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'DEATH FOR DEFAULT' OR ANTICIPATORY EXECUTION?

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In an article dedicated to the late Jacob J. Finkelstein, D. I. Owen has published an Ur III record of a barley "loan" which he understands as having a spectacular penalty for failure to repay on the due date.¹ According to Owen's interpretation of CBS 13715, if the recipient of the barley fails to return it on time, he will meet with death.

Owen interprets the text in this manner despite the doubt about the reasonableness of such a circumstance which had been expressed to him by Finkelstein. We are told that Finkelstein "did not believe that such a punishment would have been carried out for the default of a loan."² The present writer is in whole-hearted agreement with the doubts expressed by Finkelstein, despite Owen's assertion that "in view of the contractual nature of the text and the special character of the witnesses, I have no reason to doubt that the punishment, as specified, would have been carried out."³

Such a harsh penalty is amazing not only because of its inherent severity—which in and of itself would give one pause to reconsider the interpretation—but because it is assumed in an economic atmosphere where it would have been unusual, in a society where doubling is the highest (otherwise) known penalty for default on a loan. To our mind, in Mesopotamian society at least, if not in all societies, the assumption of capital punishment for a tort is virtually unthinkable.

If the risk assumed by the "lender" were great enough to require such a severe penalty, one might well have expected him to receive some compensation for undertaking such a risk—after all, the death of the borrower would provide him with no monetary compensation, and any supposed satisfaction of his sado-masochistic urges can hardly recompense the financial loss. This "loan" is, however, understood as being interest free. The borrower's duties are merely specified (in Owen's interpretation) as his obligation to return the barley in the city of Nippur. This must likewise leave one startled at such a penalty.

The harshness of the supposed penalty leads one to wonder whether there might be another way to understand the text, one more consonant

1. "Death for Default," *Essays on the Ancient Near East in Memory of Jacob Joel Finkelstein*, *Memoirs of the Connecticut Academy of Arts and Sciences* 19 (ed. Maria deJ. Ellis; New Haven, 1977) 159-61.

2. Owen, *Essays Finkelstein* p. 159 n. 6.

3. *Ibid.* He presents no evidence for "the special character of the witnesses," other than that inherent in line 11 of the text.

with an individual's innate desire to survive and with the rest of our knowledge of Mesopotamian civilization. The writer offers the present note with the hope of preventing tales of such a notorious "penalty clause" from entering into the annals of Mesopotamian legal history. We shall reproduce⁴ Owen's transliteration⁵ and translation, follow them with our own translation of the essential parts of the text, and comment on the crucial differences between the translations and interpretations of the document.

- [40?].0.0 še gur
 ki ba-la-a-ta
 a-bí-a-ti
 šu ba-ti
5. iti du₆-kù-ga
 u₄ 30 ba-zal-la
 ge₄-ge₄-dam
 tukumbi!(=ŠU.LÁ.TUR) nu-na-ág
 gaza-da
10. mu-lugal-bi in-pà
 igi lú-4 lú-kin-ge₄-a lugal-šè
 igi lú-^dgi-gi-lu-šè
 igi u₄-da-ga-šè
 igi lugal-pa-è-šè
15. igi ur-^dnin-tur-ra-šè
 šà nibru.ki ág-e-dam
 [m]r¹u¹ en-^dinana unug.ki-[g]r¹a¹ máš-e r¹i'n-pà

Owen

"40? gur of barley Abi-ati received from Bala'a. At the end of the 30th day of the month of Dukuga he shall return (the 40 gur of barley). If he does not return it, he will be killed. In the name of the king he swore. Witnessed by four men, messengers of the king (who are): witnessed

4. In order to simplify the discussion, we have simply reproduced Owen's transliteration and his representations of the personal names, instead of using Sumerian forms which reflect more accurately the phonological (and grammatical) shapes of the words. For the writer's views on Sumerian writing and phonology, see his *The Sumerian Loanwords in Old-Babylonian Akkadian 1*, Harvard Semitic Series 22 (Missoula, 1977) and the forthcoming second volume of that work.

