limit, will not release the sureties, even under a strictly statutory bond.[12] The legislative intent as expressed in the depositary statutes is presumed to be protection of the public, and not provision of loopholes for the release of sureties in case of irregularities.[13] Another line of cases holds that the sureties may estop themselves from asserting non-compliance, if they intended their principal to procure a deposit of public funds and knew or should have known that their giving a bond would be instrumental in achieving that result, and if, in fact, there was reliance up their obligation.[14] In the instant case the court said that the record did not disclose any compliance or attempt to comply with the statutes.[15] Moreover, there were apparently no facts sufficient to raise an estoppel.[16] Had the bond, then, been strictly statutory, the failure to create a debtor-creditor relation would have released the sureties.[17] But the terms of the bond actually were broader than the statute requires, covering "all funds of the School District, including those belonging to said District."[18] Thus, in effect, the decision holds only that the sureties consented to a contractual obligation broader than that required by the statute, and (by necessary inference) that the placing of funds in the hands of the bank as trustee was sufficient consideration to support the bond as worded. R. T. S.

CERTIORARI—RECORD PROPER—STIPULATIONS AS PART OF THE RECORD—[Missouri].—The relator, as a taxpayer, petitioned for certiorari in the assessment of certain trust certificates in its possession. Certiorari issued to the County Assessor and three reviewing tax boards to certify their

12. School District v. Second Bank (Mo. 1930) 26 S. W. (2d) 785, 792, held: "Where, as here, faith and credit have been given to a depositary bond and it has performed the function of a statutory bond, the sureties on such bond cannot escape liability upon the ground that their principal was not duly selected as a depositary, nor upon the ground that such bond was not executed and delivered within the time prescribed by the statute." Cf. Jones v. State to use of Blow (1841) 7 Mo. 81, 37 Am. Dec. 180; Moore v. State (1845) 9 Mo. 334; James v. Dixon (1855) 21 Mo. 538; State use of Young v. Hesselmeyer (1863) 34 Mo. 76; State use of Burrough v. Farmer (1873) 54 Mo. 439; Note (1919) 18 A. L. R. 274, 276; Note (1931) 77 A. L. R. 1479 reads in part: "Though the decisions which follow the general rule * * * are commonly reached by judicial construction, in a few jurisdictions it appears that the question is set at rest as to certain bonds by statutory provision to the effect that those bonds, shall not be vitiated by an informality or defect in the approval thereof." (Although these cases and annotations treat statutory bonds which are not depositary bonds, there seems to be no logical basis of distinction.)

13. Henry County v. Salmon (1907) 201 Mo. 136, 100 S. W. 20; Buhrer v. Baldwin (1904) 137 Mich. 263, 100 N. W. 468.

14. Henry County v. Salmon (1907) 201 Mo. 136, 100 S. W. 20; Wright County ex rel. Elk Creek v. Farmer's and Merchant's Bank (Mo. 1930) 30 S. W. (2d) 32; Canton v. Bank of Lewis County (1936) 338 Mo. 817, 92 S. W. (2d) 595.

15. School Consolidated District No. 10 v. Wilson (Mo. 1939) 135 S. W. (2d) 349, 350.

16. Id. at 354.

17. Id. at 353.

18. Id. at 353.

records as to this assessment and the appeals, complaints, and proceedings thereon. None of these bodies certified their records as required, nor did the return of the respondent assessor contain them. This return referred to a stipulation filed by the relator and respondent with exhibits marked "A" and "B" attached. The stipulation was that these exhibits were all the records in the case. Thus relator waived production of records further than these exhibits, which were the findings of fact and orders of only two of the reviewing boards. However, it was also stipulated that the allegations of the relator's petition were true. These allegations concerned the original assessment and the records of the other reviewing board. In the certiorari proceeding, respondent assessor contended that this assessment and these records were not brought properly before the court by the mere stipulation that the allegations of the petition were true, even though the stipulation was referred to in the return for other purposes. Respondent assessor contended that, since the relator had waived their production, the only records to be examined by the court were those which were attached as exhibits to the stipulation and incorporated by reference in the return. The court sustained this contention, holding that certiorari looks only to the record proper and will not consider stipulations or allegations of fact or exhibits which are not otherwise properly a part thereof. *State ex rel. St. Louis Union Trust Co. v. Neaf.*[1]

