Louisiana Merchant Detention Statute

Lee Hargrave
the NLRB\textsuperscript{41} declaring a breach of the duty of fair representation to be an unfair labor practice was somewhat abortive, since the Board's order was denied enforcement on appeal,\textsuperscript{42} but a recent Board decision stands as a reaffirmation and reiteration of the legal principles first laid down.\textsuperscript{43}

It is submitted that if federal labor policy dictates that the individual's right to prosecute his own action for breach of contract in court must be sacrificed to the needs of collective bargaining, the individual's rights within those internal procedures provided by contract ought to have complete protection. It seems that the last recourse for the protection of these rights is a cause of action against the union and the employer when the employee is unfairly represented. Regardless of the forum chosen to receive such a cause of action, it is submitted that the existence of an adequate remedy for an individual's valid claim is of paramount importance.

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Reid K. Hebert
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\textbf{LOUISIANA MERCHANT DETENTION STATUTE}

To assist storekeepers in coping with a burgeoning shoplifting problem,\textsuperscript{1} the Louisiana legislature enacted, in 1958, a merchant detention statute\textsuperscript{2} authorizing privileged detention of suspected shoplifters for questioning. The statute joined a growing list of similar legislation by most states; to date, forty-five states have acted in some manner to combat shoplifting through the various expedients of new criminal provisions, broadened arrest powers and a qualified privilege for merchants.

42. NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).  
1. The number of reported shoplifting complaints rose 81\% from 1958 to 1963, and 13\% from 1962 to 1963, \textit{FBI Uniform Crime Reports} 18 (1963). This increase is attributed to greater opportunity made possible by the growth of self-service merchandising. Shoplifting losses are estimated to run from .5\% to 3\% of sales, depending on the type of store. The estimated monetary loss is about $300 million annually in the nation. See Gunn, \textit{An Advanced Study for Controlling External and Internal Retail Pilferage} (1964) (unpublished thesis in Louisiana State University Library, used with permission); Comments, \textit{62 Yale L.J.} 788 (1953), \textit{61 Dick. L. Rev.} 256 (1957), \textit{58 Mich. L. Rev.} 429 (1959).  
2. \textit{La. R.S.} 15:84.5, 84.6 (Supp. 1964).}
to detain suspected persons. The Louisiana statute employs the qualified privilege and enlarges a peace officer’s arrest powers.

Prior to the adoption of the statute in Louisiana, a merchant assumed serious risks in arresting shoplifters or detaining them for questioning. Under the doctrine of tort liability for false arrest or malicious prosecution, the merchant was liable for unauthorized arrests. As a private citizen, he could arrest only for a felony that had in fact occurred and which he had reasonable grounds to believe the person arrested had committed; he could not arrest for a misdemeanor. Shoplifting is a felony if the value of merchandise taken exceeds $20, and a misdemeanor if under that amount. Since the majority of shoplifting incidents involve misdemeanors, the merchant virtually acted at his peril if he did make an arrest: if he arrested for a theft that happened to be a misdemeanor, it was unauthorized and he was civilly liable. If, on the other hand, the value of the goods stolen exceeded $20, he had to establish reasonable cause for the arrest and actual commission of a felony to avoid liability. The latter requirement was difficult to meet because, to convict of theft, an intent permanently to deprive the owner of possession must be proved, and in most cases the customer would simply proclaim that he intended to pay for the article. Under the broader doctrine of tort liability for false imprisonment, the merchant

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5. LA. R.S. 15:61 (1950). In Girlinghouse v. Zwahlen, 3 La. App. 720 (2d Cir. 1926), the court held the law does not allow a private person to deprive another of his liberty without a warrant when the act is at most an element of a misdemeanor. Dunson v. Baker, 144 La. 167, 80 So. 238 (1918), held that a private person may arrest upon reasonable grounds, but he must also show that a felony was committed. See Comment, 17 Tul. L. Rev. 81 (1942) for a good discussion of the laws applying to false arrest and false imprisonment in Louisiana.

