RAYMOND A. PEARSON, President, W. M. HILLEGEIST, Registrar, and GEORGE M. SHRIVER, JOHN M. DENNIS, WILLIAM P. COLE, HENRY HOLZAPFEL, JOHN E. RAINE, DR. W. W. SKINNER, MRS. JOHN L. WHITEHURST and J. MILTON PATTERSON, Members of the BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND,

vs.

DONALD G. MURRAY, Otherwise DONALD GAINES MURRAY.

IN THE

Court of Appeals

OF MARYLAND.

OCTOBER TERM, 1935.

GENERAL DOCKET No. 53.

APPELLEE'S BRIEF.

THURGOOD MARSHALL,
CHARLES H. HOUSTON,
WILLIAM I. GOSNELL,
Attorneys for Appellee.

The Daily Record Co., Print, Baltimore.

TABLE OF AUTHORITIES

Acts of Maryland:

RAYMOND A. PEARSON, President, W. M. HILLEGEIST, Registrar, and GEORGE M. SHRIVER, JOHN M. DENNIS, WILLIAM P. COLE, HENRY HOLZAPFEL, JOHN E. RAINE, DR. W. W. SKINNER, MRS. JOHN L. WHITEHURST and J. MILTON PATTERSON, Members of the BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND,

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STATEMENT OF THE NATURE OF THE CASE.

This is an appeal by Raymond A. Pearson, President of the University of Maryland; W. M. Hillegeist, Registrar of the Baltimore Schools of the University, and George M. Shriver et al., constituting the Board of Regents of the University, from an order of the Baltimore City Court entered the 25th day of June, 1935, granting a Writ of Mandamus, and ordering the above named appellants to admit Donald G. Murray, appellee, as a first year student in the Day School of the School of

Law of the University of Maryland for the academic year beginning September 25, 1935, upon his paying the necessary fee charged first year students in the Day School of the School of Law of the University of Maryland, and completing his registration in the manner required of qualified and accepted students in the first year class of the Day School of the School of Law of the University of Maryland, to wit, that he be not excluded on the ground of race or color (R. 41-42).

The trial Court rendered no formal opinion.

QUESTIONS FOR DECISION.

Question No. 1.

Whether the refusal of the appellants to admit appellee, a qualified student, to the first year class of the day school of the School of Law of the University of Maryland solely on account of his race or color was in violation of the Constitution and laws of the State of Maryland.

The trial court held that appellants had violated the Constitution and laws of the State of Maryland in refusing to admit appellee to the School of Law of the University of Maryland solely on account of his race or color.

Appellee contends that there is no statutory authority for excluding him from the School of Law of the University of Maryland solely on account of his race or color; that in the absence of statutory authority the attempted administrative regulation by the executive officers and agents of the University of Maryland and by the Board of Regents excluding appellee from the School of Law of the University of Maryland solely on account of his

race or color is void; and that appellants having conceded of record that appellee was qualified from an educational standpoint to be admitted into the Day School of the School of Law of the University of Maryland (R. 44), and basing their refusal to admit him solely on account of his race or color (R. 18-22), the trial court was correct in issuing the writ of mandamus herein.

QUESTION No. 2.

Whether appellants' attempt to exclude appellee, a qualified student, from the day school of the School of Law of the University of Maryland solely on account of race or color was a denial to him of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States.

The trial court held that appellants could not exclude appellee from the School of Law of the University of Maryland solely on account of his race or color.

Appellee contends that the acts of the executive officers and agents of the University of Maryland, and the Board of Regents, in attempting to exclude appellee, a qualified student, from the School of Law of the University of Maryland was state action within the meaning of the Fourteenth Amendment to the Constitution of the United States; that the State of Maryland having established a state university supported in part from public funds and under public control, appellee, if otherwise qualified, could not be excluded therefrom solely on account of his race or color; that the State of Maryland has provided appellee no equivalent in opportunities for legal education equal to the opportunities and advantages offered him in the School of Law of the University of Maryland;

and that the attempt by appellants to exclude him from the School of Law of the University of Maryland solely on account of his race or color in the absence of equal opportunities and advantages in legal education otherwise furnished him by the State of Maryland is a denial to him of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF FACTS.

Appellee, Donald G. Murray, a Negro citizen of the State of Maryland and a resident of the City of Baltimore, on January 24, 1935, made application in due form for admission as a first year student in the Day School of the School of Law of the University of Maryland (R. 6, 18). His application was rejected by the appellant President of the University and the appellant Registrar solely on account of his race (R. 30-32). He appealed from this ruling to the appellants, the Board of Regents of the University (R. 32-33), who ratified the rejection (R. 60-61).

Murray is a graduate of Amherst College with the degree of Bachelor of Arts conferred upon him in 1934 after successful completion of a four-year residence course (R. 6). Appellants stipulated that he was educationally qualified to enter the Day School of the School of Law of the University of Maryland (R. 44).

