In the

Supreme Court of the United States

PECOLA ANNETTE WRIGHT, et al.,

Petitioners,

vs.

COUNCIL OF THE CITY OF EMPORIA, et al.,

Respondents.

No. 70-188

Washington, D. C.
March 1, 1972

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Washington, D. C.,

Wednesday, March 1, 1972.

The above-entitled matter came on for argument at 11:34 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

SAMUEL W. TUCKER, ESQ., 214 East Clay Street, Richmond, Virginia 23219; for the Petitioners.

D. DORTCH WARRINER, ESQ., Warriner, Outten, Barrett & Burr, 314 South Main Street, Emporia, Virginia 23847; for the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-188, Wright against the City of Emporia.

Mr. Tucker, you may proceed.

ORAL ARGUMENT OF SAMUEL W. TUCKER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. TUCKER: Mr. Chief Justice, and may it please the Court:

This case was commenced on March 15, 1965, before the City of Emporia came into being. The litigation was litigation against the County School Board of Greensville County to require desegregation of the public schools it operated as a bi-racial school system for the entire county, including what then was the town of Emporia.

At that time, all of the county's white children attended the schools located in Emporia, there were two such schools: one, the Emporia Elementary School; one, the Greensville County High School. Both of which were located in the town of Emporia as it was at that time, and they were the only schools which white children in the county attended.

In other words, children who lived in the county crossed the line to attend -- white children that lived in the county crossed the line to attend schools in the city.

Some of the Negro children, the elementary children, who lived in the city crossed the lines to attend schools out--

out in the county; all the Negro high school children who lived in the city crossed the line to attend schools in the county.

There was just one school system, and as far as the school system was concerned there were no political lines.

Q There was a Negro school in the city also?

MR. TUCKER: There was one Negro school in the city, which had been the old high school or the training school doubling as high school and elementary school. And, as far as the high school was concerned, it was replaced by a new school in 1953, I believe it was; built about a mile north of the town.

Q What part of Virginia is this county in?

MR. TUCKER: Greensville County is on the North Carolina line, it's just about 10 or 20 miles north of Halifax County which was just being spoken about.

Q Yes.

Q So it's apparently close to Scotland Neck, then?

MR. TUCKER: It's quite close to Scotland Neck, yes.

After four years of litigation, we prevailed upon the District Court to require a plan that would promise real -- to desegregate the schools. The essence of the plan was one that was proposed by the plaintiffs, and that was to assign certain grades to certain schools, and assign children, whether they lived in the city or in the county, to the grade

served in that particular school.

Specifically of interest here, all the children in grades 1, 2, and 3 were assigned to the Emporia Elementary School in Emporia, that being the traditionally white elementary school; and all children in grades 10, 11, and 12 were assigned to the Greensville County High School in Emporia, that haveing been the traditional white school; and all the children in those intermediate grades were assigned to the previously all-black schools in accordance with the grades that those schools served.

Now, immediately after the District Court gave approval to this plan, the city of Emporia decided it would take over the two traditionally white schools and operate them as a separate school system.

And the Court of Appeals has held, reversing the District Court, that this should have been permitted.

Q As you say it was a town and it became a city?

MR. TUCKER: Becape a city while this case was pending.

Q Right. And this --

MR. TUCKER: Which I don't think --

Q That didn't happen automatically, just when it reached a certain size?

MR. TUCKER: Well, they had to apply for it.

Q It took action by the -- by the --

MR. TUCKER: In the local court, to show that they

had reached this population provided --

Q It had to have a population of 5,000 before they could --

MR. TUCKER: It really doesn't make any difference, because as a town they could have operated a separate school system if they had wanted to.

Q Oh, they could have?

MR. TUCKER: They could have.

There are towns in Virginia that have separate school systems.

Now, we think that --

Q But under Virginia law, when a municipality becomes a city, then governmentally it changes; then it's no longer part of the county, is it?

MR. TUCKER: It's not a -- it's politically independent of the county, that's true.

Q Right. And when it's a town, it's not politically independent?

MR. TUCKER: It's not politically independent; that's correct.

Q Yes.

MR. TUCKER: Now, we think the Court of Appeals reached its judgment through unfortunate distortions of the evidence. So we are compelled to discuss the evidence at quite some length, because we wouldn't like the same thing to happen

here.

And first we'll start with sort of an overview of the county, and the area.

The longest -- it's a small county, only 312 or so square miles. The longest straight-line distance, whether you measure from east to west or whether you measure from north to south, is -- north to south would be about 25 miles. The county averages about 12, 13 miles in diameter.

This shaded area here, schematically in the center of the county, is Emporia. The Meherrin River cuts west-to-east across the county, right through the middle of Emporia and on and over. So, in a literal sense, it turns out that all roads sort of lead to Emporia. And the only bridges across that river are at Emporia. The bridge that the local people usually use is the connecting link between North Main Street and South Main Street in Emporia.

Another signifcant fact is, which minimizes this question of transportation and so forth, every school in the system, the high school that was built for the -- the Negro high school is located about here; the elementary school, there's one here, and one over here. All of them within a radius of two and a half miles from some point in Emporia. No school is more than two or three miles out of town.

So the distance traveled, or the difference in distances in this problem are minimal.

Between 1965, when this litigation was commenced, and 1969, when complete desegregation was ordered, the black majority of pupils had decreased by 223. From 2700 to 2477. And the white minority had decreased by 518; from 1800 to 1282. We are essentially talking about a school system of about 3750 pupils, roughly.

It's true that after this litigation had been two years in going, July 31, 1967, Emporia obtained its conversion to a second-class city status.

Now, we don't make a big point about the testimony that their purpose was to get a better break on the sales tax proceeds. But we do submit that whatever the underlying motivation for the transition, the transition was made subject to the right, the power, and the duty of the District Court to dispose of this case, and accomplish the desegregation of the schools of the county, including those that were situated in Emporia.

