possibly arise in which it would be for the court, but this is not such a case. The matter was considered and briefly discussed in the opinion in *McGuiggan v. Hiller Bros., ante,* p. 402, 245 N. W. 97, and we see no need for further discussion of the point.

(4) It follows that a new trial of the case must be had. In view of this, consideration of some further questions raised by the appellant seems advisable. He contends that a question whether defendant's failure to stop at the arterial was a proximate cause of the collision should have been submitted to the jury. One stopping for an arterial must stop at a point from which he can see approaching traffic. It is manifest that if the defendant had stopped at such a point and kept a proper lookout to his right he would have seen the plaintiff approaching and should have yielded him the right of way, even though the plaintiff by his excessive speed had forfeited his right under the statute. Sec. 85.18 (1). Going ahead under the existing circumstances would manifestly result in a collision.

(5) The defendant also requested that the same questions as to lookout, speed, control, and causation be submitted to determine the question of his liability as were submitted to determine the plaintiff's. We can see no reason, under the facts of this case, for treating the parties differently as to submission. The plaintiff's violation of the statute as to speed was negligence as a matter of law as was the defendant's violation of the statute requiring him to stop at the arterial. Causation was to be inferred as matter of law in the plaintiff's case as in the defendant's. If the evidence on the next trial is the same as on the first, we see no occasion for submitting to the jury anything more than a question to determine the comparative negligence of the parties, and questions covering damages.

(6) The defendant also claims that the verdict is excessive. The testimony may be different on the next trial and there is no need to say anything more than that the damages

to plaintiff's automobile might readily have been proved with more exactness than they were and that the proof as to loss of wages falls far short of justifying the amount assessed by the jury.

By the Court.—The judgment of the circuit court is reversed, with directions for a new trial.

IN RE INCORPORATION OF THE VILLAGE OF ST. FRANCIS: ASCHERIN and others, Appellants, vs. CITY OF MILWAUKEE and others, Respondents.

November 12—December 6, 1932.

Municipal corporations: Incorporation of territory as a village: Essentials: Judicial questions: Conclusiveness of findings: Right of city under void prior annexation proceedings to object to incorporation.

1. Objections to an application for incorporation of territory as a village under secs. 61.01 to 61.14, Stats., raise issues of fact for judicial determination, and the findings and conclusion of the trial court on the question of whether the facts warrant incorporation must be accepted unless against the great weight and clear preponderance of the evidence offered in support of and in opposition to the application, or a mistake has been made in applying law to the facts. p. 650.
2. In such a proceeding the evidence is *held* to support findings that the territory involved is largely rural in character, and the conclusion that it does not have the necessary characteristics to entitle it to be incorporated as a village within the rule that the territory proposed to be incorporated must be harmonious with the idea of what a village actually is. [*State ex rel. Holland v. Lammers,* 113 Wis. 398, and *In re Village of Chenequa,* 197 Wis. 163, applied.] pp. 651–654.
3. Territory cannot be annexed pursuant to secs. 925—18 and 926—2, Stats. 1898, unless a city can comply with requirements thereof, under which the city of Milwaukee could not proceed to annex territory on a petition signed by the owners of one-half of the real estate and by no electors, and therefore could not object to proceedings to incorporate the village because of the prior annexation proceeding, based upon such petition, which was void upon its face. pp. 654, 655.

APPEAL from an order of the circuit court for Milwaukee county: AUGUST E. BRAUN, Circuit Judge. *Affirmed.*

The final order appealed from in this case, entered December 21, 1931, denied an application presented August 31, 1931, of taxpayers residing within the area for the incorporation of said territory as a village to be known as the Village of St. Francis. Objections to the proceeding were made by the city of Milwaukee and eleven taxpayers and electors residing within the limits of the proposed village. The formal proceedings leading up to the hearing before the court were complete. The court made findings and conclusions which are to the following effect:

The territory involved contains approximately 1,079.56 acres, has a population of 979 residents, of whom 517 are of voting age. The proposed village consists of five quarter-sections extending in a line from the shore of Lake Michigan on the east two and one-half miles to the center of Pine street on the west with one and a fractional quarter-section lying north of the two easterly quarter-sections, and one other quarter-section lying immediately south of the middle one of the row of five quarter-sections; the territory within the proposed village is largely rural in character, some parts being farmed and others lying idle or used for raising hay; considerable of the land has been platted but the larger part of such platted lands is practically unimproved, without streets, and although there are clusters of houses in some of the platted subdivisions, these are so widely distributed that there is no continuity in the development; there are no east-and-west highways with the exception of one leading a part of the way through the proposed village; the north-and-south highways are from a quarter to a half a mile apart, and four of these roads paved with concrete are a part of the federal, state, and county highway system; two of these highways, Lake avenue near the lake, and Kinnickinnic avenue a mile farther west, are heavily traveled, forming part of two of the main highways leading out of Milwaukee to the

south. The findings describe the barriers which for some time would interfere with any growth tending to produce a village in fact, as follows:

