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Note

NEBRASKA'S ANTI-SHOPLIFTING STATUTE

INTRODUCTION

The crime of shoplifting has become so widespread in Nebraska during the past decade that in many instances as much as twenty per cent of the merchandise tendered for sale becomes the fruit of a successful pilfering scheme.¹ This upsurge may be attributed largely to the advent and expansion of self-service stores. Formerly, merchandising techniques consisted primarily of over-the-counter sales which interposed a barrier between the goods and the customer. The switch to self-service was instituted in order to decrease the number of clerks handling cash registers and thereby reduce incidents of employee thievery. While this goal was accomplished, the resulting decrease was more than offset by an increase in customer pilferage.² The cost of this pilfering is thrust initially upon the merchant and ultimately upon the consuming public in the form of increased prices.

Recognizing the need to fortify the merchant's position in combating this problem, the Nebraska Legislature enacted an anti-shoplifting statute in 1957³ and amended its provisions in 1963 to increase its effectiveness.⁴

¹ *Hearings Before the Committee on the Judiciary on L.B. 135*, 68th Neb. Leg. Sess. 1 (March 11, 1957).

² *Floor Debate on L.B. 398*, 73d Neb. Leg. Sess. 1193-94 (1963). If this is true, it would seem more in the public interest to return to over-the-counter sales.

³ NEB. REV. STAT. §§ 29-402.01 to -.03 (Supp. 1957).

⁴ Neb. Laws 1963, ch. 157, at 556; NEB. REV. STAT. §§ 29-402.01 to -.03 (Reissue 1964):

§ 29-402.01: "Shoplifters; detention; no criminal or civil liability. A peace officer, a merchant, or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time. Such taking into custody and detention by a peace officer, merchant, or merchant's employee shall not render such peace officer, merchant, or merchant's employee criminally or civilly liable for slander, libel, false arrest, false imprisonment, or unlawful detention."

§ 29-402.02: "Shoplifters; peace officer; arrest without warrant. Any peace officer may arrest without warrant any person he has prob-

I. MERCHANTS VERSUS SHOPLIFTERS BEFORE 1957

Prior to the adoption of the 1957 act, a merchant or property owner had to resort to common law methods of recapture in defending a threatened interference or wrongful taking of his property or merchandise.⁵ Such defensive action must have commenced in "fresh pursuit" of the allegedly taken goods.⁶ The merchant or his agent⁷ could exercise force only if he was correct in believing that an interference with his property or merchandise was threatened by the person whom he detained.⁸ Although a police officer could arrest without a warrant on the basis of probable cause as to the commission of a felony, or as to the commission of a misdemeanor committed in his presence, a merchant could not. The store-owner could not exercise common law arrest powers unless a felony had in fact been committed.⁹ If mistaken in his belief, the merchant could be held liable for false imprisonment,¹⁰ assault,¹¹ battery,¹² libel,¹³ or slander.¹⁴

The only legislative protection afforded the Nebraska merchant was the provision which allowed private persons to arrest without warrant where "petit larceny or a felony *has been committed*" and the arresting person has reasonable grounds to believe the person arrested is guilty.¹⁵ Under this provision the

able cause for believing has committed larceny in retail or wholesale establishments."

§ 29-402.03: "Shoplifters; arrest; merchant or employee not liable. A merchant or a merchant's employee who causes the arrest of a person, as provided for in section 29-402.01, for larceny of goods held for sale shall not be criminally or civilly liable for slander, libel, false arrest, or false imprisonment where the merchant or merchant's employee has probable cause for believing that the person arrested committed larceny of goods held for sale."

⁵ Barr v. Post, 56 Neb. 698, 77 N.W. 123 (1898).

⁶ PROSSER, TORTS § 22, at 119 (3d ed. 1964).

⁷ Dillon v. Sears-Roebuck Co., 126 Neb. 357, 253 N.W. 331 (1934).

⁸ PROSSER, TORTS § 21 (3d ed. 1964); RESTATEMENT, TORTS §§ 100-06 (1934).

⁹ Kyner v. Laubner, 3 Neb. (Unof.) 370, 91 N.W. 491 (1902).

¹⁰ Dillon v. Sears-Roebuck Co., 126 Neb. 357, 253 N.W. 331 (1934).

¹¹ Martin v. Castner-Knott Dry Goods Co., 27 Tenn. App. 421, 181 S.W.2d 638 (1944).

¹² *Ibid.*

¹³ Thorman v. Bryngelson, 87 Neb. 53, 127 N.W. 117 (1910).

