A. That's right.

[fol. 318] Q. Did you bring with you this morning at my direction an exhibit or list of the number of colored, negro, students transported?

A. Yes, sir, four copies.

Q. I will hand you what has been marked Defendants' Exhibit "O" and is that a list of the—broken down by schools—of the negro students that are transported in the City of Topeka to the negro schools?

A. That's right.

Q. And it's true and correct?

A. It is.

Mr. Goodell: We offer the same in evidence.

Judge Huxman: What is the exhibit number?

Judge Mellott: "O".

Judge Huxman: Exhibit "O" will be received.

Defendants' Exhibit "O", having been offered and received in evidence, is contained in the case file.

By Mr. Goodell:

Q. Mrs. Mifflin, do you attend all board meetings in your capacity as clerk for the Board of Education?

A. Yes, sir, I do.

Q. You are present then when discussions of policy and administrative policy and the running of the schools comes up for discussion by the board and Dr. McFarland.

[fol. 319] A. Yes, sir.

Q. You are familiar, then, and have been all these years, with that policy.

A. Yes, sir.

Q. Are you familiar then with the actual policy with respect to the operation of the entire school system which includes the eighteen elementary schools and the four negro schools?

A. Yes, sir, I am.

Q. State whether or not you know the policy that has been adopted and carried out by the Board of Education with respect to the negro schools concerning the right of a child, if he so elects or his parents, to attend any one of the four negro schools of his own selection; do you know the policy about that?

A. Yes, it is the policy of the board to allow the child to attend the school which he wishes to attend in the colored division.

Q. Do you recall of any instances when that election was made which wasn't acceded to?

A. No.

Q. Are you likewise familiar with the course of study that is prescribed by state law and whether or not it's been adopted and used in the city schools, elementary schools, both negro and white schools.

A. The same course of study is used in all schools.

[fol. 320] Q. That would mean then, of course, the same textbooks.

A. That's right.

Q. There was some testimony given here yesterday by Dr. Speer concerning his examination of books and comparisons that he made from books found in negro schools, comparing the books found in certain of the white schools, that he made such a similar examination. Do you know whether or not, as far as the Board of Education is concerned, there is any distinction or differences in the furnishing of books to the different schools on the basis of their color, whether negro or white schools.

A. There is no distinction made. The number of books isn't—the number of books sent is determined by the number of children in the school.

Q. Well, I mean do you have any policy to send old-style books down to the negro schools and new books to the white schools?

A. No, there is no policy like that. I am sorry that Dr. Speer didn't see the schools when they were in operation. He saw them after they were closed. If a principal had "put his school to bed" as we say correctly, the good books would have been packed in boxes and packed away. The books that are left out on the shelf are books that could be eliminated, really.

Q. Obsolete books.

A. That's right.

[fol. 321] Q. But the modern up-to-date books that are actually used in the operation of the schools, your policy

has been as soon as school is out to box them up and put them away.

A. Put them away very carefully so they won't be dusty when school starts.

Q. Now, Miss Mifflin, state, if you know, whether or not additional books, not furnished by the Board of Education, are sometimes furnished by the Parent Teachers Association made up of parents of children living in the various territories in the city?

A. Yes. P. T. A.'s very frequently have money to spend, and they do buy books for various schools.

Q. Buy it with their own money, not public funds.

A. That's right.

Q. And put it in that particular school where the P. T. A. decides to make that purchase, is that correct?

A. That's right.

Q. And that is no different, whether it's negro or white, is that right?

A. That's right.

Q. The board doesn't spend its money or have any control over that.

A. No.

Q. Other than that dissimilarity wherein the Parent Teachers Association in some territory might buy more—might have more money to spend, is there any dissimilarity [fol. 322] by reference books or books furnished by the board in any of the schools in the elementary system?

A. There is no difference.

Q. Now, I want to direct your attention, Miss Mifflin, to what has been introduced in evidence as Exhibit "A" and which I want—first, I will ask you if all of the territories are named and designated on this Exhibit "A", both white and negro?

A. Yes, sir.

Q. Of the entire school system?

A. That's right.

Q. Are school territories also shown on Exhibit "A" which are outside the city limits of Topeka?

A. Yes; the school district is on that map.

Q. In other words, you have some areas shown on Ex-

hibit "A" which are in the City of Topeka for school purposes alone, is that right?

A. That's right.

Q. Does that appear colored in blue?

A. That's right.

Q. I will ask you whether or not in each, if you know, according to the records of the Board of Education, if you have children attending from all of these areas shown in the territory, school territory, or put it another way, from [fol. 323] the blue, what is marked blue.

A. Yes, we do have.

Q. Is any transportation furnished to any of the white children from any part of town?

A. None at all.

Q. Do some of them live as much as thirty blocks away?

A. Yes, sir.

Q. Well, in those cases, if they ride a bus, do they ride a city bus?

A. Yes, they would have to furnish their own transportation.

Q. Now, do you furnish a convoy with any of these children, people to go with them to get them across the streets, and so forth.

A. No, sir.

Q. White children.

A. No.

Q. Do you have any control—state, if you know, whether you have any control—I mean by you, the Board of Education, over selection of traffic lights or blinker lights at any territory in the City of Topeka?

A. No; that is the business of the city.

Q. And how—and do you know how they make that decision?

A. I think they——

Judge Huxman: Mr. Goodell, that would have to be hearsay on her part.

[fol. 324] Mr. Goodell: Yes, it would be.

By Mr. Goodell:

Q. Miss Mifflin, Exhibit "E" and "J" that have been introduced in evidence have to do or set out in a portion

of the exhibits the facilities of each school in the whole City of Topeka and, particularly, it shows on that exhibit —those exhibits—whether they have a gymnasium or auditorium and, in some cases, where they are combined, is that accurate, true and correct?

A. Yes, sir.

Q. Those exhibits.

A. That's right.

Q. Do you have some white schools where you have that combination where you turn one room into one, using it——

Judge Huxman: Mr. Goodell, haven't those exhibits been agreed to?

Mr. Goddell: I believe so. I have a note that it wasn't entirely agreed to as to that particular feature.

Judge Huxman: There were only two questions -bout it at all. The exhibits were admitted.

Mr. Goodell: Except it was held up because they claim inaccuracies in the case of one school. I have a note to that effect.

Judge Huxman: You might ask her about that one inaccuracy.

By Mr. Goodell:

Q. I believe Dr. Speer was the witness who testified [fol. 325] pertaining to four schools which I will direct your attention to, as being Buchanan, Lafayette, Polk and Potwin—in other words the data contained in this data as being true with respect to auditoriums and gymnasiums, will you examine now particularly those schools I have indicated. I will take it one by one and ask you a question: Potwin, for example, you have the record shows that it has an auditorium but no gymnasium, is that correct?

A. That's right, it has a playroom but all schools have playrooms.

Q. Is that true of the negro schools?

A. They all have rooms that they do not use; any room that is not used can be called a playroom.

Q. I notice Polk Street now, the next one that Dr. Speer mentioned in his testimony, it's marked auditorium room

used for auditorium purposes but no gymnasium, is that correct?

A. That's right; there is no gymnasium there.

Q. I notice the same before Lafayette, that your records show it has an auditorium room, facilities for an auditorium, but no gymnasium, is that right?

A. That's right.

Q. And I direct your attention to the same matter on Buchanan; your record shows it has an auditorium but [fol. 326] no gymnasium, is that correct?

A. That is correct.

Judge Mellott: Is the difference of opinion, take, for instance, Buchanan School, purely one of terminology? Now she refers to it as having an auditorium. As I understood it, counsel's statement was that there were two rooms capable of being thrown together for an assembly room, but they object to calling it an auditorium, is that the point of difference?

Mr. Goodell: That perhaps is the point of difference.

By Mr. Goodell:

Q. That is correct in some of these older schools, white schools, for example, like Lafayette and Polk and some of the others.

A. We have made auditoriums by remodeling in a number of schools. Now the auditorium, what we call auditorium at Buchanan, has a stage; it has seating. The only difference, if they do not wish to have the whole room included in the auditorium, they may pull a sliding door closed and not use the entire auditorium.

Q. Now, are you familiar and is it part of your job and are you familiar with the ordinary maintenance and operation of the school system with respect to furnishing of supplies upon requisition, accessories and needed supplies to properly make the school function?

[fol. 327] A. Yes, sir; I am the business manager of the schools; purchase all the supplies.

Q. You are familiar, then, with the practice and policy that actually has been adopted and used by the board in that respect in the furnishing of supplies.

A. Yes, sir.

Q. State, if you know, as a matter of policy, whether there has ever been any distinction shown between furnishing supplies when requested to negro schools as compared to white schools in the elementary system?

A. There is no distinction made between colored and white schools.

Q. They are operated, in other words, the whole thing is operated as a school system, is it?

A. That's right; it's a school system, and we operate entirely on the need of the school.

Q. And do you know what factors—strike that. Are you familiar with the factors, by reason of board policy and administrative practice, that Dr. McFarland and the board uses actually in fixing teachers' salaries in the entire school system, inclusive of these elementary schools.

A. Yes, sir.

Q. What are those factors?

A. Salaries—you mean the salaries?

Q. How are they arrived at?

[fol. 328] A. Salaries are determined by education, by experience and how well the job is being done.

Q. Teaching experience, educational attainments?

A. That's right.

Q. And actual manner in which the teacher has performed his duties, is that right?

A. That's right.

Q. If I understand you correctly, then, you might have a teacher with the same number of years experience and the same educational attainments, but one that didn't have as good performance record; in the case of one that had a good performance record might get more money than another one having all the other qualities except that one.

A. He might; he also might have extra duties.

Q. Extra duties.

A. That's right.

Q. State whether or not the Board, as a matter of policy by Dr. McFarland and the board, in fixing these salaries there has ever been any other factors applied to the negro school teachers not applied to the white teachers in fixing those salaries?

Mr. Carter: Your Honor, all the things brought out, I think, so far have been stipulated to, particularly the salaries.

Mr. Goodell: They wouldn't stipulate on that, and I [fol. 329] have it in my stipulation and I have it marked they wouldn't stipulate.

Judge Huxman: She may answer. I didn't think there was any issue made on it. There is no evidence whatever to show anything to the contrary, but she may answer.

