> * * * 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.

to modify that judgment.[3] To do so would be to substitute the discretion of the court for that of the official to whom it was committed.[4] When there has been a refusal to exercise discretion, a writ of mandamus is the proper legal remedy to compel official action.[5] When discretion has been exercised in an arbitrary, capricious, and unlawful manner, mandamus may be invoked to compel the exercise of discretion in a proper manner.[6]

In the instant case, the court quoted from other cases the following interesting dictum: "It is only in cases where the facts essential to the relator's rights are undisputed or have been confessed by the pleadings that the discretion of the licensing authority may be controlled by mandamus."[7] At first blush this statement seems rather too broad, since it seems to permit the courts to dictate the results of the exercise of discretion by a public official, contrary to the conventional view.[8] Upon closer analysis of the cases quoted, however, this statement can be harmonized with the conventional view of mandamus on the ground that, when all facts essential to relator's right are undisputed or stand confessed by the administrative agency, the exercise of direct control by the court merely avoids circuity

3. State ex rel. Gazzallo v. Hudson (1882) 13 Mo. App. 61; State ex rel. Brown v. Stiff (1904) 104 Mo. App. 685, 78 S. W. 675; State ex rel. Heller v. Thornhill (1913) 174 Mo. App. 469, 160 S. W. 558; State ex rel. Hendricks v. Hopson (1914) 177 Mo. App. 12, 163 S. W. 279; State ex rel. Hawkins v. Harris (Mo. App. 1922) 239 S. W. 564; State ex rel. Best v. Jones (1900) 155 Mo. 570, 56 S. W. 307; State ex rel. Clark v. West (1917) 272 Mo. 304, 198 S. W. 1111.

4. State ex rel. Brown v. Stiff (1904) 104 Mo. App. 685, 78 S. W. 675; State ex rel. Heller v. Thornhill (1913) 174 Mo. App. 469, 160 S. W. 558; State ex rel. Hendricks v. Hopson (1914) 177 Mo. App. 12, 163 S. W. 279; State ex rel. Best v. Jones (1900) 155 Mo. 570, 56 S. W. 307. See State ex rel. Gehner v. Thompson (1927) 316 Mo. 1169, 293 S. W. 391.

5. State ex rel. Wear v. Francis (1888) 95 Mo. 44, 8 S. W. 1; State ex rel. Hathaway v. State Board of Health (1891) 103 Mo. 22, 15 S. W. 322; State ex rel. Best v. Jones (1900) 155 Mo. 570, 56 S. W. 307; State ex rel. Gehrig v. Medly (Mo. App. 1930) 28 S. W. (2d) 1040, 1043: "'Where a discretion is vested in a public officer, the courts will by mandamus compel the officer to exercise that discretion, but will not direct how it shall be exercised, or what conclusion or judgment shall be reached.' State ex rel. Jones, 155 Mo. 570, 576, 56 S. W. 307, 309; State ex rel. v. Turnage, 217 Mo. App. 278, 263 S. W. 497."

6. State ex rel. McCleary v. Adcock (1907) 206 Mo. 550, 105 S. W. 270; State v. Bowman (Mo. App. 1927) 294 S. W. 107; See State ex rel. Shartel v. Humphreys (1936) 338 Mo. 1091, 1098, 93 S. W. (2d) 924: "But such discretion cannot be arbitrarily exercised, that is, exercised in bad faith, capriciously, or by simple ipse dixit. When so exercised, it is regarded that there was no discretion, recognized by law and in such case mandamus will lie."

7. Mangiercina v. Haney (Mo. App. 1940) 141 S. W. (2d) 89. See: State ex rel. Kelleher v. Board, St. Louis Public Schools (1896) 134 Mo. 296, 35 S. W. 617; State ex rel. Foerstel v. Higgins (1898) 76 Mo. App. 319.

8. State ex rel. Gazzallo v. Hudson (1882) 13 Mo. App. 61; State ex rel. Foerstel v. Higgins (1898) 76 Mo. 319; State ex rel. Brown v. Stiff (1904) 104 Mo. App. 685, 78 S. W. 675; State ex rel. Heller v. Thornhill (1913) 174 Mo. App. 469, 160 S. W. 558; State ex rel. Dolman v. Dickey (1920) 280 Mo. 536, 219 S. W. 363; State ex rel. Gehner v. Thompson (1927) 316 Mo. 1169, 293 S. W. (2d) 391.

of action. For example, in *State ex rel. Journal Printing Co. v. Dreyer*,[9] involving the award of a public contract, the statute required that the board award the contract to the lowest and best bidder. The facts were undisputed that the relator submitted the lowest and best bid. The board, in effect, thus admitted that had it exercised its discretion properly it could have reached but one result. Therefore, instead of issuing mandamus to compel proper exercise of discretion, the court issued mandamus to compel the board to award the contract to relator. Again, in *State ex rel. McCleary v. Adcock*,[10] the statute set up certain requirements as a prerequisite to the granting of a license. Since it was undisputed that the relator had fulfilled the requirements, mandamus issued to compel the granting of the license.

Paradoxically, the rule as to direct control by mandamus when all facts essential to relator's right are admitted was first enunciated in a case whose holding contravenes the orthodox application of mandamus. In that case, *State ex rel. Kelleher v. Board, St. Louis Public Schools*,[11] the statute provided for the appointment by a school board of judges and clerks for its elections. No requirements were set out as to the political affiliations of the appointees, but, because of the danger of a "gross fraud" on the public, mandamus issued to compel the selection of an equal number of Republicans and Democrats. The board's discretion, exercised properly under the terms of the statute, was directly controlled by the court.

The rule, then, seems to be that mandamus will issue (1) to compel performance of a ministerial duty;[12] (2) to compel exercise of discretion when there has been a refusal to take action;[13] (3) to compel the exercise of discretion in a proper manner when its exercise has been arbitrary, capricious, or unlawful;[14] and (4) to compel a particular result when the authority in whom discretion is vested admits in effect that, in the proper exercise of its discretion, there can be but one result.[15] Since the instant case falls into none of these categories, mandamus was properly denied.

N. B. K.

TORTS—RIGHT OF PRIVACY—LIABILITY FOR VIOLATING RETIREMENT OF PUBLIC FIGURE—[Federal].—Plaintiff was a former child prodigy who had drawn wide publicity when at the age of eleven he lectured to mathematicians on the fourth dimension and when at the age of sixteen he was graduated from Harvard. Some thirty years later he was living as unobtrusively as possible, working at a petty office job, and rooming in a boarding house in Boston. Defendant, publisher of *The New Yorker* maga-

9. (1914) 183 Mo. App. 463, 481, 167 S. W. 1123, 1127.
10. (1907) 206 Mo. 550, 105 S. W. 270.
11. (1896) 134 Mo. 296, 35 S. W. 617.
12. See cases cited supra note 2.
13. See cases cited supra note 5.
14. See cases cited supra note 6.
15. State ex rel. Journal Printing Co. v. Dreyer (1914) 183 Mo. App. 463, 481, 167 S. W. 1123, 1127; State ex rel. McCleary v. Adcock (1907) 206 Mo. 550, 105 S. W. 270.