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## Contracts - Implied Assignment - Article 2011, Louisiana Civil Code of 1870

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decade-old trend of allowing the states to levy sales taxes indirectly on the government, through private contractors, when such action has not been expressly prohibited by congressional action.<sup>26</sup> The implication of the instant decision is that the Court will examine state taxes to determine where the *economic burden* ultimately lies. The *legal incidence* fiction seems to have been in effect abandoned, at least for the present time. The dissenting opinion refers to the majority opinion as a "long step backwards,"<sup>27</sup> but there is no definite indication that the Court has re-established a variation of the old strict immunity doctrine.

The present decision does place a certain limitation upon state taxation of private individuals' purchases when made for use in fulfilling government contracts. Thereby, it is possible for the government to deprive the states of substantial revenues by employing private contractors as purchasing agents and imparting to them the government's immunity from state taxation. In the event there is too great a burden imposed on the states by this latter practice, the Court might well offer a remedy by reverting to the *legal incidence* principle.

It is submitted that this decision is questionable since it insufficiently distinguished the *King & Boozer* case. Even if the majority opinion were justified in distinguishing this case, it is evident that the Court has imposed a substantial limitation on the states' taxing power by granting immunity from state taxation to private contractors acting as purchasing agents of the government.

Huntington Odom

CONTRACTS—IMPLIED ASSIGNMENT—ARTICLE 2011,  
LOUISIANA CIVIL CODE OF 1870

The purchaser of a home from a subdivision developer brought action against the contractor's surety, alleging non-completion of the building contract and defective work. His action was based on the combined recordation of the contract and surety bond between the vendor and the contractor. The district court found no privity of contract between the purchaser

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26. Congress may grant express immunity to private contractors in its employ. See note 18 *supra*.

27. See note 25 *supra*.

and the surety and dismissed the suit for no cause of action. The Supreme Court reversed and *held* that under Article 2011 of the Civil Code, a right resulting from a contract relative to immovable property passes with the property and the purchaser of the house had a right of direct action against the surety. *Breaux v. Laird*, 223 La. 446, 65 So.2d 907 (1953).

The decision reached in the instant case and connected cases<sup>1</sup> involves a rule of law which has not been applied frequently in Louisiana jurisprudence and which now is applied for the first time to a new situation. That rule is expounded in Article 2011:

“Not only the obligation, but the right resulting from a contract relative to immovable property, passes with the property. Thus the right of servitude in favor of immovable property passes with it, and thus also the heir or other acquirer will have the right to enforce a contract made for the improvement of the property by the person from whom he acquired it.”

Article 2011 implements Article 2009, which provides that “All rights, acquired by a heritable obligation, may be assigned; this assignment may be made, expressly by contract granting such right or impliedly by the conveyance of the property to which they are attached.”<sup>2</sup> Neither of these articles of the Code have counterparts in the French Civil Code. They were added to the Louisiana Civil Code in the *Projet* of 1825,<sup>3</sup> and were undoubtedly taken from the writings of Toullier.<sup>4</sup> Toullier discusses the problems dealt with in these articles. In presenting an example he quotes excerpts from Paulus and Pomponius found in the *Digest* of Justinian.<sup>5</sup>

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1. Fourteen other suits were brought against the same defendant and judgment consolidated in the instant case. 223 La. 452-65, 65 So.2d 909-913 (1953). See also *The Work of the Louisiana Supreme Court for the 1952-1953 Term—Sales*, 14 LOUISIANA LAW REVIEW 144, 145 (1953).

2. The wording of Article 2009 may prove confusing. The redactors of the Code were no doubt referring to heritable rights, not to “heritable obligations.”

3. *Compiled Editions of the Civil Codes of Louisiana*, 1 LA. LEGAL ARCHIVES 272 (1937).

4. *Id.* at viii-ix, xxv-xxvi. See also 3 TOULLIER, LE DROIT CIVIL FRANCAIS 485, nos 422 *et seq.* (1833). Toullier gave the example of the rights arising from a contract with an architect for the improvement of the land passing with the land.

5. DIGEST 2.14.17.5. It may be of interest to note that the customs of Northern France were different from the Roman law in this respect. Pothier, as cited by TOULLIER, *op. cit. supra* note 4, in his discussion of French customs, held the contrary view. Pothier considered such rights as movables, and gave the example of a succession where one son inherited the immovables and the other son the movables. The rights arising from the contract could not then be enforced, since one possessed nothing and the other had no interest.