By Mr. Goodell:

Q. Are the same factors used, in other words, in fixing salaries in teachers contracts—I mean the same factors observed and actually followed in fixing salaries for both negro and white teachers?

A. Yes, sir, exactly the same.

Mr. Goodell: I believe that is all.

Cross-examination.

By Mr. Carter:

Q. Miss Mifflin, you said you were the clerk of the Board of Education?

A. That's right.

Q. I think you testified that—as to an exhibit with regard to the school program that this program was carried out throughout the school system, is that correct?

A. That's right.

Q. Among your duties as clerk of the board, are you the person who goes and visits the schools and examines them and inspects them; are those—is that included in your duties?

A. Yes, it is; I call on all schools.

[fol. 330] Q. I see. Now, with regard to the books that are held, if there is any difference between the books that are held by the white schools and those that are held by the negroes, if I understand your testimony correctly, you would attribute that to donations by the P. T. A. organization, is that right?

A. That's right.

Q. Is it or is it not a fact that if these books do—if they are donated by the P. T. A. they belong to the school or the Board of Education or what happens?

Mr. Goodell: We object to that as calling for a conclusion, legal conclusion, of this witness, where title is in the books.

Judge Huxman: She said she's in charge of the school system for that purpose. She may answer.

The Witness: They are usually gifts to the school. If they are a gift, then they become the property of the school.

By Mr. Carter:

Q. They become the property of the school to which they are given.

A. However, we wouldn't feel that we could go—if a gift would go to a certain school, we wouldn't feel that we should go in and remove it to another school.

Q. I understand that. They become the property of the school to which it's given, and they remain there, is that correct?

[fol. 331] A. That's right.

Judge Huxman: You may step aside, please.

(Witness excused.)

KENNETH MCFARLAND, having been previously sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Goodell:

Q. State your name again for the record.

A. Kenneth McFarland.

Q. And you are the superintendent of schools of the City of Topeka.

A. Yes.

Q. How long have you held that post?

A. Nine years; since 1942.

Q. How long have you been in educational work?

Judge Huxman: Wasn't all of that gone into yesterday. I thought the doctor was asked his qualifications.

The Witness: No.

Mr. Goodell: I don't recall it.

Judge Huxman: Proceed.

Mr. Goodell: I will dismiss it, though, if the Court doesn't want to hear it. I will make this very brief.

[fol. 332] By Mr. Goodell:

Q. What is your educational background?

A. Bachelor's Degree from Pittsburgh Teachers College here in Kansas and a Master's Degree from Columbia University and doctorate degree from Stanford University.

Q. How long have you been in education work, Doctor?

A. Twenty-four years.

Q. When you came to Topeka, state whether or not the elementary schools were being operated, separated as to negro and whites in the first six grades.

A. Yes, sir.

Q. You understand, do you, that the statute of Kansas is a permissive one, that the Board of Education may—it's up to their discretion—according to statute.

A. Yes.

Q. —to so operate the elementary schools.

A. Yes, I understand that.

Q. Has it ever been your policy that you recommended to the board to change that operation actually?

A. We have—no; we have never recommended that we change the fundamental structure of the elementary schools.

Q. Why not.

Judge Huxman: Mr. Goodell, what would that establish in this lawsuit?

Mr. Goodell: Well, I think he, as an administrator—I am leading to something. I can't ask more than one question [fol. 333] at a time.

Judge Huxman: I know, but what's the purpose? If the statute gives the city permission to operate the schools, and he testified they are operating separate schools, what difference would it make whether they had or had not considered changing?

Mr. Goodell: It might make some difference. We had a lot of expert testimony here on a hypothetical community or hypothetical situation, and I want to show the human factor in the custom and usage in this community, whether he knows it and whether or not it had something to do with the operation of the schools, why they operated——

Judge Huxman: Whether the city authorities had considered discarding what they had a right under the statute to do or hadn't considered, wouldn't prove any issue in this case.

By Mr. Goodell:

Q. Have you ever, as an administrator of schools, considered it part of your business to formulate custom and—social customs and usage in the community?

A. Mr. Goodell, I think that point is extremely significant; in fact, it's probably the major factor in why the Board of Education is defending this lawsuit, and that is that we have never considered it, and there is nothing in the record historically, that it's the place of the public school system to dictate the social customs of the people [fol. 334] who support the public school system.

Q. Do you say that the separation of the schools that we have is in harmony with the public opinion, weight of public opinion, in this community?

A. We have no objective evidence that the majority sentiment of the public would desire a change in the fundamental structure.

Q. Now, we will get on to the actual operation. Have there been any distinction in the question of fixing salaries, furnishing accessories or supplies to the negro schools as opposed to the white schools?

A. No. I think we found what we thought were some discrepancies when we first came here in salaries. Those were corrected; we adopted a minimum salary of $2400 for inexperienced teachers with degrees; that was the basis where we started and, from that point on, there has been no discrepancy of any kind.

Q. Do you take into account, as head of the schools, as recommending to the Board of Education the matter of the

color of the teacher at all in fixing that teacher's contract salary?

A. No.

Q. You have heard Mrs. Mifflin testify to the factors that are considered, is that correct?

A. The three factors plus the total responsibilities in- [fol. 335] volved in the job.

Q. Some teachers have more responsibilities than others.

A. That's right.

Q. Of course a principal, that would be naturally true. Now, in respect to furnishing, honoring requisitions and furnishing all supplies, are the same factors considered by you and the Board of Education in respect to that, without regard to whether the school is white or negro school?

A. Oh, yes, no difference.

Q. There has been some testimony here about curriculum. Is the same curriculum followed in both the negro and white schools, elementary schools.

A. Yes, they are all under the same director of elementary schools, same supervisor of elementary schools and same special supervisors, no difference.

Q. Your administrative set-up is entirely one for the operation of the entire school system, is it not?

A. Yes, it's considered twenty-two elementary schools.

Q. Yes. In any particular, whether I have asked you or not, is there the slightest difference in the actual operation and maintenance of the school system between the negro and the white schools the way it's carried on?

A. Nothing done on the basis of color. They are merely treated as individuals.

Q. Do you know whether or not this operation has been [fol. 336] well received in this community?

A. Well, I feel that it has, in the main, been well received.

Q. State whether or not the school system has been commented on by national authorities, educational authorities.

Judge Huxman: Doctor, you need not answer that question. Mr. Goodell, that is not an issue in this case, has nothing to do with the problems concerning the Court.

Mr. Goodell: I thought they were trying to show we had some poor schools. Maybe not. That is all.

Judge Huxman: You may cross-examine.

Cross examination.

By Mr. Carter:

Q. Mr. McFarland, I think you said that you didn't consider it the function of the Board of Education to go against the prevailing opinion with regard to the maintenance of public schools.

A. I said the social customs of the people. I didn't think it was the purpose of the school system to dictate the social customs of the people who support the schools. That has been our policy.

Q. Now, how do you know that social customs of Topeka require the maintenance of separate schools at the elementary school level?

A. I said we had no objective evidence that the majority [fol. 337] of the people wishes to change in the fundamental structure which we don't have.

Q. Would you say that there is a difference in the social or public opinion or social customs with regard to the maintenance of segregated schools above the elementary school level?

A. I didn't say that.

Q. Would you say, I am asking you a question.

A. I don't know; I wouldn't pass on that. You see, we are operating the schools under essentially the same structure that we took them over in 1942.

Q. But you are operating schools that have a mixed characteristic, mixed characteristics, rather, do you not? You are operating schools that are segregated at the elementary school level, integrated beyond. Now why does the Board of Education feel that they are maintaining their —they are in accord with public opinion by maintaining that type of operation?

A. Well, we have——

Mr. Goodell: Just a minute. Object to this question because it assumes as a part of the question—assumes that

part of this integration is caused by public policy of the board. The Supreme Court decision in the case of Graham vs. Board of Education, decided that there couldn't be a separation in the seventh and eighth grade where we had [fol. 338] a junior and senior set up. There is a policy set up on it of cities of the first class, all except Kansas City, which is controlled by another statute, so it isn't a matter of policy of the board.

Judge Huxman: I doubt if there is very much value to this whole line of questions.

Mr. Goodell: My point is that the law compels them to have integrated system as to junior high and high school.

Judge Huxman: The witness may answer the question.

(The last preceding question was read by the reporter.)

Mr. Goodell: If the Court please, I insist again my objection is proper. He is asking the doctor to distinguish the board forming a policy, saying in the elementary grades they will be separate and in the others it won't; it isn't a matter of choice with them as to junior high and high school. It's fixed by law.

Judge Huxman: The objection will be overruled.

The Witness: The answer is essentially that given by the attorney. The board has had no vote upon whether or not they would segregate the schools above the sixth grade [fol. 339] nor have the people—the public that they represent.

By Mr. Carter:

Q. I see. So, actually, you are not maintaining—you can't really say you are maintaining the schools in accord with social custom. You merely have kept consant the status quo as you found it when you came here. You are maintaining segregated schools merely because they were here when you arrived; that's all you can say, isn't that true?

A. We have, as I stated, no objective evidence that there is any substantial desire for a change among the people that the board represents.

Judge Huxman: May I ask counsel on both sides, assuming that is true, assuming the schools are maintained in

accordance with social customs and the wishes of the people, or that they are not, what bearing does that have on the right to so maintain them under the Fourteenth Amendment?

Mr. Goodell: Judge Parker in his opinion that was handed down by that court of South Carolina, goes into that very, very carefully.

Judge Huxman: Presently we are not interested in that. I am asking—this is——

Mr. Goodell: Our theory of the equal protection of the laws——

Judge Huxman: Mr. Goodell, the question is what the [fol. 340] Fourteenth Amendment warrants and what it doesn't. We don't care what social customs provide. That is the reason I can't see any use in pursuing this line of argument unduly—this line of questioning.

Mr. Carter: I agree with that, Your Honor, but——

Judge Huxman: Then let's not pursue it too far. I don't want to cut you off because Mr. Goodell opened it up, but don't pursue it unnecessarily.

Mr. Carter: I am not going to pursue it any further, but I thought I shouldn't allow it to remain in the record unchallenged. That is the only reason I have asked the question.

By Mr. Carter:

Q. Now, I have just a few more questions, Mr. McFarland. Are you familiar with J. Murray Lee, who is the dean of the School of Education of the State of Washington; are you familiar with him; do you know him?

