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vs.

DONALD G. MURRAY.

IN THE

Court of Appeals

OF MARYLAND.

OCTOBER TERM, 1935.

GENERAL DOCKET No. 53.

APPELLANTS' BRIEF.

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The Daily Record Co. Print, Baltimore.

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STATEMENT OF THE CASE.

This is an appeal from the Baltimore City Court in which the appellee (petitioner below), who is a colored man, sued for a writ of mandamus to require the defendants, the Regents of the University of Maryland, to admit him as a student in the law school of the University. The lower court granted the writ.

QUESTION ON APPEAL AND APPELLANTS' CONCLUSIONS THEREON.

Are the defendants compellable in mandamus to admit a negro to the law school? The lower court ruled they were so compellable.

The defendants contend that the trial court erred, for the following reasons:

I.

MANDAMUS IS NOT THE PROPER REMEDY IN THIS CASE.

1. Petitioner Has No Right to Sue in Mandamus to Compel the University Officials to Admit Him. His Remedy, If Any, Is by Appropriate Action to Require the Proper State Officials to Supply a Law School for Negroes.

II.

THE EXCLUSION OF THE APPELLEE DOES NOT VIOLATE HIS CONSTITUTIONAL RIGHTS.

1. Since education is exclusively a State matter, he has no right to admission merely because he is a citizen of the United States.

2. The equal protection of the laws does not prevent classification on the basis of race.

III.

THE LAW SCHOOL OF THE UNIVERSITY OF MARYLAND IS NOT AMENABLE TO CONSTITUTIONAL LIMITATIONS.

1. The University of Maryland Is in the Nature of a Private Corporation.

2. Private Institutions May Select Their Students Arbitrarily, Without Regard to the Fourteenth Amendment.

3. The Law School of the University Derives Its Maintenance Principally From Tuition Charges to Students.

IV.

EVEN IF THE LAW SCHOOL IS A PUBLIC INSTITUTION AMENABLE TO THE FOURTEENTH AMENDMENT, IT IS NOT REQUIRED TO ADMIT NEGROES BECAUSE THE STATE PROVIDES SCHOLARSHIPS FOR THEIR EXCLUSIVE USE.

1. The Policy of This State Is to Separate the Races.

(a) *In railway coaches*

(b) *In private and public educational institutions, at scholastic, collegiate and professional levels.*

2. Separation of the Races in Educational Institutions Has Been Upheld by the Highest Authority.

3. This State Affords Its Colored Citizens Substantially Equal Facilities for Public Education.

(a) *It has a dual and practically identical system of secondary education for the two races.*

(b) *It affords substantially equal opportunities at collegiate levels: at Princess Anne Academy, at Morgan College, and by scholarships.*

(c) *At professional levels it affords no colored schools because heretofore there has been no sufficient demand therefor; but the scholarship system offers its negro citizens opportunities and advantages substantially equal to those given its white citizens.*

STATEMENT OF THE FACTS.

The petitioner is a Negro (R. 23); he is twenty-two years old; has lived in Baltimore all his life; has attended colored Public School No. 103, on Division Street, Douglas High School and Amherst College, Amherst, Massachusetts (R. 45). He intends to practice law in the

City of Baltimore and desires to enter the Law School of the University of Maryland, because it is convenient and less expensive for him, and because he would be able to observe the Maryland courts and become acquainted with other practitioners. Also he is a citizen of this State and thinks he "should have a right to go there" (R. 45).

In December, 1934, he addressed a letter to the Dean of the Law School in which he stated that he was a graduate of Amherst College of the Class of 1934 and desired to secure admittance to the school. He also stated he could secure necessary high school records from Douglas High School "the only Negro High School in this City" (R. 29). He received a reply from Defendant Pearson, the President of the University, in which he was referred to Princess Anne Academy which is maintained as a separate institution of higher learning for the education of Negroes (R. 30). Later his application form and $2.00 money order for an entrance fee were returned to him (R. 32).

In March, 1935, petitioner addressed a letter to the Board of Regents of the University of Maryland. He asserted he was a citizen of the State and fully qualified to become a student of the University of Maryland Law School. He stated that there is no other State institution which offers a legal education. He said that the arbitrary action of the officials of the University of Maryland in returning his application was unjust and unreasonable and contrary to the Constitution of the United States and the Constitution and laws of this State. He appealed to the Regents to accept his application and, finding him qualified, to admit him to the school (R. 32). In reply to this letter he received another communication from President Pearson in which

he was referred to the exceptional facilities open to him for the study of law at Howard University, in Washington. President Pearson pointed out that Howard Law School was rated as "Class A" and was fully approved by the American Bar Association and is a member of the Association of American Law Schools. The President further stated that the tuition at Howard Law School was $135.00 per year, in contrast to $203.00 per year in the day school and $153.00 per year in the night school of the University of Maryland Law School (R. 34).

On April 18, 1935, petitioner filed in the Baltimore City Court his petition for a writ of mandamus, requiring the Board of Regents to accept his application and, upon finding him qualified, to admit him in the regular manner as a first-year student in the day school of the University of Maryland School of Law for the academic year 1935-1936. In his petition he asserted that the University of Maryland is an administrative department of the State and performs as essential governmental function, supported and maintained principally by funds from the General Treasury of the State. He further pointed out that the charter of the University provides that it shall be founded and maintained "upon the most liberal plan, for the benefit of students of every country and every foreign denomination, who shall be freely admitted to equal privileges and advantages of education, and to all the honors of the University, according to their merit, without requiring or enforcing any religious or civil test, upon any particular plan of religious worship or service" (R. 4). He further asserted that the action of the Regents in refusing him admittance violated the Fourteenth Amendment

of the United States Constitution in that it denied him the equal protection of the laws and deprived him of liberty and property without due process of law (R. 7, 8).

In their answer the Regents pointed out that the Baltimore Schools of the University of Maryland, of which the Law School is a part, do not derive their maintenance funds principally from the General Treasury of the State, but are supported principally by tuition fees paid by students in said schools (R. 17).

The Regents further pointed out that this State has provided separate institutions of learning for the exclusive use of colored persons, listing the acts of the Legislature setting up their separate system (R. 19); also they called attention to the scholarship statutes provided by the General Assembly at its 1933 and 1935 regular sessions which were open to the petitioner as a substitute for legal education in this State; and that under the 1935 Scholarship Act a commission on Higher Education of Negroes was established to administer the sum of $10,000 for scholarships to Negroes to attend college out of the State, expressly providing that the scholarships are for "college, medical, law or other professional courses * * * for the colored youth of the State who do not have facilities in the State for such courses" (R. 20).

However, petitioner did not desire one of these scholorships (R. 48) and took no action to obtain one (R. 50).

Up to June 18th, 1935 (the time of the trial below) three hundred and eighty (380) colored persons had obtained application blanks, and one hundred and thirteen

(113) had returned these forms properly filled out, for scholarships under this Act (R. 109).

Under the plan worked out for the issue of these scholarships it was decided by the Commission to award scholarships both to undergraduate students and to graduate or professional students. About one-half of the scholarships would go to undergraduates and one-half to graduates (R. 112-113). Of the number of application blanks requested three hundred and sixty four (364) were for undergraduate work and sixteen were for graduate work. Of these sixteen only one applied for law study (R. 109-110). Petitioner would have been eligible for one of these scholarships if he had applied (R. 113). The scholarships are to cover tuition only and, dividing the $10,000 per year equally between graduate study and undergraduate study, it may be possible to give more than twenty-five scholarships for each group (R. 112); no one applicant may receive more than $200.00 under one of these scholarships (R. 113).

