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CONSUMER PROTECTION: REPAIRMAN VS. CONSUMER — THE
CRIMINAL LAW SHOULD NOT INTERFERE

Just debts should be paid and the law is adequate to compel their payment where there is an ability to pay, but the criminal law is not a process to be subserved for that purpose.¹

Upon discovering that he is the victim of an unscrupulous or incompetent repairman,² a consumer's traditional reaction is to stop payment on the check with which he paid for the repairs. Although not relieving the consumer's contractual obligations,³ stopping payment is a valuable tactical device in persuading the repairman to re-repair the item or to charge a more reasonable price for the work already performed. An enactment of the 1970 Florida Legislature, however, may have severely limited the consumer's ability to exercise this traditional weapon in dealing with repairmen.

The Florida lien law was recently amended to state that it shall be a crime to fraudulently remove property upon which a possessory lien has accrued without first making full payment therefor.⁴ Significantly, the new section also provides that the mere act of stopping payment on a check issued in exchange for such property is *prima facie* evidence of fraudulent intent.⁵ Violation of the provisions of the new statute constitutes a misdemeanor and subjects the offender to fine and imprisonment.⁶

1. State v. Posey, 77 Wyo. 258, 268, 314 P.2d 833, 837 (1957).

2. For example: "[R]ecent studies have disclosed that as many as 50-70% of the auto repairmen do not perform the work for which they have charged their customers. Or if the repairs are made, second hand or rebuilt parts are sometimes used and billed as new parts. Even if the work is performed and new parts are used, often there has not been need for the repairs in the first place." Comment, *The Need for the Protection of the Consumer of Services*, 18 BUFFALO L. REV. 173, 176 (1968).

3. Murray, *The Stop Payment of Checks and the Holder in Due Course: A Conflicts and Comparative View*, 8 B.C. IND. & COMM. L. REV. 225 (1967).

4. FLA. STAT. §713.58 (Supp. 1970): "*Liens for labor or services on personal property*—

(1) In favor of persons performing labor or services for any other person, upon the personal property of the latter upon which the labor or services is performed, or which is used in the business, occupation, or employment in which the labor or services is performed.

"(2) It is unlawful for any person knowingly, willfully, and with intent to defraud, to remove any property upon which a lien has accrued under this section, without first making full payment to the person performing labor or services, of all sums due and payable for such labor or services or without first having the written consent of such person so performing the labor or services to so remove such property.

"(3) In that the possessory right and lien of the person performing labor or services under this section is released, relinquished, and lost by the removal of such property upon which a lien has accrued, it shall be deemed *prima facie* evidence of intent to defraud if, upon the removal of such property, the person removing such property utters, delivers, or gives any check, draft, or written order for the payment of money in payment of the indebtedness secured by the lien and then stops payment on such check, draft, or written order.

"(4) Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished by fine of not more than \$500 or imprisonment in the county jail for not more than 3 months."

5. FLA. STAT. §713.58 (3) (Supp. 1970).

6. FLA. STAT. §713.58 (4) (Supp. 1970).

This statute appears to be a response to problems encountered by the repairman. Although in Florida the repairman has a possessory lien on property upon which he has expended labor or services,⁷ the lien is lost when he voluntarily relinquishes such property to the consumer in exchange for a check.⁸ When the consumer stops payment the repairman's only recourse is an action on the contract. By deeming a stop payment order as prima facie evidence of intent to defraud,⁹ the new statute gives the repairman another avenue of recourse against the consumer.¹⁰ Unfortunately, however, in responding to the needs of the repairman the new provision ignores the very real problems encountered by the consumer when faced with shoddy repair work, particularly since the consumer usually is in a much weaker bargaining position. The effect of the new provision will be to place the burden of bringing an action on the contract upon the consumer.

Technically, this new section would not prevent the consumer from stopping payment when he discovers faulty or inadequate repair work,¹¹ since the repairman must have a reasonable belief that the customer is acting in bad faith before swearing out an arrest warrant.¹² The mere act of stopping payment is not in itself sufficient justification, even under the new section, for the repairman to institute criminal proceedings. If the consumer is arrested without the requisite probable cause the repairman may be subject to an action for malicious prosecution.¹³ The arrested consumer could also bring an ac-

7. FLA. STAT. §713.58(1) (Supp. 1970). Nearly every state has a statutory modification of the common law artisan's lien. The artisan's lien is not to be confused with the mechanic's lien. While a mechanic's lien confers a lien upon real property, the artisan's lien is a possessory lien upon personal property entrusted to a bailee for work done upon or added to the property. Lee, *Liens on Personal Property not Governed by the Uniform Commercial Code*, 44 N.C.L. REV. 322, 325 n.15 (1966).

