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## SHARECROPPING IN THE DAKHLA OASIS

Shari‘a and Customary Law in Ottoman Egypt

*Rudolph Peters*

In this essay<sup>1</sup> I will present and analyse two documents from a family archive found in the town of al-Qaṣr (henceforth, al-Qaṣr) in the Dakhla Oasis. They contain arrangements regarding a sharecropping contract and I will show that these must be regarded as attempts to reconcile legal doctrine with customary practice. The documents were found during clearance activities in connection with the restoration of an early eighteenth-century mud brick house, carried out by the Qaṣr Dakhleh Project (QDP) under the aegis of the Dakhleh Oasis Project. In the rubble of the ruined house a considerable number of objects and written pieces of paper were found.<sup>2</sup> According to local informants, the house was already abandoned before 1940, probably due to its sudden collapse. The pieces of paper are the remains of a family archive belonging to a branch of the Qurashī family. Their study may shed light on the pre-modern history of this little Islamic town. Although much of the paper material consists of scraps or small fragments of documents, there are also many complete or nearly complete documents. These include religious texts, personal letters, magical texts, amulets, and about 170 legal documents or documents regarding financial transactions, dating from 1579 (987 AH) to 1929. The documents have been numbered and placed between glass plates for conservation, and are now stored in the storerooms of the Egyptian Antiquities Organization Inspectorate of Dakhla. My colleague Fred Leemhuis of the University of Groningen, who is in charge of the QDP, asked me to examine and eventually publish the legal material.

Family archives are important for historical research. Their special value is that they give a great deal of information on a specific family and are, therefore, a rich source for social history. Such information cannot easily be culled from public archives, unless these are completely digitized and searchable. But even then, family archives have an added value because they usually contain many documents of minor importance (receipts, IOUs, lists of creditors, etc.) not found in the state archives. The documents found in al-Qaṣr are for these reasons of great significance. In fact, they are unique, since very little is known of the Ottoman history (nor of any

other period) of the town. There are rumours that there exists a privately held manuscript chronicle of the town. However, I have not seen it and cannot judge its value as a source. The holdings of the Egyptian state archives must undoubtedly contain documents relative to al-Qasr. However, since in the main archive, Dār al-Wathā'iq al-Qawmiyya (DWQ), only about 10% of the material has been catalogued, it will be difficult to conduct a specific search. Moreover, the main holdings of this archive, i.e., the documents of the Egyptian government, do not go back further than 1822, when a fire destroyed the then existing records. Shari'a court records exist from earlier periods. Those of the provincial courts are now available either in the DWQ (where they were housed in recent times) or in the Dār al-Mahfūzāt, an archive belonging to the Ministry of Finance. These archives may offer better prospects, but at the moment it is still unclear whether or not the records of the al-Qasr court are preserved, and if so, where they are located.

The legal documents found in al-Qasr consist mainly of contracts, often notarized in court, of receipts of payment of taxes, appointment of proxies, and notes regarding debts or expenses. In addition I have found a few charitable endowment deeds (*waqfiyya*), judicial sentences, and fatwas. The documents that I have studied so far clearly point to the fact that the Qurashī family, or at least that part of it that lived in this house, was mainly involved in agriculture. More than half of the documents are related to agricultural activities: lease or sale of land or of water rights, sharecropping, or the payment of taxes on land or springs and wells. In addition there are some documents regarding the maintenance of a spring and lists made by individual farmers of those from whom they leased water rights. I have found no documents indicating that the family was engaged in cattle breeding, trade, or artisanal production, nor documents related to the sale of the date harvest. The family seems to have belonged to the notables of the town: Among them, there were several judges and administrative sheikhs.

Al-Qasr used to be the main town of the Dakhla Oasis. It is situated about 350 km west of Luxor, halfway between the Nile and the present-day Libyan border. Nowadays the town of Mut has taken over its function as administrative centre. The town of al-Qasr goes back to Roman times, as evidenced by the remains of a Roman wall that were recently discovered and dated. An important source of livelihood was agriculture, made possible by the abundance of springs and wells, located mainly to the south and east of the town. These wells were in private hands, often owned collectively by tens of persons. A substantial part of the documents deals with titles to water, evidently just as important as titles to land.

