory element.<sup>205</sup> But this explanation hardly accounts for the economic meaning of an immediate *salam*.

The Malikis do not explain why they regard an immediate *salam* as lawful, but in my view, its economic meaning is obvious with regard to a type A *salam*, which is concluded, for example, between a merchant and the owner of a date orchard. Mālik states that such a *salam* can be concluded when date palms flower. The merchant may want to take delivery of such dates as become mature and edible on a daily basis. An immediate *salam* satisfies such a need. In fact, al-Ṭabarī writes that Mālik was asked about a *salam* of dates for 40 dinars in which it is stipulated that the buyer can demand, every Friday, the delivery of fresh dates worth two or three dinars harvested in the date orchard of the seller.<sup>206</sup>

But a more important form of immediate *salam* is suggested in the *Muwaṭṭa'*. Suppose *A* has a credit on foodstuff against *B*, who in turn has a credit on the same kind of foodstuff against *C*. Mālik states that, in general, it is forbidden that *B* transfer his credit against *C* to *A*, since this amounts to selling foodstuffs before taking possession of them, but that there is no harm in the transfer of credit if *A*'s credit against *B* derives from an immediate *salam* (*salam ḥāll*). He adds that the transfer of debt in this case is not a sale, invoking the rule

<sup>205</sup> Shāfi'ī, *Umm*, 3:97; Shīrāzī, *Muhadhdhab*, 1:297; Ibn Rushd al-Ḥafīd, *Bidāya*, 2:203; *ibid.*, tr. Nyazee, 2:242.

<sup>206</sup> Ṭabarī, *Ikhtilāf*, 101. Mālik deems this contract unlawful, on the ground that the quantity of the dates is not fixed and that the date of delivery is not determined. Loc. cit.

generally admitted by the Medinan jurists that a person can transfer ownership of foodstuffs that he has not yet taken possession of only when he does this in transfer of a share (*shirk*, i.e. *ishrāk*), *tawliya* or cancellation by mutual agreement (*iqāla*).<sup>207</sup>

I have shown that, originally, *tawliya* served as a form of partnership in which the profit earned from the resale by the buyer was intended to be distributed between the seller and the buyer, for which reason the seller is regarded as a partner of the buyer in the original sale. By a similar reasoning *B* can be regarded as a middleman for *A*: at first *A* concludes a *salam* with *B*, by which *B* is required to provide the object without delay at *A*'s request. Then *B* makes another *salam* with *C*, who is required to provide the object by the end of the specified period. If *B* transfers to *A* his credit arising from the *salam* with *C*, *A* takes the place of *B* in this *salam*. Immediate *salam* may have had a function similar to that of the original *tawliya*, in which the seller is engaged to provide an object that he does not own, and which became illegal with the introduction of the prohibition of the sale of an object that one does not own. We may also imagine that the difference in the price or the quantity of the object in the two *salam*s represents commission or remuneration for the seller in the immediate *salam* (like *B*). For example, suppose that an immediate *salam* is made in which 10 dinars are paid for 10 *ardabbs* of wheat. If the seller purchases 10 *ardabbs* of wheat for 9 dinars in another *salam*, the difference of one dinar represents a commission or remuneration for the seller in the immediate *salam*. Immediate *salam* is therefore best explained by treating them as type B *salam*.

Ibn Rushd al-Ḥafīd gives three explanations for the opinion prohibiting an immediate *salam*. First, the statement attributed to the Prophet, "He who offers to receive prepayment (*istaslafa*) should do it for a determined price, a determined weight, and for a determined period,"<sup>208</sup> indicates that the period should be determined just as the price and the weight are. Second, he notes, a *salam* in which no

<sup>207</sup> Mālik-Yahyā, *Muwattaʿ*, 3:297, no. 1386; *ibid.*, tr. Bewley, 264a. The Prophet is reported to exclude a transfer of share, a *tawliya* and a cancellation by mutual agreement from the general prohibition of the sale of foodstuff before it is taken possession of. Saḥnūn, *Mudawwana*, 4:81; Sanʿānī, *Muṣannaf*, 8:49, no. 14257.

<sup>208</sup> Ibn Rushd al-Ḥafīd, *Bidāya*, 2:201; *ibid.*, tr. Nyazee, 2:240; Shaybānī, *Ḥujja*, 2:616–17; Muzanī, *Mukhtaṣar* (1393), 90; *ibid.* (1419), 126.

period is determined constitutes a sale of an object that one does not own, which is prohibited.<sup>209</sup> He adds that the Malikis hold as follows: the *salam* is permitted for the sake of convenience (*irtifāq*): the buyer pays in advance for the purpose of “facilitating (*istirkhās*)” the purchase of the object, while the seller is attracted by the *salam* because of the delay. Thus, if the delay is not stipulated, the *salam* loses its advantages.<sup>210</sup> As has been noted, the type C *salam* will serve as a means of financing. But this explanation is at variance with the opinion of some Malikis, namely that the minimum number of the period of delay can be two or three days, which is too short for this purpose. We will return to this point in (2) (b).

The Hanafis hold that a period of delay is the necessary condition for the validity of a *salam*.<sup>211</sup> Al-Kāsānī gives three justifications for this position. The first is the above-cited Prophetic hadith. The second is that an immediate *salam* often leads to a conflict between the contracting parties: in general, the seller in a *salam* is an ‘insolvent (*muflis*),’ who cannot immediately deliver the object. If an immediate *salam* is permitted, or in other words, the buyer is allowed to demand delivery at any moment, this may lead to the cancellation of the contract. This will cause damage to the buyer, because he gains nothing while he gave the seller an expedient to satisfy his needs. Third, the *salam* is especially permitted, despite the general prohibition of the sale of an object that one does not own, in view of the presumption that the seller in a *salam* is in insolvency. The conclusion of an immediate *salam* implies that the seller actually possesses the object, which invalidates the special permission.<sup>212</sup> Once again this explanation is not valid for the opinion held by some Hanafis that the minimum period of delay can be anywhere from half a day to three days. We will return to this point in (2) (b).

(2) There are two issues relating to the period of delay. The first relates to whether or not it is necessary to specify the date of delivery, or if it is permitted to determine the period of delay by specifying the season or events such as cutting or harvesting. The second is the minimum number of days for the period of delay.

<sup>209</sup> Ibn Rushd al-Ḥafīd, *Bidāya*, 2:203; *ibid.*, tr. Nyazee, 2:242.

<sup>210</sup> Ibn Rushd al-Ḥafīd, *Bidāya*, 2:203; *ibid.*, tr. Nyazee, 2:242–43. For similar explanations, see, ‘Abd al-Wahhāb, *Ma‘ūna*, 2:988; ‘Adawī, *Ḥāshiyā*, 2:142.

<sup>211</sup> Jaṣṣāṣ, *Mukhtaṣar*, 3:6; Marghīnānī, *Hidāya*, 3:73.

<sup>212</sup> Kāsānī, *Badā‘ī* (1402), 5:212; *ibid.* (1418), 7:145.

(a) As for the first issue, the Malikis consider it lawful to specify the date of delivery by naming cutting or harvesting,<sup>213</sup> whereas the other schools prohibit this.<sup>214</sup> Ibrāhīm al-Nakha‘ī is credited with the latter view.<sup>215</sup> The Maliki position is easily understood by assuming a type A *salam*. Suppose, for example, that a merchant purchases dates in a *salam* from a particular orchard. In this case, it is reasonable to stipulate that the dates should be delivered on the date of or in a few days after harvesting. The other schools stick to the principle that prohibits any uncertainty in an onerous contract.

(b) The Hanafis and Malikis are divided over the second issue. The minimum period of delay is half a day for some Hanafis, three days for some, and one month for others (including al-Shaybānī).<sup>216</sup> Al-Kāsānī writes that the view of al-Shaybānī is the most appropriate, considering one month is the minimum period during which the seller would be able to acquire the object of the *salam*: if a shorter period is stipulated, that constitutes an immediate *salam*.<sup>217</sup>

The Maliki jurist Ibn Rushd al-Jadd writes: at first, Mālik held that the minimum period of delay is approximately fifteen days, during which market prices may fluctuate. He later changed his position to two or three days. Both opinions are attributed also to the Medinan legal authority Ibn al-Musayyab.<sup>218</sup> Ibn Rushd al-Jadd regards Mālik’s first opinion as more appropriate, for a *salam* with a delay of two or three days amounts to “a sale of an object that you do not own (*bay‘ mā laysa ‘inda-ka*).”<sup>219</sup> Al-Ṭabarī attributes to Mālik a statement that indicates the economic meaning of this opinion: asked about a delay of two or three days in a *salam* of cloth or animals, Mālik said, “This is permitted, but a *salam* with a longer

<sup>213</sup> Ibn Rushd al-Ḥafīd, *Bidāya*, 2:203–04; *ibid.*, tr. Nyazee, 2:243; ‘Abd al-Wahhāb, *Ma‘ūna*, 2:989.

<sup>214</sup> Ibn Rushd al-Ḥafīd, *Bidāya*, 2:203–04; *ibid.*, tr. Nyazee, 2:243; Shaybānī, *Aṣl*, 5:6; Shaybānī, *Hujja*, 2:613, 618; Shaybānī, *Āthār*, 98a; Jaṣṣās, *Mukhtaṣar*, 3:22; Shāfi‘ī, *Umm*, 3:95, 96; Shīrāzī, *Muhadhdhab*, 1:299; Ibn Qudāma, *Kāfi*, 2:112–13; Ḥujjāwī, *Iqnā’*, 2:140.

<sup>215</sup> *Kitāb fī al-fiqh*, 3 (2b).

<sup>216</sup> Jaṣṣās, *Mukhtaṣar*, 3:6; Marghīnānī, *Hidāya*, 3:73; Kāsānī, *Badā’i’* (1402), 5:213; *ibid.* (1418), 7:146.

<sup>217</sup> Kāsānī, *Badā’i’* (1402), 5:213; *ibid.* (1418), 7:146.

<sup>218</sup> Ibn Rushd al-Jadd, *Muqaddamāt*, 2:28–29; Saḥnūn, *Mudawwana*, 4:29–30.

<sup>219</sup> Ibn Rushd al-Jadd, *Muqaddamāt*, 2:29. The Hanbali jurist Ibn Qudāma writes that the minimum of period of delay is about one month, for the price of the object is expected to be lower than that at the moment of contract. Ibn Qudāma, *Mughnī*, 4:195.

delay is more appropriate, because this will enable the seller to profit from the price he received (*yantafī‘u al-bā‘i‘ bi-mā akhadha-hu min al-thaman*).<sup>220</sup> As the Hanafi jurist al-Sarakhsī puts it, “The price in a *salam* is usually lower than the market price of the object.”<sup>221</sup> The seller agrees to a *salam* only as a means of financing. This is the idea at the basis of the opinion prohibiting a short period of delay, say a few days.

Another reason is advanced for this opinion in the *Mudawwana*. Ibn al-Musayyab is reported to have stated as follows: it is prohibited to sell foodstuffs that one does not own in a sale with a short period of delay, such as one day or two or so before the seller purchases them, if he knows their market price and is assured to make a profit. But there is no harm in selling foodstuffs that one does not own, in a sale with a period of delay so long that it is not possible to foresee if the seller can earn a profit. Jābir b. ‘Abd Allāh, Abū Salama b. ‘Abd al-Raḥmān b. ‘Awf (b. 22/642–3; d. 94/712–3 or 104/722–3), Ṭāwūs and ‘Aṭā’ b. Abī Rabāḥ (d. 114/732, 115/733 or 117/735) are also reported to have disapproved of a short period of delay.<sup>222</sup> These jurists reasoned as follows: a person will not offer a sale in which he is engaged to deliver the object a few days later unless he knows that he can acquire the object at a cost lower than the price stipulated in the sale. Although the term ‘*salam*’ is not used, it is clear that this sale is a *salam* with a short period of delay. The idea underlying the prohibition of such a *salam* is to prohibit a seller from taking advantage of the ignorance of a buyer with regard to the price of foodstuffs to make a sure and good profit. In other words, those jurists who hold this opinion fear that the legalization of a *salam* with a short period of delay will serve only as an expedient that enables a seller to make an unlawful gain.

Let us examine the opinion permitting a short period of delay. I have mentioned an example of such a *salam* in connection with the type B *salam*, in which the seller seems to act as a middleman for the buyer, who relies on the seller’s knowledge on the local market to acquire merchandise. In such a *salam*, a few days may be sufficient for the seller, who uses the price he has received to buy the object. It is useful to refer to a case from the *Mudawwana*: when Ibn al-

<sup>220</sup> Ṭabarī, *Ikhtilāf*, 96.

<sup>221</sup> Sarakhsī, *Mabsūṭ* (n.d.), 12:130; *ibid.* (1421), 12:154.

<sup>222</sup> Ṣaḥnūn, *Mudawwana*, 4:231.

Qāsim asked Mālik about the case of a person who gives a cloth merchant money to buy cloth for him, stipulating a commission of three percent of the price, Mālik responded that there was no harm in this and defined the contract as a hire (*juʿl*).<sup>223</sup> This contract is similar to a type B *salam*. Of course, juristically speaking, there is an important difference between the two contracts: the seller in a *salam* is under an obligation to acquire the object designated in the contract and to deliver it to the buyer by the end of the specific period; whereas the cloth merchant in this case can unilaterally cancel the contract at any time.<sup>224</sup> But the two contracts seem to have the same economic function.

Another reason why a *salam* with a short period of delay is permitted is detected from the above-cited statement that al-Ṭabarī ascribed to Mālik: asked about a delay of two or three days in a *salam* of cloth or animals, Mālik said, “This is permitted, but a *salam* with a longer delay is more appropriate . . .”<sup>225</sup> We have seen that several Medinan authorities are reported to have prohibited the sale of foodstuffs in a *salam* with a delay of a few days, which Mālik at first supported. That is to say, Mālik was asked whether or not the same rule applies to a *salam* of cloth or animals. I infer that Mālik tolerated it to stipulate a short period of delay in a *salam* of items other than foodstuffs, since in general their price is stable, so that there is little fear that the seller will take advantage of the buyer’s ignorance of the market price, whereas the need for such a *salam* can be easily seen.

#### *Pledge and surety*

Jurists disagree as to whether or not pledge and surety are permitted in a *salam*. These rules would give more security to the contract. If the seller does not perform his obligation, the buyer can sell the pledge by public auction and use the proceeds to buy the object of the *salam*.<sup>226</sup> Likewise, if the seller does not perform his obligation, the buyer can demand that the surety perform the seller’s obligation in his place.<sup>227</sup>

<sup>223</sup> Saḥnūn, *Mudawwana*, 4:456.

<sup>224</sup> Saḥnūn, *Mudawwana*, 4:456.

<sup>225</sup> Ṭabarī, *Ikhtilāf*, 96.

<sup>226</sup> Māwardī, *Hāwī*, 5:390; Shaybānī, *Aṣl*, 5:43.

<sup>227</sup> Sarakhsī, *Mabsūṭ* (n.d.), 12:172; *ibid.* (1421), 12:205–06.

‘Alī b. Abī Ṭālib,<sup>228</sup> Sa‘īd b. Jubayr,<sup>229</sup> al-Ḥasan al-Baṣrī<sup>230</sup> and al-Awzā‘ī (d. 157/773–4)<sup>231</sup> reportedly disapproved of them. Al-Ḥasan al-Baṣrī is also credited with the statement, “Muslims used to say, ‘Whoever pays the price of a *salaf* can take neither a pledge nor a surety.’”<sup>232</sup> But Ibn Sīrīn is reported to have seen no harm in a pledge.<sup>233</sup> Ibrāhīm al-Nakha‘ī,<sup>234</sup> al-Sha‘bī,<sup>235</sup> ‘Amr b. Dīnār (d. 125/742–3 or 126/743–4, over 70 years old) and ‘Aṭā’ b. Abī Rabāḥ<sup>236</sup> are reported to have seen no harm in either a pledge or a surety. The Hanafis,<sup>237</sup> Malikis<sup>238</sup> and Shafi‘is<sup>239</sup> also regard the pledge and the surety as lawful.<sup>240</sup>

The ground of the argument against a pledge and surety in a *salam* is not clear, but it is easy to justify this argument by assuming a *salam* of types A or B. In a type A *salam*, e.g. one between the owner of a date orchard and a merchant, to require the owner (seller) to provide a pledge amounts to obligating him to acquire the object from a third person if he cannot harvest the quantity of dates specified in the contract, which runs counter to the aims of such a *salam*. In a type B *salam* as conceived by al-Ḥasan al-Baṣrī, in which the seller acts as a middleman for the buyer, it is also inappropriate to require the seller to provide a pledge or surety.

#### 4. Defect in the object

There are disputes over the rules regulating defects in the object of a *salam*. For later jurists, a *salam* is independent of the process by which the seller acquires the object. That is to say, legally speaking, the seller in a *salam* acquires an object on his own behalf even though he is to deliver such an object to the buyer in the *salam*. It follows

<sup>228</sup> San‘ānī, *Muṣannaḥ*, 8:9, no. 14082.

<sup>229</sup> San‘ānī, *Muṣannaḥ*, 8:9, no. 14080.

<sup>230</sup> San‘ānī, *Muṣannaḥ*, 8:9, no. 14081.

<sup>231</sup> Ṭabarī, *Ikhtilāf*, 122.

<sup>232</sup> San‘ānī, *Muṣannaḥ*, 8:9–10, no. 14084.

<sup>233</sup> Shāfi‘ī, *Umm*, 3:94; Ṣan‘ānī, *Muṣannaḥ*, 8:10, no. 14085.

<sup>234</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:10, nos. 14086, 14088; *Kūtab fī al-fiqh*, 3 (2b).

<sup>235</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:11, no. 14092.

<sup>236</sup> Shāfi‘ī, *Umm*, 3:94.

<sup>237</sup> Jaṣṣāṣ, *Mukhtaṣar*, 3:20–21; Shaybānī, *Aṣl*, 5:17–18, 70–71.

<sup>238</sup> Saḥnūn, *Mudawwana*, 4:57–58.

<sup>239</sup> Muzānī, *Mukhtaṣar* (1393), 90; *ibid.* (1419), 126–27.

<sup>240</sup> The Hanbalis disagree over this issue. Mardāwī, *Inṣāf*, 5:108–09.

that where there is a defect in the object of a *salām* at the moment when the buyer takes possession of it, it is subject to the same rules that govern an ordinary sale of a fungible object. In fact, this is true where the object of a *salām* remains in the state it was in at the moment of delivery: the buyer can exercise the option for defect and require the seller to provide an alternative object free of any defect in place of the defective object.<sup>241</sup> The seller in his turn can exercise the option for defect to cancel the original sale unless the defect took place while in his possession.

The jurists are, however, divided over when another defect occurs as a result of a natural cause in the object of a *salām* while in the possession of the buyer. Al-Shaybānī<sup>242</sup> and the Shafī'is<sup>243</sup> hold that the buyer can do nothing but demand a reduction of the price, unless the seller agrees to cancellation.<sup>244</sup> This is the same rule as the Hanafis and Shafī'is adopt with respect to an ordinary sale.<sup>245</sup> The amount of reduction is calculated as follows: let the stipulated price be  $p$ , its market value on the assumption that the object is free of any defect be  $x$ , and its market value with the defect be  $y$ ; then the amount of the reduction is equal to  $\frac{(x - y)p}{x}$ .<sup>246</sup> As for the Malikis,

al-Ṭaḥāwī writes that they adopt the same position as al-Shaybānī and al-Shāfi'ī, although no opinion on this issue is transmitted from Mālik.<sup>247</sup> The position of al-Shaybānī, al-Shāfi'ī and the Malikis is easily understood on the assumption that a *salām* is independent of the process by which the seller acquired the object.

According to al-Ṭaḥāwī, Abū Ḥanīfa and Abū Yūsuf oppose this: Abū Ḥanīfa gives the seller an option: he can choose (1) to take back the object and return the price, or (2) to refuse to take back the object, in which case he is not required either to return the price or to reduce the price. Abū Yūsuf gives the seller the option between

<sup>241</sup> Ṭaḥāwī, *Mukhtaṣar*, 88; Jaṣṣāṣ, *Mukhtaṣar*, 3:23; Qāḍī Khān, *Fatāwā*, 2:117–18; Shīrāzī, *Muhadhdhab*, 1:302.

<sup>242</sup> Ṭaḥāwī, *Mukhtaṣar*, 89.

<sup>243</sup> Shāfi'ī, *Umm*, 3:138; Shīrāzī, *Muhadhdhab*, 1:302.

<sup>244</sup> Qudūrī, *Mukhtaṣar*, 2:21; Marghīnānī, *Hidāya*, 3:37.

<sup>245</sup> Qudūrī, *Mukhtaṣar*, 2:21; Marghīnānī, *Hidāya*, 3:37; Shīrāzī, *Muhadhdhab*, 1:285.

<sup>246</sup> Bābartī, *Ināya*, 5:159; Shīrāzī, *Muhadhdhab*, 1:285.

<sup>247</sup> Jaṣṣāṣ, *Mukhtaṣar*, 3:23. See also, Qāḍī Khān, *Fatāwā*, 2:117–18. For the position of the Malikis over the case in which the buyer donates the object to a third person, see, Qarāfi, *Dhakhīra*, 4:471.

(1) taking back the object and providing the buyer another object free of any defect, and (2) refusing to take it back: in this case, the buyer can elect (a) to take back the price by providing the seller with another object equivalent to the object as it was at the moment of delivery, or (b) to retain the object, in which case he cannot demand a reduction in the price.<sup>248</sup>

Abū Ḥanīfa holds, ultimately, that the seller is not responsible for any defect due to a natural cause that exists at the moment of delivery, whether it existed prior to the original sale or occurred while in the seller's possession. This solution is similar to the solution adopted with respect to the case of a *murābaḥa* when a defect occurs in the object while in the possession of the buyer. I have demonstrated that this solution was originally based on the idea that the seller acquires the object as an agent for the buyer, so that ownership of the object transfers directly from the original seller to the buyer, while the rights and liabilities arising from the original sale are created between the original seller and the seller (see pp. 139–40). The same appears to be true of the case of a *salam* in which a defect exists in the object at the moment of delivery, on the condition that another defect occurs while in the possession of the buyer. The solution of Abū Yūsuf resembles that of Abū Ḥanīfa here, although Abū Yūsuf seeks to safeguard the interests of the buyer by enabling him to cancel the *salam* if he provides the seller with another object equivalent to the object as it was at the moment of delivery. The solution of Abū Ḥanīfa and that of Abū Yūsuf may reflect the understanding that the seller in a *salam* acquires the object as an agent for the buyer, although they are the only cases with regard to which they treat the seller as an agent for the buyer.

##### 5. *Performance*

Non-performance is frequently disputed among the jurists. Roughly speaking, the doctrinal development around this issue reflects changes in their understanding of the nature of the *salam*: the early jurists took into consideration the process by which the seller acquires the object, whereas the later jurists, including the earliest Hanafis and Malikis regard a *salam* as an independent contract with no connec-

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<sup>248</sup> Ṭahāwī, *Mukhtaṣar*, 88–89.

tion to the acquisition by the seller. I will explain the positive rules concerning cancellation, impossibility and accord and satisfaction with this in mind.

### *Cancellation*

Historically speaking, the early jurists discussed the question of the cancellation of a *salam* in connection with partial performance by a seller who was unable to entirely perform his obligation due to a rise in prices. Jurists are divided over whether or not it is permitted to cancel the contract, to the extent that the seller does not perform it: for example, if the seller can provide only one-third of the quantity of wheat that he is obliged to provide, is it permitted to exempt the seller from the obligation to provide the remaining two-thirds of the wheat, while requiring him to return two-thirds of the price that he received at the moment of the contract? We may be tempted to consider that the only acceptable solution is to permit this, for in such a situation it is extremely difficult for the seller to perform his obligation completely. However, some jurists propose a solution that appears to take into consideration the interests of the seller in a more equitable manner. As will be demonstrated, the disputes among the jurists may be reduced to their difference over the nature of a *salam* they bear in mind. To substantiate my point of view, I will now examine the opinions of the Iraqī and the Medinan jurists about the cancellation of a *salam*.

The Iraqī jurists advance four opinions about the case in which the seller does not provide the entire quantity of the object that he is obliged to provide at the end of the specified period.

(1) Al-Ḥasan al-Baṣrī,<sup>249</sup> Shurayḥ,<sup>250</sup> Ibrāhīm al-Nakhaṣī<sup>251</sup> and al-Shaḥbī<sup>252</sup> are reported to have forbidden partial cancellation of the *salam*; instead, they give the buyer the choice between maintaining the contract in its entirety and canceling it in its entirety. The following report in the *Āthār* of Abū Yūsuf points to the economic

<sup>249</sup> Ibn Abī Shayba, *Muṣannaf*, 4:275, no. 19994.

<sup>250</sup> Sanʿānī, *Muṣannaf*, 8:13, no. 14104; Ibn Abī Shayba, *Muṣannaf*, 4:276, no. 20002.

<sup>251</sup> Sanʿānī, *Muṣannaf*, 8:12, no. 14095; Ibn Abī Shayba, *Muṣannaf*, 4:275, nos. 19993, 19996.

<sup>252</sup> Sanʿānī, *Muṣannaf*, 8:12, no. 14096; Ibn Abī Shayba, *Muṣannaf*, 4:275, no. 19992.

meaning of maintaining the contract: Ibn Mas‘ūd (d. 32/652–3) concluded a *muḍāraba* with a certain Zayd b. Khalīda and gave Zayd the capital. Then Zayd used part of the capital to buy young she-camels (*qalā’is*, sg. *qalūṣ*) from ‘Atrīs b. ‘Arqūb, in a *salam*. When performance became due, ‘Atrīs provided only part of the stipulated numbers of young she-camels, whereas Zayd harshly demanded that he perform his obligation in full. Then Ibn Mas‘ūd came to Zayd and told him to give a postponement to ‘Atrīs. Subsequently Ibn Mas‘ūd sent to Zayd to ask him what the object of the *salam* was. On hearing that it was she-camels, Ibn Mas‘ūd instructed Zayd, “Restore what you have received from him and take back your price. Don’t use our money to purchase an animal in a *salam*.”<sup>253</sup> In a similar report in the *Āthār* of al-Shaybānī, ‘Atrīs approached Ibn Mas‘ūd to “ask a favor of him (*yastarfiqū-hu*),”<sup>254</sup> that is, to ask Ibn Mas‘ūd for a postponement.

The fact that Ibn Mas‘ūd told Zayd to cancel the *salam* is in accordance with the Iraqi doctrine prohibiting a *salam* of an animal. What attracts our attention, however, is that Ibn Mas‘ūd told Zayd to postpone the date of performance, before he knew that the object was she-camels. This suggests the idea that the buyer should not force the seller to acquire the object when its price rises to a high level. In fact al-Shaybānī states in his *Hujja*:

Al-Ḥasan al-Baṣrī said, “When you make a sale with a delay and performance becomes due, buy from anyone in whose possession you find the object of the sale as you please, but don’t buy it at a higher price than or at the same price as the capital [of the sale] (*idhā bi’ta bay’an nasī’an fa-ḥalla al-ajal fa-ayyu bayyi’ wajadta-hu ‘inda-hu fa-’shtari kayfa shi’ta dhālika al-bay’ bi-‘ayni-hi wa-lā tashṭari bi-ziyāda aw bi-ra’s al-māl*).”<sup>255</sup>

Although the term ‘*salam*’ or ‘*salaf*’ is not used here, the sentence “you make a sale with a delay” and the term ‘capital’ indicate that we are dealing with a *salam*. It is clear that the idea underlying the statement of al-Ḥasan al-Baṣrī is that the seller is not required to perform a *salam* that yields no profit for him, unlike the *salam* as

<sup>253</sup> Abū Yūsuf, *Āthār*, 186–87, no. 845. See also, San‘ānī, *Muṣannaḥ*, 8:23–24, nos. 14147–14150.

<sup>254</sup> Shaybānī, *Āthār*, 98b.

<sup>255</sup> Shaybānī, *Hujja*, 2:624.

conceived by the later jurists, who take it for granted that the price of a *salam* is lower than the anticipated market price of the object (see p. 168).

Therefore, the opinion that prohibits partial cancellation is intended to entirely cancel the contract or to give the seller a postponement until such time as the price of the object becomes lower than the price paid in a *salam*. To clarify the economic meaning of this opinion, let us calculate the expected profit of the seller and the buyer if the buyer cancels  $100x\%$  (or maintains  $100(1-x)\%$ ) of the contract. Suppose that  $m$  *ardabbs* of wheat are sold for  $c$  dinars, and the seller has acquired  $mp$  *ardabbs* ( $0 < p < 1$ ) of wheat for  $q_1 c/m$  dinars/*ardabb* (I assume  $q_1 < 1$ , in accordance with the above-cited statement of al-Ḥasan al-Baṣrī) on average, but he ceases to acquire wheat because of a price rise, until the date on which the performance becomes due, at which time the market price of wheat is equal to  $q_2 c/m$  dinars/*ardabb* ( $q_2 > 1$ ).

(i) If  $1-x \geq p$ , i.e.  $x \leq 1-p$ , then the seller is required to restore  $100x\%$  of the price and to acquire an additional  $m(1-x-p)$  *ardabbs* of wheat. Note that when the buyer demands a further acquisition from the seller, the buyer is expected to give a postponement until such time as the price of wheat declines to less than  $c/m$  dinars/*ardabb*.<sup>256</sup> Let the price be  $q_3 c/m$  dinars/*ardabb* ( $q_3 < 1$ ). Thus the profit of the seller is

$$b_1 = c - pq_1c - cx - cq_3(1-x-p) = (q_3-1)cx + c\{p(q_3-q_1) - q_3 + 1\}$$

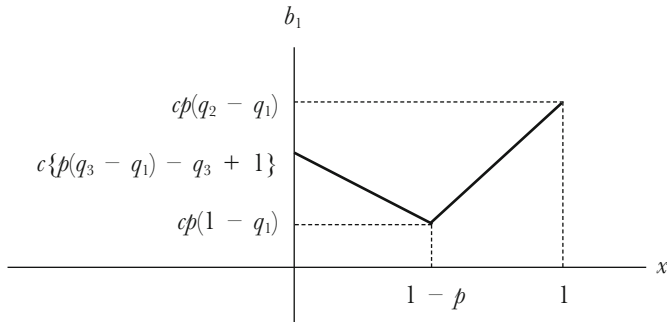
(ii) If  $1-x < p$ , i.e.  $x > 1-p$ , then  $\{p-(1-x)\}c$  *ardabbs* of wheat belong definitively to the seller. Thus if the value of the wheat is calculated on the assumption that the seller sells wheat at  $q_2c/m$  dinars/*ardabb*, i.e. the current market price, the profit of the seller is

$$b_1 = c - pq_1c - cx + cq_2\{p-(1-x)\} = (q_2-1)cx + c\{p(q_2-q_1) - q_2 + 1\}$$

Graph 1 illustrates the expected profit of the seller.

<sup>256</sup> Ibrāhīm al-Nakhaṣī is reported to have obligated the seller of a *salam* of wheat to provide wheat harvested in the next season when the date of performance was delayed to the next year. Sanʿānī, *Muṣannaḥ*, 8:6, no. 14065.

Graph 1



Note that whether or not  $cp(q_2 - q_1) > c\{p(q_3 - q_1) - q_3 + 1\}$  depends on the number of  $q_1$ ,  $q_2$  and  $q_3$ . What is important is that the profit of the seller is at the lowest point when the buyer cancels  $100(1 - p)$  % of the contract.

Likewise the expected profit of the buyer is calculated as follows.

(i) If  $1 - x \geq p$ , i.e.  $x \leq 1 - p$ , then the buyer can require the seller to restore  $100x$  % of the price and to deliver an additional  $m(1 - x - p)$  *ardabbs* of wheat. Thus the profit of the buyer is

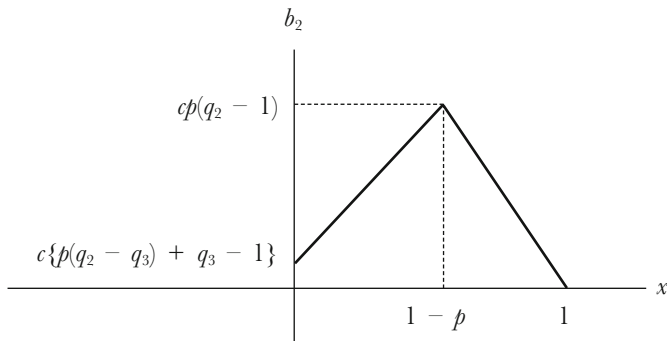
$$b_2 = -c + cx + cpq_2 + cq_3(1 - x - p) = (1 - q_3)cx + c\{p(q_2 - q_3) + q_3 - 1\}$$

(ii) If  $1 - x < p$ , i.e.  $x > 1 - p$ , then the buyer can require the seller to restore  $100x$  % of the price and to deliver  $(1 - x)m$  *ardabbs* of wheat. Thus the profit of the buyer is

$$b_2 = -c + cx + (1 - x)q_2c = -(q_2 - 1)cx + (q_2 - 1)c$$

Graph 2 illustrates the expected profit of the buyer.

Graph 2



The profit of the buyer is at the highest when he cancels  $100(1 - p)$  % of the contract.

This opinion is best explained by assuming a type B *salam*, in which the seller acts as a middleman for the buyer, and the difference between the price of the *salam* and the cost at which the seller acquires the object is the seller's commission or remuneration. Since it is unreasonable to compel the buyer to cancel the contract, he is expected to choose the option that is the most favorable to him, either canceling or maintaining the contract in its entirety. In either case, the profit of the seller is no less than whichever is less of  $cp(q_2 - q_1)$  and  $c\{p(q_3 - q_1) - q_3 + 1\}$ .

(2) The Hanafis approve partial cancellation of a *salam*. Abū Ḥanīfa considers the following case: foodstuffs are made the subject of a *salam*. When performance becomes due, the seller has acquired only part of the stipulated quantity. In such a case, the buyer can take delivery of the foodstuffs that the seller has acquired and cancel the *salam* as it applies to the remaining amount of foodstuffs, in which case the buyer can require the seller to restore that percentage of the price which corresponds to the percentage of foodstuffs that the seller does not provide.<sup>257</sup> To support this view, Abū Yūsuf and al-Shaybānī cite the statement of Ibn 'Abbās about this procedure, "There is no harm in this. This is an appropriate, good and beautiful way of acting."<sup>258</sup> Muḥammad b. al-Ḥanafīyya (d. 80/700–1) and al-Ḥakam [b. Ayyūb] are also reported to have seen no harm in this procedure.<sup>259</sup>

This procedure is illustrated by a report recorded in the *Muṣannaf* of Ibn Abī Shayba, according to which someone (*A*) approached Ibn 'Abbās and told him that he had purchased wheat in a *salam* for 1000 dirhams and received one-half of the stipulated quantity, which he resold for 1000 dirhams. Subsequently the seller in the *salam* (*B*) expressed his wish to return the remaining 500 dirhams of the price. Ibn 'Abbās said, "This is appropriate, he [viz. *A*] will be given a

<sup>257</sup> Shaybānī, *Hujja*, 2:590.

<sup>258</sup> Abū Yūsuf, *Āthār*, 186, no. 842; Shaybānī, *Āthār*, 98b–99a; Shaybānī, *Hujja*, 2:591; Shaybānī, *Aṣl*, 5:7. See also, San'ānī, *Muṣannaf*, 8:12–13, nos. 14101–02.

<sup>259</sup> San'ānī, *Muṣannaf*, 8:13, no. 14103.

double reward.”<sup>260</sup> Although the report does not specify the amount of money for which *B* acquired one-half of the wheat, it must have been much greater than 500 dirhams when he asked *A* to cancel the contract, for *A* resold it for 1000 dirhams. That is to say, *B* could not afford to perform his obligation. This is why *B* asked *A* to cancel the contract. The fact that Ibn ‘Abbās recommended cancellation indicates that *A* had the right to force *B* to acquire the rest of the wheat, whatever its cost might be.

To illustrate the economic meaning of partial cancellation, let us calculate the expected profit of the seller on the assumption that the price of the *salam* is expected to be lower than the expected market price of the object, as indicated by the repeatedly cited statement of the Hanafi jurist al-Sarakhsī, “The price of a *salam* is usually lower than the market price of the object.”<sup>261</sup>

(i) If  $1 - x \geq p$ , i.e.  $x \leq 1 - p$ , then the seller must restore 100% of the price and must acquire an additional  $m(1 - x - p)$  *ardabbs* of wheat without delay. Thus the profit of the seller is

$$b_1 = c - pq_1c - cx - cq_2(1 - x - p) = (q_2 - 1)cx + c\{p(q_2 - q_1) - q_2 + 1\}$$

The profit of the buyer is

$$b_2 = -c(q_2 - 1)(x - 1)$$

(ii) If  $1 - x < p$ , i.e.  $x > 1 - p$ , then  $m\{p - (1 - x)\}$  *ardabbs* of wheat belongs definitively to the seller. Thus, if the value of the wheat is calculated on the assumption that the seller sells wheat at the current market price, the profit of the seller is

$$b_1 = c - pq_1c - cx + cq_2\{p - (1 - x)\} = (q_2 - 1)cx + c\{1 - pq_1 - (1 - p)q_2\}$$

The profit of the buyer is

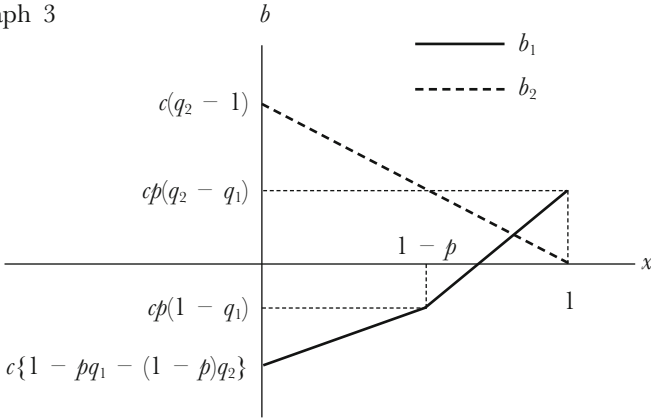
$$b_2 = -c(q_2 - 1)(x - 1)$$

Graph 3 illustrates the expected profits of the seller (the solid line) and the buyer (the dotted line).

<sup>260</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:274, no. 19981.

<sup>261</sup> Sarakhsī, *Mabsūṭ* (n.d.), 12:130; *ibid.* (1421), 12:154.

Graph 3



$cp(1 - q_1)$  and  $c\{1 - pq_1 - (1 - p)q_2\}$  can be a positive or a negative number depending on the number of  $q_1$  and  $q_2$ , but  $cp(1 - q_1)$  is usually a negative number, as has been noted. What is important is that the profit of the seller is greater in the case of partial cancellation than in the case of maintaining the contract and that when  $q_2$  is sufficiently great the seller suffers a considerable loss if the contract is maintained. This is why partial cancellation is recommended.

The following two examples represent an intermediary position from the point of view of the protection of a seller.

(3) A certain Abū Sūdā', accompanied by his brother, approached Shurayḥ and said to him, "We made a *salam* with someone and paid him the price. When the performance became due, he said, 'I do not have all the foodstuffs. Will you be kind enough to content yourself with receiving part of the foodstuffs [to be delivered] and taking back the rest of the price?' What do you say about this?" On hearing this, Shurayḥ said to them, "Take the [total stipulated quantity of] foodstuffs, or take back the [total amount of the] price."<sup>262</sup>

To illustrate the seller's proposal, let us assume that 10 *ardabbs* of wheat were sold for 10 dinars in a *salam*. The seller (*A*) acquired 4 *ardabbs* for 6 dinars. When the price of wheat continued to rise until the end of the specified period, *A* asked Abū Sūdā' and his brother to cancel 60 % of the contract, i.e. the percentage of the quantity of wheat that *A* had not acquired, whereby *A* asked them

<sup>262</sup> San'ānī, *Muṣannaḥ*, 8:13, no. 14104.

to reduce the amount of money that *A* should return to 4 dinars, i.e. the amount that remained in his possession, rather than 6 dinars calculated on the basis of the percentage of cancellation. According to *A*'s scenario, *A* would neither make a profit nor suffers a loss from the *salam*. But Shurayḥ opposed this scenario, because *A* could make a profit in the case of the affirmation or the cancellation of the *salam*, as has been shown.

