

1993

# Loretta v. Briggs : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

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DOCKET NO. 930776-CA

**IN THE UTAH COURT OF APPEALS**

LORETTA PENFOLD RECORDS, aka, \*  
LORETTA GALLENT \*

Plaintiff/Appellee

vs.

GARY M. BRIGGS

Defendant/Appellant \*

**BRIEF OF APPELLANT**

Case No. 930776-CA

Priority No. 15

**APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT  
OF CACHE COUNTY, STATE OF UTAH  
JUDGE GORDON J. LOW**

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**FILED**

DEC 21 1993

**COURT OF APPEALS**

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vs.

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Defendant/Appellant

**BRIEF OF APPELLANT**

Case No. 930517

9201

Priority No. 15  
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## **JURISDICTION**

The Trial Court entered Findings of Fact and Conclusions of Law and Order on the 15th day of September, 1993. A timely Notice of Appeal was filed October 14, 1993. This Court has jurisdiction under Utah Code Annotated 78-2A-3(2)(k).

## **ISSUES PRESENTED AND STANDARD OF REVIEW**

### **POINT I**

#### **THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE PLAINTIFF'S CLAIM BASED UPON THE STATUTE OF LIMITATIONS**

The Trial Court erred in failing to grant Defendant/Appellant's Motion to Dismiss based upon the applicable Utah and Texas Statutes of Limitations.

#### **Standard of Review**

The questions of statutory construction and application are questions of law that require no particular deference to the Trial Court's interpretation. Roosevelt City v. Nebeker, 815 P.2d 738 (Utah App. 1991); Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).

### **POINT II**

#### **THE TRIAL COURT ERRED IN GRANTING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.**

A. The Trial Court granted Plaintiff's Motion for Summary Judgment based upon the Trial Court's selected facts while ignoring other facts which create a genuine issue of fact.

B. The Trial Court erred in receiving and considering as undisputed fact, evidence in violation of the parole evidence rule.



C. The Trial Court erred in receiving and considering, as an undisputed fact, a document, the consideration of which violated the Statute of Frauds.

#### **Standard of Review**

1. Summary Judgment is appropriate only when no genuine issue of material fact exists and it clearly appears that there is no reasonable probability that the party moved against can prevail. Snyder v. Merkley, 693 P.2d 64 (Utah 1984).

2. In determining where the Trial Court correctly found that there were no genuine issues of material fact, the Appellate Court reviews the facts and all reasonable inferences in a light most favorable to the party opposing the motion. It reviews the Trial Court's conclusions of law for correctness including its conclusion that there are no material fact issues. Schurtz v. BMW of North America, Inc. 814 P.2d 1108 (Utah 1991).

#### **POINT III**

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS EVIDENCED BY ITS ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE CONTENTS OF WHICH EVIDENCE MATERIAL ISSUES OF FACT.**

#### **Standard of Review**

See paragraphs 1 and 2 above. Mountain States Telephone and Telegraph Company v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258 (Utah 1984).

#### **POINT IV**

**THE TRIAL COURT ERRED IN FAILING TO GRANT GARY BRIGGS' MOTION TO JOIN INDISPENSABLE THIRD PARTIES.**

#### **Standard of Review**

The Trial Court reviews questions of law for correctness.

Schurtz v. BMW of North America, Inc., supra.

### **Statutes**

The text of the following Statutes is as set forth in Addendum A attached hereto. UCA, §25-5-4; §70A-8-204; §70A-8-301; §70A-8-308; §70A-8-313; §70A-8-314; §70A-8-319; §78-12-45; Texas Civil Proc. SIV.P; Rem Code §16-003,051; UCA, §48A-2A-1001 et seq. UCA.

### **STATEMENT OF THE CASE**

A. Nature of the Case. The unverified Complaint of Plaintiff seeks recovery of 32,190 shares of stock of Digitran, Inc. (See Addendum B)

The Plaintiff claims that Briggs converted the stock to his own use and seeks the return of the shares of stock and/or the value of the shares of stock and any benefits or value accruing to the shares of stock.

B. Course of the Proceedings. Briggs filed an answer and an amended answer to Plaintiff's Complaint. Plaintiff took Briggs' Deposition. The deposition, together with 34 exhibits and an affidavit of Plaintiff were submitted to the Court for decision upon the Plaintiff's and Defendant's Motion for Summary Judgment.

C. Disposition in the Trial Court. The District Court of Cache County, the Honorable Gordon J. Low presiding, granted Plaintiff's Motion for Summary Judgment and entered Findings of Fact and Conclusions of Law and denied the Defendant's Motion for Summary Judgment to dismiss the complaint.

### STATEMENT OF FACTS

1981 Gary M. Briggs, a resident of the State of California in 1981 purchased a unit of a Louisiana limited partnership known as "Crane Development, Ltd. Partnership"\*\* (Depo. TR 6, l. 12) (Ex. 1)

The consideration for the Limited Partnership Unit was \$128,632 of which \$57,750 was cash. (Depo. 10, l. 25) In addition to the cash contribution to Crane Development, Briggs was required to execute a promissory note in the amount of \$70,882.00 to the partnership, due and payable on November 30, 1990. (Depo. TR p. 11) The purchase of the limited partnership unit occurred in Louisiana. (Depo. 14) Crane Development had a research on the development agreement with Digitran,m Inc.

1986 On April 1, 1986, Digitran, Inc. offered to discount the note payable to Crane Development Ltd. Partnership in exchange for the sum of \$30,400 for each unit as full payment of the 1990 note and stock in Digitran, Inc. The offer was made by Loretta Records, President, Digitran, Inc. (Ex. 1(a), Depo. p. 21 - 24) Defendant, on April 30, 1986, exercised the option to prepay the 1990 note and tendered the sum of \$30,400 to Digitran, Inc. (Ex. 2, Depo. p. 25 l. 24; p. 26)

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\* Depo. refers to the deposition of Gary Briggs. Plaintiff's affidavit refers to Plaintiff's Affidavit on file. Ex. refers to Deposition Exhibits. Rec. refers to record.

\*\* The purpose of Crane Development Ltd was to conduct R&D for the creation of simulator technology for large crane operations. The Defendant, Briggs claims the Plaintiff has converted the technology for her entity Digitran, Inc. without paying any royalty for the use of the technology.

As cited above as additional consideration of the prepayment of the note by Briggs, Digitran, Inc. agreed to issue to the limited partners a number of shares in Digitran, Inc. at a market price of 75¢ per share. (Depo. Ex. 2) The stock to be issued to Gary Briggs should have been 40,533 shares. The stock was not delivered by Digitran, Inc. to Briggs as agreed. (Ex. 3, 4; Depo. p. 42, l. 14 - 20; Depo. 43, l. 13 - 17)

1987 - 1988 Gary Briggs then a resident of Colorado, between May of 1987 through February of 1988, went to the office of Digitran, Inc. in Louisiana. Gary Briggs was an employee of Merrill-Lynch. Plaintiff, Loretta Penfold Records fixes the date as October 8, 1987. (Pl. Aff., Rec. 124)

Gary Briggs describes the conversation prior to the delivery of the stock and irrevocable stock power as expressing concerns that Digitran was having numerous problems meeting its obligations relative to Crane Partnership. (Depo. TR 42) There were problems with the payment of royalties by Digitran/Digicrane to the partnership. (TR 43) Briggs had not received his stock from Digitran as agreed. (Depo. 42)\*\*\*

Note: Defendant's counsel's objection as written in the record based upon the Parole Evidence Rule. (TR 44, l. 1)

By reason of the defaults of Digitran, Inc., Loretta Records delivered to Gary Briggs 32,190 shares of her personal stock and

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\*\*\* Briggs purchased a unit of Crane Development. Crane Development had an agreement with Digitran, Inc. or Digicrane to provide research and development funds to Digitran-Digicrane in exchange for royalties to be paid to the partnership.

irrevocable stock power (Addendum B). Gary Briggs describes his understanding of the transactions as his option to use the stock as he felt necessary to fulfill the unpaid debts relative to Digicrane

Digitran. (TR 44, l. 21 - 25) The conversations between the parties over Brigg's counsel's objection was as follows:

TR 42:

Q: So somewhere in 1987 or early 1988 when you received the stock certificate identified as Exhibit 6, can you tell me under what circumstances it was received?

A: There had been numerous problems relative to performance on the part of Digitran - Digicrane and obligations relative to the Crane partnership and the repayment offer that I had subscribed to and this document. The original of the document represented by Exhibit 6 was given to me by Loretta Records as security that the good faith performance would be followed by Digitran/Digicrane.

TR 43:

A: There were problems relative to royalties. There would have been numerous lack of good faith efforts on the part of Digitran - Digicrane and when this stock was given to me it was not specifically related to the issuance of 40,000 shares connected with the prepayment.

TR 44:

Q: The discussions you have had with Loretta Records which led to the delivery of this stock certificate on Exhibit 6 was there a clear understanding in your mind as to what a good faith performance would be? I am referring back to your earlier statement that this was to be security that good faith performance would be followed through.

A: No.

Q: So it was unclear as to what was good faith performance?

A: That is correct.

Q: Let me ask you, what do you mean by security, when you use the word security? Does that imply that this stock was for you to take and use for your own from that point forward?

A: I would have the option to use it as my own if I felt it necessary to fulfill unpaid debts relative to Digitran/Digicrane.

Q: Was it your option?

A: Yes.

Q: What would trigger the option?

A: There was no specific trigger that was identified.

TR 45:

Q: Under what sorts of circumstance would you have returned the stock?

A: We had no specific agreement.

Q: Let me ask you again. How do you define the term "security" as you used it earlier?

A: That would have been the option to sell or exchange of certificate to obtain funds in payment for unpaid debt.

TR 45:

Q: Do you believe that when you got the stock certificate that the next day or immediately for that matter that the stock certificate could be transferred into your name without further recourse such that it became your stock?

A: Yes.

TR 46:

Q: When do you believe, under what set of circumstances, would whatever obligation you felt was owed to you arising out of your Crane Partnership be satisfied? What amount of compensation, what amount of performance would you be satisfied with in connection with this transaction? It is unlimited?

A: At this point in time I would say that it is primarily tied to the payment of royalty monies owed to me as a result of Simulator Development and the manufacture and sale and ongoing commencement for an ongoing proper accounting of funds due and the commitment to make future payments.

TR 49:

Q: Let me come back to the track I was following a little bit earlier. If I were to try to assess what you believe is owed to you, arising out of the whole transaction, how would you tell me I should quantify what you are owed?

A: At this point in time the balance owed to me is represented by the royalties on simulator sale, crane simulator sales and those royalties outlined in the Manufacturing and Marketing Agreement which has been entered into.

TR 49:

Q: Do you consider the stock that was represented by Exhibit 6 as part of that compensation or is it related more to a concept of the royalty that you are concerned about?

A: The value of the stock would relate to the royalty issue.

TR 57:

Q: Did you have any discussion with Loretta Records at the time you obtained the certificate identified in Exhibit 6 as to what this irrevocable stock or bond power on that exhibit was and how it worked?

A: Yes.

Q: Can you tell me as best you can recall, what the discussion was that took place at that time?

A: The reason for the stock power was that her merely giving me the Digitran certificate was of no value relative to any kind of security or collateral in that I had no way of recourse relative to selling or disposing of that stock. It was therefore necessary to have a stock power in conjunction with the stock for it to be of any value to me personally.

TR 58:

Q: Was that explained to Loretta Records at the time?

A: Yes.

Q: Did you tell her that the execution by her of such a stock power would in fact allow you to transfer that stock in your name?

A: Yes.

As a result of this conversation relayed by Gary Briggs, Plaintiff/Gallent executed Exhibit 6 which is an irrevocable stock or bond power. A copy of Exhibit 6 is attached hereto as Addendum B. The stock power and stock certificate were delivered on that date to the Defendant.

On March 17, 1988, Gary Briggs, now a resident of Texas, demands payment of interest on the money he advanced to prepay the note by reason of the failure of Digitran, Inc. to issue the stock agreed upon. (Ex. 7; Depo. p. 51 - 52) Briggs wrote letters to Loretta Records Gallent, president of Digitran, demanding performance. (Ex. 7) Exhibit 8 is a check by Loretta Records as an officer of Simulator Research. She represented herself to be an officer of the general partner of Crane Development Ltd. Partnership. She paid interest to Briggs on money advanced years earlier to prepay the 1990 note. Therefore the Plaintiff, Loretta Records in addition to being an individual plaintiff in this case, is also the president of Digitran, Inc. or Digicrane and is the sole owner of the stock in Simulator Research, Inc., the general partner of the limited partnership, a unit of which is owned by Gary Briggs. (Ex. 19 p. 10)

The defaults of Digitran continued. In 1988 Gary Briggs had not received the shares of stock to be issued in consideration of his prepayment of the note nor had he received royalties from the general partner Simulator Research which is wholly owned by Loretta Gallent. (See Ex. 7) Exhibit 7 does not contain any offer by Briggs to return any personal stock of Loretta Gallent's upon delivery by Digitran of the stock to him. In 1988 Digitran continued to send Gary Briggs documents for his execution at his Texas address. (See Ex. 9 and 10)

On November 22, 1988, Digitran, Inc. issued to the Defendant 40,533 shares of stock. (Pl. Aff. p. 3, Rec. p. 203)



1989 On September 25, 1989, and thereafter the Defendant made requests upon Loretta Gallent at Logan, Utah for the payment of royalties. (Ex. 28) Briggs was then a resident of the State of Texas; Plaintiff is a resident of the State of Utah. The demands for royalties continued until the time of the commencement of the suit. (See Ex. 13, 15, 23, 27, 29, 30, 31)

The Plaintiff and her companies moved to Utah approximately November of 1988. (See Plaintiff's Affidavit attached to the Plaintiff's Motion for Summary Judgment, Rec. p. 203)

Briggs refused to return the 32,160 shares of stock upon the delivery to him of the 40,533 shares of stock, upon the basis that Digitran, Loretta Gallent and Simulator Research, all of which were either owned or controlled by Loretta Gallent, had failed to pay royalties as provided in the agreements between the parties. (See Ex. 1, 17 p. 6, Ex. 19 p. 70, Ex. 20 p.6) Many letters passed back and forth, however, none resulted in the payment of a royalty nor the resolution of the case.

