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if they contain less than six rooms for rent and if actually occupied by the proprietor.[132] Any place of public accommodation otherwise included in title II is not affected by the act if it is found not to affect interstate commerce and the discrimination is unsupported by state action.[133] For instance, if a substantial portion of the products sold in an establishment engaged in selling food have not moved in interstate commerce, state action will still have to be found,[134] since individual discrimination is not proscribed by the act unless the interstate commerce requirement is fulfilled.[135] However, the Court has indicated in *Heart of Atlanta Motel, Inc. v. United States*[136] that practically any establishment enumerated in the act as a place of public accommodation may fulfill the commerce requirement. So long as interstate commerce "feels the pinch,"[137] it matters not how local the operation which "applies the squeeze."[138]

In the event that an establishment is found not to be a place of public accommodation within the meaning of the act, the Court may again be called upon to consider the distinctions between state action prohibited by the fourteenth amendment and individual discrimination. Today the state action concept has reached a delicate point of balance between equality in places of public accommodations and liberty in the enjoyment of property. But unless the scales are tipped by a change in the composition of the Supreme Court or by one Justice being persuaded by his opposing brothers' argument, state action will not be found where a property owner simply employs state police, trespass laws, and courts to enforce his policy of racial discrimination.

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[132] 42 U.S.C.A. § 2000a(b)(1) (1964).
[133] 42 U.S.C.A. § 2000a(b) (1964).
[134] 42 U.S.C.A. § 2000a(c) (1964).
[135] 42 U.S.C.A. § 2000a(b) (1964).
[136] 379 U.S. 241 (1964).
[137] United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1949).
[138] *Ibid.*
* Member, Second Year Class.

MUNICIPAL LIABILITY FOR RIOT DAMAGE

The vigor of the civil rights movement has on a few occasions taken a destructive turn. Some protests in both northern and southern cities, whatever good they have done, have also caused property damage and personal injury on a large scale.[1]

Who should pay for such damge? It is the responsibility of local government

[1] Outbreaks in Harlem in 1935 and 1943 left nine dead, some 600 injured and property damage estimated at six million dollars. The 1964 Harlem riots saw one person killed, 140 injured, and over 500 cases of property damage reported. Time, July 31, 1964, p. 11, 15, 16.

to maintain order. Does it follow, then, that a person damaged by a public disorder can recover from the municipality which failed to keep the peace?

In England and in some American jurisdictions he may. The development and scope of this form of relief is our subject.

History of Communal Liability

The protection of life and property within its boundaries by a county or municipality is considered a "governmental" and not a "proprietary" function.[2] Traditional notions of sovereign immunity shield local government from liability for failures which are purely "governmental."[3] Hence, in the absence of a statute abrogating this immunity, an injured citizen has no action against his municipality no matter how derelict it has been in maintaining order.[4]

Long before the doctrine of municipal immunity took shape, however, statutes in England imposed liability on the citizens of the "hundred" for *crimes* committed in their neighborhood.[5] By the thirteenth century that practice was firmly established and embodied in the Statute of Winchester.[6] The people of an area in which a felony or robbery had occurred would have to make good whatever monetary loss had been suffered unless they could deliver the responsible criminals to the king's officers within forty days.[7] The tone of Winchester indicates clearly the policy argument behind the enactment. It opens with a flurry of righteous disgust:

> Forasmuch as from Day to Day, Robberies, Murthers, Burnings, and Theft, be more often used than they have been heretofore, and Felons cannot be attainted by the Oath of Jurors, which had rather suffer Strangers to be robbed, and so pass without Pain, than indite the Offenders . . . .[8]

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[2] Gianfortone v. New Orleans, 61 Fed. 64 (C.C.E.D. La. 1894); see Annot., 13 A.L.R. 751 (1921); 18 McQUILLIN, MUNICIPAL CORPORATIONS § 53.145 (3d ed. rev. 1963).

[3] See James, *Tort Liability of Local Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41 (1949).

[4] Clear Lake Water Works Co. v. Lake County, 45 Cal. 90 (1872); Reid v. City of Niagara Falls, 29 Misc. 2d 855, 216 N.Y.S.2d 850 (Sup. Ct. 1963); King v. City of New York, 3 Misc. 2d 241, 152 N.Y.S.2d 110 (Sup. Ct. 1956); see 20 C.J.S. *Counties* § 219 (1940); Annot., 52 A.L.R. 562 (1928).

[5] Immunity for local government, while it may have existed earlier, assumed its present form near the end of the eighteenth century. See Russell v. Men of Devon, 2 Term. Rep. 667, 100 Eng. Rep. 359 (1798); authorities cited note 3 *supra*. The practice of imposing liability on the "hundred" dates from the eleventh century. See Darlington v. New York, 31 N.Y. 164, 88 Am. Dec. 248 (1865) where the method is traced back to the reign of Canute the Dane (1016-1035).

