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Merchants Liability for False Imprisonment

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MERCHANTS LIABILITY FOR FALSE IMPRISONMENT

The extent of theft loss in the merchandising industry presents an array of statistics[1] which would be staggering if our common experience had not given us at least the suspicion that it must be a problem of grand scale. Change your focus from grand cumulations to individual values and the problem becomes pungent. To the individual merchant it can be a highly critical element in the success or failure of his enterprise. For instance, the loss of a one-dollar item on which he would have made a profit of ten cents will as a rule of thumb have to be offset by the sale of ten like items just to break even. To shut off this drain the merchant is impelled to take active measures against the shoplifter. Accosting the suspected thief is necessary not only to save the merchandise but to discourage future occurrences, but it must be accomplished with restraint, deliberation, and consummate regard for the risks involved.

The merchant's contacts with the suspected patron create a situation which makes him particularly vulnerable to lawsuit. The usual complaints to a merchant's overreaching are false imprisonment, false arrest, malicious prosecution, assault, and slander. False imprisonment is perhaps the primary threat because so very little is needed to make out a case—an unjustified restraint.[2] For this reason, the pitfalls of the merchant's conduct vis-à-vis the suspected shoplifter will be discussed within a framework of false imprisonment.

I. False Imprisonment

A false imprisonment occurs whenever one's freedom of movement is wrongfully restrained.[3] While the interest in freedom of movement is necessarily physical, the restraint need not be. It has a mental quality as well as a physical one.[4]

1. See *Shoplifting and The Law of Arrest,* 62 Yale L.J. 788 (1953); Comment, 46 Ill. L. Rev. 887 (1952).

2. Where one brings an action for false imprisonment, all that is necessary for him to allege and prove is that he has been unlawfully restrained of his liberty, and it is wholly immaterial to inquire whether the charge against him, and for which he has been arrested, is well or ill founded in fact.
Barfield v. Coker & Co., 73 S.C. 181, 188, 53 S.E. 170, 173, (1906); see McHugh v. Pundt, 1 Bailey 441 (S.C. 1830).

3. *E.g.,* Thomas v. Colonial Stores, Inc., 236 S.C. 95, 113 S.E. 2d 337 (1960); Westbrook v. Hutchison, 195 S.C. 101, 10 S.E.2d 145 (1940).

4. Prosser, Torts § 12 (3d ed. 1964); Restatement (Second), Torts § 42 (1965). See Gray v. Wallace, 319 S.W.2d 582 (Mo. 1958).

> The wrong may be committed by words alone, or by acts alone, or by both, and be merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual be confined within a prison, or within walls, or that he be assaulted, or even touched. It is not necessary that there should be any injury done to the individual's person, or to his character, or reputation. Nor is it necessary that the wrongful act be committed with malice, or ill-will, or even with the slightest wrongful intention.[5]

If mental pressure is brought to bear on one so that he fears that force will be visited upon him if he does not yield to it, and he does yield to it, he has been directly injured as well as if he had been bodily restrained. If the restraint has been wrongful, and for even a slight amount of time,[6] it is an actionable injury without any showing of actual damages.[7] However, the response must be to force, or words or acts which reasonably portend the use of force,[8] which is immediate,[9] or sufficiently near in point of time to preclude the apparent possibility of escape or avoidance of the force.[10] A voluntary submission to a request is not an imprisonment.[11] Nor is it actionable if the restraint or imprisonment complained of is under lawful process or is otherwise justified.[12]

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5. Westbrook v. Hutchison, 195 S.C. 101, 109, 10 S.E.2d 145, 148 (1940), quoting from Westbrook v. Hutchison, 190 S.C. 414, 419, 3 S.E.2d 207, 209 (1939).

6. Swetnam v. F. W. Woolworth Co., 83 Ariz. 189, 318 P.2d 364 (1957); Great Atl. & Pac. Tea Co. v. Smith, 281 Ky. 583, 136 S.W.2d 759 (1940); Great Atl. & Pac. Tea Co. v. Billups, 253 Ky. 126, 69 S.W.2d 5 (1934); PROSSER, TORTS § 12 (3d ed. 1964).

