1948

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 369

ADA LOIS SIPUEL,
Petitioner,

VERSUS

BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, GEORGE L. CROSS, MAURICE H. MERRILL, GEORGE WADSACK and ROY GITTINGER,
Respondents.

BRIEF OF RESPONDENTS

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DECEMBER, 1947.

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STATEMENT OF THE CASE

The "Statement of the Case" and the "Statement of Facts" set forth on Pages 2 to 6 of petitioner's brief, are substantially correct with the exception that respondents did not, as stated in said brief (P. 3), refuse petitioner admission to the Law School of the University of Oklahoma on the ground:

"(2) That scholarship aid was offered by the State to Negroes to study law outside the State, * * *."

While certain allegations of fact set forth in said statements are not, in all respects, accurate, respondents will fully clarify their position in relation to said allegations in our "Argument" herein.

However, before concluding this "Statement of the Case," respondents desire to call attention to the "Order Correcting Opinion—June 5, 1947," which appears on Pages 51 and 52 of the record, and to the fact that said correction was not made in the pertinent language of the decision of the Supreme Court of Oklahoma, which opinion appears on Pages 35 to 51 of the record. In this connection it will be noted that said correction should have been made in the first line of the fourth paragraph of said opinion, which paragraph appears on Page 41 of the record, so that said line would read:

As we view the matter the State itself could *not* place complete * * *

By an examination of said decision, as it appears in 180 Pac.(2d) 135-138, it will be noted that said correction was likewise not made therein.

ARGUMENT

There is but one real issue involved in this case and that is *whether or not the trial court,* that is, the District Court of Cleveland County, Oklahoma, *erred in declining to issue a writ of mandamus,* as prayed for by petitioner, *to require the respondents,* Board of Regents of the University of Oklahoma, George L. Cross, Maurice H. Merrill, George Wadsack and Roy Gittinger, *to admit the petitioner,* Ada Lois Sipuel, *to the School of Law of the University of Oklahoma.*

Before discussing the above issue respondents deem it advisable to call attention to 12 O.S. 1941, Sec. 1451, relating to the right of issuance of a writ of mandamus in Oklahoma, the material part of which is as follows:

> *"The writ of mandamus may be issued by the* Supreme Court or the *district court,* or any justice or judge thereof, during term, or at chambers, to any inferior tribunal, corporation, board or person, *to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station; * * *."*

The Oklahoma Supreme Court, in construing the above language, held in the second paragraph of the syllabus of *Payne, County Treasurer et al.* v. *Smith, Judge,* 107 Okla. 165, 231 Pac. 469, as follows:

> "To sustain a petition for mandamus *petitioner must show a legal right to have the act done sought by the writ, and also that it is plain legal duty of the defendant to perform the act."*

In the case of *Stone* v. *Miracle, Dist. Judge,* 196 Okla. 42, 162 Pac. (2d) 534, the syllabus is as follows:

> "Mandamus is a writ awarded to correct an *abuse of power or an unlawful exercise thereof by an* inferior court, *officer,* tribunal *or board by which a litigant is denied a clear legal right,* especially where the remedy by appeal is inadequate or would result in inexcusable delay in the enforcement of *a clear legal right.*"

In the case at Bar petitioner evidently recognized the principles of law announced in the above decision. In this connection it will be noted that petitioner, *as a basis for this action in mandamus,* alleged in her petition (R. 2 to 6) that although she was duly qualified to attend the School of Law of the University of Oklahoma when she, on January 14, 1946, "duly applied for admission to the first year class" of said school for the term beginning January 15, 1946, she was by respondents:

> "* * * *arbitrarily* refused admission" (Para. 1 of petitioner's pet.).
>
> "* * * *arbitrarily and illegally* rejected" (Para. 2 of petitioner's pet.).

And that said refusal or rejection was:

> "* * * *arbitrary and illegal*" (Para. 5 of petitioner's pet.).

Therefore, *the real issue* involved in this case is whether or not respondents, on January 14, 1946, *arbitrarily and illegally* rejected the application of petitioner for admission to the School of Law of the University of Oklahoma.

