

Violations of the Shafi'is of the Malikis in the book “Nihayat al-Muttalib fi Derayat al-Madhhab” by Imam al-Juwayni (d. 478) in the chapter on mortgage (comparative study)

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Abstract

Praise be to God, who favored us with the grace of Islam, and prayers and peace be upon the master of the prophets and messengers, his family and companions, and after:

This research refers to the issues in which the Shafi'is disagreed with the Malikis, and among them was the Imam of the Two Holy Mosques al-Juwayni - may God Almighty have mercy on him - in his book “Nihaayat al-Muttalib”, where he mentioned the disagreement with the Malikis in the book “The Mortgage” and it contains two issues. And as a conclusion, the first topic was a brief translation of the life of Imam al-Juwayni - may God Almighty have mercy on him - personal and scholarly.

Introduction

Praise be to God, and prayers and peace be upon our master Muhammad, his family, companions, and those who followed him. The study of jurisprudence is one of the most important disciplines. Because it is linked to the pillars of the Islamic religion, it is renewed with the renewal of daily life and with the renewal of times, as it is one of the greatest needs and interests of people.

Importance of the topic:

1- Explanation of the disagreement mentioned by the Imam of the Two Holy Mosques Al-Juwayni - may God Almighty have mercy on him - with the imams of the schools of thought, mentioning the sayings of the jurists, comparing them, and clarifying the most correct of them.

2- The impact of irregularities in understanding the sayings of the imams and explaining and discussing their evidence.

Reasons for choosing the topic:

1- The status of the imam of the Two Holy Mosques al-Juwayni - may God Almighty have mercy on him - among the jurists.

2- The importance of irregularities, as they correct the error and fill the defect, if any.

3- Knowing the opinions of the four jurists with whom the schools of jurisprudence are associated, they left a great wealth of jurisprudence, which their students devoted to studying, and the study of violations has a great impact in explaining that.

4- Serving the Islamic religion by understanding the dissenting saying and clarifying the most correct of the dispute.

Difficulties: One of the difficulties encountered in this research is how to present the statements of scholars. Because I am new to writing on the topic of violations.

Research Methodology:

1- In my study, I presented the saying of the Shafi'is mentioned by Imam al-Juwayni - may God Almighty have mercy on him - in "Nihaayat al-Muttalib", then the saying of the Malikis who mentioned the disagreement with them, then the rest of the schools of jurists.

2- Attributing the verses to their surahs, mentioning the surah and the verse number.

3- The hadiths came out, with the ruling on the hadith if it was found in the two Sahihs.

4- Identified by strange words, if any.

5- I mentioned the reason for the disagreement between the Shafi'is and the Malikis.

6- The sources are mentioned at the end of the research.

The research plan required that it be divided into an introduction, two sections, and a conclusion. As for the introduction, this is it.

As for the first topic: a brief translation of the life of Imam al-Juwayni - may God have mercy on him - and there are two requirements:

The first requirement: the personal life of Imam al-Juwayni - may God Almighty have mercy on him -.

The second requirement: the scientific life of Imam al-Juwayni - may God Almighty have mercy on him.

The second topic: Shafi'i violations of the Malikis in the chapter on mortgage, and there are two demands:

The first requirement: the necessity of mortgaging without taking possession.

The second requirement: if the mortgagor and the mortgagee differ in the amount of the mortgage, then the saying is the saying of whom.

And a conclusion in which I showed the most important findings, and then mentioned the sources and references.

The first topic: a brief translation of the life of Imam Al-Juwayni - may God Almighty have mercy on him -.

The first requirement: his personal life.

First: His name and title: He is Abu al-Ma'ali Abd al-Malik bin Abdullah bin Yusuf bin Abdullah bin Yusuf bin Muhammad bin Hayawayh, al-Juwayni al-Nisaburi, al-Shafi'i, al-Ash'ari, and he was called the Imam of the Two Holy Mosques due to his neighborhood in Makkah for four years.

Second: His birth: The Imam of the Two Holy Mosques was born in "Jain"², and there was a difference of opinion on the date of his birth. It was said: He was born in Muharram in the year 419 AH, and it was said: He was born in the year 417 AH, and it was said: He was born in the year 410 AH, and the most correct opinion is that he was born in the year 419 e; Because he died in the year 478 AH at the age of 59 years, and whoever died in the year 478 AH will be born in the year 419 AH ³.