If petitioner had applied for a scholarship for Howard University, in Washington, he would be able to commute daily from his home in Baltimore, but he "wouldn't want to". He can get from Baltimore to Washington in one hour (R. 49). He stated that if he attends Maryland Law School he will not have to pay for his room and board, whereas if he attended school in Washington and did not commute, he would have to pay for his room and board (R. 50).

Operating under statutory direction (Code, Article 77, Section 200, *et seq.*) this State has established a dual system of public education, one administered for its white and one administered for its colored citizens. The

two systems offer approximately equal, and in most cases identical, opportunities for learning.

In the counties of the State there are twenty-eight colored high schools and five hundred and ten colored elementary schools, all of which compare "very favorably" with the schools operated for white children. The courses offered students in each are identical and the curriculum offered in the small colored high school is the same as in the small white high school (R. 88). Maryland requires sixteen units of high school work for graduation and even the small colored high schools offer the full sixteen units; their graduates are admitted into such colleges as Morgan, in the State, and such universities as Howard and Lincoln out of the State (R. 88).

Ninety-eight per cent of the teachers in the colored elementary schools hold a first grade certificate, which is the same percentage as the white teachers in the white elementary schools (R. 89).

As to the distribution of these colored schools throughout the State they are found in every county except Garrett, where the population is sparse. In a county like Prince George's where the colored population is densest, there are forty-four colored schools in the county and seventy elementary teachers. No colored child is required to go more than one and a half miles to reach a school; and, on the average, colored children in the State live about three-fourths of a mile from a colored school house (R. 90).

In the majority of the counties of the State the school term for colored and white children is identical (R. 91); in certain counties on the Eastern Shore where there is

trucking, colored schools run eight months instead of nine. This is because of the strawberry season, the colored children being needed by their parents to pick strawberries (R. 90). In these schools which are open only eight months a year, the same subjects are taught as in the full-term schools, and upon completion the student receives the same number of credits and is as well prepared to go to college as the full-term students (R. 91).

As to the question of school attendance, the State provides one attendance officer for each county. However, the attendance records show a result "slightly less for Negroes than White, not very much less" (R. 92).

In regard to school transportation there are more white children transported to school than colored children, but there is a gradual increase in the number of colored children transported and for the scholastic year 1935-1936, about ten one-room schools will be closed and the colored children will be transported to other schools (R. 92). A school for colored children is opened in any community where it seems there are sufficient number of children to run a school and employ a teacher. In some cases in this State schools are operated for as few as seven colored children (Anne Arundel County); one school in Dorchester County is operated for fewer than ten children (R. 93).

Colored and white teachers do not receive the same salaries, but this does not "interfere with the equality of education". A Negro teacher having the same qualifications as a white teacher "would not slight the members of his own group because he was not paid as much as the white teacher (R. 99).

County education for Negroes, all in all, is substantially equal to the education for whites. There are some items where it is not (R. 93).

In Baltimore City the Douglas High School for Negroes is reputed to be as good as any white school in the City (R. 101).

At college levels there are available for Negroes in this State teachers training schools set up by the Public Education Law (R. 19); Morgan College, a private institution in Baltimore City for Negroes, and Princess Anne Academy, which is the Eastern Branch of the University of Maryland. Morgan College receives a substantial money grant from the State of Maryland and is exclusively a Negro liberal arts college. The present student body comprises about six hundred Negroes. For the scholastic year 1934-1935, the State appropriated the sum of $23,000 thereto, and for the scholastic year 1935-1936, it has appropriated the sum of $35,000 (R. 105, 106). It is a co-educational college specializing in liberal arts and courses in education, particularly for high school teachers. It awards degrees of Bachelor of Arts, Bachelor of Science and Education, Bachelor of Science and Home Economics. It does not maintain a law school or any other professional school (R. 104).

To Princess Anne Academy the State appropriated for the scholastic year 1934-1935 the sum of $15,000. There are about thirty-three colored students there who therefore cost the State approximately $468.00 each. Compared to the appropriation for white students at the University of Maryland and its several schools, the colored student at Princess Anne receives from the State almost three times as much. The appropriation for the

University of Maryland, college department, for the scholastic year 1934-1935 was $230,000 for fifteen hundred students, about $153.00 per student; for the entire University, including the college department and the professional schools, the appropriation was $318,000.00 for thirty-six hundred students, or about $88.00 per year per student (R. 67, 83). These figures do not include the appropriation to the University of Maryland Hospital (R. 82-83).

The appropriation for the present year is between $30,000 and $40,000 less than for the scholastic year 1934-1935 (R. 84).

The Princess Anne Academy seven or eight years ago was "just a school for Negro children, some of them were in the lower grade, some in the high school" (R. 72). During the last few years the lower grades and high school grades have been abandoned, and it is now operated as a Junior College (R. 51, 72). The rating as a Junior College is obtained by students who finish at Princess Anne Academy and enter other colleges, where they are given credit for two years of college work and are accredited as juniors, or third year students (R. 51). Graduates from Princess Anne Academy enter the third year of Morgan College, Virginia State College at Petersburg, or Hampton Institute in Virginia (R. 74, 75). Although there are but approximately thirty-three students at Princess Anne Academy, the school is equipped to take care of more than one hundred students. The dormitories for men and women can accomodate as many as one hundred and seventy-five persons and the same number can be handled in the class-room. Class-room facilities are almost unlimited (R. 74). The Princess Anne Academy offers a training especially de-

signed to prepare colored boys for country life. For this reason the school is not better attended, according to President Pearson, because "the importance and attractiveness and value of that type of education is not well understood by the leaders in the negro race." By that he meant farming and home economics (R. 75-76). Also the Academy is not as attractive as the older institutions with more years behind them and more money to spend, according to Dr. Pearson (R. 76). In addition to the facilities at Princess Anne Academy there has been made available money for scholarships for students to go elsewhere and finish their college education, the amount of the scholarship granted to any one student depending upon the difference between the cost of tuition at Princess Anne Academy and the cost of tuition at the college to which the student might desire to go. The policy was to equalize things so that "it is just as cheap to go outside the State as to stay in the State" (R. 71).

No colored students have been admitted to the Baltimore Schools of the University of Maryland since the early nineties when two negroes were admitted as an experiment. The practice was discontinued thereafter (R. 86, 107). Out of a faculty of eighteen instructors at the Law School, twelve are in general practice in Maryland or on the bench (R. 85).

ARGUMENT.

I.

MANDAMUS IS NOT THE PROPER REMEDY IN THIS CASE.

1. Petitioner Has No Right to Sue in Mandamus to Compel the University Officials to Admit Him. His Remedy, If Any, Is by Appropriate Action to Require the Proper State Officials to Supply a Law School for Negroes.

In *Cumming vs. County Board of Education,* 175 U. S. 528, 44 L. ed. 262, certain negroes sued a Georgia board of education to enjoin it from maintaining a high school for white children without providing a similar school for colored children which had existed and had been discontinued. The Supreme Court of Georgia upheld the denial of the writ. The Supreme Court of the United States affirmed this judgment. In discussing the remedy sought the Supreme Court said, at page 266, law edition:

> "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."

The basis of mandamus is a right in the petitioner and a corresponding duty in the defendant. No duty arises in the officials of the University of Maryland to admit a colored man to its law schools merely because the State has not provided a separate law school for colored persons. The duty, if any, is upon the proper state officials to provide such a separate institution; and not upon the law

school to admit a negro contrary to long established precedent and contrary to the public policy of this State founded in tradition and in statute law.

