Roman-Law Influence on Louisiana's Landlord-Tenant Law: The Question of Risk in Agriculture

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ESSAYS

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Farm tenancy was an institution of fundamental importance to the economy of the early Roman empire. Many upper-class landowners depended on farm tenancy as a means of cultivating diverse and scattered estates, and the changing and dynamic relationship between landowners and tenants was a basic feature defining the economy and social structure of the Roman empire. Any investigation of the Roman institution of farm tenancy must begin with an analysis of the legal sources, including the rescripts of Roman emperors preserved in the Justinian Code, and the writings of the classical Roman jurists preserved in the Digest of Justinian, especially § 19.2 on *locatio-conductio*, or lease and hire.

Interpreting these sources as evidence for economic history, however, involves considerable difficulties. The jurists were concerned with presenting generalized rules for farm tenancy; accordingly, the responses to a given legal problem posed in the sources tend to reduce the details surrounding the original case to a minimum. The result is that the legal sources present us with a normative lease based on abstract conceptions of both landowner and tenant, which frequently simplified and idealized reality.[1] The

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1. On the "ideal" farm tenant in the Digest of Justinian, see Bruce W. Frier, *Law, Technology, and Social Change: The Equipping of Italian Farm Tenancies*, 96 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, ROMANISTISCHE ABTEILUNG 204-28 (1979). For the use of "ideal" types in the regulation of the Roman building industry, see Susan D. Martin, *The Roman Jurists and the Organization of Private Building in the Late Republic and Early Empire*, *in* 204 COLLECTION LATOMUS 11-14, 138-40 (1989).

question that the historian of the Roman economy must answer is whether the jurists sought to respond to contemporary social needs in formulating rules for farm tenancy. Only if they did so can we use the legal sources as evidence of the fundamental relationships that characterized the Roman economy. The alternative is that the jurists, in developing rules for farm tenancy, operated within a legal system subject chiefly to its own logic, thereby taking little account of the social realities.

We could understand better the significance of the way in which the Roman jurists treated basic issues in farm tenancy by tracing their treatment in later civilian legal systems. The law of tenancy in Louisiana provides a convenient starting point for such an analysis. In the nineteenth century, Louisiana lawmakers sought to adapt Roman-based traditions as the legal foundation for a society that was largely agrarian. One particularly significant aspect of farm tenancy for analyzing how a legal system treats this institution is the allocation of risk in agriculture.

In this Essay, I will compare how this issue was treated both in classical Roman law and in nineteenth-century Louisiana law. As we shall see, although the Louisiana law of tenancy is based on Roman law, the treatment of this issue in the two systems could hardly be more different. The contrasting treatment of risk in agriculture confirms a hypothesis for my own work as a historian of the Roman economy: The classical Roman jurists were very much concerned with adapting private Roman lease law to an economy in which upper-class landowners depended on tenants with long-term leases who continually invested their own resources in maintaining the productivity of an estate.

The modern Louisiana Civil Code preserves the nineteenth-century Code's strict and specific conditions under which the farm tenant has a legal right to a rent abatement because of damage to the crop. Article 2743 of the Louisiana Civil Code allows a tenant of a predial estate to claim an abatement of rent only if at least half the crop is destroyed by accidents "of such an extraordinary nature, that they could not have been foreseen by either of the parties at the time the contract was made."[2] The Article then lists, as an example of the type of accident that would justify an abatement of rent, a war in a country

2. LA. CIV. CODE ANN. art. 2743 (West 1952).

at peace.[3] This restriction of the legal grounds for an abatement of rent goes well beyond the corresponding article in the Napoleonic Code, which allows the tenant to claim an abatement of rent in a lease enduring for at least several years if at least half the crop has been destroyed by accident and if the tenant is not indemnified by previous harvests.[4] The abatement is computed only at the end of the lease, but a judge can authorize a provisional abatement pending the final computation of the tenant's obligations.[5]

The Napoleonic Code's concern with the crops produced throughout the lease as a means of determining the tenant's obligations indicates its close affinity with Roman lease law. This particular provision adapts a Roman legal principle formulated by the early third-

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3. LA. CIV. CODE art. 2714 (1825) (West comp. ed. 1972):

> The tenant of a predial estate can not claim an abatement of the rent, under the plea that, during the lease, either the whole, or a part of his crop, has been destroyed by accidents, unless those accidents be of such an extraordinary nature, that they could not have been foreseen by either of the parties at the time the contract was made, such as the ravages of war extending over a country then at peace, and where no person entertained any apprehension of being exposed to invasion or the like.
>
> But even in these cases, the loss suffered must have been equal to the value of one-half of the crop at least, to entitle the tenant to an abatement of the rent.
>
> The tenant has no right to an abatement, if it is stipulated in the contract, that the tenant shall run all the chances of all foreseen and unforeseen accidents.