Third: His upbringing: The imam of the two holy mosques, al-Juwayni, was brought up in Nishapur⁴, and his upbringing had a great impact on his scientific life, in addition to his going out with the sheikhs to Baghdad, where he met the great scholars, looked, studied, and his acumen appeared, and he was popularly mentioned⁵.

Fourth: His death: He died on Wednesday night after Isha', the twenty-fifth of Rabi' al-Akhir of the year 478 AH, at the age of 59. He was transferred that night to the country, and was buried in his house⁶.

The second requirement: his scientific life

First: His scholarly status: The imam of the Two Holy Mosques al-Juwayni was the most knowledgeable of the later companions of Imam al-Shafi'i at all, and he was unanimously agreed on his imam, and he excelled in all sciences of fundamentals, literature, etc., and he provided sustenance from expanding the phrase what he did not know from anyone else, and he studied the system of Nishapur, and he took up rhetoric with it. He used to sit for preaching and debates.

Second: His Authors: He has many authors that varied in the diversity of sciences, including: 8

1- "Nihaayat al-Mattalib fi Dirayah al-Madhib"

2- "Summarizing the approximation"

3- "Guidance"

4 - "Ghaniyat al-Mushidrun"

Third: His sheikhs: The Imam of the Two Holy Mosques al-Juwayni - may God have mercy on him - was a student at the hands of quite a few scholars, including:

1- His father, Sheikh Abu Muhammad al-Juwayni Abdullah bin Yusuf bin Muhammad bin Abdullah al-Juwayni al-Nisaburi: He was a pious scholar and ascetic. (Al-Risalah), and the Imam of the Two Holy Mosques took jurisprudence from his father, who died in the year 438 AH 9.

2- Mansour bin Ramesh bin Abdullah bin Zaid Abu Nasr al-Nisaburi: A man of shrewd men, he assumed the presidency in Nishapur, and Nishapur was adorned with his justice, his biography, fairness, and his justice for the subjects and the poor from the darkness, and he is trustworthy in good performance, true to the origins. He died in the year 427 AH 10

Fourth: His students: A large number of scholars, including:

1- Sheikh Saad bin Abd al-Rahman al-Faqih Abu Muhammad al-Istrabadhi: He was the imam of the Two Holy Mosques and became one of his specialists, and he was an accomplished imam. He died in the year 490 AH 11.

2- Imam Ahmed bin Muhammad bin Mudhaffar Al-Khawafi, the Shafi'i jurist: He was the most knowledgeable of the people of his time.

The second topic: Shafi'i violations of the Malikis in the mortgage book.

The first requirement: the necessity of mortgaging without taking possession 14

The jurists agreed that "taking possession" 15 is a condition in the "mortgage" 16 17, but they differed regarding the obligation of mortgage by word of mouth.

The jurists differed on this matter, and there are two sayings:

The first saying: A mortgage is not necessary except by "taking" 18, and it is the saying of the Shafi'is 19, the Hanafis 20, the Hanbalis 21, the Dhahiri 22, and the more correct view according to the Imamis 23, and the Zaidis 24.

Evidence and discussion:

1- The Almighty's saying: {Furhaan Maqbudhah} 25.

The face of the indication: God - the Almighty - described the mortgage as the arrest; This indicates that the mortgage is one of the conditions for the validity of the contract, such as describing the neck with faith, and testifying to justice, and since he mentioned the mortgage and described it as taking possession, it is either a warning to someone else or his jurisdiction over it, and both matters indicate that it is a condition for the validity of the mortgage 26 .

He objected: This indicates that the mortgage existed before the receipt, but rather it was mentioned as received, not devoid of being an order or news.

As for the news, it is denied; Because if it was news, the mortgage would not be valid unless it was received.

2- This is a contract that does not bind the heir of the contracting party, by word of mouth, so the contracting party should not be bound by word of mouth, as if it were a "Jala'ah" contract 28, and since it is a contract of attachment, and one of the conditions of attachment is acceptance, so the possession must be one of the conditions of obligation in the mortgage by analogy with the loan 29.

He objected: "It was not stipulated here that this received mortgage be compared to the proof of the right, or that it precedes it or is later than it."30 .