To require the University to admit a negro, in the absence of any legislative authority so to do, and contrary to the settled policy of this State, would be to enlarge the functions of the University by judicial mandate. The State has established an elaborate system of separate education for its colored citizens. If it be found that this system is not adequate in every respect, the remedy certainly is not to pick out the University of Maryland and to seek by judicial action to compel it to supply the missing link.

Suppose there were a men's college and a women's college as part of the University and suppose that fire destroyed the men's college. Is it conceivable that mandamus would lie to require the women's college to admit men students merely because the men thus were left without facilities for education? If the proper authorities did not rebuild the men's college their remedy, if any, doubtless would be against these authorities. Their remedy certainly would not be, by mandamus, to compel the women's college to take them in.

In *Martin vs. Board of Education,* 42 W. Va. 514, 26 S. E. 348 (1896) a negro citizen, resident of a district which provided white schools but no colored schools, sued to have his children admitted to a white school. The Court said, at page 349:

> "Petitioner's counsel insists that * * * because the legislature and the board of education had failed to make proper provision to afford equal facilities to

> colored children, that they are entitled to attend the school provided for white children, on equal terms. Such a determination would be, in effect, permitting the neglect of the legislature or board of education to abrogate the Constitution, while it is the paramount duty of this Court to see that they obey it. Therefore the circuit court could not do otherwise than refuse the prayer of the petition."

It is apparent that the courts cannot remedy the lack of school facilities by enlarging the powers of existing schools contrary to the public policy of a state as expressed in its laws and in its practice.

Also it is well settled that mandamus will not lie to compel the performance of a discretionary act. *Woods vs. Simpson,* 146 Md. 547. Petitioner cannot point to any statutory or charter provision requiring the University to admit colored persons. It is clear that the University's rights to determine what class or what individual may be admitted or barred from its cloisters is a matter within its discretion, to be exercised in its best judgment and in accordance with public policy. Therefore its exercise of this discretion is not within the control of the courts.

In *Clark vs. Board of Directors,* 24 Iowa 266 (1868) it was held that where a discretion is thus left to the board of directors it cannot be controlled by mandamus even though the discretion be unwisely exercised.

In *State vs. School District,* 154 Ark. 176 (1922) it was held that the action of a school board in classifying pupils on the basis of color is discretionary and no right of mandamus will issue unless it can be shown that the Board acted arbitrarily.

In *Guthrie vs. Board,* 86 Okl. 24 (1922) it was held in a similar case that mandamus will not lie where its issuance would work injustice or introduce confusion and disorder, citing 26 Cyc. 287.

Therefore it is urged that mandamus against the University is not open to the petitioner in this case.

II.

THE EXCLUSION OF THE APPELLEE DOES NOT VIOLATE HIS CONSTITUTIONAL RIGHTS.

1. Since education is exclusively a State matter, he has no right to admission merely because he is a citizen of the United States.

At the outset of a constitutional inquiry it is pertinent to consider the nature of the right claimed to be impaired and the protection of that right asserted to be given by the federal constitution. In the sixteenth paragraph of the complaint in this case it is asserted that the actions of the respondents "violate the Fourteenth Amendment to the Constitution of the United States in that they amount to a denial to Petitioner, a citizen of the United States and of the State of Maryland, by the State of Maryland or an administrative department thereof, of the equal protection and benefits of the laws, as secured to him by the said Fourteenth Amendment and the law of the land; and in that such acts were unequal, oppressive and discriminatory and deprived the said Donald G. Murray, Petitioner, of his liberty and property without due process of law as guaranteed him by the Fourteenth Amendment and the law of the land aforesaid." (R. 7, 8).

No violation of the Constitution of Maryland is alleged in this case.

It is submitted that education is purely a matter of State concern and does not affect a person *as a citizen of the United States.*

As was said by the Supreme Court in the *Slaughter House Cases,* 16 Wall. 36, 21 L. ed. 394 (1873), the privileges and immunities of citizens of the United States are those which arise out of the nature and character of the national government, the provisions of its constitution or its laws and treaties made in pursuance thereof; and it is those which are placed under the protection of Congress by this clause of the Fourteenth Amendment. Further it said:

> "The Fourteenth Amendment recognizes a distinction between citizenship of a state and citizenship of the United States * * * It is quite clear then that there is a citizenship of the United States and a citizenship of a State which are distinctive from each other and which depend upon different characteristics or circumstances in the individual."

This decision has been commonly regarded as having established a dual citizenship in an individual, a state citizenship and a United States citizenship. Education has been consistently held one of those matters pertaining to an individual as a citizen of a state and not as a citizen of the United States. As was said in *Lehew vs. Brummell,* 103 Mo. 546, 550, 15 S. W. 765 (1890):

> "The common-school sysem of this state is a creature of the state constitution and the laws passed pursuant to its command. The right of children to attend the public schools and of parents to send their children to them is not a privilege or immunity be-

longing to a citizen of the United States as such. It is a right created by the state, and a right belonging to citizens of this state, as such."

In *Piper vs. Big Pine,* 193 Cal. 664, 669 (1924), it was said:

"The privilege of receiving an education out of the expense of the state is not one belonging to those upon whom it is conferred as citizens of the United States. The federal constitution does not provide for any general system of education to be conducted or controlled by the national government. It is distinctly a state affair."

In *Cumming vs. County Board of Education, supra,* where there was under review a state court decision denying an injunction against the maintenance of a white high school while failing to maintain a colored one, the Supreme Court, in denying the right of negro petitioners, said:

"Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the state to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined;

> and as this view disposes of the only question which this court has jurisdiction to review and decide, the judgment is affirmed."

In a Kentucky case it was held that the benefits of negroes in the school-fund of Kentucky must be received "as a citizen of this commonwealth and not as a citizen of the United States."

Marshall vs. Donovan, 73 Ky. 681 (1874).

Further, the Kentucky Court said, at p. 688:

> "These interests and benefits are privileges and immunities pertaining to the citizenship of the State owning the school fund and maintaining the school-system, and they must be secured and protected by the state government. They do not fall within that class of fundamental rights which, according to the opinion of the Supreme Court in the Slaughter House cases, are under the special care of the Federal government."

In *Cory vs. Carter,* 48 Ind. 327 (1874) a negro sued in mandamus on behalf of his children and grandchildren to compel admittance to a white school. It was held, in denying the right, that the legislature had not provided for the admission of colored children into the same schools as white children; and even if the Fourteenth Amendment required their admission the courts cannot, in the absence of legislative authority, confer the right upon them.

In *People vs. Gallagher,* 93 N. Y. 438 (1883) suit was brought on behalf of a colored girl to require her admission into a white school. The Court of Appeals of New York, through Chief Justice Ruger, held that the Four-

teenth Amendment does not operate on school classifications. Reviewing the history of this amendment and citing *the Slaughter House Cases, supra,* the Court said, at page 447:

> "It would seem to be a plain deduction from the rule in that case that the privilege of receiving an education at the expense of the state, being created and conferred solely by the laws of the state, and always subject to its discretionary regulation, might be granted or refused to any individual or class at the pleasure of the state. This view of the question is also taken in *State vs. McCann,* 21 Oh. St. 210, and *Cory vs. Carter* 48 Ind. 337. The judgment appealed from might, therefore, very well be affirmed upon the authority of these cases."

This case also distinguishes "social rights" from civil rights guaranteed by the Fourteenth Amendment.

