

5/18/62

First Supplement to Memorandum No. 23(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Mob and Riot Damage)

Attached to this memorandum is a tentative recommendation and statute relating to mob and riot damage.

The Commission requested the staff to define "mob or riot," which now appears in Government Code Section 50140. You will note that the definitions in the draft statute require at least five participants. This figure was arrived at after reviewing the riot damage statutes of England and the other 49 states.

The number of persons necessary to constitute a mob or riot varies considerably from jurisdiction to jurisdiction. At common law a riot consisted of three or more persons.¹ This common law standard was applied under the English Riot Act of 1714² for the purpose of holding local authorities liable for riot damage.³ In the United States various statutes define riots as having anywhere from a minimum of two⁴ to a minimum of 30⁵ participants. The statutes defining riots to consist of two participants are all penal statutes.⁶ In many of the riot damage statutes, the terms are left undefined, thus leaving to conjecture whether the penal definition or the common law definition is to be used.⁷ Where the required number of rioters is mentioned in the various damage statutes, five participants are frequently required,⁸ six are necessary under one statute,⁹ and 12 participants is a requirement that is commonly used.

The requirement of 12 probably comes from the English Riot Act of 1714, but the number was used there as the requisite number to constitute a capital offense if the rioters failed to disperse within one hour after the Riot Act was read.¹¹ As pointed out above, the English law required but three participants in a riot, and the smaller number was all that was needed for the absolute liability for property damage under the Riot Act.¹²

The English Riot Act and most similar United States statutes impose liability only for property damage. About 8 states have also accepted liability for personal injuries, but in doing so they have either abandoned absolute liability, have limited damages, or have increased the requisite number to constitute a mob or riot. For example, in Connecticut¹³ and Kentucky¹⁴ local entities are liable for personal injuries or property damage caused by 3-member riot, but liability is based upon failure to exercise reasonable diligence in suppressing the riot. Kansas¹⁵ has imposed absolute liability for both personal and property damage upon local entities since 1858 (when it was still "bloody Kansas"). After considerable experience with 3-member riots, the Legislature raised the requisite number to 5 in 1923.¹⁶ Illinois imposes absolute liability for personal and property damage caused by mobs, but requires 5 members in the mob and limits the damages to \$10,000.¹⁷ New Jersey¹⁸ and West Virginia,¹⁹ which also impose absolute liability for personal injuries caused by mob violence, require 5 participants and limit damages to \$5,000. Ohio,²⁰ somewhat peculiarly, provides absolute liability for personal injuries only. The Ohio statute imposes

liability for no more than \$5,000 for personal injuries inflicted by lynch mobs. In South Carolina, counties are liable for death as the result of a lynching to the extent of \$2,000.²¹ South Carolina also imposes absolute liability upon counties for any damages to person or property suffered by a person who has been "hindered, prevented or obstructed in the exercise of" his constitutional or statutory rights and privileges or who has been injured "because of his exercise of the same," whether such damages are inflicted by a mob or by an individual.²²

Drawing upon the experience of these states, the staff recommends that five be the requisite number to constitute a mob or riot for the purpose of imposing absolute liability.

In surveying these statutes, the staff discovered that the common law definition of riot is not adequate to cover all situations. The Kansas Supreme Court has pointed out some of the difficulties in Lee v. City of Kansas City:²³

What is a mob?

We dealt with that question in Maus v. City of Salina, 154 Kan. 38, 114 P.2d 808. There we said:

In interpreting the word "mob" as used in the mob statute, we need to consider not only the dictionary and textbook definitions of the term, but also the theory and purpose that lie back of such enactments. In the Koska case it was said that the word is a vernacular rather than a strictly legal term and that it is reasonable to conclude that the legislature of 1858 used the word in its generally accepted meaning. What, then, is the popular understanding of the meaning of the word? It is perhaps impossible to fix exactly, by definition, the "four corners" of the term, but its substantial content is well enough understood. When we think of a mob we instinctively visualize an assemblage of persons excited or incited to violent action, having thrown restraint to the winds, reckless and headlong in their unlawful designs, determined to brook no opposition to their common purpose, and ordinarily characterized by noisy and riotous disturbance of the public peace and order. Or, we think of

a frenzied group, defiant of the orderly processes of punishment, moving in concerted action to wrest some alleged culprit from lawful custody and wreak vengeance upon him. Perhaps not every characteristic above enumerated is present in every particular instance, but such is the general substance of the term as popularly understood.

