

Land Tenure in Byzantine Property Law: *iura in re aliena*

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INSTITUTIONS OF LAND TENURE in Byzantine property law were influenced by fiscal policies of the state. These policies, conducive to substantial changes in the content of ownership, thus determined eventually a new legal and economic base for the relationship between an owner, a tenant of his land, and the state. The present study, concerning small land holdings in the Byzantine Middle Ages, will focus on those institutions of land tenure which appear to be most affected by modifications in Byzantine property law. The evidence from the period consists of the *Nóμος Γεωργικός*, the *Taxation Treatise* (*Cod. Marc. gr. 173*), and the *Zavorda Treatise*.¹ But we must first address two fundamental questions relating to farmers' land: the content of ownership in Byzantine property law, and the objectives of the state policies that influenced this law.

In approaching the genesis of ownership (*dominium*) in Byzantine property law, one must begin by referring to classical Roman law, in order to emphasize to what extent the contents of ownership differed in the two legal systems. The Roman *dominium* provided an owner with full power over an object of his right. An owner thus could terminate his ownership at any time either by alienation or by *derelictio* of the object of ownership. In the latter case, the object became *res nullius*. In Byzantine land property law, clearly expounded in the *Taxation Treatise*, the owner's right to terminate ownership of his land by *derelictio* was drastically limited. The mere act of desertion no longer carried any immediate legal consequences. It did not produce a *res nullius*; the owner

¹ Text and translation of the *Nóμος Γεωργικός* are quoted here from W. Ashburner, "The Farmer's Law," *JHS* 30 (1910) 85–108 and 32 (1912) 68–95. The *Taxation Treatise* was discovered and published by Ashburner, "A Byzantine Treatise on Taxation," *JHS* 35 (1915) 78–85. The *Zavorda Treatise*, discovered by J. Karayannopoulos, was published in his "Fragmente aus dem Vademecum eines byzantinischen Finanzbeamten," *Polychronion: Festschrift F. Dölger* (Heidelberg 1966) 318–34. An English translation (quoted here) of the treatises with comprehensive comments and bibliography: Charles M. Brand, "Two Byzantine Treatises on Taxation," *Traditio* 25 (1969) 35–60.

retained ownership of his land for the next thirty years following the act of desertion. (Note that this statement, based on analysis of the *Taxation Treatise*, refers only to land property of Byzantine free farmers, organized in farmer communities.)

The idea of a farmer community originated in Ptolemaic Egypt with the institution of the *κώμη* as a corporation of land tenants collectively liable for the fiscal obligations of its members. The concept of the community was further developed with the evolution of the late Roman and early Byzantine land taxation system. Historians have stressed three phases of the evolution: Diocletian's concept of *capitatio-iugatio*, the pre-Justinianic institution of *ὁμόκησον*, and Justinian's *ἐπιβολή τῶν ἀπόρων*. The latter two institutions represent legislative endeavors to secure the taxation system against demographic fluctuation, responsible for the decay of Diocletian's land-tax policy. The *Νόμος Γεωργικός* and the *Taxation Treatise* illustrate the final stage of this evolution, the outcome of the Heraclian land-tax reform. This reform, aiming to restore and maintain the military and economic strength of the empire, was designed to foster a broad class of small land owners, who were viewed as the most dependable source of taxation. Consequently, the Byzantine farmer community became one of the main forces behind the empire's economy during the Byzantine Middle Ages.²

The old Ptolemaic principle of collective liability for taxes constituted a fundamental basis of the community. This liability was implemented by a combination of two institutions: personal liability of a farmer for the taxes of his next-door neighbor (*ἀλληλέγγυον*), and the collective liability of the community for the fiscal obligations of its members (*ἐπιβολή*).

In the light of these remarks, the objectives behind the changes in land property law are obvious. A farmer was to pay only for the *property* of his neighbor, and likewise the community for its member. Hence abolition of the old content of the *derelictio* be-

² Karl E. Zachariä von Lingenthal, *Geschichte des griechisch-römischen Rechts*³ (Berlin 1892) 228–36; G. Ostrogorsky, "Die landliche Steuergemeinde des byzantinischen Reiches im X. Jahrhundert," *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte* 22 (1927) 1–103; F. Dölger, *Beiträge zur Geschichte des byzantinischen Finanzverwaltung besonders des 10. und 11. Jh.* (Leipzig/Berlin 1927); M. Rostovtzeff, *The Social and Economic History of the Roman Empire*² (Oxford 1957), esp. 481ff; J. Karayannopoulos, *Das Finanzwesen des frühbyzantinischen Staates* (Munich 1958); A. H. M. Jones, *History of the Later Roman Empire 284–602 I* (Norman 1964) 61ff, 453ff; W. A. Goffart, *Caput and Colonate* (Toronto 1974). On the Ptolemaic system see C. Préaux, *L'économie royale des Lagides* (Brussels 1939) 508ff; J. Méléze-Modrzejewski, *Annuaire de l'école pratique* 1978, 353–69.

came the main legal precondition of the new taxation system. In its classical Roman scope, *derelictio*, which resulted in a *res nullius ex nunc*, would remove any legal reason for paying taxes on abandoned land. Therefore, in order to create a dependable fiscal system, the Byzantine legislator sought to maintain a continuity of the legal base for this liability by extending the ownership on the deserted property for the next thirty years. By integrating the institution of the farmer community with the state fiscal system, and by vesting in the community the basic responsibilities for the functioning of this system, the legislator defined the community as a unit of the state fiscal administration. On the other hand, owing to the change in the concept of ownership, Byzantine private law relating to land property acquired features of public law to a degree unknown in the history of the relationship between an owner and the state.³

Rights on another's property (*iura in re aliena*) can be defined as limitation of the owner's right by either a contract with the owner or an administrative act of a municipality. The former act might generate such rights as the usufruct, the emphyteusis, the superficies; the latter act resulted in the 'servitudes', a limitation of individual rights for the sake of the common good. Because the creation of *iura in re aliena* is closely determined by the contents of ownership, any innovations in the latter are conducive to new features in *iura in re aliena* as well.