The inhabitants of al-Qasr followed the Shafi'i school of jurisprudence and the Shari'a court of the town was also Shafi'i. Nearly all of the deeds

that were registered in court bear the name of a Shafi'i qadi, whose main task, like that of other qadis, was notarizing contracts and depositions. From the titles used in the documents it is clear that the local qadis felt themselves to be part of the Ottoman judiciary. They referred to themselves as the deputies (*nā'ib, khalīfā*) of the Ottoman qadi of the Western Oases (*qādī l-Wāḥāt, or al-nāzir fī l-ahkām al-shar'iyya fī kāmīl aqālīm al-Wāḥāt*). This is consistent with the legal practice in Ottoman Egypt before the nineteenth century. The Hanafi qadis appointed to various cities in Egypt would have deputies belonging to the other schools, adjudicating disputes and registering documents according to their own school, but under the supervision of the Hanafi qadi.

The two documents presented here were written with an interval of sixteen years, each on one side of an undamaged piece of paper measuring 15 by 39 cm.<sup>3</sup> The first document is an unofficial copy of a notarized contract. The last sentences mention that it has been notarized (*ṭalab al-ḥukm bihi*) by a qadi. Since there is no heading with the name and the seal of the judge, as we find in other documents, I assume it was an unofficial copy of the original one. It is signed by four witnesses. The second document, written overleaf, is not notarized and is signed by two witnesses. One of the parties is Šāliḥ Muḥammad Šāliḥ al-Qurashī, whose papers are part of the al-Qurashī collection. He was a farmer and appears between 1771 and 1801 in eight documents of the collection, all of them contracts with regard to land, palm trees, or water rights, and without exception concluded with relatives. According to these documents, he cultivated plots south and west of the town.

The documents are not only of interest for social history, they are also relevant for legal history, or rather for the history of the application of the Shari'a. They show how local jurists tried to reconcile customary practices with the legal doctrines of Islamic jurisprudence. In Islamic law, according to most schools of jurisprudence, there is no general theory of contract because the law regards as valid and binding only those contracts that are expressly mentioned and permitted in the law. If parties conclude contracts not recognized by the law, such contracts are void and cannot be enforced in a court of law. Thus, classifying customary agreements in accordance with the Shari'a is important. Since the community of al-Qasr was in the habit of concluding certain sharecropping contracts that were not regarded as valid under Shafi'i law, the jurists sought creative solutions by characterizing these contracts differently. However, these new classifications posed new legal problems. Realizing this, the jurists of al-Qasr also invoked the authority of custom, in the event the binding character of the contract would not be recognized.

The first document runs as follows:

Glory to God alone.

This is a *ja'āla*<sup>4</sup> regarding cultivation (*iṣṭilāḥ*) and a written document regarding customary practice (*iṣṭilāḥ*), whose purport will be specified and whose implications will be explained, [namely], that the honourable Shaykh al-ʿArab Muḥammad Abū Khalīfa al-Muḥājī (?)<sup>5</sup> al-ʿAmrānī (?) has requested that his following statement be witnessed (*iṣhhād*). He has offered a *ja'āla* undertaking and has agreed with both al-Zaynī Ṣāliḥ, son of the late Muḥammad Ṣāliḥ al-Qurashī, and Muḥassib, son of the late Riḍā, with regard to a parcel (*qit'ā*) of land on which there are here and there some old palm trees, in the region of the al-Najābīn spring, south of the town of al-Qasr, and known as the Farmers' Patch (*buq'at al-fallāḥīn*), confined by four boundaries: to the south on the western side [a plot] owned by the heirs of ʿAlī ʿAṭīyya and on the eastern side [a plot] owned by ʿUbayd ʿAbd al-Ghafūr (?), to the north the road (*al-tarīq*), to the east [a plot] owned by his aunt Fāṭima, and to the west the pond, as well as with regard to a piece (*khatt*) of land near the aforementioned spring close to the alleyway (*zuqāq*), confined by four boundaries: to the south the road, to the north [a plot] owned by the heirs of Abū Khāṭir, to the east [a plot owned by] Sulaymān Majīd, and to the west the rest of the piece of land owned by Muḥammad ʿAlī and his co-owners, exactly as here delimited, inherited by the aforementioned Muḥammad from his mother Umbāraka, daughter of the late Muḥammad Fāyid al-Muḥājī, to the effect that the aforementioned persons al-Zaynī Ṣāliḥ and Muḥassib, plant that part of the land that is fallow with various kinds of crops in accordance with their ability and desire and look after the land by guarding, inundating, and fertilizing it [with manure] and by trimming [the plants], and that in consideration of what they have planted, they will be entitled to one third, eight *qirāt*,<sup>6</sup> to be divided among them in three parts, one third for the aforementioned Ṣāliḥ, one third for the aforementioned Muḥassib, and one third for Muḥammad, the landlord (*al-mujāʿil*), on account of the [already existing] plants, and moreover, Muḥammad will also be entitled to two thirds, sixteen *qirāt*, on account of the land and the irrigation (*al-riḍāʿ*). Whatever God—Who is to be praised and Who is exalted—causes to grow, regardless of whether or not it has been planted, will be divided along the lines of the aforementioned *ja'āla* in accordance with the fact that they have agreed upon it (*tawāfaqū*) and consented (*radū*) to it in conformity with the Shariʿa. Now, consent has legal effect (*al-riḍāʿ hukm*). [Moreover], this is the custom (*ʿurf*) of the people of the region and the practice (*iṣṭilāḥ*) of the people of the oasis. It has been enjoined that custom must be followed, at least to the extent that it is regarded as valid. That is the case according to the honourable scholars (*al-sāda al-ʿulamāʿ*) on the basis of any of the