5. We have indulged the generosity of Åke W. Sjöberg, Curator of Tablet Collections in the University Museum, to collate the text and Owen's copy, which is, not surprisingly, quite accurate enough. We have corrected his transliteration only for the year date, where he shows [mu] as completely destroyed despite his copy which shows part of the last two *Winkelhaken*, and ga, which he shows as completely present despite his copy which shows most of the grapheme as having been destroyed. His i- in the final word has been corrected to the r¹i'n- which is on the tablet, as shown in his copy (or has it been erased to i?).

by Lu-Gi(r)gilu, witnessed by Udaga, witnessed by Lugal-pae, witnessed by Ur-Nintura. In Nippur he shall pay back (the barley). IS 2.”⁶

Lieberman

“³Abi-ati ⁴received ¹[40 (?)] cor (of) barley ²from Bala³a. ⁵In the month of Dukuga, ⁶(when) 30 days have elapsed, ⁷(the barley) shall be recompensed. ⁸If (the barley) is not measured out, ⁹(this tablet) shall be smashed. ¹⁰(They) swore (by the) name of (the) king. ¹¹Before four men, messengers of the king, ¹²before Lugi(r)gilu, ¹³before Udaga, ¹⁴before Lugalpae, ¹⁵before Urnintura. ¹⁶Within Nippur, (the barley) shall be measured out. ¹⁷(Second year of Ibbi-Sin).”

The crucial clause of the document is that found in lines 8 and 9 of the text. Owen understands the clause as a “penalty clause,” while we have taken it as an indication of the fact that the document was written before the barley was actually measured out and delivered to Abi-ati. Owen translates the verb *ág* as “return,” but that is not what it means. Sumerian *ág* (properly /aḡ/ or /aḡa/) means “measure out” (=Akkadian *madādu*). The Sumerian verb for “return” is *gur* (=Akkadian *turru*), and indeed this latter verb is common in penalty clauses: *tukun-bi la-ba-an-gur . . .* “if it is not returned . . .” For the meaning “satisfy a claim, compensate” Sumerian uses *gi₄* (=ge₄), which is equated with Akkadian *apālu*, and indeed the present text specifies in line 7 that Abi-ati is to satisfy the debt incurred.

A translation “if he does not measure it (the barley) out, he will be killed” would, then, seem grammatically possible. Indeed, Sumerian *gaz* is used to mean “kill” and is equated with Akkadian *dāku*, as Owen notes. This is not, however, the only meaning of the verb. It “also” means “to break,” Akkadian *ḥepū*,⁷ which is used of tablets.⁸ In such usage, “breaking a tablet” signifies the invalidation of the legal document.

6. Owen, *Essays Finkelstein* pp. 159-60.

7. Cf. the Akkadian dictionaries for examples of *ḥepū* meaning “to invalidate a document”; in Old Assyrian, *dāku*, “to smite,” is used in the same meaning, and *mātu*, “to die,” for its consequence. These usages seem to derive from an idiomatic Sumerian locution with *gaz*; see, for instance, *dub-ibila-a-ni in-gaz-ma*, Çiğ-Kızılyay-Kraus *Nippur* 36:4.

8. From a Sumerian point-of-view, there was a single verb meaning “to smash” (*maḥāṣu*, *pa’āṣu*, *rasābu*), which was rendered in Akkadian by various verbs, depending, by and large, on whether that which was “smashed” was people (*dāku*, *nēru*, *russubu* = “kill”), animals (*palāku* = “slaughter, butcher”), pots and inscribed objects (*ḥepū* = “break”) or plants (*ḥašālu*, *na’āsu* = “grind”). The grapheme used to write *gaz* consists of a mortar and pestle (=gum) with barley inside, presumably being “crushed.”

