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Samuel Sonenfield

The court held that when defendant took possession, with plaintiff's consent, without any lease for a definite term, he became a tenant at will. He could not be charged rent until this tenancy was terminated because no rent was contemplated until the permit could be issued. It was further held that once plaintiff gave notice to defendant to charge him rent, to which defendant did not object at that time, the occupancy would be under plaintiff's terms. Therefore, the defendant was liable for rent from the time of the demand until he vacated the basement. However, the demand could not be applied retroactively to charge defendant rent for the period he occupied the premises preceding the demand.

An interesting case of first impression is *Union Commerce Bank v. Kimbro*,[4] decided by the Cleveland Municipal Court. The lease, executed by defendant, contained a waiver of "all right to trial by jury in any summary proceeding . . . against the Lessee in respect to the demised premises."[5] The court held, relying incidentally on case law from other jurisdictions, that such a clause was not against public policy and was a reasonable provision for the lessor to ask as a condition of the tenancy. This means that when a lease contains such a waiver, a lessee cannot stall a forcible entry and detainer action, possibly for months, by demanding a jury trial. The insertion of such a clause in a lease may save a lessor substantial amounts of time and money by insuring the use of a summary proceeding in forcible entry and detainer.

JOHN H. WILHARM, JR.

MUNICIPAL CORPORATIONS

HOME RULE

Charter Versus Statute

In *Cupps v. City of Toledo*[1] the Ohio Supreme Court upheld a state statute over the provisions of Toledo's municipal charter, but the victory was one to have been expected and hardly any real blow to home rule.

A provision of Toledo's charter stated that upon disciplinary proceedings against any person in the classified service of that city, the employee should have an appeal to the civil service commission, and that "the commission's judgment in the matter shall be final." This is in clear and

1. 164 N.E.2d 750 (Ohio Ct. App. 1960).
2. Berkowitz v. Winston, 128 Ohio St. 611, 193 N.E. 343 (1934).
3. 109 Ohio App. 106, 163 N.E.2d 801 (1958).
4. 162 N.E.2d 926 (Ohio Munic. Ct. 1959).
5. *Id.* at 927.

irreconcilable conflict with certain provisions of the Revised Code which deal with the removal of employees protected by civil service and which provide that members of police and fire departments of cities may have a further appeal on questions of law and fact to the common pleas court.[2]

Within the past five years municipal corporations have won several significant victories in the home rule field: In *State ex rel. Lynch v. Cleveland,*[3] a 1956 case, and *State ex rel. Canada v. Phillips,*[4] a 1958 case, the supreme court upheld the constitutional right of a charter city to provide for appointment to municipal positions in a manner at variance with the methods laid down by state statutes.

On the other hand, in 1941, the supreme court had held in *In re Fortune*[5] that an ordinance of the City of Cleveland Heights which attempted to make the decision of that city's civil service commission final in disciplinary matters must yield to the state statute which permitted further appeal to the common pleas court.

In *Cupps,* therefore, the supreme court was forced to choose between the approach taken in *Lynch* and *Canada* and that taken in *Fortune.* The court chose to follow the latter, a case more closely related to the one before it. In reaching its conclusion the court reiterated the long settled principle that municipal corporations have no power, by virtue of the home-rule amendment, to establish courts or to regulate the administration of justice.[6] Furthermore, Section 4 of Article IV of the Ohio Constitution provides that the jurisdiction of the court of common pleas "shall be fixed by law." While charter provisions and even municipal ordinances are "law" for many purposes, it would hardly do to have the jurisdiction of the basic trial court vary from city to city, and, in addition, a city council should not have the right to cut off an aggrieved party's recourse to the courts. Accordingly, the court held that the statute controlled. An identical result had been reached in an entirely different case by the Cuyahoga County Common Pleas Court a few weeks prior to the supreme court's decision.[7]

Ordinance Versus Statute

With all due respect to a unanimous bench, the writer of this article is compelled to enter a squeaky but vigorous dissent from the decision

