Meihost describes the common-law negligence in terms of the particular facts of that case:

"In Wisconsin 'harm must be reasonably foreseen as probable by a person of ordinary prudence under the circumstances, if conduct resulting in such harm is to constitute negligence.' Accordingly, respondent was guilty of common-law negligence if harm, not necessarily the particular harm that actually occurred, could have been reasonably foreseen as probable by a person of ordinary prudence under like circumstances. The mere possibility of harm is insufficient to establish negligence. According to his affidavit, respondent had parked his car in a residential area and removed the key from the ignition, although there was a key secreted in a band-aid box in the glove compartment. There were no allegations in the complaints that the neighborhood was such that he should have been alerted to the danger of theft. Under the particular circumstances of the instant case, respondent could not reasonably anticipate the theft that occurred and he could not reasonably foresee that harm would result to the plaintiffs. Therefore, he is not negligent." *Meihost v. Meihost, supra,* page 545.

Plaintiff's allegations and the depositions in this case indicate more by way of negligent acts than were alleged in *Meihost.* Here Elmwood Motors apparently hired Maul and specifically gave him access to automobile ignition keys with the knowledge that he had previously taken an automobile without the owner's permission and had negligently caused damage while driving that automobile. Under the limited facts as they appear in the complaint and plaintiff's affidavit, we cannot determine by means of a motion for summary judgment whether Elmwood Motors was negligent. Whether plaintiff can prove negligence or even produce sufficient evidence to go to the jury will have to await the trial. Although the facts as to the negligence, if any, of Elmwood Motors as they are finally determined after trial may be such as to bring this action within the class of cases where the negligent actor is absolved from liability on public-policy grounds,[1] we express no opinion thereon before the facts are determined.

We hold that there are issues of fact to be determined at trial, both as to issue of permission to use the vehicle and the negligence of Elmwood Motors.

By the Court.—Judgment reversed, and remanded for further proceedings.

SCHARPING, Statutory Representative, Appellant, v. JOHNSON, Director of Planning Function, Department of Resource Development, Respondent.

October 4—November 1, 1966.

1. **Municipal corporations—Creation peculiarly within the province of the legislature.**
A unit of local government is a creature of the legislature which owes its existence to legislative fiat, and its life may be snuffed out by appropriate legislative action. p. 388.

2. **Municipal corporations—Incorporation of villages and cities—Statutes—Powers conferred on state director of planning function—Exercise a delegated legislative function.**
Powers conferred upon the director of the planning function, state department of resource development, with respect to proposed incorporations of villages and cities pursuant to standards prescribed in sec. 66.016, Stats., entail the exercise of a delegated legislative function. p. 389.

3. **Municipal corporations—Incorporation of cities and villages—Review of decisions of state director of resource development—Scope.**
Since sec. 66.017 (2), Stats., makes the decision of the director of resource development reviewable under the terms of ch. 227, objections to a determination made by the director that

[1] See *Meihost v. Meihost, supra,* particularly the concurring opinion of Mr. Chief Justice CURRIE, page 547; *Schilling v. Stockel* (1965), 26 Wis. (2d) 525, 133 N. W. (2d) 335.

an area proposed for incorporation as a village failed to meet the statutory requirements of secs. 66.016 (1) (a) and 66.016 (1) (b) in that the proposal did not meet the minimum standards prescribed and was not in the public interest were, upon review, subject to the test set forth in sec. 227.20 (1) (d) and (e), *i.e.*, reversal or modification was not warranted unless the decision was unsupported by substantial evidence or arbitrary or capricious. p. 389.

4. **Municipal corporations—Incorporation of cities and villages—Review of decisions of state director of resource development—Scope.**
The scope of review of the supreme court with respect to decisions of the director concerning proposed incorporation of municipalities is identical to that given to the circuit court by sec. 227.20, Stats. p. 389.

5. **Boards and commissions—Administrative agencies—Delegation of legislative function—Test for ascertaining arbitrary or capricious action.**
Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such action is unreasonable or does not have a rational basis, not when such action is the result of the winnowing and sifting process. p. 390.