The crucial question is: what is the subject of the verb *gaz* in line 9? Indeed, since the verbal form is not finite (i.e., it has no verbal “prefix” or “profix”), there is no subject expressed within the verb itself. Rather, if one were to restate the clause with a finite verb, would the subject (which would then be the “direct object,” at least from an Indo-European or Semitic point-of-view) belong to the animate or inanimate gender (class)? Would it be the “borrower” or the tablet? Owen has chosen the first of these possibilities and assumes that the borrower, *Abi-ati*, is to be smashed (i.e., killed). Our translation has taken the latter option, and understands the tablet on which the text is written to be that which is smashed (i.e., broken, invalidated).

A grammatical objection to our interpretation might be raised. Is it possible to interpret the subject of the verb in line nine as the “tablet”? After all, the document, although very much in evidence as one reads it, is not mentioned. Is such a usage in Sumerian otherwise attested? It is well known in texts such as the Ur III royal inscriptions, where the grammatical object of the verb (equivalent to the subject in line 9) is normally left unexpressed,⁹ and is the physical object on which the inscription has been written.

The form of the verb in line 8 likewise leads to the conclusion that what is involved is not a penalty clause. The form which we have is *nu-na-ág*, while in the penalty clauses, no matter what verb is used (*ág*, *gur*, *lá*, and other verbs are attested), the morpheme *ba* is present. That is penalty clauses have the verbal form *la-ba-an-ág*, and the like. The absence of *ba* is a telling feature, whether one’s interpretation of this morpheme derives from the understanding of the verbal system of Jacobsen or that of Falkenstein.

Jacobsen takes the *ba* “prefix” as a “mark of location of the occurrences denoted by the verb inside the relevant area, not that of the speech situation.”¹⁰ That is, the action takes place at the time indicated by the verb which is necessarily remote from that of the speaker’s present, showing “a degree of distance in time.”¹¹ Such an interpretation of the *ba* morpheme in penalty clauses accords well with the situation, for the measuring out (or returning, or weighing out, etc.) would necessarily take place at some time other than that of the writing of the document (in fact, considerably later). The absence of *ba* here would, then, be evidence for the clause not being a penalty clause, but rather a clause defining the conditions of (initial) transfer of the barley, a situation not as remote from the speaker’s present, one in which the distance in time was not important, and therefore not marked in the verbal form.

9. For exceptions, cf. W. W. Hallo, *HUCA* 33 (1962) 16 n. 137.

10. “About the Sumerian Verb,” *Studies Landsberger* pp. 71-102 (=Jacobsen, *Tammuz* pp. 245-70) at *Studies Landsberger* p. 82 (= *Tammuz* p. 255).

11. *Studies Landsberger* p. 83 (=Tammuz p. 256).

In the verbal system posited by Falkenstein, on the other hand, the *Lokativprafix* *ba* contrasts with the *Dativprafix* *na* (not to be confused—whatever its etymology—with the “infix” *na* which is present in the verb in line 8), and the *Lokativ-Terminativprafix* *bı/be*.¹² Falkenstein takes *ba* as being identical with the third person singular inanimate locative infix, and deduces a meaning *in etwas, in etwas hinein*.¹³ Whether this meaning or the “passive” meaning of *ba*¹⁴ is assumed for the penalty clause, its absence from the verbal form *nu-na-ag* is as telling as it is in Jacobsen’s schema.¹⁵

Although Sumerologists have yet to reach any consensus with respect to the verbal system, the part of Sumerian grammar which it is the most difficult to reconstruct, the contrast between the forms found in the usual penalty clauses which have the *ba* morpheme, and the verb in line 8 of our text must surely militate against the construction of the clause as a penalty clause.

