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Torts—False Imprisonment and Arrest—Powers of a Merchant to Detain Suspected Shoplifters

The new amendment to North Carolina General Statute section 14-72.1[1] is obviously intended to expand the freedom of a merchant, his employees, and police officers to detain and arrest suspected shoplifters. As the immunity from civil liability is limited to circumstances in which the detention is "in a reasonable manner for a reasonable time" and the detention or arrest was made for "probable cause", one might question whether the area of freedom is greater now than under the common law or prior statutory enactment. The purpose of this note is to explore changes in the state of the law as it applies to the situation of the merchant.[2]

The amendment does not expand a merchant's immunity from suit for malicious prosecution. Probable cause to institute criminal proceedings against a plaintiff has always been and remains a complete defense to the plaintiff's action for malicious prosecution.[3] The significant change in the law comes in the extension of the merchant's immunity from a suit for false imprisonment. Any detention of a person against

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[1]The amendment added sub-section (c) to North Carolina General Statutes section 14-72.1, which follows as amended:

> (a) Whoever, without authority, willfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor . . . . Such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment.
>
> . . . .
>
> (c) A merchant, or his agent or employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, where such detention is in a reasonable manner for a reasonable length of time, if in detaining or in causing the arrest of such person, the merchant, or his agent or employee, or the peace officer had at the time of the detention or arrest probable cause to believe that the person committed the offense created by this section. If the person being detained by the merchant, or his agent or employee, is a minor 16 years of age or younger, the merchant or his agent or employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention.

N.C. GEN. STAT. § 14-72.1 (1971 Advance Legislative Service Pamphlet No. 4). The 1971 amendment became effective on July 31, 1971.

[2]This note will not discuss the effect of the amendment on the powers of agents or employees of the merchant. Under general principles of agency the powers of the employee would be the same as the powers of a merchant once the determination is made that he is acting within the scope of his employment.

[3]Carson v. Doggett, 231 N.C. 629, 58 S.E.2d 609 (1950).

his will without lawful authority makes out a prima facie case for false imprisonment or false arrest.[4] In contrast to a suit for malicious prosecution, probable cause is not a complete defense. Once an involuntary detention has been made, the only complete defense to the action is legal authority or justification to have made the detention, which may be either a power to arrest or a privilege to detain conferred by statute or common law. If the circumstances are such as to give rise to a privilege, probable cause is one of the necessary elements for invoking the privilege.

The new amendment extends the defense of probable cause to some situations in which there was formerly no legal justification for the arrest and creates a new privilege of detention short of actual arrest when merchants have probable cause to suspect someone of the specific crime defined in the statute. By increasing the amount of protection afforded by the defense of probable cause, the legislature has created broad new powers of detention by a merchant. The changes effected in the merchant's power to arrest and privilege to make an involuntary detention will be examined in turn.

POWERS OF ARREST

Under prior law a merchant acted at his peril when he made an arrest by taking a person into legal custody without a warrant. A private person could arrest another for a misdemeanor without a warrant only when a breach of the peace had been committed in his presence.[5] There was no statutory or common law authority for an arrest without a warrant for other misdemeanors such as the crime of willful concealment defined by section 14-72.1.[6] Such an arrest for willful concealment constituted false arrest, and the defense of probable cause would not have been available to the merchant. Probable cause to suspect a person of an offense did not supply an otherwise nonexistent legal authority for an arrest or detention.

The fact that a police officer arrested the plaintiff would not in itself have insulated the merchant from liability for false arrest if the merchant caused the arrest to be made.[7] If the merchant gave the officer the

[4]Hoffman v. Clinic Hospital, Inc., 213 N.C. 669, 197 S.E. 161 (1938).

[5]N.C. GEN. STAT. § 15-39 (1965).

[6]*See* R. PERKINS, CRIMINAL LAW 978 (2d ed. 1969).