[6] 13 Edw. 1, stat. 2, c. 2, 3 (1285). This is often erroneously cited as the Statute of Westminster, Second, 13 Edw. 1, stat. 1, c. 3 (1285).

[7] "And if the Country will not answer for the Bodies of such manner of Offenders, the Pain shall be such, that every Country, that is to wit, the People dwelling in the Country, shall be answerable for the robberies done, and also the Damages; so that the whole Hundred where the Robbery shall be done . . . shall be answerable . . . ." 13 Edw. 1, stat. 2, c. 2 (1285).

[8] *Id* c. 1.

Primary responsibility for keeping the peace rested on the people of the "hundred" who were obliged to pursue felons by hue and cry and bring them to trial.[9] If they chose to be less than diligent in their pursuit, let them pay for their leisure.

The theory (as well as the tone) of the Statute of Winchester was first specifically applied to "riots and tumults" in what has become known as the English Riot Act of 1714.[10] By this act the inhabitants of the "hundred" wherein persons had unlawfully assembled were made liable to compensate anyone whose property was damaged by the assembly.[11] Provisions of Winchester and the Riot Act, along with related acts,[12] survived in their original form until 1827 when they were repealed in connection with a program of statutory revision.[13] Their remedies relative to riot damage were immediately embodied in new legislation.[14]

The present English statute is the Riot (Damages) Act of 1886.[15] Its provisions are virtually the same as those of the 1714 act. The political subdivision upon which liability is imposed is now the "police district," but that liability is still absolute and the cost of it is still to be offset by taxation within the district.

The American Position

In spite of this unbroken series of statutes in England, the notion of communal liability for riot damage was not widely received as a part of the common law in this country.[16] But the appeal of communal liability as an equitable method of spreading the loss, and as a stimulus for public interest in law enforcement[17] has prompted a significant minority of our states to create that liability by statute.[18]

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[9] 3 Edw. 1, c. 9 (1275).

[10] 1 Geo. 1, stat. 2, c. 5 (1714).

[11] The provision whereby the "hundred" could save itself from liability by apprehending the wrongdoers within forty days was left out of the Riot Act of 1714. Failure to apprehend continued as a condition precedent to liability in robbery, murder and similar cases but it never appeared as such in the riot legislation. Liability for riot, then, was absolute and unconditional.

[12] 28 Edw. 3, c. 11 (1354) simply affirmed the Statute of Winchester. 27 Eliz., c. 13 (1585) stipulated procedures for recovery and provided for spreading the cost of liability by taxation. 9 Geo. 1, c. 22 (1722) and 8 Geo. 2, c. 16 (1735) established more procedure.

[13] 7 & 8 Geo. 4, c. 27 (1827).

[14] *Id.* c. 31 and 2 & 3 Will. 4, c. 72 (1832).

[15] 49 & 50 Vict., c. 38 (1886).

[16] Lee v. Kansas City, 175 Kan. 729, 267 P.2d 931 (1954). See authorities cited notes 2 & 4 *supra.*

[17] See Chicago v. Sturges, 222 U.S. 313 (1911); Slaton v. City of Chicago, 8 Ill. App. 2d 47, 130 N.E.2d 205 (1955); Darlington v. New York, 31 N.Y. 164, 88 Am. Dec. 248 (1865); Marshall v. Buffalo, 50 App. Div. 149, 64 N.Y. Supp. 411 (1900).

[18] CONN. GEN. STAT. REV. § 7-108 (1958); KAN. GEN. STAT. ANN. § 12-201 (1949); KY. REV. STAT. ANN. § 411.100 (1963); LA. REV. STAT. § 33:5065 (1950); ME. REV. STAT. ANN. ch. 136, § 8 (1954); MD. ANN. CODE art. 82, §§ 1-3 (1957); MASS. ANN. LAWS ch. 269, § 8 (1956); MO. REV. STAT. §§ 537.140-.160 (1959); MONT. REV. CODES ANN. § 11-1503 (1947); N.H. REV. STAT. ANN. § 31:53 (1955); N.J. STAT. ANN. §§ 2A:48-1 to 48-7 (1952); N.Y. MUNIC. LAW § 71; PA. STAT. ANN. tit. 16, § 11821 (1956); R.I. GEN. LAWS ANN. § 45-15-13 (1956); S.C. CODE ANN. § 16-107 (1962); WIS. STAT. § 66.091 (1961).