(4) Ibrāhīm al-Nakha'ī is reported to have disapproved of a transaction in which a person who purchased foodstuffs in a *salam* receives part of the foodstuffs and takes back some of the dirhams he paid as the price of the *salam*. Ibrāhīm said, "If he wants to help him [viz. the seller], buy with the dirhams and give up for him what remains (*fa-in arāda al-iḥsān ilay-hi, fa-l-yabta' bi-'l-darāhim wa-l-yada' mā baqiya*)."<sup>263</sup>

To illustrate the statement of Ibrāhīm, let us take up the example cited in (3), adding the condition that the market price of the wheat is equal to 2 dinars/*ardabb* on the date on which the delivery comes due. Ibrāhīm instructs the buyer to require the seller to use the remaining 4 dinars to buy 2 *ardabbs* of wheat, with the result that the seller acquires 6 *ardabbs* in all; and to renounce his right to the remaining 4 *ardabbs* of wheat. According to this instruction too, the seller neither makes a profit nor suffers a loss from the *salam*.

In Medina Ibn 'Umar is the only authority that is reported to have deemed partial cancellation lawful.<sup>264</sup> But al-Bayhaqī writes that the majority opinion holds that Ibn 'Umar disapproved of it.<sup>265</sup> The opinion prohibiting partial cancellation is attributed also to Abū Salama b. 'Abd al-Raḥmān b. 'Awf,<sup>266</sup> Sālim b. 'Abd Allāh<sup>267</sup> and al-Qāsim b. Muḥammad.<sup>268</sup> But Mālik refers to an exception to this rule. He states in the *Muwatta'*:

When the date arrives and the buyer finds that the seller has not acquired a sufficient quantity of what the buyer purchased, so that he cancels (*aqāla*) the contract, he must take back the same gold, silver,

<sup>263</sup> San'ānī, *Muṣannaḥ*, 8:12, no. 14097. See also, *ibid.*, 8:12, no. 14098.

<sup>264</sup> Shaybānī, *Hujja*, 2:596; San'ānī, *Muṣannaḥ*, 8:13, no. 14105; Ibn Abī Shayba, *Muṣannaḥ*, 4:275, no. 19985.

<sup>265</sup> Bayhaqī, *Suman*, 6:27. See also Ibn Abī Shayba, *Muṣannaḥ*, 4:276, nos. 19998–9.

<sup>266</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:276, no. 19998.

<sup>267</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:276, no. 20004.

<sup>268</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:276, no. 20004.

or the price that he delivered to the seller (*lā yanbaghī la-hu an ya'khudha min-hu illā wariqa-hu aw dhahaba-hu aw al-thaman alladhī dafā'a ilay-hi*).<sup>269</sup>

It is not clear from this text whether or not Mālik adopted the same position as his Medinan predecessors, since it is not clear whether or not Mālik permitted the buyer to partially cancel a *salam* by taking back *part* of “the same gold, silver, or the price that he delivered to the seller.” But Ibn al-Qāsim seems to have understood that Mālik did: when Saḥnūn asked Ibn al-Qāsim whether Mālik had held that the buyer (in a *salam* according to which money is prepaid) must elect to cancel the contract in its entirety and take back the full price, or to maintain the contract in its entirety and receive all the foodstuffs that were made the subject of the *salam*, Ibn al-Qāsim agreed that Mālik had permitted this election. Then Ibn al-Qāsim transmitted the following opinion of Mālik: in a *salam* in which pieces of cloth, an animal, a slave or an item that is not weighed or measured is prepaid for foodstuffs, it is necessary, for its cancellation to be valid, that the price remain in the state that it was at the moment of the contract, without any increase or decrease.<sup>270</sup> Ibn al-Qāsim explains why cancellation is valid if this condition is met:

Because it is the price itself [which was restored to the buyer] and any benefit (*manfā'a*) was produced neither to the seller nor to the buyer, nor did ‘sale and loan’ (*bay' wa-salaf*) intervene. There is no harm in canceling [under this condition] any *salam* in which gold, silver or any other item is prepaid for foodstuffs, whether or not the contractual session has been concluded.<sup>271</sup>

According to the understanding of Ibn al-Qāsim, Mālik permitted the buyer to partially cancel the contract by taking back part of the price itself, because in this case it is clear that the seller has not made use of that part of the price which he returns. ‘Abd al-Wahhāb is more explicit when he states: suppose that *A* offers *B* a *salam* in which *B* is to deliver 10 *kurrs* (a unit of measure) of foodstuffs for 100 dinars. *B* responds that he will not agree to the *salam* unless *A* gives him a loan of 100 dinars. Then they conclude a *salam* in which 20 *kurrs* of foodstuffs are sold in exchange for 200 dinars. When the performance comes due, *A* cancels one-half of the contract, receiving

<sup>269</sup> Mālik-Yahyā, *Muwatta'*, 3:291; *ibid.*, tr. Bewley, 261b, 31.21, no. 49.

<sup>270</sup> Saḥnūn, *Mudawwana*, 4:69–70.

<sup>271</sup> Saḥnūn, *Mudawwana*, 4:70.

10 *kurrs* of foodstuffs and taking back 100 dinars. Therefore *B* did not use 100 dinars of the 200 dinars he has received as the price to buy foodstuffs. Thus, the partial cancellation, combined with the *salam*, gives rise to the suspicion that the purpose of the *salam* was to provide a loan of 100 dinars, which violates the prohibition of ‘sale and loan.’<sup>272</sup> In general, partial cancellation is prohibited because it creates the presumption that the *salam* was intended to serve as a loan. For this reason, ‘Abd al-Wahhāb permitted partial cancellation when one-half of the price *itself* was returned to the buyer, for it is clear that in this case the *salam* does not include a loan.<sup>273</sup>

The reasoning of Ibn al-Qāsim and ‘Abd al-Wahhāb is dubious: first, as noted, the jurists legalize the (type C) *salam* precisely because it serves as a means of financing, despite the principle prohibiting the sale of an object that one does not own. The seller usually uses the price to buy items other than the object of the *salam* and earns a profit by reselling them, thus recovering the difference between the price and the anticipated market value of the object. As noted, Mālik said, regarding a *salam* with a short term of delay, “This is permitted, but a *salam* with a longer delay is more appropriate, because this will enable the seller to profit from the price he received.”<sup>274</sup> It is curious that the Malikis prohibit partial cancellation because in this case the *salam* serves as a means of financing. Second and more important, if partial cancellation is prohibited because of the prohibition of ‘sale and loan,’ total cancellation should also be prohibited, and indeed, some examples indicate that total cancellation in various transactions is prohibited because it constitutes ‘sale and loan.’

(1) In the *Mudawwana* we read, with regard to the sale of a female-slave, that it is prohibited to stipulate that the seller can repurchase her by paying the same amount of money as the price in the original sale. Mālik states that this is because sale and repurchase by the seller amounts to ‘sale and loan.’<sup>275</sup> In this case the repurchase is equivalent to total cancellation of the original sale.

(2) In the *Mudawwana* Mālik prohibits the buyer in a sale in which an option to unilaterally cancel the contract is stipulated for the seller

<sup>272</sup> ‘Abd al-Wahhāb, *Ma‘ūna*, 2:993.

<sup>273</sup> ‘Abd al-Wahhāb, *Ma‘ūna*, 2:993.

<sup>274</sup> Ṭabarī, *Ikhtilāf*, 96.

<sup>275</sup> Ṣaḥnūn, *Mudawwana*, 4:133.

or the buyer from paying the price on the spot. Ashhab (d. 204/820) justifies this solution as follows: this amounts to ‘sale and loan,’ for in the case of cancellation, the seller who receives the price can use it from the moment of the contract until its cancellation.<sup>276</sup>

(3) The Malikis prescribe that in order for a *salam* to be valid, it must be certain that the object is available on the date on which performance comes due. Otherwise, when the object is not available, *salam* is automatically cancelled and the seller must restore the price to the buyer. In such a case, the *salam* proves to have been a loan. Thus such a *salam* can be either a sale or a loan.<sup>277</sup>

These examples show that the total cancellation of a *salam* can constitute ‘sale and loan.’ We have seen, however, that the Malikis and the Medinan jurists prior to Mālik prohibited only partial cancellation. Therefore the explanation of ‘Abd al-Wahhāb that partial cancellation is unlawful because it contravenes the prohibition of ‘sale and loan’ is unsatisfactory. In my view, the majority of the Medinan jurists prior to Mālik held the same idea as those Iraqi jurists who gave the buyer the choice between maintaining and canceling the contract in its entirety. I have inferred that the *salam* they bore in mind was a type B *salam*, where the seller is not obligated to acquire the object at a cost higher than the market price. However, Mālik seems to bear in mind a variation of a type B *salam*, in which the price is intended to be used exclusively to pay for the object designated in the contract. The condition that part of the price itself is left untouched until the date on which performance falls due points to this. On this assumption, it is easy to justify Mālik’s solution: suppose, for example, that *A* concluded different *salams* with different buyers including *B*, and that *A* must use the price that he received from each buyer to acquire the object designated in the respective *salams*. If *A* cannot acquire the object designated in the *salam* that he concluded with *B*, it follows that *B* “must take back the same gold, silver, or the price that he delivered to the seller,” as Mālik stated, because the right of the other buyers may be attached to anything else that they gave *A* as the price in their *salam* contracts with *A*. As noted, Ibn Rushd al-Jadd writes: at first, Mālik held that the minimum period of delay is approximately fifteen days, but that

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<sup>276</sup> Saḥnūn, *Mudawwana*, 4:194–95.

<sup>277</sup> Qarāfi, *Dhakhira*, 4:449.

he later changed his position to two or three days. We may assume that in a *salam* with a short term of delay the price is intended to be used for the purchase of the object. Mālik, who bore in mind a type B *salam* like his Medinan predecessors did, introduced an exceptional rule. But the Malikis including Ibn al-Qāsim and ‘Abd al-Wahhāb tried to harmonize this exceptional rule with the Median majority view. This is why they were forced to invoke the prohibition of ‘sale and loan’ to justify the prohibition of partial cancellation.

### *Impossibility*

For the Hanafis, in order for a *salam* to be valid, it is necessary that “things of the kind [specified in a *salam*] do not cease to exist from the time of the contract until the date on which the performance falls due, and that it is unimaginable that these things would disappear from the hands of people (*wa-lā yutawahhamu ‘nqīṭā’u-hu min aydī al-nās*).”<sup>278</sup> For the other schools, it suffices that the object exists when performance comes due. What solution do they adopt in the event that the subject matter of a *salam* is not available?

Before answering this question, we must explain what is meant by “these things would disappear from the hands of people.” The Hanafī jurist Qāḍī Khān writes, “Disappearance means that the subject matter does not exist in the market of a city in which it is usually sold, regardless of whether it is or not found in the houses of individuals.”<sup>279</sup> Remember that for the Hanafis and Malikis, a rise in the price of an object does not automatically lead to the cancellation of the contract. The Hanafī jurist Ibn ‘Ābidīn (d. 1258/1842) issued a *fatwā* regarding a *salam* of madder in which he argued that a rise in the price does not exempt the seller from his obligation.<sup>280</sup> In contrast, the Shafī‘ī jurist al-Ramlī (d. 1004/1595) writes that the object is said to have disappeared in three cases: (1) things of the kind designated in the *salam* have all been ruined by natural disasters in the locality in which the performance is due. If they are available in another locality, but are likely to rot during transport, they are said to have “disappeared.” (2) They are available in the locality in which the performance is due or in a locality that is sufficiently

<sup>278</sup> Samarqandī, *Tuhfa* (1964), 2:11; *ibid.* (1414), 2:12. See also, Shaybānī, *Aṣl*, 5:6–7; Jaṣṣāṣ, *Mukhtaṣar*, 3:9; Ibn Nujaym, *Bahr*, 6:172.

<sup>279</sup> Qāḍī Khān, *Fatāwā*, 2:115.

<sup>280</sup> Ibn ‘Ābidīn, *Uqūd*, 1:276.

close that the shortening of prayer is not permitted to those who travel there, but they are found only in the hands of people who have no intention to sell or people who would not sell them except “for a higher price than their fair market price (*bi-akthar min thaman mithli-hi*).” (3) They are available only in a locality so remote that the shortening of prayer is permitted.<sup>281</sup> According to the Shafi‘is, a person who travels to a place that is more than 16 *farsakhs* or 48 *mīls*, i.e. approximately 96 kilometers from his point of origin, can shorten prayer.<sup>282</sup>

The Hanafis distinguish between (1) when the object becomes unavailable at some time between the date of contract and the date on which the performance falls due, and (2) when it becomes unavailable after the date on which the performance falls due.

(1) With regard to the former case, al-Samarqandī writes, “If it disappears at the time of the contract, at the moment when the performance is due, or at some point in time between these two, it [viz. *salam*] is not valid.”<sup>283</sup>

(2) If the object does not cease to exist in the market until the date on which performance falls due and the buyer does not take delivery of the object before it becomes unavailable, he has the choice between canceling the contract to take back the price and waiting until such time as it becomes available, when he can require the seller to deliver it.<sup>284</sup>

Al-Kāsānī explains the Hanafi rules by comparing them with the Shafi‘i doctrine. According to the Shafi‘is, a *salam* is valid if the object exists on the date on which performance comes due, and the availability or unavailability of the object at other times does not affect its validity. Al-Kāsānī writes about the Shafi‘i rule:

What counts regarding this condition is not the existence of the object itself, but the possibility of its delivery. Therefore the date on which the delivery falls due, i.e. the end of the specified period, is taken into account irrespective of whether or not the object exists during the period prior to that date.<sup>285</sup>

<sup>281</sup> Ramlī, *Nihāya*, 4:189.

<sup>282</sup> Ghazālī, *Waqīz*, 1:59; Shīrāzī, *Tanbīh*, 40.

<sup>283</sup> Samarqandī, *Tuhfa* (1964), 2:11; *ibid.* (1414), 2:12.

<sup>284</sup> Ṭahāwī, *Mukhtaṣar*, 88; Kāsānī, *Badā‘i‘* (1402), 5:211; *ibid.* (1418), 7:139; Marghīnānī, *Hidāya*, 3:72.

<sup>285</sup> Kāsānī, *Badā‘i‘* (1402), 5:211; *ibid.* (1418), 7:139.

Then al-Kāsānī justifies the Hanafi position:

If the seller is capable of delivery today, it is uncertain that he is also capable at the date on which the performance is due, for he may die [before that date]. If he survives until that date, he is capable. But if he dies before that date, he is not capable. Therefore it is uncertain whether he is capable or not. In such a case, he is considered not to be capable of delivery.<sup>286</sup>

To explain the Hanafi position more concretely, let us take the example of a *salam* of fruit concluded prior to the harvest. If the seller dies shortly after the contract, performance becomes due according to the general rule that any debt becomes due at the moment of the debtor's death. However, because the fruit is not yet available, the buyer cannot take immediate possession of the fruit. To avoid such a situation, the Hanafis prohibit a *salam* of an object that does not exist in the market at some point between the date of contract and that on which the performance is due. The Hanbali jurist Ibn Qudāma writes: Sufyān al-Thawrī, al-Awzā'ī and the Hanafis require that the object does not cease to exist from the moment of the contract until that of performance, on the ground that if the seller dies at some point between the two moments, the performance immediately becomes due.<sup>287</sup> The Maliki jurist al-Ḥaṭṭāb (d. 954/1547) also writes that the Hanafis require the object to be constantly available because the seller can die or become insolvent at any moment.<sup>288</sup>

The explanation of al-Kāsānī, Ibn Qudāma and al-Ḥaṭṭāb raises two questions. First, according to this explanation, the *salam* must become invalid also in case (2), for if the seller dies before the object becomes available again, the buyer cannot take immediate delivery of the object. Why do the Hanafis give the buyer the option to maintain the *salam*? Second, in both cases (1) and (2) why do the Hanafis not distinguish the cases in which the seller has (a) acquired part of the object, (b) acquired the stipulated quantity in its entirety, and (c) has not acquired any of it? Is it not reasonable that the buyer should be able to demand that the seller deliver the object if the seller has acquired the object in its entirety? Likewise, is it not reasonable that the buyer should have the right to demand that the seller deliver what the seller has acquired and to cancel the contract to the extent that the seller has not acquired the object?

<sup>286</sup> Kāsānī, *Badā'ī* (1402), 5:211; *ibid.* (1418), 7:139.

<sup>287</sup> Ibn Qudāma, *Mughnī*, 4:196.

<sup>288</sup> Ḥaṭṭāb, *Mawāhib*, 4:535.

The Hanafis fail to justify rules for either case. In my view, the Hanafi rules are better explained by taking into consideration the interests of the seller. Where the seller fails to provide the stipulated quantity of the object, I have inferred that the Hanafis recommend partial cancellation, in order that the seller does not incur a loss beyond his expectation (remember that it is anticipated that the seller will pay a higher price for the object than the price that he receives in the *salam*). In case (1), the object must be available at the moment of the contract, for a *salam* is valid only when it is certain that the object is always available until the date of performance. Subsequently, however, objects of the kind designated in the contract disappear from the market for some extraordinary reason. They may have disappeared due to the outbreak of war or spread of a plague, as the result of which the objects, e.g. foodstuffs, are unavailable in the area in which the seller is to perform his obligation. In such a case it would be extremely costly for the seller to acquire the object. Therefore the only equitable solution is to cancel the contract in its entirety, for if the buyer may choose to require the seller to deliver what the seller has acquired, he can make a considerable profit to the detriment of the seller, who is assumed to have acquired the object at a cost price higher than the *salam* price received from the buyer. Graph 3 shows how the profits accrue to both parties. Where  $q_2$  is extremely high, the seller incurs a considerable loss.

As for case (2), if the seller has missed the chance to acquire the object at a reasonable cost, the buyer has the right to elect whichever option is the most favorable for him, either maintaining the contract or canceling it. The Hanafis may have taken into consideration the fact that the seller neglected to acquire the object, despite contracting to do so.

In the *Muwatta'*, Mālik is asked about a person who purchases fresh dates for one dinar from the owner of an orchard in a *salam* (of type A). He states: if the harvest of this orchard runs out when the buyer has taken delivery of only part of the stipulated quantity of dates, the rule is that the buyer "reckons with the owner of the orchard (*yuhāsibu ṣāhib al-ḥā'i*)."<sup>289</sup> This is to say, if the buyer takes delivery of 100a % of the stipulated quantity, he can take back (1 - a) dinar.<sup>289</sup>

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<sup>289</sup> Mālik-Yahyā, *Muwatta'*, 3:273, no. 1357; *ibid.*, tr. Bewley, 255a.

Where the seller is supposed to acquire the object from a third person, Saḥnūn asked Ibn al-Qāsim about the case of a *salam* of fruit in which the seller had not completely performed his obligation at the end of the season. Ibn al-Qāsim responded that Mālik first stated that the seller was to receive a postponement until the following season, but that he later changed his position holding that performance is postponed until the following season if one of the contracting parties so desires, but a reckoning (*muḥāsaba*) is also permitted if both parties agree to it.<sup>290</sup> It is not clear why Mālik changed his position, but his second opinion may have sought to enable the buyer to make use of the price, which, according to his first opinion, is not immediately used to acquire the object.

### *Accord and satisfaction*

The Hanafis prohibit accord and satisfaction in general, in accordance with the principle that prohibits the resale of an object that a person has purchased before he takes possession of it. This is because an accord and satisfaction amounts to the sale of the object of a *salam* that the buyer has not yet taken possession of in exchange for the substitute, and this is prohibited.<sup>291</sup> This solution is attributed to several Basran jurists prior to Abū Ḥanīfa. Al-Ḥasan al-Baṣrī reportedly said, “When you buy [an object] in a *salam*, don’t exchange the object for anything else until you take possession of it (*idhā salafā salafan fa-lā taṣrif-hu fī shay’ ḥattā taqbīda-hu*).”<sup>292</sup> A similar statement is attributed to Ibn Sīrīn.<sup>293</sup> The Basran jurist and traditionist Abū al-Sha‘thā’ Jābir b. Zayd (b. 21/641–2; d. 93/711–2, 96/714–5, 103/721–2 or 104/722–3) reportedly said, “When you purchase an object in a *salam*, don’t take anything other than the object of the *salam* or your price.”<sup>294</sup> It is not clear whether their solution is based on the same principle as the Hanafi solution.

<sup>290</sup> Saḥnūn, *Mudawwana*, 4:11–12. See also Ibn Rushd al-Jadd, *Muqaddamāt*, 2:24–25; Qarāfī, *Dhakhīra*, 4:467–68.

<sup>291</sup> Samarqandī, *Tuḥfa* (1964), 2:18–19; *ibid.* (1414), 2:17; Ibn Rushd al-Ḥafīd, *Bidāya*, 2:205; *ibid.*, tr. Nyazee, 2:245; Shaybānī, *Aṣl*, 5:33.

<sup>292</sup> San‘ānī, *Muṣannaf*, 8:14, no. 14107. For other reports ascribed to al-Ḥasan al-Baṣrī to the same effect, see Ibn Abī Shayba, *Muṣannaf*, 4:347–48, nos. 20845, 20847.

<sup>293</sup> San‘ānī, *Muṣannaf*, 8:14, no. 14108.

<sup>294</sup> San‘ānī, *Muṣannaf*, 8:15, no. 14114.

In Iraq, only ‘Umar b. al-Khaṭṭāb was credited with a statement permitting accord and satisfaction in a *salam* under certain conditions: “If you buy [an object] in a *salam*, there is no harm in taking an ‘*ard* instead of your price.”<sup>295</sup> The word “‘*ard*” apparently signifies a non-fungible item, i.e. an item that is not sold by measure or weight, in other words an object that, in principle, cannot be the subject of a *salam*. If so, we can infer that this statement is intended to permit the substitution of an object that cannot be the object of a *salam* for the stipulated object of a *salam*. The underlying idea seems to be that the buyer of a *salam* can take delivery of only the object of the *salam* or an item that cannot be the subject of a *salam*, because anything else that is found in the possession of the seller may be the object of another *salam* that the seller has concluded with a third party. A statement attributed to Ibn ‘Abbās, “If you buy foodstuff in a *salam*, don’t take another kind of foodstuff instead, but you can take fodder instead of the object as you please,”<sup>296</sup> reflects the same idea: a person who sells foodstuffs in a *salam* is presumably a merchant dealing with foodstuffs, so that if fodder happens to be found in his possession, there is no presumption that a third party has the right to it.

The Medinan jurists permitted an accord and satisfaction if two conditions are met. First, it is necessary that performance has fallen due. Second, accord and satisfaction should not contradict the prohibition of *ribā* of delay. In the following, I will demonstrate that they do not prohibit accord and satisfaction as such by closely examining the positive solutions.

(1) In a report in the *Muwattaʿ* the Medinan jurist al-Qāsim b. Muḥammad says that he heard Ibn ‘Abbās say to someone who asked him about the case of a person who wanted to sell a garment that he had purchased in a *salam* before he took possession of it, “That amounts to ‘silver for silver’,” and that Ibn ‘Abbās disapproved of it.<sup>297</sup> We can infer that Ibn ‘Abbās reportedly regarded this procedure as a delayed exchange of ‘silver for silver,’ because the buyer in the *salam* had paid the *salam* price in advance and received another price by reselling the garment (the object of the

<sup>295</sup> Ibn Abī Shayba, *Muṣannaf*, 4:347, no. 20843.

<sup>296</sup> Ibn Abī Shayba, *Muṣannaf*, 4:347, no. 20840.

<sup>297</sup> Mālik-Yahyā, *Muwattaʿ*, 3:307, no. 1402; *ibid.*, tr. Bewley, 267b, 31.31, no. 70.

*salam*), without taking possession of the garment. Thus understood, this procedure contravenes the prohibition of *ribā* of delay (for the definition of which, see p. 213), which applies to the exchange of silver (or dirham) for silver (or dirham) on a delayed term.

Commenting on this report, however, Mālik states that the Medinan jurists consider that Ibn ‘Abbās disapproved of the resale of the object of a *salam* before the buyer takes possession of it only when the buyer sells it back to the seller in the *salam* for a price higher than he paid in the *salam*. The text in the *Muwattaʿ*<sup>298</sup> continues:

Mālik spoke about the case of a man who paid in a *salam* dinars or dirhams for four described pieces of cloth to be delivered before a specified time. When performance became due, he demanded delivery from the seller but the seller did not have them. Then he found that the seller had cloth of inferior quality and of the same type (*dūnahā min šinfi-hā*), and the seller said that he would give him eight pieces of the cloth. Mālik said, “There is no harm in this procedure if he takes the pieces of cloth that are offered to him before they separate. It is not good if the transaction involves delayed terms. It is also not good if that is before the end of the term, unless he sells him cloth that is not the type of cloth for which he paid in the *salam*.”<sup>298</sup>

Mālik here applies the prohibition of *ribā* of delay in an exchange of an item other than money or foodstuffs for another of the same kind and type: (i) if the items are exchanged before the contractual session is over, there is no harm in it, even if they are not equal in quality or quantity; (ii) If the exchange is not completed before the contractual session is over, the exchange is lawful only when they are equal in quantity. It follows from the cited text that the four pieces of cloth designated in the *salam* are considered to have been delivered to the buyer by the mere fact that performance has fallen due. Such a fiction is more apparent in the following example.

(2) Also in the *Muwattaʿ*, Mālik states as follows. If Syrian wheat is made the subject of a *salam*, there is no harm in the buyer’s receiving Egyptian wheat (*maḥmūla*) instead of Syrian wheat, once performance has come due.<sup>299</sup> On the other hand, Mālik also states:

The generally agreed-on way of doing things among us is that wheat is not sold for wheat, dates for dates, wheat for dates, dates for raisins,

<sup>298</sup> Mālik-Yahyā, *Muwattaʿ*, 3:309, no. 1402; *ibid.*, tr. Bewley, 268b, 31.31, no. 70.

<sup>299</sup> Mālik-Yahyā, *Muwattaʿ*, 3:292, no. 1382; *ibid.*, tr. Bewley, 262a. For the definition of *maḥmūla*, see Shaybānī, *Hujja*, 2:597–98.

wheat for raisins, or any kind of foodstuff sold for foodstuff at all, except from hand to hand. If there is any sort of delay in the transaction, it is not good. It is prohibited.<sup>300</sup>

According to this text, it is permitted to deliver Egyptian wheat instead of Syrian wheat, i.e. the object designated in the *salam*, because the Syrian wheat is considered to be delivered by the mere fact that delivery has come due. It goes without saying that this is a fiction, as is also clear from the following text in the *Muwattaʿ*:

Mālik said, “The way of doing things about which there is no dispute among us concerning someone who purchased slaves, cattle or goods in a *salaf*, is that when they were described and a *salaf* was made for them for a specified date, and the date falls due, in order to resell them to the seller of the *salaf* for more than the original price, he must take possession of them before reselling them. If he resells them before taking possession of them, that is *ribā*.”<sup>301</sup>

In this case, the delivery is not considered to have taken place by the mere fact that it comes due. Mālik does not explain the reason for this solution, but we can infer as follows: if the buyer resells the object for more than the original price without the seller providing the object, the presumption is that the buyer compelled the seller to repurchase the object for more than the original price as a penalty for breach of contract. But if the seller has provided the object, such a presumption is out of the question.

The question is: why did Mālik and the other Medinan jurists usually adopt the fiction that the delivery takes place by the mere fact that performance becomes due? To answer this question, let us consider why it is required that the performance has become due for accord and satisfaction to be valid. The following solutions suggest an answer to this question.

Ibn Abī Salama is reported to have stated: a creditor cannot purchase an object from his debtor, using his credit to pay for it, whether or not the credit has fallen due, if the delivery of the object is delayed. If the delivery is delayed, this constitutes *ribā*, for it is presumed that the price is reduced to less than the market price (*bi-waḍīʿa min siʿr al-nās*) in consideration of the delay.<sup>302</sup>

<sup>300</sup> Mālik-Yaḥyā, *Muwattaʿ*, 3:293–94; *ibid.*, tr. Bewley, 262b. See also, Saḥnūn, *Mudawwana*, 4:33–34.

<sup>301</sup> Mālik-Yaḥyā, *Muwattaʿ*, 3:307–08; *ibid.*, tr. Bewley, 267b–68a, 31.31, no. 70.

<sup>302</sup> Saḥnūn, *Mudawwana*, 4:129–30.

The following example illustrates the rationale of this solution: *A*, who has a credit against *B*, buys from *B* fruit on trees belonging to *B*. Mālik states that it is permitted to use the credit to pay the price of the fruit only if the fruit is harvested without delay. Ibn al-Qāsim justifies this solution saying that otherwise “the creditor would make a profit by reducing the price of the object in consideration for the waiting period (*yaṣīru ṣāhib al-dayn yajtarru bi-dhālika fī-mā anzara wa-akhhara fī thaman sil’ati-hi manfa’atan*).”<sup>303</sup> That is to say, while *B*’s debt is immediately extinguished (i.e. set off), *A* waits for some time to take delivery of the fruit. The problem with this transaction is that *A* may demand a reduction of the price for this reason. This is what is meant by “the creditor would make a profit by reducing the price of the object in consideration for the waiting period.”

From an analogy with this solution, I infer that the Medinan jurists reasoned as follows: if both parties in a *salam* agree to accord and satisfaction before performance falls due, the presumption is that the value of the substitute is smaller than that of the original object because the seller performs his obligation before the specified date. This is to say, the seller makes a profit by reducing the price of the object in consideration for the acceleration of performance. The prohibition of such a procedure is embodied in the prohibition of “Reduce the price [for me] and receive [it] immediately (*Da’ [‘annī] wa-ta’ajjal*),” as attributed to Zayd b. Thābit (d. 45/665–6, 48/668–9, 51/671–2 or 55/674–5) and Ibn ‘Umar.<sup>304</sup> In the *Muwatta’*, ‘Ubayd Abū Ṣāliḥ, a *mawlā* of the first Abbasid caliph Abū al-‘Abbās al-Saffāḥ (d. 136/754), is reported to have said:

I sold some drapery to the people of Dār Nakhla on credit. Then I wanted to go to Kufa, so they proposed that I reduced the price for them and they would pay me immediately. I asked Zayd b. Thābit about it. He said, “I tell you not to accept this or to allow it to anybody.”<sup>305</sup>

The prohibition does not apply when the performance becomes due. Therefore, the Medinan jurists did not prohibit accord and satisfaction as such.

<sup>303</sup> Saḥnūn, *Mudawwana*, 4:128–29.

<sup>304</sup> Saḥnūn, *Mudawwana*, 3:426; 4:123. See also, Ṣan‘ānī, *Muṣannaf*, 8:71, no. 15354.

<sup>305</sup> Mālik-Yahyā, *Muwatta’*, 3:323, no. 1413; *ibid.*, tr. Bewley, 273b, 31.39, no. 81; Mālik-Shaybānī, *Muwatta’*, 271.

## 6. Conclusion

The foregoing arguments may be summarized as follows (for the description of various types of *salam*, see p. 166–70).

(1) The species of the price and the object are subject to restrictions deriving from the prohibition of *ribā* of delay, for a *salam*, by definition, includes a delayed exchange of the price for the object.

(2) The prohibition of uncertainty (*gharar*) and ignorance (*jahl*, *jahāla*) requires that the species, the quality and the quantity of the price and the object are specified at the moment of a *salam*. But some jurists refer in passing to the existence of contracts in which one of these elements is not specified.

(3) According to the Hanafis, a *salam* becomes invalid if the price is not paid before the contractual session is concluded. This solution may seek to protect a buyer who fears that the seller will be unable to perform his obligation. The Malikis are divided over this issue: some adopt the same solution as that adopted with respect to an ordinary sale; others side with the Hanafis.

(4) There are two issues as regards the date of delivery.

(a) The economic function of an immediate *salam*, in which the buyer has the right to require the seller to perform the contract at any time, is discernible in a *salam* of types A or B. Those jurists who regard type C *salam* as typical tend to disapprove of an immediate *salam*.

(b) There are two sub-issues as regards the definition of the date of delivery. The first is whether or not it is permitted to define the date of delivery by naming a season or an event such as cutting or harvesting. The Malikis, who attach some importance to a type A *salam*, deem it permissible to define the date of delivery in this way. The other schools, which place greater weight on the need to observe the prohibition of uncertainty and ignorance, declare it unlawful. The second issue concerns the length of the period of delay. For those jurists who regard type C *salam* as typical, a *salam* with a short period of delay, e.g. two or three days, is meaningless or even harmful. Those jurists who bear a type B *salam* in mind are tolerant toward it.

(5) It is permitted to take a pledge or a surety in a type C *salam*, just as in an ordinary sale, whereas this will be prohibited in a *salam* of types A or B.

(6) For a *salam* to be valid is it necessary that items of the kind specified in the contract do not cease to exist from the time of the

contract until the date on which the performance falls due, or does it suffice that items of the kind specified exist in the market on the date on which the performance falls due? This problem is closely related to issue (9).

(7) Al-Shaybānī, the Shafi'is and the later Malikis treat the *salam* in the same manner as an ordinary sale with regard to a defective object. They seem to have regarded the *salam* as independent of the process by which the seller acquires the object. Abū Ḥanīfa and Abū Yūsuf attribute the risk of loss or defect to the buyer. Their position is understandable by regarding the seller as an agent for the buyer, i.e. if we assume a type B *salam*.

(8) The jurists disagree over the manner in which a *salam* is canceled because of a rise in the market value of the object. To several Iraqī jurists, including al-Ḥasan al-Baṣrī, Shurayḥ, Ibrāhīm al-Nakha'ī and al-Sha'bī is attributed the opinion that the buyer must choose between maintaining the contract in its entirety and canceling it in its entirety. By the former choice, a postponement is given to the seller until the market price declines to the anticipated market price. By the latter choice, the buyer can take back the price. This opinion, which seeks to safeguard the interests of the seller, is in accordance with a type B *salam*. Abū Ḥanīfa (unlike with respect to issue (7)) and the Hanafis, who bear in mind a type C *salam*, hold that the buyer can force the seller to perform his obligation without delay and only recommend partial cancellation to prevent the seller from suffering a considerable loss. The Medinan jurists prior to Mālik seem to have adopted the same opinion as that attributed to al-Ḥasan al-Baṣrī and others. Mālik, who adopts the same position, introduces an exceptional rule, bearing in mind a type B *salam* in which the price itself is intended to be used to pay for the object.

(9) As for impossibility, the Hanafis hold, bearing a type C *salam* in mind, that a *salam* becomes invalid if things of the kind designated in the contract disappear from the market at some point between the date of the contract and the date on which the performance becomes due. This rule seeks to safeguard the interests of the seller. The Hanafis are less eager to protect the seller if the object becomes unavailable in the market only after performance becomes due. Mālik imposes a reckoning (*muḥāsaba*) arguing from a type A *salam*. As for a *salam* in which the seller is supposed to acquire the object from a third person, Mālik at first gave the seller a post-

ponement maintaining the contract, but later changed his mind and allowed a reckoning if both parties agree.

(10) The Hanafis prohibit accord and satisfaction on the ground of the general prohibition of the resale of an object that a person purchased before he takes possession of it. Al-Ḥasan al-Baṣrī and Ibn Sīrīn reportedly adopted the same solution, although their motive is not clear. In Iraq, only ʿUmar b. al-Khaṭṭāb was credited with a statement permitting accord and satisfaction in a *salam* under certain condition. The Medinan jurists did not prohibit accord and satisfaction as such.

These disputes reflect the process whereby various customary transactions having in common the prepayment of the price were scrutinized, regulated and modified in order to serve particular economic functions and to abide by the restrictions imposed by general rules, such as the prohibition of *ribā* and the prohibition of uncertainty and ignorance. On the whole, the influence of the *salam* in which the seller serves as a middleman for the buyer (type B, as I called) is strong in the opinions attributed to the jurists active in the first half of the eighth century. The general trend of doctrinal development concerning the *salam* can be envisaged as a movement in the basic classification of the contract from commission sale or remunerated agency to a sale separated from the acquisition by the seller. What is the precise nature of the type B *salam*? The solutions adopted by Abū Ḥanīfa and Abū Yūsuf with regard to the case of a defective object may suggest that the seller acts as an agent for the buyer. But apart from these, the positive solutions regulating the *salam* indicate that the seller is required to deliver to the buyer the object that he has acquired on his own behalf. I conclude therefore that the type B *salam* was a commission sale.

It is not clear why jurists came to disapprove of a type B *salam*. But we have cited the Prophetic hadith transmitted by the *isnād*: Maʿmar and Sufyān al-Thawrī—Ḥammād b. Abī Sulaymān—Ibrāhīm al-Nakhaʿī—Abū Hurayra and Abū Saʿīd al-Khudrī or one of them: “Whoever employs someone should specify his wages,” and I inferred that the idea embodied in this hadith underlaid the prohibition of brokerage in Iraq, because a broker demands a remuneration or commission that is not fixed. A similar argument is valid for a type B *salam*.

*Section 4 Conclusion*

The early legal sources and hadith collections include numerous reports and legal opinions that shed light on the original form of certain kinds of sale:

- (1) The seller in a *murābaḥa* used to acquire the object as an agent for the buyer, with the result that ownership of the object transfers directly from the original seller to the buyer in the *murābaḥa*, whereas the rights and liabilities associated with the original sale (which was formed usually after the *murābaḥa*) are created between the original seller and the seller in the *murābaḥa*.
- (2) The seller in a *tawliya* could acquire the object as a partner of the buyer, with the difference between the price in the *tawliya* and the price for which the buyer resells the object being distributed between the seller and the buyer.
- (3) The seller in one form of *salam* (type B in my terminology) used to acquire the object as a merchant receiving commission from the buyer, thus the seller, who acquired the object on his own behalf, was even so required to transfer ownership to the buyer.

However, the Iraqi jurists came to treat these sales as a transaction separate from the process by which the seller acquires the object, through the introduction of a number of principles, such as the prohibition of the sale of an object that one does not own, and the prohibition of profiting from an object the risk of which one does not assume, as embodied in the Prophetic hadiths. In doing so, they redefined the *murābaḥa* and the *tawliya* as sales that seek to ensure that the price the buyer owes is reasonable; they substituted the *ishrāk* for the original *tawliya* as a means of forming a partnership; they tolerated the *salam* only as a sale separate from the acquisition by the seller and as a means of financing. It is important to note that these changes were mostly introduced by jurists prior to Abū Ḥanīfa. This is conspicuous with regard to the solutions adopted by al-Shaybānī with regard to *murābaḥa*. They retain almost intact the residual influence of the original *murābaḥa* (the eleven-tenths or twelve-tenths sale) that was supposed to be concluded before the original sale, whereas he took it for granted that a *murābaḥa* was concluded after the seller had acquired and taken possession of the object. The Medinan doctrine seems to have taken a similar course. But its process is less clear than in Iraq, because few opinions are attrib-

uted to jurists prior to or contemporary with Mālik regarding these sales, so that it is difficult to determine when the changes in their understanding and definition took place.

Finally, the Hanafi jurists construed the rules governing the original *murābaḥa* to produce a form of direct agency, by which the effect of the contract accrues to the principal, whereas the rights and liabilities arising from the contract are created between the agent and the third party.

## CHAPTER THREE

### THE PROHIBITION OF *RIBĀ*

The prohibition of *ribā* is one of the best-known principles in Islamic law and its influence on the economic activities of the Muslim societies has been extensive. However, the origins of the prohibition still remain an unstudied mystery. In this chapter I will explain how the prohibitions of several transactions were put together to form a set of rules that collectively constitute the prohibition of *ribā*.

For Muslim jurists, the most important source of the prohibition is found in Prophetic hadiths. A representative hadith reads:

The Messenger of God said, “If gold is paid for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, payment should be made like for like (*sawāʾ bi-sawāʾ*), equal for equal (*mīthl bi-mīthl*), and hand to hand; if these species (*ajnās*, sg. *jins*) differ, [you may] sell them as you please, if payment is made from hand to hand.”<sup>1</sup>

The interpretation of this hadith by the Sunni Muslim jurists points to the complicated origins of the prohibition of *ribā*.

