



Fall 9-1-1967

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Recommended Citation

William L. Martin and J. E. Buchholtz, *Annexation-Virginia's Dilemma*, 24 Wash. & Lee L. Rev. 241 (1967).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol24/iss2/5>

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ANNEXATION — VIRGINIA'S DILEMMA

WILLIAM L. MARTIN* and J. E. BUCHHOLTZ†

I. HISTORICAL DATA

A. *Governmental Concepts*

A discussion of annexation in the Commonwealth of Virginia can become meaningful to the practitioner only when viewed in light of several basic governmental concepts of the Commonwealth. It is first necessary to accept and understand the underlying cardinal principle that Virginia is almost totally unique in her governmental structure both in theory and in practice.¹ One need do no more than perfunctorily examine the governmental structure of the political subdivisions of Virginia to become aware of the State's uniqueness. Virginia has developed the doctrine of separation of governmental units to a level equalled by only a small number of cities² without the territorial confines of Virginia and the State of Oregon.³

The precise nature of the Virginia governmental structure may best be characterized by the definitive expressions "counties" and "cities". This is to say, counties and cities in the Commonwealth are major political subdivisions of the state totally separate and distinct from each other.⁴ The essential function of county government is to provide governmental needs to rural areas.⁵ On the other hand, the essential function of city government is to provide governmental needs to urban areas.⁶ In order to allay any misapprehensions, we point out

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¹Virginia adheres to the English theory of "home rule" or "independent" cities, and has applied this theory to all cities in the Commonwealth. VA. CODE ANN. § 15.1-1010 (Repl. Vol. 1964), *Supervisors v. Saltville Land Co.*, 99 Va. 640, 39 S.E. 704 (1901). See also, *Colonial Heights v. Chesterfield County*, 196 Va. 155, 82 S.E.2d 566 (1954).

²See, *Charter of St. Louis, Missouri, and of Baltimore, Maryland.*

³See, ORE. CONST. art. 4 § 1 (a) and art. 11 § 2; ORE. REV. STAT. § 221.410 (Supp. 1965).

⁴*Supervisors v. Saltville Land Co.*, 99 Va. 640, 39 S.E. 704 (1901). See also, VA. CONST. arts. 7, 8.

⁵State policy is defined in relation to counties and cities in *Norfolk County v. Portsmouth*, 186 Va. 1032, 45 S.E.2d 136 (1947).

⁶*Ibid.*

at this juncture that "towns", the other significant governmental unit functioning in Virginia, operate as a part of the counties in which they are situated.⁷ Moreover, a town is constitutionally defined as an incorporated community having a population of less than 5,000 inhabitants within defined boundaries and not having a city charter at the time of adoption of the Constitution of 1902.⁸

The origin of the "separate and distinct" philosophy of governmental units within the state governmental structure is decidedly obscure.⁹ However, in 1901,¹⁰ the Supreme Court of Appeals accepted not only a distinction between cities and towns but also a clear and unequivocal separation of cities and counties.¹¹ Because of the unquestioned and universal adherence within the Commonwealth to the doctrine of the *Saltville* decision,¹² we are confronted with one of the single most important judicial declarations ever announced by the Supreme Court of Appeals. Within the year of the *Saltville* case, delegates of Virginia met in Constitutional Convention and their actions resulted in the eventual adoption of the Constitution of 1902. Pursuant to this document, with some amendments through the years, the lives of the citizens of Virginia are to this day governed.

The Constitution of 1902 is singularly significant to this discussion. In the first instance it provides an absolute separation of cities and counties by providing for a distinctive governmental organization for these two political subdivisions in separate articles.¹³ Secondly, in line with the *Saltville* doctrine it draws a clear distinction between cities and towns.¹⁴ And finally, it provides that future extensions (annexations) and contractions of corporate boundaries shall be accomplished by general legislation.¹⁵ Of additional importance is the fact that the Constitution of 1902 falls short of assigning towns a clear position in the governmental scheme of things. We are, therefore, con-

⁷Supervisors v. Saltville Land Co., 99 Va. 640, 39 S.E. 704 (1901).

⁸VA. CONST. art. 8, § 116.

⁹The origin of the theory is attributed by various authorities to Va. Const. (1851) or to VA. CONST. art. 6 (1868) but no clear distinction is made. See e.g., Wade v. City of Richmond, 59 Va. (18 Gratt.) 583 (1868).

¹⁰Supervisors v. Saltville Land Co., 99 Va. 640, 39 S.E. 704 (1901).

¹¹*Id.* at 644-45, "A city is entitled, under the provisions of Article VI of the Constitution, to a separate government, and, when incorporated is no part of the county for governmental purposes. But this is not true of a town. Its people and property are still subject to the county government for county purposes."

¹²Supervisors v. Saltville Land Co., 99 Va. 640, 39 S.E. 704 (1901).

¹³VA. CONST. art. 7, 8.

¹⁴VA. CONST. art. 8, § 116.

¹⁵VA. CONST. art. 8, § 126.

strained to conclude that such position in fact emanates from the authority of the *Saltville* case.¹⁶

The impact of the Virginia governmental structure on annexation proceedings may best be understood in relation to certain recurring case situations. In most cases the courts¹⁷ are faced with a highly adversarial proceeding between two or more political subdivisions of the State which have no direct allegiance one with the other. Moreover, volumes of highly technical expert evidence are quite frequently introduced by each of the adversaries, and no expense seems to be too great to overcome the position of the opponent. Frequently, the economic burden of annexation upon the annexing municipality is devastating.¹⁸ Consequently, a critical evaluation of annexation when correlated to the existing governmental structure must lead to the realization that the Commonwealth has found its Gordian knot.

B. Early Annexation Statutes

The earliest method employed in the Commonwealth to accomplish extension of boundaries of municipal corporations was by the legislature.¹⁹ Application to the General Assembly was made by the municipality to amend its charter to incorporate the new boundary.²⁰ The General Assembly would grant the charter amendment by special act subject to approval by the electors of the area affected.²¹ In the event the proposed extension was deemed inappropriate, the legislature declined to entertain action on the amendment. The above outlined method of annexation was consistently employed within the Commonwealth until the adoption of the Constitution of 1902.²² From July 10, 1902, until March 10, 1904, Virginia was without a general annexation statute,²³ and a legal moratorium on annexation existed during this

¹⁶Note 11, *supra*.

¹⁷Annexation has been a judicial function since March 10, 1904. See VA. ACTS OF ASSEMBLY 1904, ch. 99 at 144-48.

¹⁸See record in *City of Richmond v. Henrico County* (1965). Richmond refused to accept annexation at a cost of approximately \$59,000,000. See also record in *City of Bristol v. Washington County* (1965). Neither case was appealed.

¹⁹See Report of the Proceedings and Debates of the Constitutional Convention of 1901-1902 (1906)—Committee Report regarding Article VIII, Section 126.

²⁰For an example of process prior to VA. CONST. (1902) see, *Arey v. Linsey*, 103 Va. 250, 48 S.E. 889 (1904).

²¹*Ibid.*

²²VA. CONST. art. 8, § 126 prohibits annexation by special act.

²³The general annexation statute was adopted by the General Assembly March 10, 1904. VA. ACTS 1904, ch. 99 at 144-48.

period.²⁴ However, on March 10, 1904, the General Assembly passed an act,²⁵ thereafter designated Code of 1904, title 16, chapter 44, section 1014a.²⁶

With the adoption of Code of 1904, section 1014a, annexation by municipalities became a judicial function.²⁷ While subsequent enactments on the subject have made changes in the composition of the court²⁸ and the authority by whom the court is constituted,²⁹ the actual proceedings are still basically judicial in character.³⁰ Lest confusion arise over the descriptive terminology, "basically" we hasten to explain that the current statute as well as past statutes impose upon the trial court some responsibilities which are legislative in character.³¹ Moreover, the writers do not criticize this procedure for to understand existing annexation practice is to realize that annexation cannot be singularly judicial in nature.