Now, as the law required, the Emporia City Council appointed members to a newly formed Emporia School Board. That school board functioned only in two respects: It joined in signing the April 10, 1968, contract between Emporia and Greensville County, by which the county was going to continue to provide certain essential services, welfare, the sheriff, the courthouse, and even, and specifically,the public schools; and the city agreed that it would pay a share, calculated on a

percentage basis, for those services.

The only other function performed by the school board, until desegregation was ordered, was that the school board met -- I'm not sure whether it was annually or -- once a year jointly with the county school board so that they could legally hire a Superintendent of Schools. Otherwise the schools went on, the county school board ran the schools; business as usual.

As a matter of fact, there was no complaint, no question at all on the part of the city school officials or the City Council members as to the resistance that the county school board was putting up in this lawsuit to desegregate the schools, and even after the New Kent case, I promptly filed motion for relief in light of New Kent, the county school board was successful, one way or another, by proposing plans that obviously would not work, or -- a series of everything; that they successfully held off the inevitable for a full year.

Until the District Court considered that the county board had repeatedly failed and virtually refused to propose an adequate desegregation plan, asked the plaintiffs to prepare a plan, which we did, and essentially that's the plan that's in operation in the schools right now.

When the court announced that it would adopt that plan, that announcement being made in June 1969. But the taste of a hard-put victory didn't last very long, because suddenly

we find ourselves had to play in other ballgames.

July 23rd, when the county school board sought to have the court make amendments to the plan that the plaintiffs had offered, it was considered administratively desirable and it was not objected to by the plaintiffs.

The court, taking that matter under advisement, was advised that the -- by the county school board, that they may have to come back to submit another plan if the city children withdrew from the school system.

And that remark alerted plaintiffs' counsel to the counter-attack that was then being developed by the city of Emporia.

We found that on July 7 the City Counsel had sent a letter to the County Board of Supervisors and the County School Board and their legal adviser, which letter is printed in the Appendix at page 56. The letter takes note of the Federal Court's decision in these surrogates. And the second paragraph of the complaint, and we'll quote: The directed plan becomes even more unpalatable when the school records reflect those students of the city who attend the combined school system are not contributing to the imbalance which apparently led this Court to order two class relocations, busing, et cetera, into Emporia.

The county was by that document requested to transfer to the city the title to all school properties

cited within the city, and in return the county was promised that upon payment of the tuition the county students might attend the city schools on a first-come-first-served basis.

We think it obvious that they were referring to the white students of the county.

Because if they had been anticipating the black students of the county also attending the schools, there would have been no real purpose for their separating the schools.

This is just one of the many evidences in this record justifying the District Court's finding that Emporia's decision to secede from the county was racially motivated.

From the beginning, the city's concern was with the 1880 black county children, two-thirds -- three-fourths, I believe, that the plaintiff declares , which, as the city officials saw it, caused the racial imbalance which had required the desegregation order.

On July 14, 1969, the minutes of that find -- in the Appendix at page 62 -- and we think that they are the essence of the plaintiff's case here.

On July 14th the City Council had met publicly in a special session. Those minutes leave no doubt as to the purpose of the assembly, or as to the motivations of those who addressed the assembly, including the Council members.

Mayor Lee announced, and let me quote: "The purpose of the meeting is to take action on the establishment of a City

School System, to try and save a school system for the City of Emporia and Greensville County."

He further, later said that: The City of Emporia and Greensville County are as one, we could work together to save our school system."

When the cases came on for trial, the things that Mayor Lee had to say about the officials of Greensville County were a hole lot less complimentary, and we had the idea that Greensville County and Emporia had been waging a long, drawn-out war.

But at the time they're making this decision, at the time that they're really under the impact of the Federal Court order, the city and county are as one and we can cooperate and still save our school system and carry on business as we always have.

Mr. Lankford, to show the racial interest in their decision, or the racial effect in that decision, chairman of the City School Board, gave a plan judged on Judge Merhige's ruling, and percentages of Negroes in each school for the first seven grades if Judge Merhige's order would be allowed to go into effect.

You cannot read the minutes of that meeting without seeing that the thing about which the city was unhappy was the fact that the District Court order was going to require actual desegregation of the public schools in Greensville County.

At the foot of page 65 from the same minutes, we see that Mr. Lankford, chairman of the School Board, told the Council that approximately 500 county children could attend city schools if the city obtained the buildings it wanted. There were only 728 white children, white county children in the system.

Now, a separate system offered the only way to continue to insulate these children from that mass, or what they considered a mass, of 1888 black children who lived in the county.

And that was what was to be accomplished at all costs, even -- and we get from the minutes -- even if it required moving into temporary buildings and using makeshift equipment, as a matter of the separation.

Now, at the interlocutory hearing, hearing on the interlocutory injuction, some three weeks later, the Mayor, in response to the City Attorney's leading question, testified that the primary motive in separating was to provide a substantially superior education.

And a month later, at the December plenary hearing, the City School Board exhibited an elaboratley expensive budget, which the school board saw for the first time, and adopted at a meeting held 15 days prior to the trial, and which the City Council saw for the first time and adopted two nights later.

But, in July, when the decision to secede was made, the hallmark quality was a more palatable percentage of black children. And the fiscal thinking reflected in the July meeting was the expression of the Mayor that a city system wouldn't cost any more than they were paying being with the county, and that they could take county students in on a tuition basis.

Nothing else in that meeting on questions of the dollars and cents was expressed. That was the thinking in July when the City School Board was instructed to take immediate steps to establish a school division for the City of Emporia. And the City Attorney was instructed to take immediate steps to effect the legal separate in terms of the equity which the city and county had in the jointly owned property.

