

ADMINISTRATIVE TRADITION AND CIVIL JURISDICTION OF
THE CORDOBAN *ṢĀḤĪB AL-AḤKĀM* (II)

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Attestment of payment was obstructed by the sellers of a garden outside Cordoba in a case presented to the market inspector Ibn Ḥarīṣ some thirty years later. A garden in the suburb Ḥawānīt al-Riḥānī in the quarter Masğid Aslam had been sold in Ramaḍān 457 (August 1065) for 240 Carmonian gold *miṭqāl*, of which the buyer had already paid 95 *miṭqāl* upon the signing of the contract.¹⁶⁹ The buyer ‘Abd al-‘Azīz allegedly had also paid the rest due and accused the sellers, ‘Abd Allāh and Muḥammad b. Hūd, of impeding testimony to this for fear that he might claim for damages. Both sellers were summoned to the market inspector, and, after several admonitions by the judge, one brother acknowledged receipt of the price, which the other had never denied. Then the buyer made a claim for damages on behalf of the rotten and mildewy trees in the garden, substantiating it with testimonial evidence. Both sellers, however, objected and, within the time limit set by the judge, presented four witnesses backing their counter-claim. These witnesses attested, in slightly variant manners, that they had heard the buyer say that if the sellers acknowledged collecting the price, he would refrain from claiming damages for the rotten and mildewy trees. In juridical terms, this constituted evidence of agreement to renounce court action, an agreement the buyer had broken. The legal problem for the jurists was how to weigh the claim for damages on the one hand and the preceding renunciation of it on the other. Ibn ‘Attāb and Ibn al-Qaṭṭān concluded that the claim of damages nevertheless had to be accepted. According to Ibn ‘Attāb, this might lead to a return of the garden. That one of the sellers had denied receiving the price excused the renouncement of court action, but the buyer had to swear that the denial was the only reason for the testimony against him. According to Ibn al-Qaṭṭān, testimony of the renouncement did not invalidate the claim for damages, but touched aspects not to be dealt with in the *fatwā*. Ibn Mālik, on the other hand, refused to give a *fatwā* because he objected to the dishonest conduct of both sides.¹⁷⁰

¹⁶⁹ Ibn Sahl, *Aḥkām*, 577-9.

¹⁷⁰ *Ibid.*

With this last case, we come to the cases of recovering damages, not all of which were presented to the market inspector.¹⁷¹ Ḥubūr had bought a house (*dār*) in the old city of Cordoba in the quarter Maṣḡid ‘Abādil for 280 Carmonian gold *mitqāl*, of which the seller Fāṭima had already received 80 *mitqāl*. Although Fāṭima had indicated some defects of the house prior to the sale, such as «old walls» and «unstable fundaments», as a reason for a reduced price, Ḥubūr later claimed for a substantial price reduction on the grounds that the outer walls of the building were about to collapse. Asked in court, she asserted that she had seen the cracks in the walls and freed the seller Fāṭima from recompense. This kind of «dismissal» (*ta‘affā*) was the only way to sell a defective building without having to fear later claims by the buyer. Fāṭima acknowledged the contract of sale, but objected to Ḥubūr’s claim. As a consequence, Ḥubūr was obliged to have it confirmed. And two witnesses attested to the nearly collapsing walls full of cracks, which had already existed prior to the sale but could be seen only from outside and therefore must have escaped the buyer’s attention. Such damage reduces the price substantially. Their on-site testimony of the estate (*ḥiyāza*) was later certified in the market inspector’s court. Fāṭima’s legal agent, however, objected and, within those periods set to him subsequently by the judge as part of legal procedure, presented a contradicting testimonial document. This testimony, accepted by the market inspector as evidence in court, attested that the damages claimed by Ḥubūr did not exist: the wall was still balanced and not about to collapse and its cracks were not obvious although, the witnesses admitted, you could see them on a closer look.¹⁷²

In this situation of two contradicting testimonies, Ibn ‘Attāb advised the judge to visit the place himself in the presence of building experts of integrity, who should inspect the building inside and outside. This was done, and the experts found not only cracks, a shabby appearance and an east wall endangered by collapse, but also that the walls had become pervaded by salt, which however was only recognizable to experts. These defects allowed for a substantial decrease in the price, since the decay of the wall was visible only from the outside, and all these defects were older than the date of the sale. When this testimony had been certified, the seller’s agent tried in vain to produce other evidence within the deadline of three days. His inability to substantiate the counter-claim was formally declared (*ta‘ḡīz*),¹⁷³ and the jurists gave their opinion on how to deal with these contradicting testimonies. Ibn ‘Attāb held that a judicial ruling (*qaḍā’*) should be

¹⁷¹ See two cases presented to a *qāḍī al-ḡamā’a* in my *Gerichtspraxis*, 235-238.

¹⁷² *Aḥkām*, 572f.

¹⁷³ On this, see *Aḥkām*, 36f.

based on the testimony of the witnesses with the most integrity (*a'dal*), but favored an amicable settlement. Basing himself on the *Mudawwana*, according to which evidence of a claimant overruled negative evidence of the defendant, Ibn al-Qaṭṭān opted for a ruling in favor of the claimant even without further evidence. Due to the known integrity of the experts, the house even had to be returned to the seller. Of Ibn 'Abd al-Ṣamad's opinion we know that he objected to a renewal of the jurisdiction, causing only further difficulties. In considering this opinion, Ibn Ḥarīṣ passed the ruling himself and did not turn the case to the *qāḍī al-ḡamā'a*. His ruling for a return of the house to the seller was implemented and Fāṭima had to pay back the sum she had already received within two months. The later claim for accelerated payment was rejected by Ibn 'Attāb on the grounds that this was the ruled and registered time limit.¹⁷⁴

Cognizant of an assertion reproduced by Ibn Sahl that a *ṣāhib al-sūq* was not allowed to rule on defects in houses and similar problems, unless he was particularly authorized to do so (*taqḍīm*),¹⁷⁵ we may either question the relevance of this statement for describing the historical situation in Cordoba or conclude that at that time the market inspector was authorized in a general way to decide such cases, and in fact did so to a great extent.

In another case, refunding the price proved to be difficult, because the buyer who had to return the money was absent and his own claim against a third person, transferred as security to the seller, was not suitable to settle the debt immediately. The claimant Maryam returned a house she had bought from Khalaf, the saddler (*al-Sarrāḡ*), for 260 Carmonian gold *mitqāl*, based on a ruling on grave defects. She substantiated her claim for the purchase price of 260 Carmonian gold *mitqāl* with a document from Ramaḍān 458 (August 1066), which witnesses certified before the market inspector Ibn Ḥarīṣ. Upon leaving town, Khalaf had handed her a document asserting his own claim to deferred payment against Aḥmad from a similar return of sale over 220 Carmonian gold *mitqāl*: «Aḥmad and Khalaf had witnesses testify that Khalaf had bought from Aḥmad a piece of real estate with such-and-such borders for a specified price. When various defects became obvious, they were certified in court and Aḥmad had to return the price and Khalaf the estate. The estate had been returned and was taken over by Aḥmad, who had instigated Khalaf to postpone payment».¹⁷⁶

¹⁷⁴ *Aḥkām*, 574f.

¹⁷⁵ *Aḥkām*, 7.

¹⁷⁶ *Aḥkām*, 616f.

Maryam then went before the market inspector with her claim for payment of the credited sum to herself. Summoned in court, Aḥmad acknowledged the document and his debt. Concerning Khalaf, one or maybe two witnesses¹⁷⁷ attested to his residence in the region of Carmona, two others that his whereabouts were not known to them. The jurists disputed whether the claimant had to certify the document between Aḥmad and Khalaf¹⁷⁸ and whether the testimonies on Khalaf's absence would justify a completion of proceedings without his exercising his legal hearings (*i'ḍār*).¹⁷⁹ They agreed, however, that the document presented and Aḥmad's acknowledgement were not legally sufficient for a ruling against the absentee. The claimant had to swear to her claim and could then collect the 220 gold *mitqāl* from Aḥmad. Without any dissent on this point, Ibn 'Attāb held that the defendant's right to a later legal hearing had to be fixed (*taqayyada*) in an addendum to the ruling.¹⁸⁰ Whatever solution the market inspector did favor in the end, an uncomplicated offsetting of obligations between those three persons, as those concerned may originally have intended, was prevented by the jurists' objections —not to speak of the additional costs for longer proceedings.

With this, we turn from the cases on contractual obligations to disputes over various contradictory rights and claims. The first example of this kind was a border dispute over a dilapidated building; the case had already gone through court proceedings before the *qāḍī* Abū'l-Muṭarrif Ibn Siwār, but was transferred to the market inspector, here *ṣāhib al-sūq* Muḥammad Ibn Makkī, after the *qāḍī*'s sudden death on 12th Dū'l-Qa'da 464 (July 31, 1072) after having been in office only five months.¹⁸¹ The Muslim Ḥassān b. 'Abd Allāh filed a claim against the Jew Iṣḥāq for property rights to a building in the Ṣawāb Mosque Quarter of the

¹⁷⁷ Differences in manuscripts, compare *Aḥkām*, 616.

¹⁷⁸ Ibn al-Qaṭṭān held this not to be necessary. Ibn Mālik argued that, without certification, Khalaf, once returned, could contest the annulment of the sale, and then Aḥmad might lose his house without having any claim against Maryam. Ibn 'Attāb noted that a self-testimony (*maṣhad 'alā nafsihi*) about a debt from an absentee was legally considered to be weak, since the testifier might be acquainted with the claimant and acknowledge a higher sum, to the absentee's detriment. An acknowledgement in favor of an absentee was binding if the absentee was linked through a general mandate partnership to a second person present, as in the case of the silk garment, *Aḥkām*, 617f., for the latter, see part I, 77f.

¹⁷⁹ On Ibn al-Qaṭṭān's opinion on a testimony of «unknown whereabouts», see below, note 212; Ibn Mālik voted for a continuation only if his residence was unknown or the road to Carmona blocked. Ibn 'Attāb ignored this aspect. *Aḥkām*, 617f.

¹⁸⁰ *Aḥkām*, 617.

¹⁸¹ On this case, see Ibn Sahl, *Waṭā'iq fī aḥkām qaḍā' ahl al-ḍimma fī'l-Andalus* (ed. M. Khallāf, Cairo 1980), esp. 60-65, or *Aḥkām*, 827-30.

old city of Cordoba. In the market inspector's court, Ḥassān alleged that a small house on his estate had fallen to ruin and damaged the separating wall to the neighboring real property of the synagogue. When he wanted to rebuild the wall, Iṣḥāq, the legal agent of the synagogue foundation, objected and claimed property rights to the ruin on behalf of the synagogue. In order to substantiate his claim before the market inspector, Ḥassān presented an *istir'ā'* document from Raġab 464/April 1072, whose witnesses attested that the mentioned ruin had been certified in the *qāḍī's* court to be part of Ḥassān's piece of real estate. At the bottom of the same document, it was attested that the *ḥiyāza*, the «on-site testimony to borders of a piece of real estate», had been carried out by order of the judge.¹⁸² On the back, it was written that the *qāḍī* had heard Iṣḥāq on the witnesses of the *istir'ā'* document as well as on those of the estate's borders. Iṣḥāq, who had asserted he could refute this testimonial evidence, had been set several dates. The *qāḍī* himself ordered that the whole document be certified by witnesses (*iṣḥāduhu 'alā nafsihi bi-ḍālika*).

