

type of which *Baxter vs. Bowyer* is a representative, is well established, may not only be ascertained from the opinions themselves, but great credibility accrues to its certainty from the fact that for over a period of thirty years these two types of cases have appeared in the official reports of Ohio cases, and no court in making a decision in one type of case, has ever overruled the line of cases representing the other principle. The cases represented by *Steuer vs. Steuer* sprang into existence in 1900 (Anonymous Case) and are found as late as 1928 (Trumbull Case). The other line of cases originated in 1869 (Baxter Case) and continue down through the Oswald Case (1923) and Murphy Cases (1925). The Supreme Court in none of its opinions overrules the cases of which *Steuer vs. Steuer* is exponential; this savors of tacit recognition. The will on which you request an opinion belongs to that class. I direct your attention to the classification of cases found in the *Steuer* Case.

It would be unwise to extend the scope of the *Baxter vs. Bowyer* principle to cover our situation and thereby discredit the principle of *Steuer vs. Steuer*, inasmuch as the Ohio Supreme Court has itself cast doubt upon the correctness of the conclusion of *Baxter vs. Bowyer* because of its relying too much on *Smith vs. Bell*, 6 Pet. 68, a case which has been declared "contrary to authorities generally", and whose "authority * * * is somewhat impaired by the circumstance that no counsel was heard on behalf of the party against whom it was made, and the attention of the court does not seem to have been drawn to the authorities in favor of the opposite conclusion". *Widows' Home vs. Lippardt*, 70 O.S. 261, 286, 287, 288; *Clark vs. Seminary*, 3 O. C. C. 152, 174.

Specifically answering your question, I am of the opinion that where the residuary clause of a will devises and bequeaths to the testator's wife all the residue of his estate both real and personal without using any express words of limitation to indicate the quantum of her interest, and a subsequent clause then states, "It is my desire and wish that after the death of my beloved wife, (naming her), and providing there remains sufficient property, to pay the following amounts hereafter specified; and if not sufficient that they be paid proportionately", following which certain parties are named and definite sums of money written after their names, the wife takes a fee simple estate in the realty and an absolute interest in the personalty, and the attempted limitations over are void.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

2538.

CIVIL SERVICE—EMPLOYES OF TOLEDO CITY SCHOOL DISTRICT
 COME UNDER JURISDICTION OF MUNICIPAL CIVIL SERVICE COM-
 MISSION—POWER SPECIFICALLY RESERVED BY CHARTER OF
 CITY.

SYLLABUS:

1. *The charter of the city of Toledo specifically reserves to the Civil Service Commission of said city, created by said charter, the powers and duties conferred and imposed upon municipal civil service commissions by the general laws of the state.*
2. *The Civil Service Commission of the city of Toledo, as created by the Toledo*

city charter, is charged with the duty of administering the civil service of the Toledo city school district.

COLUMBUS, OHIO, November 15, 1930.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication in which you suggest that inasmuch as the jurisdiction of the City Civil Service Commission of the city of Toledo over the employes of the Toledo City School District has been questioned, you desire my opinion as to the status of these employes in their relation to the said civil service commission.

With your communication is enclosed a letter from the Director of Schools of the Toledo City School District in which he states that local officials in Toledo have ruled that "employes of the board of education do not come under the jurisdiction of the City Civil Service Commission because of the fact that the local Civil Service Commission is a chartered commission appointed under the provisions of a city charter and does not have the power conferred under the General Code."