July 31st, the City School Board published a notice to parents, that they should -- the city parents, that they should register in the city schools, and that notice invited the county parents to register their children on a first-come-no transportation-tuition basis.

The City Attorney wasn't quite so prompt in executing his directive, because it wasn't until October of 1969 that he filed a suit to have the State Court invalidate the contract, if the contract was indeed invalid.

For some reason, the Court of Appeals was of the impression that the sequence of events happened that, first,

in June of 1969 the City Attorney advised the Council that the contract was void. And the city then filed action in the State Court to have the contract invalidated. And that the parents were then notified that the city children would attend city schools; and then the plaintiffs filed a supplemental complaint seeking an injunction.

But things didn't happen in that sequence. The notification to the parents was dated July 31st. The supplemental complaint was filed August 1st. The hearing on the motion for an interlocutory injunction was August 8, and sometime after that hearing the Council doubtless was advised that the contract might be successfully attacked. And the court met on October 1st, the suit for that purpose was filed in the State Court.

Now, the erroneous impression of the Court of Appeals seems to have stemmed from the testimony of Mr. Lankford, chairman of the City School Board, when he was asked by the City Attorney: When did you obtain a lawyer who advised you that the contract was illegal and violated the Constitution? And his answer was: in June.

But on cross-examination, we developed that the advice was a matter -- something to him as an individual, he was not a member of the Council, he was chairman of the School Board, it was not given at a meeting of the School Board or the City Council or any other group.

And when we read the testimony that was being heard at the August interlocutory hearing, we find that the school board people and the City Council people looked upon this contract as a formidable obstacle. As a matter of fact, going back to the minutes of that July meeting, at which the City Attorney was present, they spoke of the contract as being something they might be able to void by mutual consent or by annexation -- annexing the territory from the county. The contract had a provision that it would terminated if the city didn't take it in annexation.

Q Mr. Tucker.

MR. TUCKER: Yes, sir?

Q You're saying that the Court of Appeals was operating under a misapprehension here. Did the District Court's finding support the position you're now stating?

MR. TUCKER: The District Court's finding supported the position. It gave the date on which the city filed its lawsuit as October.

Q Was there an express finding as to motivation by the District Court?

MR. TUCKER: The District Court found that the -- he found the motives were mixed. He said that there was racial motivation. He gave them credit for their protestations that they wanted to develop a better school system, but he could not close his eyes to the fact that the thing that triggered the

entire thing was his order.

I think that's a fair statement of it, Mr. Justice Rehnquist.

But another and perhaps more important aspect of Fourth Circuit majority misstating the facts of the case, the Circuit Court sought to ascertain the primary purpose of the city, by looking to the projections of the numbers and percentages of the black and white students which were going to be attending the two systems.

The city's witness had predicted a 48 percent black and a 52 percent white ratio in the city-operated high school. And a similar but inverted ratio in the city-operated elementary school. But these predictions blink the facts.

The anticipated return of ten percent of the school population from the private schools would increase the white percentage to the high school to 56 percent.

There is some talk in the testimony about annexation, and they could annex outlying areas of the county and increase the white population of the county immeasurably, [sic; city] while the figure given in measuring the population are not accurate. Then, to face the realities of life, they didn't take into account that the children who lived in the county could manage to live with relatives in the city or with friends or with people who could afford to move from the county into the city or into the new part of the city to be annexed, in order that

their children could attend the public school.

Q Mr. Tucker, --

MR. TUCKER: Yes, sir.

Q -- are you -- I'm not sure whether you're now taking issue with the allocation of students entirely within Emporia, or whether you're talking about the impact on the whole school district, as it was before Emporia was carved out.

MR. TUCKER: Well, I think it's a little difficult to keep the two separate, because one won't be as on the other, anyhow.

Q Yes. But your last remarks and the figures you were giving, that is, do you challenge the end result within Emporia as an improper allocation, just as to Emporia, laying aside the impact on the district or county as a whole?

MR. TUCKER: Well, I find it difficult to really think that the figures in the vicinities could make a whole lot of difference, but when we look at the entire picture, whatever happens in Emporia to increase the white majority is going to increase the black majority in the county. And it doesn't take a whole lot of imagination to see that the county schools would become, for all intents and purposes, or remain, for all intents and purposes, black schools.

But with a few shifts, annexation, or adjustments or tuition basis, or county children attending the city schools on a tuition basis, that the white children would remain out of

the schools cited in the county, just as they have remained out of those schools during the freedom of choice, and ever since Brown.

Q Well, are you suggesting a reverse flight, that is a county flight into the city --

MR. TUCKER: I am suggesting that.

Q -- of white pupils?

MR. TUCKER: That's what would happen, and I think that's fairly what the Council meant when it was trying to negotiate with the city, with the county, to get the buildings and promising that the county children may come in on a tuition basis and so forth.

Q Well, give me again, so I have it clear in my mind, what is the composition of the Emporia schools? Just within Emporia, what is the breakdown?

MR. TUCKER: At present, or what Emporia proposed?

Q At present, and what they proposed.

MR. TUCKER: Well, at present, the plan that the plaintiffs proposed and the District Court approved is in operation, and it has been in operation two and a half years. So that the grades 1, 2, and 3 are children from all the area attending the Emporia Elementary School. And grades 10, 11, and 12 of children all over the area, both county and city, that presently attend the high school; and have been doing this over two and a half years.

It happens that we got the injunction in time, and the District Court gave the injunction to protect his order, and the order went into effect, and --

Q What are those figures at present? In Emporia, within the city of Emporia.

MR. TUCKER: I said that the figures at present -- well, the best figures that we have is that the city had 543 white children and 580 Negro children. The county had 728 white children and 1888 Negro children.

Q What's the figure again, 700?

MR. TUCKER: 728 white; 1888 black.

