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In the

Supreme Court of the United States

No. .....

COCHEYSE J. GRIFFIN, ETC., ET AL.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents desire briefly to set forth some of the reasons why petition for writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Fourth Circuit entered in this cause on August 12, 1963, should not be granted.

OPINIONS BELOW

At the time the petition for writ of certiorari was filed, the opinion of the Court of Appeals had not been reported.

Since that time it has been reported and is found in 322 F. 2d 332.

JURISDICTION

We do not question the fact that this Court has the jurisdiction. We do say, and that without regard to what we hereafter point out in this reply, that the jurisdiction should not be exercised in a case such as this where the Court of Appeals has not passed upon any of the ultimate substantive issues, but has remanded the case to the District Court for a consideration by it of the substantive issues after the controlling questions of state law have been decided by the Supreme Court of Appeals of Virginia. Those controlling questions of state law were submitted to the Circuit Court of the City of Richmond in the case of *School Board of Prince Edward County* v. *Griffin, et al.,* and the opinion of that court was handed down on March 21, 1963. That opinion is not reported. In order that this Court may have full knowledge of the issues of state law involved, we print that opinion as Appendix A to this brief.

Appeal was duly taken to the Supreme Court of Appeals of Virginia which granted the appeal in June of 1963. Because of the importance of the case, the Court advanced it on the docket and set it for argument at the October, 1963, session. The case was argued October 8, 1963. It is the general practice of the Supreme Court of Appeals of Virginia to decide cases argued at one session on the second Monday of the succeeding session. The succeeding session of the Supreme Court of Appeals will convene on November 25, 1963, and its opinion day will be December 2, 1963. On very rare occasions a case is not decided at the succeeding session, but may be carried over to the session thereafter.

Should that happen in this case, the decision of the Supreme Court of Appeals may be expected in January of 1964.

We submit that this Court should not deal with a decree in a case which is in the situation that here exists; namely, where the United States Court of Appeals has decided none of the substantive issues, but has held that decision thereon should await the determination of questions of state law and where those questions of state law have not only been submitted but have been argued before the highest appellate court of the state from which an almost momentary decision is awaited.

QUESTIONS PRESENTED

The petition for writ of certiorari enumerates four questions which petitioners state are presented.

The first question is whether under the circumstances of this case the doctrine of federal abstention should be applied. In their "Reasons for the Allowance of the Writ" petitioners discuss and seek to support their view of this question.

No reason for the allowance of the writ in relation to the second and fourth questions is set forth in the petition.

The third question which the petitioners say is presented is that related to the constitutionality of state tuition grants to parents in aid of the education of their children at private nonsectarian schools or at public schools outside of the locality in which the parents reside. That question is not involved in this case as is very clearly stated by the Court of Appeals in its opinion as follows:

> "As indicated above, Virginia's tuition grants had a considerable history. That program has not been attacked in this case. Its constitutionality has not been questioned." 322 F. 2d 332, at p. 339.

STATEMENT

Beginning on page 3 of the petition and under the title of "Statement," the petitioners give their conception of an accurate factual statement which is supplemented by them in various places in the latter portion of the petition. While there is much in that "Statement" that cannot be sustained from the record, it is not necessary in this brief in opposition to go into any extended correction because our contention can be predicated as well upon the erroneous statements of petitioners as it can be upon an accurate statement. We are impelled, however, to call attention to several things in this "Statement."

In the paragraph beginning at the bottom of page 7 of the petition it is said that the present tuition grant program of Virginia has its genesis in the "massive resistance" legislation of 1956. This is incorrect. Long before the term "massive resistance" was conceived, Virginia had an extensive tuition grant program applicable to many situations.*

It is then said that the "massive resistance" legislation provided "for the channeling of public school funds into private schools," and the inference to be drawn from the remainder of the paragraph is that the present tuition grants are payable out of funds which would otherwise go to the support of public schools. A cursory examination of Virginia's financial legislation proves such an inference to be totally unwarranted. For instance, all appropriations in aid

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*For history of tuition grants to war orphans beginning with Acts of Assembly 1930, p. 810. See *Almond* v. *Day,* 197 Va. 419, 89 S. E. 2d 851 (1955); for tuition grants in other instances see Acts, 1936, p. 561 (§ 23-10, Code of Virginia (1950)); for provision that one school district authorized to pay tuition of pupil attending school in another school district, see § 719, Code of Virginia (1919); for Act under which payment of vocational rehabilitation expenses of disabled persons is authorized, see Acts of Assembly 1922, p. 901.

of public schools made by the General Assembly of Virginia for the biennium beginning July 1, 1960, are found in Items 355 through 389, inclusive, of the Appropriation Act of 1960 (Acts of Assembly 1960, pp. 995, *et seq.*) The appropriation out of which state tuition grants are paid is not found in any of those items. There is an entirely different and separate appropriation to the Governor for the sole purpose of paying these tuition grants which is found in Items 505 and 506 of that Appropriation Act (p. 1021). In like manner in the Appropriation Act of 1962 for the biennium beginning July 1, 1962, all funds in aid of public schools are to be found in Items 392 through 436, inclusive, of the Appropriation Act of 1962 (Acts of Assembly 1962, pp. 1334, *et seq.*). None of those funds is available for the payment of tuition grants. Money for tuition grants is provided in an appropriation to the Governor for that purpose and is Item 548 of that Appropriation Act (p. 1360).

Great complaint is made by petitioners of what they assert to have been delays in this litigation. The only purpose of these statements is to gain an unwarranted sympathy from the Court. It is not charged that any of these defendants has been guilty of any delay. The truth of the matter is that these very petitioners waited from the spring of 1959, when the Court of Appeals handed down its opinion ordering that desegregation of the public schools should commence in September of 1959, until April 22, 1960, before they saw fit to present to the District Court an order carrying out that opinion and mandate of the Court of Appeals. Furthermore, while these petitioners did file a motion for leave to file a supplemental complaint in June of 1960, they aggrieviously misquote the record when they state that the supplemental complaint was amended in September, 1960. They did not even move to amend that supplemental com-

plaint until January of 1961, and it was amended in April of 1961.

In September of 1961, petitioners filed in the Supreme Court of Appeals of Virginia a mandamus suit under the style of *Griffin* v. *Board of Supervisors of Prince Edward County,* 203 Va. 321, 124 S. E. 2d 227 (1962), seeking to compel the Board of Supervisors of the County to levy taxes and appropriate funds for public schools within the County. They submitted in their petition to that Court questions of both state and federal law; and upon the pleadings being presented to the United States District Judge, he found in his order of November 16, 1961, that they had submitted the questions which he in his opinion of August 23, 1961 (*Allen* v. *County School Board,* 198 F. Supp. 497 (E.D. Va. 1961)) had held needed to be decided by the State Supreme Court. That having been done, they then proceeded to file a brief before the Supreme Court of Appeals of Virginia in which they denied that they were submitting any questions of federal law. It was for that reason that the Court of Appeals for the Fourth Circuit in its opinion of August 12, 1963, stated:

> "The plaintiffs applied to The Supreme Court of Appeals of Virginia for a writ of mandamus to compel the Board of Supervisors to levy taxes and appropriate funds for the operation of public schools. The District Judge saw copies of the pleadings and, apparently, was of the opinion they put in issue all relevant questions. In their printed brief, however, the plaintiffs disclaimed the presence of any federal question, with the result that the court decided only one narrow issue. * * *" 322 F. 2d 332, at p. 334, footnote 3.

We do not believe that there has been any unnecessary delay in this case; but, if there has been, it is the petitioners

who brought it about. That statement is borne out by the fact that petitioners do not charge respondents with having brought about any delay, and it is safe to assume that if a vestige of a ground existed upon which to support such a charge, it would have been made.

Finally, we call attention to what is not only a highly improper statement but a totally erroneous one. On page 23 of the petition, it is stated:

> "Thanks to the Government of the United States, formal, standardized education has been provided Negro children in the county since September, 1963, under private auspices."

The truth is the following: As early as January of 1960 the white citizens of Prince Edward County organized a corporation for the purpose of operating private schools for the Negro children in exactly the same way that education was being made available to their own children. Had the Negro citizens desired in 1960 to cooperate with this move to furnish education through private sources to their children, those children would not have been without educational advantages during these years—but, for whatever the reason, such was not to be.

This record further shows that when the Virginia Teachers Association (an association of the Negro public school teachers in Virginia) announced it would conduct a crash educational program for Negro children in the summer of 1961, the School Board of the County immediately offered the public school buildings of the County, together with utilities and janitorial services, for use in that program, all at no expense. That offer was rejected, and as shown by this record, that crash program was carried on with makeshift facilities in county churches and stores.