1. 170 Ohio St. 144, 163 N.E.2d 384 (1959).
2. OHIO REV. CODE § 143.27.
3. 164 Ohio St. 437, 132 N.E.2d 118 (1956). See Blume, *Municipal Home Rule in Ohio: The New Look,* 11 WEST. RES. L. REV. 538, 547 (1960); Sonenfield, *Municipal Corporations, Survey of Ohio Law — 1959,* 11 WEST. RES. L. REV. 405 (1960); *Sonenfield, Municipal Corporations, Survey of Ohio Law — 1958,* 10 WEST. RES. L. REV. 425, 430 (1959).
4. 168 Ohio St. 191, 151 N.E.2d 722 (1958).
5. 138 Ohio St. 385, 35 N.E.2d 442 (1941).
6. *Ibid.* State *ex rel.* Cherrington v. Hutsinpiller, 112 Ohio St. 468, 147 N.E. 647 (1925).
7. Klucar v. Hull, 165 N.E.2d 246 (Ohio C.P. 1959).

reached by the supreme court in the other case decided by it in this area of municipal home rule during the period which this survey covers. No effort to oust a competent court of its constitutional-statutory jurisdiction was involved, so that the question became one of "why a charter?"

The facts in *State ex rel. Pettit v. Wagner*[8] were simple. The City of North College Hill is a non-charter municipality. By ordinance of its council, duly enacted, it provided that the mayor appoint to the position of chief of police one of the three candidates certified to him by the municipal civil service commission as having had the highest grades upon open competitive examination; the ordinance did not require that that appointee be a member of the city's police department. In both respects, therefore, the ordinance differed irreconcilably from the applicable provision of the state statute,[9] which requires not only that the appointee be the *top* scorer in the examination but also that he be from the ranks.

The supreme court held that the ordinance was in conflict with the state statute and that the statute must be followed.

The first step must be an examination of the differences between the relevant facts in *Lynch* and *Canada,* on the one hand, and this latest case, *Pettit,* on the other.

In *Lynch* the position of Chief of Police in the City of Cleveland was specifically placed by an amendment to that city's charter in the unclassified civil service. The supreme court had little difficulty in sustaining this divagation from the state statute. In *Canada,* there was no specific provision in the Columbus city charter, as there was in Cleveland's, upon which to turn the decision. But there was a provision whereby *all* appointments in civil service were to be made from a certification of the three highest scoring applicants. The supreme court had little difficulty in upholding the city in its application of this provision to police department promotions, despite its variance from the state statute dealing specifically with that department. In both instances it allowed the city to follow the direct or indirect admonition of its charter. In *Pettit* it did not, for the reason that the admonition came not from a charter but from an ordinance.

Now, since the decision in *Perrysburg v. Ridgeway*[10] in 1923, it has been thought to be well-established law that *all* municipal corporations in Ohio are entitled to *all* of the benefits of section 3 of article XVIII of the state constitution; that it is not necessary to adopt a charter in order to exercise "all powers of local self government"; and that section

8. 170 Ohio St. 297, 164 N.E.2d 574 (1960).
9. OHIO REV. CODE § 143.34.
10. 108 Ohio St. 245, 140 N.E. 595 (1923).

3 was in no way dependent upon section 7 of the same article, but was self-executing.[11]

In its opinion in the *Pettit* case the court admits three propositions: (1) *Perrysburg* is still the law, despite the fact that it was a four-to-three decision and that two of the four in the majority were hesitant about how far a non-charter city could go in the face of "general law"; (2) that the grant in section 3 of the right to exercise "all powers of local self government" is *not* limited by the grant of the right "to adopt and enforce . . . such local police, sanitary and other similar regulations, as are not in conflict with general laws";[12] and (3) Columbus and Cleveland do not have to follow "general laws" in appointing police chiefs because their charters are different from general laws.

The power to provide for the method of hiring and firing a police chief is, in the opinion of the author, a power of local self government and not a power to adopt a local police regulation.[13] It is only in adopting local police regulations that any municipal corporation is, or should be, subject to general laws. But even if it is assumed that the appointment of a police chief is within the power to adopt local police regulations, then *Lynch* and *Canada* are, God save the mark, wrongly decided, not because Cleveland and Columbus have charters, but because the method used in those cities is contrary to general law on the subject. If the appointment of a police chief is a power of local self government, then *Pettit* is wrongly decided, not because North College Hill has no charter, but because in the area of local self government a municipal corporation is not bound by "general laws." To this writer it is that simple.