In *Henrico County v. Richmond*,³² the first case to reach the Court of Appeals after the passage of the act, section 1014a, was found to be a constitutional and valid exercise of judicial authority.³³ Since the ruling in the *Henrico County* case, there have been several other constitutional attacks on the authority of the courts to hear and determine annexation proceedings, but the Court of Appeals has rejected every attack.³⁴

In 1914, the General Assembly authorized a re-codification of the statute law of the Commonwealth.³⁵ Pursuant to this authority, the

²⁴Annexation proceedings could not be commenced after July 10, 1902 until legislation provided the machinery.

²⁵Note 23, *supra*.

²⁶Code 1904 is not an official codification but is merely *prima facie* evidence of statutes contained therein. See, VA. CODE. Preface (1919).

²⁷VA. CODE. § 1014a (1904).

²⁸VA. ACTS, 1924, ch. 44 at 664 provides for a three-judge court.

²⁹VA. ACTS, 1940, ch. 37 at 43 designates the Chief Justice of the Supreme Court of Appeals or a committee of Justices designated by him to appoint the court instead of the Governor.

³⁰VA. CODE ANN. § 15.1-1038 (Repl. Vol. 1964) still provides for a court to hear the case.

³¹See, *Henrico County v. Richmond*, 106 Va. 282, 55 S.E. 683 (1906). Reading the current statute shows the court's analysis there to be equally true today.

³²106 Va. 282, 55 S.E. 683 (1906).

³³*Ibid*. One should note, however, the dissent in 106 Va. at 300, 55 S.E. at 690. It seems that many of the governmental entities of the state were in a great furor over the matters finally put to rest by this decision.

³⁴*Falls Church v. County Board*, 166 Va. 192, 184 S.E. 459 (1936); *Norfolk County v. Portsmouth*, 124 Va. 639, 98 S.E. 755 (1919); *Warwick County v. Newport News*, 120 Va. 177, 90 S.E. 644 (1916); *Alexandria v. Alexandria County*, 117 Va. 230, 84 S.E. 630 (1915) and *Henrico County v. Richmond*, 106 Va. 282, 55 S.E. 683 (1906).

³⁵VA. ACTS, 1914, ch. 193 at 300; VA. ACTS, 1915, ch. 18 at 40.

Code of 1919, the first official codification since 1849,³⁶ was adopted and became the statutory law of Virginia.³⁷ Code of 1919, title 26, chapter 120, sections 2956 thru 2968, the annexation provisions of the new Code, were substantially the same as Code of 1904, title 16, chapter 44, section 1014a. From 1919 through the official re-codification of 1950, the annexation statutes of Virginia remained substantially unchanged with, however, several noteworthy exceptions.³⁸

In 1952, following an exhaustive report made by a special study commission,³⁹ the General Assembly repealed the existing annexation law and adopted in lieu thereof Code of 1950, sections 15-152.2 thru 15-152.28.⁴⁰ Chapter 623, Acts of Assembly 1962, effective July 1, 1964, repealed Code of 1950, title 15 and enacted in lieu thereof title 15.1. As a result of the enactment of title 15.1, new section numbers were assigned to the annexation statute, but no significant changes were made in the substantive provisions of the law.⁴¹ There is one further interesting act which the General Assembly of 1962 adopted in relation to annexation. Chapter 625, Acts of Assembly of 1962, declared a legal moratorium on new annexation proceedings from June 29, 1962, until the expiration of ninety days following the adjournment of the regular session of the General Assembly of Virginia of 1964.⁴²

In very general terms, a comparative analysis of the current annexation law with the prior repealed enactments reflects the legislative intention of granting to the annexation courts more discretion in reaching their decisions.⁴³ One can, also see a broadened recognition of the diverse interests involved in annexation proceedings.⁴⁴ Finally, it is apparent that the legislature has begun to appreciate the enormous financial burdens often imposed upon all parties in annexation proceedings.⁴⁵

³⁶VA. CODE, Preface (1919).

³⁷VA. ACTS OF ASSEMBLY 1918, ch. 108 at 211.

³⁸Notes 30, 31, *supra*; see also, VA. ACTS, 1928, ch. 412 at 1076, which revised the statute to require necessity *and* expediency rather than necessity *or* expediency.

³⁹Report, Commission to Study Urban Growth, Doc. No. 13 (1951).

⁴⁰VA. ACTS, 1952, ch. 323 at 627.

⁴¹See VA. ACTS, 1954, ch. 3 at 3; VA. ACTS, 1958, ch. 378 at 497; VA. ACTS, 1960, ch. 474 at 731; VA. ACTS, 1960, ch. 519 at 827 and VA. ACTS, 1960, ch. 550 at 855. With these amendments the repealed statute was almost identical to the new annexation statute.

⁴²See, VA. CODE ANN. § 15-152.29 (1950) for the text of the act which is now repealed.

⁴³Compare VA. CODE ANN. §§ 15.1-1037, 15.1-1040, 15.1-1042, 15.1-1046 (Repl. Vol. 1964) with prior statutes.

⁴⁴Compare VA. CODE ANN. § 15.1-1036 (Repl. Vol. 1964) with prior statutes.

⁴⁵Compare VA. CODE ANN. §§ 15.1-1070, 15.1-1046, 15.1-1055 (Repl. Vol. 1964) with prior statutes.

II. ANNEXATION TODAY—PROBLEM AREAS

(A) *Institution of Proceedings*

While it may appear from the brief treatment of the historical background of annexation that important developmental and evolutionary materials have been minimized, such is not the case. The current statute contains certain problem areas which deserve analysis in light of present day circumstances. However, analysis of these problem areas in current practice frequently must allude to the past, particularly in the field of judicial decisions.

This analysis will commence with the difficulties relating to the institution of annexation proceedings, and develop in reasonably strict accordance with statutory sequence. Code of 1950, section 15.1-1032, in obedience to the Constitution,⁴⁶ provides in essence that municipal boundaries shall remain fixed unless changed in the manner provided in the subsequent sections. The two Code sections following, define who may institute a proceeding.⁴⁷

Ordinance annexation actions⁴⁸ may be instituted by either a city or a town. Close attention should be given to the provisions of this section and care should be taken by municipal governing bodies to adopt proper ordinances. The Court of Appeals, apparently leaving the questions to be decided in each case,⁴⁹ has repeatedly held that an ordinance in substantial compliance with this section is all that is required.⁵⁰ However, it has been held that the failure to enact an ordinance substantially complying with the provisions of section 15.1-1033 will defeat the annexation court's jurisdiction.⁵¹ Moreover, the Court of Appeals, recognizing the adoption of an ordinance by a municipal governing body as a legislative act, has held that changes in annexation ordinances cannot be effected by the judiciary.⁵²

At the risk of destroying continuity, it is felt that it is proper to

⁴⁶VA. CONST. art. 8, § 126.

⁴⁷VA. CODE ANN. §§ 15.1-1033, 15.1-1034 (Repl. Vol. 1964).

⁴⁸VA. CODE ANN. § 15.1-1033 (Repl. Vol. 1964).

⁴⁹See, *Warwick County v. Newport News*, 120 Va. 177, 90 S.E. 644 (1916); *Alexandria v. Alexandria County*, 117 Va. 230, 84 S.E. 630 (1915) and *Henrico County v. Richmond*, 106 Va. 282, 55 S.E. 683 (1906), for substantial compliance. See *Martinsville v. Henry County*, 204 Va. 757, 133 S.E.2d 287 (1963), for an insufficient ordinance.

⁵⁰*Warwick County v. Newport News*, 120 Va. 177, 90 S.E. 644 (1916); *Alexandria v. Alexandria County*, 117 Va. 230, 84 S.E. 630 (1915) and *Henrico County v. Richmond*, 106 Va. 282, 55 S.E. 683 (1906).

⁵¹*Martinsville v. Henry County*, 204 Va. 757, 133 S.E.2d 287 (1963).