7. George v. Norfolk & W. Ry., 78 W.Va. 345, 88 S.E. 1036 (1916).

8. *E.g.*, Perry v. S. H. Kress & Co., 187 Kan. 537, 358 P.2d 665 (1961); S. H. Kress & Co. v. DeMont, 224 S.W. 520 (Tex. Civ. App. 1920).

9. Knowlton v. Ross, 114 Me. 18, 95 Atl. 281 (1915); Sweeney v. F. W. Woolworth Co., 247 Mass. 277, 142 N.E. 50, 31 A.L.R. 311 (1924).

10. Great Atl. & Pac. Tea Co. v. Billups, 253 Ky. 126, 69 S.W.2d 5 (1934); Sweeney v. F. W. Woolworth Co., 247 Mass. 277, 142 N.E. 50, 31 A.L.R. 311 (1924).

11. Knowlton v. Ross, 114 Me. 18, 95 Atl. 281 (1915); Sweeney v. F. W. Woolworth Co., 247 Mass. 277, 142 N.E. 50, 31 A.L.R. 311 (1924); Lester v. Albers Super Mkts., Inc., 94 Ohio App. 313, 114 N.E.2d 529 (1952); Moses v. Dubois, Dudley 209 (S.C. 1838); S. H. Kress Co. v. DeMont, 224 S.W. 520 (Tex. Civ. App. 1920). Where one remains voluntarily to clear one's self of the charge there is no imprisonment, Fenn v. Kroger Grocery & Baking Co., 209 S.W. 885 (Mo. 1919), but where one is detained involuntarily, she may remain to be cleared of the charge without losing the cause of action, if leaving could be construed as an admission of guilt, Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N.E. 843, 26 A.L.R. 1329 (1923).

12. Bushardt v. United Inv. Co., 121 S.C. 324, 113 S.E. 637 (1922); Barfield v. Coker & Co., 73 S.C. 181, 53 S.E. 170 (1906); Whaley v. Lawton, 62 S.C. 91, 40 S.E. 128, 56 L.R.A. 649 (1901); McConnell v. Kennedy, 29 S.C. 180, 7 S.E. 76 (1888); McHugh v. Pundt, 1 Bailey 441 (S.C. 1830).

False imprisonment is clearly distinct from malicious prosecution[13] although there is some confusion due to the rather loose usage of the term false arrest. The cases speak of false arrest in the same breath with false imprisonment and again with malicious prosecution.[14] The distinction lies in the existence of valid legal authority for the arrest.[15]

> There is a material distinction between an action for false imprisonment and an action for malicious prosecution; the former proceeds upon the theory that the plaintiff has been arrested without authority of law and unlawfully deprived of his liberty, while the latter proceeds upon the theory that the plaintiff has been lawfully arrested under a warrant charging a criminal offense, and that such prosecution is malicious and without probable cause.[16]

To illustrate the difference, consider the common law roots of the two actions: "Trespass will not lie for having the plaintiff arrested under legal process, if the proceedings were regular on their face. If they are voidable for matters dehors the record, the plaintiff's remedy is by special action on the case."[17] In order to sustain such action the plaintiff must allege and prove malice, want of probable cause, and termination of the proceedings in favor of the prosecution defendant,[18] none of which is necessary to maintain an action for false imprisonment.[19]

Because invoking legal process requires a higher degree of concerted, conscious action, there is not that awesome risk that

13. George v. Leonard, 71 F. Supp. 662 (E.D.S.C. 1944) (malicious prosecution); Burton v. McNeil, 196 S.C. 250, 13 S.E.2d 10, 133 A.L.R. 603 (1941); Cannon v. Haverty Furniture Co., 179 S.C. 1, 183 S.E. 469 (1935) (dissenting opinion); Falls v. Palmetto Power & Light Co., 117 S.C. 327, 345, 109 S.E. 93, 99 (1921) (dissenting opinion); Barfield v. J. L. Coker & Co., 73 S.C. 181, 53 S.E. 170 (1906); McHugh v. Pundt, 1 Bailey 441 (S.C. 1830); PROSSER, TORTS § 12 (3d ed. 1964).