During court proceedings, the market inspector considered the legal claims attested to in the document, but could not accept it as evidence, since he had not been present at the first proceedings with Ibn Siwār. He obliged the claimant to have proceedings and orders of the deceased judge certified in his own court. Then Ibn Makkī summoned the defendant to be heard again, but the latter could not refute the certification's witnesses. The market inspector had rejected one of the two witnesses attesting to the final deadline (*talawwum*) in the *qāḍī* proceedings. This jeopardized legal evidence on this particular point and made its repetition necessary. Iṣḥāq was granted a second *talawwum*, and then the judge conferred with the jurists for a ruling. Every legally relevant step of the first proceedings had to be certified by two witnesses, whom the new judge had to accept. The different steps must have been certified by various witnesses — otherwise the rejection of one witness would have required the repetition of other parts of the proceedings as well.

The jurist Ibn Faraġ opted for a ruling in favor of the claimant because the defendant had not been able to defy Ḥassān's claim within the time limits set. Ibn Sahl, on the other hand, held that the document in its present form, which stated that «the house mentioned belonged to Ḥassān's piece of real estate»,¹⁸³ did not attest to the property rights (*milk*) of the claimant and was not sufficient for a ruling. Other jurisconsults shared his view after some discussion, and the market

¹⁸² With Ibn Sahl, *Dimma*, 62, read «*faṣlu l-'aqdi bil-ḥiyāzati bi-amrihi*», instead of *Aḥkām*, 828: *faṣlun in'aqada bil-ḥiyāzati fa-amruhu*.

¹⁸³ «*Al-baytu l-maḍkūru min ḥuqūqi dāri Ḥassānin*», *Aḥkām*, 828.

inspector called on the claimant to attest to his *milk* of the house. During a second consultation in this case, Ibn Farāğ insisted on his opinion and Ibn Sahl backed his argumentation with references to the *Mudawwana* of Saḥnūn, but had no copy of his answer when writing down the case nearly 10 years later. We are informed neither whether the claimant had presented a second, substantially different testimony, as required in the market inspector's first ruling, nor on the judge's decision. In any case, this example highlights some difficulties involved in confirming private *milk* in court.¹⁸⁴ The more pragmatic position of Ibn Farāğ and the *qāḍī* Ibn Siwār was opposed to the very strict one of Ibn Sahl, which set high hurdles for such a property dispute.

Testimony to the borders of real property was the problem in another dispute over landed property presented to the market inspector Ibn Ḥarīš. Ibn 'Abdūs claimed possession of a piece of real estate in Cordoba, which his father had endowed along with other property for the benefit of his descendants (*'aqab*), but sold during his own lifetime to the Banū Ibn al-Khayṭa, who were still living there.¹⁸⁵ The endowment deed was legally accepted, based on witness testimony that the handwriting was indeed the notary's (*šahāda 'alā al-khaṭṭ*).¹⁸⁶ As the next procedural step, witnesses had to attest to the borders of the endowed real estate on-site. Although several people (*qawm*) attested to the various borders, in assessing these testimonies in court, it was found that only one witness had testified to all four borders of the premises. As things were, the market inspector refused to validate the ruling which would have returned the piece of real estate to the endowment and finally abandoned the whole case without a decision. Naturally, the claimant Ibn 'Abdūs was dissatisfied and later filed a complaint with the *šāḥib al-mazālim* Ibn Adham. Ibn Adham, in exercising the competences of *siyāsa* justice, interdicted any use of the premises by its inhabitants and had the ground cleared and sealed off (*'aqḷa*). The final ruling, however, is not known to us.¹⁸⁷ Yet the first part of this dispute demonstrates quite clearly that the market inspector was bound to the rules of the jurists' law in his jurisdiction on real property.

¹⁸⁴ On the problem of Muslim property rights in al-Andalus going back to the time of the conquest, see Chalmeta, P., «Concesiones territoriales en al-Andalus (hasta la llegada de los almorávides)», *Cuadernos de Historia*, 6 (1975), 1-90, esp. 20-26.

¹⁸⁵ See *Aḥkām*, 52. The Banū 'Abdūs were a well-known clan in Cordoba. A *wazīr* Abū 'Āmir Aḥmad b. 'Abdūs was the rival of Ibn Zaydūn for the Umayyad princess Wallāda, who is identified by Monès as Abū 'Āmir b. 'Abdūs (died after 472/1079-80), Ibn al-Abbār, *Takmila* (Apéndice), no. 2440; Monès, «Ibn 'Abdūs» in *EP*, III, 681.

¹⁸⁶ On this specific testimony, compare *Aḥkām*, 73ff. and Santillana, *Istituzioni*, II, 613ff.

¹⁸⁷ On details of this case and a similar one before the same judge Ibn Adham, see my *Gerichtspraxis*, 346-9.

In a dispute over an irrigation well and a cistern outside the city walls, various testimonies presented in a sequence of claims and counter-claims made a legally consistent conclusion very difficult. In the beginning, the claimant Aḥmad¹⁸⁸ b. Muḥammad b. ‘Ataba, son of the tanner, presented to the market inspector, here *ṣāhib al-aḥkām* Ibn Ḥarīṣ, a contract dividing a garden, in which his father and the defendant’s father had shared irrigation well and cistern equally. This was denied by the defendant ‘Umar b. Muḥammad b. ‘Umar, who claimed that both, well and cistern, were his property which he used to irrigate his garden. To substantiate his claim, Aḥmad had the contract of division certified in court and the site of well and cistern was attested to in an «on-site testimony» (*ḥiyāza*). While ‘Umar was given several time limits to prove his allegation, Aḥmad tried to put ‘Umar under pressure with the argument that there must be two copies of the division contract. He demanded that ‘Umar take an oath that he did not have a copy of this contract. Ibn ‘Attāb held this oath to be necessary, Ibn al-Qaṭṭān and Ibn Mālīk were against it, and apparently the oath was not made.¹⁸⁹

Three persons had testified to the contract of division and on the piece of real estate concerned. Only one of them was finally accepted in court as a witness: the defendant proved that another was his personal enemy, which excluded testimony according to the jurists’ law, and the third one had been generally discredited as a witness. ‘Umar then in turn presented an *istir‘ā*’ document to be certified in court. Its witnesses attested that both, well and cistern, had belonged to his father’s property and cultivated land (*i’timār*), and that he had used them for irrigation and had paid for repairs on them during the last ten years of his life. Ten years earlier, well and cistern had been transferred to his son in the presence of the claimant Aḥmad, who had then attested to it. According to these witnesses’ knowledge, nothing had changed until their testimony in the year 458/1066, when they had heard of Aḥmad’s claim. Aḥmad countered with an *istir‘ā*’ document which attested that well and cistern had been the joint property of both fathers, but had not been used during the last fifteen years. In addition, Aḥmad alleged that he had lent well and cistern to ‘Umar without financial benefits. None of these latter *istir‘ā*’ documents were refuted by the other party, and the market inspector consulted the jurists to find a legal solution. Ibn ‘Attāb and Ibn al-Qaṭṭān refused to consider the contract of division, since one witness alone did not establish legal evidence.¹⁹⁰ They held that the document presented

¹⁸⁸ Variant: Muḥammad.

¹⁸⁹ On this case, see Ibn Sahl, *Aḥkām*, 736-741.

¹⁹⁰ In contrast to a principle in Mālīkī fiqh, see al-Bāḡī, Abū’l-Walīd, *al-Muntaqā*, 7 vols. (ed. Rabat s.d.), V, 195; and Ibn al-‘Attār, *Kiṭāb al-waṭā’iq wa-l-siḡillāt* (ed. P. Chalmeta and F.

by the claimant Aḥmad on the non-use of well and cistern during the last 15 years was not sufficient, and Ibn al-Qaṭṭān declared its testimony to be void.¹⁹¹ All contracts and testimonies in this case were considered to be insufficient and bewildering, and, as a result, inapplicable in favor of any party. Ibn ‘Attāb demanded that both parties should take the oath to their claim: if both swore, both would own the well, if one of them refused, the other would get it. Ibn al-Qaṭṭān, on the other hand, gave more weight to the property rights of ‘Umar, based on the certification of the latter’s and his father’s use and repair of the well and on Aḥmad’s assertion that he loaned the well to him. This should result in a ruling based on the defendant’s oath (*al-qaḍā’ bi-tark al-amr*)¹⁹² unless Aḥmad could supply witnesses to testify that he had loaned the use to ‘Umar. Ibn Sahl conceded some useful aspects in Ibn ‘Attāb’s answer, but considered the latter opinion to be clearer. He did not give the decision of the market inspector.

When seeking legal advice from the jurists, the market inspector was not restricted to a world of religious and law-abiding people, but dealt with realities of life. In a farmer’s claim for joint ownership (*šarika*) of landed property and cattle, the defendant had denied the claim and alleged that the claimant was only farming the land without any property rights.¹⁹³ Property rights had a decisive impact on how revenue was distributed.¹⁹⁴ Without further legal evidence, the unnamed *šāhib al-sūq* of Cordoba had granted to the defendant the right to swear to his counter-claim that the farmer was no partner. After that oath, they set up a contract, which ended with the testimony that both sides would refrain from future action, claims and oaths for old and new disputes. Later however, the original claimant did in fact present witnesses testifying that the original defendant had acknowledged to them several times joint ownership of cow and land (*baqar wa-zar’*). Upon certification of this testimony, the judge (here *ḥakam*) consulted the jurists. In this matter, disputed among early Mālikī jurists, Ibn ‘Attāb held that the testimony of witnesses overruled the oath of the defendant. The claimant, however, should be obliged to swear that he had not

Corriente, Madrid 1983), esp. 330, Ibn ‘Attāb declared the rejection of a witness due to personal enmity licit also in the case testified to by a witness not a *mubarriz*, Ibn Sahl, *Aḥkām*, 738.

¹⁹¹ For details, see *Aḥkām*, 738-740.

¹⁹² Variation: *al-qaḍā’ bi-dālik al-amr*, *ibid.* For the ruling *rebus sic stantibus* (*qaḍā’ tark*) following the oath of a defendant, Johansen, B., «Le jugement comme preuve. Preuve juridique et vérité religieuse dans le Droit Islamique hanéfite», *Studia Islamica* 72 (1990), 5-17, esp. 8f.

¹⁹³ *Aḥkām*, 716. On joint ownership in early Mālikī law, see Udovitch, A., *Partnership and Profit*, 21-3.

¹⁹⁴ In sharecropping, the share was one sixth for the farmer up to one third if he also owned the oxen (*azwāğ*); compare the legal standard forms for *muzāra’a* in Ibn al-‘Aṭṭār, *Watā’iq*, 66-69.

known the testimonial evidence in his favor when forcing the oath upon the defendant. Then his claim would be recognized, despite the former contract, but he should be warned about consequences of a false oath for the next world.¹⁹⁵ Admonitions to his partner, who must have taken a false oath in the first place, are not transmitted.