[7]This statement was made without further explanation in Long v. Eagle Co., 214 N.C. 146, 198 S.E. 573 (1938), and cited with approval in Hales v. McCrory-McLellan Corp., 260 N.C. 568, 133 S.E.2d 225 (1963). This is not a complete statement of the law on this point, however. The treatment in the text goes beyond this North Carolina dictum.

relevant information and left the decision to arrest with him, the merchant was protected by the officer's intervention.[8] If, however, the arrest was made solely at the instigation and upon the direction of the merchant, the arrest would not have been valid merely because made by the police and not by the merchant.[9] The law is unchanged as it applies to misdemeanors other than willful concealment of unpurchased merchandise, but for that crime the new amendment protects the merchant from liability for an invalid arrest whenever he "causes an arrest" with probable cause to suspect the person of willful concealment.

The powers of a police officer to make an arrest for a misdemeanor without a warrant were also limited. He could arrest without a warrant only when the misdemeanor was in fact being committed in his presence or when he had reasonable grounds to believe one was being comitted in his presence.[10] Seemingly, willful concealment of unpurchased merchandise could occur in the officer's presence if he were summoned by a merchant to the scene, but the reasonable grounds to believe that a crime was being committed in his presence had to be based on the immediate senses of the officer; reports of third parties, even those of a merchant, were not sufficient legal grounds for belief.[11] If the officer made the arrest without reasonable grounds, he acted at his peril. If a crime had not been committed, he would have been liable for false arrest. The new amendment would apparently protect him from this liability for an arrest for the specific crime of willful concealment if he has "probable cause," which apparently can be interpreted to allow the belief to be

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[8]In such a situation the defendant was found not liable for false arrest in Alexander v. Lindsey, 230 N.C. 663, 55 S.E.2d 470 (1949), but the court did not state this as a principle of the law. A good case on the point is Vimont v. S.S. Kresge Co., 291 S.W. 159, 160 (Mo. Ct. App. 1927). There the court said:

> [I]f the defendant directs a police officer to take the plaintiff into custody, he is necessarily liable to respond in damages for a resulting false imprisonment; but if, to the contrary, the defendant merely states the facts to the officer, leaving it with him . . . to act or not, as [he] see[s] fit, the defendant is not liable. The rule is eminently founded on reason. To hold to the contrary would entirely destroy the right of the humble citizen, to whom the patrolman on the beat . . . represents the majesty of the law and to whom for many reasons the advice of counsel may be unavailable, to tell his troubles and difficulties to such officer, and to trust to the power and discretion of the legally constituted authorities to secure for him the rights which the law guaranteed him.

[9]Similarly, if the merchant gives information to the police officer which is misleading, the merchant would be liable for the resulting arrest. Wehrman v. Liberty Petroleum Co., 382 S.W.2d 56 (Mo. Ct. App. 1964).

[10]N.C. GEN. STAT. § 15-41 (1965).

[11]Note, *Criminal Law—Arrest without Warrant for Misdemeanor*, 35 N.C.L. REV. 290 (1957).

based on reports of third parties.[12] If the crime was actually being committed in the presence of the officer, the arrest would be valid even under prior law.

When the statute refers to a police officer who "causes an arrest," the clear intent is to protect the officer who makes the arrest himself; the construction should not be limited to the situation in which the officer directs the arrest by another party. This obvious interpretation creates problems when applied to "a merchant . . . who . . . causes an arrest."[13] Both "merchant" and "peace officer" are parallel antecedents of the same relative clause. The same clause would have the same meaning for both its antecedents in a consistent construction of the sentence. However, the phrase "causes an arrest" seems to be more than an excess of language and apparently serves to limit the mode of arrest. This interpretation makes more sense when applied to a merchant than a police officer.

Nine other states have enacted statutes that grant immunity to a merchant who "causes" an arrest with probable cause, but none of the statutes explicitly provides immunity when the merchant makes an arrest himself, and no court has so construed any of the statutes.[14] Only two states explicitly extend immunity to merchants who make arrests themselves.[15] Two others do so indirectly.[16] Thus that form of immunity is available only in a decided minority of the states by statute.

