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NEEB V. LASTRAPES, AND THE CONFUSING STATE OF THE ANCIENT DOCTRINE OF DELIVERY IN LOUISIANA

William Gaskins*

Is there a sale when the owner's husband negotiates the deal, the price is never agreed upon, neither the buyer nor the real owner signs the document of sale, and the buyer moves into the house only to be replaced by the old owner after a month? These are the issues faced in the tangled 2011 Louisiana Fifth Circuit Court of Appeal case *Neeb v. Lastrapes.*[1] This comment will recount that odd case, and then will briefly determine its place (and that of the Louisiana law underlying it) in relation to Roman and French civil law.

I. BACKGROUND AND THE DECISION OF THE COURT

In September of 2005, shortly after the Hurricane Katrina disaster, John Lastrapes contacted Anne Neeb via email about purchasing her house in Metairie, just outside of New Orleans. Mrs. Neeb responded that she planned to sell her house for $415,000; fifteen days later, Mr. Lastrapes sent her a $10,000 "deposit," which Mrs. Neeb accepted into her bank account. Then, Mr. Neeb (who did not share in his wife's ownership) faxed an "agreement to sell real estate" to Mr. Lastrapes. The document proposed the price of $415,000 for the sale of the property, and was signed by Mr. Neeb, purportedly as a proxy for his wife; yet neither Mr. Lastrapes nor Mrs. Neeb ever signed the contract. Despite this, the Neebs removed some, but not all, of their possessions from the home, and vacated the home themselves. The Lastrapes then moved in, changed the locks, erected a fence, and

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1. Neeb v. Lastrapes, 64 So. 3d 278 (La. App. 5 Cir. 2011).

removed all of the yard's existing landscape plants except the grass.

After inhabiting the house for one month, Mr. Lastrapes called Mrs. Neeb and told her he would not be purchasing the property. He promptly quit the home, and the Neebs moved back in, all of this in such short time that the Neebs were able to host their family meal there on Thanksgiving Day (November 25, 2005). In the three years that followed before the trial began, Mrs. Neeb claimed a "homestead exemption" on the home and paid its property taxes, specifically admitting that she was the owner of the house in August, September, October, and November of 2005. Mrs. Neeb filed suit against Lastrapes in April of 2006, eventually alleging that the Lastrapes reneged on a valid obligation to buy the house.

Despite the complicated nature of the matter, the Fifth Circuit made quick work of it on appeal. The Fifth Circuit overturned the trial court decision and declared that no sale occurred because the seller's delivery and the buyer's subsequent possession were too transitory to be valid.[2] To be sure, the facts of the case are peculiar; but given how far the parties went in transferring the house, might not one argue that even the murkily-wrought delivery between the Neebs and the Lastrapes was more than sufficient to result in a valid sale?

II. COMMENTARY

A. The Louisiana Law, and Its Relation to French and Roman Law

The court's decision is based on Louisiana Civil Code art. 1839, which states in pertinent part that, "A transfer of immovable property must be made by authentic act or by act under private signature."[3] As an exception to that rule the Civil Code states,

2. *Id.* at 282. As a secondary line of reasoning seemingly based on the same assumptions as those above, the court noted that a valid sale requires ascertainment of thing, price, and consent, and those factors were not fulfilled in this case. *See* LA. CIV. CODE art. 2439.

3. LA. CIV. CODE art. 1839.

"Nevertheless, an oral transfer is valid between the parties when the property has been actually delivered and the transferor recognizes the transfer when interrogated under oath."[4] In other words, oral transfers of immovables are valid when 1) there is actual delivery and 2) the seller admits to the transfer. There is no definition of "delivery" for immovables in Louisiana law except that in Civil Code art. 2477, which only treats immovables transferred by writing;[5] the question thus arises, how should a court determine whether a delivery of immovables without a writing has taken place?

In Roman law, the earliest way to make a sale was by delivery of the thing (in French, *tradition réelle*). [6] From the requirement of actual delivery, there arose formalistic doctrines which integrated various degrees of fiction to take the place of delivery. In *tradition symbolique*, delivery of the entire thing was replaced with delivery of a smaller thing that represented or came from the bigger one. Another method was delivery by long hand (*longa manu*), which allowed the seller to merely show the thing to the buyer to effect a sale. Another method of effecting a sale, and one useful when the buyer had already possessed the thing, was delivery by short hand (*brevi manu*), in which the seller merely declared the buyer to be the owner. In such situations of pre-sale possession by the buyer, the parties might instead effect delivery by adding an additional element to the underlying contract, such as a usufruct, in order to make the contract valid (*tradition feinte*).[7] Through all of these institutions, delivery remained the element necessary to effect a sale; only the degree of fiction allowed in the delivery changed. Later, Old French law came up with nothing new, and used the