In *Gong Lum vs. Rice,* 275 U. S. 78, 72 L. ed. 172 (1927) it was held that no right of a Chinese citizen of the United States under the Federal constitution is infringed by classifying her for purposes of education with colored children and denying her the right to attend schools established for the white race. The Court said:

> "The decision (to bar the Chinese person from its white schools) is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment."

In *Hamilton vs. University of California,* 79 L. ed. 159, (1934) where it was held that military training might be made compulsory for all students of the University, the Supreme Court said, at page 166:

> "The privileges and immunities protected are only those that belong to citizens of the United

States as distinguished from citizens of the state—those that arise from the constitution and laws of the United States as contrasted with those that spring from other sources."

As was held in *Gong Lum vs. Rice, supra,* classification of students on the basis of race and color is a matter exclusively of state policy and does not conflict with any provisions of the Federal constitution.

It is submitted that there is no violation of any Federal constitutional privilege or immunity in the action of the Regents in denying admission to petitioner on the grounds that he is a negro.

2. The equal protection of the laws does not prevent classification on the basis of race.

As pointed out above, classification of students is a matter of internal State policy. If it were unconstitutional to classify on the basis of race, it also would be improper to classify on the basis of studies, or on the basis of sex. Certainly it cannot be contended that if a state provided a law school for its citizens it also must provide a medical school, or an engineering school. The University of Maryland includes among its Baltimore Schools a law school and a medical school. It does not include an engineering school. And yet this is a discrimination in favor of those desiring to study law or medicine and against those desiring to study engineering. Similarly a state might provide, without encountering constitutional objections, a certain school for men without a corresponding school for women. Distinctions on the basis of sex uniformly have been upheld by the courts.

In *Quong Wing vs. Kirkendall,* 223 U. S. 59, 56 L. ed. 350, the Supreme Court, speaking through Mr. Justice Holmes, upheld such distinctions in these words:

> "If the State sees fit to encourage steam laundries and discourage hand laundries, that is its own affair. *And if, again, it finds a ground of distinction in sex,* that is not without precedent. It has been recognized with regard to hours of work. *Muller vs. Oregon,* 208 U. S. 412, 52 L. ed 551, 28 Sup. Ct. Rep. 324, 13 A. & E. Ann. Cas. 957. It is recognized in the respective rights of husband and wife in land during life, in the inheritance after the death of the spouse. *Often it is expressed in the time for the coming* of age. If Montana deems it advisable to put a lighter burden on women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference. The particular points at which that difference shall be emphasized by legislation are largely in the power of the state."

Certain discriminations, either against persons, or classes, or occupations are found in our tax laws, our license laws and even in the classification of what work may be performed on Sundays. *As this Court said in Ness vs. Supervisors,* 162 Md. 529, at page 537:

> "Discriminations in the ordinance between activities to be permitted and those not to be permitted on Sundays are objected to as unconstitutional because of the inequality of treatment of citizens engaged in the activities of the one group and the other, and because of supposed deprivation of the liberty and property of those whose activities are excluded, without due process of law. * * * And that there are discriminations which cannot be explained or justified

> by reasons is possibly true. But what is tolerable and what intolerable in Sunday observance seems to be a question which cannot be fully answered by a process of reason. * * * But the mere fact of inequality is not enough to invalidate a law, and the legislative body must be allowed a wide field of choice in determining what shall come within the class of permitted activities and what shall be excluded".

This Court found no such "obviously arbitrary and grievous discrimination" as would make the ordinance unconstitutional (page 538).

And again, in *Jones vs. Gordy,* 180 Atl. 272, this Court held that the Legislature had a wide discretion in framing excise laws.

> "And unless the distinctions it makes", the Court said, "are obviously without reasonable foundations in conditions to be dealt with, there is no departure from constitutional powers, and the courts have no function to fulfill." (page 277).

In *Great House vs. Board of School Commissioners,* 198 Ind. 95, 151 N. E. 411 (1926) it was held at page 105:

> "The classification of scholars on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class. The Legislature has the power to provide for either separate or mixed schools."

Also see *Hayman vs. Galveston,* 273 U. S. 414.

It is submitted that the "equal protection" clause does not require a State to build a school for Negroes, just because it builds one for whites. Appellees cannot point to

any decision of this Court, or any decision of the Supreme Court, which requires equality of treatment or which forbids classification on the basis of race or color.

III.

THE LAW SCHOOL OF THE UNIVERSITY OF MARYLAND IS NOT AMENABLE TO CONSTITUTIONAL LIMITATIONS.

1. The University of Maryland Is in the Nature of a Private Corporation.

In the third paragraph of the petition it is asserted that the University is an administrative department of the State of Maryland and that it performs "an essential governmental function", with funds derived principally from the general treasury of the State. The regents in their answer admitted the "allegation of fact" of this paragraph, denying however that the Baltimore Schools derive their maintenance funds principally from the general treasury (R. 4, 17).

The admissions of fact, of course, admit no conclusion of law; and it is submitted that whether the University of Maryland is a State Department or is in the nature of a private institution for the purposes of this case, is a question of law which by the pleadings is left open for the determination of this Court.

As pointed out by this Court in *University of Maryland vs. Coale,* 165 Md. 224, 231:

> "The present University of Maryland is a consolidation of the University of Maryland, as incorporated by the Acts of 1812, chapter 159, and the Maryland State College of Agriculture, incorporated under the Acts of 1916, Chapter 372. The act of consolidation was passed by the Legislature of 1920, chapter 480."

There is nothing in the consolidation Act which strips the University of Maryland, and its separate component schools, of its status as a private corporation. This Act (chapter 480, Acts of 1920) provides that the consolidated University should possess, in addition to the powers of the Maryland State College of Agriculture, "the powers, rights and privileges heretofore possessed by the Regents of the University of Maryland, under the charter of the University of Maryland, and may exercise such of them as they shall from time to time deem judicious".

The specific question as to whether or not the University of Maryland, as organized by the Acts of 1812, is a public or private corporation, was passed upon by this Court in 1838. There it was held that the University of Maryland was a *private corporation.* After a full discussion of the organization of the University, which itself was a consolidation of separate schools and colleges, this Court said:

> "The corporation of the University has none of the characteristics of a public corporation. It is not a municipal corporation. It was not created for political purposes, and is invested with no political powers. It is not an instrument of the government created for its own uses, nor are its members officers of the government or subject to its control in the due management of its affairs, and none of its property or funds belong to the government. The State was not the founder, in the sense of that term as applied to corporations. It was the creator only, by means of the act of incorporation, and may be called the incipient, not the perficient founder.
>
> "* * * It appears from the statement of the evidence, that it has been endowed to a small amount

by private donations, and no donations that it can derive from the bounty of the State would change its character, and convert it into a public corporation."

University of Maryland vs. Williams, 9 G. & J. 365, 397-400.

In the re-organization plan of the State Government in 1922 the University retained its corporate status and the power to determine policies under which it should operate to the best public interest.

It is true that the Attorney General has consistently taken the position that the University of Maryland is a department of the State Government, for certain purposes, such as immunity from suit.

Volume 16 of the Official Opinions of the Attorney General, page 386.

The property of the University is owned by the State, and for general administrative purposes, it is treated like any other department.

Volume 9 of the Official Opinions of the Attorney General, page 273.

The Attorney General advises and represents the University in legal matters, and its funds are disbursed through the State Comptroller.

However, in the matter of admitting students, the Board of Regents acts in the exercise of a charter power. The mere fact that it has been treated as a State Department for some purposes, does not affect the question. As was said in the *Williams* case, supra, page 398:

> "It is said there have been subsequent endowments by the State. If it be so, that cannot affect the character of this corporation. If eleemosynary and private at first, no subsequent endowment of it by the State, could change its character, and make it public."