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[12]This is so because the arrest statute, N.C. GEN. STAT. § 15-41 (1965), empowers a police officer to arrest without a warrant when he has "reasonable grounds to believe" that a misdemeanor was committed "in his presence." While reasonable grounds for belief might ordinarily be founded on reports of third parties, the additional requirement that the grounds justify a belief that it was committed *in his presence* requires that the reasonable grounds be limited to facts known to the officer through his "immediate senses." Note, 35 N.C.L. REV., *supra* note 11. As the statute which grants civil immunity to the officer contains no such phrase, reports from third parties are not necessarily excluded.

[13]N.C. GEN. STAT. § 14-72.1(c) (1971 Advance Legislative Service Pamphlet No. 4). *See* note 1 *supra*.

[14]These nine states and their statutory provisions are ALA. CODE tit. 14, § 334(3) (1958); FLA. STAT. ANN. § 811.022(4) (Supp. 1971); MD. ANN. CODE art. 27, § 551A(c) (1971); NEB. REV. STAT. § 29-402.03 (1965); N.J. STAT. ANN. § 2A:170-100 (1971); N.D. CENT. CODE § 29-06-27(3) (1960); OHIO REV. CODE § 2935.041 (Supp. 1970); TENN. CODE ANN. § 40-826 (Supp. 1970); VA. CODE ANN. § 18.1-126 (Supp. 1971).

[15]GA. CODE ANN. § 105-1005 (1968); TEX. PEN. CODE art. 1436e(2) (Supp. 1970).

[16]In Arizona "reasonable cause" to believe that the suspect was committing a crime of shoplifting or willful concealment is a defense to false arrest, including the situation where the merchant makes an arrest without a warrant. ARIZ. REV. STAT. ANN. § 13-675 (Supp. 1970). The West Virginia statute makes "shoplifting" a breach of the peace, and merchants have common law authority to arrest for breaches of the peace committed in their presence. W. VA. CODE ANN. § 61-3A-4 (Supp. 1971).

The problem of construction of this provision will eventually come before the courts in North Carolina. Although the immunity extended to the merchant and to the police officer should be different in each case for policy reasons, the form of the statute makes difficult any construction which would both limit the power of a merchant to make arrests and preserve the power of a police officer to make them. However, there is no obvious intent expressed in the statute to extend immunity to merchants who make rather than cause arrests. To base a radical change in the law on an implication in the statute rather than an explicit provision would be questionable policy on the part of any court.

POWERS TO MAKE INVOLUNTARY DETENTIONS

In a minority of American jurisdictions there is clear authority under the common law for an involuntary detention that does not amount to an arrest. An old principle has been applied to the new legal situation created by shoplifting in self-service stores. The personal interest in freedom of movement, which the tort of false imprisonment seeks to protect, is limited by a second right: that of a person to defend his property from theft or interference by another. In the California case of *Collyer v. S.H. Kress Co.*,[17] a man was seen by several store employees to put various articles in his pockets. As he was leaving the store, he was stopped by a female store detective who escorted him to an upstairs room under threat of calling the police. There he was detained for questioning for twenty minutes until he was actually arrested by the police. The court held that a property owner was justified in detaining a person when he had probable cause to believe the person was stealing his property. The detention must be only for the purposes of investigation of the circumstances,[18] and the investigation must be conducted in a reasonable manner and for a reasonable time.[19] Whether there was probable cause

[17]5 Cal. 2d 175, 54 P.2d 20 (1936).

[18]Examples of improper purposes of detention are Teel v. May Dep't Stores Co., 348 Mo. 696, 707, 155 S.W.2d 74, 79 (1941) (extorting a confession), and Banks v. Food Town, Inc., 98 So. 2d 719, 721 (La. Ct. App. 1957) (dictum) (conducting a search without a warrant).