The earlier versions of LA. CIV. CODE art. 2743 (LA. CIV. CODE art. 2714 (1825) (West comp. ed. 1972)) and LA. CIV. CODE art. 3.8.54 (1808) (West comp. ed. 1972)) are largely the same as the modern version.

4. CODE NAPOLÉON art. 1769 (nouvelle ed., Paris, 1807).

5. *Id.* Article 1769 of the Napoleonic Code provided the following:

> Si le bail est fait pour plusieurs années, et que pendant la durée du bail la totalité ou la moitié d'une récolte au moins soit enlevée par des cas fortuits, le fermier peut demander une remise du prix de sa location, à moins qu'il ne soit indemnisé par les récoltes précédentes.
>
> S'il n'est pas indemnisé, l'estimation de la remise ne peut avoir lieu qu'à la fin du bail, auquel temps il se fait une compensation de toutes les années de jouissance.
>
> Et cependant le juge peut provisoirement dispenser le preneur de payer une partie du prix, en raison de la perte soufferte.

Id. Article 1770 stated the following:

> Si le bail n'est que d'une année, et que la perte soit de la totalité des fruits, ou au moins de la moitié, le preneur sera déchargé d'une partie proportionelle du prix de la location.
>
> Il ne pourra prétendre aucune remise, si la perte est moindre de moitié.

Id. art. 1770.

century jurist Papinian.[6] Clearly, the formulators of the Louisiana Code intended to strengthen the landowner's claim for rent. In so doing, they placed a greater share of the risk in agriculture on the tenant than was the case either in Roman law or in later civilian systems.[7]

Classical Roman lease law granted the tenant relief in the event of an unforeseeable disaster, or *vis maior*.[8] The question for the jurists centered around defining the conditions that released the tenant from this obligation. Ulpian and Pomponius both quoted Servius Sulpicius Rufus, who defined these conditions as "any force that cannot be resisted" (*omnem vim, cui resisti non potest*) like, for example, an irresistible force of rivers, jackdaws or starlings, disastrous and unforeseen weather conditions, an enemy attack, or an earthquake.[9]

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6. DIG. 19.2.15.4 (Ulpian, Edict 32) (referencing Papinian).

7. For discussion of lease law in the civilian tradition, see REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 338-412 (1990). For Roman lease law, see Frier, *supra* note 1, at 204-28; J. KÖHN ET AL., DIE KOLONEN IN ITALIEN UND DEN WESTLICHEN PROVINZEN DES RÖMISCHEN REICHES 183-244 (1983). For the legal principles of what civilians have termed *locatio-conductio rei*, see generally 1 MAX KASER, DAS RÖMISCHE PRIVATRECHT 565-68 (2d ed. 1971); THEO MAYER-MALY, LOCATIO-CONDUCTIO, EINE UNTERSUCHUNG ZUM KLASSISCHEN RÖMISCHEN RECHT (1956). For an authoritative discussion of lease law in Louisiana, see generally Comment, *The Louisiana Law of Lease*, 39 TUL. L. REV. 798 (1965).

8. DIG. 19.2.15.2 (Ulpian, Edict 32); *cf.* DIG. 19.2.25.6 (Gaius, Prov. Edict 10). On the legal doctrine of *remissio mercedis*, see F. Sitzia, *Considerazioni in tema di* Periculum Locatoris *e di* Remissio Mercedis, *in* I STUDI IN MEMORIA DI GIULIANA D'AMELIO 331-61 (1978); *see also* LUIGI CAPOGROSSI COLOGNESI, AI MARGINI DELLA PROPRIETÀ FONDIARIA 143-99 (1995); ZIMMERMANN, *supra* note 7, at 369-74; Pieter Willem de Neeve, *Remissio Mercedis*, 100 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, ROMANISTISCHE ABTEILUNG 296 (1983); Bruce W. Frier, *Law, Economics, and Disasters down on the Farm:* Remissio Mercedis *Revisited*, 92-93 BULLETTINO DELL'ISTITUTO DI DIRITTO ROMANO «VITTORIO SCIALOJA» 237. For a general discussion of *vis maior* in Roman law, see 1 KASER, *supra* note 7, at 566, 571; MAYER-MALY, *supra* note 7, at 140-47, 189 (discussing the classical Roman concept of *vis maior* in agricultural leases).