14. See Wingate v. Postal Tel. & Cable Co., 204 S.C. 520, 30 S.E.2d 307 (1944) and Mr. Justice Cothran's dissent in Cannon v. Haverty Furniture Co., 179 S.C. 1, 183 S.E. 469 (1935).

15. PROSSER, TORTS § 12 (3d ed. 1964); 35 C.J.S. *False Imprisonment* § 4 (1960); 22 AM. JUR. *False Imprisonment* § 3 (1939). When the detention is accomplished by reason of asserted legal authority the term false arrest is proper. False arrest embraces a false imprisonment and the only distinction is that a false imprisonment contemplates a discourse of action between private persons.

16. Barfield v. Coker & Co., 73 S.C. 180, 188, 53 S.E. 170, 173 (1906).

17. McHugh v. Pundt, 1 Bailey 441 (S.C. 1830).

18. 54 C.J.S. *Malicious Prosecution* § 4 (1948); 34 AM. JUR. *Malicious Prosecution* § 6 (1941). Elletson v. Dixie Home Stores, 231 S.C. 565, 99 S.E.2d 384 (1957).

19. *E.g.*, Westbrook v. Hutchison, 195 S.C. 101, 10 S.E.2d 145 (1940).

is involved in false imprisonment which can be committed with only a momentary indiscretion.

II. DEFENSES

Justification for an imprisonment has usually been advanced under the arrest statute.[20]

A. Who May Arrest a Felon or Thief

> Upon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law.[21]

This statute modifies the common law of arrest in that it provides for arrest by any person who acts on certain information that a felony has been committed.[22] That certain information is reasonable, positive, and creditable information of an act from which the law presumes a felony has been committed.[23] It provides justification for a person who arrests on reasonable and probable grounds one whom he suspects of a felony, even if the suspected party is innocent, and even though no felony has in fact been committed.[24] It also places two qualifications on the authority to arrest for larceny. The arresting party must witness the larceny, and he may only arrest for the purpose of taking the thief to a judge or magistrate.[25]

> [I]f a person who arrests a person, with no intention of taking him to a Magistrate or Judge, it makes no difference if the arresting party was or was not acting upon information that felony had been committed, for a private person can only arrest for the purpose of taking the arrested party to a Magistrate or Judge, for the purpose of having him dealt with according to law. . . .

20. *E.g.*, Thomas v. Colonial Stores, Inc., 236 S.C. 95, 113 S.E.2d 337 (1960); Westbrook v. Hutchison, 195 S.C. 101, 10 S.E.2d 145 (1940).

21. S.C. CODE ANN. § 17-251 (1962).

22. See Bushardt v. United Inv. Co., 121 S.C. 324, 113 S.E. 637 (1922); State v. Griffin, 74 S.C. 412, 54 S.E. 603 (1906).

23. Bushardt v. United Inv. Co., 121 S.C. 324, 113 S.E. 637 (1922).

24. See Mr. Justice Cothran's dissent in Falls v. Palmetto Power & Light Co., 117 S.C. 327, 109 S.E. 93 (1921).

25. Thomas v. Colonial Stores, Inc., 236 S.C. 95, 113 S.E.2d 337 (1960); Westbrook v. Hutchison, 195 S.C. 101, 10 S.E.2d 145 (1940).

> The obvious purpose of the statute is to permit such an arrest so as to prevent the possible escape of a felon. And where there is ample opportunity to procure a warrant for the arrest in the usual manner, the failure so to do might well be significant in determining the reasonableness of the conduct of the person making the arrest.... But without regard to that, it would be subversive of the liberty of a citizen, for which the law is said to be very jealous, if a private person might arrest and then at his option take the law in his own hands and conduct an inquisition to determine whether he should release his prisoner or deliver him to the constituted official authorities.[26]

The requirement of taking the person to a judge or magistrate, while strict as to intent, can be substantially complied with, such as by taking him to the police.[27] The responsibility to procure a warrant may then be assumed by the police.[28] But there must be some compliance and it must be done within a reasonable time or the justification is lost.

