Legal Aspects of Annexation as It Relates to the City of Milwaukee

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INTRODUCTION

In the past decade the City of Milwaukee increased in population percentagewise 8.5% while the population without the city and within the County of Milwaukee increased 30.2%. There are many reasons that may be assigned for this growth and no one article could exhaust all reasons. Insofar as the City of Milwaukee and the surrounding rural and urban area is concerned, improved means of transportation and communication have been factors. However it is believed by this writer that the most prompting factor for the growth in the rural suburban areas has been the lack of space within the city for residential development. As a matter of fact, there is presently an admitted scarcity of adequate residential areas for large development within the city. It is apparent that this has served as a cause of suburban growth exceeding Milwaukee's growth. Also true is the fact that the City of Milwaukee's growth in population is attributable to a great extent directly to its policy favoring annexation.

Other prompting reasons for the growth in suburban areas have been ascribed. It is not the purpose of this article to belabor that point. Let it suffice to state that the picture within the City of Milwaukee is changing kaleidoscopically from a physical geographical view. More changes are necessary to the end that the city be permitted to grow, be permitted to provide room for residential development for its citizens, actual and prospective, and be permitted to provide the necessary lands for industrial and business development. Otherwise the city may enter into a phase of slow decline.

There are two possible solutions within the framework of the law to permit the expansion of the city's boundaries. They are (1) annexation, and (2) consolidation. We will limit ourselves to the first means provided for the growth of cities. Indeed it would be desirable to expound both of the theories of growth. The scope must be limited, however, and furthermore, annexation is an immediately available practicable method that can be used to obtain the desired end. This does not mean, however, that the laws relating to annexation presently contained in the Wisconsin Statutes are sacrosanct and are

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the ultimate to be desired in a workable law which will foster annexation.

The Legislative Procedure for Annexation

In Wisconsin the legislature is vested with the power to determine boundaries of counties, cities, towns or villages. Although the legislature does not absolutely delegate the power to annex to the cities, it nevertheless sets up a procedure for such annexation. Under the Wisconsin law, lands that constitute portions of townships or unincorporated villages are subject to annexation by cities. It would appear that the legislature many years ago, contemplating the future growth of cities, recognized that municipalities would expand by reason of growth in population. Their boundary lines therefore could not be frozen, but rather would need some elasticity. Consequently in its wise judgment the legislature permitted, on the basis of population and an area factor, cities to grow in geographical size. Cities are surrounded in almost all instances by townships. These townships under the law were created subject to the growth of cities. Thus when cities needed lands and the people desired annexation, the lands of the townships were detachable from the township and annexable to the city if certain explicit statutory requirements were met.

A township was recognized in the past as a rural community entirely separate and distinct from our concept of an urban community. As the years went by, as the cities grew in size, and as communication and transportation improved, the townships constituting the fringe areas of many cities became so heavily populated that they no longer resembled or were compatible with the original concept of a township. As a matter of fact, in certain instances these outlying areas on the fringe of cities grew to such extent that there was sufficient population within a particular area to qualify under the statutes to become incorporated either as a village or as another city. Thus one finds today in the County of Milwaukee, in addition to the City of Milwaukee, six incorporated villages,[1] and six incorporated cities.[2]

[1] Incorporated villages:	Fox Point	incorporated	1926
	Greendale	"	1939
	River Hills	"	1930
	Shorewood	"	1900
	West Milwaukee	"	1906
	Whitefish Bay	"	1892
[2] Incorporated cities:	Cudahy	"	1906
	South Milwaukee	"	1897
	Wauwatosa	"	1897
	West Allis	"	1906
	Glendale	"	1950
	St. Francis	"	1951

(The City of Milwaukee was incorporated in 1846)

True enough in some instances cities and villages in this county have existed for many years, but others are of recent development. The circuit court recently authorized an election to determine the incorporation of another area in Milwaukee County as an incorporated village.[3] The election was held and the result favored incorporation.

There also have been recent attempts to incorporate as municipalities the Town of Lake, the Town of Milwaukee, and the Town of Wauwatosa. The attempts to incorporate those townships failed either because the determination by the courts or the vote of the people in the areas was against the incorporation.

Statutory Procedure Prior to 1951

Under Section 926.2 of the Laws of 1898, an annexation procedure was promulgated that was applicable to the City of Milwaukee. This procedure was followed by Milwaukee from 1898 until April 13, 1951. The law in its application to this city was interpreted to mean that lands of a township or an unincorporated village could be annexed to the City of Milwaukee upon the passage of an ordinance pursuant to a petition filed with the city. The petition had to be signed by the owners of at least one-half of the land to be annexed, and also by one-half of the resident electors within the same area. In the alternative, the city could meet other requirements provided for in the law to be referred to later. This method or procedure was followed in approximately two hundred actual annexations which took place between 1898 and April 3, 1951.

The Supreme Court of the State of Wisconsin passed upon this procedure of annexation in a number of cases and found the particular annexations under attack to be valid and effective. An additional condition demanded in law was that the lands to be annexed be adjacent or contiguous to the boundaries of the City of Milwaukee. As late as 1949 the Supreme Court said:

> If the territory was adjacent to the then boundaries of the city of Milwaukee we can go no further than to see that the annexation proceedings were conducted in compliance with the statute.[4]

The annexation involved in that case was declared to be valid and effective.

In the year 1924 the Supreme Court, in passing upon the procedure

[3] In December of 1951 the Circuit Court of Milwaukee County granted a petition as the original step towards the possible incorporation of another village in Milwaukee County, to-wit, an area of approximately one-half square mile generally known as Hales Corners.