First, the six species mentioned in this hadith are called *māl rib-awī* (pl. *amwāl ribawīyya*), i.e. goods susceptible to *ribā* or *ribā* goods. Although the *Zāhirīs* limit *ribā* goods to the six species specified here,<sup>2</sup> the majority of Muslim jurists hold that these six species are only examples of the goods that fall under the rubric of *ribā* goods. According to the Hanafis, gold and silver represent the class of items sold by weight (*mawzūn*) and the four other *ribā* goods represent the class of items sold by measure (*makīl*). This view is ascribed to the Kufan jurist Ibrāhīm al-Nakhaʿī (b. 50/670–1; d. 95/713–4 or 96/714–5).<sup>3</sup> According to the Malikis, gold and silver represent the class of money (*thaman*) and the four other goods the class of foodstuffs that can be dried to be stored. The Medinan jurist Ibn al-Musayyab (b. 15/636–7; d. 93/711–2 or 94/712–3), one of ‘the seven Medinan

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<sup>1</sup> Muslim, *Ṣaḥīḥ*, buyūʿ, 624; Ibn Abī Shayba, *Muṣannaf*, 4:499, no. 22485.

<sup>2</sup> Linant de Bellefonds, *Traité*, 1:219.

<sup>3</sup> Abū Yūsuf, *Āḥār*, 187, no. 846.

jurists' (*fuqahā' al-Madīna al-sab'ā*), is reported to have said, "There is *ribā* only in gold or silver or what is weighed or measured of what is eaten or drunk."<sup>4</sup> Although the later jurists try to deduce the definition of *ribā* goods from the hadith itself, the very fact that the Hanafis and Malikis and their predecessors disagree about their definitions suggests that the prohibition of *ribā* was the product of a complex historical process.

Second, the jurists disagree over the meaning of the sentence, "payment should be made like for like, equal for equal." According to the majority view, the exchange of *ribā* goods of the same species must be in equal quantities and a difference of quantity constitutes '*ribā* of excess' (*ribā al-faḍl*). These same jurists pay no attention to equality in value or quality, which is surely crucial to the parties of exchange. Why? One possible answer is that the prohibition of *ribā* of excess was initially proposed to regulate a specific transaction.

Third, the sentence, "If these species differ, [you may] sell them as you please, if payment is made from hand to hand," taken literally appears to prohibit the exchange of *ribā* goods belonging to different species on a delayed term altogether (in addition to the exchange of *ribā* goods belonging to the same species). However, the jurists do not interpret the sentence literally and they hold that the prohibition of *ribā* of delay (*ribā al-nasī'a*) operates only with respect to the exchange of *ribā* goods belonging to the same class: e.g. if gold is exchanged for silver, the exchange must be completed on the spot, for both gold and silver belong to the class of things sold by weight (according to the Hanafis) or to the class of money (according to the Malikis). If, however, gold is exchanged for wheat, the delivery of gold or wheat can be delayed, for they belong to different classes. Why do the positive rules adopted by the Muslim jurists depart from the literal interpretation of this Prophetic hadith? One possible explanation is that several rules having different origins were subsequently combined to form a single Prophetic hadith, whereas the jurists transmitted the original meaning of these rules. In fact, many hadiths refer only to the prohibition of *ribā* of excess in the exchange of gold for gold or wheat for wheat etc., or only to the prohibition of *ribā* of delay in the exchange of gold for silver,

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<sup>4</sup> Mālik-Yahyā, *Muwatta'*, 3:280, no. 1368; *ibid.*, tr. Bewley, 257b, 31.16, no. 37; Saḥānī, *Muṣannaḥ*, 8:21, no. 14139.

wheat for wheat or wheat for dates, etc., and these hadiths are in accord with the corresponding positive rules adopted by the jurists.

Thus we can infer that the prohibition of *ribā* was originally a cluster of rules aimed at regulating specific transactions, as Wichard remarks.<sup>5</sup> I will therefore examine individually hadiths that mention the prohibition of *ribā* of excess in ‘gold for gold, silver for silver’ (Section 2), those that mention the prohibition of *ribā* of delay in the exchange of goods belonging to the same class (Section 3), and those that mention the prohibition of *ribā* of excess in the exchange of ‘wheat for wheat, dates for dates etc.’ (Section 4). First, however, it is necessary to demonstrate that the prohibition of interest on loans is not a direct source of the Prophetic hadith, although it did play a role in the formation of the prohibitions of *ribā* (Section 1).

### *Section 1 Prohibition of interests on loans*

Schacht writes, “What was generally understood in the earliest period as the *ribā* forbidden in the *Qurʾān*, seems only to have been interest on loans (chiefly of money and foodstuffs); anything that goes beyond this is to be regarded as a later development.”<sup>6</sup> This thesis is plausible, because the prohibition of interest on loans has its precedent in Jewish law, and it is easier to detect its rationale there than in that of the prohibitions of *ribā* properly speaking. However, it is by no means easy to substantiate this thesis. The only argument that I could find for it is one that the Kufan jurist and traditionist ‘Amir [b. Sharāḥīl al-Sha‘bī] (d. 104/722–3, 105/723–4 or 109/727–8) is credited with, “When species differ, there is no harm in selling, in a *salām*, what is sold by weight for what is sold by weight, and what is sold by measure for what is sold by measure.”<sup>7</sup> This opinion, which is based on the prohibition of interest on loans, is isolated in Iraq. The majority opinion prohibits such transactions on the ground that it violates the prohibition of *ribā* of delay. This statement may reflect a stage where the prohibition had not yet prevailed in Iraq.

<sup>5</sup> Wichard, *Zwischen Markt*, 185–86.

<sup>6</sup> Schacht, “Ribā,” in EI, new edition, 8:491b–92a. For the *ribā* in the *Qurʾān*, see Abdullah Saeed, *Islamic Banking*, 17–30; Amereller, *Hintergründe*, 47–53.

<sup>7</sup> Abū Yūsuf, *Āthār*, 187, no. 848.

Several modern scholars have noted that interest on loans has little to do with *ribā* properly so-called.<sup>8</sup> This may be inferred from the text of the above-cited Prophetic hadith that prohibits *ribā*.

The Messenger of God said, “If gold is paid for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, payment should be made like for like, equal for equal, and from hand to hand; if these species differ, [you may] sell them as you please, if payment is made hand to hand.”

According to this hadith, an exchange of two *ribā* goods belonging to the same species is permitted only when they are delivered on the spot, i.e. before the conclusion of the ‘session’ (*majlis*) or ‘contractual session’ (*majlis al-‘aqd*) in which the agreement is reached to exchange them. However, an interest-free loan (*qard ḥasan*), which stipulates that the borrower should return, at a later date, the same quantity as he received from the lender or less, is valid. This is to say that an interest-free loan is outside the scope of this hadith.

To justify the prohibition of interest on loans, jurists invoke a Prophetic hadith, “Any loan which benefits [the lender] is a *ribā* (*kull qard jarra manfa‘a fa-huwa ribā*)” as well as the hadiths according to which Ubayy b. Ka‘b, Ibn Mas‘ūd and Ibn ‘Abbās (d. 68/686–8) prohibited interest on loans.<sup>9</sup> There are several similar statements; to Ibrāhīm al-Nakha‘ī (d. 95/713–4 or 96/714–5) is attributed the statement, “Any loan which benefits [the lender] is not good (*kull qard jarra manfa‘a fa-lā khayr fi-hi*).”<sup>10</sup> Ibn Sīrīn (b. 34/654–5; d. 110/728–9) is reported to have stated, “Any loan which benefits [the lender] is disapproved (*kull qard jarra manfa‘a fa-huwa makrūh*).”<sup>11</sup> The Hanafi jurist al-Ṭaḥāwī distinguishes interest on loans from *ribā* when he writes, “Thereafter he [viz. the Prophet] prohibited *ribā* and he prohibited any loan which gives benefit.”<sup>12</sup> The Hanafi jurist al-Kāsānī writes, justifying the prohibition of interest on loans: “Because interest stipulated [on loans] resembles *ribā*, for interest is an excess without a consideration, and it is incumbent [on you] to avoid true *ribā*

<sup>8</sup> Sanhūrī, *Maṣādir*, 3:237; Nabil A. Saleh, *Unlawful Gain*, 45.

<sup>9</sup> Shīrāzī, *Muḥadhdhab*, 1:304; Ibn Qudāma, *Mughnī*, 4:211. A statement identical to the Prophetic hadith is ascribed to Ibrāhīm al-Nakha‘ī. Ibn Abī Shayba, *Muṣannaf*, 4:333, no. 20683.

<sup>10</sup> San‘ānī, *Muṣannaf*, 8:145, no. 14659.

<sup>11</sup> Shaybānī, *Āthār*, 101a.

<sup>12</sup> Ṭaḥāwī, *Sharḥ*, 2:252.

and quasi-*ribā* (*li-anna al-ziyāda al-mashrūṭa tushbiḥu al-ribā li-anna-hā faḍl lā yuqābilu-hu ʿiwad wa-ʿl-taharruzu ʿan ḥaḳīqat al-ribā wa-shubhat al-ribā wājib*).<sup>13</sup> It is clear that he also distinguishes interest on loans (quasi-*ribā* as called here) from *ribā* properly so-called.

Let us consider a rule that seems to have derived from the prohibition on interest on loans. According to the Malikis, the exchange of two items that are of equal utility (*manfaʿa*) is invalid unless both items are delivered on the spot or are equal in quantity, even if they are neither gold nor silver nor foodstuffs. For example, according to the well-known opinion of Mālik, the exchange on a delayed term between two items of equal utility is prohibited when accompanied by excess, so that an exchange with delay of two goats for one is prohibited, unless, for example, one is meant for milking and the other for eating.<sup>14</sup> Al-Shaybānī says that the Medinan jurists hold that “if one of them [viz. different kinds of cloth of the same material] is equal to the other [in quality or utility], it is prohibited to exchange one piece of the former kind for two pieces of the latter kind on a delayed term, even if their names differ.”<sup>15</sup>

This rule is traced back to the Medinan jurist Rabīʿa (d. 136/753–4). According to him, the exchange of an item (*ʿarḍ*) other than animals or foodstuffs for an item of the same species (*ṣinf*) must be completed on the spot if the quantities exchanged are unequal; but there is no harm in exchanging two items of the same species on a delayed term in equal quantity. He clarifies the meaning of “species” by saying that it is prohibited to exchange a piece of cloth for two pieces of the same variety (*ḍarb*) on a delayed term, because there is always an excess between them. Conversely if one piece of cloth is exchanged for two pieces of a different variety on a delayed term, they are not “*ṭawab al-ramāʾ*,” i.e. cloth capable of *ribā*, because it is impossible to know with certainty which cloth will fetch a higher price.<sup>16</sup> Apparently this rule was inspired by and introduced after the prohibition on interest on loans (it appears therefore to be lawful to exchange an item for another of the same species to be delivered later if the latter is smaller in quantity).

<sup>13</sup> Kāsānī, *Badāʾiʿ* (1402), 7:395; *ibid.* (1418), 10:598.

<sup>14</sup> Ibn Rushd al-Hafīd, *Bidāya*, 2:134; *ibid.*, tr. Nyazee, 2:164.

<sup>15</sup> Shaybānī, *Hujja*, 2:645.

<sup>16</sup> Saḥnūn, *Mudawwana*, 4:131.

A similar rule is attributed to Ibrāhīm al-Nakha'ī in Iraq, who is reported to have said that there is no harm in exchanging an item that is not sold according to measure or weight for an item of the same species, on the condition that the delivery takes place on the spot; otherwise such an exchange is prohibited.<sup>17</sup> Al-Nakha'ī reportedly said also that if the species differ the exchange is permitted on a delayed term.<sup>18</sup> It is impossible to know whether or not the underlying basis for this rule was the same argument as that of the Medinan jurists, but al-Shaybānī clearly departed from the Medinan argument when he says, regarding the exchange of one piece of cloth for another, "What differs from it and what does not differ from it are treated in the same manner. Only the species are taken into consideration. If the species differ, delay is permitted (*Mā tafāwata min-hu wa-mā lam yatafāwat sawā'*, *innamā yunzaru ilā al-ajnās. Idhā 'khtalafat jāzat fī-hi al-nasī'a*)."<sup>19</sup> Al-Shaybānī attributes this point of view to his teacher Abū Ḥanīfa, who disregards equality or otherwise in quality or utility to decide whether or not the exchange of one piece of cloth for another of the same material such as cotton or flax on a delayed term is valid. If they belong to different species, i.e. they are called by different names, as, for example, Mervi and Herati cloth would be, they can be exchanged on a delayed term.<sup>20</sup>

*Section 2 Ribā of excess in 'gold for gold, silver for silver'*

Turning to the prohibition of *ribā* of excess in an exchange of 'gold for gold, silver for silver,' it is possible to establish with some certitude when the prohibition originated. The apparent reason for the introduction of the prohibition was to maintain the gold-silver standard system that prevailed in the Middle East since ancient times. Al-Shayzarī (d. 589/1193) writes, regarding the activities of money-changers, "It is not permitted to sell pure coinage (*al-khālīs*) for what is adulterated (*al-maghshūsh*), nor to sell adulterated gold and silver coins for other adulterated ones, . . . because of ignorance as to their

<sup>17</sup> Abū Yūsuf, *Āthār*, 187, no. 846.

<sup>18</sup> Abū Yūsuf, *Āthār*, 187, no. 847; Shaybānī, *Hujja*, 2:645.

<sup>19</sup> Shaybānī, *Hujja*, 2:646.

<sup>20</sup> Shaybānī, *Hujja*, 2:247.

value and the lack of similarity between them.”<sup>21</sup> “Adulterated” means that the amount of brass is so much higher than that of silver that the silver is considered an accessory to the brass.<sup>22</sup> It goes without saying that the restraint that he imposes on the activities of money-changers is a result of the prohibition of *ribā* of excess, but it is conceivable that the prohibition originally was introduced to regulate the activities of money-changers.

However, closer examination of the details of the prohibition raises a question. The prohibition applies not only to an exchange of gold or silver coins and bullion, which were traditionally used as currency, but also to the exchange of coins for metalwork, of bullion for metalwork, and of one piece of metalwork for another. It is difficult to explain why equality of weight is required in the exchange of two pieces of gold metalwork so long as we regard the preservation of gold-silver standard system as the reason for the prohibition of *ribā* of excess. By analyzing hadiths and legal opinions recorded in the early sources, I will demonstrate that the prohibition was introduced in response to an historical event.

### 1. *Origins*

The attribution to the Prophet of the prohibition of *ribā* of excess in ‘gold for gold, silver for silver’ may not be authentic. Although the four Sunni schools of law all attribute the prohibition to the Prophet,<sup>23</sup> some of the Companions are reported to have been ignorant of the concept of *ribā* of excess. According to al-Ṣan‘ānī and al-Shāfi‘ī, Usāma b. Zayd (d. ca. 54/673–4) related that the Prophet said, “*Ribā* exists only in a delayed transaction (*innamā al-ribā fī al-nasī’a*).”<sup>24</sup> Al-Shāfi‘ī says that Ibn ‘Abbās (d. 68/686–8) and some of his followers in Mecca and elsewhere held the same view.<sup>25</sup> It is reported that Ibn ‘Abbās issued *fatwās* in which he argued that it is

<sup>21</sup> Shayzarī, *Nihāya*, 74–75; tr. Buckley, *Book*, 94.

<sup>22</sup> Kāsānī, *Badā’i* (1402), 5:197; *ibid.* (1418), 7:92.

<sup>23</sup> Samarqandī, *Tuhfa* (1964), 2:28; *ibid.* (1414), 2:25; Ibn Rushd al-Ḥafīd, *Bidāya*, 2:128; *ibid.*, tr. Nyazee, 2:158; Ghazālī, *Wajīz*, 1:136; Ghazzī, *Sharḥ*, 1:661–64; Ibn Qudāma, *Kāfi*, 2:56–57; Bahūtī, *Kashshāf*, 3:251.

<sup>24</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:117, no. 14546; Shāfi‘ī, *Ikhtilāf*, 146; Shāfi‘ī, *Risāla*, 278; Khaddurī, *Islamic Jurisprudence*, 211–12. For a similar narration, see Ibn ‘Abd al-Barr, *Tamhīd*, 2:244.

<sup>25</sup> Shāfi‘ī, *Risāla*, 279; Khaddurī, *Islamic Jurisprudence*, 211.

permitted to exchange gold for gold of different weights or silver for silver of different weights. When Abū Saʿīd al-Khudrī criticized him for that, he admitted that the ground for his *fatwā* was weak. Al-Ṣanʿānī relates:

Abū Saʿīd al-Khudrī met Ibn ʿAbbās and said to him, “Is your *fatwā* based on what is contained in the Book of God or in the Prophetic sunna?” Ibn ʿAbbās responded, “No, it is found in neither of them. You Companions of Muḥammad are more acquainted with him than I, but Usāma b. Zayd told me that he heard the Messenger of God say, ‘*Ribā* exists only in a delayed transaction’.” Abū Saʿīd said, “I heard him [viz. the Prophet] say, ‘Gold for gold, like for like, silver for silver, like for like.’”<sup>26</sup>

These reports points to the possibility that the prohibition of *ribā* of excess in ‘gold for gold, silver for silver’ was introduced at some point after the death of the Prophet and met some opposition. We can learn something about the rationale for the prohibition and the timing of its introduction by analyzing hadiths that indicate what must be equal in the exchange of gold or silver. These hadiths are divided into two groups. Hadiths in one group demand equality in weight irrespective of the state of the gold or silver, while other hadiths call for equality in face value.

#### *Hadiths that demand equality in weight*

Let us consider first the hadiths that demand equality in weight. Interestingly, they all deal with the sale of manufactured gold or silver.

(a) Abū Rāfiʿ wanted to purchase two anklets of silver from Abū Bakr. He put the two items on one pan of the balance and dirhams on the other. When the dirhams outweighed the two anklets, he said, “I make it lawful (*uhillu-hu*) to you.” Abū Bakr responded, “Even if you make it lawful to me, God does not. I heard the Prophet saying, ‘Silver is paid for silver, weight for weight; gold is paid for gold, weight for weight. A person who provides excess and a person who asks for excess will be sent to Hell.’”<sup>27</sup>

<sup>26</sup> Ṣanʿānī, *Muṣannaf*, 8:117, no. 14546. See also, Muslim, *Ṣaḥīḥ*, *musāqāt*, 18; Ḥumaydī, *Musnad*, 2:328–29, no. 744; Ibn ʿAbd al-Barr, *Tamhīd*, 2:244–45; Ibn Rushd al-Jadd, *Bayān*, 6:443–44.

<sup>27</sup> Ṣanʿānī, *Muṣannaf*, 8:124, no. 14569; Ibn Abī Shayba, *Muṣannaf*, 4:500, no. 22494.

(b) When Malika Ibnat Hānī was about to sell two silver bracelets to ‘Ā’isha in exchange for dirhams, ‘Ā’isha said, “Silver for silver, weight for weight, like for like.”<sup>28</sup>

(c) Abū Rāfi‘ came to ‘Umar b. al-Khaṭṭāb and said to him, “O Commander of the Faithful, I fashion gold and then sell what I have made for more than its weight to take an amount equivalent to the work of my hand.” ‘Umar said, “Do not sell gold for gold unless weight for weight, and silver for silver unless weight for weight. Don’t take any excess.”<sup>29</sup>

(d) Mu‘āwiya b. Abī Sufyān sold a gold or silver drinking-vessel for more than its weight. When Abū al-Dardā’ spoke to ‘Umar b. al-Khaṭṭāb about this, he wrote to Mu‘āwiya, “Don’t sell it except like for like, weight for weight.”<sup>30</sup>

In these hadiths which use the terms “gold (*dhahab*)” or “silver (*ḥidda*),” it is clearly required that gold be exchanged for gold of the same weight and silver for silver of the same weight. The following hadith points to the same view.

(e) Anas b. Mālīk related as follows. ‘Umar b. al-Khaṭṭāb brought him a drinking-vessel that he had fashioned, instructing him to sell it. Then Anas sold it for ‘Umar in exchange for more than its weight (*wazna-hu wa-ziyāda*). On hearing this, ‘Umar said, “No, but equal for equal. The excess is a *ribā* (*lā, illā mithlan bi-mithl. Wa-inna al-faḍl ribā*).”<sup>31</sup>

On the eve of the Muslim conquest, the gold standard prevailed in the Byzantine Empire and the silver standard prevailed in the Sasanian Empire. The Muslims inherited these systems. However, in addition to coins, bullion was used as currency, and the jurists did not distinguish between coins and bullion.<sup>32</sup> This practice dated back to the pre-Islamic period, for al-Balādhurī (d. ca. 278/892) writes, “The dinars of Heraclius were current among the people of Mecca during the Jāhiliyya, and the *baghliyya* Persian dirhams were also known to them, but they sold and bought by considering them as bullion [i.e. according to their weight].”<sup>33</sup>

<sup>28</sup> Ibn Abī Shayba, *Muṣannaf*, 4:500, no. 22496.

<sup>29</sup> Ṣan‘ānī, *Muṣannaf*, 8:125, no. 14575.

<sup>30</sup> Mālīk-Shaybānī, *Muwatta’*, 290, no. 818; Mālīk-Yahyā, *Muwatta’*, 3:278–79, no. 1364; *ibid.*, tr. Bewley, 257a, 31.16, no. 33; Mālīk-Ḥadathānī, *Muwatta’*, 196, no. 235.

<sup>31</sup> Abū Yūsuf, *Āthār*, 183, no. 832.

<sup>32</sup> Brunschvig, “Conception,” 274.

<sup>33</sup> Balādhurī, *Futūḥ*, 466; *ibid.*, tr. Murgotten, 2:263. According to Miles, the *baghli*

The monetary situation in the early Islamic Middle East can explain why gold coin or bullion must be exchanged for gold coin or bullion of equal weights, and why silver coin or bullion are subject to the same rule. It is difficult, however, to understand hadiths (a)—(e), whereby the same rule applies to the exchange between a manufactured object and coin or bullion of the same kind. It would appear more logical and realistic to exchange a manufactured object of gold for gold of greater weight, the difference being equivalent to the wage of the workman, as explicitly indicated in hadiths (c), (e) and (k) (see below). Why should it be that “[a] person who provides excess and one who asks for excess will be sent to Hell,” as admonished in hadith (a)? It is understandable, for example, that interest on loans is regarded as evil, because a lender, by demanding interest, may well be exploiting a borrower who is in a weak position. But it is by no means clear why the exchange of gold or silver products for gold or silver of more than their weight is considered to be so evil as to send those who undertake such transactions to Hell.

A partial answer to these questions is given by the Maliki jurist al-‘Utbī (d. 254/868 or 255/869), who writes that in Damascus people used to pay a commission for the coinage when they brought silver to the mint (*bayt al-darb*) to receive in exchange minted dirhams, but that pious people avoided this.<sup>34</sup> Ibn Rushd al-Jadd (d. 520/1126), who writes that this was an Umayyad practice,<sup>35</sup> describes one of the procedures: people brought their gold to the mint, where it was combined, purified and weighed (*al-tasfiya wa-ma‘rifat wazni-hā*), and then minted. When the minting was over, each person received his share in minted coins calculated in proportion to the weight of his gold, and each person paid his share for the minting.<sup>36</sup>

These descriptions apparently refer to the Umayyad monetary reform undertaken in the 70s A.H./690s C.E. (for the detail of this

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dirhams denotes the earliest Arab dirhams coined in imitation of the late Sasanian *drahms* of Yazdigird III, Hormuzd IV and (chiefly) Khusraw II. G.C. Miles, “Dirham,” *EI*, new edition, 2:319a. Ibn Taghrībirdī quotes al-Zuhri as stating: up to the time of ‘Abd al-Malik b. Marwān (the fifth Umayyad Caliph, r. 65–86/685–705), three kinds of dirham were in circulation; the *wāfiyya* was a dirham of one *mithqāl*, the *baghliyya* a half *mithqāl*, and the *ziyādiyya* three-fifths *mithqāl*. Ibn Taghrībirdī, *Nujūm*, 1:248.

<sup>34</sup> ‘Utbī, *Mustakhraja*, 6:442.

<sup>35</sup> Ibn Rushd al-Jadd, *Bayān*, 6:443.

<sup>36</sup> Ibn Rushd al-Jadd, *Bayān*, 6:442.

reform, see below). Al-Balādhurī writes that the Iraqi governor al-Ḥajjāj b. Yūsuf (r. 75–95/694–714) collected bullion and good metal obtained from spurious coins, which were purified and weighed. Al-Balādhurī also writes that subsequently al-Ḥajjāj permitted merchants and other people to mint silver coins, and demanded a commission from the wages for artisans.<sup>37</sup> A report recorded in the *Muṣannaḥ* of al-Ṣanʿānī may reflect the fact that people received less than the weight of their gold or silver: Ibn Masʿūd (d. 32/652–3) exchanged his silver bullion (*fiḍḍa*) for silver coin (*wariq*) in the treasury (*bayt al-māl*). Subsequently he went to Medina and asked about this. He was told, “Nothing is acceptable except similar for similar (*lā yaṣluḥu illā mithl bi-mithl*).” He then passed by a money-changer, to whom he said, “There is no good in silver (*wariq*) for silver (*wariq*) except similar for similar.”<sup>38</sup> This is to say, Ibn Masʿūd used to exchange his silver bullion for silver coin of a smaller weight, the difference being equivalent to the cost of minting.

Whether it is authentic or not, the report that the Kufan legal authority Ibn Masʿūd was admonished by the Medinans for having behaved in accordance with Umayyad policy parallels the opposition between the view of some Iraqi jurists and that of some Medinan jurists regarding the exchange of gold or silver for a manufactured item.<sup>39</sup> The opinion that prohibits the sale of a sword decorated with silver inlay in exchange for silver bullion of the same weight as that of silver inlay is attributed to the Kufan jurist Ibrāhīm al-Nakhaʿī. He did permit, conversely, the sale of the sword in exchange for silver bullion that weighed more than the silver inlay, for this exchange is tantamount to “silver for silver, and excess for excess (*al-fiḍḍa bi-ʾl-fiḍḍa, al-faḍl bi-ʾl-faḍl*),”<sup>40</sup> the exchange being regarded as a com-

<sup>37</sup> Balādhurī, *Futūḥ*, 468–69; *ibid.*, tr. Murgotten, 2:267.

<sup>38</sup> Ṣanʿānī, *Muṣannaḥ*, 8:123–24, no. 14568. For more detailed report, see Bayhaqī, *Sunan*, 5:282.

<sup>39</sup> Interestingly, another report according to which Ibn Masʿūd accepted the Medinan doctrine and changed his former opinion is recorded in the *Muwattaʿ*: when he was in Kufa, he was asked about marrying the mother after marrying her daughter, on the condition that the marriage with the daughter has not yet been consummated. He permitted it. Then when he went to Medina, he was told that the marriage with the mother is not permitted. When he came back to Kufa, he visited immediately the man who had asked him about this matter and ordered him to divorce the mother. Mālik-Yaḥyā, *Muwattaʿ*, 3:140–41, no. 1157; *ibid.*, tr. Bewley, 213a.

<sup>40</sup> Shaybānī, *Hujja*, 2:577.

bination of two exchanges: (1) the silver inlay for bullion of equal weight, and (2) the sword for the rest of the bullion. It is for the same reason that Abū Ḥanīfa held that when a copy of the *Qurʾān*, a sword or a ring with silver ornament is exchanged for dirhams, the exchange is valid only if the weight of the silver ornament is less than that of the dirhams.<sup>41</sup> The statement attributed to al-Ḥasan al-Baṣrī and Ibrāhīm that there is no harm in selling decorated swords for silver coins or bullion (*fidda*)<sup>42</sup> points to the same idea if this statement implies that the coins or bullion outweigh the silver used to decorate the swords, which seems to be the case. Here it appears to be permitted to exchange bullion for coins of smaller weight, the difference being equivalent to the cost of minting.

In Medina, Mālik and others permit the sale of a sword decorated with silver for silver (coins or bullion), if the value of the decoration is less than one-third of the sword's value (i.e. one-half of the remaining part of the sword); in this case, the sale is an exchange of a sword for silver, the silver decoration being regarded as an accessory. If, however, the value of the decoration is more than one-third of the sword's value, the sale is invalid.<sup>43</sup> This view coincides with hadiths (a)—(e). The *isnād* of hadith (a), as transmitted in the *Mudawwana* is: Ibn Wahb (b. 124 or 25/742 or 43; d. between 195 and 97/810 and 12)—Sufyān al-Thawrī (d. 161/778)—Muḥammad b. al-Sāʿib (b. ca. 66/685–6; d. 146/763–4)—Abū Salama b. ʿAbd al-Raḥmān b. ʿAwf (b. 22/642–3; d. 94/712–3 or 104/722–3) or Salama.<sup>44</sup> In the *Muṣannaḥ* of al-Ṣanʿānī the *isnād* is: al-Ṣanʿānī—Sufyān al-Thawrī—Muḥammad b. al-Sāʿib—Abū Salama.<sup>45</sup> Abū Salama was a famous Medinan transmitter and jurist,<sup>46</sup> and this hadith seems to have originated in Medina. Muḥammad b. al-Sāʿib was a Kufan who “was sometimes accused of heresy, of *rifd*, of sabaʿism, of *ijāʿ* and so on, and sometimes of forgery and falsehood.”<sup>47</sup> It is possible that some Iraqis added his name in the *isnād* to discredit it.

<sup>41</sup> Shaybānī, *Hujja*, 2:573–74.

<sup>42</sup> Saḥnūn, *Mudawwana*, 3:416.

<sup>43</sup> Saḥnūn, *Mudawwana*, 3:415; Shaybānī, *Hujja*, 2:574–75.

<sup>44</sup> Saḥnūn, *Mudawwana*, 3:433.

<sup>45</sup> Ṣanʿānī, *Muṣannaḥ*, 8:124, no. 14569; cf. Ibn Abī Shayba, *Muṣannaḥ*, 4:500, no. 22494.

<sup>46</sup> Juynboll, *Muslim tradition*, 42.

<sup>47</sup> W. Atallah, “al-Kalbī,” in *EI*, new edition, 4:495a.

To sum up, hadiths (a)—(e) were put into circulation and/or invoked in order to refute the Umayyad monetary policy of collecting a commission when new coinage made from bullion or spurious coins was issued. This explains the vehement tone of hadith (a), “A person who provides excess and a person who asks for excess will be sent to Hell.”

*Hadiths that demand equality in numbers*

The preceding explanation accounts for only one of the two reasons for the formation of the prohibition of *ribā* of excess in ‘gold for gold, silver for silver.’ Let us now consider the hadiths requiring coins to be exchanged in equal numbers.

(f) The Prophet said, “One dinar for one dinar, one dirham for one dirham, there must be no excess between them (*al-dīnār bi-l-dīnār wa-l-dirham bi-l-dirham, lā faḍl bayna-humā*).”<sup>48</sup> The same statement is also attributed to Ibn ‘Umar.<sup>49</sup>

(g) The Prophet said, “Do not sell one dinar for two dinars, and one dirham for two dirhams.”<sup>50</sup>

(h) Asked about an exchange between one dirham and two dirhams, ‘Alī responded, “It is a prompt *ribā* (*al-ribā al-‘ajlān*).”<sup>51</sup>

(i) ‘Umar b. al-Khaṭṭāb said, “One dirham for one dirham. Excess between them is a *ribā*.”<sup>52</sup>

(j) Ibn ‘Umar said, “Do not sell one dinar for two dinars, and one dirham for two dirhams. I fear that you take a *ramā*.” Asked about the meaning of “*ramā*,” he responded, “It is what you call *ribā*.”<sup>53</sup>

Unlike hadiths (a)—(e), these hadiths do not require, at least explicitly, equality in weight. All that they demand is equality in number. What is the relation between hadiths (a)—(e) and hadiths (f)—(j)? Later jurists offer two explanations.

<sup>48</sup> Mālik-Shaybānī, *Muwattaʿa*, 289, no. 816; Mālik-Yaḥyā, *Muwattaʿa*, 3:276, no. 1360; *ibid.*, tr. Bewley, 256b, 31.16, no. 29; Mālik-Ḥadathānī, *Muwattaʿa*, 195, no. 232; Shāfiʿī, *Ikhtilāf*, 147; Shāfiʿī, *Risāla*, 277. For a hadith that is almost identical, see Ibn Abī Shayba, *Muṣannaf*, 4:499, no. 22479.

<sup>49</sup> Ṣanʿānī, *Muṣannaf*, 8:125, no. 14574.

<sup>50</sup> Mālik-Yaḥyā, *Muwattaʿa*, 3:278, no. 1363; *ibid.*, tr. Bewley, 257a, 31.16, no. 32; Mālik-Ḥadathānī, *Muwattaʿa*, 195, no. 233; Shāfiʿī, *Ikhtilāf*, 147; Muslim, *Ṣaḥīḥ*, *musāqāt*, 14.

<sup>51</sup> Ṣanʿānī, *Muṣannaf*, 8:124, nos. 14570, 14571. ‘Umar is also credited with the same statement. Ibn Abī Shayba, *Muṣannaf*, 4:500, no. 22492.

<sup>52</sup> Ṣanʿānī, *Muṣannaf*, 8:125, no. 14572.

<sup>53</sup> Ibn Abī Shayba, *Muṣannaf*, 4:500, no. 22488.

The first explanation is best represented by that of the Maliki jurist al-Bājī (d. 474/1081), who writes, in his commentary on the *Muwaṭṭaʿ*, about hadith (f): there are two types of exchange of dinar or dirham, exchange by weight, and exchange by number (*mubādala bi-ʿl-ʿadad*). The former is better, but the latter is lawful insofar as it involves the exchange of a small quantity and it is conducted in an appropriate (*maʿrūf*) manner, just as the *ʿariyya* sale is lawful in a case of necessity (*darūra*) insofar as it is made in an appropriate manner.<sup>54</sup> In the *Mudawwana* Mālik says that the exchange of two or three dinars or dirhams is permitted if equality in number is observed.<sup>55</sup>

The Hanafi jurist al-Kāsānī (d. 587/1191) also refers to the case of a man who borrows dirhams and is required to repay the same number. He observes that such a loan is valid only when two conditions are met. The first condition is that the dirhams are adulterated. The second condition is that the local custom allows the borrower to repay the same number of adulterated dirhams as he received. When these conditions are met, these dirhams are assimilated to *fulūs* (sg. *fals*, copper coins), which are evaluated by number.<sup>56</sup>

According to these explanations, the exchange of equal numbers of gold for gold or silver for silver is tolerated as an exception to the prohibition of *ribā* of excess. This concession is made because it is burdensome for the parties to a small transaction to evaluate the quantity and quality of the coins, for “[w]eighing and assaying were tedious and time-consuming procedures,” as Goitein remarks.<sup>57</sup>

However, hadiths (f)—(j) cannot be interpreted in this manner, for whereas al-Bājī and al-Kāsānī hold that one dinar *may* be exchanged for one dinar and one dirham for one dirham, according to these hadiths, one dinar *must* be exchanged for one dinar and one dirham for one dirham.

The second explanation advanced by jurists is that hadiths (a)—(e) and hadiths (f)—(j) essentially say the same thing. Consider the following hadith recorded in the *Muwaṭṭaʿ* and the *Muṣannaf* of al-Ṣanʿānī:

<sup>54</sup> Bājī, *Muntaqā*, 4:259. See also Brunschvig, “Conception,” 278–79.

<sup>55</sup> Saḥnūn, *Mudawwana*, 3:431.

<sup>56</sup> Kāsānī, *Badāʿi* (1402), 5:197; *ibid.* (1418), 7:92–93.

<sup>57</sup> Goitein, *Mediterranean Society*, 1:231.

(k) Mujāhid said, “I was with ‘Abd Allāh b. ‘Umar when an artisan came to him and said, ‘Oh, Abū ‘Abd al-Raḥmān, I fashion gold and then I sell what I have made for more than its weight, taking an amount equivalent to the work of my hand.’ ‘Abd Allāh forbade him to do that, so the artisan asked him again about this issue, and ‘Abd Allāh continued to forbid him until he came to the door of the mosque or to an animal that he intended to mount. Then ‘Abd Allāh b. ‘Umar said, ‘One dinar for one dinar, and one dirham for one dirham. There must be no excess between them. This is the command of our Prophet to us and our advice to you’.”<sup>58</sup>

It is clear that the statement of Ibn ‘Umar, “One dinar for one dinar, and one dirham for one dirham” is equivalent to “Gold for gold, and silver for silver, weight for weight.” In fact, al-Bājī writes, commenting on this hadith, that the terms ‘dinar’ and ‘dirham’ can refer to their weight, as in the sentences, “There are one hundred dinars of gold in this receptacle” or “There are one hundred dirhams of silver in this receptacle.”<sup>59</sup>

It is doubtful, however, that this explanation is valid for hadiths (f)—(j), for two reasons. First, the term ‘one dinar’ normally refers to ‘one dinar coin’, rather than its weight. Likewise ‘one dirham’ normally means ‘one dirham coin.’ Second and more importantly, some reports recorded in the *Muwattaʿ* suggest that hadiths (a)—(e) contradict hadiths (f)—(j). For example, Mālik relates that Yazīd b. ‘Abd Allāh b. Qusaḥ al-Laythī saw the Medinan jurist Ibn al-Musayyab “practice counter-weighing (*rāṭala*)”: when he exchanged gold for gold, he poured his gold on one pan of the scales, and the other party put his gold on the other pan, and when the pivot of the scales was balanced, they took and gave.<sup>60</sup> Mālik says also that the Medinans hold that there is no harm in exchanging gold for gold and silver for silver by *murāṭala* (counter-weighing) hand to hand, even if 11 dinars are taken for 10 dinars. He adds that dirhams are treated in the same manner.<sup>61</sup> That is to say, the weight of one dinar or one dirham may vary.

<sup>58</sup> Mālik-Yaḥyā, *Muwattaʿ*, 3:277–78, no. 1362; *ibid.*, tr. Bewley, 256b–57a, 31.16, no. 31; Mālik-Ḥadathānī, *Muwattaʿ*, 196, no. 234; Ṣanʿānī, *Muṣannaḥ*, 8:125, no. 14575.

<sup>59</sup> Bājī, *Muntaqā*, 4:260.

<sup>60</sup> Mālik-Yaḥyā, *Muwattaʿ*, 3:284, no. 1371; *ibid.*, tr. Bewley, 258b, 31.18, no. 39; Mālik-Ḥadathānī, *Muwattaʿ*, 198, no. 239.

<sup>61</sup> Mālik-Yaḥyā, *Muwattaʿ*, 3:284, no. 1371; *ibid.*, tr. Bewley, 258b, 31.18, no. 39.

What did Mālik bear in mind when he said that 11 dinars may be equal to 10 dinars in weight? Are the 11 dinars worn out? That is possible, but in the *Mudawwana* he says, regarding a *mufāwada* (a form of commercial partnership) to which one party contributes 100 Abbasid dinars (*dīnār Hāshimīyya*) and the other party 100 Umayyad dinars (*dīnār Dimashqīyya*), that the ratio of benefit that each of them gains and the loss that each of them incurs must be in proportion to the weight of his dinars rather than their face-value (*qīma*).<sup>62</sup> That is to say, an Abbasid dinar is different in weight from an Umayyad dinar.

In 70s A.H./690s C.E., the fifth Umayyad Caliph ‘Abd al-Malik b. Marwān (r. 65–86/685–705) undertook a monetary reform. He decided to issue a new gold coinage, replacing Byzantine *solidus* or *denarius aureus* by dinar (Arabicized *denarius*).<sup>63</sup> Whereas the Byzantine *solidus* weighed 4.55 grams, the weight of the new dinar was fixed at approximately 4.25 grams.<sup>64</sup> Likewise, he decided to replace Sasanian *drahm* by a new silver coin, the dirham (Arabicized *drahm*), the weight of which was, according to Miles, reduced from approximately 3.98 grams to some point between 2.91 and 2.95 grams.<sup>65</sup> But Ehrenkretz estimates the weight of the new dirham at 2.97 grams.<sup>66</sup> I return to this point just below. Miles has explained the reason why the weight of the dinar was reduced as follows:

The reduced standard of the post-reform *dīnār* resulted from a decision to redefine the *mithkāl* (i.e., *dīnār*) in convenient terms of 20 Syro-Arabian *kīrāṭs* of 0.2125 grams in place of such cumbersome terms as 21 *kīrāṭs*, or “22 *kīrāṭs* less a fraction”, etc., which had been employed by the Arabs in pre-Islamic times to express the weight of the *mithkāl*.<sup>67</sup>

It is plausible that this was one of the reasons why the weight of the new dinars was reduced. Ibn al-Athīr (d. 630/1233) also writes that the Umayyads fixed the weight of the new dirham at 14 *qīrāṭs*, i.e. the average of three kinds of dirham in circulation that were

<sup>62</sup> Saḥnūn, *Mudawwana*, 5:62–63.