The University of Maryland is an administrative department of the State of Maryland, performing an essential governmental function and supported in part out of funds derived from taxes collected from the citizens of the State (R. 4, 17). The powers of governing the Uni-

versity are by law vested in the Board of Regents; the President and Registrar of the University act as agents of the Board. The charter of the University provides that it shall be maintained "upon the most liberal plan, for the benefit of students of every country and every foreign denomination" (R. 4).

Under its charter the University conducts in the City of Baltimore a School of Law as an integral component part of the University. The School operates in two divisions: a day school and an evening school, having the same entrance requirements, to wit, the completion of at least one-half of the work acceptable for a Bachelor's degree granted on the basis of a four-year period of study by the University of Maryland or a principal college or university in the State (R. 5). The School of Law of the University of Marlyand is the only State institution which affords a legal education to Maryland citizens, and is the only law school in Maryland approved by the American Bar Association and a member of the Association of American Law Schools (R. 5, 18, 54).

All racial groups except Negroes, if otherwise qualified, are admitted to the University. Resident Negro citizens are excluded; non-resident whites, Filipinos, Indians, Mexicans, Chinese, et al., are admitted (R. 54-59).

When Murray applied for admission to the School of Law he was advised that the University of Maryland did not accept Negro students except at Princess Anne Academy, the so-called Eastern Branch of the University of Maryland (R. 30-32). No instruction in law is offered at Princess Anne Academy (R. 47). Murray was further referred to Chapter 34 of the Acts of 1933 which pur-

ported to create scholarships for Negro students who desired to take professional courses or other work not given at Princess Anne Academy (R. 21, 31). No money was ever appropriated or allocated for scholarships under said Act of 1933, nor was any scholarship under it ever awarded (R. 62-65).

Ten thousand dollars were appropriated for Negro scholarships under Chapter 577 of the Acts of 1935, approved April 29, 1935 (R. 20, 109). The administration of the Act was placed in the hands of a specially created Maryland Commission on Higher Education of Negroes. The administrative interpretation of the Act was that the scholarships provided covered tuition only (R. 112); and there were so many applications for scholarships that the Commission was not in position to satisfy all qualified applicants (R. 110-111).

Murray does not want an out-of-state scholarship (R. 48). He desires to attend the School of Law of the University of Maryland in Baltimore where he is at home and room and board cost him nothing (R. 45, 50). The nearest out-of-state law school with a general standing comparable to that of the School of Law of the University of Maryland, which he could attend, is the Howard University School of Law in Washington, D. C. To attend this School Murray would be put to the expense of commuting daily from Baltimore to Washington and return, with attendant loss of time; or of paying for room and board in Washington (R. 49-50).

Murray further desires to attend the School of Law of the University of Maryland for profesisonal advantages. He is preparing himself to practice law in Baltimore, and attending law school in Baltimore would give

him the opportunity to observe the Maryland courts and to become acquainted with other Maryland practitioners (R. 45). Ninety-five per cent. of the enrollment in the School of Law of the University of Maryland comes from the State of Maryland (R. 84), and the School of Law lays emphasis on Maryland law (R. 85). A majority of its faculty is made up of judges and practicing attorneys of Maryland (R. 85).

Finally Murray desires to attend the School of Law of the University of Maryland in exercise of his rights as a citizen to share equally the advantages offered by a public tax supported state university (R. 45).

Murray renewed the tender of his application and examination fee in open Court (R. 87), and submitted himself to be fully able to meet all legitimate demands of the School of Law of the University of Maryland (R. 46). The tender was refused (R. 87).

ARGUMENT.

I.

THE REFUSAL OF THE APPELLANTS TO ADMIT APPELLEE, A QUALIFIED STUDENT, TO THE FIRST YEAR CLASS OF THE DAY SCHOOL OF THE SCHOOL OF LAW OF THE UNIVERSITY OF MARYLAND SOLELY ON ACCOUNT OF HIS RACE OR COLOR WAS IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE STATE OF MARYLAND.

There is no statutory authority for excluding appellee from the School of Law of the University of Maryland solely on account of his race or color.

The declaration of Rights of the State of Maryland, Article 43, charges the legislature with the duty of en-

couraging "the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and the general amelioration of the condition of the people." The State Constitution, Article VIII, Section 1, provides:

> "The General Assembly, at its first session after the adoption of this Constitution, shall, by law, establish throughout the State a thorough and efficient system of free public schools; and shall provide by taxation or otherwise, for their maintenance."

Nothing in the Declaration of Rights or in the State Constitution requires or authorizes the separation of white and Negro students.

In execution of its trust the General Assembly set up a system of free public schools for the youth of the State, and has from time to time extended the system of free public education from the elementary, to the high school, to the normal school level.

> See Bagby, Annotated Code of Maryland, Article 77.

