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Criminal Law--Declaration of Mistrial Because of Absence of Defendant

John Ralph Lukens
West Virginia University College of Law

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

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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).

A point of particular interest in the principal case is the statement by the court that the declaration of a mistrial is warranted where the particular circumstances which arose were such that neither the court nor counsel had control over them. It was the fact that the trial court did have control over the evidence admitted which appeared to be controlling in the court's decision that the erroneous admission of evidence was not, of itself, a ground for declaring a mistrial. On the other hand, *D's* absence from the trial judge's chambers was held to constitute a manifest necessity, even though *D's* whereabouts would appear to have been within the control of the court. A possible solvent to this seeming inconsistency is that the power to correct the error which resulted from the erroneous admission of evidence did lay within the control of the court, while the court was powerless to amend for the fact that *D* was absent from a part of his trial, other than to grant a mistrial.

The principles upon which the court rejected a finding of manifest necessity on the basis of an error in evidence appear to be well accepted. The circumstance upon which it is sought to declare a mistrial must be forceful and be in the nature of an emergency. *State v. Little, supra.* It must be shown, generally, that the cause was not within the control of the court or counsel and could not have been prevented by the exercise of due diligence. 22 C.J.S. *Criminal Law* § 258 (1961).

A discussion of manifest necessity would hardly seem necessary with regard to the absence of the accused, because of the "inalienable" right of the accused to be present at all times during his trial. *State v. Vance,* 124 S.E.2d 252 (W. Va. 1962). The court cited, and obviously could have relied upon W. VA. CODE ch. 62, art. 3, § 2 (Michie 1961), which provides that one indicted for felony shall be personally present during the trial.

It is difficult to see how the requirement of *D's* presence would be any less within the trial court's control than the flow of evidence. As is suggested above, it may be that the court's affirming the declaration of the mistrial turned not so much on that it constituted a manifest necessity, but rather on the serious consequences which have often resulted from the absence of the accused during his trial. 65 W. VA. L. REV. 50 (1962).

John Ralph Lukens