[page 1]
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

REPLY BRIEF OF DEFENDANT ON MOTION TO DISMISS

I

In plaintiff's memorandum in opposition to the motion to dismiss there is no substantial answer attempted to point IV in defendant's brief in support of the motion to dismiss. It is defendant's contention that defendant is a mere subordinate employee of the Board of Curators and has no power to admit or refuse to admit plaintiff to the University of Missouri.

Plaintiff pleads and argues in her brief that the defendant is a "ministerial officer", but no facts are alleged which tend to show that defendant is an officer of any kind. This court takes judicial notice of the Constitution of Missouri, Article XI, Section 5 and Revised Statutes of Missouri, Section 9625, which vest the government of the University of Missouri in the Board of Curators. There is no such office as Registrar of the University, and the Registrar is not an officer either of the University or of the State of Missouri. He is a mere subordinate employee of the Board of Curators.

Plaintiff has cited the cases of Myers v. Anderson, 238 U.S. 368; Nixon v. Condon, 286 U.S. 73 and Lane v. Wilson, 307 U.S. 268 as authority that when an officer of a state deprives a citizen of rights secured by the Constitution of the United States, that said officer may be sued in damages. In each of these cases the defendants were duly elected and acting

[page 2]
election officials under the state laws of Maryland, Texas and Oklahoma, respectively.

In the cases cited by plaintiff the defendants were under a legal duty to permit the respective plaintiffs to register as voters or to refuse to register the plaintiffs. In the instant case the defendant Canada was under no legal duty whatever to the plaintiff. As a subordinate employee of the Board of Curators of the University of Missouri, he was under the contractual duty to carry out the instructions of his employer.

He was one of many employees of the Board of Curators who would carry out the instructions, rules and regulations of the Board of Curators. In order for plaintiff to receive instruction in the University of Missouri as a graduate student in journalism it would not only be necessary for the defendant as an employee of the Board of Curators of the University of Missouri to issue to her a permit to register, but it would be necessary for the dean of the graduate school to admit her into the graduate school, and it would be necessary for the head

of the department of journalism to admit her into that department, and it would be necessary for the teachers in each of the classes in journalism to admit her as a student into the classes, and it would be necessary for the secretary of the University to accept fees from plaintiff as a student in said graduate school for the study of journalism. All of these persons were employed by the Board of Curators of the University of Missouri, who are the governing body of the University. Defendant Canada had no more power or right to issue a permit to register, to plaintiff, than the dean of the graduate school would have under the regulations of the Board of Curators to admit plaintiff into the graduate school, or no more power or right than the head of the department of journalism would have to admit plaintiff into that department under the rules and regulations of the Board of Curators, or than each of the teachers would have to admit plaintiff into classes under the rules and

regulations of the Board of Curators, or more than the secretary of the University would have in accepting or declining to receive fees under the rules and regulations of the Board of Curators. If plaintiff was deprived of any rights by her inability to be admitted into the University of Missouri she was not deprived of those rights by the defendant Canada in carrying out his clerical duties as an employee of the Board of Curators, but she was deprived of same by the Board of Curators of the University, the sole governing body of that institution.

In order for plaintiff to maintain her position, it is necessary to establish the proposition that when the state legislature created the Board of Curators as the governing body of the University of Missouri, and that Board employed defendant as a subordinate, defendant by virtue of said employment could overrule the Board of Curators of the University of Missouri and establish his own rules and regulations as to who should be admitted to the University of Missouri. If the legislature of the State of Missouri had created the office of Registrar of the University and imposed upon him the duties of determining who should be admitted to the University, then and only then, could plaintiff be in any position to claim that the defendant had deprived her of any rights, if she had been deprived unlawfully of the opportunity to be admitted to the University of Missouri.

Since the defendant has no discretion as to whom he shall admit to the University of Missouri and is under no legal duty to admit or to refuse to admit anyone, but is merely an employee of the Board of Curators whose duty It is to admit or refuse to admit, by what right can defendant be held liable In damages for failure to exercise in a particular way a discretion that does not exist?

The position of plaintiff in this case is analogous to that of a litigant in court who would attempt to sue the clerk for damages for following out the orders of the court, on the

grounds that the court's instructions to the clerk were erroneous, and since the clerk carried out erroneous instructions of the court the clerk should he liable in damages to the litigant.

If the clerk of a court could be held liable in damages for carrying out the instructions of the court in a matter which was within the court's jurisdiction, this would require the clerk to challenge the correctness or legality of the directions and orders of the court at his peril.

