

1986

Wendell L. Butcher and Irene B. Butcher v. Frank K. Gilroy : Brief of Appellant

Utah Court of Appeals

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Marcus G. Theodore; Attorney for Appellants.

James R. Holbrook; Steven E. Tyler; Russell C. Kearl; Callister & Nebeker; Attorneys for Respondents.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 860111-CA IN THE SUPREME COURT OF THE STATE OF UTAH

WENDELL L. BUTCHER and
IRENE B. BUTCHER,

Plaintiffs and Appellants

vs.

FRANK K. GILROY and R.G.H., INC.,
a Utah corporation

Defendants and Respondents

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Supreme Court No. 20592
Court of Appeals No. 860111-CA

APPELLANTS' BRIEF

Appeal from the Order of the
Third Judicial District Court,
In and for Salt Lake County,
State of Utah
Hon. John A. Rokich, Judge

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Attorneys for Respondents

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COURT OF APPEALS

WENDELL L. BUTCHER and
IRENE B. BUTCHER,

vs.

Defendants and Respondents

Supreme Court No. 20592
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Attorneys for Respondents

LIST OF PARTIES

1. Wendell L. Butcher
2. Irene B. Butcher,

Plaintiffs and Appellants

vs.

3. Frank K. Gilroy
4. R.G.H., Inc., a Utah corporation

Defendants and Respondents

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APPELLANTS' BRIEF
STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the Lower Court err in dismissing the Butcher's Cause of Action as being barred by the Statute of Limitations.

STATUTES AND CONSTITUTIONAL PROVISIONS

Statutes

This appeal addresses the manner in which the district court applied the six year statute of limitations, Sections 78-12-1 and 78-12-23, U.C.A., 1953, as amended, to bar an accounting under a written land development contract stipulation to apportion and account for the proceeds from the sales of certain lands,. Section 78-12-1, U.C.A., reads as follows:

"78-12-1. Time for Commencement of actions generally.--Civil actions can be commenced only within the period prescribed in this chapter, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute."

Section 78-12-23, U.C.A., reads as follows:

"78-23-23. Within six years.--Within six years:

- (1) An action for the mesne profits of real property.
- (2) An action upon any contract, obligations or liability founded upon an instrument in writing, except those mentioned in the preceding section [78-12-22].

More particularly, it addresses the Lower Court's failure to extend the time period pursuant to Section 78-12-44, U.C.A., 1953, as amended, for bringing an action for an accounting another six years from the date Mr. Gilroy received payment of all or part of the principal and interest under the contract when he sold the property to his son's corporation without notice to the Butchers. Section 78-12-44 reads as follows:

"78-12-44. Payment--Acknowledgment--Promise to pay extends period.
--In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense. (Emphasis added).

SUMMARY OF THE ARGUMENTS

The lower court dismissed the Butcher's action for an accounting and review of the reasonableness of the terms of the sale under a written settlement agreement where the proceeds of the sale of certain real estate were to be divided 32% to the appellants-Butchers and 68% to respondents-Gilroy and his family corporation R.G.H., Inc. owned and controlled by his son on the grounds that the statute of limitations had run.

The Butchers challenge this ruling under the facts of this case upon the grounds that where one mutual obligor received the proceeds from the land sale within the statute of limitations time period, it extended the statutory time period to run another six years from receipt of the sale proceeds. Co-obligor Frank G. Gilroy sold the property in question just prior to the lapsing of the statute of limitations to a family corporation, R.G.H., Inc., and restarted the six year statute of limitations from the date of sale. As suit was brought within six years from the date of the land sale, the Butchers contend that Frank G. Gilroy was liable for an accounting and review of the reasonableness of the terms of the sale under the terms of the stipulation. As this accounting cause of action was initiated within the extended period of the statute of limitations, the lower court's ruling should be reversed and remanded for an accounting and review of the reasonableness of the terms of the land sale.

IN THE SUPREME COURT OF THE STATE OF UTAH

WENDELL L. BUTCHER and
IRENE B. BUTCHER,

Plaintiffs and Appellants

vs.

FRANK K. GILROY and R.G.H., INC.,
a Utah corporation

Defendants and Respondents

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Supreme Court No. 20592
Court of Appeals No. 860111-CA

STATEMENT OF THE CASE

This is an action for an accounting and review of the reasonableness of the terms of a land sale under a settlement agreement where the proceeds of the sale were to be divided 32% to the Butchers and 68% to Frank K. Gilroy.

STATEMENT OF THE FACTS

For purposes of the appeal, the facts alleged in the Butcher's Amended Complaint are deemed admitted; see *Bryan vs. Stillwater Board of Realtors*, 578 F.2d 1319, 1321 (10th Cir. 1977)

Paragraph 4 of the Amended Complaint alleged that on or about October 18, 1971, Wendell L. Butcher, Irene B. Butcher, and Frank K. Gilroy entered into a written Settlement Agreement concerning a dispute of 33 acres abutting the Mountain Dell Golf Course owned by the Butchers and wrongfully conveyed by the Butcher's former attorney, Peter M. Lowe, to Frank K. Gilroy, a copy of the Settlement Agreement is attached as Exhibit A to the Amended Complaint (R. 37-41).

