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Shoplifting--Ohio Combats the Light-Fingered Customer

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moral retribution. Such a self-critical attitude on the part of courts, lawyers, and legislators will benefit the entire legal complex as well as society. In the words of Cardozo:

> Jurisprudence will be the gainer in the long run by fanning the fires of mental insurrection instead of smothering them with platitudes.[47]

EDWARD C. KAMINSKI

Shoplifting—Ohio Combats the Light-Fingered Customer

The tiny, gray-haired grandmother was arrested when a clerk in a super market caught her trying to smuggle out two cartons of cigarettes and a canned ham.[1] This incident, taken from the pages of a metropolitan daily newspaper, is indicative of the problem potentially facing a merchant each day that he opens his doors for business — the problem of shoplifting. Merchants have been reluctant to apprehend and prosecute shoplifters for two reasons: fear of adverse publicity and consequent loss of customer goodwill; and the ever-present danger of law suits for false arrest and related torts.

This note will discuss the background of the tort problem and show how Ohio has attempted to remedy it by statute.

NATURE OF THE OFFENSE

Shoplifting may be defined as the theft of goods offered for sale by a store or other mercantile establishment.[2] A form of larceny, it is punishable in Ohio under the general larceny statute,[3] which makes it a felony, "grand larceny," if the value of the thing stolen is $60 or more, and a misdemeanor, "petty larceny," if the value is less than $60.

The annual national total of goods stolen by shoplifters has been estimated as high as 250 million dollars,[4] and on this basis the Ohio loss is approximately fourteen million dollars.[5] Stores cannot get effective insurance coverage against shoplifting,[6] so the amount of loss must be absorbed as a cost of doing business, and consequently it is passed on to the consumer in the form of higher prices.[7]

The ranks of the shoplifters contain a variety of types of people, with the great bulk classified as "amateurs," predominantly women and juveniles.[8] The juvenile problem seems to be increasing[9] and often shoplifting may provide a youth's first venture into crime.[10] Professional shop-

47. CARDOZO, PARADOXES OF LEGAL SCIENCE 3 (1928).

lifters, called "boosters," are less prevalent, but more skilled,[11] and a large percentage of these "boosters" are drug addicts, who sell their loot to buy narcotics.[12] Kleptomaniacs, those who steal because of a neurotic impulse, are rare.[13]

In attempting to combat the problem of shoplifting, the larger stores may utilize mechanical detection devices, such as one-way mirrors, and employ trained store detectives, but in smaller stores, detection must be left up to the merchant and his employees.[14]

TORT LIABILITY

Under the common law, a person is allowed to use reasonable force to defend[15] or recapture[16] his property. However, instead of applying these rules, the courts have been inclined to view any detention of a suspected shoplifter by a merchant as an arrest, and if the merchant cannot justify his actions under the laws of arrest, he is liable in tort. Since the shoplifter ordinarily steals relatively small articles,[17] shoplifting in the usual case is a misdemeanor, and the rules applicable are those gov-

1. Cleveland Press, Feb. 23, 1959, p. 1, col. 3.

2. See ARK. STAT. ANN. § 41-3939 (Supp. 1957); PA. STAT. ANN. tit. 18, § 4816.1 (Supp. 1958); S.C. CODE § 16-359.1 (Supp. 1958); TENN. CODE ANN. § 39-4235 (Supp. 1958).

3. OHIO REV. CODE § 2907.20. For examples of statutes constituting shoplifting as a separate offense, see *supra* note 2.

4. De Santis, *Anybody Might Be a Shoplifter,* Reader's Digest, Feb. 1955, p. 140. The greatest losses from shoplifting are suffered by department stores and drug stores, which lose about 1% of total sales, and variety stores, which tend to rate their loss even higher. *Cracking Down on Shoplifters,* Business Week, Nov. 1, 1952, p. 58.

5. Ohio retail sales account for 5.67% of the annual national retail sales. U.S. CENSUS OF BUSINESS: 1954, Vol. I, p. 9 (1957). Therefore, .0567 (Ohio percentage) x $250,000,000 (estimated annual shoplifting loss) = $14,175,000.

6. This is because of the practical difficulty of showing that an inventory shortage was caused by any particular theft, or at what time it occurred. See 5 APPLEMAN, INSURANCE LAW AND PRACTICE § 3178 (Supp. 1959).