On the basis of the *Taxation Treatise* one can distinguish five categories of land which might be the object of *iura in re aliena* that reflect the new concept of ownership in Byzantine property law. These are: (1) abandoned land for which taxes were paid by a neighbor on the basis of reciprocity (*ἀλληλέγγυον*); (2) abandoned land for which taxes were paid by the farmer community on the basis of the community's collective liability for the fiscal obligations of its members (*ἐπιβολή*); (3) the property of an insolvent farmer who had not abandoned his land; (4) abandoned land exempted from taxes (*συμπάθεια*); (5) abandoned land which thirty years after its desertion became the property of the state (*κλάσμα*).

1. *Abandoned land and reciprocity* (*ἀλληλέγγυον*)

Farmers' reciprocal liability for taxes is represented in Art. 18 and 19 of the *Νόμος Γεωργικός*, which defined two basic notions

³ Danuta M. Gorecki, "The Heraclian Land Tax Reform: Objectives and Consequences," *Byzantine Studies/Études byzantines* 4 (1977) 127–46.

of this institution: the notion of abandoned land, and the scope of rights and duties deriving from the institution of reciprocity. Abandoned land was a land on which no taxes were paid by its absent owner (19); the duty of paying taxes for one's neighbor's deserted land is firmly tied to the right of the usufruct on this land (18). Reciprocity as a legal institution mandated a particular relationship between an insolvent absent owner and the usufructuary of his land. This characteristic is further emphasized in the corresponding article in Harmenopulos' version (1.13), which stipulates that after the owner's return, neither the usufructuary of his land nor the owner has any claim against each other.

18: If a farmer who is too poor to work his vineyard (Ferrini and Harmenopulos: "his field") takes flight and goes abroad, let those from whom claims are made by the public treasury gather in the grapes, and the farmer if he returns shall not be entitled to mulct them for wine.

19: If a farmer who runs away from his own field pays every year the extraordinary taxes of the public treasury, let those who gather in the grapes and occupy the field be mulcted twofold.⁴

These articles have been studied extensively since the middle of the nineteenth century. Zachariä von Lingenthal, who viewed the community as a body of independent farmers resembling both the old Roman *commune vici* and the Slavic *obshchina*, took the articles as evidence of collective liability of a Byzantine farmer community for land taxes. Russian historians of the last quarter of the nineteenth century developed Zachariä's assumption of Slavic influence on the origin of the Byzantine farmer community into a theory that the Byzantine community owned land collectively.⁵ Panchenko, however, challenged both the theory of collective property of land and the theory of collective liability for land taxes,

⁴ 18: ἐὰν ἀπορήσας γεωργὸς πρὸς τὸ ἐργάσασθαι τὸν ἴδιον ἀμπελῶνα διαφύγη καὶ ξενιτεύσῃ, οἱ τῷ δημοσίῳ ἀπαιτούμενοι λόγῳ ἐπιτρογγήτωσαν αὐτόν, μὴ ἔχοντος ἄδειαν τοῦ ἐπανερχομένου γεωργοῦ ζημιούν αὐτοῖς τὸν οἶνον.

19: ἐὰν γεωργὸς ἀποδράσας ἐκ τοῦ ἰδίου ἀγροῦ τελεῖ κατ' ἔτος τὰ ἐκστραοῦρδινα τοῦ δημοσίου λόγου, οἱ τρυγῶντες καὶ νεμόμενοι τὸν ἀγρὸν ζημιούσθωσαν ἐν διπλῇ ποσότητι.

⁵ Zachariä (*supra* n.2) 250–54; Vasilii G. Vasilevskii, "Zakonodastel'stvo Ikonobortsev," *Zhurnal Ministerstva narodnogo prosveshcheniia* 199 (1878) 258–309 and 200 (1878) 95–129; Fedor I. Uspenskiĭ, "O istorii krest'fanskogo zemlevlendeniia v Vizantiĭ," *Zhurnal Ministerstva narodnogo prosveshcheniia* 225 (1883) 30–87, 301–60; Aleksei S. Pavlov, "Vizantiiskā 'Knigi zakonnyā' v drevne-russkom perevode," *Sbornik Otdeleniia russkogo iazyka i slovennosti Imperatorskoi akademii nauk* 38.2 (1885) 1–92.

claiming that the two articles indicate individual liability of single farmers for their next-door neighbors (*ἐπιβολή τῶν ἀπόρων*).⁶

The *Taxation Treatise* has revealed more fully the legal character and the organizational structure of the Byzantine farmer community, as well as the mechanisms of the imperial land tax administration. With respect to the rights to land, provisions of the *Taxation Treatise* confirmed Panchenko's theory of individual ownership of farmers' land—in particular provisions relating to extinction (119.6–8, 39–42) and to transfer (121; 123.8–14) of ownership. With respect, however, to the conflicting theories of collective versus individual liability for taxes, the *Taxation Treatise* proved that, in a sense, both these theories were correct. Each represented half of the truth, a creditable achievement in view of the few sources available to the nineteenth-century scholars. The *Taxation Treatise*, expounding the institution of reciprocity in the context of the full legal structure of the community, pointed to the principles of this system. It emerged that not every member of the community could take over the duty of paying taxes for abandoned land, along with the right to usufruct the land. There were in the farmer community only two individual subjects of land-tax duties: the owner, and the immediate neighbor liable on the basis of reciprocity. Therefore, the *Taxation Treatise*, by supplying information lacking in Art. 18 of the *Νόμος Γεωργικός*, allows legal definition to the right linked to reciprocity. It was a particular kind of *ius in re aliena*, which derived neither from a contract nor from the communal policies of the municipality, but from the same premises of public law, determined by reasons of state, which modified the contents of ownership with respect to farmers' land.