A. No, I don't know him.

Q. Do you know his wife, Doris Mae Lee, who is the co-author of "Learning to Read Through Experience"?

A. Do I know her?

Q. Are you familiar——

A. I just know there is such a person.

Q. In a book which both of them collaborated on——

[fol. 341] Mr. Goodell: What did you say? I didn't hear you.

Mr. Carter: Collaborated in writing.

By Mr. Carter:

Q. This statement appears, and I would like to get your views on this: "No longer is the curriculum to be considered a fixed body of subject matter to be learned. We realize only too well that the curriculum for each child is the sum total of all of his experiences which are in any way affected by the school. However rich or valuable any printed course of study may seem to be, the child benefits not at all if he does not have those experiences in classroom."

Now, would you agree or disagree with that statement?

A. Well, you lift one statement like that out of its context in an educational philosophy—it's a little difficult to say whether you would agree with the single statement or not. We would have to know the background of that, what lead up to it.

Q. The statement is—follows a philosophy that the sum total of a child's experience throughout the school—is the curriculum, not merely the subjects in the school. Now, do you or do you not agree with that?

A. I would agree with that in principle, but, of course, you understand when you go to that theory of education that the child is in the public schools a small percentage of [fol. 342] his total living hours. That puts the curriculum over into a field that is largely out of control of the schools.

Q. It puts the curriculum certainly out of control of the school but insofar as the school provides the atmosphere and everything that is part of the curriculum, not only the books but everything else that goes into the—into his experience in the schools, is that right?

A. Anything that would have to do with motivation of learning.

Mr. Carter: That is all.

Judge Huxman: Is that all.

Mr. Carter: That is all.

Judge Huxman: You may step down.

Mr. Goodell: The defendant rests.

Judge Huxman: The defendant rests. Any rebuttal testimony?

Mr. Greenberg: Yes, Your Honor.

ERNEST MANHEIM, having been first duly sworn, testified on behalf of the plaintiffs in rebuttal as follows:

Direct examination.

By Mr. Greenberg:

Q. Would you please state your full name to the Court.
A. Ernest Manheim.

Q. What is your occupation, Mr. Manheim?
A. Professor of Sociology at the University of Kansas City.

[fol. 343] Q. What degrees do you hold and where were they earned?

A. A Ph.D. in sociology at the University of Leipzig, a Ph.D. in anthropology from the University of London.

Q. What is your field of special interest, Professor Manheim?

A. Social organization, juvenile delinquency and social theory.

Q. Have you published any articles in this particular field? Or any books?

Mr. Goodell: We don't want to interfere but we object to this if this is a repetition, simply cumulative of more expert opinion.

Mr. Greenberg: It is not, Your Honor.

Judge Huxman: What do you propose to rebut by the testimony of this witness? I take it you are qualifying him as an expert. Now just what testimony offered by the defendants are you proposing to rebut?

Mr. Greenberg: The clerk of the School Board stated that to the extent that there was a difference of library holdings between the colored and white schools, it was attributable to P. T. A. donations to the white schools. We intend to show that the maintenance of a segregated school system in Topeka has caused this difference in P. T. A. and community support of the colored as against the white schools.

Mr. Goodell: We object to that.

[fol. 344] Mr. Greenberg: Directly rebuts——

Judge Huxman: Just a minute. The doctor isn't a resident of this community, is he?

Mr. Greenberg: The doctor is not a resident of this community.

Judge Huxman: How could he know whether that is what caused this condition in Topeka?

Mr. Greenberg: Well, the doctor is a man who has studied social forces in nearby communities and, in qualifying as an expert, we believe that he will be competent to generalize from his studies and his experience.

Judge Huxman: How would that qualify him to testify that segregated schools in Topeka is what caused certain voluntary and independent groups to make donations of books to certain schools?

Mr. Greenberg: I don't want to give the doctor's testimony, but——

Judge Huxman: How could it tend to establish that?

Mr. Greenberg: I believe the doctor is going to testify that studies have shown that the distance which community support—the distance that community support is from a particular school determines the force of the community effectiveness of the community support.

Judge Huxman: How long is this testimony going to [fol. 345] take?

Mr. Greenberg: Perhaps five or ten minutes.

Judge Huxman: Frankly, the Court doubts if it is rebuttal testimony. If it's brief, we will give you the benefit of the doubt and let you go ahead. I don't think it rebuts anything.

(The last question was here read by the reporter.)

The Witness: Yes, I have published in my field in sociology six books; one of them deals with juvenile delinquency in Kansas City.

By Mr. Greenberg:

Q. Have you ever made any studies which would enable you to form a conclusion concerning the community support which a community gives to a school?

Mr. Goodell: We object to this as calling not for any fact, pure conjecture and guesswork and conclusion on the part of the witness.

Judge Huxman: He may answer.

The Witness: Inasmuch as I can generalize from experience in Kansas City, I would tend to say that a school which is far from the clientele's residence, from their parents, is weakened in its position to supervise the conduct of the children, and is—and it is the cooperation between the teachers and the parents tend to be weaker.

[fol. 346] Mr. Goodell: We object to this for the further reason it's not rebuttal. If anything, it's part of their case in chief and, for the further reason, that is opinion——

Judge Huxman: The objection to that question will be sustained. It isn't responsive; it doesn't rebut anything that has been offered in the case.

Mr. Greenberg: Well, Your Honor, I believe that the clerk of the Board of Education did testify that the discrepancy between the white and colored schools was attributable to discrepancies in P. T. A. support. We are trying to show that——

Judge Huxman: Didn't so testify. She testified that these additional books or extra books were the result of donations by P. T. A. organizations; that is what she testified to and——

Mr. Greenberg: I hope to establish by this witness that a weakened P. T. A. is caused by having children and parents great distance from the school which the children attend.

Mr. Goodell: Object to it for the further reason it's outside the scope of the pleadings; it's not an issue raised by the pleadings as being one or any of the grounds of inequality, so it's outside the scope of the issues.

[fol. 347] Judge Huxman: The majority of the Court feels that this testimony is not proper rebuttal testimony from the very nature of the explanation that you have given. The doctor could not testify that the discrimination, if you want to so refer to it, which results in the donation of books in Topeka to one school and not to another is caused by segregation. He could only give that as his theory that that will flow and result from segregation generally. But he knows nothing about Topeka. The objection will be sustained. We will receive no further evidence along this line.

Anything further?

Mr. Carter: We have nothing further.
Judge Huxman: Both parties rest?
Mr. Goodell: Yes, Your Honor.
Mr. Carter: Yes.

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Huxman: We perhaps should take a short recess. We would like to ask counsel, is there a desire to argue this case orally?

Mr. Goodell: I would personally, my notion about it, I believe the Court has heard all the testimony, that we could perhaps aid the Court more in a written brief. I would like to submit a written brief, and I can have it ready inside of a week.

Judge Huxman: Does plaintiff desire to argue the case [fol. 348] to the Court?

Mr. Carter: Yes, we do, Your Honor.

Judge Huxman: You shall be afforded that opportunity. Will the defendant then want to argue the case?

Mr. Goodell: We will make a short argument.

Judge Huxman: How much time do you feel you would want to argue this case?

Mr. Carter: We would think, Your Honor, just about a half hour on opening, and we would like to have time for rebuttal.

Judge Huxman: How much time for rebuttal?

Mr. Carter: I should think approximately fifteen minutes.

Judge Huxman: Forty-five minutes, of which you take thirty minutes in the opening argument and fifteen in the closing; and how much does the defendant want?

Mr. Goodell: Twenty or thirty minutes, I think, will be sufficient.

Judge Huxman: We will take a five or ten-minute recess before we start into that phase.

(The court then, at 11:05 o'clock a. m., stood at recess until 11:15 o'clock a. m., at which time the following further proceedings were had:)

[fol. 349] Judge Huxman: Do you gentlemen desire the Court to keep a record of your time or will you do that yourselves?

Mr. Carter: I will do that, Your Honor.

Judge Huxman: All right, forty-five minutes, thirty for opening, fifteen for closing and, of course, the defendant, while they have only asked for twenty, if they should want not to exceed that, they will be given the same amount.

You may proceed.

OPENING ARGUMENT ON BEHALF OF PLAINTIFF

Mr. Carter: Involved in this case is a question of the constitutionality of the state statute, Section 72-1724, of the General Statutes of the State of Kansas which purports to give to the Boards of Education of cities of certain class the power to organize and maintain separate schools for the education of white and colored children, and I think that the reading of the wordage of the statute is very interesting. The statute says that such power as "to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kansas; no discrimination on account of color shall be made in high schools, except as provided herein; * * *."

Now, I think, that that is very interesting verbiage because, I think, there is a recognition, certainly the lan-[fol. 350] guage is a recognition by the framers of the statute, that the separation at the elementary school level was discrimination and is discrimination.

Now we rest our case on the question of the power of the state. We feel, one, that the state has no authority and no power to make any distinction or any classification among its citizenry based upon race and color alone. We think that this has been settled by the Supreme Court of the United States in a long line of cases which hold that in order for a classification to be constitutional it must be based on a real difference, a real and substantial difference which has pertinence to the legislative objective. The Supreme Court has also held in a series of cases that race and ancestry and color are irrelevant differences and cannot form the basis for any legislative action. The only exception to this provision has been in the cases involving the Japanese war cases which included—involved rights under the Fifth Amendment and the exception has been repeated by the Supreme Court of the United States after

Hirabayashi vs. U. S. and other cases that were decided, Korematsu vs. United States, and the Supreme Court has repeated again and again when it has struck down a legislative or governmental action because it said it was based on race and race alone, the Supreme Court has said that there is absence of compelling necessity to support the [fol. 351] constitutionality of this statute and the only compelling necessity that we have found in the cases is a national emergency which, in the Hirabayashi case, the court decided even though it questioned the constitutionality of the Exclusion Act of the Japanese because of their ancestry; the Supreme Court felt that national interests were of such a nature that they could not interfere with the judgment of the War Department. But that is the only exception to this general theory which I think the Court is familiar with and the principle of law established by the Supreme Court that there can be no distinction, no classification, unless it is based upon a real and substantial difference, and race is not a real and substantial difference.