<sup>63</sup> He began the reform in 75/694–5 or 76/695–6. Ibn al-Athīr, *Kāmil*, 3:452; Dīnawarī, *Akhbār*, 316; Ibn Taghribirdī, *Nujūm*, 1:248.

<sup>64</sup> Grierson, “Monetary Reform,” 244–48; G.C. Miles, “Dīnār,” in *EI*, new ed., 2:297b; Ehrenkretz, “Money,” 93.

<sup>65</sup> Miles, “Dirham,” in *EI*, new ed., 2:319b.

<sup>66</sup> Ehrenkretz, “Money,” 93.

<sup>67</sup> Miles, “Dīnār,” in *EI*, new ed., 2:297b. See also, Ṭabarī, *Ta’rīkh*, 6:256.

different in weight (20, 12 and 10 *qīrāts*).<sup>68</sup> If we consider the estimation of Ehrenkrenz accurate, the Umayyads redefined the weight of the new dirham also according to Syro-Arabian *qīrāt*, since 14 Syro-Arabian *qīrāts* are equal to 2.975 grams, i.e. approximate to 2.97 grams. It is, however, also plausible that hadiths (f)—(j) were intended to serve the interests of the Umayyads, for they must have enabled the Umayyads to make a considerable profit by putting into circulation new lighter coins in exchange for older heavier coins without making up the difference in weight. The following report appears to reflect a conflict between Umayyad policy and anti-Umayyad position:

Mu‘tamar b. Sulaymān heard ‘Abd al-Azīz b. Ḥakīm say, “I saw Ibn ‘Umar approached by a Basran, who said to him, ‘I was with those who give small dirhams (*al-darāhim al-ṣiḡhār*) and take in exchange big ones (*kībār*).’ Ibn Umar said, ‘Do they increase (*yazdādūna*)?’ The Basran said, ‘Yes.’ Ibn ‘Umar said, ‘No, except weight for weight.’”<sup>69</sup>

Basra was under the governorship of al-Ḥajjāj b. Yūsuf, who energetically conducted the Umayyad monetary reform during the reign of ‘Abd al-Malik b. Marwān. We can imagine that the statement of the Basran mentioned in the above-cited text reflects the historical fact that Basran money-changers who were under the stringent control of al-Ḥajjāj exchanged new Umayyad dirhams for old Sasanian *drahms* at their face value. Al-‘Askarī (d. 395/1105) also writes that people used to evaluate dirhams according to their weight, subsequently “they made it rule to exchange them [viz. dirhams] by number (*akthara dhālika yu’khadhu ‘adadan*),” until al-Ḥajjāj executed a Jewish called Sumayr for having forged dirhams himself.<sup>70</sup> It is interesting to note that Ibn ‘Umar was a Medinan legal authority, and that Ibn al-Musayyab, who was also a representative jurist in Medina, is reported to have practiced *murātala* (change by counter-weighing) as if he were eager to follow the words attributed to Ibn ‘Umar, “No, except weight for weight.”

The statement ascribed to Ibn al-Musayyab, “Clipping gold and silver is part of working corruption in the land (*qaṭ‘ al-dhahab wa-’l-wariq min al-fasād fi al-arḍ*)” may also refer to Umayyad monetary

<sup>68</sup> Ibn al-Athīr, *Kāmil*, 3:453–54.

<sup>69</sup> Ibn Abī Shayba, *Muṣannaḡ*, 4:500–01, no. 22497.

<sup>70</sup> ‘Askarī, *Akhhār*, 1:369–70.

reform.<sup>71</sup> There is no doubt that the term “*al-fasād fī al-ard*” is taken from Q. 27:48. Regarding the term “Clipping gold and silver,” several explanations are advanced. According to one report, Ibn al-Musayyab passed by a man who was being flogged. On hearing people say, “He used to clip dirhams (*kāna yaqṭaʿu al-darāhim*),” Ibn al-Musayyab said that he regarded clipping dirhams as “working corruption in the land.”<sup>72</sup> There are several similar reports: when Ibn al-Zubayr (2–73/624–92) was appointed governor of Mecca, he executed a man who practiced clipping coins.<sup>73</sup> When ‘Umar b. al-Khaṭṭāb was the Medinan governor, he imposed 30 lashes on one who clipped dirhams and had him paraded round the town.<sup>74</sup> The fourth Umayyad caliph Marwān b. al-Ḥakam (r. 64–65/684–85) ordered the hand of a man cut off for having clipped an old Persian dirham.<sup>75</sup>

However, it is doubtful that some Iraqī jurists had in mind an individual who clipped coins when they reportedly did not disapprove of clipping coins.<sup>76</sup> In addition, we read in the *Muwattaʿ* compiled by al-Ḥadathānī: Ibn al-Musayyab said, “Clipping gold and silver is part of working corruption in the land once [the quantity of] *mithqāls* have been fixed among the Muslims and they are familiar with them (*qaṭʿ al-dirham wa-ʿl-dīnār baʿda al-mathāqīl allatī šarat bayna al-muslimīn wa-ʿarafū-hā min al-fasād fī al-ard*).”<sup>77</sup> This statement also does not seem to refer to individual coin clippers, but to the Umayyad redefinition of the *mithqāl* in terms of 21 *qīrāṭs* in place of 22 *qīrāṭs* less a fraction for dinar and 14 *qīrāṭs* in place of 19 *qīrāṭs* less a fraction (i.e. 3.98 grams) for dirham, with which definitions people were familiar. Ibn al-Musayyab is also reported to have said,

<sup>71</sup> Mālik-Shaybānī, *Muwattaʿ*, 293, no. 829; Mālik-Yaḥyā, *Muwattaʿ*, 3:280, no. 1369; *ibid.*, tr. Bewley, 257b, 31.16, 37; Ṣanʿānī, *Muṣannaḥ*, 8:130, no. 14595.

<sup>72</sup> Ṣanʿānī, *Muṣannaḥ*, 8:129–30, no. 14594; Balādhurī, *Futūḥ*, 470.

<sup>73</sup> Ṣanʿānī, *Muṣannaḥ*, 8:130, no. 14597.

<sup>74</sup> Murāyī, *ʿAbd Allāh b. Wahb*, 325. ‘Umar is replaced with the Medinan governor Abān b. ‘Uthmān (r. 76–83/695–702) in Māwardī, *Aḥkām*, 197; *ibid.*, tr. Wafaa H. Wahba, 172.

<sup>75</sup> Māwardī, *Aḥkām*, 197; *ibid.*, tr. Wafaa H. Wahba, 171.

<sup>76</sup> Māwardī, *Aḥkām*, 197; *ibid.*, tr. Wafaa H. Wahba, 172.

<sup>77</sup> Mālik-Ḥadathānī, *Muwattaʿ*, 197–98, no. 237. Interestingly, in the *Sunan* of Ibn Māja, a statement to the same effect is attributed to the Prophet, but in different words: “The Messenger of God forbade people to destroy the coins (*kasr al-sikka*) in circulation among the Muslims without necessity.” Ibn-i-Māja, *Sunan*, 3:346, no. 2263.

“I sent gold bullion to Damascus, and it was coined for me according to the weight of the *mithqāl* in the Jāhiliyya.”<sup>78</sup> He may have been recounting that the Umayyads used to follow the Byzantine standard before the monetary reform, but it is also plausible that he was proud of having imposed his position by having made the Umayyads coin his bullion according to the ancient standards.

The statements attributed to Ibn al-Musayyab may reflect popular resentment against the Umayyad policy. For example, al-Balādhurī writes that according to one opinion the Persians disliked the *baghliyya* dirhams (here silver coins minted by al-Ḥajjāj b. Yūsuf) because of the decrease in weight (*nuqṣān*).<sup>79</sup> Mālik also says, regarding “clipped Kufan gold (*dhabab Kūfiyya muqattaʿa*),” “This Kufan gold was unpopular among the people (*tilka al-Kūfiyya makrūha ʿinda al-nās*).”<sup>80</sup> It was in Kufa that al-Ḥajjāj built his mint.

Hadiths (f)—(j) which, in my view, embody the pro-Umayyad position, are supplemented by the report according to which the Kufan jurist Ibrāhīm al-Nakhaʿī disapproved of making up for the “excess (*fadl*)” with silver when the Syrian dinar is exchanged for the Kufan dinar.<sup>81</sup> It is clear that “excess” refers to the difference in weight between the “Syrian dinar,” i.e. the Byzantine *solidus* or *denarius aureus*, or the older dinar of 4.55 grams minted at Damascus according to the Byzantine standard, and the lighter “Kufan dinar” of 4.25 grams.<sup>82</sup>

To sum up, the second reason why the prohibition of *ribā* of excess in ‘gold for gold, silver for silver’ was initiated was to frustrate the Umayyad policy of making a profit by taking old heavier coins and giving new lighter ones of the same face value without making up the difference.

<sup>78</sup> Balādhurī, *Futūḥ*, 467; *ibid.*, tr. Murgotten, 2:265.

<sup>79</sup> Balādhurī, *Futūḥ*, 468; *ibid.*, tr. Murgotten, 266. See also, Māwardī, *Aḥkām*, 196; *ibid.*, tr. Wafaa H. Wahba, 171. According to another opinion, that al-Ḥajjāj b. Yūsuf engraved on them “Allāh is One, Allāh is the Eternal” displeased the jurists. Balādhurī, *Futūḥ*, 468; *ibid.*, tr. Murgotten, 266; Māwardī, *Aḥkām*, 196; *ibid.*, tr. Wafaa H. Wahba, 171. Ibn al-Athīr and al-ʿAskarī write that people disliked them because those who are in ritual impurity and menstruating women touched them. Ibn al-Athīr, *Kāmil*, 3:453; ʿAskarī, *Akhbār*, 1:369.

<sup>80</sup> Mālik-Yahyā, *Muwattaʿa*, 3:285, no. 1371; *ibid.*, tr. Bewley, 259a, 31.18, no. 39; Shaybānī, *Ḥujja*, 2:586.

<sup>81</sup> Ṣanʿānī, *Muṣannaf*, 8:121, no. 14559; Ibn Abī Shayba, *Muṣannaf*, 4:477, no. 22247.

<sup>82</sup> Miles, “Dīnār,” 297b.

*Conclusion*

In the course of monetary reform the Umayyads tried to exploit people in two ways. First, when they gave new coins to people in return for bullion and spurious coins, they took a commission for the minting. Second, they tried to exchange the new lighter coins for the older heavier ones at face value, i.e. without making up the difference in weight, contrary to the traditional practice, according to which gold and silver were sold and bought by their weight. At least some Iraqis seem to have accommodated themselves to the Umayyad policies, but the same policies met with strong opposition from the Medinans, represented by Ibn al-Musayyab. Although hadiths (a)—(e) and (f)—(j) are considered as the most important authorities for the prohibition of *ribā* of excess in ‘gold for gold, silver for silver,’ the former represented the pro-Umayyad position and the latter the anti-Umayyad position.

2. *Maliki and Hanafi conceptions of money*

Dietrich notes that the new Umayyad coins gradually superseded the Byzantine and the Sasanian coins.<sup>83</sup> If the older coins had passed out of use, leaving only new coins in circulation, there would have been no difficulty in applying the prohibition of *ribā* of excess, as far as coins are concerned. What actually happened is that several currencies, differing in weight and purity were still in circulation.<sup>84</sup> The existence of adulterated coins, in particular, gave rise to the question as to how the prohibition of *ribā* of excess would be applied to the exchange of coins of different weight and qualities. Searching for the answer to this question will shed light on the renewed reason for the prohibition.

When Saḥnūn (d. 240/855) asked Ibn al-Qāsim (d. 191/806) about the repayment of a loan of dirhams, Ibn al-Qāsim told him that Mālik had stated as follows: there is no harm if the borrower pays less in weight than he borrowed. There is also no harm in obligating the borrower to repay heavier dirhams than the dirhams he borrowed, if the difference of weight is negligible; otherwise it is prohibited. Ibn al-Qāsim added that in the exchange of coins of the same species

<sup>83</sup> A. Dietrich, “Ḥadjdjādġ b. Yūsuf,” in *EI*, new ed., 3:41b.

<sup>84</sup> Ibn Rushd al-Jadd, *Bayān*, 6:443.

by counterweighing the balance (*mudārabat al-kayl*), there must be no difference between the coins, even though it is permitted to sell an object for more than its value. Then on being asked about the exchange of dinars of different weights, Ibn al-Qāsim began by citing the opinion of Mālik that the exchange of a heavy dinar for a light dinar is permitted “if they are of the same quality and minting (*idhā kāna ‘ayn al-dīnārāyn wa-sikkatu-humā wāḥida*).” He supplemented it by saying that there is no harm in exchanging one coin for another if their weights are different, so long as they are of the same species, e.g. Damascene, Egyptian, *‘Atīq* (Byzantine?) or Abbasid (*Hāshimīyya*) dinars. He justified this solution by explaining that the exchange of coins of different weights is prohibited when their qualities are different and the parties try to counterbalance the difference in quality by the difference in weight. If there is no difference in their qualities, “There is no harm in exchanging a heavier one for a lighter one, and a lighter one for a heavier one so long as this is undertaken in an appropriate manner (*al-wāzin bi-’l-nāqīṣ wa-’l-nāqīṣ bi-’l-wāzin ‘alā wajh al-mā’rūf*).”<sup>85</sup>

Commenting on Mālik’s opinion that there is also no harm in obligating the borrower to repay . . . , Saḥnūn states that it is implied that the number of dirhams the borrower must repay is equal to the number that he received only if the difference of their weight is negligible.<sup>86</sup> Whether this explanation is correct or not, it is clear that Mālik sought to protect the borrower. As for Ibn al-Qāsim, he did not seek to protect either of the parties, when he held that coins must be evaluated according to their weight irrespective of their quality if they are exchanged on the spot by counterweighing the balance. Let us suppose that pure silver coins are exchanged for adulterated silver coins. If the latter are heavier than the former, the parties presumably evaluate the latter as inferior to the former. As far as ordinary transactions are concerned, there is no harm in selling an item of merchandise for more than or less than its value. Why is this not the case with money? This is certainly because money is intended to serve as a universal standard in economic activities. It follows that it is permitted to exchange coins for coins of the same quality in unequal weights, because this exchange is regarded as a

<sup>85</sup> Saḥnūn, *Mudawwana*, 3:431–32.

<sup>86</sup> Barādhi‘ī, *Tahdhīb* (MS Tunis), 142a; *ibid.* (MS Paris), 125a.

combination of two lawful transactions, i.e. the exchange of coins in equal weight and the gift of the difference.

The same idea lies at the basis of a solution cited in the *Muwattaʿ* and the *Hujja* of al-Shaybānī. The Medinan jurists declare it unlawful to exchange fine Byzantine dinars and bullion of gold of a low quality for unpopular Kufan dinars, even if the weight of the Byzantine dinars plus bullion is equal to that of the Kufan dinars.<sup>87</sup> The reason for the prohibition is that the exchanging parties evaluate the Byzantine dinars higher than the Kufan dinars. Suppose that the Byzantine dinars weigh  $a$  grams and the bullion weighs  $b$  grams. There is no harm if the Byzantine dinars are exchanged for  $a$  grams of the Kufan dinars, and the bullion is exchanged for  $b$  grams of the Kufan dinars. But the Medinan jurists considered that the parties combine (1) the exchange of  $a$  grams of Byzantine dinars for  $(a + x)$  ( $x > 0$ ) grams of the Kufan dinars, and (2) the exchange of  $b$  grams of the bullion for  $(b - x)$  grams of the Kufan dinars. Both exchanges violate the prohibition of *ribā* of excess.

The following example shows how the Maliki idea was adapted to social reality. When Saḥnūn asked Ibn al-Qāsim whether it is permitted to sell a spurious dirham (*dirham zāʿif* or *dirham suttūq*) for a pure dirham, Ibn al-Qāsim disapproved of this, adding that a spurious dirham should not be exchanged for anything, because such a sale would produce cheating among Muslims and would corrupt their markets. Saḥnūn also transmits the opinion of Ashhab (d. 204/820), who prohibited the exchange of a spurious dirham for a non-fungible thing (*ʿard*) or bullion until the spurious dirham has been melted down, but allowed the exchange of a spurious dirham for a pure dirham of equal weight, as it is regarded as a money-changing (*sarf*), for “There is no excess between silver and silver. It resembles a *badal*.”<sup>88</sup> “*Badal*” appears to mean ‘*mubādala*,’ i.e. exchange of coins according to their number.

Ibn al-Qāsim seems to have feared that the circulation of spurious coins would undermine the monetary system. It is difficult to explain why Ashhab distinguished the exchange of a spurious dirham for a pure dirham (concerning which he is opposed to Ibn al-Qāsim)

<sup>87</sup> Mālik-Yaḥyā, *Muwattaʿ*, 3:285, no. 1371; *ibid.*, tr. Bewley, 259a, 31.18, no. 39; Shaybānī, *Hujja*, 2:586.

<sup>88</sup> Saḥnūn, *Mudawwana*, 3:444.

from the exchange of a spurious dirham for a non-fungible thing or bullion (concerning which he adopts the same opinion as Ibn al-Qāsim). I suspect that he was faithful to the idea that coins of different qualities should be evaluated solely according to their weight and regardless of their market value, once in circulation. It is noteworthy that he is quoted by Ibn Rushd al-Jadd as saying, “Nowadays adulterated dinars are made in mints that exist everywhere (*ammā al-yawma fa-inna al-dhahab yughashshu, wa-qad šāra li-kull makān sikka tadribu*).”<sup>89</sup> The actual circulation of adulterated dinars in the lifetime of Ashhab may have been at the basis of his opinion.

Let us turn to the Hanafi school. As noted, the Kufan jurist Ibrāhīm al-Nakha‘ī is reported to have defined the prohibition of *ribā* of excess numerically as far as money is concerned. This view was not adopted by the Hanafis, nor did they adopt the Medinan doctrine that defines gold and silver as *ribā* goods in their capacity as money. The reason why the Hanafis came to regard gold and silver as representing the class of items sold by weight will be examined in Section 3.1. Suffice it to say here that they take a formalistic view regarding the prohibition of *ribā* of excess. To illustrate this point, let us again take the example of the exchange of fine Byzantine dinars and bullion of low quality for unpopular Kufan dinars. Abū Ḥanīfa declares it lawful if it is done “like for like, there being no difference in weight (*mithlan bi-mithl lā faḍl bayna-humā fī al-wazn*),” i.e. the weight of the Byzantine dinars plus the bullion is equal to that of the Kufan dinars.<sup>90</sup> This solution is reminiscent of a solution adopted by the later Hanafis: if *A* supplies one dinar and two dirhams and *B* supplies two dinars and two dirhams in exchange, this is a valid transaction, because it is regarded as the combination of a sale of one dinar for two dirhams and a sale of two dirhams for two dinars, both of which are lawful if the exchange is completed before the contractual session is over.<sup>91</sup> The later Hanafis pay no attention to the economic meaning of the prohibition.

Conversely, as far as a loan is concerned, the Hanafis declare it unlawful to require the borrower to repay dirhams of a higher qual-

<sup>89</sup> Ibn Rushd al-Jadd, *Bayān*, 6:443.

<sup>90</sup> Shaybānī, *Hujja*, 2:586.

<sup>91</sup> Kāsānī, *Badā‘ī* (1402), 5:192; *ibid.* (1418), 7:79; cf. Marghīnānī, *Hidāya*, 3:83; Samarqandī, *Tuhfa* (1964), 3:33; *ibid.* (1414), 3:35.

ity than those he received, even if equal in weight.<sup>92</sup> This solution is ascribed to Ibn Mas‘ūd, who reportedly refused to receive anything but dirhams similar to those that he had lent.<sup>93</sup> It is clear that the Hanafis here seek to safeguard the interest of the borrower.

*Section 3 Ribā of delay in ‘wheat for wheat, dates for dates’*

To repeat, the exchange of an item for another item belonging to the same class of the *ribā* goods must take place on the spot, i.e. before the contractual session is concluded, violation of which would constitute *ribā* of delay. However, the difficulty of discerning the economic meaning of the general prohibition of *ribā* of delay that imposes, for example, the simultaneous exchange of wheat for wheat or wheat for barley suggests that the prohibition originated in specific transactions or situations. The early legal texts and hadith collections suggest that the need to regulate accord and satisfaction in a credit sale is one of the causes that led to the prohibition of *ribā* of delay, although it is impossible to exclude other possibilities. I will try to trace the process by which rules governing accord and satisfaction in a credit sale were formed and developed, and refer to accord and satisfaction in a *salam* in passing.

1. *Credit sale*

I consider here the origin of the prohibition of *ribā* of delay in ‘wheat for wheat, dates for dates, etc.’ i.e. in an exchange of foodstuff for foodstuff in Medina, and the origin of the prohibition of *ribā* of delay in ‘gold for gold, silver for silver’ and ‘wheat for wheat, dates for dates, etc.’ i.e. in an exchange of an item sold by weight for another item sold by weight, or an item sold by measure for another item sold by measure in Iraq.

*The Medinan doctrines*

As noted, for the Malikis, foodstuffs that are capable of *ribā* are defined as those foodstuffs that can be dried to be stored. Mālik,

<sup>92</sup> Kāsānī, *Badā’i’* (1402) 7:395; *ibid.* (1418), 10:597–98.

<sup>93</sup> Abū Yūsuf, *Āthār*, 184, no. 835.

however, gives another definition of foodstuffs capable of *ribā*, i.e. foodstuffs that are sold by weight or measure. This definition is attributed to Ibn al-Musayyab, who reportedly said, “There is *ribā* only in gold or silver or what is weighed or measured of what is eaten or drunk.”<sup>94</sup> In my view, the first definition of *ribā* foodstuffs originally was associated with the prohibition of *ribā* of excess, as will be demonstrated (Section 4.2). I examine therefore here the second definition attributed to Ibn al-Musayyab. Let us begin by considering two reports.

(1) In the *Muṣannaf* of Ibn Abī Shayba this definition is associated with accord and satisfaction in a credit sale.

Muḥammad b. ‘Abd Allāh said to Ibn al-Musayyab, “I sold dried dates [in a credit sale]. Can I purchase [other] dried dates with the price [without receiving it]?” He said, “Don’t take any foodstuff sold by measure or weight (*lā ta’khudhna ṭa’ām mā yukālu wa-yūzanu*) [before you receive the price].”<sup>95</sup>

I have added the interpolations following a report that appears immediately before this text in the *Muṣannaf* of Ibn Abī Shayba:

(2) The Meccan traditionist Sufyān b. ‘Uyayna (107–96/726–811) said to the Meccan traditionist and jurist ‘Amr b. Dīnār (d. 125/742–3 or 126/743–4, over 70 years old), “What do you think of the following case? I sold foodstuffs [on a credit sale]. When payment comes due and I require the buyer to make payment, he says, ‘I have no money, so take foodstuffs [in place of money].’” ‘Amr responded that the Yemeni traditionist Ṭāwūs b. Kaysān (d. 100/718–9, 101/719–20 or 106/724–5) had disapproved of the seller taking foodstuffs.<sup>96</sup>

‘Foodstuffs sold by measure or weight’ as mentioned in report (1) coincide with Ibn al-Musayyab’s definition of *ribā* foodstuffs. It is not clear, however, why he told Muḥammad not to take such foodstuffs. Likewise it is not clear why in report (2) Ṭāwūs and certainly ‘Amr b. Dīnār disapproved of the seller taking foodstuffs in place of the price. To clarify this point, let us examine the Hijazi and Yemeni doctrines with regard to accord and satisfaction in a credit sale.

<sup>94</sup> Mālik-Yaḥyā, *Muwattaʿa*, 3:280, no. 1368; *ibid.*, tr. Bewley, 257b, 31.16, no. 37; Ṣanʿānī, *Muṣannaf*, 8:21, no. 14139.

<sup>95</sup> Ibn Abī Shayba, *Muṣannaf*, 4:338, no. 20746.

<sup>96</sup> Ibn Abī Shayba, *Muṣannaf*, 4:338, no. 20745; Ṣanʿānī, *Muṣannaf*, 8:17, no. 14123.

Some reports recorded in the *Muṣannaḡ* of al-Ṣanʿānī suggest that accord and satisfaction is prohibited if the buyer incurs excessive loss from it. The Meccan traditionist Abū al-Ḥajjāj Mujaḥid b. Jābir al-Makḥzūmī (d. 100/718–9, 101/719–20, 102/720–1, 103/721–2 or 104/722–3, 83 years old) was reportedly asked about the case of a person who sold silk in a credit sale and found the silk in the possession of the buyer. Mujaḥid responded that the seller might not repurchase the silk unless he pays more than the original price.<sup>97</sup> This is certainly because if he paid less than the original price the difference would be treated as an interest on a loan. Suppose, for example, that the seller sold the silk for 100 dirhams to be paid six months later, and then he repurchases it from the buyer for 80 dirhams in cash one month after the original sale. This procedure amounts to a loan of 80 dirhams with 25% interest. This is why Ibn Ṭāwūs is reported to have added that the seller may repurchase it at any price if the silk has been sold to a third party.<sup>98</sup>

Ṭāwūs is reported to have said, “When your gold is due for the merchandise [that you have sold] and you express your wish to use the gold to buy [from the buyer] another item of merchandise that does not contain gold, do it unless you make another profit . . .”<sup>99</sup> That is to say, it is lawful for the seller to receive from the buyer another item of merchandise instead of the stipulated price, so long as its market value is not greater than the stipulated price. Otherwise it is unlawful, for the price stipulated in a credit sale is usually greater than the market value of the merchandise, so that the seller who receives an item the value of which is greater than the stipulated price exploits the buyer twice.

Ibn ʿAbbās is reported to have said, “If you buy foodstuffs in a *salaf* and you do not find them [in the hands of the seller] when the performance falls due, take a cheaper non-fungible object. Do not exploit him [viz. the seller] twice (*fa-khudh min-hu ʿarḍan bi-anqaṣ, wa-lā tarbaḥi ʿalay-hi marratayn*).”<sup>100</sup> In a *salaf* the buyer prepays the price at the moment of the contract for an object that is to be delivered at the end of a specified period. According to later jurists, the

<sup>97</sup> Ṣanʿānī, *Muṣannaḡ*, 8:17, no. 14121.

<sup>98</sup> Ṣanʿānī, *Muṣannaḡ*, 8:17, no. 14121.

<sup>99</sup> Ṣanʿānī, *Muṣannaḡ*, 8:17, no. 14122. See also Ṣanʿānī, *Muṣannaḡ*, 8:16–17, no. 14120.

<sup>100</sup> Ṣanʿānī, *Muṣannaḡ*, 8:16–17, no. 14120; Ibn Ḥazm, *Muḥallā*, 9:5.

price is usually lower than the expected market price of the object on the date on which payment comes due, i.e. the buyer exploits the seller once. As noted, Ibn ‘Abbās is reported to have approved of partial cancellation of a *salam*, which view is based on the premise that the price is lower than the expected market price of the object (see pp. 191–93). If the buyer demands that the seller deliver him another object whose market price is equal to or greater than the current market price of the stipulated object, the buyer is considered to exploit the seller twice.

Unlike these reports, the statement attributed to Ibn al-Musayyab in report (1) and Ṭāwūs’s disapproval of accord and satisfaction in report (2) apparently are not intended to protect the buyer. The same is true of the following report.

(3) Abū al-Zinād (d. 133/750–1) heard Ibn al-Musayyab and Sulaymān b. Yasār (b. 34/654–5; d. 107/725–6, one of ‘the seven Medinan jurists’) prohibit a person who sells wheat for gold on credit from buying dried dates [from the buyer] with the gold before he receives it.<sup>101</sup> The same view is attributed to Abū Bakr b. Muḥammad b. Ḥazm (b. before 40/660–1; d. 120/737–8, one of ‘the seven Medinan jurists’) and al-Zuhrī (d. 124/741–2).<sup>102</sup>

In reports (1)–(3), it is not required that the market price of the foodstuff that the buyer gives instead of payment is greater than the stipulated price in order for accord and satisfaction to be prohibited. Did these Medinan jurists fear that the legalization of accord and satisfaction would serve only as an expedient that enables a seller to exploit a buyer who is unable to pay the price? This is implausible, for if this were the case, accord and satisfaction would be prohibited, whatever the substitute may be. In my view, it is more plausible that the prohibition of accord and satisfaction seeks to safeguard a third party who concluded another credit sale with the buyer. To explain this point of view, let us assume that the buyer does not have sufficient money, as explicitly indicated in report (2). This is also the case with reports (1) and (3), for if the buyer had sufficient money, it would be meaningless to prohibit accord and satisfaction: the parties can easily circumvent the prohibition by mak-

<sup>101</sup> Mālik-Yahyā, *Muwattaʿ*, 3:290, no. 1379; *ibid.*, tr. Bewley, 260b–261a, 31.20, no. 47.

<sup>102</sup> For the reports to the same effect, see Saḥnūn, *Mudawwana*, 4:125; Ibn Abī Shayba, *Muṣannaf*, 4:339, no. 20751.

ing payment. On this assumption, suppose that *M*, a merchant of foodstuffs, who bought foodstuffs successively from *A* and *B* on credit, becomes insolvent on the date on which payment to *A* falls due. Can *M* deliver to *A* foodstuffs that are found in his possession as substitute for payment?

There is no harm in *M* delivering the foodstuffs that he purchased from *A*, for the Medinan rule (hereafter rule [a]) is that *A* can revoke the sale to take them back. This rule derives directly from the Prophetic hadith, “Whenever a man sells goods and then the buyer becomes insolvent and the seller has not taken any of the price and he finds the goods intact with the buyer, he has the greater right to it than anyone else (*ayyumā rajul aflasa fa-adraka al-rajul māla-hu bi-‘ayni-hi fa-huwa aḥaqq bi-hi min ghayri-hi*)”<sup>103</sup> The right of the seller was later called the ‘claim of restitution’ (*ḥaqq al-istirdād*).<sup>104</sup>

What if *M*, who has already resold the foodstuffs that he purchased from *A* to a third party, delivers the foodstuffs that he purchased from *B* to satisfy *A*? Mālik states that *B* can revoke the sale between himself and *M* and take back the foodstuffs delivered to *A*, because of the rule (hereafter rule [b]), “The fact that the buyer has transferred them [viz. goods] does not prevent the seller from taking them back wherever he finds them.”<sup>105</sup>

Was rule [b] introduced at the same time as or later than rule [a]? Although there is no decisive evidence, I am inclined to think that rule [b] was introduced later, for two reasons. First, the plain interpretation of the above-cited Prophetic hadith is that only when the goods are found intact in the possession of the buyer can the seller take them back. Al-Bayhaqī records a hadith in which the Prophet stated, regarding an insolvent man in whose possession an unpaid “object is found without being transferred to a third party (*idhā wujīda ‘inda-hu al-matā‘ wa-lam yufarraḡ*),” that it belongs to the seller.<sup>106</sup> This hadith indicates that the seller cannot take back the

<sup>103</sup> Mālik-Yaḥyā, *Muwattaʿa*, 3:331–32, no. 1420; *ibid.*, tr. Bewley, 275b–276a, 31.42, no. 87; Ṣanʿānī, *Muṣannaḡ*, 8:264, no. 15160; Bayhaqī, *Sunan*, 6:45. For hadiths to the same effect, see Ṣaḥnūn, *Mudawwana*, 5:237; Ṣanʿānī, *Muṣannaḡ*, 8:263–65, nos. 15157–159, 15161–15164; Ibn Abī Shayba, *Muṣannaḡ*, 4:283, nos. 20093–94; Bayhaqī, *Sunan*, 6:44; Ibn Rushd al-Ḥafīd, *Bidāya*, 2:288; *ibid.*, tr. Nyazee, 2:345. A hadith of almost the same wordings is ascribed also to ʿUmar b. ʿAbd al-ʿAzīz. Ibn Abī Shayba, *Muṣannaḡ*, 4:283, no. 20095; Bayhaqī, *Sunan*, 6:45.

<sup>104</sup> See, for example, ʿAbd al-Ghaffār Ibrāhīm Ṣāliḥ, *Iftās*, 161–73.

<sup>105</sup> Mālik-Yaḥyā, *Muwattaʿa*, 3:332, no. 1420; *ibid.*, tr. Bewley, 276a, 31.42, no. 88.

<sup>106</sup> Bayhaqī, *Sunan*, 6:45.

object once it is transferred to a third party. Second, rule [a] is ascribed to al-Zuhrī,<sup>107</sup> Ṭāwūs<sup>108</sup> and ‘Aṭā’ b. Abī Rabāḥ,<sup>109</sup> and Ibn Wahb heard from an unnamed but a trustworthy source that Medinan ulama he had met adopted this view.<sup>110</sup> In addition, several hadiths in which the Prophet mentions rule [a] are transmitted by several different *isnāds* that include Medinan transmitters and jurists.<sup>111</sup> Conversely rule [b] is neither ascribed to any Medinan jurist prior to Mālik nor recorded in the *Mudawwana*. Only al-Shaybānī refers to it as a Medinan doctrine.<sup>112</sup> These facts suggest that rule [b] was introduced only later than rule [a].

I infer, therefore, that up to some point after rule [a] was introduced and before rule [b] was introduced, *B* could not take back the object he sold to *M* if *M* had handed it over to *A* to satisfy him. I believe that the rule referred to in reports (1)—(3), which prohibits the seller of foodstuffs from receiving foodstuffs other than the foodstuffs that he delivered to the buyer without receiving the price, was intended to enable a third party (like *B*) to take back the foodstuffs that he sold. In other words, this rule was intended to fill up a lacuna in rule [a].

This inference helps us to explain why in report (1) Ibn al-Musayyab is reported to have said, “Don’t take any foodstuff sold by measure or weight” when he was asked by Muḥammad b. ‘Abd Allāh if it is permitted to take dried dates instead of the price. He seems to have reasoned as follows: a person who buys foodstuffs on credit presumably does so as part of his business, i.e. he is presumed to be a merchant dealing with foodstuffs, for most people who buy foodstuffs for consumption do so on a daily basis and pay by cash. In fact, Ibn Khaldūn (d. 784/1382) writes, “Egyptians . . . store no provisions of food, neither for a month nor a year ahead, but purchase most of it [on a daily basis] in the market” and “a man in Fez . . . always goes to the market early to buy his food for the day.”<sup>113</sup> It is likely that foodstuffs found in the possession of a mer-

<sup>107</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:263–64, no. 15157.

<sup>108</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:265, no. 15165.

<sup>109</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:265, no. 15165.

<sup>110</sup> Ṣaḥnūn, *Mudawwana*, 5:237.

<sup>111</sup> Mālik-Yaḥyā, *Muwattaʿ*, 3:331–32, no. 1420; *ibid.*, tr. Bewley, 275b–276a, 31.42, no. 87; Ṣaḥnūn, *Mudawwana*, 5:237; Shaybānī, *Hujja*, 2:714–17; Ṣan‘ānī, *Muṣannaḥ*, 8:263–65, nos. 15157–15165; Ibn Abī Shayba, *Muṣannaḥ*, 4:283, nos. 20093–94.

<sup>112</sup> Shaybānī, *Hujja*, 2:714–15.

<sup>113</sup> Ibn Khaldūn, *Taʿrīkh*, 1:73; *ibid.*, tr. Rosenthal, *Muqaddimah*, 1:175.

chant are also sold on credit, and that the seller expected to claim restitution for them in the event that the merchant becomes insolvent. The above-mentioned statement of Ibn al-Musayyab was intended to safeguard the interest of such a seller. The reason why foodstuffs that are not sold by measure or weight, such as bread or eggs, are excluded is that they are generally paid for on the spot and are not subject to claim for restitution.

The following report may be invoked in support of my inference: Ibn ‘Abbās was asked if it is permitted to a person who sold linen (*bazz*) on credit to receive wheat (*barr*), instead of the price. Ibn ‘Abbās responded that there is no harm in it.<sup>114</sup> In this report, the buyer presumably is a cloth merchant. It follows that wheat found in his possession has been paid for. The term “*bazz* بَزْ” (instead of ‘*thawb*,’ which usually is used to refer to cloth) suggests that if it were “*barr* بَر” that had been sold the seller would have been forbidden from receiving other “*barr*,” which is presumed to be the subject of another credit sale that has not yet been paid for.

In reports (1)—(3), if the buyer does not receive the price, foodstuffs are exchanged for foodstuffs, the former having been delivered at the moment of the sale, the latter being delivered in place of the price on the date on which payment comes due. I infer that the prohibition of such a transaction led to the general prohibition of *ribā* of delay in “wheat for wheat, dates for dates etc.,” as mentioned in the following reports.

(4) Ibn ‘Umar said, “There is no harm in exchanging different kinds of foodstuffs hand to hand, wheat for dates, raisins for barley.” But he disapproved of delay in exchange.<sup>115</sup>

(5) Mālik said, “The generally agreed-on way of doing things among us is that wheat is not sold for wheat, dates for dates, wheat for dates, dates for raisins, wheat for raisins, nor any kind of foodstuff sold for foodstuff at all, except hand to hand.”<sup>116</sup>

In these reports, the expression “hand to hand (*yadan bi-yad*)” signifies that foodstuffs should be actually delivered in the contractual session.

Objections to this inference may arise as follows, for if it is forbidden to substitute foodstuffs for money (or other items designated

<sup>114</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:16, no. 14119.

<sup>115</sup> Ṣan‘ānī, *Muṣannaḥ*, 8:30, no. 14175.

<sup>116</sup> Mālik-Yahyā, *Muwatta’*, 3:293–94, no. 1385; *ibid.*, tr. Bewley, 262b, 31.22, no. 52.

as the price) in a credit sale of foodstuffs in order to safeguard the claim of a third party to the foodstuffs, the same rule should apply to any credit sale, whatever the object may be. Why, according to Ibn al-Musayyab and the Malikis, is the application of the prohibition of *ribā* of delay limited to exchange of foodstuffs for foodstuffs and money for money? And why or how did the Malikis replace Ibn al-Musayyab's definition of *ribā* foodstuffs, "what is weighed or measured of what is eaten or drunk," with the definition "the foodstuffs that can be dried to be stored"? As I will discuss the second question in Section 4.2, I try here to answer the first question.

My answer to the first question is that rule [b] was introduced shortly after the introduction of rule [a]. According to rule [b], the seller of an object in a credit sale can claim its restitution if the buyer, who has become insolvent, transfers it to a third party. Rule [b] thus took the place of the prohibition of accord and satisfaction. I infer that rule [b] was introduced at the stage in which the prohibition of accord and satisfaction was hardly extended to the sale of items other than foodstuffs. I could find only one case in which a Medinan jurist prohibits accord and satisfaction in a sale of an item other than foodstuffs.

(6) The Medinan jurist Abū Salama b. 'Abd al-Raḥmān b. 'Awf is reported to have disapproved when a person who sold cattle on credit receives, from the buyer, cattle other than the cattle that he sold, on the date on which payment falls due, in order to "set off (*yuqāṣṣu*)" his credit.<sup>117</sup>

The opinion of Abū Salama is easily understood by assuming that the buyer is a cattle merchant: the buyer of cattle, who has become insolvent on the date on which payment falls, may provide other cattle that he purchased from a third party and has not yet paid for. This will prejudice the third party, who could otherwise take back the cattle.

Why was the sale of foodstuffs first subject to the prohibition of *ribā* of delay? It seems that in general a foodstuff merchant purchases different kinds of foodstuffs from different persons. As he suffers a considerable loss from a credit sale more frequently than any other merchant, because of the instability of the foodstuffs' price, he is often forced to provide to the seller foodstuffs that he pur-

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<sup>117</sup> Ibn Abī Shayba, *Muṣannaf*, 4:338, no. 20748.

chased from a third party in place of the original obligation. This is why the Medinan jurists introduced the prohibition of *ribā* of delay first with regard to a sale of foodstuffs.

*The Iraqi doctrines*

In Iraq, three opinions were advanced about accord and satisfaction in a credit sale.