four legal schools because of the words of God—Who is exalted—in his clear Book, addressing the Lord of Messengers: “Keep to forgiveness (O Muḥammad), and enjoin kindness (*ʿurf*) and turn away from the ignorant.” [Q 7:199] [The *jaʿāla* has been concluded] in a valid and legal manner, in a pleasant spirit and a joyful mind (*ʿan ṭīb qalb wa-sharḥ ṣadr*), and was provided with an authorization regarding its being witnessed (*thubūtuḥu*), with the request for a legal ruling (*ṭalab al-ḥukm bihi*) and with a behest for the witnessing of the latter. It was [then] witnessed and that took place and was recorded on the blessed Friday, the last day of excellent month of Ṣafar in the year 1206, twelve hundred and six [28 October, 1791].

#### Witnesses

ʿAbd al-Laṭīf Yūsuf al-Muḥājī  
 Ibrāhīm ʿAbd Allāh Muṣṭafā  
 Muḥammad ʿUthmān  
 Masʿūd Muḥammad al-Muḥājī

The other document reads as follows:

Glory to God alone

A division and an agreement took place between Muḥammad Khalīfa, mentioned overleaf, Ṣāliḥ Muḥammad, mentioned overleaf, and Muḥassib Riḍā, mentioned overleaf, as to all of the shares mentioned overleaf with regard to the third of the plants mentioned overleaf, since one third of the plants were to be divided among those mentioned overleaf in three thirds. Now [add] to which Ṣāliḥ, mentioned overleaf, is entitled is two young Ṣaʿdī palm trees (*wudāya*),<sup>7</sup> a palm sapling (*ʿuzb*) in the middle of the field, and also a pomegranate tree with wood at the south end [of the plot]. [The division took place] in a valid and legal way as the aforementioned persons divided the aforementioned plants before they began to bear fruit. Then Muḥammad Khalīfa undertook to irrigate the aforementioned palm trees (*wudy*) until they bear fruit, [from which moment] every one, pursuant to the stipulations of the *jaʿāla*, shall irrigate in proportion to his share. He [Muḥammad Khalīfa] requested that this accordingly be witnessed (*ishhād*). That took place and was recorded in the month of Rabīʿ al-ākhar, one of the months of the year 1222, twelve hundred twenty two [i.e., between 8 June and 7 July 1807].

As witness thereof

Ibrāhīm Muṣṭafā

As witness thereof

Al-Qurashī ʿAbd al-Ghafūr Ḥusayn [?]

In the first document, the owner of two plots of land, on one of which some palm trees were already growing, promises two other men, on condition that they plant and cultivate trees, a share of  $2/9$  each in what they have planted on the fallow parts of the plots. The landowner takes  $7/9$  of the trees, i.e., his customary share of two thirds increased with one ninth, apparently in consideration of the fact that one plot had already some palm trees on it belonging to him. Part of the arrangement was a stipulation that the landlord will irrigate the plants until the moment they start to bear fruit and that after that moment all parties to the contract shall water the plants in proportion to their shares. Almost all other *ja'āla* documents in the collection include this clause, which was apparently part of the customary law governing this arrangement. That this clause was omitted here must be due to an oversight of the scribe and cannot have been deliberate since in the second document it is referred to as part of the contract.