1992 Briggs was served with Summons in this action on January 5, 1992 while in Utah attempting to attend the stockholders meeting of Digitran in Logan, Utah.

The Deposition of Gary Briggs was taken December 18, 1992. By agreement between the Plaintiff and Defendant, it was published for the court's consideration.

At the time of the Briggs deposition, Plaintiff produced Exhibit 33 (see Appendix C) which appears to claim that the receipt of this stock is in exchange for the right to receive royalties.

The document could not be identified by Gary Briggs nor has the document been identified by any other person.

The deposition also contains Exhibit 34 which is a document produced by Loretta R. Gallent which claims to be a copy of an original document delivered to Gary Briggs. Neither Exhibits 33 nor 34 were signed by Briggs nor delivered to him and Briggs claims then, as now, that neither can be enforced against him by reason of the Statute of Frauds.

Plaintiff's Complaint in this action is a complaint for conversion or the return of personal property or its value. Gary Briggs moved the Court for the joinder of third parties and/or interpleader on the 22nd day of January, 1993. The motion was answered by the Plaintiff, and the Trial Court, in error, denied the motion. Loretta Penfold Records, a/k/a Loretta Gallent, individually, is the Plaintiff in this action. She is also the sole stockholder of Simulator Research, Inc., which is the general partner of Crane Development Ltd. Partnership. Gary Briggs is an owner of one unit of Crane Development. Loretta is also the President and a substantial shareholder of Digitran, Inc. and Digicrane. An agreement between Digitran, Inc. and Crane Development, the limited partnership, contains an agreement for the payment of royalties. (See Ex. 17 and 19) Digitran generated sales and has failed to pay royalties. Gary Briggs claims he is entitled to royalties under his agreement, and, therefore, Loretta Gallent, as the president and general partner of Crane Development and Digitran Inc. are necessary parties to this action if a

determination of royalties or any offsetting obligations is to be made.

Each party moved the Trial Court for summary disposition; Briggs claiming the Plaintiff's action was barred by the Statute of Limitations and Gallent claiming her right to the return of the stock. The Trial Court denied the Defendant's Motion for Summary disposition and granted the Plaintiff's Motion for Summary disposition. Thereafter Defendant made a request for additional rulings citing the portions of the record ignored by the Court in making its determination. The Court thereafter entered a second Memorandum Decision. Plaintiff submitted to the Court and the Court signed Findings of Fact and Conclusions of Law and Order granting the Summary Judgment and dismissing the Defendant's Motion for Summary Judgment. (Rec. p. 255) (Addendum D)

## **SUMMARY OF THE ARGUMENTS**

### **POINT I**

The Trial Court erred in failing to grant Defendant's motion for Summary Judgment based upon Utah's borrowing statute cited as 78-12-45 U.C.A. which provides that a cause of action arising in another state, if barred in that state, is barred in the State of Utah. Briggs received from Loretta Gallent 32,160 shares of stock and an irrevocable stock power on October 8, 1987 in Louisiana. Digitran issued the 40,533 shares of stock on November 22, 1988 to Gary Briggs in Texas. The action for the return of stock was brought by the Plaintiff on January 3, 1992 in Utah. The Texas Statute of Limitations of Action is two (2) years for the recovery

of personal property (Addendum A). Under any theory the action is time barred in Texas and therefore time barred in the State of Utah.

## **POINT II**

The Trial Court erred in granting Plaintiff's Motion for Summary Judgment.

A. The Trial Court granted Plaintiff's Motion for Summary Judgment based upon contested issues of fact. The Defendant describes the continued defaults of Digitran as the reason for the delivery to him by Loretta Records of 32,160 shares of stock of Digitran. These continued defaults were expressed by Briggs as being a failure by Digitran to issue shares of stock to him in accordance with their agreement and the failure on the part of Digitran to account for sales and pay royalties. The stock has now been issued but Digitran has failed to account for profits and pay royalties to the owners of the limited partnership units. There is a substantial issue of fact as to whether or not one of the conditions for the delivery of the stock to Gary Briggs by Loretta Gallent was payment or in lieu of royalties. The Trial Court acknowledged the contested issue and failed to recognize or address that it created a question of fact for trial. (Addendum D)

B. The Trial Court erred in receiving and considering evidence in violation of the parole evidence rule. Curiously the Trial Court indicated there was no contested issue as a fact and immediately followed by entering Findings of Fact. Finding No. 3 sets forth three items as consideration Briggs received for the

cancellation of a note. The Court omits the fourth item of consideration which was the payment of royalties. Briggs, however, asserts that the irrevocable stock or bond power executed by Loretta Penfold Records constitutes an unambiguous document the execution of which irrevocably transfers all right, title and interest in and to 32,190 shares of stock of Digitran Systems, Inc. to the Defendant. It is error upon the Trial Court's part to consider, as undisputed facts, portions of the deposition of Briggs and the affidavit of Loretta Penfold Records which modify or expand upon the written documents she executed.

C. The Trial Court erred in receiving and considering as an undisputed fact a document, Exhibit 34, a copy of which is attached hereto as Addendum C in violation of the statute of frauds. Exhibit 34 purports to be a document executed only by Loretta Penfold Records on October 8, 1987, confirming an agreement to return 32,190 shares of stock to her upon Gary Briggs receiving 40,533 shares of stock from Digitran, Inc. and omitting any reference to royalties.

The Trial Court found in its Findings of Fact that the Defendant had not returned 32,190 shares of stock and concluded that the transaction between Plaintiff and Defendant is reflected in a series of documents and there is sufficient question as to why the 32,190 shares of stock was transferred to support the admission of other evidence and the Trial Court concluded as follows:

"The transaction between the Plaintiff and the Defendant is reflected in a series of documents and there is sufficient question as to why 32,190 shares of stock were transferred

to support the admission of other evidence explaining the context and understanding of the parties at the time of the transfer. Consequently, the court finds as a matter of law that Exhibit 6, an irrevocable stock power, must be construed together with other documents which are in evidence and with the Defendant's own testimony and the Defendant's Motion for Summary Judgment on the basis of the statute of frauds must be denied.

Exhibit 34 is neither signed by the Defendant nor is its legitimate existence admitted by the Defendant. There is no nexus, tie or reference in the other documents to Exhibit 34. Therefore, it violates the statute of frauds and parole evidence rules. The Trial Court failed to find that the irrevocable stock power executed by the Defendant was an ambiguous document thus allowing the admission of testimony or other documents to correct the ambiguity.

### POINT III

The Trial Court erred in entering Findings of Fact in a Summary Judgment proceeding, the contents of which are clear evidence of material disputed facts which are relied upon by the Trial Court. For instance, the Trial Court concedes in paragraph 2 of the Findings that there are questions to be resolved as to why Loretta Records issued to Gary Briggs 32,190 shares of stock. The Court in Finding of Fact no. 3 totally ignores the issue of royalties being paid as one of the conditions testified by Gary Briggs. Royalties is one of the issues, as testified by Gary Briggs, causing the issuance of the personal stock of Loretta Briggs to him. In paragraph 6 the Court finds as a matter of fact that the issue of royalties were claimed or asserted by Gary

Briggs. The Trial Court, however, dismissed the issue with the conclusion that there was no other obligation at that time owed to Gary Briggs and that the claim of royalties is not before the Court. The Court concluded that the Defendant has failed to establish that he is entitled to retain the 32,190 shares. The fact that the Court and counsel thought it necessary to make findings is irrefutable evidence of disputed issues of fact which are before the Court, which the Court, in error, has summarily dispensed with.

#### **POINT IV**

Loretta Gallent is the sole shareholder of Simulator Research, Inc., the general partner of Crane Development. She is also the president of Digitran, Inc. and its allied corporations. She is individually the Plaintiff in this case and is a resident of the State of Utah. The issue of royalties can be determined in Utah, where the parties reside and there the income and profits from the business are determined. Louisiana has no contacts with the operation of the business at this time. Royalties are an issue and therefore in order to have a complete adjudication of the case the Trial Court should have included the additional parties and should determine if royalties are owed and to whom.

## ARGUMENT

### POINT I

#### DID THE TRIAL COURT ERR IN FAILING TO GRANT DEFENDANT GARY BRIGGS' MOTION TO DISMISS BASED UPON THE APPLICABLE STATUTE OF LIMITATIONS OF THE STATES OF UTAH AND TEXAS?

To review the facts briefly as far as dates and residence are concerned the following facts are pertinent:

1. In 1980, Briggs, a resident of California, buys a Louisiana limited partnership unit in Louisiana.

2. Digitran, Inc. and its predecessors make an agreement with the limited partnership to provide research and development for a crane simulator. Digitran, Inc. agrees to pay royalties.

3. Digitran, Inc. negotiates directly with the limited partners to retire prior to the due date a note due to Crane Development, Ltd. Digitran in Louisiana - Briggs in Colorado.

4. On April 30, 1986, Briggs pays \$30,400 to prepay note. (Ex. 2) Digitran, Inc. agrees to issue its 40,355 shares of stock. Loretta Records is in Louisiana; Gary Briggs is in Denver, Colorado.

5. October 8, 1987 Loretta Penfold Records executes irrevocable stock and bond power (Ex. 6) and delivers to Gary Briggs 32,190 shares of stock. Briggs a resident of Colorado. Records a resident of Louisiana.

6. Spring of 1988 Briggs moves to Texas, takes stock with him. In the Fall of 1988 Loretta Penfold Records and Digitran, Inc. move to the State of Utah.



7. November 22, 1988 Digitran, Inc. issues from Utah 40,533 shares of stock to Gary Briggs in Texas.

8. January 3, 1992, Loretta Penfold Records Gallent brings an action in the State of Utah for the return of stock.

Gary Briggs is not a resident nor has he ever been a resident of the State of Utah.

Utah's only connection with this action happens to be the fact that Loretta Penfold Records Gallent moved to the State of Utah along with her company Digitran Inc. Utah Statutes of Limitations for recovery of personal property are inapplicable (78-12-26(2))\*\*\*\*.

The applicable Statute of Limitation is UCA 78-12-45 which states as follows:

When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued.

This statute is commonly known as the "borrowing statute".

The issue then arises as to whether or not the statutes of California, Texas, Louisiana or Colorado should be applied in this action.

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\*\*\*\* However, if they were, the action is time barred in Utah.

The parties' sole contact with the State of California was that California was a residence of Gary Briggs when he purchased the unit of the limited partnership.

The sole contact the parties have had with the state of Colorado is that was Gary Briggs' residence in 1987 when Loretta Gallent delivered 32,160 shares to him in the State of Louisiana.

The contacts with the State of Louisiana by the parties is (1) that the limited partnership interest was purchased in Louisiana and (2) that the stock certificate was delivered to Gary Briggs in the State of Louisiana.

The contacts by the parties with the State of Texas are as follows:

(1) Texas was the state of residence of Briggs where the 32,190 shares were deposited and have since that time been held in that state;

(2) That Texas was the residence of Gary Briggs during all periods of time where the parties have corresponded relating to the stock certificates and royalties;

(3) The State of Texas is the only state where the stock certificates have physically been situated;

(4) Texas is the only state in which the Defendant and the certificate have been located for the purpose of commencing an action for the return of the stock.

The majority rule in the United States is that in choice of law cases, except in contract cases where the parties have agreed to a valid choice of law clause, the law of the state with the most

significant relationship to the particular substantial issue is applied to resolve that issue. Texas has adopted this rule. Duncan v. Cessna Aircraft Company, 665 SW2d 414 (Texas 1984).

Louisiana has adopted this rule in the case of Lee v. Ford Motor Company, 457 S2d 193 (LA App. 2 Cir. 1984).

The Restatement of Laws, Conflict of Laws, Section 145 dealing with the conflicts of law in tort cases cites the following criteria:

- (a) Place where the injury occurred;
- (b) Place where the conduct causing the injury occurred;
- (c) The domicile residence, nationality, place of incorporation, place of business of the parties; and
- (d) The place where the relationship, if any between the parties, is centered.

Section 188 of the restatement of conflicts, contracts, states as follows:

- (a) The place of contracting;
- (b) The place of negotiation of the contract;
- (c) The place of performance;
- (d) Location of the subject matter of the contract; and
- (e) The domicile, residence, nationality, place of incorporation, place of business of the parties.

In Plaintiff's Complaint, Plaintiff asks for relief for conversion and return of personal property. It also sets forth facts which sound in contract. Nonetheless, the substance of the Plaintiff's Complaint is a request for the return of personal

property, to-wit: stock certificates. Utah has adopted the restatement of conflicts in Pan Energy v. Martin, 813 P.2d 1142 (Utah 1991).

