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.

There is no doubt that a legislature has power to classify where differences exist and may select certain activities to legislate upon and exclude others in accordance with that classification.[6] In determining whether the classification attempted by a given statute can be sustained, the recognized test is whether the classification is "based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not mere arbitrary selection."[7]

The legislature must be allowed some latitude of judgment.[8] That the legislature has enjoyed a wide discretion in the matter of classification and resulting exemptions is evidenced by cases allowing legislative bodies to encourage steam laundries and discourage hand laundries;[9] to require a license fee of elevators situated on a railroad right of way, though none is required of elevators not so situated;[10] to select the business of fire insurance as a special target for anti-monopolistic regulation, though exempting other types of insurance companies;[11] to require a license tax on persons and corporations carrying on the business of refining sugar and molasses, though excluding planters and farmers grinding and refining their own sugar and molasses.[12]

The diametrically opposed decisions of the *Connolly* and *Tigner* cases represent two different approaches to the problem. Conceptualistically, if the legislature wishes to control trusts and combinations, the same sanctions must be applied under the "equal protection" clause of the Fourteenth Amendment to all who fit the definition. The majority in the *Connolly* case took the position that conspirators, whether agricultural or industrial, are conspirators within the meaning of the statute. But, in the language of Mr. Justice Frankfurter in the instant case,

> The equality at which the 'equal protection' clause aims is not a disembodied equality. * * * The Constitution does not require things which are different in *fact* or opinion to be treated in law as though they were the same.[13]

Realistically, a legislature may recognize the variant economic structures of agriculture and industry. Experience shows that the damage to trade resulting from the activities of a loose-knit agricultural combination is small, whereas that from the powerful industrial combination is great. The factual dissimilarity is succinctly summarized by the court in the *Tigner* case:

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6. Carrington, *Cooley's Constitutional Limitations* (8th ed. 1927) 812, and cases there cited; Rottschaefer, *Constitutional Law* (1939) 457-460, and cases there cited.

7. Gulf, C. & S. F. Ry. v. Ellis (1897) 165 U. S. 150. See: Magoun v. Illinois Trust and Savings Bank Co. (1898) 170 U. S. 283; Lindsley v. Natural Carbonic Gas Co. (1911) 220 U. S. 61; Central Lumber Co. v. South Dakota (1912) 226 U. S. 157.

8. International Harvester Co. v. Missouri (1914) 234 U. S. 199, 214.

9. Quong Wing v. Kirkendall (1912) 223 U. S. 59.

10. Cargill Co. v. Minnesota (1901) 180 U. S. 452.

11. Carroll v. Greenwich Ins. Co. (1905) 199 U. S. 401.

12. American Sugar Refining Co. v. Louisiana (1900) 179 U. S. 89.

13. Tigner v. Texas (1940) 310 U. S. 141, 147 (italics supplied).

> * * * These large sections of the population [farmers] * * * were as a matter of *economic fact* in a different relation to the community from that occupied by industrial combinations. Farmers were widely scattered and *inured to habits of individualism;* their economic fate was in large measure dependent upon contingencies beyond their control. * * * the threat [to the community] was of a different order from that arising through combinations of industrialists and middlemen.[14]

An additional point raised by the defendant in the present case was that, since agricultural combinations are exempted from the criminal statute and not from the civil statute, the validity of the criminal statute is undermined and thus both statutes are invalidated. The court disposes of this contention by saying that classifications that permit substantive differentiations also permit differentiations of remedy. The Constitution contains no doctrinaire requirement that acts and evils differing in degree though not in kind must be subjected to identical remedial sanctions. S. M. M.

MANDAMUS — CONTROL OF ADMINISTRATIVE DISCRETION — REFUSAL OF LIQUOR LICENSE—[Missouri].—Petitioner applied to the director of liquor licenses of Kansas City for a retail dealer's license. Pursuant to a city ordinance, the application was referred to the board of police commissioners and an investigation was ordered, the application to be returned to the director with a report and recommendation. The report of the police commissioners recommended that no license be issued. Although not legally bound to follow the recommendation of the police commissioners, the director refused to issue the license. Petitioner then procured an alternative writ of mandamus commanding respondent to issue or show cause. The trial resulted in a judgment which, in effect, made the writ permanent, compelling the issuance of a license. From this judgment, respondent appealed. *Held,* that the director of liquor licenses, in the grant or refusal of licenses, exercised a type of discretion that can not be controlled by mandamus. *Mangieracina v. Haney.*[1]

It is a well-established rule that mandamus will issue to compel the performance of a simple ministerial duty by a recalcitrant official.[2] When, however, discretion is reposed in an official by law, and when the official has properly exercised his judgment, the courts will refuse to issue mandamus

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14. Id. at 145 (italics supplied). See Northern Wisconsin Co-op Tobacco Pool v. Bekkedal (1924) 182 Wis. 571, 588, 197 N. W. 936, 943. See generally, Hanna, Cooperative Associations and the Public (1930) 29 Mich. L. Rev. 148, 159, 163. See United States v. Rock Royal Cooperative (1939) 307 U. S. 533, for list of state cases approving special advantages given agricultural cooperatives. See Note (1932) 32 Col. L. Rev. 347, 354, for state statutes containing exemption similar to Texas act.

1. (Mo. App. 1940) 141 S. W. (2d) 89.

2. Dreyfus v. Lonergan (1898) 73 Mo. App. 336; State ex rel. Schade v. Russell (1908) 131 Mo. App. 638, 110 S. W. 667; State ex rel. Journal Printing Co. v. Dreyer (1914) 183 Mo. App. 463, 167 S. W. 1123; State ex rel. Adamson v. Lafayette County Court (1867) 41 Mo. 545; State ex rel. Metcalf v. Garesche (1877) 65 Mo. 480; State ex rel. North and South Ry. v. Meier (1898) 143 Mo. 439, 45 S. W. 306; State ex rel. Dolman v. Dickey (1920) 280 Mo. 536, 219 S. W. 363.