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IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DIVISION OF THE WESTERN DISTRICT OF MISSOURI

Lucile Bluford,
Plaintiff,
vs.
S. W. Canada,
Defendant.
Civil Action No. 42

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

This is a damage suit, in two counts. The plaintiff alleges that on January 30, 1939, and again on September 14, 1939, the defendant registrar of the University of Missouri refused to issue to plaintiff, a negro citizen of Missouri, a permit to register as a student in the University of Missouri for graduate work in journalism. (Plaintiff alleges that she is a graduate of the University of Kansas with the degree of Bachelor of Arts with major in journalism.) For each of the alleged refusals to issue the permit, plaintiff asks $10,000.00 damages, a total of $20,000.00 in the two counts.

The complaint alleges that defendant's refusals to issue permits violated the Equal Protection Clause of the Fourteenth Amendment and Section 41 of Title 8, U.S. Code, and rendered defendant liable under Section 43 of Title 8, U. S. Code. The latter section provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected,

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> any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Defendant's motion to dismiss is based upon the ground that each count of the complaint fails to state a claim upon which relief can be granted. It is submitted that the motion should be sustained, for the following reasons:

I

The laws and long established public policy of the State of Missouri provide for and require separation of the white and negro races for purposes of higher education; and such provision is valid.

That the laws and public policy of the state provide for and require race separation in higher education was expressly ruled in the first opinion in the Gaines Case (State ex rel. Gaines v. Canada, 113 S.W. (2d) 783,787.) The holding on that point was followed by the Supreme Court of the United States in State of Missouri vs. Canada, 59 Sup. Ct. Rep. 232, 234, where the court,

after reviewing the holding on that point, said:

> "In that view it necessarily followed that the curators of the University of Missouri acted in accordance with the policy of the state in denying petitioner admission to its School of Law upon the sole ground of his race."

A provision for race separation for the purposes of education is valid. In the Gaines Case the Supreme Court of the United States recognized this to be true. In referring to the obligation of the state to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students, the court said (59 Sup. Ct. Rep. 232, 234) :

> "The state has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions," (Citing Plessy v. Ferguson, 163 U.S. 537, 544; McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 160; Gong Lum v. Rice, 275 U.S. 78, 85, 86, and Cumming v. Board of Education, 175 U.S. 528, 544, 545.)

It has been many times decided that the Fourteenth Amendment requires merely substantial equality and not identity of school facilities.

Lehew v. Brummell, 103 Mo. 546, 551.
People ex rel. King v. Gallagher, 93 N.Y. 438, 449, 455. State ex rel. Games v. McCann, 21 Ohio St. 198, 211.
Cory v. Carter, 48 Ind. 327, 362, 363.
State ex rel. Weaver v. Trustees of Ohio State University, 126 Ohio St. 290, 297.
Wong Him v. Callahan, 119 Fed. 381, 382.
Ward v. Flood, 48 Cal. 36, 54, 56.
School Dist. v. Hunnicutt, 51 F. (2d) 528.
State ex rel. Gumm v. Albritton, 98 Okla. 158, 224 Pac. 511, 513.
Lowery v. Board of Trustees, 140 N.C. 33, 52 S.E. 267. Dameron v. Bayliss, (Ariz.) 126 Pac. 273, 275.
Daviess County Board of Educ. v. Johnson, (Ky.) 200 S.W. 313, 315.
Gong Lum v. Rice, 275 U.S. 78, 84.
State ex rel. v. Board of Education, 7 Ohio Dec. 129.
People ex rel. Dietz v. Easton, (N.Y.) 13 Abbott's Practice (N.S.) 159, 161-162, 165.
United States v. Buntin, 10 Fed. 730, 735-6.
State ex rel. v. Gray, 93 Ind. 303, 306.
People ex rel. Cisco v. School Board, 161 N.Y. 598, 48 L.R.A. 113.

In determining the particular school facilities to be used by each race, the General Assembly is to be allowed a large measure of discretion. In Plessy v. Ferguson, 163 U.S. 537, 550, a statute of Louisiana requiring separate accommodations on railroad trains for white and colored

persons was held not to violate the Equal Protection Clause of the Fourteenth Amendment. In the opinion the Supreme Court said:

> "So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

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The courts will not interfere with the exercise of the legislative discretion, except in case of a very clear and unmistakable disregard of constitutional rights. In Cumming v. Board of Education, 175 U.S. 528, 545, the Supreme Court so held. The court there said:

> "We might add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

Other cases to the same effect are the following:

Lowery v. Board of Trustees, 140 N.C. 33, 52 S.E. 267, 270.
Ward v. Flood, 48 Cal. 36, 54-56.
State ex rel. v. McCann, 21 Ohio 198, 204-5, 211-12.
People ex rel. King v. Gallagher, 93 N.Y. 438, 456.
People ex rel. Dietz v. Easton, (N.Y.) 13 Abbott's Practice (N.S.) 159, 161-163.
State ex rel. v. Gray, 93 Ind. 303, 306.