The only connection that the "Government of the United States" has had with the present private schools being operated in Prince Edward County for Negroes is that an Assistant Attorney General of the United States, i.e., William vanden Heuvel, acted as a catalyst in bringing together various interests and induced the Negro people of the County to avail themselves of private educational facilities. He has paid public tribute in an address recently delivered by him at Hampden-Sydney College to the cooperation and desire of the authorities and white citizens of Prince Edward County to assist in giving to the Negro children educational advantages (Richmond Times-Dispatch, October 18, 1963). Not a member of the Board of Directors of that private school is connected with the Federal Government. They are all Virginians engaged in educational work in Virginia save the Chairman of the Board who is Ex-Governor Colgate W. Darden, former President of the University of Virginia. Those schools are being conducted and operated in buildings owned by the School Board of Prince Edward County which have been made available for use by this private corporation together with school buses and other equipment. The lease provides for a rent which simply meets the expenses to which the School Board of Prince Edward County is put in connection with the buildings being used. That rent does not provide for any return on capital investment and does not include one penny of profit. As a matter of fact, well over a million and a quarter dollars of properties are being rented for an annual consideration slightly in excess of thirty thousand dollars. And, out of that rental the School Board of Prince Edward County and not the trustees of the private school system furnishes all repairs and janitorial services. So far as the attorneys representing the respondents in this case are advised, and the attorneys for the School Board and

the Board of Supervisors have been very close to the situation, there has been not one cent of money contributed to this cause by the Federal Government or any department thereof.

But for the actions of the Governor of Virginia in persuading the individuals who are the Directors of the corporation to give of their time and ability to this cause, but for the willingness of those Virginians so to do, and but for the cooperation given by the School Board of Prince Edward County in making available buildings, equipment and transportation facilities, these schools would have been an impossibility because the trustees operating them did not agree to serve and did not begin any work on the project until late in August of this year, and those schools were begun on September 16 of this year.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Under the heading "Reasons for the Allowance of the Writ" the petitioners assign one reason. They say:

> "Application of the doctrine of federal abstention in this cause is misplaced and in direct conflict with principles established in the decisions of this Court."

After citing a number of decisions of this Court, they then set forth in the first paragraph beginning on page 13 of their petition their conception of the doctrine of federal abstention. With their statement, so far as it goes, we have no complaint. But their statement of that doctrine is not complete. Federal courts should abstain not only as stated by them "where the strands of local law are so inmeshed in the issues pending before the federal court, and an authoritative interpretation of the local law questions may make

unnecessary consideration of the federal claims presented," but the federal courts also should abstain when an essential part of the question to be decided is the meaning and interpretation of state law. When such is the case, the opportunity should be given to the state court to decide that question of state law so that the federal court may be certain of the facts to which it is applying federal law. The very cases cited by the petitioners in support of their narrow conception of the doctrine of federal abstention support this full and true statement of that doctrine.

On page 14 of their petition, the petitioners set forth four federal claims which they say are raised in this case. They then add:

> "These are all federal issues which must be determined in this cause and which cannot be settled with any finality in the state courts."

The question is not whether the issues can be settled with finality in the state courts. Rather, the question is whether or not authoritative interpretation of state Constitution and statute is needed before the true issue, if any, under the federal law may be stated.

There cannot be the slightest doubt that the case asserted by petitioners fundamentally rests upon the interpretation which petitioners place upon the Constitution and statutes of Virginia. A reading of their amended supplemental complaint filed in April of 1961 is sufficient to demonstrate the accuracy of that statement.

Yet, petitioners contend that the questions truly involved in this case may be decided by the federal court without determining a number of questions of state law—the most fundamental of which is whether the State of Virginia maintains, operates and supervises the public schools in the

state or whether each locality maintains, operates and supervises its own schools. This contention is belied by the petition itself—the above question is so fundamental to this whole case that the petitioners cannot even summarize their reasons why the writ should be granted without setting forth and relying upon their interpretation of the state law. The last full sentence in the main text on page 17 of the petition reads:

> "Here, the state is fully involved in the educational process and in the maintenance, operation, and supervision of public schools now operating throughout the state."

There is a footnote to that sentence in which many sections of the Virginia Code are cited, and the main text of the petition proceeds further to elaborate upon petitioners' view that the maintenance, operation and supervision of public schools in the State of Virginia is fundamentally a state matter. One of the great issues in this case, and indeed the federal aspects of this case cannot be approached or dealt with if that issue is to be ignored, is whether the public schools operated in Virginia are established, maintained and operated by the State of Virginia or by the localities. The Court of Appeals for the Fourth Circuit stated it thus:

> "The question here, however, is whether Virginia's school laws establish an arrangement within the local option principle the defendants advance. If Section 129 of Virginia's Constitution imposes upon the General Assembly the duty to provide operating, free, public schools in every county, as the United States contends, its election to establish a system having features of a local option arrangement may be permissible under state law only so long as schools are operated in every county.

> On the other hand, if Section 129 of Virginia's Constitution, construed in the light of other constitutional provisions, requires of the General Assembly only that it provide for a system of education under which counties and cities are authorized to establish and maintain schools of their own with state assistance, then the principle which the defendants assert may be applicable. The answer is unclear. It requires interpretation and harmonization of Virginia's Constitution and statutes.
>
> "The question is unresolved. Virginia's Supreme Court of Appeals has considered her school laws in a number of cases, but none of them settle the question here." 322 F. 2d, 332, at p. 342.

The whole case of petitioners is predicated upon an assertion of state operation, first made in their amended supplemental complaint and from then on at every stage in this proceeding. A fundamental position of the respondents from the inception has been that under the Constitution and laws of Virginia, as they now stand and for many years have stood, the establishment, maintenance and operation of the public schools is a local matter. No opinion deciding with finality the issues presented can be rendered without there first being a determination of the primary question which is not only "immeshed in" but irrevocably woven as a part of this case and that question is one of state law on which only a state court can speak with finality:

> "Are the public schools of Virginia established, maintained and operated by the State or by the several localities?"

Any attempt to determine the federal issues without first deciding that question must ultimately prove to be an exercise in futility.

We do not question petitioners' statement that this is a

case of great public importance. We at the present time are inclined to the view that ultimately the decision on substantive questions in this case should be reviewed by the Supreme Court of the United States. But that review ought to come at the proper time and under the proper conditions. It should come only after the lower federal tribunals, both District Court and Court of Appeals, have intelligently dealt with the substantive issues in the light of an authoritative decision of the meaning of state Constitution and statutes. Questions as important as those here raised should not be dealt with by this Court until they have first been decided by the courts below. Then, and only then, will this Court be placed in true appellate position where it can review the actions of the courts below rather than in the position of deciding the matter in the first instance.

CONCLUSION

Rule 19 of the Revised Rules of the Supreme Court of the United States on its face neither controls the Court nor measures the Court's discretion upon the question whether it will grant a writ of certiorari. But, the attention of the Court should be called to the fact that none of the character of reasons which the Court sets forth in that Rule as indicative of those that will be considered is here present. Here the Court of Appeals for the Fourth Circuit has not rendered a decision in conflict with the decision of another court of appeals on the same matter; certainly it has decided no question of state law in a way in conflict with the state law or otherwise; it has decided no important question of federal law which has not been settled by this Court; it has decided no question of federal law in a way which conflicts with any applicable decision of this Court; and it has not departed from the accepted or usual course of judicial proceedings.

As said above, when the substantive questions have been decided by lower tribunals in the light of state Constitution and statute, then it may well be that the matters are of such importance that this Court should review. But until that time has arrived, this Court should deny the petition for the writ.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Circuit Court of the City of Richmond, Virginia

(March 21, 1963)

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RE: *County School Board of Prince Edward County, Virginia, et al.* v. *Leslie Francis Griffin, Sr., et al.*

Gentlemen:

This proceeding is before the Court upon the plaintiff's Amended Complaint for Declaratory Judgment, said Amendment having been permitted by order of the court; upon the Answer of the defendants, State Board of Education and Superintendent of Public Instruction, to the Amended Complaint; upon the Answer of the guardian *ad litem* for the infant defendants, Leslie Francis Griffin, Jr., Betty Jean

Carter and Jacquelyn Reid, to the original Complaint, said guardian *ad litem* having stated at bar that no copy of the order amending the said Complaint was delivered to him prior to the hearing on the merits; upon the evidence adduced on December 13 and 14, 1962, and upon the briefs and argument of counsel for the parties and of *amicus curiae*. The defendants, Leslie Francis Griffin, Sr., James L. Carter and Warren A. Reid, though duly served with process and with a copy of the decree of September 13, 1962, amending the original Complaint, failed to appear, plead, answer or demur.

It appears to the Court that basically four major issues are presented for determination. First, under the facts and circumstances of this case what are the powers and the duties of the plaintiffs, the County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, with respect to the establishment, operation and maintenance of public free schools in Prince Edward County? Second, under the facts and circumstances of this case what are the powers and duties of the defendants, State Board of Education and Woodrow W. Wilkerson, Superintendent of Public Instruction, with respect to the establishment, operation and maintenance of public free schools in Prince Edward County? Third, under the facts and circumstances of this case what are the rights of the parents of children who reside in Prince Edward County under the laws applicable to State Scholarship Grants? Fourth, under the facts and circumstances of this case has any right secured to any resident of Prince Edward County by the Constitution of the United States been violated?