⁵²*Ibid.*

correlate consideration of section 15.1-1046 into the discussion at this point. It provides:

“No proceedings brought under this chapter shall fail because of a defect, imperfection or omission in the pleadings which does not affect the substantial rights of the parties or any other technical or procedural defect, imperfection or error, but the court shall at any time allow amendment of the pleadings or make any other order necessary to insure the hearing of the case on its merits.”

Lest the novitiate be lulled into a false sense of security, take heed that the import of section 15.1-1046 is not all encompassing. Comparison of the cases of *Portsmouth v. Norfolk County*,⁵³ and *Martinsville v. Henry County*,⁵⁴ gives one insight into the amendatory authority of the annexation court. In the *Portsmouth* case the municipality substantially complied with section 15-152.3.⁵⁵ However, the map published in the newspaper pursuant to section 15-152.5 was illegible. Norfolk County moved to dismiss the proceedings on this ground and on the ground that the city had failed to make a formal motion to grant the annexation on the return day of the petition. The annexation court sustained the motion, and the Court of Appeals reversed. The Court of Appeals in deciding the publication question held,

“[W]here there is a technical or procedural defect in the notice, pleadings or trial, under Code, § 15-152.16, [Now § 15.1-1046] the trial court should in its ruling, before dismissing the case, give the party in default an opportunity to amend or correct the imperfection. In the instant case the trial court did not indicate the ground or grounds on which it based its final order and it does not appear that the court pointed out to the City any defect in the proceeding. Consequently, in light of the liberal provisions of Code, § 15-152.16, and because no substantial rights of the parties were or could be affected by the defective publication nor by its proper republication, we hold that this defect, without giving the City an opportunity to republish the notice and ordinance, was not alone a sufficient ground for dismissing this annexation proceeding.”⁵⁶

In regard to the failure of the City to make a formal motion to grant the annexation on the return day the Supreme Court ruled,

“[I]n its petition the City made a motion to annex the pro-

⁵³198 Va. 247, 92 S.E.2d 296 (1956).

⁵⁴204 Va. 757, 133 S.E.2d 287 (1963).

⁵⁵198 Va. at 247, 92 S.E.2d at 300.

⁵⁶*Id.* at 252-53, 92 S.E.2d at 301.

posed territory and only failed to make a similar motion on the date stated in the notice. This failure on the part of the City has in no way affected the substantial rights of the County and is at most, if at all, only a technical defect and an insufficient reason for dismissing the case. Code, § 15-152.16.”⁵⁷

We are, however, given a glimpse of the other side of the coin in the *Martinsville* case.⁵⁸ The City adopted an annexation ordinance and attached to the ordinance a map as permitted by section 15-152.3,⁵⁹ [now 15.1-1033.] The map provided by the City and published as required failed to show existing uses of the area to be annexed. Henry County demurred to the motion on the ground that the requirements of section 15-152.3 had not been met, and the trial court sustained the demurrer because the map did not provide the requisite information. The trial court in its order granted the City leave to correct the deficiency within thirty days by filing an amended map. The County, after the new map was filed, filed a plea to the jurisdiction alleging that the original map did not comply with section 15-152.3 and that the new map had neither been adopted by the City Council nor served and published as required by section 15-152.5. The City offered no evidence that its council had adopted an amendatory resolution. The trial court by a divided vote sustained the County’s plea and dismissed the proceeding. The reason assigned for such action was that the map, in lieu of a statement in the ordinance, failed to show existing land uses as required, and the court was without authority to permit the revised or amended map to be filed as the court would in effect be amending the ordinance. The City appealed and the Supreme Court affirmed the lower court’s ruling. The Court of Appeals in rejecting the City’s contention that section 15-152.16 [now 15.1-1046] was applicable to the case ruled;

“We agree with the position of the County that the enactment of an ordinance substantially complying with § 15-152.3 [Now § 15.1-1033] is jurisdictional. The adoption of such an ordinance is the first and prerequisite step in the proceeding. . . . [T]he sufficiency of such an ordinance is a ‘jurisdictional question.’ . . . The enactment of the required ordinance is a legislative act. . . . Consequently, if a change in a legislative enactment is necessary or desirable, it must be effected by the legislative branch of the government and not by the judiciary. . . . [N]o such legislative action has been shown in the present case.

⁵⁷*Id.* at 254, 92 S.E.2d at 302.

⁵⁸*Martinsville v. Henry County*, 204 Va. 757, 133 S.E.2d 287 (1963).

⁵⁹*Id.* at 758, 133 S.E.2d at 287.

It follows that the lower court was without authority to direct or permit the amendment of the ordinance by incorporating therein the new map."⁶⁰

In specific relation to the theory advanced by the City, the Court said,

"But in the present case the defect is not a procedural defect in the notice, pleadings, or trial. It is a defect in the annexation ordinance itself, that is, in the legislative act of the city council. Clearly, then, § 15-152.16 has no application here."⁶¹

Although one is not confronted with any particular difficulty in reconciling the rulings in the two preceding cases, certain interesting questions remain unresolved. Clearly an illegible publication may be corrected, but is the situation altered by either a failure to publish *in toto* or by failure to publish the required number of times? This question was not raised in the *Portsmouth* cases; however it was raised in the *Martinsville* case in the trial court.⁶² The trial court—sustaining the jurisdictional plea on a more basic ground—apparently saw no necessity to rule on the publication question. The question was, of course, not raised in the Court of Appeals. However, a more basic question arises from the *Martinsville* ruling. Would the ruling have been different had the city introduced an amendatory resolution of its council authorizing the use of the corrected map? Proffered answers to these questions would be purely speculative; moreover, these questions, while interesting, do not cry out for answers. Consequently, it is suggested that counsel for annexing municipalities closely scrutinize the proceeding at every step to insure in the first instance that statutory requirements, especially the substantive ones, are met.⁶³ The final consideration regarding section 15.1-1033 proceedings concerns subparagraph (c).⁶⁴ Unquestionably, compliance with this subsection is as jurisdictional as is compliance with any other part of section 15.1-1033, but an equally important consideration relating to subsection (c) is in an entirely different direction. Responsible treatment of subsection (c) requirements by annexing municipalities can go a long way in promoting a favorable determination of the proceeding. In spite of the innate hostilities generally attendant upon independent municipi-

⁶⁰*Id.* at 761, 133 S.E.2d at 289-90.

⁶¹*Id.* at 761-62, 133 S.E.2d at 290.

⁶²*Id.* at 759, 133 S.E.2d at 288.

⁶³The ruling in *Martinsville v. Henry County* makes it clear that substantive defects cannot be cured by amendment.

⁶⁴VA. CODE ANN. § 15-1033(c) (1950) required the terms and conditions upon which annexation is sought to be set out in the ordinance.

palities' proceedings, a reasonable and responsible attitude will frequently breed an analogous response from the opposing governing body. Moreover, any necessary appellate proceedings will likely be more effective should the trial court reject reasonable terms offered by a city. Of similar import is the fact that a municipality is in a substantially more advantageous position to decide whether or not it should accept annexation upon altered terms,⁶⁵ if it has made responsible computations in advance. As a point of clarity, towns are not as much concerned with terms and conditions of annexation as are cities by reason of cities' independent status.

Code of 1950, section 15.1-1034, the other definitive statute heretofore mentioned, is referred to as the petition annexation statute. It provides that 51 per cent of the qualified voters of territory adjacent to a city or town, the governing body of the county in which such territory is located or the governing body of a town comprising such territory may institute a proceeding.⁶⁶ While this section or a similar one has been embodied in our annexation law since its inception,⁶⁷ only three cases of this type have been ruled upon by the Court of Appeals.⁶⁸ The three cases, *Nexsen v. Board*,⁶⁹ *Mowry v. Virginia Beach*,⁷⁰ and *Chesterfield County v. Berberich*,⁷¹ while principally important to both species of annexation, are, nonetheless, significant solely to petition annexations to some extent. In the *Nexsen* case the petition area included an incorporated town.⁷² In fact the unincorporated territory involved was adjacent to the town, not to Newport News. The county demurred on the ground that Code of 1919, section 2956 did not apply to annexation of an incorporated town with other outlying territory to a city. The trial court sustained the demurrer and dismissed the proceeding, but the Court of Appeals granted a writ and reversed the trial court's ruling. Three questions were argued in the appellate court. (1) the issue raised in the trial

⁶⁵See generally, VA. CODE ANN. § 15.1-1044 (Repl. Vol. 1964) which authorizes cities and towns in ordinance annexations to decline annexation on terms and conditions other than those contained in the ordinance.