9. DIG. 19.2.15.2 (Ulpian, Edict 32):

On the other hand, the tenant had no claim to relief for losses resulting from hazards in farming that were foreseeable, no matter how serious they were. Servius (or his commentators Pomponius and Ulpian) provide, as examples of this type of risk, the organic deterioration of wine, the infestation of a grain crop by birds or weeds, and the theft of crops by a passing army.[10] These hazards, *vitia ex re*, are distinguished from *vis maior* in that they represent the type of risks associated with agriculture that any farmer could be expected to have taken into account before entering into the lease contract. Accordingly, tenants were not legally entitled to relief on the basis of a poor crop alone. Thus, the emperor Antoninus Pius rejected as "revolutionary" a petition from a tenant of a vineyard who had claimed a remission of

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Si uis tempestatis calamitosae contigerit, an locator conductori aliquid praestare debeat, uideamus. Seruius omnem uim, cui resisti non potest, dominum colono praestare debere ait, ut puta fluminum graculorum sturnorum et si quid simile acciderit, aut si incursus hostium fiat.... sed et si labes facta sit omnemque fructum tulerit, damnum coloni non esse, ne supra damnum seminis amissi mercedes agri praestare cogatur.... sed et si ager terrae motu ita corruerit, ut nusquam sit, damno domini esse: oportere enim agrum praestari conductori, ut frui possit.

Let us see, if the force of a calamitous storm has occurred, whether the lessor should have any obligation toward the tenant. Servius says that the landlord should be obligated toward the tenant for every force, which cannot be resisted, such as a force of rivers or of jackdaws or starlings and if anything similar should happen, or if an invasion of the enemy should occur ... but if a landslide should occur and it removes the whole crop, the loss does not accrue to the tenant, so that, beyond the loss of his destroyed seed, he not be forced to pay the rent for his field.... But if the field should collapse because of an earthquake, so that it is nowhere, the loss is the landlord's: for a farm must be furnished to the lessee so that he can enjoy it.

In the papyrological attestation of this passage, Pomponius is cited as referring to Servius's discussion: "*[E]t refert Pomponius Servium existimasse omnem uim, cui resisti non potest, dominum colono praestare debere.*" The Pomponius passage is preserved in PAPIRI GRECI E LATINI [PSI] XIV No. 1449 (V. Bartoletti ed., 1957), which is quoted by Sitzia, *supra* note 8, at 331.

10. DIG. 19.2.15.2 (Ulpian, Edict 32):

si qua tamen uitia ex ipsa re oriantur, haec damno coloni esse, veluti si vinum coacuerit, si raucis aut herbis segetes corruptae sint ... sed et si uredo fructum oleae corruperit aut solis feruore non adsueto id acciderit, damnum domini futurum: si uero nihil extra consuetudinem acciderit, damnum coloni esse. idemque dicendum, si exercitus praeteriens per lasciuiam aliquid abstulerit.

If any hazards arise from the thing itself, these are the tenant's losses, such as if the wine goes sour, if the grain crops have been corrupted by earthworms or by weeds.... But if blight corrupts the crop of olives or if this happens because of unaccustomed heat of the sun, the loss will accrue to the landlord: if nothing beyond what is customary happens the loss accrues to the tenant. The same thing must be said if an army passing by removes something wantonly.

Cf. Sitzia, *supra* note 8, at 338-39 (arguing convincingly that the theft by the passing army should be viewed as a *vitium ex re*, a foreseeable risk for which the tenant was responsible).

rent because of the advanced age of the vines.[11] In addition, the relief provided to the tenant was limited; he was entitled only to a pro-rated reduction of rent, with no indemnification for the loss of income or even for the loss of seed.[12]

The origin of this principle and its precise legal basis have long been an area of heated scholarly debate. On the one hand, the Roman jurist Ulpian explained the tenant's right as deriving from the lessor's failure to provide him with a farm that he could cultivate (*ut frui liceat*); a poor harvest could be viewed as an impairment of the lessee's use and enjoyment of the farm held under lease.[13] This principle has provided the legal basis for granting the tenant relief in modern civilian systems, including Louisiana. Indeed, several modern scholars have accepted Ulpian's explanation.[14] This view has been questioned, however, most notably by Bruce W. Frier, who suggested that the Roman doctrine of remission of rent had little to do with any failure on the part of the lessor. Rather, the crucial point was that external circumstances made it impossible for the tenant to perform his contractual obligations. In Frier's view, the Roman jurists, beginning with the Republican jurist Servius Sulpicius Rufus, granted the tenant remissions of rent as a means of preserving the contractual relationship between landowner and tenant in the face of disasters that could beset farming.[15] Still, the Roman imperial authorities under this principle

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11. DIG. 19.2.15.5 (Ulpian, Edict 32).

12. DIG. 19.2.15.7 (Ulpian, Edict 32):

Ubicumque tamen remissionis ratio habetur ex causis supra relatis, non id quod sua interest conductor consequitur, sed mercedis exonerationem pro rata: supra denique damnum seminis ad colonum pertinere declaratur.

Whenever, however, the reason for a remission is considered for the reasons related above, the tenant does not gain what is in his interest, but a pro-rated exoneration of his rent: in addition finally the loss of the seed is declared to pertain to the tenant.