Said issue is summarized herein as follows:

> Mandamus will not lie to require respondents to violate the public policy and criminal statutes of Oklahoma by directing respondents to admit petitioner, a colored person, to the School of Law of the Univer-

sity of Oklahoma, same being attended only by white persons, since petitioner has not:

(1) Applied, directly or indirectly to the Oklahoma State Regents for Higher Education for them, under authority of Article 13-A of the Constitution of Oklahoma, to prescribe a school of law equal or "substantially equal" to that of the University of Oklahoma as a part of the "standards of higher education" and/or "functions and courses of study" of Langston University, same being a State institution of higher education attended only by colored persons, or

(2) Indicated, directly or indirectly, to said State Regents or to the governing board of Langston University, that she would attend such a school in the event it was established.

Respondents will present their argument in support of the above summarized issue under the following propositions.

FIRST PROPOSITION

THE PETITIONER MAY NOT SECURE IN THIS PROCEEDING A RECONSIDERATION OF THE "SEPARATE BUT EQUAL" DOCTRINE.

Rule 38, Par. 2, of this Court provides, concerning the petition for review on *certiorari* of a decision of a state court of last resort:

"The petition shall contain * * *; the question presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of *certiorari* will be considered."

This rule expresses a long-standing practice of the Court, as is shown by the following excerpts from its decisions:

"Defendant seeks reversal on a number of grounds that were not mentioned in his petition for the writ. But this Court is not called on to consider any question not raised by the petition."

Gunning v. *Cooley,* 281 U.S. 90, 98.

"The *Adkins* case, unless distinguishable, requires affirmance of the judgment below. The petition for the writ sought review upon the ground that this case is distinguishable from that one. * * * This Court confines itself to the ground upon which the writ was asked or granted."

Morehead ex rel. New York v. *Tipaldo,* 298 U. S. 587, 604.

See also:

Alice State Bank v. *Houston Pasture Company,* 247 U.S. 240, 242;

Commercial Credit Co. v. *United States,* 176 U.S. 226, 229;

Steele v. *Drummond,* 275 U.S. 199, 203.

In the instant case the reason relied on by petitioner for allowance of the writ of *certiorari* was,

"The decision of the Supreme Court of Oklahoma is inconsistent with and directly contrary to the decision of this Court in *Gaines* v. *Canada*" (Petition for *certiorari,* P. 6).

The decision in *Gaines* v. *Canada* expressly recognized the constitutional propriety of the "separate but equal" doctrine. 305 U.S. at 344. Hence it is not open to the petitioner to question that doctrine when the only reason advanced or relied on for the allowance of the writ was an alleged conflict with a decision which accepted and applied said doctrine.

Respondents, therefore, will not attempt to answer here the second proposition discussed under the heading:

> "This Court Should Re-examine the Constitutionality of the Doctrine of 'Separate But Equal' Facilities,"

on Pages 18 to 51 of petitioner's brief.

SECOND PROPOSITION

THE DECISION OF THE SUPREME COURT OF OKLAHOMA ACCORDS FULL RECOGNITION TO THE ASSERTED CONSTITUTIONAL RIGHT OF THE PETITIONER TO HAVE PROVISION MADE FOR HER LEGAL EDUCATION WITHIN THE STATE AND ESTABLISHES THAT THE STATE OF OKLAHOMA HAS PROVIDED AN EFFECTIVE BASIS ON WHICH THE PETITIONER MAY SECURE SUCH EDUCATION.

(a) The decision of the Supreme Court of Oklahoma fully accepts the proposition that the Equal Protection Clause of the Fourteenth Amendment requires a state which provides education in law to white students at an institution within its borders to likewise provide such education within the state to students belonging to other races, and that this right is available to any applicant of one of such other races who indicates an intention to accept such training.