> A private person who makes an arrest may hold his prisoner in custody only for a reasonable time. He must without unreasonable delay, either take him before a magistrate, turn him over to an officer, or place him in jail. If he fails to do so, he cannot justify the arrest.[29]

Practically, the statute is of little avail in the shoplifting situation. When does one have view of a larceny committed in a self-service store? If the merchant makes an error in judgment —a mistake—he is absolutely liable for any restraint because reasonable cause under the arrest statute justifies only arrest for a suspected felony. The preponderance of consumer items, particularly in a self service operation, are not of sufficient value to elevate their theft to a felony. The shoplifting statute[30] provides for a higher scale of penalties than for simple petit larceny[31] but it does not of itself establish the offense as a felony.[32] The stiffer penal sanctions undoubtedly provide a

26. Westbrook v. Hutchison, 195 S.C. 101, 111-12, 10 S.E.2d 145, 148 (1940).
27. Burton v. McNeil, 196 S.C. 250, 13 S.E.2d 10, 133 A.L.R. 603 (1941).
28. See Thomas v. Colonial Stores, Inc., 236 S.C. 95, 113 S.E.2d 337 (1960).
29. Westbrook v. Hutchison, 195 S.C. 101, 112, 10 S.E.2d 145, 148 (1940), quoting 6 C.J.S. *Arrest* § 17 (1937).
30. S.C. Code Ann. § 16-359.1 (1962).
31. See S.C. Code Ann. § 16-353 (1962). Simple larceny of an article below the value of twenty dollars is a misdemeanor.
32. See S.C. Code Ann. §§ 16-11 to -13 (1962).

deterrent, but they do not give any help in defending civil liability. Because of the stringent requirements of justifiable arrest and the consequent need for protection of the store-owners, South Carolina has moved with a growing number of states to recognize probable cause as a defense in an action for the detention of a suspected shoplifter, whether it be but a misdemeanor or not.[33] Like most of the efforts in this direction, the legislation creates a qualified rather than a complete defense.[34]

B. Temporary Detention

The recent amendment to the shoplifting statute provides that:

> In any action brought by reason of having been delayed by a merchant or merchant's employee or agent on or near the premises of a mercantile establishment for the purpose of investigation concerning the ownership of any merchandise, it shall be a defense to such action if: (1) The person was delayed in a reasonable manner and for a reasonable time to permit such investigation, and (2) reasonable cause existed to believe that the person delayed had committed the crime of shoplifting.[35]

This enactment brings South Carolina under a doctrine which has been ostensibly regarded as allowing the defense of probable cause in an action for false imprisonment, but it is limited to the situation where one is acting in defense of his property. It providently comes before a case provoking acceptance or rejection of the principle,[36] and as yet there are no cases under it. The principle of the right to detain for investigation is a de-

33. See PROSSER, TORTS § 22 (3d ed. 1964); See also Comment 19 MD. L. REV. 28 (1959); Comment, 58 MICH. L. REV. 429 (1960).

34. See Comment, 47 N.W. U. L. REV. 82 (1952).

35. S.C. CODE ANN. § 16-359.4 (Supp. 1965).

36. But note the rather expansive statement of Mr. Justice Cothran in a dissenting opinion:

> One who is charged with the custody and control of property of another is authorized to do any and all things necessary to protect and preserve the property. If it were necessary to arrest one to prevent a theft of the property, he would be authorized to cause such an arrest, not to punish the offender, but to prevent the theft. After a theft is committed, however, he would have no authority to put the criminal law in operation, because the object then sought, and the result thereby attained, would not be the protection or preservation of the property, but the punishment of the criminal and the vindication of justice.

Falls v. Palmetto Power & Light Co., 117 S.C. 327, 345, 109 S.E. 93, 99 (1921).

rivation of the common law rights of defense and recapture,[37] logically extended to allow an investigation where it is not certain, but only apparent, that another is interfering with one's property. Protection of property is the distinction, and the reason for the introduction of probable cause as an element of justification:

> [I]n all cases involving solely the legality of the process, it is obvious that probable cause is not pertinent to any issue in the case. Because of like irrelevancy, the statement may properly be made in cases of illegal arrests upon suspicion by a private person where, by statutory authority or otherwise, he is permitted to make such arrest only when the offense is being committed in his presence . . . . However, those authorities which hold, where a person has reasonable grounds to believe that another is stealing his property, as distinguished from those where the offense has been completed, that he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner . . . must necessarily proceed upon the theory that probable cause is a defense. And this is the law because the right to protect one's property from injury has intervened.[38]

However, while the statute extends the common law self-help rights, it bears its own rather strict limitations.