Paragraph 4 of the Amended Complaint further alleged that Frank K. Gilroy was to hold title to the 33 acres surrounding Mt. Dell Golf Course subject to the requirement in paragraph 6 of the stipulation that he sell the property by April, 1976 for the best price attainable and the proceeds be apportioned with 32% paid to the Butchers and 68% paid to Frank K. Gilroy (R.34).

Paragraph 5 of the Amended Complaint alleged that the Butchers and Frank K. Gilroy attempted to sell the property over the years, but because of various subdivision development changes and watershed questions, the parties were delayed in selling the property (R.34-35).

Paragraph 6 of the Amended Complaint alleged that on or about March 8, 1982, within six years of the performance sale date of April, 1976, Frank K. Gilroy sold the property in question to R.G.H., Inc. without notifying the Butchers or accounting to them for their share of the proceeds (R.35). A copy of the warranty deed was attached to the Amended Complaint as Exhibit B (R. 42).

The Butchers continued to attempt to sell the property and periodically notified Frank K. Gilroy of their progress in this regard. Frank K. Gilroy at no time notified plaintiffs that he had sold the property, and continued to encourage the Butchers in their efforts to find a buyer and acquire the necessary building permits from Salt Lake City. Based upon Frank K. Gilroy's representations and assurances that he was also trying to perform the contract, the Butchers continued to attempt to sell the property and work with the city to obtain permits for the property (Paragraph 7, Amended Complaint, R. 35).

To date, Frank K. Gilroy has failed to account to the Butchers or pay them the amounts due and owing under the stipulated agreement as was repeatedly promised (Paragraph 8, Amended Complaint R.35).

The Butchers therefore requested the court to require Frank K. Gilroy to account for all monies received and to apportion the same between the parties under the terms of the stipulated agreement. In the event Frank K. Gilroy failed to acquire fair market value for the property, they requested a judgment against him in the amount of any deficiency. (Paragraph 8, Amended Complaint, R. 35).

After the Butchers filed their Amended Complaint, defendants and respondents refused to produce any discovery documents pursuant to the Butchers' Motion to Produce (R. 18). Instead, the defendants and respondents moved to dismiss the action based on the statute of limitations (R.47). The lower court then dismissed the Action (R. 82,83), even though the Butchers apprised the court in their February 14, 1985 Supplemental Reply Memorandum that defendant Gilroy was absent from the State to prevent the tolling of the statute and that both defendants and respondents repeatedly promised to try and sell the property to induce plaintiffs from suing (R. 75). From the order of dismissal, this appeal was taken.

ARGUMENT

CAUSE OF ACTION NOT BARRED BY STATUTE OF LIMITATIONS

An action based upon a written contract must be commenced within six years after the

cause of action occurred; see Section 78-12-1, Section 78-12-23(2), U.C.A., 1953, as amended. Thus, the accounting action had to be initiated on or before April, 1982 (six years after the date specified for sale of the property by April, 1976) unless Frank K. Gilroy engaged in some type of conduct to extend the statutory period. The Butchers argue that Frank K. Gilroy's secret March 1982 sale of the real estate to R.G.H., Inc. was the date from which the statute of limitations ran on their action for an accounting in the same manner suits based on breach of warranty do not begin to run until the date of a sale of an article; see *M.H. Walker Realty Co. vs. American Surety Co. of New York*, 60 U. 435, 211 P. 998 (1922).

Under Section 78-12-44, U.C.A., 1953, as amended, if respondents received payments of any part of the principal or interest due under the contract, the statute of limitations runs anew from the date of receipt of payment. Section 78-12-44, U.C.A., 1953, as amended, reads as follows:

"78-12-44. Payment-acknowledgment-promise to pay extends period. In any case, founded on contract, when any part of the principal or interest shall have been paid...an action may be brought within the period prescribed for the same after such payment,...."

Frank K. Gilroy received payment for the property subject to the written stipulation in March, 1982. Receipt of this payment extend the statute of limitations for an accounting for another six years from the date of payment - i.e. March, 1988. Suit for an accounting and review of the terms of sale was brought in 1984 well within the extended period of time, since the contract in question required both the Butchers and Frank H. Gilroy to mutually attempt to sell the property and then account to one another for the profits received. As a consequence, the statute of limitations began to run anew the moment the cause of action for an accounting and review of the sale terms arose when the funds were received; see *Frederickson vs. Knight Land Co.*, 667 P.2d 34 (1983) where the Utah Supreme Court indicated that on a contract to mutually account for proceeds received from the sale of the land, the statute of limitations begins to run again on the date of the breach for failure to account for funds received from the land sale.

Frank K. Gilroy sold the land in question to R.G.H., Inc. in March, 1982, within the statute of limitations period, and failed to have the terms of the sale approved by or account to the Butchers for their portion of the sale proceeds. As a consequence, a breach occurred within the statutory time period and restarted the six year statute to run from the date the Frank K. Gilroy received the funds. As suit was brought within six years from the date of this breach, the statute

of limitations does not bar the action. The motion to dismiss was therefore improperly granted, under the *Frederickson* case criteria reaffirming the mutual accounting doctrines contained in *Toponce vs. Corinne Mill and Stock Company*, 6 Utah 439, 24 P.2d 493, affirmed 152 U.S. 405, 14 S.Ct. 632 (1890).