Whether this case is styled as a contract action or a tort action it remains evident that the action is: (1) for the return of personal property, or (2) the reasonable value thereof. Whether or not this matter is designated as a contract action or tort action the criteria is the most significant relationship test. Contractually speaking, Texas is the state of performance, location of the subject matter and the domicile of the Defendant. Speaking in torts, Texas is the place where the conduct or injury causing the injury occurred, the domicile residence of the Defendant and the place where the relationship, if any, between the parties is centered. Plaintiff submitted an affidavit by her husband stating Louisiana had no contacts with the parties. (Rec. 53)

The Texas Statute of Limitations is two years. (See Addendum A for text).

The Texas period of limitations does not sound either in tort or contract but relates to an action for the return of personal property, or taking or detaining the personal property of another, all of which fall within the tort action of conversion or the contract action of detainer.

If, as Plaintiff claims, delivery of the 40,355 shares of stock by Digitran, Inc. to Gary Briggs, triggered the return of the stock, Plaintiff's cause of action against Gary Briggs in Texas expired on November 23, 1990, two years prior to the commencement

of this action. If the cause of action accrued at the time Loretta Penfold Records irrevocably executed the stock and bond power, the Statute of Limitations ran on October 9, 1989, three years prior to commencement of this action.

According to Plaintiff's affidavit (Rec. 203), paragraph 8, Plaintiff Loretta Penfold Records could have and should have and in fact asked her secretary to retrieve her stock from Gary Briggs on November 22, 1988. She then claims that her secretary did not retrieve her shares and failed to inform her of the fact as the company was moving to Utah. At this time the sole contact of all of the parties was with the Defendant in Texas. The Texas Statute of Limitations is the only applicable statute of limitations taking into consideration the criteria outlined by the courts and the restatement of law. Defendant Gary Briggs is entitled to a reversal of the Trial Court dismissing the Plaintiff's claims as a matter of law.

## **POINT II**

### **THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.**

A. The Trial Court granted summary judgment under circumstances where there are substantial contested issues of fact which are acknowledged by the District Court as follows:

Is the payment of royalties by Digitran, Inc. to Gary Briggs, a condition barring the return of the stock certificate? Briggs Deposition says yes. (TR 42, 44, 45, 46, 47, 49, 50, 57, 58, 59; Ex 19, p. 70; Ex. 20, p. 6; Ex. 13, 14 15, 27, 28, 29, 30 and 31) In contrast see

Loretta Gallent's affidavit (Rec. 203) (Ex. 33 and 34).

The Trial Court in a Memorandum Decision stated as follows:

It is apparent that Defendant feels he has a right to receive royalty payments from Digicrane or Digitran. Whether he is correct in this claim is not an issue before the Court. Defendant has received the stock promised him in the prepayment agreement. Defendant has failed to establish why he is entitled to retain the other 32,190 shares.

Few things in this world are clear. However, it is obvious that the Trial Court decided a material contested issue of fact in Plaintiff's favor and against Defendant in making the Summary Judgment.

B. The Trial Court erred in receiving evidence in violation of the parole evidence rule.

Exhibit 6 is an unambiguous document in which Loretta Gallent unequivocally conveys all of her right, title and interest in 32,190 shares of stock to Briggs. This document was executed by Loretta Penfold Records, aka Loretta Gallent, Plaintiff, without any reservation or condition. Loretta Gallent now attempts to controvert this document and create conditions upon which the document was given. See Affidavit of Loretta Penfold Records. (Rec. 203) The question therefore is whether or not the Plaintiff can introduce written and oral evidence to modify, interpret or vary the terms and conditions of the otherwise unambiguous irrevocable stock power.

In Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1989) this Court said:

The vesper group's contention about what it really intended and its attempt to rely on extrinsic evidence in support of its contention, ignores the settled rule that in interpreting a contract, we first look to the four corners of the agreement to determine the intentions of the parties. (Citations omitted). The use of extrinsic evidence is permitted only if the document appears to incompletely express the parties' agreement or if it is ambiguous in expressing agreement.

Exhibit 6 - the irrevocable stock or bond power is neither ambiguous nor does it incompletely express the agreement between the parties. Gallent must show clear and convincing evidence of mistake. West One Trust Co. v. Morrison, 221 Ut Adv. Rep. 12.

In his deposition, Briggs states that it was his understanding that he could use the stock as necessary to fulfill the unpaid debts relative to Digitran (TR 44) and that there was no specific trigger nor specific agreement to return the stock. (TR 45) The affidavit of Loretta R. Gallent says differently, obviously in an attempt to boot strap her argument, that the irrevocable stock or bond power incompletely expresses the parties' agreement. The affidavit of Loretta R. Gallent is inadmissible to create an oral condition to the written irrevocable stock and bond power and as such, violates the parole evidence rule. Norton v. Blackham, 669 P.2d 857 (Utah 1983).

C. Exhibit 34 of the Gary Briggs Deposition is not a binding agreement between the parties and is an attempt on the part of Loretta R. Gallent to again vary the terms of the written contract. Exhibit 34 states as follows:

October 8, 1987

Dear Mr. Gary Briggs:

This letter is to confirm our conversation pertaining to my stock 32,190 shares in certificate no. 2939. We are presently in an underwriting and as soon as we are finished with this project we will complete form D to issue you 40,533 shares of restricted stock. At that time you will return my personal stock to me.

Sincerely yours,

Loretta P. Records

This document is not signed by Gary Briggs and its very authenticity was questioned during the deposition at pages 39 - 43. The Plaintiff did not have the original of the document. She had no document showing proof that it was sent or delivered, nor any evidence that it was authored or written on the date that it purports to be. Exhibit 34 cannot be integrated into Exhibit 6 because it does not meet the requirements of a written agreement. Strevell-Paterson Co., Inc. v. Michael R. Francis, 646 P.2d 741 (Utah 1982) where this court said:

It is well settled that an original agreement is within the statute of frauds. Any subsequent agreement which alters or amends it must also satisfy the requirement of the statute. Zion's Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975); Combined Metals, Inc. v. Bastian, 71 Ut 535 267 P.2d 1020 (1928).

This Court addressed the exact issue in Sparrow v. Tayco Construction Co., 846 P.2d 1323 (Ut App. 1993) where this court refused to integrate three of five documents because they lacked mutual assent. Therefore, Exhibit 6, the Irrevocable Stock or Bond



Power, satisfies the requirement of the Statute of Frauds in that Briggs is attempting to enforce the document against Gallent, but Exhibit 34 does not satisfy the requirements of the Statute of Frauds in that Exhibit 34 is not signed by Briggs. There is no nexus between the two documents nor is there any act which appears in the record that is done in reliance or part performance of Exhibit 34. In Machan v. Hampshire Properties, Inc. v. Western Real Estate & Development Company, 779 P.2d 230 (Utah Ct. App. 1989):

One or more writings, not all of which are to be signed by the party to be charged may be considered together as a memorandum for purposes of the statute of frauds if there is a nexus between them.... the nexus requirement is satisfied either by express reference in the signed writing or to the unsigned one, or by implied reference gleaned from the contents of the writings and the circumstances surrounding the transaction.

Exhibit 34, therefore, cannot be integrated because it is an offer or proposal. It does not meet the requirements of a written agreement as it is unsigned by the person to be charged with the agreement and it lacks mutual assent. (See 25-5-4 UCA 1953; §70A-2-301(1); §70A-8-319; §70A-8-308; §70A-8-313 contained in Addendum A)

The deposition of Gary Briggs and for that matter the affidavit of Loretta R. Gallent reveals the difference between admissible evidence and discoverable evidence. Gary Briggs testified relative to the transfer of the stock and the conversations prior to the transfer of the stock. That may be discoverable evidence but it is not necessarily admissible

evidence. The Trial Court's granting of a Motion for Summary Judgment must be based upon competent admissible evidence not in violation of the parole evidence rule, the statute of fraud and for that matter not creating contested issues of fact. Norton v. Blackham, supra and Rainford v. Rytting, 22 Ut.2d 252 451 P.2d 769 (1969) where this Court struck an affidavit consisting entirely of inadmissible parole evidence submitted for the purpose of varying and adding to the terms of a written agreement of the parties.

### POINT III

**THE TRIAL COURT ERRED IN GRANT SUMMARY JUDGMENT AS EVIDENCED BY THE TRIAL COURT'S ENTRIES OF FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE CONTENTS OF WHICH EVIDENCE MATERIAL ISSUES OF FACT ASSUMING THAT PLAINTIFF HAS PROVED HER RIGHT TO INTRODUCE PAROL EVIDENCE.**

The single and most pervasive fact issue created by the Judge's Memorandum Decision and the Findings of Fact and Conclusions of Law is whether or not the delivery of 32,190 shares of stock in Digitran, Inc. by Loretta R. Gallent to Gary Briggs was for or in consideration of the payment of royalties. The fact that the Court and counsel for Gallent saw fit to enter Findings of Fact rather than a recitation of undisputed facts gives rise to the recognition that there is an undecided material fact before this Court. The Trial Court's Memorandum Decision recognizes this fact at pages 3 and 4. (See Rec. 243, Addendum 1) Findings of Fact signed by the Court recognize the issue at paragraph 6 of the Facts and paragraph 4 of the Conclusion of Law. (Addendum E) See Shayne v. Stanley & Sons, Inc., 605 P.2d 775 (Utah 1980) which requires counsel for both parties to stipulate to the facts. Webster v.

Sill, 675 P.2d 1170 (Utah 1983) which states that upon a Motion for Summary Judgment it is not for the Court to weigh evidence or assess credibility.

#### POINT IV

##### **THE TRIAL COURT ERRED IN REFUSING TO JOIN NECESSARY THIRD PARTIES.**

Loretta Gallent is the sole shareholder of Simulator Research, a Louisiana corporation which is the general partner of Crane Development, a Louisiana Limited Partnership. Loretta Gallent is also the president of Digitran, Inc., which has an operating agreement with Crane Development to pay royalties. (See Ex. 17 and 19) Inasmuch as the sole owner of Simulator, which is the only general partner, and the president of the royalty paying corporation are one and the same person, there is a substantial conflict of interest. Defendant has the right under §48A-2A-1001 et. to maintain this action. Digitran, Inc. and its subsidiary Simulator Research, Inc., the general partner of Crane Development, are necessary parties. To leave them out of the loop would allow the Plaintiff, as an individual, to assert a plethora of defenses against the general partner of the limited partnership and Digitran without their presence in court.

The deposition of Gary Briggs corroborates the fact that the transfer of stock by Loretta Records, an individual, to Gary Briggs was in part consideration for the corporation's failure to meet its obligation to the limited partnership for the payment of royalties. Also for the failure of the general partner to in turn secure royalties from the corporation.

The inclusion of the necessary parties is a matter of procedure. Procedural law dictates the rights of the parties to appear before the Court. Utah Procedure is applicable in this case. Buhler v. Maddison, 166 P.2d 205 (Utah 1946).


In Plaintiff's answer to Briggs' Motion to join third parties the Plaintiff attached to the answer an affidavit together with exhibits from the Plaintiff. (See Rec. 118) The attachments show a clear intention on the part of the Plaintiff acting as the sole owner of Simulator Research, the general partner, to release obligations of a debt and her conduct as the president of Simulator Research is in direct derogations of the rights of the limited partners which further illustrate the err of the Trial Court in failing to join the indispensable parties to this action.

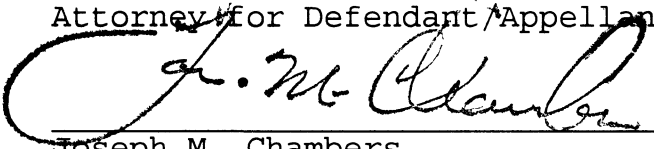
#### **CONCLUSION**

As a matter of law Gary R. Briggs, Defendant/Appellant is entitled to a summary judgment dismissing Plaintiff's Complaint by reason of the failure of Plaintiff to institute this action within the appropriate limitations of action. Alternatively, the Defendant Gary M. Briggs is entitled to a Motion for Summary Judgment based upon the Plaintiff's execution of an irrevocable stock or bond power the terms of which cannot be varied by parole evidence and have not been varied by reason of other documents unsigned by Gary M. Briggs. The Order of the Trial Court should be reversed and Plaintiff's Complaint dismissed.

DATED this 21 day of December, 1993.

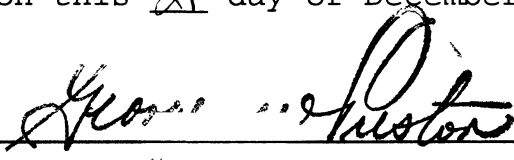
PRESTON & CHAMBERS

  
\_\_\_\_\_  
George W. Preston  
Attorney for Defendant/Appellant

  
\_\_\_\_\_  
Joseph M. Chambers  
Attorney for Defendant/Appellant

**MAILING CERTIFICATE**

I hereby certify that I mailed two (2) true and correct copies of the above and foregoing **BRIEF OF APPELLANT** to the Plaintiff's Attorney, Gary N. Anderson, Hillyard, Anderson & Olsen, 175 East 100 North, Logan, Utah 84321, on this 21 day of December, 1993.

  
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plicable where the alleged acts of part performance were not referable to the alleged oral contract to sell land. *McDonald v. Barton Bros. Inv. Corp.*, 631 P.2d 851 (Utah 1981).

The doctrine of partial performance was not applicable where all of the acts alleged were not exclusively referable to the alleged oral modification of a construction and lease agreement. *Downtown Athletic Club v. Horman*, 740 P.2d 275 (Utah Ct. App. 1987).

#### —Evidence.

Purchaser of land under an oral contract seeking to avoid the statute of frauds under the doctrine of part performance, based upon his possession of the land and improvements thereon, must establish that possession was actual, open, exclusive and with the seller's consent; improvements made were substantial, valuable and beneficial; a valuable consideration was given in exchange for the conveyance; and all of the foregoing was exclusively referable to the contract. *Coleman v. Dillman*, 624 P.2d 713 (Utah 1981).