Q But, Mr. Tucker, as the situation is now, the two schools in the city of Emporia are serving first grades 1, 2, and 3 for the whole county; is that right?

MR. TUCKER: Yes.

Q And what's the percentage of Negro and what's the percentage of white people in that primary school, do you know?

MR. TUCKER: As the record -- or updated figures, which do you --

Q Well, whatever. It may not be exact, of course.

MR. TUCKER: Well, the record would show, on page 297 of the Appendix, in the Emporia Elementary School it's 30.1 percent white and 69.9 percent Negro. And the senior high school, that's in the city, --

Q That would be about the same, wouldn't it?

MR. TUCKER: -- 44.9 percent white and 55.1 percent Negro.

Q Because of some -- a good many children don't go through high school, is that it?

MR. TUCKER: Yes. Quite a bit of it.

We'd like to suggest that the method that the Circuit used to divide purpose from objection was -- not a valid nothing -- that the only, the best way we know what people's purposes are is what they say their purpose is at the time they're making the decision. And the time they're making the decision, why, when we read this, read the minutes of that time or read what they were doing and saying at that time, the purpose is all too clear; and that was to get out from under the District Court forum.

We also would like to suggest that the Circuit form a rule of ascertaining the dominant purpose, but we think it erred in that it applied that rule rather than to remand to the District Court, for him to have make this, in the light of that rule.

We think that in any aspect of this case, that the judgment of the Court of Appeals should be reversed, for any one of six reasons.

One, if any validity could possibly attach to the Fourth Circuit's requirement of a balancing, a benign purpose

against the constitutional imperative, then this being a new rule, as we said, the case should have been remanded to the District Court, who made the initial judgment and the balancing.

We suggest that the proposed balancing test is invalid. That the Constitution commands that the school systems be desegregated, and it makes no exception to permit that command to be subordinated to notions of quality education or anything else, however so benign.

And what we have here was to point to the beautiful school system they have for Emporia. They omit the fact that the three-fourths of the plaintiff class is going to be automatically cut out of that beautiful system; and I don't think that the Constitution allows us to balance the rights of those children against the proposed benign purposes.

We think that, as I said, that we think the Fourth Circuit erred in trying to ascertain, or ignoring the motivations and purposes as expressed, would, as the fact was going on, rather than trying to ascertain them from some projections.

We think that the District Court was correct --

MR. CHIEF JUSTICE BURGER: We'll continue there after lunch, Mr. Tucker.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Tucker.

MR. TUCKER: We would like to save the rest of our time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Warriner.

ORAL ARGUMENT OF D. DORTCH WARRINER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. WARRINER: Mr. Chief Justice, and may it please the Court:

I think at the outset it might be well to remark that the facts as found by the District Court and by the Court of Appeals should be looked to for a determination of what are the underlying facts in this case, rather than to the suspicions expressed by counsel at bar.

And in this connection I would point to page 318 of the Joint Appendix, where the Court of Appeals said:

"Notably, there was no finding of discriminatory purpose, and instead the court noted its satisfaction that the city would, if permitted, operate its own system on a unitary basis."

Obviously the case must be as it appears, rather than as one might think it might have been.

We have listened here this morning to the Scotland

Neck case, along with the Court, and that, if we may express an opinion, it is a strong case.

We believe, because of certain differences of substance, that the case which Emporia has before you is an even stronger case.

In the Emporia case there are no new laws involved, there is no Chapter 31 to see. The city of Emporia is not in existence because the State interposed anything, as they did in Scotland Neck.

Emporia is in existence not because of any special Act of the General Assembly of Virginia, but is in existence, instead, because it has followed the unique pattern of independent cities which has existed in our Commonwealth for at least a hundred years.

When the town of Emporia, in the summer of 1967, became a city, automatically it became a school district. No additional Act of legislation, no additional group of people having to get together, or to sign anything. Automatically, under Section 133 of the Constitution of Virginia, the city of Emporia became a separate school district.

It became a separate governmental entity for all purposes, other than those related to the Circuit Court, in the Circuit of which it's a part. That is, the sheriff, Commonwealth's attorney, and the clerk of the court.

Q When you say it automatically became a school

district, could they have had any option about it?

MR. WARRINER: There are some provisions in the State Statutes of Virginia, and under Section 133 of the Constitution of Virginia, which, with the consent of two governing bodies, two independent governing bodies, such as two cities or a city and an adjoining county, there may be a joint school board in which both the city and the county, as the case might be, would have representation.

They could then operate a joint school district.

Absent consent from both governing bodies, there is no provision under Virginia law for a joint school district. And in this case, as the evidence shows, the County of Greensville, which would be the logical adjoining county, refused flatly to consent to any joint school system.

Q But they -- I take it that under Virginia law a school district like Emporia became could contract with the adjoining county without joining with them in a joint school board? Contract for educational services to city children.

MR. WARRINER: No, sir. The contract provision is contained in Section 20-99 of the Code, if I've cited it correctly, and the contract provision specifically provides that even in the event of a contract, that the city must have representation on a joint school board. There would be representation for each magisterial district of the county, and representation of the city.

Q So you think Emporia, since 1965, had been acting in conflict with that statute?

MR. WARRINER: 1967 was when Emporia became a city.

Q All right, then, '67.

MR. WARRINER: Yes. At that time the city of Emporia elected its school board, as required by law, and as the facts show considered very seriously and in depth the determination of forming its own school system.

Q Yes.

MR. WARRINER: Because of problems that existed at that time, largely having to do with the availability of school buildings.

The city then moved to the next choice, and that is the joint school board. This the county refused. And so the city, in April of 1968, after having become a city in August of 1967, was presented with an ultimatum from the county, saying: If you don't sign this particular contract, which the county had drawn, without change, and do it by the 30th of April, your children will be expelled from our schools.