[4] Town of Lake v. City of Milwaukee, 255 Wis. 419, 421, 39 N.W.2d 376, 378(1949).

provided for under Section 926-2 of the Statutes of 1898, and in reviewing the proceedings, said:

> There is no question but that the proceedings were regular. . . . The manner of annexation is set forth in Sections 925-18 to 925-21, [which sections are referred to in Section 926-2] inclusive. As already stated, the manner thus prescribed was followed by the city in this instance.[5]

Then again in 1949 the Supreme Court stated:

> An examination of the record discloses that the city complied with the provisions of the laws affecting annexation of territory by it . . . .[6]

Both of the annexations last referred to were found to be valid and effective.

Thus in at least three of its decisions the Supreme Court, in reviewing the record present before it, clearly said that annexations by the City of Milwaukee could be accomplished if an ordinance of annexation was adopted pursuant to a petition filed with its common council signed by one-half of the electors and the owners of at least one-half of the real estate within the area to be annexed, upon the one condition that the area annexed be contiguous to the City of Milwaukee.

As stated, this same procedure was followed by the City of Milwaukee through approximately two hundred annexations for more than fifty years and until April 1951. That was the date of a decision of the Supreme Court in *Town of Wauwatosa v. City of Milwaukee*[7] which found that the procedure in that case was defective for the reason that no referendum was held within the territory to be annexed, as prescribed by Section 925-18, Statutes of 1898. That provision in the statute had been construed by the city in its annexation proceedings in all these years as an inapplicable requirement.

In no annexation in more than fifty years was a referendum ever held, nor was it found necessary in those annexations that were reviewed by the Supreme Court heretofore cited. Although that point was not raised in those actions, the records were bare of any referendum or reference thereto.

Statutory Procedure Since 1951

After this decision, the 1951 legislature repealed Section 926-2 of the Statutes of 1898 and thus the procedure therein prescribed, as

[5] Zweifel v. City of Milwaukee, 185 Wis. 625, 627-628, 201 N.W. 385, 385-386 (1925).
[6] Mueller v. City of Milwaukee, 254 Wis. 625, 632, 37 N.W.2d 464, 467 (1949).
[7] 259 Wis. 56, 47 N.W.2d 442 (1951).

it related to the City of Milwaukee, became a matter of past history.[8] During this same session, however, the legislature amended the annexation procedure relating to general charter cities as set out in Section 62.07 of the Wisconsin Statutes.[9]

Under Section 62.03 of the Wisconsin Statutes cities of the first class can adopt any of the provisions of Chapter 62. Since no other means of annexation was left for the City of Milwaukee except as provided in Chapter 62, the City of Milwaukee by ordinance did adopt the provisions of Section 62.07 of the Wisconsin Statutes of 1951.[10] The result is that Section 62.07 of the Wisconsin Statutes of 1951 now applies to all classes of incorporated cities in the State of Wisconsin.[11]

Briefly, the procedure is as follows:

1. A notice must be posted in at least eight public places within the township within which the territory proposed to be annexed is located. It informs that a petition for annexation will be circulated within an area therein accurately described for the annexation of that area to a certain city, and that circulation will commence not less than ten days nor more than twenty days after the posting of the notice.

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[8] Wis. Laws 1951, c.547.

[9] Wis. Laws 1951, c.550.

[10] Ordinance No. 206, City of Milwaukee, 1951.

[11] WIS. STAT. § 62.07 (1951).

ANNEXATION AND DETACHMENT OF TERRITORY. (1) Annexation Procedure. Territory adjacent to any city may be annexed to such city in the manner following:

(a) A petition therefor shall be presented to the council 1. signed by a majority of the electors in such adjacent territory and by the owners of . . . one-half of the real estate within the limits of the territory proposed to be annexed, or 2. if no electors reside in the said adjacent territory signed by the owners of one-half of taxable property therein according to the last taxroll, or 3. by a majority of the electors and the owners of one-half of the real estate in assessed value; provided, that no petition for annexation shall be valid unless at least 10 days and not more than 20 days before any such petition is caused to be circulated, a notice shall be posted in at least 8 public places in the municipality in which the adjacent territory is located, and a copy of such notice published in a newspaper of general circulation within the county in which said adjacent territory is located, at least . . . 10 days prior to the time when such petition is caused to be circulated, such notice to set forth that an annexation petition is to be circulated, and including an accurate description of the territory involved.

(b) An ordinance annexing such territory to the ward or wards named therein shall be introduced at a regular or special meeting of the council after the filing of the petition, be published once each week for 4 successive weeks in the official paper and thereafter be adopted at a regular or special meeting by two-thirds of all the members of the council.

Subsection (2) omitted; relates to detachments.

(3) Time of Taking Effect. The ordinance authorized by subsection (1) (b), and the final ordinance of acceptance authorized by section 62.07 (2) (b), shall not operate to attach or detach the territory until 90 days after the passage thereof, or in case of referendum, 90 days after its approval, nor

2. The notice must be published in a newspaper of general circulation within the county in which the area is located at least ten days before the petition is circulated.

3. The petition must be circulated and (a) signed by a majority of the electors in the area and by owners of one-half of the real estate *in assessed value;* or in the alternative (b) signed by a majority of the electors and the owners of at least one-half of the real estate within the area to be annexed (regardless of assessed value), or in the alternative, (c) if there be no electors within the area, the petition is to be signed by the owners of one-half of the taxable property in the area to be annexed according to the last tax roll.

4. Upon compliance with the pertinent provisions, the petition is then filed with the common council of the city to which annexation is sought. A proposed ordinance is then drafted and is published once a week, for four successive weeks, in the official newspaper of the municipality and thereafter it may be adopted at a regular or special meeting of its common council by a two-thirds vote.