To meet the part performance exception to the statute of frauds, the terms of the oral contract must be established by clear and definite evidence. *Bradshaw v. McBride*, 649 P.2d 74 (Utah 1982).

#### Promissory estoppel.

The elements of promissory estoppel necessary to preclude the operation of this section were not present in a case where a lessee and a man claiming to be the lessor entered into an oral agreement for the lease of property and the lease was to be reduced to writing by the lessor but was never written because the lessor learned of a defect in the chain of title. The lessee moved on the property and then brought action against the claimed lessor. The lessee did not expend any moneys upon the leased premises, but was damaged because of the loss of a good bargain. *Easton v. Wycoff*, 4 Utah 2d 386, 295 P.2d 332 (1956).

#### Recovery upon quantum meruit or theory of unjust enrichment.

Where defendant owner entered into oral

agreement to sell described land to plaintiff at specified price, which was void under this section, and plaintiff thereafter entered into contract to sell same land to third person at profit, but, when defendant learned of latter contract, he refused to sell to plaintiff and sold land to third person for same amount that latter had agreed to pay plaintiff, plaintiff was not entitled to recover on theory of unjust enrichment for value of his services in procuring purchaser, even in absence of § 25-5-4(5). *Baugh v. Darley*, 112 Utah 1, 184 P.2d 335 (1947).

#### Sale defined.

As applied to land, the word "sale" implies the creation of an estate in excess of a leasehold, by the act of the owner. *Lewis v. Dahl*, 108 Utah 486, 161 P.2d 362, 160 A.L.R. 1040 (1945).

#### Settling of accounts.

Defense that agreement by wife to convey ranch to former husband and herself jointly was not in writing and thereby void was not invocable in equity proceedings of settling accounts between the parties where ranch had been sold and court was concerned only with distribution of proceeds. *Corbet v. Corbet*, 24 Utah 2d 378, 472 P.2d 430 (1970).

#### Subscription.

A document to be enforceable under the statute of frauds must be subscribed by the party granting the conveyance. *Williams v. Singleton*, 723 P.2d 421 (Utah 1986).

#### Surrender, release or discharge.

Surrender of interest under contract for purchase of land could be properly effected without a deed or conveyance in writing in compliance with this statute. *Budge v. Barron*, 51 Utah 234, 169 P. 745 (1917).

#### Termination or rescission of contract.

An agreement to terminate or rescind a contract must be in writing, if the contract that is extinguished falls within the statute of frauds. *SCM Land Co. v. Watkins & Faber*, 732 P.2d 105 (Utah 1986).

#### COLLATERAL REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d Statute of Frauds § 59 et seq

Key Numbers. — Frauds, Statute of 71 et seq

### 25-5-4. Certain agreements void unless written and subscribed.

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

- (1) Every agreement that by its terms is not to be performed within one year from the making thereof
- (2) Every promise to answer for the debt, default or miscarriage of another.
- (3) Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry.
- (4) Every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate.
- (5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation

History. R.S. 1898 & C.L. 1907, § 2467; L. 1909, ch 72, § 1; C.L. 1917, § 5817; R.S. 1933 & C. 1943, 33-5-4.

#### NOTES TO DECISIONS

##### ANALYSIS

Accord and satisfaction  
 Affirmative defense  
 Alteration or modification of original contract  
 Assignments  
 Brokerage contracts  
 —Action by broker  
 —Finder's agreement  
 —Fully executed contracts  
 —Procuring lessee  
 —Procuring option  
 —Subscription  
 City council minutes  
 Contract not to be performed within a year  
 —Automobile rental  
 Contract to make will  
 Evidence  
 —Proving nature of agreement  
 Part performance  
 Promise to recover for another's debt or default  
 —Promisor's own purposes served  
 Recovery upon quantum meruit  
 Revocation or release of agreement to answer for debt of another  
 Stipulation  
 Unilateral contracts

##### Accord and satisfaction

Although it is well settled in Utah that if an original agreement is within the statute of frauds, a subsequent modifying agreement must also satisfy the statute of frauds, an accord and satisfaction is something entirely different and need not be in writing even if the original contract was within the statute of fraud. *Golder Key Realty, Inc v Mantas*, 699 P.2d 730 (Utah 1985)

##### Affirmative defense

When an action is on a contract, admitted by

defendant, he must interpose a special plea of this statute if statute is to be available as a defense. *Abba v. Smyth*, 21 Utah 109, 59 P. 756 (1899)

Statute of frauds must be pleaded by party relying upon it as a defense. *M & S Constr & Eng'g Co v. Clearfield State Bank*, 19 Utah 2d 86, 426 P.2d 227 (1967)

Defendant, who answered by a general denial and simultaneous motion to dismiss plaintiff's claim as being barred under Subsection (2) of this section, proceeded improperly, since under Rule 12(b), Utah Rules of Civil Procedure, statute of frauds is not a ground for motion to dismiss but rather an affirmative defense under Rule 8(c). *W.W. & W.B. Gardner, Inc v. Pappas*, 24 Utah 2d 264, 470 P.2d 252 (1970).

##### Alteration or modification of original contract.

If original contract, to be binding and enforceable, and to satisfy the statute of frauds, is required to be in writing and subscribed by parties sought to be charged, then a subsequent agreement altering or modifying any of its material parts or terms is also required to be in writing and so subscribed no part performance or anything done by such party in reliance on the subsequent agreement being alleged or proved, especially if interest in land is involved. *Combined Metals Inc v Bastian*, 71 Utah 535, 267 P 1020 (1928)

Parties may modify orally an agreement in writing where the original contract is not required by the statute of frauds to be in writing at least where there is consideration for such modification. But a contract required by the statute of frauds to be in writing cannot be modified by a subsequent oral agreement, although this rule is subject to many exceptions the first great division coming between execu

**70A-8-203. Staleness as notice of defects or defenses.**

(1) After an act or event creating a right to immediate performance of the principal obligation represented by a certificated security or that sets a date on or after which the security is to be presented or surrendered for redemption or exchange, a purchaser is charged with notice of any defect in its issue or defense of the issuer if:

(a) the act or event is one requiring the payment of money, the delivery of certificated securities, the registration of transfer of uncertificated securities, or any of these on presentation or surrender of the certificated security, the funds or securities are available on the date set for payment or exchange, and he takes the security more than one year after that date; and

(b) the act or event is not covered by Subsection (a) and he takes the security more than two years after the date set for surrender or presentation or the date on which performance became due.

(2) A call that has been revoked is not within Subsection (1).

**History:** L. 1965, ch. 154, § 8-203; 1989, ch. 218, § 12.

**Amendment Notes.** — The 1989 amendment, effective April 24, 1989, inserted "certificated" in the preliminary language of Subsection (1) and twice in Subsection (1)(a), substi-

tuted "represented" for "evidenced" in the introductory language of Subsection (1), substituted "the registration of transfer of uncertificated securities, or any of these" for "or both" in Subsection (1)(a), and made stylistic changes throughout.

**COLLATERAL REFERENCES**

**Am. Jur. 2d.** — 15A Am. Jur. 2d Commercial Code § 81.

**C.J.S.** — 11 C.J.S. Bonds § 81 et seq.; 18 C.J.S. Corporations §§ 253 et seq., 444; 19 C.J.S. Corporations § 1227 et seq.; 64 C.J.S.

Municipal Corporations § 1965; 81A C.J.S. States § 258.

**Key Numbers.** — Bonds ⇐ 96; Corporations ⇐ 108, 149, 466 et seq.; Municipal Corporations ⇐ 940 et seq.; States ⇐ 163.

**70A-8-204. Effect of issuer's restrictions on transfer.**

A restriction on transfer of a security imposed by the issuer, even though otherwise lawful, is ineffective against any person without actual knowledge of it unless:

(1) the security is certificated and the restriction is noted conspicuously on the instrument; or

(2) the security is uncertificated and a notation of the restriction is contained in the initial transaction statement sent to the person or, if his interest is transferred to him other than by registration of transfer, pledge, or release, in the initial transaction statement sent to the registered owner or the registered pledgee.

**History:** L. 1965, ch. 154, § 8-204; 1989, ch. 218, § 13.

**Amendment Notes.** — The 1989 amendment, effective April 24, 1989, rewrote this section, which formerly read "Unless noted con-

spicuously on the security a restriction on transfer imposed by the issuer even though otherwise lawful is ineffective except against a person with actual knowledge of it "



### **70A-8-208. Effect of signature of authenticating trustee, registrar or transfer agent.**

(1) A person placing his signature upon a certificated security or an initial transaction statement as authenticating trustee, registrar, transfer agent, or the like, warrants to a purchaser for value of the certificated security or a purchaser for value of an uncertificated security to whom the initial transaction statement has been sent, if the purchaser is without notice of the particular defect, that:

- (a) the certificated security or initial transaction statement is genuine;
- (b) his own participation in the issue or registration of the transfer, pledge, or release of the security is within his capacity and within the scope of the authority received by him from the issuer; and
- (c) he has reasonable grounds to believe that the security is in the form and within the amount the issuer is authorized to issue.

(2) Unless otherwise agreed, a person by so placing his signature does not assume responsibility for the validity of the security in other respects.

**History:** L. 1965, ch. 154, § 8-208; 1989, ch. 218, § 17.

**Amendment Notes.** — The 1989 amend-

ment, effective April 24, 1989, so rewrote Subsection (1) as to make a detailed analysis impracticable.

#### **COLLATERAL REFERENCES**

**Am. Jur. 2d.** — 15A Am. Jur. 2d Commercial Code § 88.

**C.J.S.** — 18 C.J.S. Corporations §§ 253 et seq., 444; 19 C.J.S. Corporations § 1162 et seq.

**Key Numbers.** — Corporations — 108, 149, 466 et seq.

## **PART 3 PURCHASE**

### **70A-8-301. Rights acquired by purchaser.**

(1) Upon transfer of a security to a purchaser under Section 70A-8-313, the purchaser acquires the rights in the security which his transferor had, or had actual authority to convey unless the purchaser's rights are limited by Subsection 70A-8-302(4).

(2) A transferee of a limited interest acquires rights only to the extent of the interest transferred. The creation or release of a security interest in a security is the transfer of a limited interest in that security.

**History:** L. 1965, ch. 154, § 8-301; 1989, ch. 218, § 18.

**Amendment Notes.** — The 1989 amendment, effective April 24, 1989, substituted "transfer of a security to a purchaser under Section 70A-8-313" for "delivery of a security" in Subsection (1), substituted "unless the purchaser's rights are limited by Subsection 70A-8-302(4)" for "except that a purchaser who has himself been a party to any fraud or illegality affecting the security or who as prior

holder had notice of an adverse claim cannot improve his position by taking from a later bona fide purchaser" in Subsection (1), deleted the former second sentence of Subsection (1), construing "adverse claim", deleted former Subsection (2), which read "A bona fide purchaser in addition to acquiring the rights of a purchaser also acquires the security free of any adverse claim" redesignated former Subsection (3) as (2), substituted "transferee" for "purchaser" and "transferred" for "purchased"

### 70A-8-307. Effect of delivery without indorsement — Right to compel indorsement.

If a certificated security in registered form has been delivered to a purchaser without a necessary indorsement he may become a bona fide purchaser only as of the time the indorsement is supplied, but against the transferor the transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary indorsement supplied.

**History:** L. 1965, ch. 154, § 8-307; 1989, ch. 218, § 24.

**Amendment Notes.** — The 1989 amendment, effective April 24, 1989, substituted "If a certificated security" for "Where a security."

**Cross-References.** — Documents of title, delivery without indorsement, right to compel indorsement, § 70A-7-506.

#### NOTES TO DECISIONS

##### **Failure to indorse certificate.**

A seller of stock should be at liberty to protect his certificate from passing into the hands of innocent third parties until such time as payment is tendered and if the certificate is delivered unconditionally but indorsement is

withheld for security reasons, the failure to indorse does not evidence an intention not to complete the sale. *Taylor v. Daynes*, 118 Utah 61, 218 P.2d 1069 (1950) (decided under former Uniform Stock Transfer Act).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d Commercial Code § 101.

**C.J.S.** — 18 C.J.S. Corporations §§ 253 et seq., 444; 19 C.J.S. Corporations § 1162 et seq.

**Key Numbers.** — Corporations ☞ 108, 125, 149, 466 et seq.

### 70A-8-308. Indorsements — Instructions — "Appropriate person."

(1) An indorsement of a certificated security in registered form is made when an appropriate person signs on it, or on a separate document, an assignment or transfer of the security or a power to assign or transfer it, or when the signature of such person is written without more upon the back of the security.

(2) An indorsement may be in blank or special. An indorsement in blank includes an indorsement to bearer. A special indorsement specifies to whom the security is to be transferred, or who has power to transfer it. A holder may convert a blank indorsement into a special indorsement.

(3) An indorsement purporting to be only of part of a certificated security representing units intended by the issuer to be separately transferable is effective to the extent of the indorsement.

(4) (a) An "instruction" is an order to the issuer of an uncertificated security requesting that the transfer, pledge, or release from pledge of the uncertificated security specified in the instruction be registered.

(b) An instruction originated by an appropriate person is:

(i) a writing signed by an appropriate person; or

(ii) a communication to the issuer in any form agreed upon in writing, signed by the issuer and an appropriate person.

(5) Any person guaranteeing an indorsement of a certificated security makes not only the warranties of a signature guarantor under Subsection (1) but also warrants the rightfulness of the particular transfer in all respects.

