

1989

# Michael W. Klekas v. Citram Corporation, a Utah corporation, and Jerry Spicer, a Florida resident : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO. 89-0157 IN THE COURT OF APPEALS

STATE OF UTAH

MICHAEL W. KLEKAS,

Plaintiff,

vs.

CITRAM CORPORATION, a  
Utah corporation, and JERRY  
SPICER, a Florida resident,

Defendants.

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Docket No. 890157-CA

#141

APPELLANT'S BRIEF

Citram Corporation

Appeal from Judgment of the Third Judicial District Court  
in and for Salt Lake County, State of Utah  
The Honorable Frank G. Noel, Judge, Presiding

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Appellant

DEPOSITED BY THE  
STATE OF UTAH

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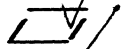
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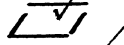
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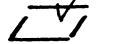
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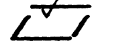
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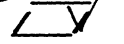
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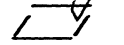


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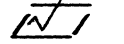


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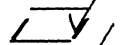


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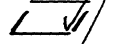
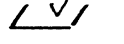
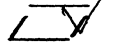


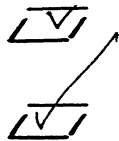
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Statement showing jurisdiction of Court of Appeals (optional with reply brief).



Statement showing nature of the proceedings (optional with reply brief).



Statement of the issues (optional with respondent's and reply brief).



Determinative constitutional provisions, statutes, ordinances, and rules set out verbatim OR by citation alone if they are set out verbatim in the addendum (optional with reply brief).



Statement of the case (optional with respondent's and reply brief)



Summary of the argument.



Argument



Conclusion



Addendum (optional with respondent's and reply brief).



Length

Appellant/Respondent--50 pages, not including addendum.

Reply--25 pages, not including addendum.

Petition for Rehearing--15 pages, not including addendum.



Original signature of counsel of record, or party appearing without counsel, on one copy of brief.



Proof of Service--attorney's original signature on one copy of brief

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IN THE COURT OF APPEALS

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MICHAEL W. KLEKAS,

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CITRAM CORPORATION, a  
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Docket No. 890157-CA

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Citram Corporation

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Appeal from Judgment of the Third Judicial District Court  
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## JURISDICTION

This Court has jurisdiction of this appeal pursuant to Utah Code Ann. Section 78-2a-3(2)(j). This case is an appeal from the District Court and has been transferred to the Court of Appeals from the Supreme Court.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The Trial Court erred in allowing Exhibit 3 to be admitted.
2. The Trial Court erred in allowing oral evidence of an agreement by defendant to purchase its own shares from plaintiff.
3. The alleged purchase contract was illegal, void and unenforceable under Utah Code Section 16-10-5.

## STATEMENT OF DETERMINATIVE STATUTES AND RULES

Utah Code Ann. Section 70A-8-319:

### **Statute of Frauds.**

A contract for the sale of securities is not enforceable by way of action or defense unless

(a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or

(b) delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment; or

(c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under Paragraph (a) has been received by the party

against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt; or

(d) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price.

Utah Code Ann. Section 16-10-5:

**Right of corporation to acquire and dispose of its own shares.**

A corporation shall have the right to purchase, take, receive or otherwise acquire, hold, own, pledge, transfer or otherwise dispose of its own shares, but purchase of its own shares, whether direct or indirect, shall be made only to the extent of unreserved and unrestricted earned surplus available therefor, and, if the articles of incorporation so permit or with the affirmative vote of the holders of at least two-thirds of all shares entitled to vote thereon, to the extent of unreserved and unrestricted capital surplus available therefor.

To the extent that earned surplus or capital surplus is used as the means of the corporation's right to purchase its own shares, such surplus shall be restricted so long as such shares are held as treasury shares, and upon the disposition or cancellation of any such shares the restriction shall be removed to the extent of the cost to the corporation of the shares so disposed of or canceled.

Notwithstanding the foregoing limitation, a corporation may purchase or otherwise acquire its own shares for the purpose of:

(a) eliminating fractional shares.

(b) collecting or compromising indebtedness to the corporation.

(c) paying dissenting shareholders entitled to payment for their shares under the provisions of this act.

(d) effecting, subject to the other provisions of this act, the retirement of its redeemable shares by redemption or by purchase at not to exceed the redemption price.