13. DIG. 19.2.15 (Ulpian, Edict 32):

Ex conducto actio conductori datur. Competit autem ex his causis fere: ut puta si re quam conduxit frui ei non liceat . . . uel si quid in lege conductionis conuenit, si hoc non praestatur, ex conducto agetur. . . . oportere enim agrum praestari conductori, ut frui possit.

An action on lease is given to the lessee. It is granted roughly on the basis of these causes: as, for instance, if it should not be possible for him to enjoy the thing that he has leased . . . or if there is some provision in the lease contract, if this is not provided, there will be an action on lease . . . for a farm must be provided to the lessee, so that he can enjoy it.

Cf. Frier, *supra* note 8, at 241-44.

14. *See* CAPOGROSSI COLOGNESI, *supra* note 8, at 143-99; de Neeve, *supra* note 8, at 296-339.

15. *See* Frier, *supra* note 8, at 239-60.

did not grant the tenant any relief for the characteristic droughts that make Mediterranean agriculture a risky business.[16]

The principal hazard that farmers in Louisiana face is flooding. The Louisiana courts have been consistent in interpreting flooding as an eminently foreseeable risk, which the tenant would have to take into account when entering into a lease. The authoritative interpretation of Article 2743 of the Louisiana Civil Code was established by the Louisiana Supreme Court in *Vinson v. Graves*.[17] There, the lessor sued to recover rent from a tenant who had leased a plantation of 160 acres in Carroll Parish in 1858. The rent was set at $4.00 per acre, for a total of $650. In the course of the year, the land was flooded by the Mississippi River. The flooding completely destroyed the growing crop, and because the land remained under water until late August, no other crop could be cultivated. The lower court, although recognizing the deleterious effects of the flood, ruled in favor of the lessor, and the tenant appealed.[18]

The Louisiana Supreme Court upheld the decision of the lower court, basing its decision on a strict interpretation of Article 2743.[19] In the court's view, the flooding by the Mississippi, no matter what damage it caused, was such a frequent occurrence that it could not be regarded as the type of unforeseen accident entitling the tenant to an abatement of rent.[20] It is noteworthy that the court did not consider Articles 2697 and 2699, which allow for an annulment of the lease or a

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16. On the risks in Mediterranean agriculture, see EMMANUEL LE ROY LADURIE, THE PEASANTS OF LANGUEDOC 133 (J. Day trans., George Happart ed., 1974).

17. 16 La. Ann. 162 (1861).

18. *Id.* at 163.

19. *Id.*

20. *Id.* The court stated:

> The overflow of the Mississippi River is of such frequent occurrence that it cannot be regarded as belonging to that class of [extraordinary] and unforeseen accidents which entitle the tenant of a predial estate to an abatement of the rent. Indeed the overflows of this river are so frequent that a system of levees, has been constructed under the authority of the State, for the purpose of preventing, we may say, the annual inundation of its banks; and so frequently have the waters of this river made breaches in the levees, that even a crevasse itself cannot be considered as an extraordinary accident in the sense of article 2714 [currently found at Article 2743] of the Code, and as such entitle the tenant of a predial estate to a reduction of the [stipulated] rent, although such crevasse [should] be the means of overflowing the land leased by the tenant, and thereby destroying a part or the whole of his crop.

Id. at 163.

partial abatement of the rent in the event of a total or partial destruction of the thing leased.[21] In an earlier case, the Louisiana Supreme Court did invoke Article 2699.[22] This case involved a lease for a house in New Orleans which had been rendered unusable for a period of time because of a Mississippi flood.[23] The court there found that the lessor had "satisfied equity" by offering the tenant a partial rent abatement.[24]

In later cases in which the tenant has sought an abatement of rent for damage caused by flooding, the Louisiana Supreme Court has consistently applied the *Vinson* rationale. Thus, a tenant of a cotton plantation was denied a rent abatement when a flood from the Red River destroyed a large part of the crop.[25] In the court's view, the tenant had failed to show that the flooding "was unusual, unforeseen, and [an accident] to which the country was not ordinarily subjected."[26] Similarly, in *Hollingsworth v. Atkins*, the Louisiana Supreme Court did not allow an abatement of rent when flooding by the Red River reduced the crop by more than two-thirds.[27] In this century, the Louisiana Supreme Court considered a claim for an abatement because of damage caused to crops by a hurricane, but in that case, the evidence that the hurricane had actually caused substantial damage to the crop was weak, so that the question of whether Article 2743 excludes hurricanes as an "unforeseen accident" was not adequately tested.[28]