(1) Some jurists are reported to have forbidden, with respect to a credit sale of foodstuffs, that the seller receive foodstuffs of a kind other than the kind of the foodstuffs that he sold, as the substitute for the price. The Kufan jurist and traditionist al-Sha‘bī reportedly said, “This amounts to foodstuff for foodstuff (*dhālika al-ṭa‘ām bi-ṭ-ṭa‘ām*).”<sup>118</sup>

(2) Ma‘mar is reported to have transmitted the following statement of “al-Zuhrī”:

When you sell an object that is sold by measure or weight for one dinar, do not take anything else that is sold by measure or weight [instead of the price]. If he [viz. the buyer] gives you another object [there is no problem]. If you sell an object that is sold by measure and he gives you an object that is sold by weight, take it, unless it is foodstuff.<sup>119</sup>

A person who sells an object sold by measure cannot receive another object sold by measure, instead of “dinar” i.e. the price. Likewise a person who sells an object sold by weight cannot substitute another object sold by weight for the price. In either case he can receive an object included in the class other than the class of the object of the sale, except that it is always prohibited that a person who sells foodstuffs receives foodstuffs as substitute. “Al-Zuhrī” is also reported to have stated that everything that is weighed was treated in the same manner as gold and silver, and that everything that is measured was treated in the same manner as wheat and barley.<sup>120</sup>

Who is this “al-Zuhrī”? Motzki concludes that in absence of counterevidence, a statement that Ma‘mar attributes to “al-Zuhrī” should be regarded as an authentic opinion of the Medinan jurist Ibn Shihāb al-Zuhrī (d. 124/741–2).<sup>121</sup> But I think that this “al-Zuhrī” is one of

<sup>118</sup> Ibn Abī Shayba, *Muṣannaf*, 4:339, nos. 20755–756.

<sup>119</sup> Ṣan‘ānī, *Muṣannaf*, 8:17–18, no. 14124.

<sup>120</sup> Ṣan‘ānī, *Muṣannaf*, 8:37, no. 14207.

<sup>121</sup> Motzki, “Fiqh des -Zuhrī,” 8–9.

those Juynboll calls “the Iraqī Zuhrīs,” i.e. those Iraqīs who were addressed as “al-Zuhrī.”<sup>122</sup> The first sentence of this text is the application of the Hanafi prohibition of *ribā* of delay, which is also attributed to the Kufan jurist Ibrāhīm al-Nakha‘ī. Indeed the Hanafis do not prohibit the exchange of foodstuffs for foodstuffs with a delayed term as such, unless they are sold by the same unit, but we have seen in (1) that the Kufan jurist al-Sha‘bī is reported to have prohibited such an exchange.<sup>123</sup> It is therefore probable that an Iraqī jurist adopted the solution attributed to “al-Zuhrī” in this text, whereas such a solution is not attributed to any Medinan jurist other than “al-Zuhrī.” For this reason, I think that this “al-Zuhrī” is one of what Juynboll calls “the Iraqī Zuhrīs.” We have seen that “al-Zuhrī” is credited with the statement, “The *tawliya* is a sale, therefore don’t conclude a *tawliya* before you take possession [of the object],” which had become the generally accepted opinion in Iraq by the middle of the eighth century, but which was contrary to the generally accepted opinion in Medina (see pp. 154–55).

(3) Other jurists reportedly put no restraint on accord and satisfaction. The Basran jurist and traditionist Abū al-Sha‘thā’ Jābir b. Zayd (b. 21/641–2; d. 93/711–2, 96/714–5, 103/721–2 or 104/722–3) reportedly permitted the seller of foodstuffs to receive whatever he likes when the buyer proposes to provide an object instead of the price, when payment comes due.<sup>124</sup> The Kufan jurist Ḥammād b. Abī Sulaymān (d. 120/737–8) and the Basran jurist and traditionist Ibn Sīrīn reportedly said, regarding the case of a person who sold foodstuff for one dinar on credit, “He can take the foodstuff [that he sold] or anything else, when payment becomes due.”<sup>125</sup> Ibn Sīrīn is also credited with the statement, “If you sold an object for one dinar, you can purchase with it another object, whether or not it is the same kind as the object, when payment becomes due.”<sup>126</sup> The dinar here is unpaid, for it goes without saying that the seller can buy anything with the dinar he has received.

<sup>122</sup> Juynboll, *Muslim Tradition*, 155–56.

<sup>123</sup> Ibn Abī Shayba, *Muṣannaf*, 4:339, no. 20756.

<sup>124</sup> Shaybānī, *Ḥujja*, 2:589–90; Ṣan‘ānī, *Muṣannaf*, 8:17, no. 14123; Ibn Abī Shayba, *Muṣannaf*, 4:338, no. 20745.

<sup>125</sup> Ṣan‘ānī, *Muṣannaf*, 8:16, no. 14117.

<sup>126</sup> Ṣan‘ānī, *Muṣannaf*, 8:16, no. 14116. See also, Ibn Abī Shayba, *Muṣannaf*, 4:339, no. 20755.

We have observed that the Medinan jurists introduced the prohibition of *ribā* of delay in an attempt to regulate accord and satisfaction in a credit sale of foodstuffs, and that by introducing the rule according to which the seller in a credit sale can claim the restitution of an object that has been transferred to a third party by the buyer after the buyer's insolvency, they abolished the prohibition on accord and satisfaction as such. The difference of opinions among the Iraqi jurists over accord and satisfaction is also related to their disputes over the claim of restitution.

On the one hand, 'Alī,<sup>127</sup> al-Ḥasan al-Baṣrī<sup>128</sup> and Ibrāhīm al-Nakhaṣī<sup>129</sup> are credited with the statement that if a person sells an object, and the buyer becomes insolvent, the seller is *not* more entitled to it than other creditors, even if the seller finds the object intact with the buyer. This rule (hereafter rule [a]) is adopted by the Hanafis.<sup>130</sup> On the other hand, the Kufan qadi Shurayḥ reportedly said, "Whoever has received part [of the price of the object that he has delivered to the buyer in a credit sale] after he [viz. buyer] became insolvent, is treated on the same foot as the other creditors [of the buyer], sharing with them [the price earned in a public auction]." Ibn Sīrīn reportedly used to issue *fatwās* in accordance with this opinion.<sup>131</sup> The Basran jurist and traditionist Qatāda (b. 60/679–80; d. 117/735–6) is reported to have transmitted a statement of the Umayyad caliph 'Umar b. 'Abd al-'Azīz to the same effect.<sup>132</sup> This rule (hereafter rule [b]) implies that insofar as the buyer received none of the price, he can take back the object. It is not clear whether or not the seller can claim restitution against a third party to whom the insolvent buyer has transferred the object.

According to rule [a], it is lawful to substitute any item found in the buyer's possession for payment, for no one is more entitled to it than anyone else. According to rule [b], it is necessary to place certain restraint on accord and satisfaction, in order to safeguard the

<sup>127</sup> Ṣan'ānī, *Muṣannaf*, 8:266, no. 15170; Ibn Abī Shayba, *Muṣannaf*, 4:284, no. 20101.

<sup>128</sup> Ibn Abī Shayba, *Muṣannaf*, 4:284, no. 20103.

<sup>129</sup> Ṣan'ānī, *Muṣannaf*, 8:266, no. 15171; Ibn Abī Shayba, *Muṣannaf*, 4:284, nos. 20102, 20104.

<sup>130</sup> 'Abd al-Ghaffār Ibrāhīm Ṣāliḥ, *Iflās*, 163–64.

<sup>131</sup> Ṣan'ānī, *Muṣannaf*, 8:266, no. 15168.

<sup>132</sup> Ṣan'ānī, *Muṣannaf*, 8:266, no. 15167. For the proclamation of 'Umar to this effect, see Ibn Abī Shayba, *Muṣannaf*, 4:283, no. 20095.

interests of a third party, who may have a claim on the object that he sold in a credit sale to the now insolvent buyer. I suspect that the rule adopted by “al-Zuhrī” in (2) was introduced for this purpose. To illustrate this point, suppose that *A* purchases goosefoot on credit from *B*. *A* presumably is a perfumier. If *A*, being unable to pay the price on the date on which payment falls due, proposes to provide *B* with ambergris or henna as a substitute, it is feared that this may prejudice a third party who might have sold *A* the ambergris or henna on credit. To safeguard such a third party, it is necessary to distinguish the goods found in the buyer’s possession that are the subject of a claim of restitution from those which are not. I suspect that some Iraqi jurists represented by “al-Zuhrī” introduced the general presumption that the goods found in a buyer’s possession that are sold by the same unit (measure or weight) as the object that has been sold to the buyer are the subject of a claim of restitution of a third party. For example, goosefoot, ambergris, henna, rose, indigo, woad and other aromatic plants, which are dealt with by a perfumier, are sold by weight; wheat, barley, sorghum, beans and dates, which would be found in the possession of a merchant dealing with foodstuffs, are sold by measure. This is the origin of the prohibition of *ribā* of delay in an exchange of an item sold by weight for another item sold by weight and an exchange of an item sold by measure for another item sold by measure. Certainly, the prohibition places too stringent a restraint on accord and satisfaction, but it must have served as an efficient means of safeguarding the interests of a third party who might have a claim of restitution on an object found in the possession of an insolvent buyer. Although the majority of the Iraqi jurists including the Hanafis subsequently declared accord and satisfaction in a credit sale lawful, they accepted the definition of *ribā* goods as items sold by measure or weight.

## 2. *Salam*

As noted, for the Hanafis gold and silver represent the class of items that are sold by weight, and wheat, barley, date and salt represent the class of items that are sold by measure. Therefore it is possible that the prohibition of *ribā* of delay was introduced to regulate transactions dealing with items sold by weight or measure. *Salam* is one such transaction. Theoretically, a *salam* is subject to the prohibition of *ribā* of delay in two cases: first, as it includes the exchange of the

price (*ra's al-māl*, 'capital') for the object (*muslam fī-hi*) with a delayed term, it is prohibited that the price and the object belong to the same class of *ribā* goods. Second, the buyer in a *salam* of an item encompassed by *ribā* is prohibited from receiving as substitute another item that falls within the same class of *ribā* goods as the designated object.

In fact, however, in either case the prohibitions of *ribā* do not necessarily apply. First, according to the Hanafī prohibition of *ribā* of delay, a *salam* is prohibited where dinars or dirhams are used to pay for an item that is sold by weight, since dinars and dirhams are normally exchanged in weight. But the Hanafīs do not prohibit such a *salam*. To explain this anomaly, al-Sarakhsī states that a *salam* in which coins are exchanged for saffron is permitted, because they belong to different subgroups of the items that are sold by weight: saffron is weighed with a steelyard and is made the subject of a sale through being specified, whereas coins are weighed with a scale and are never specified.<sup>133</sup> Al-Marghīnānī writes, "What is sold by weight does not include dirhams or dinars, for these are prices (*wa-'l-murād bi-'l-mawzūnāt ghayr al-darāhim wa-'l-danānīr, li-anna-humā athmān*)",<sup>134</sup> that is to say, dirhams and dinars constitute a category distinct from other items sold by weight. Al-Sarakhsī refers to "our Iraqi masters (*al-'Irāqīyūn min mashā'ikh-nā*)," who approved of a *salam* in which coins are exchanged for an object that is sold by weight, such as saffron, iron or cotton, "by necessity (*li-l-ḥāja*)," since payment is usually made by means of coins, and there is need for a *salam* of items that are sold by measure and items that are sold by weight.<sup>135</sup> But these explanations seem to have been introduced *ad hoc*: it is more reasonable to infer that the relationship between the price and the object in a *salam* was originally not intended to be subject to the prohibition of *ribā* of delay.

Second, as for the application of the prohibition of delay to accord and satisfaction in a *salam*, as noted, the Hanafīs prohibit not only an accord and satisfaction by which an item belonging to the same

<sup>133</sup> Sarakhsī, *Mabsūṭ* (n.d.), 12:121; *ibid.* (1421), 12:143. For similar explanations, see Marghīnānī, *Hidāya*, 3:71; Shalabī, *Hāshīya*, 4:111.

<sup>134</sup> Marghīnānī, *Hidāya*, 3:71. Wichard remarked that the Hanafīs make out of gold and silver a distinct categorie because of their "Nichtkonkretisierbarkeit," i.e. they are not susceptible to be specified. Idem, *Zwischen Markt*, 99.

<sup>135</sup> Sarakhsī, *Mabsūṭ* (n.d.), 12:121; *ibid.* (1421), 12:142.

class as the stipulated object is substituted for it, but also accord and satisfaction in general, in accordance with the principle that prohibits the resale of an object that a person has purchased before he takes possession of it. We have also seen that the same solution is attributed to several Basran jurists. In Iraq, only ‘Umar b. al-Khaṭṭāb reportedly stated, “If you buy [an object] in a *salam*, there is no harm in taking a non-fungible item (*‘ard*) instead of your price.”<sup>136</sup> I have inferred that this statement is intended to protect a third party who concluded another *salam* with the seller. But it seems to have little to do with the origin of the prohibition of *ribā* of delay.

As for the Medinan jurists, Ibn ‘Umar, who was regarded as an authority in Medinan jurisprudence, is reported to have stated, “There is no harm in a *salam*. Don’t exchange the object for anything else and don’t sell it until you take possession of it.”<sup>137</sup> As noted, however, Mālik puts no substantive restraint on accord and satisfaction in a *salam* (see p. 206). As for the relationship between the object and the price, no legal opinion is attributed to a Medinan jurist prior to Mālik on this issue. Also in Medina, it is mainly with regard to accord and satisfaction in a credit sale that the prohibition of *ribā* of delay was formed.

### 3. *The Medinan origin of ribā of delay in exchange of money*

I have indicated the possible origin of the prohibition of *ribā* of delay in ‘gold for gold, silver for silver or gold for silver’ in Iraq, i.e. in exchange of an item sold by weight for another item sold by weight. It is by no means easy to detect the Medinan origin of the prohibition in exchange of money for money of the same or a different kind. One possibility is that it was introduced for a systematic reason. Consider the following statement attributed to al-Zuhrī about Mālik b. Aws al-Ḥadathānī al-Naṣrī, in which the prohibition of *ribā* of delay in ‘gold for silver’ is mentioned along with the prohibition of *ribā* of delay in exchange of foodstuffs:

One time he [viz. Mālik b. Aws] asked to exchange 100 dinars. He said, “Ṭalḥa b. ‘Ubayd Allāh called me over and we made a mutual agreement that he would make the exchange with me. He took the

<sup>136</sup> Ibn Abī Shayba, *Muṣannaf*, 4:347, no. 20843.

<sup>137</sup> Ibn Abī Shayba, *Muṣannaf*, 4:347, no. 20844. See also, Saṅ‘ānī, *Muṣannaf*, 8:14, no. 14106.

gold and turned it about in his hand and then said, 'I cannot do it until my treasurer brings the money to me from al-Ghāba.' 'Umar b. al-Khaṭṭāb, who was listening, said, 'By God! Do not leave him until you have taken it from him.' Then he said, 'The Messenger of God, may God bless him and grant him peace, said, "Gold for silver is *ribā* except hand to hand. Wheat for wheat is *ribā* except hand to hand. 'Dates for dates' is *ribā* except hand to hand. Barley for barley is *ribā* except hand to hand.'<sup>138</sup>

On the one hand, an exchange of foodstuffs for foodstuffs, which are defined as *ribā* goods, is subject to the prohibition of *ribā* of delay, as noted, and the prohibition of *ribā* of excess, as will be demonstrated in Section 4. On the other hand, an exchange of gold for gold or silver for silver, which likewise are defined as *ribā* goods, is subject to the prohibition of *ribā* of excess, as has been demonstrated in Section 2. It results systematically that an exchange of gold for gold, gold for silver, or silver for silver is subject to the prohibition of *ribā* of delay.

#### *Section 4 Ribā of excess in 'wheat for wheat, dates for dates'*

I turn now to the prohibition of *ribā* of excess in 'wheat for wheat, dates for dates etc.,' i.e. the principle that exchange should be made like for like, equal for equal. The legal texts mention several transactions dealing with wheat that are subject to the prohibition. Ibrāhīm al-Nakhaṭī reportedly disapproved of the exchange of *sawīq* (a kind of mush) for grains because of the difference in quantity.<sup>139</sup> Abū Ḥanīfa adopts this solution.<sup>140</sup> Mālik said that it is not permitted to exchange one heap (*ṣubra*) of wheat for another heap of wheat,<sup>141</sup> apparently because of ignorance of the exact quantities.<sup>142</sup> Jurists are divided over the validity of the exchange of grains and flours. Mālik,<sup>143</sup> Qatāda<sup>144</sup> and Sufyān al-Thawrī<sup>145</sup> are reported to have held that

<sup>138</sup> Mālik-Yahyā, *Muwattaʿ*, 3:281–82, no. 1370; *ibid.*, tr. Bewley, 258a–b, 31.17, no. 38.

<sup>139</sup> Ṣanʿānī, *Muṣannaḥ*, 8:31, no. 14184.

<sup>140</sup> Shaybānī, *Aṣl*, 5:53.

<sup>141</sup> Mālik-Yahyā, *Muwattaʿ*, 3:294; *ibid.*, tr. Bewley, 262b.

<sup>142</sup> Zurqānī takes this interpretation. Zurqānī, *Sharḥ*, 3:294.

<sup>143</sup> Mālik-Yahyā, *Muwattaʿ*, 3:295–96; *ibid.*, tr. Bewley, 263b.

<sup>144</sup> Ṣanʿānī, *Muṣannaḥ*, 8:31, no. 14179.

<sup>145</sup> Ṣanʿānī, *Muṣannaḥ*, 8:31, no. 14180.

there is no harm in such an exchange so long as the quantities are equal, whereas Ḥakam and Ḥammād reportedly disapproved of it.<sup>146</sup> The transaction known as *muḥāqala*, which is defined, among other things, as “selling spikes of wheat for threshed wheat” or “selling of standing wheat for wheat,” i.e. ‘wheat for wheat,’ is unanimously held to be unlawful.

Did the prohibition of *ribā* of excess originate from one of these transactions? Although it is difficult to detect the practical reason why transactions other than *muḥāqala* are prohibited, it is possible to identify the practical reason with respect to *muḥāqala*, as will be demonstrated. To anticipate my conclusion, I maintain that *muḥāqala*, originally a share-cropping contract dating back to the pre-Islamic period, was prohibited by a number of early jurists, who invoked the prohibition of *ribā* of excess in ‘gold for gold, silver for silver’ to justify its prohibition.

As for the transactions dealing with dates, which for the Medinans represent the class of foodstuffs that can be dried to be stored, there is an interesting report in the *Muwattaʿa*:

Whatever can be made into dried fruit to be stored and eaten should not be sold for its own kind, except hand to hand, like for like, when it is the same kind of fruit. In the case of two different kinds of fruit, there is no harm in exchanging two of one kind for one of another, hand to hand on the spot. It is not good to set delayed terms. As for produce which is not dried and stored but is eaten fresh like water-melons, cucumbers, melons, carrots, citrons, bananas, pomegranates and so on, which when dried no longer counts as fruit, and is not a commodity that is stored as fruit is, I think that it is quite proper to sell such things two for one of the same variety hand to hand. If no term enters into it, there is no harm in it.<sup>147</sup>

That is to say, fruits that can be dried to be stored are subject to the prohibition of *ribā* of excess, whereas other fruits are not. Therefore, if there is a specific transaction dealing with such fruits, it is conceivable that the prohibition originated from this transaction (although we cannot exclude the possibility that the prohibition that had been established was applied to this transaction). In fact, *muzābana* and *ʿariyya* sale are such transactions.

<sup>146</sup> Ṣanʿānī, *Muṣannaf*, 8:31, no. 14182.

<sup>147</sup> Mālik-Yahyā, *Muwattaʿa*, 3:275–76, no. 1358; *ibid.*, tr. Bewley, 256a–b, 31.5, no. 27.

I will examine below *muḥāqala* and *muzāraʿa*, another share-cropping contract, and *muzābana* and *ʿariyya* sale.

### 1. *Muḥāqala* and *muzāraʿa*

The Prophet is reported to have prohibited *muḥāqala*.<sup>148</sup> Although it is unanimously held to be unlawful, traditionists and jurists are divided over its definition.

(1) According to one opinion, *muḥāqala* is defined as “giving land in exchange for a share of what is produced by the land, say a third or a fourth (*dafʿ al-ardʿ alā al-thulth aw al-rubʿ wa-ʿalā juzʿ mim mā yakhruju min-hā*).”<sup>149</sup>

(2) There is a definition, “leasing land in exchange for wheat (*kirāʿ al-ardʿ bi-l-ḥiṭa*),”<sup>150</sup> without specifying where the wheat comes from.

(3) Ibn al-Musayyab is reported to have defined a *muḥāqala* as “buying standing wheat for wheat and taking a lease on land for wheat (*ishtirāʿ al-zarʿ bi-l-ḥiṭa wa-ʿstikrāʿ al-ardʿ bi-l-ḥiṭa*).”<sup>151</sup> The Maliki jurist al-Bājī states that both “buying unharvested wheat for wheat” and “taking a lease on land for wheat” are called *muḥāqala*, whereas the Maliki jurist Ibn ʿAbd al-Barr explains that the combination of the two transactions is called *muḥāqala*.<sup>152</sup>

(4) *Muḥāqala* is also defined as “selling spikes of wheat for threshed wheat (*bayʿ al-sunbul min al-zarʿ bi-l-ḥabb al-muṣaffā*).”<sup>153</sup> Al-Ṭaḥāwī defines it as “selling standing wheat for wheat (*bayʿ al-zarʿ qāʿiman ʿalā uṣūli-hi bi-l-ṭaʿām*).”<sup>154</sup>

I refer to these definitions as definition (1), definition (2) etc. The primary sources contain many references to a share-cropping contract,

<sup>148</sup> Abū Yūsuf, *Āḥār*, 189, no. 858; Ibn Abī Shayba, *Muṣannaf*, 4:507–08, nos. 22573–74, 22576, 22578–79, 22582, 22584; *Kitāb fi al-ḥiḡh*, 43–45 (22b–23b).

<sup>149</sup> Ibn ʿAbd al-Barr, *Tamhīd*, 2:318–19. For a similar definitions, see Ṭaḥāwī, *Mushkil*, 3:290; Shāfiʿī, *Umm*, 7:111; Ibn Nujaym, *Bahr*, 6:82.

<sup>150</sup> Mālik-Yaḥyā, *Muwaṭṭaʿ*, 3:268–69, no. 1355; *ibid.*, tr. Bewley, 253b, 31.13, no.24; Ibn ʿAbd al-Barr, *Tamhīd*, 2:318; Ibn Nujaym, *Bahr*, 6:82.

<sup>151</sup> Mālik-Yaḥyā, *Muwaṭṭaʿ*, 3:269, no. 1356; *ibid.*, tr. Bewley, 253b, 31.13, no. 25; Mālik-Hadathānī, *Muwaṭṭaʿ*, 194, no. 231; Mālik-Shaybānī, *Muwaṭṭaʿ*, 275, no. 779; Ṣanʿānī, *Muṣannaf*, 8:95, no. 14461; Muslim, *Ṣaḥīḡh*, buyūʿ, 14.

<sup>152</sup> Ibn ʿAbd al-Barr, *Tamhīd*, 2:319.

<sup>153</sup> Ibn ʿAbd al-Barr, *Tamhīd*, 2:313–14, 319. See also Ibn Abī Shayba, *Muṣannaf*, 4:509, no. 22588; Ḥumaydī, *Musnad*, 2:540, no. 1292; Kāsānī, *Badāʿiʿ* (1402), 5:194; *ibid.* (1418), 7:84; Ibn Nujaym, *Bahr*, 6:82.

<sup>154</sup> Ṭaḥāwī, *Mushkil*, 3:290. For a similar definition, see also Muslim, *Ṣaḥīḡh*, buyūʿ, 158.

which is sometimes called *muḥāqala* (i.e. *muḥāqala* according to definition (1)) or *muzāraʿa*. In other cases, however, a share-cropping contract is not designated by a specific name, as in the sentence, “They used to give their land against one-third or one-fourth [of the produce].” In what follows, only when a share-cropping contract is called *muḥāqala* or *muzāraʿa* in the primary sources do I refer to it as such. Otherwise I refer to it as a share-cropping contract.

There is a historical explanation for the existence of several definitions of *muḥāqala*. Although it is difficult to decide with certainty which definition was the original one, definition (1) is the most likely candidate, for two reasons. First, the other definitions can be drawn from it. This is obvious as far as definition (2) is concerned. As for definitions (3) and (4), I infer so, because a share-cropping contract can be interpreted as a contract by virtue of which one of the parties supplies seed in exchange for a specific share in the produce, i.e. as exchange of “wheat for wheat.” Second, the term “*muḥāqala*” derives from “*ḥaql*” (field). Therefore it is plausible that the *muḥāqala* originally designated a share-cropping contract.

Ziaul Haque has studied *muḥāqala* at length as a share-cropping contract. In his view, “*muḥāqala* was an old form of landholding of pre-Islamic days in which landless tillers used to take from landlords—individuals, tribes and temples—arable lands on leases against corn, food, in kind, or against a certain part of the produce of land.”<sup>155</sup> But the term *muḥāqala* also denotes several other transactions, which suggests that “it was also a tenancy practice which must have many constituent elements and shades of transactions; and perhaps there were various combinations of the practice of *muḥāqala* . . .”<sup>156</sup> The earliest Muslims living in the limited *umma* of the Hijaz applied the general prohibition of leasing land, which was intended to be given for free to Muslim cultivators. As Muslim society became larger and more complicated as the result of the Arab conquest, it became necessary to modify the general prohibition of leasing land.<sup>157</sup> Muslim jurists tried to regulate the *muḥāqala* and other similar primitive forms of land tenure, which imposed uncertain condition and arbitrary terms on tenants. The jurists classified the *muḥāqala* into two classes:

<sup>155</sup> Ziaul Haque, *Landlord*, 15.

<sup>156</sup> Ziaul Haque, *Landlord*, 18.

<sup>157</sup> Ziaul Haque, *Landlord*, 103–04, 163.

(1) a lease of land in return for a fixed and clearly defined percentage of the crop, such as one-third or one-fourth, known as *muzāraʿa*; (2) tenancies that do not guarantee to the tenant any clearly defined share.<sup>158</sup> *Muzāraʿa*, which originated in the former Byzantine and the Sasanian territories, was developed by the Umayyads and after them by the Abbasids as an administrative principle of State.<sup>159</sup> Whereas some jurists including Abū Ḥanīfa, Mālik and al-Shāfiʿī, declare all species of leasing of land for a certain percentage of its produce to be invalid, other jurists who came in general at a time when the legal and economic institutions of the *umma* had been fully developed hold the *muzāraʿa* to be valid.<sup>160</sup>

The thesis of Ziaul Haque is based on the assumption that the Prophetic hadiths are authentic. He accounts for the fact that later jurists came to legalize a certain form of *muḥāqala* as a *muzāraʿa* in contradiction to the Prophetic hadiths by arguing that the jurists took into consideration the social and economic development of the Muslim society. It is difficult either to substantiate or refute his thesis. Be that as it may, he does not take into account the details of the rules governing the *muzāraʿa*. As there are few historical sources that shed light on the doctrinal development of *muḥāqala* or *muzāraʿa*, the positive rules themselves are the best sources at our disposal. I will attempt here to advance another thesis by analyzing the rules and legal opinions held by Iraqi and Medinan jurists regarding share-cropping contracts.

### *The Iraqi doctrines*

The doctrinal development in Iraq is divided into three stages.

(1) Al-Balādhurī writes that immediately after the conquest of Iraq the third caliph ʿUthmān b. ʿAffān (r. 23–35/644–56) gave (*aqṭaʿa*) estates in Iraq to five Companions, including Ibn Masʿūd (d. 32/652–3) and Saʿd b. Mālik (more commonly Saʿd b. Abī Waqqāṣ, d. 51/671–2, 55/674–5, 56/675–6, 57/676–7, 58/677–8 or 78/697–8), who “used to give their lands for one-third or one-fourth [of the produce] (*yuʿṭiyānī arḍa-humā bi-ʿl-thulth aw al-rubʿ*).”<sup>161</sup> ʿAbd al-Raḥmān b. al-Aswad (d.

<sup>158</sup> Ziaul Haque, *Landlord*, 11, 22–23.

<sup>159</sup> Ziaul Haque, *Landlord*, 170–71, 299.

<sup>160</sup> Ziaul Haque, *Landlord*, 24–25, 312.

<sup>161</sup> Balādhurī, *Futūḥ*, 273. See also Ṣanʿānī, *Muṣannaf*, 8:99, no. 14470; Abū Yūsuf, *Kharāj* (1981), 197; Ibn Abī Shayba, *Muṣannaf*, 4:382, no. 21221; Shaybānī, *Ḥujja*, 4:161–62.

99/717–8 or 100/718–9)<sup>162</sup> is reported to have said that he was practicing *muzāraʿa* with the people of the Sawād (*kāna yuzārīʿ ahl al-Sawād*) during the lifetime of his father al-Aswad b. Yazīd b. Qays al-Nakhaʿī (d. 74/693–4 or 75/694–5).<sup>163</sup> He is also reported to have said, “I used to practice *muzāraʿa* for one-third or one-fourth and I mentioned it to ‘Alqama [b. Qays] (d. 61/680–1, 62/681–2, 63/682–3, 65/684–5, 72/691–2 or 73/692–3) and al-Aswad. If they had thought that there was no good in it, they would have forbidden me to do that.”<sup>164</sup> There is no doubt that the share-cropping contract was practiced from the beginning of Islamic period. Ibn Sīrīn is reported to have practiced *muzāraʿa* on his land.<sup>165</sup> He is also reported to have seen no harm in a landowner leasing his land in return for one-third, one-fourth or one-tenth.<sup>166</sup>

(2) At some point during the Umayyad period, the opinion forbidding the share-cropping contract seems to have been prevalent in Iraq (as well as in Medina). Al-Ḥasan al-Baṣrī<sup>167</sup> and Ibrāhīm al-Nakhaʿī<sup>168</sup> reportedly allowed the leasing of land in return for a specific sum of money or a specific quantity of foodstuffs, but not for a percentage of the produce. Abū Ḥanīfa held the same opinion.<sup>169</sup> The Kufan jurist Saʿīd b. Jubayr (d. 95/714) reportedly permitted the leasing of land for dirhams or a specific quantity of foodstuffs,<sup>170</sup> but disapproved of “one-third and one-fourth.”<sup>171</sup> The eighth Umayyad caliph ‘Umar b. ‘Abd al-‘Azīz (r. 99–101/717–20) wrote to ‘Uthmān b. Muḥammad b. Abī Suwayd, “Sell uncultivated land in exchange for gold, and practice a *mukhābara* in trees on land (*an yabīʿa bayāḍ al-arḍ bi-l-dhahab wa-an yukhābira ʿalā aṣl al-arḍ*).”<sup>172</sup> Here “sell” means

<sup>162</sup> Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb*, 3:339–400, no. 4335.

<sup>163</sup> Ibn Abī Shayba, *Muṣannaf*, 4:383, no. 21231. For al-Aswad, see Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb*, 1:217, no. 625.

<sup>164</sup> Ibn Abī Shayba, *Muṣannaf*, 4:383, no. 21232. For a report to the same effect, see Shaybānī, *Hujja*, 4:172–74.

<sup>165</sup> Bukhārī, *Ṣaḥīḥ*, *muzāraʿa*, 8.

<sup>166</sup> Ibn Abī Shayba, *Muṣannaf*, 4:383, no. 21235.

<sup>167</sup> Abū Yūsuf, *Āḥār*, 188, no. 856; Ṣanʿānī, *Muṣannaf*, 8:100, no. 14474.

<sup>168</sup> Abū Yūsuf, *Āḥār*, 188, no. 856; Ṣanʿānī, *Muṣannaf*, 8:100, no. 14475.

<sup>169</sup> Shaybānī, *Hujja*, 4:138–41. See also, *ibid.*, 4:183; Shaybānī, *Ṣaghīr* (1406), 469.

<sup>170</sup> Shaybānī, *Hujja*, 4:187–88; Ibn Abī Shayba, *Muṣannaf*, 4:494, no. 22427.

<sup>171</sup> Ṣanʿānī, *Muṣannaf*, 8:100, no. 14475.

<sup>172</sup> Ṣanʿānī, *Muṣannaf*, 8:94, no. 14456. ‘Uthmān is a traditionist from Ṭāʿīfa, from whom al-Zuhrī transmitted hadiths. Ibn Ḥibbān, *Thiqāt*, 2:359, no. 2768.

“lease.”<sup>173</sup> The term “*yukhābira*” means a kind of share-cropping contract,<sup>174</sup> so that this sentence means that a share-cropping contract undertaken with regard to an orchard, e.g. *musāqāt*, is lawful, but it is prohibited with regard to land. The above-cited statements attributed to ‘Abd al-Raḥmān b. al-Aswad may suggest that this opinion appeared around the turn of the seventh century.

(3) Ibn Abī Laylā (b. 74/693–4; d. 148/765–6), contemporary of Abū Ḥanīfa, regarded the *muḥāraʿa* as lawful.<sup>175</sup> Sufyān al-Thawrī (b. 95/713–4, 97/715–6 or 100/718–9; d. 161/778), another contemporary of Abū Ḥanīfa, transmitted the hadith, “Ibn ‘Umar used to give his land for one-third (*kāna Ibn ‘Umar yuʿṭi arḍa-hu bi-ʿl-thulth*).”<sup>176</sup> Al-Ṭabarī writes that Sufyān saw no harm in the *muḥāraʿa*.<sup>177</sup> Abū Ḥanīfa’s two disciples, Abū Yūsuf and al-Shaybānī, consider it to be lawful, as did the later Hanafis.<sup>178</sup>

Why did a number of Iraqi jurists prohibit the share-cropping contract? Al-Shaybānī writes:

Abū Ḥanīfa did not permit the *muḥāraʿa* undertaken on land and the *muʿāmala*<sup>179</sup> in a date plantation for one-third, one-fourth or more or less [of the produce]. He used to say, “This is a leasing [of a land or a plantation] for part of what is produced by the land [or the plantation], but no one knows whether or not it will produce anything.”<sup>180</sup>

The statement of Abū Ḥanīfa sounds strange. Suppose that a cultivator leases land in return for a fixed rent, whether or not the land produces anything. Is this not less fair for the cultivator than a share-cropping contract, in which the contracting parties share the risk of a bad harvest? In fact, the Hanbali jurist Ibn Qayyim al-Jawziyya

<sup>173</sup> For an example in which “*tabīʿu*” (you sell) means leasing (*kirāʿ*), see Ṭaḥāwī, *Sharḥ*, 2:257.

<sup>174</sup> Ḥumaydī, *Musnad*, 2:540, no. 1292.

<sup>175</sup> Abū Yūsuf, *Kharāj* (1981), 194; Shāfiʿī, *Umm*, 7:111; Sarakhsī, *Mabsūṭ* (n.d.), 23:17; *ibid.* (1421), 23:19.

<sup>176</sup> Ṣanʿānī, *Muṣannaf*, 8:101, no. 14479.

<sup>177</sup> Ṭabarī, *Ikhtilāf*, 144.

<sup>178</sup> Abū Yūsuf, *Kharāj* (1981), 197–98; Shaybānī, *Hujja*, 4:141; Ṭaḥāwī, *Mukhtaṣar*, 133; Qudūrī, *Mukhtaṣar*, 2:228–29.

<sup>179</sup> *Muʿāmala*, called also *musāqāt*, denotes a contract concluded between the owner of a plantation and a husbandman, who is obligated to work in the plantation. At the end of the season crops are divided between the contracting parties according to the agreed portions.

<sup>180</sup> Shaybānī, *Hujja*, 4:138–41. See also, *ibid.*, 4:183; Shaybānī, *Ṣaghīr* (1406), 469.

(d. 751/1350) writes that it is for this reason that some jurists including Ibn Taymiyya (d. 728/1328) regarded the *muzāraʿa* as more lawful and fairer than leasing land for a fixed rent.<sup>181</sup> It is doubtful that Abū Ḥanīfa's statement transmits the true reason why a number of Iraqi jurists prior to him prohibited the share-cropping contract.

An explanation given by the Maliki jurist ʿAbd al-Wahhāb (d. 421/1030 or 422/1031) is suggestive. According to him, one of the reasons for the prohibition of the “association in cultivation (*al-sharika fī al-zarʿ*)” according to which the landowner supplies the land and the cultivator seed is that it is tantamount to “foodstuff for foodstuff on a delayed term (*taʿām bi-taʿām mutaʿakhhiran*).”<sup>182</sup> That is to say, this association is considered to contain an exchange of seed and wheat (produce) on a delayed term, which violates the prohibition of *ribā* of delay. Theoretically, the same interpretation also applies to a share-cropping contract in general in which one of the contracting parties supplies seed, for he supplies foodstuffs by the moment of cultivation and receives repayment with a percentage in the produce at the end of the harvest. Definition (4) points to such an understanding (see p. 251).

Furthermore, the *muzāraʿa* as understood by the jurists is problematic also in the sense that it can constitute an interesting-bearing loan. To illustrate this point, let us consider how the share of each party is determined in a *muzāraʿa*. According to a hadith (*isnād*: the Hanafi jurist Wakīʿ [b. Jarrāḥ] (b. 130/747–8; d. 197/812–3)—al-Awzāʿī—Wāṣil b. Abī Jamīl—Mujāhid), during the lifetime of the Prophet Muḥammad, four persons supplied land, cattle, seed and labor respectively. At the end of the season a dispute arose over their respective share. They brought the dispute before the Prophet, who gave all the produce to the party who had supplied seed, an object to the party who had supplied cattle, one dirham [a day] as wages to the cultivator, but nothing to the landowner. Commenting on this hadith, Wakīʿ said, “We hope that one-half, one-third or one-fourth are permitted, because it is popular custom among the people (*narjū an yakūna al-niṣf wa-l-thulth wa-l-rubʿ jāʾiz li-anna al-nās yaʿmalūna bi-hi*).”<sup>183</sup> It is clear that Wakīʿ means by “one-half, one-

<sup>181</sup> Ibn Qayyim al-Jawziyya, *Turuq*, 231.

<sup>182</sup> ʿAbd al-Wahhāb, *Maʿūna*, 2:1141.

<sup>183</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:506, no. 22556; *Kūb fī al-fiqh*, 46 (23a).

third or one-fourth” a *muzāraʿa*, for in his time the Hanafis regarded the *muzāraʿa* as lawful.

A.K.S. Lambton writes about the *muzāraʿa* as practiced in Iran:

Traditionally, five elements are taken into account in dividing the crop: land, water, draught animals, seed, labour; theoretically one share is allotted to each element and goes to whoever provides that element. In fact, however, this is little more than a theoretical abstraction, . . .<sup>184</sup>

That is to say, the share of each party is calculated in proportion to the importance of the element that he provides. Although we do not know when this theory originated, if a *muzāraʿa* is concluded according to this arrangement and the yield ratio (quantity of produce yielded per unit of seed) in the land exceeds a certain point, the provider of seed (generally the landowner) receives more than he provided. If, for example, the contribution of seed to the agricultural production is set at  $100t\%$  by the agreement of the contracting parties and the yield ratio is  $r$ , the provider of the seed is repaid with  $rt$  per unit of seed. This is problematic from a legal point of view, because if, for example,  $t$  equals  $1/4$  and  $r$  is greater than 4, or  $t$  equals  $1/5$  and  $r$  is greater than 5, it amounts to an interest-bearing loan, which condition seems to have been easily attainable, for Ashtor writes, “According to Arabic authors of the later middle ages, who certainly quote earlier sources, the Egyptians sowed from  $2/3$  to 1 irdabb of wheat on a feddan and harvested from 2 to 20 irdabb” and he concluded, “These figures would point to average yield ratio of 1:10.”<sup>185</sup> And we must keep in mind that the Sawād, where Kufa and al-Basra are located, was one of the most fertile areas in the world.

Did the Iraqi jurists who deemed a share-cropping contract to be unlawful in fact did so because it violates the prohibition of *ribā* of delay or the prohibition of an interest on loans? This is plausible, because Abū Yūsuf, al-Shaybānī and the later Hanafis hold that a *muzāraʿa* in which the cultivator supplies seed is treated as a lease of land to the cultivator, whereas one in which the landowner supplies seed is regarded as an employment of the cultivator by the landowner (as will be mentioned, the majority of the Hanafis regard a *muzāraʿa*

<sup>184</sup> Lambton, *Landlord*, 306.