The market inspector's role as judge went beyond the economic sphere and touched matters of family relations like maintenance, divorce or inheritance disputes. In a dispute between a newlywed bride and her father over the domestic utensils and clothing her father had provided for her wedding, the father claimed they were a loan, the daughter that they were a gift. 'Abd Allāh al-Qabbāla sued his daughter, whom he had given in marriage to Aḥmad, for the return of the bridal provisions. Bride and husband refused to comply, and the utensils were deposited with some jurists. Aḥmad presented an *istir'ā'* document dated 10 Ṣafar 458 (January 10, 1066). Its witnesses testified that, 20 days earlier, they had heard 'Abd Allāh acknowledge that the «clothing» (*ṭiyāb*) and domestic utensils enumerated in the document were his daughter's belongings. The market inspector accepted these witnesses and had their testimony certified on 12 Ṣafar.¹⁹⁶

Before a ruling in favor of the bride had been made, however, the merchant Khalaf Ibn Fatūḥ claimed ownership of a carpet and a lamp from the dowry, which he allegedly had lent to the father for his daughter's wedding procession. Three days after the first testimony in court, several witnesses testified before the market inspector that the merchant had offered this carpet for sale in their presence without selling it at the end of Dū'l-Qa'da 457. At that time, he had owned the carpet, and to the best of their knowledge this had not changed until their testimony. On that occasion they also testified that Ibn Fatūḥ had bought the lamp in their presence at the end of Dū'l-Qa'da, but they did not know whether he still owned it. One witness testified that Ibn Fatūḥ had pawned the lamp with him and redeemed it before the Feast of Immolation (November 11, 1065); he did not know whether he still owned it. The market inspector accepted these witnesses and had their testimony certified. The merchant's claim thus contradicted the father's acknowledgement of his daughter's proprietorship, testified to by the first witnesses. When summoned to court a second time, the father acknowledged that he had borrowed the carpet and the lamp from the

¹⁹⁵ *Aḥkām*, 716f., with only this response. Since the market inspector is not named, the case may have occurred before Ibn Sahl's return to Cordoba in the year 456/1064.

¹⁹⁶ On this case, see *Aḥkām*, 330-336.

merchant, but said that the remaining utensils (here *ṭiyāb*) belonged to him. Asked about his first acknowledgement in his daughter's favor, he denied the soundness of the testimony, but had no legal reasons for a rejection of these witnesses. The market inspector then consulted the jurists on several points, among them whether the merchant had to take the oath that the lamp and the carpet belonged to him.¹⁹⁷

The daughter's right to the dowry was in jeopardy because her father had acknowledged that he did not own lamp and carpet when he had given them to her. The jurists agreed on the merchant's ownership of the carpet, but held different opinions concerning the lamp.¹⁹⁸ They also agreed that 'Abd Allāh's first acknowledgement in favor of his daughter, testified to by witnesses, was legally valid, whereas his second acknowledgement favoring the merchant did not add any evidence.¹⁹⁹ On the question what to do next with the utensils, they differed: according to Ibn 'Attāb, the father had entered liability, *ḍimma*, in favor of his daughter, which did not give her the right to receive the utensils right away, but which was to be transformed into a sale with deferred delivery (*salam*) amounting to the usual father's nuptial gift (*naqd*) and to an additional sum which had to be negotiated with her husband. Then the utensils were to be deposited with the father or a third person. Ibn 'Abd al-Ṣamad held that all the utensils with a combined value up to that of the father's nuptial gift stayed with the daughter, and the rest of it had to be deposited with a third person, but not with her father, who had discredited himself. Ibn Mālik supported a *qaḍā'* ruling against the father based on his acknowledgement in his daughter's favor. Possibly this meant that the utensils stayed with her.

Lamp and carpet, however, were of different legal natures: according to Ibn 'Attāb, evidence was sufficient to return them to the merchant after he had taken the oath that the lamp and the carpet were transferred only to the father and no one else. Other jurists believed the oath applied only for the carpet. Ibn Mālik, who held the carpet to belong to the «clothing» which had to be ruled as belonging to the bride, thought that, after the oath, the merchant could only take care of the carpet, but not sell it. Without further evidence in favor of the merchant, so the opinion of Ibn 'Abd al-Ṣamad, the lamp stayed in the

¹⁹⁷ *Aḥkām*, 330f.

¹⁹⁸ Only Ibn 'Attāb was in favor of it; Ibn al-Qaṭṭān and Ibn 'Abd al-Ṣamad thought that testimony was not sufficient to back ownership, and Ibn Mālik even denied his right of possession, *Aḥkām*, 332-5.

¹⁹⁹ According to Ibn 'Abd al-Ṣamad, the contradicting testimony made the acknowledgement meaningless, and Ibn Mālik rejected it because, at the beginning, he had claimed these utensils for himself, *ibid.*

possession of Fāṭima as part of her father's dowry. Ibn Mālik agreed to such a solution, although the lamp neither belonged to the «clothing» acknowledged in her favor by her father, nor was there legal testimony about it favoring the merchant.²⁰⁰ Ibn al-Qaṭṭān also did not hold that the lamp should be returned to the merchant by a ruling. The court secretary Ibn Sahl, who was not a jurisconsult in this case, agreed to Ibn 'Attāb's opinion and commented in this direction. The decision of the market inspector, however, is not known.

A pregnant woman claimed maintenance from her recently divorced husband. He denied paternity, since the waiting period had allegedly already elapsed, and refused to pay. Fāṭima bint al-Zubayr claimed maintenance for the period beginning with their divorce by mutual consent (*mubāra'a*) and, at the beginning of Raġab 459 (May 18, 1067), in court two women attested to her pregnancy, with the unborn already moving in her belly. The husband, 'Abd al-Raḥmān b. Muḥammad, asserted he had acquitted himself from Fāṭima in a second act of repudiation (*talqa*) on 17th Rabī' I 459/February 5, 1067, a fact corroborated by Fāṭima. He denied in court that she could be pregnant by him, since he had already held himself separate from her for seven months before the repudiation. However, he was not sure whether she had menstruated since then. His statement was certified. In a second bill, written in his hand, he corrected himself and asserted that he repudiated his wife when she was menstruating. At that time, he had already abstained from having sexual intercourse with her to fulfill the waiting period (*istibrā'*) and continued to do so later on. Witnesses testified in court that they had been married for five years and had lived together under one roof until their divorce.

Most jurists regarded this refusal of maintenance to be a serious charge of adultery which was to be considered a case of *ḥadd* punishment. Of all four jurisconsults, only Ibn 'Abd al-Ṣamad held that the judge could choose between the husband's two assertions, and that in the second case Fāṭima had no rights against her former husband. Two jurists rejected the husband's second assertions: Ibn 'Attāb, because it was the result of undue legal instruction (*talqān*) which did not comply with the course of events; and Ibn al-Qaṭṭān, since it was written in the husband's own hand and not by a third person as witness.²⁰¹ Considering the first statement of the husband in court, Ibn 'Attāb held this to amount to slander (*qadf*), the accusation of unchastity without testimonial evidence that he could not have been the father of the child. In his opinion, the 80-lashes punishment for *qadf* could only be prevented by the procedure of *li'ān*, in which the husband affirms under oath that the child born

²⁰⁰ For juridical details, see my *Gerichtspraxis*, 298, note 247.

²⁰¹ Ibn Sahl, *Aḥkām*, 436.

to her is not his, and she affirms under oath the contrary, both appealing to divine punishment if they have lied. Such a couple is then divorced forever.²⁰² Ibn al-Qaṭṭān, by contrast, favored the opinion by Mālik and his companions that the husband could not affirm her unchastity by *li'ān*, but was to be tried as *qāḍif* and had to accept paternity. Ibn 'Attāb differentiated that in this case a husband only had to accept paternity after testimonial evidence that he had not denied paternity when confronted with her pregnancy for the first time. If he then continued to deny paternity, he would be accused of *qāḍf*; if she did not succeed in presenting witness evidence, she would be subject to the oath of unchastity (*li'ān*). According to the fourth jurist, Ibn Mālik, the denial of paternity was the most complete form of unproven unchastity, no matter what claim for ending the waiting period (*istibrā'*) accompanied it, and therefore had to be cleared by *li'ān*. Unfortunately, we do not know the solution chosen, but cases of *li'ān* must have been very rare in al-Andalus.²⁰³ In such a case, however, the former husband would only have to provide maintenance and housing during her pregnancy.²⁰⁴

Less dramatic in consequences was the maintenance dispute over Fāṭima, an unmarried older woman, who had lived in the house of her brother 'Abd al-Malik after her father's death in the year 447/1055. When 'Abd al-Malik b. Khayra died at the end of Ša'bān 459 (mid-July 1067), his widow and children claimed maintenance payments from her second brother 'Abd al-Raḥmān, who had also been guardian of his sister since their father's death 12 years earlier. 'Abd al-Raḥmān lived in the old city in the quarter of the Balansī Mosque in two houses which belonged —one partially, the other completely— to his sister Fāṭima. The claimants, represented by the oldest son as legal agent (*wakīl*), claimed that 'Abd al-Raḥmān should make up for the maintenance payments made by his brother to their sister. 'Abd al-Raḥmān did not deny that his brother made the payments but claimed that they had been done from a sum of 100 gold *mitqāl*, which once had been provided for this purpose by their father Khayra.²⁰⁵ The jurists agreed that 'Abd al-Raḥmān had to pay the usual rent for his sister's houses and that the heirs

²⁰² Compare *Aḥkām*, 435; for *li'ān* also Ibn 'Abd al-Barr, *Kāfi*, 286-291, and Santillana, *Istituzioni*, I, 276-9.

²⁰³ Sources register the *li'ān* by Ibn al-Hindī (d. 399/1008) in the year 388/998 as a special event, Ibn Baṣkuwāl, *Šila* no. 21, Ibn Sa'id, *Mugrib*, I, 217, no. 147, Qāḍī 'Iyāq, *Tarīb*, VII, 146f., Ibn Farḥūn, *Dibāğ*, I, 172, and Wanšarīsī, *Mi'yār*, IV, 76f. with a ruling of *li'ān* by the *šāḥib al-šurṭa* Ibn al-Šarifi in the same year. The unnamed scholar taking the *li'ān* oath may also have been Ibn al-Hindī, Ibn Bassām, *Dakhira*, I, 586f. For a different *li'ān* by Ibn Lubāba, see Ibn Sahl, *Aḥkām*, 439f.

²⁰⁴ Santillana, *Istituzioni*, 279.

²⁰⁵ On the case see Ibn Sahl, *Aḥkām*, 374f. The sum is given with 200 half-gold *mitqāl* to avoid manipulation in the cited document.

were to be compensated for the maintenance paid for his sister by the deceased also on behalf of his brother. First, however, the heirs had to swear that they had not known of Khayra's gift, and that, to the best of their knowledge, Fāṭima did not have any more obligations to the deceased. The underlying principle for this choice to have the heirs take the oath rather than the brother was that, in Mālikī law, a positive claim had more weight than a negative denial.²⁰⁶ The market inspector then had a trustworthy person calculate the adequate rent for Fāṭima's houses during the past twelve years. The sum was fixed at 144 1/2 *mitqāl* and paid by 'Abd al-Raḥmān to his brother's heirs. This sum, however, was not sufficient to cover the costs of maintenance set by the law for an adult woman under guardianship, and her houses were sold to cover maintenance. The maintenance claim was not based on the actual costs but on a taxed basket of goods she was entitled to in her social position. This amounted to 2 quarters of wheat flour, 2 eighths of oil, half a load of firewood of medium size, and 30 *dirham* each month, the latter to be reduced to 1 1/2 quarter of wheat flour and 1 1/2 eighth of oil in the case of rising prices. For clothing, she was entitled to two shirts, two pairs of trousers, a pair of shoes, a cotton veil (*miqna'*), and, for winter a lined coat each year and additionally a fur every three years. Every three years, she was entitled to a new blanket (*milḥafa*) and, for most of the period under consideration, a *muraqqa'a*, a cotton cover (*kisā' faraṣiyya*) and a woolen mattress (*firās*).²⁰⁷ When, in his position as her remaining guardian, 'Abd al-Raḥmān tried to force her to live under his roof, she refused, preferring to continue living with her other brother's family. The jurists granted her the right to choose her domicile. As a result of this case, Fāṭima had all her property transferred to her relatives she lived with, whereas her living brother got nothing.