Since each issue must be resolved in the light of this particular set of facts and circumstances, it is incumbent upon

the Court first to adjudicate the facts determinable from the pleadings and from the evidence adduced. The Court finds the following facts:

1. That in the spring of 1959 the plaintiff Division Superintendent of Schools, with the advice of the plaintiff School Board, prepared and submitted to the County Board of Supervisors of Prince Edward County the two estimates prescribed by §22-120.3 of the Code of Virginia, 1950, as amended. The first estimate showed the amount of money deemed to be needed for the support of the public schools of the County during the next scholastic year, and the second showed, in the alternative, the amount of money deemed to be needed for educational purposes for the County during that period, the school year 1959-60. Upon presentation of the two estimates, the Division Superintendent appeared in person before the County Board of Supervisors and requested that the sums called for be made available to the School Board by levy and appropriation.

2. That on June 2, 1959, the County Board of Supervisors refused to levy any taxes for the year 1959-1960 for either operation of public schools or for educational purposes and the next day, June 3, 1959, the said Board of Supervisors refused to approve either the "Budget" submitted by the Superintendent of Schools for "the operation of public schools" or the "Alternative Budget Estimate for educational purposes." No levy and no appropriation for either purpose was made with the exception of an appropriation of $30,400.00 for "Public Schools—Debt Service." As a result of lack of funds no public free schools were operated by the County School Board during the scholastic year, 1959-60.

3. That for the scholastic year 1959-60 no State Scholarship Grant applications were processed by the State Board of Education for Prince Edward County residents and no monies appropriated by the General Assembly of Virginia for the purpose of such grants were paid out by or through the defendant State Board of Education to such residents.

4. That the so-called "Constitutional Minimum" funds, consisting of Prince Edward County's proportionate share of the funds derived from the sources enumerated in Section 135 of the Constitution of Virginia, during the year 1959-60 were earmarked for teachers' salaries by the basic appropriation made by the General Assembly (Item 139, Chapter 96, Acts of Assembly, Extra Session, 1959). No public free schools being in operation in the County during the year and no teachers being employed by the County School Board, the result was that the County's share of these funds reverted to the General Fund of the Commonwealth. The so-called "Forest Reserve" funds which were apportioned to Prince Edward were not appropriated for the use of the County School Board by the County Board of Supervisors and were not available for expenditure by the School Board.

5. That on or about March 31, 1960, the plaintiff Division Superintendent of Schools transmitted to the Clerk of the County Board of Supervisors for submission to that body the two approved estimates provided for by § 22-120.3 of the Code, calling the particular attention of the said Board of Supervisors to the necessity for funds to defray the cost of a school census, as well as the fact that the policies of fire insurance on the school buildings would expire during the scholastic year. These estimates were referred to the Budget Committee of the Board of Supervisors

on April 5, 1960, and on April 27, 1960, the said Board again refused to approve the "Budget" for the operation of public schools and the "Alternative Budget Estimate for educational purposes" for the year 1960-61.

6. Although requested by Mr. Fitzpatrick, attorney for the County School Board, to lay a County levy and to appropriate the funds sought by the School Board, the County Board of Supervisors failed so to do, but rather set a public hearing to be held on June 7, 1960, to consider their actions set out above upon the two estimates submitted by the Division Superintendent on behalf of the School Board. At the same meeting of the Board of Supervisors, on April 27, 1960, that body provided for an increase in the general county levy and certain other levies, a part of which was to be expended for "educational purposes" as may be provided "by Ordinances adopted by the Board of Supervisors." This matter was to be heard at the same public hearing on June 7, 1960, and notice thereof was published.

On July 5, 1960, the Board of Supervisors met and appropriated the sum of $30,000.00 from local sources for public school debt service and the sum of $315,000.00 for "Educational purposes in furtherance of the elementary and secondary education of children residing in Prince Edward County in private nonsectarian schools to be expended as may be provided by Ordinances and pursuant to Section 141 of the Constitution of Virginia."

7. That two ordinances were adopted on July 18, 1960, by the Board of Supervisors to be effective on August 6, 1960. The first such ordinance authorized parents of and others *in loco parentis* to resident children between the ages of six and twenty to apply for and receive, subject to certain terms and conditions, grants to be used in furtherance

of elementary and secondary education of such children in private non-sectarian schools located within the County of Prince Edward and in public schools located in Virginia. The second ordinance provided that contributions to a non-profit, non-sectarian private school located in the County of Prince Edward could, under certain terms and conditions and within certain limitations, be deducted from real and personal property taxes assessed by the County upon the contributor. Neither of these ordinances mentioned or provided for the disbursement of any funds to the County School Board.

8. That for and during the school year 1960-61 1,332 applications for scholarship grants submitted by residents of Prince Edward County were processed and approved by and through the State Board of Education, of which 834 were for children who attended an elementary school and 468 for children who attended a high school. Some few of these children, less than a dozen, attended schools outside of the County, the remainder attended private non-profit, non-sectarian schools within the county.

During the same period some 1,363 scholarship grants were paid to parents of or others *in loco parentis* to resident children from funds appropriated by the County Board of Supervisors and paid out pursuant to ordinance adopted July 18, 1960.

9. That during the school year 1960-61 the County School Board received as its proportionate share of "Constitutional Minimum" funds, pursuant to Items 365 and 366, Chapter 610, Acts of Assembly, 1960, as required by Section 135 of the Constitution of Virginia, the sum of $39,-360.00. To this amount was added the sum of $2,644.40 paid to the County Treasurer for expenditure by the School

Board for public school purposes pursuant to §22-119, as amended, of the Code and representing the County's share of "forest reserve" funds. Thus, the total income of the County School Board from all sources was $42,004.40 for the school year.

From these receipts the School Board paid out its unpaid obligations from the previous year and paid a total of $7,697.47 in premiums for fire insurance on the buildings it maintained as well as other maintenance expenditures for school buildings of $8,817.70. Of this latter amount $2,243.82 was chargeable to the Farmville High School Building and $301.00 was chargeable to the R. R. Moton High School. The Division Superintendent estimated that at least 50% of the total paid out for fire insurance premiums was attributable to these two school buildings. Simple mathematics show that during the school year in question the County School Board expended approximately $3,749.15 of funds derived under Section 135 of the Constitution on the two high school buildings. As a result of the foregoing expenditures and others set out in Plaintiffs' Exhibit No. 17 the School Board ended the year with a balance of $252.08. Due to the lack of funds for the purpose, the County School Board was unable to operate any public free schools during the year 1960-1961.

10. That on or about March 31, 1961, the Division Superintendent of Prince Edward County Public Schools again submitted to the County Board of Supervisors the alternative estimates of the amounts required for the operation of the public schools and for educational purposes for the school year 1961-62 which had been prepared with the advice of the School Board. He pointed out to the Board of Supervisors that as a practical matter it was probable that if the public schools were operated in the County during the

forthcoming school year, there would be in actual attendance not more than 1800 children. To cover this situation a third estimate was submitted showing the amount deemed needed if not over 1800 pupils attended the public schools. The letter of transmittal contained a request that a levy be fixed or appropriation made by the Board of Supervisors which would provide the sums deemed needed for the operation of public schools or for educational purposes.

11. That on May 24, 1961, the Budget Committee of the County Board of Supervisors presented to said Board its report that various estimates had been received, including those from the Division Superintendent of Schools, and tendered its estimate of required revenue and expenditures for the fiscal year next ensuing. The Board set a public hearing on the proposals for June 9, 1961, and ordered publication of a synopsis of the proposed budget. At the public hearing seven citizens expressed approval of the budget as advertised, five citizens expressed disapproval for the reason that there was no provision for any expenditures for the operation of public schools. Following the hearing the Board of Supervisors appropriated the sums of $30,000.00 for "School Operation—Local Sources" and $285,000.00 for "Educational purposes" to be expended as provided by ordinance and pursuant to Section 141 of the Constitution of Virginia.

12. That for and during the school year 1961-62 the Prince Edward County School Board received as its proportionate share of "Constitutional Minimum" funds appropriated by Chapter 610, Acts of Assembly, 1960, the amount of $39,360.00 and § 22-119 "forest reserve" funds in the amount of $2,181.27, a total income of $41,541.27. Of this income, plus a balance on hand of $252.08, $341.82 was chargeable as maintenance expenditures to the Farmville

High School building and $573.44 to the R. R. Moton High School building. Of a total of $7,691.26 expended for insurance premiums on all School Board buildings, approximately 50%, or $3,845.63, was attributable to the two former high school buildings. In addition, $10,000.00 was paid out on account of a "Literary Fund" loan for the construction of R. R. Moton High School, plus $83.33 in interest on the said loan.

Adding the amounts definitely expended for the two high school buildings yields a total of $14,844.22, or $12,662.95 more than the $2,181.27 received for the use of the County School Board from "forest reserve" funds. On the basis of the evidence presented the Court is unable to determine the exact total amounts expended for the maintenance of these two buildings for either the 1960-61 or 1961-62 school years, since such calculation may require the proration of several expenditures for overhead upon which there is no evidence other than that the expenditures were made.