⁶⁶VA CODE ANN. § 15.1-1034 (Repl. Vol. 1964).

⁶⁷Compare VA. CODE ANN. § 15.1-1034 (Repl. Vol. 1964) with VA. ACTS, 1904, ch. 99 at 144 and VA. CODE § 2856 (1910).

⁶⁸One should be cognizant of the fact that other cases of this type have been tried and not appealed or appealed and a writ denied. *E.g.*, *Angle v. City of Roanoke*, Civil No. 124 (Cir. Ct. 1963); *Davis v. City of Roanoke*, Civil No. 18 (Cir. Ct. 1963). See also *Young v. Town of Salem*, Civil No. 152 (Cir. Ct. 1966) now pending in the Supreme Court of Appeals of Virginia.

⁶⁹198 Va. 205, 93 S.E.2d 323 (1956).

⁷⁰199 Va. 500, 100 S.E.2d 781 (1957).

⁷¹142 Va. 313, 128 S.E. 570 (1925).

court, (2) that Code of 1924, section 2885b relating to annulment of certain court charters of towns impliedly partially repealed Code of 1919, section 2956 and 2957 and (3) the effect of the failure of a city to adopt an ordinance before a qualified voters' petition for annexation is filed. It should be noted that only the last question relates peculiarly to petition annexations; however, the other two questions are quite significant to annexation proceedings generally. In disposing of the first question the Court of Appeals held:

"We conclude therefore that the section [2956] under which the proceeding was instituted, confers upon the court the jurisdiction which the petition invokes—that is, to hear this case on its merits.

That this has been the view of this court is perfectly apparent from a consideration of the record in the case of *County of Henrico v. City of Richmond*, 106 Va. 282, 55 S.E. 683, 117 Am. St. Rep. 1001. . . . In that case this court affirmed an order of annexation, and there is no intimation in the opinion that there is any lack of jurisdiction to order such annexation under that statute, notwithstanding the fact, that there, as here, the outlying territory included an incorporated town as well as other territory in the county outside of the town."⁷³

The Court of Appeals likewise rejected the implied partial repeal theory stating:

"We find no difficulty whatever in reconciling these several statutes. The latter statutes [Code 1924, 2885b] refer altogether to the annulment of certain court charters of towns, as distinguished from cities. The result of the annulment of such a town charter is that the territory involved reverts to the county in which the town is located; whereas the result of such a procedure as this is, if the prayer of the petition be granted, that instead of reverting to the county, the territory become annexed to the city. There is no inconsistency between the two statutes. [Code 1919, § 2956, 2957 and Code 1924, § 2885b] They refer to different methods of procedure for the accomplishment of different results."⁷⁴

In the third question argued on the appeal the Supreme Court clarified an important distinction between ordinance annexations and petition annexations when it ruled:

"Where the initiative is by the city or town, the ordinance must precede the filing of the petition, but we find nothing in the statute which would justify us in holding that such an ordinance must be passed before the filing of the petition,

⁷³*Id.* at 319, 128 S.E.2d at 571.

⁷⁴*Id.* at 320-21, 128 S.E.2d at 572.

when the initiative is taken, as it is here, by 51 per cent of the voters in the territory involved. To us it seems simply a question of the practical application of the statute."⁷⁵

Even though the *Nexsen* case was decided under a subsequently repealed annexation statute, the principles announced in the case would seem to be as cogent to present practice as to past practice. The methods of proceeding for annexation are the same in both the repealed statute and the current statute.⁷⁶

The *Mowry* case actually announces rulings which are better discussed in relation to Code provisions to be dealt with elsewhere in this article. Consequently, comment on the case will be reserved for a more appropriate place.

The *Berberich*⁷⁷ case announces two principles which are closely related. However, when these principles are catalogued, it is apparent that only one applies solely to petition annexations. The facts in the case establish that the qualified voters of the 239 acres petitioned to be annexed were two in number. It further appears that the petition area was substantially undeveloped and rural in character, and that the owners of the acreage, apparently not qualified voters of the area to be annexed, joined in the request for annexation. The trial court after a hearing on the merits decreed the annexation as requested. The County appealed and the Supreme Court affirmed, quoting with approval the comment of the trial court as follows:

"It could scarcely be argued that a city could not petition to annex an area simply because it comprised only one parcel with only two inhabitants, and we see no just reason why the petition should not be filed by the two inhabitants. The real question is whether annexation is desirable and expedient. Secs. 15-152.3 and 152.4 simply tell us who is to institute the proceeding. In our opinion, the fact that the area is now barren of urban development does not of itself, prohibit the annexation . . . [T]he farm lands immediately adjoining city limits peculiarly adaptable for urban development should not be regarded strictly as rural, especially where it is reasonably anticipated that urban development is imminent."⁷⁸

What is not actually said in the case is also of importance to petition annexations. It is quite clear that section 15.1-1034 petitioners

⁷⁵*Id.* at 321-22, 128 S.E.2d at 572.

⁷⁶Compare VA. CODE ANN. § 15.1-1034 (Repl. Vol. 1964) with VA. CODE § 2956 (1919).

⁷⁷199 Va. 500, 100 S.E.2d 781 (1957).

⁷⁸*Id.* at 504, 100 S.E.2d at 784.

need only the statutory interest⁷⁹ in the subject matter of the litigation to institute the proceeding.

An additional problem inherent in petition proceedings relates to the definition of the territory to be annexed. However, discussion of this question is directly related to section 15.1-1042 and will be dealt with there. The only other feature of section 15.1-1034 actions which requires comment is the statutory directive that the action once instituted shall proceed in all respects as if commenced as a section 15.1-1033 action unless otherwise provided by the act.⁸⁰ Reference is made to this aspect of section 15.1-1034 for the sole purpose of calling attention to it to demonstrate the importance of looking at the entire statute discerningly. It should also be noted that mention is not made of county or town proceedings under this section as there are no reported cases on the subject.

Code of 1950, section 15.1-1035 provides for service, publication and docketing, and close attention to its provisions should eliminate any difficulties in this area. The most important question raised in regard to this section was raised in *Portsmouth v. Norfolk County* where the Court of Appeals clarified the effect of the required publication when it said,

"The publication required by Code, § 15-152.5 [Now 15.1-1035] is not process but is designed to give notice to the public of the proposed annexation and to supply those who may be affected thereby, or interested therein, with certain information from which they may determine whether or not to act in support of or against the proposed annexation. But the individual members of the public are not necessary parties to the annexation proceeding . . . Hence, the publication required by Code, § 15-152.5 is not, as contended by the County a substitute for personal service of process since no one is made a party by this publication."⁸¹

Without suggesting that the foregoing comments cover the field, it is felt that many of the pitfalls inherent in instituting annexation proceedings have been pointed out. Moreover, the real substance of

⁷⁹VA. CODE ANN. § 15.1-1034 (Repl. Vol. 1964) requires that petitioners be qualified voters only. This raises the question whether the rights of freeholders or property owners in the area sought to be annexed are jeopardized. Certainly their rights may be protected by intervention in the proceeding, but should they not have a voice solely as property owners as to whether or not such an action is ever instituted.

⁸⁰VA. CODE ANN. § 15.1-1037(b) (Repl. Vol. 1964). Apparently petitioners in two counties could not institute one proceeding. See also, VA. CODE ANN. §§ 15.1-1044 & 15.1-1055 (Repl. Vol. 1964).

⁸¹198 Va. 247, 251, 93 S.E.2d 296, 300-01 (1956).

annexation is in the difficulties and questions raised in the trial. Quite naturally, however, certain pre-trial matters must be explored first.