No purchase of or payment for its own shares shall be made at a time when the corporation is insolvent or when such purchase or payment would make it insolvent.

Rule 803, Utah Rules of Evidence:

**Hearsay exceptions; availability of declarant immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...  
(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

#### STATEMENT OF CASE

This case was commenced by Klekas filing a Complaint against Citram and Jerry Spicer (hereinafter "Spicer") in the District Court. The Complaint alleged breach of contract and fraud against both defendants. The Complaint alleged that Citram and Spicer had agreed to purchase 22,000 shares of Citram stock from Klekas at \$2.25 per share and had breached the agreement. The Complaint also alleged that Citram and Spicer had fraudulently

entered into the agreement by not intending to perform under the agreement all to prevent Klekas from selling his Citram stock. Citram and Spicer denied all of the material allegations contained in the Complaint of Klekas and raised the Statute of Frauds as a defense since the alleged contract was an oral contract.

#### DISPOSITION IN LOWER COURT

A bench trial was conducted on October 24 and 25, 1989. At the conclusion of the trial, the Court dismissed all claims against Spicer and the fraud claim against Citram. The Court entered findings of fact and conclusions of law and awarded judgment in favor of Klekas and against Citram on the breach of contract claim and awarded damages in the amount of Forty-Nine Thousand Five Hundred Dollars (\$49,500.00). A Notice of Appeal was timely filed.

#### STATEMENT OF FACTS

On January 27, 1987, a meeting was held in Salt Lake City, Utah, attended by Klekas and Spicer, among others. Klekas and Michael Hughes, a witness called by Klekas, testified that at that meeting an agreement was reached whereby Citram, through Spicer, agreed to purchase 22,000 shares of Citram stock from Klekas at \$2.25 per share. A timely objection to all such testimony was made on the grounds it violated the Statute of Frauds (Section 70A-8-319 of the Utah Code). See TR. at pp. 69, 71, 87, 100 and 282. The Court overruled the Statute of Frauds objection (TR. at 102) and allowed testimony of the alleged oral contract.

The agreement was denied by Spicer and Alcott Thompson, a witness called by Citram.

There was no written memorandum of the alleged agreement prepared or signed. On January 28, 1987, the attorney for Klekas delivered to Federal Express for delivery to Citram a letter addressed to Citram, which sought to confirm the purported agreement. While in the deposition of Spicer introduced at trial Mr. Spicer testified he had received a copy of the letter at some point in time, no testimony was given as to when the letter was received, from whom it was received, or whether it was in fact received by Spicer or Citram prior to March 28, 1987, the date the suit was filed. No evidence was adduced which would show that Spicer received the said letter prior to the commencement of litigation by plaintiff.

Over the objection of defendant on grounds of hearsay, plaintiffs introduced a copy of a document (Exhibit 3) which a secretary from the offices of plaintiff's attorney testified was received from Federal Express. The document purported to show the date Federal Express delivered the January 28, 1987, letter. Exhibit 3 purports to show delivery to one J. Goforth. Spicer was the only employee of Citram in Florida. Spicer testified in his deposition that he did not recognize the name of the person shown on Exhibit 3 as the person who accepted the Federal Express package, one J. Goforth. Janice Conger, the witness used to give foundation to Exhibit 3, testified that her only knowledge of

Federal Express procedures was based on what Federal Express told her (TR:32).

No evidence was produced by plaintiff to show Citram had any unreserved or unrestricted earned surplus at any time between January 1, 1987, and the date of trial, and in fact, Exhibit 7C showed a deficit of \$102,348.00 (TR:314).

#### SUMMARY OF ARGUMENT

The District Court erred in admitting plaintiff's Exhibit 3, the Sender Activity Summary from Federal Express, which was relied on by plaintiff to show a purported delivery date of Exhibit 1 (TR:35-36). Receiving the Exhibit was improper because the Exhibit was not properly founded. The foundation testimony on which the Court allowed the Exhibit to be admitted was provided by a secretary employed by the plaintiff's attorney. To be admissible, the Exhibit should have been founded by testimony of someone from Federal Express, the entity which conducted the business and allegedly prepared the document. Further, there should have been evidence the letter (Exhibit 1) was delivered to an agent of Citram with the date of delivery to said agent.

