No. 37449 IN THE SUPREME COURT OF MISSOURI DIVISION No. 1. MAY TERM, 1941.
STATE OF MISSOURI AT THE RELATION OF LUCILE BLUFORD, APPELLANT, VS.
S. W. CANADA, REGISTRAR OF THE UNIVERSITY OF MISSOURI, RESPONDENT.
RESPONDENT'S ADDITIONAL ABSTRACT AND BRIEF.
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INDEX
Additional Abstract of the Record 1-2
Statement 3
Points and Authorities 9
Argument—
I. Mandamus should be denied because this suit is not prosecuted in good faith for the purpose alleged in the alternative writ 17
II. Mandamus should be denied because respondent registrar does not owe relator the alleged legal duty to issue to her a permit to register as a student in the University of Missouri 34
A. Under present laws of this state,
relator can have no cause of action for admission to the University of Missouri 34
B. Relator has made no demand upon Lincoln University for instruction, and therefore is in no position to demand admission to the University of Missouri, even on her own theory
of the case 52
C. Respondent registrar is a mere subordinate of the Board of Curators, and his lawful duty is to obey the rules and regulations of the Board.

Mandamus should not issue to compel him to violate his lawful duty 66
III. Mandamus is a discretionary remedy, and not a writ of right; and under all the circumstances of this case the exercise of a sound judicial discretion requires that the writ should be denied 73
Conclusion 77
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ADDITIONAL ABSTRACT OF THE RECORD.

The Appellant's Abstract of the record, in setting forth respondent's return to the alternative writ of mandamus (R. 21-32), omits paragraph 21 thereof, which was added to the return by amendment during the trial (R. 370). Said paragraph 21 is in words and figures as follows, to wit:

"21. Relator at the time this suit was filed and at all times mentioned in her petition and at all times since said date has not been and is not now acting in good faith, and Relator does not come into this court with clean hands, in that she is proceeding herein for an ulterior purpose and not to obtain for herself the relief purported to be sought. Relator is attempting to destroy the law and the policy of the State of Missouri with reference to separating the white and negro races for the purpose of education. Relator is proceeding as a mere nominal party for the National Association for the Advancement of Colored People, and in conspiracy with said

Association, for its purposes and for the purpose of obtaining publicity for it and for other persons and causes."

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STATEMENT.

Relator, a negro citizen of Missouri, brought suit in mandamus to compel the respondent, registrar of the University of Missouri, to issue to her a permit to register in the Graduate School of the University, for graduate work in journalism (R. 1- 10, 12-20). The circuit court found the issues against relator, quashed the alternative writ and rendered judgment in favor of respondent (R. 41). Relator appealed.

Relator applied for admission to the university on January 30, 1939, and again on September 14, 1939 (R. 67-68, 85). The respondent registrar refused admittance on both dates (R. 68, 85). The refusals were based upon a ruling of the Board of Curators of the university, made in accordance with the laws and policy of the State of Missouri providing for separate education of the white and colored races (R. 215-218). The state maintains two state universities: Lincoln University for colored students and the University of Missouri for students of the white race.

At the time relator brought this suit she was twenty-eight years of age (R. 44). She had been graduated seven years previously at the University of Kansas with an A. B. degree in Journalism (R. 62, 73). Her transcript from that institution and her oral testimony show that she had received extensive education in that field (R. 48). After her graduation she became a newspaper woman (R. 99). At the time of her application she was, and for some years had been, and she is now, managing editor of the Kansas City Call, a negro newspaper (R. 99). She has charge of the publication of five editions of that paper each week (R. 51), and also has charge of the publication of a St. Louis negro newspaper known as the St. Louis Call (R. 51). As managing editor she is in general charge of all departments (R. 52). The Kansas City Call covers fifteen states with a negro population of about 3,000,000, and reaches about 100,000 readers (R. 55-6).

Relator is a member of the National Association for the Advancement of Colored People, and is at the head of its "Publicity Committee" (R. 104). This association for some years has been pursuing a general policy of bringing test suits in various states to break down the policy of race separation in education (R. 164-5). Relator is represented in this suit by the special counsel for the association (R. 11,108) Respondent alleged in his answer and return that relator's applications to the University of Missouri were not made in good faith, and that relator was and is acting as a mere front for the N. A. A. C. P., and in conspiracy with it, in the attempt to break down the state policy of race separation in education. (Additional Abstract, p. 2, supra.) In support of this defense respondent offered in evidence many letters and telegrams passing between relator and various officials of the association (R. 105-117). The substance of this correspondence is fully stated in Point I of the Argument, infra.

On the dates when relator sought admission to the University of Missouri, Lincoln University did not offer graduate instruction in Journalism. There is no evidence that any negro had ever applied to Lincoln University for such instruction. Relator's suit proceeds on the theory that the mere absence of such instruction in Lincoln University automatically entitled her forthwith to

admission in the University of Missouri.

Respondent contends that relator has no cause of action against the University of Missouri, or against respondent registrar; and that (assuming she actually wants instruction) her remedy is by application to Lincoln University. Respondent bases this contention upon the mandatory provisions of the Lincoln University Act (Sec. 10774, R. S., 1939), requiring Lincoln University to provide the same courses and equal standards of instruction as are available in the University of Missouri, for negro residents of the state; and upon the appropriation by the General Assembly of ample funds for the specific purpose of establishing new departments in Lincoln University (Laws, 1939, p. 78). In 1939 the General Assembly appropriated to Lincoln University the sum of $200,000 for this specific purpose (Laws, 1939, p. 78), and $704,500 additional for general purposes (Laws, 1939, pp. 76-79). At the time of the trial the unexpended balance in the $200,000 appropriation for new departments was $120,850.14 (Exhibit 32, R. 254, 261, 262); and the unexpended balances in the Lincoln appropriations for new departments, new buildings and equipment, salaries and general expense totalled $499,595.29 (Exhibits 28, 29, 30, 31, 32, 43 and 44; R. 250, 252, 254, 362, 363, 364). The cost of establishing and maintaining graduate instruction in Journalism for one year would be $8,744 (R. 301); the cost of both undergraduate and graduate courses would be $15,795 per year, and on a liberal estimate would not exceed $35,000 for the first biennium (R. 293-4). The appropriations to Lincoln at the 1939 session became available on July 7, 1939 (Laws 1939, pp. 76- 79), and in the intervening period before the opening of the September semester, 1939, there was ample time for the establishment of a course in Journalism in Lincoln, if relator had asked for it (R. 321-2).

The record shows without dispute that relator never applied to Lincoln University for instruction. Although respondent registrar as early as August 16, 1939, suggested that she apply to Lincoln (R. 78), her first communication with Lincoln was by letter written September 9, 1939 (R. 80), received on September 11,1939 (R. 82), which was only two or three days before the opening of the September semester (R. 82). In this letter relator made no demand or application for instruction, and merely inquired whether Lincoln was “offering graduate work in Journalism this fall” (R. 81-2). Even if she had then applied for admission to Lincoln, there would not have been time for Lincoln to establish a course in Journalism in the two or three days before the September semester began. She demanded admission to the University of Missouri on September 14th (R. 85), without even waiting for Lincoln’s reply to her letter of inquiry (R. 86).

There is no evidence of any refusal by Lincoln University to comply with any application for graduate work in Journalism. As stated, relator made no such application at any time; nor has any other negro applied for it.

There is no proof that respondent registrar was ever told by relator that she had made any application to Lincoln or that Lincoln had refused any application. Relator’s demands on the respondent registrar were unconditional demands for admission, with no pretense that she had applied to Lincoln (R. 67-68, 85).

The record further shows that the respondent registrar has no power or authority to overrule the Board of Curators of the University of Missouri by issuing permits to students in violation of the board’s rules and policy (R. 229). Respondent has no power or authority to make rules or fix policy (R. 229). He is not a statutory officer, but a mere subordinate clerk, whose duties consist in carrying out the rules and policies of the board and of the faculty (R.

229-230). According to the by-laws of the University it is within the powers of the president of the University and not of the registrar "to refuse to admit to the University any student not entitled to admission under the regulations of the University" (R. 222). Eligibility for admission of students from the standpoint of race, age and residence is determined by the board (R. 272) not by the registrar (R. 229). The board by resolution adopted in March, 1936, established the rule that negroes are not to be admitted as students in the University of Missouri (R. 215-218). This rule was binding on respondent, and he had no authority to do otherwise than obey it (R. 272, 229-30).

The trial court at the conclusion of the evidence heard oral arguments, then took the cause under advisement with leave to the parties to file briefs (R. 388). Thereafter the court made a general finding of the issues and rendered judgment in favor of respondent (R. 41), from which judgment relator appealed to this court (R. 42).

POINTS AND AUTHORITIES.

I.

Mandamus Should Be Denied Because This Suit Is Not Prosecuted in Good Faith for the Purpose Alleged in the Alternative Writ.

State ex rel. Hahn v. Westport, 135 Mo, 120, 127, 133, 36 S. W. 663.

State ex rel. Hyde v. Jackson County Medical Society, 295 Mo. 144, 152, 243 S. W. 341.

State ex rel. Haeusler v. German Mutual Life Insurance Co., 169 Mo. App. 354, 363, 152 S. W. 618.

State ex rel. Thomas Cusack Co. v. Shin- nick, 208 Mo. App. 284, 289, 232 S. W. 1053.

Funck v. Farmers' Elevator Co., (Iowa) 121 N. W. 53, 56.

People ex rel. Durant Land Improvement Co. v. Jeroloman, (N. Y.) 34 N. E. 726. Teeple v. State ex rel. Bowen, (Ind.) 86 N. E. 49.

State ex rel. Hale v. Risley, (Mich.) 37 N. W. 570.

Donahue v. State ex rel. Seieroe, (Neb.)
96 N. W. 1038.

38 Corpus Juris 574.

The finding on the issue of good faith must be ascertained from the judgment and not from the memorandum opinion.

Smith v. Pettis County, (Mo. Sup.) 136 S. W. 2d 282, 285.

Missouri-Kansas & Eastern Railway Co. v. Holschlag, 144 Mo. 253, 257, 45 S. W. 1101.

Hewitt v. Steele, 118 Mo. 463, 473, 24 S. W. 440.

Smith v. Holdoway Construction Co., 344 Mo. 862, 129 S. W. 2d 894, 901.

Easton Food Center v. Beatrice Creamery Co., (Mo. App.) 119 S. W. 2d 987, 989.

Mandamus is a proceeding at law; and the trial court's finding in respondent's favor on this issue, being supported by substantial evidence, should not be disturbed on appeal.

State ex rel. Dolman v. Dickey, 280 Mo.
536, 219 S. W. 363, 367.

State ex rel. Journal Printing Co. v. Dreyer, 183 Mo. App. 463, 479, 167 S. W. 1123.

State ex rel. Haeusler v. German Mutual Life Ins. Co., 169 Mo. App. 354, 363-4, 152 S. W. 618.

State ex rel. First National Bank v. Bourne, 151 Mo. App. 104, 125, 131 S. W. 896.

II.

Mandamus Should Be Denied Because Respondent Registrar Does Not Owe Relator the Alleged

Legal Duty to Issue to Her a Permit to . Register As a Student in the University of Missouri.

A. Under present laws of this state, a negro can have no cause of action for admission to the University of Missouri.

Secs. 10774 and 10779, R. S. Mo., 1939. Laws, 1939, pp. 76-79.

Mandamus will not issue to compel the University of Missouri to do something which it has no lawful authority to do, and which Lincoln University alone is authorized and required to do, namely, to furnish higher education to negro residents of this state.