8. RESTATEMENT OF SECURITY §80(1) (1941). Florida has not considered the problem, but if the repairman's surrender of possession was obtained by actual fraud (such as payment in counterfeit money) the possessory lien would probably continue. However, it would be subject to intervening interests of third parties. *Id.*, Explanatory Notes §80, comment c at 222 (1941). Florida has distinguished common law liens from equitable liens in *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127 (1925). In that case the court indicated a willingness to grant an equitable lien whenever it is in the interests of right and justice. *Id.* at 414, 106 So. at 129. However, no Florida cases were discovered that granted such a lien to one who repairs personality.

9. "Prima facie evidence" is merely a device to aid in proofmaking. Courts have consistently held that statutory language making certain acts prima facie evidence does not rebut the presumption of innocence or shift the burden of proof. If prima facie evidence is uncontested, however, it will support a verdict. *See, e.g., State v. Kahler*, 232 So. 2d 166, 168 (Fla. 1970).

10. "In that the possessory right and lien of the person performing labor or services under this section is released . . . it shall be deemed prima facie evidence of intent to defraud." FLA. STAT. §713.58(3) (Supp. 1970) (emphasis added).

11. A classic example of such a situation is where the repaired automobile begins to malfunction on the way home from the shop.

12. *See, e.g., Dunnevant v. State*, 46 So. 2d 871, 874 (Fla. 1950).

13. *See, e.g., Liabos v. Harman*, 215 So. 2d 487, 488 (2d D.C.A. Fla. 1968): "It is well established in Florida that an action for malicious prosecution lies where the following elements concur: (1) the commencement or continuance of an original civil or criminal judicial proceeding; (2) its legal causation by the present defendant against the plaintiff; <https://scholarship.law.ufl.edu/flr/vol23/iss4/10>

tion for abuse of process if the repairman threatened to apply the criminal sanctions of the statute while the parties were negotiating payment of the bill.¹⁴

In reality, however, malicious prosecution and abuse of process are inadequate remedies when the new section is used to harass the consumer. Not only do courts frown on actions for malicious prosecution,¹⁵ but a consumer also may unwittingly lose his right to sustain such an action even after arrest if he and the repairman settle their differences out of court.¹⁶ In addition, the consumer cannot bring an action for abuse of process unless he has actually been arrested.¹⁷ The repairman is therefore relatively free to coerce his customers into paying the disputed charge by threatening arrest, so long as no actual arrest takes place.

The new statute could be used by the repairman to threaten his uninformed customers, particularly when the repair charge is small. For example, if a consumer stops payment on his check because he is dissatisfied with the repairs the repairman could simply point to a photocopy of the new section, which is taped to the back of his cash register,¹⁸ and threaten arrest if the consumer does not pay. The typical consumer is unaware of his tort remedies and is unwilling to incur the expense of an attorney to discover them. Perplexed by the new statute, he is apt to decide not to risk the humiliation of a possible police record and pay the charge without insisting on a reasonable settlement. At a minimum, the criminal sanctions of the new statute give the repairman added bargaining strength.

Florida is the only state that has attempted to employ statutory criminal law to provide a solution to the problems involved in stopping payment on a check issued to a repairman.¹⁹ Several states have simply made the repairman's lien non-possessory.²⁰ Some states have extended the repairman's lien

(3) its bona fide termination in favor of the plaintiff; (4) *the absence of probable cause for such prosecution*; (5) the presence of malice; and (6) damage conforming to legal standards resulting to plaintiff." (Emphasis added).

14. Abuse of process is, in essence, the threat of arrest for the collection of debt. Malicious prosecution is the unjustified arrest. W. PROSSER, *LAW OF TORTS* 876 (3d ed. 1964).

15. *Id.* at 859.

