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# A Fresh Look at Kentucky's Stale Annexation Statutes

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# Notes

## A FRESH LOOK AT KENTUCKY'S STALE ANNEXATION STATUTES

It is not the purpose of this note to indulge in an extensive consideration of Kentucky case law construing the Kentucky annexation statutes, although a brief summary of them will be outlined. Rather, it will be an attempt to evaluate these statutes in the light of other state annexation statutes, pointing out their strong and weak features, how they can be improved, and the reasons why they should be improved and democratized. For this purpose we will not consider any constitutional limitations and will assume they have been satisfied.<sup>1</sup> We will be primarily concerned with annexation of unincorporated territory, and only incidentally concerned with annexation of incorporated territory.

### SUMMARY OF KENTUCKY STATUTES

In Kentucky, cities are grouped into six different classifications based on population.<sup>2</sup> The annexation statutes for the different cities are for the most part similar, with some variations. In general, whenever a city desires to annex any unincorporated territory, or to reduce the boundaries of a city, the city legislative body may enact an ordinance defining accurately the boundaries of the territory proposed to be annexed.<sup>3</sup> The ordinance is then published in a manner particular to each city, either by newspaper or in public localities.<sup>4</sup> If there is no protest within thirty days, the city legislative body may enact another ordinance annexing the territory, thereby making it a part of the city.<sup>5</sup> Within thirty days, one or more residents or free-

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<sup>1</sup> The Kentucky Court of Appeals has held that municipalities annexing adjacent land and subjecting it to taxation does not amount to a taking of private property for public use without just compensation if it is reasonable; *Elkton v. Gill*, 94 Ky. 138, 21 S.W. 579 (1893); that such does not amount to a deprivation of property without due process of law; *Lenox Land Co. v. City of Oakdale*, 137 Ky. 484, 127 S.W. 538 (1910); and that a statute which provided for appeal to the circuit court from an annexation ordinance of a city council wasn't unconstitutional as a delegation of legislative power to the courts; *Lewis V. Brandenburg*, 105 Ky. 14, 47 S.W. 862 (1898). It has generally been held that annexation is a state legislative function and may properly be delegated to a municipality; 37 Am. Jur. *Municipal Corporations* § 23 (1941).

<sup>2</sup> Ky. Rev. Stat. § 81.010 (1893) (hereinafter cited as KRS).

<sup>3</sup> KRS 81.100,

<sup>4</sup> KRS 81.100, 140(2), 190(1), 210, 230(1), 240(1).

<sup>5</sup> KRS 81.100, 140, 190, 210, 230, 240.

holders may petition the circuit court setting forth the reasons why the territory should not be annexed.<sup>6</sup> In all cities other than the first class, the case shall be tried before the judge without the intervention of a jury.<sup>7</sup> If the jury, or judge, finds upon a hearing that less than seventy-five per cent of the freeholders of the territory to be annexed have remonstrated, and that the addition of the territory will be for the interest of the city, and will cause no manifest injury to the persons owning real estate in the territory sought to be annexed, the annexation shall be approved and become final. But if it is found that seventy-five per cent or more have protested, the annexation shall not take place unless it is found from the evidence that a failure to annex will materially retard the prosperity of the city, and of the owners and inhabitants of the territory sought to be annexed, in which case the annexation shall take place notwithstanding the remonstrance.<sup>8</sup> In cities of the second class, the number of freeholders whose protest is necessary will be fifty per cent.<sup>9</sup> In cities of the fourth class, the necessary remonstrance is fifty per cent of the resident *voters*.<sup>10</sup> An appeal may be taken from the judgment of the circuit court as in other cases,<sup>11</sup> except in proceedings concerning third<sup>12</sup> and fifth<sup>13</sup> class cities. The judgment shall be entered and certified to the city legislative body and then the annexed territory shall become a part of the city.<sup>14</sup> If the judgment of the circuit court is adverse to annexation, no further attempt may be made to annex that territory within the next two years.<sup>15</sup> In the case of incorporated territory, the same preliminary procedure, with only slight variations for second<sup>16</sup> class cities, is followed, except in the case of first<sup>17</sup> and second<sup>18</sup> class cities, the qualified voters of the city to be annexed vote on the annexation proposal which requires a fifty per cent majority to be effective. Other cities annex incorporated territory in the same manner as unincorporated territory. If approved, the annexing city is then bound for all the debts and liabilities of the annexed city, and is the owner of all its assets, franchises and rights.<sup>19</sup>

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<sup>6</sup> KRS 81.110(1), 140, 190, 220, 230, 240.