State ex rel. Kent v. Olenhouse, 324 Mo. 49, 23 S. W. 2d 82, 86.
State ex rel. Nick v. Edwards, (Mo. Sup.) 260 S. W. 454.
State ex rel. Hamilton v. Brown, 172 Mo. 374, 381-2, 72 S. W. 640.
State ex rel. Blue v. Waldo, 222 Mo. App. 396, 5 S. W. 2d 653.
State ex rel. Hemmerla v. Newburg Special Road District, 217 S. W. 605, 606.
State ex rel. Laclede Gas Light Co. v. Murphy, 170 U. S. 78, 99.
State ex rel. Onion v. Supreme Temple Pythian Sisters, 227 Mo. App. 557, 54 S. W. 2d 468, 470.
United States ex rel. Fisher v. Board of Liquidation, (5 C. C. A.) 60 Fed. 387, 390.
State ex rel. Peoples Bank of Greenville v. Goodwin, (S. C.) 62 S. E. 1100, 1102.
American Book Co. v. Marrs, (Tex.) 253 S. W. 817, 818.
38 Corpus Juris 554.
Mills v. Lowndes, 26 Fed. Supp. 792, 802-3, 806.
State ex rel. Relief Association v. Wilmington, 118 Atl. 640.
Sims v. Fitzgerald, Mayor, 191 Mass. 382, 77 N. E. 714.
Holtzclaw v. Riley, 113 Ga. 1023, 39 S. E. 425.
State ex rel. Whidden v. Jones, 125 Fla. 829, 170 So. 168.
Mayer v. Police Commissioners, 136 Calif.
App. 534, 29 Pac. 2d 458.
38 Corpus Juris 848-9.

The decisions in the Gaines case are inapplicable, because they involved and were controlled by a radically different statute.

State ex rel. Gaines v. Canada, 305 U. S. 337.
State ex rel. Gaines v. Canada, 344 Mo. 1238, 131 S. W. 2d 217.

If, upon application by any qualified negro, Lincoln University should refuse to establish a department of journalism, such applicant would have an adequate remedy by mandamus to compel the Lincoln Board to perform its duty to establish such department.

State ex rel. Johnson v. Sevier, 339 Mo.
483, 98 S. W. 2d 677, 678.
State ex rel. McCleary v. Adcock, 206 Mo.
550, 556, 105 S. W. 270.
State ex rel. Kelleher v. President and Directors of Public Schools, 134 Mo. 296, 305, 35 S. W. 617.
State ex rel. Journal Printing Co. v. Dreyer, 183 Mo. App. 463, 481, 167 S. W. 1123.
Cumming v. Richmond County Board of Education, 175 U. S. 528, 545.
State ex rel. Morehead v. Cartwright, 122 Mo. App. 257, 99 S. W. 48.
School District v. Hunnicutt, 51 F. 2d 528, 529.
Board of Education v. Excise Board, 86 (Okla.) 24, 206 Pac. 517, 521.

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.

B. Relator has made no demand upon Lincoln University for instruction, and therefore is in no position to demand admission to the University of Missouri, even on her own theory of the case.

Bluford v. Canada, 32 Fed. Supp. 707, 709.
Myers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41, 50-51.
Highland Farms Dairy v. Agnew, 300 U. S. 608, 616-617.
Bourjois, Inc., v. Chapman, 301 U. S. 183, 188.
Petroleum Exploration, Inc., v. Public Service Commission, 304 U. S. 209, 222-3.
Natural Gas Co. v. Slattery, 302 U. S. 300, 309.
Gundling v. Chicago, 177 U. S. 183, 186. Smith v. Cahoon, 283 U. S. 553, 561-2.
Hall v. Geiger-Jones Co., 242 U. S. 539, 554.
Lehmann v. State Board of Public Accountancy, 263 U. S. 394, 398.
Utah Power & Light Co. v. Pfost, 286 U. S. 165, 190.
Dalton Adding Machine Co. v. State Corporation Commission of Virginia, 236 U. S. 699, 701.
Plymouth Coal Co. v. Commonwealth of Pennsylvania, 232 U. S. 531, 545.
Goldsmith v. Board of Tax Appeals, 270 U. S. 117, 123.
Bradley v. Richmond, 227 U. S. 477, 483.
State ex rel. v. Seibert, 130 Mo. 202, 222, 32 S. W. 670.
State ex rel. Onion v. Supreme Tent Pythian Sisters, 227 Mo. App. 557, 54 S. W. 2d 468, 470.
State ex rel. Cammann v. Tower Grove Turnverein, 206 S. W. 242, 243.
State ex rel. v. Wenom, 326 Mo. 352, 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 (S. Ct. en banc).
State v. Cape Girardeau County Court, 109 Mo. 248, 19 S. W. 23.
State ex rel. v. Smith, 48 S. W. 2d 891, 330 Mo. 252.
State ex rel. v. Hudson, 226 Mo. 239, 265- 266, 126 S. W. 733.
State ex rel. v. Bank of Conception, 174 Mo. App. 589, 593, 163 S. W. 945.

The rule of reason is applicable in the construction of all statutes.

Stack v. General Baking Co., 283 Mo. 396, 410-411, 223 S. W. 89.
St. Louis v. Christian Brothers College, 257 Mo. 541, 552, 165 S. W. 1057.
Standard Oil Co. v. United States, 221 U. S. 1, 60.
United States v. American Tobacco Co., 221 U. S. 106, 178-180.

C. Respondent registrar is a mere subordinate of the board of curators, and his lawful duty is to obey the rules and regulations of the board. Mandamus should not issue to compel him to violate his lawful duty.

The government of the University of Missouri is vested in its Board of Curators (Sec. 10782, R. S. Mo., 1939).

Relator has no cause of action against respondent registrar, a mere subordinate of the Board of Curators, to compel him to violate his lawful duty to follow the rules and regulations of the Board.

State ex rel. Laclede Gas Light Co. v. Murphy, 170 U. S. 78, 99.

United States ex rel. Fisher v. Board of Liquidation, (5 C. C. A.) 60 Fed. 387, 390.
State ex rel. Dodd v. Tison, 175 La. 235, 143 So. 59.
American Book Co. v. Marrs, (Tex.) 253 S. W. 817.
Holtzclaw v. Riley, (Ga.) 39 S. E. 425.

III.

Mandamus Is a Discretionary Remedy, and Not a Writ of Right; and under All the Circumstances of this Case the Exercise of a Sound Judicial Discretion Requires That the Writ Should Re Denied.

State ex rel. Jacobsmeyer v. Thatcher, 338 Mo. 622, 627, 92 S. W. 2d 640, 643.
People ex rel. Wood v. Board of Assessors of the City of Brooklyn, 33 N. E. 145.
State ex rel. Crow v. Boonville Bridge Co., 206 Mo. 74, 134-135, 103 S. W. 1052. High on Extraordinary Legal Remedies (3d Ed.), Section 9.
State ex inf. Barker v. Kansas City Gas Co., 254 Mo. 515, 531, 163 S. W. 854. Duncan Townsite Co. v. Lane, 245 U. S. 308, 311.
Arant v. Lane, 249 U. S. 367, 371.
State ex rel. Burnett v. School District of City of Jefferson, 335 Mo. 803, 815, 74 S. W. 2d 30, 34.
State ex rel. Attorney General v. Railroad Co., 77 Mo. 143, 147.
State ex rel. Lyons v. Bank, 174 Mo. App. 589, 593-595, 163 S. W. 945.
Social equality cannot be enforced by law. Plessy v. Ferguson, 163 U. S. 537, 551. People ex rel. King v. Gallagher, 93 N. Y. 438, 448.
State ex rel. Weaver v. Trustees of Ohio State University, 136 Ohio St. 290, 297. Lehew v. Brummell, 103 Mo. 546, 551-2, 15 S. W. 765.
Younger v. Judah, 111 Mo. 303, 311-312, 19 S. W. 1109.
Martin v. Board of Education, (W. Va.) 26 S. E. 348, 349.
Roberts v. City of Boston, 5 Cush. 198, 210. Ward v. Flood, 48 Calif. 36.

ARGUMENT.

I.

Mandamus Should Be Denied Because This Suit Is Not Prosecuted in Good Faith for the Purpose Alleged in the Alternative Writ.

It is respectfully submitted that this suit was not brought in good faith for the purpose alleged in the petition and alternative writ. It was brought and is prosecuted for an ulterior and indirect purpose. It is prosecuted in relator's name by the National Association for the Advancement of Colored People as part of its campaign to destroy this state's policy of race separation in education. The ostensible object of the suit is to enable relator to obtain graduate instruction in journalism; but the testimony of the relator and the communications passing between herself and the N. A. A. C. P. make it perfectly plain that the suit is not actually prosecuted for that purpose. The ulterior object of the suit and the absence of good faith are alleged in respondent's return (Additional Abstract, p. 1, supra). The evidence overwhelmingly supports the circuit court's finding in respondent's favor on this issue.

What are the conceded facts? Relator was graduated nine years ago at the University of Kansas with an A. B. degree in journalism (R. 62, 73). A transcript from that institution and her oral testimony show the extensive education in that field which she has had (R. 48). Since her graduation she has become an experienced newspaper woman (R. 99). She is managing editor of the Kansas City Call (R. 99). She has charge of the publication of five editions of that paper

each week (R. 51). She is in general charge of all departments of the paper, and is responsible for correct writing and editing, makeup of pages, seeing that the paper goes to press on time to make mail schedules, and all other details of management (R. 52). The Kansas City Call covers 15 states having a negro population of about 3,000,000 and reaches about 100,000 readers (R. 55-6). She also has charge of the publication of the St. Louis Call, which is published in the plant of the Kansas City Call (R. 51). Obviously, this relator must already know more about journalism than any graduate school could possibly teach her. Dean Frank L. Martin of the University of Missouri School of Journalism testified that he never heard of a managing editor of a newspaper returning to school to study journalism (R. 323-4). So at the outset we have the incredible fact of an experienced and successful newspaper woman professing a desire to abandon her career and return to the class-room for the study of subjects which, to one of her experience, would seem quite elementary.

Relator is a member of the N. A. A. C. P., as are all of her counsel. She is the head of its "Publicity Committee" (R. 104). Her father is secretary and one of her counsel is president of its Kansas City branch (R. 104-5). That association for some years has been pursuing a general campaign of bringing test suits in various states to break down the policy of race separation in education. It has prosecuted such suits in North Carolina, Virginia, Maryland, Tennessee and Missouri (R. 164-5). These suits are systematically brought in the names of persons ostensibly desiring instruction in various fields. The Gaines case in this state was such a suit (R. 164-5). Relator knew that this state's policy was to educate negroes at Lincoln University, and not to admit them as students at the University of Missouri (R. 46).

The record contains letters and telegrams passing between relator and various officials of the association, regarding her application for admission to the University of Missouri. These officials included Mr. Roy Wilkins, assistant secretary, Mr. Charles H. Houston, special counsel, and Mr. Thur- good Marshall, assistant special counsel, all of whom are on the association's official roster appearing on its letterhead (R. 108). These communications throw a flood of light upon the real purpose of this suit.

In relator's letter of January 25, 1939, to Mr. Houston she expressed doubt whether her employer (Mr. Franklin, publisher of the Kansas City Call) would grant her leave of absence. In this connection she said (R. 108):

"Mr. Franklin has not yet granted me a leave of absence and I'm not sure that he will. If he doesn't, and I can't attend for a whole semester (if they admit me), do you think I should enroll anyway and attend classes for a few days?"

This shows there was no sincere purpose to submit a bona fide application to the University, for the purpose of really receiving instruction there. In this connection it should be noted that in her letters to the University authorities relator represented that she desired to take the required course of study for a "master's degree" (R. 60, 73, 100), which she knew would require at least one year (R. 101, 119). The false pretense is exposed by the above letter, disclosing that, if admitted to the University, she might only stay "a few days."

The first paragraph of this letter shows that relator's contract with counsel for the N. A. A. C. P. was not made on her own initiative, but was suggested to her by its assistant secretary (R. 106).