(6) Any person guaranteeing an instruction requesting the transfer, pledge, or release of an uncertificated security makes not only the warranties of a special signature guarantor under Subsection (3) but also warrants the rightfulness of the particular transfer, pledge, or release in all respects.

(7) An issuer may not require a special guarantee of signature under Subsection (3), a guarantee of indorsement under Subsection (5), or a guarantee of instruction under Subsection (6), as a condition to registration of transfer, pledge, or release.

(8) The foregoing warranties are made to any person taking or dealing with the security in reliance on the guarantee, and the guarantor is liable to the person for any loss resulting from breach of the warranties.

**History:** L. 1965, ch. 154, § 8-312; 1989, ch. 218, § 29.

**Amendment Notes.** — The 1989 amendment, effective April 24, 1989, added Subsections (2), (3), (4), (6), and (7), renumbering the existing subsections accordingly; in Subsection (1), inserted "certificated" in the introductory language, inserted "under" in Subsection (1)(b), deleted the final sentence, which read "But the guarantor does not otherwise warrant the rightfulness of the particular transfer,"

and made related and punctuation changes; in Subsection (5), substituted "guaranteeing" for "may guarantee," "makes" for "and by so doing warrants," and "guarantor under Subsection (1)" for "(Subsection 1)," inserted "certificated," "warranties of a," and "warrants," and deleted the final sentence, which read "But no issuer may require a guarantee of indorsement as a condition to registration of transfer"; and, in Subsection (8), inserted a comma and substituted "the person" for "such person."

#### COLLATERAL REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d Commercial Code § 103.

C.J.S. — 38 C.J.S. Guaranty § 44 et seq. Key Numbers. — Guaranty ◀ 27 et seq.

### 70A-8-313. When transfer to purchaser occurs — Financial intermediary as bona fide purchaser — "Financial intermediary."

(1) Transfer of a security or a limited interest therein, including a security interest, to a purchaser occurs only:

(a) at the time he or a person designated by him acquires possession of a certificated security;

(b) at the time the transfer, pledge, or release of an uncertificated security is registered to him or a person designated by him;

(c) at the time his financial intermediary acquires possession of a certificated security specially indorsed to or issued in the name of the purchaser;

(d) at the time his financial intermediary, not a clearing corporation, sends him confirmation of the purchase and also by book entry or otherwise identifies as belonging to the purchaser:

(i) a specific certificated security in the financial intermediary's possession;

(ii) a quantity of securities that constitute or are part of a fungible bulk of certificated securities in the financial intermediary's possession.

sion or of uncertificated securities registered in the name of the financial intermediary; or

(iii) a quantity of securities that constitute or are part of a fungible bulk of securities shown on the account of the financial intermediary on the books of another financial intermediary;

(e) with respect to an identified certificated security to be delivered while still in the possession of a third person, not a financial intermediary, at the time that person acknowledges that he holds for the purchaser;

(f) with respect to a specific uncertificated security the pledge or transfer of which has been registered to a third person, not a financial intermediary, at the time that person acknowledges that he holds for the purchaser;

(g) at the time appropriate entries to the account of the purchaser, or a person designated by him, on the books of a clearing corporation are made under Section 70A-8-320;

(h) with respect to the transfer of a security interest where the debtor has signed a security agreement containing a description of the security, at the time a written notification, which, in the case of the creation of the security interest, is signed by the debtor which may be a copy of the security agreement or which, in the case of the release or assignment of the security interest created pursuant to this subsection, is signed by the secured party, is received by:

(i) a financial intermediary on whose books the interest of the transferor in the security appears;

(ii) a third person, not a financial intermediary, in possession of the security, if it is certificated;

(iii) a third person, not a financial intermediary, who is the registered owner of the security, if it is uncertificated and not subject to a registered pledge; or

(iv) a third person, not a financial intermediary, who is the registered pledgee of the security, if it is uncertificated and subject to a registered pledge;

(i) with respect to the transfer of a security interest where the transferor has signed a security agreement containing a description of the security, at the time new value is given by the secured party; or

(j) with respect to the transfer of a security interest where the secured party is a financial intermediary and the security has already been transferred to the financial intermediary under Subsection (a), (b), (c), (d), or (g), at the time the transferor has signed a security agreement containing a description of the security and value is given by the secured party.

(2) The purchaser is the owner of a security held for him by a financial intermediary, but cannot be a bona fide purchaser of a security so held except in the circumstances specified in Subsections (1)(c), (d)(i), and (g). If a security is held as part of a fungible bulk as in the circumstances specified in Subsections (1)(d)(ii) and (1)(d)(iii), the purchaser is the owner of a proportionate property interest in the fungible bulk.

(3) Notice of an adverse claim received by the financial intermediary or by the purchaser after the financial intermediary takes delivery of a certificated security as a holder for value or after the transfer, pledge, or release of an uncertificated security has been registered free of the claim to a financial intermediary who has given value is not effective either as to the financial

70A-8-319

UNIFORM COMMERCIAL CODE

History: L. 1965, ch. 154, § 8-318, 1989, ch. 218, § 35.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, inserted "certificated" and "or has sold or caused the transfer or pledge of uncertificated securities over

which he had control," substituted "to deal with the securities" for "to dispose of them," and made punctuation changes.

Cross-References. — Bailor not liable for good faith delivery pursuant to warehouse receipt or bill of lading, § 2A-7-404.

NOTES TO DECISIONS

Bailment.

A defendant was charged with obtaining property under false pretenses where he was asked to keep stock certificates until the owner returned from a trip, but had them transferred

to his own name, a mere bailor has no authority to transfer certificates. *State v. Jensen*, 74 Utah 527, 280 P. 1046 (1925), (decided under prior law)

COLLATERAL REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d Commercial Code § 111.

C.J.S. — 2A C.J.S. Agency § 221; 8 C.J.S. Bailments §§ 97, 98, 12 C.J.S. Brokers § 129 et seq.

Key Numbers. — Bailment — 21; Brokers — 100 et seq.; Principal and Agent — 159(2).

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.

History: L. 1965, ch. 154, § 8-319.

Cross-References. — Contract for sale of goods, statute of frauds, § 70A-2-201

NOTES TO DECISIONS

Oral c.o.d. arrangement.

Oral c.o.d. arrangement whereby buyer of stocks paid broker only when stock was delivered to buyer was not void where within 24 hours after each transaction, broker sent to

buyer written confirmation thereof and broker never received a written objection from buyer. *Prince-Covey & Co. v. Strand*, 29 Utah 2d 224, 407 P.2d 706 (1973).

agreement was made; (2) by the debtor/obligor of the settlement agreement (or by a third party at the debtor's direction); and (3) the payment was made to the creditor under the settlement agreement. *Butcher v. Gilroy*, 744 P.2d 311 (Utah Ct. App. 1987).

#### Verbal agreement.

A verbal agreement or new promise based upon a prior agreement barred by statute comes within this section. *Whitehill v. Lowe*, 10 Utah 419, 37 P. 589 (1894) (decided under prior law).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 51 Am. Jur. 2d Limitation of Actions § 325 et seq.

**C.J.S.** — 54 C.J.S. Limitations of Actions § 261.

**A.L.R.** — Promises to settle or perform as estopping reliance on statute of limitations, 44 A.L.R.3d 482.

Promises or attempts by seller to repair goods as tolling statute of limitations for breach of warranty, 68 A.L.R.3d 1277.

**Key Numbers.** — Limitations of Actions ← 146.

### 78-12-45. Action barred in another state barred here.

When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued.

**History:** L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-45.

#### NOTES TO DECISIONS

##### ANALYSIS

Applicability of section.

—Counterclaim.

—Act occurring in other state.

Choice of laws.

—Utah court.

Exception to section.

—Assignee of resident's claim.

—State resident.

—Accrual of cause of action.

Applicability of section.

This section is a general provision applying to causes of action that arise in a different state and are not reduced to judgment. *Pan Energy v. Martin*, 813 P.2d 1142 (Utah 1991).

—Counterclaim.

—Act occurring in other state.

Where defendant's counterclaim for malpractice occurring in Idaho was barred by the Idaho statute of limitation, it would be barred here under this section. *Lindsay v. Woodward*, 5 Utah 2d 183, 299 P.2d 619 (1956).

Choice of laws.

—Utah court.

In wrongful death action by Utah resident

against Colorado residents, in which Utah court had quasi in rem jurisdiction, Utah court applied Utah law on matter concerning the statute of limitations, including the tolling thereof. *Rhoades v. Wright*, 622 P.2d 343 (Utah 1980), cert. denied, 454 U.S. 897, 102 S. Ct. 397, 70 L. Ed. 2d 212 (1981).

Exception to section.

—Assignee of resident's claim.

Resident of Utah, who acquired claim upon which he based his right of action by virtue of assignment after cause of action had accrued thereon, did not come within exception to this section. *Lawson v. Tripp*, 34 Utah 28, 95 P. 520 (1908).

—State resident.

—Accrual of cause of action.

Only those persons who are Utah residents as of the date their cause of action arises come within the exception to this section. *Allen v. Greyhound Lines*, 583 P.2d 613 (Utah 1978).

**EXEMPTIONS** *continued*

to extent that contributions thereto were tax exempt, plus interest or dividends) are exempt from all liability from debt except for alimony and child support. But no contribution to such fund is exempt if made within one year of filing for bankruptcy or within one year of filing of writ of seizure against such plan (T 20, §33[1], as am'd Act 362 of 1983). All gratuitous payments made by employers to employees or former employees or their widows heirs or beneficiaries are also exempt from all but alimony and child support obligations (T 20, §33[2]).

**Homestead Exemption**—See topic Homesteads

**FACTORS**

Any factor, broker, commission merchant, middleman or other person or corporation acting as commission merchant, or undertaking to sell for another any goods, wares, merchandise, sugar, cotton, rice, or any other agricultural produce, must render a true and correct account of the sales thereof within fifteen days of the date of said sales, which statement must give the name and address of the person or corporation to whom sold and dates of said sales (T 51 §5). Cotton merchants purchasing from farmers must register with Commissioner of Agriculture and provide bond of \$50,000 (T 3, §700 et seq., as am'd Act 888 of 1985).

**Bond**—Commission merchants who sell in this state on commission or buy as agent or broker any farm products fish, oysters, shrimp, crabs, game or fur skins must furnish bond to Commissioner of Agriculture, etc., in the sum of \$1000 (T 51, §51-4).

**False Statements, Etc.**—It is misdemeanor to render a false statement or account of a sale of cotton or other agricultural product or falsely to represent that such products are held for future sale when sold, or when they are held on consignment, to sell, without rendering a complete account, showing price, grade, and name and address of purchaser, or with intent to defraud consignor, to make a false charge, report of condition, or statement (T 3, §500).

**Lien**—Factor has lien on movables entrusted to him for sale and on proceeds and unpaid purchase money, which is prior to lien of attachment. If factor becomes insolvent, consignor may reclaim goods consigned or if sold has lien on unpaid price thereof (C C 3247-8).

**Recordation of Contracts**—There are no provisions as to filing or recording consignment agreements or notices of factors' liens.

**Business license tax** levied on all factorage, brokerage or commission businesses ranges from a minimum of \$30 when the gross annual commissions are less than \$5,000 to a maximum of \$4,000 when such commissions are \$500,000 or more, twenty-two classes being provided for (T 47, c 3).

**FILING FEES**

See topics Chattel Mortgages, Corporations, Records

**FORECLOSURE**

See topics Liens, Mortgages of Real Property

**FOREIGN CORPORATIONS**

See topics Corporations, Insurance

**FRANCHISES:**

No special legislation. Uniform Franchise and Business Opportunities Act not adopted.

**FRAUDS, STATUTE OF**

See also topic Commercial Code

No statute as such. Analogous provisions are:

**Transfer of immovable property** must be in writing, but if a verbal sale or other disposition of such property be made, it is good against the vendor and vendee who confesses it when interrogated on oath, provided actual delivery has been made of the immovable (C C 2275).

**Sale of movables verbally** is valid, but all verbal agreements relative to movable property and all verbal contracts for payment of money where value is in excess of \$500 may be proved by two or more witnesses, or one witness and other corroborative circumstances (C C 2277, 2441). Verbal sale of movables without delivery cannot benefit third persons (C C 2247).

**Parol evidence** is not received to prove any promise to pay: (1) A judgment of any court in or out of this state for the purpose of taking same out of prescription, or reviving it after prescription has run; (2) any debt or liability of one deceased in order to take it out of prescription, or to revive it after prescription has run; (3) the debt of a third person; (4) any debt or liability evidenced by writing, when prescription has already run. But in all these cases the acknowledgment or promise must be in writing, signed by the party to be bound or by his agent or attorney in fact specially authorized in writing so to do (C C 2278).

**FRAUDULENT SALES AND CONVEYANCES**

**Annulment**—Obligee has right to annul act of obligor or result of failure to act of obligor, made or effected after right of obligee arose, the causes or increases obligor's insolvency (C C 2036, eff Jan 1, 1985). Obligor deemed insolvent when total of liabilities exceeds total of fairly appraised assets (C C 2037, eff Jan 1, 1985). Obligor may annul onerous contracts under certain conditions (C C 2038, eff Jan 1, 1985). Obligor may attack gratuitous contract made by obligor whether or not other party to contract knew the contract would cause or increase obligor's insolvency (C C 2039, eff Jan 1, 1985). Action of obligee must be brought within one year from time he learned or should have learned of act or failure to act, but not more than three years from act (C C 2041, eff Jan 1, 1985). Obligor may not annul contract of obligor in regular course of business (C C 2040, eff Jan 1, 1985). Obligor must join

obligor and third persons who can plead discussion of obligor's assets (C C 2042, eff Jan 1, 1985). If obligor establishes right to annul, such right is exercised only to extent that it affects obligee's rights (C C 2043, eff Jan 1, 1985). Obligor may exercise obligor's right when he refuses to do so, unless it is strictly personal, if obligor causes or increases insolvency by his refusal (C C 2044, eff Jan 1, 1985).