Floods and other disasters could do more than simply destroy a crop—they could also destroy the working capital of the farm, making it impossible for the tenant to produce his crop. This circumstance provides the only legal grounds on which the Louisiana courts might offer any relief to the tenant. The legal principle was firmly established in a Louisiana case that went to the United States Supreme Court. *Viterbo v. Friedlander* involved an appeal from the federal

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21. *See* LA. CIV. CODE ANN. arts. 2697, 2699 (West 1952).
22. Dussnau v. Generis, 6 La. Ann. 279 (1851).
23. *Id.*
24. *Id.*
25. Masson v. Murray, Carroll & Co., 21 La. Ann. 535, 536 (1869).
26. *Id.*
27. 15 So. 77, 46 La. Ann. 515 (1894).
28. Patout v. Bourriaque, 44 So. 2d 238 (La. Ct. App. 1st Cir. 1950); *see also* Haygood v. McKenna, 11 La. App. 312, 123 So. 479 (La. Ct. App. 2d Cir. 1929) (refusing a claim for a rent abatement affecting one-third of a cotton plantation).

circuit court for the Eastern District of Louisiana.[29] In *Viterbo*, a French citizen had leased a sugar plantation in St. Charles Parish for five years, from September 27, 1883 to December 15, 1888, for an annual rent of $5,000. The lessor provided standing cane, as well as thirty-four mules, valued at $3,700, and other implements, valued at $500. At the end of the lease, the tenant was to leave behind eighty-five acres of full-standed seed cane, as well as 200 acres of stubble, both of which were needed to produce the following year's crop. During March of 1884, however, the levee of the Mississippi River gave way, destroying all the cane and leaving a three- to six-inch deposit of mud all over the plantation.[30] The tenant argued that the plantation had been "rendered wholly unfit for the purpose for which it had been leased," and accordingly, he requested that the lessor restore the plantation to its condition at the time when the original lease was contracted, replacing the lost cane and stubble.[31] The lessor refused to do this, and so the tenant petitioned for an annulment of the lease.

The tenant based his original demand—that the lessor restore the plantation to its condition at the time of the contracting of the lease—on the articles in the Civil Code prescribing the duties of the lessor.[32] Under Articles 2692 and 2693, the lessor is obligated to maintain the thing leased "in a condition such as to serve for the use for which it is hired," as well as to make necessary repairs, including those which "may accidentally become necessary" during the course of the lease.[33] Under this interpretation of the law, the flooding of the Mississippi was an "accident" for which the lessor bore the risk. When the lessor did not meet the demand that he repair the plantation in order to restore it to its original condition, the tenant based his petition for the annulment of the lease on Articles 2697[34] and 2699.[35] According to Article 2697, the lease is annulled if the thing leased is totally destroyed by an "unforeseen accident," whereas if the thing leased is destroyed in part, the lessee has a right to either an abatement of the

29. 120 U.S. 707 (1886), *rev'g* 24 F. 320 (E.D. La. 1885).

30. *Id.* at 708.

31. *Id.*

32. *Id.* at 716-24.

33. *Id.* at 716.

34. LA. CIV. CODE art. 2697 (1870) (West comp. ed. 1972) (corresponding to LA. CIV. CODE art. 2667 (1825) (West comp. ed. 1972)).

35. LA. CIV. CODE art. 2699 (1870) (West comp. ed. 1972) (corresponding to LA. CIV. CODE art. 2669 (1825) (West comp. ed. 1972)).

rent or an annulment of the lease. According to Article 2699, the tenant can seek an annulment of the lease if the thing leased should "cease to be fit for the purpose for which it was leased, or if the use be much impeded."[36]

The lower court appointed a master to examine the tenant's claim.[37] While acknowledging the destruction caused by the flood, the master found that the property itself had not been destroyed or rendered unfit. In fact, the deposit of mud that the Mississippi had left on the land was considered to have enhanced the fertility of the plantation. Accordingly, the lower court refused to grant the tenant any relief. Given the Louisiana Supreme Court's decision in *Vinson v. Graves*, the court could not grant the tenant an abatement of rent because of the destruction of the crop by an unforeseen accident. Similarly, the lower court interpreted the language of Articles 2697 and 2699 as likewise excluding any liability on the part of the lessor for a flood.

The United States Supreme Court, in overturning the lower court's decision and granting the tenant an annulment of the lease, considered an important factor that distinguished *Viterbo* from *Vinson v. Graves*, and applied a broader interpretation to the term "unforeseen accident" in Articles 2697 and 2699.[38] Whereas the lower court considered only the condition of the land, the Supreme Court considered the condition of the plantation's equipment and also the condition of the standing and stubble cane. In the Court's interpretation, the damage to the plantation went well beyond the destruction of the crop, for which the tenant could not expect any relief. The Court considered that the standing and stubble cane, necessary for the cultivation of a future crop, was in fact an essential part of what the tenant had leased.[39] Its destruction, then, meant that

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36. LA. CIV. CODE art. 2699 (1870) (West comp. ed. 1972); *cf.* CODE NAPOLÉON art. 1722:

> Si, pendant la durée du bail, la chose louée est détruite en totalité par cas fortuit, le bail est résilié de plein droit; si elle n'est détruite qu'en partie, le preneur peut, suivant les circonstances, demander, ou une diminution du prix, ou la résilation même du bail. Dans l'un et l'autre cas, il n'y a lieu à aucun dédommagement.