The association's reply to relator's letter is most significant. It was written on January 27, 1939, by special counsel Houston from the association's home office in New York. We quote

from it as follows (R. 108-9):

"I acknowledge your letter of January 25 and hasten to express my hopes that you will register, or attempt to register at the University of Missouri, School of Journalism. This will do four or five very valuable things for the cause of higher education.

"1. It will focus attention on Negro women. So far our test cases have been men. The only girl whose case we ever had for a short time was that of Alice Jackson of Richmond, Virginia. She applied to the University of Virginia for graduate work in English. Virginia passed a scholarship act and her case took an inactive status. Yours would be the first case of a Negro woman actually being accepted and either admitted or refused at a State university.

"2. It will keep the legislature of Missouri from going off half cocked on the law school. It will show it that the problem cannot be solved by putting a law school at Lincoln University.

"3. It will keep public attention focused on the University problem. A rejection of you would have much more publicity value than a rejection of a man.

"4. The School of Journalism at the University of Missouri is about the best and your applying will force its hand on whether the school stands for liberal principles.

"5. If you get in, you have the satisfaction of opening a new door. * * *

"If possible I hope you can get to Columbia a day in advance so as to get a room tentatively, because I should not like to have you worry both about a room and school at the same time."

This letter plainly shows that the association was in the business of promoting test suits. It says, "So far, our test cases have been men," and that the Alice Jackson case was the only case of a girl "we ever had." Please note the significance of that expression: "OUR test cases!" The association no doubt regards this case, not as one to obtain instruction for relator, but as just another one of "our test cases."

This letter plainly shows the opposition of the N. A. A. C. P. to the expansion of the Lincoln curriculum. When Mr. Houston wrote it he had no idea what kind of a law school might be established at Lincoln University. He could not possibly have known, for the new statute under which that school was to be established was not yet enacted (Laws, 1939, pp. 685-6). Plainly, the N. A. A. C. P. was opposing any Lincoln law school at all. This is obvious from the language: "It will keep the legislature of Missouri from going off half cocked on the law school; it will show it that the problem cannot he solved by putting a law school at Lincoln University.'' This shows beyond dispute that the N. A. A. C. P. was opposed to the establishment of any separate law school for negroes—regardless of how good it might be. In the Gaines case the association's counsel professed to be interested only in equal facilities for the legal education of negroes. The real purpose—here unmasked—was, if possible, to prevent the establishment of equal facilities. If the association could have had its way, Lincoln University would never have had a law school; yet this record shows that in spite of its opposition the law school is in operation (R. 263), with a staff of four professors, a law library of 22,000 volumes (R. 269) and an enrollment of 15 negro students (R. 263).

The N. A. A. C. P. was also vitally interested in stirring up publicity. Note that in the above letter the association says to relator (R. 108): "A rejection of you would have much more publicity value than a rejection of a man." Quite obviously, the association was considering whether to use a woman or a man as the next "applicant"; and was urging the advantage, purely from a publicity standpoint, of using the relator because she was a woman. Relator testified that rejection would cause more publicity than acceptance (R. 186). The Kansas City

Call was also interested in this publicity, as a possible aid in boosting its circulation (R. 181-2).

On January 30, 1939, in accordance with the association's request (R. 108), the relator made application for admission to the University of Missouri (R. 67, 110). And who came with her? Significantly enough, she was accompanied by Elmore Williams, then president of the N. A. A. C. P. branch at Kansas City, and by James Herbert, an attorney for the association, who had "successfully handled the golf course segregation case" at Kansas City (R. 112). It is unusual, to say the least, for a prospective student to take along a lawyer when seeking to enroll. It was evidently thought wise not to disclose the presence of the president and the lawyer, for relator says (R. 112), "I went to the campus alone."

Of course, if relator's application had been made in good faith for the sincere purpose of receiving education, the rejection of the application would have caused disappointment. But the result in fact was exactly the opposite. When the application was rejected, relator advised Mr. Houston by wire (R. 110). Was Mr. Houston disappointed or crestfallen? Not at all. To the contrary, he was highly elated! He immediately telegraphed relator as follows (R. 111-112):
"Congratulations and thanks. You have
done education negroes real service."
This telegram from the association's chief counsel is a plain give-away. The rejection of relator's application instead of being received as a set-back was actually hailed a cause for congratulation! The association thanked her for putting on the act, and commended her for "real service" rendered—not service to her own interests, but to its campaign. It is simply impossible to reconcile this telegram with the idea that the "application" was made in good faith. Manifestly it was a mere maneuver in the association's campaign, and the association was better pleased by the rejection than it would have been by an acceptance. This is too plainly apparent to be denied.

In her letter reporting the rejection, relator said (R. 112):

"I hope I did nothing to hurt the case. What will the next move be?"

This sounds like an actress asking directions for the next scene.

Other officials of the association were also elated by the rejection of relator's "application." Assistant special counsel Thurgood Marshall and assistant secretary Roy Wilkins were equally jubilant and congratulatory. On February 6, 1939, Mr. Marshall wrote relator as follows (R. 114):

"Thanks for your letter of February 2nd, which has been called to my attention this morning.

"First of all permit me to congratulate you on the very fine way you have handled your case. Roy and I have been talking about it ever since it broke. Everything seems perfect. There is one item I would suggest which would close up all technicalities. I would suggest that you write the Board of Curators, care of President of the Board of Curators. This will technically mean that you have appealed to the Board of Curators officially in addition to the President.
You can use the same type of letter as the one you sent to President Middlebush, with the exception that you add the statement that you have already appealed to President Middlebush. Please keep us advised of all replies." This advice by Mr. Marshall was entirely voluntary; relator had not asked it, and, so far as the record shows, had never communicated with him at all. He was obviously acting for the association, and not as her attorney.

Manifestly, the N. A. A. C. P. was more interested in litigation than in education; and

rejection served its purpose better than acceptance, in that it paved the way for more litigation. So Mr. Houston wired his "congratulations and thanks," and Mr. Marshall wrote that "everything seems perfect!" Relator was notified to produce at the trial all communications passing between herself and the N. A. A. C. P. (R. 101). She produced the foregoing letters and telegrams, but withheld and refused to produce nineteen other communications (R. 101- 104). The ostensible reason for the refusal was that they were "confidential communications" between Mr. Houston and relator (R. 101). On the issue as to good faith we might stop with the communications produced, which overwhelmingly show that relator was merely acting as a front or figurehead for the N. A. A. C. P. It is a fair presumption that if the nineteen other communications had been disclosed, they would have made the proof even stronger.

But there is more proof in the record. It appears that when the General Assembly was considering the Taylor Bill (Laws, 1939, p. 685), designed to strengthen the Lincoln University Act by making it mandatory, and the bill to appropriate $200,000 for new departments in Lincoln University (Laws, 1939, p. 78), these bills met with a veritable storm of opposition, in the form of editorials and news items written in part by relator, and approved in their entirety by her (R. 126-154), and in equally vigorous opposition by the N. A. A. C. P. (R. 161-2). Relator personally appeared before the Appropriation Committee of the House in opposition to the appropriation for new departments at Lincoln University (R. 157).

Please consider the anomaly. In its suits against University of Missouri officials the N. A. A. C. P. has always been claiming, as the fundamental basis of the attack, an alleged inequality of the facilities at Lincoln University; yet when the state was attempting in good faith to make the facilities equal, relator and the N. A. A. C. P. were violently striving to block the attempt! Their attitude was not only inconsistent—it was unconscionable and wholly indefensible, from the standpoint of good faith. They opposed the Taylor Bill, requiring new departments at Lincoln. They opposed the appropriation of money for the establishment and operation of those new departments. They hoped to sabotage the entire program, for the ulterior purpose of forcing negroes into the University of Missouri and destroying the state's admittedly valid policy of race separation.

In the circuit court the association's counsel and the relator feebly attempted to justify their opposition to these bills on the ground that the amount of the appropriation was inadequate. But if this had been true, they would have presented that objection to the General Assembly instead of condemning the whole program. They did not ask for any increase in appropriation. They condemned the program outright. Indeed, they even condemned the Taylor Bill five months before they knew how much money would be appropriated! (R. 127-130; Laws, 1939, pp. 78-79).

What was the reason for all this violent opposition? The reason is as clear as the noonday sun. The N. A. A. C. P. saw in the enactment of these bills a complete bar to their suits to force negroes into the University of Missouri. They saw that with the Lincoln University Act so amended as to make it mandatory and constitutional, and with ample funds appropriated to Lincoln for new departments, their persistent campaign to destroy this state's policy of race separation necessarily would come to an end. This, and this only, explains their bitter opposition.

But there is still more proof. The record shows that in addition to this mandamus suit, relator filed a damage suit against registrar Canada in the Federal Court, praying $20,000

damages for the rejection of her application. (R. 166-7). Her complaint in that suit is in evidence (R. 167-177). Astounding as it may seem, the N. A. A. C. P. actually had a financial interest in that case, and would have participated in any damages recovered. (No damages were recovered, because at the trial of that case the verdict and judgment were in respondent's favor.) On this point relator testified in this case, prior to the trial of the damage suit, as follows (R. 179-180):

"Q. What is the arrangement in the event you should recover damages in that case? How are the proceeds to be divided? How much would go to the National Association, if any, how much to the lawyers, and how much would go to you?

A. That has never been discussed.

Q. You haven't reached an agreement on that subject?

A. No.

Q. That is a matter for future disposition, I take it?

A. That is right ."

It is utterly impossible to explain the association's participating interest in this damage claim on any theory except that relator's so-called "application" was actually made for the association's benefit and for its purposes.

We submit that this record proves beyond all question that relator's application to the University of Missouri was not a bona fide application for instruction. It was a spurious counterfeit, a mere piece of stage-play, for the purposes of the association's campaign. In these circumstances relator does not present such a case as to entitle her to the discretionary writ of mandamus. The applicable rule of law is stated in 38 Corpus Juris 574, as follows:

"To authorize the allowance of the writ, the application must be made in good faith and not in order to serve some ulterior or indirect purpose."

In State ex rel. Hahn v. Westport, 135 Mo. 120. 36 S. W. 663, the relator brought a proceeding by mandamus to compel the city officials to issue certain tax bills for grading city streets. From the evidence the court concluded that it was ''apparent that relator's real effort was more to secure a ruling of the court as to the validity or invalidity of the tax bills heretofore issued than to secure absolutely the issuance to them of new tax bills." (Page 127). The court concluded that "this is not a good faith proceeding on the part of relators to have issued to them absolutely new tax bills in lieu of those heretofore issued by the city." (Page 127.) Then the court proceeded to rule (1. c. 133):

"As we understand the law, this court as the trial court would he wanting in authority to try and determine the issues as raised upon the writ and return made thereto, by the conspiring aldermen, or any and all parties appearing, whenever the fictitious character of the proceedings was made to appear to the court. The authority of this, as of every judicial tribunal, is limited to the consideration of rights which are actually controverted. Unless some individual right, directly affecting the parties litigant is thus brought in question, so that a judicial decision becomes necessary to settle the matter in controversy between those relative thereto, the courts have no jurisdiction; * * *."

The court said further (1. c. 133):

"Sham proceedings and colorable disputes between parties actually friendly, to obtain the opinion of courts upon questions of law, for their own interests or for their future guidance, have ever been condemned, and should never receive knowingly their approval."

In State ex rel. Hyde v. Jackson County Medical Society, 295 Mo. 144, 152, 243 S. W. 341, this Court said:

"Mandamus, in its exceptional traits, partakes, in some respects, of the nature of equity, in which forum it is a maxim that he who applies for relief by this writ must come with 'clean hands,' else the law, regardless of merits, will decline to interfere in his behalf."

On the same page of the opinion the court quoted with approval from an Alabama case the following language:

"Whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle, in his prior conduct, then the doors of the court will he shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his rights, or to award him any remedy."