The decision of the Oklahoma Supreme Court, as above outlined, is in accord with the basis upon which the decision in *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, rests (See "Fourth Proposition" hereof). The decision of the Supreme Court of Oklahoma recognizes this fully and repeatedly. "That it is the State's duty to furnish *equal facilities* to the races goes without saying"

(R. 38). "Negro citizens have an equal right to receive their law school training within the State if they prefer it" (R. 42). Said court expressly stated that it is the duty of the proper state authorities, upon proper notice or information "to provide for her [petitioner] an opportunity for education in law at Langston or elsewhere in Oklahoma" (R. 45). "The reasoning and spirit of that decision [the *Gaines* case], of course, is applicable here, that is, that the State must provide either a proper legal training for petitioner in the State, or admit petitioner to the University Law School" (R. 47). The opinion (R. 51) specifically holds that "petitioner is fully entitled to education in law with *facilities equal* to those for white students, * * *."

(b) The decision of the Supreme Court of Oklahoma establishes that the law of the State vests in the petitioner a right to education in law within the State, at a public institution of higher education, on a basis of equality with white students admitted to law courses at the University of Oklahoma.

It is expressly stated in said decision (R. 42) that,

> "* * * the State Regents for Higher Education has undoubted authority to institute a law school for Negroes at Langston. It would be the duty of that board to so act, not only upon formal demand, *but on any definite information* that a member of that race was available for such instruction and desired the same."

Said duty is summed up in the concluding portion of the opinion (R. 50) in the statement,

> "* * * we are convinced that it is the *mandatory duty* of the State Regents for Higher Education to provide equal educational facilities for the races to the full extent that the same is necessary for the patronage thereof. That board has full power, and as we construe the law, the *mandatory duty* to provide a separate law school for Negroes upon demand or substantial notice as to patronage therefor."

This determination rests upon a substantial basis (as is shown by Paragraphs 1 to 5, below) in the constitutional and statutory law of Oklahoma:

1. The constitution and laws of said State prescribe the policy of segregated education of the white and the colored races, but with equal facilities, from the common schools, Oklahoma Constitution, Article 13, Section 3 (R. 16), on through the colleges and other institutions, 70 O.S. 1941, Sections 455, 456 and 457 (R. 16 and 17).

2. In pursuance of this policy, the State has established, among other institutions of higher education, the University of Oklahoma, to which white students are admitted. Likewise the State has established Langston University, to which colored students are admitted. 70 O.S. 1941, Section 1451 (R. 18).

3. The Oklahoma State Regents for Higher Education is established as "a co-ordinating board of control" for all institutions of higher education. As such, it is empowered and directed to "prescribe standards of higher education applicable to each institution," to "determine the functions and courses of study in each of the institutions to conform to the standards prescribed," and to "recommend to the State Legislature the budget allocations to each institution." Oklahoma Constitution, Article 13-A, Section 2 (See Pages 23 and 24 hereof). This last function of recommending budget allocations is merely for the information of the Legislature, since Section 3 of said article is as follows:

> "The appropriations made by the Legislature for all such institutions shall be made in consolidated form *without reference to any particular institution* and the Board of Regents herein created shall allocate to each institution *according to its needs and functions.*"

The *mandatory character* of the above quoted constitutional provision was given effect by the Supreme Court of Oklahoma in the case of *Board of Regents* v. *Childers, State Auditor* (July 9, 1946), 197 Okla. 350, 170 Pac.(2d) 1018, approximately one year prior to its decision in the case at bar. From these constitutional provisions it appears that the State Regents for Higher Education, and not the governing board of each educational institution, have the power to prescribe the functions and courses of study of each institution, and that said State Regents have under their control all the financial resources which the State has appropriated for higher education. Hence, it is clear that the State Regents have full power to provide a legal education for the petitioner within the State and to prescribe the institution at which it shall be given, and that no other authority of the State possesses such power.

4. The Constitution of Oklahoma, Article 1, Section 1, provides that "the State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land." The same constitution, in Article 15, Section 1, prescribes an official oath to be taken by all State officers, including, of course, the State Regents for Higher Education, that they will "support, *obey* and defend the Constitution of the United States, and the Constitution of the State of Oklahoma." It is the established practice of the courts of Oklahoma to construe grants of power in such a way as to comply with constitutional requirements. *Ex parte Tindall,* 102 Okla. 192, 200, 229 Pac. 125, 132; *In re: Assessment of Kansas City Southern Railway Company,* 168 Okla. 495, 33 Pac.(2d) 772. "The statutes of

Oklahoma are construed in connection with and in subordination to the Constitution of the United States * * *." *Overton* v. *State,* 7 Okla. Cr. 203, 205, 114 Pac. 1132.

