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The Privilege of Detention for Investigation: Collyer v. Kress Co. Revisited

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NOTES

THE PRIVILEGE OF DETENTION FOR INVESTIGATION: *Collyer v. Kress Co.* Revisited

Upon what basis may a detention for investigation be predicated in order that the person detaining may exercise a right to protect his property yet not run the risk of a false imprisonment action should the person detained not have committed the offense?

Section 837 of the California Penal Code[1] provides that a private person may arrest another for a public offense committed or attempted in his presence. Section 236 defines false imprisonment as the unlawful violation of the personal liberty of another.

To say that a detention is a condition prior to, and not amounting to, an arrest under Penal Code section 837 is to violate the definition of arrest. Section 835 states that an arrest is made by an actual restraint of the person of the defendant. To demand that the offense or the attempt be committed in the presence of the person detaining is to deny an effective privilege where the manager or store detective detains pursuant to information supplied by clerk or customer. It might be suggested that a detention for investigation would not be an "unlawful violation" under section 236, but the wording of section 837, "offense committed or attempted," permits no exception by way of a privilege to detain where no offense, in fact, has been attempted or committed.

Hence, if this privilege to protect one's property and to err exists at all, it must be based on the common law principal that "the owner of property, in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it."[2]

Early English cases on the problem are valuable only by indirection. One such group denied a privilege to detain, but it was grounded not upon the rule that detention per se was unlawful, but that these particular detentions were unlawful because plaintiffs were not brought immediately before the courts.[3] Another group stands for the proposition that one's person or clothing may not be detained as security for an unpaid bill.[4]

In the United States, many courts have refused to permit detention for investigation regardless of probable cause, reasonableness, or good faith. This result has been achieved by a close construction of penal statutes which do not provide for arrest by private citizens for misdemeanors. *A fortiori*, then, these courts will not grant a privilege to detain where no

[1] CAL. PEN. CODE § 837: "A private person may arrest another: 1) For a public offense committed or attempted in his presence. 2) When the person arrested has committed a felony, although not in his presence. 3) When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

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

[3] Hall v. Booth, 3 Nev. & M. KB. 316, 14 Dig. 175 § 1531 (1834); Morris v. Wise, 2 F & F 51, 175 Eng. Rep. 955, 14 Dig. 175 § 1533 (1860).

[4] The Six Carpenters' Case, 8 Co. Rep. 146a, 77 Eng. Rep. 695 (1610); Sunbolf v. Alford, 150 Eng. Rep. 1135 (1838).

misdemeanor in fact has been committed. Illinois,[5] New York,[6] and Ohio[7] are among these states.

Collyer v. S. H. Kress Co.,[8] a California case decided in 1936, is the landmark case establishing in this state a privilege to detain based on property interests and independent of statutory arrest provisions. Here, after a customer and two store detectives had seen the plaintiff shoplift, he was intercepted at the main exit and escorted to a room on the second floor for purposes of investigation. When a detective attempted to search him, plaintiff intervened physically. He further refused to sign a statement; after which the police were summoned, searched him, and found the articles. In the criminal complaint the jury found plaintiff not guilty of theft.

The California Supreme Court phrased the question thus, "We are here concerned only with the right of defendant store to detain the plaintiff for purposes of investigation and to secure a confession, after three persons had seen him pilfer articles."[9] The court distinguished two theories: first, that the owner of property, in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it; second, that probable cause is no defense in false imprisonment cases involving misdemeanors. The court granted that probable cause was not a defense to a breach of statutory authority of private persons to arrest, but that it was a defense where a person had reasonable grounds to believe that another was stealing his property as distinguished from those where the offense has been completed. Two qualifications were laid down for the exercise of the detention: first, that probable cause exists; second, that the detention be reasonable. As authority the court cited *Jacques v. Childs' Dining Hall*[10] and *Fenn v. Kroger Grocery & Baking Co.*[11] These are slender reeds. In *Jacques*, the Massachusetts court stated that "defendant undoubtedly had the right if apparently [plaintiff] . . . had not paid to detain her for a reasonable time to investigate the circumstances."[12] Because she was detained an unreasonable time she was allowed to recover. But the court further stated, "It is obvious that no criminal offense had been committed, and the right appertaining to private individuals to arrest without a warrant, . . . is confined to cases of the actual guilt of the party arrested; and the arrest can only be justified by proving such guilt."[13] This seems to negate the idea that the privilege is based on probable cause. The "privilege" is effective only if plaintiff is guilty. In *Fenn* the court found no