<sup>7</sup> KRS 81.110(1), 140(3), 190(3), 220(1), 230(2), 240(2).

<sup>8</sup> KRS 81.110(2), 190, 230, 240.

<sup>9</sup> KRS 81.140(4).

<sup>10</sup> KRS 81.220(1).

<sup>11</sup> KRS 81.110(3), 140, 220(1), 240.

<sup>12</sup> KRS 81.190(4).

<sup>13</sup> KRS 81.230(3).

<sup>14</sup> KRS 81.110(4).

<sup>15</sup> KRS 81.270(1).

<sup>16</sup> KRS 81.150.

<sup>17</sup> KRS 81.120.

<sup>18</sup> KRS 81.150, 160.

<sup>19</sup> KRS 81.130, 170, 200, 250.

## SUMMARY OF KENTUCKY CASES

The general rule is that municipal limits may be reasonably and properly extended to contiguous land. Contiguity is usually necessary as a matter of law. This requires that the annexed territory must legitimately abut the municipality at some point, however small.

The area should also be urban in character. Kentucky has held that cities should be able to expand to territories adapted to urban development, and should be organized as a thriving municipal unit.<sup>20</sup> The annexation statutes contemplate a city in the sense of a going concern provided that it has functioned as a city for a sufficient period of time.<sup>21</sup> However, property is materially injured by annexation to a city where it is not adapted to city uses.<sup>22</sup> The use and adaptability of the territory and its capacity of being absorbed into the city are to be considered where less than the requisite number protest. This is to determine if it is for the interest of the city.<sup>23</sup>

The city must be financially able to provide municipal services to the annexed area within a reasonable time.<sup>24</sup> These refer to the usual municipal services—water, street lights, sewage collection, disposal and fire protection. The fact that the county already provides such services adequately may be weighed against annexation.<sup>25</sup> If the residents of the territory enjoy the benefits of the city without contributing to the city's support, annexation may be proper.<sup>26</sup>

Where less than the required majority remonstrate, that the territory will be for the "interest of the city" means only that it contributes to the prosperity of, and be generally advantageous to, the city. Annexation is not contrary to the city's interest unless it would constitute an over extension of the capacities of the city to function as a sound going concern.<sup>27</sup> On the other hand, "manifest injury" to the property owners in the territory means clear and obvious imposition of material and substantial burdens upon them—benefits disproportionately small compared to the burdens.<sup>28</sup> The mere imposition of city taxes is not manifest injury if benefits in some degree will be

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<sup>20</sup> *Hardin v. City of St. Matthews*, 240 S.W.2d 554 (Ky. 1951).

<sup>21</sup> *Ibid.*

<sup>22</sup> *City of Russell v. Ironton Russell Bridge Co.*, 249 Ky. 307, 60 S.W.2d 628 (1933).

<sup>23</sup> *Masonic Widows and Orphans Home and Infirmary v. City of Louisville*, 309 Ky. 532, 217 S.W.2d 815 (1949).

<sup>24</sup> *Hannah v. City of South Shore*, 332 S.W.2d 247 (Ky. 1960).

<sup>25</sup> *City of Lexington v. Rankin*, 278 Ky. 388, 128 S.W.2d 710 (1939).

<sup>26</sup> *Ibid.*

<sup>27</sup> *Gordon v. City of Louisville*, 357 S.W.2d 693 (Ky. 1962).

<sup>28</sup> *City of Greenville v. Gossett*, 355 S.W.2d 311 (Ky. 1962); *City of Prestonburg v. Conn*, 317 S.W.2d 484 (Ky. 1958).

received by the annexed territory.<sup>29</sup> Material injury is determined from the standpoint of property holders as a class or majority, and not with reference to individual owners.<sup>30</sup>

Where the required majority have remonstrated, failure to annex will materially retard the prosperity of the city where it will delay the progress of the community as gauged by its attainments in the many fields affecting the welfare of its inhabitants and property owners as a whole. It is fair to consider the city as an organized community and the suburban property as an unorganized community.<sup>31</sup> Likewise, the prosperity of the property owners and inhabitants of the territory will be materially retarded where others would be deterred from locating in the vicinity, thereby postponing development and preventing property values from rising.<sup>32</sup>

#### BENEFITS OF ANNEXATION

It is submitted that the potentialities and benefits of annexation clearly predominate over the drawbacks. For this and other reasons, the Kentucky annexation statutes should be liberalized in certain areas.