' In State ex rel. Haeusler v. German Mutual Life Insurance Co., 169 Mo. App. 354, 363, 152 S. W. 618, the court refused mandamus because it was sought for an ulterior purpose. The court held that a policyholder has a legal right to inspect the records of a mutual life insurance company, but the court said:

"But though such be true, a mandamus will not be awarded in aid of this right of inspection where it is shown that the petitioner's purpose in seeking the inspection is an improper or evil one or that it is malicious or frivolous or unlawful. Mandamus is frequently denied by the courts in such cases, for the reasons above suggested. (26 Am. & Eng. Ency. Law (2 Ed.) 955; 2 Cook on Corporations (6 Ed.), Sec. 515; State ex rel. Johnson v. Transit Co., 124 Mo. App. 111, 100 S. W. 1126.) Where it appears the real object of the examination is to obtain information and aid the petitioners in injuring the business of the corporation for the benefit of a business rival, it is proper for the court, in the exercise of a sound discretion, to refuse the writ. (See In re Kennedy, 75 App. Div. (N. Y.); see, also, In re Coats, 73 App. Div. (N. Y.) 178.) So, also, it was declared proper to refuse the writ where it appeared that relator, who was a debtor, was endeavoring, by means of his position as a stockholder, to extract material for a defense and was, therefore, not asserting his right as a stockholder for a good purpose. (See Investment Co. v. Eldridge, 2 Pa. Dist. Rep. 394.) Even where there exists a statutory right to such inspection, which, as a general rule, is regarded as practically an absolute right, the courts usually declare that it is proper to deny mandamus in aid of it when it appears that the inspection is sought for mere curiosity or for an unlawful purpose. (See 26 Am. & Eng. Ency. Law (2 Ed.) 952; Weihenmayer v. Bit- ner, 88 Md. 325; Stone v. Kellogg, 165 Ill. 192, 56 Am. St. Rep. 240.)"

In State ex rel. Thomas Cusack Co. v. Shinnick, 208 Mo. App. 284, 289, 232 S. W. 1053, mandamus was denied because relator did not come into court with clean hands.

In Funck v. Farmers' Elevator Co., (Iowa) 121 N. W. 53, 56, the court held that if a relator appears "under false colors, his complaint may for that reason be dismissed."

In each of the following cases mandamus was denied because of the conduct of the applicant for the writ: People ex rel. Durant Land Improvement Co. v. Jeroloman, (N. Y.) 34 N. E. 726; Teeple v. State ex rel. Bowen, (Ind.) 86 N. E. 49; State ex rel. Hale v. Risley, (Mich.) 37 N. W. 570; Donahue v. State ex rel. Seieroe, (Neb.) 96 N. W. 1038.

Counsel for relator say in their brief (p. 47) that we charge a "sinister motive" behind relator's request for "the plain personal right to get her share of public education." That is not quite an accurate statement of our position. Our position is that her so-called "application" was a sham application, made for an ulterior purpose; that the evidence conclusively proves this to

be true, and that in such a case mandamus will not issue.

Counsel say (pp. 47-48) the same charge was made in the Gaines case. In the Gaines case there was no such evidence as we have here. In that case the communications passing between Gaines and the N. A. A. C. P. were not in evidence. It was not until after a law school was established in Lincoln University for the benefit of Gaines and other negroes, that conclusive proof of Gaines's bad faith came into the open. Then Gaines exposed the sham character of his professed desire for a legal education by quietly disappearing from the scene (R. 391). Evidently counsel for Gaines (the same counsel representing relator here) felt that the situation required an explanation, for they went so far as to file their own affidavits in the effort to explain it (R. 391). It would seem that on the issue of bad faith, the less counsel say about the Gaines case, the better.

Counsel say (p. 48) they "did not seek this litigation or the publicity attached thereto." It is simply impossible to believe this, in view of counsel's letter of January 27, 1939 (R. 108), wherein he stressed the point that a rejection of relator "would have much more publicity value than a rejection of a man"; and in view of his fervent expression of "congratulations and thanks" on the occasion of the rejection of her application (R. 111-112). It is as plain as a pikestaff that litigation and publicity were exactly what the N. A. A. C. P. desired—and that relator's so-called "application" was a mere means to the desired end.

No special findings of fact were requested below by either party, and none were filed; hence the circuit court stated its finding generally, as provided by the statute (Sec. 1103, R. S., 1939). The court filed a memorandum opinion (R. 389). In such a case the settled rule is that the finding must be ascertained from the record of the judgment, and not from the memorandum opinion. (Smith v. Pettis County, (Mo. Sup.) 136 S. W. 2d 282, 285; Missouri-Kansas & Eastern Railway Co. v. Holschlag, 144 Mo. 253, 257, 45 S. W. 1101; Hewitt v. Steele, 118 Mo. 463, 473, 24 S. W. 440; Smith v. Holdoway Construction Co., 344 Mo. 862, 129 S. W. 2d 894, 901; Easton Food Center v. Beatrice Creamery Co., (Mo. App.) 119 S. W. 2d 987, 989). The circuit court made a general finding of "the issues" in favor of the respondent and against the relator (R. 41). This included a finding in respondent's favor upon the issue of bad faith presented in respondent's return to the alternative writ (Additional Abstract, page 1, supra).

Mandamus is a proceeding at law; and the finding of the trial court as to the facts, when supported by substantial evidence, will not he disturbed, on appeal. (State ex rel. Dolman v. Dickey, 280 Mo. 536, 219 S. W. 363, 367; State ex rel Journal Printing Co. v. Dreyer, 183 Mo. App. 463, 479, 167 S. W. 1123; State ex rel. Haeusler v. German Mutual Life Ins. Co., 169 Mo. App. 354, 363-4, 152 S. W. 618; State ex rel. First National Bank v. Bourne, 151 Mo. App. 104, 125, 131 S. W. 896). It is respectfully submitted that the circuit court's finding is overwhelmingly supported by substantial evidence, and necessarily must result in an affirmance of the judgment.

IL

Mandamus Should Be Denied Because Respondent Registrar Does Not Owe Relator the Alleged Legal Duty to Issue to Her a Permit to Register As a Student in the University of Missouri.

Relator sues for mandamus. Before mandamus can issue it must appear that under the applicable law the respondent owes a duty. In this case that would mean a duty to issue to a negro a permit to register as a student in the University of Missouri. It is submitted that no such duty exists. This is true for three reasons.

A. Under present laws of this state, a negro can have no cause of action for admission to the University of Missouri.

Under the present laws of this state the respondent owes no legal duty to admit relator under any circumstances. The Missouri laws require race separation in higher education, and these laws are constitutional. The Supreme Court of the United States has so held (State ex rel. Gaines v. Canada, 305 U. S. 337, 344). That decision recognizes that the test of constitutionality is equality and not identity of educational facilities. The same principle, with reference to Pullman facilities on railroads, is recognized in the recent decision of the Supreme Court of the United States in Mitchell v. United States, decided April 28, 1941, Vol. 9, U. S. Law Week, p. 4319; the thing there denounced was the denial of "equality of accommodations." Relator's counsel in their brief (p. 40) expressly "admit the power of the state to educate the races separately."

Following the decision of the Supreme Court of the United States in the Gaines Case, the Lincoln University Act was amended to conform with that decision. Section 2 of the amendment expressly shows that this was the legislative intent and purpose (Laws, 1939, p. 686). The new act became effective on May 4, 1939, more than five months before this suit was filed (R. 1). It now appears as Sections 10774 and 10779, R. S. 1939.

The new act fully complies with the constitutional requirement of equal protection, laid down by the Supreme Court in the Gaines case. The act provides for graduate instruction in journalism for any qualified negro resident of the state within the borders of the state, at Lincoln University. This is the necessary effect of the requirement in the act that the Lincoln Board shall equalize the opportunity for education at Lincoln with that at the University of Missouri.

The validity of this amended act is not denied. It could not be plausibly denied. The act plainly lays upon a state agency the mandatory duty to equalize the Lincoln University curriculum and facilities with those at the University of Missouri. No longer is it left to the Lincoln Board to say in their opinion whether it is "necessary and practicable" to open new departments at Lincoln. The old law left it to their discretion (Sec. 9618 R. S. 1929)—and that is why the Supreme Court of the United States ruled in favor of Gaines (305 U. S. 337, 347-8). But the General Assembly met that defect; the new law is mandatory, and is therefore constitutional. This is not denied by relator.

To enable the Lincoln Board to perform its mandatory duty the General Assembly in 1939 appropriated $904,500 to Lincoln University. The Appropriation Act was approved July 7, 1939 (Laws, 1939, pages 76-79). Included in this total was $200,000 for the specific purpose of establishing new departments in Lincoln University (Laws, 1939, page 78).

But relator says that Lincoln University did not establish a Journalism Department, and that the $200,000 was allocated to other new departments. Passing for the moment relator's failure to make any demand on Lincoln, the proof shows that, at the time of the trial, $120,850.14 of that $200,000 fund remained in the bank as an unexpended balance (See exhibit 32, R. 254, 261, 262). The allocation was tentative, and the fund was subject to reallocation at any time to meet the need for graduate work in journalism (R. 256, 259, 368-9).

The cost of establishing and maintaining graduate instruction in journalism for one year would be $8,744 (R. 301); the cost of both undergraduate and graduate courses in journalism would be $15,795 per year, and on a liberal estimate would not exceed $35,000 for the first

biennium (R. 293-4).

Even if the $200,000 special appropriation were unavailable—which is not true—recourse could be had to the $298,000 appropriated for salaries, to the $218,000 for new buildings and equipment and to the $116,000 appropriated for general expenses (Laws, 1939, pages 76, 77). Of these appropriations the record shows $371,819.68 remaining in unexpended balances at the time of the trial. (See exhibits 28, 29, 31, 43 and 44; R. 250, 252, 254, 362, 363). The establishment of a graduate course in journalism requires money for salaries and equipment. The appropriations for salaries are not limited to salaries of any particular kind of professors or instructors, and are general. So the salary appropriations could be used for payment of professors and instructors in graduate journalism. The general appropriations for new buildings, equipment and general expense were likewise available, if needed.

At the time of the trial, the grand total of unexpended balances in the foregoing appropriations was $499,595.29. (See exhibits 28, 29, 30, 31, 32, 43 and 44; R. 250, 252, 254, 362, 363, 364.) It is perfectly obvious that, on proper demand by any qualified negro, the Lincoln University Board had ample funds to enable it to establish and maintain a graduate course in journalism. They owe the mandatory duty on proper demand, and they had the necessary funds.

We therefore submit—paraphrasing the language of the Supreme Court of the United States —that the State of Missouri has made "other and proper provision for relator's graduate training in journalism within the state."

Not only was ample provision made, but it was made early enough so that the Lincoln Board could have opened the required course in journalism at the September semester, 1939, if relator had asked for it (R. 321-2). The money became available for use by Lincoln when the Appropriation Act was approved on July 7, 1939. The intervening period before the September semester began was ample time for Lincoln to have established a course in journalism, if relator had asked for it (R. 321-2).

As we shall later show, relator made no such request. But even if she had done so, and if the Lincoln Board had failed to perform its mandatory duty, this would not have cast any duty whatever on the University of Missouri or the respondent registrar. It is well settled in the law of mandamus that the writ will not issue against one state agency which does not owe a certain duty, merely because another state agency, which does owe that duty, fails to perform it. The failure of a state agency to perform its duty cannot impose or shift that duty upon another state agency which does not initially owe it. In this case relator bases her case fundamentally upon the duty to furnish her graduate instruction in journalism. If she were in good faith in her desire to receive that instruction, the state would unquestionably owe her that duty. But the agency charged with the duty to furnish her with that instruction is Lincoln University (Sec. 10774, R. S., 1939). Mandamus will not issue to compel the University of Missouri to do something which it has no lawful authority to do, and which Lincoln University alone has authority and is required to do, namely, furnish higher education to negro residents of this state.

