Volume 34
Issue 1 *10/1/1929*

10-1-1929

Constitutionality by Long Acquiescence and Tacit Assumption

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The Court concluded that in such a district a garage properly built to, under, or around an apartment house is not a nuisance *per se* but its use may, from the facts of operation, become a nuisance. It was also decided that where two apartments in the same vicinity are joined in the same ownership, a garage under one building may serve both, the Court leaving the matter of the use of the garage by other owners in the immediate vicinity to the discretion of the court below. The rule as to public garages remains in full vigor in those districts outside apartment house influence.

The public garage is a nuisance in residence districts, Class A and Class B. In Class C, in portions unaffected by apartment houses, the rule is the same. In a Class C district bordering on a commercial district or affected by apartment houses the rule now is that a public garage may be a nuisance *in fact* but not *per se*.

The change in policy evidenced by these cases is a happy one. It might have been wiser to have denied the operation of the rule in any Class C district. The cases seem to foreshadow such a rule in the near future if not a complete abdication of the doctrine.

The latter portion of the *Ladner* case seems unfortunate. The public garage rule was said to depend not at all on the ownership of the cars or the building but on the injurious effect on adjoining owners. Why then is the Court so careful to limit the discretion of the lower court to the use of the garage by owners in the immediate vicinity? If the effect when used by tenants of the surrounding apartment or nearby apartments or by owners in the immediate vicinity is not injurious to adjoining owners, how can it be injurious if used by owners who do not live in the immediate vicinity? Manner of operation is to be the test regardless of the domicil of the users, be it near or far. This the Court seems to have forgotten.

Harold S. Irwin

CONSTITUTIONALITY BY LONG ACQUIESCENCE AND TACIT ASSUMPTION—An interesting field of speculation is opened to the inquiring mind by the reasoning of the courts on the weight to be given to a contemporaneous or practical construction of the constitution by an agency other than the court which has charged itself with final jurisdiction of constitutional questions. It frequently

occurs that the court is confronted with the necessity of deciding the constitutionality of a question on which other officers in the discharge of their official duties have acted for a long period of time and rights have accrued under their construction. Great weight is given to their construction, though not to the extent of absolute control. The courts justify such action not only upon the relatively familiar ground of the inconvenience which would be caused to the rights thus vested, but also upon the theory that it his been approved by acquiescence, or, to be exact, by the absence of effective objection.

Treading at first with the caution appropriate to uncertain ground, and faced with intelligent criticism, the courts, gradually gathered courage from the lack of effective objection which was the very basis of their argument and came to place more unquestioning reliance upon this theory as each year added its fortifying assurance to the doctrine.

The earlier cases, lacking the support of years of acquiescence, reasoned from the basis of contemporaneous construction. Thus we find Mr. Justice Story using the following language:[1] "Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. * * * * It is an historical fact that the Supreme Court of the United States have from time to time sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States of the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this *acquiescence* by enlightened State courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken without delivering over the subject to perpetual and irremediable doubts."

In a later case,[2] Mr. Justice Johnson says: "Every candid mind will admit that this is a very different thing from contending that the frequent repetition of a wrong will create a right. It proceeds upon the presumption that the contemporaries of the Constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the under-

[1] Martin v. Hunter's Lessee, 1 Wheat. 304.

[2] Ogden v. Saunders, 12 Wheat. 290.

standing of the framers of the Constitution, and of the sense put upon it by the people when it was adopted by them."

In a case decided in 1803[3] the Supreme Court used even stronger expressions in justifying a practice of their own instituting: "It is sufficient to observe that practice and *acquiescence* under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled." (Note that the "practical exposition" and "contemporaneous construction" are those of the court pronouncing the judgment. Does the word "obstinate" carry the implication of a threat?)

In more recent cases, there appears to be a tendency to rely upon the principle of long acquiescence without the trouble of supporting it by argument. Thus we find the court in the case of *Leser v. Garnett,*[4] decided in 1922, reasoning that the Nineteenth Amendment does not violate the fundamental principles of the Constitution because it is similar in character to the Fifteenth which has been acted upon without effective objection for half a century. In the cases cited the Fifteenth Amendment was applied, but its validity was not directly questioned.