Separate, but patently unequal, provisions are made in the public school laws for colored elementary, industrial, high and normal schools; the salaries of the colored teachers therein, and the administrative officers thereof.

> For example, see:
> Code, Art. 77, Chap. 3A, sec. 35 (4); Chap. 18; Chap. 19, Sec. 204; Chap. 20, Secs. 211-214.

No collegiate education for either white or Negro students was provided as a part of the system of free public schools. Down to the year 1935 the collegiate and professional education which the State of Maryland offered to its citizens was provided by it at the University of Maryland, and through certain free scholarships to institutions *within* the State of Maryland attended exclusively by white students.

See Code, Art. 77, secs. 240-257;
See Acts of 1912, Chap. 90, scholarships at The Johns Hopkins University.

By chapter 234, Acts of 1933 (Code, Art. 77, sec. 214A) the Legislature attempted to establish certain out-of-state "partial scholarships" for Negro students as follows:

> "* * * The Board of Regents of the University of Maryland may allocate such part of the state appropriation for Princess Anne Academy or other funds of the Academy as may be by it deemed advisable, to establish partial scholarships at Morgan College or at institutions outside of the State of Maryland, for Negro students who may apply for such privileges, and who may, by adequate tests, be proved worthy to take professional courses or such other work as is not offered in the said Princess Anne Academy, but which is offered for white students in the University of Maryland; and the Board of Regents of the University of Maryland shall have authority to name a Board which shall prepare and conduct such tests as it may deem necessary and advisable in order to determine which applicants for scholarships may be worthy of such awards."

The record shows (R. 34-36, 62-65) that no money was ever appropriated or allocated for these "partial scholarships" under the Act of 1933, nor was any scholarship under it ever awarded.

The first State appropriation for collegiate and professional scholarships for Maryland Negro students was $10,000 provided by Chap. 577 of the Acts of 1935. This Act created a special Maryland Commission on Higher Education of Negroes, and assigned it the duty of administering the said $10,000 "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) * * *." (Italics ours.)

There is nothing in the charter of the University of Maryland and the acts amendatory thereto, as confirmed and adopted by Chapter 480, Acts of 1920, (Code, Art. 77, sec. 240) restricting admission to the University of Maryland to white students only.

The College of Medicine of Maryland, which was the nucleus of the present University of Maryland, was incorporated by Chapter 53, Acts of 1807. It was therein provided that the College be established "upon the following fundamental principles, to wit: The said college shall be founded and maintained forever upon a most liberal plan, for the benefit of students of every country and every religious denomination, who shall freely be admitted to equal privileges and advantages of education, and to all the honors of the college, according to their merit, without requiring or enforcing any religious or civil test * * *."

In 1812 (Chap. 159, Acts of 1812) the legislature authorized the College of Medicine "to constitute, appoint and annex to itself, the other three colleges or faculties, viz., The Faculty of Divinity, the Faculty of Law, and the Faculty of the Arts and Sciences; and that the four faculties or colleges, thus united, shall be and they are hereby constituted an University, by the name and under the title of the University of Maryland." The charter provided (Sec. 2, Chap. 159 *supra*):

> "That the said University 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 * * *."

This statement of basic policy has never been modified or limited in any way. Negro students were actually admitted into the School of Law of the University of Maryland in the 1890's, and two graduated therefrom. (R. 86)

Until 1920 the University was a private institution within the meaning of the decision in *Clark vs. Maryland Institute,* 87 Md. 643 (1898). In 1920 by Chap. 480 *supra* the legislature took over the University of Maryland as a state institution, adopted and confirmed the former charters (R. 4, 17). The Act of 1920 gave the State of Maryland *one* state university offering collegiate and professional education. The Act makes no distinction between the races and there is no expression in it which could be interpreted as applying to the white race only. In the absence of equal facilities for colle-

giate and professional education for qualified Negro citizens otherwise, the Act if interpreted to benefit white students only would be unconstitutional.

> "* * * But the denial to children whose parents, as well as themselves, are citizens of the United States and of this State, admittance to the common schools solely because of color or racial difference without having made provision for their education equal in all respects to that afforded persons of any other race or color, is a violation of the provisions of the fourteenth amendment of the Constitution of the United States * * *" Piper v. Big Pine Schools District 193 Cal. 664 (1924) at p. 668-669.

See also:

Ward v. Flood, 48 Cal. 36, 17 Am. R. 405 (1874);
State v. Duffy, 7 Nev. 342, 8 Am. R. 713 (1872);
U. S. v. Buntin, 10 Fed. 730 (C. C. Ohio) (1882);
Corey v. Carter, 48 Ind. 327 (1874);
Williams v. Bradford, 158 N. C. 36, 73 S. E. 154 (1911);
5 *Ruling Case Law,* 596, sec. 20;
11 *C. J., Civil Rights,* sec. 10, p. 805;
Cooley on Torts (Perm. Ed.) sec. 236.