Based on the foregoing case law, and the fact that Frank K. Gilroy concealed the sale and repeatedly encouraged the Butchers to try and sell the property to prevent Butchers from suing (R. 35), he should be estopped from the raising the defense of the statute of limitations; see *Rapp vs. Rapp*, 218 Cal 505, 24 P.2d 161 (1933).

The Butchers also pointed out in their supplemental reply memorandum to the lower court that there is a question of fact as to whether the Gilroys, who maintain a Nevada residence, were absent from the state a sufficient time to prevent the tolling of the statute. Frank K. Gilroy's extended stays in Nevada would delay the tolling of the statute of limitations, until their return under Section 78-12-35, U.C.A., 1953, as amended; see *Snyder vs. Clune*, 390 P.2d 915, 15 U.2d 54 (1964). To resolve this issue, the lower court should have reserved ruling on the matter until after discovery had been completed. As Utah is a notice pleading state, issues regarding the tolling of the statutes of limitation involve questions of fact which cannot be resolved solely from the face of the complaint.

Nor can R.G.H., Inc. be arbitrarily dismissed from the cause of action as a matter of law. Since Frank K. Gilroy refused to undergo discovery, the Butchers were not able to determine if the sale of the property was an installment sale, a conditional sale, or an outright sale. If the sale was conditional, the property would revert back to Frank K. Gilroy upon default of the conditions. Title would not be able to be cleared without R.G.H., Inc.'s joinder as a necessary party. If the funds were to be paid over a period of time, then R.G.H., Inc. was also a necessary party to insure that the funds were paid into court until the accounting was completed.

In summary, the cause of action was initiated within the extended statute of limitations time period, and the lower court erred as a matter of law in granting the motion to dismiss.

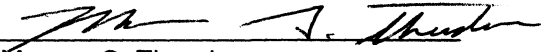
CONCLUSION

For the foregoing reasons, the Butchers respectfully request the court to reverse the lower court's Order and remand the case for an accounting and review of the reasonableness of the terms of the land sale. Respondents are seeking a windfall of the fair market value of the sale proceeds where were to be divided 32% to the Butchers and the 68% balance to respondents. Frank K. Gilroy has converted the proceeds of the sale and should not be rewarded for his

clandestine bad faith actions.

Dated this 28th day of April, 1987.

Respectfully submitted,

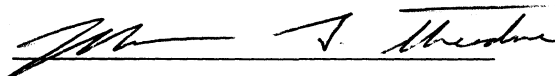
By 
Marcus G. Theodore
Attorney for Wendell L. Butcher and Irene B.
Butcher

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Appellants Brief were served by mailing the same, first class, postage prepaid, this 28th day of April, 1987 to the following:

James R. Holbrook
Steven E. Tyler
Russell C. Kearl
GREENE, CALLISTER & NEBEKER
Suite 800 Kennecott Building
Salt Lake City, Utah 84133
Telephone: 801-530-7300

Attorneys for Respondents.



ADDENDUM

COMPLAINT AND ORDER

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FILED IN CLERKS OFFICE
SALT LAKE COUNTY, UTAH

OCT 19 11 43 AM '84

H. DIXON

BY

K. B. Youngberg

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WENDELL L. BUTCHER and IRENE B. BUTCHER,	:	
	:	
Plaintiffs,	:	AMENDED COMPLAINT
	:	
vs.	:	Civil No. C84-1826
	:	
FRANK K. GILROY, and R.G.H. INC., a Utah corporation,	:	Judge Leary
	:	
Defendants,	:	

COME NOW Wendell L. Butcher and Irene B. Butcher and allege as follows:

1. Wendell L. Butcher and Irene B. Butcher are residents of the State of Utah.
2. Frank K. Gilroy is a resident of the State of Utah.
3. R.G.H., Inc. is a Utah corporation.
4. On or about October 18, 1971, Wendell L. Butcher, Irene B. Butcher, and Frank K. Gilroy stipulated to an entry of an order and judgment as Civil No. 179775. As part of the stipulation, a settlement agreement attached hereto as Exhibit A. was entered into. Frank K. Gilroy was to hold title to 33 acres surrounding Mt. Dell Golf Course subject to the requirement in paragraph 6 that he sell the property by April, 1976 for the best price attainable and the proceeds be apportioned with 32% paid to the plaintiffs and 68% paid to the defendant.
5. Plaintiffs and Frank K. Gilroy attempted to sell the property over the years but because of various subdivision

development changes and watershed questions, the parties were delayed in selling the property.

6. On or about March 8, 1982, within six years of the performance sale date of April, 1976, Frank K. Gilroy sold the property in question to R.G.H., Inc. without notifying plaintiffs or accounting to them for their share of the proceeds. A copy of the warranty deed is attached hereto as Exhibit B., and by this reference incorporated herein.