The market inspector dealt with the assertion of contractual rights not only in the field of commerce, but also in family law. It was no exception that a woman filing for divorce in accordance with her wedding contract brought her claim to the market inspector:²⁰⁸ in the suit of 'Ātika for divorce from her long-absent husband, juridical problems arose from differing testimonies about her husband's whereabouts as well as from a discrepancy between written testimony and oral attestation in court. 'Ātika's legal agent presented to the market inspector Ibn

²⁰⁶ *Aḥkām*, 375f.

²⁰⁷ *Ibid.*, 376. On clothing comp. Arié, R., «Aperçus sur la femme dans l'Espagne musulmane», in: *Árabes, judías y cristianas: mujeres en la Europa medieval*, ed. C. del Moral, Granada 1993, 137-160, esp. 151-154. Compare also maintenance requirements for a newborn and a six-year-old boy, *Aḥkām*, 376f.

²⁰⁸ Compare for example the wife of Ibn al-Šarafi, *Aḥkām*, 732.

Ḥarīš an *istir‘ā*’ document testifying to the stipulations of her right of divorce and to the long absence of her husband. The witnesses of the document notarized «to know the husband Mas‘ūd b. Aḥmad personally and by name and that he had left his wife ‘Ātika bint ‘Alī one year prior to the date of this document and stayed at a place unknown to them. Fifteen years earlier, the husband had called them as witnesses of the wedding contract. One of its stipulations was that she was not bound to stay his wife if he was absent for more than six consecutive months or three years for the pilgrimage, and could then act according to her own will; and for this, her assertion would be valid in court (*al-qawl qawluhā*). Once she had taken the oath that her husband had left her longer than stipulated, she was free to decide on a divorce. She could however grant him a final deadline (*talawwum*) without interrupting the period of his absence required for the divorce».²⁰⁹ This testimony of Ibn al-As‘ad and Fuṭays b. Aḥmad in an *istir‘ā*’ document issued in Ramaḍān 457 (August 1065) was supplemented by Abū Muḥammad al-Mu‘ayyī and ‘Abd Allāh b. Muḥammad b. ‘Abd Allāh al-Umawī notarizing that «they knew of Mas‘ūd’s absence from his wife, but not whether he had already returned to her at the time of their testimony in Šawwāl 457 (September 1065)». When the witnesses repeated their written testimony orally in court, to make it valid as judicial evidence, two witnesses repeated their testimony word for word, and one of the witnesses, al-Mu‘ayyī, added that he knew the husband to be staying in Seville. As the next step in court, the wife’s will to dissolve the marriage was also testified before the market inspector, who accepted these witnesses and gave her the legal hearings. She did not raise any counter-claim. In the eyes of some jurists, the difference between the *istir‘ā*’ document issued in Ramaḍān and the additions one month later gave rise to the necessity for her to swear that she had not renounced divorce, but regarded this as a last deadline for her husband. At this stage, the market inspector considered the conditions of the oath fulfilled, and allowed her, under some excuse that she could not leave the house, to take the oath not in court but at home. She swore that «her husband had not yearned for her since his absence, and that her silence within the mentioned period did not mean a renunciation of divorce but a deadline to her husband». The wording of this oath must have been prescribed by the market inspector, since one of the jurists later criticized the second part as unnecessary, since already granted in the witnesses’ testimony, and «a judge has to restrict his orders, also for the formula of the oath, to the essential, and the market inspector should take care of this in the future».²¹⁰

²⁰⁹ On the text of this document, which Ibn Sahl claimed to have transmitted word for word, see *Aḥkām*, 346f.

²¹⁰ *Aḥkām*, 349, with some corrections and explanations of Ibn Sahl on this topic, *ibid.*, 349f.

If the market inspector had expected the jurists to vote for an instant ruling of divorce, he was mistaken. Ibn ‘Attāb demanded the legal hearing of the husband, whose whereabouts were known through the testimony of al-Mu‘ayyī; this option was rejected by Ibn Mālik and Ibn al-Qaṭṭān on the grounds that testimony of one witness did not constitute legal evidence for a fact to be considered at court.²¹¹ Ibn ‘Attāb criticized the contradicting parts of the testimony of «unknown whereabouts» and the assertion «that he was not on pilgrimage», and held that unless this was sorted out, the document had to be considered «lacking» (*muftaqar*), not allowing a judicial ruling (*qaḍā’*) of divorce. Ibn al-Qaṭṭān, on the other hand, held that the testimony of «unknown whereabouts» should be completed with «being far away» in order to avoid the necessity of a legal hearing before a ruling could be passed.²¹² According to this jurist, a testimony that the husband «was not on pilgrimage» needed to be accompanied by the words «according to the best knowledge [of the witnesses]» and could not otherwise be the basis of a ruling. Ibn Mālik, however, criticized that written testimony and oral attestation in court were not identical. If the witnesses were still alive, they should repeat the notarized testimony in court and have it certified. This would ensure that any difference between the oral and the written form had originated from the notary of the document. He held that the judge should combine in suitable formulation the wording of court testimony and its understood sense with the intention of the *istir‘ā*’ document and notarize (*qayyada*) this on the document.²¹³ Then the judgment could be passed with the right of legal hearings to be postponed for the absent husband. Both jurists, Ibn Mālik and Ibn al-Qaṭṭān, criticized that ‘Ātika swore at home without any legal reason for this.²¹⁴ If she was one of those women who did not leave the house during the day—a sign of high social status—she should swear at court during the night. The decision of the market inspector is not known to us, but it seems highly improbable that he allowed ‘Ātika to be divorced without further legal proceedings.

Another woman sued for divorce on the grounds that her husband had remarried his former wife, in which case her own wedding contract stipulated instant divorce. Since the husband had married, repudiated and remarried several

²¹¹ *Aḥkām*, 349, 352.

²¹² *Aḥkām*, 348f., criticized by Ibn Sahl as illogical, *ibid.*, 350f. This was a frequent point of disagreement between Ibn al-Qaṭṭān and Ibn ‘Attāb.

²¹³ *Aḥkām*, 351f.

²¹⁴ One of the possible reasons was illness.

women at the same time, the jurists regarded his case as touching upon matters of illicit sexual intercourse (*zinā*). Not much later than May 1066, Maryam bint Muḥammad b. Aṣḡabāg asserted before Ibn Ḥarīṣ that her husband ‘Alī b. Ṭāhir had remarried his former wife ‘Azīza, and she demanded divorce from him. She had married ‘Alī in Ṣafar 457 (January 1065), who had repudiated her with one *ṭalqa*, i.e. revocably, but remarried her at the beginning of Rabī‘ II 458 (March 1066). She only consented to this marriage on condition that if ‘Alī remarried his divorced wife ‘Azīza bint Ni‘am al-Khalaf, she herself would be irrevocably divorced from him. Corroborating her grounds for divorce, she presented her wedding contract (*kitāb al-ṣadāq*) from Ṣafar 457, which also notified (*qayyada*) to the repudiation and to her remarriage thereafter. The husband ‘Alī acknowledged the wedding contract and its stipulations, but argued that he had not married his former wife ‘Azīza bint Ni‘am al-Khalaf, but another woman from Toledo. Both assertions were notarized on the wedding contract. As proof of his assertion, ‘Alī presented two contracts with his present second wife, ‘Azīza bint Aṣḡabāg b. Qulsāl²¹⁵ (? Gonzal). In a first contract from 3rd Ġumādā I 458 (April 2, 1066), they had dissolved their marriage by agreement (*mubāra‘a*),²¹⁶ a fact also attested by two witnesses personally known to the market inspector Ibn Ḥarīṣ. One month later, ‘Alī had remarried ‘Azīza, and this contract of remarriage in Ġumādā II 458 (May 1066) contained testimony that Salwa bint Abī‘l-Walīd had been repudiated irrevocably three times by ‘Alī. The claimant Maryam had already asserted in court that she was also called Salwa and her father was called Abū‘l-Walīd, and ‘Alī also recognized her as Salwa bint Abī‘l-Walīd, but he nevertheless refused to consent to a divorce, on the grounds that he had not remarried ‘Azīza bint Ni‘am al-Khalaf, but ‘Azīza bint Aṣḡabāg, which was no reason for a divorce from Maryam. The father of his present second wife asserted in court that his daughter was not ‘Azīza bint Ni‘am al-Khalaf. From a legal perspective, Maryam’s wedding contract did not require a divorce from ‘Alī, but the jurisconsults considered his conduct of marrying, repudiating and remarrying several women as making him totally untrustworthy.

Ibn ‘Attāb compared the husband with people avoiding culpability for *ḥadd* offenses by playing tricks, a conduct rendering his assertions in court untrustworthy. The conditions for a divorce from Maryam may have been fulfilled, which made any further sexual contact illicit and amount to *zinā*. However, since a *ḥadd* punishment should only be applied on the basis of facts

²¹⁵ According to *Aḥkām*, 421: Ms. *Qāf* 370 Rabat *Awqāf*: Q.l.b.y.l., Ms. *Qāf* 55 Rabat: Q.l.y.b.s.l.

²¹⁶ On *mubāra‘a* s. Schacht, *An Introduction to Islamic Law*, Oxford⁵ 1982, 164.

certified as evidence in court, in this case no *ḥadd* punishment applied, but the contract of remarriage with the Toledo women ‘Azīza should be fulfilled and Maryam be divorced from ‘Alī.²¹⁷ Eventually coming to the same result, Ibn al-Qaṭṭān held that after her husband’s denial, the burden of proof now lay with the claimant Maryam. If she could not present witness evidence, ‘Alī could swear to his assertion at the *Maqta’ al-ḥaqq* (literally the «point where the right is cut») in the Friday Mosque, that his present wife is not the one mentioned in the contract with Maryam. Then his statement would become legally valid, and he would not be divorced from Maryam immediately upon his marriage with the Toledo ‘Azīza, thus not committing *zinā*. Since ‘Alī, however, had sworn to his divorce from Maryam when remarrying ‘Azīza, he should definitively be divorced from her. Ibn Mālik considered the husband ‘Alī to be a swindler who created problems in the religious sphere and who should therefore be lashed. Then he should be allowed to swear to his assertion of not having married ‘Azīza bint Ni‘am al-Khalaf, which would have resulted in his divorce from Maryam.²¹⁸ Whereas Ibn ‘Attāb rejected the *ḥadd* punishment for reasons of uncertain evidence, both other jurisconsults seem to consider ‘Alī’s oath to be necessary to avoid *ḥadd* punishment. The jurists agreed that the claimant Maryam had to be divorced, but not on the basis of her own wedding contract; rather, the grounds were his definite repudiation of her, testified in the wedding contract with the Toledan ‘Azīza in May 1066. This may have made all the difference for a *ḥadd* punishment, since the conditions of a divorce were then not fulfilled beginning with April 2, 1066, when he had been married to ‘Azīza, but only from May on, with his remarriage to ‘Azīza. But this aspect is not dealt with in the juridical responsa. If the claimant Maryam had substantiated that ‘Alī had in fact married his former wife ‘Azīza bint Ni‘am al-Khalaf, he most probably would have been subject to the *ḥadd* punishment of 80 lashes, but in the present situation only Ibn Mālik voted for physical punishment.