II

The General Assembly of Missouri has imposed upon the Board of Curators of Lincoln University the mandatory duty to provide for negro residents of the state the opportunity and facilities for higher education (including graduate education in journalism), up to the standard furnished at the University of Missouri; and has appropriated ample funds to enable that Board to discharge that duty.

By Article 19 of Chapter 57 (Sections 9616 to 9624, R. S. Mo. 1929) the State of Missouri has created and established in Cole County, Missouri, a negro university, known as Lincoln University, for the higher education of negro students; and by

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said law has vested control of Lincoln University in a Board of Curators.

By Section 9618 of said Article, as amended (Laws 1939, page 685), the duty imposed on the Lincoln University Board is made definitely mandatory. That section as amended reads:

> "Section 9618. The hoard of curators of the Lincoln University shall be authorized and required to reorganize said institution so that it shall afford to the negro people of the State opportunity for training up to the standard furnished at the State University of Missouri. To this end the board of curators shall be authorized to purchase necessary additional land, erect necessary additional buildings, to open and establish any new school, department or course of instruction, to provide necessary additional equipment, and to locate the respective units of the university wherever in the State of Missouri in their opinion the various schools will most effectively promote the purposes of this article."

We here note the important fact that Section 9618, as it stood before the 1939 amendment, and at the time of the decision by the Supreme Court of the United States, vested in the Lincoln Curators a discretion in the matter of equalizing its facilities with those of the University of Missouri. It was because of that discretion that the Supreme Court of the United States ruled in favor of Gaines. That is obvious from the following language in its opinion (59 Sup.Ct. Rep. 232, 235-6):

> "The state court has not held that it would have been the duty of the curators to establish a law school at Lincoln University for the petitioner on his application. Their duty, as the court defined it, would have been either to supply a law school at Lincoln University as provided in Section 9618 or to furnish him the opportunity to obtain his legal training in another state as provided in Section 9622. Thus the law left the curators free to adopt the latter course. The state court has not ruled or intimated that their failure or refusal to establish a law school for a very few students, still less for one student, would have been an abuse of the discretion with which the curators were entrusted. And, apparently, it was because of that

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> discretion, and of the postponement which its exercise in accordance with the terms of the statute would entail until necessity and practicability appeared, that the state court considered and upheld as adequate the provision for the legal education of negroes, who were citizens of Missouri, in the universities of adjacent states."

It was in order to meet that defect in Section 9618 that the General Assembly amended it. The General Assembly took notice of the decision by the Supreme Court of the United States in the Gaines Case, as appears from Section 2 of the amending act (see Laws 1939, page 686). The discretion vested in the Lincoln Board by the former law has been removed, and that Board is now unconditionally and unqualifiedly required to provide for negro residents of Missouri the

opportunity and facilities for higher education in all branches available at the University of Missouri, up to the standard furnished at the University of Missouri.

The General Assembly has enabled the Lincoln University Board to discharge its duty by appropriating ample funds to that end. By various appropriation acts, at sessions of the General Assembly from 1921 to 1939 inclusive, there has been appropriated for Lincoln University the total sum of $5,034,653.49 (Laws of 1921 pages 65, 87, 101; Laws of 1923 pages 51, 60, 61, 96, 128; Laws of 1925 pages 57, 78; Laws of 1927 page 88; Laws of 1929 pages 24, 101; Laws of 1931 page 46; Laws of 1933 page 124, 130; Laws of 1935 pages 66, 67; Laws of 1937 pages 72, 73, 74; Laws of 1939 pages 76, 77,78).

Included in that total of $5,034,653.49 there was a specific appropriation of $200,000.00 for the use of the Board in employing additional teachers and instructors, and purchasing necessary equipment, for the purpose of opening new departments, so as to comply with the provisions of Section 9618 as amended. The specific appropriation of this sum appears in Laws 1939, page 78.

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While this case is now pending before the court on the complaint and motion to dismiss, this court takes judicial notice of the foregoing laws and appropriation acts. (Lamar v. Micou, 114 U.S. 218, 223; Mills v. Green, 159 U.S. 651, 657.)

That the duty now imposed upon the Lincoln University Curators by the amended act (Laws 1939, page 685) is mandatory, seems too plain for debate. Compare Lincoln University v. Hackmann, 295 Mo. 118, 124, and State ex rel. Gaines v. Canada, 342 Mo. 121, 113 S.W. (2d) 783, 791.