7. Plaintiffs continued to attempt to sell the property and periodically notified Frank K. Gilroy of their progress in this regard. Frank K. Gilroy at no time notified plaintiffs that he had sold the property, and continued to encourage plaintiffs in their efforts to find a buyer and acquire the necessary building permits from Salt Lake City. Based upon Frank K. Gilroy's representation and assurances that he was also trying to perform the contract, plaintiffs continued to attempt to sell the property and work with the city to obtain permits for the property.

8. To date, Frank K. Gilroy has failed to account to plaintiffs or pay them the amounts due and owing under the stipulated agreement as was repeatedly promised.

9. Plaintiffs therefore request the court to require Frank K. Gilroy to account for all moneys received and to apportion the same between the parties under the terms of the stipulated agreement. In the event Frank K. Gilroy failed to acquire fair market value for the property, for a judgment against him in the amount of any deficiency.

WHEREFORE, plaintiffs pray for judgment as follows:

1. For the court to require Frank K. Gilroy to account to plaintiffs for all sums received from the sale of the property.

2. For judgment to be entered against Frank K. Gilroy for the amounts due and owing plaintiffs under the stipulated agreement.

3. For such other and further relief as the court may

deem just and equitable under the premises.

DATED this 16th day of August, 1984.



MARCUS G. THEODORE
Attorney for Plaintiffs

Address of Plaintiffs:

3980 Eldorado Drive
Salt Lake City, UT 84117

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing Amended Complaint was mailed first class postage prepaid this 16th day of October, 1984 to Steven E. Tyler, Switter, Axland, Armstrong & Hansen, 175 South West Temple, #700, Salt Lake City, UT 84101.



SETTLEMENT AGREEMENT

THIS AGREEMENT, made and entered into this ____ day of October, 1971, by and between Wendell L. Butcher, hereinafter referred to as "Butcher" and Frank K. Gilroy, hereinafter referred to as "Gilroy".

W I T N E S S E T H:

WHEREAS, the above named parties are presently involved in litigation in the Third Judicial District Court in Case No. 179775, entitled "Frank K. Gilroy, Plaintiff, vs. Peter M. Lowe, et al., Defendants"; and

WHEREAS, both Gilroy and Butcher have claims against each other and desire to resolve and settle said claims prior to the final judgment of the Court trying this matter.

NOW, THEREFORE, in consideration of the foregoing and of the mutual promises of the parties contained herein, the parties agree as follows:

1. Gilroy will pay to Butcher the sum of \$35,000 cash, payable within five (5) days of the date of this Agreement.

2. Butcher hereby acknowledges that the foregoing sum is received as complete satisfaction of his claim against Frank K. Gilroy for damages, and hereby waives all claim and interest in and to the property known as Mountain Dell Estates, which is the subject matter of the above mentioned litigation. It is recognized that Butchers have heretofore elected to abandon any rights under the contract dated July 26, 1963, relative to the Mountain Dell properties, and shall stipulate that a declaratory judgment may be entered that they have no interest therein. Butchers shall further stipulate that the pending Counterclaim by Butchers against Gilroy shall be dismissed with prejudice. Butcher shall quit claim to Gilroy any and all right, title or interest he may have or claim in and to the Mountain Dell properties, and the so-called Fisher and Wand properties. Butchers and Gilroy shall provide to each other reciprocal General Releases of all claims or liabilities to date.

3. Butcher agrees to obtain approval from the appropriate county and state authorities for permission to subdivide the Mountain Dell property and shall be entitled to a period of 36 months from the date of this Agreement to obtain such approval. Gilroy agrees to execute such documents as owner of the properties as may be required in order to obtain such approval, provided, however, that Gilroy shall not be required to expend any funds in connection with the effort to obtain said subdivision approval and all costs in connection therewith will be Butcher's expense. It is understood that subdivision approval and all development work and expense in order to obtain approval of a contemplated subdivision of the Mountain Dell properties shall be the responsibility and at the sole expense of Butcher. Gilroy shall have no responsibility whatsoever in subdivision approval, or any developmental work and expense in connection therewith, or any subsequent developmental work and expense of any kind or nature whatsoever. Subdivision approval shall mean absolute approval of the subdivision, including approvals of going forth absolutely for the sale of lots, including but not limited to Health Department approvals, Water Department approvals, Zoning Department approvals, State Highway approvals, approvals of all governmental agencies and clearances of any kind or nature whatsoever in order to go forward and sell lots without any restrictions of any kind.

4. Butcher agrees to employ the firm of Coon, King & Knowlton or some other competent engineering firm mutually agreed upon to assist him in obtaining the approval of the subdividing of the Mountain Dell Estate properties and to pay all costs in connection therewith and in addition any legal or other expenses necessary to obtain such approval. Butcher agrees to follow the recommendations of such engineers in obtaining such subdivision approval, and it is understood that if the subdivision approval is not obtained by reason of Butcher's failure to follow the recommendations of the engineering firm employed to assist in obtaining subdivision approval his recovery from the sale or disposition of the property as hereinafter provided shall be reduced by 10%.

5. In the event the subdivision is approved within 36 months from the date of this Agreement, the first proceeds from the sale of lots shall be paid to Gilroy until Gilroy has received the sum of \$86,565.58, together with interest thereon from the date of this Agreement to the date of payment calculated at a rate of 8% per annum. Provided, that in the event Gilroy is required to pay interest on the \$35,000 paid to Butcher in connection with this settlement agreement, Butcher will pay such additional interest rate, but not more than a total rate of 9% per annum as to the \$35,000. "First proceeds" shall mean the net proceeds from the sale of each lot, less escrow fees and expenses of sale.