[19]A third limitation set by the court was that the privilege was applicable only in cases where the suspect was believed to be stealing property "as distinguished from those where the offense has been completed." 5 Cal. 2d at 180, 54 P.2d at 23. This limitation was ignored in a case decided five days later in which the suspect was detained when he had already stolen an article and was on the sidewalk outside the store. Bettolo v. Safeway Stores, Inc., 11 Cal. App. 2d 430, 54 P.2d 24 (1936). This limitation has subsequently been ignored by jurisdictions which have followed *Collyer* in other respects. *See* Comment, *The Protection and Recapture of Merchandise from Shoplifters*, 47 NW. U.L. REV. 82 (1952); cases cited note 21 *infra*.

to make the detention was said to be a question of law for the court.[20]

Eight American jurisdictions have adopted this rule by court decision as a defense to the common law tort.[21] The *Restatement (Second) of Torts* codified the position in its section 120A, which has in its turn influenced the law.[22] The significance of this development is that it gives the merchant the right to make an involuntary detention within these limits.

Four jurisdictions have considered the doctrine and have rejected it, asserting that probable cause is no defense to an action for false imprisonment even if defense of property is concerned.[23]

North Carolina has not specifically rejected the doctrine by court decision. Two cases have reached the North Carolina Supreme Court since *Collyer* was decided in which defense of property might have been held a justification for the detention of a suspected shoplifter. One suit was dismissed on the grounds that the detention was voluntary.[24] In the other liability was found without mention of the doctrine in the court's opinion, even though the issue was squarely raised in the brief for the defendants.[25] One may assume that the issue may be raised again in a

[20]5 Cal. 2d at 181, 54 P.2d at 23. This was clarified in later decisions to mean that if there was a conflict in the evidence, the question must go to the jury with appropriate instructions from the court. Note, *Torts: False Imprison: Probable Cause: Instruction on Conflicting Facts*, 3 U.C.L.A.L. REV. 269 (1956).

[21]Kroger Grocery & Baking Co. v. Waller, 208 Ark. 1063, 189 S.W.2d 361 (1945); Sima v. Skaggs Payless Drug Center, Inc., 82 Idaho 387, 353 P.2d 1085 (1960); Durand v. United Dollar Store, Inc., 242 So. 2d 635 (La. Ct. App. 1970); Teel v. May Dep't Stores Co., 348 Mo. 696, 155 S.W.2d 74 (1941); Swafford v. Vermillion, 261 P.2d 187 (Okla. 1953); Cohen v. Lit. Bros., 166 Pa. Super. 206, 70 A.2d 419 (1950) (*Collyer* doctrine applied without discussion); Lopez v. Wigwam Dep't Stores, Inc., 49 Hawaii 416, 421 P.2d 289 (1966) (doctrine applied without discussion). Tennessee adopted the doctrine in Little Stores v. Isenberg, 26 Tenn. App. 357, 172 S.W.2d 13 (1943), and a later court distinguished detention from arrest saying that probable cause is no defense when an arrest is made by a private person. Martin v. Castner-Knott Dry Goods Co., 27 Tenn. App. 421, 181 S.W.2d 638 (1944).

[22]RESTATEMENT (SECOND) OF TORTS § 120A (1965) has been cited with approval in two jurisdictions which follow the doctrine. Proulx v. Pinkerton's Nat'l Detective Agency, Inc., 343 Mass. 390, 178 N.E.2d 575 (1961) (Tent. draft No. 1, 1957, cited); Bonkowski v. Arlan's Dep't Store, 12 Mich. App. 88, 162 N.W.2d 347 (1968). It was cited with approval but not followed in Roberts v. Hecht Co., 280 F. Supp. 639 (D. Md. 1968).