**Bulk Sales**—Transfer in bulk and not in ordinary course of trade of a portion or whole of merchandise or merchandise and fixtures or substantially all fixtures or trucks or vehicles is void as to transferor's creditors unless detailed inventory made ten days before transfer, publication of notice of date, place and time of sale in official journal of parish at least 15 days before transfer, and transferee gets sworn statement of creditors with addresses and indebtedness, notifies each, personally or by certified or registered mail, ten days before transfer, and sees that purchase price goes to bona fide creditors. Otherwise transferee must pay fair value to creditors. Misdemeanor for transferor not to give full and complete statement to transferee (T 9, §2962, as am'd Act 584 of 1985).

Under Bulk Sales Law, "creditors" include only creditors for debts owed by transferor before transfer, and not for debts arising afterwards. By special provision, collector is included among creditors (T 9, §2961, as am'd Act 379 of 1985).

See also topic Taxation, subhead Payment

**GARNISHMENT:**

**Caveat** *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), held notice and an opportunity to a hearing prior to seizure of property constitutionally essential under due process clause.

Garnishment process may be issued in aid of attachment, if the attaching creditor has reason to believe that a third person has possession of money or other property belonging to the defendant. The process, with appropriate interrogatories, must be served on the third person (C C P 2412).

Garnishment process may also be used in aid of execution of a judgment under a writ of fieri facias (C C P 2411).

**Reply of Garnishee**—Within 15 days (five days in City Court) after service of citation and interrogatories, the garnishee must file sworn answers thereto, otherwise there is prima facie case made against him that he is indebted to defendant for amount of claim plus costs, and interest (C C P 2412, 2413). Interrogatories served on garnishee must include questions which when answered will inform court as to whether defendant debtor is employed by garnishee, his wage rate, manner paid, and other judgments or garnishments, if no longer employed, where and by whom debtor is presently employed and residing, if known to garnishee (T 13, §3924, as am'd Act 532 of 1982).

**Traversal of Reply**—The reply of the garnishee may be traversed by the attaching creditor and the issue raised is tried by the court (C C P 2414). Traversal of reply of garnishee must be made within 15 days after service of notice of reply on party making garnishment (C C P 2414).

**Seizure**—If garnishee declares in his reply that he has property, etc., of debtor in his possession, the court can order that it be turned over to sheriff or constable, as the case may be.

**Wages, salary, etc.**, may be garnished, in which case the court, after a hearing, fixes the portion which is exempt (see Exemptions) and provides for payment to the garnishing creditor out of the balance. Indebtedness to employer may be given priority over garnishment (T 13, §§3921-3927). No person lending money at more than 10% per annum may garnish any legally exempt salary or wages of debtor in attempt to force payment of debt, under penalty of imprisonment (T 20, §32). Worker may be discharged because of single garnishment, and has remedy for reinstatement and back pay. Worker may be discharged if earnings are subjected to three or more garnishments for unrelated debts in two-year periods other than garnishment resulting from accident or illness causing loss of ten or more consecutive days at work (T 20, §731, as am'd Act 204 of 1983).

See topic Exemptions, subhead Earnings

**GUARDIAN AND WARD**

**Persons Entitled to Tutorship**—During marriage father is administrator of minor's estate and mother when father is mentally incompetent, committed, interdicted, imprisoned or an absentee (C C 221, C C P 4501, C C P 4502, as am'd Act 56 of 1975). Parents enjoy usufruct of minor's estate but right does not extend to donation to child unless specifically so provided in donation (C C 226, as am'd Act 704 of 1985). Mother is tutor of illegitimate child not acknowledged by father or acknowledged by him without her concurrence. If both have acknowledged, court selects one as tutor (C C 256, as am'd Act 215 of 1983). Parents of mother are considered to be on death of mother of illegitimate who has not been acknowledged by father (C C Act 536, as am'd Act 536 of 1979).

Upon death of either parent, tutorship of minor children belongs of right to surviving parent, but survivor must qualify as provided by law (C C 248, as am'd Act 5 of 1960). Father or mother dying last, or parent who is curator of spouse can appoint a tutor by will or by having made a declaration before death, executed before a notary public and two witnesses (C C 257). Judge may, for good reasons, refuse to give tutorship given by surviving father or mother and appoint someone else in his stead (C C P 4062). When tutor has not been appointed by father or mother dying last, or if tutor is not confirmed or is excused, tutor appointed from among ascendants in direct line, collaterals by blood with third degree and surviving, or of minor's father or mother dying last (C C Act 261, as am'd Act 429 of 1981). There is no ascendant nearest of kin in collateral line is entitled to tutorship (C C 267).

A minor not emancipated is placed under a tutor after dissolution of marriage by parents or their separation from bed and board (C C 147 and 246). During marriage, fathers and mothers have enjoyment of estate of the children, but in such enjoyment property belonging to children cannot be sold or mortgaged or any other step taken regard to it, except with same formalities as are prescribed in case of minors' property.

Vernon's  
TEXAS CODES  
ANNOTATED



CIVIL PRACTICE AND REMEDIES CODE  
Sections 1.001 to 16.050

ST. PAUL, MINN.  
WEST PUBLISHING CO.



## CITE THIS BOOK

Thus: V.T.C.A., Civil Practice & Remedies Code § —

#### 9. Breach of marriage promise

When there is no dispute as to the fact that the promise of marriage was made within one year before filing suit, the court properly refused to charge upon the issue made by the plea of limitation. *Daggett v. Wallace* (1890) 75 T. 352, 13 S.W. 49.

A suit to establish a trust against a house and lot was not barred by one year statute of limitations governing actions for breach of promise of marriage, although plaintiff testified that defendant stated they would be married, where it could not be said as a matter of law when the promise of marriage, if any, was breached. *Davis v. Clements* (Civ.App.1951) 239 S.W.2d 657, ref. n.r.e.

Vernon's Ann.Civ.St. art. 5524 (repealed; now, this section) which barred actions for breach of promise to marry not brought within one year from accrual of cause of action did not bar action to cancel a deed procured by promise to marry, which was allegedly breached. *Hooks v. Brown* (Civ. App.1961) 348 S.W.2d 104, ref. n.r.e.

In action for breach of promise of marriage, wherein defendant pleaded Vernon's Ann.Civ.St. art. 5524 (repealed; now, this section) as defense, fact issue existed upon the resolution of which the validity of plea of limitation would depend, precluding sum-

was barred by one-year limitation. *Seven One Seven Tire Service v. Firestone Tire & Rubber Co.* (Civ.App.1927) 288 S.W. 558.

Debtor's alleged cause of action for slander against creditor for words uttered by creditor's agent upon failure of debtor to pay indebtedness did not arise out of the same transaction which was the basis for creditor's suit for debt, and debtor's cross action was barred by the one-year statute of limitations. *Swaim v. International Harvester Co.* (Civ.App.1974) 505 S.W.2d 634, ref. n.r.e.

Debtor's mention in his answer filed in suit on indebtedness that debtor intended to file cross action for damages for slander did not protect debtor so that his later-filed suit by way of cross action praying for recovery of damages flowing therefrom was not subject to creditor's limitation plea. *Swaim v. International Harvester Co.* (Civ.App.1974) 505 S.W.2d 634, ref. n.r.e.

#### 11. Summary judgment

Defendant who establishes in summary judgment proceeding the applicability of a statute of limitations is entitled to prevail unless plaintiff comes forward with proof showing some excuse for delay. *McClelland v. Peterson* (Civ.App.1973) 494 S.W.2d 583.

### § 16.003. Two-Year Limitations Period

(a) A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

(b) A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

#### Revisor's Note

(1) The revised law omits the reference to firms and public and private corporations in the source law. The Code Construction Act (V.A.C.S. Article 5429b-2) includes business entities and governmental entities within the definition of "person."

(2) The revised law omits the source law material that provides for suits to be brought within two years of the effective date of V.A.C.S. Article 5526a (March 7, 1934) because the two-year period has expired.

## LIMITATIONS

### Ch. 16

§ 16.004

by which statute might be tolled. *Phipps v. Chrysler Corp.* (Civ.App.1970) 460 S.W.2d 170, error refused.

Where plaintiff in personal injury and property damage suit admitted doing nothing to have citation both issued and served upon one defendant, a resident of county in which suit was brought, from period December 19, 1967 to November, 1969, plaintiff did not exercise due diligence, and his excuse that he feared being brought to trial without both defendants being in court and possibility of dismissal for want of prosecution pending service on another defendant was insufficient to toll statute of limitation. *Green v. Steigerwald* (Civ.App.1971) 468 S.W.2d 122.

Under Vernon's Ann.Civ.St. art. 5526 (repealed; now, this section), mere filing of suit would not interrupt running of statute of limitations; to interrupt running of statute, not only must petition have been filed but use of due diligence in procuring issuance and service of citation was required. *Walker v. Hanes* (Civ.App.1978) 570 S.W.2d 534, ref. n.r.e.

Due diligence in procuring issuance of citation and its service upon defendant was not established so as to interrupt or toll running of two-year period of limitations in action for property damage arising from automobile collision where delay on part of plaintiff in seeking issuance of an alias citation for a period in excess of six months

was unexplained. *Hamilton v. Goodson* (Civ.App.1979) 578 S.W.2d 448.

Where after plaintiff in personal injury action requested clerk to issue citation for defendant, which was returned unserved, there was total inaction by plaintiff during 17-month period after expiration of limitations period before service was completed, with no additional attempts to obtain service and attempt to determine whether service was completed, there was lack of diligence by plaintiff in procuring issuance and service of citation, and thus, statute of limitations was not tolled and barred plaintiff's action. *Reynolds v. Alcorn* (Civ.App. 1980) 601 S.W.2d 785.

#### 442. Dismissal, tolling statute of limitations

Where former wife's first suit for partition of former husband's military retirement benefits was dismissed for want of prosecution, that suit did not interrupt running of statute of limitations. *Shaw v. Corcoran* (Civ.App.1978) 570 S.W.2d 96.

#### 443. Review, tolling statute of limitations

Where patient did not urge to trial court issues of whether statute of limitations on medical malpractice claim was tolled based on discovery rule or fraudulent concealment, patient failed to preserve for appeal complained of error in grant of physician's summary judgment motion based on limitations defense. *Jean v. Jones* (App. 1 Dist. 1983) 663 S.W.2d 56, ref. n.r.e.

## § 16.004. Four-Year Limitations Period

(a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:

- (1) specific performance of a contract for the conveyance of real property;
- (2) penalty or damages on the penal clause of a bond to convey real property; or
- (3) debt.

(b) A person must bring suit on the bond of an executor, administrator, or guardian not later than four years after the day of the death, resignation, removal, or discharge of the executor, administrator, or guardian.

(c) A person must bring suit against his partner for a settlement of partnership accounts, and must bring an action on an open or stated account, or on a mutual and current account concerning the trade of merchandise between merchants or their agents or factors, not later than

four years after the day that the cause of action accrues. For purposes of this subsection, the cause of action accrues on the day that the dealings in which the parties were interested together cease.

#### Historical Note

##### Prior Law:

Acts 1841, p. 143.  
P.D. 1375, 3923, 4604.  
Acts 1876, p. 102.  
G.L. vol. 2, p. 627.  
Rev.Civ.St.1879, arts. 3205, 3206, 3209.

G.L. vol. 8, p. 938.  
Rev.Civ.St.1895, arts. 3356, 3357, 3360.  
Rev.Civ.St.1911, arts. 5688, 5689, 5692.  
Acts 1917, 35th Leg., 3rd C.S., p. 87.  
Acts 1979, 66th Leg., p. 1769, ch. 716, § 2.  
Vernon's Ann.Civ.St. arts. 5527, 5528, 5531.

#### Cross References

Bonds of public officers, actions on, see Vernon's Ann.Civ.St. art. 6003a.  
Statute of limitations in contracts for sale, see V.T.C.A. Bus. & C. § 2.725.

#### Law Review Commentaries

Analysis of 1979 amendments to Deceptive Trade Practices Act. Robert E. Goodfriend and Michael P. Lynn, 33 Southwestern L.J. (Tex.) 999 (1979).

##### Annual survey of Texas law:

Civil procedure. Ernest E. Figari, Jr., 34 Southwestern L.J. (Tex.) 415 (1980).  
Property insurance. Arno W. Krebs, Jr., and Otway B. Denny, Jr., 35 Southwestern L.J. (Tex.) 256 (1981).  
Purchase and sales of real property. Lawrence J. Brannian, 35 Southwestern L.J. (Tex.) 53 (1981).  
Secured transactions. John Krahmer, 34 Southwestern L.J. (Tex.) 220 (1980).  
Support. Ellen K. Solender, 35 Southwestern L.J. (Tex.) 163 (1981).  
Wills. Charles O. Galvin, 34 Southwestern L.J. (Tex.) 21 (1980).

Implied warranty of habitability: Contract or tort? 31 Baylor L.Rev. 207 (1979).

Legal malpractice in Texas. Steven K. Ward, 19 South Texas L.J. 587 (1978).

Limitations in legal malpractice actions. 34 Baylor L.Rev. 269 (1982).