Quite the opposite of a suit for divorce was the curious case of a man who had repudiated his wife three times in the presence of witnesses. But since they attested that he had done this not in his right mind, the jurisconsults argued that the repudiation was void, since the man had not been conscious of what he was doing. Since neither the husband nor the wife was interested in a divorce, the claimant must have been some unnamed third person. Aḥmad b. ‘Ubāda asserted

²¹⁷ *Aḥkām*, 422f., with Ibn Sahl’s commentary *ibid.*, 426f.

²¹⁸ *Aḥkām*, 424. Ibn Sahl refrained from commenting on this, since Ibn Mālik had argued according to his own choice (*ikhtiyār*) and not followed Mālikī teachings.

before Ibn Ḥarīš that he was subject to attacks in which he lost his senses and his mind and was not able to realize the situation he was in. After some attacks, some people present told him that he had repudiated his wife Sitā a total of three times. He alleged that he did not know of this repudiation and presented a document in which witnesses attested that he sometimes lost his mind and that they had heard him repudiate his wife three times during one of these attacks. Obviously there were no doubts concerning the witnesses, whose testimony was certified at court. When the market inspector heard the wife, she confirmed her husband's assertions.²¹⁹ Some jurists held that in order to prevent a divorce, Aḥmad b. 'Ubāda had to swear that «he had neither known of, nor wished or intended the repudiation (*ṭalqa*), but that he had been informed of it only later». If he also swore that his loss of memory was due to an existing illness, he could continue to be married to his wife.²²⁰ The other opinion rejected the idea of an oath for someone who was not conscious at the time of the incident. If he did not know anything about it, his people had to decide what to do, but he would not be brought to court nor had to swear an oath, as long as the witnesses at least had doubts that the accused was master of his mind at the time of the incident.²²¹ Whatever opinion was held by the market inspector, the jurists all agreed that Ibn 'Ubāda did not have to be divorced by law, because of the specific circumstances of this case. As we see from another case, the simple repudiation of a woman was treated much less severely than a man who had sworn a false oath, which created such pressure that the man left town before the judge enforced the divorce from his wife.

To conclude this section on divorce, we come to a case only indirectly connected to this field of law but highlighting the social situation in Andalusian society of that time. Legally speaking, a female slave's claim that she should be allowed to be sold to another person touched the property rights of her absent proprietor. One slave of Muḥammad b. Aḥmad al-Šarafī²²² appeared with the market inspector Ibn Ḥarīš, here *šāhib al-aḥkām*, and told him that her master had been away in the Maghreb for years now and had left her behind without any means of living and had not sent her anything so that she was starving. In order to

²¹⁹ *Aḥkām*, 419f.

²²⁰ Opinion of Ibn 'Attāb and, slightly different, Ibn al-Qaṭṭān *Aḥkām*, 419f.

²²¹ Ibn Mālik, *Aḥkām*, 420.

²²² From al-Šaraf (Aljarafe), a region west of Seville, É. Lévi-Provençal, *La Péninsule Ibérique au Moyen Âge, d'après le 'Kitāb ar-rawḍ al-mi'ār fi khabar al-aqfār' d'Ibn 'Abd al-Mun'im al-Ḥimyārī*, Leiden 1938, 101 (Arabic)/124 (French), which is to be preferred to «al-Šarqī» in *Aḥkām*, 611. Known scholars of Cordoba are Ibrāhīm b. Muḥammad Ibn al-Šarafī (d. 396/1005-6), Ibn Baškuwāl, *Šila* no. 194, Qāḍī 'Iyād, *Tarīḥ*, VII, 192, and his son 'Abd al-Raḥmān (d. 438/1046-7), *Šila* no. 705.

survive, she demanded that the market inspector pass a ruling (*nazar*) that she could be sold to someone else. He ordered her to bring the necessary testimonies that she suffered hunger and wanted to be sold to someone who maintained her. She then had certified to the judge that her master owned her, that he had departed without leaving her anything to provide for herself, that he did not send her anything, and that she had no funds of her own nor anyone she could lean on. The jurists held that if she certified what she had asserted, the judge should sell her, take the selling price for the absentee and deposit it with him or another trustworthy person until he returns.²²³ This being done, the divorced wife of Ibn al-Šarafī, Fāṭima, and his legal agent (*wakīl*) disputed over who should receive the selling price. Interestingly enough, none of them had been obliged to provide for the starving slave.

At the time of this second case, the wife Fāṭima had already been divorced as stipulated in her wedding contract because of her husband's prolonged absence. After the sale of the slave, Fāṭima claimed debts against her divorced husband, to be repaid from the deposited sum. She alleged before the market inspector Ibn Ḥarīš that, before he left, she had paid him a hundred *mitqāl* to buy her a servant, which in the end he had not done. For a sale with deferred delivery (*salam*) of two *mudd* of wheat, he should have paid her 18 *mitqāl* but did not. Of the two witnesses attesting to the payment of a hundred *mitqāl*, the market inspector accepted only one, with the consequence that her claim was not fully accepted by the jurists. Then the market inspector summoned the legal agent of the absentee, the *imām al-farīda* (prayer leader) Muḥammad b. Aḥmad al-Bagānī.²²⁴ His capacity to act as a general mandate agent (*wakāla mufawwada*) was substantiated by an *istir'ā'* document dated from the middle of Muḥarram 459/beginning of December 1066, whose witnesses had attested to the kind of agency²²⁵ and that they had been summoned to attest (*išhād*) to this mandate by Ibn al-Šarafī and al-Bagānī, to the best of their knowledge, about one year before the document was drawn up. In his capacity as legal agent, al-Bagānī acknowledged the absentee's debts to his former wife, a fact noted down (*taqayyada*) at the end of the record of the questioning of the defendant (*tawqīf*).²²⁶ The agent, in turn, claimed that the selling price for the slave which had been deposited by the market inspector, here *ḥakam*, with a

²²³ Ibn Sahl, *Aḥkām*, 611.

²²⁴ Better than *Aḥkām*, 732 «Bāgāy». His father may well be the scholar mentioned in Qāḍī 'Iyād, *Tartīb*, VII, 198.

²²⁵ On the text, see *Aḥkām*, 733; compare the standard forms in Ibn al-'Aṭṭār, *Waṭā'iq*, 500.

²²⁶ Better than *Aḥkām*, 733, «*tawkil*», see *Ms. Qāf 370 Rabat Awqāf*; on *tawqīf* see Santillana, *Istituzioni*, II, 585.

trustworthy person, should be entrusted to himself, since he was entitled to this as the absentee's agent according to this written attestation to his mandate.

Juridically, two different problems arose: Fāṭima's claim to have her debt repaid and the agent's claim to possession as a trustee. Whereas Ibn al-Qaṭṭān and Ibn 'Abd al-Ṣamad held that the agent could take possession of the price on behalf of his client, Ibn 'Attāb would not accept the existing document, which lacked any specified authorization for this.²²⁷ Unless the absentee was very far away and attestations in court had been very recent, Ibn Mālik did not accept testimony to the agency of al-Bagānī in its presented form, but said the case had to be resumed before Ibn Ḥarīṣ. He reminded the judge that the presented document did not contain the summoning for testimony, *ishād*, but only the witnesses' memory in the form of an *istir'ā* document. Since the claimant al-Bagānī alleged that they had written the document from memory, they should attest to its content by memory as well. He said that if a judge informs a witness of the content of that same witness's written testimony, then the witness could not attest «I do testify before you to my [written] testimony».²²⁸

It was disputed whether the debt owed to Fāṭima could be settled with the selling price of the slave. Ibn 'Attāb and Ibn al-Qaṭṭān negated this, since her claim had been backed by only one witness, and she therefore could not claim property (*māl*) of an absentee. Ibn 'Abd al-Ṣamad held that the 100 *mitqāl* had been a deposit in trust (*amāna*), but not owned by the absentee and therefore should be handed to Fāṭima. The situation was different with the two *mudd* of wheat, which she could not claim from the absentee since this was «obligation against obligation» (*dayn bi-dayn*).²²⁹ With the greatest degree of differentiation, Ibn Mālik held that, once the agency had been certified, Fāṭima should have the right to swear to her claim and then receive her money, and that the rest should go to the agent as trustee. He argued that testimonial evidence and the acknowledgement of the agent supported her claim, which would grant her the right of an oath according to the *Muwaṭṭa'* and other texts.²³⁰ We do not know the judge's ruling, but it seems very unlikely that the sum remained deposited with the original trustee.

This was not the only claim presented to the Cordoban market inspector for a sum which had been deposited in favor of an absentee. Once a ruling had been

²²⁷ *Aḥkām*, 733; according to Ibn Sahl, Ibn 'Attāb held this view because he did not consider al-Bagānī to be a trusted (*ma'mūn*) agent, *ibid.*, 736.

²²⁸ *Aḥkām*, 735.

²²⁹ *Aḥkām*, 734, this answer was vehemently rejected by Ibn Sahl as ignorant, *ibid.*, 736.

²³⁰ *Aḥkām*, 735.

passed to such an effect, the claim for it need not be presented to the same judge who had issued the ruling of deposition. At the end of the year 456/1064, ‘Abd Allāh b. Aḥmad b. Sa‘īd claimed before the market inspector, here *ṣāḥib al-aḥkām*, Ibn Ḥarīṣ a sum deposited for his cousin ‘Alī b. Aḥmad b. Sa‘īd Ibn al-Kharrāz, which he had inherited from their cousin Muḥammad. The former *qāḍī al-ḡamā‘a* Ibn Sirāḡ had the death of Muḥammad b. ‘Alī b. Sa‘īd²³¹ and his legal heirs, namely his wife, one sister and his two cousins ‘Abd Allāh and ‘Alī, certified on Monday 18th Dū‘l-Qa‘da 454 (November 19, 1062). The share of ‘Alī, who had lived on the East coast of al-Andalus for a long time, was deposited with a trustee by orders of the *qāḍī al-ḡamā‘a*. Shortly after the death of the *qāḍī al-ḡamā‘a* Ibn Sirāḡ in the middle of Šawwāl 456 (end of September 1064) —and this is more than coincidence— ‘Abd Allāh claimed the share of ‘Alī, who had died before the cousin he was supposed to inherit from. Since *sunnī* Islamic law does not acknowledge the concept that an already deceased heir is represented by his descendants,²³² the claimant would have been entitled to this share as the sole cousin of the deceased. To substantiate his claim, he presented an *istir‘ā‘* document from Dū‘l-Qa‘da 456 (which began on October 15, 1064), in which witnesses attested, on hearsay from very different sources (*bi-l-samā‘ al-mustafīḍ*), that ‘Alī had died three years before that document was drawn up.²³³ Muḥammad b. Yaḥyā b. Rifā‘, the trustee for the deposited share, acknowledged that fact in court and did not pose any legal problems.