37. *Viterbo*, 120 U.S. at 710.

38. *Id.* at 736-37.

39. *Id.* at 736.

the farm could no longer be used as a sugar plantation.[40] Accordingly, the central issue that the Court faced was whether the flooding of the Mississippi in fact represented the type of "unforeseen accident" envisioned in Articles 2697 and 2699.

Relying on the terminology in the Napoleonic Code and in the original French version of the Louisiana Code, the Supreme Court distinguished between the types of accidents in these two articles and those in Article 2743 that justify the tenant's claim for an abatement of rent.[41] The term "unforeseen accident" is a translation of the French *cas fortuit*, and the Napoleonic Code distinguishes between *cas fortuits ordinaires* and *cas fortuits extraordinaires*. The term *cas fortuit* expresses the Roman concept of "*vis maior*," or irresistible force.[42] In the Court's reasoning, the article in the 1808 Digest corresponding to the present Article 2743 went far beyond the Napoleonic Code in restricting the circumstances under which a tenant could claim an abatement of rent.[43] Thus, the language of Article 2743, "accidents . . . of . . . an extraordinary nature," is a rendering of *cas fortuits . . . d'une nature extraordinaire*.[44]

Limiting the tenant's right to an abatement of rent for the destruction of crops to a *cas fortuit extraordinaire* is also found in Pothier,[45] but this restriction is not part of the Napoleonic Code.[46]

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40. *Id.*

41. *Id.* at 716-35.

42. *Id.* at 727-28.

43. *Id.* at 729-33.

44. LA. CIV. CODE art. 3.8.54 (1808) (West comp. ed. 1972); LA. CIV. CODE art. 2714 (1825) (West comp. ed. 1972):

> Le fermier d'un bien rural ou de campagne ne peut obtenir aucune remise sur le prix du bail sous prétexte que, pendant la durée de son bail, la totalité, ou partie de sa récolte, lui aurait été enleveé par des cas fortuits, si ce n'est que ces cas fortuits fussent d'une nature extraordinaire, et dont l'événement n'a pu raisonnablement être prévu, ou supposé par les parties, lors du contrat.

45. ROBERT J. POTHIER, OEUVRES DE POTHIER, TRAITÉ DU CONTRAT DE LOUAGE ET TRAITÉ DES CHEPTELS no. 163, at 91 (1806). Pothier wrote:

> Il faut . . . que l'accident qui a causé une perte considérable des fruits, soit un accident extraordinaire, et non pas de ces accidens ordinaires et fréquens auxquels un fermier doit s'attendre. Par exemple, le fermier d'une vigne ne doit pas demander une remise de sa ferme pour la perte qu'a causée la gelée, la coulure ou la grêle, à moins que ce ne fût une gelée extraordinaire, ou une grêle extraordinaire qui eût causé la perte totale des fruits.

Id.

46. *See* CODE NAPOLÉON arts. 1769-1771.

Accordingly, the formulators of the Louisiana Code, in the Supreme Court's reasoning, sought to apply stricter standards for an abatement of rent than for a cancellation of a lease in Articles 2697 and 2699.[47] In these articles, the term "unforeseen event" is a rendering of the French *cas fortuit*, itself a rendering of the Roman term *vis maior*. Thus, even though the flooding of the Mississippi could in no way justify an abatement of the rent in accordance with Article 2743, it could be viewed as the type of "unforeseen accident" that could justify a cancellation of the lease in accordance with Article 2697. Subsequently, the Louisiana Supreme Court would apply the same reasoning in requiring another lessor to make good on a loss of a tenant's equipment caused by flooding.[48]

The Supreme Court's decision to consider the lease annulled in *Viterbo* contrasts sharply with the practice of the Roman legal authorities in adjudicating remissions of rent. Louisiana law imposes practically all the risk for the crop on the tenant; only in the most extreme circumstances, which do not seem to have arisen in connection with nineteenth-century cases, could a tenant legally claim a remission of rent. In circumstances that make it impossible for the tenant to fulfill his lease requirements, Louisiana law envisions the annulment of the lease as the most equitable solution.