5. Fitting these constitutional and statutory provisions and this established practice of construction together, recognizing the unquestionable fact that the State Regents for Higher Education can give effect to the State's policy of segregation, consistently with obedience to the Constitution of the United States, only by providing education in law within the State to such Negroes as request it, so long as such instruction is afforded to whites, it was clearly proper for the Oklahoma Supreme Court to hold that the State Regents are under a *mandatory duty* to provide for that training, consistently with the policy of segregated education, whenever it is clear that there are Negroes who are willing to receive it. It was merely a compliance with the command of the State's highest law that the Constitution of the United States shall be obeyed. It was an adherence to the sound doctrine expressed by the Supreme Court of Missouri in *State ex rel. Bluford* v. *Canada* (1941), 348 Mo. 298, 309, 153 S.W.(2d) 12, 17:

> "It is the duty of this court to maintain Missouri's policy of segregation so long as it does not come in conflict with the Federal Constitution. It is also our duty to follow the interpretation placed on the Federal Constitution by the Supreme Court of the United States."

It was but giving effect to the principle enunciated by this Court in *American Power and Light Company* v. *Securities and Exchange Commission,* 329 U.S. 90:

> "Wherever possible statutes must be interpreted in accordance with constitutional provisions."

Counsel for the petitioner are hardly in a position to assail as unreasonable (Pet. B. 14) a statement of the law with which they concurred, when they said in their brief

in the Supreme Court of Oklahoma, as quoted in the opinion (R. 49 and 50) of said Court:

> "The Constitution and laws of the United States and the State of Oklahoma require that equal facilities be afforded all citizens of the State. *The duty of making such equal provisions was delegated to the Board of Regents of Higher Education.* This duty is incumbent upon the Board by virtue of their office."

This reasonable and tenable declaration of the law of Oklahoma, by its highest court, will be accepted by this Court as an authoritative definition of the *mandatory duty* of the State Regents for Higher Education under the State law.

Tampa Water Works Company v. *Tampa,* 199 U.S. 241, 244;

Douglas v. *New York, New Haven and Hartford Railroad Company,* 279 U.S. 377, 386;

Atchison, Topeka and Santa Fe Railroad Company v. *Railroad Commission of California,* 283 U.S. 380, 390;

Senn v. *Tile Layers Protective Union,* 301 U.S. 468, 477;

United States v. *Texas,* 314 U.S. 480, 487;

Allen-Bradley Local v. *Wisconsin Employment Relations Board,* 315 U.S. 740, 746.

This Court, as held in *Quong Ham Wah Co.* v. *Industrial Accident Commission,* 235 U.S. 445, 449, will not accept an argument which

> "* * * but disputes the correctness of the construction affixed by the court below to the State statute and assumes that that construction is here susceptible of being disregarded upon the theory of the existence of the discrimination contended for when, *if the meaning*

affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears."

(c) The Oklahoma law, thus interpreted, is in accord with the Equal Protection Clause of the Fourteenth Amendment, as interpreted by this Court.

The decisions of this Court consistently have recognized the validity of racial segregation in education under the Fourteenth Amendment, provided that all races are accorded equal, or substantially equal, facilities.

Plessy v. *Ferguson,* 163 U.S. 537, 544;
Cumming v. *County Board of Education of Richmond County,* 175 U.S. 528;
Berea College v. *Kentucky,* 211 U.S. 45, 55;
Gong Lum v. *Rice,* 275 U.S. 78.

In *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 344, this Court reaffirmed this principle, stating it as "the obligation of the state to provide Negroes with advantages for Higher Education *substantially equal* to the advantages afforded to white students," and that the fulfillment of said obligation, "by furnishing *equal facilities* in separate schools, * * * has been sustained by our decisions." The petitioner's counsel take their stand upon the proposition that "The decision of the Supreme Court of Oklahoma is inconsistent with and directly contrary to the decision of this Court in *Gaines* v. *Canada*" (Pet. for *cert.* 6). But the distinctions between the legal and factual situation presented in the *Gaines case* and that presented in this case are significant and controlling under the very doctrine to which the petitioner appeals.