¹⁴ *Ibid.*

¹⁵ NEB. REV. STAT. § 29-402 (Reissue 1964): "Arrest by person not an officer. Any person not an officer may, without warrant, arrest any person, if a *petit larceny* or a *felony has been committed*, and there is reasonable ground to believe the person arrested guilty of such offense,

merchant was not protected if a petit larceny or felony had not been committed.

Because of the limited scope of these common law and legislative protections, the merchant has been reluctant to take affirmative steps against suspected shoplifters. He has refrained not only for fear of legal liability, but also for the reason that any unwarranted accosting of customers is detrimental to business goodwill.

Merchants in Nebraska have spent large sums annually on elaborate systems of mirrors, two-way radios, hidden television cameras, and private detectives. Special methods of packaging small items such as razor blades and combs have also been devised to deter pilferage. These increased merchandising costs, coupled with the estimated half-billion dollar loss due to shoplifting itself, put a heavy burden on the consuming public in the form of higher retail prices.¹⁶

II. LEGISLATIVE SOLUTION

The 1957 statute created defenses to the common law actions which, it was thought, unfairly curbed merchants attempting to preserve their stock.¹⁷ The statute allows peace officers, merchants, or merchants' employees to act affirmatively against suspected shoplifters on the basis of probable cause and provides them with defenses to both criminal and civil actions for false arrest, false imprisonment, and unlawful detention.¹⁸ The statute was instituted to extend the common law rights of defense and recapture so that the merchant and his agents could protect his goods under a reasonable mistake of fact.¹⁹

Hearings before the Judiciary Committee prior to the passage of the 1957 act brought out the view that the increase in shoplifting justified, indeed necessitated, a reevaluation of the rights of merchants vis-à-vis their customers.²⁰ The hearings show that

and may detain him until a legal warrant can be obtained." (Emphasis added.)

¹⁶ *Floor Debate on L.B. 398*, 73d Neb. Leg. Sess. 1194 (1963).

¹⁷ *Hearings Before the Committee on the Judiciary on L.B. 135*, 68th Neb. Leg. Sess. 1-3 (March 11, 1957).

¹⁸ NEB. REV. STAT. §§ 29-402.01 to -.03 (Reissue 1964).

¹⁹ *Hearings Before the Committee on the Judiciary on L.B. 135*, 68th Neb. Leg. Sess. 1-3 (March 11, 1957).

²⁰ *Ibid.*

the committee felt a detention would be less embarrassing to a suspect than an arrest, particularly when the merchant was dealing with juvenile offenders.²¹

The record indicates that the retailers' case for more protection was forcefully stated at these hearings. The consumer, however, was not so ably represented. The minutes are conspicuously free of any evidence of a "consumer lobby" defending the sanctity of the individual's rights.²²

The 1957 statute, comprehensive as it was, contained a loophole in that it did not protect the merchant in actions for libel and slander. Recognizing this difficulty, various retailers requested an appropriate amendment to the statute. It was their position that experienced shoplifters would circumvent the statute by instituting actions whenever the merchant made accusations or notations concerning a suspected theft which were later proved false.²³ The legislature in its 1963 session responded by amending the 1957 statute to include defenses to both libel and slander.²⁴

III. EFFECT OF THE LEGISLATION

At first glance, the statute as amended appears to provide heavy armor for merchants confronting shoplifting suspects. Whether such will be the case in practice depends to a large extent upon how the courts construe qualifying language which requires detentions to be based on "probable cause" and to be conducted in "a reasonable manner" for a "reasonable length of time." As yet, the Nebraska courts have not had occasion to address themselves to this question. Although there is no specific authority dealing with the crucial statutory language quoted above, the Nebraska courts will presumably take judicial notice of terms such as "probable cause" as they have been used in other contexts.

²¹ *Id.* at 1.

²² *Id.* at 1-3. Arguably, the allowance of such statutory privileges to a group of private citizens constitutes "class legislation" in violation of the equal protection clause of the fourteenth amendment to the United States Constitution. Cf. Mr. Justice Jackson's concurring opinion in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 111-117 (1949).

²³ *Floor Debate on L.B. 398*, 73d Neb. Leg. Sess. 1194 (1963); *Hearings Before the Committee on the Judiciary on L.B. 398*, 73d Neb. Leg. Sess. 3-4 (1963).

²⁴ Neb. Laws 1963, ch. 157, at 556; NEB. REV. STAT. §§ 29-402.01 to -.03 (Reissue 1964).