B. PRE-TRIAL CONSIDERATIONS

The writers are of the opinion that the statutory sequence of directives are somewhat disarranged from this point to the conclusion of the statute. Therefore, we will deal with all pre-trial matters in this portion of the article.

Code of 1950, section 15.1-1034 provides the manner in which the annexation court shall be constituted.⁸² The statute appears relatively unequivocal in its terms and should not give rise to difficulties. Nonetheless, attention is directed to *Norfolk v. Oast*,⁸³ where the Court of Appeals held that the annexation court as defined by repealed Code of 1950, section 15-133 could not be constituted on the facts of the case and sustained dismissal of the proceeding.⁸⁴ The present Code provisions,⁸⁵ however, seem to obviate the result of the *Oast* case. The most serious problem presented by section 15.1-1038 seems to be one of when the court should be constituted. Although this precise question has never reached the Court of Appeals, the Court has said, in a somewhat anticipatory declaration:

“Except as otherwise stated in Code, § 15-152.8, [Now § 15.1-1038] the annexation court is comprised of three judges, two of whom are required to be judges of circuit courts remote from the territory sought to be annexed. These judges are not designated until after the notice has been filed, and in most of the cases the days on which the court will convene must be left to the convenience and discretion of its members. It is apparent therefore that at the time of filing its notice of annexation, the city or town cannot be certain that the annexation

⁸²Comprised of three judges—judge of circuit court of county involved and two circuit judges of circuits remote from area—designated by Chief Justice or committee of Justices designated by him.

⁸³189 Va. 501, 53 S.E.2d 137 (1949).

⁸⁴The former statute, VA. CODE ANN. § 15-133 (1950) provided for the court to be comprised of judge of circuit court of county involved, the judge of the circuit court of the city seeking to annex and a judge of a remote circuit. Norfolk sought to annex territory in Norfolk County and Princess Anne County by one ordinance. A proceeding was instituted in Circuit Court of Norfolk County pursuant to VA. CODE ANN. § 15-130 (1950). The circuit judges of Princess Anne and Norfolk counties were not the same person. Judge Oast of Norfolk County dismissed the proceeding on the ground that a court could not be constituted and the Court of Appeals denied a writ of prohibition. But see dissent by Chief Justice Hudgins and Justice Eggleston, *Norfolk v. Oast*, 189 Va. 501, 53 S.E.2d 137 (1949).

⁸⁵See amendment to VA. CODE ANN. § 15-152.8 (1950) by VA. ACTS OF ASSEMBLY 1954, ch. 3 at 3 which was carried over into VA. CODE ANN. § 15.1-1038 (Repl. Vol. 1964).

court will be in session on any 'given day.' Furthermore, there is no compelling reason for requiring the motion to annex to be made before the local judge on a 'given day' since the case is on the docket and must await the convening of the annexation court."⁸⁶

From the foregoing declaration, it seems apparent that the Court of Appeals has determined that the annexation court should be designated after the notice is filed but before the return day of the notice. Nevertheless, in some recent cases the circuit court in which the proceeding was instituted has undertaken to determine jurisdiction before requesting the designation of an annexation court.⁸⁷ Consequently, a situation is found in which a circuit court is undertaking to perform a legitimate function of the annexation court. That is to say, the import of the statute and the thrust of the ruling of the Court of Appeals⁸⁸ effectively establishes that the circuit court is ousted of all jurisdiction⁸⁹ once the notice is filed and the case is docketed.⁹⁰

We now turn to a consideration of several other pre-trial matters. Code 1950 section 15.1-1036 provides who may come into the action once instituted. While not explicitly provided, presumptively such additional parties may offer evidence either in favor or against the proposed annexation.⁹¹ The leading case on this section is *Continental Baking Co. v. Charlottesville*,⁹² where the Court of Appeals determined that a proper construction of the statute obviated the necessity of additional parties having a special interest or being affected in a special way. In view of this ruling one must conclude that almost anyone could become a party to an annexation proceeding. However, the weight and sufficiency attached to evidence introduced by a party

⁸⁶Portsmouth v. Norfolk County, 198 Va. 247, 253, 93 S.E.2d 296, 302 (1956).

⁸⁷See records in *Weddle v. City of Roanoke*, Civil No. 98 (Cir. Ct. 1966) and *Kinsey v. City of Roanoke*, Civil No. 126 (Cir. Ct. 1966) both pending in the Circuit Court of Roanoke County.

⁸⁸Portsmouth v. Norfolk County, 198 Va. 247, 97 S.E.2d 296 (1956).

⁸⁹It appears that the circuit court as a circuit court is without jurisdiction to hear annexation matters—the annexation court is a statutory court specifically designated to hear annexation proceedings and even where only the local judge hears an annexation case his jurisdiction and authority are determined by statute. *Continental Baking Co. v. Charlottesville*, 202 Va. 798, 120 S.E.2d 476 (1961); *Portsmouth v. Norfolk County*, 198 Va. 247, 93 S.E.2d 296 (1956) and *Henrico County v. Richmond*, 106 Va. 282, 55 S.E. 683 (1906).

⁹⁰See VA. CODE ANN. § 15.1-1035 (Repl. Vol. 1964) for docketing requirements.

⁹¹The nature of the evidence which can be introduced could be decided in *Young v. Town of Salem*, Civil No. 152 (Civ. Ct. 1966) which is now pending in the Supreme Court of Appeals of Virginia.

⁹²202 Va. 789, 120 S.E.2d 476, 479.

remotely affected by or interested in the proceeding would not be too great unless such evidence was extremely cogent. Herein, then, lies the safeguard.

Code of 1950, section 15.1-1037(a) provides for consolidation of proceedings seeking to have the same or part of the same territory annexed to different municipalities. The provisions of this section seem clear and unequivocal. However, there is now pending in the Court of Appeals a case in which the trial court failed to comply with the statute where the circumstances envisioned by the statute clearly existed.⁹³ This Code provision bears a direct relation to section 15.1-1042 and an analysis of the correlated problems will be made in the discussion of section 15.1-1042. Section 15.1-1037(b) provides the method by which a city or town may institute one proceeding against two or more counties. However, this Code provision is not mandatory as a city or town may institute one proceeding against two counties in the circuit court of the county where the larger part of the territory is located, or the city or town may institute separate actions against each of the several counties.⁹⁴

To consider sections 15.1-1055 and 15.1-1057 in a discussion of pre-trial matters may at first glance appear unusual. However, if one views these two sections as jurisdictional defenses, it is appropriate to consider them here. Section 15.1-1057, prohibits annexation of a part of a town. Although there is no case which has construed this section, we must assume that an ordinance which included only a portion of a town in the metes and bounds description would be fatally defective.⁹⁵ Moreover, a careful reading of the statute would indicate that the same defense would be available in a petitioners' action.⁹⁶

We now turn to the somewhat more involved jurisdictional defense provided by Code of 1950, section 15.1-1055. Unquestionably, the

⁹³See *Young v. Town of Salem*, Civil No. 152 (Cir. Ct. 1966) which is now pending in the Supreme Court of Appeals of Virginia. A problem does arise, however, in the case where the overlapping petition is filed after the trial in the pending suit has commenced and particularly where the trial is concluded but a final order has not been entered. Technically at least it would seem that the first case would still be pending.

⁹⁴*King v. Henning*, 203 Va. 582, 125 S.E.2d 827 (1962).

⁹⁵*Martinsville v. Henry County*, 204 Va. 757, 133 S.E.2d 287 (1963), indicates such result because the metes and bounds description dictated by the Code would not be adequate; and, moreover, proper terms and conditions could not be set out in the ordinance as required.