In the recent case of State ex rel. Kent v. Olenhouse, 324 Mo. 49, 23 S. W. 2d 82, 86, this Court en banc ruled:

"Relator is not entitled to the relief granted by this writ. In the first place, the county court, and not the township board, is authorized to fill vacancies in the township board, and we will

not attempt by mandamus to compel the township board to do a thing it has no authority to do ”

In State ex rel. Nick v. Edwards, 260 S. W. 454, this Court en banc refused mandamus because the statute upon which the action was based conferred “no such authority upon the respondents, as is commanded by the writ, to declare that the relator was elected.”

In State ex rel. Hamilton v. Brown, 172 Mo. 374, 381-2, 72 S. W. 640, this court held that mandamus would not lie against the county collector to perform an act that was lawfully the duty of the county clerk. This court said:

“We think clearly that the trial court was right in denying the writ. The facts as disclosed in this case show that the county clerk extended the taxes to the respective school districts; whether his action was in pursuance of the provisions of the statute, whether legal or illegal, the collector was not answerable for the acts of the clerk. * * *

“Mandamus is a remedy sought to compel the performance of some ministerial duty which is required to be performed by the law of the land. No such duty as was requested of the collector in this cause is enjoined upon him by the law”

In State ex rel. Blue v. Waldo, 222 Mo. App. 396, 5 S. W. 2d 653, mandamus was sought to compel one officer to perform functions properly belonging to another. The court pointed out that the duty there in question fell within the authority vested by law in the other officer, and on that ground denied the writ.

In State ex rel. Hemmerla v. Newhurg Special Road District, 217 S. W. 605, 606, the Springfield Court of Appeals held:

“A writ of mandamus, when it becomes peremptory, rules with an iron hand, and, before a court will exercise it, it must be plainly shown to it, not only that there is a failure of duty on the part of the respondent, hut that it is within the province and power of the respondent to obey the mandate.”

In State ex rel. Laclede Gas Light Co. v. Murphy, 170 U. S. 78, 99, mandamus was sought to compel the Street Commissioner of St. Louis to issue permits to make certain street excavations. Mandamus was denied. The Supreme Court said:

“The Street Commissioner had no power under the charter and ordinances to issue the permit requested, in the absence of the assent of the Board of Public Improvements, which had general control; and the court could not command him to do that which it was not his official duty to perform.”

In State ex rel. Onion v. Supreme Temple Pythian Sisters, 227 Mo. App. 557, 54 S. W. 2d 468, 470, mandamus was sought to compel reinstatement of a member of a fraternal organization. The respondents sued were the Supreme Temple and the other executive officers. Mandamus was denied, The court said:

“It follows from the very nature of the remedy by mandamus and the principles governing it that it must appear from the petition that respondents have the power to reinstate relator or to grant the relief prayed for. * * * It nowhere appears from the facts stated in the petition that, if the peremptory writ were to issue, respondents would have any power or authority to reinstate her; * * *”

In United States ex rel. Fisher v. Board of Liquidation, (5 C. C. A.) 60 Fed. 387, 390, relator applied for mandamus to compel the Board of Liquidation to issue bonds in payment of a judgment. Mandamus was denied. The court said:

"Under the act in question, the board of liquidation of the city debt, defendant in this suit, is not by said act authorized to issue any bonds whatever, hut that duty, under the terms of the act, devolves upon the municipal government of the City of New Orleans."

In State ex rel. Peoples Bank of Greenville v. Goodwin, (S. C.) 62 S. E. 1100, 1102, the court said:

"It is very plain that a mandamus will not be awarded to compel county officers of a state to do any act which they are not authorized to do by the laws of the state from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred on them by the author of their being. And it may be observed that the office of the writ of mandamus is not to create duties, but to compel the discharge of those already existing. A relator must always have a clear right to the performance of a duty resting on the defendant before the writ can be invoked."

In American Book Co. v. Marrs, (Tex.) 253 S. W. 817, 818, mandamus was sought against the state Superintendent of Public Instruction to enforce compliance with certain book contracts. By the laws of the state the authority to purchase books was conferred upon the State Board of Education. The court held that this statute

"* * * places the responsibility upon the State Board of Education to ascertain or determine who are contractors of textbooks from whom they are to purchase books. This is the agency the Constitution and the law have created and charged with the administration of these functions of government, and clothed with the powers necessary to their performance.

"From the foregoing it is clear, we think, that unless the acts of the Superintendent in specifying the contracting companies and the books to be used have the approval of the State Board of Education, all he may do is a nullity. It amounts to nothing."

The rule we are here invoking is one universally applied by the courts. In 38 Corpus Juris 554, (title "Mandamus") it is said:

"When the duty belongs to some other officer or tribunal or for any reason respondent has no power to act, the writ will be denied."

In Mills v. Lowndes, 26 Fed. Supp. 792, 802-3, 806, counsel for the present relator made the same sort of mistake which they made here—they brought their suit against officials who did not owe the duty relied on as the basis of the relief sought. There they sued the State Board of Education of Maryland, to enjoin the enforcement of a Maryland statute, and the practice thereunder, of paying colored teachers in colored schools salaries materially less than amounts paid white teachers in white schools having equal professional qualifications. The suit should have been brought against the County Board of Education, because—

"As to the statutes themselves it is clear that it is only the County Board that had power to enforce them in making the contracts with the teachers. The defendants had no power or authority in this respect" (Page 802).

The court therefore concluded (page 806):

"As the responsibility for this alleged wrongful and discriminatory action lies with those Counties, if any, where such conditions prevail, and as there is no denial of equal protection of the laws with respect to the distribution of the State moneys called the Equalization Fund among the Counties, this action cannot properly he maintained against the defendants who are general State officers and not County officials, in the absence from the record of the latter who are indispensable parties to the case. It would be contrary to the

elementary principles of due process of law to determine the rights of an absent indispensable party."

In State ex rel. Relief Association v. Wilmington, 118 Atl. 640, the relator sued the mayor, council and council members to compel them to pay relator $15,000. The court held that since under the city charter the city auditor and treasurer must counter-sign any order for money, the writ would not issue, since mandamus will issue only against persons who have the power to perform the duty commanded.

In Sims v. Fitzgerald, Mayor, 191 Mass. 382, 77 N. E. 714, relator sued to compel defendant to reinstate him as janitor of the police station. The court held the writ should have been brought against the police board, whose duty it would be to reinstate relator, if he was entitled to reinstatement.

In Holtzclaw v. Riley, 113 Ga. 1023, 39 S. E. 425, relator sued in mandamus to compel defendant county judge to pay certain fees received as compensation for the convict labor hired out by defendant for the county. Under the applicable law the board of county commissioners alone had authority to hire out convicts, and to dispose of compensation for their services. The judge had hired out the convicts as the agent of the court. It was held that mandamus could not lie to compel a public officer to perform acts outside of his official duty.

In State ex rel. Whidden v. Jones, 125 Fla. 839, 170 So. 168, relator sued in mandamus to compel certain election officers to recount the ballots cast in an election. The court refused the writ, holding that it was a command to those officers to perform a function which was not their duty under the law to perform, and therefore one which they could not be compelled to perform by the writ of mandamus.

See, also, Mayer v. Police Commissioners, 136 Calif. App. 534, 29 Pac. 2d 458, and 38 C. J. 848-9.

Notwithstanding the absence of any law requiring respondent registrar to issue permits to negroes, and notwithstanding the Missouri laws which in effect forbid his issuing such permits, relator's counsel argue that respondent should have issued the permit to relator nevertheless. In support of this contention they cite State ex rel. Gaines v. Canada, 305 U. S. 337, 59 Sup. Ct. Rep. 232, and State ex rel. Gaines v. Canada, 344 Mo. 1238, 131 S. W. 2d 217.

We contend that the decisions in the Gaines case are inapplicable, because of the radical change in the Lincoln University Act by the 1939 Amendment. The Gaines case arose under the old Lincoln University Act (Secs. 9618 and 9622, R. S., 1929). The Supreme Court of the United States held that the provision made in that act was unconstitutional because the equalizing of the curriculum at Lincoln University was left as an entirely discretionary matter with the Lincoln Board (305 U. S. 337, 347- 8). But that is certainly not true of the present law. The distinction is fundamental. It is submitted that that decision can have no application to the new law or to the present case.

This court's second opinion in the Gaines case (344 Mo. 1238, 131 S. W. 2d 217) necessarily was written in conformity with the opinion of the United States Supreme Court. By the latter opinion the case was remanded to this court "for further proceedings not inconsistent with this opinion" As indicating the constraint imposed upon it by the opinion of the Supreme Court of the United States, this court in its second opinion specifically called attention to the fact that the Gaines case had been remanded by the higher court "for further proceedings not inconsistent with said opinion." Under that mandate there was nothing that this court could do

except follow the opinion, based on the old law. It is true that in its second opinion this court took cognizance of the new law. But there was nothing this court could do about it, in face of the mandate directing disposition of the case in conformity with an opinion based on the old law. This court could not apply the new law, and at the same time follow the opinion of the Supreme Court based on the old and radically different law.

Another point of distinction in the Gaines case is this: Gaines had brought his suit at a time when the Missouri provision for equal facilities at Lincoln University was inadequate and unconstitutional. Wholly apart from the mandate binding upon it, this court doubtless felt that it would have been unjust to Gaines to dismiss his case, seasonably-brought, and force him to start over under the amended law.

In any view, the two decisions in the Gaines case merely involved, and were entirely controlled by, the old law. The case of this present relator is controlled by a new and different law, which was in full force and effect before she filed her suit. It is submitted that this suit must be determined by that new law, and not by the Gaines decisions construing and applying the old law.

The decision in Gong Lum v. Rice, 275 U. S. 78, cited by relator, instead of aiding relator's position is opposed to it. There the Supreme Court held that provision by the state of a separate school fog: colored children, even though located in a different district from the district of the complainant's residence, was not a denial of equal protection.

The decision in Pearson v. Murray, 169 Md. 478, 182 Atl. 570, 103 A. L. R. 706, cited by relator, is obviously distinguishable, because in that case there was no provision at all for legal education of negroes within the borders of Maryland.

Contrary to the argument of relator's counsel (p. 43), the state is not attempting to destroy relator's right of admission to a state university "directly by legislative fiat." The state has provided a state university in which, on request, relator can obtain graduate instruction in journalism.

Nor did the circuit court "destroy the right indirectly by withholding the only appropriate remedy for its enforcement." Under the present laws
of this state, the "appropriate remedy" for the enforcement of relator's right is by application to Lincoln University. The decisions in Marbury v. Madison, 1 Cranch 137, 163; Poindexter v. Greenhow, 114 U. S. 270, 303, and Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673, cited by relator, do not support a contrary position.

Nor is the state attempting to "postpone recognition of this right at its pleasure." The state fully recognizes the right of negro residents of the state to education equal to that available at the University of Missouri, and has provided for it. The trouble is that relator simply refuses to avail herself of the provision made by the state for her benefit.

Indulging the far-fetched assumption that relator actually wanted graduate instruction in journalism, and assuming (contrary to the fact) that she had made application for it to Lincoln University, and that her application there had been rejected or ignored, relator's sole right of action would have been against the Board of Curators of Lincoln University, the state agency which is exclusively authorized and required to provide university education for negro residents of this state. If, after an application by relator or any qualified negro resident of the state, Lincoln University would refuse to perform its duty by establishing a department of Journalism, such applicant would have an entirely adequate remedy by mandamus to compel the Lincoln

Board to perform its plain duty.

In State ex rel. Johnson v. Sevier, 339 Mo. 483, 98 S. W. 2d 677, 678, this court en banc held:

"* * * mandamus will lie to correct or control the action of administrative officers, bodies and other tribunals, notwithstanding that an official discretion may be reposed in them, where they have in fact refused to exercise such discretion in a lawful manner, impartially and in good faith ."