The only evidence in the record which purports to show Spicer received the January 28 letter (Exhibit 1) prior to commencement of litigation is Exhibit 3, the Sender Activity Summary of Federal Express. Even if Exhibit 3 had been properly founded and admitted into evidence, the document merely shows that Federal Express delivered the package to someone named J. Goforth. There is no evidence in the record that J. Goforth, the person to

whom the package was purportedly delivered, was an agent or employee of Citram or which would show that such person ever delivered the letter to Citram. In fact, the evidence in the record showed that Jerry Spicer was the only agent of Citram in Florida. Since the Summary was improperly admitted, there is no competent evidence in the record to show when the letter was delivered to Citram. Having failed to show when the January 28, 1987 letter was received by Citram prior to March 28, 1987, there was no legal basis for the Trial Court to hold that the letter dated January 28, 1987, was received within a reasonable time pursuant to Utah Code Ann. Section 70A-8-31. Therefore, the Trial Court erroneously held the Statute of Frauds had been satisfied.

The evidence introduced at trial shows that Citram had no earnings for the years 1983, 1984 and 1985, and that Citram showed a loss in 1986, through July 23, of Ninety-Four Thousand Eight Hundred Forty-Eight Dollars and Forty Cents (\$94,848.40). Utah Code Ann. There was no evidence in the record to show Citram had earned surplus, and the plaintiff failed to show there to be earned surplus when the purported contract was supposedly negotiated.

#### ARGUMENT

Point 1: THE TRIAL COURT ERRED IN ALLOWING EXHIBIT 3 TO BE ADMITTED.

Rule 801(c), Utah Rules of Evidence, defines hearsay as follows:

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Exhibit 3, which was admitted for the sole purpose of establishing the date when Exhibit 1 was supposedly delivered to Citram Corporation, is clearly hearsay when offered for that purpose. Plaintiff argued that Exhibit 3 was properly admitted as a business record of Van Wagoner and Stevens Law Office under Rule 803(6) (the business records exception). Janice Conger, an employee at the law office, testified regarding the Exhibit (TR:29). She testified she was the one who received bills and invoices from Federal Express and that Exhibit 3 was a document received from Federal Express (TR:29-30). She testified her experience with the practices of Federal Express was based on what was told her by Federal Express people (TR:32). She testified Exhibit 3 was received from Federal Express in the normal course of business (TR:33-34). She received the item as a bill from Federal Express (TR:34 at 15-22). The Exhibit was admitted over defendants' hearsay objection (TR:39 at 20-21). The Summary was prepared by an unknown agent or employee of Federal Express and no one from Federal Express testified at trial. Ms. Conger did not and could not testify regarding how the document was prepared or the circumstances regarding its preparation. While Ms. Conger testified Exhibit 3 was kept as a record of the law office where she was employed, she did not testify that the said Exhibit was prepared as a business record of the office, but, in fact,



testified it was merely a copy of a record of Federal Express that was delivered to her by mail.

The Summary was admitted as an exception to hearsay under the business records exception contained in Rule 803(6), Utah Rules of Evidence. Business records properly founded are allowed as an exception to hearsay because there are circumstantial guarantees of trustworthiness and a record contemporaneously prepared by one who acts under a business duty of care and accuracy, particularly when the business entity for which the record is made relies on it. U. S. v. Licavoli, 604 F.2d 613 (9th Cir. 1979).

To be admissible as a business record, the Utah Court has held that a document must be founded in part by a showing that the report was prepared in the regular course of business and contemporaneously with the occurrence of the event reported. See Kehl v. Schwendiman, 735 P.2d 413 (Utah App. 1987).

Rule 803(6), Utah Rules of Evidence, is identical to Rule 803(6), Federal Rules of Evidence. The cases of the federal courts which construe Rule 803(6) should be given great weight by the courts in Utah. 82 C.J.S. Statutes Section 372, 373. Donahue v. Warner Bros. Pictures Distributing Corp., 272 P.2d 177 (Utah 1954).