It may also be noted that this question was not raised or discussed in the *Coale* case, *supra*. It may be significant, however, that the Supreme Court dismissed the appeal in that case, for want of a substantial Federal question, whereas in the *Hamilton* case, *supra*, it assumed jurisdiction, commenting on the fact that by express Constitutional provision and court decision, the University of California was part of the State Government.

2. Private Institutions May Select Their Students Arbitrarily, Without Regard to the Fourteenth Amendment.

It is well settled that the provisions of the Fourteenth Amendment refer to the action of the States exclusively and not to the action of individuals and private corporations.

In *Clark vs. Maryland Institute*, 87 Md. 643 (1898), there was under consideration a similar question raised by a colored citizen who was attempting to force his admittance into the Maryland Institute. This Court pointed out that the school is a private corporation, not created for political purposes nor endowed with political powers. It held:

> "It has none of the faculties, functions or features of a public corporation as they are designated in the Regents' case, 9 Gill & Johnson, 365, and the many other cases which have followed that celebrated decision." Page 658.

In the Maryland Institute case there was a precedent of four colored persons who had been admitted prior to the refusal of this applicant. Commenting upon this the Court said:

> "It (the Maryland Institute) was established for the benefit of white pupils, and has never admitted any other kind with the exception of the four instances already mentioned. When it found that the admission of these pupils had a very injurious effect on its interest, and seriously diminished its usefulness, it certainly had the right to refuse to continue such a disastrous departure from the scheme of administration on which it was organized. It would have been mere folly to persevere in the experiment under the existing circumstances. We suppose that it could hardly be maintained that the constituted authorities of the corporation did not have the right to conduct its affairs according to the plan and policy on which it was founded. * * *" Page 658.

Referring to the constitutional question the Court held that the Maryland Institute, in denying admittance to the negro, impaired no constitutional right. It said, at page 661:

> "* * * The Constitution of this State requires the General Assembly to establish and maintain a thorough and efficient system of free public schools. This means that the schools must be open to all without expense. The right is given to the whole body of the people. It is justly held by the authorities that 'to single out a certain portion of the people by the arbitrary standard of color, and say that these shall not have rights which are possessed by others, denies them the equal protection of the laws'. *Cooley on Torts*, page 287, where a large number of cases are cited. Such a course would be manifestly in violation of the Fourteenth Amendment, because it would deprive a class of persons of a right, which the

> Constitution of the State had declared that they should possess. Excellent public schools have been provided for the education of colored pupils in the city of Baltimore. But the Maryland Institute is not a part of the public school system. This has been solemnly adjudged by this Court. *St. Mary's School v. Brown,* 45 Maryland 310. The appellant has no natural, statutory or constitutional right to be received there as a pupil, either gratuitously or for compensation. He has the same rights, which he has in respect to any other private institution; and none other or greater. * * *"

Just as Maryland Institute is not a part of the public school system, neither is the University of Maryland.

In *Booker vs. Grand Rapids Medical College,* 156 Mich. 95 (1909), two negroes were taken into the school and the school attempted to bar them from returning the second year. It was held that the Medical College was a private institution which "may select those whom they will receive as students". The Court further said:

> "The arbitrary refusal to receive any student would not violate any privilege or immunity resting in the positive law, protected or granted by the Federal or State Constitution."

Also see note in 24 L. R. A. (N. S.) 447.

3. The Law School of the University Derives Its Maintenance Principally From Tuition Charges to Students.

As asserted by the Regents' in their answer, and uncontroverted in the testimony, "the Baltimore schools of the University of Maryland, of which the Law School is a part, do not derive their maintenance funds principally from the general treasury of the State but are supported principally by tuition fees paid by students in said school" (R. 17).

For all these reasons it is submitted that the University of Maryland and its school of law are not subject to the provisions of the Fourteenth Amendment, and that they may choose such students as they desire to admit.

IV.

EVEN IF THE LAW SCHOOL IS A PUBLIC INSTITUTION AMENABLE TO THE FOURTEENTH AMENDMENT, IT IS NOT REQUIRED TO ADMIT NEGROES BECAUSE THE STATE PROVIDES SCHOLARSHIPS FOR THEIR EXCLUSIVE USE.

1. The Policy of This State Is to Separate the Races.

(a) *In railway coaches.*

It has long been the policy of this State to provide separate facilities for the two races in railway coaches and on steamboats. *Article 27 of the Code,* Sections 432 to 448 inclusive, is statutory authority for the separation of white and colored passengers in these mediums of public transportation.

This segregation statute has been upheld by this Court, as to intra-state commerce, in *Hart vs. State,* 100 Md. 595, in which the Court of Appeals quoted with approval from *West Chester and Philadelphia Railroad Company vs. Miles,* 55 Pa. St. 209 (1867) where it was said, prior to a legislative Act prohibiting segregation, at page 212:

> "It is much easier to prevent difficulties among passengers by regulations for their proper separation, than it is to quell them. The danger to the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. If a negro takes his seat beside a white man or his wife or daughter, the law cannot repress the anger, or

conquer the aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation than to punish afterwards the breach of peace it may have caused * * *."

The Pennsylvania Court likened the race classification to the separation of the sexes:

"The ladies' car is known upon every well-regulated railroad, implies no loss of equal right on the part of the excluded sex, and its propriety is doubted by none." Page 211.

The power of the State to separate the races in railway coaches has been upheld by the Supreme Court in *Plessy vs. Ferguson*, 163 U. S. 537 (1895).

Discussing the applicability of the Fourteenth Amendment the Supreme Court held that it was not intended to abolish distinctions based on color and pointed to the "most common instance" of separation in schools. It said, at page 544:

"The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with

the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced." (Italics supplied).

Commenting upon the *Plessy* case, *Freund* in his work on the *Police Power,* Sec. 699c, says

> "The following seems to be the strongest argument in favor of the legality of compulsory separation: it is legitimate for transportation companies to provide separate accommodations for the two races, just as it may provide ladies' waiting rooms or cars for smokers, as conducive to the comfort of the parties thus separately accommodated. Transportation companies may be subjected to public control in the interest of public convenience and comfort, and if separate accommodation is generally demanded, and not unreasonably burdensome it may be compelled by law. It then follows also that the failure to provide it or the failure to maintain it on the part of the railroad company, may be visited with penalties, and a passenger who intrudes himself into a compartment in which he is not wanted may likewise be punished. The facts in *Plessy vs. Ferguson* did not call for more than a recognition of these principles."

Also see *Article* 27, *Section* 365 of the Code, which forbids intermarriage of white and colored persons in Maryland. And also *Article* 27, *Section* 415.

(*b*) *In private and public educational institutions, at scholastic, collegiate and professional levels.*

It is a matter of general knowledge that there is no mixture of the races in educational institutions in the State of Maryland. As to private institutions the case of

Clark vs. Maryland Institute, 87 Md. 643, exemplifies the policy of this State on the question.

Public Schools.

In public education, the State has erected a dual system giving practically identical instruction to each race.

In 1872 by *Chapter* 377, *sub-chapter* 18 (*now codified as Section* 200 *of Article* 77 *of the Code of Public General Laws* 1924 *Edition*), the Legislature of Maryland established and provided a system of separate public schools for the exclusive use of the colored children of the State. This Section of the Code reads as follows:

> "200. It shall be the duty of the county board of education to establish one or more public schools in each election district for all colored youths, between six and twenty years of age, to which admission shall be free, and which shall be kept open not less than one hundred and sixty (160) actual school days or eight months in each year; provided, that the colored population of any such district shall, in the judgment of the county board of education, warrant the establishment of such a school or schools."