In the case of State ex rel. McCleary v. Adcock, 206 Mo. 550, 556, 105 S. W. 270, this court granted mandamus directing the State Board of Health, to issue to relator a license to practice medicine. The court said:

"Respondents claim that they exercised their discretion on this question and that their judgment is final. If so, there is an end to this cause. But in this we do not assent to the contentions of respondents. Discretions must always he reasonably exercised. As to whether or not they are reasonably exercised is a question for the courts. * * * Does the law place in the hands of administrative boards such arbitrary power? We think not. If so, the courts are not open to the aggrieved, if such there be, and this case is wrongfully here. If so, such boards can arbitrarily refuse any applicant the rights prescribed by the law, and he is without remedy. If so, such a board can hear the evidence, and against all of the evidence, place its ipse dixit, and refuse to the applicant the privileges granted by the law. Such a doctrine is not consonant with reason and is not the law."

In State ex rel. Kelleher v. President and Directors of Public Schools, 134 Mo. 296, 305, 35 S. W. 617, this court said:

"While it is generally true that mandamus will not lie to control the discretion of an inferior tribunal in whom a discretion is vested in the performance or non-performance of certain duties devolved upon it by law, it is well settled that if the discretionary power is exercised with manifest injustice the courts are not precluded from commanding its due exercise. Such an abuse of discretion is controllable by mandamus. * * *

"These authorities sufficiently indicate that when an inferior tribunal or official body, charged with the performance of a duty involving a discretion in the exercise thereof, is guilty of a gross and palpable violation of the discretion confined to it, this court, in the exercise of the superintending control conferred by the constitution of the state, will control the inferior tribunal by its writ of mandamus, especially if the right violated pertains to the public."

In State ex rel. Journal Printing Co. v. Dreyer, 183 Mo. App. 463, 481, 167 S. W. 1123, the court said:

"It has been repeatedly held that mandamus will lie where there has been a palpable abuse of discretion; that discretion must always be reasonably, fairly and impartially exercised, in good faith; and that whether or not it has been so exercised is a question for the courts. And the great weight of authority is to the effect that mandamus will lie to correct or control the action of administrative bodies and other tribunals, notwithstanding that an official discretion may be reposed in them, where they have in fact refused to exercise such discretion in a lawful manner, impartially and in good faith."

In Cumming v. Richmond County Board of Education, 175 U. S. 528, 545, the Supreme Court of the United States said:

"If, in some appropriate proceeding instituted directly for that purpose, the plaintiffs had sought to compel the Board of Education, out of the funds in its hands or under its control, to

establish and maintain a high school for colored children, and if it appeared that the Board's refusal to maintain such a school was in fact an abuse of its discretion and in hostility to the colored population because of their race, different questions might have arisen in the state court."

In State ex rel. Morehead v. Cartwright, 122 Mo. App. 257, 99 S. W. 48, mandamus was issued to compel public school directors to establish and maintain a school for colored children. That decision is directly in point.

To the same effect are the decisions in School District v. Hunnicutt, 51 F. 2d 528, 529; Board of Education v. Excise Board, 86 Okla. 24, 206 Pac. 517, 521; 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, and Cory v. Carter, 48 Ind. 327, 363-4.

It is submitted that in no circumstances may relator or any negro person have mandamus commanding the University of Missouri or its registrar to perform a duty which the Lincoln Board alone is by law authorized and required to perform.

B. Relator has made no demand upon Lincoln University for instruction, and therefore is in no position to demand admission to the University of Missouri, even on her own theory of the case.

There is an impassable barrier to relator's recovery, even on her own theory of the case. Assuming, as relator does, that the absence of a course of journalism in Lincoln University would automatically cast a duty on the University of Missouri to admit relator as a student, relator has never put herself in position to demand that the University of Missouri perform such duty. This is true because (a) relator has never demanded or applied for instruction in Lincoln University; (b) Lincoln University was never given time to establish a course in journalism before relator's demand on respondent and filing of this suit; (c) there is no proof of any refusal by Lincoln University to comply with any demand or application for such a course; and (d) there is no proof whatever that respondent registrar was ever told or given to understand that she had made any demand or application for instruction in Lincoln University.

The right of the state to separate the races being conceded, and the mandatory duty of Lincoln University to educate negroes being conceded, it is obvious that the state agency to whom any negro seeking higher education should apply is Lincoln University. That institution is the state agency exclusively charged with the duty to furnish such instruction to negroes.

The state laws require race separation; and those laws are concededly valid. The state has provided a separate university for negroes; has required its governing board to equalize its curriculum and facilities with those at the university for white students; and has appropriated ample funds to enable this to be done. May the relator ignore these provisions made for her benefit, and upset the state's whole plan for the separate education of negroes, by making a summary demand for admission to the University of Missouri, without any demand whatever on Lincoln University? The answer inevitably must be, No.

This exact question was considered and decided by Judge Collet in Bluford v. Canada, 32 Fed. Supp. 707, a case arising out of the identical facts presented here. In that case Judge Collet said (p. 709):

"The petition does not allege any demand by plaintiff or any other negro for instruction in journalism at Lincoln University, nor does the petition allege that the governing body of Lincoln University had ample time to furnish those facilities after plaintiff first sought admission to the

University of Missouri."
Judge Collet held that these missing allegations were essential, and in that connection he said (p. 711):

"Furthermore, if plaintiff may maintain this action without alleging previous notice of her desires and opportunity for compliance, will on tomorrow the individual members of the Board of Curators of Lincoln University or the University of Missouri be liable in damages to another negro if, perchance, late today he or she demands instruction at Lincoln University for which facilities are lacking, and then in the morning demands admittance to the University of Missouri? Yet such would seem to be the result contended for by plaintiff unless the curators should maintain at Lincoln University at all times all departments of instruction, whether used or not, which are available at the University of Missouri. It does not appear that 'a clear and unmistakable disregard of rights secured by the supreme law of the land' would result from a failure on the part of those curators to keep and maintain in idleness and non-use facilities at Lincoln University which no one had requested or indicated a desire to use.

"Since the state has made provision for equal educational facilities for negroes and has placed the mandatory duty upon designated authorities to provide those facilities, plaintiff may not complain that defendant has deprived her of her constitutional rights until she has applied to the proper authorities for those rights and has been unlawfully refused. She may not anticipate such refusal. Highland Farms Dairy v. Agnew, 300 U. S. 608, 1. c. 616- 17. Until and unless plaintiff alleges facts which demonstrate an unlawful deprivation of her constitutional rights defendant may not be held liable therefor." It is submitted that this holding is unanswerable. Counsel for relator were unable to answer it in the Federal Court, and we predict that they will present no satisfactory answer here. Contrary to the assertion of relator's counsel (p. 45), the decision in State ex rel. Gaines v. Canada, 344 Mo. 1238, 131 S. W. 2d 217, does not hold otherwise.

Judge Collet's opinion is in principle supported by numerous decisions of the Supreme Court of the United States and of this court. In Myers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41, 50-51, the Supreme Court declared it to be— "the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

In Highland Farms Dairy v. Agnew, 300 U. S. 608, 616-617, the court said:

"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. (Citing cases.) He should apply and see what happens."

In Bourjois, Inc., v. Chapman, 301 U. S. 183, 188, the court said:

"The plaintiff has not applied for a certificate; and it is not to be assumed that, if it concludes to do so, its application will be refused, or that the board will deny any right to which it is entitled." To the same effect are Petroleum Exploration, Inc., v. Public Service Commission, 304 U. S. 209, 222-3; Natural Gas Co. v. Slattery, 302 U. S. 300, 309; Gundling v. Chicago, 177 U. S. 183, 186; Smith v. Cahoon, 283 U. S. 553, 561-2; Hall v. Geiger-Jones Co., 242 U. S. 539, 554; Lehmann v. State Board of Public Accountancy, 263 U. S. 394, 398; Utah Power & Light Co. v. Pfost, 286 U. S. 165, 190; Dalton Adding Machine Co. v. State Corporation Commission of Virginia, 236 U. S. 699, 701; Plymouth Coal Co. v. Commonwealth of Pennsylvania, 232 U. S. 531, 545; Goldsmith v. Board of Tax Appeals, 270 U. S. 117, 123; and Bradley v. Richmond, 227

U. S. 477, 483.

The same principle has many times been applied in this state. (State ex rel. v. Seibert, 130 Mo. 202, 222, 32 S. W. 670; State ex rel. Onion v. Supreme Tent Pythian Sisters, 227 Mo. App. 557, 54 S. W. 2d 468, 470; State ex rel. Cammann v. Tower Grove Turnverein, 206 S. W. 242, 243; State ex rel. v. Wenom, 326 Mo. 352, 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, 19 S. W. 23; State ex rel. v. Smith, 330 Mo. 252, 48 S. W. 2d 891; State ex rel. v. Hudson, 226 Mo. 239, 265-266, 126 S. W. 733; State ex rel. v. Bank of Conception, 174 Mo. App. 589, 593, 163 S. W. 945).

Not only must relator have made a demand on Lincoln University, but she must have made it in time to enable the Lincoln board to comply with it. This is but the application of the rule of reason to the Lincoln University Act. The mandatory provision of that Act (Sec. 10774, R. S., 1939) requires the Lincoln board to establish a course in graduate journalism. But the Act will not be construed to require the unreasonable—the board would not be required to establish such a course unless there was a demand for it. Nor will the Act be construed to require the impossible—the board would not be required, upon such demand, to establish such a course instanter. Every statute will be construed and applied according to the rule of reason. This is a fundamental principle in statutory construction.
(Stack v. General Baking Co., 283 Mo. 396, 410-411, 223 S. W. 89; St. Louis v. Christian Brothers College, 257 Mo. 541, 552, 165 S. W. 1057; Standard Oil Co. v. United States, 221 U. S. 1, 60; United States v. American Tobacco Co., 221 U. S. 106, 178-180.)

Now what are the pertinent facts? Relator made her first application to respondent registrar on January 30, 1939 (R. 67). At that time concededly she had had no communication whatever with Lincoln University.

Thereafter on May 4, 1939, the Lincoln University Act was amended to require the establishment of new departments in Lincoln University (Laws, 1939, pp. 685-6). On July 7, 1939, the General Assembly appropriated $200,000 to enable the Lincoln board to open new departments, “so as to comply with the provisions” of the amended Act (Laws, 1939, pp. 78-9). There was then ample time for the establishment of a course in journalism at Lincoln before the opening of the September semester, 1939 (R. 321-2), which was to begin September 13 (R. 82).

Relator was keeping close track of the progress of the bill to amend the Lincoln University Act (the Taylor Bill) and the bill to appropriate money for new departments, as indicated by the barrage of opposition to those bills in the Kansas City Call (R. 126-154, 161-2, 157). On August 16, 1939, respondent registrar wrote her a letter suggesting that she apply to Lincoln (R. 78). Yet she waited until September 9, 1939, before she wrote Lincoln.

On that date she wrote a letter to President Sherman D. Scruggs and the Board of Curators of Lincoln University. While this letter appears to be dated September 8, 1939, it is conceded that it was not written until September 9, 1939 (R. 80). A rubber stamp on it indicates that it was not received until September 11, 1939 (R. 82). In that letter relator narrated her previous application to the University of Missouri, and respondent’s suggestion that she “take up the matter with the Board of Curators at Lincoln University” (R. 81). Then the letter proceeds as follows (R. 81-2):

“May I inquire whether Lincoln University is offering graduate work in Journalism this fall? If so, will the work offered at Lincoln U. be equal to that offered in the School of Journalism at the

University of Missouri?

"Please send me a catalogue of the School of Journalism of Lincoln University. If a catalogue is not available, will you please furnish me detailed information concerning the graduate work in Journalism which Lincoln University is prepared to offer at the beginning of the first semester of the academic year 1939-40. I would like information concerning the faculty, with qualifications and experience; courses and schedule; library, school publication and other facilities.

"I will appreciate your advice on these points at your very earliest convenience as the time for registration is at hand and I wish to he advised whether to press my application at the University of Missouri or whether I can really obtain equal graduate work in Journalism at Lincoln University."