In the second document, dated sixteen years later, Ṣāliḥ's share is defined and transferred to him. It consists of two young palm trees, one sapling, and a pomegranate tree. The division took place at a time when the palm trees Ṣāliḥ had planted had not yet borne fruit, since, in accordance with customary law, Muḥammad undertakes to continue to water them until that moment. Ṣāliḥ had this contract written on the back of his copy of the original contract. If Muḥassib also had a specific share assigned to him, it must have been recorded on the back of his own copy.

I found eight *ja'āla* documents in the collection. One of them, written in 1866 CE,<sup>8</sup> is a contract in which more than fifty persons, who together own a spring, contract two persons to repair the spring for a share in the property rights. A judge's note in the margin, dated about a year and a half after the contract was concluded, indicates that there were some problems with its implementation: it states that the remuneration is only due after the completion of the tasks and that the person who undertook the task can only claim it from the other parties if he can prove that they are owners of the well. The other *ja'āla* documents,<sup>9</sup> dated between 1773 and 1823 CE, deal with sharecropping of planted trees and are practically identical to the first document presented here, except that most of them include the stipulation about the irrigation.

According to the terms mentioned in the document, it is a typical *mughārasa* contract, that is, a sharecropping contract whereby a landowner agrees with a person (the sharecropper) that the latter plants trees on his land and cultivates them in exchange for a share in them (or, in addition, a share in the land), to be transferred to him after they bear fruit.<sup>10</sup> The question then arises why this contract is called *ja'āla* and not *mughārasa*. In order to answer this we must consider what the different legal schools say about these contracts.

Let us first consider the position of the schools on sharecropping (*muzāraʿa*, *musāqāt*, *mughārasa*).<sup>11</sup> It is a contract that can be construed as either hire of labour or lease of land, both called *ijāra* in the works of jurisprudence. The crucial problem, however, is that it is a contract in which one of the performances, i.e., the wages or the rent, is uncertain, because it involves the future transfer of ownership of objects that do not exist at the time of the contract and whose quantity and value are not precisely determined. This constitutes a form of risk (*gharar*) which vitiates the contract. Therefore, it cannot be a valid lease of land or hire of labour. The Malikis construe it as a form of partnership (*sharika*), but this also brings about legal constraints. However, there exists a Prophetic tradition (*ḥadīth*) that is regarded by most schools as legitimizing an exception to the principle that the performances in a contract must be precisely specified. The *ḥadīth* relates that, after the conquest of Khaybar, the Prophet Muḥammad concluded a contract with the Jews who were living there, stipulating that they could remain on the land and cultivate the palm orchards, but had to pay one half of the crop to the Prophet.<sup>12</sup> The law schools, however, differ on the legal implications of this *ḥadīth*. Most schools allow on the strength of the *ḥadīth* some form of lease of land against a part of the crop. Only Abū Ḥanīfa maintained that such contracts were forbidden. His argument was that the *ḥadīth* is unclear on a number of legal points, and therefore may not be regarded as introducing an exception to a general principle of the law of contracts. For instance, the Jews might have been slaves (who cannot have ownership rights) or the obligation to pay half of the date harvest may have been imposed on them not by contract but by the state as taxation for non-Muslims (*kharāj*). However, Abū Ḥanīfa's students Abū Yūsuf and al-Shaybānī regarded the contract as valid and their opinion became the prevailing one in their school because it was customary practice.<sup>13</sup>

The Hanbalis allow sharecropping contracts (both *muzāraʿa* and *musāqāt*) with hardly any restrictions. The Malikis make a distinction between *muzāraʿa* and *musāqāt*. The former is valid, according to them, but only under certain conditions and by virtue of a rather complicated legal construction. They view it as a composition of three separate contracts: lease, rent, and partnership. The parties must agree on a fixed rent of the land and fixed wages of the labour in order to circumvent the problem of uncertainty of the wages or rent. The rent and wages may be balanced so that neither party is in debt to the other. On that basis they conclude a contract of partnership and share the profit (the harvest, which can be of all types: fruits, cereals, cotton) in equal proportions. On the other hand, a *musāqāt* contract is held to be valid by them without fixing the rent and the wages and for unequal shares between landowner and labourer. However, such a contract may only be concluded with regard to fruit trees.<sup>14</sup> The Shafi'is