6. **Boards and commissions—Administrative agencies—Legislative-type decisions—Test.**
When the substantial-evidence rule of sec. 227.20 (1) (d), Stats., is applied to a legislative-type decision, the test is whether reasonable minds could arrive at the same conclusion reached by the agency. p. 391.

7. **Municipal corporations—Proposed incorporation of area as isolated village—Statutory requirement not met—Substantial evidence supporting director's finding.**
Denial by the state director of a petition for the incorporation of a proposed municipality as an isolated village would not be disturbed on review where supported by substantial evidence showing that the area outside the core was largely rural, with sizeable individual land holdings, and that there existed considerable disparity in the population of sections within the proposed incorporation, from which the director properly concluded that the territory to be incorporated was not homogeneous and thus did not meet the requirement of sec. 66.016 (1) (a), Stats. pp. 391, 392.

8. **Municipal corporations—Proposed incorporation of cities and villages—Statutory requirement of compactness.**
The requirement of compactness in sec. 66.016 (1) (a), Stats. *(i.e.*, that an area to be incorporated must be reasonably homogeneous and *compact)*, is addressed primarily to the regularity of the shape of the proposed annexation—the legislative concern being directed to attenuated annexations and gerrymandered "shoestring" shaped districts. p. 392.

9. **Municipal corporations—Proposed incorporation of isolated village—Statutes—Core area a mere crossroads not a reasonably developed community—Deficiency warranting denial.**
Dismissal of the petition was also warranted by further evidence showing that the core area was in effect a mere crossroads community without the requisite community center—a mandatory requirement—and hence the proposed incorporation additionally on this ground did not meet the test of sec. 66.016 (1) (a), Stats. pp. 392, 393.

10. **Municipal corporations—Proposed incorporation of isolated village—Statutory standards—Criteria applicable to territory beyond core.**
Findings that the territory beyond the core did not qualify under sec. 66.016 (1) (b), Stats., in that the highest number of dwelling units in any quarter section was 10, rather than the prescribed average of more than 30, and that under the statutory alternative based on assessed valuation only 10 percent thereof was attributable to existing mercantile and manufacturing uses, rather than greater than 25 percent, the statutory minimum, further supported the director's conclusion that there was no significant potential for growth in the area, also warranting dismissal of the petition. p. 393.

11. **Municipal corporations—Incorporation of city or village—Question of public interest a legislative question.**
It is beyond the judicial power to determine the legislative question of whether the public interest would be promoted by the incorporation of a village, the judicial task being confined to applying the stricture of ch. 227, Stats., to the determination of whether the administrative body properly exercised its delegated authority. p. 394.

12. **Constitutional law—Unconstitutionality of statute—Party not aggrieved without status to complain.**
A party may not urge the unconstitutionality of a statute upon a point not affecting his rights, and must show that he

has been injuriously affected by the application of the statute before he can attack it on the grounds of unconstitutionality. p. 395.

13. **Constitutional law—Statutory scheme of classifying proposed incorporations—Petitioners without standing to complain where less stringent standards applied.**
Petitioners had no standing to challenge the statutory scheme of classifying proposed incorporations on the basis of their characteristics as metropolitan communities or as isolated municipalities where, as here, the application was treated as a petition for incorporation of an isolated rather than metropolitan community and the less stringent statutory standards were applied. p. 395.

14. **Municipal corporations—Incorporation of cities and villages—Constitutional law—Statutes—Construction—Validity of scheme of classification.**
The legislative history with respect to the substantial changes in the statutory law governing the overall problem of municipal incorporation and urban expansion resulting in the enactment of ch. 261, Laws of 1959, reveals a legislative determination that the problems of the metropolitan community and the isolated community were different and require different treatment, and hence demonstrates that the scheme of classification meets applicable constitutional tests. pp. 396, 397.

15. **Municipal corporations—Incorporation of cities and villages—Constitutional law—Classification—Inapplicability of constitutional provisions with respect to home rule and uniform town and county government.**
Devoid of merit is the contention that the statutory scheme of classification reflected in ch. 261, Laws of 1959, offends against sec. 23, art. IV (uniform town and county government), and sec. 3, art. XI (home rule), Wisconsin constitution, for aside from inapplicability of these provisions to the instant case, these sections are concerned with the treatment of municipalities and their form of government *after* organization and not with the constitutional power to create cities and villages by act of the legislature. pp. 397, 398.