Said distinctions, as will hereinafter be shown, have been accurately apprehended and correctly applied by the Supreme Court of Oklahoma.

1. The basic ground of the decision in the *Gaines case* is stated thus by Mr. Chief Justice Hughes:

> "By the operation of the laws of Missouri a privilege has been created for white law students which is denied to Negroes by reason of their race. The white resident is afforded legal education within the State; the Negro resident having the same qualifications *is refused it there and must go outside the State to obtain it.*" 305 U.S. at 349.

2. Subsidiary to this main proposition, the opinion in the *Gaines case* points out that under the decision of the Missouri court the curators of the Lincoln University were not under a duty to provide the petitioner therein with training in law, but merely had an option to do so or to remit him to the procuring of a legal education outside Missouri at state expense. 305 U.S. at 346 and 347. The decision herein of the Supreme Court of Oklahoma expressly declares (R. 42) that:

> "The State Regents for Higher Education has undoubted authority to institute a law school for Negroes at Langston. *It would be the duty of that board to so act,* not only upon formal demand, but on any definite information that a member of that race was available for such instruction and desired the same."

3. Inasmuch as the first decision of the Supreme Court of Missouri in the *Gaines case* maintained that the constitutional rights of the petitioner therein were provided for adequately by the opportunity to have his tuition paid in an out-of-state law school, this Court declared that:

> "We must regard the question whether the provision for the legal education *in other states* of Ne-

groes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection, *as the pivot upon which this case turns.*" 305 U.S. at 348.

The decision of the Supreme Court of Oklahoma expressly recognizes that the provision in the Oklahoma law for the payment of tuition in out-of-state schools "does not necessarily discharge the State's duty to its Negro citizen" (R. 42), and recognizes his right to education within the State.

4. In the *Gaines case* (305 U. S., Pages 351, 352), the decision did not rest upon the point that no law school presently existed for Negroes, but upon the ground that the discrimination arising from its absense

> "may nevertheless *continue for an indefinite period* by reason of the discretion given to the curators of Lincoln University and the alternative of arranging for tuition in other states, as permitted by the state law as construed by the state court, *so long as the curators find it unnecessary and impracticable* to provide facilities for the legal instruction of Negroes within the state.
>
> "In that view, we cannot regard the discrimination as excused by what is called its *temporary character.*"

This language implies that a state is not required to maintain in its institution for Negroes a duplication of all departments existing in its institution for whites, *regardless* of whether students present themselves for training therein.

The decision of the Supreme Court of Oklahoma specifically points out that "authority already exists" (R. 44) for the establishment of a separate law school within the State, and that, contrary to the situation in

the *Gaines case. "it is the mandatory duty"* of the State Regents for Higher Education "to provide a separate law school for Negroes upon demand or substantial notice as to patronage therefor" (R. 50). Hence, the possibility of indefinite continuance of discrimination, upon which the *Gaines* decision turned, does not exist in Oklahoma.

5. The petitioner's counsel make much of an alleged misstatement by the Supreme Court of Oklahoma that Gaines had demanded, unsuccessfully, training in law from Lincoln University (Pet. Brief, pp. 17, 18). Read in the entire context, as we demonstrated in our brief in response to the petition for *certiorari* (P. 14), the Supreme Court of Oklahoma treated the communication from Gaines to Lincoln University merely as giving the Lincoln authorities notice that "there existed a need and at least one patron for a law school for Negroes" (R. 46), a condition which petitioner's conduct thus far has prevented from arising in this case. There is no foundation for the assertion (Pet. Brief, P. 17), that this shows that "the Supreme Court of Oklahoma completely ignored the opinion of this Court in the *Gaines case.*"

THIRD PROPOSITION

THE PETITIONER HAS FAILED TO SEEK RELIEF FROM OR AGAINST THE OFFICIALS WHO MAY PROVIDE IT UNDER THE LAW OF OKLAHOMA.