And under those circumstances a contract was entered into which, in the opinion of counsel, was a void and illegal contract under the Constitution of Virginia.

Q Now, has that -- that contract has been the subject of litigation in the Virginia Courts?

MR. WARRINER: It is presently before the Supreme

Court of Appeals of Virginia.

Q And no decision?

MR. WARRINER: No decision. It has not been argued. The briefs have been filed.

Q What was the decision in the lower court?

MR. WARRINER: The lower court said that contracts of this -- I'll try to quote -- contracts of this type are unconstitutional; but since a necessity existed at the time that the contract was entered into, the court will not hold it unconstitutional.

This was the opinion of the lower court, which left us in quite a quandary, as you can imagine.

Q Yes.

Q Mr. Warriner, am I wrong in thinking that the town of Emporia, when it reached the population level, did have an option as whether to elect to become a city or not?

MR. WARRINER: That is correct. Once a town has passed the 5,000 point in population, it may elect to become a city by merely filing a census with the court, and the court enters an order saying it is now a city.

And this became an imperative thing for the towns of over 5,000 in Virginia to do in 1967, because of the enactment in that year of a State sales tax, which returned to the point of sale, that is the source, one cent out of every dollar spent. And so long as the town of Emporia, which was the

market area, was a town, then the money was being returned to the county, which was not a market area.

As soon as it became a city, then the one cent was returned to the city; and that was why the haste to proceed immediately to become a city before the law came into effect.

Q Well, was there any allegation in this case, or any findings by the District Court that the decision to become a city had anything to do with the school situation?

MR. WARRINER: No allegation, no claim, and no finding.

Q Yes.

MR. WARRINER: And this is, again, a somewhat different case, I think, from Scotland Neck, in which there were some allegations to that effect.

Also, Scotland Neck is still a part of Halifax County. The city of Emporia is not a part of the County of Greensville. It is not a part of it for any purpose, not the purpose of the basic school levy or the purpose of the superimposed school levy, or any other purpose, other than, as I mentioned, in connection with the Circuit Court.

Another --

Q The Circuit Court covers, or can cover in Virginia more than one county, though, can't it?

MR. WARRINER: It does in our particular case, it covers six counties.

Q Right.

MR. WARRINER: And two cities.

Q Yes.

MR. WARRINER: Another, I think, difference which may weigh in the balance is the fact that in the city of Emporia, with its separate, distinct school system, there will be no schools with a white majority; all the schools will be with a black majority. Actually I think, for purposes of argument, we generally think of it as being 50/50, but at the time of 1969 the ratio would have been 52 percent black, 48 percent white. And I think the Chief Justice asked what the present figures were. And they would be, if you care to have them, 55 percent black and 45 percent white, if the school were in existence at the present time.

Q Well now, I don't -- I'm not sure I get that.

MR. WARRINER: The city school system would be 55 percent black and 45 percent white as of this school year.

Q If what you wanted to prevail should prevail?

MR. WARRINER: That's correct, yes, sir.

Q Or would have prevailed. It'd be 55 percent black, 45 percent white. All through or --

MR. WARRINER: All through the city school system. Because, you see, we would have the simplest type of unitary system: it would have one elementary school building into which all elementary children would go; it would have one high school building into which all high school children would go. It

would have, for all practical purposes, the most perfect integration of schools that one could seek anywhere.

Q So, except insofar as it might be affected by dropouts in the higher grades, in the high school, that percentage would pretty well carry through from grade 1 through grade 12?

MR. WARRINER: That is correct, and we also envision, and it is in evidence, a special program and hope to prevent dropouts. An enhancement program aimed specifically at potential dropouts.

Q When did the Distr Court plan go into effect?

MR. WARRINER: The District Court plan was to go into effect in the fall of 1969. It was decided in June of 1969, effective that fall.

Q You said it "was to", did it or did it not go into effect?

MR. WARRINER: Did it go into effect? Oh, yes, sir.

Q Yes. That's why your phrase "was to go into effect" misled me for a moment.

MR. WARRINER: I'm sorry.

Q It went into effect and the Court of Appeals did not stay the order?

MR. WARRINER: That's correct.

And the schools at the present time just simply are not racially identifiable. For the past three years the

majority of blacks in all of the schools of the county has been roughly 2 or 3 to 1.

And this would be in schools that might be characterized as formerly all-white. They are all now with a black majority, and they will be with a black majority after the city is permitted to proceed with its unitary school plan.

Q Now, you said that if the school board, the Emporia city plan had gone into effect, it would have been 55/45?

MR. WARRINER: As of this school year.

Q Now, what is it in fact now, let me get that difference clearly in mind.

MR. WARRINER: In fact now the ratio is 66 percent black, 34 percent white.

Q That's because of the -- going outside of the city into the county?

MR. WARRINER: That's -- yes, that's because the entire system of Greensville County, with the city of Emporia combined, would give you a ratio of 66 blacks to 34 whites.

If the city were proceeding in its own system, it would be -- the city would be 55 percent black, 45 percent white; and the remaining county would be a change from 66 percent combined to 71 percent, if it were by itself.

And the city -- the county would have 29 percent white if it were by itself.

Q Mr. Warriner, when are these buildings going to be built? You say there's going to be one high school and one elementary school. Are they in existence now?

MR. WARRINER: Yes, Your Honor.

Q They are in existence.

MR. WARRINER: Yes, Your Honor.

Q And are there any other schools?

MR. WARRINER: Within the city?

Q Yes, sir.

MR. WARRINER: There is a school known as the Greensville County Training School, which is located on the edge of the city, the northeastern edge of the city.

Q What are you going to do with that?