Annexation, if properly cultivated, can be the solution to many local governmental problems and inadequate facilities. It can be used as a planning device to foster economies in duplicating governmental services. If properly implemented, it can be of benefit to the suburbs, as well as the cities. The decline of the availability of annexation as a tool in this respect has resulted primarily from annexation statutes that have failed to keep pace with the corresponding territorial expansion of urban and metropolitan areas. What were once agricultural and rural areas are now urban in character.

Many cities find themselves in peculiar positions. Several are bounded somewhat by natural borders and incorporated areas. Most are overcrowded due to their rapid growth in population. As a result, health and moral standards become increasingly difficult to maintain. They lack suitable industrial and residential building sites. They are stagnant and dormant. Outsiders contribute to these problems. Many work in the city since most industry is located there. They frequently avail themselves of the city's facilities, shop in city stores, visit churches, public libraries, theatres, civic clubs and other places of

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<sup>29</sup> *City of Louisville v. Kraft*, 297 S.W.2d 39 (Ky. 1956).

<sup>30</sup> *Mitchell v. Central City*, 354 S.W.2d 281 (Ky. 1962).

<sup>31</sup> *Likins v. City of Clarkson*, 280 S.W.2d 491 (Ky. 1955).

<sup>32</sup> *Park v. City of Covington*, 187 Ky. 311, 218 S.W. 986 (Ky. 1920).

business and recreation. Many, if not most of these outside areas, represent the actual growth of the city beyond its borders. Scarcely anything divides them but the municipality's legal boundary line. Much of this land is readily adaptable for urban purposes and in many cases is being used for such presently. Several municipal functions and facilities, which could be more readily augmented if they served a larger area, are presently held in abeyance simply because they are not economically feasible. In short, there is a community of interest in these inhabitants and areas; they are contiguous in both respects. Certainly annexation would be expedient, prudent and equitable in these situations. Frugality, if nothing else, dictates that urban area should be under urban government. For many cities, annexation is a public necessity.

This is not to say there are no objections to annexation; for there are. In most cases annexation brings higher taxes, zoning restrictions and other municipal controls. But certainly these are not insurmountable in view of the services acquired. In most cases such unincorporated territory is already confronted with special fees and assessments over and above the county tax rate to obtain the same facilities as city dwellers. Many county governments contract out such services to private organizations, thereby necessitating higher assessments. If annexed, these would cease. The meager loss of revenue to the county government is likewise no objection, in view of the corresponding reduction in expenses. The fact that industrial owners in the territory to be annexed will be subjected to inspections and regulations not desired is frequently voiced. This is not denied, but as these unincorporated areas become more urban and extend to the suburbs, they increasingly adopt such restrictions for their own benefit. This is evidenced by the recent growth of area zoning and planning commissions, or similar county commissions. Usually these function under the head of the county government. As the county becomes more urban with its population advance, much of which trickles over from the cities, these types of restrictions will increase, not decrease. As they grow into cities, they acquire urban problems and characteristics. In any event, in most cases these regulations are not detrimental, but beneficial. Consideration should be given to the growing tendency of county governments to render these municipal services in "built up" urban areas around the city, where the financing results from county revenues raised primarily within the city. In many cases property values would rise if within the city. The fact that cities were unable to provide certain services, or provide them soon enough, is another frequent objection. But this question is academic

for the most part since cities are able now to provide these services much more rapidly.

These same considerations also apply to areas that are suburban in character and not completely urban. For as they move in the urban direction, the more compelling become the reasons for annexation, and the greater the economies and services attainable. Certainly there will always be competition between city and county officials and governments, and a reluctance to give up what each already has. But such unimportant desires should yield to the much greater economies and reforms possible and probable through annexation. As soon as these potentials are known and understood, they will be realized.

#### COMPARISON WITH OTHER STATES

There are certain defects in the Kentucky annexation statutes that hinder the attainability of these above mentioned potentials. There is no provision for the property owners or inhabitants of unincorporated territory to petition the city council to be annexed. Ordinarily this doesn't present a formidable problem unless the city is reluctant to annex the territory. In most cases, however, they do desire to annex, and can be advised of the owners' desire for annexation and pass an ordinance for this purpose. Most states provide for such initiative on the part of the residents of the territory.<sup>33</sup> Several require a majority of the owners to petition the city council. Some require all the owners of the territory to petition, or a small percentage, if the territory is platted.<sup>34</sup>