APPEAL from a judgment of the circuit court for Dane county: NORRIS E. MALONEY, Circuit Judge. *Affirmed.*

This is an appeal from the circuit court's judgment affirming the determination of the director of the planning function, department of resource development, denying a petition for the incorporation of the proposed village of Rockfield.

Citizens of the area petitioned for incorporation of Rockfield as an "isolated" village pursuant to secs. 66.013 to 66.016, Stats. As so provided, the petition was filed with the circuit court for Washington county. That court made the preliminary determination required by sec. 66.015 that the formal and signature requirements were met and "that it meets the minimum requirements of an Isolated Village in that the area exceeds one-half square mile and that the resident population exceeds 150." The court failed to determine whether or not the area lay within the type of territory defined in sec. 66.013 as a "metropolitan community." The court ordered the petition for incorporation referred to the director of the planning function in the department of resource development.

The director held a public hearing and issued findings pursuant to sec. 66.016, Stats., that the area proposed for incorporation failed to meet the statutory requirements of sec. 66.016 (1) (a) that the area be "reasonably homogeneous and compact" and also that there was not "a reasonably developed community center." He also found, as a matter of fact, that the area beyond the core failed to meet the minimum statutory requirements of 30 housing units per quarter section. He also found that the area failed to meet the alternative requirement that 25 percent of the assessed valuation be attributable to existing or potential mercantile, manufacturing, or public utility uses. In addition, sec. 66.016 (2) requires that proposed incorporation be in the public interest. The director, though not making the finding (re public interest) as the statute directs, did examine the statutory criteria to be considered in making that determination and concluded that the prospective tax revenues were inadequate, that certain usual municipal services were not planned for the proposed village, that the incorporation

of Rockfield would be inconsistent with the objectives of the legislature to avoid the "fragmentation of local governments," and that Rockfield was attempting to retain "its historic identity in the face of . . . inevitable changes." The director determined that the petition should be dismissed.

On review by the circuit court for Dane county, the director's determination was affirmed. A memorandum opinion of the circuit judge stated:

"The evidence recited by the Director shows conclusively that Rockfield cannot meet the minimum standards of either the number of housing units or the requisite tax proportion and . . . the evidence sustains the . . . findings that Rockfield is a mere 'crossroads community,' without the requisite 'community center.'"

This appeal is from the judgment of the circuit court.

For the appellant there was a brief and oral argument by *C. J. Schloemer* of West Bend.

For the respondent the cause was argued by *Albert Harriman,* assistant attorney general, with whom on the brief was *Bronson C. La Follette,* attorney general.

HEFFERNAN, J. The creation of municipal corporations is peculiarly within the province of the legislature. A unit of local government is a creature of the legislature. It owes its existence to legislative fiat and its life may be snuffed out by appropriate legislative action. It is a matter of hornbook law [1] that:

"The exercise of the legislative function of creating municipal corporations is wholly within the discretion of the legislature, and is not subject to the control of the judicial power."

"Subject to state constitutional limitations, the power of the state legislature over municipal corporations is complete, and it may create, change, divide, and even

[1] Cooley, Handbook of the Law of Municipal Corporations (hornbook series), West Publishing Co. (1914), page 35.

abolish them, at pleasure, as it deems in the public good." [2]

In *Madison Metropolitan Sewerage Dist. v. Committee* (1951), 260 Wis. 229, 50 N. W. (2d) 424, we pointed out the broad scope of legislative control over local government. Quoting earlier cases, this court said:

"'Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. . . . The state, therefore, at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will . . . .'"

What the appellants would have us review is, therefore, the exercise of a legislative function that has been delegated to the state department of resource development. Sec. 66.017 (2), Stats., makes the decision of the director reviewable under the terms of ch. 227. The objections raised by the appellant must be tested by sec. 227.20 (1) (d) and (e). Sec. 227.20 provides that the decision of the agency may be reversed or modified by the circuit court:

". . . if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions, or decisions being:

". . .