The second saying: the "mortgage" is obligatory 31 and it is valid simply by saying, which is the saying of the Malikis 32 .

Evidence and discussion:

1- The Almighty said: {O you who have believed, fulfill the contracts} 33.

And the Almighty says: {And fulfill the covenant, for the covenant was responsible} 34.

The aspect of the evidence from the two verses: God Almighty commanded the fulfillment of the contract, and the mortgage is a contract, and God commanded the fulfillment of the covenant, and the mortgage is a covenant 35.

The reason for the disagreement on this issue between the Shafi'is and the Malikis:

The reason for the disagreement in this matter between the Shafi'is and the Malikis is their difference in the meaning of arrest? Is it a condition of completeness in the mortgage, or a condition of validity? Whoever said: A condition of validity, said: The mortgage is only obligatory upon receipt, and whoever said: The mortgage is a complete condition said: The mortgage is obligatory by mere saying; Because it is a contract and obliges the mortgagee to take possession, so the Shafi'is held that it is one of the conditions of validity, so the mortgage is not obligatory except with it, and the Malikis held that it is one of the conditions of completion, so the mortgage is obligatory by word of mouth even if it is not received 36 .

The preponderant saying: After presenting the sayings of the jurists and explaining and discussing their evidence, it becomes clear, and knowledge with God Almighty, the preponderance of the second saying, which is the saying of the Malikis and those who agreed with them, who say: that the mortgage is necessary by mere saying for the generality of His saying: {And fulfill the covenant that the covenant was responsible} 37 and since the mortgage is tantamount to the trust in The hand of the pledgee, so he must keep his trust and give it to him, whether he has taken it or

not. As for the condition of taking possession in the generality of His saying, the Most High: {a bet that is taken} 38, this is considered a documented increase in the mortgage if the clerk is not on the road so that the right of the mortgagor is not lost.

The second requirement: if the mortgagor and the mortgagee differ in the amount of the mortgage, then the saying is the saying of 39?

There is no disagreement between the jurists as to whether the mortgagor and the mortgagee differ about the amount of the mortgage and one of them has evidence for that, then the saying is his saying 40, but the scholars differed as to if there is no evidence, then the saying is the saying of the mortgagor? Or say the mortgagee?

The jurists differed on this matter, and there are two sayings:

The first saying: The saying is the saying of the present with his oath, and it is the saying of the Shafi'is 41, the Hanafis 42, the Hanbalis 43, the Imamis 44, and the Zaidis 45.

Evidence and discussion:

1- The Almighty's saying: {And let him who owes the truth be bored, and let him fear God, his Lord, and not diminish anything from Him} 46.

Significance: The verse clarified that the one who owes the right is the present 47.

2- The words of the Prophet Muhammad, may God's prayers and peace be upon him: "Evidence is on the plaintiff, and the oath is on the one who denies it" 48.

The aspect of evidence: The noble hadith of the Prophet indicates that the mortgagee claims that the pledgor is liable to increase the guarantee while he is denying it, so the

Prophet Muhammad - may God bless him and grant him peace - explained that the saying is saying the denial with his oath, and the denial here is the pledge 49.

The second saying: The saying is the saying of the mortgagee, which is the saying of the Malikis 50, and a weak narration of the Imamis 51.

Evidence and discussion:

1- The principle in the dispute between the mortgagor and the mortgagee is to refer to custom and custom. Because there is no priority here, and the custom is that people only mortgage what is close to their debts, or equal to them 52 .

He objected: that the custom in the mortgage differs, because people may mortgage what is more or less than the right, so the custom is not considered here 53.

2- The mortgagee has the right to suspect the transfer of the oath to his property, and its possession, because the mortgage is a witness to it 54 .

The reason for the disagreement on this issue between the Shafi'is and the Malikis:

The reason for their disagreement in this matter is the apparent meaning of the honorable Prophet's Sunnah, which is his saying - may God's prayers and peace be upon him -: "The proof is on the plaintiff" 55, and that the plaintiff according to the Shaafa'is is the presenter, so the saying is his saying with his oath, but according to the Malikis, even if the pledgee is a plaintiff But the mortgage is a witness to it, and the oath is transferred to its domain, and one of the principles of Imam Malik - may God Almighty have mercy on him - is that the strongest of the suspects swear an oath. Because the mortgagor may

mortgage a specific thing and its value is higher than the pledged.