Other Problems in Appointment and Removal

Pursuant to the applicable statute[14] the Mayor of the Village of Belpre preferred charges against the Chief of Police for misconduct and inefficiency. A hearing was had before the municipal council, which voted by the required majority to remove the accused officer. The chief appealed to the courts and the case ultimately reached the supreme court.[15]

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11. For just one example, see State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 580, 53 N.E.2d 501, 504 (1944); Fordham, *Home Rule Powers in Theory and Practice,* 9 OHIO ST. L.J. 18, 25 (1948). It is true that in this case Cincinnati's charter had to yield to state law, on the basis of the doctrine of "state-wide concern," but even the majority of the court in an unfavorable decision admit that a charter is not necessary in order for a city to exercise whatever powers it does have within the concept of "local self government."

12. OHIO CONST. art XVIII, § 3.

13. The author of this article invokes no less an authority than the Honorable Murray Seasongood. See *Cincinnati and Home Rule,* 9 OHIO ST. L.J. 98, 112 (1948).

14. OHIO REV. CODE § 733.35.

15. *In re* Walker, 171 Ohio St. 177, 168 N.E.2d 535 (1960).

The key to the problem lies in the wording of section 737.15, wherein, among other things, it is said that

> [i]n case of the removal of a marshal or chief of police of a village, an appeal may be had from the decision of the legislative authority to the court of common pleas *to determine the sufficiency of the cause of removal* . . . . (Emphasis added.)

The common pleas court had stated that the emphasized words required it to determine whether or not there were substantial charges and *credible* evidence in support of those charges, and on that basis upheld the action of council. The court of appeals had reversed the council and the trial court, holding that the evidence against the accused must be "clear and convincing." The supreme court agreed with the common pleas court's reading of the statute and therefore reversed the court of appeals. Its decision brings the construction of the statute dealing with the removal of safety officers in villages in line with the construction given to the statute relating to appeals by safety officers under civil service, prior to the amendment of the latter statute in 1955.[16]

In *State ex rel. DeMatteo v. Allen*[17] the relator had been a village patrolman. Five years after his appointment as such he had been "employed" as chief of police of the village. Section 737.17 of the Revised Code provides that all appointments to village police departments shall be for a probationary period of six months' continuous service; that none shall be finally made until the appointee has satisfactorily served his probationary period; and that at the end thereof the mayor may, with the concurrence of the legislative authority, remove or finally appoint the employee. In DeMatteo's case no action was taken at the end of his first six months as chief, and it was not until eighteen months after his being named chief that the council finally refused to concur with the mayor in approving him.

The supreme court refused to issue a writ of mandamus to require the respondent mayor of the village to "restore" relator to the position of chief of police. The apparent result of this case is the holding that each promotion in a village police department is, in effect, a new appointment, that it is probationary, and that non-action on the part of the appointing and confirming authority works no estoppel in favor of the appointee. This writer can see a possibility that a changed political complexion could cause the ouster of a man who had served well and faithfully for many years, but who had overlooked the necessity of prodding a favorably disposed mayor and council "to dot the 'i' and cross the 't.'"

16. OHIO REV. CODE § 143.27, as amended, 126 Ohio Laws 91 (1955). See *In re* Koeliner, 160 Ohio St. 504, 117 N.E.2d 169 (1954).

17. 170 Ohio St. 375, 165 N.E.2d 644 (1960).