By force of Sections 486-1 and 486-19, General Code, the Municipal Civil Service Commission created by statute for each city is charged with the duty of administering the civil service laws for and within the corresponding school districts. Pertinent parts of said sections read as follows:

Sec. 486-1. "The term 'civil service' includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof. * * *

Sec. 486-19. "The mayor or other chief appointing authority of each city in the state shall appoint three persons, one for a term of two years, one for four years, and one for six years, who shall constitute the municipal civil service commission of such city and of the city school district in which such city is located; * * * Such municipal commission shall prescribe, amend and enforce rules not inconsistent with the provisions of this act for the classification of positions in the civil service of such city and city school district; * * * "

The city of Toledo adopted a charter under and by authority of Section 7 of Article XVIII of the Constitution of Ohio, whereby local municipal departments, divisions and offices were established and provisions made for the distribution of the functions thereof for purposes of local self government. Chapter 8 of said charter is devoted to the creation, manner of appointment, organization and the fixing of the duties of a municipal civil service commission for purposes of local self-government. Provision is made therein, in considerable detail, with reference to the duties and powers of the said civil service commission as respects municipal civil service. No specific mention is made in said charter of the civil service of the Toledo City School District and no duties are specifically imposed therein on the civil service commission thus created with reference to the civil service of the Toledo City School District. It is provided in Section 10 thereof, however, as follows:

"The enumeration of particular powers by this charter shall not be held or deemed to be exclusive; but in addition to the powers enumerated or implied therein, or appropriate to the exercise thereof, the city of Toledo shall have and may exercise all other powers which under the constitution and laws of Ohio now are, or hereafter may be, granted to cities. Powers proper to be exercised, and not specially enumerated herein, shall be exercised and enforced in the manner prescribed by this charter; or, when not pre-

scribed herein, in such manner as shall be provided by ordinance or resolution of the council, or by statute."

The charter does not assume, if indeed it might lawfully do so, to relieve itself or the government of the city of Toledo as a state agency, from any of the burdens lawfully imposed on it, or from exercising those powers which lawfully should be exercised by it, but on the other hand specifically provides that:

"* * * Powers proper to be exercised, * * * shall be exercised
* * * when not prescribed herein, in such manner as shall be provided
* * * by statute."

It only remains to be determined whether or not powers relating to the civil service of the Toledo City School District are powers proper to be exercised by the city of Toledo, and if so, what local officers or departments are the proper functionaries to exercise those powers.

Since the amendment of the Constitution of Ohio, in 1912, by the adoption of Article XVIII thereof, authorizing municipalities to adopt charters and exercise thereunder all powers of local self-government, frequent clashes between local and state authorities have occurred as to what is meant by, and what is included within the language of Section 3 of said Article XVIII, "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

A great many cases have been decided by the Supreme Court of Ohio involving an interpretation of the so-called home rule provisions of the Constitution of Ohio as a result of which it is definitely settled that "local police, sanitary and other similar regulations" can only be valid when not in conflict with general laws. There has been considerable difficulty, however, in determining whether a given ordinance or charter provision relates to "powers of local self-government" or to "local police, sanitary and other similar regulations."

A few of the cases involving these questions are the following: *State Board of Health vs. City of Greenville*, 86 O. S. 1; *Fitzgerald vs. Cleveland*, 88 O. S. 338; *State ex rel. Lentz vs. Edwards*, 90 O. S. 305; *Ide vs. State of Ohio*, 95 O. S. 224; *State ex rel. vs. French*, 96 O. S. 172; *State ex rel. Linden vs. Davis, Mayor*, 96 O. S. 301; *Cleveland Telephone Company vs. City of Cleveland*, 98 O. S. 358; *Village of Perrysburg vs. Ridgeway*, 108 O. S. 245; *Village of Struthers vs. Sokol*, 108 O. S. 263; *Dillon vs. City of Cleveland*, 117 O. S. 258; *Hile vs. City of Toledo*, 118 O. S. 99. These cases, and others which might be cited, have definitely settled the proposition that there are some powers of local self-government which may be exercised by municipalities, regardless of conflict with general laws although no definite rule for determining which powers and functions of municipalities may be classed as local self-government has ever been laid down by the courts.

