"SHOPLIFTERS" BEWARE?

Detention of Suspected Shoplifters

A storeowner detaining a suspected shoplifter to recover property which may be worth only a few dollars risks liability for hundreds or thousands of dollars in damages.[1] Realizing this great risk, store owners often permit obvious shoplifting to avoid possible litigation for false arrest or false imprisonment.[2] The purpose of this article will be to explore the law of false arrest and false imprisonment in relation to shoplifting. Emphasis will be placed on how courts determine the liability, if any, of a merchant where he or his employees detain a suspected shoplifter. Emphasis also will be placed on how the new Iowa shoplifting law affects Iowa merchants.

I. WAS THE CONDUCT EITHER "FALSE ARREST" OR "FALSE IMPRISONMENT"

Originally, "imprisonment" meant stone walls and iron bars. Under present law, it no longer means simply incarceration.[3] The gist of false imprisonment is illegal restraint or detention.[4] Illegal restraint can result

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[1] "False Arrest liability insurance costs soar. Casualty companies have nearly doubled premium rates this year. Reason: Widespread publicity given to big jury awards—they average more than $10,000—has prompted a 10-fold increase in court actions in the last five years. It's making store detectives act more gingerly in nabbing shoplifters, too." *Wall Street Journal*, April 30, 1959, p. 1, col. 5. See also: Jefferson Dry Goods Co. v. Stoess, 304 Ky 73, 199 S.W.2d 944 (1947) ($3,000 damages; article involved was a pair of hose); S. H. Kress & Co. v. Bradshaw, 186 Okla. 588, 99 P.2d 508 (1940) ($1,500 damages; suspicion of payment in counterfeit coin); Long v. Eagle 5, 10 & 25c Store Co., 214 N.C. 146, 198 S.E. 573 (1938) ($750 damages; article involved was a screw driver); S. H. Kress & Co. v. Rust, 132 Texas 89, 120 1.W.2d 425 (1938) ($1,500 actual damages, $500 exemplary damages, item involved was 5 yards of tatting); S. H. Kress & Co. v. Lawrence, 162 S.W. 448 (Texas 1914) ($500 damages; item involved was a 10c pin).

[2] H.F. 52, 59th Gen. Assembly (1961), which was the genesis of the new Iowa shoplifting statute, has the following explanation:

"This is a 'shoplifting bill' supported by the retail merchants of Iowa . . .

It is estimated that shoplifters cost the retailers of Iowa more than fifty million dollars a year.

. . . Any person who arrests a shoplifter without a warrant does so at his peril. Professional shoplifters often pave the way for a lawsuit for false arrest by handing stolen goods to a confederate. This has become a problem of serious proportions in Iowa. Many stores permit obvious shoplifting rather than risk litigation for false arrest."

[3] Gust v. Montgomery Ward & Co., 234 Mo. App. 611, 136 S.W.2d 94 (1939) (to constitute false imprisonment it is not necessary that there be a formal declaration of arrest or that the individual be confined within a prison, or assaulted or touched).

[4] Ashland Dry Goods Co. v. Wages, 302 Ky. 195 S.W.2d 312 (1946) (illegal detention where customer's purse seized and customer told she couldn't leave store until her package was wrapped; store rule that everything bought had to be packaged didn't help defendants); Great Atl. & Pac. Tea Co. v. Smith, 281 Ky. 583, 136 S.W.2d 759 (1940) (illegal detention, store manager grabbed plaintiff by wrist and bag she was holding and searched bag); J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S.W.2d 359 (1935) (woman customer taken to basement of store, detained for five hours, and searched, illegal detention); McCrory Stores Corp. v. Setchell, 148 Md. 279, 129 Atl. 348 (1925) (illegal detention; store manager grabbed plaintiff's purse and went through it); Pilos v. First Nat'l Stores, Inc., 319 Mass. 475, 66 N.E. 576 (1946); (store employee dragged plaintiff to back of store; jury question on illegality of detention); Dillon v. Sears-Roebuck & Co., 125 Neb. 269, 249 N.W. 604 (1933) (lawful for employer to conduct interview with employee suspected of embezzlement to get truth as long as it was on company time); Homeyer v. Yaverbaum, 197 App. Div. 184, 188 N.Y. Supp. 849 (1921) (plaintiff accused of theft and

from violence or from threats of violence.[5] To be illegal, the restraint of freedom must be total, with no reasonable means of escape available.[6]

Closely related to false imprisonment is false arrest. The difference between the two is in the manner in which they arise.[7] Detention in false arrest arises by reason of an asserted legal authority to enforce the process of the law, while detention in false imprisonment arises between private persons for private ends. Further, in false imprisonment, there is no intention of bringing one before a court, or otherwise securing the administration of the law.

Not every detention includes an arrest. However, many jurisdictions do not recognize the difference between false imprisonment and false arrest.[8] This has put merchants in a precarious position in shoplifting situations and has led state legislatures to pass laws giving merchants protection.

Depending on the facts and jurisdiction, one or more of several theories may be applied to determine whether the conduct amounted to false arrest or false imprisonment. Was the merchant's action in defense of possession of property, was it recapture of chattels, was it arrest to be treated by the local rules of justifiable arrest, or was it privileged because of probable cause to believe that the detained person had shoplifted?

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forbidden from leaving store; illegal detention); Fitscher v. Rollman & Sons Co., 31 Ohio App. 340, 167 N.E. 469 (1929) (instruction properly refused where word "detained" not qualified by word "unlawful"); Alsup v. Saggs Drug Center, 203 Okla. 525, 223 F.2d 530 (1949) (illegal detention, when store manager tapped lady customer on shoulder, said 'Lady, come back with me', took her by the arm and went to his office where her purse was emptied); S. H. Kress & Co. v. Rust, 132 Texas 89, 120 S.W.2d 425 (1938) (illegal detention where lady customer forced to return to store was disrobed completely and searched); Montgomery Ward & Co. v. Wickline, 188 Vo. 485, 50 S.E.2d 387 (1948) (neither malice, ill will nor wrongful intention are elements of false imprisonment).

[5] Great Atl. & Pac. Tea Co v. Billups, 253 Ky. 126, 69 S.W.2d 5 (1934) (neither reasonable apprehension nor submission where plaintiff paid for articles after accusation and went on her way); Gust v. Montgomery Ward & Co., 234 Mo. App. 611, 136 S.W.2d 94 (1939) (false imprisonment can result by actual force, or only from fear of force, or by words alone, or by both); Halliburton-Abbott Co. v. Hodge, 172 Okla. 175, 44 P.2d 122 (1935) (threats that police were on way).

[6] Crews-Beggs Dry Goods Co. v. Bayle, 97 Colo. 568, 569, 51 P.2d 1026, 1027 (1935) (clerk called "Hey, hey, hey" to plaintiff, ran up the stairs in the store to her, grabbed her coat, jerked it out and said "You needn't hide those stockings under your coat"; held, interference with freedom of movement, hence false imprisonment); Gust v. Montgomery Ward & Co., 234 Mo. App. 611, 136 S.W.2d 94 (1939) (if a way of escape is left open which is available without peril of life or limb, there is no false imprisonment, but this rule has no application where detention is by force or threats of force; it was false imprisonment when clerk stopped plaintiff on street, accused her of shoplifting, threatened to call police, searched her, and used violent and abusive language); Gold v. Armer, 140 App. Div. 73, 124 N.Y. Supp. 1069 (3d Dept. 1910) (plaintiff locked in store); Halliburton-Abbott Co. v. Hodge, 172 Okla. 175, 44 P.2d 122 (1935) (door open, yet false imprisonment if threats and conduct of detaining store detective [Willmark detective] induced in plaintiff reasonable belief that resistance or physical attempts to escape room would be futile; jury so found); S. H. Kress & Co. v. De Mont, 224 S.W. 520 (Texas, 1920) (no fear from simple command to return to store from small, frail, and elderly clerk; plaintiff, a bigger woman, testified she wasn't afraid; *held:* plaintiff could have walked away but submitted, hence, no false imprisonment).

[7] Alsup v. Skaggs Drug Center, 203 Okla. 525, 223 P.2d 530 (1949).

[8] Fox v. McCurnin, 205 Iowa 752, 757, 218 N.W. 449, 501 (1928) ("although plaintiff has alleged false arrest . . . and false imprisonment . . . they are not distinguishable . . . ."); Hammergren v. Montgomery Ward & Co., 172 Kan. 484, 241 P.2d 1192 (1952); Montgomery Ward & Co. v. Wickline, 188 Va. 485, 50 S.E.2d 387 (1948).