Sixteen states impose liability for riot damage on the county or municipality.[19] The scope of the liability takes various forms. A few states allow recovery for personal injury as well as property damage, thus departing from the exclusive concern for property which we find in the English precedents.[20] A more significant departure from their historical background is seen in the Connecticut, Kentucky, and Maryland statutes. These three abandon the strict liability approach and require a showing of some dereliction of duty on the part of the government in suppressing or controlling the riot. Three other states allow only a partial recovery.[21]

Only the New York statute has seen extensive use in connection with civil rights demonstrations.[22] In *Feinstein v. City of New York*,[23] the leading case arising from the 1935 Harlem riots, the court applied the New York riot damage act to compensate a businessman whose store front had been destroyed. This method of compensation, the court held, was both practical and well supported by New York precedent.[24] When a new series of riots erupted in Harlem in 1943 the riot damage act was under a temporary suspension imposed by wartime emergency laws.[25] The courts continued to recognize the principle of communal liability as firmly established, even though it was temporarily unavailable.[26]

It is perhaps a testimony to our national good order and discipline that the riot damage acts of most other states have found relatively little use.

Municipal Liability in California

The California riot damage statute[27] was typical of the communal liability laws. It was enacted in 1868 as the first statutory waiver of sovereign immunity in the State.[28] It applied to property damage only, imposed absolute liability on the local political entity, and allowed full recovery.

Chinese tong wars in the late nineteenth century led to use of the statute on two occasions.[29] A farm labor riot in this century gave rise to the leading Cali-

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[19] *Ibid.*

[20] Connecticut, Kansas, and Wisconsin.

[21] Maine, Massachusetts, and Rhode Island allow 3/4 recovery.

[22] For a review of seventy years of litigation under the New York statute, see N.Y. Law Journal, July 30, 31, 1964, p. 1.

[23] 157 Misc. 157, 283 N.Y.S. 335 (City of New York Munic. Ct. 1935).

[24] Darlington v. New York, 31 N.Y. 164, 88 Am. Dec. 248 (1865); Marshall v. Buffalo, 50 App. Div. 149, 64 N.Y. Supp. 411 (1900).

[25] See Finkelstein v. City of New York, 182 Misc. 271, 47 N.Y.S.2d 156 (Sup. Ct. 1944), *aff'd*, 295 N.Y. 730, 65 N.E.2d 432 (1946).

[26] Blumkin v. City of New York, 183 Misc. 31, 47 N.Y.S.2d 492 (Sup. Ct. 1944); Butchers' Mut. Cas. Co. v. City of New York, 182 Misc. 809, 52 N.Y.S.2d 121 (Sup. Ct. 1944); D & D Chemist Shops v. City of New York, 181 Misc. 686, 47 N.Y.S.2d 163 (Sup. Ct. 1944), *rev'd*, 269 App. Div. 741, 55 N.Y.S.2d 114 (1945); 146 W. 117th St. v. City of New York, 50 N.Y.S.2d 569 (City of New York, City Ct. 1944).

[27] Cal. Stats. 1949, ch. 81, § 1. As codified this enactment was CAL. GOV'T CODE §§ 50140-45.

[28] See David, *Municipal Tort Liability in California*, 7 So. CAL. L. REV. 372, 380 (1934).

[29] Bartlett v. San Francisco, 63 Cal. 156 (1883); Wing Chung v. Los Angeles, 47 Cal. 531 (1874).

fornia case on municipal liability.[30] But the statute seems to have been called upon rarely. It appears as the basis of relief in only three other reported cases.[31]

In 1963, after ninety-five years of living with municipal liability for riot damage, the California legislature repealed the statute.[32] The repeal came as one of the many consequences of the *Muskopf v. Corning Hosp. Dist.* case.[33] *Muskopf* held that the doctrine of sovereign immunity was "mistaken and unjust" and would no longer protect governmental entities from civil liability for their torts. Thus most California statutes dealing with governmental immunity became anomalies. They had been drafted under the assumption that the underlying rule was immunity. Now immunity, where it existed, was to be the exception and the underlying rule was liability.[34]

If this enormous change in California law cast adrift scores of statutes, leaving them abrogating something which no longer existed, it had no such effect on the riot damage act. This act imposed a liability which was absolute. While immunity was the rule it operated as a waiver of that immunity. If liability was the rule it still served to impose an *absolute* liability which would not have existed without the statute.[35] This function of the act was, however, not enough to save it.