It is obvious that this letter was not a demand or application for admission to Lincoln University. It was a request for information—nothing more. Relator plainly stated that she wanted the information in order that she might "be advised whether to press my application at the University of Missouri or whether I can really obtain equal graduate work in Journalism at Lincoln University." (R. 82). This definitely meant that relator was not making application to Lincoln University. Relator sent a copy of this letter to the respondent registrar (R. 82); so respondent was likewise notified that she had made no such application.

President Scruggs answered this letter on September 13th, stating that it would be presented to the Executive Committee of the Board of Curators of Lincoln University for consideration at its meeting on September 30th (R. 83-84).

On the very next day and before she had received President Scruggs's letter (R. 86), relator made her second application to respondent registrar (R. 85). The fact that she did this without having received any reply from Lincoln shows that she actually cared nothing about what courses were available there. She testifies regarding her conversation with the registrar as follows (R. 85):

"I told him I had come back to enroll for the first semester in the School of Journalism and he said he was sorry but he could not admit me. I told him that I thought the second decision of the Missouri Supreme Court in the Gaines case had definitely settled the matter and that I thought I was eligible to enter the Missouri School of Journalism, and he said he was sorry he could not admit me but that Lincoln University was responsible for providing graduate Journalism work for me and I told him that I didn't think Lincoln University had any courses in Journalism, undergraduate or graduate, and he said he thought plans were being made for such instruction the first semester." Please note that she was telling respondent registrar that she "didn't think" Lincoln had any courses in journalism, when she had only just written Lincoln to inquire about that, and had not yet received Lincoln's reply! In this conversation relator did not even faintly intimate to the respondent registrar that she had ever made any demand or application to Lincoln University, or that Lincoln University had ever refused any application or demand.

On the same day, September 14th, 1939, relator went to Jefferson City and had a talk with President Scruggs. We quote from her testimony (R. 86):

"Q. Where did you go from the campus of the University of Missouri on September 14th, 1939?
A. I went to Lincoln University, Jefferson City, to see what courses were being offered in Journalism.

Q. What did you find out?
A. He (President Scruggs) asked had I received his letter and I told him no, that I had wired him for an answer but had not received it and he said he had mailed it the night before and probably it reached Kansas City after 1 had left, but he said the Board of Curators had decided it would be impossible to have a School of Journalism at that time, but it would have to wait for a report back and further study by the Board." In this conversation relator's sole object was not to apply for instruction in journalism, but "to see what courses were being offered in journalism."

Relator then immediately telegraphed the respondent registrar as follows (R. 87):

"Lincoln University has no school of Journalism and will not have one. Please reconsider my application to enter Missouri U. Journalism School for Graduate Work and permit me to enroll at once. Answer today." There was no pretense in this telegram that relator had made any application to Lincoln University. On the same day respondent registrar telegraphed relator that he had no authority to admit her to the University of Missouri (R. 89).

On October 2, 1939, President Scruggs wrote her as follows (R. 90):

"In a meeting of the Executive Committee of the Board of Curators of Lincoln University on Thursday, September 28, it was voted that you be informed that the graduate courses in Journalism in which you are interested are not available to any student at present in Lincoln University. The organization and approval of such course offerings must await time for study and report by the President and the Faculty of the University."

On October 6, 1939, relator wrote an argumentative letter, filled with self-serving statements, to President Middlebush, Senator McDavid (President of the Board of Curators), Dean Martin of the School of Journalism, Dean Bent of the Graduate Faculty, and the respondent registrar (R. 91-93). One week later this suit was filed (R. 1).

This is all the evidence pertinent to the present point. The conclusion is inescapable that, even on her own theory of the case, this relator has never put herself in position to demand admission to the University of Missouri. She has never made any demand or application to Lincoln University; to the contrary, she has studiously refrained from so doing. It is unreasonable to argue that relator's mere request for information (in the letter of September 9th) as to the curriculum at Lincoln University was enough to create a duty to establish a graduate course in journalism at that institution. Particularly is this true, when the same letter plainly showed that her real intention was to press her application for admission to the University of Missouri (R. 81-82). If Lincoln University had instantaneously established a course in Journalism, there is no assurance whatever that relator or any other negro would have used it.

Even if her letter of September 9th could be twisted into a demand or application, it was received at Lincoln only two or three days before the opening of the September semester (R. 82)—obviously too late to enable Lincoln to establish a School of Journalism by the opening of that semester. In this connection, please note that as early as August 16th respondent had suggested that she apply to Lincoln (R. 78). Manifestly, her delay in writing Lincoln for nearly a month was deliberate and intentional. The whole record shows, of course, that a journalism course at Lincoln was the last thing on earth relator and the N. A. A. C. P. wanted, for that would have sadly disarranged their plan to sue the University of Missouri!

There is no proof that Lincoln University ever refused any demand or application by relator.

There is no proof in the record that Lincoln has ever refused the application of any negro for any course of instruction. So far as this record shows, no one can say that if relator had made a definite and timely demand on the Lincoln board (instead of merely catechizing its president) a course of instruction would not have been established there for her benefit.

Above and beyond all this, there is no proof that respondent registrar was ever told, or had any reason even to suspect, that relator had made demand or application to Lincoln University or that such a demand or application had been rejected. Respondent and President Middlebush evidently believed that relator had made no such demand because they repeatedly told her that she should apply to Lincoln (R. 78, 85, 97). Even on relator's own theory, no duty could possibly be cast upon the registrar unless he was informed that she had made a demand on Lincoln and her demand had been refused or ignored.

In this state of the record there is a complete lack of any proof even remotely tending to cast a duty upon respondent to admit relator as a student in the University of Missouri; and this is true under any theory of the law.

Counsel for relator argue in their brief (p. 41) that the Lincoln administration and board considered the establishment of a School of Journalism, and that its Executive Committee decided to postpone the opening to February 1, 1941. And that is true. But that does not answer our contention. We are here concerned with the question as to this relator's right, and with the question whether this relator has put herself in position legally to demand admission to the University of Missouri. The action of the Lincoln administration in considering the establishment of a School of Journalism was certainly not due to any demand therefor by this relator—for she made no such demand.

Counsel for relator say (p. 45 of brief) that "Lincoln University cannot claim lack of notice." Of course Lincoln University is not a party to this suit, and is not here claiming anything. But it is not a question of "notice" to Lincoln University. For that matter, the only "notice" that Lincoln University ever had was that relator was pressing an application—and later this suit—for admission to the University of Missouri (R. 81-2). No "notice" was ever given Lincoln University that she was applying or ever would apply to Lincoln University.

Counsel say (p. 45 of brief) that Lincoln treated appellant's correspondence and contacts as a "demand," and counsel refer to pages 90 and 196 of the record. At page 90 there appears President Scruggs's letter to relator wherein he merely refers to "the graduate courses in Journalism in which you are interested," which certainly did not treat relator's correspondence or contacts as a "demand." At page 196 of the record is an excerpt from the minutes of the Executive Committee of the Lincoln Board, reciting that "a letter requesting admission to graduate courses in Journalism was received from Miss Lucile Bluford of Kansas City, Missouri, on September 9, 1939." But the letter itself shows that it was not a request for admission at all, and was merely a request for information (R. 81-2). The recital in the minutes cannot make it anything else. Another complete answer to counsel's suggestion is that it is not a question of what the Executive Committee of Lincoln University thought relator wanted. The question is whether relator, without any definite demand on the Lincoln Board, and without giving that Board an opportunity to comply with a definite demand, can summarily demand admission to the University of Missouri, and that, too, without the authorities of the latter institution being told that relator had ever applied to Lincoln and been rejected there.

Counsel at page 46 of their brief say "the University of Missouri cannot claim surprise"; and

they refer to an application for a course in Journalism at the University of Missouri, made in 1935 by a negro named Sweets. Sweets was one of four negroes (including Gaines) who applied, not to Lincoln University, but to the University of Missouri—one for Law, one for Engineering, one for Medicine, and one for Journalism (R. 215). Evidently the N. A. A. C. P. then chose to concentrate on Gaines as their test "applicant," and the other applications were abandoned. Obviously, the application of Sweets to the University of Missouri has nothing whatever to do with the present case. It has not even a remote tendency to excuse this present relator from applying to Lincoln University, if she wanted instruction in Journalism.

Counsel say (p. 46) that "Lincoln University has neither the space, plant, teachers nor money to inaugurate graduate courses in Journalism." The same counsel made the same argument in the Gaines case, in regard to a law school; yet today Lincoln University is operating a creditable Law School for negroes, with a distinguished negro educator in law as its dean. The school is a complete success, notwithstanding Gaines's defection, and notwithstanding the violent opposition of the N. A. A. C. P. and its counsel.

Counsel argue that "the law does not require a vain and futile thing" (p. 46 of brief). We certainly agree with that statement. The law does not require—nor does common sense require—the establishment of courses of instruction for which there has never been any definite demand. The law does not require that Lincoln University establish courses in archaeology, astronomy, medicine, engineering, journalism or any other field of education, and maintain those courses in idleness and non-use, when no negro requests or indicates any desire to avail himself of them (Bluford v. Canada, 32 F. Supp. 707, 711).

It is respectfully submitted that there was a total failure of proof, even on relator's own theory; and that the circuit court therefore properly refused mandamus.

C. Respondent registrar is a mere subordinate of the board of curators, and his lawful duty is to obey the rules and regulations of the board. Mandamus should not issue to compel him to violate his lawful duty.

The government of the University of Missouri is vested in its Board of Curators (Sec. 10782, R. S., 1939). Respondent registrar has no lawful authority to overrule the Board of Curators by issuing a permit to relator in violation of the board's rule and policy.

The undisputed proof is that the respondent has no power, and exercises no power, over the making of rules or policy of the University of Missouri respecting eligibility for admission (R. 229). The registrar is not a statutory officer. His position is a creation of the board. He is a mere subordinate clerk under the board (R. 229). His duties consist solely in carrying out the rules and policies of the board and the faculty of the University (R. 229-39). The board and the faculty each have a code of bylaws, the material portions of which are in the record (R. 219-229). According to those by-laws it is the respondent's duty to perform such duties as may be assigned him by the board or the executive board or the executive committee, "subject to and in conformity with the authority of the board." (R. 220-221). It is within the powers of the president of the university—instead of the registrar—"to refuse to admit to the university any student not entitled to admission under the regulations of the university" (R. 222). The eligibility for admission of students from an academic standpoint is determined by the faculty, and eligibility from the standpoint of race, age and residence is determined by the board (R. 272). The respondent has no lawful power to change, modify or do otherwise than obey the rulings of the board (R. 272).

The record shows that the Board of Curators, by resolution in March, 1936, adopted the rule, conformably with Missouri law, that negroes are not to be admitted as students in the University of Missouri (R. 215-218). This rule was binding on respondent. It was not within his power to say he thought the board's rule was wrong, or to refuse to follow it. The writ of mandamus should not issue to compel him, a mere subordinate, to violate the rule of his superior.

The board's rule is in complete harmony with the concededly valid Missouri laws requiring race separation; and the Lincoln University Act as amended, providing for equal facilities at Lincoln University, strongly fortifies it. Certainly the registrar, a mere subordinate, owes no legal duty to overrule the Board of Curators.

Under the most extreme view in relator's favor, if relator had a cause of action against any official connected with the University of Missouri (which we deny), it could only be against the body which made the ruling which she is attacking—the Board of Curators. She has no cause of action, in any view of the case, against a mere subordinate of the board.