6. In the event Butcher is unable to obtain subdivision approval within 36 months from the date of this Agreement, then, and in that event, the Mountain Dell Estates property shall be sold or disposed of for the best price obtainable, and from the proceeds of such sale Gilroy and Butcher will receive a proportionate share based upon the investment of Gilroy in the property of \$86,565.58 and the investment of Butcher in the property of \$40,877.43. The sale or disposition shall be conducted within 18 months immediately following the expiration of the 36 month period set forth in paragraph 3 herein, and such sale or disposition shall be conducted by Gilroy at a price to be determined by Gilroy in his own discretion.

7. It is understood that Gilroy or his designated attorney in fact will execute all documents reasonably necessary in order to obtain subdivision approval, including but not limited to the Petition for Subdivision Approval, the application to the State of Utah for permission to sell subdivided lands and any other petitions, documents and/or agreements with the municipality of Salt Lake City, Salt Lake County, State of Utah, and/or any subdivisions thereof, provided, however, in all such documents there shall be a disclosure of the fact that Gilroy has not undertaken any responsibility or liability in connection with the approval of the subdivision or any developmental work of any kind or nature whatsoever.

8. In the event at any time Gilroy is not satisfied with the progress being made in connection with the effort to obtain subdivision approval, he shall have the right and option, at his own expense, to provide additional legal or engineering assistance, but such assistance will not be chargeable against Butcher's ultimate recovery from the sale of the property if the subdivision approval is not obtained or from the sale of lots if the subdivision approval is obtained. In no event shall the providing of such legal or engineering assistance be construed to obligate Gilroy to perform any of the subdivision or developmental responsibilities herein, nor excuse Butcher therefrom.

9. Butcher hereby agrees to defend Gilroy from any claim, lien or assertion of judgment or other rights as against the Mountain Dell property or as against Gilroy relative to the Mountain Dell property, provided, however, that Butcher shall have no liability therewith except to provide and pay for such defense.

10. It is agreed that Gilroy shall be provided with a copy of all documents, correspondence or writings which shall be sent or received in connection with attempts to gain subdivision approval, developmental work and any other matter in connection with the Mountain Dell properties. Upon request not more often than each six months, Gilroy shall receive a written status report and shall have the right to examine Butcher's expense records as to the Mountain Dell property at any reasonable time.

11. Butcher agrees not to represent or hold out to any public official, creditor or any other person that Gilroy is a partner, joint venturer, or stands in a principal-agent relationship with Butcher. Whenever Gilroy's name shall appear in all such documents there shall be a disclosure of the fact that Gilroy has not undertaken any responsibility or liability in connection with the approval of the subdivision or any developmental work of any kind or nature whatsoever.

12. Butchers herewith waive and abandon any and all claims as against Gilroy by reason of that certain agreement dated July 26, 1963, between Marlowe Investment Company as Seller and Butchers as Buyer, and herewith acknowledge that they will assert no claim of any kind or nature by reason of any acts which at any time have been occurred by Marlowe Investment Company, or Peter M. Lowe or by reason of that certain agreement between Gilroy and Lowe dated February 3, 1963. Butchers, however, reserve all rights and claims against the defendants Lowe and Marlowe.

13. An escrow arrangement is contemplated in connection with this transaction, and the parties agree to pay escrow fees 50% by each party. The escrow instructions shall provide for a release of lots upon payment to Gilroy of the net proceeds of sales thereof, with the provision that in no event shall there be any release of lots without payment to Gilroy of the net proceeds in each instance. Any property taxes and assessments paid by Gilroy shall be repaid to Gilroy and shall be added to Gilroy's interest in the proceeds payable hereunder. Upon payment of the full balance due to Gilroy, plus interest, the escrow shall be closed and Gilroy shall convey his remaining right, title and interest in and to the property to Butcher. In the event that Gilroy has not been paid all sums due within 12 months after subdivision approval, the escrow agent shall be instructed to list the properties for sale over the multiple listing bureau of the Salt Lake Real Estate Board, at appraisal value.

14. Butchers' rights shall be determined entirely by reason of this contract, and no other or further agreements exist. Any modifications of the foregoing agreement shall be in writing signed by the parties.

15. It is understood that both parties to this Agreement are reserving all rights which they have or believe they have against the defendants Peter M. Lowe, Martha Lowe and Marlowe Investment Company.

IN WITNESS WHEREOF, the parties have hereunto subscribed their names the day and year first above written.