7. Fay, *I Am a Supermarket Detective,* Collier's, Mar. 29, 1952, p. 16 at 17.

8. *Cracking Down on Shoplifters,* Business Week, Nov. 1, 1952, p. 58.

9. *Id.* at 61; De Santis, *supra* note 4 at 142.

10. *Supra* note 8.

11. De Santis, *supra* note 4.

12. *Supra* note 8.

13. *Supra* note 7.

14. *Houston Finds a Cure For Shoplifting Spate,* Business Week, June 6, 1953, p. 56.

15. PROSSER, TORTS 92-96 (2d ed. 1955).

16. PROSSER, TORTS 100-04 (2d ed. 1955).

17. Comment, 62 YALE L.J. 788 (1952).

erning arrest without warrant for a misdemeanor. At common law, this was allowed to peace officers only where a breach of the peace had been committed in the officer's presence,[18] and was prohibited to private citizens entirely.[19]

An Ohio statute allows either a peace officer or a private citizen to arrest without warrant one whom he has reasonable grounds to believe has committed a felony.[20] Therefore, a merchant is allowed to arrest when he has reasonable grounds to believe the suspect to be guilty of grand larceny, that is, to have taken something worth $60.00 or more. However, since Ohio still follows the common law rules regarding arrest for misdemeanors, a private individual arresting another on a mere charge of petty larceny would be liable for false arrest.[21] Even if he does not attempt the arrest himself, but instead summons a policeman who arrests without a warrant, the individual is liable. Since the policeman did not personally see the act committed, the arrest is illegal, and a private person who causes an officer to arrest another illegally is liable in tort to the person thus arrested.[22]

Although there is a technical distinction between false arrest and false imprisonment, in that the former arises by reason of an asserted legal authority, while the latter arises from detention for a purely private end,[23] Ohio generally uses the term "false imprisonment" to cover both situations.[24] False imprisonment is defined as the unlawful restraint of another.[25] The essence of the tort is the deprival of the plaintiff's liberty without lawful justification.[26] As we have seen, the fact that the defendant had reasonable grounds to believe the plaintiff to be guilty of a misdemeanor is no defense,[27] and there is some authority to the effect

18. People v. McLean, 68 Mich. 480, 36 N.W. 231 (1888); Hennessy v. Connolly, 13 Hun. 173 (N.Y. 1878).

19. Union Depot & R.R. v. Smith, 16 Colo., 361, 27 Pac. 329 (1891); Palmer v. Maine Cent. R.R., 92 Me. 399, 42 Atl. 800 (1899).

20. OHIO REV. CODE § 2935.04.

21. Szymanski v. Great Atlantic and Pacific Tea Co., 79 Ohio App. 407, 74 N.E.2d 205 (1947); Fitscher v. Rollman & Sons, Co., 31 Ohio App. 340, 167 N.E. 469 (1929).

22. Hill v. Henry, 90 Ga. App. 93, 82 S.E.2d 35 (1954); McDermott v. W.T. Grant Co., 313 Mass. 736, 49 N.E.2d 115 (1943); Howard v. Burton, 338 Mich. 178, 61 N.W.2d 77 (1953).

23. McGlone v. Landreth, 200 Okla. 425, 195 P.2d 268 (1948); Hepworth v. Covey Brothers Amusement Co., 97 Utah 205, 91 P.2d 507 (1939).

24. Thus the one year Statute of Limitations for actions of false imprisonment applies to actions for false arrest. Alter v. Paul, 101 Ohio App. 139, 135 N.E.2d 73 (1955).

25. Brinkman v. Drolesbaugh, 97 Ohio St. 171, 119 N.E. 451 (1918).

26. Diehl v. Friester, 37 Ohio St. 473 (1882).

27. *Supra* note 21.

that even actual guilt of the plaintiff is not a defense, where a private individual arrests for a misdemeanor.[28]

The ordinary rules of agency govern detention of a suspected shoplifter by a store employee, and since the employee is generally found to be acting within the scope of his employment, the employer is liable for such acts.[29] Nor can the merchant relieve himself of this liability by delegating the authority to apprehend shoplifters to an independent detective agency.[30]

JUDICIAL REMEDIES

The laws of arrest and false imprisonment have provided a strong deterrent to the merchant in apprehending suspected shoplifters. Recognizing the problem, some courts have sought to mitigate the harshness of the rules and to allow the merchant leeway to make a reasonable mistake without being subjected to tort liability.