Professional malpractice: Extent of liability in Texas and elsewhere. Steven K. Ward, 42 Texas Bar J. 117 (1979).

Security deposits with utilities. 21 Southwestern L.J. (Tex.) 857 (1967).

Statutory damages recovery: Uninsured motorist statute. Howard L. Nations, 18 South Texas L.J. 329 (1977).

Uninsured motorist coverage: Relief in Texas from financially irresponsible motorist. David J. Beck, 32 Texas Bar J. 93 (1969).

#### Library References

West's Tex. Forms, Civil Trial and Appellate Practice, Ch. 5.

#### Notes of Decisions

- I. IN GENERAL 1-140
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*...continued*

- Factor's Lien.**—See topic Commercial Code.
- Judgment Lien.**—See topic Judgments.
- Landlord's Lien.**—See topic Landlord and Tenant.
- Lien on Exempt Property.**—See topic Exemptions.
- Lien on Homestead.**—See topic Homesteads.
- Real Estate Mortgage Lien.**—See topic Mortgages of Real Property.
- Tax Lien.**—See topic Taxation.

#### LIMITATION OF ACTIONS:

Uniform Commercial Code enacted. (Bus. & Comm. C. Title 1). See topic Commercial Code.

Actions must be brought within following times:

**Ten years:** on judgments, domestic or foreign, except that foreign judgment barred by statute entered in less than ten years is barred likewise in this state (Civ. P. Rem. Code §16.033); action to recover land, when instrument of record is defective in certain particulars such as record not showing seal of officer taking acknowledgment, or instrument not being signed by proper officer, etc. (Civ. P. Rem. Code §16.033); to recover damages arising out of defective or unsafe conditions of real property against the performing construction or repair thereto (Civ. P. Rem. Code §16.009); to recover damages caused by error in survey conducted by registered public surveyor or licensed state land surveyor, except if written claim presented during ten-year period, the period extended two years from date claim presented. (Civ. P. Rem. Code §16.011).

**Five years:** action on officer's bond for failure to make return of execution. (Civ. P. Rem. Code §16.007).

**Four years:** actions for debt; actions for penalty or for damages on penal clause of bond to convey real estate; actions by one partner against his co-partner for settlement of partnership accounts, actions upon stated or open accounts, or upon mutual and current accounts concerning trade of merchandise between merchant and merchant, their factors or agents; and cause of action shall be considered as having accrued on termination of dealings in which they were interested together (Civ. P. Rem. Code §16.004); on notes secured by deeds, mortgages, or deeds of trust, or vendor's liens contained in deeds of conveyance, or vendor's lien notes for purchase money, time running from maturity of debt (Civ. P. Rem. Code §16.035); for specific performance of contracts to convey real estate (Civ. P. Rem. Code §16.004[a][1]); suits on bond of executor, administrator or guardian, time running from death, resignation, removal or discharge of executor, etc. (Civ. P. Rem. Code §16.004[b]); on all causes not otherwise specified (Civ. P. Rem. Code §16.051). See also topic Commercial Code. As to suits for defalcation on bonds of public officials, see 6003a.

**Three years:** by or against carriers of property for hire for charges or overcharges. (Civ. P. Rem. Code §16.006).

**Two years:** for injuries to person or property; for death, time running from death; for detaining personal property and converting same to own use, for taking or carrying away goods or chattels of another; for forcible entry and detainer (Civ. P. Rem. Code §16.003); will contests (Prob. C. §93).

**One year:** for injuries to character or reputation; for malicious prosecution, seduction or breach of promise to marry. (Civ. P. Rem. Code §16.002).

**Six months:** actions under bulk transfer provisions of U.C.C.

**Extension of Limitations Period.**—If last day of limitations period under any statute of limitations falls on Sat., Sun., or holiday, period for filing suit is extended to the day that county offices are open for business. (Civ. P. Rem. Code §16.072).

**New Action.**—When an action is dismissed or judgment set aside or annulled in a court proceeding because of lack of jurisdiction of trial court, and within 60 days thereafter action is commenced in proper court, period between date of first filing and date of commencement of action in proper court is not counted as part of period of limitation, unless first filing was intentional disregard of jurisdiction. (Civ. P. Rem. Code §16.064).

**Foreign Causes of Action.**—No statutory provision regarding foreign causes of action. However, actions based upon foreign judgment or decree are barred if by laws of foreign state or country such action would there be barred and judgment or decree is incapable of being otherwise enforced there; and whether so barred or not, no action against person who shall have resided in this State during ten years next preceding such action shall be brought upon any such judgment or decree rendered more than ten years before commencement of such action. (Civ. P. Rem. Code §16.066).

**Disabilities of Plaintiff.**—Time does not run against insane persons, persons under 18 years of age, or during war, as to real estate against persons in military or naval service of federal government, handicapped persons who because of handicap are unable to determine that property is under adverse possession, or elderly persons who because of advanced age are unable to determine that property is under adverse possession, but no action to recover real property may be brought more than 25 years after cause accrued. (Civ. P. Rem. Code §§16.001, 16.022, 16.027).

**Death.**—In case of death of person against whom or in whose favor a cause of action exists, time ceases to run until 12 months after such death, unless an administrator or executor sooner qualifies, in which case time ceases to run only until such qualification. (Civ. P. Rem. Code §16.062).

**Absence or Concealment of Defendant.**—The time during which a defendant is absent from the state is deducted from the period of limitation. (Civ. P. Rem. Code §16.063).

**Counterclaim or Cross Action.**—If at time required by law for answer to plaintiff's action, defendant's counterclaim or cross action would otherwise be barred by applicable statute of limitation, period of limitations is extended 30 days following answer date for counterclaim or cross action arising out of same transaction or occurrence made subject matter of opposing party's claim. (Civ. P. Rem. Code §16.069).

**Revival of Barred Claims.**—A debt barred by limitation may be revived only by acknowledgment in writing, signed by person to be charged. (Civ. P. Rem. Code §16.065). Judgment where no execution issued within 12 months after rendition may be revived by scire facias or action of debt brought within ten years. (Civ. P. Rem. Code §31.006).

**Extension of maturity of any evidence of indebtedness secured by mortgage, deed of trust or vendor's lien on real property must be in writing, signed, acknowledged, and recorded, as in case of a mortgage.** (Civ. P. Rem. Code §16.036).

**Contractual Limitations.**—Time within which to sue may not be limited by contract to less than two years unless contract is for sale of business entity and aggregate value not less than \$500,000 (Civ. P. Rem. Code §16.070), and except extent permitted under Uniform Commercial Code. See topic Commercial Code. Contractual stipulation requiring claimant to give notice of claim of damages as condition precedent to right to sue must be reasonable. Notification period of less than 90 days void. Notice is presumed unless lack of notice is specifically pleaded under oath, where contract is for sale of business entity and has value not less than \$500,000. (Civ. P. Rem. Code §16.071).

**Pleading.**—To be available as a defense limitations must be pleaded. (Rule 92a).

**Immigrants** may not be sued on causes of action barred in state or country in which they emigrated prior to emigration. Action not barred at time of removal if Texas is not barred until immigrant has resided in state for one year. (Civ. P. Rem. Code §16.067).

See also topic Adverse Possession.

**LIMITED PARTNERSHIP:** See Partnership.

#### MARRIAGE:

Person under 18 years may not marry without: (i) consent of parent or guardian; (ii) court order. Person under 14 years may not marry without court order. (Fam. C. §§1.51-1.53).

**Medical Examination.**—No statutory provision.

**License required;** it is procured from any county clerk. (Fam. C. §1.07). Parties must appear in person unless county judge waives requirement of personal appearance. (Fam. C. §1.02). License becomes invalid unless marriage has been contracted within 30 days after license issued. (Fam. C. §1.81).

**Waiting Period.**—No statutory provision.

**Ceremonial marriage** may be performed by: licensed or ordained Christian minister or priest; Jewish rabbi; officer of religious organization authorized by organization to perform marriage ceremonies; justice of peace; judge of any court of record; or justice of peace or judge of any court of record can discriminate on basis of religion, or national origin. (Fam. C. §1.83).

**Reports of Marriages.**—Clerk records all licenses issued. Person solemnizing matrimony must endorse same on license and return it to county clerk within 10 days after celebration; return is recorded with license. (Fam. C. §1.84).

**Record.**—See topic Records, subhead Vital Statistics.

**Common law marriages,** both local and out-of-state, are recognized. (191-495; Fam. C. §1.91-95).

**Proxy Marriages.**—Ceremonial marriage performed by a proxy under power of attorney, where couple was separated by military service, is legal marriage, a band can be guilty of offense of desertion. (Op. Atty. Gen. 1946, No. 0-7529).

**Marriages by Written Contract.**—No statutory provision.

**Prohibited Marriages.**—Person may not marry his or her aunt or uncle, his or her niece (including half-blood or by adoption) or any nearer relative by consanguinity or stepchild. Such marriages are void. (Fam. C. §2.21).

**Foreign marriage** recognized unless contrary to policy of state.

**Annulment.**—A marriage may be annulled for natural or incurable impotence at the time of entering into the marriage contract, or for any other impediment renders such contract voidable. (Fam. C. §§2.41-2.46). Statutory time limit for annulment for nonage is 90 days after date of marriage. (Fam. C. §2.41).

#### MARRIED WOMEN:

See topics Dower; Executors and Administrators, Homesteads, Husband and Wife, Marriage, Wills, Witnesses.

#### MASTER AND SERVANT:

See topic Labor Relations; also Principal and Agent.

#### MECHANICS' LIENS: See Liens

#### MINES AND MINERALS:

**Operation of Mines.**—Note: 5901-5920a, governing health and safety of mines, were repealed by 1989 H.B. 863. Department of Licensing and Regulation governs. (9100). Statute is unclear.

**Safeguarding of Employees.**—Rules of safety formerly governed by 5 Occupational Safety Board can enact safety rules applicable to industry. (5182a).

**Inspection of Mines.**—See subhead Operation of Mines, supra.

**Oil and Gas.**—Railroad Commission has duty of enforcing statutory regulation of oil and gas industry, which include extensive conservation laws. (N.R.C. leases on state lands must provide that no gas will be sold for use outside of state without permission from Texas Railroad Commission is obtained and any lease not in compliance is void. (N.R.C. §§52.292-52.296). Railroad Commission is authorized to pool of mineral interests for oil and gas well under certain conditions. (102). Railroad Commission is authorized to approve designation by deed.



Member S&P 500

**Pierce Fenner & Smith Inc.**

Dear Customer,

We have received from you certificates for the securities indicated below. However in order to process them and make good delivery it is necessary that the power of assignment bearing your signature be attached to the certificate(s) since it does not bear your endorsement. Therefore will you please sign the power below and return it to us in the enclosed envelope.

Your prompt attention to this matter will be greatly appreciated.

## IRREVOCABLE STOCK OR BOND POWER

**For Value Received,** the undersigned does (do) hereby sell, assign and transfer to

Gary Briggs

**F STOCK,  
COMPLETE  
THIS PORTION**

(SOCIAL SECURITY OR TAXPAYER ID NUMBER)

32,190 shares of the Common stock of Digitran Systems, Inc.

represented by certificate(s) No(s). 2939 inclusive,  
standing in the name of the undersigned on the books of said Company.

**F BONDS,  
COMPLETE  
THIS PORTION**

\_\_\_\_\_ bonds of \_\_\_\_\_

in the principal amount of \$ \_\_\_\_\_ No(s). \_\_\_\_\_ inclusive,  
standing in the name of the undersigned on the books of said Company.

The undersigned does (do) hereby irrevocably constitute and appoint

\_\_\_\_\_ attorney to transfer  
the said stock or bond(s), as the case may be, on the books of said Company, with full  
power of substitution in the premises.

### FOR OFFICE USE ONLY

\_\_\_\_\_ TITLE WHICH APPEARS ON CERTIFICATE

\_\_\_\_\_ TITLE WHICH APPEARS ON CERTIFICATE

**IMPORTANT:** The signature(s) to this power must correspond with the name(s) as written upon the face of the certificate(s) or bond(s) in every particular without alteration.

Loretta Penfold Records

(PERSON(S) EXECUTING THIS POWER SIGN(S) HERE)

Account No. \_\_\_\_\_

Dated \_\_\_\_\_



THE CORPORATION WILL FURNISH WITHOUT CHARGE TO EACH STOCKHOLDER WHO SO REQUESTS THE POWERS, DESIGNATIONS, PREFERENCES AND RELATIVE PARTICIPATING, OPTIONAL OR OTHER SPECIAL RIGHTS OF EACH CLASS OF STOCK OR SERIES THEREOF AND THE QUALIFICATIONS, LIMITATIONS OR RESTRICTIONS OF SUCH PREFERENCES AND/OR RIGHTS.

The following abbreviations, when used in the inscription on the face of this certificate, shall be construed as though they were written out in full according to applicable laws or regulations:

TEN COM	— as tenants in common	UNIF GIFT MIN ACT —	Custodian
TEN ENT	— as tenants by the entireties	(Cust)	(Minor)
JT TEN	— as joint tenants with right of survivorship and not as tenants in common	under Uniform Gifts to Minors Act	(State)

Additional abbreviations may also be used though not in the above list.