do not allow *muzāraʿa* at all, but like the Malikis, regard *musāqāt* contracts as valid, but only with regard to grapes and dates. Al-Shāfiʿī's argument is that the legitimacy of *musāqāt* is a permission by way of exception (*rukḥṣa*) based on the *ḥadīth* (there is also a similar one regarding grapes) and that exceptions to rules may not be extended by analogy. Another controversy is the remuneration of the person who contributes his labour: should that only be a share in the crop (as in the contracts of *muzāraʿa* and *musāqāt*) or the labourer allowed to receive part of the trees that he has planted (as in the *mughārasa* contract)? Malikis and Hanbalis regard the latter contract as valid; the Shafiʿis and the Hanafis do not allow it.

The jurists of al-Qaṣr were obviously well aware of this position of the Shafiʿi school. They therefore tried to cast the contract in another mould, that of *jaʿāla*. The idea of constructing this form of sharecropping in this way must have come from jurists familiar with Maliki jurisprudence. For Maliki jurists point out that the *mughārasa* contract, which they regard as valid, is like *jaʿāla*:

As to *mughārasa*, that is a contract whereby a man hands over his land to another who will plant trees on it. There are three modes of it: (1) hire (*ijāra*), whereby a person plants for the owner for fixed wages; (2) *juʿl* (a synonym of *jaʿāla*, RP), whereby a person plants trees for the owner on condition that he acquire a share of what grows out of it [the saplings]; (3) something between hire and *juʿl*, whereby a person plants for the owner on condition that he acquire both a share of that [planting] and of the land.<sup>15</sup>

It is doubtful, however, that such a legal construction is valid according to the Shafiʿi doctrine.<sup>16</sup> The Shafiʿi jurists define *jaʿāla* as “the undertaking to give a specific remuneration (*juʿl*) for work, regardless of whether it[s amount] is defined and known or unknown and difficult to define precisely” (*iltizām ʿawaḍ maʿlūm ʿalā ʿamal maʿlūm aw majhūl yaʿsur dabṭuhu*). *Jaʿāla* is therefore a legal act that can be used to contract labour for producing a result if the amount of labour required for it cannot be determined. This result may be to restore something, such as the finding and returning of stray cattle or lost objects, or to produce something new, such as the digging of a well until the water appears, or teaching a skill to someone. It differs from hiring labour (*ijāra*) in that for *ijāra* to be valid and binding the amount of work must be specified. The *jaʿāla* contract, therefore, is an exception to the strict rule that in synallagmatic contracts the performances must be known and well defined. The textual basis for the exception is Q 12:72: “They said: We have lost the king’s cup, and he who bringeth it shall have a camel-load, and I (said Joseph) am answerable for it.”<sup>17</sup> In addition there is a tradition according to which the Prophet approved of an arrangement whereby a person who was bitten by a snake undertook

to pay thirty sheep to a person who would recite the Qur'an in order to heal him, in the event he succeeded.<sup>18</sup> The remuneration is only due if and when the desired result has been produced. Jurists stress that *ja'āla* is not a contract but a unilateral legal act of the person who promises the remuneration. He is entitled to revoke his promise at any time until the result has been achieved and the reward is due. However, in order to prevent unfair advantage, he must pay standard wages (*ujrat al-mithl*) if the labour accomplished until that moment is beneficial to him, for instance if the object of the *ja'āla* is the digging of a well until it reaches the water table and the *ja'āla* is revoked before water is reached. According to the Shafi'i doctrine, it is essential for the *ja'āla* that the remuneration is well defined; otherwise, the conditions are the same as for the rent or wages in a contract of lease or employment. And here, I think, lies the crux in the application of the *ja'āla* contract to sharecropping, for the remuneration does not exist at the time of the *ja'āla* and is not well defined.