[23]Jefferson Dry Goods Co. v. Stoess, 304 Ky. 73, 199 S.W.2d 994 (1947); Clark's Brooklyn Park, Inc. v. Hranicka, 246 Md. 178, 227 A.2d 726 (1967); Herbrick v. Samardick & Co., 169 Neb. 833, 101 N.W.2d 488 (1960) (dissent advocates adoption of the *Collyer* doctrine); Zayre, Inc. v. Gowdy, 207 Va. 47, 147 S.E.2d 710 (1966). In each of these states there are now statutes extending some form of immunity to merchants who detain suspected shoplifters. *See* note 27 *infra*.

[24]Black v. Clark's Greensboro, Inc., 263 N.C. 226, 139 S.E.2d 199 (1964).

[25]Brief for Defendant at 8, Hales v. McCrory-McLellan Corp., 260 N.C. 568, 133 S.E.2d 225 (1963). The two cases are discussed in Byrd & Dobbs, *Torts, Survey of North Carolina Case Law*, 43 N.C.L. REV. 873, 909-12 (1965).

similar case before the court on the premise that the court has left it open for consideration at a later date. Thus the existence of the privilege at common law in North Carolina is problematic at best.

The spread of the *Collyer* doctrine in the courts has been slow,[26] while the desire of shopkeepers for increased immunity from suit has been great. The result of this frustration has been a virtual explosion of statutory enactments of which North Carolina's is only the most recent example. Forty-one states now have statutes extending some form of immunity to merchants who detain suspected shoplifters.[27]

In order to assess the scope of the new power of a merchant to detain, one may compare North Carolina's new statute to the statutory patterns that have emerged in the other states. The most notable fact

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[26]Since 1936 less than one-fifth of the American jurisdictions have adopted the doctrine. *See* notes 21-22 & accompanying text *supra*.

[27]The following statutes are substantially similar to North Carolina's amended statute, containing immunity provisions for detention: ALA. CODE tit. 14, § 334 (1958); COLO. REV. STAT. ANN. § 40-5-31 (Supp. 1968); DEL. CODE ANN. tit. 11, §§ 646-47 (Supp. 1970); FLA. STAT. ANN. § 811.022 (Supp. 1971); GA. CODE ANN. § 105-1005 (1968); HAWAII REV. LAWS § 663-2 (1967); ILL. ANN. STAT. ch. 38, § 10-3(c) (Smith-Hurd Supp. 1970); IND. ANN. STAT. §§ 10-3042, -3046 (Supp. 1970); IOWA CODE ANN. §§ 709.22-709.24 (Supp. 1971); KAN. STAT. ANN. § 21-535b (1964); KY. REV. STAT. § 433.236 (Supp. 1968); LA. CODE CRIM. PRO. art. 215 (1967); MD. ANN. CODE art. 27, § 551A (1971); MASS. ANN. Laws ch. 231, § 94B (Supp. 1970); MICH. STAT. ANN. § 27A.2917 (1962); MINN. STAT. ANN. § 629.366 (Supp. 1971); MISS. CODE ANN. § 2374-04 (Supp. 1970); MO. ANN. STAT. § 537.125 (Supp. 1970); NEB. REV. STAT. § 29-402.01 (1965); NEV. REV. STAT. § 598.030 (1969); N.J. STAT. ANN. § 2A:170-100 (1971); N.M. STAT. ANN. § 40A-16-22 (Supp. 1969); N.Y. GEN. BUS. LAW § 218 (McKinney 1968); N.D. CENT. CODE § 29-06-27 (1960); OHIO REV. CODE § 2935.041 (Supp. 1970); OKLA. STAT. ANN. tit. 22, § 1343 (Supp. 1970); ORE. REV. STAT. § 164.392 (1969); S.C. CODE ANN. § 16-359.4 (1962); TENN. CODE ANN. §§ 40-825 to -826 (Supp. 1970); TEX. PEN. CODE art. 1436e (Supp. 1970); UTAH CODE ANN. §§ 17-13-30, -32 (Supp. 1971); WASH. REV. CODE §§ 4.24.220 (1961), 9.01.116 (Supp. 1970); W. VA. CODE ANN. § 61-3A-4 (Supp. 1971); WIS. STAT. ANN. § 943.50 (Supp. 1971); WYO. STAT. ANN. § 6-146.3 (Supp. 1971).