5. Upon adoption, the ordinance is then published and the annexation becomes effective ninety days after adoption pursuant to Section 62.07(3). A certificate relative to the ordinance of annexation is then forwarded to the Secretary of State.

That briefly summarizes the statutory procedure to accomplish an

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shall the adoption of the ordinance authorized by said paragraph (b) require the board of school directors in any city of the first class to administer the schools in the territory detached or annexed to any city of the first class untill July 1 following the date of the adoption of such ordinance. At that time 2 copies of a certificate and plat signed by the clerk of the city, village or town describing the territory attached or detached, the boundaries of the city, village or town after such alteration, and naming the cities, villages or towns to which the detached territory was annexed, shall be filed in the office of the secretary of state. One copy of the certificate and plat shall be forwarded by the secretary of state to the highway commission. The validity of the proceedings shall not be collaterally attacked, nor in any manner called in question in any such court unless the proceedings therefor be commenced before the expiration of either of the 90-day periods herein provided for.

(4) Record of City Boundaries. The duty to file the certificate required by subsection (3) of this section shall be a continuing duty until performed as to all alteration of boundaries subsequent to incorporation. Any city may direct a survey of its present boundaries to be made, and when properly attested such survey may be filed in the office of the register of deeds in the county or counties in which such city is located and when so filed such survey and plat shall be prima facie evidence of the facts therein set forth, and after the lapse of one year such a survey and plat shall be conclusive evidence of such facts. Any citizen may, by appropriate legal procedure, test the correctness of said survey and plat. The time such action is pending shall be excluded from the above limitation of time. Subsequent extensions of the boundaries of such cities may be surveyed and such surveys filed in the manner above provided and may be tested in the same manner and with like effect as a survey and plat of the original boundaries.

Subsections (5) and (6) omitted.

annexation insofar as it relates to the City of Milwaukee, or for that matter to any city in the State of Wisconsin.

Characteristics of the Territory That May Be Annexed

As heretofore stated, apparently the only requirement relative to the territory to be annexed is that the territory be adjacent to the annexing municipality. The word "adjacent" as used in Section 62.07 is synonymous with the word "contiguous" as used in Sections 4 and 5, Article IV of the Wisconsin Constitution. The use of the word is almost identical with its use in Section 926-2 of the Laws of 1898 which was held to be synonymous with the word "contiguous" as used in those sections of the Constitution.[12]

The territory annexed must be one tract of land, that is, it must be a unit of territory without being divided by intervening strange territories. It cannot help but be patent that the legislature in the enactment of the law did not lay down any rule specifically restricting the extent or the shape of the territory that might be annexed to any given municipality. The legislature did set forth general limitations for annexation in order that the laws enacted would be workable and practicable. However, the statutes do not define or provide for any measurements as to length or width nor do they define the shape or limit the area of land that a city may annex. The legislature apparently thought it wise to limit the conditions of annexation to those prescribed in Section 62.07 in order that cities and adjacent areas have freedom and flexibility to determine their own policies.

There are, however, limitations in the Wisconsin Constitution relative to legislative districts, which have a direct bearing on annexation. Sections 4 and 5 of Article IV of the Wisconsin Constitution provide briefly that legislative districts shall be bounded by county, precinct, town or ward lines, are to consist of contiguous territory, and are to be in as compact form as practicable.[13]

This has a definite bearing on annexation in that no annexation of a territory can take place if the result of the annexation leaves a legislative district divided, that is, portions thereof not contiguous

[12] Town of Lake v. City of Milwaukee, 255 Wis. 419, 39 N.W.2d 376 (1949).

[13] [Art. IV] ASSEMBLYMEN, HOW CHOSEN. SECTION 4. The members of the assembly shall be chosen biennially, by single districts, on the Tuesday succeeding the first Monday of November after the adoption of this amendment, by the qualified electors of the several districts, such districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable.

SENATORS, HOW CHOSEN. SECTION 5. The senators shall be elected by single districts of convenient contiguous territory, at the same time and

to other portions thereof. Furthermore, no annexation can take place if, as a result thereof, a legislative district is left unbounded by county, precinct, town or ward lines. In a recent case the Supreme Court invalidated an annexation by the City of Milwaukee when it found that the annexation resulted in leaving a legislative district unbounded as prescribed by the Constitution.[14]

Furthermore, there is no statutory provision relating to the geographical measurements of a township that must remain after annexation. That is, there is no provision that a township remaining must be of a certain length or width, or that it be constituted in a particular shape or form. It is conceded that no township can be split by means of annexation; an annexation cannot be successful if the lands annexed physically divide the remaining portion of the town into two separate and distinct parcels of land. After annexation the town remaining must be one unit. In a recent action an area of land 30 to 72 feet wide and 675 feet long connecting portions of the township was held to satisfy the prohibition against splitting of the township into two separate segments.[15]

Further, it seems provident that the question of the reasonableness of a particular extension of corporate limits as it relates generally to size and shape ought not to be subject to judicial review. In California the Supreme Court has stated this proposition well.

> . . . Hence it was doubtless concluded by the Legislature in conferring a power of annexation in the general terms used in the statute that the voters in a municipality could best determine whether its growth and the conditions surrounding it called for an extension of its municipal limits by the increase of additional territory and its extent, and that the voters of the territory proposed to be annexed could with equal wisdom determine whether it was of advantage to them to become a part of the municipality to the extent and in the form as proposed. With the wisdom of their determination in the matter the courts cannot interfere. . . . That the extent and shape which the annexed territory shall take is a political, and not a judicial question, is clear . . . .[16]

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in the same manner as members of the assembly are required to be chosen; and no assembly district shall be divided in the formation of a senate district. The senate districts shall be numbered in the regular series, and the senators shall be chosen alternately from the odd and even-numbered districts. The senators elected or holding over at the time of the adoption of this amendment shall continue in office till their successors are duly elected and qualified; and after the adoption of this amendment all senators shall be chosen for the term of four years.