Illinois has recognized the problem by defining both "mob" and "riot."²⁴ The staff has adopted the same approach in the draft statute. The definition of mob in the draft statute follows rather closely similar provisions appearing in the statutes of Illinois,²⁵ New Jersey,²⁶ Ohio²⁷ and West Virginia.²⁸ For comparison, several of these are attached on yellow paper as Exhibit I. The context of these definitions in the statutes of these states indicates that the "mob" definition is used in implementation of a state policy against lynch mobs. The "riot" definition follows fairly closely the traditional common law definition.²⁹

In several states, the mob and riot damage statutes provide for a right over against the participants in the mob or riot.³⁰ In Missouri, the local entity is also entitled to recover whatever damages have been paid from the rioters plus an additional 10%.³¹ In the staff's draft statute, a provision creating a cause of action against the rioters has been added; but instead of requiring the rioters to reimburse the entity for the damages plus a fixed percentage, the staff's draft requires the rioters to reimburse the entity for the damages paid plus expenses.

The remaining revisions in the existing mob damage statute are either self-explanatory or are explained in the tentative recommendation.

Respectfully submitted,

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1. 10 Halsbury's Laws of England (3d ed.) 587.
2. Stat. 1 Geo. I, st. 2, ch. 5 (1714).
3. Pritchit v. Waldron, 5 Term Rep. 14, 101 Eng. Rep. 8 (1792).
4. For example, Cal. Penal C. § 404, Illinois Smith-Hurd Ann. St. Ch. 38 § 504.
5. For example, New Jersey St. Ann. § 2A:126-4 (30 unarmed persons or 12 armed), Revised Stat. of Maine (1954) C. 136 § 9 (30 unarmed persons or 12 armed).
6. Such as the California and Illinois statutes cited in note 4, supra.
7. Some states have rejected the penal definition for damage purposes. Koska v. Kansas City, 123 Kan. 362, 255 Pac. 57 (1923). Others hold that it is applicable. Feinstein v. City of N. Y., 157 Misc. 157, 283 N.Y.S. 335 (1935).

The Kansas case indicates that the applicable rule may depend upon the order in which the statutes were enacted.

8. For example, Illinois Smith-Hurd Ann. St. Ch. 38 § 512, New Jersey St. Ann. §§ 2A:48-8, 2A:126-1.
9. Gen. L. of Rhode Is. (1956) § 45-15-13.
10. For example, Illinois Smith-Hurd Ann. St. Ch. 38 § 518, Ann. Laws of Mass. C. 269, §§ 1-8.
11. If you have never had the privilege of "reading the Riot Act," you may do so now (at least that portion of it that was required to be read to disperse rioters):

Our sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations or to their lawful business upon the pains contained in the Act made in the first year of King George for preventing tumults and riotous assemblies. God save the King.

In *Rex v. Child*, 4 C. & P. 442, 172 Eng. Rep. 774 (1830), the magistrate forgot to read "God save the King" and, as a result, the court directed an acquittal.

New Jersey has a similar statement to be read in case of riot that ends with "God save the state". New Jersey St. Ann. § 2A:126-4.

12. *Fritchit v. Waldron*, 5 Term Rep. 14, 101 Eng. Rep. 8 (1792).
13. Conn. Gen. Stat. Ann. § 7-108.
14. Kentucky Rev. Stat. § 411.100.
15. Gen. Stat. of Kansas § 12-201.
16. The history of the Kansas legislation and its treatment by the courts is contained in *Koska v. Kansas City*, 123 Kan. 362, 255 Pac. 57 (1923). At the time of the decision in *Maus v. City of Salina*, 154 Kan. 38, 114 P.2d 808 (1941), some 17 appeals had been taken in cases involving the riot damage statute, and eleven of these were concerned with the definition of "mob" or "riot". Cases are still arising in regard to the definitional problem. *Lee v. City of Kansas City*, 175 Kan. 729, 267 P.2d 931 (1954).
17. Illinois Smith-Hurd Ann. St. Ch. 38 §§ 512, 515. Illinois also imposes liability for property damage caused by riots, as distinguished from mobs, and requires 12 persons to participate in the riot before liability exists. Smith-Hurd Ann. St. Ch. 38 § 518.
18. New Jersey St. Ann. §§ 2A:48-8, 2A:48-9.
19. W. Va. Code of 1961 § 6038.
20. Page's Ohio Rev. Code Ann. §§ 3761.01-3761.03.
21. So. Car. Code of Laws (1952) § 10-1961.
22. So. Car. Code of Laws (1952) § 16-106.
23. 175 Kan. 729, 731-2, 267 P.2d 931, 933 (1954).
24. Illinois Smith-Hurd Ann. St. Ch. 38 §§ 504 (riot), 512 (mob).
25. Illinois Smith-Hurd Ann. St. Ch. 38 § 512.
26. New Jersey St. Ann. § 2A:126-1.
27. Page's Ohio Rev. Code Ann. § 3761.01.
28. W. Va. Code of 1961 § 6038.
29. See, 10 Halsbury's Laws of England (3d ed.) 587. Compare Ariz. Rev. Stat. § 13-631 and Cal. Penal Code § 404.
30. See, e.g., New Jersey St. Ann. § 2A:48-7, So. Car. Code of Laws (1952) § 16-111.
31. Missouri Rev. Stat. (1959) § 537.150.