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4. *Id.*
5. Concerning immovables, "Delivery of an immovable is deemed to take place upon execution of the writing that transfers its ownership."
6. ROBERT POTHIER, TRAITÉ DU DROIT DOMAINE DE PROPRIÉTÉ 126-32 (M. Hutteau fils, 2006); MARCEL PLANIOL, 1 TREATISE ON THE CIVIL LAW 529-32 (Louisiana State Law Institute trans., William S. Hein & Co., 2005)
7. *Id.*

Roman methods of delivery and fictitious delivery to satisfy the continued requirement of delivery for the validation of a sale.[8]

Notwithstanding the reverence of the French for Roman law, the 1804 *Code civil* made a complete break from the past on the subject of consecration of a sale. Whereas the necessity of delivery, either real or fictitious, had always been the rule in civil law before, the drafters of the *Code civil* declared consent to be the new means of sale. Article 1589, in both the 1804 *Code civil* and that of today, reads: "La promesse du vente vaut vente, lorsqu'il y a consentement réciproque des deux parties sur la chose et sur le prix."[9] Furthermore, in article 1583, "[La vente] est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé."[10] In other words, the French *Code civil* has held since its conception that *consent* is what consecrates a sale. Planiol argues that the effect of the new rule is the same as that of the old because Roman delivery was often fictitious, and might as well have not occurred;[11] yet the fundamental theory underlying sale was certainly changed in 1804. Even where the *Code civil* requires writing to prove a sale, consent is nonetheless the real modern method for achieving the sale, and writing is merely proof of the consent.[12]

Louisiana law states that, "[a] party who demands performance of an obligation must prove the existence of the obligation;"[13] likewise the French *Code civil* says, "[c]elui qui réclame

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8. PLANIOL, *supra* note 6, at 532.

9. "The promise of sale becomes validly a sale when there is reciprocal consent of the two parties on the thing and the price." CODE CIVIL art. 1589 (fr.) (years 1804 and 2005). Note that the modern-day article adds a stipulation for land that is to be divided into allotments.

10. "[The sale] is perfect between the parties, and the property is acquired by law by the buyer with regard to the vendor, when there is agreement on the thing and the price, although the thing has not yet been delivered, nor the price paid." CODE CIVIL art. 1583 (fr.) (years 1804 and 2005).

11. PLANIOL, *supra* note 6, at 533-34.

12. PLANIOL, *supra* note 6, at vol. II, 564.

13. LA. CIV. CODE art. 1831.

l'exécution d'une obligation doit la prouver."[14] Doubtless this idea is the reason for the requirement that a sale be validated by a writing in authentic form. Perhaps the allowance for sale by delivery in Louisiana Civil Code art. 1839 serves the same purpose: not as a way around the requirement of proof of a transfer, but simply as another, more ancient method of proof. Whatever the reason for the delivery provision, its effect is exactly that: although modern civil law doctrine has otherwise abandoned its old method of consecrating a sale of an immovable, one Louisiana Civil Code article keeps alive the tradition of consecration by delivery.

B. Interpreting the Louisiana Rule and Neeb in Light of Legal History

In *Neeb v. Lastrapes*, the court declared that Mrs. Neeb did not meet the Louisiana Civil Code art. 1839 requirement that property be "actually delivered," despite the facts that the Neebs moved out of their house, that they removed most of their possessions, that the Lastrapes moved into the house and lived there for a month, and that the Lastrapes changed the locks, dug up all of the plants, and erected a fence around the property. It seems that under ancient Roman and Old French law such actions would have constituted not just fictional but real delivery of the immovable into the hands of the sellers. Thus, the court's decision that the actions do not satisfy the delivery provision under Louisiana Civil Code art. 1839 departs from, not only the ancient law of delivery, but also the words themselves in the modern allowance for valid sale when 1) "the property has been actually delivered" and 2) "the transferor recognizes the transfer."[15]

Present-day law of sale in both France and Louisiana is based upon consent, rather than the ancient doctrine of sale by delivery.

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14. "He who claims the execution of an obligation must prove it." CODE CIVIL 1315 (fr.) (1804 and 2005).
15. LA. CIV. CODE art. 1839.

Yet one article of the Louisiana Civil Code—article 1839—pays tribute to the ancient Roman and Old French delivery law. Unfortunately, the short explanation of the court in *Neeb* leaves readers to wonder why the lengthy and multi-faceted delivery to and possession by the Lastrapes was not sufficient for the property to have been "actually delivered" and thus to result in a valid sale. Perhaps a future case will explain this questionable departure from both the written and the historical law; but if to have our explanation we must wait for another case with facts as odd as those in *Neeb*, we may have to wait a long time.