The most correct saying: After presenting the sayings of the jurists and explaining and discussing their evidence, it becomes clear and knowledge with God Almighty that the most correct saying is the first saying, which is the saying of the Shafi'is and those who agree with them: that the saying is the saying of the present with his oath; Because the principle in that is the non-mortgage, and since the mortgagee has no evidence in that, he remains on the original, but if the evidence is found, then the saying is for the mortgagee with his evidence.

Conclusion

After this scientific tour in this jurisprudential research, I have come to the following results:

- 1- Imam Al-Juwayni - may God Almighty have mercy on him - is a great jurisprudential figure.
- 2- The importance of studying violations, as the concept of violations is to fix the error and fill the defect, if any.
- 3- A mortgage is like a trust in the hands of the mortgagee, so he must keep his trust and return it to him, whether he receives it or not.
- 4- Saying to the mortgagee if there is evidence.

In conclusion, we ask God Almighty for success and payment, and praise be to Him in the first and the last, and prayers and peace be upon our master Muhammad and his family and companions.

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Margins:

1 See: Al-Kamil in History (8/190), Tabaqat al-Shafi'i al-Kubra al-Subki (5/170), Tabaqat al-Shafi'i (466).

2 Jawin: It is a large district of Nishapur, which the people of Khorasan called Koyan, then after that it was Arabized and became Jawin. To join many imams and scholars. See: Mujam al-Buldan (2/192).

3 See: al-Muntaziz fi Tarekh al-Mulk wa'l-Num (16/244), al-Kamil fi al-Tarikh (8/301), Tareekh al-Islam T. Bashir (10/424), Tabaqat al-Shafi'i by Ibn Qadi Shahba (1/255).

4 Nishapur: With the conquest of Ulah, which is a great city, one of the cities of Khorasan,

with good virtues, many good things, and fruits, the source of the virtuous and the source of scholars. about them-. See: Mujam al-Buldan (5/ 331).

5 See: Nihaayat al-Muttalib fi Dirayat al-Madhab (Introduction / 187), gold nuggets in Akhbar Min Dahab (5/339).

6 See: al-Muntaziz in the history of kings and nations (16/247).

7 See: Deaths of Notables (3/ 167-168).

8 same source.

9 See: Tabaqat al-Shafi'i al-Kubra al-Subki (5/73).

10 See: Al-Muntakhab from the book Al-Siyaf for the History of Nishapur (479), Tabaqat Al-Shafi'is (467).

11 See: Tabaqat al-Shafi'i al-Kubra al-Subki (4/382).

12 Tus: "It is a city in Khurasan, between it and Nishapur, about ten leagues. It includes two towns, one of which is called Al-Tabaran and the other two Nuqan. They have more than a thousand villages that were opened in the days of Othman bin Affan, may God be pleased with him. It contains the tomb of Ali bin Musa Al-Ridha, and it also contains the tomb of Harun Al-Rashid." Mujam al-Buldan (4/49).

13 See: Al-Wafi Bal-Wafiyat (8/84).

14 Imam Al-Juwayni - may God Almighty have mercy on him - said: "It is not necessary to mortgage without taking possession, unlike Malik - may God have mercy on him." Nihaayat al-Muttalib fi Dirayat al-Madhab (6/78).

15 Requisition is linguistic: "The source of you grasped, which is taking the thing with your fingertips.", *Islah al-logic* (13).

16 Al-Rahn is linguistically: "I bet, bet, bet: if it is given in advance, and it is said: I have mortgaged the commodity in the sense that I have borrowed." *Lisan Al-Arab*, Chapter (Chapter of R), (13/190), and in terminology: "Making the property a document with a debt that is collected from it, when It could not be collected from those who owed it." *Kifayat al-Nabih fi Sharh al-Tanbih* (9/ 394).

17 See: Al-Bannaiyah Explanation of Al-Hidaya (12/467), Explanation of Indoctrination (3/2/365), The Beginning of the Mujtahid and the End of the Muqtasad (4/57), Al-Tanbeeh in Shafi'i Fiqh (100), Al-Sharh Al-Mutti' on Zad Al-Mustaqni' (9/135) For the Almighty saying: {The proof is received}. Surah Al-Baqarah, from verse: 283.