The document shows that the person who drafted it was familiar with the unilateral character of the *ja'āla*. In conformity with standard practice, the documents in our collection record synallagmatic contracts as declarations of both parties, such as: A has bought from B and B has sold to A. In this document we find only that the landlord requests that witnesses hear that he undertakes (*jā'ala*) to pay a remuneration on certain conditions. Only at the end of the document is it mentioned that the other parties agreed to the arrangement. Moreover, I believe that the lawyer who wrote the document was well aware of the problematic character of the way the sharecropping contract was framed. For this reason he also invoked custom (*urf*) as a ground for regarding the contract as valid and binding. At the end of the first document there is the following statement about the validity of customary law (also found in some other *ja'āla* documents)<sup>19</sup>:

Now, consent has legal effects (*al-riḍā hukm*) and that is the custom of the people of this region and the customary practice (*iṣṭilāḥ*) of the people of the oasis. It has been ordered that custom must be followed, at least to the extent that it is regarded as valid. That is the case according to the honourable scholars (*al-sāda al-ūlamā'*) on the basis of any of the four legal schools because of the words of God—Who is exalted—in his clear Book, addressing the Lord of Messengers: “Keep to forgiveness (O Muḥammad), and enjoin kindness (*urf*)<sup>20</sup> and turn away from the ignorant.” [Q 7:199]

It seems as if the lawyer who drafted the document is saying here: “Yes, I know that the way this contract is constructed is not entirely in conformity with Shafi'i doctrine. However, this is the way we always do it here in the oasis; moreover, it is the will of the parties and therefore it must be regarded as valid and binding.” But even this argument would not pass

the scrutiny of strict Shafi'i jurists. Under Shafi'i law, custom cannot override provisions of the Shari'a. Shafi'i doctrine is rigorous in this respect, as illustrated, for instance, by the fact that, unlike the other schools, it regards the contract of *istisnā'* (a contract whereby a person pays another to manufacture something for him, which is a transaction about objects that do not exist at the time of the contract) as not valid despite the fact that it is a customary transaction.<sup>21</sup> We do not know whether the validity of the contracts recorded in these documents were ever tested in a court of law. However, it seems that this did not bother the inhabitants of al-Qasr very much.

The documents examined in this essay, as well as most others found in al-Qasr, show that its inhabitants were committed to their Shafi'i *madhhab*. Otherwise, they could have had recourse to the Maliki school. *Madhhab* shopping was common practice in Ottoman Egypt. In most major towns, there were, in addition to the Hanafi supreme qadi appointed by the Porte, deputy qadis of the three other schools of jurisprudence. As shown by the court records from that period, people would go to the qadi who could formulate contracts or draft endowment deeds as they wanted it. People knew that in order to found a religious endowment (*waqf*) with certain specific clauses you had to go to the Hanbali qadi, for instance, or to another for a specific type of lease.<sup>22</sup> There are no indications at all that this practice was considered to be blameworthy. Therefore, it is striking that the inhabitants of al-Qasr stuck to the Shafi'i doctrine, although sharecropping in the form they practised it was valid under Maliki and not under Shafi'i law. It is not clear why they did not ask a Maliki qadi (and there are one or two documents signed by a Maliki qadi in al-Qasr)<sup>23</sup> to draw up a *mughārasa* contract. Instead the drafter of the document invoked two general principles as a justification of the binding force of the contract: the fact that it was sanctioned by custom and the fact that it was based on mutual agreement. However, neither would have carried any weight in a Shafi'i court of law.

## NOTES

<sup>1</sup> This is a revised version of a paper presented at the Customary Law in the Middle East Workshop, Dept. of Near Eastern Studies, Princeton University (May 13–14, 2006) with the title "Shari'a and Customary Law in al-Qasr (Dakhla Oasis, Egypt) in the Eighteenth Century."

<sup>2</sup> For more information on the project, see <http://weekly.ahram.org.eg/2006/787/heritage.htm>.

<sup>3</sup> Document D.04.291 recto and verso.

<sup>4</sup> *Ja'āla* (also pronounced *ji'āla* and *ju'āla*) is a legal arrangement whereby one person undertakes to pay a remuneration to another person after the latter has completed a task. See below for the legal discussion concerning this contract.

<sup>5</sup> The question marks indicate that the original Arabic text was not entirely clear.

<sup>6</sup> *Qyāṭ* in this context is not a square measure, but is used for a share of 1/24.

<sup>7</sup> I am grateful to several inhabitants of al-Qasr for explaining to me the agricultural terms in the documents during my stay there in February and March 2006.

<sup>8</sup> D.05.063 from 1283 H.

<sup>9</sup> D.05.045 recto, dated 1217; D.05.045 verso, dated 1217; D.05.049 recto, dated 1198; D.04.166, dated 1187; D.04.277, dated 1239; D.04.228r, dated 1220.