<sup>185</sup> Ashtor, *Social and Economic History*, 50.

in which the cultivator supplies labor and seed, and the landowner supplies land and cattle, as invalid).<sup>186</sup> According to this interpretation, the *muzāraʿa* does not involve a loan of seed. It is plausible that Abū Yūsuf or an earlier jurist who deemed the *muzāraʿa* to be lawful introduced this interpretation to persuade his opponents that the *muzāraʿa* neither violates the prohibition of *ribā* of delay nor contains interest on loans.

But this explanation raises a question: why is *muḍāraba*, which constitutes a *ribā* of delay and involves an interest on loans every time the agent has made a profit, unanimously held to be lawful? *Muḍāraba* is a commercial association in which an investor (*rabb al-māl*) entrusts capital to an agent (*muḍārib*, *ʿāmil*), who trades with it and shares with the investor a pre-determined proportion of the profits after deducting the capital.<sup>187</sup> Is there not another possible reason for the prohibition of a share-cropping contract? To explore such a possibility, let us reconsider the Maliki “association in cultivation.” We have seen that they declare to be unlawful an association in cultivation in which the landowner supplies land and the cultivator seed. But the Malikis declare to be lawful, among others, an association in which the landowner supplies land and seed, and the cultivator labor and seed, if the ratio of the stipulated contribution of land to the agricultural production to that of the labor equals the ratio of the quantity of seed supplied by the landowner to that of seed supplied by the cultivator.<sup>188</sup> For example, if they agree that land and labor contribute to the agricultural production in the same proportion (i.e. 1:1), the association is lawful on the condition that the landowner and the cultivator respectively supply one-half of the quantity of seed to be sown on the land. Likewise, Mālik declares to be lawful an association in which one person provides land, another person cattle, and a third person labor, if these constituent elements contribute to the agricultural association in the same proportion (i.e.

<sup>186</sup> Ṭabarī, *Ikhtilāf*, 147, 166; Johansen, *Islamic Law*, 55; Sarakhsī, *Mabsūṭ* (n.d.), 23:26, 85–86; *ibid.* (1421), 23:29, 83–84; Kāsānī, *Badāʿiʿ* (1402), 6:179; *ibid.* (1418), 8:271. Abū Ḥanīfā, who considers the *muzāraʿa* unlawful, holds that if a *muzāraʿa* in which the landowner supplies seed was undertaken, the landowner who obtains all the produce owes an equivalent wage to the cultivator. Abū Yūsuf, *Kharāj* (1981), 198.

<sup>187</sup> Jeanette A. Wakin, “Muḍāraba,” *EI*, new edition, 7:284b.

<sup>188</sup> Ibn ʿAbd al-Barr, *Kāfi*, 379.

1/3) and the partners provide one-third of seed required for cultivation respectively.<sup>189</sup>

What if the landowner, who alone possesses seed, lends one-half of the required quantity of seed to the cultivator? Although I could find no mention to this in the Maliki text, an association that al-Ṣanʿānī mentions in his *Muṣannaf* is such a contract: a certain Ismāʿīl b. ʿAbd Allāh is quoted as having stated:

Several persons told me that Ibn Sīrīn used to give a share of his land, and lend to his partners seed, which would be repaid with the produce of the land, after it was harvested (*Ibn Sīrīn kāna yushriku arḍahu wa-yusliḥu al-shurakāʾ al-baḥr ḥattā yaʾkhudha-hu baʿdu min zarʿ al-ard idhā ḥuṣīdā*).<sup>190</sup>

The sentence “Ibn Sīrīn used to give a share of his land” signifies that Ibn Sīrīn used to lease a share of his land. Ibn Ṭāwūs is reported to have said about his father Ṭāwūs, “He used to give a share of his land, say one-third or one-half, and give them [viz. his partners, i.e. the cultivators] the [corresponding] share of the seed [to be sown on the land].”<sup>191</sup> This sentence refers to the same contract as in the text cited just above. I will call it ‘the agricultural association’ hereafter.

The agricultural association is as follows: the landowner leases  $100a\%$  of his land to cultivators, i.e. his partners. This is exchanged for the labor the cultivators provide for the remaining  $100(1 - a)\%$  of the land.<sup>192</sup> At the same time the landowner lends to the cultivators  $100a\%$  of the seed sown on the land. The remaining  $100(1 - a)\%$  of the seed, which belongs to the landowner, also is sown by the cultivators. According to Wakīʿ, agricultural production is composed of four elements, i.e. land, seed, cattle, and labor. Cattle may be supplied by the landowner, by the cultivators or by the both parties. If they belong to the landowner, he rents  $100a\%$  of them to the cultivators. If they belong to the cultivators, the cultivators rent  $100a\%$  of them to the landowner. The result is that the landowner and the cultivators own respectively  $100(1 - a)\%$  and  $100a\%$  of

<sup>189</sup> Saḥnūn, *Mudawwana*, 5:54.

<sup>190</sup> Ṣanʿānī, *Muṣannaf*, 8:102, no. 14483.

<sup>191</sup> Ṣanʿānī, *Muṣannaf*, 8:101–02, no. 14481. See also, Ibn Abī Shayba, *Muṣannaf*, 4:382, no. 21222.

<sup>192</sup> Ibn Qayyim refers to such a transaction as a *hiyal*. Ibn Qayyim, *Flām*, 3:312.

each of the four elements. It follows that the landowner and the cultivators take  $100(1 - a)$  % and  $100a$  % of the produce respectively at the end of the season, with the cultivators being obligated to repay the seed they received in equal quantity and eventually to pay the rent of the cattle. It is obvious that the agricultural association violates neither the prohibition of *ribā* of delay nor the prohibition of interest on loans.

My contention is that the agricultural association was introduced as a substitute for the share-cropping contract. This is suggested by the following statement of Abū Ḥanīfa: his teacher Ḥammād b. Abī Sulaymān (d. 120/737–8) had heard from Sālim b. ‘Abd Allāh (d. 106/725) and Ṭāwūs that there was no harm in the *muzāra‘a*. When he told Ibrāhīm al-Nakha‘ī about this, the latter disapproved of the *muzāra‘a*, saying, “Ṭāwūs practices *muzāra‘a* on his land. That is why he says so.”<sup>193</sup> Similarly Ibn Abī Laylā, who considered the *muzāra‘a* lawful, is reported to have owned land.<sup>194</sup> These reports may suggest that Ṭāwūs and Ibn Abī Laylā legalized the *muzāra‘a* because it was advantageous for landowners. If so, the question arises: what is the *muzāra‘a* advantageous for landowners compared to? Of course, it may as well be that these jurists legalized the *muzāra‘a* simply because they were practicing it on their land. However, I am inclined to surmise that those jurists who considered the *muzāra‘a* unlawful did so in order to safeguard a cultivator who would be put in a less favorable condition under a *muzāra‘a* than under an agricultural association that involves no interest and no legal ambiguity. I think so for three reasons.

(1) As noted, the eighth Umayyad caliph ‘Umar b. ‘Abd al-‘Azīz prohibited a share-cropping contract from being practiced on land. On the other hand, he wrote, probably to provincial governors, regarding the agricultural association: “Give a half share of the land, and do not make the partners guarantee the seed (*Ashrikū al-ard’ alā al-niṣf, wa-lā tuḍammīnū al-shurakā’ al-badhr*).”<sup>195</sup> That is to say, ‘Umar,

<sup>193</sup> Shaybānī, *Āthār*, 102a. See also Ibn Abī Shayba, *Muṣannaf*, 4:382–83, no. 21230; Shaybānī, *Ḥujja*, 4:172; *Kitāb fi al-ḥiqh*, 45–46 (22b–23a). According to al-Shaybānī, Ṭāwūs reportedly said, “When Mu‘adh [b. Jabal] was appointed to the Yemen, they used to give their land in exchange for one-third or one-fourth, but he did not blame it.” Shaybānī, *Ḥujja*, 4:166–67.

<sup>194</sup> Ibn Abī Shayba, *Muṣannaf*, 4:384, no. 21243.

<sup>195</sup> Ṣan‘ānī, *Muṣannaf*, 8:102, no. 14482.

who prohibited the share-cropping contract, legalized the agricultural association and tried to regulate it, even though the leasing land against fixed rent might have been the least problematic in his view.

(2) On the one hand, Ibn Sīrīn is reported to have regarded *muzāraʿa* as lawful.<sup>196</sup> He also reportedly sent a certain Hishām [b. Ḥassān?] to the Medinan jurist al-Qāsim b. Muḥammad to ask him about the case of a person who says to someone, “Work in my plantation, and I will give you one-third or one-fourth [of the produce].” Al-Qāsim answered that there was no harm in this. When Hishām returned and brought this answer to Ibn Sīrīn, the latter said, “This is the best way of doing things with respect to land (*hādhā aḥsan mā yuṣnāʿu fī al-arḍ*).” But Hishām said that al-Ḥasan al-Baṣrī disapproved of it.<sup>197</sup> Abū ʿUbayd al-Qāsim b. Sallām writes that Ibn Sīrīn used to give his *kharāj* land in return for one-third or one-fourth.<sup>198</sup> Ṭāwūs also is reported to have seen no harm in a *muzāraʿa*.<sup>199</sup> On the other hand, we have seen that Ibn Sīrīn and Ṭāwūs are reported to have practiced an agricultural association. This may reflect the historical fact that the agricultural association was introduced as a substitute for the *muzāraʿa*.

(3) As stated, Abū Yūsuf and al-Shaybānī hold that certain, but not all, types of *muzāraʿa* are lawful. The proto-type of the *muzāraʿa* for them is one in which the cultivator provides only labor and the landowner provides land, seed and cattle. Theoretically, there are numerous types of *muzāraʿa* corresponding to numerous combinations of the four elements of agricultural production, but the combinations of the elements in a *muzāraʿa* about the validity of which the Hanafis mainly argue are four.

(A) The landowner contributes only land; the cultivator contributes labor, seed and cattle.

(B) The landowner contributes land and seed; the cultivator contributes labor and cattle.

(C) The landowner contributes land, seed and cattle; the cultivator contributes only labor.

<sup>196</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:383, no. 21235.

<sup>197</sup> Ṣanʿānī, *Muṣannaḥ*, 8:100, no. 14474.

<sup>198</sup> Abū ʿUbayd al-Qāsim b. Sallām, *Aḥwāl*, 164.

<sup>199</sup> Shaybānī, *Āthār*, 102a. See for a report to the same effect, Ibn Abī Shayba, *Muṣannaḥ*, 4:382–83, no. 21230.

(D) The landowner contributes land and cattle; the cultivator contributes labor and seed.

The Hanafis unanimously hold that a *muzāraʿa* in combinations (A), (B) or (C) is valid.<sup>200</sup> As for a *muzāraʿa* in combination (D), al-Shaybānī regards it as invalid, as do the later Hanafi jurists.<sup>201</sup> Qāḍī Khān (d. 592/1196) states that *fatwās* have been issued according to this opinion.<sup>202</sup> To Abū Yūsuf are attributed the same opinion<sup>203</sup> and the opinion that it is valid.<sup>204</sup> Al-Sarakhsī explains the reason why a *muzāraʿa* in combination (D) is invalid as follows: if the *manfāʿa* of cattle were the same as that of land, cattle could be supplied in a *muzāraʿa* in their capacity as an accessory (*tabʿ*) to land. But the *manfāʿa* of land lies in that it yields produce, whereas the *manfāʿa* of cattle is to help cultivation, so that they belong to different categories. This is why a *muzāraʿa* in combination (D) is invalid.<sup>205</sup> Al-Samarqandī points to the same reason when he states that in this combination land and cattle are put together to be rented for a share in the produce, but “There is no sacred justification for this (*lam yarid al-sharʿ bi-hi*).”<sup>206</sup>

These explanations are superficial. In particular, they cannot account for two solutions, one regarding a *muzāraʿa* in combination (D), and the other regarding a *muzāraʿa* in combination (A).

(i) Regarding a *muzāraʿa* in combination (D), al-Ṭabarī writes that Abū Yūsuf and al-Shaybānī held as follows: if this contract has been undertaken, the entire produce once belongs to the cultivator, but he must give the rest of the produce as *ṣadaqa* after he pays the rents for the cattle and the land, and takes a share of the produce equal to the quantity of the seed he sowed and the expenses he paid.<sup>207</sup>

<sup>200</sup> Qudūrī, *Mukhtaṣar*, 2:229; Samarqandī, *Tuhfa* (1964), 3:363–64; *ibid.* (1414), 3:265–66; Sarakhsī, *Mabsūṭ* (n.d.), 23:19–20; *ibid.* (1421), 23:22–23; Johansen, *Islamic Law*, 55. The term “tools (*āla*)” is interchangeably used with “cattle (*baqar*).”

<sup>201</sup> Ṭahāwī, *Mukhtaṣar*, 133. According to the Shāfiʿī jurist al-Nawawī, for the Shāfiʿīs the distinction between the *muzāraʿa* and the *mukhābara* is that in the former the landowner supplies seed, while in the latter it is the cultivator who supplies seed. Nawawī, *Majmūʿ*, 10:193.

<sup>202</sup> Qāḍī Khān, *Fatāwā*, 3:177.

<sup>203</sup> Ṭabarī, *Ikhtilāf*, 152.

<sup>204</sup> Qāḍī Khān, *Fatāwā*, 3:177; Samarqandī, *Tuhfa* (1964), 3:364; *ibid.* (1414), 3:266.

<sup>205</sup> Sarakhsī, *Mabsūṭ* (n.d.), 23:20; *ibid.* (1421), 23:23.

<sup>206</sup> Samarqandī, *Tuhfa* (1964), 3:364; *ibid.* (1414), 3:266. See, for a similar explanation, Ṭabarī, *Ikhtilāf*, 152.

<sup>207</sup> Ṭabarī, *Ikhtilāf*, 152.

The rents he should pay are the “equivalent rent (*ajr al-mithl, ujrat al-mithl*).”<sup>208</sup> This solution raises two questions. First, it gives the impression that the share that goes to the landowner according to a *muzāraʿa* in combination (D) is always less than the total of the equivalent rents for the cattle and the land. Is this true? If so, why? Second, why cannot the cultivator receive more than the quantity of seed he sowed and the expenses he paid for cultivation? The general rule concerning an invalid (*fāsid*) contract is that if, subsequent to its execution, it becomes impossible to recover the original state, the contract is replaced with an equivalent one, with the intended legal effect of the contract being maintained. For example, if an object is delivered based on an invalid rent contract, the hirer owes the equivalent rent, i.e. the rent usually paid for an object similar to that object, corresponding to the period between the delivery of the object and its restoration to the owner.<sup>209</sup> The explanations given by al-Sarakhsī and al-Samarqandī cannot explain why this rule does not apply to a *muzāraʿa* in combination (D).

(ii) If a *muzāraʿa* in combination (A) is invalid for some reason, a similar rule to that adopted with respect to a *muzāraʿa* in combination (D) applies, i.e. the cultivator, who has the right to the entire produce, must give the rest of the produce as *ṣadaqa* after paying the equivalent land rent. With regard to this solution, al-Marghīnānī states, “This is because the increase [viz. produce] originates in seed and grows out of land, but the invalid ownership of the *manfāʿa* of land makes [ownership in] the increase vicious. What was delivered to him in exchange for a lawful consideration is lawful to him, but what was delivered to him without a lawful consideration should be given as *ṣadaqa*.”<sup>210</sup> As noted, a *muzāraʿa* in which the cultivator supplies seed is regarded as a lease of land. According to al-Marghīnānī, if the *muzāraʿa* is invalid, the cause according to which the *manfāʿa* of the land belongs to the cultivator is illegal. This is why the cultivator cannot retain the profit he earned through the contract.

However, this explanation is not valid for the case in which *muzāraʿa* in combinations (B) or (C) is invalid, for when it has been undertaken, the landowner can acquire the rest of the produce after paying rents

<sup>208</sup> Qudūrī, *Mukhtaṣar*, 2:231; Johansen, *Islamic Law*, 65.

<sup>209</sup> Linant de Bellefonds, *Traité*, 1:106.

<sup>210</sup> Marghīnānī, *Hidāya*, 4:56. See also, Kāsānī, *Badāʾiʿ* (1402), 6:183; *ibid.* (1418), 6:279; Sarakhsī, *Mabsūṭ* (n.d.), 23:22; *ibid.* (1421), 23:25.

for labor and cattle (in combination (B)) or rent for labor (in combination (C)). This time al-Marghīnānī justifies this solution by stating, “This is because the increase [viz. produce] grew out of his land.”<sup>211</sup> This solution is not persuasive, for by analogy with the explanation given to the solution adopted with respect to a *muzāraʿa* in combination (A), the landowner should give as *ṣadaqa* the remaining produce after the rents have been paid, since the labor came to him via an illegal cause.

In the end, the Hanafī jurists fail to justify the solutions they adopt with regard to a *muzāraʿa* in combinations (A) and (D). Let us justify them for ourselves. A clue may be gained by considering cases where someone who has gained a benefit must give it as *ṣadaqa*. Such cases are not difficult to find. To take some examples, according to al-Shaybānī, if the usurper of land sowed and cultivated the land, and harvested produce, he must give as *ṣadaqa* the remainder after deducting for the seed he sowed and making compensation for the diminution in the value of the land caused by cultivation.<sup>212</sup> If the lessee of a house leases it, without improving it, to a third person for a rent higher than the original rent, he must give the difference as *ṣadaqa*.<sup>213</sup> These examples show that the profit obtained through unjust enrichment must be given as *ṣadaqa*.

The problem is: if the same is true of a *muzāraʿa* in combinations (D) or (A), why did Abū Yūsuf in one of his opinions and al-Shaybānī consider such a *muzāraʿa* unjust? My contention is that they compared the shares of the cultivator and the landowner under a *muzāraʿa* with their respective shares under the corresponding agricultural association. To demonstrate this, let us consider a sentence in the *Kūtab al-kharāj* of Abū Yūsuf. After describing some variations of *muzāraʿa*, he writes:

Another type is that a man who owns land, seed and cattle invites an *akkār* [cultivator who owns only labor] and delivers him the land. He cultivates it and gains one-sixth or one-seventh . . . (Abū Yūsuf said,) “I think that this is permitted according to the agreement reached by the contracting parties, because there are hadiths to this effect.”<sup>214</sup>

<sup>211</sup> Marghīnānī, *Hidāya*, 4:56. See also, Kāsānī, *Badāʿi* (1402), 6:183; *ibid.* (1418), 6:279; Sarakhsī, *Mabsūt* (n.d.), 23:22; *ibid.* (1421), 23:25.

<sup>212</sup> Shaybānī, *Ṣaghīr*, (1302), 109. See also, Johansen, *Islamic Law*, 36–38.

<sup>213</sup> Shaybānī, *Aṣl* (MS), 12b; Sarakhsī, *Mabsūt* (n.d.), 15:130; *ibid.* (1421), 15:145.

<sup>214</sup> Abū Yūsuf, *Kharāj* (1981), 198.

Why “one-sixth or one-seventh”? If every element contributes equally to agricultural production, it should be one-eighth (on the assumption that Abū Yūsuf refers to a *kharāj* land), although this idea is “little more than a theoretical abstraction,” as Lambton puts.<sup>215</sup> Ashtor maintains that they represent the average shares that cultivators actually received in a *muzāraʿa*.<sup>216</sup> This is plausible, but I assume that Abū Yūsuf named these percentages as necessary ones for a *muzāraʿa* to be valid: i.e. if under a *muzāraʿa* the share of the cultivator is equal to one-sixth or one-eighth, he is given the same share as he would receive under an agricultural association, which contains no interest-bearing loan and no legal ambiguity. To illustrate this point, suppose that a *muzāraʿa* is practiced on land in which an equal share (say a quarter) is allotted to each element of agricultural production. If the average yield ratio of the land is equal to 12, the expected share of the cultivator who contributes only labor is  $12 \times \frac{1}{4} = 3$  per unit of seed. If an agricultural association according to which land is exchanged for labor in equal terms is practiced on the same land, his share is  $\frac{12}{2} - \frac{1}{2} - \frac{12}{8} = 4$  (for this calculation, see below), i.e. greater than 3. This is to say, the share allotted to labor is underestimated. My hypothesis is that Abū Yūsuf set the share allotted to labor under a *muzāraʿa* at one-seventh or one-sixth as the point at which the cultivator (and the landowner) gain the same share as they would under an agricultural association. This hypothesis may look fanciful, but it accounts for the view of Abū Yūsuf and al-Shaybānī concerning the validity of a *muzāraʿa* in various combinations. To verify this hypothesis, let us calculate the share the cultivator receives under the two contracts. For this purpose, it is first necessary to refer to the tax system adopted in the time of Abū Yūsuf, for the percentages one-sixth or one-seventh seem to presuppose the *kharāj* system. Before Abū Yūsuf dedicated *Kitāb al-kharāj* to the fifth Abbasid caliph Hārūn al-Rashīd (r. 170–93/786–809), the third caliph al-Mahdī (r. 158–69/775–85) had introduced *muqāsama*, i.e. a levy of a percentage or share of the crops.<sup>217</sup> Al-Balādhurī and al-Būzajānī

<sup>215</sup> Lambton, *Landlord*, 306.

<sup>216</sup> Ashtor, *Social and Economic History*, 38.

<sup>217</sup> Bosworth, “*Muqāsama*,” in *EI*, new edition, 7:506b–507a. Shimizu has pointed

write that the proportion of *kharāj* under the new system was normally one-half.<sup>218</sup>

So we can calculate the respective share of the cultivator and the landowner. First, let the contribution of each element of production, i.e. land, seed, cattle and labor in relation to the produce be, respectively,  $2s$ ,  $2t$ ,  $2u$ ,  $2v$  (note that their total is equal to 1). As one-half of the produce is assigned to the payment of *kharāj*, the final shares that go to the respective elements are  $s$ ,  $t$ ,  $u$  and  $v$ . See Table.

<i>Kharāj</i>	Land	Seed	Cattle	Labor
1/2	$s$	$t$	$u$	$v$

If the yield ratio of a season is equal to  $100x\%$  of the average yield ratio ( $\bar{y}$ ), the share of the cultivator in a *muzāraʿa* in combination (C) per unit of seed is given as

$$c_m = vx$$

In an agricultural association in which the cultivator contributes only labor, he borrows at the beginning of the season  $100y\%$  of seed and  $100y\%$  of cattle required for cultivation, if the landowner and the cultivator agree that the ratio of the contribution of land to the agricultural production to that of labor is  $(1 - y) : y$ . Let us assume that  $y$  equals  $1/2$  according to the above-cited instruction of ʿUmar b. ʿAbd al-ʿAzīz (if  $y$  is equal to  $1/3$ , the share of the cultivator is most probably smaller than  $1/7$ , which contradicts the statement of Abū Yūsuf). After the harvest, one-half of the produce is distributed to the cultivator, but he must repay one-half of seed (since interest on loans is prohibited). He must pay, at the same time, the fixed rent for the cattle, which is equal to one-half of its contribution to the average yield ratio, i.e. to  $nu$ . Consequently the cultivator receives  $\frac{rx}{2} - \frac{1}{2} - nu$ , one-half of which is assigned to payment of *kharāj*. Thus the share of the cultivator in the corresponding agricultural association is given as

out that the *muqāsama* was introduced by the government in order to monopolize the grain trade and to use its profits for the construction of Baghdad. Shimizu, "Finances," 20–22.

<sup>218</sup> Balādhurī, *Futūḥ*, 272; Būzajānī, *Taʾrīkh*, 278.

$$c_a = \left( \frac{rx}{2} - \frac{1}{2} - ru \right) \cdot \frac{1}{2}$$

Note that the cultivator and the landowner assume the payment of *kharāj* in proportion to their respective share, since they are partners. Likewise, the share of the landowner is given as

$$l_a = \left( \frac{rx}{2} + \frac{1}{2} + ru \right) \cdot \frac{1}{2}$$

My assumption is that the share of the cultivator (or that of the landowner) under a *muzāraʿa* is equal to that under an agricultural association when the yield ratio of a season is equal to the average yield ratio. In other words,  $c_2 = c_a$  when  $x = 1$ . Thus,

$$rv = \left( \frac{r}{2} - \frac{1}{2} - ru \right) \cdot \frac{1}{2}$$

That is to say,

$$r = \frac{1}{1 - 2u - 4v}$$

As has been mentioned, Abū Yūsuf referred to the value of  $v$  as one-sixth or one-seventh. We have  $r = \frac{7}{3 - 14u}$  for  $v = \frac{1}{7}$ ,  $r = \frac{3}{1 - 6u}$  for  $v = \frac{1}{6}$ . If we assume, in addition, that Abū Yūsuf and probably al-Shaybānī applied these values to a *muzāraʿa* in other combinations (i.e. combinations (A), (B) and (D)), we reach the following conclusions (for the demonstration of which, see Appendix).

(i) If the yield ratio is greater than  $100x_e\%$  (whereby  $x_e = \frac{1 - 4v}{4(t + u + v) - 1}$ , and ranges from 0.45 to 0.88) of the average yield ratio, the share of the cultivator in a *muzāraʿa* in combination (A) is greater than his share in the corresponding agricultural association. In other words, the *muzāraʿa* in combination (A) is usually more favorable for the cultivator than the agricultural association, but the latter can be more favorable than the former in a bad season.

(ii) Whether the share of the cultivator in a season in a *muzāraʿa* in combination (B) is greater or smaller than his share in the corresponding agricultural association depends on whether the yield ratio of the season is greater or smaller than the average yield ratio. In

other words, the expected share of the cultivator in a *muzāraʿa* in combination (B) is exactly the same as in the corresponding agricultural association.

(iii) Empirically speaking, the share of the cultivator in a *muzāraʿa* in combination (D) is necessarily greater than his share in the corresponding agricultural association. That is to say, the *muzāraʿa* in combination (D) is always more favorable for the cultivator than the agricultural association.

These conclusions coincide with solutions adopted by the majority of the Hanafis with respect to the *muzāraʿa* in various combinations: (i) they declare the *muzāraʿa* in combination (A) to be valid, but prohibit the cultivator from earning any profit from it if the contract is invalid for some reason; (ii) they declare the *muzāraʿa* in combination (B) perfectly valid; (iii) they consider the *muzāraʿa* in combination (D) invalid. There may be the objection that it is groundless to use the percentage obtained by examining a *muzāraʿa* in combination (C) as the basis for calculating the share of the cultivator in other combinations, but by doing so we can explain the opinion of Abū Yūsuf and al-Shaybānī regarding the validity of various types of *muzāraʿa*. Therefore, I conclude that Abū Yūsuf in his *Kitāb al-kharāj* set the share of the cultivator under a *muzāraʿa* at one-seventh or one-sixth as the point at which the cultivator (and the landowner) gains the same share as they would under a corresponding agricultural association. Furthermore, by assuming that Abū Yūsuf or other jurists who legalized the *muzāraʿa* tried to introduce a minimal change to the rights and obligations of the landowner and the cultivator under an agricultural association, we can explain two Hanafī rules regarding the *muzāraʿa* for which the Hanafī jurists give no satisfactory explanation.

(i) According to the Hanafis, the *muzāraʿa* is binding only upon the party who does not supply seed, whereas the party who supplies seed is permitted to unilaterally cancel the contract up to the time the land is sown.<sup>219</sup> Conversely they hold that *ijāra*<sup>220</sup> (lease or employment in return for a fixed rent or wages) and *musāqāʿ*<sup>221</sup> are binding upon the both parties, either of whom may cancel it only through

<sup>219</sup> Marwazī, *Kāfi*, 23:28; Kāsānī, *Badāʿi* (1402), 6:182; *ibid.* (1418), 8:277; Sarakhsī, *Mabsūṭ* (n.d.), 23:25–26; *ibid.* (1421), 23:28–29; Marghīnānī, *Hidāya*, 4:57; M.J.L. Young, “Muzāraʿa,” *EI*, new edition, 10:822b; Johansen, *Islamic Law*, 62.

<sup>220</sup> Kāsānī, *Badāʿi* (1402), 4:201, 6:182; *ibid.* (1418), 6:35, 8:277.

<sup>221</sup> Kāsānī, *Badāʿi* (1402), 6:187; *ibid.* (1418), 8:289.

legitimate excuse (*ʿudhr*). As noted, Abū Yūsuf, al-Shaybānī and the later Hanafis hold that a *muzāraʿa* in which the cultivator supplies seed is treated as a lease of land to the cultivator, whereas one in which the landowner supplies seed is regarded as an employment of the cultivator by the landowner. Why is the *muzāraʿa* not subject to the same rule as the *ijāra* (rent or lease, and employment)?

Al-Kāsānī and al-Sarakhsī explain the rule in the *muzāraʿa* as follows: when a *muzāraʿa* is undertaken, some seeds necessarily perish in the soil, whereas it is not certain whether or not the crop is harvested at the end of the season. This is why he can unilaterally cancel the contract before land is sown. As for the party who does not supply seed, the execution of the contract does no harm to his property, so that he can cancel the contract under the same condition as in an *ijāra*.<sup>222</sup> This explanation is not persuasive. To take a single example, according to this explanation, the seller in a credit sale could unilaterally cancel the contract before he receives the price, for otherwise he loses necessarily the object sold, whereas it is not certain that he can receive the price or that he can take back the object if the buyer eventually becomes insolvent. Interestingly al-Sarakhsī says that indeed a landowner who refuses to supply seed is not legally obligated to pay his partner “equivalent rent (*ajr mithl*),” but is obligated to pay it as far as the relation between himself and God is concerned.<sup>223</sup> This shows that al-Sarakhsī was not satisfied with this rule.

In my view, this rule was introduced by Abū Yūsuf or other jurists who wanted to legalize the *muzāraʿa* after the opinion had become prevalent that prohibits the *muzāraʿa* and legalizes the agricultural association. We have seen that the agricultural association contains an interest-free loan. We also know that an interest-free loan takes effect only if the lender hands over the object to the borrower.<sup>224</sup> Abū Yūsuf or other jurists, who tried to make a *muzāraʿa* as favorable as an agricultural association for both the cultivator and the landowner, may have introduced this rule to the *muzāraʿa* in imitation of the agricultural association.

<sup>222</sup> Kāsānī, *Badāʾiʿ* (1402), 6:182; *ibid.* (1418), 8:277; Sarakhsī, *Mabsūṭ* (n.d.), 23:47; *ibid.* (1421), 23:48. See also, Marghīnānī, *Hidāya*, 4:57.

<sup>223</sup> Sarakhsī, *Mabsūṭ* (n.d.), 23:47; *ibid.* (1421), 23:49; Johansen, *Islamic Law*, 62–63.

<sup>224</sup> Kāsānī, *Badāʾiʿ* (1402), 7:394–95; *ibid.* (1418), 10:596; Aḥmad Ibrāhīm Ibrāhīm, “*Itlīzām*,” 3 (1933), 230–31.

(ii) In the *muzāraʿa*, the Hanafis prohibit giving the supplier of seed the same quantity as he supplied before distributing the produce between the contracting parties.<sup>225</sup> Al-Kāsānī explains this rule as follows: if it were not for this rule, when the produce is equal to or less than the seed in quantity, all the produce would belong to the supplier of the seed, in which case the *muzāraʿa* would lose its meaning as a partnership (*sharika*).<sup>226</sup> This explanation is not convincing, for in the *muḍāraba* the capital is deducted before distribution, so the agent earns nothing if the gross income (the amount of money that remains in his possession after the transactions he conducted with the capital) is equal to or less than the capital. By analogy with the *muḍāraba*, the supplier of the seed would be able to demand its repayment prior to the distribution. It should be noted, in this context, that Abū Yūsuf invokes the *muḍāraba* when he legalizes the *muzāraʿa*.<sup>227</sup>

This rule may also be explained on the assumption that it was introduced in imitation of the corresponding rule in the agricultural association. As noted, this contract combines a loan of seed to be repaid with the produce harvested at the end of the season, a rent of cattle, and an association to which each party contributes every productive element in the same proportion. It follows that it is prohibited to deduct the seed before distributing the produce. To demonstrate this, suppose that the cultivator borrows half the seed required for cultivation in a loan from a third party to form an association with the landowner. It is obvious that the third party cannot demand that the same quantity of seed as he lent be deducted before the distribution of the produce. He has to require the cultivator to repay him with the produce that has been distributed to the cultivator. The same reasoning is valid for the case in which the landowner lends seed to the cultivator. It is possible, therefore, to imagine that those jurists who supported the *muzāraʿa* applied the same rule to the *muzāraʿa*.

<sup>225</sup> Kāsānī, *Badāʿi* (1402), 6:178; *ibid.* (1418), 8:268; Sarakhsī, *Mabsūṭ* (n.d.), 23:17; *ibid.* (1421), 23:20; Qāḍī Khān, *Fatāwā*, 3:175. Lambton writes that in contemporary Iran, "Great variety of practice prevails in the form and method of deduction of" a number of dues. Lambton, *Landlord*, 308. She refers to cases in which prior to the distribution of the harvest the seed is deducted from the total harvest. *Ibid.*, 311.

<sup>226</sup> Kāsānī, *Badāʿi* (1402), 6:178; *ibid.* (1418), 8:268.

<sup>227</sup> Abū Yūsuf, *Kharāj* (1981), 193.

The question then arises: why did Abū Yūsuf hold, in another opinion, that the *muzāraʿa* in combination (D) is valid? In my view this solution accords with the opinion he adopted regarding some cases in which someone has obtained a gain by an unlawful cause.

First, Abū Ḥanīfa holds that if the guarantor of the rent of a house invests in trade the money the lessee entrusted him to pay the rent and makes a profit, the guarantor has to give the profit as *ṣadaqa*, whereas Abū Yūsuf permits him to retain it.<sup>228</sup> Second, in opposition to the majority opinion of the Hanafis, Abū Yūsuf once held that if a person usurps a house and leases it to a third person, he can retain the whole rent: he is not obliged to give it as *ṣadaqa*, for if the house had perished, he would have been liable for the loss. Abū Yūsuf later changed his position.<sup>229</sup> Third, if a guarantor sent as a messenger by the seller in a *salām* to deliver the object to the buyer sells it and makes profit, al-Shaybānī holds that the guarantor must give the profit as *ṣadaqa*.<sup>230</sup> Commenting on this, al-Sarakhsī states that Abū Ḥanīfa and al-Shaybānī required the guarantor to give it as *ṣadaqa*, whereas Abū Yūsuf held that the profit lawfully belongs to the guarantor.<sup>231</sup>

In these cases, Abū Yūsuf seems to have decided that a person who makes profit by using his sagacity and diligence is not forced to give it up even if the cause of gain is unlawful. One of his solutions with respect to a *muzāraʿa* in combination (D) may be based on the same idea.

Thus I conclude as follows. The agricultural association was introduced as a substitute for a share-cropping contract, the prohibition of which is ascribed to some leading Iraqi jurists, such as al-Ḥasan al-Baṣṣī and Ibrāhīm al-Nakhaʿī, and the Umayyad caliph ʿUmar b. ʿAbd al-ʿAzīz. The prohibition derives from the consideration that a share-cropping contract is necessarily or usually more favorable to the landowner who supplies seed, or less favorable to the cultivator, than the corresponding agricultural association. This is inevitable if these contracts are practiced on a fertile land, inasmuch as the agricultural association contains no interest on loan of seed. If an agricultural

<sup>228</sup> Shaybānī, *Makhārīj*, 11–12. For a similar solution, see Sarakhsī, *Mabsūṭ* (n.d.), 20:29; *ibid.* (1421), 20:32.

<sup>229</sup> Sarakhsī, *Mabsūṭ* (n.d.), 15:138; *ibid.* (1421), 15:154–55.

<sup>230</sup> Shaybānī, *Aṣl*, 5:45.

<sup>231</sup> Sarakhsī, *Mabsūṭ* (n.d.), 12:172–73; *ibid.* (1421), 12:206.

association is concluded, the landowner cannot make profit from the supply of seed: ideally his profit derives only from the contribution of land and cattle. Conversely, if he invests seed in a *muzāraʿa*, he can also profit from it, on the condition that the agricultural production of the land attains a certain level. Suppose that a share-cropping contract (by whatever name it is called, *muḥāqala* or *muzāraʿa*) is concluded. As noted, if the yield ratio of a season is equal to the average yield ratio  $r$ , the quantity of the produce that the cultivator receives per unit of seed is given as

$$c_m = rv$$

If an agricultural association were undertaken in the same land, his share would be given as

$$c_a = \left( \frac{r}{2} - \frac{1}{2} - ru \right) \cdot \frac{1}{2}$$

Thus

$$c_a - c_m = \frac{r(1 - 2u - 4v) - 1}{4}$$

Although we have no information on the actual value of  $u$  or  $v$ , if, for example,  $u = v = \frac{1}{8}$ , then when  $r$  exceeds 4,  $c_a$  is greater than  $c_m$ . This was likely to happen in the Sawād, which was one of the most fertile areas in the world. I infer that this is why Ṭāwūs, Ibn Sīrīn and Ibn Abī Laylā who owned land deemed a *muzāraʿa* to be lawful, and why Abū Yūsuf set the share of the cultivator at a comparably high values of one-sixth or one-seventh to legalize it.

It is necessary to explain the motive for which Abū Yūsuf and al-Shaybānī legalized the *muzāraʿa*, in opposition to their master Abū Ḥanīfā. They invoke two reasons. First, in a *muḍārabā*, in which one of the contracting parties (investor) supplies the capital and the other party (agent) labor, the profit is distributed according to the pre-determined proportion. That is to say, in spite of the uncertainty as to whether profit is earned or not and as to its amount, a *muḍārabā* is regarded as lawful. There is no reason to regard as unlawful the *muzāraʿa* which is accompanied by a similar uncertainty. Second, the Prophet made an agreement with the Jew of Khaybar to divide the produce that the Jew's land yielded by halves, and several

Companions used to lease their land for one-third or one-fourth of the produce.<sup>232</sup>

These are, however, not substantial reasons for legalizing the *muzāraʿa*. In my view, there were two considerations that led Abū Yūsuf and al-Shaybānī to legalize it. The first was the social need for it. As has been mentioned, the Hanafi jurist Wakīʿ is reported to have said, “We hope that one-half, one-third or one-fourth are permitted, because it is popular custom among the people.”<sup>233</sup> This may be why the *muqāsama* system was introduced in the Sawād. As noted, the third Abbasid caliph al-Mahdī (r. 158–69/775–85) was the first to introduce the *muqāsama*, reportedly on the request from the inhabitants of the Sawād at the end of the reign of the previous caliph al-Manṣūr. Before then the *misāha* system, whereby a fixed *kharāj* was levied on land, was used. This had been inherited from the Sasanian period.<sup>234</sup> The alleged request from the inhabitants is understandable if *muzāraʿa* was prevalent in practice in the Sawād.

The second consideration is that the agricultural association seems to have been made illegal, for there is no mention of it in the Hanafi texts. Muslim jurists in general prohibit the combination of two contracts and the conclusion of one contract as part of another (*ṣafqatān fī ṣafqa, bayʿatān fī bayʿa, ṣafqa fī ṣafqa*).<sup>235</sup> In view of this principle, the agricultural association, which is a combination of a loan of seed and an association, must have been prohibited. We have seen that the Prophet is reported to have instructed ʿAttāb b. Abī Asīd to prohibit the people of Mecca from combining a sale and *salaf*, among others (see p. 91). This hadith was put in circulation in the lifetime of Abū Ḥanīfa. The general prohibition of combining two contracts derived from this prohibition.

Let us now consider the origin of the prohibition of *ribā* of excess in ‘wheat for wheat,’ which is our main theme. I infer that those jurists who prohibited the share-cropping contract introduced it. As

<sup>232</sup> Abū Yūsuf, *Kharāj* (1981), 193–97; Shaybānī, *Hujja*, 4:141, 162–74; L. Veccia Vaglieri, “Khaybar,” *EI*, new edition, 4:1140b. See for the explanation given by later Ḥanafī jurists, Kāsānī, *Badāʾiʿ* (1402), 6:175; *ibid.* (1418), 8:263; Sarakhsī, *Mabsūṭ* (n.d.), 23:2, 17; *ibid.* (1421), 23:3–4, 19–20; Marghīnānī, *Hidāya*, 4:53.

<sup>233</sup> Ibn Abī Shayba, *Muṣannaf*, 4:506, no. 22556.

<sup>234</sup> Bosworth, “Muqāsama,” in *EI*, new edition, 7:506b–507a; Dennett, *Conversion*, 23–25; Balādhurī, *Futūḥ*, 272; *ibid.*, tr. Murgotten, 1:429.