"(d) Unsupported by substantial evidence in view of the entire record as submitted; or

"(e) Arbitrary or capricious."

We conclude the scope of our review to be identical to that given to the circuit court by sec. 227.20, Stats.

[2] Ryhne, Municipal Law (1957), p. 11.

The appellant contends that the action of the director was arbitrary or capricious and, hence, violative of the standards imposed by sec. 227.20 (1) (e), Stats. A review of the record, however, makes it clear that the director's action was neither arbitrary nor capricious. The capricious use of administrative power is described as follows:

"It is, in general, the most flagrant violations of the scope of delegated discretionary powers which are described as capricious. In common usage, the term refers to a whimsical, unreasoning departure from established norms or standards; it describes action which is mercurial, unstable, inconstant, or fickle. In legal usage, a decision is capricious if it is so unreasonable as to 'shock the sense of justice and indicate lack of fair and careful consideration.'

"Typical of the cases in which the epithet *capricious* may properly be applied are those where an agency has given different treatment to two respondents in identical circumstances, or has exhibited an irrational unfairness which suggests malice or discrimination." 2 Cooper, State Administrative Law (1965), p. 761.

This court has stated:

"Arbitrary or capricious action . . . occurs when it can be said that such action is unreasonable or does not have a rational basis. . . . Arbitrary action is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the 'winnowing and sifting' process." *Olson v. Rothwell* (1965), 28 Wis. (2d) 233, 239, 137 N. W. (2d) 86.

Obviously, there is no basis in this record for denominating the conduct of the director either as arbitrary or capricious in light of the above definitions. The real question is whether the findings are supported by substantial evidence in light of the record as a whole. The test to be used is that enunciated in *Ashwaubenon v. State Highway Comm.* (1962), 17 Wis. (2d) 120, 131, 115 N. W. (2d) 498, where we stated:

". . . when the 'substantial evidence' rule of sec. 227.20 (1) (d), Stats., is applied to a legislative-type decision, the test is whether reasonable minds could arrive at the same conclusion reached by the commission."

Is there substantial evidence to support the director's determination?

The director applied the standards of sec. 66.016, Stats., to the petition and considered the application to be for the incorporation of an isolated village [3] and determined the petition must be dismissed. To qualify for incorporation, the area must meet the requirements of both sec. 66.016 (1) (a), pertaining to the characteristics of the territory, and sec. 66.016 (1) (b), in reference to territory beyond the core. It must also be determined to be in the public interest, after giving consideration to the guidelines of sec. 66.016 (2).

The director found that:

"Section 66.016 (1) (a), Wis. Stats., states that the area to be incorporated must be reasonably homogeneous and compact. In fact, the area outside of the core is largely rural. Being rural, with sizeable individual land holdings, the requirement of compactness is not met." [4]

[3] The director concluded that the nature of the area was metropolitan and that application should have been for incorporation as a metropolitan village and not as an isolated village, but proceeded to base his findings on the hypothesis that Rockfield could not qualify for incorporation even by the less rigorous standard applicable to the isolated village.

[4] This decision accords with decisions by this court involving the earlier incorporation statutes, which held that a village may not be incorporated where the territory to be included therein involves a large amount of sparsely settled rural or agricultural lands not having the distinctive characteristics of the village area itself. See *In re Town of Hallie* (1948), 253 Wis. 35, 38, 39, 33 N. W. (2d) 185; *In re Village of Elmwood Park* (1960), 9 Wis. (2d) 592, 600, 101 N. W. (2d) 659 (concurring opinion of Mr. Justice CURRIE).

There is evidence in the record showing considerable disparity in the population of the sections within the proposed incorporation. The disparity of population ranges from 298 to 29. We conclude that the requirement of homogeneity is not met because of this diversity. We do, however, question the director's interpretation of the standard of "compactness." In view of legislative concern over attenuated annexations and gerrymandered "shoestring" shaped districts, we conceive that the requirement of "compactness" is addressed primarily to the regularity of the shape of the proposed annexation. Taking notice of the map, made a part of the record, it is apparent that the incorporation does not offend in that respect.