13. That on or about March 30, 1962, the Division Superintendent transmitted to the County Board of Supervisors the alternative estimates for the school year, 1962-63, as prescribed by § 22-120.3 of the Code, which estimates had been prepared with the advice of the County School Board. Once again, an additional estimate showing the amount deemed needed for the support of public schools was submitted. This latter estimate was predicated upon the assumption that, should the public schools be operated, only some 1600 children would be in attendance rather than all children of school age. In his letter of transmittal the Division Superintendent requested that the Board of Supervisors fix such levy or make such appropriation as would provide the amount deemed necessary for the operation of public schools.

14. That on May 23, 1962, the Budget Committee of the County Board of Supervisors reported that it had received various estimates of amounts deemed to be needed for the fiscal year 1962-1963, including the estimates of the Division Superintendent of Schools. The Committee submitted its consolidated estimate of required revenue and expenditures and the Board of Supervisors then set a public hearing thereon for June 15, 1962, and ordered due publication of a synopsis.

On June 15, 1962, at the public hearing nine citizens expressed approval of the "budget" and eighteen citizens expressed opposition thereto on the ground that no provision was made for expenditures for the operation of public schools. After the public hearing the Board of Supervisors adopted a resolution appropriating the sums of $30,000.00 for "School Debt Retirement" and $360,000.00 for "Educational Purposes" as provided by ordinance and pursuant to Section 141 of the Constitution of Virginia. No amounts were appropriated for the support and operation of the public schools.

15. That up to December 13, 1962, the date of hearing of this proceeding, the County School Board had received, or there had been paid in to its credit, payments on account of its proportional share of the "Constitutional Minimum" appropriated by the General Assembly (Items 396 and 397, Chapter 640, Acts of Assembly, 1962) which were expected to total for the school year the amount of $39,260. The County School Board's share of "forest reserve" funds was also received, but the amount was not stated. Insufficient funds being on hand, the said School Board had not operated any public schools up to the date of hearing on December 13, 1962.

16. That during the school years beginning in 1959-60, and continuing through 1960-61, 1961-62 and 1962-63 to date, while no public free schools have been operated in Prince Edward County, a private corporation, Prince Edward School Foundation, has operated private non-sectarian schools in the County. Further, public free schools have been operated by other School Boards in the Commonwealth.

Turning now to certain mixed questions of fact and law raised by the pleadings, it appears that in Paragraph number 6 of the Amended Complaint plaintiffs allege that certain of the defendants, namely, Leslie Francis Griffin, Sr., *sui juris,* and Leslie Francis Griffin, Jr., infant; James L. Carter, *sui juris,* and Betty Jean Carter, infant, and Warren A. Reid, *sui juris,* and Jacquelyn Reid, infant, have asserted and continue to assert, *inter alia,* that the plaintiffs and the other defendants, State Board of Education and Superintendent of Public Instruction, have "acquiesced" in the refusal of the County Board of Supervisors of Prince Edward County to levy taxes and appropriate money for the maintenance and operation of public schools in the County. This acquiescence is denied by the plaintiffs and by the last named defendants. The fact of assertion and the denial of acquiescence of these parties is taken for confessed as to the *sui juris* defendants, Leslie Francis Griffin, Sr., James L. Carter and Warren A. Reid, by their failure to appear and controvert. The evidence adduced, in particular Plaintiffs' Exhibit No. 22, reveals that the infant defendants have made such an assertion or have had the same made in their behalf and, until final disposition of that matter, continue to assert the same.

This issue of fact must be resolved in favor of the plaintiffs, the State Board of Education and the Superintendent

of Public Instruction. Each year Dr. McIlwaine and the County School Board duly performed all of the duties incumbent upon them under the law in preparing and submitting estimates and requests to the County Board of Supervisors, in maintaining the physical properties for which they were responsible to the people of the County, and in being ready, willing and able to operate public schools in the County had the requisite funds been made available by the Board of Supervisors. Beyond this they had no duty with respect to the situation. Acquiescence implies active assent. Such was not the case with these individuals.

Nor does the evidence support an allegation of acquiescence by either the State Board of Education or the Superintendent of Public Instruction. If any duty to object to the failure of the Prince Edward Board of Supervisors to appropriate any money for the operation of public schools required such action on the part of these two defendants, there is no showing of any knowledge of such duty thereof on their part. The evidence reveals a flat, uncontradicted denial that either the State Board of Education or the Superintendent of Public Instruction "acquiesced" in the Board of Supervisors' failure to act. By Section 22-21 of the Code the State Board is required to stimulate and encourage local supervisory activities and interest in the improvement of elementary and secondary schools. Where no schools are operated there is no local supervision to encourage.

Paragraph 8 of the Complaint as amended alleges that the State Board of Education and the Superintendent of Public Instruction assert that the County School Board has no right to use any portion of the "constitutional minimum" funds, enumerated in Section 135 of the Constitution of Virginia and appropriated and to be appropriated by the General Assembly to the credit of the said School Board,

for the repair and upkeep of any school building except such buildings as are and have been used for the primary and grammar grades. The plaintiffs allege that such funds may be used by the School Board for the repair and upkeep of any school building.

Section 135 of the Constitution specifies that the General Assembly shall apply the amounts derived from the three sources enumerated "to the schools of the primary and grammar grades, for the equal benefit of all the people of the State, to be apportioned on a basis of school population; the number of children between the ages of seven and twenty years in each school district to be the basis of such apportionment." The primary and grammar grades are those grades below the secondary or high school level. In England, the term "grammar school" designates a school in which such instruction is given as will prepare a student to enter a college or university, but in modern American usage the term denotes a school, intermediate between the primary school and the high school, in which English grammar and other studies of that grade are taught. Black's Law Dictionary, 3rd Ed., p. 854.

However, the question of the intent of the framers of the Constitution of Virginia is laid to rest in Volume I, Debates of the Constitutional Convention, 1901-1902, beginning on page 1204, wherein Mr. Richard McIlwaine, the member representing Prince Edward County, explains as follows:

> "While I am on my feet I will say that a gentleman has asked me why we put in the first part of this section 'for the benefit of the primary and grammar grades?' What was the reason of our saying anything about the grammar grade? Those are two distinctive terms, the

> primary alluding to that degree of knowledge which is acquired in reading and writing and a little ciphering, and then the grammar grade, which does not include any language other than the English, but takes in a careful study of grammar and of geography and of history and of such studies as increase the general intelligence of the student. In all the Constitution so far as I can recollect that distinction is made. It is all below what is called the high school. The primary and grammar grades embrace what is below the high schools."

The evidence before the Court shows that generally secondary or high school education is given to the grades numbered 8 through 12. Below the eighth grade, education is classified as elementary, including first, primary, and then, grammar grades. The building designated as "Farmville High School" was constructed in two stages, the initial construction being completed circa 1928, and the remainder of the present building in 1936. According to the Division Superintendent, the building was intended to and did for a number of years house both elementary and high school grades. For the last ten or eleven years, that is since 1942 or 1943, this structure has been used exclusively for a high school. The "R. R. Moton High School" building was completed in 1953, having been built for occupancy and use by the high school grades and has been used solely as a high school.

Since 1959 both high school buildings have been vacant and, as set out above in findings of fact numbers 9 and 12, the County School Board has expended for maintenance of these buildings and repayment of a loan on the R. R. Moton building at least $16,412.10 of funds received pursuant to

the provisions of Section 135 of the Constitution of Virginia. Plaintiffs have caused a census to be taken to determine what the school population situation would be should public schools be operated again in Prince Edward County. The results of this census, completed in 1961, are set out in Plaintiff's Exhibit No. 21. In interpreting these results and projecting the same to the date of hearing, the Division Superintendent and the County School Board reached the conclusion that, in the event of a reopening of the public schools, the R. R. Moton High School Building would "probably" be used for both elementary and high school grades and that there was a "possibility" that the Farmville High School building might be used as an elementary school.

The Court is of the opinion that the expenditure by the County School Board for the care and maintenance of the Farmville High School and R. R. Moton High School buildings of any of the "constitutional minimum" funds derived from the sources enumerated in Section 135 of the Constitution has been and is violative of the provisions of that Section and of the successive Appropriation Acts enacted pursuant thereto. Both common sense and the plain language of the Constitution dictate this result. Probabilities and possibilities do not change the actual status of school buildings and equipment when balanced against the logical inference that if the public schools had been operated continuously by the County School Board, there would have been no change in the use of these two structures.

Paragraph number 4(a) of the Amended Complaint sets forth that the six defendants first named as such in the said pleading have asserted and continue to assert that, under the circumstances existing in Prince Edward County, it is the duty and responsibility of the County School Board and of the Division Superintendent, in conjunction with the State

Board of Education and the Superintendent of Public Instruction, under the Virginia Constitution and statutes and under the United States Constitution to establish, maintain and operate a system of public free schools throughout the Commonwealth, including Prince Edward County. This the plaintiffs and the State Board of Education and the Superintendent of Public Instruction deny. For the pertinent reasons hereinabove stated with reference to Paragraph number 6 of the Amended Complaint, the Court finds that the issue exists and should be resolved. As indicated in the Court's statement of the issues involved in this case, the question will be approached first by a determination of the powers and duties of the County officials, under these facts and circumstances, as prescribed by the Constitution and statutes of Virginia.