The other trend of the law is that the rights under the Fourteenth Amendment are individual rights. You cannot take away the individual's rights by classifying him or putting him in a group and therefore saying that we, on the average, treat the group well, therefore the individual, if he suffers he has to suffer because he is a member of the group. The Supreme Court of the United States has taken care of that in a series of cases which I think I need not mention but one particularly is Missouri ex rel Gaines vs. Canada; the other is the recent Sweatt vs. Painter, involving the admission of a negro to the University of Texas. [fol. 352] Another is the Henderson vs. U. S. which involved the right of negroes to eat any place on a dining car without the curtains or signs or distinctions based on race and color.

Now, in all of those cases the argument raised was that we are providing for negroes as a group about as much as we can. We are meeting the demand. It just happens that this individual—if this individual wants to eat in the dining car and the space we have reserved for him is filled, then even though there are vacant seats in the outer part of the dining car, the fact that he has to wait, he is no

more disadvantaged than a white person who comes into the dining car and the place is filled, and he has to wait. The Supreme Court said in those cases that the Fourteenth Amendment granted individual rights, rights to the individual, and it was no answer to say that because the person was a member of a group or because of his number, because of the numbers of the group, that therefore he should not be accorded this right which the Fourteenth Amendment gives.

Now, I think that those two trends of the law—those are the two trends of the law which presently exist, and those two trends, I think, make it clear that no other conclusion can be reached in this case other than that this statute is unconstitutional.

[fol. 353] I realize that there is a body of law which is classified under the separate but equal doctrine of Plessy vs. Ferguson which would seem to give authority to a state to maintain segregation, but it is our contention, and I will attempt to show—I will attempt to demonstrate to the Court that whatever potency that doctrine may have had that by virtue of the present classification doctrine which has been established by the Supreme Court of the United States by the emphasis and reemphasis of the individual right under the Fourteenth Amendment, the Plessy vs. Ferguson doctrine of separate but equal has been whittled away.

Now, it is interesting, in examining the cases under this doctrine, in the field of education to find that in none of the Supreme Court cases has this doctrine been applied. It was mentioned—the nearest case in which it came to being applied, rather, was a case which was decided sometime ago, I think about 1925, Gong Lum vs. Rice. In that case Mr. Chief Justice Taft assumed that the Supreme Court of the United States had followed and had made as to law the separate but equal doctrine of Plessy vs. Ferguson, but the real problem in that case was not the application of the separate but equal doctrine; the real problem in Gong Lum vs. Rice is whether a person of Chinese extraction who was classified by the state as a negro had [fol. 354] a right to being so classified. The petitioner, the Chinese child, did not question the power of the state to

make a classification; it questioned the use of the power in putting her, as a Chinese, being classified as a negro for purposes of education, so that the problem which we here present as to whether or not the state has the power to classify on the basis of race, was not presented in Gong Lum vs. Rice and certainly was not passed upon. The Gaines case, the Sipuel case, Sweatt case, the McLaurin case, the McKissick vs. Carmichael, and I will merely mention it because it is a more recent case and it may well be that the Court hasn't read it; I am sure that you are familiar with the other cases that I will not have to go into, but in McKissick vs. Carmichael involves the right of a negro to attend the University of North Carolina School of Law. The state maintained a separate and segregated school at the North Carolina College for Negroes. The case was lost in the lower court on the grounds that it would be better for negroes to go to a segregated school than it would be for them to go to the university—to the University of North Carolina. On appeal to the United States Court of Appeals for the Fourth Circuit the judgment of the court below was reversed on authority of the U. S. Supreme Court in Sweatt vs. Painter, and the Supreme Court, on June 4, 1951, refused to review the case. Now, the interesting [fol. 355] thing about that case, if the Court please, is that here in North Carolina one of the oldest negro law schools in the country had been operated. It had been established and had been operating since 1939—the oldest school. It was conceded that the state was making an effort to maintain a school for the education of negroes but, because of the segregation, because that school was segregated, the Court of Appeals held, consistent with the case of Sweatt vs. Painter, the state had no power to make any such distinctions.

Now I think that, if anything, the only argument that can be made with regard to this problem is not whether the law, as it now stands, is for the proposition that the maintenance of separate schools can be maintained by the state. I think that the law, as it now stands with the classification cases, with the individual right under the Fourteenth Amendment, I think that the inevitable conclusion must be

that segregation, the maintenance by the state of segregated facilities on the basis of race, is unconstitutional.

The question sometimes may arise with regard to whether or not even though this is the law, it is expedient for the Court to reach a decision at this time, and I think that that seems to me to probably be apparently the trend of [fol. 356] the present cases. The United States Supreme Court recently also handled a case involving interstate travel and, in this case, in which it denied to review on May 28, 1951, the Fourth Circuit held that Jim Crow coaches—the separate coaches for negroes and whites on a north-south journey was unconstitutional. The Supreme Court refused to review this. Now I see no distinction between Jim Crow coaches on a north-south journey than between Jim Crow coaches on a south-north journey. The Court made the distinction, and the law as I understand it at the present time, applies only to north-south journies. I think that the distinction was made because the Court felt that it could and should strike down illegal regulations involving racial distinctions of a person who comes from an area in which they do not have to submit to that, going into an area in which they do, even though they pass the imaginary Mason-Dixon Line.

Now, however, I think the facts show that here in Topeka the time is now ripe for decision and for this court to use its power to strike down this statute. The system in Topeka is operated with eighteen schools for white children and four schools for negroes. The white children attend the schools in the territories in which they live. Negroes attend four schools that are located in I think for the most part in the center of town, with one in an area which I believe is called North Topeka. A number of negro children have to be [fol. 357] transported to these schools in buses. We have submitted testimony to show that insofar as the time spent on the bus takes away from the child the opportunity to play and to learn, to play rather, that he is being deprived of something of value to his education, and he is being deprived of this in this instance because the state says that the City of Topeka can, and the City of Topeka has decided to maintain separate schools at the elementary school level.

Now also in the City of Topeka there is a school system which is different from that at the elementary school level. At the junior high school level and the high school level we have mixed schools. Now, defendants have indicated, and I realize that this is because the statute says that there can be no discrimination at the high school level; however, in this type of mixed situation where on one hand you have for only six grades of the same public school system you maintain segregation, with the other six grades you do not maintain segregation, then certainly the interest, whatever interest the state may have in the maintenance of segregation, if it could be argued that it has such an interest, and therefore a court should withhold its authority to strike down that power, whatever interest it has, it seems that the picture of it maintaining in one end of the system for most of the system and not maintaining it in another, in- [fol. 358] dicates that if there is such an interest, it is of minor importance and should be disregarded.

We maintain, of course, that the state has no power in this area. But this case, I think, is as close to McLaurin vs. The Board of Regents of Oklahoma as any other case that we have been familiar with. If the Court will remember, in that case a negro, or a group of negroes, were admitted to the University of Oklahoma. They were given the same teachers, the same textbooks; they apparently got the same education, that is, in terms of subject matter. But, because they were negroes, they were forced in the classroom to sit at separate seats; they were forced to sit at separate benches in the library; they were forced to eat at separate tables in the cafeteria. In reviewing this case, the United States Supreme Court felt that here was an area in which it was apparent that this type of segregation was ridiculous and meaningless. If McLaurin could be admitted into the classroom, necessarily he should be able to be permitted into the classroom without distinction or difference based upon race and color. The Court found that these arbitrary distinctions, putting him aside, stigmatized him and interfered with his ability to learn and with the learning process.

Now we contend the same thing here. We contend that [fol. 359] this statute, one, that the state has no power to enforce the statute in the first place, and, two, that if it has

such power, that by making a difference at the high school level and the junior high level, whatever interest it may have, that interest is not now of any importance because it is clear that there is no distinction between maintaining a power to maintain segregation in the first six grades of school and the power to maintain segregation at the junior high and the high school level. So that with this mixed situation we think that it's even more important that the power of this Court should be exercised in striking down this statute.

We have introduced testimony to show that there are differences, substantial differences, between various of the white schools as contrasted to the negro schools. We have shown that on the average in terms of teacher preparation, subject matter taught, buildings, and so forth, that on the average the school system here, as between the negro and the white schools, there is not too much difference except for this factor: We have shown that 45% of the white children attend schools newer than the newest colored schools and that 66% of them attend in buildings newer than the average age of the negro school, and that on the average the insured value per classroom of the negro school is approximately $4,000 below that of the white school. We have also [fol. 360] shown that in terms of books which are held by the various schools that the white schools maintain a newer supply of books; that the white schools have better books and that therefore the book holdings of the schools, as between negro and white, is substantially different.

Now, the defendants attempt to defend this on the grounds that the P. T. A. is the cause of this difference. It is our contention that in spite of where the books come from and it has been testified that when they get into the school they belong to that particular school; that without regard to where they come from, the fact that they belong to the school and are held by the school is really the factor which makes for the difference and that has to be considered.

We have submitted testimony also to show that the separation of negroes and whites in the elementary school of the school grades of Topeka is harmful to the development of the child, although it has been conceded that the subject-matters taught are the same, and in our definition

of what is a school curriculum we have attempted to point out in the record that the school curriculum is the sum total of the child's experience from the time he leaves home to go to school until the time that he returns, and therefore the fact that negroes have to ride buses, those [fol. 361] who do, and cannot go to the school which is within walking distance of them, therefore they cannot come home for hot lunches, that they are required to travel across the town merely because they are negroes and attend a segregated school and makes it impossible for us to say that the curriculum at the segregated negro schools are equal to those at the white schools.

We have also attempted to establish that, if anything, the maintenance of the segregated system at the first six grades and then integration at the high school, junior high school level, places an added burden upon the child because that is the time that he is meeting the problems of adolescence and attempting to develop into a man or into a woman and that with those additional burdens upon him, we think this is an additional hardship which makes this statute, in our view, unreasonable.

Now, with that in mind we feel that we have sufficiently established that the separation of negroes and whites in the public schools of Topeka is a denial of equal protection because of the Fourteenth Amendment, that this statute which the city or Board of Education under which it purports to operate, is unconstitutional and should be so declared by this Court, and we also contend that by virtue of the facts which we have set in the record with regard to the stigma on the negro child because of race and color [fol. 362] at what is considered the most crucial age of his development, that the injuries which are established here, we have put on evidence to show that these injuries are likely permanent and that they cannot be corrected merely by introducing them into the junior high school at a later age. In fact, we show that it probably by making this introduction to the junior high school on an integrated basis at the adolescent age, probably compounds the injury which has been suffered at the elementary school level and, for these reasons, we think we have established the rights of the plaintiffs for the issuance of the injunction for which

we have prayed and we submit that this Court should declare this statute to be unconstitutional and order the Board of Education of Topeka to admit all persons into its schools without regard to race or color.