A. DEFENSE OF POSSESSION OF PROPERTY

One in possession of real or personal property is privileged to defend it by the use of force which reasonably appears necessary to prevent a threatened interference with the possession.[9] The one in possession, if he has a better right to the property than the intruder, has a privilege to resist a trespass to the property by use of reasonable force, which would otherwise amount to assault, battery, false imprisonment, or false arrest.[10] This privilege depends on the appearance which the actions of the intruder would present to a reasonable man in the possessor's position.[11] Thus, there need not be an actual threat, and a reasonable mistake as to the interference or threatened interference would be a defense.

Before the privilege arises, there must be an immediate and urgent necessity to take action. Danger in the past would not bring forth the privilege.[12]

The privilege of the possessor to defend will not arise where the intruder has a privilege to take the property. This situation may occur where the intruder actually owns the property or where a sheriff attaches the property under process of law. A mistake as to the *privilege* of the intruder is not a defense,[13] except where the intruder is intentionally or negligently responsible for the possessor's mistake.[14]

At common law, the defense of possession of property was the only fact situation where a merchant could mistakenly use force without liability. The only time the merchant was allowed a reasonable mistake at common law was when he was in possession and he reasonably believed someone, who in fact had no privilege to take possession, was threatening to or was in the process of dispossessing him.

The defense of possession of property theory is not adaptable to protecting the merchant from liability. By necessity, the merchant must allow people to come into his store, pick up his goods and look them over before deciding to purchase them. A merchant can not reasonably believe that a customer will pilfer his goods until the customer has pocketed or in some way concealed the goods on his person without paying for them and then proceeds out of the store. By this time complete dispossession has occurred and the storeowner can not now assert he is acting in defense of possession of property. It becomes clear why few courts have ever used this theory in shoplifting situations.

B. RECAPTURE OF CHATTELS

Because most merchants will not try to stop suspected shoplifters until complete dispossession, merchants in the majority of cases find themselves

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[9] S. H. Kress & Co. v. Bradshaw, 186 Okla. 588, 99 P.2d 508 (1940) (merchant could detain customer tendering payment thought to be counterfeit for reasonable time pending investigation as to genuiness of coin); S. H. Kress & Co. v. Lawrence, 162 S.W. 448 (Texas, 1914) (same idea rejected where merchant had already been dispossessed).

[10] Cole v. Rowen, 88 Mich. 219, 50 N.W. 138 (1891) (servant); Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S.W. 878 (1902) (finder); Brendlin v. Beers, 144 App. Div. 403, 129 N.Y. Supp. 222 (1st Dept. 1911) (janitor).

[11] Bunten v. Davis, 82 N.H. 304, 133 Atl. 16 (1926).

[12] Hamilton v. Howard, 234 Ky. 321, 28 S.W.2d 7 (1930).

[13] Arlowski v. Foglio, 105 Conn. 342, 135 Atl. 397 (1926); RESTATEMENT, TORTS § 77 (1934).

[14] Leach v. Francis, 41 Vt. 670 (1868).

in the fact situation of recapture of chattels. This is the area where the merchant needs the most protection for his reasonable mistakes, but where he receives the least protection.

Once the merchant has been wrongfully dispossessed of his goods, he is allowed, under the limited doctrine of fresh pursuit, to use reasonable force to retake them.[15] This privilege of reasonable force includes the privilege to detain. The doctrine of fresh pursuit is limited to those specific situations where the possessor promptly discovers the dispossession and makes prompt and persistent efforts to recover the goods.[16] An undue lapse of time may deprive the possessor of his privilege to retake the goods. He must then resort to his remedies at law.[17]

The merchant acts at his peril under the doctrine of recapture of chattels. *Any mistake* he may make, no matter how reasonable, will not justify the use of force or detention.[18]

The problem of the liability of the merchant becomes a question of whether the facts constitute a defense of possession situation, or a recapture of chattels situation. The merchant has the defense of a reasonable mistake in the former, but not in the latter. But when the actions of the merchant constitute detention, many courts fail to make the distinction between these two theories and instead look to their laws of arrest.

C. JUSTIFIABLE ARREST

At common law a private citizen could make an arrest without a warrant for a misdemeanor constituting a breach of the peace if the misdemeanor was committed in his presence.[19] A private citizen could also make an arrest for a felony, if a felony had in fact been committed and the arrested person committed it.[20] When a merchant detains a suspected shoplifter, whatever his reasons for the detention, many courts tend to treat the detention as an arrest without a warrant rather than as the use of force incident to defense of possession or recapture of property.[21] These courts

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[15] Demand should first be made for return of the property. See: Dyk v. De Young, 35 Ill. App. 138 (1889). But, demand should not be required where it reasonably appears that it will be useless or dangerous. RESTATEMENT, TORTS § 104 (1934).

[16] RESTATEMENT, TORTS § 103 (1934). See also the definition in the UNIFORM ACT ON THE FRESH PURSUIT OF CRIMINALS § 5, IOWA CODE § 756.5 (1958), adopted in the majority of states: "Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay."

[17] Bobb v. Bosworth, 16 Ky. 81 (1808); Barr v. Post, 56 Neb. 698 (1898) (whether, even then, the owner may not act to prevent destruction of the property, or removal from the state, has not been determined). See RESTATEMENT, TORTS § 100 *Caveat* (1934).

[18] Hanna v. Raphael Weill & Co., 90 Cal. App. 2d 461, 203 P.2d 564 (1949) (store detective accosted plaintiff on sidewalk and took her back to store on mistaken belief that she took something from store); Crews-Beggs Dry Goods Co. v. Bayle, 97 Colo. 568, 51 P.2d 1026 (1935) (detention of customer by clerk on mistaken belief she had taken stockings); Ashland Dry Goods Co. v. Wages, 302 Ky. 577, 195 S.W.2d 312 (1946) (store manager searched customer's purse on mistaken report by employee that customer had put something in her purse); J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S.W.2d 359 (1935) (assistant store manager searched customer's baggage in mistaken belief that she had hid merchandise in it); Titus v. Montgomery Ward & Co., 232 Mo. App. 987, 123 S.W.2d 574 (1938) (employee searched customer; dress later found in store; honest mistake defense rejected).

[19] Hayes v. Mitchell, 69 Ala. 452 (1881).

[20] Malley v. Lane, 97 Conn. 133, 115 Atl. 674 (1921).

[21] Fitscher v. Rollman & Sons Co., 31 Ohio App. 340, 167 N.E. 469 (1929) (no

will then apply their arrest rules to determine whether the merchant's actions are justifiable. If the merchant was wrong in his belief that the suspected shoplifter committed a felony or a misdemeanor, he is liable for false arrest.

In a few jurisdictions which have codified the common-law rule for arrest by a private citizen it is uncertain whether shoplifting is a breach of the peace.[22] In these jurisdictions it is uncertain whether the merchants may arrest or detain the shoplifter without a warrant even though the merchant sees the shoplifter pilfering his goods.

Those courts which rely entirely on the arrest rules when only a bare detention is involved put the merchant in a parodoxical position. He may seize his property by force, to the point of an assault and battery, from a shoplifter under the defense of possession or recapture doctrines, but he may not detain the same person for a short time in hopes that the shoplifter will give the goods back voluntarily.

The dangers of liability are further compounded because under the arrest rules, the burden is on the arresting person to establish by a preponderance of the evidence that he was justified in making the arrest.[23] The plaintiff has only to make out a prima facie case of detention and damages. If the defense of possession or recapture doctrines were used, the plaintiff would have to prove the illegality of the detention by a preponderance of the evidence.

The arrest rules approach seems an illogical and harsh method to determine whether the actions of a merchant in detaining a suspected shoplifter are tortious. In many cases merchants do not detain a suspected shoplifter under an asserted legal authority but only for their private end of recovering their property or to investigate whether or not their property has been taken without payment. The possessor of property under the recapture doctrine is allowed to use reasonable force which includes assault and battery to recover his property wrongfully taken. He should also be allowed to reasonably detain without regard to whether or not he is arresting without a warrant. Taken in this light the detention could be considered a proper exercise of force incident to recapture of his property wrongfully

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evidence of formal arrest, store detective followed customer out of store, accused her of stealing stockings, brought her back, and got confession; court decided case on basis of arrest for misdemeanor without warrant).