Other states have statutes with various idiosyncrasies. Montana and Vermont give a merchant the right to request any individual to place or keep in full view merchandise which he has removed from display counters. MONT. REV. CODES ANN. § 64-213 (1970); VT. STAT. ANN. tit. 13, § 2566 (Supp. 1971).

Arkansas, Pennsylvania, and South Dakota extend immunity only when the suspect actually concealed unpurchased merchandise. ARK. STAT. ANN. § 41-3492 (1964); PA. STAT. ANN. tit. 18, § 4816.1(b) (1963); S.D. COMPILED LAWS ANN. § 22-37-24 (1967).

Arizona alone imposes no limitation that the detention must have been for a reasonable time in a reasonable manner. ARIZ. REV. STAT. ANN. § 13-675 (Supp. 1970).

Virginia exempts a merchant from civil liability only when he causes an arrest and does not provide immunity when he detains. VA. CODE ANN. § 18.1-126 (Supp. 1971).

Eight jurisdictions have no statute protecting merchants who detain or cause arrest of suspected shoplifters: Alaska, California, Connecticut, District of Columbia, Idaho, Maine, New Hampshire, and Rhode Island.

about section 14-72.1 is the absence of an express limitation of the purpose for which detentions may be made by a merchant. Only three other states have enacted similar statutes without limiting detention to a specific purpose.[28] The common law privilege to detain is usually limited to the purpose of investigation of the circumstances. Fourteen states have followed this example and have limited the statutory privilege in the same way.[29] Twelve other states have gone beyond this and have declared that detention may be made when there is at least a reasonable possibility of recovery of the goods.[30] Three states have gone so far as to authorize involuntary searches of the person or seizures of goods on reasonable cause to believe that merchandise has been or is being stolen.[31] At the other end of the spectrum, Wisconsin and Minnesota specifically exclude any involuntary interrogation of the suspect. They and three other states limit the purpose of the detention to the summoning of a police officer.[32]

The lack of a specified purpose for a detention creates problems in interpreting the scope of the privilege. Does it include the privilege to search the person detained and to seize goods in his possession? Even if the statute were construed to protect a merchant who arrests without a warrant, as discussed earlier, the arrest would not be a lawful one so that a search of the person could be justified as incident to a lawful arrest.

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[28]The three states are Maryland, Massachusetts, and Michigan. *See* statutes cited note 27 *supra*.

[29]Fourteen states have limited the privilege to investigation of the circumstances or questioning of the detainee: Colorado, Hawaii, Illinois, Indiana, Kansas, Louisiana, Missouri, New York, Oregon, South Carolina, Utah, Washington, West Virginia, and Wyoming. Mississippi grants a right to question but no accompanying right to detain. Oklahoma is unusual in allowing detention for almost any purpose, including questioning, informing the police, performing a "reasonable search," and recovering the merchandise. *See* statutes cited note 27 *supra*.

[30]Detention for the purpose of effecting recovery of goods reasonably thought to have been unlawfully taken is allowed in Alabama, Arkansas, Florida, Kentucky, Nebraska, New Mexico, Ohio, Oklahoma, Tennessee, Utah, New Jersey, and North Dakota. *See* statutes cited note 27 *supra*. Pennsylvania authorizes detention for recovery only when goods have actually been concealed. PENN. STAT. ANN. tit. 18, § 4816.1(b) (1963).

[31]Iowa allows searches by merchants without a warrant under the direction of a police officer. IOWA CODE ANN. § 709.22 to -23 (Supp. 1971). Oklahoma allows "reasonable searches" when it appears the merchandise may otherwise be lost. OKLA. STAT. ANN. tit. 22, § 1343(e) (Supp. 1970). Texas authorizes "all persons" to "prevent the consequences of shoplifting by seizing any goods . . . which has [*sic*] been so taken . . . on reasonable grounds to suppose that the crime of shoplifting to have [*sic*] been committed . . . ." TEX. PEN. CODE art. 1436e(2) (Supp. 1970).