"The main line of the Chicago & Northwestern Railway extends its right of way in a northwesterly and southeasterly direction through the middle portion of the proposed village bisecting the territory into east and west halves. This private right of way with the frequent and fast trains running over it between Milwaukee and Chicago forms a barrier between the east and west portions of the proposed village which effectually interferes with the welding together of such settlements and clusters of homes as are on either side of it so as to make up a nucleus of a real village. This fact is demonstrated by the presence of only one street (East Norwich avenue) running east and west across the right of way and that is located parallel to and near the northern limits of the proposed village, the western part of which street is also cut off from the rest of the village by the railroad right of way of the Milwaukee Electric Railway & Light Company's coal line railroad embankment. Then there is one north-and-south street that crosses the Chicago & Northwestern Railway's right of way at a point approximately in the center of the proposed village. This crossing is so located that in order to travel from any point in the southeastern portion of the village to a point in the southwestern part it is necessary to first travel north to the crossing referred to and then to travel south and west.

"About a half a mile west of this main line of the Chicago & Northwestern Railway is located a so-called freight line of the same railroad which is depressed and runs through a deep cut in a northerly and southerly direction through the west central part of the proposed village, and the fact that there are only two crossings over it at the extreme northern and southern ends of the proposed village interferes with the development of this area into a village in fact.

"About a half a mile west of this freight line in about the middle of the western portion of the proposed village is the right of way of the high-speed rapid-transit line of the Milwaukee Electric Railway & Light Company leading off from said company's east-and-west coal line in the northern part of the proposed village and running in a south-

easterly and northwesterly direction from the coal line in the north to and across the south boundary of the village, furnishing an additional barrier that divides the western part of the proposed village into two parts and tends to isolate the western portion of the village from the central and eastern part of the proposed village.

"In the northeastern corner of the proposed village on the lake shore the Milwaukee Electric Railway & Light Company maintains and operates, through a subsidiary company, a large electric power plant. In order to supply coal to this plant the electric company has built and operates, through a holding company, a private railroad extending from this power plant first in a northerly, then in a southwesterly, and then in a westerly direction near the northern boundary of the proposed village to and beyond the western boundary of the proposed village. This railroad in the western half of the proposed village runs practically east and west near the northern boundary of the proposed village. A large part of this line is built upon an elevated roadbed and acts as a wall between the north and south sections of the proposed village, the north section being much smaller in size. Intercourse between these sections is also hampered by infrequent crossings. Parallel to the railroad the electric company has constructed and maintains a high-tension electric power line.

"While it is true that more crossings may be built over these railway lines, they would create new hazards. . . ."

"14. The proposed village is within the Metropolitan Sewerage District and sewers have been laid by authority of the town board in practically all streets where there has been a request made for them by abutting property owners. Street-car service is provided on a line running north and south through the proposed village along Kinnickinnic avenue between the cities of Milwaukee, Cudahy, and South Milwaukee. Gas, electric, and telephone service is furnished by the public utilities to all who apply for the same, under their respective regulations. The residents of the proposed village do most of their shopping in the stores in Milwaukee and Cudahy and delivery service is furnished by the Milwaukee stores. Likewise, milk is delivered to the homes by the milk dealers the same as in Milwaukee. Forty-six street

lights have been erected at various points upon the streets, mostly at intersections in the proposed village, of which all except two are maintained by the town board. The town board also provides for the periodical collection of garbage and ashes. Practically all streets and highways in the town which are not paved with permanent pavement are oiled. The area here involved is given ample police protection by the sheriff's department and, in addition to this service, the town provides special police protection at certain hours and at certain places for the protection of children while going to and from schools.

"The residents in the proposed village at the present time rely on wells for their present supply of water. . . .

"The town board maintains a fire house and apparatus for the protection of its residents against fire, but such protection is limited on account of the inadequate supply of water.

"The town board of the town of Lake exercises all the powers of villages under the statute in the town of Lake.

"The town of Lake, out of which the proposed village is to be carved, receives such a large annual revenue from the public utilities within its borders that it finds it unnecessary to levy any tax for general purposes. The only taxes that are levied in the town are for road and school purposes. This annual utility revenue amounts to approximately $300,000.