[22] A breach of the peace connotes violence. Marcuchi v. Norfolk & W. Ry., 81 W. Va. 548, 94 S.E. 979 (1918). The recent West Virginia Shoplifting Statute, W. VA. CODE ch. 61, art. 3A, § 1 (Michie Supp. 1960), settled this perplexing problem for West Virginia by providing that shoplifting is to constitute a breach of the peace and any citizen of that state may arrest a person committing shoplifting in his presence.

[23] McVay v. Carpe, 238 Iowa 1131, 29 N.W.2d 582 (1947); Fox v. McCurnin, 205 Iowa 752, 218 N.W. 499 (1928) (defendant had plaintiff arrested for nonpayment of rent); Hobbs v. Illinois Cen. R. R., 182 Iowa 316, 165 N.W. 912 (1917); Buseman v. Schultz, 154 Iowa 493, 132 N.W. 378 (1911); Young v. Gormley, 120 Iowa 372, 94 N.W. 922 (1903); Gold v. Armer, 140 App. Div. 73, 124 N.Y. Supp. 1069 (3d Dept. 1910) (private person who is sued for false arrest on misdemeanor must prove that the misdemeanor was committed and that the plaintiff committed it); Alsup v. Skaggs Drug Center, 203 Okla. 525, 223 P.2d 530 (1949) (detention without process of law or authority is prima facie unlawful; same rule applies to one directing or requesting an unlawful arrest or detention however pure his motives).

taken. Hence, the arrest rules would be irrelevant.[24] If the merchant goes beyond a reasonable detention, he would forefeit his privilege of detention; or if the merchant was mistaken as to his belief that the detained person took his property wrongfully, the privilege would not arise. However, the proper action should then be false imprisonment and not false arrest.

If the merchant's purpose is to arrest, the courts could easily determine this by noting the manner in which the merchant handles the situation. Such actions as telling the suspected shoplifter that he is under arrest, not letting him go once the property has been recovered, and having him brought before a magistrate are actions of arrest. Only then should the arrest rules come into play.

The practicalities of the situation call for the privilege of detention. Most shoplifters, after they have been caught, willingly give back the property on request. If merchants know that the non-violent method of detention for investigation will be considered as an arrest by their courts, but that an assault and battery in an attempt to recover property wrongfully taken under the fresh pursuit doctrine will not subject them to liability, these merchants are more apt to use the more violent method of forcible seizure.

D. PROBABLE CAUSE

Still other courts have developed the doctrine of probable cause to alleviate some of the dangers of liability which a merchant faces in detaining a suspected shoplifter. This doctrine achieves the same result as the doctrine of defense of possession of property by allowing a merchant a reasonable mistake in detaining a suspected shoplifter. Probable cause is allowed as a defense to false imprisonment.[25] In its broadest terms the

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[24] A case recognizing the difference between false arrest and a mere detention and showing that the arrest rules are irrelevant where the detention is merely for the purpose of investigation or to recover property wrongfully taken is: Lester v. Albers Super Markets, Inc., 94 Ohio App. 313, 315, 114 N.E.2d 529, 532 (1948) ("To constitute an arrest there must be an intent to arrest under a real or pretended authority, accompanied by a seizure or detention of the person which is so understood by the person arrested . . . nor is there any arrest where a person is forcibly seized without any pretense of taking him into custody,"; *held:* a manager's insistence on searching customer's bag and doing so wasn't sufficient to indicate to plaintiff that she was being taken into custody or held for delivery to peace officer).

[25] Bettolo v. Safeway Stores, Inc., 11 Cal. App. 2d 430, 54 P.2d 24 (1936) (search of customer revealed he had not pilfered yet court held no false imprisonment because of sufficient probable cause for detention; detention didn't result until suspect was out of store); Collyer v. S. H. Kress & Co., 5 Cal. 2d 175, 54 P.2d 20 (1936) (probable cause is a question of law for trial judge where facts amounting to probable cause are not in dispute); J. C. Penney Co. v. O'Daniell, 263 F.2d 849 (10th Cir., 1959) (OKLA. STAT. ANNO. tit. 22, §§ 1341, 1342 [1958] allows probable cause as defense to false arrest and false imprisonment, even though no warrant is used and a misdemeanor is involved; here there were acts of formal arrest, and police were called in; *held:* detention and arrest has to be done to protect defendant's property; whether probable cause existed is jury question; test for probable cause is whether a reasonable man in defendant's position would believe from the circumstances that probable cause existed); Montgomery Ward & Co. v. Freeman, 199 F.2d 720 (4th Cir. 1952) (using Virginia law; instruction of lower court neglecting to mention privilege of reasonable detention was reversible error; no material distinction between issue of reasonable grounds for detention in false imprisonment and issue of probable cause in malicious prosecution and procedure for submission of the issue to the jury, if minds of reasonable men would not differ;

doctrine permits a private person to detain for the purpose of investigation any person whom he has probable cause (or reasonable grounds) to believe is unlawfully depriving him of his property.[26]

Those courts following the arrest rules approach for determining a merchant's liability for detention leave no leeway for the probable cause doctrine.[27] Because these courts make no distinction between false arrest and

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issue of probable cause is to be determined by the court but where facts are in dispute jury should determine credibility); Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214 (1936) (restraint must be shown to be unreasonable and not warranted by the circumstances before recovery for false arrest is allowed); Jacques v. Childs Dining Hall Co., 224 Mass. 438, 138 N.E. 843 (1923) (one of first cases to recognize probable cause as a defense to false imprisonment; involved non-payment for food; jury allowed to determine whether the detention was reasonable and for a reasonable time and whether the proprietor had probable cause to detain the customer even though proprietor had made a mistake); Teel v. May Dep't Stores Co., 348 Mo. 696, 155 S.W.2d 74 (1941); Herbrick v. Samardick & Co., 169 Neb. 833, 101 N.W.2d 488 (1960) (see dissenting opinion which criticizes majority opinion for not allowing privilege of detention in shoplifting situations; dissenting opinion cites Collyer v. S. H. Kress & Co., 5 Cal. 2d 175, 54 P.2d 20 [1936], as the correct statement of the law); S. H. Kress & Co v. Bradshaw, 186 Okla. 588, 99 P.2d 508 (1940) (privilege to detain on probable cause that payment was in counterfeit money; privilege lost when police called in); Cohen v. Lit Bros, 166 Pa. Super. 206, 70 A.2d 419 (1950) (probable cause is question of law for trial judge where facts amounting to probable cause are not in dispute); Little Store v. Isenberg, 26 Tenn. App. 357, 172 S.W.2d 13 (1943) (jury question); Burnaman v. J. C. Penney Co., 181 F. Supp. 633 (S.D. Tex. 1960) (holding that, under TEX. CODE CRIM. PROC. art. 325, and TEX. PENAL CODE art. 1169 [1948], reasonable grounds for searching a suspected offender in order to prevent consequences of theft are a defense to an action for false imprisonment). RESTATEMENT (SECOND), TORTS § 120A (Tentative Draft No. 1, 1957) recognizes a limited privilege of temporary detention for investigation.

See: Note, 10 ALA. L. REV. 253 (1957) (ALA. CODE tit. 14 § 334(1) (1958 Recomp.), adopts probable cause of doctrine of *Collyer* and *Bettolo*, to wit: privilege of detention for reasonable time and to investigate in reasonable manner where probable cause exists); Note, 25 ALBANY L. REV. 173 (1961) (New York Shoplifting Statute, N.Y. GEN. BUS. LAW art. 12-B, provides defense in any action for false imprisonment, defamation or similar tort resulting from detention in or in vicinity of mercantile establishment; there must be reasonable grounds for believing person was committing or attempting to commit larceny; reasonable grounds defined to include but not limited to knowledge that a person has concealed possession of unpurchased goods); Comment, 37 N.D.L. REV. 113 (1961) (N.D. GEN. CODE § 29-06-17 [1960] adopts probable cause doctrine of *Collyer* and *Bettolo*); Comment, 63 W. VA. L. REV. 196 (1961) (W. VA. CODE ch. 61, art. 3A, § 1 [Michie Supp. 1960] defines shoplifting as a breach of the peace and gives private persons the right to arrest for this act if committed in their presence; article concludes that no reasonable mistake is allowed and detaining person must see and know shoplifter shoplifted and must intend to arrest and not proceed to detain for purposes of recapturing his property).