There were, and are, no other facilities for Negroes to study law in the State of Maryland (R. 5, 18), so that under the well established doctrine that a statute will not be declared unconstitutional so long as a constitutional interpretation is reasonably available, the Act of 1920 must be held to open the doors of the University of Mary-

land to qualified white and black citizens of Maryland alike.

> "We are not at liberty to declare a legislative act void, as being unconstitutional, unless it is clearly so, beyond any reasonable doubt. There is always a strong presumption in force of the validity of legislation, which must be overcome by some convincing reason to induce a court to declare it void. The act under consideration makes no distinction between the races and there is no expression in it which leads us to think that the school was intended for the exclusive benefit of one race or the other * * * " Whitford v. Board of Commissioners, 159 N. C. 160, 74 S. E. 1014 (1912) at p. 1015.

The sole question remaining under this sub-heading is whether any subsequent statute has legally modified the effect of the Act of 1920 so as to exclude Negroes from the School of Law of the University of Maryland. This depends upon the interpretation of the two so-called out-of-state scholarship acts of 1933 and 1935, *supra.*

There is no express provision in either act conditioning the scholarships upon a forfeit of the Negro student's right to attend the University of Maryland, any more than there is a condition of forfeiture upon the "Free Scholarships" established through state appropriation at St. Mary's Female Seminary, St. John's College, Western Maryland College, Maryland Institute, Washington College, Charlotte Hall School, The Johns Hopkins University, etc.

> See Code, Art. 77, secs. 241 et seq.; Acts of 1912, Chapter 90.

White students have the *option* of attending the University of Maryland or applying for "free scholarships" covering the same courses at the institutions mentioned; and in the case of The Johns Hopkins University "free scholarships", for courses not offered in the University of Maryland. The language of the act of 1933 is distinctly permissive only: "partial scholarships * * * for Negro students who may apply for such privileges".

Nothing in the 1933 Act says that Negro students who do not desire to apply for such privileges cannot attend the University of Maryland. The 1935 act is a limited enabling act good for two years only, creating scholarships *outside* the State without reference to the limitation of parallel courses at the University of Maryland. It is impossible to read into these acts of 1933 and 1935 any forfeiture of the rights of qualified Negro citizens of Maryland to attend the state University of Maryland without striking down the whole structure of public collegiate and professional education in the State of Maryland as unconstitutional because therein Negroes are denied the equal protection of the laws.

There is no statutory authority express or implied which excludes Negroes from the University of Maryland.

B. *In the absence of statutory authority the attempted administrative regulation by the executive officers and agents of the University of Maryland and by the Board of Regents excluding appellee from the School of Law of the University of Maryland solely on account of his race or color is void.*

The right of admission to a state university is a right which the trustees or other officers are not authorized to

abridge materially, and which they cannot as an abstract proposition rightfully deny.

Foltz v. Hoge, 54 Cal. 28 (1879);
State v. White, 82 Ind. 278 (1912);
Cornell v. Gray, 33 Okla. 591 (1912).

It has been uniformly held that in the absence of express authority by statute, a municipality, school district or board has no authority even to separate white and colored children for educational purposes.

> " * * * It must be remembered that unless some statute can be found authorizing the establishment of separate schools for colored children that no such authority exists; * * * " *Board of Education v. Tinnon,* 26 Kan. 1, 39 L. R. A. 1020 (1881).

Crawford v. District School Board, 68 Or. 388, 137 Pac. 217 (1913).

The administrative authority, in the absence of power delegated by statute, cannot exclude Negro students from schools established for white students, even though the educational facilities in the segregated Negro school are equal or superior to those of the white school.

People ex rel. Bibb v. Mayor, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. 95 (1901).

All youth stands equal before the law,

Clark v. Board, 24 Iowa 266, 277 (1868).

The question as to what the legislature might have done is beside the point; the administrative authority cannot arrogate to itself the legislative functions.

Tape v. Hurley, 66 Cal. 473, 6 P. 129 (1885).

It is noteworthy herein that appellants themselves do not claim any statuory authority for excluding appellee from the School of Law of the University of Maryland solely on account of his race or color. The only authority they rely on is a resolution of the Board of Regents April 22, 1935, recorded in the minutes of the Board and set out in the Record pp. 60-61.

While the Board of Regents of the University of Maryland has large and discretionary powers in regard to the management and control of the University, it has no power to make class distinctions or racial discrimination.

> See *Chase v. Stephenson,* 71 Ill. 383, 385 (1874).

The reason is obvious. A discrimination by the Board of Regents against Negroes today may well spread to a discrimination against Jews on the morrow; Catholics on the day following; red headed men the day after that.