[14] Town of Wauwatosa v. City of Milwaukee, 259 Wis. 56, 47 N.W.2d 442 (1951).

[15] Town of Lake v. City of Milwaukee, 255 Wis. 419, 39 N.W.2d 376 (1949).

[16] People v. City of Los Angeles, 154 Cal. 220, 224, 97 Pac. 311, 312 (1908).

With reference to territory eligible for annexation, it has further been held that an area to be annexed need not be confined within one township but may be annexed even though lying within two or more townships.[17]

It is the view of this writer that a city's boundaries may also be enlarged by annexation so as to include territory lying in two or more counties. This has never been decided by our Supreme Court. It is an undisputed fact, however, that several Wisconsin cities and villages were created or have been enlarged so that today they lie in more than one county.[18] The constitutional provisions relating to the bounding of legislative districts can be met by having a county line or ward line serve as the boundary line of the legislative district within the city.

Recently the City of Eau Claire, lying entirely within Eau Claire County, annexed land which was a part of Chippewa County. Chippewa County and Eau Claire County are in different assembly districts. Apparently to overcome the constitutional demands, the area annexed became a part of the City of Eau Claire as a separate and distinct ward. Thus the ward line still bounded the legislative districts as they now exist. Without a doubt, some difficulties may arise by virtue of a city lying in two counties, but the difficulties would not be insurmountable, and as a matter of fact the present cities that do exist in two counties do so without imponderable problems.

Finally, in reference to the land that is to be annexed, it has been held that no land of a city or incorporated village is annexable by another city.[19]

Who Are Electors and Owners of Real Estate Under Section 62.07?

Electors

Question may arise whether an elector referred to in Section 62.07 is synonymous with a registered voter. The question is whether a person could sign the petition for annexation if he were not registered.

Section 6.01 of the Wisconsin Statutes states that every citizen of the United States of the age of 21 years or upward who shall have resided in the state one year next preceding an election and in

[17] Zweifel v. City of Milwaukee, 188 Wis. 358, 206 N.W. 215 (1925).

[18] For example, the City of Kiel lies in Calumet and Manitowoc Counties; the City of Colby lies in Clark and Marathon Counties; the City of New London is a part of Outagamie and Waupaca Counties; the City of Berlin is a part of Green Lake and Waushara Counties; the City of Watertown is a part of Dodge and Jefferson Counties; the City of River Falls is a part of Pierce and St. Croix Counties; and the City of Waupun is a part of Fond du Lac and Dodge Counties.

[19] Wauwatosa v. Milwaukee, 180 Wis. 310, 192 N.W. 982 (1923).

the election district or in the precinct where he offers to vote for ten days, shall be deemed an eligible elector. There is nothing in that section which states that one must be registered before he can be determined to be an elector under the Wisconsin law. To the contrary there are other sections of the statutes which indicate that one is an elector even though not registered in the district in which he votes or intends to vote. Section 6.16(1) of the Wisconsin Statutes states: "The clerk shall provide a sufficient number of blank forms for the registration of electors . . . ." In other words electors may register and once they register they shall become registered electors, but that they are electors before registration is clearly indicated by the foregoing statute.

Other provisions of the statutes lead to the same conclusion. For example, Section 6.44(2) provides that if one is not registered he may, nevertheless, vote if he meets the conditions specified in this subsection. It is clear, therefore, that a person's name need not appear on the printed poll list to be a qualified elector or before he is permitted to sign a petition for annexation as an elector.

Bearing out this argument even further, Section 62.07 places no limitations upon the word "elector." There is nothing within it that states that an elector, for the purpose of annexation, must be one whose name appears on the poll list of the area, either of the last election or the following election, or that he need be registered. If the legislature had meant to permit only the registered voters or registered electors to sign the petition it would have clearly stated so. As a matter of fact, in matters relating to incorporation of cities under Section 62.06, the legislature clearly stated, with reference to the word "electors," that as it is used in that section they "shall be determined by the poll list of the last general election." No such limitation appears as to electors referred to under Section 62.07. Therefore one is qualified to sign the petition of annexation if he is an elector as generally accepted and as particularly defined under the statutes of the State of Wisconsin. That he can in addition be a registered elector or registered voter is not denied. Nonetheless it is just as clear that to be an elector he need not be registered as an elector or as a voter.

Owners of Real Estate

Difficulties have also been encountered in determining what is meant by "owners of one-half of the real estate." The wording relating to "owners of one-half of the real estate" as contained in Section 62.07 is identical with the wording as it was contained in Section

925-18 of the Statutes of 1898. The wording under the 1898 Statute has been construed by our Supreme Court.[20] The court held that the word "real estate" as therein used did not mean taxable property, nor did it mean taxable real estate. Its true meaning was real estate *in area* without reference to its taxability.

The court said that "real estate" as contained in that provision of the statute had no reference to the value of real estate. "Real estate" was not synonymous with property and had no reference to improvements that may exist thereon. It did not mean lands, tenements and hereditaments, but rather simply land considered in area or size only. This case takes on greater import and significance since Section 62.07, as amended in 1951, literally lifted that particular phrase from the 1898 Statute. Thus the conclusion follows that "owners of one-half of the real estate" as contained in Section 62.07 has reference strictly to area, not value or taxability.