Since the term "arrest" implies some asserted legal authority,[31] it is clear that not every bare detention need be classified as an arrest. If a court is willing to recognize the distinction between an arrest and a mere detention, it may then proceed to find justification for the detention where there would be no justification for an arrest. The more modern trend is to recognize this distinction and to find the necessary justification.

Thus, if a merchant detains a suspected shoplifter without assuming to exercise any powers of arrest, the question is one of false imprisonment only, with no arrest problem involved. In order to hold the merchant liable for false imprisonment, the plaintiff must have been unlawfully restrained.[32] Therefore, the merchant can avoid liability by showing either: (1) that the restraint was not unlawful, or (2) that the plaintiff was not in fact restrained. Two lines of cases have developed, each acting upon one of these two elements.

1. *Lawfulness of the restraint*

One judicial solution is to render the detention lawful by allowing probable cause as a defense. Thus a merchant could be allowed to detain for a reasonable investigation a person whom he has probable cause to

28. Fitscher v. Rollman & Sons Co., 31 Ohio App. 340, 167 N.E. 469 (1929).

29. Combs v. Kobacker Stores, Inc., 114 N.E.2d 447 (Ohio Ct. App. 1953); *cf.* Cleveland Ry. v. Durschuk, 31 Ohio App. 248, 166 N.E. 909 (1928).

30. Zentko v. McKelvey Co., 88 N.E.2d 265 (Ohio Ct. App. 1948); Szymanski v. Great Atlantic & Pacific Tea Co., 79 Ohio App. 407, 74 N.E.2d 205 (1947).

31. *Supra* note 23.

32. Brinkman v. Drolesbaugh, 97 Ohio St. 171, 119 N.E. 451 (1918).

believe is unlawfully depriving him of his property. *Jacques v. Childs Dining Hall Co.*[33] was the first case to recognize this right. In that case, the plaintiff had been called to the cashier's desk as she was leaving the defendant's restaurant because her aunt, who was with her, but had not eaten, did not have a check. After some investigation, during which a question was raised whether the plaintiff herself had paid her check, she was permitted to leave. In a suit for false imprisonment, the court, without discussing any issue of arrest, held that it was a jury question whether defendant's conduct was reasonable, saying that the defendant could *detain* the plaintiff for a reasonable time to investigate the circumstances, if apparently she had not paid.

This doctrine was extended to the mercantile field in the case of *Collyer v. S. H. Kress & Co.*,[34] in which the plaintiff had been accosted by store detectives as he was leaving the store and detained for investigation for twenty minutes before being turned over to the police. During the interval, he was questioned and was asked to sign a statement, which he refused to do. Plaintiff sued for false imprisonment, and the court, saying that no question of arrest was involved, held that probable cause justified the *detention* of the suspect for a reasonable length of time to investigate in a reasonable manner.

It should be noted that this doctrine allows detention of the suspect for the purpose of *investigation* only. It does not grant the merchant any powers of arrest, nor does it authorize the forcing of confessions or the compelling of payment. If the defendant, after a reasonable investigation, decides that the plaintiff is guilty, he must then seek legal remedies.

The doctrine of the *Collyer* case has been adopted by courts of an increasing number of states in recent years.[35] Some states which have refused to follow it allow probable cause to negate any liability for punitive damages,[36] which may leave the plaintiff with merely nominal damages.

2. *Restraint in fact*

The second method that the courts have used to shield the merchant has been to refuse to find a *restraint* upon the facts of the particular case.

33. 244 Mass. 438, 138 N.E. 843 (1923).

34. 5 Cal.2d 175, 54 P.2d 20 (1936).

35. *E.g.*, Kroger Grocery & Baking Co. v. Waller, 208 Ark. 1063, 189 S.W.2d 361 (1945); Teel v. May Department Stores Co., 348 Mo. 696, 155 S.W.2d 74 (1941); S.H. Kress & Co. v. Bradshaw, 186 Okla. 588, 99 P.2d 508 (1940).

36. *E.g.*, S.H. Kress & Co. v. Powell, 132 Fla. 471, 180 So. 757 (1938); Jefferson Dry Goods Co. v. Stoess, 304 Ky. 73, 199 S.W.2d 994 (1947).