The California Law Revision Commission undertook a study of the effects of the *Muskopf* decision. Their recommendations called for repeal of the now anomalous waivers of immunity, and a re-establishment of immunity by statute in selected areas.[36] They also recommended repeal of the riot damage act, on grounds that any imposition of absolute liability was inconsistent with the new standards of immunity urged in their report.[37] Most of the Commission's recommendations were enacted as law during the 1963 regular session of the legislature.[38] The riot damage act was repealed[39] and at the same time (and upon the same recommendation) provisions were enacted saving public entities and their employees from liability for failure to enforce any law.[40]

This combination of repeal and enactment seems to have stifled not only

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[30] Agudo v. Monterey County, 13 Cal. 2d 285, 89 P.2d 400 (1939).

[31] Bank of Cal. v. Shaber, 55 Cal. 322 (1880); Clear Lake Water Works Co. v. Lake County, 45 Cal. 90 (1872); Chamon v. San Francisco, 1 Cal. Unrep. 509 (1869).

[32] Cal. Stats. 1963, ch. 1681, § 18.

[33] 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[34] See generally Cobey, *The New California Governmental Liability Statutes*, 1 HARV. J. LEGISLATION 16 (1964).

[35] See Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 203, 204 (1963).

[36] 4 CAL. LAW REVISION COMM'N REP. RECOMMENDATIONS & STUDIES 801 (1963).

[37] "Sections 50140 through 50145 of the Government Code are inconsistent with the foregoing recommendations (relating to non-liability for failure to preserve health and safety). These sections impose absolute liability upon cities and counties for property damage caused by mobs or riots within their boundaries. These sections are an anachronism in modern law. They are derived from similar English laws that date back to a time when the government relied on local townspeople to suppress riots. The risk of property loss from mob or riot activity is now spread through standard provisions of insurance policies. Accordingly these sections should be repealed." *Id.* at 818.

[38] Cal. Stats. 1963, ch. 1681.

[39] *Id.* at § 18.

[40] CAL. GOV'T CODE §§ 818.2, 821, 846.

absolute communal liability for mob violence but liability based on fault as well. A California property owner whose property has been damaged by riot cannot now recover from his local government on any theory. He has no claim against them based on strict liability because we have seen that such liability does not exist unless supported by statute,[41] and California no longer has a riot damage statute. He has no claim based on the government's negligent or intentional failure to enforce the law because the Government Code has established immunity from liability for such failures.[42]

This complete countermarch from absolute liability to no liability at all has left the property owner few sources of relief. He may, of course, recover from the rioters or from any individual rioter, the full amount of damage done.[43] But this will be a meaningful remedy only in cases where the rioters can be identified, then later located for service of process, and where they have sufficient assets to make collection of a judgment possible. Mobs which destroy property are not likely to be made up of such vulnerable, established citizens.

The only effective source of relief would seem to be that favored by the Law Revision Commission: "standard provisions of insurance policies." Assuming that those "standard provisions" would be adequate, one still may seriously question if they would be as fitting as liability imposed on all the people through the agencies to which they have delegated the task of keeping the peace.

Communal liability for riot damage, financed by taxation of those in the immediate locale where the riot occurred, has several advantages which the Law Revision Commission seems not to have considered. First, private responsibility for the maintenance of law and order did not disappear when we abandoned the hue and cry. Lawlessness and the caliber of law enforcement in the community are still matters for private concern. The first communal liability statutes in England were, as we have seen, expressly designed to stimulate and insure that concern. Early cases in this country recognized the same design in the American statutes.[44] Whether or not this purpose of communal liability has been achieved is beyond the realm of proof, but it is difficult to believe that it has had no effect. A local population faced with the certainty that they will have to pay for the consequences of disorder could not afford to be less than vigilant in demanding and assisting in the scrupulous enforcement of order. Second, distributing the cost of riot damage through taxation puts the burden on the largest practical number of citizens with little or no discrimination. Reliance on insurance, on the other hand, burdens most those least likely to be responsible for riot damage, the property owners. Few rioters will be affected by insurance rates for riot coverage, but virtually all property owners will be. Local taxation, however, can (or can be made to) reach both those prone to riot and those well disposed toward the *status quo*.

These policy arguments were not mentioned in the Law Revision Commis-

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[41] See authority cited notes 2 & 3 *supra*.

[42] See note 40 *supra*.

[43] DeVries v. Brumback, 53 Cal. 2d 643, 349 P.2d 532, 2 Cal. Rptr. 764 (1960); Schaefer v. Berinstein, 140 Cal. App. 2d 278, 295 P.2d 113 (1956).

[44] Chicago v. Sturges, 222 U.S. 313 (1911); Darlington v. New York, 31 N.Y. 164, 88 Am. Dec. 248 (1865); Marshall v. Buffalo, 50 App. Div. 149, 64 N.Y. Supp. 411 (1900).