[5] Lindquist v. Friedman's, Inc., 366 Ill. 232, 8 N.E.2d 625 (1937).

[6] Mali v. Lord, 39 N.Y. 381, 100 Am. Dec. 448 (1868); Damilitas v. Kerjas Lunch Corp., 165 Misc. 186, 300 N.Y. Supp. 574 (N.Y. City Ct. 1937); Rodney v. Interborough Rapid Transit, 149 Misc. 271, 267 N.Y. Supp. 86 (Sup. Ct. 1932); Gill v. Montgomery Ward & Co., 284 App. Div. 36, 129 N.Y.S.2d 288, 49 A.L.R.2d 1452 (1954).

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

[8] 5 Cal. 2d 175, 54 P.2d 20 (1936). And see generally 3 ARK. L. REV. 484 (1948); 5 FORDHAM L. REV. 362 (1936); 21 MINN. L. REV. 107 (1936); 10 So. CAL. L. REV. 103 (1936); 5 U. CHI. L. REV. 318 (1937); 84 U. PA. L. REV. 912 (1935).

[9] *Id.* at 179-80, 54 P.2d at 23.

[10] 244 Mass. 438, 138 N.E. 843, 26 A.L.R. 1329 (1923).

[11] 209 S.W. 885 (Mo. 1919).

[12] 244 Mass. 438, 439, 138 N.E. 843, 844 (1923).

[13] *Id.* at 440-41, 138 N.E. at 844.

imprisonment because plaintiff willingly submitted to the authority of the manager.

In a case decided four days after *Collyer*, the district court of appeal overturned the trial court's instruction that probable cause was not a defense to a false imprisonment action. Yet that court went on to say, "If he [plaintiff] was entitled to any damages at all, he could have had nothing more than nominal damages. . . ."[14] Again the privilege to err is questioned.

Since *Collyer*, the decisions have not been uniform, but the defense has at least been recognized. The cases may be divided into three groups: 1) those that have recognized the *Collyer* principle; 2) those where the defense does not appear to be recognized nor *Collyer* cited; and 3) those which could be distinguished on grounds of no probable cause, unreasonable detention, or completed offense.

Under group one, probable cause, reasonableness, and incomplete act are presumed. Since the privilege derives from protection of property, rather than from the Penal Code, detention is privileged though the act was not committed in the presence of the person detaining.[15] The requirement is that the act be committed or attempted which will reasonably appear to the owner to injure him in his person or property. Thus the owner may act through his agents or servants, who may in turn act on information supplied by others. Thus defendant in Oklahoma was privileged to act through the police to detain plaintiff in Missouri,[16] and a store manager who detained a supposed shoplifter was privileged to act on the owner's behalf to detain plaintiff because of information supplied by a clerk.[17]

Under group two, the court used the doctrine of *respondeat superior* and a strict interpretation of Penal Code section 836[18] to fasten liability on a department store for an arrest not committed in the presence of the person detaining.[19] But even that fact is not particularly vital where the misdemeanor was not in fact completed. It is only the property theory that grants the privilege to err.