Thus, the merchant may be allowed to request, command, or even threaten the suspect in order to induce him to remain for investigation, without being liable for false imprisonment.[37]

An Ohio court of appeals adopted this approach in *Lester v. Albers Super Markets, Inc.*[38] In that case, a woman, waiting for a streetcar in front of the defendant's store, noticed a canned fruit display in the window and decided to buy a can. While waiting in line to pay for her purchase, she saw her streetcar coming, so she laid the can aside and turned to leave. The manager stopped her at the door and demanded to search her shopping bag, which was a standard procedure of the store. Being a regular customer, she knew of this practice, but since she was in a hurry, she told him she hadn't bought anything. The manager stood in front of her and repeated his demand several times, before she allowed him to search her bag, after which she was permitted to leave. She sued for false imprisonment, and the court, after saying that the laws of arrest were irrelevant, held that there was no restraint in fact sufficient to constitute imprisonment.

As to fortify its decision, the court then went on to state that, "a customer who apparently has not paid for what he has received may be detained for a reasonable time to investigate the circumstances . . . ,"[39] thus apparently granting the privilege of the *Collyer* case. However, since it had already found that the plaintiff had not in fact been detained, this appears to be purely dictum.

The factual approach typified by the *Lester* case is less satisfactory than the privilege granted by the *Collyer* case and the line of decisions which follow it, because through the factual approach each case is decided upon its own circumstances and there is no certainty as to what may be labelled as a "restraint."

It seems clear that the granting of any type of privilege to a merchant to detain suspected shoplifters involves a balancing of two fundamental concepts: the protection of property and the right to individual liberty. In broadening the power of the merchant to protect his chattels, a court or legislature must keep in mind that the innocent shopper should not be subjected to unnecessary restraint and harassment.

STATUTORY REMEDIES

In 1955, Florida passed a statute allowing detention of a suspected shoplifter by a merchant upon "probable cause," and in addition, allow-

37. Sweeny v. F.W. Woolworth Co., 247 Mass. 277, 142 N.E. 50 (1924); S.H. Kress & Co. v. DeMont, 224 S.W. 520 (Tex. Civ. App. 1920); James v. MacDougall & Southwick Co., 134 Wash. 314, 235 Pac. 812 (1925).

38. 94 Ohio App. 313, 114 N.E.2d 529 (1952).

39. *Id.* at 319, 114 N.E.2d at 533.

ing a peace officer to arrest such suspect without a warrant.[40] The apparent success of this statute in combatting the shoplifting problem[41] has led a number of states in the past few years to give merchants by statute varying degrees of power to detain suspects.[42]

The Ohio General Assembly passed a shoplifting statute[43] in 1957, the effect of which is twofold:

First, it grants to the merchant and his employees a privilege to detain a suspected shoplifter in a reasonable manner for a reasonable time upon probable cause.

Second, it changes the law of arrest to allow a police officer to arrest the suspect without a warrant, upon probable cause.

Except where the suspect is a minor, the merchant may make the detention only for the purpose of causing an arrest to be made by a police officer. Another important limitation upon the merchant's privilege should be noted, that the detention is not lawful unless the suspect has left the store or has passed the check-out counter in a self-service store. The Ohio statute is the only one which limits the merchant's privilege in this manner. The purpose of the provision obviously is to make easier the proof of intent to steal, one of the necessary elements of the crime of larceny,[44] since the suspect cannot so easily excuse his

40. FLA. STAT. ANN. § 811.022 (Supp. 1958).

41. Business Week, Dec. 24, 1955, p. 42.

42. ARIZ. REV. STAT. ANN. §§ 13—673-75 (Supp. 1958); ARK. STAT. ANN. §§ 41—3939-42 (Supp. 1957); GA. CODE ANN. § 26—2640-42 (Supp. 1958); ILL. ANN. STAT. ch. 38, §§ 252.1-.3 (Supp. 1958); 1958 Acts of Ky., ch. 11; MASS. ANN. LAWS ch. 231, § 94B (Supp. 1958); MINN. STAT. ANN. §§ 622.26-.27 (Supp. 1958); NEB. REV. STAT. §§ 29—402.01-.03 (Supp. 1957); OKLA. STAT. ANN. tit. 22, §§ 1314-42 (1958); PA. STAT. ANN. tit. 18, § 4816.1 (Supp. 1958); TENN. CODE ANN. §§ 40—824-26 (Supp. 1958); UTAH CODE ANN. §§ 77—13 — 30-32 (Supp. 1958); VA. CODE §§ 18 — 187.1-.3 (Supp. 1958).