It is respectfully submitted that the foregoing laws and acts of the General Assembly of the State of Missouri make proper provision for plaintiff's education, including graduate education in journalism, within the borders of the State of Missouri; and provide for plaintiff an opportunity for instruction in that course of study equal to that available to white students at the University of Missouri.

III

Plaintiff has a plain remedy under the laws and acts aforesaid, by application to the Lincoln University Board of Curators for graduate education in journalism; and certainly she must exhaust that remedy before she could sue anyone for damages.

It is indisputable that the State of Missouri has delegated to the Board of Curators of Lincoln University the exclusive power, and has charged that Board with the mandatory and exclusive duty, to provide within the borders of the State of Missouri for qualified negro residents of the State (includ-

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ing plaintiff) the facilities and opportunity for obtaining graduate instruction in journalism

substantially equal to those available to white students in the University of Missouri. The State has not delegated any such power to the defendant registrar of the University of Missouri. Nor, for that matter, has the State delegated any such power to the Board of Curators of the University of Missouri. The State has not charged the defendant (or the Board of Curators of the University of Missouri) with any such duty. It is no part of the duty of the defendant (or of the Board of Curators of the University of Missouri) to provide for negroes the facilities and opportunities for education in any branch of learning. The duty so to provide rests elsewhere.

The plaintiff's right, therefore, to obtain graduate instruction in journalism in a state-supported university is one which, under the laws and acts aforesaid, she is entitled to assert against the Lincoln University Board only, and she is not entitled to assert it against this defendant.

It does not appear from the allegations in the complaint that plaintiff has made any application at all to Lincoln University for education in any branch. True, plaintiff alleges that Lincoln University does not offer graduate work in journalism, and lacks the faculty, plant, money or other resources or facilities to offer it. That allegation is conclusively overthrown by the appropriations to which we have referred, including a recent appropriation of $200,000 for the very purpose of enabling the Lincoln Board to employ additional teachers and purchase necessary equipment for the purpose of opening new departments. So the allegation that Lincoln University "cannot offer said work" must be treated as a mere conclusion of the pleader, conclusively overthrown by the appropriation act of which the court takes judicial notice.

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Having made no application to the Lincoln Board (so far as the complaint shows), and having thereby refused to avail herself of the remedy open to her, plaintiff is in no position to sue anybody for damages — and certainly she is in no position to sue defendant, who is in no way charged with the duty to afford negro residents of Missouri education in any branch.

In Trudeau v. Barnes, (5 C.G.A.) 65 F. (2d) 563, 564, a negro brought suit for damages under Section 43 of Title 8, U. S. Code, for being deprived of the right to register as a voter in the State of Louisiana. It appeared that every citizen denied the right to register as a voter was given the right under the Louisiana Constitution to apply without delay and without expense to himself to the trial court for relief, to submit his qualifications to vote to a jury, to have them finally passed upon by an appellate court. In other words, the plaintiff in that case had an administrative remedy available to him. But he had failed to pursue such remedy, and undertook instead to bring suit for damages under Section 43 of Title 8 U.S. Code, — exactly as this plaintiff has done. The district court denied recovery, and the Fifth Circuit Court of Appeals affirmed the judgment. The latter court said:

> "We cannot say, and refuse to assume, that, if the plaintiff had pursued the administrative remedy that was open to him, he would not have received any relief to which he was entitled. At any rate, before going into court to sue for damages he was bound to exhaust the remedy afforded him by the Louisiana Constitution. First National

Bank of Greeley, Colo. v. Weld County, 264 U.S. 450, 44 S. Ct. 385; 68 L. Ed. 784; First National Bank v. Gildart (C.C.A.) 64 F. (2d) 873, Fifth Circuit, decided April 22, 1933."

The principle applied in that case is in essence applied by the Supreme Court of the United States in the following decisions:

Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 50-51, 58 Sup. Ct. Rep. 459, 463,
Highland Farms Dairy v. Agnew, 300 U.S. 608, 616-617.
Petroleum Exporation, Inc., v. Public Service Commission, 304 U.S. 209, 222-3, 58 Sup. Ct. Rep, 834, 841.
Bourjois, Inc. v. Chapman, 301 U.S. 183, 188.
Natural Gas Co. v. Slattery, 302 U.S. 300, 309.
Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 123.
Gundling v. Chicago, 177 U.S. 183, 186.
Smith v. Cahoon, 283 U.S. 553, 561-2.
Porter v. Investors' Syndicate, 286 U.S. 461, 468, 471.
Lehon v. City of Atlanta, 242 U.S. 53, 55-6.
Leiberman v. Van De Carr, 199 U.S. 552, 562.
Ex parte Virginia Commissioners, 112 U.S. 177.

As tersely said by Mr. Justice Cardozo in Highland Farms Dairy v. Agnew, 300 U.S. 608, 616-617:

"One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. Lehon v. Atlanta, 242 U.S. 53, 56; Smith v. Cahoon, 283 U.S. 553, 562. He should apply and see what happens."