<sup>10</sup> *Mughārasa* is one instance of a group of sharecropping contracts, to which also belong *musāqāh* and *muzāraʿa*, i.e., agreements whereby a person undertakes to cultivate another person's land for one or more years in exchange for a share in the crop.

<sup>11</sup> Unless otherwise indicated, this part relies on Ibn Rushd, *Bidāyat al-mujtahid*, 2 vols. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1960) 2:244–51 (*kitāb al-musāqāh*), and William J. Donaldson, *Sharecropping in the Yemen: A Study in Islamic Theory, Custom and Pragmatism* (Leiden: Brill, 2000), chs. 3 and 4.

<sup>12</sup> al-ʿAsqalānī, *Bulūgh al-marām fī adillat al-aḥkām* (Cairo: Dār al-Kitāb al-ʿArabī, n.d.), no. 765, where the variants are also listed.

<sup>13</sup> Shaykhzāde, *Majmaʿ al-anhur fī sharḥ Multaqā al-abhur*, 2 vols. (Istanbul, 1301 H.), 2:393–94.

<sup>14</sup> ʿAbd al-Raḥmān al-Jazīrī, *Kitāb al-Fiqh ʿalā al-madhāhib al-arbaʿa*, vol. 3 *al-Muʿāmalāt* (5th impr., Cairo: al-Maktabat al-Tijāriyya al-Kubrā, n.d.), 4, 21–5.

<sup>15</sup> Ibn Juzayy, *al-Qawānīn al-fiqhiyya* (N.p.: n.d.), 212 (*kitāb* 4, *bāb* 3: *Fī al-muzāraʿa wa l-mughārasa*).

<sup>16</sup> See al-Ramlī, *Nihāyat al-muhtāj fī sharḥ al-Minhāj* (Cairo: Dār al-Fikr, 1969), 5:465–81.

<sup>17</sup> It is an episode from the Yūsuf story. After he had hidden his precious cup in Binyamīn's luggage and the brothers were leaving the town, it was announced that this cup was missing and that the person who found it, would get a camel load of goods as a reward.

<sup>18</sup> al-Bukhārī, *Ṣaḥīḥ* (*kitāb al-ṭibb*).

<sup>19</sup> See, e.g., D.04.166 and D.05.045 verso.

<sup>20</sup> Most Qurʾan exegetes explain the word *ʿurf* in this context as fear of God and observance of His commands, or as *maʿrūf*, i.e., fair and equitable, and not as custom. However, some jurists, especially the Malikis, regard this text as a command to take custom into account. See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991), 284, 292.

<sup>21</sup> See, e.g., Jalāl al-Dīn ʿAbd al-Raḥmān al-Suyūfī, *al-Ashbāh wa l-naẓāʾir fī qawāʾid wa-furūʿ fiqh al-shāfiʿiyya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1990), 99.

<sup>22</sup> R. Peters, “What Does It Mean to Be an Official Madhhab? Hanafism and the Ottoman Empire,” in *The Islamic School of Law: Evolution, Devolution, and Progress*, ed. P. Bearman, R. Peters, and F. Vogel (Cambridge, Mass.: ILSP/Harvard University Press, 2005), 147–58.

<sup>23</sup> E.g., a divorce on grounds of abandonment (which is a ground for divorce under Maliki but not under Shafiʿi law) pronounced by a Maliki qadi, authorized by the regular Shafiʿi qadi. D.05.050, dated 1116 H.

