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Is Knowledge of the Fact of Imprisonment by the Plaintiff a Necessary Element in False Imprisonment?

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A hypothetical case with the constituent elements of a typical crime set forth might be helpful in indicating where the line is to be drawn. A and B are next-door neighbors and bitter enemies. A is sitting in his living room reading the evening paper and brooding over the grudge he bears his neighbor. He decides to kill B, but he has no gun in the house, and no place is open where he can buy a gun at that hour. Next morning A goes down town and purchases a gun and cartridges, putting both in his pocket. Both intent and the means of executing that intent are now present, but his acts do not yet constitute an attempt. When evening has come, and B is out upon his lawn, A goes out upon his own lawn, his hand grasping the gun concealed in his pocket. Probably no attempt could yet be made out. A takes the gun from the pocket of his coat and points it at B—at this point the attempt is complete. In this case A's intent was fully formed while he sat brooding over his grudge, and even at this point he was a menace to society. The law, however, will take no action until his intent has crystallized into dynamic manifestation.

It is submitted that the better rule—the rule which is latent in the cases cited—is that preparation for a crime becomes a crime when the acts of the defendant are so unequivocal in nature that the defendant's intent to commit the crime is shown beyond reasonable doubt. Under this rule, proximity to the crime itself would not be the decisive factor except to the extent that proximity would bear upon the question of intent. This rule would permit a greater flexibility of administration, and thus, in turn, would enable courts and juries more effectively to guard against socially dangerous individuals.

LEO OXLEY

IS KNOWLEDGE OF THE FACT OF IMPRISONMENT BY THE PLAINTIFF A NECESSARY ELEMENT IN FALSE IMPRISONMENT?

"False imprisonment has been said to be the unlawful restraint by one person of the physical liberty of another."1 Prosser says that it is an invasion of an interest, which is in a sense mental, resembling the apprehension of contact in the assault cases. Therefore, if one incloses another within definitive bounds without just cause and without the consent of the other, he is liable for false imprisonment.

It is contended by the text-writers that the better view is that the plaintiff must have actual knowledge, at the time, of the fact that he is imprisoned before he can maintain an action.2

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2. Prosser, Torts (1941) 68.
3. Ibid.
Harper goes so far as to say that one cannot be imprisoned unless he knows about it. The Restatement of Torts is very clear in stating that the plaintiff must have actual knowledge of the imprisonment at the time it occurred. There is a notable dearth of cases on the subject. As far as can be found no case in Kentucky has been decided on the point.

The leading English case on the subject is *Herring v. Boyle.* In that case, the plaintiff, an infant, was sent to the defendant's boarding school. Later the child's mother requested that the boy accompany her home. The defendant refused because a certain amount of the tuition was overdue. This request and refusal was not known to the boy at the time. The court affirmed a non-suit, because the plaintiff did not know that he was being restrained. This case refused to follow the principle laid down in the later case, *Meermg v. Grahame-White Aviation Company.* In the latter case the plaintiff was an adult. Atkin, L. J., in delivering the opinion of the court, said that in his opinion, if one were actually imprisoned it was unnecessary to consider whether he knew about it or not.

There are two American cases which seem to be contra to the view taken by the text writers. In *Barker v. Washburn,* a committee for an idiot was allowed to prosecute an action for the false imprisonment of the idiot. In *Commonwealth v Nickerson,* the guardian of a child of nine years of age was allowed to maintain an action for the child's false imprisonment. Both in *Herring v. Boyle* and in the American cases the person imprisoned is presumed to be incapable of consent and is also deemed not to have the capacity for effective will. It is submitted, therefore, that *Herring v. Boyle* is inadequate as a precedent to establish the principle of the necessity of the plaintiff's knowledge.

It has been stated that false imprisonment must include some element of assault. If that be true, it would seem to sustain

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1 Harper, Torts (1933) sec. 21.
2 Restatement, Torts (1932) sec. 42.
3 1 Cr. M. & R. 376 (Exch. 1834).
5 Note (1920) 68 U. Pa. L. Rev. 360. The writer vigorously criticizes Meermg v. Grahame-White, contending that the concept of restraint is erroneous.
7 5 Allen 518 (Mass. 1862).
8 The author cited in note 8, supra, at page 362, in criticizing the Meermg case, says: "As indicated above this was not a case of first impression in England, a directly contrary adjudication having been rendered in the case of Herring v Boyle nearly a century before."
9 "False imprisonment is the illegal restraint of a person against his will and generally includes an assault and battery and always at least a technical assault." Hoffman v. Clinic Hospital, 213 N. C. 669, 197 S. E. 161 (1938).
the position that the interest invaded is mental and therefore the plaintiff must suffer mental anguish at the time he is confined. Disregarding the meaning of the vague term "technical assault," it is clear that if X is in a room and Y turns the key in the door there may be false imprisonment, but there is certainly no assault without something further. False imprisonment is not so much an invasion of a mental interest in security as it is of the right of free locomotion. The instant the key is turned in the door rather than the moment of discovery is the point of time when false imprisonment should begin.

The rule supported by the writers puts a premium on subterfuge. In other words, one may safely enclose another and accomplish some end detrimental to him so long as he is clever enough or lucky enough to hide that fact of imprisonment from the one confined. X knows that Y will be called at a certain time by a prospective employer. The employer needs the job filled quickly. X also wants the job, so he induces Y, who is always home at this time, to come to his home, where he locks him in a room, making the excuse that they are likely to be disturbed. Y's wife calls and X answers the phone and refuses to let her tell Y about the job; Y does not discover the trick until he returns home. He has no action for false imprisonment against X under the rule supported by the text writers.

Such a view is likely to produce bad social results. If the common law is so zealous of personal freedom that it raises a cause of action against a private person who arrests another in good faith if in fact no felony has been committed, why should it permit some one else, for no just cause, to confine another and be free of liability so long as he can keep the fact of restraint from the one confined?

It is submitted that the rule, in its present form, is undesirable. Should personal freedom and its social consequences be so lowly regarded? Should the common law intrust to anyone such opportunity for interfering with another's right to free locomotion, or, in fact, encourage it?

SCOTT REED

LIABILITY OF SUBLESSEE AND ASSIGNEE TO OWNER FOR RENT

In Entroth Shoe Co. v. Johnson the plaintiff, owner, leased a store for a term extending from February 1, 1929, to April 30, 1932. On February 25, 1929, the lessee leased a part of the premises to the defendant for the remainder of the term. Shortly before February 1, 1931, the defendant abandoned the premises. On October 1, 1931, the defendant settled with the lessee and secured

1 260 Ky. 309, 85 S. W (2d) 686 (1935).