The same principle is announced in the following decisions, also:
State ex rel. v. Seibert, 130 Mo. 202, 222.
State ex rel. Onion v. Supreme Tent Phthian Sisters, 54 S.W. (2d) 468, 470.
State ex rel. Cammann v. Tower Grove Turnverein, 206 S.W. 242, 243.
State ex rel. v. Wenom, (Mo. Sup.) 32 S.W. (2d) 59.
State ex rel. v. Kansas City Gas Co., 254 Mo. 515, 163 S.W. 854.
State ex rel. Nick v. Edwards, et al., 260 S.W. 454 (Sup. Ct. en banc).
State v. Cape Girardeau County Court, 109 Mo. 248.
State ex rel. v. Smith, 48 S.W. (2d) 891.
State ex rel. v. Hudson, 226 Mo. 239, 265-266.
State ex rel. Bank of Conception, 174 Mo. App. 589, 593.

Since plaintiff has never applied to the Lincoln University Curators for education, they have never declined to furnish it. But assuming (for the sake of argument only) that plaintiff should make a demand on Lincoln University, and that her demand should be refused or ignored, in

such a case she

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would have a clear right to mandamus, not to compel the defendant registrar or the Board of Curators of the University of Missouri to admit her to the University of Missouri, but to compel the Curators of Lincoln University to establish a department of journalism in Lincoln University and to admit her as a student. This proposition is sustained by the following decisions:

Cumming v. Board of Education, 175 U.S. 528, 545.
School District v. Hunnicutt, 51 F. (2d) 528, 529.
Board of Education v. Excise Board, 86 Okla. 24, 206 Pac. 517, 521.
State ex rel. Morehead v. Cartwright, 122 Mo. App. 257.
Black v. Lenderman, 156 Ark. 476, 246 S.W. 876.
Jones v. Board of Education of City of Muskogee, 90 Okla. 233, 217 Pac. 400.
Cory v. Carter, 48 Ind. 327, 363-4.

While this situation will never actually arise, we note the point that if it should arise, plaintiff would have an adequate remedy against the Lincoln Board.

In State of Missouri v. Canada, 59 Sup. Ct. Rep. 232, 235, relied on by defendant, the University of Missouri urged that if Caines had applied to the Lincoln Board it would have been the duty of such Board to establish a Law School, and that it was its mandatory duty to furnish Gaines what he sought. The Supreme Court of the United States ruled against that contention on the ground that Section 9618, as it then read, did not impose a mandatory duty, and that the state court had not construed the section as mandatory. It seems clear that that decision is distinguishable on the ground that Section 9618 as now amended is mandatory.

On the remand and second hearing of the Caines Case, the Supreme Court of Missouri was of course bound by the mandate and opinion of the Supreme Court of the United States; and its second opinion (131 S.W. (2d) 217) must be read in the light of that fact.

In short, the Gaines Case arose long before the amendment of Section 9618, and was decided In the Supreme Court of the

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United States in light of that section as it originally was enacted; and the mandate of that court was controlling upon the Supreme Court of Missouri in its second hearing of that case. But the situation in the present case — the case at bar — is materially different. The present case was instituted after the amendment of Section 9618, and the decision here must be made in light of the provisions of that section as amended.

IV

Plaintiff has no right of action against defendant registrar in any event, because defendant

is a mere subordinate having no power or control whatsoever over the question whether negroes may be admitted as students in the University of Missouri.

We submit the propositions hereinbefore presented are decisive; and that it is unnecessary to say more. However, we call attention to the fact, apparent from Section 9625, R. S. Mo. 1929, that defendant registrar has nothing to do with determining whether negroes may be admitted in the University of Missouri. By that section the government of the university is vested in the Board of Curators of that institution. The defendant Canada is a mere subordinate of the Board, has no policy-making power whatever, and according to the allegations of the complaint is merely in charge of the "details covering the registration and admission of students," including the issuance to each student entitled to admission of a "permit to register." While the complaint refers to defendant as an "officer," it is obvious from the description of his duties that he is a person charged with merely ministerial duties, lacking any and all power to determine whether negroes may be admitted as students.

As a matter of law, and as we have hereinabove shown, not even the Board of Curators of the University of Missouri

determines whether negroes are admitted as students. As we have shown, the General Assembly has determined that question.

It does not appear from the complaint that plaintiff ever made any application to the Board of Curators of the University of Missouri; and we assume that it is for that reason that plaintiff has sued the registrar only, — on the theory (untenable, as we submit) that a mere subordinate clerk can be held liable in damages under Section 43 of Title 8 U.S. Code.

For these reasons we respectfully submit that the motion to dismiss the complaint should be sustained.

Respectfully submitted,

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Civil Action
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