VERDELL L. BUTCHER

PETER M. GILROY

EXHIBIT A
Page 5 of 5

Recorded at Request of Moyle & Draper 600 Dearest Plaza, S.L.C. Ut. 84111

at M. Fee Paid \$

by Dep. Book Page Ref:

Mail tax notice to R.G.H., Inc. Address 3604 Astro Circle, S.L.C., Ut.
84109

3657636

WARRANTY DEED

(Special)

FRANK K. GILROY grantor
of Las Vegas Nevada hereby

CONVEY AND WARRANTY against all claiming by, through or under

to R.G.H., INC., grantee
3604 Astro Circle, Salt Lake City, Utah 84109

of Salt Lake City, Salt Lake County, State of Utah for the sum of

Ten and No/100 DOLLARS,
and other good and valuable consideration
the following described tract of land in Salt Lake County,

State of Utah:

The Northeast quarter of the Southeast quarter of Section
11, Township 1 South, Range 2 East, Salt Lake Meridian.

EXCEPTING such documents as may refer to the rights of way
of Salt Lake and Eastern Railroad, Utah Central Railroad,
Denver and Rio Grande Railroad Companies, Knight Power
Company, the Mountain States Telephone and Telegraph Company
and Salt Lake County, but which do not definitely locate said
rights of way in connection with said property.

Subject to all current taxes, easements, restrictions and
rights of way of record or enforceable in law or equity.

* * *

WITNESS, the hand of said grantor, this 8th day of
March, A.D. 19 82

Signed in the Presence of

Frank K. Gilroy

STATE OF UTAH,

County of Salt Lake

On the 8th day of March
personally appeared before me Frank K. Gilroy

the signer of the within instrument, who duly acknowledged to me that he executed the
same.

Notary Public.

My commission expires Residing in

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SALT LAKE COUNTY
UTAH
Name Indexer

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Exhibit B.

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SALT LAKE COUNTY, UTAH

MAR 13 4 08 PM '85

H. D. [Signature] CLERK
BY [Signature] CLERK

GREENE, CALLISTER & NEBEKER
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Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WENDELL L. BUTCHER and
IRENE B. BUTCHER,

Plaintiffs,

v.

FRANK K. GILROY and R.G.H.,
INC., a Utah corporation,

Defendants

ORDER

Civil No. C 84-1826
Judge John H. Rokich

* * * * *

The motion of defendants Frank K. Gilroy and R.G.H., Inc., to dismiss the above-titled action for failure to state a claim upon which relief may be granted by reason that all claims made therein are barred by the appropriate statute of limitations, came on regularly for hearing before the Honorable John H. Rokich on Monday, February 25, 1985 at 10:00 o'clock a.m. Plaintiffs were represented by Marcus G. Theodore and

defendants were represented by Steven E. Tyler. Based upon the arguments of counsel and the Court's review of the memoranda filed herein, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. All claims alleged in the plaintiffs' First Amended Complaint are hereby dismissed with prejudice because they are barred by the applicable statute of limitations. See Utah Code Ann., Section 78-12-23 (Repl. 1977).

2. In the event that plaintiffs have not filed an Amended Complaint stating a claim against defendants which is not barred by the statute of limitations on or before March 11, 1985, this action is dismissed with prejudice.

DATED THIS 12 day of March, 1985.

BY THE COURT:

ATTEST

H. DIXON HINDLEY

Clerk

By

[Signature]
Deputy Clerk

[Signature]
John A. Rokich,
Third District Court Judge

Approved as to Form:

By

[Signature]
Marcus G. Theodore,
Attorney for Plaintiffs

Date

By

[Signature]
Steven E. Tyler,
Attorney for Defendants

Date Feb. 27, 1985

STATUTES

(2) The minor recklessly or willfully shoots or propels a missile, or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car or caboose, whether moving or standing; or

(3) The minor intentionally and unlawfully tampers with the property of another and thereby recklessly endangers human life or recklessly causes or threatens a substantial interruption or impairment of any public utility service.

History: L. 1977, ch. 181, § 1.

Title of Act.

An act relating to parent and child; providing that parents or legal guardians of minors are liable up to \$1,000 for damages sustained by the minor inten-

tionally damaging, defacing, taking, or destroying property; and providing for damages when the minor tampers with property and recklessly endangers human life or recklessly causes a substantial interruption of any public utility service. —L. 1977, ch. 181.

78-11-21. Property damage caused by minor—When parent or guardian not liable.—No parent or guardian shall be so liable if he or she made a reasonable effort to supervise and direct their minor child, or in the event the parent knew in advance of the possible taking, injury or destruction by their minor child, he or she made a reasonable effort to restrain it.

History: L. 1977, ch. 181, § 2.

CHAPTER 12

LIMITATION OF ACTIONS

Section 78-12-1. Time for commencement of actions generally.

ARTICLE 1. REAL PROPERTY, 78-12-2 to 78-12-21.

2. OTHER THAN REAL PROPERTY, 78-12-22 to 78-12-34.

3. MISCELLANEOUS PROVISIONS, 78-12-35 to 78-12-47.

78-12-1. Time for commencement of actions generally.—Civil actions can be commenced only within the periods prescribed in this chapter, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-1.

Compiler's Notes.

This section is identical to former section 104-2-1 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Cross-References.

Accident and sickness insurance policy provisions, actions on, 31-33-14.

Affirmative defense, statute of limitations as, Rules of Civil Procedure, Rule 8(c).

Bank statements, when presumed final, 7-3-51.

Cemetery maintenance districts, validity of organization, 8-1-7.