6. Shoplifting is defined as “theft of goods displayed for sale.” LA. R.S. 15:84.5 (Supp. 1964). It would be prosecuted under theft, id. 14:67, and would be subject to the regular theft distinction between felonies and misdemeanors.

7. Id. 14:67.

8. False imprisonment requires a total and unlawful restraint of a person’s freedom of locomotion. Sweeten v. Friedman, 9 La. App. 44, 118 So. 787 (Orl. Cir. 1928). See Restatement, Torts § 35 (1934); LA. R.S. 14:46 (1950). False imprisonment is a broad doctrine covering unauthorized detentions in general; false arrest would cover the more specific cases when the false imprisonment is under legal authority and there is a taking into custody. As far as shoplifting is concerned, false imprisonment would arise when there was a detention without an arrest; false arrest would arise when there was a citizens’ arrest, or an arrest by a police officer on the request of a merchant. In Louisiana, there has been some confusion about the categorization of the two torts, and in many cases,
was also subject to liability for detentions of customers that did not constitute an arrest; thus, he also acted at his peril if he simply detained a suspected shoplifter for questioning.

Facing similar conditions, the courts in many common law jurisdictions began to recognize a qualified privilege to detain suspected shoplifters without liability if there were probable cause for the detention. In Louisiana, probable cause or reasonable grounds for an arrest was sufficient to render a police officer immune to civil liability for an authorized arrest without a warrant; however, the courts never directly extended immunity to private citizens. Dicta in two cases indicated approval of a qualified privilege similar to the one established outside Louisiana in the leading case of Collyer v. S. H. Kress & Co., but ultimately the legislature, rather than the courts, sought to provide a solution to the merchants' predicament.

The Louisiana Merchant Detention Statute of 1958, as recovery has been granted without distinguishing the two. See Comment, 17 Tul. L. Rev. 81 (1942).

9. Comment, 17 Tul. L. Rev. 81, 82 (1942); see Crossett v. Campbell, 122 La. 659, 48 So. 141 (1909); Banks v. Food Town, Inc., 98 So.2d 719 (La. App. 1st Cir. 1957).

10. The qualified privilege recognized in the leading case of Collyer v. S. H. Kress & Co., 5 Cal.2d 175, 54 P.2d 20 (1936) has been widely followed and has formed the basis of most of the later statutory privileges. It held that a private person may detain another for investigation to protect his property, and that probable cause to make the detention would be a defense in a false imprisonment suit. The detention, however, had to be made in a reasonable manner. The privilege is a restricted one, confined to what is reasonably necessary for its limited purpose. See Prosser, Torts § 22 (3d ed. 1964).

11. Pellifique v. Judice, 154 La. 782, 98 So. 244 (1923); Dunson v. Baker, 133 La. 167, 80 So. 238 (1918); Wells v. Gaspard, 129 So.2d 245 (La. App. 3d Cir. 1961); see La. R.S. 15:60 (1950); id. 15:62.

12. 5 Cal.2d 175, 54 P.2d 20 (1936). In Sanders v. W. T. Grant, 55 So.2d 89, 92 (La. App. 1st Cir. 1951), the court said, "It is our opinion that had the defendant specially pleaded qualified privilege, we would find merit to its contention, but having failed to do so except by way of general denial, we cannot sustain that conclusion." In Banks v. Food Town Inc., 98 So.2d 719 (La. App. 1st Cir. 1957), the court quoted the holding of Collyer v. S. H. Kress Co., 5 Cal.2d 175, 54 P.2d 20 (1936), discussed note 10 supra, with approval and indicated that the apparently contrary case of Girlinghouse v. Zwahlen, 3 La. App. 720 (2d Cir. 1926), could be distinguished.