The most notable authority for the temporary detention of a suspected thief is *Collyer v. S. H. Kress & Co.*[39] which arose in California in 1936. The *Collyer* case took dicta from three earlier cases[40] and ruled that where one has reasonable grounds to believe that another is taking one's property—even though it be a mistaken belief and even though it is but a misdemeanor—he may detain the person in a reasonable manner for a reasonable time for the purpose of investigation.[41]

37. PROSSER, TORTS § 22 (3d ed. 1964).

38. Collyer v. S. H. Kress Co., 5 Cal. 2d 175, 177, 54 P.2d 20, 23 (1936); quoted in Teel v. May Dep't Stores Co., 348 Mo. 696, 155 S.W.2d 74, 137 A.L.R. 495 (1941).

39. 5 Cal. 2d 175, 54 P.2d 20 (1936).

40. The wellspring of the right to detain is Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N.E. 843, 26 A.L.R. 1329 (1923) where the court said there would be a right to detain the plaintiff if she had apparently not paid for what she had received, but having paid the defendant's demand she had an unqualified right to leave. See also Standish v. Narragansett S.S. Co., 111 Mass. 512, 15 Am. Rep. 66 (1873); Fenn v. Kroger Grocery & Baking Co., 209 S.W. 885 (Mo. 1919).

41. Collyer v. S. H. Kress Co., 5 Cal. 2d 175, 54 P.2d 20 (1936).

The amendment is largely a codification of the rule in *Collyer*. The statute and *Collyer* expressly limit the detention to a reasonable time in a reasonable manner on reasonable grounds. Implicit in *Collyer* was that detention was justifiable only when the offense was being committed and not when it was complete. This is the limit of the rule as adopted in *Teel v. May Dep't Stores Co.*[42] in Missouri, but *Bettolo v. Safeway Stores, Inc.*,[43] which followed on the heels of *Collyer*, bore a statement to the effect that it also applied to offenses that were complete.[44] However, from the facts of the case it was not necessary to go so far. The statute provides for detention on or near the premises, as did *Collyer*, so the act progresses after the actual taking of the merchandise. The right to detain ought to extend to fresh pursuit reasonably near the premises.[45] Perhaps in this determination the point where the motive of recapture stops and the motive to punish begins should be considered.

The purpose of the detention is investigatory. It is temporary and does not give one the right to purport to make an arrest or take into custody.[46] One can identify the parties, establish the circumstances, and collect witnesses. If the circumstances are then such as to satisfy the merchant of the guilt of the detained party, he must proceed through the normal processes of law and call the police.[47]

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42. 348 Mo. 696, 155 S.W.2d 74, 137 A.L.R. 495 (1941).

43. 11 Cal. App. 2d 430, 54 P.2d 24 (1936).

44. *Id.* at 432, 54 P.2d at 25.

45. The probable limits of fresh pursuit are prompt and persistent efforts to recover the property without any undue lapse of time during which it may be said pursuit has come to a halt. PROSSER, TORTS § 22 (3d ed. 1964). In J. C. Penney Co. v. O'Daniell, 263 F.2d 849 (10th Cir. 1959) which arose in Oklahoma, employees pursued the plaintiff out of the store, in and out of several stores, and stopped her aboard a bus. The case indicated this was permissible under the rule. The South Carolina statute reads "on or near the premises" and how far beyond a check-out counter or parking lot this means must inevitably be determined by what is reasonable under all the circumstances.

46. PROSSER, TORTS § 22 (3d ed. 1964); Virginia, having adopted the rule, W. T. Grant Co. v. Owens, 149 Va. 906, 141 S.E. 860 (1928), denied probable cause as justification in Montgomery Ward & Co. v. Wickline, 188 Va. 485, 50 S.E.2d 387 (1948) where the detention proceeded to arrest and trial. In Montgomery Ward & Co. v. Freeman, 199 F.2d 720 (4th Cir. 1952) the law of Virginia was stated that reasonable cause is a defense to temporary detention.