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EXHIBIT I

Common law riot (10 Halsbury's Laws of England 587):

A riot is a tumultuous disturbance of the peace by three or more persons, who assemble together, without lawful authority, with an intent mutually to assist one another, by force if necessary, against any who shall oppose them in the execution of a common purpose and who actually execute, or begin to execute, that purpose in a violent manner displayed not merely by demolishing property but in such a manner as to alarm at least one person of reasonable firmness and courage.

It is immaterial whether the purpose intended is itself lawful or unlawful or whether the Riot Act has been read or not.

Ill. Smith-Hurd Ann. St. Ch. 38 § 512:

That any collection of individuals, five or more in number, assembled for the unlawful purpose of offering violence to the person or property of any one supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional powers or regulative powers over any person by violence, and without lawful authority, shall be regarded and designated as a "mob."

New Jersey St. Ann. § 2A:126-1:

A mob is a collection of 5 or more individuals, assembled for the unlawful purpose of offering violence to the person or property of one supposed to have violated the law, or for the purpose of exercising correctional or regulative powers over a person by violence, and without lawful authority.

Page's Ohio Rev. Code § 3761.01(A):

"Mob" means a collection of people assembled for an unlawful purpose and intending to do damage or injury to anyone, or pretending to exercise correctional power over other persons by violence and without authority of law.

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

Liability for Damages from Mobs and Riots

Sections 50140 through 50145 of the Government Code impose absolute liability upon cities and counties for property damage caused by mobs or riots within their boundaries. Similar laws exist in many states. These laws are patterned after the English Riot Act of 1714 which, together with its successor statutes, have imposed liability on local police districts for mob and riot damage for almost 250 years. Such statutes reflect an underlying policy that local community government should be absolutely responsible for the maintenance of peace and order, and hence should be liable in damages for failure to do so effectively. Imposition of absolute liability for damages caused by mobs or riots provides local policing agencies with the strongest of incentives to prevent the deterioration of law enforcement to the point where mob violence is apt to occur.

The Commission has concluded that the purpose underlying these statutes is sound, but the California statute should be revised to eliminate several defects and anachronisms. Accordingly, the Commission recommends:

1. Liability for mob or riot damage should be imposed upon all local entities that provide police protection service. The existing

law applies only to cities and counties. Yet community services districts and police protection districts may also provide police protection service. Under the existing law, if riot damage occurred in such a district, the county would be liable even though powerless to suppress the mob or riot.

Inasmuch as the chapter of the Government Code in which the present California statute appears deals only with cities and counties, a new statute should be enacted to be placed in a portion of the Government Code that deals with the liability of public entities generally.

2. Local policing agencies should be liable for death or personal injuries as well as for property damage caused by mobs or riots. The rationale that supports recovery for property damage caused by mob violence applies with equal vigor to death or personal injuries resulting from civil disorders. Several states have extended their mob or riot damage statutes to provide compensation for personal injuries in recognition that it is as important to provide persons with effective police protection as it is to protect property. Such statutes implement the public policy against lynching and mob intimidation of minority groups, for they encourage local policing agencies to be diligent in preventing such occurrences.

3. The terms "mob" and "riot" should be defined. Neither "mob" nor "riot" is now defined in the statute imposing liability for mob or riot damage (Government Code Sections 50140 through 50145), although there is a definition of "riot" in Section 404 of the Penal Code. It is uncertain whether the Penal Code definition is applicable to Sections 50140 through 50145, or whether the "riot" referred to in Sections

50140 through 50145 is a common law riot. Under the Penal Code definition a riot is any use of force or violence, disturbing the peace, by two or more persons acting together without authority of law. A common law riot is a tumultuous disturbance of the peace by three or more persons who, without lawful authority, seek to accomplish a common purpose, using force if necessary, in such a manner as to alarm and frighten.