The director also found:

"Also of concern is the requirement that the area have a reasonably developed community center which is the focal point for the common social, economic and cultural ties that bind the community. It is the opinion of the Director that the crossroads facilities heretofore enumerated do not constitute a reasonably developed community center. The fact that the only church in the core is now empty and unused would suggest that community activities occur elsewhere. There is no facility for public gatherings, no park, no town square or municipal center, no bank, no telephone exchange. The crossroads development which exists is too limited in facilities to function effectively as a community center."

The evidence from which the director might reasonably make this finding is undisputed. The record [5] shows that the core area contains the following establishments:

"Post Office . . . warehouse, unused church, general store, service station, feed store, two taverns, machine shop, print shop, paint shop, two-room school, a subdivision with nine houses, railroad, natural gas, telephone

[5] Taken from a summary appearing in appendix to respondent's brief.

service, public sewer, no public water supply. . . . Area children attend highschool in the Village of Germantown. Shoppers patronize the local merchants, but there are a lot of things that can't be gotten there, so they go to West Bend, Menomonee Falls, and Cedarburg."

Hence, it appears that there is substantial evidence to support the findings of the director that the proposed incorporation does not meet the test of sec. 66.016 (1) (a), Stats. Since this is a mandatory requirement, this deficiency alone supports the decision to dismiss the petition.

It is equally apparent that the director could reasonably have determined that the area did not satisfy sec. 66.016 (1) (b), Stats., which requires that in the territory beyond the most densely populated square mile, in an isolated municipality (which by the definitions of sec. 66.013 (2) (e) includes an isolated village), there shall be an average of 30 housing units per quarter section or an assessed value for real-estate-tax purposes of which more than 25 percent is attributable to mercantile, manufacturing, or public utility uses. It is undisputed that not one quarter section beyond the core meets this requirement. The highest number of dwelling units in any quarter section is 10. The director also found that the area did not qualify under the alternative based on assessed valuation. He applied his expert judgment to the assessment rolls and concluded that less than 10 percent of the assessed valuation is attributable to existing mercantile or manufacturing uses. He also found that there was no significant potential for growth indicating that these figures would change drastically. This evidence is uncontradicted in the record. It is apparent that these findings are also supported by substantial evidence.[6]

[6] Petitioner argues that it is an error of law to apply this subsection (66.016 (1) (b)) to a petition for an isolated village as this subsection uses the words, "isolated municipality," and refers to the territory beyond the "most densely populated square mile." This argument derives whatever vitality it has from the fact that sec. 66.015 (1), Stats., sets the *minimum* area of an isolated vil-

Nor can the petitioner controvert the finding of the director that the incorporation was not in the public interest. *In re Incorporation of Village of North Milwaukee* (1896), 93 Wis. 616, 624, 67 N. W. 1033, this court held that it was beyond the judicial power to determine the legislative question of whether the public interest would be promoted by the incorporation of a village. We stated:

"The question as to whether incorporation is for the best interest of the community in any case is emphatically a question of public policy and statecraft, not in any sense a judicial question; and in attempting to submit that question to the decision of the circuit court the legislature

lage at "one-half square mile." This argument flies in the face of the definition of "isolated municipality" contained in sec. 66.013 (2) (e), which explicitly includes villages within the defined term. Petitioner does not argue that the phrase, "isolated municipality," as it appears in sec. 66.016 (1) (a) is meant to exclude isolated villages. If, in fact, "isolated municipality" excludes isolated village, then a petition for the incorporation of an isolated village would only need comply with sec. 66.016 (2). This result would seem entirely inconsistent with the opening words of sub. (2):

"In addition to complying with *each* of the applicable standards set forth in sub. (1) and s. 66.015, *any* proposed incorporation in order to be approved for referendum must be in the public interest . . . ." (Emphasis supplied.)