43. OHIO REV. CODE § 2935.041, which reads as follows:

"A merchant, or a merchant's employee who has probable cause for believing that items offered for sale by mercantile establishment have been unlawfully taken by a person, may, in order to cause an arrest to be made by a police officer until a warrant can be obtained, detain such person in a reasonable manner for a reasonable length of time within the said mercantile establishment or the immediate vicinity thereof. In the event such person detained is a minor, said detention may be made in order to recover such items without undue restraint or to cause such an arrest or for the purpose of communicating with the parents or guardian of said minor.

Such detention, however, shall not be lawful unless the person to be detained has left the confines of the establishment but is within the immediate vicinity thereof; or, where the establishment is of the self service type, the person to be detained has passed the cashier's counter.

Any police officer may, within a reasonable time after such alleged unlawful taking has been committed, arrest without a warrant, any person he has probable cause for believing has committed such unlawful taking in a mercantile establishment."

44. Berry v. State, 31 Ohio St. 219 (1872).

conduct by saying that he desired to examine the article under a better light, or by giving similar excuses. However, the provision weakens the power of store detectives, who prefer to follow a shoplifter around the store until his intent to steal is clearly established, and then apprehend immediately.[45] Professional shoplifters are generally quick to sense that they are being watched,[46] and if they know that they cannot be apprehended until they leave the store they can quickly get rid of the merchandise before leaving. A better solution than that adopted by the Ohio statute would be the one found in those statutes which make concealment of unpurchased goods prima facie evidence of intent to steal.[47] This simplifies proof without weakening the store detective's effectiveness. Customer goodwill could still provide a check upon abuse of the privilege.

There is still room for judicial discretion in cases in which the provisions of the statute have not been strictly followed. For example, suppose an alleged detention had occurred before the suspect left the store. This would be unlawful under the statute, but a court could still decide, as in the *Lester* case, that there was no restraint, and that the merchant is therefore not liable. Thus the statute does not completely supplant the judicial remedies to the problem of the tort liability of the merchant.

In granting a police officer the right to arrest a suspected shoplifter upon probable cause, the statute protects both the officer and the merchant who summons him. Ordinarily, an officer who is not personally present when a misdemeanor is committed may not arrest the person charged without first obtaining a warrant.[48] If he arrests without a warrant in such a situation he acts at his peril. Under the statute, the merchant may now summon a police officer who can make a lawful arrest on the basis of the merchant's communication. The "at peril" aspect is removed, and even if the suspect is later found innocent, neither the merchant nor the officer is liable for false imprisonment.

There does not seem to be any problem of the constitutionality of the statute, although a statute allowing arbitrary arrest without a warrant would be unconstitutional.[49] A statute enlarging the common law pow-

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45. See Comment, 46 ILL. L. REV. 887, 888 (1952); Note, 32 IND. L.J. 20, 22 (1956).

46. Note, 32 IND. L.J. 20, 22 (1956).

47. ARK. STAT. ANN. § 41-3942 (Supp. 1957); PA. STAT. ANN. tit. 18, § 4816.1 (Supp. 1958).

48. State v. Lewis, 50 Ohio St. 179, 33 N.E. 405 (1893).

49. *Ex parte* Rhodes, 202 Ala. 68, 79 So. 462 (1918); Pinkerton v. Verberg, 78 Mich. 573, 44 N.W. 579 (1889).

ers of arrest is constitutional if the power granted is reasonable,[50] and here the reasonableness is provided by the fact that the officer may arrest only upon probable cause.

RELATED TORTS UNDER THE OHIO STATUTE

Because the Ohio statute has not as yet received any judicial interpretation, many possible problems in its application remain unsolved. For example, there is nothing in the statute dealing with its effect upon liability for torts other than false imprisonment, such as slander, assault and battery, and malicious prosecution.

1. *Slander*

Slander is often used as an additional count to false imprisonment in an action against a merchant.[51] To charge a person with larceny is actionable per se, *i.e.,* without proof of special damages.[52] A necessary element of a slander action is "publication," communication to a third person,[53] so if the accusatory statement is made to the suspect alone and is not heard by anyone else, there would be no slander. However, if the suspect is obstinate and a loud argument ensues in front of others, or if the merchant shouts a warning, such as "Stop, thief!" there is the necessary publication.