2. *Abandoned land and collective liability* (*ἐπιβολή*)

According to the principle of collective liability for taxes, the farmer community was to take over all the tax duties of its fugitive members. Along with this duty, the community, according to Art. 18, acquired the right of the usufruct of the deserted land. In practice this meant that the amount of tax money due for the abandoned land was divided among those community members who were economically efficient enough to share the burden. Consequently, the deserted land itself, on which the paying farmers

⁶ Boris A. Panchenko, *Krest'ianskafā sobstvennost v Vizantiī: zelmedel'cheskiī zakon i monastyrskie dokumenty* (Sofia 1903) 15, 39–40, 86.

had collectively acquired the right of usufruct, might be distributed among them for their individual use. If a farmer who was obliged to pay, and thus was entitled to the usufruct, considered either of these divisions unjust or harmful, he had the right to claim cancellation of the division. For I would argue that this is the right guaranteed by Art. 8 of the *Νόμος Γεωργικός*: “If a division wronged people in their lots or lands, let them have license to undo the division.”⁷

The interpretation of the unclearly written Art. 8 has been one of the most controversial issues in the study of the Byzantine peasantry. A survey of the discussion on this article can be reduced to three main questions: (1) the right of the community to the land that was to be divided; (2) the rights of farmers to the allotted shares; (3) responsibility for initiating and executing the division. All scholars who have discussed this matter supplement their arguments on Art. 8 with the evidence of Art. 81–82⁸ and the *Sentence of Magister Kosma*.

The first two questions, inseparably interrelated, produced three theories. Those who believed in communal ownership of the community land assumed that after the division individual farmers acquired only possession—occupancy of the allotted shares—a right that was mutable and thus did not conflict with the idea of periodic redistributions.⁹ Historians who believed in the individual property of farmers’ land also admitted the existence of land owned

⁷ εἰάν μερισμός γενόμενος ἡδίκησέν τινας ἐν σκαρφίοις ἢ ἐν τόποις, ἐχέτωσαν ἀναλύειν τὴν γενομένην μερισίαν.

⁸ 81: εἰάν τις οἰκῶν ἐν χωρίῳ διαγνώσῃ τόπον κοινὸν ὄντα ἐπιτήδειον εἰς ἐργαστήριον μύλου καὶ τοῦτον προκατάσῃ, ἔπειτα δὲ μετὰ τὴν τοῦ ἐργαστηρίου τελείωσιν εἰάν ἢ τοῦ χωρίου κοινότης καταβοῶσι τῷ τοῦ ἐργαστηρίου κυρίῳ ὡς ἴδιον τὸν κοινὸν τόπον προκατασχόντι, πᾶσαν τὴν ὀφειλομένην αὐτῷ διδώτωσαν καταβολὴν εἰς τὴν τοῦ ἐργαστηρίου ἔξοδον καὶ ἔστωσαν κοινωνοὶ τῷ προεργασμένῳ. “If a man who is dwelling in a district ascertains that a piece of common ground is suitable for the erection of a mill and appropriates it and then, after the completion of the building, if the commonalty of the district complains of the owner of the building as having appropriated common ground, let them give him all the expenditure that is due to him for the completion of the building and let them share it in common with its builder.”

82: εἰάν μερισθείσης τῆς τοῦ χωρίου γῆς εὔρη τις ἐν τῇ ἰδίᾳ μερίδι τόπον ἐπιτήδειον εἰς ἐργαστήριον μύλου καὶ ἐπιμελήσῃται αὐτοῦ, οὐκ ἔχουσιν ἄδειαν οἱ τῶν ἄλλων μερίδων γεωργοὶ λέγειν τι περὶ τοῦ τοιοῦτου μύλου. “If after the land of the district has been divided, a man finds in his own lot a place which is suitable for the erection of a mill and sets about it, the farmers of the other lots are not entitled to say anything about the mill.”

⁹ Zachariä (*supra* n.2) 253; Fedor I. Uspenskiĭ, “Nablŭdeniĭa po sel’skokhozŭstvennoi istoriĭ Vizantiĭ,” *Zhurnal Ministerstva narodnogo prosveshcheniĭa* 259 (1888) 229–59 at 247–48; Fedor I. Uspenskiĭ and Vasilĭ V. Beneshevich, *Vazelonskie akty: materialy dlĭa istoriĭ krest’ŭnskogo i monastyrskogo zemlevladieniĭa v Vizantiĭ XIII–XV vekov* (Leningrad 1927) xlvī–xlviii.

collectively by the community (meadows, barrens, forests, etc.). These historians correctly concluded that the undivided communal land might become an object of two kinds of divisions. The *differentia specifica* between these two kinds was determined by whether the act of division created ownership or possession of the allotted shares. Hence, if the act of division transferred the rights to the land under division from the community to its individual members, then the act created ownership on the part of the members, and thus was final and immutable.¹⁰ Consequently, this type of division could not be linked to Art. 8, which clearly implies the mutability of the situation resulting from the division. The second kind of division of communal land would not create ownership on the part of individual owners. All the farmers were co-owners of the undivided land, paid their shares of taxes due from this land, and thus were entitled to exploit it: their right to the *usus* on this land would be implemented and secured by provisions of Art. 8 of the *Νόμος Γεωργικός*. Finally, some historians have maintained that Art. 8 dealt with simultaneous divisions of the abandoned land and taxes due from this land paid by the community on the principle of collective liability.¹¹

Unfortunately, the *Taxation Treatise* elucidated only a part of this controversial topic. By confirming the individual ownership of farmers' shares, it definitely excluded the first alternative (possession only), which was based on the assumption of communal ownership of community land. The treatise, however, offers no indication concerning the nature and result of division, so that the other hypotheses remain.

As to the question of responsibility for the division of Art. 8, the *Taxation Treatise* may be taken to suggest that this act was performed by a state official supervising *ex officio* matters dealing with appropriation and execution of taxes. This question, which scholars have treated as marginal, is of substantial importance for the interpretation of the objectives and scope of Art. 8.

Indeed, the existence of an office of the inspector would imply that divisions of land and taxes were vested in an official of the

¹⁰ Panchenko (*supra* n.6) 35–38, 77; Paul Lemerle, “Esquisse pour une histoire agraire de Byzance: les sources et les problèmes,” *Revue historique* 219 (1958) 32–74, 254–84; 220 (1958) 43–94 (at 219.59–62).