Of course there are other provisions under Section 62.07 referring to real estate wherein alternative requirements for a petition for annexation are prescribed. One of the alternatives provides that in the event there are no electors in the area attempted to be annexed, the petition shall be signed by the "owners of one-half of taxable property therein according to the last tax roll." In that instance and under this alternative it is patent that "real estate" does not mean real estate merely in area but rather that particular real estate in area which is taxable. Clearly in that instance exempt lands would not be included under the term "real estate."

Another alternative provides that a petition may be signed by a majority of the electors and the "owners of one-half of the real estate in assessed value." Under this alternative "real estate" does not mean real estate in area or size. It is not necessary to belabor the point more than to state that under this alternative the "real estate" considered is the real estate determined by its value predicated upon the assessments. Area or size of lands in this case has no particular significance.

Under Section 925-18, Statutes of 1898, reference was to a petition signed by the "owners of one-half of the real estate." This language is now carried in one of the alternatives under Section 62.07. The Supreme Court, in construing that phrase as contained in the 1898 Statute, held in 1949, that exempt lands may be considered.[21] In that annexation the officers of the County of Milwaukee, duly authorized, signed a petition for annexation as owners of certain

[20] Zweifel v. City of Milwaukee, 188 Wis. 358, 206 N.W. 215 (1925).

[21] Mueller v. City of Milwaukee, 254 Wis. 625, 37 N.W.2d 464 (1949).

park lands that were included in the area to be annexed. The park lands of course were exempt and therefore constituted property that was not taxable. It was held that the lands were properly included in the annexation and that the duly authorized officers of Milwaukee County could sign the petition in behalf of the county as owner of such lands.

Another case challenged one of the alternatives relating to real estate in assessed value.[22] Challenge was made to the petition on the basis that certain Wisconsin Power and Light Company lands were signed for by that utility as an owner, and that this was improper since the lands of that utility were subject to taxation by the state and did not appear on the local tax roll. It was held that, irrespective of its taxability by the local community or by the state, the assessment could be ascertained. The lands were not exempt from taxation, and therefore were properly included in a petition for annexation.

The question of ownership therefore does not seem too difficult under the above rules if applied to title in fee simple. What is the answer, however, if a person has an interest in the land less than a fee, such as a land contract interest or an undivided interest less than the whole, or an interest in the remainder? In those circumstances is the person an owner of real estate?

In the Circuit Court of Milwaukee County it was held that a remainderman's interest was an interest that qualified the person as an "owner" of real estate under the statute.[23] The fact that the remainderman did not sign the petition for annexation was held to invalidate that particular annexation, because "the owners of at least one-half of the real estate" did not sign the petition.

It therefore appears that "owner" is not necessarily a limited term. It may include a person who has a life interest, an owner in fee, a remainderman, and possibly others, such as a land contract vendee. It may be pointed out that in a Supreme Court case relating to a drainage district, the word "owner," as employed in another section of the statutes, was defined to include a land contract vendee and, to the extent of his interest, the land contract vendee's signature was included and given recognition in a petition.[24] Although that case was not an annexation case, the word "owner" as contained in the pertinent statute was just as undefined as in Section 62.07.

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[22] Wilson v. Sheboygan, 230 Wis. 483, 283 N.W. 312 (1939).

[23] Town of Lake v. City of Milwaukee, Circuit Court of Milwaukee Co. No. 229-188. No appeal from judgment. Lands annexed later.

[24] *In re* Catfish River Drainage District, 176 Wis. 607, 187 N.W. 673 (1922).

Two Annexations or an Annexation and Incorporation Proceeding at the Same Time in the Same Area

The general rule has been followed in the State of Wisconsin on the question of priority relating to annexations. If an annexation of a particular area is commenced, a subsequent annexation proceeding of that same area, or a part thereof, cannot be commenced.[25] An annexation proceeding once commenced also precludes an incorporation of the same area or any part thereof.[26] The reverse is also true; no annexation of an area can commence where an incorporation proceeding is pending. The rule simply stated is that "the proceeding first instituted has preference."

This rule is not free from difficulty. The question that has resulted is "When was a proceeding instituted"? Previously our Supreme Court held that under Section 926-2 of the 1898 Statute, which was applicable to the City of Milwaukee, the annexation proceeding was instituted when a petition was filed with its common council. Under this statute the City of Milwaukee was not required to post notices or publish notices. Therefore, the court ruled that the first procedural statutory step which initiated the proceedings was the filing of the petition for annexation with the city's governing body.[27]

Section 62.07, as it now applies to all cities in the State of Wisconsin, also has been construed by our Supreme Court. The court has held that under that section the procedure for annexation is instituted when the notice for annexation is posted. That is the first procedural step under the statute.[28]

Prior to the court's ruling and as an original proposition it had been the opinion of the writer that posting did not commence an annexation. The reasons for this opinion may be noted here. The posting of a notice can be accomplished by any individual. Consequently the city to which annexation is sought need not be a party to the posting .The city may not even be interested in the annexation proposed. Furthermore, it is just as obvious that the city to which annexation is sought may never be in a position to act upon the proposed annexation. A sufficient petition in law may never be submitted to the city. That is, the petition may be incomplete for various reasons. For example, the majority of the electors in the area sought to be annexed may not have signed the petition. Consequently the city

[25] Greenfield v. Milwaukee, 259 Wis. 77, 47 N.W.2d 292 (1951).
[26] *In re* Incorporation of Village of St. Francis, 208 Wis. 431, 243 N.W. 315 (1932).
[27] *In re* Incorporation of Village of St. Francis, 208 Wis. 431, 243 N.W. 315 (1932). Town of Greenfield v. City of Milwaukee, 259 Wis. 77, 47 N.W.2d 292 (1951).
[28] Town of Greenfield v. City of Milwaukee, 259 Wis. 77, 47 N.W.2d 292 (1951).

may never have jurisdiction to act upon the petition. In one case our court held that a city obtained jurisdiction when a petition for annexation was filed with its common council.[29] This must assume that the petition was sufficient in law at the time it was filed.