Cities and towns, claims and actions against, 10-7-77, 11-14-21, 63-30-13, 63-30-15, 78-12-29, 78-12-30.

Collection agency bond, actions on, 12-1-3.

Common carriers, claims and actions for loss or damage to freight, 54-3-16.

Contracts for sale of goods, 70A-2-725.

Counties, claims and actions against, 17-15-10, 17-15-12, 63-30-13, 63-30-15, 78-12-30.

County service areas, legality of bonds and proceedings, 17-29-28.

County water and sewer districts, 17-6-3, 17-6-3.11.

Fraternal benefit societies, actions on benefit certificates or contracts, 31-29-20.

Governmental Immunity Act, 63-30-1 et seq.

Improvement district proceedings, 10-16-28.

Metropolitan water districts, 73-8-17, 73-8-30.

Model Marketable Title Act, 57-9-1 et seq.

Receivership proceedings as suspending statute of limitations, 21 A. L. R. 961.

Revival of judgment by constructive service of process upon nonresident, as affected by due process and full faith and credit clauses, 144 A. L. R. 403.

Right of foreign corporation to plead statute of limitations, 122 A. L. R. 1194.

Rule that adverse possession of successive holders may be tacked, in determination of period of limitation, as applicable to chattels, 135 A. L. R. 711.

Running of limitation as to action by public body against officer or employee is deferred until defendant ceases to be officer or employee, or until the end of his term of office or employment, 137 A. L. R. 674.

Running of statute of limitations as affected by uncertainty as to existence of a cause of action because of delay in settling or determining a matter of general or governmental concern upon which it depends, 135 A. L. R. 1339.

State statute of limitations as affecting action or proceeding by federal government or its officials, 61 A. L. R. 412.

Statute of limitations as applicable to action by municipality or other political subdivision in absence of specific provision in that regard, 113 A. L. R. 376.

Statute of limitations: effect of delay in appointing administrator or other representative on cause of action accruing at or

after death of person in whose favor it would have accrued, 28 A. L. R. 3d 1141.

Substitution, or addition, as plaintiff, after limitation period, of assignee, or trustee in bankruptcy, in action commenced by assignor, or bankrupt, within limitation period, but after assignment or bankruptcy, 105 A. L. R. 610.

Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations, 27 A. L. R. 2d 236.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 A. L. R. 2d 1080.

Validity and construction of war enactments in United States suspending operation of statute of limitations, 137 A. L. R. 1440, 140 A. L. R. 1518.

When statute of limitation commences to run against action to recover tax, 131 A. L. R. 822.

When statute of limitations commences to run against action to recover or for conversion of, property stolen or otherwise wrongfully taken, 136 A. L. R. 658.

Withdrawal of foreign corporation from state as tolling statute of limitations as to action against corporation, 133 A. L. R. 774.

DECISIONS UNDER FORMER LAW

Money judgment.

Notwithstanding former 104-37-6 permitting enforcement of judgment after lapse of eight years, an action upon a money judgment could not be brought after expiration of eight years. *Youngdale v. Burton*, 102 U. 169, 128 P. 2d 1053.

Tolling statute.

In action by administrator, indebtedness created by check was held to be barred, and statute was not tolled by unauthorized acts of plaintiff. *Bingham v. Walker Bros., Bankers*, 75 U. 149, 283 P. 1055.

78-12-23. Within six years.—Within six years:

(1) An action for the mesne profits of real property.

(2) An action upon any contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding section [78-12-22].

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-23.

Compiler's Notes.

This section is identical to former section 104-2-22 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Cross-References.

Product Liability Act, statute of limitations, 78-15-3.

Promise to pay extends period, 78-12-44.

Accounting.

Mere dissolution of partnership did not of itself give rise to a cause of action in partners so as to start running of statute; absent proof to establish claim was barred by statute of limitations, it was error to nonsuit plaintiff in his action for accounting. *Kimball v. McCornick*, 70 U. 189, 259 P. 313.

- 78-12-45. Action barred in another state barred here.
 78-12-46. "Action" includes special proceeding.
 78-12-47. Separate trial of statute of limitations issue in malpractice actions.

78-12-35. Effect of absence from state.—If when a cause of action accrues against a person when he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-35.

Compiler's Notes.

This section is identical to former section 104-2-36 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Application of section.

The full time that the debtor is out of the state must be excluded in computing the time, notwithstanding fact that debtor's family may have residence or place of abode in state and that service of process could be made upon some member of debtor's family at its residence or place of abode. *Keith-O'Brien Co. v. Snyder*, 51 U. 227, 169 P. 954, applying former statute.

Statute runs only during time debtor is openly in state, and immediately on his leaving it the statute again ceases to run until his return; in computing time all periods of absence must be considered and added together. *Keith-O'Brien Co. v. Snyder*, 51 U. 227, 169 P. 954, applying former statute.

Maintenance of residence within state with persons living therein did not prevent tolling of statute of limitations. *Buell v. Duchesne Mercantile Co.*, 64 U. 391, 231 P. 123, applying former statute.

Construction of section.

Although generally statutes of limitation are to be liberally construed, it is also a well-recognized doctrine that when such statutes contain provisions excepting certain persons or classes from operation of statutes, those exceptions are to be strictly construed. *Lawson v. Tripp*, 34 U. 28, 95 P. 520.