Whether the merchant or his agents have "probable cause to believe that goods held for sale . . . have been unlawfully taken" and can be recovered by taking the suspect into custody will depend on the facts of each case and will ordinarily be a question for the jury.²⁵ The statute itself sheds some light on what constitutes "probable cause to believe" by suggesting two requirements of "belief" which must be met in order to justify detention. First, the store-owner, acting as a reasonable merchant, is required to entertain a belief that his goods have in fact been taken by the suspect in question. This invites judicial inquiry into the circumstances which constitute grounds for suspicion. Once the first requirement is met, it seems reasonable, under most circumstances, for the merchant to believe that by detaining the suspect the goods so taken could be recovered. Once the first test is met, there seems to be little additional justification needed to fulfill the second.

The merchant's privilege is further qualified by the requirement that the detention be conducted "in a reasonable manner" for "a reasonable length of time." Whether a manner of detention is reasonable or not will depend on its suitability under the circumstances.²⁶ A detention which could be conducted courteously will be unreasonable if handled in an unnecessarily public or humiliating manner.²⁷ Also, considerations as to the value of the goods, the sex and age of the suspect, and the place of detention will all be important elements in determining whether in fact the detention was conducted reasonably.²⁸

In analyzing what kinds of action a merchant may take while conducting a detention "in a reasonable manner," it is important to note that the statute does not provide defenses to actions for assault and battery. Thus, arguably, a merchant may still be guilty of an assault when he detains in an overly forceful manner. Correspondingly, he may be guilty of battery as a result of physical contact used to detain a customer. Although retailers may view the statute's failure to deal with assault and battery as still another loophole for the shoplifter, it is submitted that the inclusion or exclusion of such defenses will have no practical effect on the administration of the statute. The reasonable manner

²⁵ *Diers v. Mallon*, 46 Neb. 121, 64 N.W. 722 (1895).

²⁶ *Collyer v. S. H. Kress Co.*, 5 Cal. 2d 175, 54 P.2d 20 (1936); *Herbrick v. Samardick & Co.*, 169 Neb. 833, 101 N.W.2d 488 (1960); *Lukas v. J. C. Penney Co.*, 233 Ore. 345, 378 P.2d 717 (1963).

²⁷ PROSSER, *TORTS* § 22, at 124 (3d ed. 1964).

²⁸ *Ibid.*

limitation incorporates a test of reasonable force, a requirement which makes the exercise of such force depend on the purpose of the detention itself. If the purpose was merely to question, less force would be justified than if the purpose was to effect a recovery of the merchandise. If the force employed has not been used in a reasonable manner, the merchant is no longer within the privileged class of statutory conduct and could be held liable in tort regardless of the availability of the defenses if his conduct had been privileged.²⁹

The reasonable time requirement, like the reasonable manner requirement, will depend upon the nature and purpose of the detention or interrogation. Whether the period of detention is privileged or not will vary with the circumstances of each case.

The effect of the statute and its qualifications is to extend the merchant's common law rights of defense and recapture to cope with the pilferage problems resulting from modern merchandising techniques. Although the retailer may be free from legal liability when he is mistaken as to the occurrence of a theft, he is only so protected when he has conducted the detention within the qualified confines of the statute.

IV. CONSTITUTIONAL ISSUES

Apart from the problem of readjusting the common law rights of merchants and shoplifting suspects, Nebraska's anti-shoplifting act may raise two important constitutional issues:

1. Whether goods seized by a merchant or his agents may be admitted into evidence in a later criminal proceeding against the shoplifting suspect.
2. Whether the accused suspect is entitled to counsel during the detention and questioning period.

The question as to the admissibility of seized goods in a criminal proceeding must be considered in light of the recent United States Supreme Court decisions in *Mapp v. Ohio*³⁰ and *Ker v. California*.³¹ These decisions held the fourth amendment's

²⁹ If this is true, why was it necessary to amend the statute to include defenses to libel and slander? It would seem that the reasonable manner limitation would also apply to require that any statement or notation made pursuant to a detention be reasonably conducted under the circumstances.

³⁰ 367 U.S. 643 (1961).

³¹ 374 U.S. 23 (1963).

requirement as to the legality of searches and seizures³² applicable to federal and state officials alike.

Whether a merchant's recapture of his merchandise constitutes an arrest and seizure within the mandate of the fourth amendment may be dependent upon the ultimate objective of the recovery. The courts at common law often distinguished between an "arrest" and a "detention." Where a merchant stopped a suspect to protect his own property interests, it was generally held to be a detention.³³ Where, however, the ultimate purpose was to protect societal interests by turning the suspect or the seized goods over to public officials, the detention constituted an "arrest."³⁴

It is arguable, therefore, that a detention for a private defensive purpose may become an arrest for a public purpose at the point where the detaining merchant or his agent turns the suspect or the seized property over to public officials. At that point, the arrest and subsequent search and seizure must satisfy the fourth amendment's requirements in order to allow the admission of the seized evidence in a criminal proceeding against the suspect.³⁵ If such a public purpose is to be effectuated in the absence of a valid warrant, a legal arrest may be predicated upon probable cause for believing that the person to be arrested is guilty of shoplifting. Such a legal arrest is a condition precedent to a valid search and seizure.³⁶ If the officer or merchant did not

³² The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

³³ See Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 541-57 (1924); accord, *McGlone v. Landreth*, 200 Okla. 425, 195 P.2d 268 (1948).