> " * * * it is obvious that a board of directors can have no discretionary power to single out a part of the children by the arbitrary standard of color, and deprive them of the benefits of the school privilege. To hold otherwise would be to set the discretion of the directors above the law. If they may lawfully say to the one race you shall not have the privilege which the other enjoys they can abridge the privileges of either until the substantive right of one or both is destroyed." *Maddox v. Neal,* 45 Ark. 121, 124 (1885).

Most of the cases above cited have dealt with elementary education and neighborhood schools. If a board of education cannot of its own motion exclude Negro children from a neighborhood school, although more schools

are available within the same community, it follows with greater force that the administrative authority of the only state university within the territory of the State cannot, minus legislative authorization, exclude a qualified citizen of the State from the only instruction in law which the State offers to its citizens. Counsel has been unable to find a case with facts exactly paralleling the instant case. The most recent case involving an apparently allied problem is *State ex rel. Weaver v. Board of Trustees of Ohio State University,* 126 Ohio St. 290, 185 N. E. 196 (1933). In that case, however, no attempt was made to exclude the Negro student from the University, nor even from the course. The court took the position that the University was offering her its full facilities, exactly the same as it offered to the white students in the same courses.

Cf. *Patterson v. Board of Education,* 11 N. J. Misc. 179 (1933).

As distinguished from the Weaver case, the administrative authority of the University of Maryland, on its own responsibility, attempted to withhold all the facilities of the University from appellee solely on account of his race or color.

The school cases establish clearly that this attempted exclusion was void.

C. *Appellants having conceded of record that appellee was qualified from an educational standpoint to be admitted into the Day School of the School of Law of the University of Maryland, and basing their refusal to admit him solely on account of his race or color, the trial court was correct in issuing the writ of mandamus.*

While the State is under no compulsion to establish a state university, yet if a state university is established the rights of white and black are measured by the test of equality in privileges and opportunities. No arbitrary right to exclude qualified students from the University of Maryland is claimed by appellants except as to qualified Negroes, whom the administrative authority would reject on the sole ground of race or color. As to all other racial elements comprising the population of Maryland, the appellants concede that if the students were otherwise qualified they would be admitted as a matter of course. (R. 55-59.) White students from foreign states, if otherwise qualified, would be admitted as a matter of course. (R. 59.) In other words, assuming that a student is qualified his admission to the proper course in the University of Maryland, provided he is not a Negro, is a ministerial matter. If he is a qualified Negro, he is rejected automatically (R. 55-59).

Appellants stipulated of record that appellee was fully qualified from an educational standpoint to be admitted into the Day School of the School of Law of the University of Maryland (R. 44), to which he had applied for admission (R. 6, 10). They automatically and arbitrarily rejected him solely on account of his race or color. (R. 18-22, 30-34, 60-61.) No element of discretion was involved.

Under these circumstances the writ of mandamus was properly issued after full consideration of all the pleadings, stipulations of record and the evidence taken, to undo the arbitrary wrong inflicted by the appellants on the appellee, and to compel them to the proper performance of their ministerial duty to accept and register him

in the Day School of the School of Law of the University of Maryland upon the same terms as any other qualified applicant.

See

State v. Duffy, 7 Nev. 342 (1872).
Ward v. Flood, supra.
Piper v. Big Pine School District, supra.
Woolridge v. Board of Education, 157 Pac. 1184 (1916).
People ex rel. Bibb v. Mayor etc. City of Alton, supra.
Lowery v. Board of Trustees, 52 S. E. 267 (1906).
Clark v. Board of Trustees, 24 Iowa 266 (1868).
Smith v. Independent School District, 40 Iowa 518 (1875).

II.

APPELLANTS' ATTEMPT TO EXCLUDE APPELLEE, A QUALIFIED STUDENT, FROM THE DAY SCHOOL OF THE SCHOOL OF LAW OF THE UNIVERSITY OF MARYLAND SOLELY ON ACCOUNT OF RACE OR COLOR WAS A DENIAL TO HIM OF THE EQUAL PROTECTION OF THE LAWS WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. *The acts of the executive officers and agents of the University of Maryland, and of the Board of Regents, in attempting to exclude appellee, a qualified student, from the School of Law of the University of Maryland was state action within the meaning of the Fourteenth Amendment to the Constitution of the United States.*

It being conceded of record that the University of Maryland is an administrative department of the State of Maryland, and a State institution performing an essential governmental function; that the funds for its support and maintenance in part are derived from the general Treasury of the State out of funds procured by taxes collected from the citizens of Maryland; that the appropriations for it are made by the Legislature as a part of the public school system; that the governing body of the University is the Board of Regents, who are appointed by the Governor, by and with the consent of the Senate; and that the appellant President of the University and the appellant Registrar function as agents of the Board of Regents under their supervision and control (R. 4, 17-18)—it follows that the action of the President, the Registrar and the Board of Regents in attempting to exclude appellee from the School of Law of the University of Maryland solely on account of his race or color was state action within the meaning of the Fourteenth Amendment to the Constitution of the United States.