<sup>235</sup> Schacht, *Introduction*, 146; Ṣanʿānī, *Muṣannaf*, 8:138–39, nos. 14636–39.

noted, the difference between the *muḥāqala* in definitions (1)—(3) (see p. 251) and the *muzāraʿa* is not clear from the descriptions in the primary sources. Ziaul Haque explains the difference as follows: the Muslim jurists classified the *muḥāqala* among other share-cropping contracts into two classes: the first class comprises a lease of land against a fixed and clearly defined part of the crop, such as one-third or one-fourth, which is known as *muzāraʿa*. The second class consists of tenancies that do not guarantee to the tenant any clearly defined share.<sup>236</sup> According to him, therefore, *muzāraʿa* is a special type of *muḥāqala* which is comparably favorable to the cultivator. There is, however, no clear evidence to sustain his thesis.

Primary sources suggest that there are two major differences between the *muzāraʿa* and the *muḥāqala*. First, the *muzāraʿa* is defined exclusively as a share-cropping contract, whereas the *muḥāqala* is defined also as an exchange of wheat for wheat, a definition which became common in the later Hanafi works.<sup>237</sup> Second, there are disputes over whether or not the *muzāraʿa* is lawful, whereas the *muḥāqala* is unanimously held to be unlawful. I infer therefore as follows: some of those jurists who prohibited a share-cropping contract invoked the prohibition of *ribā* of excess in ‘gold for gold, silver for silver,’ which had been established as the result of the Umayyad monetary reform undertaken in the 70s A.H./690s C.E., and the prohibition of *ribā* of delay in an exchange of an item sold by weight for another item sold by weight and an exchange of an item sold by measure for another item sold by measure. By combining the two prohibitions, they could easily reach the rule that the exchange of an item sold by measure for another of the same kind must be completed on the spot and in equal measure, and justify the prohibition of share-cropping contract as an application of this rule by interpreting it as an exchange of wheat for wheat, i.e. an item sold by measure. Once the prohibition of share-cropping contract had been firmly grounded, those jurists who were eager to legalize it had to redefine it in such a manner that it did not contain an exchange of wheat for wheat, while they sought for sacred texts that supported their claim. Remember that Abū Yūsuf, al-Shaybānī and the later Hanafis hold that a *muzāraʿa* in which the cultivator supplies seed is treated as a lease of land to

<sup>236</sup> Ziaul Haque, *Landlord*, 11, 22–23.

<sup>237</sup> Kāsānī, *Badāʾiʿ* (1402), 5:194; *ibid.* (1418), 7:84; Schacht, *Introduction*, 146.

the cultivator, whereas one in which the landowner supplies seed is regarded as an employment of the cultivator by the landowner. According to these definitions, the *muzāraʿa* does not contain an exchange of wheat for wheat. This is how they differentiated the *muzāraʿa* from the *muhāqala*, both of which indiscriminately referred to various forms of share-cropping contract.

*The Medinan doctrines*

Some reports indicate that share-cropping contract was widely practiced in Medina. Qays b. Muslim (d. 120/737–8) transmitted the statement of Abū Jaʿfar [Muḥammad b. ʿAlī b. Ḥusayn] (d. 131/748–9 or 132/749–50), “No *Muhājirūn* in Medina failed to have their land cultivated for one-third or one-fourth [of its produce].”<sup>238</sup> Al-Qāsim b. Muḥammad and al-Zuhrī are reported to have held that there is no harm in a share-cropping contract.<sup>239</sup>

But it seems that at some point opinions appeared that put restraint on the leasing of land. There are some reports about Sālim b. ʿAbd Allāh, one of ‘the seven jurists of Medina’ and traditionist, which reflect various positions of the Medinan jurists regarding leasing land. As has been mentioned, he is reported to have regarded a *muzāraʿa* as lawful.<sup>240</sup> According to a report recorded in the *Āthār* of Abū Yūsuf, Sālim used to practice a *muzāraʿa*, when a certain Jaʿfar said to him, “Do you disapprove of a *muzāraʿa*?” Sālim responded, “I will not give up the staff of life according to the opinion of a single person.”<sup>241</sup> This “single person” refers to a Companion Rāfiʿ b. Khadij, as indicated just below. Second, we find the following report in the *Muwattaʿa*: when al-Zuhrī asked Sālim about the leasing of land, he responded that there is no harm if it is done in exchange for gold or silver, but when al-Zuhrī asked him about the hadith transmitted by Rāfiʿ forbidding the leasing of land, he said, “Rāfiʿ has exaggerated. If I had land, I would lease it.”<sup>242</sup>

<sup>238</sup> Ṣanʿānī, *Muṣannaf*, 8:100, no. 14476; Ibn Abī Shayba, *Muṣannaf*, 4:383, no. 21239; Bukhārī, *Ṣaḥīḥ*, *muzāraʿa*, 8.

<sup>239</sup> Ṣanʿānī, *Muṣannaf*, 8:100, nos. 14473–74.

<sup>240</sup> Shaybānī, *Āthār*, 102a.

<sup>241</sup> Abū Yūsuf, *Āthār*, 189, no. 857.

<sup>242</sup> Mālik-Yahyā, *Muwattaʿa*, 3:375, no. 1454; *ibid.*, tr. Bewley, 292a, 34.1, no. 3. See also, Ibn Abī Shayba, *Muṣannaf*, 4:382, no. 21229.

Therefore, on the one hand the *muzāraʿa* was a popular practice. On the other hand, the opinion was advanced that some hadiths transmitted by Rāfiʿ b. Khadij forbid the leasing of land in general. For example, the Prophet is reported to have said, “Whoever has a surplus of land is requested to give it to his brother [for nothing] or leave it.”<sup>243</sup> Legal doctrine in Medina took a moderate course, as suggested by the statement attributed to Sālim, “Rāfiʿ has exaggerated. If I had land, I would lease it.” Ibn al-Musayyab is reported to have disapproved of “one-third and one-fourth,”<sup>244</sup> while declaring a leasing land for silver, i.e. a fixed amount of money to be lawful.<sup>245</sup> Al-Zuhrī is reported to have seen no harm in leasing land for gold or silver, but to have disapproved of paying rent in “*ṭaʿām*” (foodstuff or wheat), saying, “This is a *muḥāqala*.”<sup>246</sup> Abū Yūsuf<sup>247</sup> and al-Shaybānī<sup>248</sup> state that the Medinan jurists regard *muzāraʿa* as unlawful.

It follows that in Medina just as in Iraq, share-cropping contracts were customarily practiced, but by the end of the eighth century the jurists had unanimously declared them to be unlawful. One of the grounds they invoke is the Prophetic hadiths, including one according to which the Prophet prohibited a leasing of land in exchange for part of the produce it yields.<sup>249</sup> The other ground is explained by al-Shaybānī as follows: the Medinan jurists permit *musāqāt* whereby the cultivator is given a pre-determined portion of the dates harvested in an orchard, whereas they hold that a leasing of uncultivated land is tolerated only in exchange for dirhams or dinars, for “risk (*gharar*) exists in land, but it does not exist in a date plantation.”<sup>250</sup> We read also in the *Muwattaʿa*: “[T]hat [viz. *muzāraʿa*] is an aleatory transaction because crops may be scant one time and plentiful another time and it may perish completely.”<sup>251</sup> Al-Shāfiʿī explains the position of the Medinan jurists as follows: in *musāqāt*, fruit is collected from the

<sup>243</sup> Ṣanʿānī, *Muṣannaḥ*, 8:95–96, no. 14463. For similar hadiths, see Ibn Abī Shayba, *Muṣannaḥ*, 4:493, no. 22423; Ṭaḥāwī, *Sharḥ*, 2:256; Bukhārī, *Ṣaḥīḥ*, *muzāraʿa*, 18; Muslim, *Ṣaḥīḥ*, buyūʿ, 87–92.

<sup>244</sup> Ṣanʿānī, *Muṣannaḥ*, 8:100, no. 14475.

<sup>245</sup> Ibn Abī Shayba, *Muṣannaḥ*, 4:495, no. 22438.

<sup>246</sup> Ṣanʿānī, *Muṣannaḥ*, 8:91, no. 14446; Ṭaḥāwī, *Sharḥ*, 2:258.

<sup>247</sup> Abū Yūsuf, *Kharaʿj* (1981), 193.

<sup>248</sup> Shaybānī, *Hujja*, 4:141–43.

<sup>249</sup> Mālik-Yahyā, *Muwattaʿa*, 3:374, no. 1452; *ibid.*, tr. Bewley, 292a, 34.1, no. 1; ʿAbd al-Wahhāb, *Maʿūna*, 2:1140.

<sup>250</sup> Shaybānī, *Hujja*, 4:141–43.

<sup>251</sup> Mālik-Yahyā, *Muwattaʿa*, 3:370, no. 1450; *ibid.*, tr. Bewley, 290a, 33.1, no. 2; Shaybānī, *Hujja*, 4:158.

date trees that already exist on the plantation, so that the harvest is stable. But in a *muzāraʿa*, since the produce is yielded by the land vacant at the beginning of the season, it is not certain whether or not it will yield any produce, and its amount is not stable. This is why a *muzāraʿa* is prohibited as an aleatory contract.<sup>252</sup>

This explanation is the same as that given by Abū Ḥanīfa, and it is doubtful whether a share-cropping contract was originally prohibited for this reason. In my view, there are two possible explanations. The first explanation is the same as the Iraqī doctrine, but the only evidence I could find for it is that al-Zuhrī is reported to have disapproved of a *muhāqala* and is credited with regarding “*shirk*” as lawful.<sup>253</sup> If this “*shirk*” is synonymous with the agricultural association defined above, he may have taken into consideration that a *muzāraʿa* would impose less favorable terms to the cultivator than an agricultural association, as did some Iraqī jurists. This is plausible, because ʿUmar b. ʿAbd al-ʿAzīz, who legalized the agricultural association, is reported to have permitted “*shirk*.”<sup>254</sup>

The second possible explanation for the prohibition of a share-cropping contract is suggested by the following report: Ibn al-Musayyab stated to Abū Jaʿfar al-Khaṭamī as follows: Ibn ʿUmar used to regard the *muzāraʿa* as lawful, until he narrated a hadith from Rāfiʿ b. Khadij, one of the Companions, according to which the Prophet, who knew that a certain Zahr had leased his land to others in a *muzāraʿa*, told them to pay the cultivators the expenses the latter had spent and to take back the land and the produce. They followed his instruction. Having narrated this, Ibn al-Musayyab said to Abū Jaʿfar, “Impoverish your brother, or lease him for silver (*Afqir akhā-ka aw akri-hi bi-wariq*).”<sup>255</sup>

What is intended by the last statement, “Impoverish your brother”? We can surmise as follows: there are several reasons for which the contracting parties might prefer a share-cropping contract to a lease for a fixed rent. The reason that at first occurs to us is to share the risk of a bad harvest. Another reason for the cultivator may be that for the lack of money he cannot pay rent but with the harvest distributed to him in a share-cropping contract he concludes. In such

<sup>252</sup> Shāfiʿī, *Umm*, 4:12.

<sup>253</sup> Ṣanʿanī, *Muṣannaf*, 8:101, no. 14480.

<sup>254</sup> Ibn al-Athīr, *Nihāya*, 5:468.

<sup>255</sup> Ibn Abī Shayba, *Muṣannaf*, 4:495, no. 22438. See for a hadith to the same effect, Ṭaḥāwī, *Mushkil*, 3:281.

a case, there is the fear that the landowner would take advantage of his stronger position to hold down the share of the cultivators. It would be better for the latter to receive *zakāt* than to work hard to obtain a minimum part of the produce. Note that Ibn al-Musayyab in this report gave the cultivators no profit, which implies that they will be given *zakāt*. Conversely, a cultivator who has enough money is not compelled to agree with a contract unfavorable to him. This may be why a share-cropping contract is forbidden, whereas a leasing land for a fixed rent is permitted.

Two points may be noted in this context. First, Medina relied for supply of foodstuffs on importation, in particular Egyptian wheat called *maḥmūla* ('imported'). It does not seem that a share-cropping contract for wheat played an important role in Medina. Second, it is said that an important section of the Umayyad family resided there and could enjoy a luxurious life owing to the wealth brought by wars of conquest.<sup>256</sup> Medina may have been able to afford to feed an unproductive sector.

## 2. *Muzābana* and 'ariyya sale

To repeat, we find the following description in the *Muwatta'*.

Whatever can be made into dried fruit to be stored and eaten should not be sold for its own kind, except hand to hand, like for like, when it is the same kind of fruit. In the case of two different kinds of fruit, there is no harm in exchanging two of one kind for one of another, hand to hand on the spot. It is not good to set delayed terms. As for produce which is not dried and stored but is eaten fresh like water-melons, cucumbers, melons, carrots, citrons, bananas, pomegranates and so on, which when dried no longer counts as fruit, and is not a thing which is stored up as fruit is, I think that it is quite proper to sell such things two for one of the same variety hand to hand. If no term enters into it, there is no harm in it.<sup>257</sup>

In other terms, "whatever can be made into dried fruit to be stored and eaten" is subject to the prohibition of *ribā* of excess. This qualification exactly coincides with that of 'ariyya fruit as defined by Mālik in the *Mudawwana*. Therefore it is expected that the prohibi-

<sup>256</sup> W.M. Watt, "Madīna," *EI*, new edition, 5:997a–b.

<sup>257</sup> Mālik-Yahyā, *Muwatta'*, 3:275–76, no. 1358; *ibid.*, tr. Bewley, 256a–b, 31.5, no. 27.

tion originated with the *‘ariyya* sale, which is defined as an exchange of *‘ariyya* for dried dates. I will discuss mainly this contract, but before that it is useful to mention the *muzābana*, which is regarded as belonging to the same category as the *muḥāqala*.

### *Muzābana*

The definitions of *muzābana* are similar to those of *muḥāqala*.

(1) Mālik defines it as “the purchase of ripe dates on the date trees for dried dates.”<sup>258</sup> Al-Shaybānī defines it more precisely as “the exchange of ripe dates on the date trees for dried dates by measure, it not being known whether the ripe dates are more voluminous or otherwise. Or the exchange of ripe grapes on the trees for dried grapes in the same conditions.”<sup>259</sup> Ibn ‘Umar is reported to have defined it as “the exchange between dried dates and ripe dates by measure, or the exchange between dried grapes and ripe grapes by measure.”<sup>260</sup> Mālik defines it in general as “buying something the number, weight and measure of which are not known with something whose number, weight or measure is known,”<sup>261</sup> but this must be an enlarged definition. According to these definitions, the prohibition of *muzābana* is due to the prohibition of *ribā* of excess, which corresponds to the prohibition of *muḥāqala* according to definition (4) (see p. 251).

(2) There is an interpretation that sees the wrong with *muzābana* as its violation of the prohibition of *ribā* of delay. Al-Ṭaḥāwī transmits the disputes over an exchange of ripe dates for dried dates: according to some hadīths, when people asked the Prophet about the validity of such an exchange, he asked them if ripe dates decrease in quantity when dried. When they responded affirmatively, he prohibited the exchange. Abū Yūsuf and al-Shaybānī regard these hadīths as authentic. Others hold that only when the exchange is delayed is it prohibited. The ground they invoke is the Prophetic hadīth:

<sup>258</sup> Mālik-Yaḥyā, *Muwattaʿa*, 3:268–69, no. 1355; *ibid.*, tr. Bewley, 253b, 31.13, no. 23.

<sup>259</sup> Mālik-Shaybānī, *Muwattaʿa*, 276.

<sup>260</sup> Mālik-Yaḥyā, *Muwattaʿa*, 3:268, no. 1354; *ibid.*, tr. Bewley, 253b, 31.13, no. 23; Mālik-Shaybānī, *Muwattaʿa*, 275, no. 778; Mālik-Ḥadathānī, *Muwattaʿa*, 194, no. 231; Ṣanʿānī, *Muṣannaf*, 8:104, no. 14489. See also Bukhārī, *Ṣaḥīḥ*, buyūʿ, 82; Muslim, *Ṣaḥīḥ*, buyūʿ, 158.

<sup>261</sup> Mālik-Yaḥyā, *Muwattaʿa*, 3:269; *ibid.*, tr. Bewley, 253b, 31.13, no. 25. See also, Ibn ‘Abd al-Barr, *Tamhīd*, 3:314.

“The Prophet prohibited an exchange of ripe dates for dried dates with delay (*bayʿ al-ruṭb bi-ʿl-tamr nasīʿatan*).”<sup>262</sup> Ibn Rushd al-Ḥafīd writes that the majority of the jurists are inclined to the former view.<sup>263</sup> This may suggest that the latter view preceded in time.

(3) We find in the *Muṣannaf* of al-Ṣanʿānī a report reminiscent of the definition of *muḥāqala* as a share-cropping contract: having referred to the Medinan practice of leasing land for one-third, one-fourth or one-half, Rāfiʿ b. Khadij said that the Prophet had prohibited a *ḥaql* (i.e. *muḥāqala*),<sup>264</sup> saying, “Whoever has a surplus of land is requested to give it to his brother or leave it,” and he had prohibited also a *muzābana*. Commenting on this, al-Ṣanʿānī writes:

The explanation of the *muzābana* is that one who has a large fortune consisting of date orchards is approached by someone, who says, “I took this in exchange for so-and-so quantity of dried dates (*wa-ʿl-muzābana an yakūna al-rajul la-hu al-māl al-ʿazīm min al-nakhl, fa-yaʿtī-hi al-rajul fa-yaqūlu, “akhattu-hu bi-kadhā wa-kadhā wasqan min tamr”*).”<sup>265</sup>

Let us try to reconstruct the contract explained by al-Ṣanʿānī. To begin with, there is no doubt that “I took it” means “I take possession of the orchard to work there.” I have already quoted examples in which “to give (*aʿtā*)” means “to deliver land to the cultivator.”<sup>266</sup> The verb “to take (*akhadha*)” must make a pair with it. The problem is: what legally does taking of dried dates mean? The simplest interpretation is that they represent a rent paid by the cultivator for leasing of the orchard, but this interpretation has two difficulties. First, it is difficult to understand why the owner of the orchards, who must possess plenty of dried dates, consents to receive the rent in dried dates. Second, it is difficult to see why *muzābana* is referred to, in hadiths, usually along with *muḥāqala*.<sup>267</sup>

Another interpretation that occurs to us is that dried dates represent wages for the cultivator, but this interpretation still does not

<sup>262</sup> Ṭahāwī, *Sharḥ*, 2:199. For the second interpretation, see also Ḥumaydī, *Musnad*, 2:296, no. 673.

<sup>263</sup> Ibn Rushd al-Ḥafīd, *Bidāya*, 2:139; *ibid.*, tr. Nyazee, 2:169–70.

<sup>264</sup> Ibn ʿAbbās is reported to have said that “*ḥaql*” is called “*muḥāqala*” among the Anṣār. Muslim, *Ṣaḥīḥ*, buyūʿ, 20.

<sup>265</sup> Ṣanʿānī, *Muṣannaf*, 8:96, no. 14463. We find a hadith of almost the same wordings in, Bayhaqī, *Sunan*, 6:132.

<sup>266</sup> For example, Balādhurī, *Futūḥ*, 273; Ṣanʿānī, *Muṣannaf*, 8:99, no. 14470.

<sup>267</sup> For example, Ḥumaydī, *Musnad*, 2:540, no. 1292; *Kūtab fi al-fiqh*, 43–45 (22b–23b).

answer the question about why it is assimilated to *muḥāqala*. By analogy with the *muḥāqala*, however, it is possible to describe *muzābana* as follows: at the beginning of the season, the cultivator receives dried dates from the owner of the orchard. At the same time they make a share-cropping contract by which the cultivator is obligated to work in the orchard, in exchange for which he is allotted a pre-determined share in the harvested ripe dates. This explanation is in accordance with the position of those who prohibit *muzābana* because of the delay stipulated in the exchange (of dried dates for ripe dates), as cited above. A hadith may suggest that *muzābana* was a share-cropping contract: the Prophet is reported to have prohibited *muḥāqala*, *muzābana* and “that two persons go into association for date palms for one or two years (*an yashtarikā fi nakhl sanatān wa-sanatayn*).<sup>268</sup> This may suggest that *muzābana* is a kind of association, similar to *muḥāqala* in definition (3) (see p. 251).

This explanation has, however, a difficulty, for it still remains to clarify what the taking of dried dates means. In a share-cropping contract on land (*muḥāqala* or *muzāraʿa*), the supply or more exactly the sowing of seed is an indispensable element of production, whereas in a date plantation, it is pollination which corresponds with sowing, and the supply of dried dates does not contribute to production.

Ultimately, the scarcity of information on *muzābana* does not enable us to further explore. Let us then turn to *ʿariyya* sale, about which information is ample particularly in the *Mudawwana*.

### *ʿAriyya sale*

As an exception to the prohibition of *muzābana*, i.e. an exchange of ripe dates for dried dates, the *ʿariyya* sale is lawful when a number of conditions are met. In the following I will discuss at length the descriptions in the primary sources, which seem to fail to explain the positive rules regarding the *ʿariyya* sale. Then I will attempt to explore its origin and doctrinal development.

To begin with, several definitions are given of *ʿariyya* (pl. *ʿarāyā*).

(1) *ʿAriyya* denotes a tree whose fruit can be dried to be stored, such as date, grape, fig, walnut and almond, and whose fruit has been donated.<sup>269</sup>

<sup>268</sup> *Kitāb fi al-fiqh*, 43–44 (22b–23a).

<sup>269</sup> Abū ʿUbayd al-Qāsim, *Amwāl*, 590; Ibn Manẓūr, *Lisān*, 15:49b–50a; Ibn Rushd al-Jadd, *Muqaddamāt*, 2:525.

- (2) *ʿAriyya* denotes fruit itself as defined in (1).<sup>270</sup>  
 (3) *ʿAriyya* can refer to the donation of *ʿariyya* fruit as defined in (2).<sup>271</sup>  
 (4) *ʿAriyya* can refer to an *ʿariyya* sale, i.e. exchange of *ʿariyya* fruit for dried fruit of the same kind.<sup>272</sup>

For the sake of convenience, I use the term ‘*ʿariyya*’ to refer to fruit, in particularly dates, in accordance with definition (2), and use the term ‘*ʿariyya* tree’ to denote a tree bearing *ʿariyya*. The donor of *ʿariyya* is called ‘*muʿrī*’ and the donee ‘*muʿrā*.’ The *muʿrā* is generally in need.<sup>273</sup> The act of giving dates as *ʿariyya* is called *īrāʿ*.

According to the *Mudawwana*, *ʿariyya* sale is lawful so long as the following conditions are met: first, the *ʿariyya* should be exchanged for dried fruit whose quantity is equal to the estimated quantity of the *ʿariyya* when it is dried.<sup>274</sup> Second, the quantity of the *ʿariyya* to be exchanged should not exceed 5 *wasqs* (pl. *awsuq*, a unit of measure to be explained below) when dried. It is unanimously held that if it exceeds 5 *wasqs* the *ʿariyya* sale is invalid. The jurists are divided over the question about whether or not the *ʿariyya* sale is valid when the estimated quantity of the *ʿariyya* is equal to 5 *wasqs*.<sup>275</sup> Third, the *ʿariyya* sale should be concluded after the *ʿariyya* becomes mature and eatable,<sup>276</sup> in accord with the general rule governing the sale of fruit. Fourth, the delivery of both of the *ʿariyya* and the dried fruit should be completed at the moment of harvesting the *ʿariyya*, which may be posterior to the contract.<sup>277</sup> This rule constitutes an exception to the prohibition of *ribā* of delay, according to which the delivery should be executed during the contractual session.

Why was the *ʿariyya* sale declared to be valid unlike the prohibition of *muzābana*? In the *Mudawwana*, Mālik explains this point, distinguishing between (1) the case when someone who has acquired by sale or succession an orchard in which *ʿariyya* trees stand offers

<sup>270</sup> Ibn Rushd al-Jadd, *Muqaddamāt*, 2:525.

<sup>271</sup> Ibn ʿAbd al-Barr, *Tamhīd*, 2:323–24, 329.

<sup>272</sup> Shīrāzī, *Muhadhdhab*, 1:274.

<sup>273</sup> Bukhārī, *Ṣaḥīḥ*, buyūʿ, 84; Ibn Rushd al-Jadd, *Muqaddamāt*, 2:525; Ibn Manzūr, *Lisān*, 15:49b; Ibn ʿAbd al-Barr, *Tamhīd*, 2:324; Ibn Nujaym, *Baḥr*, 6:82.

<sup>274</sup> Saḥnūn, *Mudawwana*, 4:259; Ibn ʿAbd al-Barr, *Kāfi*, 315.

<sup>275</sup> Saḥnūn, *Mudawwana*, 4:259; Shāfiʿī, *Umm*, 3:54; Ibn ʿAbd al-Barr, *Kāfi*, 315; Ibn ʿAbd al-Barr, *Tamhīd*, 2:323, 328.

<sup>276</sup> Saḥnūn, *Mudawwana*, 4:258.

<sup>277</sup> Saḥnūn, *Mudawwana*, 4:258.

an *‘ariyya* sale, and (2) the case in which the *mu‘rā* himself offers an *‘ariyya* sale.

(1) One who has acquired by sale or succession an orchard in which *‘ariyya* trees are found can offer an *‘ariyya* sale to the *mu‘rā*, because it brings benefits to the both parties. There are two benefits for the *mu‘rā*. First, Mālik says that if it were not for an *‘ariyya* sale, “An employment would be made and part of *‘ariyya* would be lost as wages.”<sup>278</sup> Al-Bājī explains this point of view as follows:

A *mu‘rā* needs to administer date trees, collect and preserve what falls from them, irrigate them, and take care of them. The work required for this will exceed the value of the *‘ariyya*. The result is that the *mu‘rā* cannot benefit from all that is there . . . Therefore he needs someone who spares him from the efforts he must make to take care of the *‘ariyya*.<sup>279</sup>

That is to say, as it requires a lot of work to take care of *‘ariyya* trees, it is more advantageous for a *mu‘rā* to receive dried dates whose quantity is equal to the estimated quantity of *‘ariyya* when dried than to take care of them or employ someone for that purpose.

The second benefit of an *‘ariyya* sale for the *mu‘rā* is as follows: if the *‘ariyya* suffers a total or partial loss after the *‘ariyya* sale, the owner of the orchard is not exempt from the obligation to provide the entire quantity of dried dates stipulated in the *‘ariyya* sale, even if he is not responsible for the loss.<sup>280</sup> In other words, the *mu‘rā* does not bear the risk of loss.

The benefit for the owner of the orchard is as follows: even if the *‘ariyya* trees represent a small fraction of the orchard, the owner cannot prevent the *mu‘rā* from entering the orchard to take care of them, which is troublesome for the owner. But if the owner can make the *mu‘rā* give up his right to the *‘ariyya* by concluding an *‘ariyya* sale, the owner can get rid of this trouble.<sup>281</sup>

These explanations are dubious. First, the idea that an *‘ariyya* sale is beneficial to the *mu‘rā* is contradicted by a statement of “some of the high disciples of Mālik (*ba‘ḍ kibār aṣḥāb Mālik*).” They are of the opinion that when the estimated quantity of the *‘ariyya* is equal to

<sup>278</sup> Saḥnūn, *Mudawwana*, 4:259.

<sup>279</sup> Bājī, *Muntaqā*, 4:225.

<sup>280</sup> Saḥnūn, *Mudawwana*, 4:259.

<sup>281</sup> Saḥnūn, *Mudawwana*, 4:259–60; Mālik-Shaybānī, *Muwatta‘*, 267. See also, Ṭaḥāwī, *Sharḥ*, 2:213.

or less than 5 *wasqs*, it is prohibited to conclude an *‘ariyya* sale over only part of the *‘ariyya*. To justify this solution, they state:

Permission in [donation of] *‘ariyya* and its sale are given in consideration of the trouble caused by the *mu‘rā* to the *mu‘rī* when he comes in and goes out of the orchard. If the *mu‘rī* buys only part of it [viz. *‘ariyya*] and does not stop [the trouble] while it is easy for him to buy all the *‘ariyya*, he is considered to seek the excess and profit (*al-faḍl wal-riḥ*), and the sale is suspected of [being a disguise of] a *muḏābana*.<sup>282</sup>

Although this text concerns the case of a *mu‘rī*, the same reasoning must apply to one who has acquired the orchard from him. It is not clear what is meant by “excess and profit,” but I infer that in an *‘ariyya* sale the *mu‘rī* exchanges in equal quantity dried dates for ripe dates whose market value is much higher than that of dried dates. This inference is confirmed by the statement of al-Shāfi‘ī that the purpose for which the Prophet permitted an *‘ariyya* sale is to enable someone who does not have money but has dried dates to eat ripe dates.<sup>283</sup> This statement implies that ripe dates (like *‘ariyya*) are preferred to dried dates. In addition, Ibn Qayyim al-Jawziyya refers to those who maintain that a person who swears by God that he will not eat fruit does not break his oath if he eats ripe dates, grapes or pomegranates, because “these three are among the best fruits and each of them is the best of its kind, so that they do not fall under the rubric of ‘fruit’.”<sup>284</sup>

We cannot therefore accept the explanation of Mālik that an *‘ariyya* sale is permitted because it is beneficial to the *mu‘rā*.

Second, his explanation cannot account for the reason why for an *‘ariyya* sale to be valid it is necessary that the estimated quantity of the ripe *‘ariyya* to be sold do not exceed 5 *wasqs* when dried. What is curious about this rule is that when the estimated quantity of *‘ariyya* exceeds 5 *wasqs*, the *mu‘rī* or a person who has acquired the orchard from the *mu‘rī* can definitely offer an *‘ariyya* sale to the limit of 5 *wasqs*. In other words, an *‘ariyya* sale can be concluded with respect to only part of the *‘ariyya*, so that the *mu‘rā* still can enter the orchard.

(2) Regarding the case in which the *mu‘rī* himself offers an *‘ariyya* sale, Mālik states as follows: a person, who has donated as *‘ariyya* his

<sup>282</sup> Saḥnūn, *Mudawwana*, 4:263.

<sup>283</sup> Shāfi‘ī, *Ikhtilāf*, 197.

<sup>284</sup> Ibn Qayyim al-Jawziyya, *Flām*, 3:340.

dates, grapes, figs or walnuts or such like, wants to repurchase them when it has become ripe. If he gives fruit of the same kind as the *‘ariyya* in exchange, the execution of the contract can be delayed, provided that the *‘ariyya* and the dried fruit are simultaneously delivered and that they are estimated to be equal in quantity if the *‘ariyya* is dried.<sup>285</sup>

Mālik does not mention the condition under which the *mu‘rī* can offer an *‘ariyya* sale. This may mean that the *mu‘rī* is free to offer it. In fact al-Barādhi‘ī writes that according to Mālik the *mu‘rī* can offer an *‘ariyya* sale whatever his motive may be.<sup>286</sup>

This rule looks strange. As we have seen, the *‘ariyya* sale is unfavorable to the *mu‘rā*. Why is the *mu‘rī* authorized to impose an unfavorable transaction on the *mu‘rā*? Does it not contradict the benevolent nature of the donation of *‘ariyya*? Al-Shaybānī states, however, according to the Medinans “legally it is incumbent on him [viz. *mu‘rā*] and it is binding for him to consent to it [viz. *‘ariyya* sale] (*wa-huwa ‘alayhi wājib yalzamu-hu fī al-ḥukm*)”<sup>287</sup> if the *mu‘rī* suffers from the *mu‘rā* entering his orchard. Al-Barādhi‘ī quotes “some disciples of Mālik” as having stated that only when the *mu‘rī* wants to prevent the *mu‘rā* from entering the date orchard can the *mu‘rī* offer an *‘ariyya* sale.<sup>288</sup> They seem to have taken into consideration the benevolent nature of the donation of *‘ariyya*.

Turning to jurists other than Mālik, as has been mentioned, al-Shāfi‘ī states that the *‘ariyya* sale is a sale especially permitted to enable those who have only dried dates to eat ripe dates. He quotes a hadith transmitted by Zayd b. Thābit (d. 45/665–6, 48/668–9, 51/671–2 or 55/674–5): “The Prophet has permitted the owner of *‘ariyya* to exchange it for the estimated equivalent [in dried dates].”<sup>289</sup> Likewise Abū ‘Ubayd al-Qāsim explains that the Prophet permitted the poor who have neither gold nor silver, but have dried dates to buy *‘ariyya* in exchange, so that the poor can eat ripe dates.<sup>290</sup>

Once again, these explanations have difficulties. First, if the purpose of an *‘ariyya* sale were to enable the poor to eat ripe dates, an

<sup>285</sup> Saḥnūn, *Mudawwana*, 4:258.

<sup>286</sup> Barādhi‘ī, *Tahdhīb* (MS Tunis), 157b–158a; *ibid.* (MS Paris), 163b.

<sup>287</sup> Shaybānī, *Hujja*, 2:549–50.

<sup>288</sup> Barādhi‘ī, *Tahdhīb* (MS Tunis), 157b–158a; *ibid.* (MS Paris), 163b.

<sup>289</sup> Shāfi‘ī, *Ikhtilāf*, 197. For this hadith, see also Mālik-Ḥadathānī, *Muwatta‘a*, 191, no. 226.

<sup>290</sup> Abū ‘Ubayd al-Qāsim, *Amwāl*, 590, no. 1460. See also, Shāfi‘ī, *Umm*, 3:55.

exchange of ripe dates for dried dates would be permitted, whether or not the ripe dates are *‘ariyya*. Second, these explanations do not account for the rule that the quantity of fruit exchanged cannot exceed 5 *wasqs*. One *wasq* denotes load that a camel can carry and is equivalent to 60 *ṣāʿs*.<sup>291</sup> For jurists, “the value of the *ṣāʿ* is 26 2/3 *riṭls* or *raṭls*, the *riṭl* being equivalent to 128 Meccan drams and the dram equivalent to 50 2/5 grains of barley.”<sup>292</sup> According to this definition, 5 *wasqs* are approximately equivalent to 51,600,000 grains of barley. Although this does not give us a clear idea about how much this might be, two examples do: first, annual *zakāt* is levied on one kind of crop if its measure reaches 5 *wasqs* (or 300 *ṣāʿs*).<sup>293</sup> We can infer therefrom that 5 *wasqs* represent the minimum food requirement for a family for one year. Second, according to the Shafiʿis, a poor husband is obliged to supply to his wife one *mudd* of food a day, and a husband of an average income, one and a half *mudd*.<sup>294</sup> Accordingly, the quantity of food that a husband must supply to his wife is equal to 365 *mudds* per solar year for a poor husband, and 547.5 *mudds* for a husband of average income. As one *mudd* is equivalent to a quarter *ṣāʿ*,<sup>295</sup> 365 *mudds* is equivalent to 91.25 *ṣāʿs* or 1.52 *wasqs*, 547.5 *mudds* to 136.875 *ṣāʿs* or 2.28 *wasqs*. This is to say, 5 *wasqs* represent the quantity of foodstuffs that two or three adults consume in one year. Therefore, it is almost impossible for a man or his family to consume 5 *wasqs* of dates before the season is over. This is why I think that the explanations of al-Shāfiʿī and Abū ʿUbayd are unable to account for the rule limiting the quantity of dates exchanged to 5 *wasqs* or less.

We have seen that the explanations given by the Muslim jurists are not persuasive. Those of al-Shāfiʿī and Abū ʿUbayd al-Qāsim are difficult to accept. Mālik and his disciples, who make efforts to justify the positive solutions regarding an *‘ariyya* sale, do not succeed in their attempt, because they are bound by the idea that the donation of *‘ariyya* is a gratuitous act.

Coulson attempts to detect the economic meaning of the *‘ariyya* sale. He writes referring to the *‘ariyya* sale in the early Islamic period:

<sup>291</sup> ʿUtbī, *Mustakhrāja*, 2:493; Ibn Manzūr, *Lisān*, 10:378b.

<sup>292</sup> A. Bel, “Ṣāʿ,” in *EI*, new edition, 8:654b.

<sup>293</sup> ʿUtbī, *Mustakhrāja*, 2:493.

<sup>294</sup> Shīrāzī, *Tanbīh*, 207; Nawawī, *Minhāj*, 3:426.

<sup>295</sup> Bājī, *Muntaqā*, 2:91.

One type of customary contract common in the society of this period, where there was little floating capital, was the barter of unripe date on the palm against their calculated value in edible dried dates, when the owner of the growing dates found himself in need of foodstuffs. Known as the barter of *‘araya* this contract obviously involved a certain degree of risk and uncertainty. Nevertheless the early jurists accepted the validity of the barter of *‘araya*, doubtless because considerations of the need of the owner of the unripe dates outweighed the possible element of *riba* involved . . .

Some jurists, indeed, sought to restrict the barter of *‘araya* to the one particular case where the two parties involved are the owner of the palm tree itself and the person who has the usufructory right to its crop, the latter trading the growing dates against edible dates supplied by the tree's owner.<sup>296</sup>

I agree with his thesis to the extent that there were cases in which the owner of growing dates who was in need of foodstuffs would be forced to sell premature dates and that he could benefit from the barter referred to in the first paragraph. But his thesis has problems. First, during the lifetime of Mālik the established rule was that only when *‘ariyya* has become mature and eatable can it be exchanged for dried dates. That is to say, the *mu‘rā* was supposed not to be in need of foodstuffs at the moment of *‘ariyya* sale. To sustain his thesis, it is necessary to show that this rule was introduced at some point in time. Second, his thesis cannot explain why the *mu‘rā* can impose an *‘ariyya* sale on the *mu‘rā*: according to the second paragraph, it is not the *mu‘rā* but the *mu‘rā* in need of foodstuffs who can offer an *‘ariyya* sale. Third, his thesis cannot explain why the quantity of *‘ariyya* exchanged for dried dates cannot exceed 5 *wasqs*, which is by far greater than the quantity the *mu‘rā* and his family need.

To detect the nature of the *‘ariyya* sale, let us examine more closely the nature of the donation of *‘ariyya*. According to the Maliki jurist Ibn ‘Abd al-Barr, the donation of *‘ariyya* (*‘irā’*) falls under the rubric of acts consisting in gratuitously giving the *manfa‘a*, rather than the substance (*raqaba*), of an object. *Minḥa*, *ikhbāl*, *itrāq* and *iskān* belong to the same rubric. *Minḥa* is the donation of milk of an animal. *Ikhbāl* denotes the donation of *manfa‘a* of a riding animal, the beneficiary being authorized to ride it or lease it for a rent. *Itrāq* denotes giving a male animal for mating. *Iskān* denotes the right to live in a

<sup>296</sup> Coulson, *Commercial Law*, 13.

house.<sup>297</sup> *Ikhdam*, i.e. giving the right to make a slave work, is included in this rubric. Ibn al-Qāsim says that Mālik stated: a person who has given by *minḥa* milk of a camel, a cow, a sheep or a goat for one or two years or more cannot revoke the *minḥa*. Conversely, a person who has given the right to make a slave work (*akhdama*) or to live in a house (i.e. *iskān*) can repurchase this right from the beneficiary in consideration, whether it consists of dinars, dirhams or goods, and whether the payment is prompt or deferred.<sup>298</sup> Therefore the rule seems to be that a person who has donated the *manfaʿa* of an object cannot simply and purely revoke the donation, but only by providing the beneficiary with a consideration can he repurchase the *manfaʿa*.

The question then arises: what does the consideration consist of with respect to the donation of *ʿariyya*? To answer this question, let us consider the sales of *ʿariyya* other than the *ʿariyya* sale. Mālik states:

- (1) If the *muʿrī* buys the *ʿariyya* with dinars or dirhams, no restraint is put on the amount of money and the payment can be prompt or deferred.
- (2) The same rules apply if he provides the *muʿrā* with goods other than foodstuffs.
- (3) If he provides foodstuffs of a different kind from that of the *ʿariyya*, the harvest of the *ʿariyya* and the exchange of the *ʿariyya* for the foodstuffs must be completed before the contractual session is over, in accordance with the prohibition of *ribā* of delay. But no restraint is put on the quantity of the *ʿariyya* or the foodstuffs.<sup>299</sup>

It is important to note that unlike an *ʿariyya* sale as defined by Mālik, in these sales the *muʿrī* apparently cannot determine the terms of sale against the will of the *muʿrā*: the conclusion or otherwise of sale and the amount or quantity of consideration are determined only through agreement between the two parties. The *ʿariyya* sale, which can be imposed by the *muʿrī* on the *muʿrā*, is exceptional from this point of view. This exceptional rule is easily understood if we assume that

<sup>297</sup> Ibn ʿAbd al-Barr, *Tamhīd*, 2:324. For *iskān*, see also Ibn Abī Shayba, *Muṣannaf*, 4:284, nos. 20105–115.