The Court, in U. S. v. Dreer, 740 F.2d 18 (11th Cir. 1984), set out the foundation elements to be established in qualifying an exhibit as an exception under Rule 803(6). The Court stated:

"Admissions under the business records exception to the hearsay rule, Federal Rules of Evidence 803(6), inherently require two separate findings by the trial judge. First,

the proposed evidence must be genuine. Second, if genuine, the document must be 'made at or near the time' of the 'event' or 'acts' reported 'by or from information transmitted by, a person with knowledge' of these 'acts' or 'events' and 'kept in the course of a regularly conducted business activity' where 'it was the regular practice of the business activity to make the reports.' In other words, the second test determines whether the evidence possesses sufficient indicia of reliability and trustworthiness." See also U. S. v. Grossman, 614 F.2d 295 (1st Cir. 1980). 740 F.2d at 19-20.

The evidence, introduced through Ms. Conger at the trial of this case, failed to satisfy the second test as enunciated above. Ms. Conger's testimony dealt with her experience with Federal Express as the secretary of the law firm that represented Klekas. There was no testimony given, nor could there have been, as to how Federal Express conducts their business and how they prepare and keep records, since Ms. Conger is not associated with Federal Express. She only could testify that she received the Summary in the mail. There was no testimony introduced from the custodian or other qualified witness stating that the document was made at or near the time of the event, reported by or from information transmitted by a person with knowledge of the event and kept in the course of a regularly conducted business activity where it was a regular practice to make the report. In this case, Ms. Conger does not satisfy the requirement that the foundation be provided by the custodian or other qualified witness.

The Court, in National Labor Relations Board v. First Termite Control Company, Inc., 646 F.2d 424 (9th Cir. 1981), dealt

with a situation similar to the one faced by the Trial Court in the present case. In the First Termite case, the N.L.R.B. introduced a freight bill received by a company referred to as Economy from Southern Pacific Railroad to prove that a substantial amount of the lumber purchased by First Termite from Economy had been purchased by Economy outside of the State of California. The freight bill showed that a shipment of lumber delivered to Economy originated in the State of Washington. The freight bill was prepared by Southern Pacific Railroad and sent to Economy where it was placed in Economy's records. The custodian of records for Southern Pacific was not called as a witness. Instead, the N.L.R.B. called Economy's bookkeeper as a witness. The bookkeeper testified that she had received the freight bill from Southern Pacific, and that she had paid it. No other witnesses were called to support the admission of the freight bill.

In holding that the freight bill did not qualify as a business record of Economy, the Court stated:

"The provision in the Rule that requires that the record be supported by 'the testimony of the custodian or other qualified witness' insures the presence of some individual at trial who can testify to the methods of keeping the information. If the witness is not knowledgeable as to the manner in which the records are made and kept, he or she can not be subjected to meaningful cross-examination. Without cross-examination on the keeping of the records, the trier of fact would have no rational basis on which to evaluate the accuracy of the record, and, therefore, the trustworthiness of the evidence. Thus, 'the testimony of the custodian or other qualified witness who can explain the record keeping of the organization is ordinarily essential.' The bookkeeper from

Economy had no knowledge of how Southern Pacific's records were made or maintained. She testified that she received a freight bill from Southern Pacific for a shipment of lumber and that she made payment of the bill. At best, the freight bill seemed to corroborate her testimony that she had paid for a shipment of lumber. ...It is clear from the foregoing that the witness from Economy had no knowledge as to how the records were prepared, nor any knowledge as to the manner in which factual information was placed and the records kept by Southern Pacific." 646 F.2d at 427

It is clear from the First Termite case that a copy of a business record of one company which is kept in the records of a second company cannot be properly founded by the custodian of records of the second company.

While Rule 803(6) does not require that a qualified witness must have personally participated in the creation or maintenance of a document or even know who actually recorded the information, a qualified witness must be someone with knowledge of the procedures governing the creation and maintenance of the type of records sought to be admitted and the record must be generated by the company which seeks to found it. U. S. v. Keplinger, 776 F.2d 678 (7th Cir. 1985); National Labor Relations Board v. First Termite Control Company, Inc., Supra.

What is important is that the witness be familiar enough with the practices of the businesses in question, and with the circumstances in which the record was stored and retrieved, to be able to say with assurance, based upon this circumstantial knowledge, that the record is what it purports to be and was prepared in the ordinary course of business in the manner

contemplated by Rule 803(6). Where the identifying witness lacks even the rudimentary knowledge described in the previous paragraph, the Court should exclude it for failure to satisfy the foundation requirements.