[26] Bettolo v. Safeway Stores, Inc., 11 Cal. 2d 430, 431, 54 P.2d 24, 25 (1936) ("where a person has reasonable grounds to believe that another is stealing his property . . . he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner. . . .").

[27] Safeway Stores v. Barrack, 122 A.2d 457 (Md. 1956) (hired policeman held plaintiff after thinking he stole butter, probable cause held no defense); Titus v. Montgomery Ward & Co., 232 Mo. App. 987, 123 S.W.2d 574 (1938) (no actions of arrest were present here, just bare detention by store employee and a search, yet false arrest was found); Gold v. Armer, 140 App. Div. 73, 124 N.Y. Supp. 1069 (3d Dept. 1910) (probable cause no defense to false imprisonment; recent New York shoplifting statute changes this decision).

But probable cause may be shown to mitigate damages where exemplary damages are asked and where the detaining person acted reasonably and in good faith: Titus v. Montgomery Ward & Co., 232 Mo. App. 987, 123 S.W.2d 574 (1938).

In Collyer v. S. H. Kress & Co., 5 Cal. 2d 175, 178, 54 P.2d 20, 23 (1936), the court recognized that considerable confusion exists as to whether or not probable cause is

false imprisonment, they consider every detention an arrest.[28] Under most arrest statutes, a private individual cannot arrest on probable cause as to the crime committed. In other words, no mistake is allowed as to the crime committed. This is the reason for the expression in these jurisdictions that probable cause is no defense to false arrest or false imprisonment.

The jurisdictions allowing probable cause as a defense to false imprisonment impose strict limitations. There must be probable cause or reasonable grounds for detention; mere suspicion is not enough.[29] The detention must be

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a defense in an action for false imprisonment and admitted that statements had been made to the effect that probable cause is no defense in actions for false imprisonment. After distinguishing the cases in which such statements had been made, however, the court went on to say that probable cause is a defense. Its language, frequently cited by other courts, was as follows: "Ordinarily, the owner of property, in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it. . . . However, there seems to exist considerable confusion in the cases as to whether probable cause is a defense in false imprisonment cases involving misdemeanors. The broad statement occasionally appears to the effect that probable cause is no defense in actions for false imprisonment . . . . The cited cases involved unlawful arrest under the authority of illegal process issued in civil actions. In such instances, as in 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 an 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. In an effort to harmonize the individual right to liberty with a reasonable protection to the person or property of the defendant, it should be said in such a charge of false imprisonment, where a defendant had probable cause to believe that the plaintiff was about to injure defendant in his person or property, even though such injury would constitute but a misdemeanor, that probable cause is a defense, provided, of course, that the detention was reasonable. As already indicated, the rule should be different if the offense believed to be in the process of commission relates to the person or property of another. And, of course, we may properly refer to probable cause as a defense in false imprisonment cases as constituting that justification for the arrest which may be announced by statutory enactment."

[28] Jefferson Dry Goods Co. v. Stoess, 304 Ky. 73, 199 S.W.2d 994 (1947) (case of bare detention; no calling of police nor acts of formal arrest were present, yet case decided on basis of arrest by private person for misdemeanor).

[29] Collyer v. S. H. Kress Co., 5 Cal. 2d 175, 54 P.2d 20 (1936) (customer, store detective and assistant saw plaintiff pick up articles from open counters and put them in his pocket); Moffath v. Buffums', Inc., 21 Cal. App. 2d 371, 69 P.2d 424 (1937) (no grounds for probable cause where defendant in good faith believed that employee had in past taken money from her employer); J. C. Penney Co. v. O'Daniell, 263 F.2d 849 (10th Cir. 1959) (directed verdict for plaintiff reversed on grounds that the following evidence was sufficient to make probable cause an issue for the jury: customer saw plaintiff handle gowns and lower them below top of counter and on each occasion heard rustling of paper sacks; customer didn't see plaintiff return gowns to table; plaintiff hurriedly left when she saw customer watching her; customer relayed information to employee who in turn told store manager; plaintiff hurriedly left store when she saw store manager approach her; store manager stopped her on street and found gown in plaintiff's bag, no such gown had been displayed in store; plaintiff explained she wanted to exchange gown; held error for trial court to direct for plaintiff on grounds that employee did not see plaintiff handle gowns; jury should have been allowed to draw its own inference from this fact); Burnaman v. J. C. Penney Co., 181 F. Supp. 633 (S.D., Tex., 1960) (clerk saw plaintiff, a paraplegic in wheel chair, take dress and

for the purpose of investigation only.[30] Where the suspect makes payment for the goods, he has an unqualified right to leave the premises.[31] The shoplifter must be released after he returns the goods.[32] The detention must be for a reasonable time[33] and in a reasonable manner.[34]

A few jurisdictions have arrived at the same result of probable cause even though they have not adopted the doctrine formally. This has been done through a narrow definition of detention. Here merchants are allowed to investigate a suspected shoplifter on the reasoning that the suspect submitted voluntarily,[35] or that the suspect did not have a reasonable apprehension of

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reported incident to assistant manager; evidence allowed in where clerk saw plaintiff and her son in store before and, right after, store had missing merchandise). But see: Great Atl. & Pac. Tea Co., v. Smith, 281 Ky. 583, 136 S.W. 2d 759 (1940) (storekeeper must see and know customer is taking wrongfully before he has the right to prevent attempted shoplifting).

[30] Moffatt v. Buffums', Inc., 21 Cal. App. 2d 371, 69 P.2d 424 (1937) (limits of privilege of detention exceeded where purpose of detention was to procure confession to theft of money at prior time; prima facie evidence of false imprisonment where plaintiff was told she couldn't leave until she signed confession); S. H. Kress & Co. v. Bradshaw, 186 Okl. 588, 99 P.2d 508 (1940) (privilege lost where police called in; went beyond detention for investigation).

[31] Lester v. Albert Super Markets, Inc., 94 Ohio App. 313, 114 N.E.2d 529 (1952); Little Store v. Isenberg, 26 Tenn. App. 357, 172 S.W.2d 13 (1943) (privilege lost where clerk pursued plaintiff out of store and accused her of not paying after another clerk had told him plaintiff had paid).

[32] Teel v. May Dept. Stores Co., 348 Mo. 696, 155 S.W.2d 74 (1941) (court approved right of employees to detain a suspect for a reasonable time for a reasonable investigation on reasonable grounds but held false imprisonment could exist by detaining the suspect after goods had been returned).

[33] Bettolo v. Safeway Stores, Inc., 11 Cal. 2d 430, 54 P.2d 24 (1936) (15 minutes reasonable); Collyer v. S. H. Kress Co., 5 Cal. 2d 175, 54 P.2d 20 (1936) (20 minutes reasonable); Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N.E. 843 (1923) (jury question); Weiler v. Herzfeld-Phillipson Co., 189 Wis. 554, 208 N.W. 599 (1924) (as long as plaintiff was detained on company time on suspicion of dishonesty, false imprisonment couldn't be predicated on length of time plaintiff was detained).

[34] Montgomery Ward & Co. v. Freeman, 199 F.2d 720 (4th Cir. 1952) (accusation by manager of store that plaintiff stole zippers from defendant's store and his taking plaintiff back to store to small room and making it clear she could not leave was held sufficient to take case to jury on false imprisonment on question of reasonable detention); Burnaman v. J. C. Penney Co., 181 F. Supp. 635 (S.D. Tex., 1960) (forced search of woman customer, paraplegic in wheel chair by clerk and assistant manager held to be lawful force; evidence of assault and battery held not to have gone beyond what would reasonably be necessary to effect a lawful search, hence assault and battery action failed as did the false imprisonment action); Collyer v. S. H. Kress Co., 5 Cal. 2d 175, 54 P.2d 20 (1936) (words of reproach, "robber", "thief", "skunk", used by defendant as testified to by plaintiff not to be considered in false imprisonment action; defendants were entitled to use reasonable amount of compulsion to effect the restraint; request to sign statement of theft not improper under the circumstances, since plaintiff could have left the premises at any time); Weiler v. Herzfeld-Phillipson Co., 189 Wis. 554, 208 N.W. 599 (1926) (fact employee was detained on suspicion of dishonesty on company time and being compensated and was refused a request to leave held not to disclose an unlawful manner of detention; fact she was threatened with incarceration if she didn't confess held not to bear on question of false imprisonment; but such threat bore on value of confession as evidence).