Judge Huxman: In assigning time for argument, we overlooked the State of Kansas represented by the attorney general. That was unintentional. How much time, Mr. McQueary, if any, do you desire to argue in behalf of the constitutionality of the state statute which you are defending here.

Mr. McQueary: If the Court please, I think we can explain our position very fully and amply well in a brief [fol. 363] on the matter of the constitutionality of the statute.

Judge Huxman: All right. You may proceed with the argument.

Do you desire the Court to keep track of your time, or are you going to keep track of your time?

Mr. Brewster: Perhaps you better keep track, Your Honor.

Judge Huxman: How much time do you desire to take in the opening argument, Mr. Brewster?

Mr. Brewster: I would say twenty, twenty-five minutes.

Judge Huxman: Well, now, you say which? I can't keep——

Mr. Brewster: Twenty-five minutes.

Argument on Behalf of Defendants

Your Honor, I would like to touch on one point mentioned by counsel for the plaintiffs, and that is attempting to lay some stress on the fact that the distance traveled by a pupil in attending school has some bearing upon the question before this Court.

There are a number of cases to the effect that the mere fact that certain colored school children must travel farther to reach a colored school than any white child is required to travel to reach the white school, is not necessarily a deprivation of equal advantages. There are a lot of cases on that. They are collected in an annotation in A. L. R. [fol. 364] Then, going to a United States Supreme Court

decision of Gong Lum vs. Rice, in there the Court pointed out that there was no colored school within the district in which this—school for other than whites; that involved a Chinese girl being declared as ineligible to attend a white school; but they did point out in that case that there was a school in the county in which this particular school district was located where she could attend and therefore there could be no objection made on constitutional ground. The distance you travel is immaterial, and I would say that that is especially true in our situation where the entire city of Topeka constitutes a school district and where the evidence, testimony, shows that there are a number of white students who are required to walk to school a greater distance than these colored children who are furnished transportation, and we have the Kansas case in which this question was raised, Reynolds vs. The Board of Education—well, I believe it's the Wright case, and there the Supreme Court pointed out that the question was raised that they had to attend Buchanan School which was twenty blocks farther than a white school they could attend, and our court pointed out the fact that transportation was furnished and therefore the question of distance traveled would have no bearing on the proposition. Now that is all I want to say right [fol. 365] now on distance traveled.

The plaintiffs in this case, of course, are by these cases attempting to have the courts abandon the separate but equal doctrine which was enunciated in the case of Plessy vs. Ferguson, which appears in 163 U. S. 537. It has been mentioned by counsel for the plaintiff, and they mention or contend that the more recent descisions have whittled away the effect of that decision and, of course, in that connection, they rely upon the case of Sweatt vs. Painter, which is the most recent case on this point. I will come to that in just a minute. First, I would like to call attention to the fact that there have been a number of decisions to the effect that establishing separate schools for white and colored children does not violate the constitutional right to equal privileges and immunities if equal advantages are afforded for each class.

Now, defendants admit that there has been engrafted upon this separate but equal doctrine the requirement that

you must afford equal opportunity, and it's our position that under the facts stipulated to here and the evidence, that there is no real question but what we do afford equal educational opportunities to the colored folks, and we finally get down to there one point and that is that segregation in and [fol. 366] of itself constitutes a discrimination.

School segregation statutes have been before the United States Supreme Court in a number of cases and at no time have they held that these state statutes are unconstitutional.

Now, getting down to the case of Sweatt vs. Painter, we have here the opinion of the District Court of the United States for the Eastern District of South Carolina. This is the opinion of the court and, while it is not published, it is, of course, authority—Harry Briggs, Jr., et al, Plaintiff, vs. R. W. Elliott, et al.

Judge Mellott: You mean that is the last case that came down a year or two ago.

Mr. Brewster: That is correct. This is the opinion of the court, and it was decided June 23, 1951. I would like to first call attention to this Sweatt case. In the opening paragraph of the opinion of that case the Court said this:

"This case and McLaurin vs. Oklahoma State Regents" and cites "present different aspects of this general question: To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?"
[fol. 367] In other words, the Court specifically restricted that to professional and graduate education in a state university. Then the Court pointed out that broader issues had been urged for their consideration, but adhering to the rule that constitutional questions are made as narrow as possible, and the Court says that was—is not necessary to consider, and the point I am making is that the Sweatt and the McLaurin cases do not in anyway detract from the effect of Plessy vs. Ferguson which is still the law.

Now, reviewing Plessy vs. Ferguson, that is the case which involved the state statute providing for separate railway carriages for white and colored races, and it was a Louisiana statute, and it provided that the passengers be

assigned to the coaches according to their race by the conductor, and the Court held that it did not violate—deprive a colored person of any rights under the Fourteenth Amendment to the federal constitution. That is the case from which stems this separate but equal doctrine which the defendants think is still applicable and which the plaintiffs, of course, are seeking to overturn.

Here's one thing the Court said:

"So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question [fol. 368] whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, [fol. 369] and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an

enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."

Judge Huxman: Mr. Brewster, I don't know——

Mr. Brewster: I am about through with that.

Judge Huxman: I was going to say that on the Circuit Court we do not care to have reading from an opinion.

Mr. Brewster: I want to point out that Plessy vs. Ferguson, which establishes the separate but equal doctrine and the basis upon which they go, and that is that this regulation that this is a part of the police power of the state. Now, it has been repeatedly held, and that is part—that is the basis of the decision in the South Carolina case, that each state determines for itself, subject to the observ- [fol. 370] ance of fundamental rights and liberties guaranteed by the federal constitution, how it shall exercise the police power and that the power to legislate with respect to safety, morals, health and general welfare and that in no field—in no field is this right of the several states more clearly recognized than in that of public education.

Well, now, the case—the South Carolina case—bases their decision, and I won't quote a great deal from it on the proposition that it's within the police power of the state to segregate these schools if they want to, but they must provide equal educational facilities.

Now, speaking of the Sweatt vs. Painter case which, of course, it will be found the plaintiffs rely on that to a great extent; that dealt with a professional or graduate school. We are here dealing with an elementary school system which, assuming that the student goes through high school and college, this segregation exists in less than one-half of the normal educational, formal educational, period. "At this level" I would like to quote just briefly from this opinion, "At this level as good education can be afforded in negro schools as in white schools and the thought of establishing professional contacts does not enter into the picture. Moreover, education at this level is not a matter of voluntary choice on the part of the student, but of compulsion by the [fol. 371] state."

Now, I would like to also call attention to the fact that in Sweatt vs. Painter the Supreme Court of the United States specifically refused to overrule Plessy vs. Ferguson and, in that respect, I think it strengthens the opinion and shows that the present segregation and separation and equality is still recognized.

Now, there has been testimony to the effect that mixed schools would give a better education. But, on the other hand, it's been indicated that mixed schools might result in additional racial friction due to the fact that the colored student would be greatly outnumbered and you'd still have that inferior feeling.

I would like to, with the Court's permission, quote just a little more from this South Carolina opinion; I just got it this morning or I would have tried to give it without quoting it:

"The federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the state in such matters, however desirable such policies might be in the opinion of some sociologists or educators. For the federal courts to do so, would result not only in interference with local affairs by an agency of the federal government, but also in the substitution of the judicial for the legislative process in what [fol. 372] is essentially a legislative matter." In other words continuing the theory that this is a matter of the police power, and the state has the right to make this regulation.

We submit that under the facts which are stipulated, there is established—it is established that there is no inequality of educational facilities and, furthermore, that it is within the province of the state to determine what regulations necessary under its police power which, of course, is to promote the peace and the welfare of the people of that state, and, as far as the opinions of some sociologists or educators are concerned, we are in agreement with what the Court decided in South Carolina that it would not be within the province of a federal court or any federal agency to adopt those views regardless of what the state might consider to be the proper regulation under the police powers.

Judge Huxman: You may proceed, Mr. Goodell.

Mr. Goodell: I prefer to—if we are given authority to file briefs, I will waive argument.

Judge Huxman: You will waive your argument. All right, the plaintiff may close the argument, then.

Closing Argument on Behalf of Plaintiff

Mr. Carter: Your Honor, I just have a few comments to make.

[fol. 373] I remember the last point that counsel for the defendants made about the statements of sociologists and educators. I would like to point the Court's attention again to the decision in McLaurin vs. The Board of Regents where what was considered in that case to be crucial to the decision was the mental attitude of the negro and the impact of segregation upon him mentally, and therefore it was held that he was deprived of the equal protection of the laws in the segregated educational system.

Now, I have to congratulate the attorneys for the Board of Education on being much more efficient than, at least, I am, because I had hoped that we could have the South Carolina opinion ourselves and that we could quote from the dissent, but we were unable to get it.

Judge Mellott: We have a copy of it.

Mr. Carter: No, thank you. But, at any rate, if the Court please, I think that although these two decisions certainly, McLaurin and Sweatt, were limited, as counsel indicated, to the graduate and professional schools, it was not necessary for the Court to have made any such limitation because that would have been obvious because they applied to graduate and professional schools anyway, but the United States Supreme Court, in a recent case, Rice vs. Arnold, which I don't remember the exact date of the decision, I think it was about October 16, 1950; I don't [fol. 374] believe it's yet reported—that case involved a question of the separate days for the use of a golf course in Miami; negroes were given certain days of the week and whites were given the rest of the time. The matter was appealed through the Florida Supreme Court to the U. S. Supreme Court, and the question raised was whether or not the separation and giving of this separate time to negroes and not permitting them to use the golf course without dis-

crimination based on race or color was a denial of the equal protection clause, the golf course being municipally owned. The Supreme Court took the case, granted certiorari, reversed and remanded in the light of the McLaurin and Sweatt opinions.