> "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." *Ex parte Virginia*, 100 U. S. 339, 346 (1879).

B. *The State of Maryland having established a state university supported in part from public funds and under public control, appellee, if otherwise qualified,*

could not be excluded therefrom solely on account of his race or color.

The general proposition that a state cannot establish a single state university and exclude Negro citizens solely on account of race or color has already been argued *supra* under Section I-A. At the trial appellants did not seriously challenge this general proposition, but maintained that the State had provided appellee with equal facilities for the study of law otherwise than in the School of Law of the University of Maryland. The argument which follows will demonstrate that no such equal facilities have been afforded appellee.

C. *That the State of Maryland has provided appellee no equivalent in opportunities for legal education equal to the opportunities and advantages offered him in the School of Law of the University of Maryland.*

The question whether the State of Maryland has offered appellee any opportunities and facilities for the study of law otherwise than in the School of Law of the University of Maryland depends upon the two so-called scholarship acts of 1933 and 1935 *supra.*

The administration of the scholarship act of 1933 was committed to appellants, the Board of Regents. The record discloses that the interpretation of the act was that the Board of Regents was to give the Negro student the difference between the cost of his tuition in the foreign school and the cost of tuition for the same course in the University of Maryland. If the tuition in the foreign school happened to be lower than the tuition for the same course in the University of Maryland, the Negro student

was to receive nothing. (R. 71.) Appellant Pearson, President of the University of Maryland, in rejecting appellee's application solely on account of race or color referred him to the scholarship act of 1933 and suggested that he register in the Howard University School of Law. (R. 33-34.) On the witness stand appellant Pearson was forced to admit that if appellee had registered in Howard University School of Law, he would not have intended to give appellee a single cent under the scholarship act of 1933 (R. 71).

Appellee is reluctantly forced to charge the appellants with evasion throughout. The attitude of the Board of Regents of the University of Maryland toward Negro education in the State is illustrated in its attempt to avoid giving Princess Anne Academy its fair share of the money due it under the Federal Morrill Act. The Morrill Act of 1862 provided for Federal grants in aid of State land grant colleges. It was amended by Act of August 30, 1890, to prohibit expressly discrimination on account of race; but it was therein provided that if a State maintained separate educational institutions of like character for white and colored, and a just and equitable division of the fund received be divided by the State between the two institutions such division should be deemed a compliance with the Act. The State of Maryland regularly received Federal donations under the Morrill Act, and down to 1933 applied the same for the benefit of white students only. In 1933 the General Assembly provided (Acts of 1933, Chap. 34; Code, Art. 77, Sec. 214A *supra*) that the donations received under the Morrill Act, which amounted to $50,000 per year, should be "divided on the basis of the population of the State of Maryland as shown by the latest census, so that

a percentum of these funds equal to the percentum of the Negro population to the whole population of the State, *shall be expended by the Comptroller of the State, upon recommendation of the Regents of the University of Maryland,* for the benefit and in the interests of the Princess Anne Academy." (Italics ours.) The Census of 1930 established that Negroes constituted approximately 17% of the total population of Maryland, which would make the sum to be expended for the benefit of Princess Anne Academy under the Act approximately $8,500.00.

The minutes of the Board of Regents show that less than a year previously, to wit on September 9, 1932, (R. 61) the Board of Regents had attempted to avoid using any of the proceeds of the Morrill Act donations for Negro education by withdrawing $600.00 from the miserably small existing budget of Princess Anne Academy to create some Junior and Senior College scholarships:

> "The Committee on Princess Anne recommends that authority be given for the use of not to exceed $600, payable from available funds in the Princess Anne budget, as scholarships for students who have completed the Freshman and Sophomore college work now offered at Princess Anne and who desire to take Junior and Senior years of college work. In view of the fact that Junior and Senior work is not given at Princess Anne it will be necessary for the higher work in agriculture to be obtained in some other state. These scholarships would be used to assist such students.
>
> "These scholarships would represent a smaller expenditure of State funds than would be required to provide the additional education facilities at Princess Anne. A precedent for such scholarships had been provided by other states and the scholarships are recommended by the Federal Office of Education.

> *The institution of a few of these Scholarships would make it impossible for anyone to claim that Negroes are not given a fair opportunity in Maryland* under the terms of the Land Grant legislation * * *" (R. 61, italics ours).

A specious gesture on the part of the Board of Regents to delude the Negro population of Maryland and keep it quiet.

It is to be noted that the Board of Regents ratified in full the duplicity of the appellant President in dealing with the appellee; and that this ratification coming April 22, 1935 (R. 60) antedated the scholarship act of 1935, which was approved April 29, 1935. At that time the Board of Regents, agents of the State of Maryland, did not even have the semblance of an equivalent to offer appellee in exchange for excluding him from the School of Law of the University of Maryland solely on account of his race or color; but they affirmed the conduct of the President of the University in concealing that fact from him.