A similar parallel but more pointed occurs in Tennessee: *Compare* Martin v. Castner-Knott Dry Goods Co., 27 Tenn. App. 42, 181 S.W.2d 638 (1944), *with* Little Stores v. Isenberg, 26 Tenn. App. 357, 172 S.W.2d 13 (1943). The defense is valid for a temporary detention only and not for arrest or taking the party into custody. *But see* Kroger Grocery & Baking Co. v. Waller, 208 Ark. 1063, 189 S.W.2d 361 (1945).

47. *Cf.* discussion accompanying note 46 *supra*. See 47 N.W. U. L. REV. 82 (1952).

Because the plaintiff in a false imprisonment action need not allege or prove want of probable cause, the burden of proving the existence of probable cause as an element of justification is on the one asserting the lawfulness of the detention;[48] but there is authority that the plaintiff, pleading an unlawful restraint, must prove that the restraint was unreasonable to make out his case.[49]

What constitutes reasonable cause is, as always, a mixed question of law and fact.[50] From the facts as established, the court will test their sufficiency as reasonable cause.[51] Where the facts do not admit of but one inference the question of reasonable cause is for the court,[52] and the standard applied is an external one.[53] "The question is not whether . . . [the actor] thought the facts to constitute probable cause, but whether the court thinks they did."[54] It is governed by the same principles as probable cause in malicious prosecution.[55] Probable cause requires a state of facts that would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person detained is guilty.[56] Mere suspicion is not sufficient. What is required is a reasonably grounded suspicion.[57] The report of a third person based only on suspicion has been ruled unreasonable,[58] but where a manager was informed that a customer had seen a person surreptitiously taking goods, the manager might reasonably detain one answering the description elsewhere on the premises.[59]

48. S.C. CODE ANN. § 16-359.4 (Supp. 1965) ("It shall be a defense. . ."); Director Gen. of Railroads v. Kastenbaum, 263 U.S. 25 (1923); J. C. Penney Co. v. Cox, 246 Miss. 1, 148 So. 2d 679 (1963); Teel v. May Dep't Stores Co., 348 Mo. 696, 155 S.W.2d 74, 137 A.L.R. 495 (1941); Isaiah v. Great Atl. & Pac. Tea Co., 111 Ohio App. 537, 174 N.E.2d 128, 86 A.L.R.2d 435 (1959).

49. See Burnaman v. J. C. Penney Co., 181 F. Supp. 633 (S.D. Tex. 1960); Lester v. Albers Super Mkts., Inc., 94 Ohio App. 313, 114 N.E.2d 529 (1952).

50. J. C. Penney Co. v. O'Daniell, 263 F.2d 849 (10th Cir. 1959); Delp v. Zapp's Drug & Variety Stores, 238 Ore. 538, 395 P.2d 137 (1964).

51. Gibson v. J. C. Penney Co., 165 Cal. App. 2d 640, 331 P.2d 1057 (1958).

52. Director Gen. of Railroads v. Kastenbaum, 263 U.S. 25 (1923); Collyer v. S. H. Kress Co., 5 Cal. 2d 175, 54 P.2d 20 (1936); Bettolo v. Safeway Stores, 11 Cal. App. 2d 430, 54 P.2d 24 (1936); Rothstein v. Jackson's of Coral Gables, Inc., 133 So. 2d 331 (Fla. Dist. Ct. App. 1961).

53. Director Gen. of Railroads v. Kastenbaum, 263 U.S. 25 (1923).

54. *Id.* at 28.

55. Montgomery Ward & Co. v. Freeman, 199 F.2d 720 (4th Cir. 1952).

56. Gibson v. J. C. Penney Co., 165 Cal. App. 2d 640, 331 P.2d 1057 (1958).

57. Aley v. Great Atl. & Pac. Tea Co., 211 F. Supp. 500 (W.D. Mo. 1962); Gibson v. J. C. Penney Co., 165 Cal. App. 2d 640, 331 P.2d 1057 (1958); Wilde v. Schwegmann Bros. Giant Supermarkets, 160 So. 2d 839 (La. 1964); J. C. Penney Co. v. Cox, 246 Miss. 1, 148 So. 2d 679 (1963).