The question of how one should have expected a condemnation to death to have been expressed in Sumerian likewise provides us with a hint pointing towards the conclusion that there is no death penalty in CBS 13715. While such a penalty is apparently lacking in the collections of “laws” currently available, the famous “trial for homicide” provides an expression of this most severe of penalties: *lu-lu-u in-gaz-eš-am* (var. *al-gaz-a*) *lu-ti-la nu-me-eš* (var. *-en*) . . . *ı-gaz-de-eš* (lines 30-36),¹⁶ translated by Jacobsen as “As men who have killed men they are not live men . . . [they] shall be killed,” and *gaz-de ba-an-sum-mu-uš* (line 59), “they were delivered up to be killed” (var. *al-gaz-e-de-eš*).¹⁷ In brief, we should expect an unambiguous finite verbal form for the expression of such a severe penalty.¹⁸

Clearly, given our interpretation of the document, the clause at the end, in line 16, must refer not to the return of the barley within Nippur, but to its being weighed out there in the first instance. It was reasonable, but hardly

12. Falkenstein *Grammatik* 1 187-93 §§59-62, 2 182-90 §§115-17; Falkenstein *Das Sumerische* pp. 46-47 §32B.

13. Falkenstein *Grammatik* 1 188 §59.

14. Falkenstein, *Grammatik* 2 186 §116a6; Falkenstein *Das Sumerische* p. 60 §47c.

15. The meaning of *ba* deduced by J. N. Postgate (“Two Points of Grammar in Gudea,” *JCS* 26 [1974] 16-54 at 25) cannot be that of the penalty clauses, for surely the “subject” of the verb is *not* “the only animate (and possibly even inanimate) party affected by the action.”

16. Thorkild Jacobsen, “An Ancient Mesopotamian Trial for Homicide,” *AnBib* 12 (1959) 130-53 (reprinted with some corrections in Jacobsen *Tammuz* pp. 193-214, 421-22) at 135, 137 (=Tammuz 198-99). A re-edition of this text will be included in the writer’s publication of the “Manual of Sumerian Legal Forms,” the so-called “model contracts,” which is in preparation, with the collaboration of W. W. Hallo and F. Yuldz.

17. *AnBib*. 12 (1959) 136, 138 (=Tammuz pp. 200-201).

18. For the same formulation in an Ur III document, namely *gaz-de ba-sum*, cf. J.-M. Durand, “Une Condamnation a Mort a l’Epoque d’Ur,” *RA* 71 (1977) 125-36 line 6 (cf. also line 25), which was published at approximately the same time as Owen’s article.

essential, that the place where the actual transfer of the barley was to take place be specified, given the fact that the document was framed from the viewpoint of the completed initial act of transfer.

If, on the other hand, the “pay[ing] back” of the barley in Nippur was part of the satisfaction of the debt, as Owen’s interpretation would have it, then one should have expected this to be part of the penalty clause, and we would have šà nibru.ki in the middle of line 8. The specification of locale would then not only have formed a proper part of the legal obligation which was to be fulfilled in satisfying the debt, but would have been witnessed.

Given our contention that the act referred to in the clause of line 8 (tukumbi nu-na-ág) is the act which was to initiate the legal relationship, rather than that which made the penalty operative, it is reasonable for the formulation to have been looser. The specification of the place where the initial transfer of the barley was to take place could well simply have been added on at the end of the tablet as an afterthought, since the time of the initial transfer was rather closer at hand, and since the legal obligation recorded in the text would simply not have come into being unless the initial transfer took place at the agreed place (the tablet would then be broken, as specified in line 9).

The primary objection which can be raised to the interpretation of CBS 13715 offered here lies, to our mind, in the fact that we assume that the document was written before the actual transfer of the barley took place. The causes for such an occurrence must be sought in two realms: that of the nature of legal obligations and their expression in Mesopotamian law, and the specific circumstances surrounding the transfer of the barley.

The Sumerian formula šu ba-(an-)ti, “he received,” is ubiquitous. It has been the subject of a study by E. Pritsch,¹⁹ and lies as one of the cornerstones of early Mesopotamian law. Indeed, the student of Ur III or Old Babylonian documents meets it nearly everywhere he turns. The essential nature of the clause consists of the fact that it indicated the establishment of a new legal relationship²⁰ which was executed by the transfer of some piece of property. Until that transfer had taken place, there was no (relevant) relationship between the two parties involved. In the present instance, this means that until Abi-ati had received the grain from Bala’a there could be no obligation on the part of either one to the

19. “Zur juristischen Bedeutung der šubanti-Formel,” *Bonner Biblische Beiträge* 1 (1950) 172-87.