Article IX of the Constitution of Virginia, entitled "Education and Public Instruction," begins with Section 129, which reads:

> "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

This Section apparently had its origin in Section 3 of Article VIII of the Constitution of 1869. The Constitutional Convention which drafted that Constitution assembled in Richmond December 3, 1867, and Section 3 was contained in the report of the Education Committee to the Convention. Prior to that time the only reference to schools in Constitutions successive to the Constitution of 1776 had been to the effect that one equal moiety of a capitation tax levied should be "applied to the purposes of education in primary and free schools." Constitution of 1851, Section 24. By statute, all powers and duties with respect to the establishment, opera-

tion and maintenance of "primary" and "free" schools had been vested in and imposed upon boards of school commissioners in counties, cities and towns, the county courts (for revenue) in counties and the councils of cities and towns. See Chapters LXXXI and LXXXII, Code of 1860. By Chapter LXXIX of that Code the Literary Fund was defined and provision made for the application of a portion of the capitation tax to the purposes of education in primary and free schools. See also *Board of Supervisors* v. *County School Board,* 182 Va. 266, 268-269, for additional historical facts.

In order to determine the powers and duties of the County School Board and of the Division Superintendent the mandate to the General Assembly spelled out in Section 129 of the present Constitution deserves consideration. The Supreme Court of Appeals stated unequivocally in *School Board* v. *Shockley,* 160 Va. 405, 412, that Section 129 imposes a mandatory duty on the General Assembly to establish and maintain an efficient system of free schools throughout the State. Then, in *Scott County School Board* v. *Board of Supervisors,* 169 Va. 213, 215, that Court reiterated the above statement and added that the General Assembly had complied with that requirement by the enactment of a School Code, Acts of Assembly, 1928, Ch. 471, as amended; and again by Acts of Assembly, 1936, Ch. 314. This School Code is today contained in Title 22, Code of Virginia, 1950, as amended.

A "system" is defined by Webster as a formal scheme or method, arrangement, etc., of objects or material, or a mode of procedure; a definite or set plan of ordering, operating, or proceeding. Websters, New International Dictionary, 2nd Ed., p. 2562. This system of free schools throughout the State has been established and is being maintained. Not

only are the various procedures and general plan of operation set out in the Code enacted by the General Assembly, but by successive Appropriation Acts that body has made available each year, within the limitations fixed by the Constitution, the funds necessary to enable the system to function in accordance with the applicable constitutional and statutory provisions. Whether the system is efficient is left to the General Assembly and where it enacts legislation which runs counter to constitutional requirements, the courts will strike down such legislation.

The powers and duties of the County School Board with respect to public schools in the County are clearly enumerated in the law of the Commonwealth. Section 133 of the Constitution specifies that:

> "the supervision of the schools in each county or city shall be vested in a school board, to be composed of trustees to be selected in the manner for the term and to the number provided by law."

This constitutional provision is recognized by the General Assembly in § 22-2 of the Code providing for administration of the State System.

The School Board is then empowered to maintain the public schools for at least nine months or 180 teaching days in each school year, but this term may be reduced, in which event the participating or matching funds provided by the State are reduced proportionately. (Section 22-5 of the Code). Each such Board constitutes a body corporate, with power to contract and to sue or be sued (§ 22-63 of the Code.) It is empowered to enforce the school laws, to make regulations for the conduct of its schools and discipline of the students; to provide for payment of teachers' salaries;

to provide for the erecting, furnishing, and equipping of necessary school buildings and maintenance thereof; to provide such text books for indigent children as may be necessary; to incur costs and expenses; to provide for the consolidation of schools whenever such procedure will contribute to the efficiency of the school system; and to perform such other duties as may be prescribed by the State Board of Education or prescribed by law (§22-72 of the Code); and to provide for the free transportation of pupils (§22-72.1).

Title to all property in the County applicable to public school purposes is vested in the County School Board (§22-147, Code) and the Board may acquire property by gift, devise or bequest (§22-148), as well as by eminent domain (§22-149). The Board has the power to sell or exchange and convey school property (§22-161 of the Code) and is empowered to permit its use for other lawful purposes (§22-164).

The determination of the number and location of public schools which the public welfare may require is left to the sole judgment of local school boards by Section 136 of the Constitution, *School Board* v. *Shockley,* 160 Va. 405, 414. As for public high schools, only local school boards have the power to establish and maintain such schools, provided the establishment of such schools or teaching of high school branches does not interfere with the regular and efficient instruction in the elementary branches (§22-189 of the Code).

Aside from land, buildings, and equipment three other elements are necessary for the establishment and operation of schools; administrative personnel, teachers and pupils. Section 133 of the Constitution requires that the school board of each school division appoint a Division Superin-

tendent of Schools. This administrative and supervisory officer is selected from a list of eligibles certified by the State Board of Education (§22-32 of the Code); has powers and duties, the fixing of the majority of which has been delegated by the General Assembly to the State Board of Education (§22-36); is required to keep records of receipts and disbursements of school funds (§22-36.1); has the duty of inspection of the accounts of and direction of the discharge of duties by the Clerk of the School Board (§22-53); to attend all meetings of the School Board (§22-49); to see that teachers discharge their duties and report neglect or violation thereof to the School Board (§22-203 of the Code and Regulations of the State Board of Education, 1959, §9); and, in general, act as a connecting link between the State Board of Education and the local School Board, primarily in order that the State authorities may be assured that the State funds appropriated for the use of the local school authorities are properly accounted for and to carry out further the requirement of Section 130 of the Constitution which vests general supervision of the school system in the State Board of Education.

The County School Board employs teachers, certified as competent by the State Board of Education, and places them in appropriate schools (§22-203 of the Code). The School Board is required to enter into a contract of employment with each full-time teacher (§22-207), and has the power and duty to dismiss them (§22-203). Once a teacher has been placed in a school, the Division Superintendent has the power of reassignment (§22-205).

With respect to pupils, for many years the statutes of Virginia had conferred upon the local school boards control of the admission of persons eligible to attend the local public schools. Then in 1956 the General Assembly enacted

the "Pupil Placement Act" (Acts of Assembly, 1956, Ex. Sess., Ch. 70), now codified as §§ 22-232.1 to 22-232.8 and §§ 22-232.10 to 22-232.16 of the Code of Virginia, 1950, as amended. Under this legislation the local school boards were divested of all authority to determine the school to which any child should be admitted and all power of enrollment or placement of pupils in the public schools was vested in a "Pupil Placement Board." The Supreme Court of Appeals, in considering the contention that Section 133 of the Constitution vested the power of enrollment or placement of pupils in public schools exclusively in local school boards, held that if the General Assembly "deems it advisable to vest the power of enrollment or placement of pupils in an authority other than the local school boards, it may do so without depriving such local school boards of any express or implied constitutional power of supervision." *DeFebio* v. *County School Board,* 199 Va. 511, 513.

In 1959, however, the General Assembly returned to the local school boards a large measure of the responsibility they had borne formerly. By Chapter 71, Acts of Assembly, 1959, Extra Session, it was prescribed that should a county, city or town, if such town be a separate school district, elect by ordinance adopted by its local governing body upon recommendation of the local school board to be bound by the provisions of the new statute, now codified as Sections 22-232.18 to 22-232.31 of the Code, then the provisions of the Pupil Placement Act would be inapplicable in such county, city or town. Under the 1959 statute the placement of pupils would again be accomplished by local school boards, subject to rules and regulations promulgated by the State Board of Education. The local boards were authorized to fix attendance areas and to adopt such additional rules and regulations relating to placement "as may be in the best interest of their

respective school districts and the pupils therein." (§22-232.19 of the Code). The State Board of Education was constituted a "Board of Appeals," with the right of judicial review of its decisions reserved to the parent or other person having custody of the pupil in question or to "five interested heads of families" should either feel aggrieved by any final order of the Board. (§§22-232.22 to 22-232.26 and §22-232.38 of the Code). Whether the County School Board of Prince Edward County has made the requisite recommendation to the County Board of Supervisors or whether an ordinance has been adopted by the County Board of Supervisors is not revealed by the evidence in this proceeding. Local school boards retain the power to discipline pupils through their principals and teachers (§§22-230 and 22-231.1) and the duty to suspend or expel pupils when the welfare and efficiency of the schools make it necessary (§22-231). Further, should a school board by resolution so recommend to the local governing body and should an ordinance to that effect be adopted by the governing body, then the State compulsory attendance laws shall be in force within the particular county, city or town (§22-275.24 of the Code).

