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CIVIL RIGHTS—DUE PROCESS—ACTION FOR CIVIL CONSPIRACY BASED ON SECTION 1983—In an action for damages based on sections 1983 and 1985 of the Civil Rights Act, plaintiff alleged that a county health officer and his deputy, pursuant to a conspiracy, forcibly took plaintiff to a mental hospital and confined him there for a period of two months in willful violation of a state court order requiring plaintiff to be brought before the court for a sanity hearing. Plaintiff also alleged a false return of citation to the court by the officers and an intentional suppression of facts by the officers and the examining physician regarding plaintiff's illegal detention. Plaintiff contended that these allegations stated a cause of action for civil conspiracy to obstruct the due course of justice in violation of section 1985 (2), to deny plaintiff equal protection of the laws in violation of section 1985 (3), and to deprive plaintiff under color of state law of rights, privileges, and immunities secured by the Constitution and laws in violation of section 1983. The district court dismissed the action for failure to state a cause of action. On appeal, *held*, reversed.¹ Section 1983 will support a cause of action against all the members of a conspiracy for acts in furtherance of the conspiracy and which under color of state law deprive the plaintiff of due process of law. *Hoffman v. Halden*, (9th Cir. 1959) 268 F. (2d) 280.

¹ The dismissal of the action as against the superintendent of the state mental hospital, however, was affirmed because he enjoyed the immunity of a jailor in detaining the plaintiff and because his authority to release the plaintiff was a discretionary function for which he also enjoyed immunity from civil liability. Principal case at 300. See, generally, *Cooper v. O'Connor*, (D.C. Cir. 1938) 99 F. (2d) 135; *Francis v. Lyman*, (1st Cir. 1954) 216 F. (2d) 583.

Sections 1983² and 1985 (3)³ of the Civil Rights Act fit into the scheme of federal protection of civil rights as the general provisions for civil relief. Section 1983, commonly called the state action section, gives a cause of action in law or equity to any person within the jurisdiction of the United States for deprivation, under color of state law, of any rights, privileges, or immunities secured by the Federal Constitution or laws. Section 1985 (3), commonly called the conspiracy section, gives a cause of action in law for injury caused by an act done in furtherance of a conspiracy to deprive any person or class of persons of equal protection of the laws or of equal privileges and immunities under the laws. The two sections remain in substantially the same form as they appeared in 1871 when passed by the 42nd Congress as part of the Civil War Reconstruction legislation.⁴ Shortly after their enactment, the two sections entered into an extended period of dormancy. Any incentive to rely on these sections had apparently suffered from the series of Supreme Court decisions limiting the scope of the Fourteenth Amendment, from which the sections draw their real vitality. The late 1930's marked the end of the dormancy period and the beginning of a continuing increase in litigation based on the two sections.⁵ But, at present, the usefulness of the conspiracy section is questionable. Its criminal counterpart in the Act of 1871 was declared unconstitutional in *United States v. Harris*⁶

² 42 U.S.C. (1958) §1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

³ 42 U.S.C. (1958) §1985 (3): "If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . In any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by each injury or deprivation, against any one or more of the conspirators." Section 1985 (1), relating to conspiracies to prevent an officer from performing his duties, and §1985 (2), relating to conspiracies to obstruct justice, will not be discussed because of their more limited scope. Section 1986 is the same as §1985 (3) except that §1986 applies to an action for neglect to prevent.

⁴ 17 Stat. 13 (1871). The words "and laws" were added to the language of §1983 in Rev. Stat. §1979 for the purpose of extending the purview of §1983 to rights and privileges created by congressional act. See note, 66 HARV. L. REV. 1285 (1953).

⁵ For a full development of the history of the two sections, see Gressman, "The Unhappy History of Civil Rights Legislation," 50 MICH. L. REV. 1323 (1952); Poole, "Statutory Remedies for the Protection of Civil Rights," 32 ORE. L. REV. 210 (1953); note, 66 HARV. L. REV. 1285 (1953); comment, 26 IND. L. J. 361 (1951); CARR, FEDERAL PROTECTION OF CIVIL RIGHTS (1947); KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS (1947).

⁶ 106 U.S. 629 (1882).

because it did not contain the requisite state action element necessary for violation of equal protection under the Fourteenth Amendment, and section 1985 (3) is deficient in the same respect.⁷ Section 1983, although not in peril constitutionally, is the subject of some discord among the lower federal courts with regard to its proper scope. The discord stems from two different approaches to construction of the section. A number of courts have limited section 1983 with the language of section 1985 (3), treating the two sections as *in pari materia*. Other courts have construed section 1983 on its own terms, treating the two sections as having significance independent of each other. In the principal case the court was presented with a problem of determining whether section 1983 would support an action for civil conspiracy. At least one court has taken the "*in pari materia*" approach to this particular question, holding that because section 1985 (3) expressly mentions civil conspiracy while section 1983 does not, there cannot be an action for civil conspiracy based on section 1983.⁸ The court in the principal case rejected this approach and directed its attention to the language of section 1983 and the meaning of "civil conspiracy," concluding that the civil injury which results from action taken pursuant to a civil conspiracy is the cause of action and that those who cooperate to produce the injury are all equally liable in an action for civil conspiracy in the same manner as joint tortfeasors.⁹ The court found nothing in the language of section 1983 to preclude an action for civil conspiracy when the resulting civil injury is clearly within the purview of section 1983.¹⁰ The court also discussed the issue

⁷ A more recent indication of the possible unconstitutionality of §1985 (3) is found in the majority opinion of Justice Jackson in *Collins v. Hardyman*, 341 U.S. 651 at 659 (1951) where Justice Jackson stated, "It is apparent that, if this complaint meets the requirements of this Act [section 1985 (3)], it raises constitutional problems of the first magnitude that, in the light of history, are not without difficulty. These would include issues as to congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the question of separability of the Act in its application to those two classes of rights." Since the Court found that the complaint did not meet the requirements of §1985 (3), the constitutional issue was not reached.