CONTRACTS — LOWEST AND BEST BID

Numerous statutes in Title VII of the Revised Code[18] require that public contracts be let to "the lowest and best" bidder. Sometimes it is quite obvious who has earned that sobriquet, other times it is not so easy. Accordingly, the courts have permitted the contracting municipal officer a broad discretion[19] with which they are reluctant to interfere. In *Heitch v. Village of Chagrin Falls*[20] the supreme court did interfere. Oddly enough, there was involved in this case the rarer problem of the highest bidder, for the village was leasing out municipally owned property, and the statute in that case requires the lease to be made to the highest bidder.[21]

The village received two bids, one for a rental of $63,000 to be paid over a period of twenty-five years, the other providing for no sum of money, but offering to use the land solely and exclusively for parking purposes, to be open to the general public, the bidder to grade, pave and sewer the premises at its own expense, provide the area with adequate lighting, and permit the village to install parking meters at any time and to retain all the revenue therefrom. It should be pointed out that this latter bidder appears to have been a group developing a shopping center in immediate or close proximity to the land which was the subject of the proposed lease.

The supreme court seems tacitly to have conceded that there are other and better things in this world than mere money. But, it said, in effect, that if the parking lot arrangement was worth more than $63,000, it had to be convinced of that fact and neither the village nor the shopping center group had convinced the court. In the absence of a showing that the "no-money-but-lots-of-service" bidder's consideration "exceeded or even approached the $63,000 named in the other bid," the value of the improvement-and-service bid remained in "the realm of mere speculation." Accordingly, acceptance of the no-money bid was enjoined.

Quaere: Could the council now adopt the shopping center's offer as its specifications upon which bids for a lease were to be offered and readvertise on such a basis?

PENALTIES UNDER ORDINANCES

Coming back again to home rule, can we agree that it is settled that a municipal criminal ordinance is not in conflict with general laws merely because it provides for a greater penalty than that indicated by the cor-

18. For example: OHIO REV. CODE §§ 731.14, 735.05.

19. See ELLIS, OHIO MUNICIPAL CODE, Text § 8.28 (10th ed. 1955) and cases cited therein.

20. 171 Ohio St. 172, 168 N.E.2d 410 (1960) .

21. OHIO REV. CODE § 721.03.

responding state statute?[22] As a general proposition, this can be said to be true, although a new element was injected into the problem in 1958 by the decision in *City of Cleveland v. Betts.*[23]

An analogous situation was the center of controversy in *City of Columbus v. Kraner.*[24] By ordinance the City of Columbus enacted a municipal income tax. The ordinance contains a *three-year* statute of limitations on prosecutions for violation of the obligations under the ordinance. Section 1905.33 of the Revised Code, however, provides that:

> Actions for the recovery of fines, penalties, or forfeitures, or prosecutions for the commission of any offense made punishable by any ordinance of any municipal corporation, shall be commenced within *one year* after the violation of the ordinance, or commission of the offense. (Emphasis added.)

One Kraner was charged with a violation of the ordinance in Columbus Municipal Court. He moved to dismiss for the reason that the city had not commenced prosecution within the one year provided by the state statute. The Court of Appeals for Franklin County ruled that his motion should have been granted.

The court distinguished the statute of limitations situation from the penalty situation on the ground that, insofar as the penalties provided by statute were concerned, "there were no words of limitation upon the authority of the municipalities, but here in section 1905.33 the legislature must have intended that this be a limitation upon the authority of the city, as it is directed to 'any municipal corporation' and 'forbids that which the ordinance permits'."[25]

This writer submits that section 715.67 of the Revised Code (as set forth below[26]) is as much an attempted restriction upon the authority of municipalities as is section 1905.33; yet the supreme court held that 715.67 did not prevent the City of Youngstown from imposing a more severe penalty than the maximum permitted by that section.[27]

If section 715.67 "is not a law defining offenses and prescribing pun-

22. Village of Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923); Fordham, *Home Rule Powers in Theory and Practice,* 9 OHIO ST. L.J. 18, 47, 68 (1948); Ellis, *op. cit. supra,* note 19, Text, pp. 25, 26 and 27, citing City of Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929).

23. 168 Ohio St. 386, 154 N.E.2d 917 (1958). See Greene, *Criminal Law and Procedure, Survey of Ohio Law — 1959,* 11 WEST. RES. L. REV. 366, 368 (1960); Sonenfield, *Municipal Corporations, Survey of Ohio Law — 1959,* 11 WEST. RES. L. REV. 405, 510 (1960). See also discussion in *Constitutional Law* section, p. 471 *supra.*

24. 169 N.E.2d 44 (Ohio Ct. App. 1960).