The Roman authorities, by contrast, never countenanced abrogating the lease except under the most extreme circumstances. Instead, they undertook to define the rights and obligations of landowners and tenants in an economy characterized by landowners being forced by economic considerations to grant remissions of rent to tenants occupying their farms in open-ended leases. We can see this concern on the part of the Roman authorities in their treatment of the granting of remissions on the basis of *sterilitas*, or a disastrously poor harvest.

In theory, the Roman farm lease imposed the bulk of the risk on the tenant, who, because he paid a cash rent, bore the risk both for the size of the crop and for its market price. As we have seen, under the principle of *vitia ex re*, the tenant had no legal claim for a remission of rent when a drought or other common disaster made it just as

47. *Viterbo*, 120 U.S. at 729-33.

48. *See* Hollingsworth v. Atkins, 15 So. 77, 46 La. Ann. 515 (1894) (stating that the lessor of a plantation had to bear the costs of repairs to fences, houses, and cisterns caused by the flooding of the Red River).

impossible for him to pay his rent as might an accident that could formally be classified as *vis maior*. On the other hand, the experiences of upper-class landowners in the Roman empire suggest that these matters were far from clear. The Roman Senator Pliny the Younger, whose published correspondence allows us to trace how he dealt with problems involving his tenants, frequently was forced by circumstances to grant his tenants remissions of rent; there was no question of the tenants' difficulties being caused by *vis maior*. In fact, the chronic indebtedness of his tenants had become so troublesome to Pliny that, on several estates, he replaced the traditional system of cash rents with sharecropping.[49] The Roman agronomist Columella also saw landowners as beset by requests on the part of tenants for remissions of rent, and so he prescribed measures by which the landowner could avoid this awkward situation in the first place.[50]

The imperial government was drawn into this issue repeatedly because tenants frequently petitioned that government for relief from poor harvests. Clearly, social considerations forced many landowners to grant their tenants remissions of rent, and the generosity of one landowner in a particular geographic area could influence other tenants to claim the same concessions from their landowners. The concern of the imperial government was to define the circumstances under which the tenant could make such a request when *sterilitas* reduced the crop, and also to define the rights and obligations of both landowners and tenants once a remission had been granted.[51] Papinian declared that a landowner granting a *remissio ob sterilitatem* still had a claim for the

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49. For a discussion of Pliny's relationships with his tenants, see Dennis Kehoe, *Allocation of Risk and Investment on the Estates of Pliny the Younger*, 18 CHIRON 15, 15-42 (1988); Dennis Kehoe, *Approaches to Economic Problems in the Letters of Pliny the Younger: The Question of Risk in Agriculture*, *in* II AUFSTIEG UND NIEDERGANG DER RÖMISCHEN WELT 33.1, at 555-90 (H. Haase & H. Temporini eds., 1989). For a contrasting interpretation of the evidence provided by Pliny's letters, see Pieter Willem de Neeve, *A Roman Landowner and his Estates: Pliny the Younger*, 78 ATHENAEUM 363, 363-402 (1990). For other recent discussions of Roman farm tenancy, see CAPOGROSSI COLOGNESI, *supra* note 8, at 143-301; KÖHN ET AL., *supra* note 7; PIETER WILLEM DE NEEVE, COLONUS: PRIVATE FARM-TENANCY IN ROMAN ITALY DURING THE REPUBLIC AND THE EARLY PRINCIPATE (1984); W. SCHEIDEL, GRUNDPACHT UND LOHNARBEIT IN DER LANDWIRTSCHAFT DES RÖMISCHEN ITALIEN (1994); E. Lo Cascio, *Considerazioni sulla struttura e sulla dinamica dell'affitto agrario in età imperiale*, *in* DE AGRICULTURA: IN MEMORIAM PIETER WILLEM DE NEEVE 296-316 (Heleen Sancisi-Weerdenburg et al. eds., 1993).

50. COLUMELLA, DE RE RUSTICA 1.7.1-.2.

51. This discussion of the *remissio ob sterilitatem* is based on Sitzia, *supra* note 8, at 331-61, and Frier, *supra* note 8, at 92-93.

full rent for the entire lease period if subsequent years produced bountiful crops, *ubertas*.[52] This was the principle that found its way into the Napoleonic Code's treatment of this issue, as I have stated, and it was reaffirmed in a rescript of Alexander Severus. That emperor granted a petitioner's claim to a remission of rent only if the petitioner's poor harvest caused by a climatic disaster was not balanced out by other bountiful years during the lease period.[53] In a later rescript, Diocletian defined the rights and obligations of landlords when other landlords in their vicinity engaged in acts of generosity that

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52. *See* DIG. 19.2.15.4 (Ulpian, Edict 32) concerning remissions granted *ob sterilitatem*:

Papinianus libro quarto responsorum ait, si uno anno remissionem quis colono dederit ob sterilitatem, deinde sequentibus annis contigit uberitas, nihil obesse domino remissionem, sed integram pensionem etiam eius anni quo remisit exigendam. hoc idem et in uectigalis damno respondit.