In answering the questions posed by the market inspector Ibn Ḥarīṣ, the jurists basically agreed that the death of ‘Alī had to be certified in court and that his heirs had the right to be heard in court. This being achieved without further problems, the claimant should receive the deposited share from the trustee.²³⁴ This meant, however, that an immediate return of the deposit was not possible. The claimant ‘Abd Allāh had two children of his cousin ‘Alī, one absent son and a daughter living in Cordoba, certified as his heirs. The absent son obviously was not summoned to court, and the daughter did not object against ‘Abd Allāh receiving the deposited share of her father, which he eventually did. Considering the fact that the *qāḍī al-ḡamā‘a* Ibn Sirāḡ’s ruling of the case acted as if the absent cousin ‘Alī was still alive, although his daughter lived in Cordoba and

²³¹ Possibly the *mubarriz* witness Muḥammad b. ‘Alī b. Sa‘īd b. Ibrāhīm from Cordoba (d. 452/1060), Marrākuṣī, *al-Ḍayl wa-l-takmilā*, vol. VI (ed. I. ‘Abbās, Beirut 1973), no. 1202.

²³² Schacht, *Introduction*, 170, Santillana, *Istituzioni*, II, 514-517.

²³³ See *Aḥkām*, 628, for the text of the document; on *samā‘ mustafīḍ* compare Santillana, *Istituzioni*, I, 55.

²³⁴ Ibn ‘Attāb wanted to postpone ‘Alī’s right to be heard in court, *Aḥkām*, 627; other jurists did not take up this aspect.

witnesses later testified that they had heard of his death, it was probably less a matter of knowing when he had died in his domicile on the east coast of al-Andalus, but rather a matter of accepting this information and those persons bearing it as witnesses. The claimant must have waited until the death of the *qāḍī*, who had denied him the share, and then collected witness testimony for his claim before the market inspector.

Whereas in the former case the presiding *qāḍī* of the first proceedings had already died during the second proceedings under Ibn Ḥarīṣ, another inheritance dispute was brought to the market inspector although the *qāḍī* originally dealing with it was still in office. The agent of the widow of ‘Abd Allāh Ibn Abī Zayd complained before the market inspector Ibn Ḥarīṣ that the amicable settlement concerning her husband’s inheritance, which had been ratified by the *qāḍī al-ḡamā’a* Ibn Baqī (456/1064-461/1069), had been broken by her brother-in-law and his mother. The latter party held that the settlement contradicted the law and therefore was void. After the death of ‘Abd Allāh Ibn Abī Zayd, his widow ‘Ā’īsa, his mother Ṣafiyya and his brother Aḥmad were certified as legal heirs. For the division of property, the widow made Muḥammad al-Quraṣī her legal agent, and the mother delegated this task to her son Aḥmad. Furniture and clothing of the deceased were sold for silver coins to the value of 300 gold dinar and two vineyards yielded 110 gold dinar, which Aḥmad also gave to his mother Ṣafiyya. The widow’s agent agreed to this sale with his signature, but claimed 50 *mitqāl* as a debt to his client, which the deceased still owed to his wife as part of her *kālī*, the deferred dower.²³⁵ Aḥmad then demanded that the widow take the oath that she had neither received this sum nor given it as a present to her husband. At this point, events in court must have escalated, since both parties accused the other of withholding property from the inheritance: the widow’s agent denied she had withheld 50 *mitqāl* from the sale of Malagan yarn and in turn claimed that the horse was part of the inheritance and the black slave belonged to the widow. Aḥmad alleged that the horse was his and the slave had been bought by the deceased, which made him part of the inheritance. The *qāḍī al-ḡamā’a* had all the property of the widow certified, and both parties came to the following amicable agreement: Aḥmad was to pay 70 *mitqāl* to the agent of the widow, was to receive the slave and all allegations against both sides were to be dropped. The remaining dower should be paid with the silver coins from the sale of the inheritance, but only after real estate (*aṣl*) and movable property (*māl*)

²³⁵ On *kālī*, compare Santillana, *Istituzioni*, I, 220.

of the deceased had been certified. Before that, however, the widow was to take the oath that her deceased husband still owed her the deferred dower.

Both agents agreed to this settlement in a binding manner, and the agent of the widow received 39 *mitqāl ḥākīmī*, the currency once stipulated in the wedding contract, and the slave in turn now belonged to mother and son.²³⁶ Both agents ruled out further claims and court proceedings except the widow's oath and the certification of the inheritance. The *qāḍī al-ḡamā'a* Ibn Baqī had all steps of the proceedings certified in court and notarized in a document of agreement from Ṣafar 457 (January 1065). Before the widow had sworn to her claim, however, the other side broke the agreement and she filed a claim for the withheld items and fulfillment of the agreement. Summoned before the market inspector, Aḥmad argued that the stipulations of the agreement were irregular (*fāsid*), which the widow could only counter with the argument that all agreements were valid according to prevailing practice (*sunna*).

Most juriconsults indeed held the settlement signed by the *qāḍī* to be irregular (*fāsid*) and that it had to be annulled (*nasakha*): for Ibn al-Qaṭṭān, even the sale of the vineyard and its offsetting (*ṣarf*) the dower was irregular, since Mālik had forbidden the selling of inheritance before all debts had been assessed.²³⁷ Contradicting him on this point, Ibn 'Abd al-Ṣamad held that the sale of the inheritance was licit, since it was not distributed among the heirs but served to liquidate (*iḡtīmā'*, literally «collecting») the inheritance and to efface the debt of the dower. All other actions and provisions, however, he considered void, since the widow had not yet sworn to her claim for the dower, which resulted in an —illicit— «postponed change of obligations» (*ṣarf muta' akhkhār: dayn bi-dayn*). The widow had to return the money from the sale and the whole case should be reconsidered.²³⁸ Ibn Mālik approved of this latter opinion that the contract was void, but conceded to the judge the right to sanction the settlement according to his own discretion (*al-iḡtīhād ba'd al-istikhāra*). In order to avoid its annulment, one could, on the basis of the Koran, apply the concept of *salaf*, a sale with deferred delivery.²³⁹ Only the prestigious jurist Ibn 'Attāb held the settlement between widow and other heirs to be valid, since only God could invalidate any legally binding agreement.²⁴⁰ Unfortunately, we do not know whether the market inspector had jurisdiction over the contractual agreement sanctioned by a *qāḍī*, we also cannot say whether he in fact did invalidate it; Ibn

²³⁶ *Aḥkām*, 843f., what happened to the 70 *mitqāl* is not known.

²³⁷ *Aḥkām*, 846.

²³⁸ *Aḥkām*, 847.

²³⁹ *Aḥkām*, 847, according to Ibn Sahl, *ibid.*, 850, this was Koran 4,128 and 4,114.

²⁴⁰ *Aḥkām*, 845.

Sahl did not consider this point to be important for the juridical discussion of the case. Similar settlements between heirs seem to have occurred quite frequently.²⁴¹

Another inheritance dispute concerned a small house still inhabited by some heirs, which others sued to have vacated in order to reach a better price for it. The unnamed market inspector (*ṣāhib al-aḥkām*) consulted the jurists on such a case, in which some heirs of Khalaf b. Sa'īd had demanded an assessment of the house for sale and claimed that this should be done in an uninhabited state. The other group had consented to the assessment, but insisted on living in the house for rent.²⁴² Ibn 'Attāb held with his teachers that a house too small for partition should be vacated by its inhabitants and sold in such a state, unless strangers agreed to rent the house on short notice under the condition that it may be sold.²⁴³ Ibn al-Qaṭṭān, on the other hand, considered the high damage caused by the loss of rent and suggested an agreement between the heirs on a sum of rent. Should this fail, the house had to be vacated and offered publicly for rent under the reservation of a later sale. The highest bidder could live in the house and had to pay the heirs in proportion to their shares. The heirs, however, had the right to overbid this rent and live in the house.²⁴⁴ Such constellations must have been quite frequent in a society in which the law of inheritance confronted the widow living in her husband's house with his other agnatic heirs, who did not belong to the same household but could demand a partition of the inheritance. The role of the market inspector in these cases was not to determine the inheritance and its partition as such, but he was consulted in aspects connected to the selling of the inherited property.

Disputes between neighbors were also brought before the market inspector. There, legal solution was not based on contractual law, but considered on the basis of the principle «to prevent detriment without causing undue disadvantage» (*lā ḍarara wa-lā ḍirāra*).²⁴⁵ In the first case of this kind, Yahyā b. Ğa'far b.

²⁴¹ Compare standard forms in Ibn al-'Aṭṭār, *Wāṭā'iq*, 428 ff., on the settlement between widow and other heirs; see also Ibn 'Abd al-Barr, *Kāfi*, 451f. A case of refused settlement in *Aḥkām*, 210-222, slightly abbreviated in Wanṣarīsī, IX, 400-404.

²⁴² Ibn Sahl, *Aḥkām*, 730-732. This case may well have happened before Ibn Sahl's employment as a scribe under Ibn Ḥarīṣ in 456/1064, since he cites the case from a copy of Ibn Mālik and did not name the judge.

²⁴³ *Aḥkām*, 731.

²⁴⁴ *Aḥkām*, 731f. Ibn Mālik agreed with this response, which he claimed to be the opinion of the Mālikī school.

²⁴⁵ On this tradition from the Prophet, compare Mālik's *Muwatta'* in the recension of Yahyā b. Yahyā al-Layṭī (ed. S. al-Laḥḥām, Casablanca 1989), nos. 1461, 1540; on the legal concept i.e. «to prevent detriment caused by intruding upon other's rights, but not for excessive disadvantage to the other side», see Santillana, *Istituzioni*, I, 380f.

Muḍimm and his wife Hind alleged that their neighbor Iṣrāq, a client (*mawlā*) of Muḥammad b. Ḥubbā,²⁴⁶ had recently attached some stairs to the northern wall of their estate, situated in the Abū Riyāḥ Mosque Quarter in the old city of Cordoba. They claimed that these stairs leading to one of their neighbor's rooms damaged their wall. In addition, the edges of two thresholds and the beams of a room had been inserted into the ceiling of their reception hall; and the smoke caused by the recently established oven in that room also damaged them. Iṣrāq acknowledged her neighbors' right to an intact wall, but claimed that stairs and oven had been long established. Aside from this acknowledgement, it was certified in court that the ceiling belonged to the claimant's real property and, to the knowledge of these witnesses, had not been sold. Two witnesses testified in favor of the claimants that neither thresholds nor beams had been attached to the wall, and one of them added that he knew the wall in that condition twenty years ago. The defendant in turn presented an *istir'ā'* document whose witnesses attested to knowing that the present situation, with the stairs and beams and thresholds inserted into the ceiling, had existed for more or less 30 years. Only one of these latter witnesses, however, was accepted by Ibn Ḥarīš.²⁴⁷ Ibn 'Attāb and Ibn al-Qaṭṭān held that the defendant had not succeeded in establishing her claim and that a *qaḍā'* ruling should be made to dismantle these new constructions and to restore the earlier situation. Ibn al-Qaṭṭān argued that the claimants had to take the oath because of the legal doubt (*šubha*) caused by the one witness in favor of the defendant, but Ibn 'Attāb did not hold an oath to be necessary. Ibn Mālik held the testimony in favor of the claimants to be without legal consequences, since it attested to a very old situation. If constructions actually were from that period, they would be sanctioned by their age (*istaḥaqqā bil-qidm*). Since however the defendant had not established in court that the constructions were old, the preponderance of legal evidence returned to the claimants, who could take the oath that the constructions had been recent. This would result in their dismantling. But they could also refuse to swear, which—unspokenly—would result in preserving the status quo. In the end, Ibn al-Qaṭṭān and Ibn Mālik came to the conclusion that the claimants could only have the constructions removed if they took the oath that they were recent ones. Ibn 'Attāb opted against the oath,²⁴⁸ and we are not informed about the judge's

²⁴⁶ Variation «Ḥayyī», both not found in biographical dictionaries.