¹¹ Franz Dölger, *BZ* 29 (1929/30) 341; Mikhail ĪA. Sūsŭmov, “O kharaktere i sushchnosti vizantiiskoi obshchiny po Zemledelcheskomu zakonu,” *Vizantiiskii Vremennik* 10 (1956) 27–47 (at 37–38); for a fuller survey of the literature see D. Gorecki, “The Farmer Community,” forthcoming in *Byzantine Studies/Etudes byzantines* 8 (1981).

state fiscal administration. F. Dölger, who viewed Art. 8 as evidence of such divisions, linked its provisions with the *Sentence of Magister Kosma*, in particular with the thirty-year term stipulated in the latter source. From these two sources Dölger concluded that the division of abandoned land and taxes due from it was performed by the inspector, as a rule every thirty years. Yet the *Taxation Treatise* does not seem to support this conclusion. The phrases “and after some time an inspector comes” (121.10) or “the inspector sent by the emperor” (119.3) speak against any theory about regularity of official inspections. The *Taxation Treatise* also seems to limit the inspector’s duties to three basic issues: the primary division of the total sum of taxes imposed on a community; official transfer of ownership of land to legal successors; all the operations that result in any changes in the gross income of the community. In addition, other sources, investigated by Ostrogorsky and Svoronos, not only give no evidence of a fixed timetable for the inspector’s duties, but instead reveal substantial gaps, sometimes of up to five generations, in the official inspections of farmer communities.¹²

We may therefore infer that the day-to-day management of tax- and land-related matters was vested in the community itself. The community, being a corporation, had to be endowed with some executive power to handle its own administrative affairs, and especially those which called for a close familiarity with the economic situation of the members. The fact that Art. 8 was included in a compilation of laws relating to the inner structure of the farmer community confirms these assumptions. The absence of any term in this article allowed the community the maximum flexibility needed to adjust collective liability for taxes on deserted land to the financial potential of the individual taxpayers. If this conclusion is correct, then Art. 8 and Art. 18 both alike dealt with *ius in re aliena*: the right to usufruct of abandoned land, linked with the duty of paying taxes, on the part of the community (8) or of an individual farmer (18).

3. *Non-abandoned land of insolvent community members*

The *Νόμος Γεωργικός* and the *Taxation Treatise* do not address directly liability for taxes of an impoverished farmer who stayed in the community and kept on cultivating his land. We may infer

¹² Ostrogorsky (*supra* n.2) 84–85; Nicolas G. Svoronos, “Recherches sur le cadastre byzantin et la fiscalité aux XI^e et XII^e siècles: le cadastre de Thèbes,” *BCH* 83 (1959) 1–145, at 63–67.

from the premises of collective liability that the community had to pay taxes for an insolvent member whether he stayed on his land or not. Several historians of the Byzantine peasantry have stressed that the legal principles on which the community was organized developed a spirit of solidarity among the community members. It is obvious that the welfare of the community as a whole was determined by a balance between the community's fiscal obligations and its economic efficiency. Thus any case of a single farmer's tax insolvency became in fact a community problem. Therefore it is only logical to expect that the fact of collective liability for taxes of impoverished farmers who had not abandoned their land would lead to legal measures aimed at preserving this balance. The institution of half-sharing (*ἡμίσεια*) seems to be the answer to these collective concerns.

The institution of half-sharing is represented by Art. 11–15:

11. If a man takes land from an indigent farmer and agrees to plough only and to divide, let their agreement prevail; if they also agreed on sowing, let it prevail according to their agreement.

12. If a farmer takes from some indigent farmer his vineyard to work on a half-share and does not prune it as is fitting and dig it and fence it and dig it over, let him receive nothing from the produce.

13. If a farmer takes land to sow on a half-share, and when the season requires it does not plough but throws the seed on the surface, let him receive nothing from the produce because he played false and mocked the land-owner.

14. If he who takes on a half-share the field of an indigent farmer who is abroad changes his mind and does not work the field, let him restore the produce twice over.

15. If he who takes on a half-share changes his mind before the season of working and gives notice to the landowner that he has not the strength and the landowner pays no attention, let the man who took on a half-share go harmless.¹³

¹³ 11: *ἐάν τις γῆν λάβῃ παρὰ ἀπορήσαντος γεωργοῦ καὶ στοιχίσῃ νεώσαι μόνον καὶ μερίσασθαι, κρατεῖτωσαν τὰ σύμφωνα· εἰ δὲ καὶ συνεφώνησαν σποράν, κατὰ τὰ σύμφωνα κρατεῖτωσαν.*

12: *ἐάν γεωργὸς λάβῃ παρὰ τινος γεωργοῦ ἀπορήσαντος τὴν ἡμισείαν ἄμπελον πρὸς ἐργασίαν καὶ οὐ κλαδέυσῃ αὐτὴν ὡς τὸ πρέπον σκάψῃ τε καὶ χαρακώσας διασκαφίσῃ, μηδὲν ἐκ τῆς ἐπικαρπίας λαμβανέτω.*

13: *ἐάν γεωργὸς λαβὼν χώραν τοῦ σπεῖραι τὴν ἡμισείαν καὶ τοῦ καιροῦ καλοῦντος οὐ νεώσει ἀλλ' εἰς ὄψιν ῥίψει τὸν κόκκον, μηδὲν ἐκ τῆς ἐπικαρπίας λαμβανέτω, ὅτι ψευδάμενος διεχλεύασε τὸν τῆς χώρας κύριον.*

14: *ἐάν ὁ τὴν ἡμισείαν λαβὼν τοῦ ἀγροῦ τοῦ ἀπόρου γεωργοῦ ἀποδημήσαντος μεταμεληθεὶς οὐκ ἐργάσῃται τὸν ἀγρόν, ἐν διπλῇ ποσότητι τὰς ἐπικαρπίας ἀποδιδότω.*

Even a perfunctory analysis of these articles will raise doubts whether all refer to the same legal and factual situation. Art. 11 and 12 stress the poverty of the land owner, without mentioning his absence from the community; 14 and 15 indicate that the impoverished farmer is absent. Art. 13 seems to belong to the first group, because it provides for the same penal sanctions in case of negligence on the part of the tenant (“let him receive nothing from the produce”), while Art. 14 makes a negligent tenant “restore the produce twice over.”