MR. WARRINER: We do not desire -- if the county needs it and would use it. In our suit, what we call the equity suit, which is our suit to allocate to the city that which it is entitled to have upon transition from a town to a city, we have asked for that which we needed, and no more. And we need, or to meet the needs of the schoolchildren of the city, an elementary school building and a high school building.

Q How many county children are going to be in the city schools?

MR. WARRINER: None.

Q None?

MR. WARRINER: None. No, sir.

Q And no possibility of transfer?

MR. WARRINER: No, sir, not unless the District Court says so.

Q And no city children in the county schools?

MR. WARRINER: None. None, sir.

Q Right.

Q Under Virginia law, if a city and the surrounding county have this joint arrangement, this joint school board as the law permits, how does the city, under the law, then pay for its education?

MR. WARRINER: It presents a problem because --

Q They don't become subject to county taxation?

MR. WARRINER: No. No, each body, each governmental body has to raise its proportionate share, which is generally a contractual share of the combined budget. And the problem exists becasue one body or the other may want to spend more or less than the other.

Q Who --

MR. WARRINER: And we don't have -- excuse me.

Q Under the law, the representation that the city would have to have on the board, is it specified?

MR. WARRINER: Yes, Your Honor. One for each ward. There happened to be four wards in the city of Emporia, but there's no reason why we couldn't have more wards than that, or

less wards than that, which again leads to awkwardness in the --

Q So you wouldn't know who would have voting control of the joint board?

MR. WARRINER: I would suspect, in all fairness, that the county should have voting control of the joint board, because its population is roughly 2 to 1 that of the city.

Q Did the county give a reason for rejecting the proposal?

MR. WARRINER: No, Your Honor, they did not.

Q Well, anyway, it's not in the record?

MR. WARRINER: It's not in the record, and so far as I know they didn't give a reason; they just said they weren't going to do it. Which is not contrary to the usual course of affairs between the city of Emporia and the County of Greensville; it's part of the pattern. And it's part of the reason we're here.

As a matter of fact, it's the overwhelming reason that we're here.

This case is not the usual zoning case, with which you have dealt before, as you can readily see. A zoning case involves one government, which is dividing itself up into attendance zones. That's not the case here. We're talking about two governments.

The populace of one having no voice whatever in the operations of the other. And since the stay of the District

Court's order, as a matter of fact since 1967, the children of the city of Emporia have been educated in a school system over which their parents, the taxpayers, and their City Council, and their City School Board has had not one item or iota of control. This of course is contrary to the old American idea of how government ought to be run.

Q Did the District Court purport to issue any opinion on the legality of the contract arrangement?

MR. WARRINER: No, it did not, Your Honor. And that is a State Court matter, it's under the State law that it's illegal.

However, I think that certainly there's a Federal question involved.

Q Under the District Court's order, what is the arrangement between city and county? Was it specified?

MR. WARRINER: No, Your Honor, it's exactly as I've just stated it. Our children go to a school system over which we have no control.

Q Well, I know, but how about money?

MR. WARRINER: We have to pay -- the order said that we should pay our, quote, "proportionate or proper share". And we are now paying a share which we unilaterally determine to be appropriate and proper, and that is, we took the local effort and divided it by the total number of children in the school system, and we're paying on a per-capita basis.

This involves problems of capital expenditures, which are difficult to root out, and certainly we don't owe anything to capital expenditures; but this is the most anomalous situation that we're in under the present situation, and it is ample justification of what we are seeking to do.

No governing body, no people would want the most important aspect of local government to be completely out of their control, as it is in the city of Emporia.

Q Now, this plan has been in operation how long?

MR. WARRINER: Since June the 25th, 1969, when it was entered by the District Court.

Q Now, has the county been appropriating funds to implement the plan?

MR. WARRINER: The city appropriated funds?

Q Well, the county.

MR. WARRINER: Oh, yes.

Q I mean for transportation. This District Court plan involved some busing, did it?

MR. WARRINER: Well, it involved busing of city children out into the county to county schools, and the city has had to pay its proportionate share of that.

Q And I read in the City Council's minutes that they were fearful the county wouldn't seriously implement the plan.

MR. WARRINER: That is correct.

Q But they are.

MR. WARRINER: If Your Honor pleases, the difference between carrying out the mechanics of the plan and carrying out the spirit of the plan; and it was our position then and it is our position now that the spirit and the will which must go into a unitary system of education, to work, is lacking. And it is not lacking in the city.

The city may have delayed long in trying to pick up the beat of the drum, but they've picked it up, and they want to march.

And I respectfully submit that we should be seeking and obtaining the help of our adversaries here at the bar, rather than their obstruction. Because we have sought, and seek now, to implement a realistic, workable, unitary system. We know that it can work. And it will work, given the chance to do it.

Q Mr. Warriner, did you tell me that no county students were going to be in this system?

MR. WARRINER: That's correct, Your Honor.

Q Well, one of the dissenting opinions says that you have a transfer plan. Is that an error?

MR. WARRINER: If Your Honor please -- that is in error; we do not have a transfer plan.

May I explain that a bit?

At the time that we first proposed operating our

independent school system, as a part of our hope of persuading the county to do that which it ought to do, and that is turn over to us the school buildings which rightfully should be ours, we included, on a first-come-first-served, nc transportation basis, or tuition, the opportunity for anyone who wanted to attend the city school system to attend it.

The District Court expressed doubt about the validity of that. We said: very well, if there is any question about it, if that shows any, casts any doubt upon our good faith, we freely and willingly give it up. And we have.

I think that we have to view this case conceptually, by going back to the basis. What constitutional right has been violated?

Now, no constitutional right, admittedly, was violated at the time the town of Emporia became a city in 1967. And so if a right has been violated, it had to be violated as a result of having a separate school system flowing from the city status.