<sup>298</sup> Saḥnūn, *Mudawwana*, 4:265–66. Al-Shaybānī says that the owner can revoke the *minḥa* at his will. Shaybānī, *ʿAmālī*, 32.

<sup>299</sup> Saḥnūn, *Mudawwana*, 4:258.

the *ʿariyya* sale originated from the *muʿrī*'s right to repurchase the *ʿariyya*, whereby the *muʿrī* was required to provide the *muʿrā* with the estimated quantity of the *ʿariyya* when dried. But this explanation raises some questions: first, as will be demonstrated, the *muʿrā* used to be required to irrigate the orchard in which the *ʿariyya* trees stand. Is it not unjust, however, that the *muʿrā*, who has worked in the plantation, is required to agree to an *ʿariyya* sale, by which the *muʿrā* exchanges the *ʿariyya* for dried dates whose market value is lower than that of the *ʿariyya*? Second, if the purpose of the donation of *ʿariyya* is to feed those who are in need of foodstuffs, why does the owner of a date orchard not give the *muʿrā* dried dates at the outset, rather than later require the *muʿrā* to relinquish the right to the *ʿariyya* in exchange for dried dates? Third, if a *muʿrā* is in general in need of foodstuffs, how can he earn foodstuffs before the *ʿariyya* becomes mature and eatable?

In my view, we can answer these questions if we assume that a *muʿrī* used to give a *muʿrā* dried dates when or immediately after the former donated *ʿariyya* to the latter and that the latter repaid it with part of the *ʿariyya* he harvested. We have seen that the Prophet is reported to have prohibited an exchange of ripe dates for dried dates when a delay occurs.<sup>300</sup> This may suggest that originally the *muzābana* or the *ʿariyya* sale could be an exchange with delay, e.g. a sale of dried dates for ripe dates. This assumption is sustained by the following statements. The first is the statement ascribed to the Egyptian *mufī* Yazīd b. Abī Ḥabīb (b. 53/672–3; d. 128/745–6)<sup>301</sup> by the *isnād*: Ibn Wahb—the Egyptian qadī Ibn Lahīʿa (d. 174/790–1). Asked about *ʿariyya*, Yazīd is reported to have said:

Suppose that someone has designated as *ʿariyya* trees (*aʿama*, literally “fed”) one or two or three date palms. The Prophet—peace and blessings of God be upon him—used to permit one who was gifted with *ʿariyya* to sell it before it became mature and eatable (*Kāna Rasūl Allāh—ṣallā Allāh ʿalay-hi wa-sallama—yurkhiṣu li-lladhī uʿīma-hunna an yabīʿa-hunna qabla an yabduwa ṣalāḥu-hunna*).<sup>302</sup>

<sup>300</sup> Ṭahāwī, *Sharḥ*, 2:199.

<sup>301</sup> Ibn Ḥajar al-Asqalānī, *Tahdhīb*, 6:201, no. 8881.

<sup>302</sup> Saḥnūn, *Mudawwana*, 4:260. We read, following this statement: “The Prophet permitted this because He hoped completion of what is good and prevention of damage and tightness (*itmām al-maʿrūf wa-tarḥ al-maḍarra wa-ʿl-dīq*).” This interpolation seems to be added by Ibn Wahb.

The second is the following statement transmitted by the *isnād*: Yazīd [b. Hārūn]—Sufyān b. al-Ḥusayn:<sup>303</sup>

*ʿArāyā* are date palms [whose fruit was] donated to the needy. Since they could not wait [until fruit became mature and eatable], it was permitted to them to sell it in exchange for dried dates as they pleased.<sup>304</sup>

Since later jurists unanimously prohibit the selling of fruit on a tree before it becomes mature and eatable, these statements must have originated before this prohibition was generally accepted. We have seen that according to Ibn ʿAbd al-Barr, the beneficiary of *ikhbāl*, i.e. the donation of *manfāʿa* of a riding animal, is authorized to ride it himself or lease it for a rent. It is sound to assume that a *muʿrā* had a similar right. If so, a *muʿrā* could sell the *ʿariyya* to the *muʿrī* at the moment of or immediately after its donation. On this assumption I infer as follows: the *muʿrā* bought dried dates from the *muʿrī* at the moment of or immediately after the donation of *ʿariyya*, and received them without delay. Subsequently he paid for them with the *ʿariyya* when it became mature and eatable. We can imagine that the *muʿrī* usually donated *ʿariyya* on the condition that the *muʿrā* agreed to this sale, i.e. the original *ʿariyya* sale. By assuming this, we can justify two rules adopted by Mālik.

(1) The rule that the *ʿariyya* must be exchanged for dried dates in equal quantities on the supposition that the *ʿariyya* is dried is easily explained, because otherwise the *ʿariyya* sale would constitute an interest on a loan.

(2) The rule that the quantity of the *ʿariyya* exchanged for dried dates cannot exceed 5 *wasqs* when dried can be explained if we take two points into consideration. First, a *muʿrā*, who is generally in need of foodstuffs, needs to procure foodstuffs for consumption. Second, as noted, an *ʿariyya* sale is unfavorable to a *muʿrā*. In my view, in an attempt to safeguard the interest of the *muʿrā*, who is in a weak position vis-à-vis the *muʿrī*, i.e. the owner of the orchard, the Medinan jurists set the upper limit of the quantity of dried dates that the *muʿrā* receives from the *muʿrī* at 5 *wasqs*, which is equivalent to the average quantity of foodstuffs consumed by two or three adults in a year.

<sup>303</sup> The Iraqi traditionist Sufyān b. Ḥusayn b. al-Ḥasan Abū Muḥammad al-Wāsiṭī is reported to have died in the reign of the fifth Abbasid caliph Hārūn al-Rashīd (r. 170–93/786–809). Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb*, 2:350–51.

<sup>304</sup> Bukhārī, *Ṣaḥīh*, buyūʿ, 84.

I have alluded to the possibility that *muzābana* was a share-cropping contract undertaken in a date orchard, in parallel with *muḥāqala*, by definition (3) (see p. 280). The following text from the *Mudawwana* suggests that according to some Medinan jurists the donation of *‘ariyya* was accompanied with a share-cropping contract. When Saḥnūn asked Ibn al-Qāsim who of the *mu‘rā* and the *mu‘rī* is obligated to irrigate the orchard and pay *zakāt*, Ibn al-Qāsim replied:

Mālik said to me, “Irrigation and payment of *zakāt* are the responsibility of the owner of the orchard.” The same rule applies if he divides the orchard among the poor. As you know, if the owner gives the dates found in the orchard to the poor as *ṣadaqa*, the responsibility of irrigation is incumbent on him, it being prohibited to deduct wages from among the dates [given as *ṣadaqa*] for those employed [for irrigation]. This is what I heard long ago from someone whom I trust. This point of view is demonstrated by the following reasoning: if someone donates [in an ordinary donation] the dates found in his orchard or date palms before the dates become ripe, the responsibility of irrigation is incumbent on the donee and he owes payment of *zakāt* if the quantity of the dates reaches the definite minimum value (*niṣāb*); otherwise *zakāt* is not due. This is not the case with *‘ariyya*: irrigation and payment of *zakāt* are the responsibility of the one who gives *‘ariyya*, rather than the *mu‘rā*, whatever its quantity may be, if it reaches the definite minimum value. If someone donates [in an ordinary donation] the dates found in his orchard or the dates produced by several date palms found there for several years, he cannot purchase any of ripe dates from the donee in exchange for the same quantity of dried dates as estimated at the moment of harvest and all that he can do is to buy them with dirhams or dinars, just as it is permitted for a third person to buy them [viz. ripe dates given in an ordinary donation] or ripe dates given as *ṣadaqa* [with dirhams or dinars].<sup>305</sup>

Saḥnūn continued to ask Ibn al-Qāsim about the case of the owner of an orchard who gave *‘ariyya* with respect to an unspecified share of the date palms standing there, say one-half or one-third. Ibn al-Qāsim responded as follows:

What I heard directly from Mālik and what reached me from him is that he said, “Irrigation is the responsibility of the one who gives *‘ariyya*. If it were the responsibility of the one who is given the *‘ariyya* when *‘ariyya* trees are designated in terms of a share, say one-half or one-third, it follows that when dates to be produced by specific date palms are given as *‘ariyya*, irrigation and payment of *zakāt* would be the

<sup>305</sup> Saḥnūn, *Mudawwana*, 4:267–68.

responsibility of the *muʿrā*. But the [donation of] *ʿariyya* is different from an ordinary donation (*hiba*). The rule is that when *ʿariyya* is given irrigation and payment of *zakāt* are the responsibility of the one who gives *ʿariyya*, and the one who is given *ʿariyya* is under no obligation. [To the contrary,] if specified date palms or a share of the orchard are donated in an ordinary donation or a *taʿmīr*<sup>306</sup> for several years, irrigation is the responsibility of the donee.” This is the best solution. The authorities that I have met of our colleagues (*kibār man adraktu min aṣḥābi-nā*) applied to [a donation of] *ʿariyya* the same rule [regarding the other types of donation] and treated *ʿariyya* in the same way as an ordinary donation, but Mālik rejected this to distinguish between them regarding *zakāt* and irrigation.<sup>307</sup>

Mālik argues as follows: if the *muʿrā* were required to irrigate the *ʿariyya* trees, he would be required to irrigate the entire orchard when the *ʿariyya* trees are defined in terms of a share in it, since it is impossible to separate the *ʿariyya* trees. Therefore a *muʿrā* who is gifted with specified *ʿariyya* trees would also be required to irrigate the entire orchard. This solution is unacceptable, because it enables the *muʿrā* to further exploit the *muʿrā*, who is required to consent to an *ʿariyya* sale offered by the *muʿrā*. This is why Mālik sees no harm in obligating an ordinary donee, who is not required to consent to an unfavorable sale like an *ʿariyya* sale, to irrigate the entire orchard, whether gifted date palms are specified or defined as a share of the orchard. Conversely, some Medinan jurists did not hesitate to treat a *muʿrā* in the same manner as an ordinary donee. We might assume that this was the original solution: whether the *muʿrā* is required to irrigate the orchard and to what extent he is required to do so were decided according to the agreement reached between the *muʿrā* and the *muʿrā*, but the former, who is in a stronger position, would usually impose his decision on the latter. If the *muʿrā* is required to irrigate the entire orchard or part of it, the donation of *ʿariyya* is a constituent element of a contract combining a sale of dried dates for part of the ripe *ʿariyya* and a share-cropping contract in which the *muʿrā* receives the ripe *ʿariyya* as his share.

<sup>306</sup> Its meaning is not clear, but it seems to be synonymous with “*umrā*,” by which is meant a life-long donation.

<sup>307</sup> Ṣaḥnūn, *Mudawwana*, 4:268.

*Synthesis*

By closely examining the positive rules regulating the *ʿariyya* sale as described in the *Mudawwana*, I have shown that they can be explained on the assumption that they originated from a contract combining the donation of *ʿariyya*, a sale of dried dates to be paid for with (part of) the *ʿariyya*, and a share-cropping contract undertaken in the orchard of the *muʿrā*. I suspect that the *muzābana*, which is defined by the later jurists as the exchange of dates for dates like the *ʿariyya* sale, was originally similar to this complex contract.

The reason why *muzābana* was prohibited is not clear, but I surmise that this was because it substantively is an interest-bearing loan, for the cultivator was obligated to work in the orchard in addition to the repayment of the dried dates. In fact, Ibn ʿUmar (d. 73/693) is reported to have held that the obligation of the borrower consists only of the repayment with what is equal in sort, quantity and quality to what he borrowed, and that it amounts to *ribā* to charge him with any extra-obligation. Mālik ascribes similar opinions to the authoritative Medinan jurists al-Qāsim b. Muḥammad (d. 101/719–20, 102/720–1, 106/724–5, 107/725–6 or 112/730–1) and Sālim b. ʿAbd Allāh b. ʿUmar (d. 106/725).<sup>308</sup> The prohibition of *ribā* of delay in the exchange of foodstuffs for foodstuffs must have been invoked, as reflected in the Prophetic hadith: “The Prophet prohibited an exchange of ripe dates for dried dates with delay (*bayʿ al-ruṭb bi-l-tamr nasīʾatan*).”<sup>309</sup>

I infer that the complex contract including an *ʿariyya* sale was introduced to circumvent the prohibition of *muzābana*. This contract was tolerated probably for two reasons, one theoretical and the other practical. First, the contract contains a gratuitous act, i.e. the donation of *ʿariyya*, so that it is not subject to the prohibition of *ribā* of delay. Second, it is necessary to procure foodstuffs for the needy to live on. Thus the jurists tolerated the contract on the condition that the *muʿrā* is not required to receive more dried dates than he needs, i.e. 5 *wasqs*. The donation of *ʿariyya* had been known, but it was a new idea to combine it with the employment of a *muʿrā* for cultivating the orchard and a sale of it in exchange for dried dates.

<sup>308</sup> Saḥnūn, *Mudawwana*, 4:133–134.

<sup>309</sup> Ṭaḥāwī, *Sharḥ*, 2:199.

I infer also that subsequently the introduction of the prohibition of the sale of fruit on a tree before it becomes mature and eatable forced the Medinan jurists to redefine the *‘ariyya* sale: an *‘ariyya* sale now should be concluded after the *‘ariyya* becomes mature and eatable, and the delivery of both of the *‘ariyya* and the dried fruit should be completed at the moment of harvesting the *‘ariyya*, which may be posterior to the contract. Inasmuch as the rule still remained that the *mu‘rī* could impose an *‘ariyya* sale on the *mu‘rā*, the Medinan jurists retained two rules to protect the *mu‘rā*: first, the *‘ariyya* should be exchanged for dried fruit whose quantity is equal to the estimated quantity of the *‘ariyya* when it is dried; second, the quantity of the *‘ariyya* to be exchanged should not exceed 5 *wasqs* when dried. To justify the first rule, the Medinan jurists applied the prohibition of *ribā* of excess, which originated in the Umayyad monetary reform, to the *‘ariyya* sale. This is why in the above-cited description from the *Muwatta‘a*’ (see p. 278) the application of the prohibition of *ribā* of excess is limited to “[w]hatever can be made into dried fruit to be stored and eaten,” which coincides with the definition of an *‘ariyya*. We have also seen that the exchange of wheat for wheat (i.e. *muḥāqalā*) was subject to the prohibition of *ribā* of excess. Since wheat also can be stored (it is dry from the outset), the Medinan jurists defined the *ribā* foodstuffs as the class of foodstuffs that can be dried to be stored.

### *Section 5 Origins of the prohibition of ribā*

In the foregoing arguments I have tried to explore the origins of the prohibitions of *ribā*. My arguments are summarized as follows.

(1) It seems that in the earliest period the interest on loans was understood as the *ribā* prohibited in the *Qur‘ān*, but it was not the *ribā* properly speaking, i.e. that understood in the Prophetic hadiths as such. But the prohibition of interest on loans is the direct origin of the prohibition of *ribā* of delay in an exchange between two objects that are equal in utility (according to the Medinan jurists) or between two objects of the same kind (according to the Iraqi jurists) even if they do not fall under the rubric of *ribā* goods referred to in Prophetic hadiths.

(2) The prohibition of *ribā* of excess in ‘gold for gold, silver for silver’ was introduced as the result of the Umayyad monetary reform. In the 70s/690s the Umayyads decided to issue their own coins instead of the Byzantine gold coins and the Sasanian silver coins,

whereby they tried to exploit people in two ways. First, when they gave new coins to people in return for bullion and spurious coins, they collected a commission for the minting. Second, they tried to exchange a new lighter coin for the older heavier coin at face value, i.e. without making up for the difference in weight, contrary to the current practice according to which gold and silver were sold and bought according to their weight. The Umayyad policies seem to have been favorably received by some Iraqis, but they met with strong opposition from the Medinans represented by Ibn al-Musayyab. Both pro-Umayyad hadiths and anti-Umayyad hadiths were put into circulation, and the latter, which represent the prohibition of *ribā* of excess as understood by the later jurists, came to be generally accepted.

(3) The prohibition of *ribā* of delay was introduced primarily to regulate accord and satisfaction in a credit sale.

(a) In Medina, the seller of an object delivered to the buyer under a credit sale was originally authorized to take it back if the buyer was insolvent when payment was due, so long as it was found in the possession of the buyer in its original state. But according to this rule, if the buyer had transferred it to a third person, the seller could not pursue the third party. In an attempt to protect the seller more efficiently, the Medinan jurists introduced the prohibition of *ribā* of delay as regards the exchange of foodstuffs sold under a credit sale for foodstuffs. This is the origin of the prohibition of *ribā* of delay in the exchange of ‘wheat for wheat, dates for dates, etc.’ However, when the Medinan jurists introduced another rule that enabled the seller to pursue a third person to which the now insolvent buyer had transferred ownership of an object that had not been paid for, the original definition of *ribā* foodstuffs was abandoned to be replaced with a definition derived from the *‘ariyya* sale. The Medinan prohibition of *ribā* of delay in money was introduced for a systematic reason.

(b) In Iraq, in an attempt to safeguard a third party who might have a claim of restitution on an item found in the possession of an insolvent merchant, some jurists represented by “al-Zuhri” tried to place restraint on accord and satisfaction in a credit sale by introducing the general presumption that goods found in a buyer’s possession sold by the same unit (weight or measure) as the object that has been delivered to the buyer are the subject of a claim of restitution by a third party. This is the origin of the prohibition of *ribā* of delay in an exchange of an item sold by weight for another item sold by weight and an exchange of an item sold by measure for another item sold by measure. Although the majority of the Iraqi

jurists including the Hanafis subsequently abolished any restraint on accord and satisfaction in a credit sale, they accepted the definition of *ribā* goods as items sold by measure or weight.

(4) The prohibition of *ribā* of excess in ‘wheat for wheat, dates for dates’ has its origins in a doctrinal development concerning share-cropping contracts.

(a) In Iraq, those jurists who argued against a share-cropping contract invoked the prohibition of *ribā* of excess in ‘gold for gold, silver for silver’ and the prohibition of *ribā* of delay in an exchange of an item sold by weight for another item sold by weight and an exchange of an item sold by measure for another item sold by measure. By combining the two prohibitions, they could easily produce the rule that the exchange of an item sold by measure for another of the same kind must be completed on the spot and in equal measure, and justify the prohibition of share-cropping contract as an application of this rule by interpreting it as an exchange of wheat for wheat, i.e. an item sold by measure.

(b) In Medina, the *muzābana* was a complex contract combining a share-cropping contract and a sale of dried dates for consumption in exchange for ripe dates distributed to the cultivator, which substantially violated the prohibition of an interest-bearing loan. The complex contract combining the donation of ‘*ariyya*, an ‘*ariyya* sale (i.e. the sale of ‘*ariyya* for dried dates) and a share-cropping contract was introduced to circumvent the prohibition of *muzābana*. However, the introduction of the prohibition of the sale of fruit on a tree before it becomes mature and eatable forced the Medinan jurists to redefine the ‘*ariyya* sale. Since the rule still remained that a *muṣṭā* could impose an ‘*ariyya* sale on the *muṣṭā*, they retained the rule that the ‘*ariyya* should be exchanged for dried fruit whose quantity is equal to the estimated quantity of the ‘*ariyya* when it is dried. To justify this rule, they applied the prohibition of *ribā* of excess, which had been formed in the course of the Umayyad monetary reform, to the ‘*ariyya* sale. This is the origin of the Medinan prohibition of *ribā* of excess in ‘dates for dates.’ By combining it with the prohibition of excess in ‘wheat for wheat,’ i.e. *muḥāqala*, they defined the *ribā* foodstuffs as the class of foodstuffs that can be dried to be stored.

These prohibitions that originated in various transactions were brought together to be crystallized in the prohibition of *ribā* represented by the Prophetic hadith:

The Messenger of God said, “If gold is paid for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, payment should be made like for like (*sawāʾ bi-sawāʾ*), equal for equal (*mīthl bi-mīthl*), and hand to hand; if these species (*ajnās*, sg. *jins*) differ, [you may] sell them as you please, if payment is made from hand to hand.”

On the one hand, I have demonstrated that the prohibition of *ribā* of excess in ‘gold for gold, silver for silver’ and the prohibition of excess in ‘wheat for wheat, dates for dates,’ and the Medinan prohibition of *ribā* of delay in ‘gold for gold, silver for silver’ were introduced after 75/694–5 when Umayyad monetary reform was undertaken. On the other hand, the earliest Hanafis and Mālik were acquainted with this or similar Prophetic hadiths and argued issues concerning the prohibition of *ribā* from them. It follows that the prohibition of *ribā* was established as a general principle governing the Islamic law of property in the first decades of the eighth century.



## CONCLUSION

In the Introduction, I posited two purposes of this study. The first purpose was to explain the positive solutions regarding civil liability (*damān*), several special types of sale, i.e. what the later Hanafis called ‘trust sales’ and *salam* (or *salaf*), and the prohibition of *ribā*, by tracing their respective historical developments. The second purpose was to clarify the reason why the system of Abū Ḥanīfa and that of Mālik became predominant in Iraq and the Hijaz respectively, and were later transformed to become the Hanafi and Maliki schools. I advanced two hypotheses. First, Abū Ḥanīfa and Mālik were the authoritative representatives of the systems that later took their names, in other words, they emerged as systematizers of the existing rules that had been established prior to them. Second, the jurists active in the first decades of the eighth century, i.e. before Abū Ḥanīfa and Mālik stood out as authoritative jurists in Iraq and Medina respectively, had established the abstract rules that characterize the Islamic law of property, such as the prohibition of *ribā* or the prohibition of ignorance (*jahl*, *jahāla*) and uncertainty (*gharar*).

To verify the first hypothesis, I have demonstrated, in Chapter One, how the earliest Hanafis elaborated their doctrine about usurpation, which sought to make the usurper liable for damage or loss to the usurped object, whatever its cause, by making use of the existing rules regarding pledge, rent of an animal, the sale of a specific object and unauthorized agency that they inherited from their Iraqi predecessors (with the possible exception of unauthorized agency). Most of these rules are ascribed to the Iraqi jurists one or two generations before Abū Ḥanīfa (b. ca. 80/699; d. 150/767), such as Ibrāhīm al-Nakha‘ī (d. 95/713–4 or 96/714–5), al-Sha‘bī (d. 104/722–3, 105/723–4 or 109/727–8), al-Ḥasan al-Baṣrī (b. ca. 22/642–3; d. 110/728) and Ibn Sīrīn (b. 34/654–5; d. 110/728–9), whereas no statement or opinion is attributed to them on the subject of usurpation. Whether these ascriptions are authentic or not, it is certain that the Hanafi system of usurpation was by no means innovative. The same is true of the rules adopted by the earliest Hanafis with regard to certain kinds of sale and direct agency, which I examined in Chapter Two. In particular, the solutions adopted by al-Shaybānī

with regard to *murābaḥa* retain almost intact the residual influence of the original *murābaḥa* (the eleven-tenths or twelve-tenths sale) that was supposed to be concluded before the original sale, whereas he took it for granted that a *murābaḥa* was concluded after the seller had acquired and taken possession of the object, because the Prophet is reported to have prohibited the sale of an object that a person does not own and the sale of an object that he has not yet taken possession of. The earliest Hanafis also construed the rules regulating the original *murābaḥa* to produce direct agency in which the agent does not disclose the principal.

I demonstrated in Chapter One that Mālik's doctrine on usurpation also was inspired by the existing rules concerning pledge, rent of an animal and sale. But his system is so artificial. He or his immediate predecessors may have created it in a short period of time, possibly under the influence of the legal concept of usurpation introduced from Iraq, which was based on a religious or ethical motive.

Thus Abū Ḥanīfa and after him his two disciples successfully elaborated a system that met two requirements. First, their systems were consistent in themselves and with the existing systems. Second, their systems were in accordance with religious or ethical norms, many of which were already embodied in Prophetic hadiths. The same appears to be true of Mālik, although my arguments were here less satisfactory than for the earliest Hanafis. It is impossible to decide whether or not the system, if any, that jurists who were contemporaries of Abū Ḥanīfa or Mālik tried to create was less responsive to these requirements, for few sources are extant from which to verify this point, let alone discover for what reasons their systems could not survive. But my conclusion is that Abū Ḥanīfa and Mālik emerged as systematizers of early jurisprudence that grew more and more pervaded with religious or ethical norms that were often expressed in Prophetic hadiths.

As for the second hypothesis, I have demonstrated, through the analysis of the rules that led to the formation of the prohibition of *ribā*, that the prohibition had been established as a general principle that governs the Islamic law of property in the first decades of the eighth century, i.e. just before Abū Ḥanīfa and Mālik emerged as representative authorities in their respective regions. Needless to say, it remains to verify if the same is true of other abstract principles, such as the prohibition of ignorance (*jahl*, *jahāla*) and uncertainty (*gharar*).

## APPENDIX

If we assume that Abū Yūsuf set the share allotted to labor under a *muzāraʿa* at one-seventh or one-sixth as the point at which the cultivator (and the landowner) receives the same share as under an agricultural association, we obtain  $r = \frac{1}{1-2u-4v}$ , whereby  $r$  is the average yield ratio in a season. On this assumption we reach the following conclusions (for the definition of  $s$ ,  $t$ ,  $u$  and  $v$ , see p. 266).

(1) If the yield ratio is greater than  $100x_e\%$  (whereby  $x_e = \frac{1-4v}{4(t+u+v)-1}$ , and ranges from 0.45 to 0.88) of the average yield ratio, the share of the cultivator in a *muzāraʿa* in combination (A) is greater than his share in the corresponding agricultural association. In other words, the *muzāraʿa* in combination (A) is usually more favorable for the cultivator than the agricultural association, but the latter can be more favorable than the former in a bad season.

(2) Whether the share of the cultivator in a season in a *muzāraʿa* in combination (B) is greater or smaller than his share in the corresponding agricultural association depends on whether the yield ratio of the season is greater or smaller than the average yield ratio. In other words, the expected share of the cultivator in a *muzāraʿa* in combination (B) is exactly the same as in the corresponding agricultural association.

(3) Empirically speaking, the share of the cultivator in a *muzāraʿa* in combination (D) is necessarily greater than his share in the corresponding agricultural association. That is to say, the *muzāraʿa* in combination (D) is always more favorable for the cultivator than the agricultural association.

I will demonstrate these conclusions. Before doing this, let us add another assumption, i.e.  $\frac{1}{10} \leq u \leq \frac{1}{5}$ , because if  $u$  is equal to  $\frac{1}{10}$ , when the yield ratio of a season is equal to 100 % of the average yield ratio, the ratio of the share of the landowner in an agricultural association ( $l_a = (\frac{r}{2} + \frac{1}{2} + m) \cdot \frac{1}{2}$ ) to that of the cultivator

$(c_a = (\frac{r}{2} - \frac{1}{2} - ru) \cdot \frac{1}{2})$  ranges from 1.6 to 2.3 under the assumption  $5 \leq r \leq 30$  (which assumption seems to be sound, as will be shown), which is too unfavorable to the landowner. If  $u$  is equal to  $\frac{1}{5}$ , the contribution of cattle is estimated at 40% in relation to the remaining produce after deducting *khawāj*, which is too high a percentage. Therefore I think that we are allowed to assume that  $\frac{1}{10} \leq u \leq \frac{1}{5}$ .

(1) In a *muzāraʿa* in combination (A), the share of the cultivator, who supplies labor, seed and cattle is given as:

$$c_m = (t + u + v)rx$$

His share under the corresponding agricultural association ( $c_a$ ) is:

$$c_a = (\frac{rx}{2} + \frac{1}{2} + ru) \cdot \frac{1}{2}$$

Therefore,

$$c_m - c_a = (t + u + v - \frac{1}{4})rx - (\frac{1}{4} + \frac{ru}{2})$$

By using  $r = \frac{1}{1 - 2u - 4v}$ , we obtain

$$c_m - c_a = \frac{\{4(t + u + v) - 1\}x - (1 - 4v)}{4(1 - 2u - 4v)}$$

As it is improbable that  $t + u + v$  is smaller than  $1/4$ ,  $c_m - c_a$  is an increasing function. Therefore if  $x > \frac{1 - 4v}{4(t + u + v) - 1} \equiv x_e$ , then  $c_m > c_a$ .

If  $x < x_e$ , then  $c_m < c_a$ . What is the number of  $x_e$ ? To estimate it, I show it is allowed to assume that  $t$  is greater than  $s$ . Then the share corresponding to land is  $rs$ . The share corresponding to seed is  $rt$ , but as seed is sown, the net profit corresponding to seed is  $rt - 1$ . It should be noted that the Hanafis prohibit deducting the quantity equal to the sown seed before distributing the produce.<sup>1</sup> Let the

<sup>1</sup> Kāsānī, *Badāʿi* (1402), 6:178; *ibid.* (1418), 8:268; Sarakhsī, *Mabsūt* (n.d.), 23:17; *ibid.* (1421), 23:20; Qādī Khān, *Fatāwā*, 3:175.

ratio of the net profit deriving from seed to the produce after the deduction of *kharāj* be  $a$ , that is,  $\frac{rt-1}{r/2} = a$ . Thus we obtain  $t = \frac{a}{2} + \frac{1}{r}$ . Taking into consideration that  $\frac{1}{10} \leq u \leq \frac{1}{5}$ ,  $\frac{1}{7} \leq v \leq \frac{1}{6}$  and  $s+t+u+v = \frac{1}{2}$ , we get

$$t-s = t - \left(\frac{1}{2} - t - u - v\right) \geq 2t - \frac{9}{35}$$

As  $t = \frac{a}{2} + \frac{1}{r}$ , we obtain

$$t-s \geq a + \frac{2}{r} - \frac{9}{35}$$

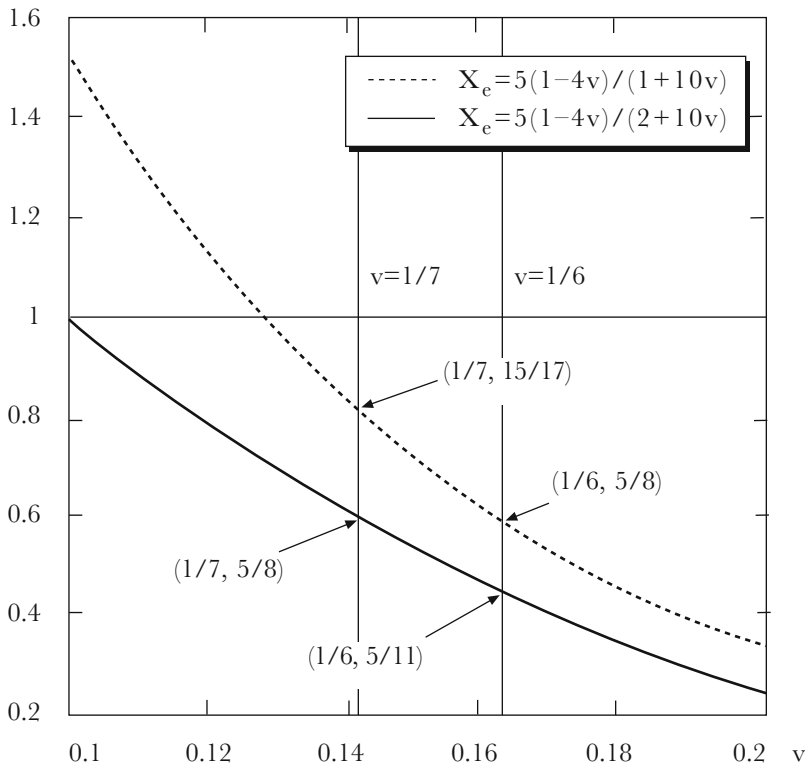
This number is greater than 0, if  $a > \frac{11}{70} \approx 0.16$  when  $r < 20$ . As Ashtor estimates the average yield ratio of Egypt of the later Middle Ages at about 10,<sup>2</sup> we are allowed to assume that the average yield of the Sawād at less than 20. As it is improbable that the ratio of the net profit deriving from seed is set at less than 16% of the produce after the deduction of *kharāj*, we may assume that  $s \leq t$ . But in the following I assume that  $s = t$  for the following reason: my purpose is to demonstrate that the number of  $c_m - c_a$  is positive on the condition that  $x$  is greater than  $x_e$ , which is smaller than 1. As it is obvious that  $c_m - c_a$  is an increasing function of  $t$ , if this demonstration is made on the assumption that  $s = t$ , this demonstration is valid on the assumption that  $s < t$ . Thus on the assumption that  $s$  is equal to  $t$ ,  $u = \frac{1}{2} - 2t - v$  and  $x_e = \frac{1-4v}{2(u+v)}$ . As  $\frac{\partial x_e}{\partial v} = \frac{-(4u+1)}{2(u+v)^2} < 0$  and  $\frac{\partial x_e}{\partial u} = \frac{-(1-4v)}{2(u+v)^2} < 0$ ,  $x_e$  is a decreasing function of both  $u$  and  $v$ . See Graph 1 for the range covered by  $x_e$ . The range between two curves,  $x_e = \frac{5(1-4v)}{1+10v}$  (for  $u = \frac{1}{10}$ ) and  $x_e = \frac{5(1-4v)}{2+10v}$ , (for  $u = \frac{1}{5}$ ) represents the number of  $x_e$  for a given number of  $v$ . Graph 1 shows that when  $0.143 \approx \frac{1}{7} \leq v \leq \frac{1}{6} \approx 0.167$ , then  $x_e$  is smaller than 1. More exactly, if the yield ratio of a season is superior to  $\frac{5}{11} \approx 0.45$  of the average

<sup>2</sup> Ashtor, *Social and Economic History*, 50.

yield ratio (when  $u = \frac{1}{5}$ ,  $v = \frac{1}{6}$ ), or  $\frac{15}{17} \approx 0.88$  (when  $u = \frac{1}{10}$ ,  $v = \frac{1}{7}$ ), then

$c_m > c_a$ , that is to say, a *muzāraʿa* is usually more favorable to the cultivator than an agricultural association, but in a bad season the latter can be more favorable. We can infer that this is why while a *muzāraʿa* in combination (A) is in itself valid, the cultivator is required to give up any profit earned from the *muzāraʿa* when it is invalid for some reason.

$X_e$



Graph 1

(2) In a *muzāraʿa* in combination (B), in which the cultivator contributes labor and cattle, his share is given as:

$$c_m = (u + v)rx$$

His share in an agricultural association in the same combination will be given as

$$c_a = \left(\frac{rx}{2} - \frac{1}{2} + ru\right) \cdot \frac{1}{2}$$

Thus

$$c_m - c_a = \left(u + v - \frac{1}{4}\right)rx + \frac{1}{4} - \frac{ru}{2}$$

By substituting  $r$  for  $\frac{1}{1 - 2u - 4v}$ , we have

$$c_m - c_a = \frac{(4u + 4v - 1)(x - 1)}{4(1 - 2u - 4v)}$$

It is obvious that whether a *muzāraʿa* is or an agricultural association is more favorable to the cultivator depends on whether the yield ratio of a season is more or less than the average yield ratio. In other words, the expected profit for the cultivator is exactly the same in the both contracts. We can infer that this is why a *muzāraʿa* in combination (B) is exempt from any defect.

(3) In a *muzāraʿa* in combination (D), whereby the cultivator supplies labor and seed, his share is given as

$$c_m = (u + v)rx$$

In an agricultural association, his share is given as

$$c_a = \left(\frac{rx}{2} - \frac{1}{2} + ru\right) \cdot \frac{1}{2}$$

Thus

$$c_m - c_a = \left(t + v - \frac{1}{4}\right)rx - \frac{1}{4} + \frac{ru}{2} = \frac{(4t + 4v - 1)x + (4u + 4v - 1)}{4(1 - 2u - 4v)}$$

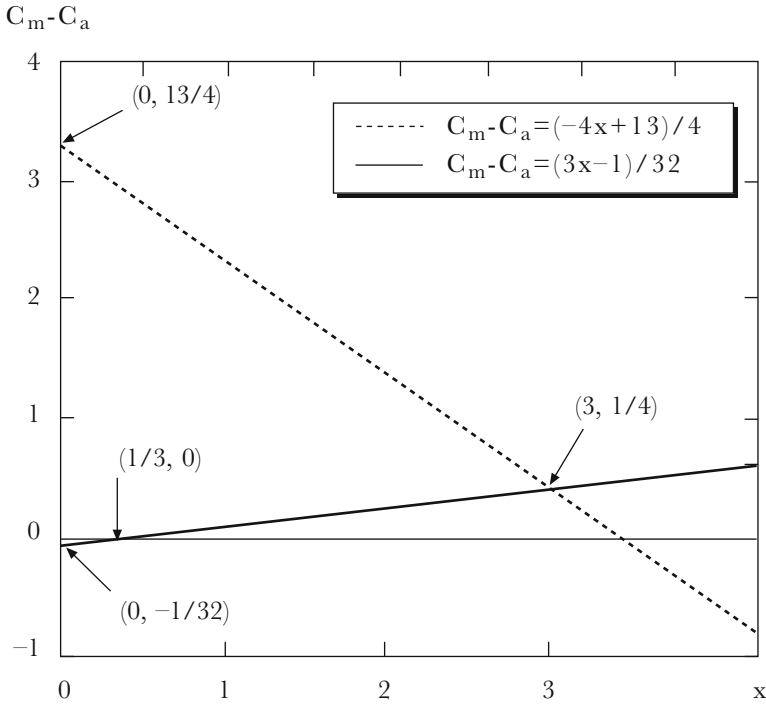
As  $\frac{\partial(c_m - c_a)}{\partial v} = \frac{(4t - 2u)x + 2u}{(1 - 2u - 4v)^2}$ , it is an increasing function of  $v$ , for

it is improbable that  $t$  is inferior to a half of  $u$ . Therefore, if it is demonstrated that  $c_m - c_a > 0$  when  $v$  is equal to  $1/7$ , it is demonstrated

that  $c_m$  is always superior to  $c_a$  when  $\frac{1}{7} < v < \frac{1}{6}$ . If we assume once again that  $s$  is equal to  $t$ , when  $v = \frac{1}{7}$ , we obtain

$$c_m - c_a = \frac{2(1-7u)x + 28u - 3}{4(3-14u)}$$

whereby let us remember that  $s + t + u + v = \frac{1}{2}$ . I will demonstrate that on the assumption that  $\frac{1}{10} \leq u \leq \frac{1}{5}$ ,  $c_m - c_a$  cannot be a negative number as a matter of fact. For this purpose, note at first that  $c_m - c_a$  is a linear function of  $x$ . The coefficient of  $x$  is  $\frac{1-7u}{2(3-14u)}$ . As  $\frac{\partial}{\partial u} \left\{ \frac{1-7u}{2(3-14u)} \right\} = -\frac{7}{2(3-14u)^2} < 0$ ,  $c_m - c_a$  is a decreasing function of  $u$ . Therefore, the range covered  $c_m - c_a$  for a given  $x$  is delimited by two straight lines,  $\frac{-4x+13}{4}$  and  $\frac{3x-1}{32}$ . See Graph 2. As is easily understood from it,  $c_m - c_a$  is always a positive number when  $\frac{1}{3} \leq x \leq 3$ . Since it rarely happens that the yield ratio of a season is less than  $1/3$  of the average yield ratio and it never happens that the yield ratio of a season is three times higher than the average yield ratio, a *muzāraʿa* is almost necessarily more favorable to the cultivator than an agricultural association. I conclude that this is the reason why a *muzāraʿa* in combination (D) is deemed to be invalid.



Graph 2

The arguments above-mentioned is summarized as follows: I made two assumptions. First, I assumed that Abū Yūsuf set the share allotted to labor under a *muzāraʿa* in combination (c) at one-seventh or one-sixth as the point at which the cultivator (and the landowner) receives the same share as under an agricultural association. Second, I assumed that Abū Yūsuf applied the same share to a *muzāraʿa* in other combinations of productive elements. I have demonstrated that their solutions regarding a *muzāraʿa* in combinations (A), (B) and (D) are well explained on these assumptions.



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