²⁴⁷ On this case, see Ibn Sahl, *Aḥkām*, 1071-3, *Nawāzil*, 53f., *Waṭā'iq fī šu'ūn al-'umrān* (ed. M. Khallāf, Cairo 1983), 82-86.

²⁴⁸ This is totally ignored by Khallāf in Ibn Sahl, *'Umrān*, 24. The juriconsults did not deal with the possibilities Khallāf presents. A continuation of the proceedings with new evidence cannot be ruled out, of course, but this must remain speculation.

decision. It is important to say that testimonial evidence in this case was not rejected because it was contradictory, but for legal reasons in each individual testimony.²⁴⁹

Another case before the unnamed *ṣāhib al-aḥkām* shortly after 462/1070²⁵⁰ dealt with the damage caused by people looking into their neighbors' premises in the densely populated old quarters of the city. Two sons of Ibn al-Mīrānī²⁵¹ sued their neighbor Fāṭima because people could reach a forward extended roof of her house by a door, sit there and look from that into their own premises. The sill, *raff*,²⁵² of this roof terrace was so near to their own roof that one could even climb over and look into their courtyard. Witnesses certified in court that this was a substantial detriment to the claimants. The husband of the defendant, Abū l-Qāsīm al-'Umarī, who was her legal agent in this case, had his own witnesses certify, on the other hand, that this door was not causing detriment to the neighbors: this roof faced a different direction and one could not see anything of the neighboring piece of real estate. The claimants could not, for any reason, reject these witnesses, and referred to what habitual practice (*sunna*) had made obligatory. The defendant also stated in court that no one ever went on this roof, but the claimants asserted that they had seen persons there who behaved in a disgraceful manner.²⁵³

Considering these contradictory testimonies, both jurisconsults, Ibn Sahl and Ibn Farāğ, held that the testimony of detriment took precedence over its denial,²⁵⁴ and that the detriment must be ended. But under the principle of *lā ḍarara wa-lā ḍirāra*, the detriment in this case was not so substantial that the door had to be removed. The judge decided to have a big balustrade (*ṣarğab*) installed in front of the door to prevent access to the roof. In this, he followed the opinion of the jurisconsult Ibn Farāğ, who referred to a similar decision of the *qāḍī al-ğamā'a* Ibn Zarb (d. 391/1001).²⁵⁵ Ibn Sahl, who in his own *fatwā* had suggested

²⁴⁹ But, see Khallāf in Ibn Sahl, 'Umrān, 24.

²⁵⁰ Both jurists in this case, Ibn Farāğ and Ibn Sahl, had become members of the *ṣūrā* after the deaths of Ibn 'Attāb (462/1069), Ibn al-Qaṭṭān (460/1068) and Ibn Mālik (460/1068).

²⁵¹ A certain Ibn al-Mīrānī al-Balawī (d. 428/1036-7) is mentioned by Ibn Baṣkuwāl, *Ṣila* no. 89.

²⁵² Not «rabb», as in Ibn Sahl, 'Umrān, 111.

²⁵³ Ibn Farāğ refers to this in his *fatwā*.

²⁵⁴ If, however, the witnesses of a denial had a higher integrity, so Ibn Farāğ in his response, court witnesses and experts had to go to the site and see whether one could look into the neighbors' buildings.

²⁵⁵ Ibn Sahl, 'Umrān, 112f. This decision was made according to discretionary opinion (*istiḥsān*) and not authoritative rulings; Ibn Zarb to the *qāḍī* Ibn al-Ṣaffār (d. 429/1037-8), cited by Ibn Sahl, *ibid.*, 115.

blocking the door with a barrier, consented to the solution finally taken.²⁵⁶ This case is a good example of what was socially acceptable in Cordoban society.²⁵⁷

In none of these disputes between neighbors was the claim of detriment challenged at the level of religious considerations, as happened in the following case: someone complained to the market inspector Abū 'Alī Ibn Ḍakwān²⁵⁸ about Sulaymān al-Ṣāqqāq who ascended to the roof of a mosque near his home in the middle of the night, called for prayer and prayed aloud until dawn. The claimant asserted that this conduct was a detriment to the neighbors (*ḍarar 'alā al-ḡirān*). Sulaymān, when asked by the judge, acknowledged his behaviour, but alleged that he did this only for one hour. Sulaymān was a follower of Abū'l-'Abbās Aḥmad b. Abī'l-Rabī' al-Ilbūrī, a successful preacher (*wā'iz*) in the Great Mosque of Cordoba, who died there in 432/1040.²⁵⁹ When Ibn Ḍakwān consulted the jurists, two of them, Ibn Ḡurğ and Ibn Daḥḥūn, were favorable to the complaint, both on the grounds that Sulaymān's conduct deviated from that of his devout predecessors. But two other jurists, al-Masīlī and Ibn 'Attāb, supported the defendant's behaviour as pious conduct.²⁶⁰ The striking fact that this complaint was treated as a question of religion can be seen in its relation to the preacher Ibn Abī'l-Rabī', whose sudden death during one of his sessions in the Great Mosque only a few years later—the claim against Sulaymān was before the death of Ibn Daḥḥūn and al-Masīlī in 431/1039—had caused turmoil among the common people.²⁶¹ Contrary to Marín's interpretation, al-Masīlī's objection, that a case like this should not be presented to the worldly power (*sulṭān*), was not directed against the *qāḍī* jurisdiction²⁶² but against the market inspector Ibn Ḍakwān in his capacity as agent of the political power. For all practical aspects of jurisdiction, we should not forget that the case was filed as a

²⁵⁶ For this case, see Ibn Sahl, *Aḥkām*, 1089-1091, 'Umrān, 111-115, *Nawāzil*, 61f.

²⁵⁷ For a discussion on neighbors' rights, see the juridical opinions given to a case before al-Ḥasan Ibn Ḍakwān during his term as *qāḍī* after 435/1043, Ibn Sahl, *Aḥkām*, 1080-89, 'Umrān, 98-111, *Nawāzil*, 56-60.

²⁵⁸ The text refers to *al-wazīr al-qāḍī* during his time in the *khuṭṭat aḥkām al-sūq*, 'Umrān, 53. This explains why he is called *qāḍī* in the source. He became *qāḍī* in 435/1043 after the death of most of the jurisconsults in this case, Ibn Baṣkuwāl, *Ṣīla*, no. 312, Ibn Sa'īd, *Mugrib*, I, 160f. (no. 103), and *Aḥkām*, 7.

²⁵⁹ Ibn Baṣkuwāl, *Ṣīla*, no. 100, Qāḍī 'Iyād, *Tarīb*, VIII, 39, but not *al-muqri'* Abū 'Umar Aḥmad b. Abī'l-Rabī' from Baeza, who died in 446/1054 in Almeria, Ibn Baṣkuwāl, *Ṣīla*, no. 112.

²⁶⁰ Ibn Sahl, *Aḥkām*, 1032-35, *Nawāzil*, 34-36, 'Umrān, 53-63; the doctrinal considerations of this case are well explained by Marín, «Law and Piety: a Cordovan *Fatwā*», in *British Society for Middle Eastern Studies Bulletin*, 17 (1990), 129-136.

²⁶¹ Qāḍī 'Iyād, *Tarīb*, VIII, 39, and Ibn Baṣkuwāl, *Ṣīla*, no. 100.

²⁶² Marín, *Piety*, 136, for al-Masīlī's argument, see 'Umrān, 59.

complaint about public behaviour to one's neighbors' detriment, and that al-Masīlī developed his argument in the juridical religious discourse.

If the former case was a matter of moral conduct (*ḥisba*) and its enforcement (*iḥtisāb*),²⁶³ the power of this concept for judicial practice can best be seen in the following case: a *muḥtasib* complained against Aḥmad b. 'Alī b. Dalhāt, who had acknowledged his vow that the brother of his wife would never enter his house again. He alleged that the brother-in-law had later entered the house, and that Ibn Dalhāt had broken his vow.²⁶⁴ In order to substantiate his claim, the *muḥtasib* presented to the market inspector Ibn Ḥarīš an *istir'ā'* document which was dated 1st Dū'l-Ḥiğga 457 (November 3, 1065). Its witnesses attested that they heard Ibn Dalhāt acknowledge this vow and that they saw the brother-in-law later enter his house. When some witnesses repeated their accusations personally in court, the market inspector ordered that the *istir'ā'* document be certified and its witnesses checked for their integrity in the *tazkiya* procedure. Ibn Dalhāt was heard in court and given several periods for his defence, but all we know is his assertion that «the witnesses knew of his living with his wife after the oath until the beginning of Ṣafar 458 (beginning of January 1066)», which was not a counter-claim.²⁶⁵ Some jurisconsults had demanded a 15-day limit by which time certification of the claim was to be accepted by the court. Ibn Dalhāt must have seen his chance to escape a sentence by leaving the city for Baeza (*Bayyāsa*), a town east of Cordoba.

All jurists who were consulted by Ibn Ḥarīš held that Ibn Dalhāt «broke his vow» (*ḥanaṭ*), and that this had to be effaced by expiation (*kaffāra*).²⁶⁶ Ibn 'Attāb offered two possibilities to the fugitive: First, he could return to the market inspector before a *qaḍā'* ruling was passed. The market inspector should then rule that he give a third of his property to the poor and go on pilgrimage to Mecca. As expiation, he could choose between liberating his slaves or feeding and clothing 15 poor people, otherwise he should fast three days without interruption.²⁶⁷ This ruling was only possible after the wife had been heard at

²⁶³ See Ibn 'Attāb in *'Umrān*, 60f.

²⁶⁴ On this case, see Ibn Sahl, *Aḥkām*, 441-445; Wanšarīsī, *Mi'yār*, IV, 80-82, without any names or date.

²⁶⁵ Ibn Sahl referred to it in his commentary on when the waiting period of the divorced wife should begin. *Aḥkām*, 443f.

²⁶⁶ On Mālikī rules about violations of an oath that needed expiation, see e.g. Ibn 'Abd al-Barr, *Kāfi*, 193; on oaths generally, see Schacht, *Introduction*, 159. For a case before the *qaḍī* on whether a man had committed *ḥanaṭ*, see Ibn Sahl, *Aḥkām*, 459f., or Wanšarīsī, *Mi'yār*, IV, 84f.

²⁶⁷ These possibilities are identical to those enumerated by Ibn 'Abd al-Barr, *Kāfi*, 198, with the exception that the latter stipulated the feeding of 10 poor people.

court as well. Secondly, the *qāḍī*'s ruling, on the other hand, was that he should divorce his wife definitively and liberate all his slaves. The judge could postpone legal hearings for the defendant, but did not have to do so; whatever decision was made had to be noted in an appendix to the ruling.