Now, I think that that is clear evidence at least that the Supreme Court realized and certainly feels that the decisions and the principles which it enunciated in Sweatt and McLaurin have wide application and cannot be limited in the narrow scope of a professional school or a law school. I believe that what the Supreme Court, of course, in Plessy vs. Ferguson—the Supreme Court refused to overrule Plessy vs. Ferguson, refused to apply it or refused to reexamine it, but I don't believe that counsel for the defendants can take too much hope in that in view of the decision which was reached. The two decisions reached were to the effect that segregation, at least at the level at [fol. 375] which the decision was handed down, were unconstitutional in the law school and in the graduate schools and I might also add that Plessy vs. Ferguson applied to railroads and not to education and, although it has somehow been taken over into the educational field, it is really a railroad case. However, I think that actually what—with the trend of the law, I think that the trend of the law is to such an extent that it is impossible to reach any other decision except that the State of Kansas has no power to order segregation. I think also that here this is no situation—this is not applicable to South Carolina; the two states are entirely different. There is not the vested interest in the maintenance of segregation in Kansas as there is in South Carolina or in Georgia. This is clear, by virtue of the fact that the state forbids it at one level even though it permits it at another, and I think that what should be applied in this case is the rule that at least if the segregation is unconstitutional, and I think that the Supreme Court cases inevitably point to that end, that a declaration of unconstitutionality should be made in an area in which it is ripe. The time is ripe for such a decision to be reached, and I think that certainly in Kansas, with the situation as it is, that the time is now ripe for this Court to strike down the statute here in issue and to declare

[fol. 376] that the State of Kansas has no power to maintain segregation in its public school system.

Judge Huxman: Before the Court adjourns, the Court wants to compliment the parties on both sides for their fairness in the presentation of this case, the spirit of cooperation exhibited by all, to have a speedy determination of the issues in the trial of the case. I think this case was tried within less than ten days after the issues were made up and concluded, and we feel that we want to have as speedy a determination by the Court as can be handed down, giving counsel an opportunity to file briefs because, if this law is declared unconstitutional, certainly the City of Topeka is—wants to have it done as soon as possible before the beginning of the fall school term and all those matters. So we are all interested in having the matter determined just as expeditiously as it can be done, affording everybody an opportunity to prepare and file their briefs.

Now, the questions are comparatively simple to state and quite difficult to answer. There are only two questions in the case; one is, are the facilities, as I see them, are the facilities which are afforded by Topeka in its separate schools, comparable; that is one question, and the other is, granting that they are, is segregation unconstitutional notwithstanding, in light of the Fourteenth Amendment. As [fol. 377] I get it, those are the two points in the case, is that right?

Mr. Carter: Yes, sir.

COLLOQUY BETWEEN COURT AND COUNSEL.

Judge Huxman: There is nothing else.

Now, ordinarily, of course, the plaintiffs prepare and file their briefs and the defendants have a certain time to reply thereafter, which, of course, would take additional time. I am wondering if you want to invoke that rule or whether, in view of the fact that these two issues are so clear, and the testimony is clear in the minds of all of us, whether you would be willing or feel that you would prefer to proceed without waiting to receive the briefs on the part of the plaintiff. What do you say, Mr. Goodell?

Mr. Goodell: Subject only to this, Your Honor: If coun-

sel chooses to argue points of evidence, I would be a little handicapped to answer them when I didn't know what he was going to argue.

Judge Huxman: You would be given the right for reply brief.

Mr. Goodell: With that exception, I would be perfectly willing to hand mine in at the same time.

Judge Huxman: How much time do you think you need to prepare and file your brief?

[fol. 378] Mr. Goodell: I think a week we can do it in.

Judge Huxman: Well, no need of rushing you to that extent.

Mr. Goodell: Ten days.

Judge Huxman: What do plaintiffs—of course, you have done a lot of work; you have practically got your material assembled on the law, naturally. How long does plaintiff feel that you need to prepare and file your brief?

Mr. Carter: Well, Your Honor, we could, of course, do it within a week, but we would like to have, say, a week from next Monday, which would give us about ten days.

Judge Huxman: Well, let's give the parties—do you want to wait in the preparation of your brief until you receive the record? Of course it will take approximately ten days to get the record. I presume each side will want a record, because, irrespective of the outcome of this litigation, it's headed for the Supreme Court anyway. Do you prefer to wait with your brief until you have a copy of the record? What do you say?

Mr. Goodell: That depends on the turn it takes. As I understand counsel, you are relying now entirely on the question of segregation in itself is discriminatory.

[fol. 379] Mr. Carter: We are relying—of course we are relying on that. I think, Your Honor, that we would not need the record. I think we have our testimony in mind that has been presented.

Mr. Goodell: If that is your point, of course, then——

Judge Huxman: Mr. Goodell, I do not understand the attorneys for plaintiff waive the one point and rely on the other alone.

Mr. Goodell: I——

Judge Huxman: I understand from what they have said

they practically indicate they do not lean too heavily on this discrimination in the facilities which are furnished.

How much time from today does plaintiff want to file their brief, assuming the record will be ready for you in ten days. We will put it that way. How much time do you want from today?

Mr. Carter: We would like to have ten days, Your Honor.

Judge Huxman: We will give you fifteen days. You understand what I asked was assuming that it will take ten days from now to get the record, how much time from now do you want to file your brief? If you want ten days after the record is furnished, you may take twenty days, of [fol. 380] course, from now.

Mr. Goodell: The time, Your Honor, while I am on that subject——

Mr. Carter: Fifteen days will be ample.

Mr. Goodell: If it's going to be appealed, and I think it will be perhaps, either way this decision goes, the time lag would be such that we couldn't have a determination, I don't believe, by September in the appellate court.

Judge Huxman: Of course there are these factors: Judge Mellott and Judge Hill, both, have heavy schedules left and myself, my schedule isn't as heavy as theirs is for the remaining portion of the summer, but if we defer this matter too long, it runs into the fall when our new terms of court take place, and then it would be difficult for any of us to devote our time to it. We don't want to cut the parties short, but, on the other hand, there is no need of granting more time than you need for the preparation.

Mr. Goodell: It seems to me if he is going to go into evidence, it's pretty awkward to write a brief about evidentiary matters without having a transcript, and it's not satisfactory.

Judge Huxman: We will give you twenty days from today for the filing of your brief, and the reporter has told us [fol. 381] it would be about a week for the preparation of the record so, in any event, if you wanted the record, you will have ten or twelve days, and I will say this: If your briefs don't get in on the twentieth day, you will not be out of court.

Mr. Goodell: That will be satisfactory.

Judge Huxman: Are the parties going to order a copy of the record, each of you; I presume that is your intention.

Mr. Goodell: Yes, we will.

Mr. Carter: Yes, sir.

Judge Huxman: All right.

Mr. Goodell: Your Honor, do I understand we are given the privilege of a reply brief if we desire.

Judge Hill: Certainly.

Judge Huxman: Now, there is one other suggestion that the Court has in mind that you could be very helpful to the Court, and that may take a little additional time; that when you file your brief, to go with it each side file suggested findings or requested findings of fact, on the theory that you are going to prevail in the lawsuit, and conclusions of law.

Judge Mellott: We are required to make them under Rule 52.

Judge Huxman: Yes. We must make them, of course, and [fol. 382] it will be helpful to the Court if we had in mind when we come to consider this case, the idea and the theories of both sides as to the findings of fact; if we have both of them, then we will make our own findings, of course.

You also understand that there are three of us, that we all live in separate cities and if you would file your briefs in triplicate so that each judge can have a copy of the brief, it will expedite matters.

One thing I would like to inquire of my two associates of the district bench, what is your practice with regard to requiring printed or typewritten briefs in cases such as these? Of course in the Circuit Court, as you know, briefs must be printed, but my associates tell me that typewritten briefs are the practice here so that will be the practice in this case.

Judge Mellott: Use some good carbon paper because carbons are hard to read.

Mr. Goodell: We will do that.

Judge Huxman: Judge Hill makes this suggestion, which I have found valuable in my work on the appellate bench: If, when you prepare and submit a requested finding of fact, if you will alongside of it have the page of the record that you claim sustains that request, it will save us a

tremendous amount of work; otherwise we have to go [fol. 383] through the whole record to see whether there is any warrant in the record for that request. So, if you will do that, that will help the Court.

Judge Mellott: I would like to have you get copies of the court's rules of practice, which are printed, and that will call your attention to the way we want the brief prepared; give us a table of cases and your citations.

Judge Huxman: My associates are more familiar with those rules than I am. It's their court, and they know what the practice is.

Now, I suppose Judge Mellott and Judge Hill, that we should make the same order with respect to all of these requests for brief amicus curiae, that they be filed within the same length of time, within twenty days from today; anybody that has appeared here that wants to file a brief as amicus curiae.

Mr. Goodell: Our notion, if it doesn't interfere with the rules of the court, would be to have the other lawyers join with us in a certain section of the brief.

Judge Huxman: Well, I would certainly prefer—frankly, I have never been very much impressed with this amicus curiae theory of the law. There just isn't such a thing anyhow because an amicus curiae has an active interest on [fol. 384] one side or the other of the litigation and if you could get—that is, however, for you defendants to arrange—if you could get all the parties who have entered an appearance amicus curiae to join with you in the brief, it would save a lot of duplication.

Mr. Goodell: That is what I thought.

Judge Huxman: These issues are sharply drawn. There is a certain line of cases, and it's just a question of analyzing and distinguishing those cases, but, however, I doubt whether we could order that—whether we can order amicus curiae to join with you in a brief.

Mr. Goodell: If it's satisfactory, I meant, I think that is what we will do.

Judge Huxman: That would be much simpler. Anything that the parties have to request? The court will be adjourned subject to further call.

(The court then, at 12:15 o'clock p. m., stood adjourned until further call.)

* * *

REPORTER'S CERTIFICATE (omitted in printing)

[fol. 385] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 386] IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Entered August 3, 1951.

HUXMAN, Circuit Judge, delivered the opinion of the Court.

Chapter 72-1724 of the General Statutes of Kansas, 1949, relating to public schools in cities of the first class, so far as material, authorizes such cities to organize and maintain separate schools for the education of white and colored children in the grades below the high school grades. Pursuant to this authority, the City of Topeka, Kansas, a city of the first class, has established and maintains a segregated system of schools for the first six grades. It has established and maintains in the Topeka School District eighteen schools for white students and four schools for colored students.