Laches.

Absence of defendant from state does not preclude interposition of defense of laches to suit for an accounting, even though statute of limitations has not barred proceeding. *Smith v. Smith*, 77 U. 60, 291 P. 298.

Proof of residence or nonresidence.

A finding that defendant had his home, family and residence in state continuously from time debt was contracted is sufficient finding of continuous presence in the state. *Woolf v. Gray*, 48 U. 239, 158 P. 788.

Plaintiff seeking to toll statute has burden of proof; mere proof of nonresidence is not a prima facie showing of absence from state. *Tracey v. Blood*, 78 U. 385, 3 P. 2d 263, applying identically worded Idaho statute.

Tolling of statute as to foreign corporation.

Where answer of defendant foreign corporation set up statute of limitations as defense and face of pleadings and uncontradicted evidence indicated statute had run, it was incumbent on plaintiff to state in his reply conditions tolling the statute; in Utah, foreign corporation's privilege of pleading statute of limitations was not conditioned on its compliance with "doing business within the state" statutes. *Clawson v. Boston Acme Mines Dev. Co.*, 72 U. 137, 269 P. 147, 59 A. L. R. 1318, applying former statutes.

Words and phrases defined.

The words "return" and "departs" in this section comprehend all persons who are without the state, and are not confined to the inhabitants thereof. *Burnes v. Crane*, 1 U. 179, applying former statute.

Word "return" as used in this section includes nonresidents as well as citizens of state who have gone abroad and returned to state; the words "return to the state" are held to be equivalent to "come into the state." *Lawson v. Tripp*, 34 U. 28, 95 P. 520, applying former statute.

Collateral References.

Limitation of Actions—84, 85.
 54 C.J.S. Limitations of Actions § 211.
 51 Am. Jur. 2d 725 et seq., Limitation of Actions § 154 et seq.

Absence of judgment debtor from state as suspending or tolling running of period

tion 104-2-44 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

54 C.J.S. Limitations of Actions § 220.
51 Am. Jur. 2d 747, Limitation of Actions § 178.

Collateral References.

Limitation of Actions—220.

78-12-44. Payment—Acknowledgment—Promise to pay extends period.

—In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-44.

Compiler's Notes.

This section is identical to former section 104-2-45 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Acknowledgment or promise.

What constitutes an acknowledgment or promise in writing depends, of course, upon the language thereof. *Boukofsky v. Powers*, 1 U. 333, applying former statute.

Stating of account between the parties will not take case out of statute, unless such stating is "in writing, signed by the party to be charged thereby." *Anthony & Co. v. Savage*, 2 U. 466, applying C. L. 1876, p. 369, § 1126.

A written acknowledgement of an indebtedness upon open account, already barred, and a promise in writing to pay the same, contained in a letter from debtor to creditor, becomes a new promise in writing, and will not be barred until four years from date of new promise. *Gruenberg v. Buhring*, 5 U. 414, 16 P. 486, applying former statutes.

A verbal agreement or new promise based upon a prior agreement barred by statute comes within this section. *Whitehill v. Lowe*, 10 U. 419, 37 P. 589, applying 2 Comp. Laws 1888, § 3165.

Letter from defendant to plaintiff held denial that defendant was indebted to plaintiff in any sum at time of letter's date, rather than acknowledgment of and promise to pay amount formerly owing to plaintiff by defendant. *Thomas v. Glendinning*, 13 U. 47, 44 P. 652, applying former statute.

Acknowledgment from which by implication of law promise is to be raised ought to be direct and unqualified admission of

previous, subsisting debt for which debtor is liable and which he intends to pay. *Kuhn v. Mount*, 13 U. 108, 44 P. 1036, applying former statute.

Under former statute, promise sufficient to create new or continuing contract and to remove bar of statute was required to be express, clear, and unequivocal; if there were any conditions or contingency annexed, proof was required to show that such conditions had been performed and such contingency had happened, so as to raise qualified promise into one which was absolute and unqualified. *Kuhn v. Mount*, 13 U. 108, 44 P. 1036.

Where promise or acknowledgment raises at best—because vague and indeterminate—mere probable inference of intention to pay, and may affect minds of different persons differently, it should not be held sufficient to evidence new cause of action. *Kuhn v. Mount*, 13 U. 108, 44 P. 1036, applying former statute.

Under former statute, held that letters written by maker of note to payees thereof contained, not only admission of, but also promise to pay, debt evidenced by note, and, under evidence, etc., were sufficient to remove bar of statute. *Kuhn v. Mount*, 13 U. 108, 44 P. 1036.

A mere acknowledgment of an existing liability is insufficient to revive the debt, but no set phrase or particular form of language is required. Anything that will indicate that the party making the acknowledgment admits that he is still liable on the claim is sufficient to revive the debt. *O'Donnell v. Parker*, 48 U. 578, 160 P. 1192, applying former statute.

Merely scheduling a claim in petition in bankruptcy does not operate to waive the statute of limitations, or constitute an acknowledgment that will revive the debt. *O'Donnell v. Parker*, 48 U. 578, 160 P. 1192, applying former statutes.