In the State Courts the doctrine has been frequently employed but with the usual difference of opinion, and resulting diversity of application. With less caution about definitely committing themselves to a fixed policy than the Supreme Court uses, it might be expected that the extremes of the doctrine would here be found. This may be illustrated by cases from a few jurisdictions.

In an early Massachusetts case[5] the court says: "Although if it were now *res integra,* it might be very difficult to maintain such a construction, yet at this day the argument *ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground upon which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words."

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[3]Stuart v. Laird, 1 Cranch 299.

[4]258 U. S. 130.

[5]Rogers v. Goodwin, 2 Mass. 475.

In an Ohio case[6] the court reluctantly approves the legislative practice of granting divorces, though holding it a usurpation of power, solely on the ground of long acquiescence, saying: "Our legislature have assumed and exercised this power for a period of more than forty years, although a clear and palpable assumption of power, and an encroachment upon the judicial department, in violation of the Constitution. To deny this long exercised power, and declare all the consequences resulting from it void, is pregnant with fearful consequences."

In a case from Illinois,[7] where the legislature had been granting railroad charters by special law, the court said: "It is now too late to make this objection, since, by action of the General Assembly under this clause, special acts have been so long the order of the day and the ruling passion with every legislature which has convened under the Constitution * * * and important and valuable rights are claimed under them. * * * But the Legislature, in their wisdom, have thought differently, and have acted differently until now our Special Legislation and its mischiefs, are beyond recovery or remedy."

In sharp contrast to these cases where the inconvenience of the result was allowed to silence the mandates of the Constitution, are a few cases which disregard it. The Supreme Court of Indiana believes that in construing constitutions, courts have nothing to do with the argument *ab inconvenienti* and should not "bend the Constitution to suit the law of the hour."[8]

The same principle is elaborated by Bronson, Chief Justice in a New York case[9] in the following language: "It is highly probable that inconvenience will result from following the Constitution as it is written, but that consideration can have no force with me. It is not for us, but for those who made the Constitution to supply its defects. * * * My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process."

Under close scrutiny the doctrine of Constitutionality by long acquiescence bears a startling family resemblance to that trite and misleading aphorism "Silence gives assent", but borrows no savor from such relationship. Nor

[6]Brigham v. Miller, 17 Ohio 446.

[7]Johnson v. Joliet & Chicago R. R. Co., 23 Ill. 202.

[8]Greencastle Twp. v. Black, 5 Ind. 557.

[9]Oakley v. Aspinwall, 3 N. Y. 547.

is it easy to see how it can gain strength from such weak supports as *"Communis error facit jus."* The party penalized by this imputed laches is the body politic, the people in their capacity as constitution makers. They, as such, have no independence of action, but can proceed only through the legal sovereignty, their duly constituted and sole agents, and, *mirabile dictu,* the very agency which pronounces the limitation against them.

The force of such an argument can be more readily seen when attended by circumstances such as those which caused Mr. Chief Justice Gibson, of Pennsylvania, to change his views on the power of Courts to declare legislation unconstitutional and void. In 1825 this astute logician argued with great force against the existence of such power in a dissenting opinion.[10] In 1845 this opinion was mentioned by counsel in the argument of *Norris v. Clymer, 2 Pa. 277,* to which he replied: "I have changed that opinion for two reasons. The late convention (1838) by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the Legislature; and from experience of the necessity of the case." But how, when no constitutional revision has intervened, can assent of the people, so vital in Constitutional matters, be imputed to them from this so-called "acquiescence?"

The resentment of vested interests which are "inconvenienced" by strict adherence to the Constitution is apparently more to be reckoned with than the wrongs of a Constitution which can only suffer in silence when outraged by its protectors.

J. F. Ingham

THE TIME FOR FILING AFFIDAVITS OF DEFENSE IN ACTIONS OF TRESPASS—In a number of lower Court cases a question has been raised as to the right of the defendant in actions of trespass to file an affdavit of defense after the expiration of fifteen days from the service of the statement upon him. This same question has been raised in actions of assumpsit and the Supreme Court has decided that an affidavit of defense in actions of assumpsit may be filed at anytime before judgment for want of an affidavit of defense has been entered. *Fuel City Mfg. Company v. Waynesburg P. C., 268 Pa. 441-446.* The

[10]Eakin v. Raub, 12 S. & R. 330.