20. For the analysis of legal relationships, cf. W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed. W. W. Cook; New Haven, 1923), particularly the first two articles, which are reprinted from *Yale Law Journal* 23 (1913) and 26 (1917), and have appeared elsewhere, as well. An exposition of Hohfeldian analysis may be found in E. A. Hoebel, *The Law of Primitive Man* (Cambridge, Mass., 1961) chap. 4. For an explication of Hohfeldian analysis as applied to Mesopotamian law; see my forthcoming study in connection with the “Manual of Sumerian Legal Forms.”

other with respect to the barley. The legal formulary was framed from an objective viewpoint dated after the event initiating the legal relationship. Abi-ati's duty to repay the barley, as well as Bala'a's demand-right to have it returned, was only in force after some legal event had taken place. That legal event was the initial transfer of the barley, indicated by the phrase *šu ba-ti*.

A promise on the part of Bala'a to deliver the barley to Abi-ati (and Abi-ati's undertaking the obligation to return it) would be meaningless without the giving of some legal "consideration," but the only legal consideration specified in the text, and the only one in fact, was the initial transfer of the barley.²¹ This duty could exist only after the initial delivery of the barley had taken place, and it had not when the text was about to be written. The framer of the document was presented, then, with a difficult problem: how could he write a document which would conform to both the accepted norms of Mesopotamian law and the situation at hand? He solved it quite neatly by inserting the crucial clause of lines 8 and 9 in the text, specifying that if the (initial) transfer of the barley did not in fact take place, then the document would be null and void (i.e., broken). The formulation of this Ur III document is, then, more careful from a jurisprudential point-of-view than that of the antedated Old Babylonian documents.²²

The only other way out of the scribe's dilemma would seem to have been a postponement of the writing of the text. He could have waited until the transfer had in fact taken place, and then could have written a normal text, merely specifying the amount, names, transfer, obligation to return, and the oath and witnesses, etc.

Why didn't he take this seemingly simpler way out of the problem? The reason for this must surely lie in the concrete situation which confronted him, and many possible scenarios can be imagined which would present such a dilemma. For instance, perhaps the scribe, along with Bala'a, Abi-ati, and the witnesses, was on his way to (or was at) the site of the transfer, formed tablet and stylus in hand, when his young son ran up to tell him that an emergency at home required his attention. Instead of delaying the proceedings and forcing all who were assembled to wait until another scribe could be fetched, or until he could come back, he decided to have the oath taken, and to take his stylus and write, etc. As another alternative, perhaps the trip to the scribe after the transfer was to take place would

21. We have no doubt that, given the types of formulation of "interest free" loans in the "Manual of Sumerian Legal Forms" and elsewhere, if Abi-ati defaulted on the loan, some penalty, most likely in the form of interest at the usual rate, would have been imposed. These texts often speak of barley (etc.) being borrowed without interest (*máš nu-ub-tuku*, etc.), but then specify that if the property is not returned in a timely fashion, it will bear interest (*máš ġá-ġá-dam*, and the like).

22. For antedated documents from the Old Babylonian period, cf. M. Stol, *Studies in Old Babylonian History* (Leiden, 1976) pp. 44-45.

force one of the parties to travel further than he wanted to, and all agreed to go to the scribe first, and then go into Nippur itself for the actual transfer.

Many possibilities for the background of such a situation can be imagined, and they must remain mere possibilities, for the actual circumstances which, in detail, surround any legal or economic document are not recorded. They are not *legally* relevant, and therefore are left unmentioned. We can only be certain that the grain was transferred (as shown by the fact that the tablet is unbroken) in Nippur (since the document was found there).

Given the considerations which we have brought to bear, then, it seems likely that the clause interpreted by Owen as a penalty clause is no penalty clause at all: it refers to the execution of a document, not the killing of a man.