³⁴ *People v. Mirbelle*, 276 Ill. App. 533 (1934).

³⁵ *Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁶ "The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists 'where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Ker v. California*, 374 U.S. 23, 34-35 (1963). See also *Beck v. Ohio*, 85 Sup. Ct. 223 (1964), which holds that mere suspicion is not sufficient probable cause under the fourth amendment.

have probable cause at the time the search and subsequent seizure were made, the goods seized would be inadmissible.³⁷ If the merchant or his agent saw the suspect taking the goods, or if he was informed of such a taking by a person known to be reliable,³⁸ the circumstances would constitute sufficient probable cause to allow an arrest and subsequent search for evidentiary purposes.

Although Nebraska courts formerly allowed the admission of evidence which would be excluded under federal standards,³⁹ they now follow the federal exclusionary tests set out in *Mapp* and *Ker*.⁴⁰ Consequently, it is no longer relevant that the arresting party was or was not a peace officer, if he was acting in the public interest in making the arrest and search and if the fruits obtained therefrom were admitted in a criminal proceeding against the suspect.

If the Nebraska courts apply federal standards of probable cause to test conduct under the statute, a detention and recapture effected for private purposes would simultaneously constitute a valid arrest and search under the federal tests. If the Nebraska courts apply different standards of probable cause to "detention" and "arrest" under the statute, the constitutional question as to admissibility of evidence may arise.

A second constitutional question which may come up under the statute concerns the alleged shoplifter's right to counsel during the period of detention and questioning. In *Escobedo v. Illinois*,⁴¹ the United States Supreme Court recently held that persons suspected of a crime are entitled to counsel during periods of accusatory interrogation wherein a confession is obtained. Because the Nebraska statute requires that the goods can be recovered by taking the suspect into custody, it is arguable that the person so detained is in fact an accused. Whether such detention is accusatory within the meaning of *Escobedo*, or whether the *Escobedo* rule will be applied to merchants under state anti-shoplifting statutes is not apparent from the opinion, and must await further clarification by the Court.

It is submitted that the *Escobedo* rule will not require that the suspect be informed of his right to counsel by the merchant or

³⁷ *Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁸ *Katz v. Peyton*, 334 F.2d 77, 78 (4th Cir. 1964).

³⁹ *Haswell v. State*, 167 Neb. 169, 92 N.W.2d 161 (1958).

⁴⁰ *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963); *State v. Easter*, 174 Neb. 412, 118 N.W.2d 515 (1962).

⁴¹ 84 Sup. Ct. 1758 (1964).

detaining officer in order to allow recapture of merchandise under the statute. The rule would apply only to situations where criminal proceedings were thereafter commenced against the person detained, and even then it seems to be merely an "exclusionary test," concerned only with the admissibility of a confession obtained under circumstances which preclude its admission.⁴²

CONCLUSION

In an effort to harmonize the individual's right to free movement in mercantile establishments with reasonable protection for merchants and consumers, the Nebraska Legislature has provided the retailer with a privileged, but limited standard of conduct in protecting his merchandise. It is unlikely that the merchant will abuse these privileges, not only because of their limited scope, but also because of the need to preserve consumer goodwill.

When conduct under the statute is exercised not only as the means to protect and recapture goods, but also to provide a basis for criminal proceedings against the shoplifter, the courts will be confronted with constitutional questions concerning the accused person's protection from illegal searches and seizures and the denial of the right to counsel. If the Nebraska Supreme Court holds that the requirements of probable cause under the statute are identical with the probable cause standards prescribed by the federal courts, whether in cases of detention or arrest, or in cases of recapture or search and seizure, there will be no problem as to the admissibility of the seized goods into evidence.

Similarly, if judicial interpretations of the recent *Escobedo* mandate do not construe that rule to require an absolute right to counsel in every circumstance, but rather limit it as an "exclusionary test," the only remaining problems under that decision concern its applicability to merchants or their agents acting as quasi-public officers in obtaining confessions from consumers detained in their establishments. As the limitation and scope of *Escobedo* is still an open federal question, any conclusive statements at this time as to its application would be conjectural.

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⁴² "The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution . . . and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation." *Id.* at 1759. (Emphasis added.)