Furthering this policy of separate education, our Legislature has provided for the establishment of colored industrial schools in each county of the State where there is need of one, in which the colored youths of the State are given instruction in domestic science and the industrial arts. (*Code, article* 77, *section* 211).

The State also provides a State Normal School for the instruction and practice of colored teachers in the science of education. (*Code, Article* 77, *Section* 256).

As to the character of the public education furnished the colored children in public schools of the State, Doug-

las High School, an all-Negro institution, is reputed to be as good as any in Baltimore City (R. 101); whereas in the county schools the colored children study the same curriculum and the facilities of both races are substantially the same. (R. 87-100).

College Education.

At college levels the demand for education by the negro population of the State is much less, but the State has met this demand insofar as it exists by the creation of an "eastern branch" of the University of Maryland, known as Princess Anne Academy and situated at Princess Anne, Somerset County. This institution is devoted exclusively to the higher education of colored boys and girls of the State and has a rating of a junior college. (R. 51).

While this college has in the past accommodated more than one hundred students there are at the present time only thirty-three students at the school. Thus the *supply* is greater than the *demand* for this type of education, which is largely agriculture and home economics.

For those negro students who wish a four year liberal arts college, the State annually appropriates a sum of money to Morgan College (R. 105).

Post-Graduate Education.

Up to the present time there has been no demand for professional or postgraduate education. As far as the law school is concerned, there have been but nine negro applicants for admission for the years 1933, 1934 and 1935 and before that there were none (R. 107).

It is a settled policy of the University not to accept negroes except at its eastern branch at Princess Anne, as shown by the minutes of the Board of Regents (R. 60-61).

2. Separation of the Races in Educational Institutions Has Been Upheld by the Highest Authority.

There is no doubt of the power of a State to segregate the races in schools.

Gong Lum vs. Rice, Supra; 11 Corpus Juris, 806 (Civil Rights, Section 11) and cases there cited.

In the case of *Wall vs. Oyster,* 31 Appeals of D. C. 180 (1910) a federal court held that "Congress may constitutionally provide for the separation of white and colored children in the public schools of the District of Columbia."

In this State there is statutory authority for separation.

In Maryland we have not only a public policy of separation of the races in educational institutions but statutes authorizing and requiring it. At professional levels the *Acts of* 1933, *Chapter* 234 *and the Acts of* 1935, *Chapter* 577 clearly point out the State policy in this respect.

Even without statutory authority to separate the races it appears that the State, or any corporation organized under the State laws, has a right to separate the races. As this Court said in *Hart vs. State, supra,* speaking of segregation in railway coaches:

> "It seems to be well settled that a common carrier has the power, in the absence of statutory provision,

to adopt regulations providing separate accommodations for white and colored passengers, *provided, of* course, no discrimination is made." Page 601.

If common carriers may segregate the races without statutory authority it follows that private schools and public institutions *operating* under charter from the State may do likewise.

One of the earliest cases on segregation of white and colored children in schools is *Roberts vs. Boston,* 5 Cush. 198 (1849). A colored girl brought action against the school authorities of Boston because they excluded her from a white school and required her to attend a school maintained exclusively for colored children. The State of Massachusetts had neither authorized nor forbidden race segregation in the schools, but there was a State constitutional injunction of equal protection, the same as the Fourteenth Amendment (see *Gong Lum vs. Rice, supra* at page 87). It had been the public policy of Boston to segregate the races for at least fifty years. It was held by the Supreme Court of Massachusetts that the school board had the power to segregate the races without specific statutory authority upon the subject.

"'The great principle,'' said Chief Justice Shaw, "advanced by the learned and eloquent advocate of the plaintiff (Mr. Charles Sumner) is, that by the Constitution and laws of Massachusetts, all persons *without distinction of age or sex, birth* or color, origin or condition, are equal before the law. * * * But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed *with the same civil* and political powers, and that children and adults are legally to have the same functions and be sub-

> ject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

It was held that the powers of the school board extended to the establishment of separate schools for children of difference ages, sexes, and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools.

The cases heretofore cited have concerned schools. One of the few college cases we have found is *Berea College vs. Kentucky,* 211 U. S. 45 (1908)—affirming 123 Ky. 209, 94 S. W. 623. In this case the State of Kentucky passed a law in 1904 prohibiting the teaching of white and negro pupils in the same institution. It was held that in this case the State statute, when applied to a corporation as to which the State has reserved the power to alter, amend or repeal its charter, does not deny due process of law or otherwise violate the Federal constitution.

Thus it is clear that separation of the races is not prohibited by the Fourteenth Amendment. While some cases from other states have held that, in order to justify separation, substantially equal facilities must be granted each race, it should be pointed out that neither the Supreme Court of the United States nor this Court has imposed the test of "substantial equality".

The segregation of the races, by statute or otherwise, long has been recognized by this Court. As was said by Judge Sloan, speaking for the Court in *Lee vs. State,* 164 Md. 550, at 553:

"White and colored alike are entitled to the equal protection of the laws, yet states have not been denied the right to pass and enforce many segregation statutes. Railways and other means of transportation have been required by states, and lawfully, to provide separate compartments for whites and colored. Innkeepers, in the conduct of their business, are not required to throw their houses open to whomsoever chooses to be their guests. *Hall v. De Cuir,* 95 U. S. 485, 24 L. ed. 547, 553; *Chiles v. C. & O. R. Co.,* 218 U. S. 71, 30 S. Ct. 667, 54 L. ed. 936. If the defendant's contention is sound or logical, then so long as this State has separate schools for white and colored children, he could not be brought to trial, for nowhere is the separation more marked than there. Yet it has been frequently held that separate schools do not violate the provisions of the Fourteenth Amendment. *Cumming v. Board of Education of Richmond County,* 175 U. S. 528, 20 S. Ct. 197, 44 L. ed. 262, and note. In all of the cases the right to make such regulations in public places and institutions is recognized, provided equal advantages and comforts are afforded both races, and there is no suggestion here that this has not been done."

3. This State Affords Its Colored Citizens Substantially Equal Facilities for Public Education.

(a) *It has a dual and practically identical system of secondary education for the two races.*

As pointed out above, this State maintains a dual system of public education in the lower schools, substantially equal and in most respects identical. Huffington, (R. 93; 87-100); Cook (R. 102). It not only furnishes an adequate system of separate education for its colored youth but it provides substantially more than other Southern states.

Maryland *spends more money on negro education per capita* in the lower schools than any other Southern State. In the scholastic year 1929-30 Maryland spent $43.16 on each colored child enrolled in its schools. In other states the figure ranged from $5.45 in Mississippi to $34.25 in Oklahoma. No Southern state spends as much on its colored education as it does on its white but in Maryland the ratio is more favorable to the negro than in the other states.

See *McCuistion's "Financing Schools in the South,"* published in 1930 by State Directors of Educational Research in the Southern States, 502 Cotton States Building, Nashville, Tenn.