25. *Id.* at 46.

26. The section provides: "Any municipal corporation may make the violation of any of its ordinances a misdemeanor, and provide for the punishment thereof by fine or imprisonment, or both. The fine, imposed under authority of this section, shall not exceed five hundred dollars and imprisonment shall not exceed six months."

27. City of Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929).

ishment therefor,"[28] then neither is section 1905.33. For this reason the court of appeals' decision in *City of Columbus* appears to go against the position taken by the supreme court.

TORT LIABILITY — PROPRIETARY CAPACITY

In its 1958 decision in *Broughton v. City of Cleveland,*[29] the supreme court determined that the collection of rubbish and garbage by a municipal corporation was a governmental function and denied recovery to an unhappy lady who was struck by a flying object being tossed by "Abercrombie" to "Fitch" while they were performing this function for Cleveland. It is of interest that after that decision the Court of Appeals for Summit County ruled in *Lasko v. City of Akron*[30] that when a city engages in the disposal of garbage and rubbish, not only for its own inhabitants, but at the same time and in the same place engages for a fee in the business of disposing of garbage and rubbish for other municipalities and private parties, it is acting in a proprietary capacity and is subject to common-law liability for conduct which causes injury to another. This ruling, though contrary to *Broughton,* appears to be clearly justified because of the distinctive facts upon which it was based.

MANDAMUS TO COMPEL SUBMISSION OF CHARTER TO VOTERS

The Ohio Constitution gives the voters of any municipal corporation the right to frame and adopt a charter.[31] Occasionally such a document is the cause of violent political strife. Such was the case history which preceded and led up to *State ex rel. Graham v. Pestrak.*[32] A charter commission had been elected in Warren, had framed a charter document for submission to the voters and had set the date for the special election on it. The mayor and at least a majority of the city council either neglected or refused to take the necessary steps to place the question on the ballot at the time fixed by the charter commission. Less than two months before the date established by the commission for the election, a writ of mandamus was sought by a member of the commission to compel the mayor and council to take the necessary steps to hold the election. For various reasons argument upon and submission of the mandamus action to the supreme court could not be had until after the date set for the special election, and thus the argument was not held until after the one year limit fixed by the Constitution for the holding of such an election.

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28. *Id.* at syllabus 2.

29. 167 Ohio St. 29, 146 N.E.2d 301 (1958). See Sonenfield, *Municipal Corporations, Survey of Ohio Law — 1958,* 10 WEST. RES. L. REV. 425 (1959).

30. 166 N.E.2d 771 (Ohio Ct. App. 1958), *motion to certify denied,* Dec. 17, 1958.

31. Art. XVIII, §§ 7-9.

32. 171 Ohio St. 221, 168 N.E.2d 545 (1960).

The supreme court refused to issue the writ, indicating in a brief opinion that it was doing so because the facts had not been "presented in an adequate manner" to show that "illegal and obstructive tactics" were being employed by the legislative authority in "deliberately and wrongfully attempting to thwart the constitution and the electorate."[33]

Judge Taft vigorously dissented, and, to this writer, he seems to have had the better of the argument.[34] It is to be hoped that the case will not become a precedent for heel-dragging and obstructionism.

Zoning Problems

Each year's collection of opinions contains a spate of those in which a court is called upon to rule whether a municipal council has acted reasonably or arbitrarily in zoning or refusing to zone Blackacre for a gas station, factory or land fill. Almost every one of such cases turns on its own unique fact situation, and seldom is there enunciated any startlingly new principle of zoning law or any unusual application of an existing precept. During the period covered by this survey, the following noteworthy zoning decisions were published, dealing with problems other than the reasonableness of the zoning of specific parcels of land.

Determination of Applicant's Rights

The case of *Gibson v. City of Oberlin*[35] is worthy of note in this survey, not because it establishes any new principle, but rather because it reaffirms an old one and distinguishes a 1954 case[36] in which the supreme court had cast a modicum of doubt upon decided authority.