The Supreme Court of the United States recognized that it was the Board of Curators at the University of Missouri who would admit or refuse to admit a student in the University of Missouri. In the case of State of Missouri, ex rel. Gaines v. Canada, et al., 59 Sup. Ct. Rep. 232, at page 234, the court said:

> "The action of the curators, who are representatives of the State in the management of the state university (R.S.Mo. Sec. 9625, Mo.St.Ann. Sec. 9625, p. 7330) must be regarded as state action."

And again on page 234:

> "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."

II

It is the contention of defendant that plaintiff was not deprived of any rights by not being admitted to the University of Missouri, and she was certainly not deprived of any right by defendant for the reasons herein above stated. Plaintiffs contention that she was entitled to receive an education in journalism in the graduate school at the University of Missouri Is based upon a misconception of the decision in the case of State, ex rel. Gaines v. Canada and the Board of Curators of the University of Missouri 59 Sup. Ct. Rep. 232.

In that case the United States Supreme Court interpreted

Article 19, Chapter 57, Revised Statutes of Missouri, 1929, as giving the Board of Curators of Lincoln University a discretion as to whether it should educate Gaines at Lincoln University or pay the tuition of Gaines in a University in an adjacent state.

In that case the facts showed that the State of Missouri had created a law school for whites within the State of Missouri, through the agency of the Board of Curators of the University of Missouri. The State had not created a law school for negroes within the state, and no agency was directed to create such a school.

Under those facts the United States Supreme Court held that Gaines could not be barred from the only existing public law school In the State of Missouri, and directed a mandate to the Missouri Supreme Court for proceedings in conformity with that opinion.

In conformity with that opinion the Missouri Supreme Court directed its mandate to the Trial Court to admit Gaines at the next school term at the University of Missouri, unless the Trial Court found that there then existed a law school for negroes substantially equal to that for whites.

The decision of the United States Supreme Court in the Gaines case was specifically limited to the facts of that case.
The United States Supreme Court was not dealing with a situation where the Board of Curators of Lincoln University had the mandatory duty to educate Gaines at Lincoln University but was dealing with a case in which Lincoln University had a discretion whether to educate the negro at Lincoln University or to pay his tuition out of state.

In the instant case Lincoln University has the mandatory duty to educate plaintiff at Lincoln University If she really desires to study journalism in a graduate school.

The United States Supreme Court did not rule that if it was the mandatory duty of Lincoln University to create an opportunity to obtain a legal education at Lincoln University, that Gaines would have any right to enter Missouri University. The court

[page 6]
said, p. 236:

> "We must regard the question whether the provision for the legal education in other states of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection as the pivot upon which this case turns."

And at p. 237:

> "In the instant case, the State Court did note that petitioner had not applied to the management of Lincoln University for legal training. But as we have said, the State Court did not rule that it would have been the duty of the Curators to grant such an application, but on the contrary, took the view, as we understand it, that the Curators were entitled under the state law to refuse such an application and in its stead to provide for petitioner's tuition in an adjacent state. That conclusion presented the federal question as to the constitutional adequacy of such a provision while equal opportunity for legal training within the state was not furnished, and this federal question the State Court entertained and passed upon. We must conclude that in so doing the court denied the federal right which petitioner set up in the question as to the correctness of that decision as before. We are of the opinion that the ruling was error, and that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State."

> "The judgment of the Supreme Court of Missouri is reversed and the cause is remanded for further proceedings not inconsistent with this opinion."

The decision of the Missouri Supreme Court upon the return of this case to it from the Supreme Court must be read in the light of the mandate to the Missouri Supreme Court from the United States Supreme Court.

However, there is no mandate that Bluford shall be admitted to the University of Missouri

either by the Board of Curators of that University, or by this defendant, under the law that now exists. Bluford knowing that the mandatory duty was upon Lincoln University to give her an education in journalism the graduate school, and that money was appropriated for that purpose cannot by merely pleading that Lincoln University cannot give her an education destroy the validity of Article 19, Chapter 57, Revised Statutes of Missouri, 1929, as amended in 1939 and

6

[page 7]
the appropriations to Lincoln University. The Court's judicial knowledge, to the contrary, overcomes this pleading. A non-controverted allegation in a pleading does not preclude the Court from finding the fact to be otherwise, by resorting to its judicial knowledge.
23 C.J. 174.

III

Plaintiff tacitly concedes the constitutionality of the segregation of the races as prescribed by the laws of the State of Missouri. But plaintiff attempts to destroy the educational system set up by the State of Missouri by the captious assertion that on a day certain the Board of Curators of Lincoln University had not created a graduate school in journalism. Plaintiff does not allege that she requested the Board of Curators of Lincoln University to create such a school in order that she might be admitted to the same. She does not allege that a reasonable time has elapsed since she so requested the Board of Curators of Lincoln University and that the Board has not created such a school or made any reasonable effort to do so.

