Volume 66 | Issue 4 Article 6

June 1964

Constitutional Law--State Action Under Hill-Burton Act

Charles M. Love III
West Virginia University College of Law

CASE COMMENTS

Constitutional Law—State Action Under Hill-Burton Act

Suit by Negro doctors, dentists, and patients, for themselves and other Negro citizens, against Moses H. Cone Memorial Hospital and Wesley Long Community Hospital, private non-profit corporations, for a declaratory judgment and injunctive relief. *Ds* received funds from the state and federal governments under the Hill-Burton Act, a joint federal and state program for allocating aid to erect new and modernize existing hospital facilities. *Ps* alleged that state acceptance and disbursement of these funds in hospital building and improvement programs constituted state action; and, when Ds accepted these funds, they came within the purview of the fifth and fourteenth amendment prohibitions against racial discrimination. *Ps* sought an injunction to restrain *Ds* from continuing to deny *Ps* the use of staff facilities and for permission to enter as patients. *Ps* also sought a judgment declaring unconstitutional a provision of the Hill-Burton Act authorizing construction of private facilities with public funds on the basis of separate but equal accommodations. The United States intervened on behalf of *Ps*. The District Court dismissed the suit for lack of jurisdiction as no state action was involved. *Held,* reversed and remanded. Private hospitals participating in the Hill-Burton program are sufficiently involved with state and federal action to be within the fifth and fourteenth amendment prohibitions. The provision within the Act for separate but equal facilities is unconstitutional. Two of the five judges dissented, taking the position that Hill-Burton funds paid to private hospitals were a grant in aid, or a gift, and did not constitute the degree of state or federal participation necessary to come within the fifth or fourteenth amendments. *Simpkins v. Moses H. Cone Memorial Hosp.,* 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 84 Sup. Ct. 793 (1964).

The funds allocated by the Hill-Burton Act are made available to all states that qualify within the terms of the Act. States wishing to take advantage of the funds must create an agency to inventory existing public and private hospital facilities, determine their needs, and develop construction priorities on federal standards. The Act also provides that a state must enact legislation requiring participating hospitals to comply with a minimum standard of maintenance and operation. The standard is established by each state. 42 U.S.C.

§ 291 (a)(7) (1957). The state plans are then submitted to the Surgeon General of the United States for approval. If approved, the funds are distributed through the state agency. If a participating hospital be sold within twenty years of the completion of construction, to one not approved by the state agency, the federal government may recoup an amount proportionate to its share of the hospital's grant. 42 U.S.C. § 291(h)(e) (1957).

The right of an individual or private organization to discriminate has been consistently upheld. Only if the state, to some significant extent, has become involved in the discrimination has state action been found. *Peterson v. City of Greenville,* 373 U.S. 249 (1963); *Civil Rights Cases,* 109 U.S. 3 (1883). A municipal ordinance which prohibited integration of restaurant facilities was held to be state action. *Peterson v. City of Greenville, supra.* Failure of a franchise holder to operate an airport restaurant, owned by the city, on an integrated basis was held state action. *Adams v. City of New Orleans,* 321 F.2d 493 (5th Cir. 1963). Enforcement of a covenant restrictive as to race was held state action. *Shelly v. Kraemer,* 334 U.S. 1 (1948). Discrimination in a salary of a public school teacher on the basis of race was held state action. *Cook v. Davis,* 178 F.2d 595 (5th Cir. 1949).

On the other hand, a case where surplus public property was leased to a private individual where there was no reservation of control was held not to be state action. *Derrington v. Plummer,* 240 F.2d 922 (5th Cir. 1956). Issuance of a license by a state racing commission was held not to constitute state action. *Watkins v. Oaklawn Jockey Club,* 86 F. Supp. 1006 (W.D. Ark. 1949). A corporation organized under Redevelopment Companies Law, which refused to consider Negroes as tenants, was held not to constitute state action. *Dorsey v. Stuyvesant Power Corp.,* 229 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied* 339 U.S. 981 (1950). A private school corporation, receiving public funds and leasing public property, which refused a Negro admittance due to his race, was held not the subject of state action. *Norris v. Baltimore,* 78 F. Supp. 451 (Md. 1948). A public hospital, which receives public funds for the care of certified indigent patients was held not to constitute sufficient state action to proscribe racial discrimination. *Eaton v. Board of Mgrs. of James Walker Memorial Hosp.,* 261 F.2d 521 (4th Cir. 1958), *cert. denied* 359 U.S. 984 (1958).