Certiorari is an extraordinary legal remedy by which inferior courts or quasi-judicial tribunals are held within their proper jurisdiction.[2] As such it calls up the records of the tribunal. If these records show on their face that jurisdiction has been exceeded, the return is quashed. If not, then the writ itself is quashed. In Missouri, as at common law, review on certiorari will not go *dehors* the record proper.[3] This rule is sustained by a long line of cases.[4]

The contents of the record of a tribunal vary with the nature of the proceeding. The record proper of a court consists of the process and return, the subsequent pleadings, and the verdict and judgment.[5] In general "whatever proceedings * * * the law or the practice of the court requires to be enrolled constitute and form a part of the record; but what it is not necessary to enroll does not form any part of the technical record unless made so by order of the court * * *."[6] The record may, of course,

1. (Mo. 1940) 139 S. W. (2d) 958.

2. See Finkelnburg & Williams, *Missouri Appellate Practice* (2d ed. 1906) c. XI; Ferris, *Law of Extraordinary Legal Remedies* (1926) secs. 155, 157, 182.

3. Hannibal & St. Joseph R. R., Relator v. State Board of Equalization (1876) 64 Mo. 294, 308; State ex rel. Kansas & Texas Coal Ry. v. Shelton (1900) 154 Mo. 670, 692, 693, 55 S. W. 1008, 1012, 1013, 50 L. R. A. 798, 807, and cases cited; State ex rel. Summerson v. Goodrich (1914) 257 Mo. 40, 47, 48, 165 S. W. 707, 708, 709; State ex rel. Kennedy v. Remmers (1936) 340 Mo. 126, 131, 101 S. W. (2d) 70, 71.

4. From as early as Hannibal & St. Joseph R. R. v. Morton (1858) 27 Mo. 317, 320, to State ex rel. St. Louis County v. Evans (Mo. 1940) 139 S. W. (2d) 967, 968, citing principal case.

5. Smith v. Moseley (1911) 234 Mo. 486, 495, 137 S. W. 971, 974.

6. State ex rel. May Department Stores Co. v. Haid (1931) 327 Mo. 567, 580, 38 S. W. (2d) 44, 50. In Ward v. Board of Equalization (1896) 135

be enlarged by statute. Thus, although "the writ of certiorari brings up for review only the record proper and not the evidence,"[7] a statute may make a transcript of the evidence part of the record.[8] However, "jurisdictional facts and exhibits cannot be imported into the case by voluntarily inserting them in the abstract" of the record.[9] The pleadings in a certiorari action are, obviously, no part of the record proper of the court whose record is being certified and, consequently, serve only to bring the issue before the court.[10] Hence, in the instant case, neither the relator's petition nor the stipulation nor the respondent's return was, as such, part of the record proper. The record proper was confined to the records of the assessor and the reviewing tax bodies, namely, the relator's tax return, the assessment thereon, and the assessments and appeals, complaints, and proceedings thereon before the tax bodies (as recorded in the certified minutes of the tribunals). Part of these records were not produced, apparently because relator had waived their production. The court properly confined its consideration to such of these records as were before the court and ignored the stipulation and allegations of the petition, since they were clearly *dehors* the record.

It is thus apparent that the court has followed the established Missouri rule in reaching its decision. However, relator called to its attention eight cases of certiorari which appeared to be exceptions to the rule. In these cases, the court seemed to consider matters *dehors* the records, such as stipulations of facts, admissions of record, conceded facts, facts not in dispute, and references to allegations in the petition and to evidence heard in the inferior tribunal.[11] The court distinguished these cases on the ground

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Mo. 309, 319, 36 S. W. 648, 650, a case involving a commission rather than a court, it is said: "But it is well settled that, the writ of *certiorari* only brings up the record, and only such matters as appear from the face thereof, and which go to the jurisdiction of the tribunal, to which the writ is sued out, can be reviewed by such writ."

7. State ex rel. Heimburger v. Wells (1908) 210 Mo. 601, 621, 109 S. W. 758, 764. Specifically: "The evidence heard by the board of equalization is not in the record. Being a proceeding by certiorari only the record certified by the board to the circuit court was before the court and that alone was considered, no evidence being heard." State ex rel. Davis v. Walden (1933) 332 Mo. 680, 684, 60 S. W. (2d) 24, 26. The court in the instant case declines to discuss whether recitals of evidence or findings of fact in the records of the tribunal will be considered. State ex rel. St. Louis Union Trust Co. v. Neaf (Mo. 1940) 139 S. W. (2d) 958, 965.