16. See, e.g., *Cline v. Flagler Sales Corp.*, 207 So. 2d 709 (3d D.C.A. Fla. 1968).

17. Florida has not clearly defined its position on the remedy of abuse of process, but those states that have done so require that process must be instituted. *Crews v. Mayo*, 165 Cal. 493, 132 P. 1032 (1913); *Earl v. Winne*, 34 N.J. Super. 605, 614, 112 A.2d 791, 796 (Bergen County Ct. 1955); Goldoftas, *Abuse of Process*, 13 CLEV.-MAR. L. REV. 163 (1964).

18. This writer observed such a display of the new section in several car dealerships. The statute was listed under the bold heading, "Unlawful To Stop Payment on Checks."

19. Although all states have statutes involving worthless checks, stop payment orders, and liens for repairs on personal property Florida appears to be unique in its application of criminal law to this problem. In addition, the Florida supreme court has indicated that the purpose of bad check legislation should be to prevent mischief to banking practice. *Ennis v. State*, 95 So. 2d 20, 23 (Fla. 1957). Since the declared intent of the new statute is to provide relief for repairmen, FLA. STAT. §713.58(3) (Supp. 1970), the statute may be subject to constitutional attack on the ground that the criminal law is being subverted for the collection of debt.

20. ARK. STAT. ANN. ch. 51, §409 (1963); GA. CODE ANN. ch. 67, §2003 (1960); ILL. ANN. STAT. ch. 82, §40 (1966); KY. REV. STAT. ANN. §376.270 (1969); MISS. CODE ANN. §355

for a definite period of time whether or not he has relinquished possession,²¹ while others provide that the lien will not be lost when the repairman surrenders possession if he records a written notice at the courthouse after the work is completed.²²

These states have balanced the interests of the repairman and the consumer without resorting to the criminal law. Making the lien independent of possession maintains the repairman's security interest in the goods even though payment on the check is stopped. Although legal machinery would have to be instituted if the consumer and the repairman do not come to terms, negotiations could proceed without the consumer being threatened by immediate criminal punishment.

Repairmen do have problems with consumers who stop payment on checks, but the present amendment is not the best solution to those problems. The practical effect of the new section may be to allow the repairman to use the criminal law as a club to threaten the consumer into paying for shoddy repairs. It is doubtful whether this is the proper function of criminal sanctions. Additionally, there is no reason why repairmen should be able to shift the inconvenience and expense in resolving such disputes to the consumer, particularly when the real issue is often the repairman's shoddy work. The first concrete step toward a meaningful solution to the problems of both the repairman and consumer would be to take these problems outside the criminal law. Repealing this new provision and making the repairman's lien independent of possession would be a substantial start.

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(1968); S.D. COMPILED LAWS ANN. ch. 44, §11-3 (1969); WASH. REV. CODE ANN. ch. 60.08 .010 (1965). Two jurisdictions have judicially solved the problem of the repairman by using the theory of estoppel. These courts have held that although no fraud was involved when the consumer stopped payment on the check, since possession was gained by tendering the check, the consumer is estopped from asserting the repairman's lack of possession when he sues on the possessory lien. *Frost Motor Co. v. Pierce*, 72 Ga. App. 447, 33 S.E.2d 910 (1945); *Maxton Auto Co. v. Rudd*, 176 N.C. 497, 499, 97 S.E. 477, 478 (1918).

21. *E.g.*, ILL. ANN. STAT. ch. 82, §40 (1966): "Every person, firm or corporation who has expended labor, skill or materials upon any chattel . . . shall have a lien upon such chattel . . . for a period of one year from and after the completion of such expenditure of labor, skill or materials . . . notwithstanding the fact that the possession of such chattel has been surrendered to the owner, or lawful possessor thereof."

22. *E.g.*, GA. CODE ANN. ch. 67, §2003 (1960): "All mechanics of every sort, for work done and material furnished in manufacturing or repairing personal property, shall have a special lien on the same, which may be asserted by retention of such property, or the mechanic may surrender such personal property and give credit, when the same shall be enforced in accordance with the provisions of section 67-2401 When they surrender possession of the property to the debtor, such mechanics shall record their claims of lien, within 90 days after such work is done and material furnished, in the office of the clerk of the superior court of the county where the owner of such property resides."