[32]DEL. CODE ANN. tit. 11, § 646 (Supp. 1970); MINN. STAT. ANN. § 629.366 (Supp. 1971); OHIO REV. CODE § 2935.041 (Supp. 1970); S.D. COMPILED LAWS ANN. § 22-37-24 (1967); and WIS. STAT. ANN. § 943.50 (Supp. 1971).

A court might decide that it is unreasonable as a matter of law to search the person or seize goods in his possession. No federal constitutional right is at stake; the fourth amendment protects citizens only from governmental searches and seizures and not those by private persons.[33] If the issue is left to a jury,[34] there appears to be no reason why they might not find a search or seizure to have been done "in a reasonable manner" in terms of the statute under the particular circumstances of a case.

Other states have incorporated limits as to what constitutes a "reasonable manner for a reasonable length of time" in the language of the statute. There are presumptive limits on "reasonable time": not more than thirty minutes in West Virginia[35] or one hour in Louisiana;[36] until the police arrive after being promptly notified in South Dakota[37] and Wisconsin;[38] and for time to permit a person to make or refuse to make a statement and time to examine records in Hawaii[39] and Washington.[40] The statutes of two other states indicate the limits of a "reasonable manner" of detention. Wisconsin[41] requires that all detainees be allowed to make telephone calls and, with Minnesota,[42] forbids an involuntary interrogation of the suspect. Although there are no other limitations on the manner of detention, North Carolina does require that when a minor is detained a reasonable attempt must be made to notify his parent or guardian during the detention.[43]

Another area of uncertainty in defining the scope of detention is "probable cause." Among the courts that have considered this phrase in similar statutes, the determination has been that probable cause is a

[33]"Moreover, the Fourth Amendment protects only against searches and seizures which are made under governmental authority, real or assumed, or under color of such authority." Burdeau v. McDowell, 256 U.S. 465, 467 (1921). The provisions of the fourth amendment were applied to the states in Wolf v. Colorado, 338 U.S. 25 (1949).

[34]In Cooke v. J.J. Newberry & Co., 96 N.J. Super. 9, 232 A.2d 425 (App. Div. 1967), a directed verdict for the defendant was affirmed even though plaintiff had been detained for thirty minutes before the police were summoned. This was held insufficient to support a jury finding of detention for an "unreasonable time" as required by statute. The statute is cited in note 27 *supra*.

[35]W. VA. CODE ANN. § 61-3A-4 (Supp. 1971).

[36]LA. CODE CRIM. PRO. art. 215 (1967).

[37]S.D. COMPILED LAWS ANN. § 22-37-24 (1967).

[38]WIS. STAT. ANN. § 943.50 (Supp. 1971).

[39]HAWAII REV. LAWS § 663-2 (1967).

[40]WASH. REV. CODE § 9.01.116 (Supp. 1970).

[41]WIS. STAT. ANN. § 943.50 (Supp. 1970).

[42]MINN. STAT. ANN. § 629.366 (Supp. 1971).

[43]N.C. GEN. STAT. § 14-72.1(c) (1971 Advance Legislative Service Pamphlet No. 4).

question of law for the court that goes to the jury only where the facts are in conflict and then with an appropriate instruction as to which facts, if believed, constitute probable cause.[44] A mere suspicion will not suffice.[45] A "strong suspicion" will when there are objective facts to justify it.[46] A customer who lingers over and handles certain items may not be detained,[47] but one who puts an article around her waist,[48] in her purse,[49] or in his pocket[50] may be detained. And yet a man who put an ascot around his neck as he left a store was held to have been unreasonably detained.[51] The conclusion is that there must be specifically observed facts to support a belief that the crime was being committed. As the privilege in section 14.72.1 is specifically limited to the crime of willful concealment, one would have to point to facts indicating that the specific crime of willful concealment was being committed. This limitation narrows the scope of the privilege considerably.