The dual and inferior standard which appellants apply to Negro education is evidenced by the pitiful attempt of the President of the University on the witness stand to assert that just as good a course was offered at Princess Anne as at College Park. (R. 51-53, 67-69, 72-76).

Not only on the part of the Board of Regents but in the official policy of the State as expressed in its school laws (See Code, Art. 77, *supra*), it is notorious that no real attempt is made to provide true equality between white and Negro public education in Maryland in a single particular: length of school term, teacher's salaries, bus

transportation, high school facilities, per capita cost of education per pupil, or otherwise. The scholarship act of 1935 (Acts of 1935, Chap. 577) is no exception.

This scholarship act of 1935 is a special experimental limited act providing $10,000 for the total of scholarships for Negro collegiate, graduate and professional education. The act was interpreted to provide scholarships for tuition only. (R. 112.)

No provision is made for the differential in maintenance between what it would cost the Negro student to maintain himself at the University of Maryland and what it would cost him to maintain himself at the foreign school. No differential in cost of travel is provided. The Negro student would have to bear the cost of maintenance and travel himself.

Appellee does not concede that it is constitutional for a State to exile one set of its citizens beyond its borders to obtain the same education which it is offering to citizens of different color at home. It is not without significance that all the "free scholarships" which the State provides for its white citizens are in Maryland colleges and universities. Only its Negro citizens are exiled.

But granting for the sake of argument, that the Act is not void for constitutional reasons regardless of its money provisions, it still does not furnish appellee the equivalent of a course in law at the School of Law of the University of Maryland.

1. Even though his tuition charges of $135.00 in the Howard University School of Law would be paid by the State of Maryland, and he himself would have to pay

$203.00 to attend the Day School of the School of Law of the University of Maryland (R. 33-34), appellee would still be the loser to attend the Howard University School of Law.

a. If he commuted from his home in Baltimore to Washington and return each school day, commutation would cost him approximately $15.00 per month for 9 months; he would have to buy at least one meal per school day in Washington; he would lose four hours per school day on the road from home to school and back again, or approximately 840 hours during the school year which he might otherwise use in relaxed, uninterrupted work on his courses. Then there would be the physical energy expended in the travel back and forth catching early and late trains.

b. If he lived in Washington he would have to pay for separate room and board, whereas attending the School of Law of the University of Maryland he could live at home with no maintenance expense. (R. 50.) The question whether he can be forced into exile has already been noted.

2. Since appellee desires to practice law in Baltimore, the $135.00 scholarship would be no equivalent for loss of the opportunity to observe the courts in Baltimore during his law school career which would be possible if he attended the School of Law of the University of Maryland; no equivalent for the familiarity and drill he would get in Maryland law through the special emphasis laid on it in the instruction given in the School of Law of the University of Maryland; no equivalent for the opportunity he would have to become acquainted with, to ap-

praise the strength and weaknesses of the Judges and practitioners of Maryland whom he would have to deal with later in his practice. It must be remembered that the law is a competitive profession, and this matter of equivalent must be judged in part on the basis of the handicap which appellee would have coming from a foreign law school in competitive practice with graduates of the School of Law of the University of Maryland.

3. The $135.00 scholarship is but a tempting mess of pottage held out to induce him to sell his citizenship rights to the same treatment which other citizens of Maryland receive, no more and no less. Equivalents must also be considered in terms of self-respect. Appellee is a citizen ready to pay the same rate of taxes as any other citizen, and to go as far as any other citizen in discharge of the duties of citizenship to state and nation. He does not want the scholarship or any other special treatment.

4. The School of Law of the University of Maryland is firmly established in the life of the State. Founded in 1813, the School of Law has been providing legal education to the citizens of Maryland without interruption since 1870. The scholarship act of 1935 is frankly a temporary experiment with only two years of life guaranteed it. The shortest day law course in a recognized law school is three years. The scholarship act by the wildest stretch of the imagination cannot be considered the equivalent of the School of Law of the University of Maryland.

It is plain that the State of Maryland has not offered appellee the equivalent of the opportunities and advantages which he would have in studying law in the School of Law of the University of Maryland.

D. *The attempt by appellants to exclude appellee from the School of Law of the University of Maryland solely on account of his race or color, in the absence of equal opportunities and advantages in legal education otherwise furnished him by the State of Maryland, was a denial to him of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States.*

The argument on this point has already been anticipated throughout the brief.

It is the further contention of the appellee that even if this Court should find that the General Assembly intended to exclude Negroes from the University of Maryland by the so-called scholarship acts of 1933 and/or 1935, nevertheless since said acts furnished Negroes no true equality they are unconstitutional and cannot be the legal predicate of an exclusion of Negroes from the University.