Probably the largest single objection to the statutes is the possibility that any one resident or freeholder may petition the court setting forth reasons why the territory should not be annexed.<sup>35</sup> The case is then tried. This enables one person to force the proceeding to trial, which can be very expensive and time consuming. This may be so even though a majority of the residents or freeholders desire annexation. As a result, annexation is postponed in many cases for several years. In this situation, so-called "ring leaders" attempt to stir up opposition to annexation and carry their fight to the court against the will of the majority. It would seem that where the city desires annexation, and the majority of the residents in the territory initiate or desire it, simple procedures should facilitate annexation. Indeed,

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<sup>33</sup> See, Ind. Ann. Stat. § 48-701a (Burns 1953); Minn. Stat. Ann. § 412.13 (1959); Ohio Rev. Code Ann. § 7-709.02 (Page's 1935); Ariz. Rev. Stat. Ann. § 9-471 (1956); Iowa Code Ann. § 362.30 (1947).

<sup>34</sup> See, Iowa Code Ann. § 362.30-31 (1947).

<sup>35</sup> KRS 81.110(1), 140, 190, 220, 230, 240.

the state of Arizona provides such a procedure upon the initiative of the owners of one-half the value of the property in the territory to be annexed.<sup>36</sup> The governing body of the city may by ordinance annex the territory and merely file a map with the county recorder. Nobody can protest this action; only the jurisdiction of the city can be challenged. Minnesota statutes provide that a minimum number of the legal voters of the territory may petition the governing body of the city desiring an election for a determination of the proposed annexation.<sup>37</sup>

Even if a majority do not initiate such action, it would seem that only a majority should be able to force the proceeding to the point of an expensive trial. This was the idea behind a bill introduced in the 1964 Kentucky General Assembly pertaining only to second class cities. It would require that if the court finds upon a hearing that less than a majority of the freeholders of the territory to be annexed have remonstrated in writing in an exhibit filed with or as part of the original complaint, the annexation shall be approved and become final. This dispenses with the need for the city to prove that the annexation would be for the interest of the city, or be of manifest injury to the property owners in the territory to be annexed. If a majority have remonstrated, the city must come forth with its proof. It also provides for annexation cases to be advanced on the docket of the circuit court and the Court of Appeals, if it is appealed. Likewise, before a hearing, the parties can be ordered to appear before the court for a conference to consider simplification of the issues and pleadings, and such other matters as might aid in the expeditious disposition of the case. Such reforms are painfully needed for all class cities. Indiana annexation statutes provide that once the annexation ordinance is passed, only a majority of the owners of the territory to be annexed may appeal from it.<sup>38</sup>

The two states that have had the most success with annexation have been Virginia and Texas. In Virginia, the city passes an ordinance setting forth the necessity and expediency of the proposed annexation including the terms and conditions. After public notice is given, it is placed before an independent court formed specially to decide the matter.<sup>39</sup> Some of Virginia's success undoubtedly results from placing the decision before an independent body, distinct from the parties involved, that is not hampered by confusing statutes. This gives the court greater flexibility. Other alternatives are placing the matter

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<sup>36</sup> Ariz. Rev. Stat. Ann. § 9-471 (1956).

<sup>37</sup> Minn. Stat. Ann. § 412.13 (1959).

<sup>38</sup> Ind. Ann. Stat. § 48-702 (Burns 1953).

<sup>39</sup> See, Va. Code Ann. §§ 15-152.2-152.28 (1950).



before an arbitration board, or in the hands of a state administrative agency. However, this procedure cuts the cost of the determination only slightly. For the most part, the Virginia success has resulted from the liberal interpretation of the words "necessary and expedient" to mean that the city may grow and develop, and that there be only a community of interest between the city and the territory to be annexed. Many state statutes use merely the word "reasonable"<sup>40</sup> or "reasonable and necessary."<sup>41</sup> In Missouri, the court weighs the reasonableness to the city and the territory to be annexed and rules for the side with the preponderance.<sup>42</sup>

Generally there are two methods by which Texas cities may annex. In the smaller cities (having a population of 5,000 or less) a majority vote in the territory to be annexed is required.<sup>43</sup> In the larger home rule cities, all that is necessary is an ordinance passed by the governing body of the annexing city without the consent of the residents of the territory being annexed.<sup>44</sup> This is usually called annexation by ordinance. It is advanced that this procedure goes to the opposite extreme and cannot be sustained. Certainly cities should not be able to annex at will, and the residents of the territory to be annexed should be able to protest in some manner. A landowner's property should not be taken unreasonably. The only restriction the Texas Supreme Court has levied on this procedure is that the adjacent territory must bear some reasonable relation to the city's needs.<sup>45</sup> This procedure has been criticized in that no legislative standards are provided.<sup>46</sup>