In considering this publication it must be borne in mind that *money spent* is by no means an exact criterion of equality, since colored children get more for their school dollar than do whites. See testimony of Huffington (R. 99) where it is stated that colored teachers' salaries are lower than whites but this does not affect the equality of *education* received. In like manner, colored schoolhouses ordinarily do not cost as much as those of white children, but this would not affect the quality of education received. The above figures are cited merely to show that Maryland *spends more on colored education than any other Southern state.*

(b) *It affords substantially equal opportunities at collegiate levels at Princess Anne Academy, at Morgan College and by scholarships.*

As pointed out above, Maryland maintains the Princess Anne Academy as the eastern branch of the University of Maryland. Here the enrollment at the present

time is only thirty-three students, although more than one hundred may be accommodated (R. 74). Graduates of this institution, which is a junior college, may go into the third or junior year of Morgan College in the State, or of other colleges out of the State. The educational advantages afforded are approximately the same as at other junior colleges. The State appropriation for Princess Anne is $15,000 a year; on the present basis of the student enrollment it is $468. per student (R. 67).

On the basis of money spent by the State on white and colored college work, the following comparisons gleaned from the testimony are pertinent (R. 67, 83, 84, 105):

	Student enrollment	*State appropriation*	*Amt. spent per Student enrolled*
Colored			
Morgan			
1934-35	600	$23,400.	$39.
1935-36	600	$35,000.	$58.
Princess Anne			
1934-35	33	$15,000.	$468.
White			
Un. of Md.			
1934-35	3,600	$318,000.	$88.
1935-36	3,600	$288,000.	$80.

It will be noted from the above that the State appropriation for the year 1935-36 is greater than the preceding year in the case of Morgan College, the colored institution, and less than the preceding year in the case of the University of Maryland, the white institution.

(c) *At professional levels it affords no colored schools because heretofore there has been no sufficient demand therefor; but the scholarship system offers its negro citizens opportunities and advantages substantially equal to those given its white citizens.*

It is apparent at this early stage of the call for professional education for negroes that there are not enough students to form separate professional schools for each group, even if there were money with which to finance them. There were only nine colored persons who applied for admission to the School of Law in the years 1933, 1934 and 1935 and none before that (R. 108).

While preserving Maryland's traditional policy of separation of the races, the State has met the demand of the negroes for higher education by establishing a system of scholarships to institutions out of the State for the exclusive use and benefit of colored students. This scholarship policy was launched by the Legislature of 1933, which provided that the Board of Regents of the University of Maryland might set apart a portion of the State appropriation for Princess Anne Academy and establish scholarships for negro students who might wish to take professional courses or other work not offered in Princess Anne but which were offered white students at the University of Maryland. *Chapter* 234, *Acts of* 1933.

No special appropriation was made by the Legislature to finance these scholarships and since the University budget was severely cut there was no practical benefit to the colored race from this Act (R. 34-36, 61-64). The case before us is not affected by this circumstance, however, since Petitioner applied for admissioner to the Law School for the year 1935-36.

The General Assembly at its regular session in 1935 set up a new scholarship statute and appropriated the sum of $10,000. annually to be set aside for the higher education of negroes. This Act, after establishing a "Maryland Commission on Higher Education of Negroes," of which Judge Morris A. Soper was named chairman, provided:

> "Sec. 2. And Be It Further Enacted, That it shall be the duty of said Commission to administer the sum of Ten Thousand Dollars ($10,000) included in the Budget for the years 1935-36 and 1936-37 for scholarships to Negroes to attend college outside the State of Maryland, it being the main purpose of these scholarships to give the benefit of such college, medical, law, or other professional courses to the colored youth of the State who do not have facilities in the state for such courses, but the said commission may in its judgment award any of said scholarships to Morgan College. Each of said scholarships shall be of the value of not over Two Hundred Dollars ($200). Each candidate awarded such scholarship must be a bona fide resident of Maryland, must maintain a satisfactory standard in deportment, scholarship and health after the award is made, and must meet all additional charges beyond the amount of the scholarship to enable him to pursue his studies."
>
> *Chapter* 577, *Acts* of 1935.

This Act went into effect on June 1st, 1935. At the time of the trial below, on June 18th, 1935, three hundred and eighty colored persons had applied for application blanks for these scholarships and one hundred and thirteen completed applications had been turned in. There were twelve days left in which to file applications (R. 111).

Only sixteen of these completed applications were for graduate work; and, of these, only one was for law work (R. 109-110).

It will be noted that from the scholarship Act above quoted that the maximum available for any one student is $200 and that the scholarship covers tuition only. Since it is the policy of the scholarship commission to divide the appropriation about equally between undergraduate applicants and graduate applicants (R. 112-113), it will be seen that there will be at least twenty-five scholarships for graduate study (R. 112).

As only sixteen had applied for graduate scholarships, with but twelve days to go, it is a fair inference that there were enough scholarships to gratify all graduate or professional demands for the current year.

The petitioner in this case would have been eligible for one of these scholarships if he had applied (R. 113); and since he did not apply, he cannot be heard to deny the adequacy of the scholarship provision, assuming that he can be required to accept a fair substitute for consolidated instruction.

Howard University, in the City of Washington, maintains the nearest negro law school to Baltimore. There the tuition is $135.00 per year compared to $203.00 in the day school of the University of Maryland Law School (R. 34).

In effect the State, by paying petitioner's tuition at another school, relieves him from the payment of the $203.00 he would have to pay as tuition here, which sum he can apply to his transportation to Howard Law School or some other school of his choice.

A number of authorities have held that where the State furnishes or pays for transportation of colored persons to and from a school which is farther away from their homes than a white school, there is no discrimination or inequality.

In *Wright vs. Board of Education,* 129 Kan. 852, 284 Pac. 363 (1930) an injunction was sought to prevent the school board from removing the Wright girl from a white school to a colored school twenty blocks farther away. The State agreed to furnish transportation. In holding that there was no inequality here, the Court said:

> "Plaintiff lives within a few blocks of Randolph School (white) and it is convenient for her to attend school there. Buchanan school (colored) is some twenty blocks from plaintiff's residence and to attend school there would require her to cross numerous intersections, where there is much automobile traffic, in going to and from school. No contention is made that the Buchanan school is not as good a school and as well equipped in every way as is the Randolph school. The sole contention made by appellant here is that defendant's order that plaintiff attend school at the Buchanan school is unreasonable in view of distance she would have to go and the street intersections she would be compelled to cross. * * * This contention is taken out of the case when we examine the pleadings, for plaintiff alleged that defendant furnishes transportation by automobile bus for plaintiff to and from the Buchanan school without expense to her or to her parents, and the answer of defendant admitted that it does so. There is no contention that this transportation is not adequate, appropriate or sufficient."

In *Riecks vs. Danbury,* 257 N. W. 546, 219 Iowa— (1934) it was held that, under a statute, a school may

provide transportation *or* may make a money allowance to parents or children living two miles from the school.

In *Lehew vs. Brummell,* 103 Mo. 546 (1890), the question was whether a statute of segregation of the races in schools was unconstitutional because, in the individual case, certain colored children had to go three and one-half miles to reach a colored school whereas no white child lived farther away from the white school than two miles. Upon this question the Court said, at page 552:

> "It is true Brummell's children must go three and one-half miles to reach a colored school, while no white child in district is required to go further than two miles. The distance which these children must go to reach a colored school is a matter of inconvenience to them, but it is an inconvenience which must arise in any school system. The law does not undertake to establish a school within a given distance of anyone, white or black. The inequality in distances to be travelled by the children of different families is but an incident to any classification and furnishes no substantial ground of complaint".

To its negro citizens who desire to take up law work, Maryland says substantially this: "under our policy of separate schools for both races it is permissible and proper for the University of Maryland Law School to deny your admittance. If you were admitted you would have to pay the tuition fee of $203. a year. We cannot yet give you a separate law school in the State: there is no sufficient demand for it, nor sufficient money available to start it. However, to even things up, we will pay your tuition at some law school of your own selection out of the State. You will save the $203. tuition fee at Maryland and you may apply this money to your maintenance at the law school of your choice."