As the analysis herein of Article 13a of the Oklahoma Constitution already has demonstrated, the State Regents for Higher Education have full control over the functions, the courses of study and the budgets of the several Oklahoma institutions of higher education. (See pertinent provisions of said Article 13a on Pages 23 and 24 of this

brief). The Board of Regents of the University of Oklahoma and its administrative authorities have no power to alter its functions from those of an institution for the education of *white students* to those of an institution for the education of *white and colored students.*

The authority to prescribe functions rests in the State Regents. They have complete control over the purse strings of the State's higher educational institutions. It is they who must make the decision whether the resources available will enable them to provide separate education in law for the two races in accordance with the State's policy, and what budgetary adjustments must be made for that purpose. If they find this to be impossible, they might elect to comply with the Constitution of the United States by discontinuing all State provision for instruction in law, or by opening up the single State law school to students of all races.

Hence, it is they, and not the authorities of the University of Oklahoma, from whom and against whom the petitioner should seek relief. This case, therefore, comes under the rule enunciated and applied in *Copperweld Steel Company* v. *Industrial Commission of Ohio,* 324 U. S. 780, 785, wherein this Court held:

> "The question of the propriety of taking the appeal need not be decided, in the view we take of the basis of the state court's judgment. Inasmuch as we conclude that decision was grounded upon the view that the appellant *had not pursued the remedy afforded by State law for the vindication of any constitutional right it claimed was violated,* we must dismiss the appeal and deny *certiorari.*"

See also, as to the need for pursuing State administrative remedies before resorting to judicial action:

Prentis v. *Atlantic Coast Line Company,* 211 U.S. 210, 230;

Lawrence v. *St. Louis-San Francisco Railway Company,* 274 U.S. 588, 592;

St. Louis-San Francisco Railway Company v. *Alabama Public Service Commission,* 270 U.S. 560, 563.

The decision of the Supreme Court of Oklahoma expressly holds and determines:

(1) That the petitioner, a Negro, is entitled to education in law within the State so long as the State maintains facilities for such education available to white students;

(2) That such education must be furnished on a basis of equality of facilities, but, under the established law and policy of the State, in a separate institution;

(3) That only the State Regents for Higher Education have the authority to provide such education, since they constitute the only official body of the State having authority to prescribe the standards and the functions and courses of study of the several State institutions of higher education;

(4) That the duty of the State Regents to provide the petitioner with legal training on a basis of equality with that afforded to white students *is mandatory* and not discretionary;

(5) That this duty attaches whenever, either by formal demand or through information arising in some other way, the State Regents properly are chargeable with notice that a Negro student desires the provision of training in law *at a separate law school;* and

(6) That the State Regents are the only State officers that have at their command the State's revenue provided for purposes of higher education.

On the basis of this analysis of the pertinent law, the petitioner's road to secure a legal education within Oklahoma, if she is willing to accept the State's valid policy of segregated education, is clear. If she applies to the State Regents for Higher Education to provide her with facilities for a legal education, it is inconceivable that, with the instant opinion of the Supreme Court of Oklahoma before them, they will refuse to do so. Should they, the remedy through judicial recourse is clear.

The petitioner could have set this machinery in motion on April 29, 1947, when the opinion of the Supreme Court of Oklahoma was filed. The constitutional and statutory provisions upon which the decision rests were in existence at all times, and certainly her attention was called to the respondents' contention respecting their interpretation as early as the filing of respondents' answer in the District Court of Cleveland County, Oklahoma, on May 14, 1946. Thus, at any time since then, she might have evinced her willingness and desire to accept an education in law furnished according to the valid policy of the State. Instead, she insisted at all times, and still insists, on her alleged right to attend the Law School of the University of Oklahoma regardless of that policy.

Her disregard of the State Regents for Higher Education, as aforesaid, and her failure to make them parties to this action, combine to indicate that her interest was in breaking down the State's policy of segregated education, not in securing provision for legal training in accordance

therewith. This conduct fully justifies the comment (R. 47) of the Supreme Court of Oklahoma:

> "The effect of her actions was to withhold or refrain from giving to the proper officials, the right or option or opportunity to provide separate education in law for her * * *."

This attitude, so manifested and continued, gives no assurance that petitioner would accept legal training in a separate law school. For all resulting delay, the petitioner alone is responsible.