In order to exercise the powers and perform the duties incumbent upon them, local school boards must have available the funds necessary to defray the costs of construction, operation and maintenance of the public schools they deem necessary in the public welfare. The Constitution of Virginia provides that there shall be two principal sources of these funds, the General Assembly and the local governing bodies.

Section 186 of the Constitution directs that:

> "All taxes, licenses and other revenues of the State shall be collected by its proper officers and paid into the State

> Treasury. No money shall be paid out of the State treasury except in pursuance of appropriations made by law; * * *."

With reference to funds for school purposes, Section 135 makes mandatory appropriation by the General Assembly of the "Constitutional minimum" to be apportioned and applied to the schools of the primary and grammar grades. In addition, Section 135 reads:

> "And the General Assembly shall make such other appropriations for school purposes as it may deem best, to be apportioned on a basis to be provided by law."

By this sentence the General Assembly is vested with discretion to determine the amounts and the basis of apportionment of the balance of the money deemed required for school purposes.

In limitation of Section 135 the Constitution prescribes in Section 141 that:

> "No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision, thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and non-sectarian private schools and institutions of learning, in addition to those owned or exclusively

> controlled by the State or any such county, city or town; * * *; third, that counties, cities, towns and districts may make appropriations to non-sectarian schools of manual, industrial or technical training and also to any school or institution of learning owned or exclusively controlled by such county, city, town or school district."

The second source of school funds is established by Section 136 of the Constitution. That source is local taxation. The Section provides:

> "Each county, city or town, if the same be a separate school district, and school district is authorized to raise additional sums by a tax on property, subject to local taxation, not to exceed in the aggregate in any one year a rate of levy to be fixed by law, to be apportioned and expended by the local school authorities of said counties, cities, towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require; provided that such primary schools as may be established in any school year shall be maintained at least four months of that school year, before any part of the fund assessed and collected may be devoted to the establishment of schools of higher grade. The boards of supervisors of the several counties, and the councils of the several cities and towns, if the same be separate school districts, shall provide for the levy and collection of such local school taxes."

A third source of funds for local school boards, which source is limited for all practical purposes in amount and of which there is no evidence in this case, is revenue or income from glebe lands and church property which may

be appropriated after a referendum of county voters as prescribed in § 57-3 of the Code (§ 22-118).

A fourth source is money derived from the United States under the "Forest Reserve Act" (§ 22-119) and the "Flood Control Act" (§ 22-119.1). There is no evidence that Prince Edward County is entitled to receive any funds under the latter Act. Finally, local school boards may receive donations (§§ 22-116 and 22-145 of the Code).

The local school boards are empowered to borrow money, but the power to borrow is limited. The controlling constitutional provision is Section 115a which prohibits the contraction of any debt by or on behalf of any school board of any county except in pursuance of authority conferred by the General Assembly by general law. The General Assembly is prohibited from authorizing any school board of any county to contract any debt except (1) to meet casual deficits in the revenue, (2) a debt created in anticipation of the collection of the revenue of the said county or board for the then current year, or (3) to redeem a previous liability, unless in the general law authorizing the contraction of debts provision is made for submission of the question to the qualified voters of the county, etc., for approval, which approval by a majority vote is a prerequisite. See § 15-666.29 of the Code. Under this Section the General Assembly may now authorize, by general law, the school board of any county to contract to borrow from the Virginia Supplemental Retirement System for the purpose of school construction, but only with the approval of the governing body of the county. This authorization has been conferred upon county school boards by the General Assembly in Chapter 19.2 of Title 15 of the Code (§§ 15-666.69 to 15-666.76). *Harrison* v. *Day,* 201 Va. 386, 397.

There is one other source of funds for the construction

of schools which is available without the necessity of a referendum. The principal of the Literary Fund above the basic $10,000,000 minimum may be utilized by the General Assembly for public school purposes. Constitution, Section 134. The General Assembly has acted under this provision and, in Chapter 7 of Title 22 of the Code, has empowered the State Board of Education, which invests and manages the Fund (§§ 22-101, 22-102, 22-104 and 22-106), to lend money belonging to the Fund and in hand for investment to local school boards (§ 22-105) and has authorized such school boards to borrow such money (§ 22-107) for the purpose of erecting, altering or enlarging schoolhouses in the respective counties, cities and towns. The onus of repayment of a Literary Fund construction loan falls upon the local governing body, which is required by § 22-113 of the Code to include in its general county levies a sum sufficient to meet its liabilities on the loan contract under pain of removal for cause for failing to provide for payment of the loan or the interest thereon, when and as due (§ 22-113).

In the field of establishment of schools, in the sense of determining whether to build, selecting and acquiring the site, and having the structures erected, the local school boards are the only bodies or agencies vested with power so to act. They alone have conferred upon them the power to determine the requirements of the public welfare as to number and location of schools in their counties, cities and towns and to decide how that welfare "may best be subserved." *School Board* v. *Shockley,* 160 Va. 405, 414. For annual operational and maintenance expenses funds are made available by the General Assembly and by the local governing bodies, based upon the estimates prepared by the division Superintendent with the advice of the particular

School Board showing the amounts deemed needed for the support of the public schools of the county, city or town for the ensuing school year (§§ 22-120.3 and 22-120.5). These estimates are submitted to the local governing body, in this particular case the Board of Supervisors, and that body is requested to fix such levy or make such appropriations as will provide the necessary funds (§ 22-120.4). Thereupon the local governing body, acting for the citizens of the county, levies the taxes or appropriates the funds for the use and benefit of the local school board.

This procedure follows the traditional theory of checks and balances exemplified by Section 5 of the Virginia Bill of Rights—that the whole power should not be exercised by one hand, for it is clear that while the school board has the power and duty to determine the amounts needed for public schools, only the local governing body has the power and duty to determine the financial ability of the people whom they represent. There is no need for this Court to go into further detail in this regard. The Supreme Court of Appeals in *Board of Supervisors* v. *County School Board,* 182 Va. 266, adopted the opinion of the Honorable J. Garland Jefferson, the trial judge, which opinion sets forth clearly both the historical background and present application of the fiscal system on the local level and holds that the local school board is an independent agency charged by law with establishing, maintaining and operating the schools efficiently and that the local governing body, while not entitled to reduce or eliminate individual items of the budget estimates of the school authorities, does have the right, within the limits prescribed by law, in their discretion, to fix the amount of money to be raised by local taxation for school purposes at whatever amount they see fit.

In carrying out its duties under the constitution, the

General Assembly is required to appropriate funds for the use of both State and local school authorities. In its interpretation and construction of the provisions of Article IX of the Constitution it has seen fit to follow the intention of the framers of that document and to require local effort and participation in defraying the costs of the public free schools established in any locality. That this local participation was uppermost in the minds of the members of the Constitutional Convention of 1901-02 cannot be doubted after reading that portion of the Debates of the Convention devoted to the school question. As a result, the General Assembly, in its wisdom, has for many years circumscribed its appropriations for school purposes, except the amounts from the three sources designated by Section 135, forest reserve funds, and the like, with conditions which must be fulfilled by the localities before any appropriated State funds may be spent by or for them.

Beginning with the Appropriation Act of 1916 (Acts of Assembly, 1916, Ch. 520), wherein the sum of $200,000 appropriated to the State Board of Education to be apportioned to the counties for use by the local school authorities in the establishment of one and two room rural schools was conditioned upon the local levies for county school purposes for the year aggregating a sum equal to or greater than the average rate of the levies of county school funds of the Commonwealth, and continuously since that time each successive Appropriation Act has required that county schools be in operation and that certain funds be levied, appropriated, or expended by the local governing body before any of the "State" money becomes available. This makes the local governing body and through it, the people of the locality, the key to the public educational system of this Commonwealth.

The logical conclusion to be drawn from reading together and applying the constitutional and statutory provisions pertinent to the establishment and operation of the public free schools in Virginia is that, fundamentally, it is a system based upon local self-determination or local option. It is the policy of the State to afford an education to its residents. In carrying out this policy the people of Virginia have determined that the residents of each locality shall make the initial determination of what schools will be established and where, and that they will supervise, operate and maintain the local schools, utilizing both State and local revenues and operating under State rules and regulations.

The people of a locality elect the local governing body and, in order to remove them as far as possible from local politics, have their local school board elected by a trustee electoral board composed of resident qualified voters appointed by the Circuit Court. Without the concurrence of these two bodies, the local school board and the local board of supervisors, in the case of a county, the public free schools of the locality cannot be operated, unless there is some power in the General Assembly or some other constitutional officer or agency to establish, operate and maintain such schools without local participation by way of financial assistance.

In *Griffin* v. *Board of Supervisors,* 203 Va. 321, the Supreme Court of Appeals held that mandamus did not lie to control the discretion lodged in the County Board of Supervisors of Prince Edward County to compel the levy and assessment of taxes for the support of public schools and reaffirmed the principle that Section 136 of the Constitution prohibited the General Assembly from exercising the power to determine what additional sums, if any, should be raised by local taxation and to impose local taxes for school purposes. Prior to that decision that Court had held, in

Harrison v. *Day,* 200 Va. 439, that an Act directing that local levies for school purposes be paid into the State treasury under certain circumstances, which funds were to be expended by the State Board of Education in the locality, ran counter to Section 136 of the Constitution which requires that local school taxes be expended by the local school authorities (200 Va., at page 452).