[35] White v. Levy Brothers, Inc., 306 S.W.2d 829 (Ky. 1957) (employee held to have submitted voluntarily and felt no apprehension since she left when she wanted to, such conduct held to constitute consent to interrogation); Meinecke v. Skaggs, 213 P.2d 237 (Mont. 1949) (no false imprisonment because only reason plaintiff went back to store was to convince manager that she had paid for the goods he accused her of stealing).

detention,[36] or that the suspect was not really detained.

A merchant in those jurisdictions not recognizing probable cause cannot safely detain a suspected shoplifter unless he knows exactly how the courts will interpret his methods of detention. Merchants in these jurisdictions contemplating a detention for investigation should follow at least these simple rules: detain only on strong probable grounds, preferably only after observing someone conceal goods without paying for them; detain only for investigation; approach the suspect in a non-threatening and quiet way, without loud accusations and abusive language; carry on the investigation as quickly as possible. If a merchant follows these rules, the most he can hope for is that such conduct will induce a court not to find any false imprisonment or false arrest. If false imprisonment or false arrest is found, such conduct will at least prevent punitive damages and reduce actual damages.

II. EFFECTS OF CONDUCT OF EMPLOYEES, DETECTIVES, AND SPECIAL POLICE

In every law suit the practicalities call for suing the one who has the "deep pocket". In shoplifting cases, where false arrest or false imprisonment is brought in a civil action, the proprietor of the store or the corporation,[37] if the store is incorporated, is the logical defendant. The principle of respondent superior is the bridge between the employee's misconduct and the owner's liability for false arrest or false imprisonment. The critical questions in shoplifting cases, where vicarious liability is involved, are whether the acts of the employee in detaining a suspected shoplifter were authorized and were within the scope of his employment.

It has been held that a clerk of a store has not by virtue of such employment authority to arrest, detain, and search anyone suspected of having stolen and secreted about his person any of the goods kept in the store unless the owner expressly authorized such arrest, detention, and search. Since the employer himself could not lawfully detain, he could not lawfuly authorize his employee to do something he himself was not lawfully allowed to do. The result was that the authority to detain could not be implied from the detaining person's employment and hence the employer could not be held liable.[38]

However, a majority of courts do not require express authority, and do hold the employer liable on a theory of implied authority.[39] The reasoning behind the implied authority theory is that the employees entrusted with property for sale, or safe-keeping, or assigned to positions requiring perform-

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[36] Great Atl. & Pac. Tea Co. v. Billups, 253 Ky. 126, 69 S.W.2d 5 (1934) (store manager stopped plaintiff on street and plaintiff paid him and continued on her way after he accused her of shoplifting, and insisted that she go back to store; held: no reasonable apprehension and hence no false imprisonment).

[37] J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S.W.2d 359 (1935) (good discussion of the period of the law when corporations could not be held responsible for torts of their agents on the idea that the state in granting its charter could not confer power to commit unlawful acts; if such torts were committed by corporate agents, they were held to be ultra vires; this court concludes that now corporations are liable for torts of their agents in the course of their employment and therefore false imprisonment will lie against a corporation).

[38] Homeyer v. Yaverbaum, 197 App. Div. 184, 188 N.Y. Supp. 849 (2d Dept. 1921) (store owner held not liable for manager's accusing plaintiff of stealing handbag and refusing to permit her to leave store).

[39] Philadelphia & Reading R. R. v. Derby, 55 U.S. 468 (1852); New Orleans, M.&C. R. R. v. Hanning, 82 U.S. 649 (1872).

ance of certain duties to protect the property in the store, have implied permission from their employers to do all things proper and necessary to protect the property and to perform their duties. Therefore, the employer becomes liable for his employee's acts within the limits of the employee's implied authority and scope of employment, however erroneous or mistaken the employee's acts.[40]

Scope of employment refers to the duties that the employee has to perform.[41] Implied authority refers to the necessary authority and power to perform those duties.[42] If the scope of employment, for example, is to sell goods and be responsible for the safe-keeping of these goods, it will be inferred from these duties that the employer has impliedly given the employee the necessary authority to perform these duties.

Titles, duties, and discretion called for by the employment and the exigencies of the situation form the basis for determining whether the employee has the implied authority to detain and search.[43] For example, a clerk,

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[40] Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214 (1936); J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S.W.2d 359 (1935) (liberality in favor of person imprisoned or otherwised injured must be exercised in determining scope of authority of agent and responsibility of principal); McCrory Stores Corp. v. Satchell, 148 Md. 279, 129 Atl. 348 (1925) (store manager was held to have acted within his implied authority because goods for sale were entrusted to him for safe-keeping, in attempting to recover goods he thought had been stolen; store owner was held liable for the manager's assault and false imprisonment of plaintiff erroneously suspected); Hurst v. Montgomery & Co., 107 S.W.2d 183 (Mo. 1937) (company held liable for store clerk's mistake in stopping customer on street and searching customer on suspicion of theft of dress from store; court rejected argument that since the employer could not act on mere suspicion, clerk acted beyond scope of his implied authority); Phoenix Assur. Co. v. Wachter, 132 Pa. 438, 19 Atl. 289 (1890) (if agent is acting within the scope of apparent authority, the principal is still liable even though the agent in the matter exceeded his authority).

[41] L. S. Ayres & Co. v. Harmon, 56 Ind. App. 436, 104 N.E. 315 (1914) (female private detective employed by store to protect goods from shoplifting held to be acting within scope of her employment in following plaintiff from store under supposition that plaintiff had stolen goods and procuring her arrest by policeman away from store).

[42] In Magnolia Petroleum Co. v. Guffey, 95 S.W.2d 690 (Tex. 1936) (purportedly applying RESTATEMENT, AGENCY 43 (1933) (the court held that the ordinary experience, usages, and habits of men are to be taken into consideration, and authority to use force will not be implied when the business entrusted to the agent is such that the use of force is not a natural or ordinary means or incident of transacting it; these directions were used in negating an implied authority to an oil station agent to enforce payment of a worthless check with a six shooter and his acts in doing so were held not to be within the scope of his implied authority). But see: Hostettler v. Carter, 73 Okla. 125, 175 Pac. 244 (1918) (store owner held liable for false arrest where manager had customer arrested for bad check; store owner was not present when the arrest was made and did not particularly authorize such acts of the manager; manager was still held to be acting within the scope of his implied authority and employment in endeavoring to protect the interest of the owner).

[43] Pilos v. First Nat'l Stores, Inc., 319 Mass. 475, 66 N.E.2d 576 (1946) (manager's duties to see that all money transactions went through channels of operations and were completed properly and to do anything else pertaining to the grocery department were sufficient to take to jury the question of whether the manager acted within the scope of his authority in connection with his detention of the plaintiff); Rigby v. Herzfeld-Phillipson Co., 160 Wis. 228, 151 N.W. 260 (1915) (boy employed by department store for one day followed plaintiff out of store and had policeman bring her back on charge of theft; boy had no duty to sell nor address customers; court held he was acting outside scope of his employment).

whose job is selling, necessarily has a duty to protect his employer's property.[44] Although his allowable discretion is not as great as his supervisor, the exigency of the situation may demand that he act quickly when he discovers a shoplifting because he may be the only one present besides the shoplifter. The employer in this situation would naturally expect the clerk to prevent the theft.

The wider the permissible discretion an employee has, the easier it is to find implied authority to detain and search.[45] In going up the scale of authority from floor walker, to supervisor, to department head, to general manager, it is relatively simple to find prima facie implied authority to detain and search.[46]

The most important limit for the "scope of employment" requirement is that the employee must be in the act of recovering his employer's property.[47] Where an employee takes steps to punish a suspected shoplifter, or to vindicate the law, or to vindicate his conception of a personal wrong, or to vindicate the invasion of his personal rights, the employee is not performing his duties

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[44] Crews-Beggs Dry Goods Co. v. Bayle, 97 Colo. 568, 51 P.2d 1026 (1935) (employer held liable for clerk's acts in detaining customer where evidence showed clerk had duty to sell and protect goods; authority to detain was implied); Hurst v. Montgomery Ward & Co., 107 S.W.2d 183 (Mo. 1937) (clerk in the ready-to-wear department in defendant's store who first and primarily had duty to sell, but was entrusted with the care and custody of its goods was held empowered, as the nature of her employment implied, to do everything necessary to protect the merchandise in her keeping and to that end authorized to arrest and detain persons charged with theft, not for criminal punishment, but to recover her employer's goods); Montgomery Ward & Co. v. Wickline, 188 Va. 485, 50 S.E. 2d 387 (1948) (prima facie case of false arrest made out against the store where police officer arrested customer for alleged misdemeanor not committed in his presence [theft of tool from store] without a warrant at direction and insistence of clerk).