The question of jurisdiction of a city should be controlling and not the time of posting of a notice. Because the city can not act until it has jurisdiction, it seems to follow that the time when jurisdiction takes effect is the propitious time to determine a city's priority to annex a certain area of land. The Supreme Court, however, stated that the first statutory step is the posting of notice and consequently this is the point in time when an annexation proceeding is instituted and takes precedence over other annexations or attempts of incorporation relating to the same lands.[30]

The application of the court's construction has resulted in numerous notices being posted in Milwaukee County. Today the larger portion of this county is posted in various proceedings for annexation to various cities. It is within the realm of possiblity that the reason for some of these postings is "to institute" an annexation proceeding so as to preclude the City of Milwaukee from continuing its present program of annexation which may include plans for the same areas. These proceedings, even though "instituted," do not in any way guaranty that the municipality to which the annexation is sought will favor such annexation, or that it will ever be in a position to act on the proceedings. The municipality can take no action on the annexation at the time of posting. It may take action only when and in the event a sufficient petition is filed with its governing body. Thus the vehicle of posting, it appears, can be used to preclude annexations.

This becomes more apparent when the element of time is considered. Section 62.07 of the Wisconsin Statutes does not define or limit the time during which a petition for annexation must be completed. It is clear, therefore, that the courts may be called upon to construe the statute to set such time. The rule of reasonableness should apply, for no territory should be tied up indefinitely by the mere posting of the area for annexation. One must assume, in the absence of proof to the contrary, that the persons posting are sincere in their effort to accomplish an annexation. This being true, the annexation proceedings should tend toward fulfillment. Consequently a reasonable time should be permitted to accomplish the annexation

[29] Town of Blooming Grove v. City of Madison, 253 Wis. 215, 33 N.W.2d 312 (1948).

[30] Town of Greenfield v. City of Milwaukee, 259 Wis. 77, 47 N.W.2d 292 (1951).

in all of its steps, including the circulation of the petition for annexation.

It can readily be seen that the law relating to this particular question may be self-frustrating. It was adopted to facilitate annexations. The result may be a negative one. Lands exceeding 20 square miles in area have been posted for annexation in Milwaukee County. People living in these areas number into the thousands. In these circumstances the courts may rule, from the standpoint of reasonableness, that a number of years is not too long to permit the circulation of a petition. This assumes the sincerity of all parties concerned. What if the person or persons posting the area for annexation are not sincere in their efforts to accomplish the annexation? What if they use this means solely to preclude an annexation? It is conceivable that a particular area could be maintained as a township area almost indefinitely. The sincerity of purpose to the contrary, as a matter of practicality, is almost beyond proof.

It becomes readily apparent that in application the law can be subjected to misuse. That is, although the law can be used to foster annexation, it can be used to preclude annexation. There is no limit in the law relating to the size of the area that can be annexed. Generally the rule as applied by the courts relating to the area proposed for annexation is that it must either be urban in character or, if rural in character, necessary to the annexing city for its natural and anticipated growth within the foreseeable future.

Applying these rules to the City of Milwaukee, it is easy to project the urban development on the fringe of Milwaukee into the future to show the necessity of making adjacent land the proper subject of annexation. Further, visualizing the need for land for industrial and commercial development as it presently exists in the city, a large tract of undeveloped land could be the subject of annexation to this city since such lands will be required for the natural anticipated growth of the city within the foreseeable future. The City of Milwaukee has a population of 637,392 according to the last national census. At the end of 1951 it had an area of 50.668 square miles. It desperately needs additional lands for future industrial and residential development.

In light of this situation a fifty per cent increase in the size of the city within the near future does not seem to be an unreasonable conclusion in terms of foreseeable future growth. Atlanta, Georgia, recently more than tripled its area. In these circumstances it appears that 25 or 30 square miles of lands could reasonably be annexed to the city under the present rules of law. We do not mean to discuss

or enlarge upon the economic feasibility of such annexation either from the standpoint of the City of Milwaukee or the surrounding communities. This article is limited, so far as possible, to the legal aspects involved.

These facts being true, the commencement of an annexation proceeding, by the posting of a notice, to cover an area of 20 square miles or more would not be considered unreasonable by any of our courts. The implications arising therefrom can be devastating to an annexation program. Again assuming that a person or a group of persons may wish to impede or actually stop a prospective annexation, it could be done. Such person or groups of persons could proceed by purportedly commencing an annexation by posting an area of 20 or more square miles. They could then proceed pursuant to the present law to circulate a petition at a leisurely pace. Since purportedly an annexation has been instituted or commenced by the posting of the notice, that area could be tied up under the guise of possible annexation in process for two or more years. If people in portions of the area should wish to be annexed their desires would be frustrated, for no portion of the entire area in the process of annexation could be subjected to a separate annexation. The same would apply to the City of Milwaukee for it would be precluded during that time from annexing any portion of the area which was "in the process of annexation" and this may be true, notwithstanding that the city may not be interested in annexing the entire area but only a portion thereof.

It becomes more apparent that some remedial provisions need to be promulgated by the legislature to improve the present law relating to annexation.