The general rule is that the applicant's rights to use his property are fixed by the provisions of the zoning ordinance as of the time he perfects an application which is in conformity to the ordinance as it stands, and not by the ordinance as it is subsequently changed.[37] The typical situation in which the rule comes into play is this: The owner of Blackacre presents his plans and specifications for the use or building which he

33. *Id.* at 223, 168 N.E.2d at 546.

34. *Ibid.* The dissent placed emphasis on the mandatory language of art. XVIII, § 8 of the constitution which requires the legislative authority of the city to provide for submission of the charter issue to the electors. The dissent also took the view that the one year period specified by the constitution for the holding of the election was intended primarily to insure that it was held promptly and was not meant to limit the power to hold the election.

35. 171 Ohio St. 1, 167 N.E.2d 651 (1960). See also discussion in *Constitutional Law* section, p. 469 *supra.*

36. Smith v. Juillerat, 161 Ohio St. 424, 119 N.E.2d 611 (1954).

37. State *ex rel.* Fairmount Center Co. v. Arnold, 138 Ohio St. 259, 34 N.E.2d 777 (1941); State *ex rel.* City Ice & Fuel Co. v. Kreuzweiser, 120 Ohio St. 352, 354, 166 N.E. 228, 229 (1929).

desires to make or build upon his land. They conform to the zoning requirements, but not to the wishes or hopes of other property owners in the neighborhood. Within the usual ten-day waiting period for the issuance of a permit the neighbors obtain the ear of a friendly councilman, and at the next council meeting the air is filled with pleas, demands and threats. On some pretext or other the issuance of the permit is withheld and a zoning amendment is enacted which makes illegal that which was legal when the application was first made, thereby leaving the applicant with a lot of useless plans and specifications. There are variations on this theme, but all are clearly recognizable.

Since, as was just stated, the general rule holds that the property owner's rights are fixed by the terms of the zoning or building code as of the time of proper application, and not as of the time the permit is finally issued,[38] the amendment to the zoning code should not be permitted to operate against the owner of Blackacre.

In 1954, however, the supreme court cast some doubt on this rule by its decision in *Smith v. Juillerat*.[39] In that case the applicant held a license which permitted it to engage in strip mining upon certain lands. A zoning resolution pending at the time such license was issued, and enacted before the strip mining had been commenced, made such a use of the lands illegal. Although the applicant had spent money on preliminary work pertaining to the contemplated strip mining operation, it "had not in fact perfected a non-conforming use and thus . . . it had no vested right prior to the effective date of the ordinance rendering strip mining illegal."[40] For this reason, the newly enacted ordinance was held to control.

In the present case the application of the property owner having been refused, he appealed to the Oberlin Board of Zoning Appeals and then to the Oberlin City Council. While these appeals were being taken the council was busy amending the ordinances to make illegal what had clearly been legal at the time that Gibson had first applied. The supreme court decided in favor of Gibson, reiterating the general rule and distinguishing *Juillerat* on the ground that the applicant there had not gained any vested right because it had not yet begun its mining operations upon the subject lands.

It is diffcult to see how the expenditure in preparation to carry on strip mining is different from the expenditure to prepare plans and specifications for a building, but, in all likelihood, *Juillerat* will remain confined to its facts.

38. *Ibid.*

39. 161 Ohio St. 424, 119 N.E.2d 611 (1954).

40. Gibson v. City of Oberlin, 171 Ohio St. 1, 3, 167 N.E.2d 651, 652 (1960).

Amendment of Zoning Ordinances is a Legislative Function

A novel proposition was advanced and disposed of in *Hilltop Realty, Incorporated v. City of South Euclid.*[41] Plaintiffs owned a parcel of real estate in the defendant city. At the request of plaintiffs the city council amended the zoning ordinance to place plaintiffs' land in a less restricted use category. The neighbors erupted with a referendum petition in proper form. Plaintiffs sought to enjoin the holding of a referendum election thereon, arguing that while the adoption of a comprehensive zoning ordinance is a legislative act, subject to referendum procedures, the amendment thereof is an administrative matter and as such is not subject to referendum procedures. They relied mostly upon a Nebraska case in support of their contention.[42]

The Court of Appeals for Cuyahoga County was unanimously unimpressed with the logic of the Nebraska case or of plaintiffs' argument. It pointed out that the *legislative* authority of the city was vested in a council and that under section 713.07 of the Ohio Revised Code the legislative authority of a municipal corporation is empowered to adopt *and amend* zoning ordinances. As such the amending ordinance was subject to referendum.