⁹⁶If only part of town were included in the petition it would be practically impossible to determine whether or not the required 51% had authorized a petition to be filed.

proper place to raise the defense, if it is available, is at the outset of the proceedings. However, the real problem is the exact nature of the defense. The meat of the statute is provided by the first three sentences which read,

"No city or town, having instituted proceedings to annex territory of a county, shall again seek to annex territory of such county within the five years next succeeding the entry of the final order in any annexation proceedings under this article or previous acts except by mutual agreement of the governing bodies affected, in which case the city or town moving to dismiss the proceedings before a hearing on its merits may file a new petition five years after the filing of the petition of the prior suit. Nor shall any county be made defendant in any annexation proceeding brought by any city, except by consent of the county governing body, more frequently than once in any five-year period following the conclusion of any annexation proceeding instituted against it by any city; provided, however, that this provision shall not apply to any suits brought by consent of the county governing body; nor shall this provision apply to any annexation proceedings pending and undetermined on June twenty-seventh, nineteen hundred and fifty-eight.

Notwithstanding the foregoing provisions, a city shall have the right to file and maintain an annexation proceeding against any county against which it has not filed such a proceeding during the preceding eight years. . . ."⁹⁷

One can be certain of only two things in regard to this statute. First the prohibitions of the statute are not applicable to petition annexation, i.e., qualified voter petitions.⁹⁸ An secondly, the third sentence of the statute qualifies both the first and second sentences.⁹⁹ The single most important question in relation to the statute is one of reconciliation. Query: what is the specific significance of the first and second sentences of section 15.1-1055? In the first sentence we find a prohibition against a city or town instituting proceedings against a county within five years of the entry of a final order in a proceeding by said city or town against the same county. However, where a city or town moves to dismiss a proceeding before trial, the five year limitation is computed from the date the dismissed proceeding was filed. This provision seems clear enough. It simply relieves a county of the burden of defending in rapid succession numerous actions filed by the same municipality.

The second sentence of section 15.1-1055 prohibits any city from

⁹⁷VA. CODE ANN. § 15.1-1055 (Repl. Vol. 1964).

⁹⁸Mowry v. Virginia Beach, 198 Va. 205, 93 S.E.2d 323 (1956).

⁹⁹Portsmouth v. Chesapeake, 205 Va. 259, 136 S.E.2d 817 (1964).

making any county a defendant in any annexation proceeding more frequently than once in any five-year period following the conclusion of any annexation proceeding instituted by any city. This prohibition is not so clear as the first, and so far as is known the two prohibitions have never been construed in relation to each other. It should be noted that the second prohibition relates only to cities. This fact, when viewed in light of the governmental status of cities,¹⁰⁰ makes a reconciliation of the separate statutory limitations somewhat less difficult. Since both limitations are to alleviate the burdensomeness of annexations upon counties,¹⁰¹ one can only conclude that the legislature recognized that the first limitation alone was not sufficient to alleviate the burden upon counties subject to annexation by more than one city. Hence, the apparent import of section 15.1-1055 is to limit to one the number of city annexations a county will have to defend in any five-year period subject to the maximum limitation of eight years. A more important problem in the application of this section is the point from which the five years are computed. The first limitation provides for computation from the entry of the final order. What is the final order is not so clear. Unquestionably the annexation court's order which is not appealed from is a final order, but this is not necessarily the case where an appeal is taken. It seems reasonably clear that when a writ of error is denied by the Court of Appeals the limitation is computed from the entry of the order of the trial court. Moreover, the statute¹⁰² seems to make it clear that the period shall be computed from the entry of an order of the Court of Appeals affirming an order granting annexation. Likewise, if the Court of Appeals reverses or modifies the judgment of the trial court, the Court of Appeals must enter such order as the trial court should have entered and such order is final.¹⁰³ However, the situation becomes muddled where a writ is granted to an order denying annexation and the Court of Appeals affirms such order. A genuine difference of opinion exists between qualified annexation lawyers as to when the five-year period begins to run in this situation. The Attorney General has issued an opinion,¹⁰⁴ but this of course has not ended the debate. The better part of discretion would doubt-

¹⁰⁰See note 1 *supra*.

¹⁰¹*Mowry v. Virginia Beach*, 198 Va. 205, 93 S.E.2d 323 (1956).

¹⁰²VA. CODE ANN. § 15.1-1047 (Repl. Vol. 1964).

¹⁰³VA. CODE ANN. § 15.1-1050 (Repl. Vol. 1964).

¹⁰⁴See [1964-1965] VA. ATT'Y GEN. OPS. AND REP. TO THE GOV. 5, wherein it is said the period should be computed from date of entry of order of the Court of Appeals.

less indicate caution on the part of annexation conscious municipalities. However, one is constrained to ask would an action dismissed because it had no jurisdictional foundation have been an action *ab initio*? If "final order" gives rise to debate, what then of the term "conclusion"?

Two other Code sections should be noted before leaving the discussion of pre-trial matters. The first is section 15.1-1039 which establishes the method of filling vacancies on the annexation court. This provision is equally applicable to all stages of the proceedings, and mention is made of it here merely as a matter of convenience. Finally, section 15.1-1040, in an obvious effort to curtail economic burdens incident to annexation proceedings, directs that a pre-trial conference be held. At least one such conference is mandatory. Moreover, as a practical matter annexation courts convene as many conferences as are reasonably necessary in order to carry out the purpose of the statute.¹⁰⁵ Note, however, that agreement or stipulation to all matters set out in the statute is not a prerequisite to a trial.

C. MATTERS INCIDENT TO TRIAL

The trial of an annexation proceeding is covered in the provisions of just two Code provisions.¹⁰⁶ Code of 1950, section 15.1-1041 prescribes the criteria by which the annexation court is to determine whether or not any given annexation is to be granted. Whereas, Code of 1950, section 15.1-1042 prescribes the powers of the annexation court to determine area and fix terms and conditions of the annexation to be granted. Of necessity, therefore, it is appropriate to examine the more difficult aspects of section 15.1-1041 even though the more difficult questions apparently arise out of section 15.1-1042.¹⁰⁷ The real substance of section 15.1-1041 is provided by subparagraph (b) which reads,

"The court shall determine the necessity for and expediency of annexation, considering the best interest of the county and the city or town, the best interests, services to be rendered and

¹⁰⁵See record in *Roanoke v. Roanoke County*, Civil No. 110 (Cir. Ct. 1959), where numerous pre-trial conferences were held.

¹⁰⁶See VA. CODE ANN. § 15.1-1043 (Repl. Vol. 1964). Evidence on these matters should be presented of course but this section is quite closely tied to VA. CODE ANN. § 15.1-1042 (Repl. Vol. 1964) and probably is separated only as a matter of convenience.

¹⁰⁷This section is the price tag portion of the code and governmental entities worry more about this aspect of the case than anything else.

needs of the area proposed to be annexed, and the best interests of the remaining portion of the county. . . ."¹⁰⁸

Before launching into a discussion of subparagraph (b), we point out that the remaining parts of the section are a study in mechanics and that subparagraph (e) is not applicable to petition annexations. The court's first duty is to determine if the requested annexation is necessary and expedient¹⁰⁹ within the terms of the statute. The Court of Appeals in *Norfolk County v. Portsmouth*, defined necessary and expedient, possibly as well as the terms can be defined within the context of the statute, when Mr. Justice Staples said:

"It is clear from the maps exhibited to us and from the testimony of many witnesses that, unless the future growth and expansion of Portsmouth are to be almost completely obstructed, the annexation of both areas is necessary. The evidence shows that both are already so closely interwoven into the life, and the business and commercial activities of the city, as to constitute an integral part thereof. The homes and industrial properties in these areas, the evidence shows, have resulted from the city's natural growth and expansion. The people who live and work there constitute an integral part of what O. Henry portrays as 'The Voice of the City.' To require them, nevertheless, to remain under separate and different types of governmental administration and control would run afoul of the established policy of the State above alluded to that urban areas should be under urban government and rural areas under county government. Such a condition of divided government is one compactly settled urban community would be likely to generate undesirable frictions and controversies among the respective inhabitants.

Is the annexation 'expedient' within the meaning of the statute? That is—as we interpret the word—is it advantageous and in furtherance of the aforesaid policy of the State with respect to annexation."¹¹⁰

A more recent case of similar import is *Fairfax County v. Fairfax*.¹¹¹ It appears, from what the Court of Appeals has said, axiomatic

¹⁰⁸VA. CODE ANN. § 15.1-1041 (Repl. Vol. 1964).

