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Torts--False Arrest--False Imprisonment--Shoplifting

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barment before the judicial branch of government. If it is alleged that the privilege to practice law is separate and distinct from the constitutional office of judge, how can the removal of the privilege work a forfeiture of the office of judge? However, compare *Mahoning County Bar Ass'n v. Franko,* 168 Ohio St. 17, 151 N.E.2d 17 (1958), in accord with the instant case, allowing the disbarment of an attorney who was serving as a municipal judge, and *State ex rel. Saxbe v. Franko,* 168 Ohio St. 338, 154 N.E.2d 751 (1958), holding that the suspension from practice of law in *Mahoning County Bar Ass'n, supra,* works a forfeiture of the office of municipal judge.

Although the disbarment of a judge should not work a forfeiture of the judgeship on the basis of exclusive remedy of impeachment provided by the state constitution, to disallow disbarment proceedings on the basis of exclusive remedy would deny the bar its right and duty to protect the public from lawyers of unethical standards. See *In re Meraux,* 202 La. 736, 12 So. 2d 798 (1943). Thus, it appears that the necessary measures to halt such a dilemma lie in constitutional revision or with the legislature.

One method of avoiding the problems raised herein would be to require all judges to be resident members of the bar and to provide for the removal of such judges through disbarment proceedings as well as impeachment. A failure to observe the judicial code of ethics, which in essence embrace the "spirit" of the attorneys' code of ethics, should properly result in dismissal from office and revocation of the privilege to practice law.

James William Sarver

Torts — False Arrest — False Imprisonment — Shoplifting

On November 18, 1957, the manager of *D's* supermarket detained *P* after *P* had left the premises of the store for the purpose of investigating whether *P* had paid for the groceries. The manager acted on a "hunch." He found that *P* had in fact paid for his groceries. On November 27, 1957, after leaving the store, *P* was again accosted by the store manager, who laid his hand on *P's* shoulder, took the poke out of *P's* arms, examined its contents, and again found that *P* had paid for his purchases. The third

complaint is a sequel to the incident of November 27 — the allegation being that the store manager said in the presence of others in reference to *P*, "Well, the s-o-b will never come in my store again." In the District Court for the Southern District of West Virginia, *P* recovered $1,000 compensatory damage and $2,000 punitive damages on account of two incidents of false arrest and false imprisonment and one incident of slander. *D* appealed. *Held,* any restraint of one's personal liberty may constitute false imprisonment, and the $1,000 compensatory damages are affirmed. However, the punitive damages are reversed. *Great Atlantic and Pacific Tea Co. v. Lethcoe,* 279 F.2d 948 (4th Cir. 1960).

The purpose of this comment is to elaborate upon false arrest and false imprisonment in relation to shoplifting and describe the position West Virginia holds in light of a recent trend of some jurisdictions to allow a reasonable detention of suspected shoplifters without creating liability for false imprisonment. The trend developed from a need to give more protection to store owners when exercising their right to protect their property. Encompassed within this discussion will be a consideration of West Virgina's recent legislation pertaining to shoplifting.

Originally, imprisonment connoted the idea of stone walls and iron bars, but it no longer means simply incarceration. The gist of false imprisonment now is illegal restraint. This can be done in the open street as well as within an inclosure. However, the restraint of freedom must be total, with no reasonable means of escape. The restraint may be achieved by threats of force and violence as well as by physical barriers. Furthermore, intent to confine is an essential element to this tort. PROSSER, TORTS § 12 (2d ed. 1955).

The distinction between false arrest and false imprisonment is essentially in the manner in which they arise. In false arrest, detention is for the purpose of enforcing the processes of law. But in false imprisonment, the detention is merely a matter between private persons for a private end. Hence, a false arrest always includes a false imprisonment, but a false imprisonment does not necessarily include a false arrest. 12 AM. JUR. *False Imprisonment* § 3 (1939).

At common law, the possessor of property could defend the possession by the use of reasonable force. But if dispossession had occurred, then reasonable force could be used to regain posses-

sion only under circumstances of fresh pursuit, and in the event the one seeking to defend or recapture possession made a mistake as to identity, however reasonable, no force was justified. Thus, the only situation permitting a possessor to mistakenly use force without incurring liability was when he still had possession and had reason to believe that his possession was threatened by one who in fact did not have the privilege to take the property. The difficulty arises when these common law rules are applied by the courts, because the courts normally allow reasonable force to be used as a defense only to the tort of assault and battery, and seldom will this defense be allowed to bar recovery because of a wrongful detention, and never for an illegal arrest. Therefore, since most cases having to do with shoplifting are put on grounds of false arrest and false imprisonment, the alleged tort-feasor finds himself without a common law defense. Comment, 46 ILL. L. REV. 887 (1952). However, where there is consent, there is no false imprisonment. As stated in *Lester v. Albers Super Markets, Inc.*, 94 Ohio App. 313, 114 N.E.2d 529 (1952), submission to mere verbal direction of another cannot constitute false imprisonment, unless the submission was effected by force or threats of force.