"Substantially the only development in the northeast corner of the proposed village along the lake shore is the large power plant of the Milwaukee Electric Railway & Light Company. About a half a mile west of this power plant, also in the northeastern part of the proposed village, is located an abandoned steel mill which has been idle for several years and the record fails to indicate when, if ever, it will again be used. The above power plant is located in the southeast fractional quarter-section of section 14, all of which fractional quarter-section is owned by a subsidiary of the electric company. The said steel mill is located in the west central part of the southwest quarter of section 14. Approximately three-fourths of the land in these two quarter-sections is owned by the electric company or its subsidiary. The total population of these two quarter-sections which constitute the northeast corner of the proposed vil-

lage is only forty-two persons. Though most of the land of these sections is owned by the electric company or its subsidiary, no evidence has been presented to show that this company contemplates using the land not now actually used either for its own purposes or to place it on the market for prospective homes or industrial sites."

Other facts were proven to the satisfaction of the court which concluded:

"1. The applicants for the incorporation of the proposed village of St. Francis have no legal right to incorporate the proposed territory into a village for the reason that said territory is not urban or semi-urban in character but is mostly rural and agricultural in character and is not naturally connected with or reasonably appurtenant to and necessary for the future growth of any urban territory or any territory having the aspects of a village in fact within the limits of the proposed village.

"2. The city of Milwaukee is not a proper party to these proceedings. . . ."

The application was dismissed. From the order the applicants appeal and the city of Milwaukee seeks a review of the ruling which excluded it as an objector.

George H. Gabel of Milwaukee, for the appellants.

For the respondents there was a brief by *Max Raskin,* city attorney, and *Mark A. Kline,* assistant city attorney, for the city of Milwaukee, and *Howard P. Haberla* of Milwaukee, attorney, and *Mark A. Kline* of counsel, for other objectors, and oral argument by *Mr. Kline.*

FAIRCHILD, J. The objections to the petition of the applicants for incorporation raise issues of fact which are for judicial determination. The result of the inquiry must depend upon the surroundings, occupations of the residents, the location of the territory, and the presence or absence of forces tending to develop and affect the prospects of the proposed village. From the evidence offered in support of and in opposition to the application the court is required to

find whether or not those marks or signs fixed by the legislature, as indicating a condition of territory and habitation fit for incorporation into a village, exist. When the conclusion is reached by the trial court it must be accepted unless it is against the great weight and clear preponderance of the evidence, or a mistake has been made in applying the law to the facts.

The question at the bottom of the controversy may be said to be, Has the territory which the applicants describe in their petition the necessary characteristics to entitle it to be incorporated as a village? They attached to their petition a survey, map, and an accurate census of the territory according to the provisions of secs. 61.01 to 61.14, Stats., and offered evidence in support of their claims. This evidence has considerable convincing power, but considered under the advantage of a personal view of the *locus in quo* by the trial court it failed to carry sufficient conviction to gain a favorable determination for the applicants. In the record, observations by the learned trial judge occur which seem to question the wisdom of the plan to incorporate, and appellant urges that the trial court's misconstruction of his functions "is evidenced by his effort to convince witnesses that the incorporation was not desirable." But a review of the entire record, including the statements and question by the trial court referred to, indicates that the trial judge considered the evidence with a correct understanding of the law in mind. His findings to the effect that the territory within the proposed village is largely rural in character seem to be amply sustained by the testimony of witnesses, surveys, and the testimony relating to the undeveloped and neglected condition of platted portions. The platted property in this territory amounts to approximately 378 acres, but this includes all of the platted property whether improved or not. There appear to be upwards of 302 acres held as industrial property, a considerable portion of which, if in

use at all, is used for agricultural purposes, and some 399.56 acres of agricultural lands and home sites.

The foregoing classification was made by one of the engineers for applicants, who, on cross-examination, stated: "When I state there are 378 acres of platted and improved property I do not wish to indicate that it is all improved property. I just wish to indicate it was serviceable for home sites, smaller divisions. . . . There is included, therefore, in the 378 acres this Harbor View plat. There is not a single building on that. There are no roads leading there. It is entirely in its natural state."

There is further testimony by the same witness to the effect that there is considerable non-urban property in the proposed village. Testimony of a similar nature is found in cross-examination of applicants' witnesses and in the direct examination of objectors' witnesses, the objectors' witnesses rather increasing the percentage of rural or non-urban lands over the estimate which comes from the applicants.