Plaintiff is entitled to receive education in journalism in the graduate school at Lincoln University if she desires such education in good faith. However, if she had instituted a mandamus suit in the Circuit Court of Cole County, Missouri, requiring that the Board of Curators of Lincoln University admit her to the University to study journalism In the graduate school without alleging that she had requested the Board to give her such an opportunity and without alleging that the Board of Curators had failed to give her that opportunity after having had a reasonable time to comply with her request, certainly the Circuit Court of Cole County would not in those circumstances be expected to mandamus the Board of Curators of Lincoln University. The rule of reason is firmly imbedded in Anglo-American Jurisprudence. The Supreme Court of the United States recognized that fact In its enforcement of the Anti-Trust Laws of

7

[page 8]
the United States in the case of United States v. Standard Oil Co., 221 U.S. 1, 60, 62. It is recognized by the Supreme Court of Missouri in St. Louis v. Christian Brothers College, 257 Mo. 541, 552 and in many other cases including the late case of Fischbach Brewing Company v. City of St. Louis, 95 S.W. (2d) 335, 339.

It is a corollary of the rule of reason that where two statutes are susceptible of a

construction which will give force to both they must be so construed. State ex rel. Halsey v. Clayton, 226 Mo. 292, 302; Hannibal Trust Company v. Elzea, 315 Mo. 485; McGill v. City of St. Joseph, 38 S.W. (2d) 725, 728.

Therefore, we have a system of education in the State of Missouri under which equal facilities are furnished to the races In separate schools, a method the validity of which has been sustained by many decisions of the Supreme Court of the United States Including Plessy v. Ferguson, 163 U.S. 537; Gong Lum v. Rice, 275 U.S. 78; Cumming v. Board of Education, 175 U.S. 528; and State ex rel. v. Canada, 59 Sup. Ct. 232, 234. We have in the State of Missouri an agency charged with the duty to create the separate school for the whites, and an agency with the duty to create the separate school for the negroes. The rule of reason requires that plaintiff, a negro, apply to the agency charged with the duty of creating a separate school for negroes to give her the opportunity for education which she desires, and the duty is thereupon cast upon such agency to give her that opportunity within a reasonable time.

That Lincoln University would be entitled to a reasonable time in which to give plaintiff an opportunity to study journalism in that University is shown by the United States Supreme Court opinion. At page 237 it is shown that a discrimination which is of a temporary character Is excusable. However, the court held that because the Board of Curators of Lincoln University under the old statute had the discretionary power to refuse to create a school when requested the discrimination could not be regarded as a temporary one. The court said:

8

[page 9]

> "In that view, we cannot regard the discrimination as excused by what is called its temporary character."

Obviously when Lincoln University is required to furnish the school requested by a qualified negro student within a reasonable time such discrimination would be temporary and excusable.

If plaintiff should so request and the agency should fail or neglect to comply with the request within a reasonable time, plaintiff would have an adequate remedy either in a suit for damages against the Board of Curators of Lincoln University or by mandamus to force that agency to do its duty.

Plaintiff in no event would have any remedy against defendant Canada because defendant Canada owes her no duty. The duty to plaintiff in regard to education is the duty owed by the Board of Curators of Lincoln University, but even as to that agency, she would be entitled to no relief until she had given that agency a reasonable opportunity to perform its duty.
She cannot be heard to complain until she has requested that agency to act.

As tersely said by Justice Cardozo in Highland Farm Dairies 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. * * * He should apply and see what happens."

In Cory v. Carter, 48 Ind. 327, a negro attempted to compel the officers of a white school to admit a negro into the white school. The court held that mandamus would not lie against the

officers of the white school but the Trustee who had the duty to organize colored schools could be compelled to act. The court said, at page 364:

> " * * And even if for the sake of argument we were to concede that colored children are under and by force of the Fourteenth Amendment so entitled (to go to white schools) the court cannot in the absence of legislative authority confer that right upon them."

The court then proceeded to state that the legislature had declared

[page 10]
that when schools could not he provided for the colored children the Trustee should provide such other means for their education as the school revenue would permit; and the court concluded:

> "If the Trustee fails in the discharge of this duty he may he compelled by a mandate to discharge the duty imposed on him by law."

For the reasons stated in our original brief on motion to dismiss and for the reasons stated herein, we respectfully submit that the motion to dismiss the complaint should he sustained.

Respectfully submitted,

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[page 11]

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A. L. Arnold - Clerk
By Edward Morris
Deputy