13. La. R.S. 15:84.5 (Supp. 1964): "A. A peace officer, or a merchant, or a merchant's specifically authorized employee, may use reasonable force to detain for questioning for a length of time, not to exceed sixty minutes, on the merchant's premises any person whom he has reasonable grounds to believe has committed theft of goods displayed for sale by the merchant, regardless of the actual value of such goods, and such detention shall not constitute an arrest. Wilful concealment of goods either inside or outside the store of the merchant is prima facie evidence of intent to steal and permanently deprive the owner of his goods.

"B. A peace officer may arrest without a warrant any person whom he has reasonable ground to believe has committed theft of goods displayed for sale,
amended, authorizes the detention of suspected shoplifters, provides that such detentions do not constitute an arrest, specifically confers immunity from false arrest and false imprisonment on those authorized to detain, and liberalizes the requirements for proof of an intent to steal. The detention authorization extends to merchants, their specified employees and peace officers. The detainer must have reasonable grounds to believe the person has committed a theft. The detention must be for questioning, must not exceed sixty minutes and must be made on the merchant's premises; and reasonable force may be used to accomplish it. To facilitate criminal prosecutions, the statute provides that wilful concealment of goods is prima facie evidence of intent to steal.

Only two Louisiana cases have construed the statute, and both have construed it strictly. The requirement of reasonable grounds for detention is held to demand more than mere suspicion: detention must be grounded on substantial action by the customer showing an intent to steal. In Wilde v. Schwegmann Bros. Giant Supermarkets, the court sustained a false imprisonment claim, ruling that the store detective who detained the plaintiff was not privileged by the statute. The basis for detention was the suspicion of a store detective who claimed to have seen the customer hide a buffer pad in her purse. Without checking her sales slip, and relying on a statement by a cashier that the plaintiff had not paid for the item, the detective detained her in a small windowless storeroom. It was shown that the detective, who claimed to have watched the customer

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regardless of the actual value of such goods. A charge made to a peace officer by a merchant or a merchant's employee shall constitute reasonable grounds for such arrest."  

Id. 15:84.6: "No peace officer, merchant, or merchant's specifically authorized employee shall be criminally or civilly liable for false arrest or false imprisonment of any person detained as provided in R.S. 15:84.5A or arrested under R.S. 15:84.5B where the said police officer, merchant, or merchant's specifically authorized employee had reasonable grounds at the time of the detention or arrest for believing that the person detained or arrested committed theft of goods displayed for sale, regardless of the actual value of such goods."

14. In 1963, a Louisiana appellate court considered an action for unlawful detention and search of a suspected shoplifter without referring to the statute. It denied the plaintiff's claim on the ground that she had impliedly consented to be searched, Coates v. Schwegmann Bros. Giant Supermarkets, 152 So.2d 665 (La. App. 4th Cir. 1963), citing Banks v. Food Town Inc., 98 So.2d 719 (La. App. 1st Cir. 1957). See note 12 supra. The customer carried a shopping bag into the store without checking it at a special counter despite a large sign directing customers to do so. The court found that the plaintiff had suffered at her own fault and that the checking requirement was a reasonable one.  

15. 180 So.2d 839 (La. App. 4th Cir. 1964).
closely, failed to notice some of her more obvious movements in
the store. The court found these grounds for detention unrea-
sonable; a basic requirement would have been to verify the sus-
picions by checking the sales slip. In another decision rendered
the same day, Chretien v. F. W. Woolworth Co.,16 the same court
affirmed a slander judgment against a store arising out of an
alleged shoplifting situation. The manager questioned a cus-
tomer after he received information from another customer and
observed items similar to those he sold in her translucent hand-
bag. He was in error, and the court indicated that information
from an unidentified stranger was not sufficient to constitute
reasonable grounds under the statute.17

Although it is difficult to impose a trend on the few decided
cases in this area of the law,18 it seems that the majority of
states which have applied merchant detention statutes are in
accord with Louisiana's strict interpretation and require sub-
stantial grounds for reasonable cause. Mere suspicion of a cus-
tomer wearing a raincoat with bulging pockets who was not
seen taking anything was not reasonable grounds; detention
would be authorized only when the person had manifested an
intent to steal in some overt manner.19 Detention on suspicion
where no one saw the customer as much as touch an article was
not privileged.20 The fact that a clerk noticed that a dress which
a customer had been trying on was not in its place on a rack
was not reasonable grounds to detain;21 neither was the fact
that shoes were missing from their display box when the plain-