A clear line of distinction, however, running through the cases dealing with the subject is that matters of health and public schools are matters of general government cognizance which may not be affected by special local regulations, and on the other hand, that those matters which relate to the internal government of the municipality and particularly the distribution of powers within such government are matters of local self-government which may not be influenced or controlled by general laws. It has been definitely held in the case of *State ex rel. vs. Edwards*, supra, that matters relating to municipal civil service are matters of local municipal concern, and may be regulated by local legislation. In the course of the court's opinion in the above case, it is said:

"It would not be contended that the civil service of a city is not a

matter of municipal concern nor that the power of regulating that service is not one of the powers of local self-government. Those powers are referred to by Shauck, J., in *State, ex rel. Toledo, vs. Lynch*, supra, as follows: 'They are such powers of government as, in view of their nature and the field of their operation, are local and municipal in character.' And in *Fitzgerald vs. City of Cleveland*, supra, it is said they 'are clearly such as involve the exercise of the functions of government, and they are local in the sense that they relate to the municipal affairs of the particular municipality.'

The manner of regulating the civil service of a city is peculiarly a matter of municipal concern. One of the powers of local self-government is the power of legislating with reference to the local government within the limitations of the constitutional provisions above referred to. As long as the provisions made in the charter of any municipality with reference to its civil service comply with the requirement of Section 10 of Article XV, and do not conflict with any other provisions of the constitution, they are valid and under the cases referred to discontinue the general law on the subject as to that municipality. That provisions adopted by a city might differ from the general laws within the limits defined was not only expected but the very purpose of the amendment was to permit such differences and make them effective."

From the provisions of Section 486-19, General Code, it appears that the municipal civil service commission created by said statute is a dual purpose public agency, one purpose being to carry out the provisions of law with reference to purely municipal civil service, a purpose which, in accordance with the case of *State vs. Edwards*, supra, is a matter of municipal concern and is one of the powers of local self-government of a municipality which may be controlled by local charter provisions, the other the administration of the civil service of city school districts, which clearly is a matter of State concern and which the Legislature has by force of the statute, confided to the several municipal civil service commissions created by the statute.

As to the former, powers with reference to purely municipal civil service, the citizens of Toledo have made provision by charter enactment to the effect that a civil service commission be appointed, with powers consistent with the constitutional provisions providing for appointments and promotions in the civil service of the city according to merit and fitness, to be ascertained by competitive examinations. Such charter provisions are lawful and proper and supersede the statutory provision on the subject as held in *State vs. Edwards*, supra.

As to the powers of administration of the civil service of the Toledo City School District, we are confronted with the question of whether or not by the terms of the said charter the municipal civil service commission created thereby possesses such powers or whether or not a separate civil service commission as created by the statute will necessarily be appointed for the one purpose only, of exercising powers relating to the civil service of the city school district.

It will be noted that the charter of the city of Toledo, in Section 3 thereof, provides:

"All persons holding office at the time this charter goes into effect shall continue in office and in the performance of their duties until provision shall have been otherwise made in accordance with this charter for the performance or discontinuance of the duties of any such office. When such provision shall have been made the term of any such officer shall expire and the office be deemed abolished."

By the terms of Section 167 of said charter, whereby the local civil service commission for the city of Toledo is created, it is provided:

“The civil service commission shall be composed of three electors to be appointed by the mayor with the approval of the council. The members of the existing commission shall continue in office for the terms for which they were severally appointed.”

It is apparent, from the terms of the charter, as quoted above, that it was intended thereby to abolish the civil service commission created by statute for the city of Toledo and create a new civil service commission in accordance with the provisions of the charter, although the new commission was to be appointed by the same appointing authority as the statutory commission for the same term and with practically the same duties. Again, there should be noted the further provision of Section 3 of said charter, as follows:

“The powers and duties which are conferred and imposed upon any officer, commission, board or department of the city under the laws of the state shall, if such office or department is abolished by this charter, be thereafter exercised and discharged by the officer, board or department upon whom are imposed corresponding functions, powers and duties under this charter.”