8. See State ex rel. May Department Stores Co. v. Haid (1931) 327 Mo. 567, 580, 38 S. W. (2d) 44, 50 (workmen's compensation act makes transcript of evidence before commission part of the record for circuit court). The statutes concerning the various tax tribunals contain no such provision.

9. State ex rel. Chase v. Calvird (1930) 324 Mo. 429, 437, 24 S. W. (2d) 111, 115.

10. State ex rel. School District v. Williams (1897) 70 Mo. App. 238, 242.

11. State ex rel. St. Louis Union Trust Co. v. Neaf (Mo. 1940) 139 S. W. (2d) 958, 966, citing: State ex rel. Y. M. C. A. v. Gehner (1928) 320 Mo. 1172, 1175, 11 S. W. (2d) 30, 31 (trial on agreed statement of facts); State ex rel. American Automobile Ins. Co. v. Gehner (1928) 320 Mo. 702, 708-711, 8 S. W. (2d) 1057, 1058, 1059, 59 A. L. R. 1026, 1029, 1030 (facts not disputed and oral admissions); State ex rel. American Central Ins. Co. v.

that in none of them was the issue raised whether these matters should be considered in certiorari. It disposed of them by saying "We think it apparent that the references made in the opinions referred to resulted from the manner in which these cases were presented and the issues there involved."[12] Does all this mean that the court will act to exclude matter foreign to the record only at the instance of a vigilant attorney? It is difficult to see the logic of such a holding. The nature of certiorari proceedings too clearly restricts them to the record, not as submitted, but to the record proper. To make consideration of matters *dehors* the record a function of the vigilance of the attorneys suggests an area of discretion in the matter of what the court will consider. If such area exist, it should scarcely be exercised in favor of a reneging stipulator. Rather, the instant case must be taken to hold that, whether or not the court has nodded in the past, the rule remains as it has always been and will be enforced in the future.

W. G. P.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—ANTI-TRUST LEGISLATION—DIFFERENT SANCTIONS APPLIED TO AGRICULTURE AND INDUSTRY —[United States].—Defendant was charged with participation in a conspiracy to fix the retail price of beer. Such a conspiracy in restraint of trade is made a criminal offense by a Texas statute,[1] which, however, exempts from the operation of the law "agricultural products and livestock in the hands of the producer and raiser."[2] Another Texas statute[3] attaches civil liability to all conspiracies, without exemptions. Defendant sued out a writ of *habeas corpus* and contended that the exemption fell within the condemnation of *Connolly v. Union Sewer Pipe Co.*[4] as offensive to the "equal protection of the laws" clause of the Fourteenth Amendment and that therefore the Texas act was unconstitutional. *Held,* that the Texas statute was constitutional, overruling the *Connolly* case. *Tigner v. Texas.*[5]

Gehner (1928) 320 Mo. 901, 903, 9 S. W. (2d) 621, 622, 59 A. L. R. 1041, 1043 (evidence before board); State ex rel. American Central Ins. Co. v. Gehner (1926) 315 Mo. 1126, 1129, 280 S. W. 416 (references in stipulation to allegations in petition); State ex rel. Compton v. Buder (1925) 308 Mo. 253, 259, 260, 271 S. W. 770, 771 (facts stipulated in the certiorari hearing); State ex rel. Smith v. Williams (1925) 310 Mo. 267, 270, 275 S. W. 534, 535 (admissions in brief); State ex rel. Orr v. Buder (1925) 308 Mo. 237, 244, 271 S. W. 508, 509, 39 A. L. R. 1199, 1203 (allegations of petition); State ex rel. Adler v. Ossing (1935) 336 Mo. 386, 389, 79 S. W. (2d) 255, 256 (allegations in petition).

12. State ex rel. St. Louis Union Trust Co. v. Neaf (Mo. 1940) 139 S. W. (2d) 958, 966.

1. Texas Vernon's Stats. (1936) Penal Code, art. 1632 et seq.

2. Texas Vernon's Stats. (1936) Penal Code, art. 1642.

3. Texas Vernon's Stats. (1936) Rev. Civil Stats., art. 7426 et seq. For a critical discussion of Texas anti-trust legislation, see Nutting, Texas Anti-Trust Law: A Post Mortem (1936) 14 Tex. L. Rev. 293.

4. (1902) 184 U. S. 540 (same exemption held unconstitutional).

5. (1940) 310 U. S. 141, reh. den. (1940) 310 U. S. 659.