18 Confiscation according to the Shaafa'is: a condition for the necessity of the mortgage. See: *Al-Hawi Al-Kabir* (6/7).

19 See: *Nihaayat al-Muttalib fi Dirayat al-Madhab* (6/ 78).

20 See: Al-Bannaah Explanation of Al-Hidaya (12/470).

21 See: Al-Sharh Al-Mumti' on Zad Al-Mustaqni' (9/135).

22 See: *Al-Muhalla bi-Athar* (6/ 363).

23 See: Sharia lessons in the jurisprudence of Imamiyyah - (80/1).

24 See: Al-Taj Al-Madhab li Ahkam Al-Madhab - Zaydiyyah - (5/111).

25 Surah Al-Baqarah, from verse: 283.

26 See: *Al-Hawi Al-Kabir* (6/7).

27 See: *Al-Masalak fi Sharh Muwatta Malik* (6/325).

28 Al-Jalalah is linguistically: by breaking and joining: "what He assigned to him for his work." *Lisan Al Arab*, Chapter (Chapter of Gym), (11/111).

29 See: *Al-Hawi Al-Kabir* (6/7).

30 Explanation of indoctrination (3/2/338).

31 Mortgage at the Malikis: it is necessary to say; Because taking possession is a condition of completeness and perfection in the mortgage, see: Explanation of indoctrination (3/2/346).

32 See: Supervision of Jokes on Issues of Dispute (2/576), Issue: 955, Explanation of Indoctrination (3/2/366), Clarification in Explanation of Mukhtasar Ibn al-Hajib (6/104).

33 Surah Al-Ma'idah, verse: 1.

34 Surah Al-Isra, verse: 34.

35 See: *Tafsir Al-Qurtubi* (3/ 410).

36 See: The Beginning of the Mujtahid and the End of the Muqtasid (4/57).

37 Surah Al-Isra, verse: 34.

38 Surah Al-Baqarah, from verse: 283.

39 Imam al-Juwayni - may God Almighty have mercy on him - said: "If the mortgagor and the mortgagor differed about the amount of the mortgage, or its receipt, and the mortgagor denied an amount of the mortgage, or denied the acknowledgment of the mortgage, then the saying in all of that is the saying of the mortgagor... Malik said: The saying is the saying of the mortgagor." . The end of the demand in the knowledge of the doctrine (6/ 233).

40 See: Bada'i al-Sana'i fi Tartib al-Sharia' (6/174), Al-Bayan wa'l-Tahsil (11/94), Al-Sharh al-Mumti' on Zad al-Mustaqni' (9/164).

41 See: Nihaayat al-Muttalib fi Dirayat al-Madhab (6/ 233).

42 See: Bada'i al-Sana'i fi Tartib al-Sharia' (6/174).

43 See: Al-Mughni by Ibn Qudamah (4/ 298).

44 See: Al-Rawdah Al-Bahia - Imamiyyah - (3/5).

45 See: Al-Taj Al-Madhab li Ahkam Al-Madhab - Zaydiyyah - (5/148).

46 Surah Al-Baqarah, from verse: 282.

47 See: Tafsir Al-Qurtubi (3/ 389).

48 Al-Sunan Al-Saghir by Al-Bayhaqi, Book of Claims and Evidence, Chapter (Evidence on the claimant and oath on the one who denies), (4/ 189), Hadith No. (3386), its chain of transmission is good, see: Sunan Abi Dawud v. Al-Arna'ut (5/ 469).

49 See: Explanation of Sahih Al-Bukhari by Ibn Battal (7/33).

50 See: The Eyes of Issues by Judge Abd al-Wahhab al-Maliki (539), Khalil's brief explanation of al-Kharshi (5/ 261).

51 See: Al-Rawdah Al-Bahia - Imamiyyah - (3/5).

52 See: Supervision of Jokes of Dispute Issues (2/ 585), Issue: 977.

53 See: Al-Hawi Al-Kabeer (6/ 193).

54 See: The Beginning of the Mujtahid and the End of the Muqtasid (4/61).

55 has already graduated.

56 See: The Beginning of the Mujtahid and the End of the Muqtasid (4/61).