Suggested Changes in the Law

1. Because ordinarily the city has nothing to say officially about commencement of an annexation at the time of its institution, an amendment to the law is necessary. The municipality must be in a position to act before an annexation can be effectively commenced, therefore the time when jurisdiction of that city over a certain area takes effect should be the guiding factor. Since the city can take no official action favoring a proposed annexation until a sufficient petition is filed, that ought to be the time when the priority of an annexation proceeding should be determined. Stated in another way, jurisdiction should be determined as of the time of the filing of a sufficient petition for annexation with the governing body of the municipality to which the petition is addressed. All statutory steps preceding the

filing of the petition ought to be considered what they actually are, merely procedural and no such procedural step should invoke priority over other attempted annexations or incorporations.

To make the laws relating to incorporation fit within the statutory structure of changes permitted within townships, it is suggested that they also be amended. For the purpose of incorporating a village or a city in the first instance it should be necessary to circulate a petition ought to be the same as those that relate to annexations. at least one-half of the owners of the lands and a majority of the electors in the area should be required. The requirements for the petition ought be the same as those that relate to annexations. Thereupon the petition should be sufficient for the purpose of filing it with the court or governing body as now prescribed by law. Jurisdiction and the actual commencement of the incorporation should start with the filing of a sufficient petition and not at any time prior thereto.

Under these suggested changes it is conceivable that various petitions for annexations may be circulated at the same time within the same area. There is nothing objectionable to that. As a matter of fact it is entirely within the contemplation of our democratic system. The people therein could choose to sign the petition that they favored. They would not be limited, as they presently are under the law, to evincing their wishes through only one proposed annexation that was instituted by the posting of a notice.

2. Another suggested change in the law is to limit the time during which the governing body may act upon a petition presented to it. In one case decided by the Supreme Court a nine month lapse before the governing body acted on a petition was not considered unreasonable, there being no specified limitation.[31] It is suggested that, unless the governing body accept or reject the petition filed with it within a period of four months, the petition should be deemed rejected. This is to preclude impairment of the annexation law by undue delay of action by a municipal governing body.

3. The law ought further to provide that if a petition for annexation is rejected by a governing body or is deemed rejected by failure of that body to act within four months, the annexation be considered void *ab initio* or as if it had never been commenced. This would permit other pending or proposed annexations to continue without interruption in such circumstances. That is, other pending or proposed annexation proceedings relating to certain lands would not be immediately terminated by virtue of the filing of a petition for an-

[31] Roehrborn v. Ladysmith, 175 Wis. 394, 185 N.W. 170 (1921).

nexation of a portion or all of the lands considered in the first annexations. The other annexation proceedings would be terminated only in the event that the governing body to which the annexation petition is addressed acted favorably upon such petition.

4. Possibly another saving device should also be considered. Let us assume that a certain territory is posted for annexation. Later a territory including the area within the first annexation petition is also posted for annexation. The law could provide in those circumstances that, should the first annexation succeed, that portion be automatically deleted from the second annexation without wholly nullifying the second annexation. Thus the second annexation could proceed to a successful termination with the balance of the territory.

5. It is suggested that a limitation of time for withdrawals of names from a petition be enacted by statute. Under the case of *Town of Blooming Grove v. City of Madison*,[32] in the absence of statutory law, it was held that withdrawals of names from the petition could take place any time until the final passage of the ordinance of annexation by the governing body of a municipality.

Section 10.44(2) of the Statutes prohibits the withdrawals of names from petitions for recall elections once such petitions are properly filed. It is suggested that the same rule be followed in annexation. Permitting additional names to be filed is sound. However, to permit withdrawals, subjects the governing body to repeated checking of the petition and the resulting confusion that may arise in the necessary determination of a sufficient petition.

6. It is further suggested that the rule promulgated in *Slauson v. Racine*[33] should be limited. Under the court's decision lands that lie within a legislative district outside of the incorporated municipality upon annexation become a part of the legislative district within the incorporated municipality to which they become attached. Thus by annexation, by local action, under an apparent delegated power of the legislature, reapportionment takes effect. It seems provident that the legislature should jealously preserve the exclusive power of reapportionment. It should therefore be provided that no legislative district boundaries are to be affected, changed or altered by means of annexation, and that the annexation of lands be effective for municipal purposes only. Thus the legislative boundaries would remain at all times intact, notwithstanding annexations, and would be subject to alteration or change only by the exclusive action of the legislature. This change is suggested with full cognizance of the

[32] 253 Wis. 215, 33 N.W.2d 312 (1948).
[33] 13 Wis. 398 (1861).

decision in the *Town of Wauwatosa* case[34] which stated that legislative districts must be bounded by town, county, precinct or ward lines. It would appear that the constitutional provision referred to in that case is a limitation placed upon the legislature at the time of reapportionment. Once reapportionment does take place it seems that it is of less import that the ward lines or town lines be moved about for local purposes without having the effect of disturbing the legislative boundary lines, than to permit, under the rule in the *Slauson* case, a locality to actually move about legislative boundary lines and effectuate reapportionment by means of annexation. It would seem that one of these rules should be subordinated to the other. In the circumstances it is urged that the power of reapportionment should be left exclusively to the legislature.

7. Subsection 3 of Section 62.07 of the Wisconsin Statutes provides in part:

> . . . The validity of the proceedings shall not be collaterally attacked, nor in any manner called in question in any such court unless the proceedings therefor be commenced before the expiration of either of the ninety day periods herein provided for.

The ninety day period referred to relating to annexation is that period after the passage of the ordinance of annexation.