The highways have, perhaps, influenced the people living in the different sections to form their associations with those to the north and the south rather than with those to the east or west; and the proximity of a large city on the north and a growing industrial city on the south may explain the belated transition of the property from rural to urban or semi-urban. The lack of opportunity for communication and community exchange between the eastern and western portions of the area and between those living in the center with those on either side, impressed the trial court; and so far as the roads or highways are concerned the opportunity is limited. This division may account for the clusters of houses disconnected and distant from each other and for the failure here of a community interest and the distinctive characteristics of a village. A planned development may become a village, but the necessary elements are not always to be

found when an effort is made to segregate a portion of an old community or political unit. As a part of the old it may serve one purpose and fit in harmoniously with the existing scheme of government, while as a separate and distinct unit it may not possess the qualifying characteristics for the changed purpose. The forming of territory lacking in the characteristics referred to into a village would be bringing into the lives of those living there a new association and an unexpected and perhaps an unnatural allegiance. The ultimate destiny of this territory, or portions of it, may be read in the possible growth of larger communities near by; but to force either village incorporation or annexation before the prescribed conditions necessary therefor exist is not conforming to the legislative plan provided for such matters. As to incorporation it would violate the rule that territory proposed to be incorporated "as a village must be harmonious with the idea of what a village actually is." *State ex rel. Holland v. Lammers,* 113 Wis. 398, 86 N. W. 677, 89 N. W. 501. The case *In re Chenequa Village,* 197 Wis. 163, 221 N. W. 856, while apparently broadening the old rule, did nevertheless recognize it and adhere to it, and applying it to a state of facts where a group of people in a given territory had a common interest which induced in a natural way communication and exchange between them for a community purpose; not only the friendly intimacies of a neighborhood but the more positive and easily recognized interdependence which usually characterizes village life. There the situation was such that in order to gain their common end they were forced to rely upon each other and on a combination of all.

In this case the benefit which the applicants urge as the loadstone to draw together the interests of the community and eventually create the characteristics of a village do not exist under circumstances entitling it to the weight given to it in the *Chenequa Case.* The learned trial judge was of

the opinion that the lines of communication established between the people in different sections of the proposed village were such as to affect or restrict their interests and their property development so as to make impractical a relation or association east and west, and that the desire for water could be satisfied more readily by each group's working with the town of which they were a natural and integral part. He attached considerable importance no doubt to the recent legislation which eliminates many differences between the powers exercised by towns and those exercised by villages, and grants village powers to towns having a certain population.

The conclusion of the trial court that the provisions of law and the rules which govern the creation of a village by incorporation require the presence of the distinctive characteristics of a village before the step can be taken, is sound and its findings of fact that these do not appear in this instance must be sustained.

The trial court correctly ruled that the city of Milwaukee was not a proper party to these proceedings and may not be heard as an objector. The city's claim to a right to be heard is based on a proceeding attempting to annex a part of the proposed village territory to the city of Milwaukee, which proceeding had been begun prior to the application to incorporate the proposed village. The petition in that annexation proceeding was signed only by the city, which, by reason of the location of one of its parks, was the owner of one-half of the property in the territory proposed to be annexed, there being no residents within the district. The authorization for annexation proceedings by the city is found in sec. 926—2 of the Statutes of 1898:

"Territory lying adjacent to any city so incorporated may be annexed to such city in the manner provided by sections 925—17 to 925—21 inclusive; provided, that the petition required by section 925—18 shall be sufficient for the purposes therein mentioned if signed by one-half of the

resident electors and the owners of one-half of the real estate within the limits of the territory proposed to be annexed."

Supported by the case of *Coughran v. Huron,* 17 S. Dak. 271, 96 N. W. 92, the counsel for the city argue that where there are no resident electors in the territory to be annexed the petition is sufficient if signed by the owners of one-half of the real estate. But prior to the enactment of the section under which Milwaukee proceeded, a city organized under a special charter was without the power of annexation, and when the legislature extended the right to begin proceedings of this character it limited the right by the provisions found in sections referred to. Such a city was to have the advantage of acting upon a petition signed by one-half of the resident electors instead of three-fourths. There is provision in sec. 925—18 for a situation in which there are no electors residing within the district, that in that event such petition must be signed by the owners of at least three-fourths of the taxable property desired to be annexed before the council shall have power to act thereon. The construction of sec. 926—2, considering the history of the legislation, is a declaration that territory cannot be annexed unless the city can comply with the requirements therein set forth. *Zweifel v. Milwaukee,* 185 Wis. 625, 201 N. W. 385, and 188 Wis. 358, 206 N. W. 215. While it is unnecessary to determine in this case what might have been the result had the city secured the signatures of the owners of three-fourths of the taxable property, it seems that the legislature in writing this law had these different situations in mind and did not intend to permit the city to proceed on a petition signed by one-half the owners and by no electors, hence the annexation proceeding on which they based their claim of right to be made parties to the incorporation proceedings was void on its face.

It is unnecessary to consider other questions raised.

By the Court.—Order affirmed.