It was held by the Supreme Court of Ohio, in the case of *Flotron vs. Berringer*, 94 O. S. 185, that the character of an officer is determined more by the powers and duties of the office than by the name given to the officer; that the city commission provided for in the charter of the city of Dayton, in so far as its legislative authority is concerned, corresponds to the council of other cities and is, to all intents and purposes the council of that city, notwithstanding that that commission is vested with further governing powers not possessed by councils of other municipalities and not legislative in character.

Following this case it is held in the case of *Ide vs. State of Ohio*, 95 O. S. 224, as follows:

“A provision in a municipal charter, adopted under authority of Section 7 of Article XVIII of the State Constitution, continuing in force the general laws of the state conferring judicial functions upon mayors of cities and villages, to be exercised by the president of a city commission, who is elected a member of that commission by the qualified electors of the municipality, is not in conflict with any provision of the Constitution of Ohio.”

In a later case, *State, ex rel. Linden vs. Davis, Mayor*, 96 O. S. 301, it is held:

“1. The charter of the city of Cleveland specifically reserves to the mayor of the city the judicial powers conferred upon mayors of municipal corporations by the general laws of the state.

2. Section 6142, General Code, is a valid exercise of the power conferred upon the general assembly by the constitution of this state, and vests in the mayors of municipal corporations jurisdiction to hear and determine the sufficiency of petitions filed with them under the provisions of that section.”

There is a clear analogy between the principles announced in the foregoing cases and the question before us. There exists in the charter of the city of Toledo

an express provision specifically providing that municipal power proper to be exercised by the city of Toledo shall be exercised and enforced in the manner prescribed by the charter or by statute, whether the said powers be expressly prescribed in said charter or not. See Section 3, *supra*.

The laws of the State imposed upon the municipal civil service commission of the city of Toledo before the said charter was adopted, the duty of administering the civil service of the Toledo City School District. The charter having abolished the said civil service commission theretofore existing and imposed on the civil service commission created by said charter corresponding duties with reference to municipal civil service, it clearly follows that by force of Section 3 of said charter, the duties imposed by statute on the former existing civil service commission which was abolished devolve upon the civil service commission created by charter.

I am therefore of the opinion, in specific answer to your question, that the Civil Service Commission of the city of Toledo, created by the charter thereof, is charged with the duty of administering the civil service of the Toledo City School District.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2539.

APPROVAL, ABSTRACT OF TITLE TO LAND OF GRANT D. CURTIS IN
THE CITY OF COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, November 17, 1930.

The State Office Building Commission, Columbus, Ohio.

GENTLEMEN:—In Opinion No. 2519 of this office, directed to you under date of November 8, 1930, I had under consideration the abstract of title, special warranty deed of one Grant D. Curtis and encumbrance estimate No. 685, relating to a certain parcel of land in the city of Columbus, Franklin County, Ohio, the same being part of fractional inlot No. 120 in said city, as delineated upon the recorded plat in Deed Book F, page 332, Recorder's Office, Franklin County, Ohio, and which parcel of land is more particularly described by metes and bounds in said former opinion. Although in said former opinion above referred to no question was made with respect to the title by which the respective interests of Grant D. Curtis and G. Stark Frambes in said property were held and no question was made as to the execution and form of the special warranty deed of said Grant D. Curtis, and said encumbrance estimate was found to be in proper form, yet, inasmuch as the special warranty deed tendered by said Grant D. Curtis is effective to convey this property to the State of Ohio, subject to whatever interest said G. Stark Frambes may have under the ninety-nine year lease by which he holds this property, which leasehold may likewise be subject to the lien of the judgment against said G. Stark Frambes, mentioned in said former opinion, I advised you in said opinion not to rely upon said special warranty deed for the acquisition of this property but that you should pay into the probate court of this county the amount of money awarded by the jury as compensation for said property in the appropriation action and proceeding referred to in said opinion.

Since said former opinion was written the probate court of Franklin County, by an entry filed and journalized in said appropriation case and proceeding, has provided that upon payment of said compensation money into said court, or upon payment thereof to the parties entitled thereto, title to said property and to the several