The contract of half-sharing has received little discussion. Historians who believed in the collective ownership of land maintained that half-sharing represented a contract between a great land-owner and a poor peasant. Others have maintained that this form of contract involved two individuals belonging to the same, although economically differentiated, social class of free farmers.¹⁴ As to why there was need of such a contract within a farmer community, some scholars attributed to the arrangement purely economic goals, others linked it also to social matters. The meaning of the phrase ‘indigent farmer’ (*ἀπορήσας γεωργός*) has occasioned debate. In a wider sense it might be understood as “lacking means,” which may refer equally to the lack of the means of production as well as to the lack of the means for paying taxes. Panchenko rightly noted that in the case of a vineyard, the means of production were reduced to a hoe and some poles, affordable to even the poorest farmer. Similarly Siusiumov maintained that an indigent farmer was one who had no means to pay his taxes. The question of taxes, to which scholars are particularly sensitive because of the availability of numerous relevant sources, occasioned Lemerle’s speculation regarding tax arrangements in the contract of half-sharing. Leaving the entire question of half-sharing open for further study, Lemerle assumed that under the conditions of this contract, the taxes were paid by the owner of the land.¹⁵ Answering Lemerle’s

15: εἰν ὁ τὴν ἡμισίαν λαβὼν πρὸ τοῦ καιροῦ τῆς ἐργασίας μεταμεληθεὶς μὴνύσῃ τῷ κυρίῳ τοῦ ἀγροῦ ὡς μὴ ἰσχύων, καὶ ὁ κύριος τοῦ ἀγροῦ ἀμελήσῃ ἀζημίως ἔστω ὁ ἡμισιατὴς.

¹⁴ Zachariä (*supra* n.2) 256; Panchenko (*supra* n.6) 42–43, 47–49, 75; Ashburner, *JHS* 32.80–83; Elena E. Lipshits, “Slovianskaia obshchina i jeje rol’ v formirovanii vizantiiskogo feodalizma,” *Vizantiiskii Vremennik* 26 (1947) 143–63 (at 151); “Vizantiiskoe krest’ fanstvo i slavianskaia kolonizatsiia,” *Vizantiiskii Sbornik* (Leningrad 1945) 122–24; Sfusumov (*supra* n.11) 29–30; Nicolas G. Svoronos, “Sur quelques formes de la vie rurale à Byzance: Petite et grande exploitation,” *Annales, économies-sociétés-civilisations* 11 (1956) 325–35 at 333.

¹⁵ Lemerle (*supra* n.10) 219.56–58, 61.

question will help define the institution of half-sharing and its socio-economic function in the farmer community.

Although neither Panchenko nor Siusumov linked the institution of half-sharing with the collective fiscal obligations of the community, both believed that tax insolvency on the part of a landowner constituted the main reason behind this contract. This opinion has been confirmed by the *Taxation Treatise*. The *Treatise* proves that the phenomenon of migrating peasants who sought some income outside their communities was so common that the fiscal administration was forced to adjust its tax policies with respect to these farmers. The *Treatise* reveals an institution of temporary tax relief which occurs

when the owners move away, but it is not unknown that they are alive, being somewhere nearby, and where they dwell. Wherefore, since their migration is thus and there is a clear expectation that they would return shortly, the inspector, lest they be blotted out and the remaining inhabitants of the village be constrained to make up the difference, . . . creates a temporary relief for the parcels on which the migrants used to pay, that is until they return to their holdings (119.19–30).

However, although the *Taxation Treatise* allowed temporary relief on land of a farmer who left his community, it gives no indication that an insolvent farmer who had chosen to stay in his community could benefit from any similar measure.

Juxtaposition of all these data and comments with the uneven penalty for negligence in Art. 12–14 suggests that Art. 12–13 and Art. 14 represented two different kinds of contracts.

In any law of contracts there is always an institutional balance between the obligations of the parties involved. If this balance is upset, the party responsible must compensate the other party for any losses. In the provisions of Art. 12–14 this balance, which represented the *essentialia negotii* of any contractual relationship, is not executed consistently. Art. 12 and 13 clearly state that in case of the tenant's negligence, the owner of the land received no compensation for the decreased value of his crop; the negligent tenant, in turn, lost only his salary for the ill-performed job. Yet in Art. 14 the negligent tenant of an indigent and *absent* owner's land must "restore the produce twice over" because he failed to fulfill his obligation. Thus the fact that in Art. 12–13 the negligent tenant was not obliged to any compensation for the owner's

losses suggests that here the legislator treated the tenant's involvement with the impoverished owner's land not as his contractual duty but as some kind of right. In Art. 14, on the other hand, the owner's loss, for which the negligent tenant was to compensate, was calculated as a double value of the ruined crop—surely in order to cover also the amount of tax money that the absent owner had to pay for his land during his absence.

All of this allows us to answer Lemerle's question: who paid the tax? In the first case, the taxes due from a poor farmer's land were paid by another farmer on the basis either of reciprocity or of the collective liability of the community of which he was a member. Therefore the contract of half-sharing indicated in Art. 12–13 might be considered a means of executing the taxpayer's usufruct on the land, a right not covered by provisions of Art. 18. Art. 14 represented a 'normal' contract between two farmers, wherein an indigent farmer wanted to leave for an outside job without abandoning his land. Therefore one can infer, finally, that while the institution of half-sharing of Art. 14 represents a contract of civil law, Art. 12–13 illustrated a particular kind of *ius in re aliena*, which derived from the duty to pay taxes for non-abandoned land, and which, presumably, was executed optionally.

4. *Land exempted from taxes (συμπάθεια)*

According to the *Taxation Treatise*, a farmer, a group of farmers, or a whole community could be totally exempted from taxes in two cases: (1) when the tax burden, on account of the extreme poverty of the farmers, might force them to abandon their own land (118.21–23); (2) when, because of natural disaster, the arable land was either permanently destroyed (*πτῶσις*) or temporarily rendered unfit for cultivation (*διάπτωσις*) (120.29–35). This complete exemption from taxes on abandoned land on which the community members were not able to pay taxes without jeopardizing their own tax solvency, was called *sympatheia*.