16. 160 So.2d 854 (La. App. 4th Cir. 1964), cert. denied, 246 La. 75, 163 So.2d
356 ("no error of law").
17. The Louisiana statute provides a defense for the merchant in a civil
action arising from detention for shoplifting. An Ohio court has expressly ruled
that the burden of proving probable cause is on the detainer. Isiah v. Great
W. RES. L. Rev. 527 (1962). It seems that this is the rule in Louisiana also,
although the courts have not so expressly ruled. In the cases in which the im-
munity of the qualified privilege has been denied, see notes 15 and 16, supra,
the courts held that the storekeepers had not reasonable cause to detain, appar-
ently recognizing that the burden of proof is on the merchant claiming the privi-
gle. See note 12 supra.
18. Search has produced only seven cases outside Louisiana which have con-
strued merchant detention statutes. The American Law Reports annotation on the
subject, 80 A.L.R.2d 430 (1961), is based on two cases; two additional cases
are listed in its supplements.
tiffs were the only customers in the store.\textsuperscript{22} Probable cause was found in a case in which the customer took an article, placed it around her waist, and moved away from the clothes rack when no sales personnel were present.\textsuperscript{23}

Only in Oklahoma has the statute been broadly applied. The Oklahoma Supreme Court upheld as probable cause the fact that the storekeeper had seen the customer take articles on previous occasions and was acting "suspiciously."\textsuperscript{24} Applying Oklahoma law, a federal court of appeals held that a jury might find reasonable detention predicated solely on another customer's accusation.\textsuperscript{25}

Another problem arises under the Louisiana statute's specific grant of immunity from civil and criminal liability for false arrest and false imprisonment to those authorized to detain.\textsuperscript{26} If the detention is authorized, it seems that civil and criminal immunity would automatically follow and that no specific grant of immunity would be needed.\textsuperscript{27} Some states make no specific grants of immunity; others provide more complete enumerations.\textsuperscript{28} The Louisiana approach can create a difficulty if a detention is conducted in a defamatory manner. It could be argued that the general authorization of detention covers immunity from all liability; the opposite conclusion can be reached by arguing that the enumeration is exclusive and that slander was intentionally excluded from immunity. In \textit{Chretien v. F. W. Woolworth Co.},\textsuperscript{29} the manner in which the store manager questioned the plaintiff was found to be slanderous. He

\textsuperscript{23} Rothstein \textit{v. Jackson's of Coral Gables}, 133 So.2d 331 (Fla. App. 1961).
\textsuperscript{24} Doyle \textit{v. Douglas}, 390 P.2d 871 (Okla. 1964) (no error in allowing defendant store manager to testify about general gravity of shoplifting problem).
\textsuperscript{25} J. C. Penney Co. \textit{v. O'Daniell}, 263 F.2d 849 (10th Cir. 1959).
\textsuperscript{26} La. Acts 1960, No. 326, § 1, amended La. R.S. 15:84.6, enlarging the immunity clause to grant immunity from civil and criminal liability, heretofore granted only to peace officers, to all who were authorized to detain or arrest suspected shoplifters.
\textsuperscript{28} See Comment, 58 Mich. L. Rev. 429 (1959). Illinois and Utah, for example, grant the qualified privilege and make no specific enumeration of the defenses it provides, simply saying there shall be no liability. On the other hand, Virginia specifically enumerates immunity from liability for false arrest, false imprisonment, unlawful detention, malicious prosecution, slander, assault and battery. ILL. REV. STAT. ANN. c. 38, §§ 252.1 to 252.4 (1959) ; UTAH CODE ANN. §§ 77-13-30 to 77-13-32 (1955) ; VA. CODE §§ 18-187.1 to 18-187.3 (1950).
\textsuperscript{29} 160 So.2d 854 (La. App. 4th Cir. 1964), \textit{cert. denied}, 246 La. 75, 163 So.2d 356 ("no error of law").
made statements, heard by many customers, that imported that the customer was trying to steal the store's merchandise. The court said that, even had there been reasonable grounds for detaining the plaintiff, the qualified privilege of the statute would not clothe the storekeeper with immunity when he resorted to slander. Thus, the court seems to exclude slander from the civil immunity granted by the statute. Mississippi's Supreme Court has taken a similar view; found to be a slanderous, and therefore unprivileged, detention was the halting of a customer on a stairway and making accusations of theft in a loud voice.80