"Equal protection of the laws' sets a goal not attainable by the invention and application of a precise formula." *Kotch v. Pilot Comm'rs.*, 330 U.S. 522, 556 (1947). The term state action is not susceptible to definite explanation, but rather becomes a question to be determined by the court under the circumstances in each case. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961).

The majority opinion in the principal case drew an analogy between it and *Burton v. Wilmington Parking Authority, supra.* In the *Burton* case it was held that a restaurant, located on public property adjacent to a public parking lot, but leased to a private individual, was operated as an integral part of a public service and thus was the subject of state action. Defendant hospitals in the principal case were held to be operated as integral parts of a state cooperative for public health. The facts that large amounts of public funds were expended and that the Act deals with a "concern touching health and life itself" were persuasive upon the Court.

The dissent found no federal action as the Hill-Burton funds were intended to be a grant or gift because no federal officer or employee of the federal government had any right of supervision or control over the participating hospitals. 42 U.S.C. § 291 (m) (1957). An opinion of the Attorney General of the State, and an affidavit of the Executive Secretary of the State Commission created by the State in compliance with the Act wherein power to regulate or control the hospitals was denied, supported the dissent's contention of no state action.

As sufficient state action was found, the Court was able to consider the constitutionality of 42 U.S.C. § 291 (e)(f) (1957), which holds that a hospital participating in Hill-Burton ". . . . will be made available to all persons . . . without discrimination . . . but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision . . . [for] services of like quality for each group. . . ." See also, 42 C.F.R. § 53.112 (1960).

The separate but equal phraseology was placed within the Act to encourage private hospital participation in the program. Subse-

quent to the enactment of Hill-Burton, *Brown v. Board of Educ.*, 347 U.S. 493 (1954), held segregation of public facilities (in the principal case private facilities so imbued with state action as to make them public) was a denial of equal protection of the laws.

At present in West Virginia there are fifty hospitals that have participated in the Hill-Burton program. Of these fifty, twenty-six are private hospitals which will be affected by this decision. Their position as private hospitals seems in jeopardy as avoidance of this decision by repayment of funds or any other means appears doubtful.

This far-reaching decision opens the door of state action much wider. The question now arises each time federal or state funds, or both, are accepted by a private institution as to whether it has become so imbued with state action as to make it public?

Charles M. Love III

Criminal Law—Declaration of Mistrial Because of Absence of Defendant

D sought a writ of prohibition to bar his retrial on a felony indictment. With *D* absent, *D's* attorney had been informed in chambers of the court's intention of declaring a mistrial for improper admission of evidence. *D's* attorney resisted, demanding the evidence be stricken, and with the evidence stricken, *D* be granted a directed verdict. This position was argued with *D* absent. *Held,* writ denied. Mistrial could not be declared for improper admission of evidence, but it was proper when a part of the trial had occurred with *D* absent. *State ex rel. Dandy v. Thompson,* 134 S.E.2d 730 (W. Va. 1964).

The double jeopardy rule does not bar a retrial when the first trial was terminated by a fortuitous occurrence, *State v. Shelton,* 116 W. Va. 75, 178 S.E. 633 (1935). Such fortuity was referred to as a "manifest necessity" in W. Va. Code ch. 62, art. 3, § 7 (Michie 1961). Wide discretion is vested in trial courts to declare mistrials under such circumstances, but appellate courts, while reluctant to lay down general rules, have cautioned the trial courts that they deal with a "delicate and important power." *Gori v. United States,* 367 U.S. 364 (1961); *State v. Little,* 120 W. Va. 213, 197 S.E. 626 (1938).