¹⁰⁹VA. CODE ANN. § 15.1-1041 (Repl. Vol. 1964) clearly requires this finding first. However, evidence in the cases is frequently hopelessly intermingled. *E.g.*, see records in *Young v. Town of Salem*, Civil No. 152 (Cir. Ct. 1966) and *Davis v. City of Roanoke*, Civil No. 18 (Cir. Ct. 1966).

¹¹⁰186 Va. 1032, 1045-46, 45 S.E.2d 136, 142 (1947).

¹¹¹201 Va. 362, 111 S.E.2d 428 (1959). One should note the similarity of the ruling in this case and *Norfolk County v. Portsmouth*, 186 Va. 1032, 45 S.E.2d 136 (1936) as pointed in the text of this article, but also note that the *Fairfax County* case waters down the effect and importance of the announced State policy considerations.

that expediency follows necessity. However, *both* must be proven to sustain an annexation decree.¹¹² Further heed should be given to the fact that the *Norfolk County* case was decided under a former statute.¹¹³ Nonetheless, the writers suggest that the definitions there established are of substantial value today because of the similarity between terminology employed in the two statutes.¹¹⁴ A further problem associated with necessity and expediency arises in the area of urban society as opposed to rural society. In *Norfolk County* the Supreme Court formulated an all inclusive appearing guidepost to assist courts in determining necessity and expediency. It was there said:

"We also concur in the position taken by the city that the Virginia Constitution and statutes, by providing the different types of government for the counties and cities of the State, have established 'the policy of placing urban areas under city government and keeping rural areas under county government'."¹¹⁵

In view of the announced State policy, it would seem that annexation would be a relatively uncomplicated proceeding.¹¹⁶ However, the thrust of the realistic guidepost established by *Norfolk County* has been eroded away.¹¹⁷ In this respect attention is directed to *Roanoke v. County of Roanoke*, wherein it was said:

"[U]rbanization is an important factor to be considered, but not a conclusive factor."¹¹⁸

Once again we have not attempted to cover the entire concept of 'necessity and expediency' but have merely tried to point out the problems facing both the court in deciding the question and the parties in the presentation of evidence either pro or con.

Having once decided that any given annexation is necessary and expedient, the court must then come to grips with the provisions of Code of 1950, section 15.1-1042. As heretofore suggested, the more difficult problems incident to annexation trials, from the parties' points of view, arise in regard to this section. This is true because section 15.1-1042 is the "price tag" or "damages" section of the Annexa-

¹¹²Falls Church v. Board, 193 Va. 112, 68 S.E.2d 96 (1951).

¹¹³VA. CODE ANN. § 2956 (1919) (as amended).

¹¹⁴Compare VA. CODE ANN. § 15.1-1041 (Repl. Vol. 1964) with VA. CODE ANN. § 2958 (1919).

¹¹⁵*Norfolk County v. Portsmouth*, 186 Va. 1032, 1044-45, 45 S.E.2d 136, 141 (1947).

¹¹⁶It would only be necessary to determine if an area were urban or not and whether or not the city was financially able to serve the area after annexation.

¹¹⁷Note 111, *supra*.

¹¹⁸204 Va. 157, 167, 129 S.E.2d 711, 718 (1963).

tion Statute.¹¹⁹ It is equally true that one of the principal concerns of the parties to annexation is inevitably bound to the cost factor; and therefore, a great deal of significance and importance is attached to "terms and conditions" of annexation.¹²⁰ Nevertheless, we do not intend to devote any significant time or space to this subject for two reasons. First, it is felt that this is principally an area of highly technical data to be compiled by expert witnesses such as accountants and engineers. And secondly, the terms and conditions of annexation depend almost exclusively on the particular facts of any given case and precedents are of little value. One word of caution however, the annexation lawyer cannot go to trial without being forearmed with this information.

Our primary concern in the discussion of section 15.1-1042 will treat with subparagraph (a) and its relation to certain other provisions of the annexation statute. Subparagraph (a) of section 15.1-1042 provides that the annexation court shall have the power:

"To determine the metes and bounds of the territory to be annexed, and may include a greater or smaller area than that described in the ordinance or petition, the court shall so draw the lines of annexation as to have a reasonably compact body of land, and so that no land shall be taken into the city which is not adapted to city improvements, or which the city will not need in the reasonably near future for development, unless necessarily embraced in such compact body of land;..."¹²¹

The quoted Code provision has been frequently construed by the Court of Appeals.¹²² However, we have been unable to find a construction of it in relation to a specific portion of Code of 1950, section 15.1-1034. At a recent pre-trial conference in a pending qualified voters' case the county moved to dismiss the proceeding because the petitioners did not know by metes and bounds the territory sought to be annexed at the time they signed the master petition.¹²³ Undeniably the petition filed to institute the proceeding contained the requisite description and a map. Moreover, evidence taken in the case establishes that a general outline map of the territory involved was shown or available to the petitioners at the time they signed the

¹¹⁹It is by authority of VA. CODE ANN. § 15.1-1042 (Repl. Vol. 1964) that the annexation court is authorized to determine terms and conditions of annexation, *i.e.*, the price the city must pay the county for taking territory.

¹²⁰See, 41 VA. L. REV. 1129.

¹²¹VA. CODE ANN. § 15.1-1042(a) (Repl. Vol. 1964).

¹²²See VA. CODE ANN. § 15.1-1042 (Repl. Vol. 1964) (Annot.).

¹²³See record in *Weddle v. City of Roanoke*, Civil No. 98 (Cir. Ct. 1966), now pending in the Circuit Court of Roanoke County.

master petition. The crux of the County's argument apparently is that the petitioners cannot say the annexation is necessary and expedient if they do not know the precise metes and bounds of the territory in regard to which they will subsequently file an annexation petition. In the first instance the statute itself requires only that a metes and bounds description be part of the petition instituting the proceeding.¹²⁴ Moreover, necessity and expediency are unquestionably factual determinations to be made by the annexation court.¹²⁵ More significantly, however, the annexation court is given express authority to shape the boundaries of the territory as it deems necessary. The question is when the court is to exercise this authority. After it determines necessity and expediency for annexation exists, the court is directed to fix the metes and bounds of the territory to be annexed. Consequently, one can only conclude that the inclusion of metes and bounds descriptions in petitions is to aid the court in determining the jurisdictional questions involved in annexations.¹²⁶ However, such descriptions are binding on no one, least of all the court, and are not even remotely involved in determining necessity and expediency.

The final comments in regard to section 15.1-1042(a) will be directed to its clarifying effect upon section 15.1-1037 (a). The problem arises in relation to consolidation of cases in which the separate areas are not totally co-extensive. Query; can the annexation court decree annexation of all the territory overlapping as well as non-overlapping to one of the municipalities. The prior analogous code section provided that the court must decree annexation to one or the other of the municipalities.¹²⁷ However, the present code section merely provides that the court shall enter such order as is just considering the interests of all parties to each case.¹²⁸ While such wording would seem to permit the court to decree that all the territory should be annexed to one of the municipalities, the question has arisen.¹²⁹ However, when one understands that the court possesses the power to enlarge or reduce an area sought to be annexed, the answer appears with unexcelled clarity.

An additional matter, which is probably more closely related to

¹²⁴VA. CODE ANN. § 15.1-1034 (Repl. Vol. 1964).

¹²⁵VA. CODE ANN. § 15.1-1042 (Repl. Vol. 1964).

¹²⁶VA. CODE ANN. § 15.1-1034 (Repl. Vol. 1964) requires 51% of the qualified voters of the petition area and the percentage must relate to a specifically defined area.

¹²⁷See VA. CODE ANN. § 15-136 (1950) (repealed).

¹²⁸VA. CODE ANN. § 15.1-1037(a) (Repl. Vol. 1964).