Since the sympathetic land did remain a property of its absent owner, it could not be "sold or given or offered to any bureau . . . unless the thirty-year period has passed for the remitted properties" (119.30–31). Yet, as the *Zavorda Treatise* reveals (p.321), sympathetic land was leased by an inspector under the condition that in case of the owner's return, any such transaction should be cancelled and the land returned to its legitimate owner. It is impossible to discuss such a transaction, which derives purely from administrative convenience, against any legal framework. It is

even impossible to judge whether leasing sympathetic land happened by official state policy or by illicit practices of the bureaucracy. The two alternatives would imply references to different branches of public law: administrative or criminal respectively. Thus the institution of leasing the sympathetic land must be discussed here as a factual rather than a legal problem.

An official goal of these practices was to restore taxability of the sympathetic land, thereby making them appear a service to the common good. Yet there was also an unofficial goal behind these practices which had nothing to do with welfare of the state economy. These unofficial objectives become obvious in the light of evidence that a returning owner had practically no chance to revindicate his land. As Ostrogorsky summarized his research on this question, "land that had once slipped from the hand of peasants, never returned to them".¹⁶

These manipulations were part of a political struggle between the Byzantine throne and the influential class of the potentates (*δυνατοί*). The control of land, the most reliable base for a steady income, became the primary object of the conflict. The Heraclian state economy was based on the existence of a broad, well-to-do class of small landowners. To secure the integrity of this class, the Heraclians applied a very harsh policy towards the potentates, restricting their political influence and thus paralysing their economic expansion. From the beginning of the eighth century, however, a combination of factors gave new opportunities to the potentates, who regained their political and economic power. Their tendency to increase their latifundia by buying up the farmers' land converged with a new phenomenon, the growing pauperisation of small landowners overburdened with taxes and decimated by famines and epidemic diseases.

In order to protect the integrity of the farmer community, Romanos Lakapenos and his successors of the Macedonian dynasty undertook to strengthen the institution of preemption (*προτίμησις*), which strictly defined an order of persons authorized to buy or rent a piece of land within the community. The order coincided with the sequence of farmers obliged to pay taxes for land on the

¹⁶ Georg Ostrogorsky, "The Peasant's Preemption Right," *JRS* 37 (1947) 117–26, at 126. The institution of back taxation was the most damaging means keeping legitimate owners away from their property (*Zavorda Treatise*, 322–23). This institution, unknown to the *Taxation Treatise*, provided that a returning farmer might take possession of his property only after paying taxes due for the last three years of his absence. This request was almost always impossible to meet for a poor farmer. Also Brand (*supra* n.1) 45–46.

basis of reciprocity: a transaction with an outside buyer or tenant was permitted only if nobody from among those authorized was interested in the parcel of land offered for rent or for sale.¹⁷

The imperial agrarian policies found no favor with the executive officials responsible for implementation of the policies. The high-ranking bureaucracy consisted solely of the potentates, who—not surprisingly—sabotaged preemption as being wholly opposed to their own agrarian interests. In the case of the sympathetic land, however, even the sabotage was not needed. In respect to this category of property, preemption—no matter how strictly observed and implemented—had very little chance to serve its objectives. Given the special circumstances under which sympathetic land originated, one can easily conclude that there was no demand for this land within a community, in which some residents were “whipped out” (*Zavorda Treatise*, 321) while the others were so poor that they could not cope with more land and, consequently, with more taxes. Therefore the institution of preemption presented in fact no legal obstacle in passing the sympathetic land to the potentates.

5. *Abandoned land as escheat to the state (κλάσμα)*

When an owner’s rights on his deserted property expired, the abandoned land became escheat (*κλάσμα*). As such, it was excluded from all records of the community and might be rented or alienated by the state. But because the *klasmatic* land was situated within the territory of the community, the state—like any other owner of farming land—was bound by the provisions of preemption.

As both the treatises indicate, there were two categories of *klasmatic* land: the formerly abandoned land on which taxes were paid by the community, and the formerly abandoned sympathetic

¹⁷ Land owners within a community were entitled to preemption in the same sequence in which they were liable for one another’s taxes: (1) *ἀναμεμιγμένοι*: joint possessors, family members; (2) *συμπαρκείμενοι*: the owners of adjoining land embraced by the same *στίχος*; (3) *πλησιασταί*: other owners of the land adjacent to the lot for sale. This sequence was set up already in post-classical times (*Cod.Theod.* 2.5.1, 3.1.6) and adopted by Justinianic law (*Cod.Iust.* 4.38.14, 4.52.3) and in the *Basilika* (16.5.20). See Zachariä (*supra* n.2) 236–48; Ostrogorsky (*supra* n.2) 32–39. The *Zavorda Treatise* indicates that a tax collector had the power to lease the sympathetic land to the villagers. This confirms the view of Lemerle and Sîsiûmov that not only the large landowning aristocracy, both lay and ecclesiastical, but also wealthy village officials were interested in accumulating the farm land within a community. Sîsiûmov and Lemerle maintain that the Macedonian novels were addressed to both the economically powerful community members and the politically powerful great landowners of the higher social class. Lemerle (*supra* n.10) 200.278–80; Sîsiûmov (*supra* n.11) 37–38.

land on which taxes were paid by tenants renting the land from the state.

In the latter category, evasion of preemption was rather easy. Because of a very broad interpretation of this institution by the bureaucracy, a tenant who cultivated the land and thus paid taxes for it was presumably included in the first group of subjects entitled to buy the escheat. That sympathetic land which turned into *klasma* was usually purchased by its tenants confirms this assumption.¹⁸ Hence, in this manner, with all the appearance of legality, the great landowners continued infiltrating farmer communities and accumulating the farmers' land, despite the official obstacles.

With respect to escheat instituted on abandoned land for which a farmer community paid taxes, preemption had all the potential to fulfill its objectives. The land was in possession of the farmers for thirty years. By the time it became escheat, the land had been farmed by approximately two generations of usufructuaries who had invested their labor and their capital in it. Therefore, there was a good chance that these usufructuaries might be interested in maintaining the *status quo*.

We can thus see that Romanos Lakapenos or his immediate successors introduced in the tenth century a new means to save the ailing rural economy of the empire. The new means seems to be, however, not new at all. Once again the Byzantine legislator, who combined in the Heraclian fiscal system all the old fiscal institutions suitable to increase tax revenues, reached back to the past for ideas.