58. J. C. Penney Co. v. Cox, 246 Miss. 1, 148 So. 2d 679 (1963).

59. J. C. Penney Co. v. O'Daniell, 263 F.2d 849 (10th Cir. 1959).

Certainly concealment of merchandise, as under section 16-359.2 of the Code,[60] or partial concealment,[61] would constitute reasonable cause. Each case, of course, will be decided on its own particular facts and circumstances. A less obvious instance than concealment is a case where a customer placed an article of apparel around her waist and proceeded to walk away.[62] A store security officer might reasonably react when he was told that a customer had taken two garments into a dressing room and come out with one.[63]

Accosting a person with a past history of shoplifting was allowed in one case, but there was testimony that in the present instances a taking of merchandise had been witnessed.[64] This case was criticized however, and evidence of shoplifting in the past would not be admissible to establish reasonable cause for a detention.[65]

What is a reasonable manner, and a reasonable time, is in the domain of the jury,[66] and the two questions are closely interrelated. One may use only reasonable force to effect the detention[67] and if it is exceeded justification will be lost.[68] Likewise, the right to detain is no license to insult or abuse and if the actor is excessively vehement there may be liability for slander[69] and

60. S.C. CODE ANN. § 16-359.2 (1962). "Any person wilfully concealing unpurchased goods or merchandise of any store or other mercantile establishment either on the premises or outside the premises of such store, shall be prima facie presumed to have so concealed such article with the intention of converting it to his own use without paying the purchase price thereof. . . ."

61. Delp v. Zapp's Drug & Variety Stores, 238 Ore. 538, 395 P.2d 137 (1964).

62. Rothstein v. Jackson's of Coral Gables, Inc., 133 So. 2d 331 (Fla. 1961).

63. Gibson v. J. C. Penney Co., 165 Cal. App. 2d 640, 331 P.2d 1057 (1958).

64. Burnaman v. J. C. Penney Co., 181 F. Supp. 633 (S.D. Tex. 1960) (tried without a jury and no objection was made), criticized in Aley v. Great Atl. & Pac. Tea Co., 211 F. Supp. 500 (W.D. Mo. 1962).

65. Great Atl. & Pac. Tea Co. v. Smalley, 26 Ala. App. 176, 156 So. 639 (1934).

66. Delp v. Zapp's Drug & Variety Stores, 238 Ore. 538, 395 P.2d 137 (1964).

67. *E.g.*, Collyer v. S. H. Kress Co., 5 Cal. 2d 175, 54 P.2d 20 (1936); Bettolo v. Safeway Stores, 11 Cal. App. 2d 430, 54 P.2d 24 (1936).

68. *E.g.*, Teel v. May Dep't Stores Co., 348 Mo. 696, 155 S.W.2d 74, 137 A.L.R. 495 (1941). See also Peak v. W. T. Grant Co., 386 S.W.2d 685 (Mo. 1964).

69. Burnaman v. J. C. Penney Co., 181 F. Supp. 633 (S.D. Tex. 1960); Camp v. Maddox, 93 Ga. App. 646, 92 S.E.2d 581 (1956); Little Stores v. Isenberg, 26 Tenn. App. 357, 172 S.W.2d 13 (1943); W. T. Grant & Co. v. Owens, 149 Va. 906, 141 S.E. 860 (1928). In Little Stores v. Isenberg, *supra*, where the alleged defamatory words—"you didn't pay for your groceries"—were spoken in a crowd, a publication could be inferred without producing a witness who had heard it, but in Burnaman v. J. C. Penney Co., *supra*, the court ruled against the plaintiff on the point of slander because they introduced no evidence that the words—"Where is that red dress"—were heard in a defamatory sense.

assault as well.[70] It is obviously beyond reason to confine a person in a small room to compel a confession.[71] One may request a confession,[72] for recovery of the goods is no less than a confession, but he cannot compel or coerce a confession. Nor is he allowed to conduct a search of the person.[73] When the tenor of conduct begins to sound more of punishing the offender than of protecting the property, the merchant has gone as far as he can go.