Furthermore, while perhaps evidencing a legislatively dropped stitch in the statute, it cannot be said that the application of sub. (1) (b)'s terms, either to the petitioner (whose area admittedly exceeds one square mile) or to an isolated village of only one-half square mile, would result in any incongruous prejudice. As written, the statute says in effect:

"*If* an isolated village exceeds one square mile *then* the territory beyond the most densely populated square mile must meet sub. (1) (b)'s standards."

It would not seem legislatively capricious to require an isolated village whose territory exceeds one square mile to demonstrate that the excess territory meets certain population standards and is not just irrelevantly attached agrarian land. Thus it would not seem to be an error of law for the director to apply sub. (1) (b) to the petitioner.

has undoubtedly done that which the constitution forbids."

In accordance with that venerable principle, this court's task is confined to applying the strictures of ch. 227, Stats., to the determination of whether the administrative body properly exercised its delegated authority. Accordingly, the question of public interest in respect to the incorporation of a municipality is not properly addressed to this court.

Appellant also challenges the constitutionality of the entire statutory scheme of classifying proposed incorporations on the basis of their characteristics as metropolitan communities, or as isolated municipalities. We conclude that the petitioner has no standing to urge the unconstitutionality of this classification. It is familiar Wisconsin law that a party may not urge the unconstitutionality of a statute upon a point not affecting his rights. *Milwaukee Boston Store Co. v. American Federation of Hosiery Workers* (1955), 269 Wis. 338, 359, 69 N. W. (2d) 762; *Pedrick v. First Nat. Bank of Ripon* (1954), 267 Wis. 436, 441, 66 N. W. (2d) 154. Appellant correctly points out that the classification results in the application of more stringent requirements to those petitions for the incorporation of metropolitan communities. However, the aggrieved parties, in this matter appearing by their statutory representative were treated as petitioners for the incorporation of an isolated village. The less stringent standards were applied to them. They have not been hurt by this classification and we have heretofore insisted that a party must show that he has been injuriously affected by the application of a statute before he can attack it on the grounds of unconstitutionality. *Milwaukee v. Milwaukee Amusement, Inc.* (1964), 22 Wis. (2d) 240, 251, 125 N. W. (2d) 625; *Joint School Dist. v. Boyd* (1955), 270 Wis. 222, 226, 70 N. W. (2d) 630.

Even if the appellant were in a position to raise this point, his argument would fail. We have stated that to be valid, a classification should rest upon a difference which bears a fair, substantial, natural, reasonable, and just relationship to the object, act, or persons in respect to which it is proposed. *State ex rel. Wisconsin Lutheran High School Conference v. Sinar* (1954), 267 Wis. 91, 96, 65 N. W. (2d) 43. We have stated that:

". . . classifications of persons or property must be based upon reasonable differences or distinctions which distinguish the members of one class from those of another in respects germane to some general and public purpose or object of the particular legislation." *Christoph v. Chilton* (1931), 205 Wis. 418, 237 N. W. 134.

In *Madison Metropolitan Sewerage Dist. v. Committee* (1951), 260 Wis. 229, 253, 50 N. W. (2d) 424, we stated that:

"The question of classification is primarily for the legislature, both as to need and basis. . . . All that seems to be required is that there must be some reasonable basis along general lines for the adoption, all reasonable doubts to be resolved in favor thereof . . . ."

This court has recognized the general legislative purpose in enacting these sections of the statutes:

"The legislature in its 1959 session made substantial changes in the statutory law governing the overall problem of municipal incorporation and urban expansion. A dominant change was a legislative recognition that many localities of the state were experiencing a substantial urban growth and that the existing legislation permitted haphazard, unrealistic, and competitive expansion without regard for present and probable future development in the best overall public interest." *Elmwood Park v. Racine* (1966), 29 Wis. (2d) 400, 406, 139 N. W. (2d) 66.