And you've looked at the school system, and you see that there is a completely and wholly unitary system in the city of Emporia. You look, if you will, at the county school system, and you see a complete and wholly unitary school system in the county. Nothing artificial in either case.

Nothing forced. Nothing temporarily expedient in order to obtain some particular balance.

But the natural consequences of non-State action result in two separate school units, each having within it a unitary system, each with no predominance of one race over the other, but each representing the community which it intended to serve.

Now, if there is a constitutional right involved, it must be a constitutional right to a specified ratio, because we're not damaging any other right. There might be a right to a specified ratio in some geographic area.

We submit that Swann didn't say that. Green didn't say that. And Spencer v. Kugler, decided by this Court in January, did not say that.

Where there is no showing of State action, which produced a racial pattern in a community, and certainly in southside Virginia there is no racial pattern. There is a -- it is a completely intermixed community, no one in Emporia lives over three blocks from someone of a different race. It's just that way.

So not only is no State action creating a racial pattern, it doesn't exist.

Just as in Kugler; just as in Kugler, the boundary lines of the city of Emporia were not drawn in an attempt to gerrymander in or out anyone. And when I mention that, I'm reminded of the fact that in closing, counsel for the plaintiffs mentioned something about 75 percent of the children

being included out. Twenty-five percent of his clients are included in a substantially better system, which is the uncontradicted evidence in this case, and certainly they are entitled to rights. Where a unitary school system can bring about a better school system, then it ought to be implemented.

Too often, I feel sure you hear the arguments before you that the unitary school system is going to bring about a poorer school system. This is just the opposite of that argument. And it is a sincere argument. And it is an argument which is not contradicted in the evidence; as a matter of fact, the evidence is conclusive to that effect, as found by the District Court.

Q Let's assume that as part of the District Court's plan the court had ordered -- I'm not suggesting that it had the power to; I'm not suggesting that it didn't -- but suppose it had ordered that the county make available to the city a proportionate share based on students, a proportionate share of representation on the County School Board. And that the money that the city was going to contribute, let's assume, was fair, in terms of anybody's judgment.

Would you still be here?

MR. WARRINER: Yes, Your Honor. I think that the record which we have presented to you is abundantly clear that the problem of having a separate -- the desire to have a separate school system for the city of Emporia, just as every

other city in Virginia has, has been one of long standing. The dissatisfaction with the arrangement that we've had with the county is one that is ingrained. The ameliorative influence that you have suggested, of having representation on the board, proportionate, would not cure the problems that exist --

Q Well, it may not cure it, but you offered to do it once.

MR. WARRINER: Yes, we --

Q You wanted to do it once, and it was rejected.

MR. WARRINER: We offered to do it, if Your Honor please, because --

Q Why wouldn't that offer -- what if the county had come back, in the District Court proceedings, and said: Now we accept your offer. Why wouldn't you have accepted it then?

MR. WARRINER: Well, we first said it's been withdrawn. But, second, we'd say we've got something better, we've got our own -- we've got what we think --

Q Why would you have changed your mind?

MR. WARRINER: The experience that we've had with the county has changed our mind. And the case of Green has changed our mind. And I say that without blanching at it at all. Because the county could operate reasonable good school system under the circumstances that existed prior to Green.

They have no will to implement Green. They have no desire to implement Green. And this is what the evidence shows. I am not stating my view. The evidence shows that. Apathy with respect to Green.

And the evidence shows that they, post-Green, didn't increase their budget even enough to take care of inflation, and yet the needs that arise post-Green are far greater than the pre-Green needs.

Q What's the composition of the County School Board?

MR. WARRINER: Insofar as race is concerned?

Q Yes. Number and race.

MR. WARRINER: There are four people on the County School Board, three of whom are white and one of them is black.

Q And what's the population of the county?

MR. WARRINER: Population of the county is about 9,000.

Q Divided between blacks and whites?

MR. WARRINER: Roughly 50/50.

I think that I'm correct in saying there are four. In any event, it's four or five, and one of them is black. I think it's four.

If there is anything in the decision of Swann, with respect to the problem of flexibility, the problem being met by flexibility, that the school boards have plenary power

provided there is no invidious discrimination, then this is the case to apply the language of Swann. This is a case where a city has undertaken its obligation under Brown, and has asked and fought for the right, through the courts, to provide a realistic unitary school system.

Q Well, you say, then, that the desire to maintain a racial balance in the school, acceptable to the white population, is not a factor in this case, as it is said to be in the Scotland Neck case?

MR. WARRINER: If it is a factor in this case, it's a most muted one. We have an area that is already a municipality --

Q Well, what did the Court of Appeals say about that?

MR. WARRINER: They didn't make any observation on that, that I can recall.

Q And how about the District Court?

MR. WARRINER: Nor did the District Court.

There was discussion of the fact that a good school system would help make a viable, growing community, which would include both white and black; but, so far as I can recall, neither the District Court nor the Court of Appeals addressed itself to white flight, and, as far as I can recall, neither did our evidence.

However, I think it's obvious that the better the

better the school system the more people will stay in it, white and black.

Q Are there private schools?

MR. WARRINER: We have managed to keep them out of our county and city up to now. I hope we can always do that.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. warriner.

Mr. Tucker.

REBUTTAL ARGUMENT OF SAMUEL W. TUCKER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. TUCKER: Mr. Chief Justice --

Q Mr. Tucker, let me ask you one question. Suppose in 1965, is that when this litigation, your case started?

MR. TUCKER: That's right.

Q Suppose in 1965 that Emporia had reached this 5,000 population point --

MR. TUCKER: I think it had.

Q Oh, it had? Well, that makes it easier.

-- and Emporia said, We're tired of waiting for these people out in the county to catch up with what the Court says is required in compliance with the Constitution, and we want to run a purely unitary system, and they withdrew and had run a unitary system with the percentages which now prevail, that have just been described to us, and they had

been doing it ever since. Do you think the District Court would have the power to say: Yes, that's fine that you were ahead of these people all this time, but now you've got to be put into the whole county system?