The greater number of cases are found in group three. *Moffat v. Buffum*[20] and *Parrot v. Bank of America*[21] distinguished *Collyer* on the ground that defendant was not seeking to prevent the present commission of a crime, but to secure a confession to a previously completed act. In the latter case punitive damages were allowed, making a total award of 30,000 dollars, and the jury was instructed that it was proper for them to consider the wealth of the corporate defendant – 284,000,000 dollars surplus. In *Alterauge v. Los Angeles Turf Club*[22] defendant was given special protection in that Business & Professions Code section 19561.5 requires that certain undesirable persons be excluded from its race track. Despite this,

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[14] Bettolo v. Safeway Stores, 11 Cal. App. 2d 430, 433, 54 P.2d 24, 25 (1936).

[15] Hill v. Nelson, 71 Cal. App. 2d 528, 162 P.2d 927 (1945).

[16] Swafford v. Vermillion, 261 P.2d 187 (Okla. 1953).

[17] J. C. Penney Co. v. O'Daniel, 263 F.2d 849 (10th Cir. 1959).

[18] CAL. PEN. CODE § 836: "A peace officer may . . . without a warrant, arrest a person: 1) For a public offense committed or attempted in his presence. . . ."

[19] Hanna v. Raphael Weill & Co., 90 Cal. App. 2d 461, 203 P.2d 564 (1949).

[20] 21 Cal. App. 2d 371, 69 P.2d 424 (1937).

[21] 97 Cal. App. 2d 14, 217 P.2d 89 (1950).

[22] 97 Cal. App. 2d 735, 218 P.2d 802 (1950).

plaintiff's detention was handled in such an unreasonable manner that a false imprisonment count was allowed. Three hundred dollars compensatory damages were awarded pursuant to Civil Code section 3333,[23] and 750 dollars exemplary damages against defendant's security agents pursuant to Civil Code section 3294.[24] But 2,000 dollars exemplary damages against the corporation were disallowed absent proof of authorization or ratification.

The question of probable cause leads to defendant's frequent downfall. Probable cause is a matter of law, given to the jury under proper instructions.[25] Juries may have a tendency to find for plaintiffs in such cases though the person detaining seemingly had sufficient probable cause.[26] The court, sitting alone, appeared to suffer from the same affliction.[27] And several cases have had to be reversed for "sympathy verdicts."[28]

In this area it is difficult to distinguish a *bona fide* allowance of the defense of protection of property, reasonably exercised, from mere lip service to the doctrine and an actual adherence to the principal that probable cause is no defense in a false imprisonment case where plaintiff is, in fact, innocent.

Those jurisdictions which adhere to a strict reading of statutes similar to California's Penal Code section 837 deny the privilege on two grounds: first, that a misdemeanor must in fact have been committed; second, that it must have been committed in the presence of the person detaining.

California, through *Collyer*, which is essentially judge-made law, has grounded the privilege on the right to protect property from injury or suspected injury. Such a rule gives an effective privilege where the store operation is large-scale.

Collyer has struck the balance in favor of the property owner's rights over the individual's rights of freedom from interference. It is submitted that the individual may clear himself easily, quickly, and completely, and may rely on the twin safeguards of probable cause and reasonableness. The property owner, on the other hand, would be rendered powerless to prevent petty theft if the privilege were not granted. Every detention would be at his peril. The *Collyer* result does not seem unreasonable.

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[23] CAL. CIV. CODE § 3333: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

[24] CAL. CIV. CODE § 3294: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

[25] 22 CAL. JUR. 2d, *False Imprisonment*, § 46 (1955); Robertson v. J. C. Penney Co., 136 Cal. App. 2d 1, 288 P.2d 275 (1955); Hill v. Nelson, 71 Cal. App. 2d 528, 162 P.2d 927 (1945).

[26] Robertson v. J. C. Penney Co., *supra* note 22.

[27] Grove v. Purity Stores, 153 Cal. App. 2d 234, 314 P.2d 543 (1957).

[28] Bettolo v. Safeway Stores, 11 Cal. App. 2d 430, 54 P.2d 24 (1936); Hebrick v. Samardick & Co., 169 Neb. 833, 101 N.W.2d 488 (1960).

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