The defendants, State Board of Education and Superintendent of Public Instruction, occupy important roles in the educational system of the Commonwealth. Recognizing the necessity for State supervision of any comprehensive system, the framers of the Constitution created these two agencies or instrumentalities to perform that function in conjunction with the General Assembly. While Section 40 of the Constitution vests the legislative power in the General Assembly without limitation except by other provisions of the Constitution itself, the powers and duties of the State Board of Education are limited in the grants thereof.

Section 130 creates the Board and prescribes that in it shall be vested general supervision of the school system. Section 132 enumerates the powers and duties, as follows:

> "First. It shall divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions. It shall certify to the local school board or boards of each division in the State a list of persons having reasonable academic and business qualifications for division superintendent of schools, one of whom shall be selected as the superintendent of schools for such division by the said school board or boards, as provided by section one hundred and thrity-three of this Constitution.

"Second. It shall have the management and investment of the school fund under regulations prescribed by law.

"Third. It shall have such authority to make rules and regulations for the management and conduct of the schools as the General Assembly may prescribe; but until otherwise provided by law, the State Board of Education may continue existing rules and regulations in force and amend or change the same.

"Fourth. It shall select textbooks and educational appliances for use in the schools of the State, exercising such discretion as it may see fit in the selection of books suitable for the schools in the cities and counties, respectively; provided, however, the General Assembly may prescribe the time in which the State Board of Education may change the textbooks."

Section 133 of the Constitution reiterates the duty of the Board to prepare and certify to local school boards a list of persons eligible for appointment as division superintendents of schools and empowers the State Board to appoint a division superintendent in the event a local school board fails to do so within the time prescribed by law.

In compliance with the duty imposed upon it by Section 129 of the Constitution, the General Assembly has enacted legislation which amplifies the duties imposed on the State Board of Education by that instrument. These statutes appear throughout the School Code and are many in number. Basically, the General Assembly has authorized and required the State Board to adopt rules and regulations for the management and conduct of schools (§22-19 of the Code), to "do all things necessary to stimulate and encourage local supervisory activities and interest in the improvement of

the elementary and secondary schools" (§22-21); to prescribe the duties of the Superintendent of Public Instruction in addition to those prescribed by the General Assembly (§22-26); to invest and manage the Literary Fund (§22-101 *et seq.*); to promulgate rules and regulations for the payment of State scholarships (§22-115.33); to examine teachers and certify them as eligible for employment by local school boards (§22-202), and so on. In short, the State Board of Education acts as a supervisory and administrative arm of the State in the functioning of the educational system.

After a careful and comprehensive study of the Constitution of Virginia, the statutes, and the case authorities, this Court is of the opinion that the State Board of Education has neither power nor duty to establish, operate or maintain the public free schools in Prince Edward County or in any other county, city or town in the Commonwealth. It cannot perform its principal function of general supervision unless the schools are open and operating and it cannot apportion or expend a locality's portion of the funds appropriated by the General Assembly unless and until the local governing body provides its proportionate part of the whole amount to which the locality is entitled under the law. There is no question but that the historic method of conditional appropriations may be changed, but even then Section 136 of the Constitution limits the power of establishment of local public free schools to the local school authorities, which would still require the cooperation of local school boards.

The defendant Superintendent of Public Instruction is similarly without any power or duty to establish, operate or maintain the public free schools in any county, city or town. His office is created by Section 131 of the Constitution, which concludes with the sentence:

> "The powers and duties of the Superintendent of Public Instruction shall be prescribed by law."

The General Assembly has assigned to him the duties of formulation of such rules and regulations and provision of such assistance in his office as shall be necessary for the proper and uniform enforcement of the school laws in cooperation with the local school authorities (§ 22-25 of the Code). It provided further that he should have additional duties as prescribed by the State Board of Education (§ 22-26) and made him Secretary of the State Board of Education (§ 22-28). Examination of the pertinent statutes and regulations of the State Board reveals that, as a practical matter, the Superintendent of Public Instruction on the State level performs many of the functions of the Division Superintendent on the local level.

In the case of the Superintendent of Public Instruction the Court is unable to find, nor has its attention been directed to, any power in or duty imposed upon the Superintendent to establish, operate or maintain the public free schools in any county, city or town.

The Court is of the opinion that, with respect to the establishment, operation and maintenance of public free schools in Prince Edward County under the facts and circumstances as shown by the evidence in this case, that the County School Board of Prince Edward County and the Division Superintendent of Schools of Prince Edward County have exercised every power and performed every duty incumbent upon them under the Constitution and statutes of Virginia. The Court is of the opinion, further, that, with respect to said schools under the said facts and circumstances, the State Board of Education and the Superintendent of Public Instruction have exercised every power and performed every

duty incumbent upon them under the said Constitution and statutes.

In Paragraph Number 12 of the Amended Complaint, upon which this proceeding is based, it is alleged that the assertion has been and is being made by certain defendants herein that State Scholarship grants are not available to the parents of children resident in Prince Edward County so long as the public schools in the County remain closed. This Court has found that the assertion has been and is in fact being made as evidenced by Plaintiffs' Exhibit # 22. The question necessarily involves consideration of Section 141 of the Constitution of Virginia and the statutes enacted subsequent to the 1956 amendment thereof. Particularly pertinent are the provisions of Chapters 448 and 461, Acts of Assembly, 1960, now codified as §§22-115.29 through 22-115.35 and §§22-115.36 and 22-115.37, respectively, of the Code of Virginia.

The 1956 amendment of Section 141 was adopted after the Comptroller of the Commonwealth had questioned the validity of Item 210 of the Appropriation Act of 1954, which provided for the payment of tuition, institutional fees, room and board, etc., for the secondary or collegiate education of children of Virginia citizens killed in action or totally disabled as a result of military service during World War I and or any armed conflict subsequent to December 6, 1941. The maximum amount of $400.00 per school year per child was to be paid when approved by the Superintendent of Public Instruction. The Comptroller felt that the language used would have made the funds available while such children were attending either sectarian or nonsectarian private schools.

The Supreme Court of Appeals, in which court, the Attorney General had sought a writ of mandamus, considered

whether Section 141 of the Constitution prohibited such payments where the eligible children attended private schools. That Court held that the fact that in the administration of the Act the funds may be paid to the parents or guardians of the children and not directly to the institutions did not alter the underlying purpose and effect of the appropriations—i.e. an appropriation for the benefit of private schools. The Court suggested that if payments for tuition and other expenses of children who attend private schools be a desirable end, it should be accomplished by amending the Constitution of Virginia, since it should not be done by judicial legislation. *Almond* v. *Day,* 197 Va. 419, 426, 431.

Following this decision in November, 1955, Section 141 was amended and now reads:

> "No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and non-sectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the citi-

> zens of the several States joining in such agreement; third, that counties, cities, towns and districts may make appropriations to non-sectarian schools of manual, industrial or technical training, and also to any school or institution of learning owned or exclusively controlled by such county, city, town, or school district."

A careful reading of the Journal of the Constitutional Convention of Virginia (1956) reveals that the Convention was well aware of the fact that local governing bodies throughout the State held the financial keys to the schoolhouses in their respective localities and it was clear, even in 1956, that some of these boards of supervisors and city and town councils might well refuse to levy or appropriate the sums necessary for the participating shares of the localities which were prerequisite to the receipt of State appropriations. The General Assembly so construed the intention of the draftsmen of the Amendment, for in § 22-115.32 of the Code, the Section which fixes the amount of local scholarship grant to be added to the amount of the State scholarship, the third alternative is declared to be the total cost of operation, excluding debt service and capital outlay, per pupil in average daily attendance in the public schools of the county, city, or town providing such scholarships, as determined by the Superintendent of Public Instruction for the school year in which public schools were last operated in the locality.

The present scholarship grant statute is the third which has been enacted, both the 1956, Extra Session, and the 1959, Extra Session, statutes, which preceded it, having been repealed in turn. Section 22-115.29 of the Code declares that it is the policy of the Commonwealth to encourage the education of all of the children of Virginia; that to

afford each individual freedom of choice it is desirable and in the public interest to provide public funds for the education of children in non-sectarian private schools, in or outside, and in public schools outside, the locality where the children reside; and that local governing bodies should be authorized to levy taxes and appropriate funds for scholarships.

Section 22-115.30 describes the children eligible and entitled to the State scholarships and fixes the amounts. Section 22-115.31 authorizes local governing bodies to appropriate funds for local scholarships in such amounts as they may deem proper, not less than the minimum set by the statute, while § 22-115.32 describes the children eligible and entitled to receive local scholarships and fixes the minimum amount thereof. Section 22-115.33 directs the State Board of Education to promulgate rules and regulations for the payment of scholarships and administration of the statute. The State Board may prescribe minimum academic standards which must be met by non-sectarian private schools to permit a child attending any such school to receive a scholarship, but the Board is prohibited from regulating as to private school requirements with regard to eligibility of pupils for admission.