FOURTH PROPOSITION

THE CASE OF STATE OF MISSOURI EX REL. GAINES v. CANADA (1939), 305 U.S. 337, 83 L.ed. 208, RELIED ON BY PETITIONERS HEREIN, WHEN PROPERLY CONSTRUED, SUPPORTS THE DECISION OF THE SUPREME COURT OF OKLAHOMA IN THE CASE AT BAR.

In the above case this Court recognized the validity, under the Fourteenth Amendment of the Constitution of the United States, of racial segregation in education provided all races are afforded equal or substantially equal educational facilities, and in this connection stated:

> "* * * the state court [Supreme Court of Missouri] has fully recognized the obligation of the State to *provide negroes with advantages for higher education substantially equal to the advantages afforded to white students.* The State has sought to fulfill that obligation *by furnishing equal facilities in separate schols, a method the validity of which has been sustained by our decisions. Plessy* v. *Ferguson,* 163 U. S. 537, 544, 41 L. ed. 256, 258, 16 S. Ct. 1138; *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235

> U.S. 151, 160, 59 L.ed. 169, 173, 35 S. Ct. 69; *Gong Lum* v. *Rice*, 275 U.S. 78, 86, 88, 72 L.ed. 172, 176, 177, 48 S. Ct. 91. * * * the fact remains that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes negroes from the advantages of the law school it has established at the University of Missouri.
>
> "It is manifest that this discrimination, *if not relieved by the provisions we shall presently discuss,* would constitute a denial of equal protection."

This Court then proceeded to call attention to the two provisions of the Missouri law relied upon by the Supreme Court of that state as grounds justifying its decision denying the petitioner, Gaines, the writ of mandamus prayed for by him to require his admission to the School of Law of the University of Missouri, said grounds being stated by this Court, as follows:

> "(1) that in Missouri, * * * there is 'a legislative declaration of a purpose to establish a law school for negroes at Lincoln University whenever necessary or practical;' and
>
> "(2) that, 'pending the establishment of such a school, adequate provision has been made for the legal education of negro students in recognized schools outside of this State.' "

In relation to said *second ground,* this Court held that the provisions of the Missouri law, offering negro students educational facilities at state expense in a school of law of another state while offering similar facilities at state expense to white students in a school of law located in Missouri, did not give such negro students "equal pro-

tection of the law" within the meaning of the Fourteenth Amendment.

In relation to the *first ground,* however, this Court stated:

> "As to the *first ground,* it appears that the policy of establishing a law school at Lincoln University has not yet ripened into an actual establishment, and it cannot be said that a *mere declaration of purpose,* still unfulfilled, is enough. The provision for legal education at Lincoln is at present entirely lacking. *Respondent's counsel urge* that if, on the date when petitioner applied for admission to the University of Missouri, he had instead applied to the curators of Lincoln University *it would have been their duty to establish a law school;* that this 'agency of the State,' to which he should have applied, was 'specifically charged *with the mandatory duty* to furnish him what he seeks.' We do not read the opinion of the Supreme Court as construing the state statute to impose such a *'mandatory duty'* as the argument seems to assert. The state court quoted the language of § 9618, Mo. Rev. Stat. 1929, set forth in the margin, making it the *mandatory duty* of the board of curators to establish a law school in Lincoln University *'whenever necessary and practicable in their opinion.'* This qualification of their duty, explicitly stated in the statute, manifestly *leaves it to the judgment of the curators to decide when it will be necessary and practicable to establish a law school, and the state court so construed the statute.* * * *
>
> *"The State court has not held that it would have been the duty of the curators to establish a law school at Lincoln University for the petitioner on his application.* Their duty, as the court defined it, would have been either to supply a law school at Lincoln University as provided in § 9618 *or* to furnish him the opportunity to obtain his legal training in another State as provided in § 9622. *Thus the law left the curators free to adopt the latter course.* * * * In the

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

The above quoted language indicates this Court was of the opinion that if the Missouri law referred to therein had made it the *mandatory duty* of the curators of Lincoln University, upon a proper application therefor, to establish a law school in connection with said University at which the petitioner, Gaines, could attend, he would not have been entitled to a writ of mandamus to attend the law school of the University of Missouri, that is, unless and until he had applied to said curators to establish such a school and his application had been denied.