Papinian says in his fourth book of responses, if someone has given the tenant a remission in one year because of a poor crop, then in the following years a bountiful crop ensues, the remission does not compromise the rights of the landlord, but the entire payment, including for that year in which he remitted the rent, must be exacted. He made the same response also in connection with the loss of a vectigal.

For the view that this passage suggests that the imperial government imposed on tenants a requirement to cultivate the land, see MAYER-MALY, *supra* note 7, at 144. For a full discussion of this passage, see Frier, *supra* note 8, at 253-56 (discussing whether the "*quis*" in this response is an imperial official or a lessor); *cf.* H. Ankum, *Remissio mercedis*, 19 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ 219, 229 (1972); de Neeve, *supra* note 8, at 321.

53. *Cf.* CODE J. 4.65.8 (Alex.):

Licet certis annuis quantitatibus fundum conduxeris, si tamen expressum non est in locatione aut [aut VC cum Graecis, ut PR] mos regionis postulat, ut, si qua labe tempestatis vel alio caeli vitio damna accidissent, ad onus tuum pertinerent, et quae evenerunt sterilitates ubertate aliorum annorum repensatae non probabuntur, rationem tui iuxta bonam fidem haberi recte postulabis, eamque formam qui ex appellatione cognoscet sequetur.

Granted that you have leased a farm for fixed annual payments in kind, if however it has not been expressly provided for in the lease or the custom of the region does not require that, if losses should have occurred because of any destruction of a storm or any climatic disaster, they should be part of your burden, and the poor crops that have occurred will not be shown to have been balanced out by bountiful crops of the other years, then you will correctly demand that your petition be considered to be in accordance with good faith, and the one who will judge on appeal will follow this rule.

For the reading of "*aut*" and in general for the interpretation of this rescript, see Sitzia *supra* note 8, at 357-58 & n.92; *cf.* POTHIER, *supra* note 45, no. 159, at 89:

> Pour qu'il y ait lieu à la remise, il faut que la perte de la récolte de l'année pour laquelle le fermier demande la remise, n'ait pas été recompensée par quelque abondance dans les autres années du bail, soit dans celles qui ont précédé cette année, soit dans celles qui l'ont suivie.

went beyond their contractual obligations or the custom of the region.[54]

In these decisions, it seems clear that the jurists and the Roman chancellery were concerned with responding to the needs of landowners whose economic prosperity to a large extent depended on the continued presence of tenants. The Roman legal authorities religiously avoided establishing conditions under which the lease might be canceled. Instead, they applied the principle of *remissio mercedis ob sterilitatem* in such a way as to cause a minimum of disturbance to the contractual arrangement.

In conclusion, I have examined how the legal authorities in Rome and Louisiana treated a fundamental aspect of farm tenancy. The contrasting treatment of risk in the two legal systems underscores the remarkable flexibility of Roman law. The Roman jurists and the imperial government developed the doctrine of *remissio mercedis* in order to define the rights and obligations of landowners and tenants in the face of the chronic vicissitudes that made agriculture in the ancient Mediterranean a risky business. The concern of the Roman legal authorities was to preserve what was most advantageous in farm tenancy to the economic interests of upper-class landowners, given the realities of the Roman economy. Accordingly, they developed a legal doctrine that resolved questions arising from disasters to the tenant's crop by preserving the lease relationship.

In nineteenth-century Louisiana, by contrast, where the continued presence of the types of tenants who appear in the cases was not a basic aspect of the agrarian economy, the legal authorities had a different concern. The inclusion of what is now Article 2743 in the Louisiana Civil Code strengthened the hand of the landowner to a degree unfamiliar in classical Roman law. But the United States Supreme Court mitigated this harsh approach in its interpretation of Articles 2697 (now Article 2967) and 2699 (now Article 2969) by

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54. CODE J. 4.65.19 (A. & Diocletian 293):

Circa locationes atque conductiones maxime fides contractus servanda est, si nihil specialiter exprimatur contra consuetudinem regionis. quod si alii remiserunt contra legem contractus atque regionis consuetudinem pensiones, hoc aliis praeiudicium non possit adferre.	In connection with leases and rentals the faith of the contract must especially be preserved, if nothing should expressly be provided for against the custom of the region. But if some have remitted payments against the law of the contract and the custom of the region, this should not be able to prejudice the rights of others.

invoking the classical principle that the lessor had to provide the tenant with a farm that he could use and enjoy, *ut ei frui liceat.* However, the result was one that surely would have been unfamiliar and probably undesirable to the classical Roman jurists. The one circumstance that the jurists were concerned with avoiding, the annulment of the lease, provided the solution to the problem of allocating the risk in agriculture.