> "Had the petition alleged specifically that there was no colored school in Martha Lum's neighborhood to which she could conveniently go, a different question would have been presented, and this, without regard to the State Supreme Court's construction of the State Constitution as limiting the white schools provided for the education of children of the white or Caucasian race." *Gong Lum v. Rice,* 275 U. S. 78, 84 (1927).

In the principal case appellee has maintained from the beginning that the *only* law school in Maryland which he could attend is the School of Law of the state University of Maryland, and that the State has offered him no equivalent substitute therefor. Appellants' attempt to exclude

him from the School of Law under the circumstances, solely on account of his race or color, is a denial to him of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Ward v. Flood, 48 Cal. 36 (1874).
Piper v. Big Pine School District, 193 Cal. 664 (1924).
United States v. Buntin, 10 Fed. 730 (1882).
People, ex rel. Bibb, v. Alton, 193 Ill. 309 (1901).

It remains to notice some of the argument advanced by the appellants at the trial in their attempt to defeat the application for the writ.

1. Appellants contended that there was no demand on the part of Maryland Negroes for collegiate and professional education (R. 21). The record however shows that the number of applications for scholarships under the Act of 1935 was so great that there would not be scholarship money enough to satisfy all qualified applications. (R. 110-111). 626 Negroes are registered in Morgan College in Baltimore. (R. 67). Further it does not sound well for the agents of the State to complain that there is no great demand on the part of Negroes for collegiate and professional education, when the State itself has made it difficult for Maryland Negroes to qualify for collegiate and professional education because of the inferior elementary schools which the State and counties maintain and the absence of adequate high school facilities for Negroes. Finally appellee is an individual. His years and days are numbered, and he cannot wait for his education until there is a mass demand to the satisfaction of

the appellants. A citizen's constitutional rights receive protection on an individual basis.

> "This argument with respect to volume of traffic seems to us to be without merit. It makes the Constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is a personal one." McCabe v. Atchison Topeka & Santa Fe Ry. Co., 235 U. S. 151, 160 (1914).

2. Appellants contended that public sentiment demanded the exclusion of appellee from the School of Law of the University of Maryland (R. 66), and dire predictions were made that there would be disorders, loss of enrollment and general friction if appellee were admitted to the School of Law. It is a notorious fact of public comment and general note in the public press of which this Court can take judicial notice and which appellants will not deny, that the School of Law opened for its Fall term September 25, 1935, that appellee registered and was admitted as a student, and there has been no disorder, no friction, no loss of enrollment, but on the contrary a substantial increase in enrollment both in the School of Law and in the total enrollment in the University.

Maryland has come a long way from the days of *Clark v. Maryland Institute*, 87 Md. 643 (1898), where the Superior Court of Baltimore City denied mandamus to compel the Maryland Institute to enroll a Negro student. This Court affirmed on the ground that the Maryland Institute was a private institution, but went on in its opinion to note:

> " * * * The effect of the admission of these four pupils was very disastrous. There was an immovable

> and deep settled objection on the part of the white pupils to an association of this kind. Notwithstanding earnest and zealous efforts on the part of the board of managers and the faculty of teachers to reconcile the white pupils, their parents and guardians to the innovation, it caused a great decrease in the number of pupils; and the bringing of this suit made it still greater" (p. 656).

It is the height of absurdity to say that appellee Murray cannot sit in the same room and recite and study without friction with the same men, who within the next few years will have to sit side by side with him within the bar of the Court and at the counsel table.

The question was asked the President of the University on the witness stand "just what harm, in your opinion, would arise from the fact that a Negro boy might want to occupy a seat at the law school of the University of Maryland, the same as any other student, minding his own business." The President replied: "I did not go into that question. I felt I knew the well-established policy in this State, the District of Columbia, and different States, and personally, I was influenced by that policy." He was asked whether the question had ever been submitted to the students of the School as to the admission of Negro students. He replied he did not know (R. 66). The students of the School of Law, however, have themselves given the answer by the absence of friction due to Murray's presence in the School and no loss in enrollment altho the order admitting him was entered and made public property June 25, 1935, three months prior to the opening of the autumn term.

Appellee does not concede that if public sentiment were hostile this Court would be entitled to uphold his exclu-

sion from the School of Law of the University on that ground in the absence of statute.

Clark v. Board of Directors, 24 Iowa, 266 (1868).

If the constitutional right exists, the test of sovereignty in a government is its ability to enforce and protect the same even in the face of a temporary manifestation of hostile public sentiment. But appellee is gratified that he can report in this case that there has been in the School no manifestation of a hostile public sentiment, and no evidence of harm done the institution or any of its members.

CONCLUSION.

For the aforegoing reasons it is respectfully submitted that the decision of the trial court be affirmed.

Respectfully submitted,

THURGOOD MARSHALL,

CHARLES H. HOUSTON,

WILLIAM I. GOSNELL,

Attorneys for Appellee.