The Summary from Federal Express should not have been admitted and it was error for the Trial Court to do so.

Point 2: THE TRIAL COURT ERRED IN ALLOWING ORAL EVIDENCE OF AN AGREEMENT BY DEFENDANT TO PURCHASE ITS OWN SHARES FROM PLAINTIFF.

Utah Code, Section 70A-8-319, is the Statute of Frauds provision applicable to the sale of securities in the State of Utah. In the present case, no writing was prepared or signed when the purported agreement between Klekas and Citram was made. Therefore, in order for the Court to hear oral evidence of a contract, Klekas must satisfy the provisions of Subparagraphs (b), (c) or (d) of Section 319. In this case, Klekas sought to prove compliance with Subparagraph (c) by proof of sending a writing in confirmation of the sale. Subparagraph (c) requires that the writing in confirmation must be received within a reasonable time by the party against whom enforcement is sought. Even with the benefit of the erroneous admission of Exhibit 3, the Federal Express Summary, Klekas has still failed in his burden since he did not prove that an agent of Citram received the letter of confirmation within a reasonable time as required by the Statute of Frauds.

To the knowledge of Appellant, there are no cases holding that a package given to Federal Express for delivery raises a presumption that delivery to the addressee timely occurred.

The evidence admitted at trial on the issue of receipt by Citram of Exhibit 1 consisted solely of the following:

1. Testimony of Jerry Spicer, President of Citram, that at some unknown date he received a copy of the letter.

2. Exhibit 3.

Exhibit 3 purports to show that the original of Exhibit 1 (the January 28 letter) was delivered on January 29, 1987, to one "J. Goforth". There was no evidence in the record to establish who J. Goforth was and no evidence that the said person was or ever had been an agent of Citram. There was also no evidence to show how the said letter might have gotten to Citram or when it was received.

Thus, even if Exhibit 3 had been properly admitted, which fact is contested by defendant, there is still no showing in the record as to when Exhibit 1 was received by an agent of Citram.

Plaintiff, of course, argues that Exhibit 3 allows a presumption of receipt by Citram on January 29, 1987. However, given the erroneous admission of Exhibit 3, no presumption as to the date of alleged delivery to Citram could possibly arise.

Even assuming for the sake of argument that Exhibit 3 was properly founded and admitted, without a showing that J. Goforth was a Citram employee or agent, no presumption of delivery can arise. There is no evidence in the record as to who or what

J. Goforth might be, or evidence of any relationship between J. Goforth and Citram. Thus, plaintiff failed in his burden to show receipt by Citram within a reasonable time as required by the Statute of Frauds.

If the letter was received by Citram after the Complaint was filed by Klekas, the letter cannot be used to satisfy the Statute of Frauds. The purported agreement in this case was made on January 27, 1987. The Complaint was filed on March 29, 1987. The general rule is that the memorandum of the contract required by the Statute of Frauds may be made subsequently to the making of the contract itself and at any time before an action is brought on the contract. Teel v. Harlan, 185 P.2d 695 (Okla. 1947). 37 C.J.S. Statute of Frauds, Section 171. The Trial Court adopted this position (TR:296).

In the deposition of R. Jerry Spicer in his corporate capacity, Mr. Spicer was asked whether Citram received a copy of Exhibit 1. Spicer replied "Yes". The question was then asked if he knew when Citram received it. Citram's reply was "No, I don't know the exact date." No question was asked as to whether it was received prior to filing of the Complaint.

Since there is no proof in the record that Spicer or any other agent of Citram received Exhibit 1 within a reasonable time, and in any event before the action was commenced, the claim of Klekas against Citram must fail because failure to comply with the Statute of Frauds precludes oral testimony of the contract.

Point 3: THE ALLEGED PURCHASE CONTRACT WAS ILLEGAL, VOID AND UNENFORCEABLE UNDER UTAH CODE SECTION 16-10-5.

Section 16-10-5 of the Utah Code provides that the purchase of its own shares by a corporation shall be made only to the extent of unreserved and unrestricted earned surplus. The Rule has some exceptions, but they do not apply in this case. The financial statements of Citram dated July 23, 1986, and admitted as plaintiff's Exhibit 7, indicate that Citram had no earnings or losses for the years ending December 31, 1983, 1984 and 1985. Through July 23, 1986, Citram showed a net loss of Ninety-Four Thousand Eight Hundred Forty-Eight Dollars and Forty Cents (\$94,848.40) for the year 1986. There was no evidence produced at trial to show that Citram had ever earned any income which would enable it to have any earned surplus available to purchase its own shares. This deficiency was pointed out to the Trial Court at argument (TR:312-315).