With these principles in mind, one can understand the predicament in which a merchant finds himself when he attempts to detain a suspect. He may be held liable in an amount many times greater than the property he is trying to protect. This dilemma has evolved from the common law principle, as previously implied, that good faith and probable cause are no defense to actions of false arrest and false imprisonment. See PROSSER, TORTS §§ 12-24 (2d ed. 1955). As it was held in one case, false arrest and false imprisonment give an absolute right to recover at least nominal damages, and neither probable cause nor lack of malice will justify the wrongful act or defeat the action. *George v. Norfolk & Western Ry.*, 78 W. Va. 345, 88 S.E. 1036 (1916).

Therefore, those merchants who cannot afford to employ floorwalkers, who would make it possible to prevent dispossession, are frequently forced to pay large sums in damages resulting from a judgment against them for false arrest and false imprisonment when they investigate at the checkout counter, or thereafter, against the suspect's will. In fact, the doctrine that all persons who arrest without warrant for misdemeanors do so at their peril is the most compelling reason causing merchants to de-emphasize arrests.

Furthermore, a conviction is no bar to this tort action. Comment, 62 YALE L.J. 788 (1953).

The merchant's plight has led a few jurisdictions to alleviate the extreme risk on them. The interpretation used to achieve this purpose is to allow the merchant the defense of probable cause. But this defense only applies to the merchant's right to detain, not to arrest. Therefore, if the merchant is detaining for the purpose of arresting and not merely for the purpose of defending or recapturing his property, he will still be liable for false arrest and false imprisonment. This conclusion, of course, depends upon the arrest laws of the particular state. Comment, 46 ILL. L. REV., *supra.* However, at common law, a private person could never arrest for a misdemeanor unless it was a breach of the peace committed in his presence. Lugar, *Arrest Without a Warrant in W. Va.,* 48 W. VA. L.Q. 207 (1942). A breach of the peace connotes violence. *Marcuchi v. Norfolk & Western Ry.,* 81 W. Va. 548, 94 S.E. 979 (1918). It should be noted that there does not seem to be any other situation in which actual restraint has been held to have been justified. 84 U. PA. L. REV. 912 (1936).

In those jurisdictions allowing probable cause as a defense, the courts are very strict as to the circumstances giving rise to it. In *Collyer v. S. H. Kress Co.,* 5 Cal.2d 175, 54 P.2d 20 (1936), store authorities were entitled to use a reasonable amount of compulsion to effect restraint of customer for the purpose of investigating whether the customer had pilfered articles from the counters or not. But in *Little Stores v. Isenberg,* 26 Tenn. App. 357, 172 S.W.2d 13 (1943), while the court was in agreement that a storekeeper had the right to make a reasonable investigation as to whether the merchandise had been paid for and to detain a reasonable time for such investigation, it was held that false imprisonment occurred by holding the purchaser after the clerk had stated that purchaser had paid. This decision seems to support the statement in 22 AM. JUR. *False Imprisonment* § 3 (1939), that although the patron may be detained for a reasonable time for investigation, upon payment, he has the unqualified right to leave the premises. Again, in a Virginia case, *Montgomery Ward & Co. v. Freeman,* 199 F.2d 720 (4th Cir. 1952), detention upon a reasonable belief, for a reasonable time and in a reasonable manner was upheld. Of course, reasonableness is a question for the jury. PROSSER, TORTS § 21 (2d ed. 1955). In another case, *Teel v. May Department Stores Co.,*

348 Mo. 696, 155 S.W.2d 74 (1941), the court approved the right of the employees to detain a suspect for a reasonable time for a reasonable investigation on reasonable grounds to believe, but held that false imprisonment could exist by retaining her after the goods had been returned. However, in one jurisdiction, *Great Atlantic & Pacific Tea Co. v. Smith,* 281 Ky. 583, 136 S.W.2d 759 (1940), the court would not allow the defense of probable cause merely upon grounds of suspicion based only upon customer's disregard of the store's regulation requiring customer to present for checking the merchandise she was carrying. The detention against the customer's will for the purpose of investigating was held to constitute false imprisonment. The court stated that the storekeeper must see and know that a customer is taking wrongfully before he has the right to prevent the attempted shoplifting. In view of these decisions, the conclusion might safely be drawn that in these jurisdictions committing themselves to a new trend of allowing probable cause as a defense to false imprisonment in shoplifting cases there is some variance as to when it will be allowed.