⁸ The Court of Appeals for the Seventh Circuit took this position in *Eaton v. Bibb*, (7th Cir. 1954) 217 F. (2d) 446, cert. den. 350 U.S. 915 (1955), and in *Jennings v. Nester*, (7th Cir. 1954) 217 F. (2d) 153.

⁹ Principal case at 293-296.

¹⁰ *Ibid.* Although there is no authority in accord, several cases holding aiders and abettors liable under §1983 lend support. *Baldwin v. Morgan*, (5th Cir. 1958) 251 F. (2d) 780; *Valle v. Stengel*, (3d Cir. 1949) 176 F. (2d) 697. See also *Lewis v. Brautigam*, (5th Cir. 1955) 227 F. (2d) 124; *McShane v. Moldovan*, (6th Cir. 1949) 172 F. (2d) 1016; *Picking v. Pennsylvania R. Co.*, (3d Cir. 1945) 151 F. (2d) 240. The differences between the civil meanings of "aider and abettor," "joint tortfeasor," and "conspirator" is more a matter of semantics than of substance. The same principle of vicarious liability underlies all three terms, i.e., all those who cooperate to produce a tortious injury should be held equally liable. See PROSSER, *TORTS*, 2d ed., 234 (1955). Although the term "joint tortfeasor" in the procedural setting now often includes defendants who, acting independently, contributed to the civil injury, the original civil concept of "aiding and abetting," "joint tort," and "conspiracy" required concerted action. It should also be noted that the civil concept of conspiracy is quite different from the criminal concept.

whether section 1983 can support a cause of action for denial of equal protection. Although this discussion was *obiter dictum*,¹¹ it serves to illustrate further the general approach used by the court in the construction of section 1983. On this issue also there is a line of cases following the "*in pari materia*" approach. These cases reason that section 1983 does not give a cause of action for denial of equal protection because such a cause of action is expressly provided under section 1985 (3).¹² The court in the principal case, however, took the position that the broad language of section 1983 encompasses all of section (1) of the Fourteenth Amendment.¹³ This position is supported by the majority of cases.¹⁴ In support of the general approach which treats sections 1983 and 1985 (3) independently, it should be recognized that such treatment is in accordance with the separate and distinct purposes which the sections were originally intended to have. Section 1985 (3), known at the time of its enactment as the Ku Klux Klan Act, was directed against discriminatory practices by groups of private persons.¹⁵ This historic purpose is evidenced by the language of the section which requires, without mention of color of state law, a conspiracy of two or more persons and a denial of equal protection or equal privileges or immunities. Section 1983, on the other hand, was intended to have a much broader scope. Its original purpose was to provide civil relief for violation under color of state law of any and all civil rights secured by the Constitution against invasion by state authority.¹⁶ This purpose is evidenced by the language of section 1983 which broadly refers to deprivation under color of state law of "any rights, privileges, and immunities secured by the Constitution or laws."¹⁷ The existence of these separate and distinct purposes

While under the criminal concept of conspiracy the conspiracy itself may be a crime without an overt act, under the civil concept the cause of action is the tortious injury and without an overt act causing such injury there is no cause of action. *James v. Evans*, (3d Cir. 1906) 149 F. 136; principal case at 295. See also *Collins v. Hardyman*, note 7 supra, at 659. In view of these considerations it would not seem proper to deny an action for civil conspiracy based on section 1983 because the plaintiff worded his complaint in terms of "conspiracy" instead of the all inclusive term "joint tort."

¹¹ The court held that the complaint stated a cause of action for deprivation of due process of law. Principal case at 298.

¹² *Eaton v. Bibb*, note 8 supra; *Jennings v. Nester*, note 8 supra; *McShane v. Moldovan*, note 10 supra; *Bottonne v. Lindsley*, (10th Cir. 1948) 170 F. (2d) 705.

¹³ Principal case at 294.

¹⁴ E.g., *Agnew v. City of Compton*, (9th Cir. 1956) 239 F. (2d) 226; *Lewis v. Brautigam*, note 10 supra; *Morris v. Williams*, (8th Cir. 1945) 149 F. (2d) 703. The leading authority is Justice Stone's concurring opinion in *Hague v. CIO*, 307 U.S. 496 (1939) in which he said at 526, "It will be observed that the cause of action, given by the section in its original as well as its final form, extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution. It thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment."

¹⁵ See the authorities cited in note 5 supra.

¹⁶ *Ibid.* See also note, 7 *BAYLOR L. REV.* 224 (1955).

¹⁷ See the excerpt in note 14 supra from Justice Stone's opinion in *Hague v. CIO*.

clearly refutes any suggestion that section 1983 should be unnecessarily limited by being read *in pari materia* with section 1985 (3).

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