M. Rostovtzeff characterized the late Roman Empire as a "state based on the peasants and the country . . . a new phenomenon in history" (*SEHRE* 506). Investigating the reasons for economic instability in the Empire, he underlined two factors: state policies with respect to the land, and depopulation of the countryside.

[State policy was marked by] the supremacy of the interests of the state over those of the population, an age-old idea and practice, which had to a large extent undermined the prosperity of the Oriental monarchies and of the Greek city-states . . . But the pressure of the state on the people was never so heavily felt as under the Roman Empire (377). A salient feature of this system . . . was the further development of the principle of compulsion . . . particularly in the sphere of taxation. . . . The system assumed unparalleled proportions and, being not used

¹⁸ Brand (*supra* n.1) 45–46, with bibliographical references.

as subsidiary, but as the main, resource of the government, it became a real plague which undermined and destroyed both the prosperity of the Empire and the spirit of its inhabitants (449–50). The predominant features of Egyptian life in the third century were the gradual depopulation . . . and the increase of waste and unproductive land. . . . Waste land and state land became gradually synonymous. The state might assign the land to the communities or to rich landowners, or burden them with it (the well-known system of *ἐπιβολή*) (480–81).

The analogies between the period studied by Rostovtzeff and that covered by this essay suggest what kind of means were likely to be applied in the tenth-century Byzantine empire. Because the taxation system based on the *ἀλληλέγγυον/ἐπιβολή* principle failed owing to the gradual disintegration of the farmer community, and because preemption failed to stop the disintegration, the legislator turned to direct compulsion. I suggest that the institution of *adiectio sterilium* in its old Ptolemaic form, understood as a compulsory allotment of unproductive land ‘without a contract’ (*ἀνευ συναλλάξεων*)¹⁹ was restored and put into action for the same purpose.

This reasoning seems to be corroborated by the evidence of the *Taxation Treatise* and the *Zavorda Treatise*. These sources indicate that klasmatic land situated within the territory of a community might be distributed among its members by an administrative act. The *Taxation Treatise* states that such a distribution might take place at the emperor’s order (120, 10–12); the *Zavorda Treatise* lacks any restrictions on this policy.²⁰ It is obvious that leaving the escheat in the hands of the farmers who had cultivated the land for the preceding thirty years, instead of alienating it to outside buyers, was consistent with the goals of Macedonian agrarian policy. Moreover, the institution of *adiectio* will have helped to hinder manipulations of the bureaucracy who served the economic interests of the potentates. By removing the problem of payment as a condition of acquiring the land, *adiectio* deprived the potentates of one of their main advantages, the fact that farmers entitled to preemption could not always afford to buy the land.

Furthermore, it seems justified to hypothesize that the controversial *Sentence of Magister Kosma* refers to the division of the

¹⁹ M. Rostovtzeff, *Studien zur Geschichte des römischen Kolonates* (Leipzig 1910) 62–63, 73.

²⁰ *Zavorda Treatise* 321; Svoronos (*supra* n.12) 122–24, 129; Lemerle (*supra* n.10) 219.256–57, 263; 220.74–75.

klasmatic land by administrative act. *The Sentence*, a single phrase of a lost judicial verdict of the tenth century, provides:

If there is one tax register for a territory and one tax payment due and the single lots constitute a community, and if thirty years have not yet elapsed since the division took place, one can treat the entire register and the single lots as a whole again in order to perform a new division into equal parts, in which the land under cultivation will be distributed according to its size and value.²¹

All commentators on this text have identified the “one register” for a territory (*ὑποταγή*) and “a community” with the community of free farmers, conceived as a territorial unit of the tax administration. Zachariä and his followers considered the *Sentence* evidence of periodic divisions of collectively owned land; Panchenko linked the text with the concept of collective liability for taxes, but he did not elaborate his view. The ambiguity of the passage, taken from an unknown context, has reduced analysis to mere speculation and thus discouraged close scholarly attention. Dölger and Siusiumov, interpreting the *Sentence* as an indication of divisions of abandoned land and taxes due from it, represent an exception to the rule.

It seems quite justified, however, to argue that findings of N. Svoronos have revealed the lost context for studying the *Sentence*.²² Svoronos examined numerous MSS of the *Synopsis Basilicorum Major*; all included the *Sentence* as a component of a distinctive group of documents. This group represented a compilation of provisions serving evidently the same objective. Svoronos characterized these documents as “un ensemble indissociable” which (I translate)

denoted a final elaboration of Romanos Lacapenos’ novel on preemption. . . . The law expounded here provided for restrictions on freedom of sale, of concession to rent, of emphyteusis or of *paroikia*, aiming to protect the cohesion of the rural community against encroachment of the powerful.

²¹ εἴπερ ἐστὶ τοῦ τόπου μία ὑποταγή καὶ εἰς τελεσμὸς καὶ αἱ μερίδες ἀνακεκοίνωνται, οὕτω δὲ διήλθε τριακονταετία ἀφ’ οὗπερ γέγονε μερισμός, ἵνα καὶ πάλιν κοινοῦται πᾶσα ἡ ὑποταγή καὶ συγχέωνται τὰ ὅρια, καὶ γένηται μερισμός πρὸς ἕκαστον αὐτῶν κατὰ κλήρων ἰσότητα, τῆς γῆς τοῦ ἀγροῦ οὐ μόνον κατὰ ποσότητα μεριζομένης ἀλλὰ καὶ κατὰ σύγκρισιν ποιότητος διανεμομένης. Zachariä (*supra* n.2) 253.

²² Nicolas G. Svoronos, *Recherches sur la tradition juridique à Byzance: La Synopsis major des Basiliques et ses appendices* (Paris 1964) 145–46.