[45] Hammargren v. Montgomery Ward & Co., 172 Kan. 484, 241 P.2d 1192 (1952) (where an unlawful arrest is caused by a general agent, like a general manager, general superintendent, or one performing the duties of such an agent, or by a special agent whose general duty is to investigate and prosecute offenses committed against the company, specific authority to cause the arrest need not be shown; it will be inferred from the relationship as a matter of law if there is no controversy about the position of the agent); J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S.W.2d 359 (1935) (character of employment held to be important consideration attending the inclusion or exclusion of particular agent's misconduct as within or without his implied authority; designation as "manager" or "assistant-manager" carries implication of general power and permits reasonable inference of authority to conduct and control employer's business in the store, and his acts are more surely those of the principal).

[46] Adams v. F. W. Woolworth Co., 144 Misc. 27, 257 N.Y. Supp. 776 (Sup. Ct. 1932) (store manager's statement to detective "do with her as you please" was enough to taint defendant store with liability for false imprisonment due to detective's illegal detention of plaintiff-customer); Long v. Eagle 5, 10 & 25¢ Store Co., 214 N.C. 146, 198 S.E. 573 (1938) (designation "manager" held to imply general power); S. H. Kress & Co. v. Rust, 120 S.W.2d 425 (Tex. 1938) (assistant manager held to ratify as that of defendant store act of servant in detaining customer when assistant manager turned customer over to detective).

[47] Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214 (1936) (clerk still held to be within scope of her employment when she left store and detained customer outside of store); Long v. Eagle 5, 10 & 25¢ Store Co., 214 N.C. 146, 198 S.E. 573 (1938) (fact that store manager called policeman to arrest and search plaintiff did not relieve store from liability; fact that store manager had plaintiff arrested and searched right away was evidence showing that manager was attempting to protect employer's property and not vindicating the law; jury question); Perkins Bros. Co. v. Anderson, 155 S.W. 556 (Tex. 1913) (store detective held to still be acting within scope of his employment in detaining plaintiff off the premises because he thought he saw the customer put goods in her bag in the store).

to sell or protect his employer's property. He is acting outside the scope of his employment, on a "frolic of his own".[48] For such actions, the employer can not be held liable. The injured person's action is against the employee.

Store owners have tried to avoid vicarious liability through the use of independent contractors. Stores using detectives to prevent shoplifting in their stores argue that these store detectives are independent contractors for whose torts storeowners are not liable. The doctrine of independent contractor may be circumvented in various ways.

A possible circumvention is to strictly construe the independent contract relationship and conclude that an employer-employee relationship existed. An independent contractor is one who contracts to do a specific job according to his own methods and without being subject to the control of his hirer except as to the result of his work.[49] A contract providing for continuous service of a store detective, and not for a specific job, has been held to negate an independent contract relationship.[50] Further, the unrestricted right of the employer to end the particular service whenever he chooses[51] without regard to the final result of the work itself has been held to be almost conclusive evidence of an employer-employee relationship.[52]

Although a store owner may be able to show an independent contract relationship, some jurisdictions are still reluctant to hold store owners immune from tortious acts of store detectives in detaining suspected shoplifters. The feeling is that the duty to protect customers is not delegable.[53] Arguments used against immunizing store owners against liability for misconduct of store detectives include: that such an immunity would permit any store owner to subject his customers to the hazards of an irresponsible detective without peril to himself, that the store owner would obtain all the benefits of surveillance and punishment of shoplifters without being subjected to any of the penalties for unjustified or unlawful detention of law-abiding citizens, and that opportunities for gross injustices would be afforded by such an immunization doctrine.[54]

Other jurisdictions, although considering the detectives to be independent contractors, have held the store owners or employees liable by treating them as joint tortfeasors. Where this is done it requires very little action on the part of store owners or their employees to taint them with liability for false imprisonment because of the actions of store detectives. Simple directions by

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[48] Adams v. F. W. Woolworth Co., 144 Misc. 27, 257 N.Y. Supp. 776 (Sup. Ct. 1932) (liability of store not extended to acts of store detective in extorting $1,000 from customer detained and accused of shoplifting because detective committed these acts on his own without apparent or real authority from defendant store); Pruitt v. Watson, 103 W. Va. 627, 138 S.E. 331 (1927) (manager held not to be acting within scope of employment in calling police and lodging complaint after detaining suspect since when he called police and lodged complaint against suspect he was not acting to recover his employer's property).

[49] Adams v. F. W. Woolworth Co., 144 Misc. 27, 257 N.Y. Supp. 776 (Sup. Ct. 1932).

[50] *Ibid.*

[51] *Ibid.* (contract provided that the agency could be discharged on five day's notice).

[52] *Ibid.* (shows circumstantially the subserviency of the employee).

[53] *Ibid.* (non-delegable duty theory applied to protect customer).

[54] *Ibid.* (store detective accused cultured and refined woman customer of shoplifting, extorted $1,000 from her on promise to release her after securing confession through fraud, duress, and fear).

the store manager to the detective have been found sufficient to fix liability on the store owner, the store manager, and the store detective for false imprisonment.[55]

Hiring special policemen from a local police force is still another method used by store owners in their attempts to avoid vicarious liability. A distinction is made between those situations where the police officer is acting in the discharge of his public duties and where he is acting in performance of his duty to the store owner to protect his property. In the former case, the store owner would not be liable for the acts of the police officer, but in the latter case, he would be.[56] When is the special policeman acting in his public capacity and when is he acting in the scope of his private employment to protect the store owner's property? The special policeman's intention at the time of detention usually is controlling on this question.[57] Another factor in determining in what capacity the special policeman is acting is whether he was specifically hired to protect the store owner's property from shoplifting and to reclaim it from the shoplifter.[58]

III. SHOPLIFTING IN IOWA; THE EFFECT OF THE NEW STATUTE

Prior to the adoption of the Shoplifting Act,[59] in 1961, no "shoplifting" case had been decided by the Iowa Court. However, as so many other courts have done, it had not seemed to recognize any substantial distinction between false arrest and false imprisonment.[60] Probably it would have followed the arrest rules approach in determining liability for detention of suspected shoplifters.

Arrest is taking a person into custody when and in the manner authorized by law,[61] and is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest.[62] Both a peace officer and a private citizen may arrest without a warrant for a misdemeanor committed in their presence,[63] but the private citizen acts at his peril when

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55 Halliburton-Abbott Co. v. Hodge, 172 Okla. 175, 44 P.2d 122 (1935).

56 Perkins Bros. Co. v. Anderson, 155 S.W. 556 (Tex. 1913).

57 Hanna v. Raphael Weill & Co., 90 Cal. App. 2d 461, 203 P.2d 564 (1949) (held: special policeman's detention was made to recover employer's property); Perkins Bros. Co. v. Anderson, *supra*, note 56 (fact that special policeman testified his intention in following plaintiff was to get the goods of the store back rather than to arrest plaintiff was sufficient to show he was acting within scope of employment for store rather than as a peace officer even though he told plaintiff "consider yourself under arrest").

58 J. J. Newberry Co. v. Smith, 227 Ala. 234, 149 So. 669 (1933) (direction and control over the special policeman by the store owner, and whether his duty is to protect property of store and to reclaim it if shoplifted, are factors in holding that a special policeman is an employee of the store; mere fact of payment for special police protection is not controlling).

59 Iowa Laws ch. 291 (1961), entitled: An Act Relating to Larceny, Creating and Defining the Offense of Shoplifting, Providing Penalties for Such Offense.

60 Fox v. McCurnin, 205 Iowa 752, 757, 218 N.W. 499, 501 (1928) (" . . . although plaintiff has alleged false arrest . . . and false imprisonment . . . they are not distinguishable, and . . . do not state distinct causes of action. . . ."). In Sergeant v. Watson Bros. Transp. Co., 224 Iowa 185, 52 N.W.2d 86 (1953), the Court held that probable cause is no defense in a false imprisonment action, although it is important on the issue of exemplary damages.