¹²⁹Young v. Town of Salem, Civil No. 152 (Cir. Ct. 1966) now pending in the Supreme Court of Appeals of Virginia.

the trial than to any other area of the proceedings warrants some comment. Section 15.1-1056 prohibits annexation in the event the county would be reduced to an area of less than 60 square miles, or be otherwise left with insufficient area, population or sources of revenue to support its government and schools unless the entire county is ordered annexed.¹³⁰ In view of the alternative wording of the statute one must presume that this section does not provide a county a jurisdictional defense to either an ordinance or petition annexation. Additional support is lent this conclusion in view of the annexation court's power to alter the boundaries of the territory to be annexed.¹³¹

The final matters incident to the trial of annexation proceedings involves payment of costs. The statute is quite specific in this regard and presents no particular problem.¹³²

D. POST-TRIAL CONSIDERATIONS

The first concern after the trial is concluded is the problem of whether or not to accept the annexation upon the terms and conditions decreed. A municipality is given authority to decline the annexation by Code of 1950, section 15.1-1044 if it does so before the final order is entered. However, this is a policy matter to be decided by the governing body of the municipality, and we will not undertake to elaborate upon much matters. We do, however, feel called upon to point out that a municipality cannot decline to accept annexation if the proceeding was initiated by petitioners.¹³³

The only really significant problem related to post-trial considerations arises in regard to Code of 1950, section 15.1-1047. This section provides that a court granting annexation shall continue to exist for a period of five years from the effective date of any annexation order entered. The extent of the power of the court thus continued in existence gives rise to considerable speculation. This problem, however, has been alleviated for the most part by the ruling of the Court of Appeals in *City of Portsmouth v. City of Chesapeake*.¹³⁴ In that case the Supreme Court was specifically called upon to define the powers of such a court and there said,

“[I]ts functions are limited to the enforcement of the terms and conditions of such annexation order as it may have en-

¹³⁰VA. CODE ANN. § 15.1-1056 (Repl. Vol. 1964).

¹³¹VA. CODE ANN. § 15.1-1042 (Repl. Vol. 1964).

¹³²VA. CODE ANN. § 15.1-1045 (Repl. Vol. 1964).

¹³³*Mowry v. Virginia Beach*, 198 Va. 205, 93 S.E.2d 323 (1956). This is also clear from the terms of VA. CODE ANN. § 15.1-1044 (Repl. Vol. 1964).

¹³⁴205 Va. 259, 271, 136 S.E.2d 817 (1964).

tered. There is nothing in the language of the statute to indicate that the court may be reconvened for the purpose of reconsidering and rehearing its prior order denying to the City of Portsmouth the right to annex any portion of the territory sued for."¹³⁵

Here as in the case of so many of the foregoing comments the Court of Appeals was speaking of a former Code provision.¹³⁶ In spite of this fact, the similarity of the statutes¹³⁷ justifies reliance on the ruling.

The matter of an appeal must be considered at this time. In this area, the attorney must evaluate the prior proceedings to determine the existence of error. This is, however, more a matter of experience than a matter of any dogmatic guidelines which these writers can set out. After the determination to appeal has been made, the statute is reasonably explicit¹³⁸ and close attention to it is advised. As for appellate procedure, the Rules of Court¹³⁹ provide the guide. In the case of substantive law, the Court of Appeals has decided that the same principles are applicable to annexation proceedings as to any other appeals.¹⁴⁰ Further discussion of specific Code sections will not be undertaken in this article. This is not to say that those sections¹⁴¹ we have not discussed are not important. On the contrary, they are important and should be consulted, but they are principally mechanical in nature and should not give rise to problems.

III. REFLECTIONS ON ANNEXATION

It is presumed that most of the persons who have dealt with annexations would welcome the opportunity to offer suggested improvements in the practice. We are no exception. However, it is only fair to point out that all of the suggestions we may make are not original with us. Of course, where the source of any idea is known appropriate credit will be given. On the other hand, many ideas have evolved by association of fragmentary pieces and no definite source is available.

¹³⁵*Id.* at 826.

¹³⁶VA. CODE ANN. § 15-152 (1950) (repealed).

¹³⁷Compare VA. CODE ANN. § 15.1-1047 (Repl. Vol. with VA. CODE ANN. § 15.152 (1950) (repealed).

¹³⁸VA. CODE ANN. § 15.1-1049 (Repl. Vol. 1964).

¹³⁹VA. R. CIV. P. § 5:1 *et seq.*

¹⁴⁰See, *York County v. Williamsburg*, 204 Va. 732, 133 S.E.2d 520 (1963); *Falls Church v. Board*, 193 A. 112, 68 S.E.2d 96 (1951); *Narrows v. Giles County*, 184 Va. 628, 35 S.E.2d 805 (1945); *Henrico County v. Richmond*, 177 Va. 754, 15 S.E.2d 309 (1941); *Norfolk County v. Portsmouth*, 124 Va. 639, 98 S.E. 755 (1919).

¹⁴¹VA. CODE ANN. §§ 15.1-1048, 15.1-1051, 15.1-1052; 15.1-1053, 15.1-1054; 15.1-1058 (Repl. Vol. 1964).

Probably the single most important problem to be overcome in reference to annexation in Virginia relates to the enormous economic burdens created by annexation. We offer no solution to this problem, for it seems that the only possible solution would be a major realignment of governmental units within the Commonwealth. In the face of many years of tradition such a solution is a practical impossibility. We do feel that a more realistic approach to the immediate problem of the progression and preservation of an urban society can be achieved. The fact that annexation by cities is a public necessity is totally unarguable.¹⁴² Moreover, the same is equally true of the fact that county government, without major legislative overhauling, is not equipped to meet the needs of an urban community. However, within the basic framework of the current annexation statute a solution is available. All that is required is a re-definition of the terms necessity and expediency. Perhaps better phraseology would be a return to the definition announced by Mr. Justice Staples.¹⁴³ That is to say, urbanization of an area coupled with the financial ability of the city to serve the area after annexation appears to be the only realistic approach to annexation. The preservation of counties for the mere sake of tradition defies reason. If county government is incapable of meeting the needs of the people it should be abolished, albeit county politicians will surely seek our heads.

It is the writers' feeling that improvement of the composition of the annexation court could alleviate many of the problem areas of annexation. A recommendation of the League of Virginia Counties to the VALC Subcommittee Studying Annexation, Consolidation and the Structure of Local Government in Virginia on March 1, 1967, is quite good. As we understand its recommendation, the League advocates establishing a permanent annexation court consisting of a panel of seven or nine judges. Three judges from this panel would be designated to hear any given annexation case. The court would also have a staff of independent experts as court employees to assist the court in investigating and evaluating the mass of technical evidence incident to annexation proceedings. The principal drawback to this suggestion is that it requires revision of the current statute by legislative action of a major character. While we generally concur with the above recommendation, we believe that less extensive revision of the current statute would accomplish an equally good result. It is eminently fair and reasonable to have the judge of the

¹⁴²Norfolk County v. Portsmouth, 186 Va. 1032, 45 S.E.2d 136 (1947).

¹⁴³*Id.*

circuit court of the county whose territory is sought to be annexed on the court. The judge of such circuit court is closely associated with many of the governmental functions of the county and is well versed in the problems of county government both with relation to annexation and otherwise. On the other side of the ledger, it seems just as fair and reasonable that a judge of a court of record of the city to which the territory is sought to be annexed should be a member of the annexation court. Such a judge would be equally cognizant of city problems as the county judge is of county problems. The third judge sitting on the court should be a judge of any court of record remote from the area in which the annexation case arises. Thus, balance and temperance could be achieved within the framework of the current annexation statute. As the court is now constituted, cities particularly are frequently faced with the additional problem of proving a case to a court that is not even remotely conversant with the problem of city government. How then can such a court make a valid determination of necessity and expediency?

IV. CONCLUSION

In conclusion we wish only to say that it is hoped that this article will be of some assistance to both the student and the practitioner in recognizing and coming to grips with some of the problems associated with annexation in Virginia.

Washington and Lee Law Review

Member of the National and Southern Law Review Conferences

Volume XXIV

Fall 1967

Number 2

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