In State ex rel. Laclede Gas Light Co. v. Murphy, 170 U. S. 78, 79, mandamus was sought to compel the Street Commissioner to issue permits to make certain street excavations. The writ was denied. The Supreme Court said:

"The Street Commissioner had no power, under the charter and ordinances, to issue the permit requested, in the absence of the assent of the Board of Public Improvements, which had general control;* *

In United States ex rel. Fisher v. Board of Liquidation, (5 C. C. A.) 60 Fed. 387, 390, mandamus was sought to compel the Board of Liquidation of the City of New Orleans to issue bonds in payment of a judgment. The writ was denied because the duty to issue the bonds devolved upon the Board's superior, the municipal government. The court said:

"Under the act in question the Board of Liquidation of the city debt, defendant in this suit, is not by said act authorized to issue any bonds whatever, but that duty, under the terms of the act, devolves upon the municipal government of the City of New Orleans."

In State ex rel. Dodd v. Tison, 175 La. 235, 143 So. 59, mandamus was sought against Tison as president of Louisiana State Normal College to order him to reinstate a student who had been expelled from the college. The court held that mandamus would not lie because under the law the president of the college was the mere agent of the State Board of Education, and was without power to control the reinstatement of students except in conformity with the Board's direction. It is submitted that this decision is squarely in point.

In American Book Co. v. Marrs, (Tex.) 253 S. W. 817, mandamus was sought against the State Superintendent of Public Instruction to enforce compliance with certain contracts for books. By the laws of Texas authority to purchase books was vested in the Superintendent's superior, the State Board of Education. In holding that the suit had been brought against the wrong party, the court said:

"Relator does not allege that the state board of education has in any way acted upon its said contracts. Nowhere in relator's petition does it allege that the said state board has exercised its powers and authority in any manner as affecting its contracts, or that respondent, in Ms ministerial capacity, has refused, or is refusing, to do and perform the decisions, ruling, or mandates of the board, or that he, in the matters complained of, was acting contrary to or without the approval of the board.

“From the foregoing it follows that relator, in order to show itself entitled to a mandamus against respondent, must allege that the state board of education has determined that a contract exists with it, and has instructed the respondent to place its books on the requisition lists. Otherwise the respondent has no duty in the premises. Whatever he may do amounts to nothing, so far as abrogating the contract of relator is concerned, or determining its nonexistence, unless what the respondent may do is authorized by or approved by the state board of education.

“The decisions upon the matters involved in relator’s petition lying with the state board of education, and not with respondent, it is clear that respondent could not by mandamus be required to do the things prayed for here, unless and until the state board of education had ordered and directed him to do them and he had failed or refused to do them. Therefore relator has not shown itself entitled to the relief sought.”

In Holtzclaw v. Riley, (Ga.) 39 S. E. 425, mandamus was denied because the respondent had nothing to do with the performance of certain of the duties alleged, and as to other duties he acted as the agent and subordinate of the Board of County Commissioners. The court held (syllabus by the court):

“Where a Board of County Commissioners is invested with the full management and control of certain matters with which the county judge, as such, has nothing to do, but to a part of which he is attending as the agent of the Board of Commissioners, mandamus will not lie against such county judge to compel him to perform certain acts in connection with such matters, when these acts, if required at all by law, are required of the Board of Commissioners.”

Counsel for relator argue (p. 44) that the action of the board in “setting up the color bar” is void. Manifestly, that is not true; because the state lawmakers have separated the races, and they have constitutional power to do so (State ex rel. Gaines v. Canada, 305 U. S. 337, 344), as counsel explicitly concede (p. 40 of brief).

Before counsel filed this suit they were evidently much interested in learning what action the Board of Curators had taken on relator’s application, and requested a copy of any minutes pertaining thereto (R. 95-6). Relator having never applied to the Board (R. 97), counsel did not make the Board a party (R. 1-10). Now counsel attempt to minimize this defect, and they argue (p. 44), that “when a policy was to be established, as in the Gaines case, the Board of Curators was made a party”; and that “this case involves not the creation of a policy, but its practical, mechanical application.” Obviously, there is much more involved here than the mere mechanical act of issuing a permit. This case involves the question whether, in any case, a negro is entitled to admission to the University of Missouri; and the question whether such admission can be had in the absence of any previous demand on Lincoln University for instruction and refusal by that state agency to furnish it.

Counsel say (p. 44) that “respondent registrar cannot hide behind a void order of a superior authority,” citing Nixon v. Condon, 286 U. S. 73, and Lane v. Wilson, 307 U. S. 268. Neither decision supports counsel. In the Nixon Case (p. 85) the Supreme Court points out that the Executive Committee was acting under a statute and not as an agency of the Democratic Party Convention; hence the case did not involve the point on which counsel cite it. Likewise, in the Lane Case (p. 274), the defendant election officials were acting under color of a state registration statute; and the proposition on which counsel cite the case was not involved or

decided. In the case at bar the respondent registrar is not attempting to "hide behind a void order of a superior authority." The rule of the Board forbidding the enrollment of negroes is a valid rule, in conformity with a valid state policy of race separation in education (State ex rel. Gaines v. Canada, 305 U. S. 337, 344).

For all the reasons above stated, it is respectfully submitted that the judgment below was right, and should be affirmed.

III.

Mandamus Is a Discretionary Remedy, and Not a Writ of Right; and under All the Circumstances of This Case the Exercise of a Sound Judicial Discretion Requires That the Writ Should Be Denied.

The granting of mandamus in this case would he a long stride toward the destruction of the state policy of race separation in education. The people of the state believe race separation to be a wise policy. Experience has shown it to be a wise policy. It has preserved order and discipline in the educational system. It has resulted in a steady advance in the education of each race. It has been established at an expenditure of millions of dollars (R. 281). To destroy and overthrow this system would be to do great injury to the public interest.

It is our position, respectfully submitted, that if the settled policy of the state in separating the races is to be changed, it can only be done in an orderly way; namely, by a repeal of the present statutory provisions requiring separation of the races, and by the enactment of new laws providing for a mingling of the two races in the same class rooms. We submit that this radical and fundamental change in the law should not be accomplished by the writ of mandamus.

In State ex rel. Jacobsmeyer v. Thatcher, 338 Mo. 622, 627, 92 S. W. 2d 640, 643, this court en banc recently dealt with the essential conditions which must be shown to exist before mandamus will be awarded, and in that connection said:

"More than that, even though a clear legal right has been established, the court must look to the large public interest concerned and should act in view of all existing facts and with due regard to the consequences which might result. This is true especially where, as here, the writ, if granted, would affect others not party to the suit, and where questions of grave importance are involved, or where the result might bring about confusion and disorder, or be unreasonable or injurious to the public; and in such cases the court should deny the writ, irrespective of the question of clear legal right of relator."

Certainly the spirit as well as the letter of the law in Missouri requires race separation in education. The requirement is founded upon an old and settled tradition. The destruction of that tradition will work public mischief. In People ex rel. Wood v. Board of Assessors of the City of Brooklyn, 33 N. E. 145, the New York Court of Appeals holds that mandamus will not issue "to compel the performance of an act which will work a public or a private mischief or to compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a palpable fraud."

The writ of mandamus is grantable, not as a matter of right, but only in the court's sound discretion. In State ex rel. Crow v. Boonville Bridge Co., 206 Mo. 74, 134-135, 103 S. W. 1052, this court en banc said regarding the remedy of mandamus:

"But whether it be called a prerogative writ, a writ of right, or an ordinary action at law, the authorities agree that the courts have a discretion whether they will issue or refuse

the writ, even where a prima facie right thereto is shown. Though there he no other remedy, the court will still exercise its discretion on the subject."

In the same case this court quoted with approval from High on Extraordinary Legal Remedies (3rd Ed.), Section 9, as follows:

"Cases may therefore arise where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, hut where the court may, in the exercise of a wise judicial discretion, still refuse the relief."

In State ex inf. Barker v. Kansas City Gas Co., 254 Mo. 515, 531, 163 S. W. 854, this court en banc said:

"In the next place (still further by way of a generalization) it is uniformly held that a writ of mandamus, though it has somewhat lost its sometime high prerogative quality and sanction, is yet in so far forth a discretionary writ that it should he denied if a sound (that is, judicial) discretion bespeaks that course (State ex rel. v. Gibson, 187 Mo. 1. c. 555 et seq.; State ex rel. v. Bridge Co., 206 Mo. 1. c. 133, and authorities cited, among them those infra). Such discretion must not be measured by the yardstick of mere whim, arbitrariness, humor, fancy. It must be sound, legal, regular, quickened and guided by law. Subject to the limitations thus foreshadowed, the rule is that 'whether a writ of mandamus shall be issued is in every case a matter resting largely in the discretion of the court, and depends upon all the surrounding facts and circumstances' (Morawetz, Priv. Corp. (2nd Ed.), Sec. 1134;
High, Ex. Leg. Rem. (3rd Ed.), Sec. 9; Merrill on Mand., Secs. 64, 67)."

The same principle is announced in Duncan Townsite Co. v. Lane, 245 U. S. 308, 311, and Arant v. Lane, 249 U. S. 367, 371. See, also, State ex rel. Burnett v. School District of City of Jefferson, 335 Mo. 803, 815, 74 S. W. 2d 30, 34; State ex rel. Attorney General v. Railroad Co., 77 Mo. 143, 147, and State ex rel. Lyons v. Bank, 174 Mo. App. 589, 593-595, 163 S. W. 945.

This is not a case where relator, acting of her own free will, is seeking relief for an actual grievance. We would find no fault with the N. A. A. C. P. (and would commend it) for rendering legal aid to any negro so situated. We do, however, question the wisdom of the association in inciting litigation attacking long-established traditions based upon settled law, in states where the association is not familiar with prevailing conditions. Such litigation may be a disservice rather than a benefit; the association may do more harm than good to members of the negro race by using them in what is nothing more or less than a struggle for social equality. Social equality is something which cannot be enforced by law, as the courts have held.

Plessy v. Ferguson, 163 U. S. 537, 551.

People ex rel. King v. Gallagher, 93 N. Y. 438, 448.

State ex rel. Weaver v. Trustees of Ohio State University, 126 Ohio St. 290, 297.

Lehew v. Brummell, 103 Mo. 546, 551-2, 15 S. W. 765.

Younger v. Judah, 111 Mo. 303, 311-312, 19 S. W. 1109.

Martin v. Board of Education, (W. Va.)
26 S. E. 348, 349.

Roberts v. City of Boston, 5 Cush. 198, 210.

Ward v. Flood, 48 Calif. 36.

On the basis of sound discretion, if it stood alone, the writ of mandamus should be denied. A decision on that ground would in no way conflict with the decision in State ex rel. Gaines v. Canada, 305 U. S. 337, as clearly shown by the comments both in the majority opinion (p. 352)

and in the minority opinion (p. 354) in that case.
Conclusion.

It is respectfully submitted that the judgment of the circuit court should be affirmed, for each of the following reasons:

1. This suit is not prosecuted in good faith for the purpose stated in the alternative writ.

2. Even if relator were in good faith, Lincoln University under existing laws is the only state agency which would owe her any duty to furnish instruction; and she has and can have no cause of action for admission to the University of Missouri under any circumstances.

3. Relator has no cause of action even on her own theory of the law, because she has never made any demand on Lincoln University for instruction; she did not even communicate with Lincoln University until three days before her last demand for admission to the University of Missouri; Lincoln University has never refused an application of relator or any negro for graduate instruction in
Journalism; and respondent was never given notice of any application by relator to Lincoln or of any refusal by Lincoln to admit her and furnish instruction for her. For these reasons relator has never put herself in any position to demand admission to the University of Missouri.

4. In no event should mandamus issue against respondent registrar, who is not a statutory officer and is a mere subordinate of the Board of Curators, because respondent has no lawful power or authority to do otherwise than obey the rule of the Board forbidding him to issue permits to negroes.

5. Mandamus, a discretionary remedy, should be denied because of great injury to the public interest which would flow from the granting of the writ.

We respectfully submit that all of these defenses are sound and should be sustained, and the judgment affirmed. It is respectfully submitted that if in the opinion of this Court these defenses are sound, respondent is justly entitled to a decision by this court upholding all of them.

Respectfully submitted,
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