The provision was similar at the time the Supreme Court decided the case of *Lutien v. Kewaunee.*[35] The facts in that case disclosed that an ordinance of annexation was challenged because the ordinance was not published in accordance with law. The action was commenced after the ninety day period referred to in the statute. The answer pleaded the statute of limitations. The court held that the action was barred since apparently the question was not raised within the time provided by law.

Later cases, such as *State* ex rel. *Madison v. Walsh,*[36] by dicta made reference to procedural errors and questions relating to jurisdiction. It is just as logical to have a statute of limitations applicable to both questions of jurisdiction and questions relating to procedural steps. It will improve the annexation procedure if an absolutely clear time limitation be set forth by statute relating to both of these matters affecting ordinances of annexation.

The failure to challenge an ordinance of annexation within a limited period of time can result in substantial and irreparable harm and damages to the municipalities affected by such annexation. Let

[34] Town of Wauwatosa v. City of Milwaukee, 259 Wis. 56, 47 N.W.2d 442 (1951).
[35] 143 Wis. 242, 126 N.W. 662, 127 N.W. 942 (1910).
[36] 247 Wis. 317, 19 N.W.2d 299 (1945).

us assume a failure to challenge an ordinance of annexation that has been adopted two, three, five or more years before. Then suddenly someone decides to challenge the annexation because of some alleged jurisdictional defect. In the meantime the municipality to which the lands have been annexed has assimilated the said lands, has extended all of its services and installed improvements in the area annexed with a cost that may have run into hundreds of thousands of dollars, has levied taxes on the owners for that period and has assumed jurisdiction over the lands fully and totally. Should a municipality forever be subjected to the constant jeopardy of having an annexation challenged beyond the period provided for in the statute of limitations? Should the annexing municipality be subject to action which may tend to create havoc within its tax base and cause chaos among the people within the city as well as the area annexed? "Should the people affected forever be subjected to a quandary as to the municipality in which they reside and to which they pay their lawful share of taxes"?

The possibility of a defense, if one were necessary, other than the statute of limitations, that could apply in such instances is appreciated. Particular reference is made to the application of the theory of laches. Certainly one must realize, however, that the time element and the adverse effect upon the municipality, caused by delay, as well as other factors, will be different in each case. In the circumstances a clear-cut statute of limitation should be established precluding any attack on any annexation beyond its period. The statute should be made clear that it applies not only to procedural steps but also to matters challenging jurisdiction of the city to annex. We urge this in spite of the apparently clear language in the statute as it exists today, particularly that portion that says ". . .nor in any manner called in question in any such court . . . ."

To this end it is suggested that the statute be amended by making it unmistakably clear that the ninety-day period within which an action is to be commenced applies to jurisdictional defects, procedural errors or any other challenges in law that may be used to contest such annexation. So that no tax period should transpire before such a challenge is made, it is urged that the ninety-day period of limitations as used in the present law be continued.

8. A change in the law is recommended which would require the approval of an annexation in advance from the governing body of the municipality to which the annexation is desired. This is important since planning the growth of a city cannot be sufficiently con-

trolled if it is subjected to the wishes of individuals having little or no connection with such city.

9. All of these suggestions look to the municipal government and provide more efficient legal tools for carrying out their policies. What of the townships, what should be their legal position? A brief review of the basic principles relating to the existence of present municipalities is necessary. If, as heretofore mentioned, unincorporated townships are subject to diminutions in their area by detachment and annexation, then considerable thought should be given to how much the township, as a government, should have to say about the annexation. It is suggested that the rule in *In re Village of Mosinee*[37] be reinstated by repealing Section 60.29(31). The court held in that case that the township was not a party in interest in the annexation, but rather the parties in interest, insofar as the township was concerned, were limited to the petitioners and owners of the lands being annexed. Consequently the township could not commence an action contesting the validity of an annexation which resulted in the detachment of a portion of the township territory. The township form of government is primarily suitable for rural areas. It has not been set up or created to furnish the services in areas within the township that become fully urbanized. It is to the benefit of the township not to have the responsibility of giving urban services and therefore such responsibility for urban services ought to be transferred to an incorporated urban municipality. Furthermore, if more than one-half of the people in an area desire to be a part of a city, should the township be given the legal position to frustrate that desire? The answer seems obvious.

10. Finally, it is also suggested that an entirely new alternative method of annexation be given consideration. Elsewhere in this country[38] a method of annexation by judicial determination is provided. Briefly, the law sets forth the factors that must be submitted to the court and upon which the court determines whether an annexation is or is not to be effected. A similar provision in Wisconsin in the alternative would be worthy of serious study and contemplation.

Conclusion

As has been pointed out, the primary purpose of this article is to set forth the present annexation laws and procedures, as well as evaluate their application. There has been no attempt to explore, what is perhaps, the more fundamental question: must, or should, a

[37] State of Virginia.

[38] 177 Wis. 74, 187 N.W. 688 (1922).

city such as Milwaukee annex adjacent areas?[39] If we assume that this must be answered in the affirmative, what can we conclude about the present statutory system? It is clear that although the law as it exists can be utilized to effect annexation, it nevertheless, could be substantially improved to the end of facilitating annexations.

As a concluding thought it is conceded that townships have rights that should be protected, but such protection should not be so complete as to jeopardize the organization of the metropolitan community of which the township is only a component part. The community interest of a metropolitan area as a whole in a righteous cause should have subordinated to it the individual interests of any portion thereof. If annexation is the means of promoting the interests and the greater welfare of the entire community it should be expedited and not hindered, impeded or precluded.

[39] See Quast, *Why Annexation For the City of Milwaukee, supra* at p. 617.