Use of Zoning to Limit Number of Establishments

The question is occasionally asked whether a municipality may legally limit, by zoning, the number of establishments of a particular kind within a given area. It is intimated in *State ex rel. Husted v. Woodmansee*[43] that it may not do so with respect to gasoline stations. It should be pointed out that there are other factors upon which the decision may have turned, so that it is not fair to say that the case stands unequivocally for this principle.

Control of Liquor Traffic

Similarly, there is an intimation in *City of Lyndhurst v. Compola*[44] that zoning may not be used to outlaw the location of establishments dispensing alcoholic beverages. Again, there are other factors in this particular case which make it impossible to say with finality that the court based its decision solely on this point.

41. 164 N.E.2d 180 (Ohio Ct. App. 1960).

42. Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956).

43. 169 N.E.2d 655 (Ohio Ct. App. 1960). See also discussion in *Constitutional Law* section, p. 469 *supra.*

44. 169 N.E.2d 558 (Ohio Ct. App. 1960).

Abatement of Nonconforming Uses

Insofar as the Supreme Court of Ohio has ever spoken on whether a prior nonconforming zoning use may be compulsorily abated or terminated, it did so in *City of Akron v. Chapman.*[45] In that case the court denied the right of the city to compel such termination, although it is the opinion of this writer that the case does not stand for a rule that a city may never accomplish that result; rather, he prefers to explain the decision on the basis of the weakness and uncertainty of the ordinance there in question.

The principal case has a direct sequel in *City of Akron v. Klein,*[46] in which the same junk yard premises were involved, although the operator had not directly succeeded by purchase from the previous owner whose rights had been upheld in *Chapman.*

The city this time attacked the operation on the ground of nuisance and relied upon the right given municipal corporations by statute to

> [a]bate any nuisance and prosecute in any court of competent jurisdiction, any person who creates, continues, contributes to or suffers such nuisance to exist. . . .[47]

Ruling for the first time on this statute the supreme court approved the court of appeals determination that "the statute . . . must be interpreted as though the word 'public' appeared before the word 'nuisance.' "[48] Refusing to disturb what it assumed to have been the finding of the court of appeals, the supreme court held that it had not been shown that Klein was operating a public nuisance. Certainly the inference may be taken that if the court of appeals had found such a public nuisance, and the record had offered a reasonable basis for such a finding, then the operation would have at least *pro tanto* been enjoined. Or to put it as a general rule, no prescriptive or prior nonconforming right to operate a public nuisance may be acquired. This is probably only by inference a principle of zoning law; its broader base is the overall police power of the state and its political subdivisions.[49]

There is another aspect of the *Klein* case which bears noting here. The ordinance in question forbade the operation of junk yards between

45. 160 Ohio St. 382, 116 N.E.2d 697 (1953). See also, Note, 6 WEST. RES. L. REV. 182 (1955); Sonenfield, *Municipal Corporations, Survey of Ohio Law — 1954,* 6 WEST. RES. L. REV. 271, 273 (1955).

46. 171 Ohio St. 207, 168 N.E.2d 564 (1960).

47. OHIO REV. CODE § 715.44(A). It is submitted that under the constitutional grant of all powers of local self-government the attempt by the legislature to grant or limit this power is an act of arrogant supererogation.

48. City of Akron v. Klein, 171 Ohio St. 207, 211, 168 N.E.2d 564, 567 (1960).

49. See Hadacheck v. Sebastian, 239 U.S. 394 (1915) and other cases cited by the Ohio Supreme Court at footnote 1 of its opinion in City of Akron v. Klein, 171 Ohio St. 207, 212, 168 N.E.2d 564, 567 (1960).