Circumstances which would not independently justify a detention may do so when viewed in relation to prior events or knowledge—for example, when police warnings to be on the lookout for teen-age shoplifters have been issued,[52] or when the merchant is familiar with the suspect and has missed articles at other times when he was present.[53] A suspect may not be forcibly detained when other methods of investigating exist, such as checking a sales slip against purchases.[54] The burden of showing probable cause under the statute is a considerable one, and it rests squarely on the shoulders of the merchant who takes action.[55]

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[44]Jefferson Stores, Inc. v. Caudell, 228 So. 2d 99 (Fla. Ct. App. 1969); Dixon v. S.S. Kresge, Inc., 119 Ga. App. 776, 169 S.E.2d 189 (1969); Delp v. Zapp's Drug & Variety Stores, 238 Ore. 538, 395 P.2d 137 (1964).

[45]Butler v. Walker Stores, Inc., 222 So. 2d 128 (Miss. 1969).

[46]Coblyn v. Kennedy's, Inc., ___Mass. ___, 268 N.E.2d 860 (1971).

[47]Butler v. Walker Stores, 222 So. 2d 128 (Miss. 1969).

[48]Rothstein v. Jackson's of Coral Gables, Inc., 133 So. 2d 331 (Fla. Ct. App. 1961).

[49]Stienbaugh v. Payless Drug Store, Inc., 75 N.M. 118, 401 P.2d 104 (1965).

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

[51]Coblyn v. Kennedy's, Inc., ___ Mass. ___, 268 N.E.2d 860 (1971).

[52]Meadows v. F.W. Woolworth Co., 254 F. Supp. 907 (N.D. Fla. 1966).

[53]Burnaman v. J.C. Penney Co., 181 F. Supp. 633 (S.D. Tex. 1960). *See also* Doyle v. Douglas, 390 P.2d 871 (Okla. 1964).

[54]Frught v. Schwegmann Bros. Giant Supermarkets, 160 So. 2d 839 (La. Ct. App. 1964).

[55]Butler v. Walker Stores, Inc., 222 So. 2d 128 (Miss. 1969); J.C. Penney Co. v. Cox, 246 Miss. 1, 148 So. 2d 679 (1963); Isaiah v. Great Atlantic & Pacific Tea Co., 111 Ohio App. 537, 174 N.E.2d 128 (1959).

CONCLUSIONS

Two general conclusions may be drawn concerning the effect of the amendment on previous law. First, the amendment clears up the confusion in the common law as to whether the merchant can make an involuntary detention in a reasonable manner and for a reasonable length of time. He may do so as long as he has probable cause to believe that the person committed the specific crime of willful concealment. The privilege is not as broad as the common law privilege because it is tied to a specific crime. The statutory privilege apparently would not provide immunity for a merchant who detains a shoplifter who attempts to leave the store with goods that are not concealed. In another respect the statutory privilege is broader. While the common law privilege is limited to detentions for the purpose of investigation, there is no equivalent limitation on the statutory privilege. As a result important problems of construction are raised.

Second, the amendment clearly exempts a merchant from civil liability when he causes an arrest by a police officer on probable cause to believe the crime of willful concealment is being committed, despite the fact that the merchant may not have observed the procedure necessary under prior law of merely giving information to the police officer. However, the fact that this immunity is limited to the specific crime created by section 14-72.1 may hold hidden pitfalls for a merchant who directs an arrest for other types of larceny.

Inflammatory confrontations between merchants jealous of their wares and citizens jealous of their rights will inevitably lead to litigation over this ill-defined new power granted to the merchant. Perhaps the North Carolina courts will then resolve the numerous problems associated with the statute. Regardless of the outcome, however, one must conclude that a statute more closely modeled on the common law privilege of the merchant to detain suspected shoplifters would have better served both the public and the merchants.

VANCE BARRON, JR.