An employer is liable for slander by employees acting in the scope of their employment.[54] Although truth of the statement is a complete defense in a slander suit,[55] a mistaken belief in the truth is not, but it may be shown to mitigate damages.[56] So if the suspected shoplifter is later found innocent, an action for slander might be successfully prosecuted against the merchant.

2. *Assault and Battery*

Since the least touching of another, if done in a rude, insolent or angry manner, constitutes a battery,[57] the merchant may be committing a

50. Childers v. State, 156 Ala. 96, 47 So. 70 (1908); Burroughs v. Eastman, 101 Mich. 419, 59 N.W. 817 (1894).

51. *E.g.,* Fenn v. Kroger Grocery & Baking Co., 209 S.W. 885 (Mo. 1919); Lester v. Albers Super Markets, Inc., 94 Ohio App. 313, 114 N.E.2d 529 (1952).

52. Hughey v. Bradrick, 39 Ohio App. 486, 177 N.E. 911 (1931).

53. Massee v. Williams, 207 Fed. 222 (6th Cir. 1913); Stivers v. Allen, 115 Wash. 136, 196 Pac. 663 (1921).

54. Citizens Gas & Electric Co. v. Black, 95 Ohio St. 42, 115 N.E. 495 (1916).

55. OHIO REV. CODE § 2739.02.

56. Reynolds v. Tucker, 6 Ohio St. 516 (1856); Wilson v. Apple, 3 Ohio 270 (1827).

57. Wilson v. Orr, 210 Ala. 93, 97 So. 133 (1923); Crosswhite v. Barnes, 139 Va. 471, 124 S.E. 242 (1924).

battery if he grabs the suspect by the arm or lays a hand on his shoulder. Although reasonable force may be used to recapture property wrongfully taken,[58] apparently no force is justified if the owner is mistaken in his belief in the guilt or identity of the accused.[59] Because the statute does not indicate what degree of force may be used in detaining a suspected shoplifter, liability for assault and battery is still possible.

3. *Malicious Prosecution*

Malicious prosecution is another action sometimes brought by the indignant customer who has been wrongfully accused.[60] However, since want of probable cause is an essential element of this tort,[61] it is difficult to conceive of a situation in which a merchant could be held liable for malicious prosecution if he complied with the provisions of the statute.

4. *Possible Broad Interpretation*

In dealing with the problem of related torts, perhaps a court, in view of the legislative intent to facilitate the apprehension of shoplifters, would construe the statute to relieve the merchant of all tort liability if he acts reasonably. But possible litigation over this could be avoided if the statute stated, as does the Virginia statute, that a merchant or his employee who complies with its provisions "shall not be held civilly liable for unlawful detention, slander, malicious prosecution, false imprisonment, false arrest, or assault and battery. . . ."[62]

THE STANDARDS OF THE OHIO STATUTE

1. *Reasonable Time and Manner*

The statute sets up reasonableness as the basic test and the standard for executing the privilege. But what is a "reasonable time" and a "reasonable manner"? These are questions for the jury,[63] to be determined according to the circumstances of the particular case. Fifteen minutes[64]

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58. PROSSER, TORTS 100-04 (2d ed. 1955).

59. RESTATEMENT, TORTS § 100, comment d (1934).

60. S.H. Kress & Co. v. Powell, 132 Fla. 471, 180 So. 757 (1938); Jefferson Dry Goods Co. v. Stoess, 304 Ky. 73, 199 S.W.2d 994 (1947).

61. Melanowski v. Judy, 102 Ohio St. 153, 131 N.E. 360 (1921); Ash v. Marlow, 20 Ohio 119 (1851).

62. VA. CODE § 18-187.2 (Supp. 1958).

63. Collyer v. S.H. Kress & Co., 5 Cal.2d 175, 54 P.2d 20 (1936); *cf.* Johnson v. Reddy, 163 Ohio St. 347, 126 N.E.2d 911 (1955).

64. Bertolo v. Safeway Stores, Inc., 11 Cal. App. 2d 430, 54 P.2d 24 (1936).

and twenty minutes[65] have been held to constitute reasonable times for detention.