What is a reasonable time depends on the particular facts and circumstances of each case. In *Collyer*[74] a detention of twenty to thirty minutes was reasonable, but approximately the same length of time in confinement until a confession was signed would be patently unreasonable.[75] A reasonable time should be whatever is needed to conduct a reasonable investigation. Such investigation could include an identification, an inquiry to establish the facts, and, perhaps, a reasonable time for an employee to summon a supervisor with decision-making capacity. Once the purpose for which the statute allows a detention is satisfied —the goods are returned,[76] payment is tendered,[77] or the cashier vindicates the suspect[78]—any further delay is unreasonable.

III. Conclusion

This type legislation has been criticized from both ends. It is thought to be rather niggardly in increasing protection of merchants on one hand, and to be a danger to constitutional rights

70. Perry v. S. H. Kress & Co., 187 Kan. 537, 358 P.2d 665 (1961); A false imprisonment always involves a technical assault and if combined with a battery it does not change the character of the action but merely serves to increase actual damages.

71. See Wilde v. Schwegmann Bros. Giant Supermarkets, 160 So. 2d 839 (La. App. 1964); W. T. Grant & Co. v. Owens, 149 Va. 906, 141 S.E. 860 (1928.)

72. *E.g.,* Collyer v. S. H. Kress Co., 5 Cal. 2d 175, 54 P.2d 20 (1936).

73. Sutherland v. Kroger Co., 144 W.Va. 673, 110 S.E.2d 716 (1959). *But see* Gibson v. J. C. Penney Co., 165 Cal. App. 2d 640, 331 P.2d 1057 (1958), where the plaintiff was required to undress, and Burnaman v. J. C. Penney Co., 181 F. Supp. 633 (S.D. Tex. 1960) where reasonable search was allowed under a Texas statute allowing "seizure" of the goods.

74. Collyer v. S. H. Kress Co., 5 Cal. 2d 175, 54 P.2d 20 (1936).

75. See Wilde v. Schwegmann Bros. Giant Supermkts., 160 So. 2d 839 (La. App. 1964).

76. Teel v. May Dep't Stores Co., 348 Mo. 696, 155 S.W.2d 74, 137 A.L.R. 495 (1941).

77. Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N.E. 843, 26 A.L.R. 1329 (1923).

78. Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N.E. 843, 26 A.L.R. 1329 (1923); Little Stores v. Isenberg, 26 Tenn. App. 357, 172 S.W.2d 13 (1943).

on the other. Neither criticism burns in the conscience, and, taken together, they are probably a fair recommendation for it. It does give the merchant a valuable margin of time to deliberate his actions without immediately incurring liability. A too hasty reaction such as pinching a young pilferer by the ear is an excellent way to be later introduced to his guardian ad litem. With the proper approach, an inquiry will make the point so far as it is needed for the discouragement of others, and, if further action is called for, the merchant can proceed under advisement. A little tact will go a long way. Too often overzealousness comes with the idea of making an example of the suspect. The small amounts usually involved should not cause the loss of objectivity on the part of employees that so often occurs. In one instance there was testimony that a manager of a super market pushed a sixty-three-year-old lady's face against a plate glass window because he thought she had taken a few dress zippers.[79]

There is more realism than cynicism in recognizing that the larger merchandising companies make the most inviting defendants, but they are also in the best position to establish a check list or an operating procedure to guide employees in these situations—and to see that they use it.[80] Whereas before the amendment preventive measures were nearly frustrated because almost any action was perilous, now the situation is very favorable for effective prevention.

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79. Montgomery Ward & Co. v. Freeman, 199 F.2d 720 (4th Cir. 1952).

80. Evidence showed a manager of a store had slapped and shoved a sixteen year old girl, and the manager responded in the affirmative when asked if he had followed the standard operating procedure. Peak v. W. T. Grant Co., 386 S.W.2d 685 (Mo. 1964). In Safeway Stores v. Barrack, 210 Md. 108, 122 A.2d 457 (1956), after evidence that the employee had abused and vilified the plaintiff, he replied that his instructions were to use his own discretion in dealing with the "nasty" ones—to do what he wanted to with them.