Ibn al-Qaṭṭān voted that the market inspector should rule to divorce the couple and liberate the man's slaves. If the clearance (*tazkiya*) of witnesses had been done through persons other than usual, a point not specified in the market inspector's report, Ibn Dalhāt and his wife had to be heard before the final ruling.²⁶⁸ This precaution may indicate that the witnesses of the *tazkiya* in fact had differed in this case. Legally speaking, the opinions of Ibn 'Attāb and Ibn al-Qaṭṭān did not contradict each other in the eyes of their contemporary Ibn Mālik. Since Ibn 'Attāb mentions a possibility of circumventing divorce, we may conclude that Ibn Dalhāt had not vowed to separate from his wife,²⁶⁹ but that this was a penalty inflicted upon him for his breach of vow. We are unfortunately not informed about the outcome of this case. Assessing the possibilities given to the defendant, he might either return to Cordoba to await the ruling by the market inspector, or stay where he was and hope to escape penalty. But then a *qaḍā'* ruling could be inflicted in a different city as well.²⁷⁰

Considering these cases before the Cordoban market inspector, we see his efforts to comply with the rules of evidence established by Mālikī *fiqh*. In this respect, we cannot clearly distinguish between claims in contractual law and other disputes, even if, in matters of dispute, testimonial evidence was more often subject to doubt or suspicion. To a certain degree, the jurisdiction of the market inspector seems to have overlapped with that of the *qāḍī al-ḡamā'a*. However, indications that the market inspector was subordinated to the *qāḍī* in a hierarchical sense cannot be found in the sources for the period studied here. Or how would one explain, for example, that the claim for breach of an agreement, which was sanctioned by the *qāḍī*, was dealt with by a—subordinate—market inspector? And why, in such a case, did the market inspector certify to all procedural steps in a case he took over from the deceased *qāḍī* and even reject one of the witnesses formerly accepted by

²⁶⁸ *Aḥkām*, 443. Ibn 'Abd al-Ṣamad had voted similarly, according to Ibn Sahl.

²⁶⁹ The Mālikī penalty for this, 15 lashes, was not mentioned in any of the answers.

²⁷⁰ Compare the case of Ibn Ḥātim, *Aḥkām*, 1150-7, on this case, see also Fierro, M. «El proceso contra Ibn Ḥātim al-Ṭulayṭulī (años 457/1064-464/1072)», in *Estudios Onomástico-Biográficos de al-Andalus*, 6 (1994), 187-215, esp. 191 and 197. The market inspector did not have the legal power to write authoritatively to judges in other cities, Ibn Sahl, *Aḥkām*, 7. This may have meant that his rulings were not to be imposed outside the area of his purview.

the *qāḍī*? Yanagihashi's thesis of a «hierarchy of judgments»²⁷¹ is based on a wrong understanding of an assertion Ibn 'Attāb made when asked by Ibn Sahl whether a *ḥākim* had to reexamine the facts of a case upon assuming the office of *qāḍī*. After answering «no», Ibn 'Attāb informs Ibn Sahl that this was how he had responded to Abū 'Alī Ibn Ḍakwān when the latter was promoted from the *ṣurṭa wa-sūq* jurisdiction to become *qāḍī*.²⁷² This event took place in 435/1043,²⁷³ and it is clear from the context that the judge Ibn Ḍakwān consulted the jurist Ibn 'Attāb. The excerpt does not refer to «judgments of the police or the market inspector which subsequently were raised to the status of judicial decisions in a *qāḍī* court».²⁷⁴ But, if we rule out a hierarchical structure of offices, this does not mean that the *qāḍī* could not annul a binding ruling of the market inspector if it contradicted the law. On the contrary,²⁷⁵ but such an annulment was based on legal considerations by the jurists, and not on a hierarchy of orders.

One way to understand the various judicial competences is to compare the legal quality of rulings. Unfortunately, hardly any rulings are mentioned, neither for cases before the *qāḍī* nor before the market inspector. We may learn from juridical sources that the revision of a ruling would be legally possible, if the judge was generally not considered «just», or if evidence leading to the ruling proved to be false.²⁷⁶ If we consider the diligence with which the market inspector had various elements necessary for a legal title substantiated according to Mālikī law, e.g. circumstances of inheritance, borders of a piece of real estate, etc., we must assume that rulings passed by the market inspector on these grounds and in accordance with the jurists' views were not easily revised by other judges, not even by the *qāḍī al-ḡamā'a*. We do not really know whether the market inspector had the capacity to pass a *qaḍā'* ruling.²⁷⁷ There are indeed cases in which the

²⁷¹ Yanagihashi, H., «The Judicial Functions of the *Sulṭān* in Civil cases according to the Mālikīs up to the Sixth/Twelfth Century», *Islamic Law and Society*, 3 (1996), 41-74, esp. 71.

²⁷² *Wa-biḍālīka aftaytu Abā 'Alīyi bna Ḍakwānin ḥīna rtafa'a min aḥkāmī ṣ-ṣurṭati wa-s-sūqi ilā aḥkāmī l-qaḍā'*, cf. Ibn Sahl, *Aḥkām*, 7.

²⁷³ Ibn Baṣkuwāl, *Ṣīla*, no. 312.

²⁷⁴ Yanagihashi, *Judicial Functions*, 71.

²⁷⁵ For one example, see Khuṣānī, *Quḍāh*, 127.

²⁷⁶ On Judicial review in general, see Powers, D., «On Judicial Review in Islamic Law», *Law & Society Review*, 26 (1992), 315-341; esp. for Mālikī *fiqh* in the Cordoban context, see my *Gerichtspraxis*, 144-6, 156f.; compare also the case of the farmer who claimed for joint ownership after a first ruling had been passed, cited above.

²⁷⁷ On *qaḍā'*, see Johansen, B., «Wahrheit und Geltungsanspruch: Zur Begründung und Begrenzung der Autorität des *qāḍī*-Urteils im islamischen Recht», in: *La giustizia nell'alto medioevo II (secoli IX-XI). Quarantottoquattresima Settimana di studio: Spoleto 11-17 aprile 1996*,

jurisconsults demand such a decision. But this may only indicate that all conditions for a *qaḍā'* are given in these specific cases, which need to be transferred to the *qāḍī al-ḡamā'a* for such a ruling. When the market inspector in fact did pass a ruling in these cases, it was not explicitly called *qaḍā'*.²⁷⁸ And in the case of the fugitive Ibn Dalhāt, an explicit difference between the ruling of the market inspector and a *qāḍī* ruling was made.²⁷⁹ In principle, a *ṣāḥib al-sūq*, appointed by the same ruler who appointed the *qāḍī*, could pass a valid *qaḍā'* on property and land (*amwāl wa-arḍ*) if authorized to do so, no matter whether there was a *qāḍī* or if he had died.²⁸⁰ This, however, was subject to a political decision, and not part of the inherent authority of a *ṣāḥib al-sūq*.²⁸¹ It may be significant for the strong position of the market inspector in the field of civil jurisdiction in the Cordoban context that, in the period of the early cases, no *qāḍī* was appointed to the city between Ša'bān 430 and Muḥarram 432 (end of April 1039 until September 1040).²⁸² Half a generation later, the Ğahwarid ruler Abū al-Walīd Muḥammad had his *wazīr* Ibn al-Saqqā' administer the *qāḍī*'s jurisdiction for 6 months beginning with the death of the *qāḍī* Ibn Zarb on Friday 25th Raġab 447.²⁸³ Both events indicate the ruler's desire to prevent a strong *qāḍī* who might become a rival for power within the city.

Finally, we must distinguish between the market inspector's capacity as a judge in civil matters concerning contracts or disputes and his function of supervising the markets and preventing fraud and false measures. In this latter function, he had to act preventively and could start an inquiry without any person having presented a claim before him.²⁸⁴ When he acted «to promote the good and forbid the evil», the market inspector was not bound to the procedural law of Mālikī *fiqh*, which, on the other hand, he complied with as a judge in civil cases. Yet many regulations of market supervision in some of the so-called *ḥisba* manuals are based on the legal teachings of Mālik or later

Spoletto 1997, 975-1065, esp. 1015-22, who asserts a lack of discussion in the early Mālikī school, *ibid.* 1022.

²⁷⁸ The market inspector did not transfer the case of contradicting testimony on the defects of a house to the *qāḍī*, but decided it on his own, see above, 309.

²⁷⁹ See above, 334.

²⁸⁰ Bāġī, *Muntaqā*, V, 226, in reference to Ṣaḥnūn.

²⁸¹ To demonstrate the fluidity of authority ascribed to these offices, one may refer to the much later al-Qarāfī, who rejected the idea that the *ṣāḥib al-ḥisba* should rule on weddings and human transactions (*mu'āmalāt*), *Tamyīz*, 168.

²⁸² Qāḍī 'Iyāḍ, *Tarīb*, VIII, 87, and Ibn Sa'īd, *Mugrib*, 70 (no. 14) and 160 (no. 102).

²⁸³ Ibn Sa'īd, *Mugrib*, I, 161, no. 104.

²⁸⁴ Compare references in Part I, notes 135 and 146, as well as Johansen, *Vérité*, 129-32.

Mālikī jurists,²⁸⁵ and thus reflect a strong orientation towards the *fiqh*. The Cordoban market inspector of the 5th/11th century is an example of how the legal norms elaborated by the jurists influenced spheres of jurisdiction which strictly speaking, did not belong to the «religious» *qāḍī* justice. The scope of the jurists' law was in practice not restricted to the *qāḍī*. The application of the *fiqh* by the market inspector may be seen as a link between an uncompromising *fiqh* jurisdiction and that of a mere utilitarian one. In effect, the market inspector was an officer who exercised what later jurists called *siyāsa šar'īyya*, the administrative justice oriented towards and inspired by the sacred law.²⁸⁶

ABSTRACT

Using court cases from Ibn Sahl's judicial decisions collection *al-Aḥkām al-Kubrā* as well as data from biographical and historical sources, the present article examines both history and jurisdiction of the «police and market inspector» (*šāḥib al-šurṭa wa-l-sūq*) in Cordoba.

During the taifa period, this Umayyad expression gave way to the «inspector of judgements» (*sāḥib al-aḥkām*). Through a wide range of more than twenty cases between the years 456/1064 and 464/1072, it is demonstrated how this non-*qāḍī* judge adhered to procedural and substantive law as interpreted by Mālikī *fiqh*.

RESUMEN

Este artículo examina el desarrollo histórico y la jurisdicción del «inspector de la policía y del mercado» (*šāḥib al-šurṭa wa-l-sūq*) en Córdoba a través de los casos judiciales tomados de la colección de dictámenes jurídicos de Ibn Sahl *al-Aḥkām al-Kubrā* y de fuentes biográficas e históricas.

Durante el período de Taifas, esta expresión omeya dio paso al «inspector de sentencias jurídicas» (*sāḥib al-aḥkām*). A través de más de veinte casos, datables entre los años 456/1064 y 464/1072, se demuestra cómo este juez, que no era *qāḍī*, seguía en sus sentencias el *fiqh* mālikí, tanto en las leyes procesales como en la ley sustantiva.

²⁸⁵ See the «*Kitāb Aḥkām al-sūq*» by Yahyā b. 'Umar (d. 289/901), ed. M. Makkī in *Revista del Instituto Egipcio de Estudios Islámicos*, 4 (1956), 59-151, and the «*Risāla fi ādāb al-ḥisba wa-l-muḥtasib*» by A. b. 'Abd al-Ra'ūf, ed. É Lévi-Provençal, *Trois traités hispaniques*, Cairo 1955, 67-116. Compare Chalmeta, *Señor*, 372, and 384; generally on *ḥisba* manuals in al-Andalus, *idem*, 307f., 369-373, 381-387, 415-423, 428-449 and 451f.

²⁸⁶ Vogel, F., «Siyāsa» iii, in: *EP*, IX, 694-6, and Tyan, «Méthodologie et sources du droit en Islam», *Studia Islamica* X (1959), 79-109, esp. 101-6.