The statute is unclear as to how much investigation, if any, the merchant may undertake and still have his conduct classified as reasonable. It says only that the detention is allowed "to cause an arrest to be made by a police officer . . . ," and that it is allowed for the purpose of recovering the items only when the shoplifter is a minor.[66]

Often it is difficult to determine whether a person is or is not a minor. Suppose a youthful looking shoplifter is apprehended and the merchant, reasonably believing that he is a minor, attempts the recovery of the goods, only to discover later that the suspect is over twenty-one. Apparently the statute would not protect the merchant in a situation such as this.

This is another area in which possible litigation could be avoided by better drafting. An example of a more precise defining of the allowable conduct is found in the Pennsylvania statute, which states that the detention of the suspect is lawful "for the sole purpose of delivering him to a peace officer without unnecessary delay. . . . The person detained shall be informed promptly of the purpose of the detention and shall not be subjected to unnecessary or unreasonable force, nor to interrogation against his will."[67]

2. *Probable Cause*

Unlike reasonableness, probable cause is a question of law for the court.[68] It has been defined as "a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty."[69] Good faith alone is not sufficient, if the belief is unfounded,[70] but the accusatory statements of a credible person provide probable cause.[71] The burden of pleading and proving probable cause is on the defendant.[72]

Although probable cause is a question of law, whether the required facts and circumstances exist in a particular case is a question of fact. So

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

66. OHIO REV. CODE § 2935.041.

67. PA. STAT. ANN. tit. 18, § 4816.1 (Supp. 1958).

68. Bock v. City of Cincinnati, 43 Ohio App. 257, 183 N.E. 119 (1931).

69. *Id.* at 262, 183 N.E. at 121.

70. Canton Provision Co. v. St. John, 52 Ohio App. 507, 3 N.E.2d 978 (1936); Neff v. Palmer, 152 N.E.2d 719 (Ohio C.P. 1956), *aff'd* 151 N.E.2d 390 (Ohio App. 1956).

71. ALEXANDER, LAW OF ARREST 443 (1949).

72. Johnson v. Reddy, 163 Ohio St. 347, 126 N.E.2d 911 (1955); Nappi v. Wilson, 22 Ohio App. 520, 155 N.E. 151 (1926).

where the facts are in controversy, the court must instruct the jury as to what facts will constitute probable cause and submit to them only the question of what facts have been established.[73] But there is the danger that in doing this the jury will, in fact, pass upon the question of probable cause. This could be avoided by the use of a special verdict, to separate questions of law and fact.

3. *Mercantile Establishment*

Another area in which interpretation is necessary is the scope of the statute. A "mercantile establishment" is one where the buying and selling of articles of merchandise, either at wholesale or retail, is conducted. Since a restaurant is not a mercantile establishment,[74] a dispute over payment of a restaurant check, such as in *Jacques v. Childs Dining Hall Co.*,[75] would not be covered by the statute. Even where a restaurant is operated in connection with a department store, or other mercantile establishment, it is not classified itself as a mercantile establishment.[76] In certain situations this could lead to anomalous results. For example, a drug store employee may detain a customer who has apparently pilfered an article of toiletry, but may not detain one who apparently has left the lunch counter without paying for his meal.

4. *Merchant's Employee*

In extending the privilege of detention to the "merchant" and "merchant's employee," the statute does not indicate whether the privilege likewise extends to store detectives who are independent contractors. Since such individuals are held to be "employees" for the purpose of holding the store liable for their acts,[77] a fair implication would be that the statute also confers the privilege upon them.

CONCLUSION

The Ohio statute is no panacea for the problems confronting the merchant in the battle against shoplifting. Its faults render it a somewhat less than perfect solution and may provide pitfalls to snare the

73. Bock v. City of Cincinnati, 43 Ohio App. 257, 183 N.E. 119 (1931); Britton v. Granger, 13 Ohio C.C.R. 281 (1897).

74. D.C. Goff Co. v. First State Bank, 175 Ark. 158, 298 S.W. 884 (1927): Block v. New Era Cafe, Inc., 23 Ohio L. Abs. 131, 1 Ohio Supp. (N.E. Reporter) 93 (C.P. 1932); 1948 OPS. ATT'Y GEN. (OHIO) 297.

75. 244 Mass. 438, 138 N.E. 843 (1923).

76. 1948 OPS. ATT'Y GEN. (OHIO) 297.

77. Zentko v. McKelvey Co., 88 N.E.2d 265 (Ohio Ct. App. 1948); Szymanski v. Great Atlantic & Pacific Tea Co., 79 Ohio App. 407, 74 N.E.2d 205 (1947).