The Louisiana statute allows detention for questioning only. In Wilde v. Schwegmann Bros. Giant Supermarkets,81 detention was used to obtain a confession from the customer, who was not allowed to leave until she had signed a confession blank. The court again construed the statute strictly, and denied the qualified privilege because the detention went beyond questioning. An analogous Texas statute82 gives a storekeeper the right to seize property taken from his store by a shoplifter. This statute has been strictly construed, a court finding that it does not privilege detention when there is no accompanying seizure of property.83

Remaining unresolved are questions concerning the constitutionality of the detention provisions. Neither the United States Supreme Court nor the highest courts of any of the states have decided the issue.84 The American Civil Liberties Union

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30. J. C. Penney Co. v. Cox, 246 Miss. 1, 148 So. 2d 678 (1963). Under a statute which provides that the detention must be reasonable, the Oregon Supreme Court held to be unreasonable the apprehension of a customer on the street by a store employee who did not identify himself and tussled with the customer to inspect her shopping bag. Lukas v. J. C. Penney Co., 223 Ore. 345, 378 P.2d 717 (1965).

31. 160 So. 2d 839 (La. App. 4th Cir. 1964). In this case, the court said the grounds for detention were unreasonable and that the detention itself went beyond the privilege of the statute. It is arguable that the latter statement might be considered dictum and unnecessary for the disposition of the case. However, the strong language of the court in the latter regard seems to indicate that the two grounds are concurrent holdings and the court based its decision on both points.

32. Texas Penal Code art. 1436c, § 2 (Supp. 1964): "All persons have a right to prevent the consequences of shoplifting by seizing any goods . . . which have been so taken, and bring it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the crime of shoplifting to have been committed and the property so taken, and the seizure must be openly made and the processing had without delay."


34. North Carolina's Supreme Court has ruled constitutional a statute defining
maintains the statutes are unconstitutional, and it is possible they might conflict with the due process clause of the fourteenth amendment of the Constitution, and with the fourth and fifth amendments. Applying these amendments, the United States Supreme Court has recently ruled, in a case concerning arrest by federal officers, that suspicion based on accusations of an untested informer is insufficient to render an arrest without a warrant constitutionally valid; however, arrests without warrants are valid when there is probable cause and sufficient grounds for them. State law enforcement officers are subject to the same tests of constitutionality as federal officers, and state statutes allowing private citizens, without a warrant, to arrest for felonies and breach of the peace are valid. It seems reasonable to assume that the constitutional standards applying to arrest by officers would apply to detention by private citizens authorized by state statutes, since the test of constitutionality centers on what rights of an individual are protected. It should not be a major distinction whether this right is invaded by peace officers or by private citizens operating under state authority. Thus, the statutes would probably be valid if they require a reasonable cause test similar to that required of state and federal officers. Furthermore, the test of validity of arrests generally centers not on the statutes, but on the particular arrest which was made under the statute and whether it was reasonable under the due process limitation. The court's policy is to judge the facts of each case on its merits.