Annexation cases that must be litigated in court are very costly. Pleadings must be filed. Petitions, in the majority of cases, are circulated. Extensive pre-trial work is necessary. Many depositions are taken and several witnesses (including city and county officials) take the stand for both sides. In order to circumvent this costly and time-consuming procedure, a few states provide for a referendum either of the voters of the territory to be annexed only, of the voters of the annexing city only, or the voters of the two combined. In Florida, after an ordinance is passed by the city council, an election is held and the ordinance must be approved by a two-thirds vote of

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<sup>40</sup> Annot., 62 A.L.R. 1011, 1019 (1929).

<sup>41</sup> Mo. Rev. Stat. § 71.015(2) (1959).

<sup>42</sup> *City of Olivette v. Graeler*, 338 S.W.2d 827 (Mo. 1960).

<sup>43</sup> Tex. Civ. Stat. acts. 965, 974, 1135, 1182 (Vernon 1948); Tex. Civ. Stat. act 974-1 (Vernon Supp. 1950).

<sup>44</sup> Tex. Civ. Stat. act 1175, subd. 2 (Vernon 1948).

<sup>45</sup> *Graves v. Sulphur Springs*, 214 S.W.2d 663 (Tex. Civ. App. 1948).

<sup>46</sup> See discussion, O'Quinn, *Legislative Control of Cities*, 39 Tex. L. Rev. 172 (1960).

the combined voters of the territory to be annexed and the annexing city.<sup>47</sup> Since city voters overwhelmingly approve annexation proposals, it would seem that a majority vote by the city alone would be unfair to the residents of the territory to be annexed since this would, for all practicable purposes, amount to annexation by ordinance. Closely resembling this would be the situation where the combined vote of the annexing city and outside territory would result in annexation, since usually the city is of much larger size with the preponderance of voters. This is unfair unless a higher percentage would be required as the two-thirds requirement in Florida, or an even higher per cent. However it could also be argued that the city should have some voice in the matter, and a rejection of annexation by a majority vote of the residents in the area to be annexed should not defeat annexation in all cases. Probably the best and most equitable method would be to require a high percentage of the combined voters of the territory to be annexed and the annexing city. Such a vote would reflect the will of all the voters, and at the same time, not overpower the votes of the residents of the territory to be annexed.

However, there are disadvantages to the referendum method also. Where annexation is desired by both groups, the next general election may be too far in the distant future to satisfy either. The expenses connected with such a project can be costly. False rumors may be spread by a few to deceive the many as to the dangers of annexation, thereby compounding the possibility of receiving an inaccurate vote. As mentioned above, determining who should vote is also a problem. If only the voters in the territory to be annexed are permitted to vote, they are the only ones who realize the annexation; and if they veto it, the city is powerless to act. Probably the disadvantages of the referendum method outweigh the advantages.

#### CONCLUSION

It is submitted that the portions of the Kentucky annexation statutes as to the burden of proof on the parties, although not ideal, are adequate. There are no specific legislative standards. But the phrases "interest of the city," "manifest injury" and "materially retard the prosperity of the city or property owner," while not the most clear phrases, have been construed fairly and properly by the Court of Appeals. In addition, they are more lucid than "reasonable" or "necessary." It can also be stated that such words or phrases give

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<sup>47</sup> Fla. Stat. Ann. § 171.05 (1961).

the courts greater flexibility, and do not saddle them with rigid legislative guidelines. But the greater and more immediate problem is who should be allowed to contest annexation. It is submitted that no less than a majority of the residents of the territory should be able to force an annexation proceeding into court for litigation, or appeal from the adoption of such an ordinance. In this regard, the proposed bill, mentioned earlier, introduced in the Kentucky General Assembly, is a large step forward for second class cities, along with the provisions for a pre-hearing conference and advancement of annexation suits on the court dockets. It deserves the support of each and every Kentucky legislator. Similar legislation is needed for the other five classes of cities. Likewise, a measure for allowing a majority of the residents of the outside territory to initiate annexation proceedings, and a simple procedure for its culmination should be adopted. The stumbling block with the existing annexation statutes is the delay to which the final consummation of the annexation proceeding is susceptible. This must be resolved and remedied. Annexation delayed is annexation denied.

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