It was pursuant to this general purpose that the classifications in question were made. The legislative note

attached to Assembly Bill No. 226, A., of the 1959 legislative session reads in part:

"Particular attention is devoted to establishing minimum standards which are relevant to the problems presented by governmental organization in metropolitan areas. This bill also recognizes the special problems of rural or 'isolated' areas by providing somewhat different standards for proposed incorporations in such areas." (p. 1)

"The impact of an incorporation on a metropolitan community must also be considered. To prevent fragmentation of an urban area the director is required to make 'an express finding that the proposed incorporation will not substantially hinder the solution of governmental problems affecting the metropolitan community' of which the territory is a part." (p. 2)

Thus, it was apparent that the classifications in question followed from a legislative determination that the problems of the metropolitan community and the isolated community were different and required different treatment. The reason for the exact difference in treatment effected appears on page 13 of this legislative note:

"For each of the types of municipalities defined in s. 66.013 (2) different minimums are established. The minimums vary according to the proximity of the proposed incorporation to a metropolitan center. The requirements for creation of a village or city near a metropolitan community are more stringent to avoid the creation of governmental units without sufficient area or population to economically supply services or perform functions which are needed."

The classification meets the applicable constitutional tests.

The appellant also claims that the statutory scheme of classification offends against sec. 23, art. IV [7] (uniform

[7] Sec. 23, art. IV: "The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable; but the legislature may provide for the

town and county government), and sec. 3, art. XI [8] (home rule), Wisconsin constitution. The appellant has not defined his objections based on these sections of the constitution. However, a perusal of these sections of the constitution makes apparent their inapplicability to the case at hand. Even assuming the relevance of these sections, it is apparent that they are concerned with the treatment of municipalities and their form of government after organization and not with the constitutional power to create cities and villages by act of the legislature.

By the Court.—Judgment affirmed.

TOBAR, Plaintiff in error, v. STATE, Defendant in error.

October 5—November 1, 1966.

1. **Witnesses—Competency of testimony of narcotic addict.**
A narcotic addict is competent to testify although his use of narcotics is a proper consideration concerning the weight to be given his testimony. p. 408.

2. **Criminal law—Illegal sale of narcotics—Accomplice's testimony—Sufficiency to support conviction.**
In a prosecution for the illegal sale of narcotic drugs contrary to sec. 161.02 (1), Stats., conviction based principally upon the testimony of an accomplice, although a drug addict, would not be disturbed on appeal where such testimony was not inherently incredible and the jury, resolving the issue after

election at large once in every four years of a chief executive officer in any county having a population of five hundred thousand or more with such powers of an administrative character as they may from time to time prescribe in accordance with this section."

[8] Sec. 3, art. XI: "Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village. The method of such determination shall be prescribed by the legislature."

rational consideration, could have concluded, as it did, that the offense charged was committed. pp. 403, 404.

3. **Witnesses—Scope of cross-examination.**
What issues are covered in direct examination and therefore within its scope for purposes of cross-examination are governed by and dependent upon the quantitative and not the semantic precision of questions and answers on direct examination. p. 405.

4. **Witnesses—Cross-examination—Scope and propriety of inquiry.**
Where on cross-examination of state witnesses the defense inquired into the circumstances concerning a search, pursuant to a warrant, of the premises in which defendant was apprehended made subsequent thereto (the purpose of which was to create the inference that the search was fruitless), defendant opened the door entitling the state to offer evidence to rebut that inference. pp. 404, 405.

5. **Criminal law—Sale of narcotics—Evidence—Contraband found upon premises where transaction occurred—Relevance and admissibility.**
Contraband in the nature of narcotics and paraphernalia used for the injection thereof, seized pursuant to the search of the premises, was admissible and did not constitute impeachment on a collateral issue, since it was relevant and material to the charge that the sales transaction had taken place, and admissible for the purpose of impeaching defendant who testified to the contrary. pp. 405, 406.

ERROR to review a judgment of the circuit court for Milwaukee county: HENRY G. GERGEN, JR., Circuit Judge of the Thirteenth circuit, Presiding. *Affirmed.*

The defendant Onecimo B. Tobar was charged and found guilty by a jury in the circuit court of the illegal sale of narcotic drugs, contrary to sec. 161.02 (1), Stats., and was sentenced to the state prison at Waupun to an indeterminate term of not less than two nor more than ten years.

The facts in this case are in dispute. Two witnesses testified on behalf of the state concerning the alleged sale.