The Penal Code definition is too broad for use in the mob or riot damage statute, for the Penal Code definition would classify virtually any violent crime committed by more than one person as a riot. On the other hand, the common law definition does not reach the mob violence committed without great tumult, such as lynching, that sometimes occurs when there is a serious breakdown in law enforcement.

The recommended legislation contains definitions of "mob" and "riot" that are similar to definitions that appear in the statutes of several other states. These definitions raise the requisite number of participants in the mob or riot to five. If only two or three persons take part in the disturbance, law enforcement has not failed in such a degree that liability should be imposed.

4. The provision of the existing law that a person who negligently aids or abets a riot may not recover damages should be broadened to bar compensation for damage to anyone who participated in, aided or abetted the mob or riot.

5. The statute should expressly provide that a public entity held liable under its terms has a right to recover any amounts paid as damages under the statute from any person who was a party to the mob or riot. In

addition, the entity should be able to recover any reasonable expenses it incurred in defending against liability under the statute, including reasonable attorney's fees.

6. Provisions found in the existing law governing venue and the time within which such actions may be brought should be repealed. The general provisions relating to the venue of actions make the special venue provisions unnecessary. The claims statute applicable to all local public entities provides entities with adequate notice; hence, the special statute of limitations is also unnecessary.

7. Other provisions of the existing law requiring the issuance of warrants and the levy of taxes to pay judgments are also obsolete and redundant and should be repealed.

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to add Article 5 (commencing with Section 905.1) to Chapter 4 of Division 3.5 of Title 1 of, and to repeal Article 6 (commencing with Section 50140) of Chapter 1, Part 1, Division 1, of Part 5 of, the Government Code, relating to liability for mob and riot damage.

The people of the State of California do enact as follows:

SECTION 1. Article 5 (commencing with Section 905.1) is added to Chapter 4 of Division 3.5 of Title 1 of the Government Code, to read:

Article 5. Damage by Mobs and Riots

905.1. As used in this article:

(a) "Local agency" means a city, county, police protection district or other local public entity maintaining a police force.

(b) "Mob" means any collection of individuals, five or more in number, assembled for the unlawful purpose of offering violence to the person or property of anyone supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional or regulative powers over any person by violence and without lawful authority.

(c) "Riot" means a tumultuous assembly of five or more persons engaged in disturbing the peace who injure or threaten to injure persons or property by force and violence or who use or threaten to use force and violence against anyone who opposes them in the execution of their purpose.

905.2. A local agency is liable for death or for injury to persons or property caused by mob or riot within its boundaries. A county is liable under this section only if the acts that caused the death or injury did not occur within the boundaries of a local agency within the county.

905.3. A local agency is not liable under this article for the death, or for injury to the person or property, of any person who aided, abetted or participated in the mob or riot that caused the death or injury. A local agency is not liable under this article if the death or injury was aided, abetted or permitted by the negligence of the plaintiff.

905.4. A local agency having paid damages under this article, either upon a judgment or as a settlement, may recover the amount of such payment together with all costs and expenses necessarily incurred by it in defending the action for such damages, including a reasonable attorney's fee in an amount to be fixed by the court, from any person who participated in or who aided or abetted the mob or riot.

905.5. Any action brought under this article for damage to the levees or other works of reclamation of any district shall be prosecuted by the Attorney General in the name of the people of the State of California, and the amount recovered shall be paid to the treasurer of the county, who shall credit it to the district.

SEC. 2. Article 6 (commencing with Section 50140) of Chapter 1, Part 1, Division 1, of Title 5 of the Government Code is repealed.

Note: The repealed article provides:

50140. A local agency is responsible for damage by mobs or riots to property within its boundaries.

50141. Such actions shall be tried in the county where the property damaged is situated and shall be commenced within one year after the commission of the act complained of.

50142. The plaintiff in any such action shall not recover if the damage was aided, sanctioned, or permitted by his negligence.

50143. On the certificate of the presiding judge or clerk of the court rendering the judgment against the local agency for damages by mobs or riots, the legislative body, by ordinance, shall cause a warrant to be issued on the general fund, which shall be paid in its regular order.

50144. Within three years, at the proper times, the legislative body shall levy and cause to be collected a tax on the taxable property of the local agency for the payment of the warrant.

50145. When the levees and other works of reclamation of a district are damaged or destroyed by mobs or riots and an action is brought for damages, it shall be prosecuted by the Attorney General in the name of the people of the State of California. The amount recovered shall be paid to the treasurer of the county, who shall credit it to the district.