## APPENDIX ONE

D.04.291 recto

الحمد لله وحده |  
 هذه جمالة على الاصلاح ووثيقة محررة على الاصطلاح يعرف مضمونها |  
 ويوضح مكنونها اشهد على نفسه المحترم شيخ العرب محمد ابو خليفة المحاجي [؟] العمراني [؟] انه |  
 جاعل ووافق كل من الزيني صالح بن المرحوم محمد صالح القرشي ومحسب بن |  
 المرحوم رضا على جميع قطعة ارض مخلاة بالنخيل الكبير (وتعرف<sup>1</sup>) بعين |  
 النجاين الكاينة قبلي مدينة القصر وتعرف ببقعة الفلاحين ويحصرها |  
 حدود اربعة القبلي بعضه من غربي بيد ورثة علي عطية وبعضه من شرقي |  
 بيد عيد عبد ال غفور [؟] والبحري الطريق والشرقي بيد خالته فاطمة والغربي |  
 البركة وجميع خط ارض بالعين المذكورة بجوار الزقاق ويحصرها |  
 حدود اربعة القبلي الطريق والبحري بيد ورثة ابو خاطر والشرقي سليمان |  
 مجيد والغربي بقية الخط بيد محمد علي وشركايه بحد ذلك وحدوده الايل |  
 الى محمد المذكور اعلاه من والدته امباركة ابنة<sup>2</sup> المرحوم محمد ابو<sup>3</sup> فايد [؟] المحاجي [؟] |  
 على ان الزيني صالح المذكور ومحسب المذكور يفرسوا خلو الارض |  
 من انواع الغراسات على حسب طاقتهم وارادتهم وباشروا الارض |  
 المذكورة بالصيانة والغراق والتزليل والتقليم ويكون لهم في نظير غرسهم |  
 الثلث ثمانية قراريط يقسم بينهم اثلاثا ما هو لصالح المذكور الثلث |  
 ومحسب الثلث ومحمد المجاعل الثلث بحق الغرس ولمحمد ايضا الثلثان<sup>4</sup> |  
 ستة عشر قيراطا بحق الارض والرضاع ومهما اطلع الله سبحانه وتعالى |  
 بغراس وغير غراس يكون على اسوة الجمالة المذكورة حسبما توافقوا ورضوا |  
 على ذلك الرضى الشرعي والرضى حكم وذلك عرف اهل البلاد واصطلاح اهل الواحه |  
 والعرف مامور به وذلك على ما يرى صحته ذلك عند السادة العلماء على قاعدة مذهب من المذاهب الاربعة<sup>5</sup> |  
 لقوله تعالى في كتابه المبين خطابا لسيد المرسلين خذ العفو وامر بالعرف واعرض عن الجاهلين<sup>6</sup> جمالة<sup>7</sup> |  
 صحيحة شرعية وهما |  
 عن طيب قلب وشرح صدر مشمولاً (؟) بالتوكيل في ثبوته |  
 وطلب الحكم به وسؤال الاشهاد فيه وبه شهد وجرى ذلك |  
 وحرر في يوم الجمعة المبارك ختام شهر صفر الخير الذي هو |  
 من شهور سنة 1206 ستة ومايتان والف |

شهوده

عبد اللطيف يوسف حجاج عني عنه

شهوده

ابراهيم عبد الله مصطفى عني عنه

شهد

محمد عثمان [؟]

شهد على المجاعل المذكور  
الحاج مسعود محمد

D.04.291 verso

الحمد لله وحده

وقعت القسمة والمراضة ما بين محمد خليفة المذكور باطنه |  
وما بين محمد صالح المذكور باطنه وما بين محاسب رضا المذكور باطنه في كامل |  
الحصص المذكورة باطنه في الثلث الغرس المذكور باطنه لكون ان ثلث |  
الغرس يقسم بين المذكورين اثلاثا فكان الذي استحق لصالح ودايا اثنتان |  
صعيديتين وعزب بوسط الغيط وايضا شجرة وعود رمان قبلي |  
قسمة صحيحة شرعية لكون ان المذكورين قسموا الغراس المذكور قبل ان |  
يثر حينئذ الزم نفسه محمد خليفة المذكور بسقي الودي المذكور الى حين |  
يثر على شرط الجمالة كل احد<sup>8</sup> يستقي على قدر حصته حسبما اشهد |  
على نفسه بذلك جرى ذلك وحرر في شهر ربيع الاخر الذي هو من شهور سنة 1222 |  
اثنين وعشرون ومايتان والـف |

شهد بذلك ابراهيم مصطفى  
شهد بذلك القرشي [...؟] حسين

#### NOTES

<sup>1</sup> To be deleted, scribal error.

<sup>2</sup> ابوا

<sup>3</sup> ابنت

<sup>4</sup> ابوا

<sup>5</sup> الثلثتاي(?)

<sup>6</sup> الابع

<sup>7</sup> القرآن 7:199

<sup>8</sup> Parallel text in D.04.166:

والرضا حكم وعرف بلا دهم والعرف مامور به على قاعدة مذهب من المذاهب الاربع على ما يرى صحته  
ذلك عند السادة العلماء رضي الله عنهم اجمعين [ لقوله تعالى في كتابه المبين ] خطابا لسيد المرسلين  
خذ العفو وامر بالعرف واعرض عن الجاهلین

<sup>9</sup> احدا