Said quoted language was, in effect, so construed in the following cases:

1. The second decision of the Supreme Court of Missouri in the *Gaines case, supra,* 131 S.W. (2d) 217,
2. *State ex rel. Bluford* v. *Canada,* 153 S.W. (2d) 12 (R. 48),
3. *Bluford* v. *Canada,* 32 Fed. Supp. 707, appeal dismissed 119 Fed. (2d) 799 (R. 39, 40, 41 and 48),
4. *Michael et al.* v. *Witham et al.,* 165 S.W. (2d) 378 (R. 47), and
5. The decision of the Supreme Court of Oklahoma in the case at bar (R. 35 to 51).

In this connection it will be noted that in the case last above cited the Supreme Court of Oklahoma construed Article 13-A of the Constitution of Oklahoma (adopted

in 1941), creating the Oklahoma State Regents for Higher Education and providing in part that,

> "2. * * *
>
> "The Regents shall constitute a co-ordinating board of control for all State institutions described in Section 1 hereof, with the following specific powers:
>
> "(1) it shall prescribe standards of higher education applicable to each institution;
>
> "(2) it shall determine the functions and courses of study in each of the institutions to conform to the standards prescribed;
>
> "(3) it shall grant degrees and other forms of academic recognition for completion of the prescribed courses in all of such institutions;
>
> "(4) it shall recommend to the State Legislature the budget allocations to each institution, and;
>
> "(5) it shall have the power to recommend to the Legislature proposed fees for all of such institutions, and any such fees shall be effective only within the limits prescribed by the Legislature.
>
> "3. The appropriations made by the Legislature for all such institutions shall be made in consolidated form without reference to any particular institution and the Board of Regents herein created shall allocate to each institution according to its needs and functions."

and held (R. 42) that under said Article 13-A:

> "The State Regents for Higher Education has *undoubted authority* to institute a law school for negroes at Langston. It would be the *duty* of that board to so act, not only upon formal demand, but on any definite information that a member of that race was available for such instruction and desired the same."

The Supreme Court of Oklahoma further held (R. 50) that said Article 13-A, when construed in connection

with other cited constitutional and statutory provisions of Oklahoma establishing *a state policy to segregate* the white and negro races "for the purpose of education in * * * institutions of higher education" of Oklahoma and in the light of said Fourteenth Amendment, made it

> "* * * the *mandatory duty* of the State Regents for Higher Education to provide equal educational facilities for the races to the full extent that the same is necessary for the patronage thereof. That board has full power, and as we construe the law, the *mandatory duty* to provide a separate law school for negroes upon demand or substantial notice as to patronage therefor."

It, therefore, appears that under the above construction of the pertinent constitutional and statutory provisions of the State of Oklahoma *by the highest court thereof* and the principles of law heretofore quoted from the *Gaines case, supra,* and since there is nothing in the record of the case at bar which even indicates:

> (a) That the petitioner herein or any other qualified negro (or any person whatsoever) has ever applied to said Regents for Higher Education to establish a school of law for negroes in Oklahoma, or,
>
> (b) That said petitioner or any other qualified negro would attend such a school if established,

the writ of mandamus prayed for by petitioner herein should be denied.

In reaching the above conclusion that "the writ of mandamus prayed for by petitioner should be denied," *respondents assume that*:

1. A method adopted by a State

> "* * * to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students * * * by furnishing equal facilities in separate schools,"

of the state, which method this Court stated in the *Gaines case* was,

> "* * * a method the validity of which has been sustained by our decisions,'

will still be sustained by this Court, and

2. This Court will not take the position that in order for such a method of equal education in separate schools of a state to be valid under the Fourteenth Amendment, the state, if it establishes and maintains, for example (as here), a law school therein for the members of one race, must at the same time establish and maintain a law school therein for members of the other race, *even though no member of said other race ever applies, or is eligible to apply, for admission thereto.*

CONCLUSION

WHEREFORE, premises considered, respondents respectfully ask this Court to affirm the decision of the Supreme Court of Oklahoma herein.

Respectfully submitted,

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