The general rule is that if a statute prohibits a corporation from making a contract of a certain kind, the contract is void even though not expressly declared to be so in the statute. Fletcher Cyclopedia Corporations (hereinafter "Fletcher"), Section 3595. If a contract is illegal, neither party is entitled to affirmative relief under ordinary circumstances. Fletcher, supra, Section 3604. The Rule also applies to the purchase of its own stock by a corporation. Fletcher, supra, Sections 3620 and 3613. There can be no estoppel to set up the defense of illegality, nor



can an illegal contract be ratified. Fletcher, supra, Sections 3611 and 3612.

Courts, including those in Utah, have held that a purchase of its own shares cannot be allowed unless the Court makes a specific finding that the corporation has sufficient earned surplus to allow for the purchase. See White v. Western Empire Life Ins. Co., 11 Utah 2d 227, 357 p.2d 483 (1960); Conine v. Leikam, 570 P.2d 1156 (Okla. 1977); Fisk v. Newsum, 9 Wash. App. 650, 513 P.2d 1035 (1973); Hansen v. Singmaster Ins. Agency, Inc., 80 Or. App. 329, 722 P.2d 1254 (1986). The Trial Court herein admitted no such evidence was produced. (TR:313 at 15-21). Also, no finding of fact was made that there was earned surplus, a necessary prerequisite to entry of judgment enforcing such a contract.

It is held that where there is a statute similar to Utah Code Section 16-10-5, which prohibits the purchase of its own shares by a corporation, unless purchased with earned surplus, that a contract in violation of such a statute is "illegal", as opposed to "ultra vires", and such a contract will not be enforced. See e. g. McGinley v. Massey, 71 Md. App. 352, 525 A.2d 1076 (1987); Field v. Haupert, 58 Or. App. 117, 647 P.2d 952 (1982); Naples Awning & Glass, Inc. v. Cirou, 358 So. 2d 211 (Fla. App. 1978).

At common law, as adopted in Utah, a corporation could not purchase its own stock unless authorized by statute. Shumaker v. Utex Exploration Company, 157 F.Supp. 68 (D. Utah 1948). Thus, given the common law prohibition, the only right a corporation has

to purchase its own stock is as defined by the Statute allowing such purchase. Utah law allows such a purchase only from earned surplus at a time when the corporation is solvent. Utah Code Ann. Section 16-10-5. Thus, when as here, a plaintiff seeks to compel a corporation to purchase its own shares from him, plaintiff has the burden to show that the said purchase was legal and complied with the Statute. Plaintiff offered no such proof and the Court made no finding that Citram had any earned surplus which is, by statute, an absolute condition precedent to any enforceable agreement for a corporation to purchase its own stock.

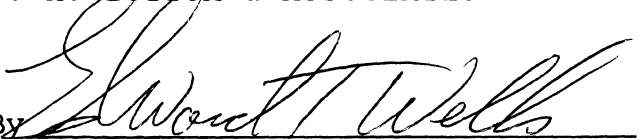
Having failed to show evidence of the earned surplus necessary to make the alleged contract "legal" under Utah law, plaintiff failed in his proof and the Court below should have dismissed the claim of an oral contract between plaintiff and defendant corporation.

#### CONCLUSION

WHEREFORE, premises considered, this honorable Court should reverse the judgment of the Trial Court and remand the case with directions to enter judgment in favor of defendant Citram, dismissing plaintiff's Complaint.

DATED this 24 day of May, 1989.

J. H. BOTTUM & ASSOCIATES

By   
Edward T. Wells  
Attorney for Defendants

MAILING CERTIFICATE

I certify that on the 24<sup>th</sup> day of May, 1989, two (2) true and correct copies of the foregoing Appellant's Brief in the above matter was mailed, postage prepaid, to:


Mark Van Wagoner, Esq.  
VAN WAGONER & STEVENS  
215 South State Street  
Salt Lake City, Utah 84111

  
\_\_\_\_\_  
Edward T. Wells

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