In West Virginia, the common law principles as to false arrest and false imprisonment are still in force. W. VA. CONST. art. VIII, § 21. In fact, this year in *City of McMechen, ex rel Willey v. Fid. & Cas. Co.*, 116 S.E.2d 388 (W. Va. 1960), the court reaffirmed the common law principles that neither probable cause nor lack of malice barred the absolute right of plaintiff to recover at least nominal damages for false arrest or false imprisonment. Although this case dealt with circumstances other than shoplifting, it does show West Virginia's continued adherence to the common law concepts in respect to these torts.

In another recent West Virginia case, *Sutherland v. Kroger Co.*, 110 S.E.2d 716 (W. Va. 1959), although the grounds used to seek recovery were injuries resulting from illegal search of plaintiff's parcels which she had purchased at another store, constituting an invasion of the right of privacy, this decision is germane to the present topic because it indicates that defendant did not have a right to search the shopping bag unless this right was expressly given by plaintiff. Furthermore, it was held that signs in a store purporting to reserve the right to search patrons' shopping bags do not relieve liability for an illegal search.

With the preceding case and the principal case, in which the court stated that any restraint of one's personal liberty may con-

stitute false imprisonment, it would seem that in West Virginia, any intentional restraint on one's right to move about freely in an effort to defend or recapture property will certainly constitute a false imprisonment, or possibly cause liability for injuries resulting from an illegal search. However, in light of a recent West Virginia statute, *infra,* this conclusion must be understood to include only those situations in which defendant proceeds to protect his property or make an arrest upon mere suspicion with no actual knowledge. Nevertheless, it would not seem that West Virginia has followed the new trend of some jurisdictions which allow probable cause to be a defense against false imprisonment.

In considering the West Virginia shoplifting statute, W. VA. CODE ch. 61, art. 3A § 1 (Michie Supp. 1960), the legislature provided in section 4 that shoplifting is to constitute a breach of the peace and any citizen of this state may arrest a person committing this act in his presence. This statute settles a previously perplexing problem since it has been uncertain whether shoplifting constituted a breach of the peace, and this issue was important to merchants because at common law a private person could only arrest a misdemeanant when committing a breach of the peace in his presence. Comment, 46 ILL. L. REV., *supra.* Although there are no cases interpreting this statute, it appears from the wording that probable cause grounded in mere suspicion will still not be a defense in West Virginia to the torts of false arrest and false imprisonment. Nor would this statute seem to protect a merchant who proceeds solely with the intention to defend or recapture his property should he detain the thief, even though he sees and has actual knowledge of the shoplifting. But, it appears that the statute would protect the merchant having actual knowledge of the shoplifting if he proceeds with the intent to make an arrest.

In summary, common law false arrest and false imprisonment no longer mean merely incarceration but have come to mean the unlawful restraint of one's right to move about freely. The modern view of false arrest and false imprisonment has produced a complicated situation for the merchant when his right to protect his property clashes with the right of an individual to move about freely. This problem has motivated some jurisdictions to elevate the merchant from his subordinate position by allowing a defense of probable cause if he acts reasonably in belief, investigation and time. West Virginia has not followed the recent trend, but con-

tinues to disallow probable cause as a defense in all false arrest and false imprisonment cases. However, West Virginia has provided a statute making shoplifting a breach of the peace and giving private persons the right to arrest for this act if committed in their presence.

Esdel Beane Yost

ABSTRACTS

Adoption — Rights of Inheritance of Natural Child of Adopted Child

C, the natural child of *A* who was adopted, is contesting the will of *A's* adopting mother. The trial court held that *C* was not a lawful lineal descendant of the testator, *A's* adopting mothers, and thus not able to contest the will. *Held,* reversed. The right of adopted children to have their children inherit under the statute of descent and distribution was one of the rights included in the statutory amendment which abolished any remaining distinctions between the legal rights of a natural and an adopted child. *In re Miner's Estate,* 103 N.W.2d 498 (Mich. 1960).

In 1959, the West Virginia Legislature amended the former code provision which deprived adopted children of the rights to take from lineal kindred of the adopting parents by representation. W. Va. Acts 1959, ch. 47. W. VA. CODE, ch. 48, art. 4, § 5 (Michie Supp. 1960). See *Wheeling Dollar Sav. & Trust Co. v. Stewart,* 128 W. Va. 703, 37 S.E.2d 563 (1946), interpreting the section prior to amendment.

The pertinent Michigan statute does not specifically provide for the fact situation presented in the principal case nor does the West Virginia statute as it now reads. However, the West Virginia statute, like the Michigan statute, does entitle the adopted child to "all the rights and privileges of a natural child of the adopting parents. . . ." Further, the West Virginia statute gives the adopted child the same rights of inheritance from his adoptive parents and the parents' lineal kindred as though he were a natural child of the adopting parents. It also provides for the adopted child's intestate property to pass as though he were a natural child of the adopting parents. Thus by analogy with the reasoning of the princi-