The adult plaintiffs instituted this action for themselves, their minor children plaintiffs, and all other persons similarly situated for an interlocutory injunction, a permanent injunction, restraining the enforcement, operation and execution of the state statute and the segregation instituted thereunder by the school authorities of the City of Topeka and for a declaratory judgment declaring unconstitutional the state statute and the segregation set up thereunder by the school authorities of the City of Topeka.

As against the school district of Topeka they contend that the opportunities provided for the infant plaintiffs in the separate all negro schools are inferior to those pro-

vided white children in the all white schools; that the respects in which these opportunities are inferior include the physical facilities, curricula, teaching resources, student personnel services as well as all other services. As against both the state and the school district, they contend that apart from all other factors segregation in itself constitutes [fol. 387] an inferiority in educational opportunities offered to negroes and that all of this is in violation of due process guaranteed them by the Fourteenth Amendment to the United States Constitution. In their answer both the state and the school district defend the constitutionality of the state law and in addition the school district defends the segregation in its schools instituted thereunder.

We have found as a fact that the physical facilities, the curricula, courses of study, qualification of and quality of teachers, as well as other educational facilities in the two sets of schools are comparable. It is obvious that absolute equality of physical facilities is impossible of attainment in buildings that are erected at different times. So also absolute equality of subjects taught is impossible of maintenance when teachers are permitted to select books of their own choosing to use in teaching in addition to the prescribed courses of study. It is without dispute that the prescribed courses of study are identical in all of the Topeka Schools and that there is no discrimination in this respect. It is also clear in the record that the educational qualifications of the teachers in the colored schools are equal to those in the white schools and that in all other respects the educational facilities and services are comparable. It is obvious from the fact that there are only four colored schools as against eighteen white schools in the Topeka School District, that colored children in many instances are required to travel much greater distances than they would be required to travel could they attend a white school, and are required to travel much greater distances than white children are required to travel. The evidence, however, establishes that the school district transports colored children to and from school free of charge. No such service is furnished to white children. We conclude that in the maintenance and operation of the [fol. 388] schools there is no willful, intentional or sub-

stantial discrimination in the matters referred to above between the colored and white schools. In fact, while plaintiffs' attorneys have not abandoned this contention, they did not give it great emphasis in their presentation before the court. They relied primarily upon the contention that segregation in and of itself without more violates their rights guaranteed by the Fourteenth Amendment.

This contention poses a question not free from difficulty. As a subordinate court in the federal judicial system, we seek the answer to this constitutional question in the decisions of the Supreme Court when it has spoken on the subject and do not substitute our own views for the declared law by the Supreme Court. The difficult question as always is to analyze the decisions and seek to ascertain the trend as revealed by the later decisions.

There are a great number of cases, both federal and state, that have dealt with the many phases of segregation. Since the question involves a construction and interpretation of the federal Constitution and the pronouncements of the Supreme Court, we will consider only those cases by the Supreme Court with respect to segregation in the schools. In the early case of Plessy v. Ferguson, 163 U. S. 537, the Supreme Court said:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to encorce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily [fol. 389] imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where

> the political rights of the colored race have been longest and most earnestly enforced."

It is true as contended by plaintiffs that the Plessy case involved transportation and that the above quoted statement relating to schools was not essential to the decision of the question before the court and was therefore somewhat in the nature of dicta. But that the statement is considered more than dicta is evidenced by the treatment accorded it by those seeking to strike down segregation as well as by statements in subsequent decisions of the Supreme Court. On numerous occasions the Supreme Court has been asked to overrule the Plessy case. This the Supreme Court has refused to do, on the sole ground that a decision of the question was not necessary to a disposal of the controversy presented. In the late case of Sweatt v. Painter, 339 U. S. 629, the Supreme Court again refused to review the Plessy case. The Court said:

> "Nor need we reach petitioner's contention that Plessy v. Ferguson should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation."

Gong Lum v. Rice, 275 U. S. 78, was a grade school segregation case. It involved the segregation law of Mississippi. Gong Lum was a Chinese child and, because of color, was required to attend the separate schools provided for colored children. The opinion of the court assumes that the educational facilities in the colored schools were adequate and equal to those of the white schools. Thus the court said: "The question here is whether a Chinese citizen of the [fol. 390] United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black." In addition to numerous state decisions on the subject, the Supreme Court in support of its conclusions cited Plessy v. Ferguson, supra. The Court also pointed out that the question was the same no matter what the color of the class that was

required to attend separate schools. Thus the Court said: "Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we cannot think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow race." The court held that the question of segregation was within the discretion of the state in regulating its public schools and did not conflict with the Fourteenth Amendment.

It is vigorously argued and not without some basis therefor that the later decisions of the Supreme Court in McLaurin v. Oklahoma, 339 U. S. 637, and Sweatt v. Painter, 339 U. S. 629, show a trend away from the Plessy and Lum cases. McLaurin v. Oklahoma arose under the segregation laws of Oklahoma. McLaurin, a colored student, applied for admission to the University of Oklahoma in order to pursue studies leading to a doctorate degree in education. He was denied admission solely because he was a negro. After litigation in the courts, which need not be reviewed herein, the legislature amended the statute permitting the admission of colored students to institutions of higher learning attended by white students, but providing that such instruction should be given on a segregated basis; that the instruction be given in separate class rooms or at separate times. In compliance with this statute McLaurin [fol. 391] was admitted to the university but was required to sit at a separate desk in the ante room adjoining the class room; to sit at a designated desk on the mezzanine floor of the library; and to sit at a designated table and eat at a different time from the other students in the school cafeteria. These restrictions were held to violate his rights under the federal Constitution. The Supreme Court held that such treatment handicapped the student in his pursuit of effective graduate instruction.[1]

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[1] The court said: "Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an

In Sweatt v. Painter, 339 U. S. 629, petitioner, a colored student, filed an application for admission to the University of Texas Law School. His application was rejected solely on the ground that he was a negro. In its opinion the Supreme Court stressed the educational benefits from commingling with white students. The court concluded by stating: "We cannot conclude that the education offered petitioner in a separate school is substantially equal to that which he would receive if admitted to the University of Texas Law School." If segregation within a school as in the McLaurin case is a denial of due process, it is difficult to see why segregation in separate schools would not result [fol. 392] in the same denial. Or if the denial of the right to commingle with the majority group in higher institutions of learning as in the Sweatt case and gain the educational advantages resulting therefrom, is lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades.

It must however be remembered that in both of these cases the Supreme Court made it clear that it was confining itself to answering the one specific question, namely: "To what extent does the equal protection clause limit the

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advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under this guidance and influence must be directly affected by the education he received. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State imposed restrictions which produce such inequalities cannot be sustained."

"It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. * * * having been admitted to a state supported graduate school, [he] must receive the same treatment at the hands of the state as students of other races."

power of a state to distinguish between students of different races in professional and graduate education in a state university?'', and that the Supreme Court refused to review the Plessy case because that question was not essential to a decision of the controversy in the case.

We are accordingly of the view that the Plessy and Lum cases, supra, have not been overruled and that they still presently are authority for the maintenance of a segregated school system in the lower grades.

The prayer for relief will be denied and judgment will be entered for defendants for costs.

[fol. 393] In United States District Court

Findings of Fact and Conclusions of Law—Entered August 3, 1951.

Findings of Fact

I

This is a class action in which plaintiffs seek a decree, declaring Section 72-1724 of the General Statutes of Kansas 1949 to be unconstitutional, insofar as it empowers the Board of Education of the City of Topeka ''to organize and maintain separate schools for the education of white and colored children'' and an injunction restraining the enforcement, operation and execution of that portion of the statute and of the segregation instituted thereunder by the School Board.

II

This suit arises under the Constitution of the United States and involves more than $3,000 exclusive of interest and costs. It is also a civil action to redress an alleged deprivation, under color of State law, of a right, privilege or immunity secured by the Constitution of the United States providing for an equal rights of citizens and to have the court declare the rights and other legal relations of the interested parties. The Court has jurisdiction of the subject matter and of the parties to the action.

III

Pursuant to statutory authority contained in Section 72-1724 of the General Statutes of Kansas 1949, the City of Topeka, Kansas, a city of the first class, has established and maintains a segregated system of schools for the first six grades. It has established and maintains in the Topeka School District, eighteen schools for white children and four [fol. 394] for colored children, the latter being located in neighborhoods where the population is predominantly colored. The City of Topeka is one school district. The colored children may attend any one of the four schools established for them, the choice being made either by the children or by their parents.

IV

There is no material difference in the physical facilities in the colored schools and in the white schools and such facilities in the colored schools are not inferior in any material respects to those in the white schools.

V

The educational qualifications of the teachers and the quality of instruction in the colored schools are not inferior to and are comparable to those of the white schools.

VI

The courses of study prescribed by the State law are taught in both the colored schools and in the white schools. The prescribed courses of study are identical in both classes of schools.

VII

Transportation to and from school is furnished colored children in the segregated schools without cost to the children or to their parents. No such transportation is furnished to the white children in the segregated schools.

[fol. 395]

VIII

Segregation of white and colored children in public schools has a detrimental effect upon the colored children.

The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retain the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial integrated school system.

IX

The court finds as facts the stipulated facts and those agreed upon by counsel at the pre-trial and during the course of the trial.

Conclusions of Law

I

This court has jurisdiction of the subject matter and of the parties to the action.[1]

II

We conclude that no discrimination is practiced against plaintiffs in the colored schools set apart for them because of the nature of the physical characteristics of the buildings, the equipment, the curricula, quality of instructors and [fol. 396] instruction or school services furnished and that they are denied no constitutional rights or privileges by reason of any of these matters.

III

Plessy v. Ferguson, 163 U. S. 537, and Gong Lum v. Rice, 275 U. S. 78 upholds the constitutionality of a legally segregated school system in the lower grades and no denial of due process results from the maintenance of such a segregated system of schools absent discrimination in the maintenance of the segregated schools. We conclude that the above cited cases have not been overruled by the later cases of McLaurin v. Oklahoma, 339 U. S. 637, and Sweatt v. Painter, 339 U. S. 629.

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[1] Title 28 U.S.C. § 1331; idem § 1343; idem Ch. 151. Title 8 U.S.C. Ch. 3. Title 28 U.S.C. Ch. 155.