MR. TUCKER: Well, if Your Honor please, I live there, and if Emporia had, in 1965, decided -- made any such decision, you could have knocked me over with a feather!

Q Well, but suppose they had?

MR. TUCKER: Suppose they had?

Q That's the central question. Would the District Court now have the power to do what it did?

MR. TUCKER: I think it probably would have had the power, if anything like I believe would happen in Emporia, if -- had Emporia -- well, had Emporia, you're saying, created a unitary non-racial school system as early as 1965, would the District Court have had power to eliminate the minds and expand the school system to -- I think it could have, if the necessity would have required it.

If, as a result of that, or even without a result, if it meant that the children in the county were attending what in effect were racially segregated schools, if it meant that the children in the county were attending racially identifiable schools, were being denied equal protection of the law, I think the District Court could take, could use the command of the Fourteenth Amendment to the States, not to a

city, not to a county, to provide equal educational opportunities for all the children in the State, as far as that was practical.

So I wouldn't have any whole lot of problem if the evidence demonstrated the necessity for that, for the District Court to have erased the lines and required one school system. Because, after all, our doctrine of federalism does not recognize the State's carve-outs; it makes a demand to the State not to deny any person within the jurisdiction of the State equal protection of the laws.

And that is the basis for this entire line of litigation now.

Q Do you agree that neither the District Court nor the Court of Appeals found that race was a factor in the --

MR. TUCKER: The District Court found that the -- that Emporia's plan or proposal was originally motivated, as he says on page -- well, anyhow, he said that the motives were mixed, and he does not discount the racial motivation.

Q And the Court of Appeals --

MR. TUCKER: Page 307 of the Appendix. Right in the middle of the page,"the Court finds that, in a sense, race was a factor in the city's decision to secede."

Q But the Court of Appeals said the record does not suggest that Emporia chose to become a city in order to

prevent or diminish integration?

MR. TUCKER: The Court of Appeals managed to avoid the District Court's finding that race was a factor.

Q But that was it's decision to become a city. The real question is what about its decision to --

MR. TUCKER: Its decision to become a city I think is immaterial to our consideration here.

Q You don't say that --

MR. TUCKER: But its decision to secede from the school system --

Q Yes. All right.

MR. TUCKER: -- is the thing that the District Court was addressing -- found race to be a motivating factor.

And I don't think that conclusion is unavoidable, it would just look at the minutes of July 14, 1969, when they made the decision, and look at the things that they did, even the resolution of the City School Board asking the State Board to decree them a separate school division. Every preamble points to the District Court orders, the thing with which they were unhappy.

Being unhappy about the quality of the school system came after the application for an injunction, as a matter of preparation for trial.

The question was asked whether we have private schools, and Mr. Warriner correctly answered that we don't have

a private school in the County of Greensville; but in the neighboring county of Brunswick there is a private school, and a considerable number of white children do attend the private school there. As a matter of fact, I think that's in the record, in the testimony of the Mayor somewhere, where he refers to the people who have gone to the private school in the neighboring county of Brunswick. You get all the way across, which would be about 20 miles away from Emporia.

Q Mr. Tucker, your reference to the District Court's finding on page 307a, you left a couple of words out, and I wanted to ask you what they meant.

"The Court finds that, in a sense, race was a factor in the city's decision to secede."

What do you think the judge meant when he said "in a sense"?

MR. TUCKER: Well, my -- it's rather difficult for me to say what Judge Merhige meant. I can say that the evidence he's looking at, and I think the evidence he was looking at was the fact that the people took into consideration, when they made their decision to secede; they took into consideration, as shown by their minutes, the percentages of blacks that would be in the schools under Judge Merhige's decision.

The Chairman of the School Board came to the Council meeting armed with that information, the testimony is that he

went by the Superintendent's office to get it, so he could carry that information to the Council, to the Council meeting, at which the formal decision to secede was made.

Q Well, Mr. Lankford, as chairman of the School Board, testified --

MR. TUCKER: That's correct.

Q -- that part of the desire was to have a quality school system that would hold the residents, the white residents in the public schools rather than deciding to go to private schools.

MR. TUCKER: I recall that in his testimony, sir.

But again I go back to the letter of July 14, and I find two references to quality education, and I get that the hallmark of quality there was the palatable racial mix in the schools. I mean, that's the impression I get from reading the minutes of July 14, where they made the decision. That that's what they were concerned about.

They weren't concerned with spending money then, because their only question of money was the Mayor's suggestion that: We can operate city schools as cheaply, or for as much money as we can in the county; and we can take county students in on a tuition basis.

And I can't omit the fact, even though now the city can protest that no county children will come into the city, when they decided to secede, their purpose was to let children

come in on the county basis, and that cannot be denied.

I mentioned in my original argument that the town could have had a separate school system, even when it was a town. The statute for that is printed in our brief.

I would like also to call the attention to -- on page Appendix 4 of the petitioners brief, Section 22-99, which governs when city contracts with county to furnish facilities, that there is statutory provision provided, and the statute provides for city representation on the school board.

And while we're right at that, I might even point out that the present school board does have one black member, who is -- to my recollection, that is correct, -- he was appointed there some time after the Court's decision to desegregate schools. I will point out also that the evidence shows that two of the members of the school board live in the city of Emporia.

So there is not that sort of open warfare between Emporia and its neighbors in Greensville County; there's been quite a bit of cooperation, even to the point of the county not taking any position before the District Court in our injunctive proceedings to protect the District Court's order.

Yes, Mr. Chief Justice?

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Tucker.

MR. TUCKER: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:39 o'clock, p.m., the case was submitted.]

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