It cannot be too strongly urged that by this scholarship plan the colored youth of the State receive more real and practical benefit than if there were a law school for them in connection with the University of Maryland.

Obviously Petitioner would have no complaint whatsoever *if there were maintained a law school at Princess* Anne Academy; yet he, a resident of Baltimore City, would have to pay his maintenance charges, travelling expenses and tuition. He could not commute daily, since Princess Anne is three or four times farther from Baltimore than is Washington.

From Baltimore he could commute daily to Washington if he chose to go to Howard Law School; and it is stated as a matter of common knowledge that the $203. tuition fee he would save by accepting a scholarship is sufficient to cover his commutation charges. Or he could live in Washington, if he preferred not to commute, and the $203. thus saved would go far towards his maintenance. In either event he would be better off financially than if he were required to go to Princess Anne; and better off than a white boy from the Eastern Shore who comes to Baltimore to study law. The white boy must provide his own maintenance in Baltimore and *in addition* pay the tuition.

If a negro lives in Prince George's County where the colored population is densest (R. 90), he could commute to Washington at a negligible cost and save considerable money by the scholarship arrangement. If a negro lives on the Eastern Shore or in Southern Maryland, he would be just as close to Washington as to Baltimore and could live as reasonably in either City. *And he would save the* $203. *tuition at Maryland.*

Certainly a great advantage of the scholarship system is that the colored boy may choose his own school and no matter where he goes, whether it is Harvard, Howard, Columbia or some other school, the State of Maryland will pay his tuition charges.

It is earnestly suggested that these scholarships are eminently more practicable and more desirable from the point of view of the colored race itself than would be a separate law school established in the State.

No Demand for Negro Professional Study.

We urge upon this Court consideration of the fact that there has been no demand by the negro citizens of this State for the establishment of separate professional schools; and in the absence of a sufficient demand to justify the expenditure of the money involved, courts will not require such schools established.

In *Trustees vs. Board of Education,* 115 Miss. 117 (1917) it was held that trustees need not establish a separate school for colored persons if their numbers did not warrant it, even if there is no other school provided for them.

Also see

Black vs. Lenderman, 156 Ark. 476 (1923).

It has not been shown in this case that there is any demand for professional schools for negroes in this State. If the State were required to establish separate professional schools for negroes there is no doubt but that they would be far from satisfactory. A school set up for half a dozen persons either would be entirely inadequate to their needs or would require an appropri-

ation per student far in excess of the appropriation by the State for white professional students. Unlike an elementary school, a professional school requires expensive equipment: a law school requires an elaborate library, a pharmacy school requires a laboratory, a medical school requires both library and laboratory and, in addition, hospital facilities. Such courses are entirely unsuited to treatment in small groups and the tendency is to concentrate professional studies in large centers with adequate equipment and facilities. Thus it is far better for Maryland's negro citizens to be given scholarships to first-rate institutions out of the State than it would be for the State to supply separate schools in the State for the few colored persons who would patronize them.

Moreover, any allocation of funds to provide facilities for professional study for negroes probably would be made out of funds now available for the education of white and colored children in the lower schools. Certainly the colored race would not profit by establishing separate professional schools if this were done at the expense of the great mass of colored children who are now being educated at public expense; and neither would the white race. The only ones to profit by such a diversion of funds would be the few colored youths who would patronize such schools and these are *better* provided for by our scholarship system.

It is submitted that the negro education system of this State has been expanded by State authorities as rapidly as money will permit and as rapidly as the demand has been made. It is only within the last few years that Princess Anne Academy has given college studies; before that it was a negro high school. As time

goes on this institution doubtless will be expanded into a full four year college. In like manner, as the demand increases, suitable provision for professional education for negroes doubtless will be made in the State. In the meantime scholarships have been provided for them to institutions out of the State so that the colored youth of Maryland may have all the advantages offered by other States and offered white persons in the State.

We strongly are of opinion, and so contend, that this scholarship system established by the General Assembly at the 1933 and 1935 sessions adequately provides for the needs of colored citizens for college and professional work at the present time. It is a reasonable inference that subsequent sessions of the Legislature will amplify and expand this system as experience dictates, to the end that Maryland may continue adequately to care for the needs of its colored citizens.

CONCLUSION.

This State always has enjoyed the most amicable relationship between its white and colored citizen. This relationship has been characterized by the zealous safeguarding of the political and civil rights of the colored man. In every way open to it, the State has extended a fraternal hand to the Negro; in no way has this aid been more practically demonstrated than in public education.

At the time of the Emancipation it was generally conceded that illiteracy was the greatest drawback to the colored man in his rise to a position of civil and political equality with whites guaranteed him by the war amendments; and as far back as 1872 the General Assembly of Maryland provided for the establishment of one or more

public schools in each election district of the State for the education of colored youths between the ages of six and twenty years. This system has been continually expanded during the intervening years and it is now generally considered a model for other Southern States.

It may be said, without any prejudice to the colored race as a class, that the problem of educators in this State has been to get colored children to attend the schools provided for them (R. 92) and not so much to meet a demand for expansion. It is asserted without fear of contradiction that the State authorities are just as much interested, if not more so, in expanding Negro educational facilities and advantages in Maryland, as are the leaders of the colored race itself. The need for trained leadership among colored citizens has been thought to demand college training. For those who are fitted to receive it, this demand has been met in two ways: by appropriations to Princess Anne Academy, a junior college, and Morgan College, a four year liberal arts institution; and by the founding of scholarships to institutions out of the State.

There has never been any demand in this State for professional education for Negroes; and if there were, it is plain that the requirements of the race at school and college levels should come first. As appears in the testimony concerning the applications for scholarships under this new scholarship Act of 1935, out of 380 application blanks requested by colored youths only sixteen were interested in graduate or professional work, and only one of these was interested in law (R. 109-110). In other words, twenty-five colored youths are interested in college scholarships to every one who is interested in professional scholarships.

It is apparent that it would be absurd at this time to create separate professional schools for this small group, although conditions may change in the future and it may become less expensive and more beneficial to establish Negro medical and law schools in the State than to continue the scholarship system. This would be a great step forward, both for the colored race and for the State of Maryland, but at the present time it obviously is out of the question.

To allow petitioner to enter the University of Maryland Law School would be a departure from precedent for which there is no legislative or other authority. Public education being purely a matter of State concern, the Federal Constitution does not affect petitioner's rights therein; and if it did, there is no prejudice or inequality by which he could invoke the aid of the Fourteenth Amendment. In the absence of statute compelling mixture of the races at professional levels, it is submitted that the Regents are entirely within their rights in cleaving fast to Maryland's traditional policy of separation—a policy which for generations has proven most wise and beneficial to both races—and their adoption of this rule cannot be deemed an abuse of their discretion.

In closing we most strongly urge upon this Court that the case at bar is controlled by the decision of this Court in *Clark vs. Maryland Institute, supra,* where, in a situation closely parallel to the case at bar, it was held that the petitioner was not entitled to be received as a pupil and that there was no occasion for the application of the privilege clause of the Fourteenth Amendment. In both that case and this one the institution operated under a charter from the State; in both cases a substantial money grant was provided by a governmental agency.

For these reasons it is respectfully urged that petitioner is not entitled to the writ of mandamus in this case and the judgment of the lower Court should be reversed.

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