Article 2011 implies a tacit assignment of rights resulting from contracts relative to immovable property. These rights must be distinguished from real obligations such as mortgages and rent charges which encumber the right of ownership of subsequent holders of the property until satisfied. It may be presumed, since Article 2011 assumes a tacit assignment, that the rules of assignment thus apply.<sup>6</sup> In such event, under the facts of *Breaux v. Laird*, if the contractor's surety, without notice of the sale of the property, had settled with the vendor for the defective construction, apparently the vendee would have lost his cause of action against the surety. Article 2644 provides that if the debtor makes payment to the transferor prior to notice of the transfer, the debtor is discharged of the debt.<sup>7</sup>

Article 2011 mentions only two examples of the types of rights which pass with a transfer of the property: (1) the rights arising from servitudes in favor of the immovable; and (2) the rights arising from contracts for the improvement of the land. While the instant case is clearly covered by the latter example, the question arises as to whether or not the examples given are exhaustive. A search of the jurisprudence reveals few applications of Article 2011. It has been used by the courts to enforce the rights arising from a contract of lease<sup>8</sup> and to enforce the rights of a servitude of passage.<sup>9</sup> In *Paul v. Nolen* the court held that the right arising under a contract between lessor and lessee limiting the liability of the lessor to third persons on the land<sup>10</sup> passed to the purchaser of the land.<sup>11</sup> The court's decision in that case was based on a "tacit" acceptance of the assignment by the lessee on the basis of his continuing to reside in the house with knowledge of the transfer. No such acceptance of the assignment by the obligor appears to be required under Article 2011.

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6. Arts. 2642 *et seq.*, LA. CIVIL CODE of 1870.

7. It should also be noticed that since Article 2011 does not speak of real obligations, the rules pertaining to such obligations do not apply. For example, there would be no requirement that these contracts be recorded for the rights arising thereunder to pass with the property.

8. *Canal & Claiborne R.R. v. Orleans Ry.*, 44 La. Ann. 54, 10 So. 389 (1892). See also *Hinrichs v. Tulane Educational Fund*, 49 La. Ann. 1029, 22 So. 96 (1897).

9. *Coguenhem v. Trosclair* (Laurel Grove Co., Intervenor), 137 La. 985, 69 So. 800 (1915). See also *Simoneaux v. Lebermuth & Israel Planting Co., Ltd.*, 155 La. 639, 99 So. 531 (1924). The latter case has never been followed.

10. LA. R.S. § 9:3221 (1950) (La. Acts 1932, No. 174, p. 552).

11. *Paul v. Nolen*, 166 So. 509 (La. App. 1936). See also Comment, 16 TULANE L. REV. 448, 454 (1942). In the *Nolen* case the court also upheld the constitutionality of La. Acts 1932, No. 174, p. 552.

The assumption, therefore, seems justified that the examples enumerated in Article 2011 are not exclusive.<sup>12</sup>

The decisions of the courts to date have involved only questions of the transfer of the right as distinguished from the duty. The complications would be increased if the right that is impliedly assigned is coupled with a duty resting on the assignor, as in the case of an executory bilateral contract. If the owner of a lot, for example, contracts for the erection of a house thereon, but sells the land to a third party before construction begins, the right acquired by the third party would be conditioned on the performance of the obligations of the former owner under the contract. The question would then arise as to whether the contractor is in a position to enforce the contract against the purchaser. The answer would certainly be that the obligation is personal to the vendor and not enforceable against the vendee. But the owner of course could not escape his obligation to the contractor by selling the property.<sup>13</sup> At the same time, according to Article 2019, such a personal obligation would not pass to the vendee unless he made it such by his own act.<sup>14</sup> On the other hand, the right to require performance by the contractor passes to the vendee under Article 2011. Since it is conditioned on the contractor's receiving the counter performance due to him, it would seem to follow that an attempt on the part of the vendee to enforce the right would be an act sufficient to make the obligation personal to him. At common law, the assignee's acceptance of an assignment of an executory bilateral contract is interpreted, in the absence of circumstances showing a contrary intention, as an assumption of the duties.<sup>15</sup> Although there is nothing in the Code on the point, such an interpretation could well be placed on the vendee's attempt under Article 2011 to secure the benefits of the contract.

*Charles M. Lanier*

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12. The suggestion has also been made that the rights resulting from fire insurance contracts could also pass in such fashion. Note, 24 *TULANE L. REV.* 378, 380 (1950), discussing *Sutton v. Cuppay*, 41 So.2d 106 (La. App. 1949).

13. According to Art. 2192, *LA. CIVIL CODE* of 1870, a novation is never effected "unless the creditor has expressly declared that he intends to discharge his debtor who has made the delegation."

14. *Cambais v. Douglas*, 167 La. 791, 120 So. 369 (1929). The facts are different in this case, as the obligation to build the house rested in the owner as a condition of his purchase. The court held that the obligation to build the house was personal to the owner and did not bind subsequent transferees of the property, who were not parties to the agreement.

15. *RESTATEMENT, CONTRACTS* § 164 (1932).