61 Iowa Code § 755.1 (1958).

62 Iowa Code § 755.2 (1958).

63 Iowa Code §§ 755.3 - 755.5 (1958).

he arrests for either a misdemeanor or a felony.[64] He suffers for making a mistake as to whether such a crime was committed.[65] The arrested person must be taken without delay before a magistrate or delivered to a peace officer to be taken before the magistrate.[66]

These requirements made it difficult for the Iowa merchant to deal with suspected shoplifters. A stock answer of one apprehended before he leaves the store is that he intended to pay for the goods he has picked up. Proof of the intent to deprive needed for larceny was almost impossible, unless the shoplifter left the store with the goods without paying for them. If he was tried for larceny, and acquitted, the arrest would appear to be unjustified and a false arrest action might lie. Also, as every statutory procedure for arrest had to be followed, if the merchant simply detained the shoplifter, got his property back peacefully, and then released the culprit, he was open to a charge of false arrest.[67]

Increasing concern with the shoplifter problem led to agitation for legislative action. A 1959 bill passed by the Legislature was vetoed by the Governor.[68] A 1961 bill was enacted.[69] Although a number of states have recently adopted legislation in this area, the Iowa Act does not seem to be patterned on

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[64] Merchants Motor Freight, Inc. v. State Highway Comm., 239 Iowa 888, 32 N.W.2d 733 (1948); 1911-1912 OP. ATTY. GEN. 619 (defines felony as a crime which is or may be punished by imprisonment in the penitentiary).

[65] Maxwell v. Maxwell, 189 Iowa 7, 177 N.W. 541 (1920) (burden on private person arresting without a warrant to show legal right to do so).

[66] IOWA CODE § 755.14 (1958); Norton v. Mathers, 222 Iowa 1170, 271 N.W. 321 (1937) (mandatory for one making an arrest to take the arrested person before a magistrate without unnecessary delay; arrested person need not ask to be taken; failure to take the arrested person before a magistrate makes the detention prima facie unlawful; whether proper procedure has been followed is jury question); Arneson v. Thorstad, 72 Iowa 145, 33 N.W. 607 (1887) (there can be a legal excuse for failure to take a suspect before a magistrate immediately as where suspect is so intoxicated as to be apparently unfit to attend to his own rights).

[67] Releasing the culprit may also make detainer a trespasser ab initio. See: Steward v. Feeley, 118 Iowa 524, 92 N.W. 670 (1920) (officer discharged plaintiff on his own motion whom he arrested without a warrant; held: officer was liable for false arrest for prior actions of detention on theory of trespass ab initio; fact that detained person accepted discharge did not constitute waiver of damages for false arrest).

[68] S.F. No. 3, 58th Gen. Assem. (1959).

[69] Iowa Laws ch. 291 (1961). The main differences between the wording of the 1959 bill and the 1961 bill appear in two sections. In the 1959 bill section three reads as follows: "Persons so concealing such goods may be detained and searched by a peace officer, merchant, or a merchant's employee, provided that the detention is for a reasonable length of time and that the search is conducted in a reasonable manner by a person of the same sex." Section three of the 1961 bill adds to the last sentence of the above section "and according to section four (4)."

In the 1959 bill section five reads as follows: "Detention of a person suspected of shoplifting, or the searching of said suspect as provided in this Act, shall constitute a complete defense to any criminal or civil action for false arrest or false imprisonment provided that the person making the detention has probable cause to believe that shoplifting was committed or attempted in his presence, or that shoplifting has in fact been committed and that he had reasonable grounds for believing that the person detained had committed it." Section five of the 1961 bill reads as follows: "The detention or search under this Act by a peace officer, merchant, or merchant's employee shall not render such peace officer, merchant, or merchant's employee liable, in a criminal or civil action, for false arrest or false imprisonment provided the peace officer, merchant, or merchant's employee had reasonable grounds to believe the person detained or searched committed or was attempting to commit the crime of shoplifting as defined in this Act."

other acts.[70] The Legislature may have intended to give the Iowa merchant about the same leeway and protection as that afforded by the probable cause doctrine. But a number of problems of construction are presented, and their resolution will determine the extent of protection for the merchant.

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[70] More than half the states now have statutes affording some measure of protection against shoplifting. In Note, *Shoplifting and the Law of Arrests: A Problem in Effective Social Legislation*, 19 MD. L. REV. 28 (1959), the author collected all the shoplifting statutes then in force, and classified them in the following categories:

A. Amendment of the general larceny statute: MASS. ANN. LAWS ch. 276, § 28 (1956);

B. Defining the crime of shoplifting:
   (1) In terms of willful concealment:
   ARIZ. REV. STAT. ANN. § 13-673 (Supp. 1960); IDAHO CODE ANN. § 18-4626 (Supp. 1961); ME. REV. STAT. ANN. ch. 132, § 10-A (Supp. 1959); MISS. CODE ANN. § 2374-01 (Supp. 1958); N.H. REV. STAT. ANN. ch. 582 § 15 (Supp. 1959); N.C. GEN. STAT. § 14-72.1 (Supp. 1959).
   (2) In terms of the traditional larceny concept:
      (i) with a presumption from the possession of goods: ARK. STAT. ANN. § 41-3942 (Supp. 1959); KY. REV. STAT. § 433.234 (1960); PA. STAT. ANN. tit. 18, § 4816.1 (Purdon Supp. 1960); S.C. CODE §§ 16-359.1-.4 (Supp. 1960);
      (ii) without such presumption: GA. CODE ANN. §§ 26-2640 to 26-2642 (Supp. 1958); VA. CODE ANN. §§ 18.1-126 to 18.1-128 (1960 Repl.);

C. Allowing reasonable detention of a suspect by the merchant without incurring civil or criminal liability: ALA. CODE ANN. tit. 14, § 334(1) (1958 Recomp.); ARIZ. REV. STAT. ANN. §§ 13-674 to 13-675 (Supp. 1960); ARK. STAT. ANN. § 41-3942 (Supp. 1959); FLA. STAT. ANN. § 811.022 (Supp. 1960); GA. CODE ANN. §§ 26-2640 to 26-2642 (Supp. 1958); ILL. ANN. STAT. ch. 38, §§ 252.1-.4 Smith-Hurd Supp. 1960) (civil immunity only); KY. REV. STAT. § 433.234 (1960); MINN. STAT. ANN. § 622.27 (Supp. 1960) (detention for limited purpose only); MISS. CODE ANN. § 2374-04 (Supp. 1958) (suspect may be questioned but not searched); NEB. REV. STAT. § 29-402.01 (Supp. 1958); OHIO REV. CODE § 2935.041 (Baldwin 1960); OKLA. STAT. ANN. tit. 22, § 1341 (1958) (detention until a peace officer may be summoned); PA. STAT. ANN. tit. 18, § 4816.1 (Purdon Supp. 1960); TENN. CODE ANN. §§ 40-824 to 40-826 (Supp. 1961); UTAH CODE ANN. §§ 77-13-30 to 77-13-32 (Supp. 1961);

D. Other approaches: MONT. REV. CODES ANN. § 64-213 (Supp. 1961) ("Any merchant shall have the right to request any individual on his premises to place or keep in full view any merchandise such individual may have removed, or which the merchant has reason to believe he may have removed, from its place of display . . . [without being] criminally or civilly liable for slander, false arrest, or otherwise, on account of having made such request."); WIS. STAT. ANN. § 939.49 (1958) (defines right of recapture and allows merchant or other owner of property to threaten and use force against another to prevent or terminate what he believes is an unlawful interference with his property; the threat must be reasonable and the use of force may not be such as may cause great bodily harm or death solely for the defense of property; a third party, specifically including an employee, is accorded a similar privilege).

Several states have adopted shoplifting statutes since the above article was written. The New York and North Dakota statutes would fall within category C, above: N.Y. GEN. BUS. LAW art. 12-B; N.D. GEN. CODE ANN. § 29-06-17 (1960). The West Virginia statute, which requires the merchant to arrest and not merely to detain to recapture property, should fall within category D: W. VA. CODE ch. 61, art. 3A § 1 (Michie Supp. 1960).