In addition, in a study of the Theban cadaster and the taxation system in the period of the *Taxation Treatise* and later, Svoronos was able to broaden the definition of *ὑποταγή*.²³ This definition proves that the ‘community’ of the *Sentence of Magister Kosma* and the farmer community of the *Taxation Treatise* were not always synonyms. A *ὑποταγή* represented often a much larger territorial area than a single village, and thus might incorporate several farmer communities, or any other type of single fiscal units. Consequently, the provisions of the *Sentence* can indicate not one but two kinds of land divisions by administrative act: a division of land situated within a single community of taxpayers, and a division of land situated within the entire territory covered by the same tax register. Thus the *Sentence* can encompass: (1) a division of the klasmatic land within a farmer community or any other community organized on the basis of collective liability for taxes; (2) a division of state lands situated outside a single community, among several single fiscal units, *i.e.*, farmer communities, tenant communities, and great landowners alike; (3) a subsequent division of the allotted outside land among individual members of the community for cultivation and for payment of taxes.

This conclusion is consistent with the suggestion that large landowners were now subject to participation in compulsory *adiectio sterilium*. A well-known historical fact seems to corroborate this view: in 966 Basil II burdened the great landowners with liability for farmers’ land taxes, an act thus contemporary with the agrarian policies reflected in the *Taxation Treatise*.

To supplement the central topic of this study, namely the relationship between land tenure and tax duties in Byzantine civil and administrative law, we may conclude with a comment on *ἀντιτοπία*, the ‘equivalent in land’. This institution, again a type of *ius in re aliena*, applied to all situations in which abandoned land of an absent farmer was usufructed either by his neighbor on the basis of reciprocity or by another community member on the basis of collective liability.

It is obvious that a tenant of abandoned property might have to invest in the land he farmed. Hence the question arises as to the tenant’s rights to a building or fence or vineyard which he constructed or grew on another’s property. Several articles of the

²³ Svoronos (*supra* n.12) 55–57; on the applicability of the *Sentence* to communities of emphytecarii and for broader comments on the *Synopsis*, *cf.* Gorecki (*supra* n.11).

Νόμος Γεωργικός indicate that Byzantine property law fully accepted the classical Roman principle that an owner of land acquired ownership of anything attached to this land (*superficies solo cedit*). Art. 1 and 2 clearly state that any *superficies* belongs to the owner of land; a flour-mill built on common land belongs to all members of the community who collectively owned the land (81), while a similar mill built on individual property belongs only to the owner of the land (82). These provisions have one common characteristic: all apply to a situation where an owner is in physical control of his property. Yet, as Art. 21 indicates, the classical principle did not apply when a landowner was absent and his property was controlled by another person:

21. If a farmer builds a house or plants a vineyard in another's field or plot and after a time there come the owners of the plot, they are not entitled to pull down the house or root up the vines, but they may take an equivalent in land. If the man who built or planted on the field that was not his own stoutly refuses to give an equivalent, the owner of the plot is entitled to pull up the vines and pull down the house.²⁴

The character of land tenure dealt with in Art. 21 is therefore clear. The term 'field' (*ἀγρός*) defines a piece of land under cultivation and thus protected by law against encroachment by others. A usufructuary as described in Art. 18 is the only exception to this rule: he alone could legally enter someone else's farmland in order to exercise his rights linked to his liability for the insolvent neighbor's taxes. Yet, as Art. 21 states, the returning owner could not take possession of his land where the usufructuary had built or grown something during the owner's absence. It was not the returning owner but the actually farming usufructuary whose interests were granted first consideration in Byzantine property law. Art. 21 provides the usufructuary of Art. 18 with an option: he could acquire ownership of the land on which he built or planted, or he could reestablish the *status quo ante*. If he chose the first alternative, he had to give the owner another piece of land of equal value; if he chose not to do so, he lost all his rights to the land as well as to the *superficies*, including any claim for the expenses involved in constructing the *superficies*. Nevertheless, the return-

²⁴ εἰν γεωργός οἰκοδομήσῃ οἶκον καὶ φυτεύσῃ ἀμπελῶνα ἐν ἀγρῷ ἀλλοτρίῳ ἢ τόπῳ, καὶ μετὰ χρόνον ἔλθωσιν οἱ τοῦ τόπου κύριοι, οὐκ ἔχουσιν ἄδειαν τὸν οἶκον κατασπᾶν καὶ τὰς ἀμπέλους ἐκρίζουῖν, ἀλλὰ λαμβάνειν ἀντιτοπίαν δύνανται· εἰ δὲ ἀνανεύων ἀνανεύει ὁ εἰς τὸν ἀλλότριον ἀγρὸν κτίσας ἢ φυτεύσας μὴ δοῦναι ἀντιτοπίαν, ἄδειαν ἔχειν τὸν τοῦ τόπου κύριον τὰς ἀμπέλους ἀνασπᾶν, τὸν δὲ οἶκον κατασπᾶν.

ing owner of the land acquired no right to the *superficies* either; he had to remove it from his property. The destruction of the house and vineyard upon the return of the owner of the property served to restore the legal and economic situation that existed before he abandoned the land.

Hence, as a consequence of the legal principles expounded in Art. 18, the usufructuary of abandoned land who built a house or planted a vineyard acquired a right to the land itself. This right did not mean that—as the vulgar law, the Greek, and the barbarian laws permitted—there were two owners on the same plot, the owner of the land and the owner of the object attached to the land. To benefit the actual taxpayer, the Byzantine legislator had created a unique legal relationship between the right of an owner and that of the usufructuary of his land as in Art. 18; this relationship can be defined as *solum cedit superficiei*. Art. 21 thus clearly expresses the genuine and distinctive features of Byzantine land law. This law, which modified the contents of ownership to fit the principle of mutual and collective liability for taxes, also had to modify other legal institutions relating to this liability.²⁵

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²⁵ On Art. 21, Panchenko (*supra* n.6) 79–80 commented on the institution as limitation of the owner's rights; Lipshits, "Slovñanskafñ obshchina" (*supra* n.14), thought these provisions remnants of the old socio-economic structure, when, as she believed, the Byzantine farmer community owned land collectively; Sfñsfumov (*supra* n.11) maintained that Art. 21 aimed to preserve the quality of an absent owner's land; N. Pantazopoulos, "Peculiar institutions of Byzantine law in the *Nomos Georgikos*," *Revue des études sud-est européennes* 9 (1971) 541–47, believed that the institution of *avtitoπia* proves "an official recognition of Greek customary law, previously applied 'illegally', since the State officially had adopted Roman Law. . . ."; Gorecki (*supra* n.3) 140.