Should a local governing body fail to provide local scholarships as authorized by the preceding sections, it is provided in Section 22-115.34 that the State Board of Education shall direct the Superintendent of Public Education to provide for the payment of scholarships on behalf of the county, city, or town concerned. Sums so paid out will be deducted by the Comptroller from other State funds appropriated for distribution to the locality in order to reimburse the State, but no such deductions may be made from funds to which the county, city, or town may be entitled under Title 63 of the Code or for the operation of public schools.

The last section of Chapter 448 of the 1960 Act makes it a misdemeanor for anyone to seek to or to obtain or expend any scholarship funds for any purpose other than that for which they are intended (§22-115.35 of the Code). Sections 22-115.36 and 22-115.37 of the Code authorize and empower the governing bodies of counties, cities and towns to appropriate and expend local funds for educational purposes in furtherance of the elementary and secondary education of children residing in such counties, cities and towns in such amounts as may be provided by ordinance and require express reference to the Article in which the Sections appear before other statutes may be construed in limitation of the powers conferred by §22-115.36.

This Court is unable to find in either the Constitution of Virginia, with particular reference to Sections 129 and 141, or in the above-cited statutes (§§22-115.29 through 22-115.37), or in the Regulations of the State Board of Education, any prohibition, restriction or condition which would prevent the payment of State and local scholarship grants to or for the benefit of any eligible child in the Commonwealth whose parents, or those standing *in loco parentis,* desire that such child attend either a non-sectarian private school within or without the locality of which he is a resident or a public school without that locality. It is clear that the intent and plain language of Section 141 and the intent and plain language of the Scholarship Grant law is to provide the means for the education of each eligible child. If the public schools are in operation in the child's county, city, or town, he has a choice between those public schools, non-sectarian private schools throughout the State and public schools outside the county, city or town. If the public schools are not in operation in his county, city, or town, his choice is limited to non-sectarian private schools anywhere in the State or public

schools outside the locality. By the same token, if there are no non-sectarian private schools in the county, city, or town, the choice is further limited, but the funds for his education are nevertheless available from the State.

No State funds are withheld or diverted by this legislation from any public free schools. The Supreme Court of Appeals has held in *Harrison* v. *Day,* 200 Va. 439, 452, that Section 141 of the Constitution, as amended, authorizing State and local appropriations for the purpose of tuition or scholarship grants places no restriction on the manner in which this is to be done, thus leaving it to the discretion of the General Assembly. The General Assembly, in the exercise of its discretion, has given due regard to the fact that public schools in a locality might be closed and has made provision for the continued education of the children of the Commonwealth in the event such a contingency occurs. In so doing the principle of local option as to the operation of public schools within a county was again recognized.

The Court turns now to the final issue raised by the Complaint as amended and the responses thereto. In paragraph Number 14 of the Complaint as amended a question is raised as to whether the public schools operated and maintained previously in Prince Edward County may remain closed while public schools are operated and maintained in other localities in Virginia without violating some right or rights secured by the Constitution of the United States to the defendants, Leslie Francis Griffin, Sr., and Leslie Francis Griffin, Jr., James L. Carter and Betty Jean Carter, Warren A. Reid and Jacquelyn Reid. Section 1 of Amendment XIV to that Constitution reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of

> the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5 of this Amendment reads:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Court is aware of no federal statute requiring a State to provide public free schooling for its citizens, nor is the Court aware of any provision of the Fourteenth Amendment which requires a State either to operate public free schools or to provide State Scholarship grants or any other form of free public education. On the contrary, whether free public education shall be provided is strictly a matter for State determination. *James* v. *Almond,* 170 F. Supp. 331, 337.

This Court has determined above that in this case the actions, on the one hand, and the inability to act, on the other, of the plaintiffs, County School Board of Prince Edward County and the Division Superintendent of Schools of Prince Edward County, and of the defendants, State Board of Education and Superintendent of Public Instruction, do not violate either the Constitution or the statutes of Virginia and that the system of public free schooling established by the General Assembly is predicated upon the theory of home rule or local option. In other words, territorial uniformity is not a constitutional requisite. This is by no means a new feature in Virginia government, nor is it unique when that principle is applied to public education.

Local option as to the sale of beer and other alcoholic beverages within a locality is provided for by the Virginia Alcoholic Beverage Control Act, in particular by §4-45 *et seq.* of the Code. That same Act permits the governing body of each locality to adopt "Sunday" ordinances prohibiting or fixing the hours within which beer and wine may be sold on Sundays (§4-97). Whether juvenile detention facilities will be established in a particular locality is left to the option of the local governing body by §§16.1-201 and 16.1-202 of the Code, participating State funds being provided where the election is made in favor of the establishment of such facilities. In the field of hospitalization and treatment of indigent persons Chapter 15 of Title 32 of the Code provides for State contributions where a county or city elects to participate in the program established by the General Assembly.

The Supreme Court of Appeals of Virginia has recognized consistently the local option or home rule aspect of the system established pursuant to Article IX of the Constitution of Virginia. This Court will not belabor the point further other than to cite the *Griffin* case found reported in 203 Va. 321 and *Harrison* v. *Day,* 200 Va. 439. A study of many federal cases is supportive of the view that the federal courts are of the opinion that a State has the power to pass a local option law without violating constitutional rights. See *Ohio ex rel Lloyd* v. *Dollison,* 194 U. S. 445.

It appears that in each instance the question of ultimate control should be dispositive of the issues presented by local option systems whether they be concerned with education, hospitalization, recreation or any other public facility. If the ultimate control—the final determination of whether a service or privilege is to be furnished to all citizens alike—lies with the State, then to refuse such service or privilege

to any of its citizens, without proper classification, may create an inequality of benefits. But where the people of a locality have the power of self-determination, the situation is different.

The Jacksonville, Florida, cases involving municipal swimming pools and a municipal golf course show that the federal courts recognize and give effect to the local option system. *Hampton* v. *City of Jacksonville,* 304 F. (2d) 319, and *Hampton* v. *City of Jacksonville,* 304 F. (2d) 320. Similarly, where Harris County, Texas, owned and operated a public beach and Greensboro, North Carolina, owned and operated a public swimming pool, the closing of the beach and of the pool to all residents of the localities involved were held not to constitute any unconstitutional discrimination. *Willie* v. *Harris County,* 202 F. Supp. 549 and *Tonkins* v. *City of Greensboro,* 162 F. Supp. 549, aff. 276 F. (2d) 890.

Reference could be made to numerous other decisions of the federal courts confirming this view, but such reference would only prolong this already lengthy opinion. The public free school system of Virginia and her coordinate provision for State and local Scholarship grants are not deemed by this Court to constitute a scheme for the evasion of the decision of the United States Supreme Court in *Brown* v. *Board of Education of Topeka,* 347 U. S. 483. Her adoption of the local option concept long antedates that decision. Further, in many localities other than Prince Edward County that decision is being carried out by the local school authorities and by the local governing bodies. That these other localities have so chosen to act does not make the inaction of the local governing body of Prince Edward County invalid, nor is the converse true.

In sum, the Court is of the opinion that none of the actions

of the plaintiffs, County School Board of Prince Edward County and Division Superintendent of Schools, and of the defendants, State Board of Education and Superintendent of Public Instruction, under the facts and circumstances of this case, in connection with the "non-operation" of public schools in Prince Edward County, have the effect of violating any rights of the defendants Leslie Francis Griffin, Sr., and Leslie Francis Griffin, Jr., James L. Carter and Betty Jean Carter, and Warren A. Reid and Jacquelyn Reid, under the Constitution and laws of Virginia or under the Constitution of the United States, although public free schools are in operation in other localities in the Commonwealth and, therefore, the failure to operate and maintain such schools in Prince Edward County is not violative of any right secured to the six individual defendants next above named.

In view of the length of this letter opinion, necessitated by the many varied issues presented in this case, the Court will not recapitulate its findings here, but rather will fix the date and hour of Wednesday, April 10, 1963, at two o'clock p. m. in chambers at the City Hall, Richmond, for the receipt and consideration of a sketch or sketches for a decree embodying the findings of the Court. At that time the question of a reasonable fee for the guardian ad litem for the infant defendants will be determined. It may be that in the course of this letter the Court has omitted inadvertently reference to some aspect of the case which one or more of the parties is entitled to have considered. Counsel will please be prepared to bring any such matter to the attention of the Court.

In the event the April 10th, two o'clock p. m., date and hour conflict with the schedule of counsel for any of the parties, it is requested that the Court and other counsel be so informed and the Court will meet with counsel on Satur-

day, April 13, 1963, at ten o'clock a. m., in chambers at the City Hall. The Court wishes to express its appreciation for the many excellent briefs and arguments of counsel for the parties, the guardian ad litem, and of *amicus curiae*.

Very truly yours,

(s) John Wingo Knowles
John Wingo Knowles
Judge

JWK:ft