IV

The only question in the case under the record is whether legal segregation in and of itself without more constitutes denial of due process. We are of the view that under the above decisions of the Supreme Court the answer must be in the negative. We accordingly conclude that plaintiffs have suffered no denial of due process by virtue of the manner in which the segregated school system of Topeka, Kansas, is being operated. The relief sought is therefore denied. Judgment will be entered for defendants for costs.

Walter A. Huxman, Circuit Judge, Arthur J. Mellott, Chief District Judge, Delmas C. Hill, District Judge.

[fol. 397] IN UNITED STATES DISTRICT COURT

DEGREE—Entered August 3, 1951.

Now on this 3rd day of August, 1951 this cause comes regularly on for hearing before the undersigned Judges, constituting a three-judge court, duly convened pursuant to the provisions of Title 28 U. S. C. 2281 and 2284.

The Court has heretofore filed its Findings of Fact and Conclusions of Law together with an opinion and has held as a matter of law that the plaintiffs have failed to prove they are entitled to the relief demanded.

Now, therefore, it is by the court, considered, ordered, adjudged and decreed that judgment be and it hereby is entered in favor of the defendants.

Walter A. Huxman, Circuit Judge, Arthur J. Mellott, Chief District Judge, Delmas C. Hill, District Judge.

[fol. 398] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed October 1, 1951

Considering themselves aggrieved by the final decree and judgment of this court entered on August 3, 1951, Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emanuel, Mrs. Lucinda Todd, Mrs. Iona Richardson, Mrs. Lena Carper, Mrs. Shirley Hodison, Mrs. Alma Lewis, Mrs. Darlene Brown, Mrs. Shirla Fleming, Mrs. Andrew Henderson, Mrs. Vivian Scales, Mrs. Marguerite Emmerson, and Linda Carol Brown, an infant by Oliver Brown, her father and next friend; Victoria Jean Lawton and Carol Kay Lawton, infants, by Mrs. Richard Lawton, their mother and next friend; James Meldon Emanuel, an infant, by Mrs. Sadie Emanuel, his mother and next friend; Nancy Jane Todd, an infant, by Mrs. Lucinda Todd, her mother and next friend; Ronald Douglas Richardson, an infant, by Mrs. Iona Richardson, his mother and next friend; Katherine Louise Carper, an infant, by Mrs. Lena Carper, her mother and next friend; Charles Hodison, an infant, by Mrs. Shirley Hodison, his mother and next friend; Theron Lewis, Martha Jean Lewis, Arthur Lewis and Frances Lewis, infants, by Mrs. Alma Lewis, their mother and next friend; Saundria Dorstella Brown, an infant, by Mrs. Darlene Brown, her mother and next friend; Duane Dean Fleming and Silas Hardrick Fleming, infants, by Mrs. Shirla Flem-
[fol. 399] ing, their mother and next friend; Donald Andrew Henderson and Vicki Ann Henderson, infants, by Mrs. Andrew Henderson, their mother and next friend; Ruth Ann Scales, an infant, by Mrs. Vivian Scales, her mother and next friend; Claude Arthur Emmerson and George Robert Emmerson, infants, by Mrs. Marguerite Emmerson, their mother and next friend, plaintiffs herein, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said plaintiffs, and that the amount of security be fixed by the order allowing the

appeal, and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

Respectfully submitted, Charles E. Bledsoe, 330 Kansas Avenue, Topeka, Kansas, John J. Scott, Charles S. Scott, 410 Kansas Avenue, Topeka, Kansas, Robert L. Carter, Jack Greenberg, Thurgood Marshall, 20 West 40th Street, New York 18, New York, Counsel for Plaintiffs-Appellants.

[fol. 400] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—
filed October 1, 1951.

Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emanuel, Mrs. Lucinda Todd, Mrs. Iona Richardson, Mrs. Lena Carper, Mrs. Shirley Hodison, Mrs. Alma Lewis, Mrs. Darlene Brown, Mrs. Shirla Fleming, Mrs. Andrew Henderson, Mrs. Vivian Scales, Mrs. Marguerite Emmerson, and Linda Carol Brown, an infant by Oliver Brown, her father and next friend; Victoria Jean Lawton and Carol Kay Lawton, infants, by Mrs. Richard Lawton, their mother and next friend; James Meldon Emanuel, an infant, by Mrs. Sadie Emanuel, his mother and next friend; Nancy Jane Todd, an infant, by Mrs. Lucinda Todd, her mother and next friend; Ronald Douglas Richardson, an infant, by Mrs. Iona Richardson, his mother and next friend; Katherine Louise Carper, an infant, by Mrs. Lena Carper, her mother and next friend; Charles Hodison, an infant, by Mrs. Shirley Hodison, his mother and next friend; Theron Lewis, Martha Jean Lewis, Arthur Lewis and Frances Lewis, infants, by Mrs. Alma Lewis, their mother and next friend; Saundria Dorstella Brown, an infant, by Mrs. Darlene Brown, her mother and next friend; Duane Dean Fleming and Silas Hardrick Fleming, infants, by Mrs. Shirla Fleming, their [fol. 401] mother and next friend; Donald Andrew Hen-

derson and Vicki Ann Henderson, infants, by Mrs. Andrew Henderson, their mother and next friend; Ruth Ann Scales, an infant, by Mrs. Vivian Scales, her mother and next friend; Claude Arthur Emmerson and George Robert Emmerson, infants, by Mrs. Marguerite Emmerson, their mother and next friend, plaintiffs in the above-entitled cause, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment of the District Court entered on August 3, 1951.

The District Court erred:

1. In refusing to grant plaintiffs' application for a temporary and permanent injunction restraining the defendants from acting pursuant to Chapter 72-1724 of the General Statutes of Kansas under which they are maintaining separate public elementary schools through the first six grades for Negro children solely because of their race and color.

2. In refusing to hold that the State of Kansas is without authority to promulgate Chapter 72-1724 of the General Statutes of Kansas in that such statute constitutes a classification based upon race and color which is violative of the Constitution of the United States.

3. In refusing to enter judgment in favor of plaintiffs, after the court found that plaintiffs suffered serious harm and detriment in being required to attend segregated elementary schools in the City of Topeka, and were deprived thereby of benefits they would have received in a racially integrated school system.

Wherefore, plaintiffs pray that the final decree of the [fol. 402] District Court be reversed, and for such other relief as the Court may deem fit and proper.

Charles E. Bledsoe, 330 Kansas Avenue, Topeka, Kansas, Charles S. Scott, John Scott, 410 Kansas Avenue, Topeka, Kansas, Robert L. Carter, Jack Greenberg, Thurgood Marshall, Counsel for Plaintiffs-Appellants.

Dated: September 28, 1951.

[fol. 403] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Entered October 1, 1951.

Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emanuel, Mrs. Lucinda Todd, Mrs. Iona Richardson, Mrs. Lena Carper, Mrs. Shirley Hodison, Mrs. Alma Lewis, Mrs. Darlene Brown, Mrs. Shirla Fleming, Mrs. Andrew Henderson, Mrs. Vivian Scales, Mrs. Marguerite Emmerson, and Linda Carol Brown, an infant by Oliver Brown, her father and next friend; Victoria Jean Lawton and Carol Kay Lawton, infants, by Mrs. Richard Lawton, their mother and next friend; James Meldon Emanuel, an infant, by Mrs. Sadie Emanuel, his mother and next friend; Nancy Jane Todd, an infant, by Mrs. Lucinda Todd, her mother and next friend; Ronald Douglas Richardson, an infant, by Mrs. Iona Richardson, his mother and next friend; Katherine Louise Carper, an infant, by Mrs. Lena Carper, her mother and next friend; Charles Hodison, an ingant, by Mrs. Shirley Hodison, his mother and next friend; Theron Lewis, Martha Jean Lewis, Arthur Lewis and Frances Lewis, infants, by Mrs. Alma Lewis, their mother and next friend; Saundria Dorstella Brown, an infant, by Mrs. Darlene Brown, her mother and next friend; Duane Dean Fleming and Silas Hardrick Fleming, infants, by Mrs. Shirla Fleming, their mother and next friend; Donald Andrew Henderson and [fol. 404] Vicki Ann Henderson, infants, by Mrs. Andrew Henderson, their mother and next friend; Ruth Ann Scales, an infant, by Mrs. Vivian Scales, her mother and next friend; Claude Arthur Emmerson and George Robert Emmerson, infants, by Mrs. Marguerite Emmerson, their mother and next friend, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this court in this cause entered on August 3, 1951, and from each and every part thereof, and having presented their assignment of errors and prayer for reversal and their statements as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and

rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $500 with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

Walter A. Huxman, U. S. Circuit Judge.

Dated: October 1, 1951.

[fol. 405] Citation in usual form showing service on Lester M. Goodell and George Brewster omitted in printing.

[fol. 406] NOTE RE COST BOND

Cost bond in the sum of $500.00, with Fidelity & Deposit Company of Maryland, as surety, was approved by the Clerk and Filed October 1, 1951.

[fols. 407-408] Statement required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing).

[fols. 409-411] Acknowledgment of service (omitted in printing).

[fols. 412-413] PRAECIPE—Filed October 5, 1951 (omitted in printing).

[fol. 414] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE AND DOCKET RECORD ON APPEAL IN THE SUPREME COURT OF THE UNITED STATES—Entered November 5, 1951

Now, on this 5 day of November, 1951, upon the application of Charles S. Scott, one of the attorneys for the plaintiffs, and for good cause shown,

It is hereby ordered that the time within which to file and docket the record on appeal in above action in the Supreme Court of the United States be and it is hereby extended twenty days from November 9, 1951.

Walter A. Huxman, United States Circuit Judge.

[fol. 415] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 416-417] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951, No. 436

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed November 27, 1951

A. Appellants adopt for their statement of points upon which they intend to rely in their appeal to this Court the points contained in their Assignment of Errors heretofore filed.

B. Appellants designate the entire record, as filed in the above-entitled case, for printing by the Clerk of this Court.

Robert L. Carter, Counsel for Appellants.

[File endorsement omitted.]

[fol. 418] SUPREME COURT OF THE UNITED STATES

No. 436, OCTOBER TERM, 1951

ORDER NOTING PROBABLE JURISDICTION—June 9, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

(2734)