Iowa's statute, Iowa Laws ch. 291 (1961), has similarities with several in various parts of categories A and B, but is not identical with them. Its provision for search by a person of the same sex is unique. It may be more comprehensive in coverage than the others, perhaps because the Legislature was attempting to provide a middle ground in preserving freedom of movement of the individual and his constitutional right to be secure in his person as well as the right of the merchant to protect his property from theft. As a result, the statute may be loaded in favor of the person who is detained. The most common type of shoplifting statute, according to the author of the Maryland Law Review note, is very similar to section 5 of the Iowa Act, although the wording has been considerably rearranged. He notes

Section one[71] of the new statute amends the Code chapter on larceny by adding thereto the crime of "shoplifting", defined as: "tak[ing] possession of any goods, wares, or merchandise offered for sale by any store or other mercantile establishment, with the intention of converting the same to his own use without paying the purchase price thereof." This would seem to require complete dispossession. Questions will arise as to what are "goods, wares or merchandise" and "store or other mercantile establishment". Probably these would not include failures to pay the fare for train or bus rides, or the admission to theaters, amusement parks or circuses. But does it cover failure to pay for a meal in a restaurant? Another question is whether an employee who takes store merchandise without paying for it is guilty of both shoplifting and embezzlement.

The second section[72] of the new act seems aimed at the problem of proof of the intent to deprive, especially where detention occurred before the suspect left the store. It states:

> The fact that any person has concealed unpurchased goods or merchandise of any store or other mercantile establishment, either on the premises or outside the premises of such store, shall be material evidence of concealment of such article with the intention of converting the same to his own use without paying the purchase price thereof within the meaning of Section one (1) of this Act, and the finding of such unpurchased goods or merchandise concealed, upon the person or among the belongings of such person, shall be material evidence of willful concealment and, if such person conceals, or causes to be concealed, such unpurchased goods or merchandise, upon the person or among the belongings of another, the finding of the same shall also be material evidence of willful concealment on the part of the person concealing such goods.

What do the words "material evidence" mean? Will the finding of unpurchased goods on a person raise a presumption of intention to convert, or is the evidence admissible but the jury can regard or disregard it as it wishes? If a presumption is raised, is it a permissive one which the jury can disregard and the court will not have to instruct on, or is it one which must be followed until rebutted and will have to be instructed on? If the words simply mean that such evidence is admissible on the intention to convert but not that a presumption is raised, the merchant is in little better position than before the statute was adopted, because finding unpurchased goods on a person in a store would be admissible as relevant and material on the question of intent to convert, even without the statute.[73]

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that the American Civil Liberties Union had stated that a proposed Maryland bill following the common version would be fought in the legislature and, if passed, the ACLU would attempt to have it held unconstitutional, although no reported cases have dealt with the validity of such a provision. Note, 19 MD. L. REV. 28, 35 (1959).

[71] Iowa Laws ch. 291, § 1 (1961).

[72] Iowa Laws ch. 291, § 2 (1961).

[73] Reading the 1959 bill as it originally stood before amendments points to the conclusion that the legislature intended no presumption by the words "material evidence". The original title of the 1959 bill read as follows: "An Act relating to larceny, creating and defining the offense of shoplifting, providing penalties for such offense, *creating presumptions arising out of concealment of goods held for sale by merchants, and providing for the detention and searching of persons guilty of shoplifting.*" By amendment the last 25 words of the title [dealing with the presumptions] were deleted. Section two of the 1959 bill read as follows: "Any person wilfully concealing unpurchased goods or merchandise of any store or

According to section three,[74] "persons so concealing such goods may be detained and searched by a peace officer, merchant, or merchant's employee", but only "provided that the detention is for a reasonable length of time and that the search is conducted in a reasonable manner by a person of the same sex and according to section (4)." The words "such goods" apparently refer to the "unpurchased goods" of section two. This section seems to say that even if the detaining person has reasonable grounds to believe that the detained person has shoplifted, detention and search is improper unless unpurchased goods are found on that person or in his belongings or unless it can be shown that he did conceal such goods upon the person or in the belongings of someone else. The section permits detention and search. Would an attempt to secure a confession destroy the privilege?[75] The section speaks of detaining and searching a person. Are a person's belongings a part of the person, or otherwise within the scope of this section? Those having the privilege to detain and search include a peace officer, a merchant, and a merchant's employee. Are merchant police either "peace officers", or "employees?" Though an incorporated store could conduct a search only through employees, it probably will be considered to be a merchant. But would those store detectives that previously have been claimed to be independent contractors qualify as "employees" under this section?

Section three also raises questions as to the length and method of detention and search. What are "reasonable times" and "reasonable manners" will probably be a jury question. Is a merchant permitted to use any force to detain a shoplifter who won't remain voluntarily? And the requirement that the search be conducted by a person of the same sex as the one searched presents interesting problems. Stores using detective agencies to protect their goods from shoplifting probably will now need to retain at least two detectives, one male and one female. Suppose an overzealous employee looks into a bag or package of a detained suspect, or asks the suspect to dump out what he has in his pockets. This may be a search, and if the employee is of the opposite sex from the detained person, would not conform to section three.

Section four[76] is a further limitation on the power to search, though not the power to detain. "No search of the person shall be conducted by any person other than someone acting under the direction of a peace officer except where permission of the one to be searched has been first obtained." Again, does "of the person" include a person's belongings? If the detained person submits to a search without saying anything, will this be implied permission; or does the section require express permission. Even though consent to search

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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 . . . ." After amendment section two read as follows: "The fact that any person has concealed unpurchased goods or merchandise of any store or other mercantile establishment, either on the premises or outside the premises of such store, shall be *material evidence* of concealment of such article . . . ." Throughout the 1959 bill where the words "prima facie evidence" appeared there were amendments substituting the words "material evidence" for "prima facie evidence".

[74] Iowa Acts ch. 291, § 3 (1961).

[75] Moffatt v. Buffums', Inc., 21 Cal. App. 2d 371, 69 P.2d 424 (1937) (under the probable cause doctrine in California it was held that there was prima facie evidence of false imprisonment where plaintiff was told she couldn't leave until she signed a confession of theft).

[76] Iowa Laws ch. 291, § 4 (1961).

is obtained, it does not, apparently, waive the requirement that the search be made by someone of the same sex as the detainee. If consent is not obtained, can the person be forcibly detained until a peace officer can be summoned?

Section five[77] of the new act provides that the peace officer, merchant, or employee shall not be rendered liable, criminally or civilly, for "detention or search under this Act", in actions for false arrest or false imprisonment, where he had reasonable grounds to believe the person detained or searched committed or was attempting to commit the crime of shoplifting as defined in the Act. Are reasonable grounds the same as "probable cause"?[78] The section may permit a reasonable mistake as to whether the person had actually committed or was attempting to commit shoplifting. To this extent it seems to represent a departure from the arrest statutes, since under them the private individual could not be mistaken as to the crime committed. But the section does not allow the merchant a reasonable mistake as to his *privilege* to detain and search. If the detained person cannot be shown to have concealed unpurchased goods, on himself, someone else, or in their belongings, section five would seem to offer no defense to the detaining person or to the searcher.

Section five specifically provides defenses to actions for false arrest or false imprisonment. It says nothing about actions for assault and battery. Could the suspected shoplifter now maintain the latter action where, because of the section, a false arrest action would be unsuccessful? If the elements of assault or battery are included in the elements of false arrest, what is the effect of the section?[79]

Because of the many questions raised by this Act, its value to the Iowa merchant seems not as great as was intended by its sponsors. The merchant is allowed a reasonable mistake as to the crime committed or attempted, but in some respects may be in a more rigid position than he was under the arrest rules. It would seem, therefore, that the merchant should still "walk softly" when dealing with suspected shoplifters.

LOUIS A. LAVARATO (June 1962)

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[77] Iowa Laws ch. 291, § 5 (1961).

[78] In the 1959 bill in section five "probable cause" was used in place of "reasonable grounds".

[79] The New York Shoplifting statute attempts to take care of this problem by providing a defense in any action for false imprisonment, defamation, or other similar tort, commenced by any person as a result of his having been detained on or in the vicinity of a mercantile establishment in order to ascertain the ownership of merchandise found on his person. Burnaman v. J. C. Penney Co., 181 F. Supp. 635 (S.D. Tex. 1960) (a clerk and the assistant manager forcibly searched the plaintiff; the court held that the evidence of assault and battery showed that the force did not go beyond what was reasonably necessary to effect a lawful search; hence the assault and battery action failed as did the false imprisonment action [this may be one way the Iowa court may be able to solve this problem, if and when it arises under the Iowa shoplifting statute]).