Since suspicion alone is not reasonable grounds under the due process limitation, and the Supreme Court's policy is to enforce strictly the limitation, it seems that courts applying detention statutes will have to tread carefully and require a

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35. See the reports of the ACLU: 39TH ANNUAL REPORT 93 (1958-59); 40TH ANNUAL REPORT 65 (1959-60), 41ST ANNUAL REPORT 64 (1960-61).
37. 18 U.S.C. § 3052 (1951) limits federal officers to make felony arrests without a warrant to cases where the crime was committed in the presence of officers or upon reasonable grounds. Henry v. United States, 361 U.S. 98 (1957).
41. Ibid.
substantial test for reasonableness under the statutes to avoid constitutional difficulties. A Texas court has taken this approach. In ruling that suspicion alone was not sufficient grounds for detention, the court stated that if the legislature had authorized a clerk to arrest on suspicion all persons in the store, the statute would be of doubtful constitutionality.\footnote{42. Browning v. Pay-Less Service Shoes Inc., 373 S.W.2d 71 (Tex. Civ. App. 1963).}

In summary, the Louisiana courts are applying the merchant detention statute strictly, as are most courts in the United States which have considered similar legislation. This interpretation achieves a proper adjustment of two competing interests brought into collision by the statutes: the right of a merchant to protect his property from theft and the right of citizens to enjoy the fundamental freedom of movement protected by the due process clause. No matter how serious the shoplifting problem may be, the measures taken to deal with it should not be allowed to interfere seriously with individual constitutional rights. It is submitted that the courts of Louisiana are pursuing a wise course in strictly interpreting the statute to protect this basic liberty.

It is also contended that the detention privilege cannot be extended much further, and the existing privilege has not been properly used. In a study of shoplifting based on surveys of Louisiana stores, it was discovered that many security personnel were unaware of the provisions of the detention statute and believed they could go much further than the law allows;\footnote{43. Gunn, An Advanced Study for Controlling External and Internal Pilferage 192 (1964) (unpublished thesis in Louisiana State University Library, used with permission).} this may explain the problems arising from unauthorized detentions. It would be helpful for merchants to learn exactly what their privilege entails, what they can safely do: it seems that the merchant can detain when he has seen a customer steal and conceal an article, and then takes apparent and available steps, as checking sales slips, to verify the theft. He can also detain when the customer consents. When the basis for holding a customer would be mere suspicious action—clothes with bulging pockets, information from another customer and the like—detention would be ill-advised, unless the item stolen is of great value and the merchant is willing to take the risk of a false imprisonment suit. If he should choose to detain, he should pro-
ceed politely and ask the customer to accompany him to an area away from the presence of other persons; he could then question the customer without fear of liability for slander. However, he should not attempt to coerce the customer into signing a confession. It would be advisable to make the detention after the customer has passed a check-out counter or has made some movement toward leaving the premises, thus making it easier to show that the customer did not intend to pay for the item.

It must be recognized that legislation is but one means of combating shoplifting; too many merchants neglect to institute their own procedures to protect themselves. Also, stores are reluctant to prosecute for shoplifting because of fear of creating bad public relations by harassing customers. Until stores make more prosecutions, there will be little deterrence to shoplifters; shoplifting will remain profitable and it will be difficult to curb.

In essence, each merchant must balance the risk of loss of merchandise and loss through tort liability, considering also that shoplifting losses are passed on to the customer and that many methods of self-help for curbing shoplifting are available. Since his profits are greater under self-service merchandising, the merchant will probably continue using the present methods despite the limited protection given by the statute. To improve the situation, it is up to the merchant to use the state's restricted privilege correctly, to prosecute more shoplifters, and to use more effective practical means to curb shoplifting. The law cannot do much more by extending detention statutes.

Lee Hargrave

44. Ibid. This recent master's thesis is based on surveys and interviews with many store owners and security personnel. It presents a complete plan for effective control of shoplifting, emphasizing practical precautions a merchant can take, including better trained security personnel, strategic placing of most-frequently stolen merchandise where it can be watched closely, use of large mirrors, closed-circuit television and fake TV cameras to act as real and psychological deterrents, arrangement of counters so that all areas of the store can be readily observed, coordinated and organized planning for apprehending shoplifters, and generally better security procedures.