*For value received* \_\_\_\_\_ *hereby sell, assign and transfer unto*

PLEASE INSERT SOCIAL SECURITY OR OTHER IDENTIFYING NUMBER OF ASSIGNEE

PLEASE PRINT OR TYPEWRITE NAME AND ADDRESS INCLUDING POSTAL ZIP CODE OF ASSIGNEE

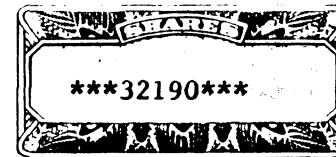
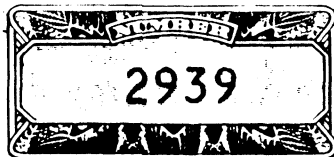
\_\_\_\_\_ *Shares*  
*of the capital stock represented by the within Certificate,*  
*and do hereby irrevocably constitute and appoint*  
\_\_\_\_\_ *Attorney*  
*to transfer the said stock in the books of the within-named*  
*Corporation with full power of substitution in the premises*  
*Dated* \_\_\_\_\_

NOTICE: THE SIGNATURE TO THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE IN EVERY PARTICULAR WITHOUT ALTERATION OR ENLARGEMENT OR ANY CHANGE WHATSOEVER

SIGNATURE GUARANTEED

"THE SHARES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED UNDER EITHER THE SECURITIES ACT OF 1933, AS AMENDED, OR APPLICABLE BLUE SKY LAWS. THEY MAY NOT BE SOLD, OFFERED FOR SALE OR TRANSFERRED IN THE ABSENCE OF AN EFFECTIVE REGISTRATION UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND THE APPLICABLE BLUE SKY LAWS OR AN OPINION OF COUNSEL SATISFACTORY IN FORM AND SUBSTANCE TO COUNSEL FOR THE COMPANY THAT SUCH TRANSACTION WILL NOT RESULT IN A PROHIBITED TRANSACTION UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR THE APPLICABLE BLUE SKY LAWS."

SEE RESTRICTIVE LEGEND ON  
REVERSE OF CERTIFICATE



INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE

# DIGITRAN SYSTEMS, INCORPORATED

SEE REVERSE SIDE  
FOR CERTAIN DEFINITIONS

THIS CERTIFIES THAT \*\*\*LORETTA PENFOLD RECORDS\*\*\*  
F49999  
HT

is the owner of

\*\*\*THIRTY TWO THOUSAND ONE HUNDRED NINETY\*\*\*

FULLY PAID AND NON-ASSESSABLE SHARES OF COMMON STOCK, \$.01 PAR VALUE, OF

DIGITRAN SYSTEMS, INCORPORATED

transferable on the books of the Corporation by the holder hereof in person or by duly authorized attorney on surrender of this certificate properly endorsed. This certificate is not valid unless countersigned by the Transfer Agent and Registrar.

WITNESS the facsimile signatures of the Corporation's duly authorized officers.

Dated: 04/27/87

*Burman James Prejan*

SECRETARY

*L. Penfold Records*

PRESIDENT

Countersigned and Registered:  
FIRST NATIONAL BANK OF MINNEAPOLIS  
(Minneapolis, Mn.)  
By *[Signature]*  
Authorized Signature  
Transfer Agent and Registrar



**THE EXCHANGE  
OFFER**

---

The Limited Partners may exchange their partnership interest in the Partnership in return for common stock in Digitran Systems, Inc. In exercising such option, the Limited Partner will be required to pay \$30,400 in cash, based on each 1 Unit of the Partnership owned by a Limited Partner which is being exchanged. On the exercise of each Exchange Offer, Digitran Systems Inc., will be released from all obligations involving that certain Guaranty and Assumption Agreement entered by said Limited Partners of the formation of the Partnership, and will further receive a return of their Promissory Note which was contributed to Partnership on its formation.

**THE PARTNERSHIP**

Crane Development Limited Partnership, a Louisiana limited partnership.

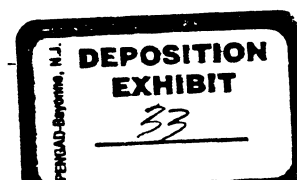
**THE GENERAL  
PARTNER**

The General Partner is Simulator Research, Inc., a Louisiana Corporation.

The principal office of the Partnership is 109 Michelle Circle, Lafayette, La. 70503.

**STOCK**

Each Limited Partner accepting the Exchange Offer will receive 40,533 shares of common stock in Digitran Systems, Inc. for each Unit of limited partnership interest in the Partnership exchanged. These shares of stock will be subject to substantial restrictions on their transferability. Digitran is a public corporation, with its principal place of business in Lafayette, Louisiana.



**ROYALTY  
AGREEMENTS**

Each Limited Partner who accepts the Exchange Offer will not be entitled to the right to future revenues realized by the Partnership from the sale of crane simulators.

**INVESTOR  
QUALIFICATIONS**

An investor must be a Class A or Class B Limited Partner in Crane Development Limited Partnership.

**NO LIQUIDITY  
OF STOCK**

A public market is not presently available to trade the stock of Digitran acquired under the Exchange Offer as the stock is subject to federal and state securities laws.

**NO TAX RULING**

A ruling will not be obtained from the Internal Revenue Service regarding the federal tax consequences associated with a limited partner accepting the Exchange Offer.

October 8, 1987

Dear Mr. Gary Briggs

This letter is to confirm our conversation pertaining to my stock of 32190 shares in certificate #2939. We are presently in an underwriting and as soon as we are finished with this project we will complete a Form D to issue you 40,533 shares of restricted stock. At that time you will return my personal stock to me.

Sincerely yours,

*Loretta P. Records*  
Loretta P. Records



. . . . .  
 \*  
 \*  
 LORETTA PENFOLD RECORDS, a/k/a  
 LORETTA GALLENT \* MEMORANDUM DECISION  
 \*  
 \* No. 920000001  
 Petitioner,  
 vs. \*  
 \*  
 GARY M. BRIGGS \*  
 Respondent. \*  
 \*  
 . . . . .

This matter is before the Court upon Defendant's Motion for Summary Judgment on the grounds that Plaintiff's action is barred by the Statute of Limitations or alternatively by the Statute of Frauds. Plaintiff has also filed a Motion for Summary Judgment on the grounds that Plaintiff is entitled to judgment as a matter of law based on undisputed facts set forth in Defendant's deposition and Plaintiff's affidavit. The same was argued on the 27th day of July, 1993 and taken under advisement.

## STATUTE OF LIMITATIONS

Defendant argues that Plaintiff's action is barred by the Statute of Limitations. Upon reflection of those arguments made by the parties and in review of the exhibits presented to the Court, the Court finds that the issue is one of contract and is not barred by the Statute of Limitation.

Case No. 92-701  
AUG 4 - 1993 #5

## STATUTE OF FRAUDS

Defendant argues that exhibit 6, the Irrevocable Stock Power, is the only admissible evidence of the transaction concerning the 32,190 shares of stock. He claims that the exhibit is clear on its face and any other document or testimony explaining it is barred by the parole evidence rule. As such, Defendant argues that Plaintiff has no action against Defendant. The Court does not agree.

Exhibit 6 is only one a series of documents in a transaction between Plaintiff and Defendant. There is sufficient question, as to why these shares of stock were transferred, to support the admission of other evidence explaining the context and understanding of the parties at the time of transfer.

Defendant's Motion for Summary Judgment is denied.

### PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff argues that the agreement between the parties is clear, leaving no genuine issue of material fact and entitling Plaintiff to judgment as a matter of law.

It is undisputed that Defendant entered into an agreement to prepay the class note to Digitran. As a part of the agreement Defendant elected to pay \$30,400, half the value of the original note, in cash to Crane Development Limited Partnership. The following was part of the consideration given to Defendant for the prepayment: (1) Defendant's promissory note would be canceled and delivered to him, (2) Digicrane would execute an amendment to the Guaranty and Assumption Agreement, (3) Defendant

would receive one share of Common Stock from Digitran for each \$0.75 contributed by Defendant in cash upon the execution of the Agreement. Defendant paid the \$30,400 and was guaranteed to receive the stock by June 1, 1986.

By October 1987, Defendant had still not received the stock from Digitran as promised. Defendant met with Plaintiff at this time and received 32,190 shares of Plaintiff's personal stock. Defendant's own testimony as to this transaction explained that the delivery of the stock was "security for the good faith performance . . . by Digicrane/Digitran."

A year later, November 22, 1988, Defendant received a stock certificate from Digitran for 40,533 shares of stock, the amount of stock owed from the prepayment agreement. An interest payment was also paid April 1988 to Defendant in the amount of \$1824 to compensate him for the delay.

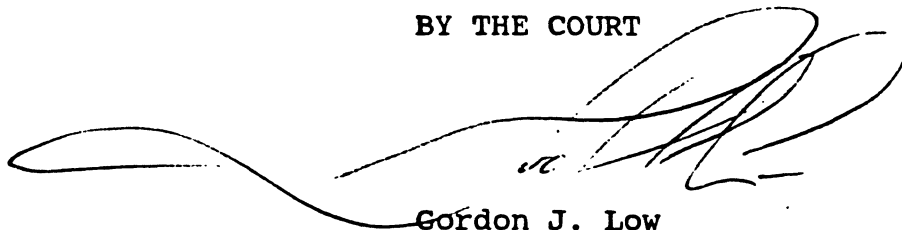
Defendant has not returned the 32,190 shares of stock given him in 1987 by Plaintiff. He claims they were to act as security, not only for the 40,533 shares of stock, but to ensure good faith efforts from the company for other difficulties Defendant was having, particularly the payment of royalties from Digicrane. Plaintiff has brought this action to recover this stock.

The 32,190 shares of stock given to Defendant by Plaintiff were admittedly given as "security for a good faith performance." They were delivered at a time when Digitran had still not delivered the 40,533 shares of stock pursuant to the prepayment

agreement. There was no other clear obligation at that time to Defendant. It is apparent Defendant feels he has a right to receive royalty payments from Digicrane or Digitran. Whether he is correct in this claim is not an issue before this Court. Defendant has received the stock promised him in the prepayment agreement. Defendant has failed to establish why he is entitled to retain the other 32,190 shares. Plaintiff's Motion for Summary Judgment is granted. Counsel for Plaintiff is directed to prepare a formal order in conformance herewith.

Dated this 4<sup>th</sup> day of August, 1993.

BY THE COURT

A handwritten signature in black ink, appearing to read 'Gordon J. Low', is written over a horizontal line. The signature is stylized with a large, sweeping initial 'G' and a long, horizontal stroke extending to the left.

Gordon J. Low  
District Court Judge

Case No: 920000001 CN

Certificate of Mailing

I certify that on the 5<sup>th</sup> day of August, 1993,

I sent by first class mail a true and correct copy of the  
attached document to the following:

JOSEPH CHAMBERS  
Atty for Defendant  
31 FEDERAL AVENUE  
LOGAN UT 84321

GARY N. ANDERSON  
Atty for Plaintiff  
175 EAST 100 NORTH  
LOGAN UT 84321

GEORGE W. PRESTON  
Atty for Defendant  
31 FEDERAL AVENUE  
LOGAN UT 84321

District Court Clerk

By:   
Deputy Clerk



IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE  
STATE OF UTAH

---

LORETTA PENFOLD RECORDS,  
aka LORETTA GALLANT,

Plaintiff

vs.

GARY M. BRIGGS,

Defendant

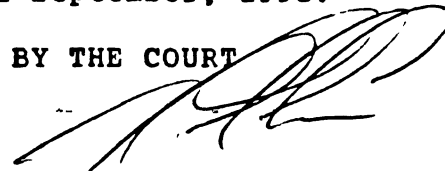
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\* MEMORANDUM DECISION  
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\* Case No. 920000001  
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THIS MATTER IS BEFORE THE COURT on an Objection to the  
Proposed Findings of Fact and Order. The Objection is overruled.  
This Memorandum will serve as notice that the Findings and Order,  
as proposed, have been signed and entered.

DATED this 9<sup>th</sup> day of September, 1993.

BY THE COURT



JUDGE GORDON J. LOW  
FIRST DISTRICT COURT

RECORDS aka GALLANT v. BRIGGS  
Case No. 920000001  
Page 2

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, Loretta Penfold Records aka Gallant v. Gary M. Briggs, Case No. 920000001, postage prepaid, this 9<sup>th</sup> day of September, 1993, to the following attorneys:

GREGORY SKABELUND  
Attorney for Plaintiff  
2176 North Main  
North Logan, Utah 84321

GEORGE W. PRESTON  
Attorney for Defendant  
Preston & Chambers  
31 Federal Avenue  
Logan, Utah 84321

GARY N. ANDERSON  
Attorney for Plaintiff  
Hillyard, Anderson & Olsen  
175 East 100 North  
Logan, Utah 84321

JOSEPH M. CHAMBERS  
Attorney for Defendant  
Preston & Chambers  
31 Federal Avenue  
Logan, Utah 84321

  
\_\_\_\_\_  
Court Secretary

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE  
STATE OF UTAH

---

LORETTA PENFOLD RECORDS,  
aka LORETTA GALLANT,

Plaintiff

vs.

GARY M. BRIGGS,

Defendant

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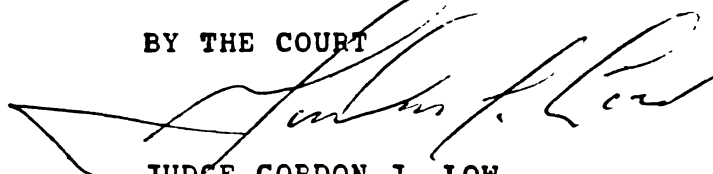
MEMORANDUM DECISION

Case No. 920000001

THIS MATTER IS BEFORE THE COURT upon an Objection to the Proposed Findings of Fact and Conclusions of Law. As noted in the Plaintiff's response, much of the argument by the Defendant is not to the form of the Findings but to the Memorandum Decision itself. For those reasons and to the reasons that the Court finds the proposed Findings and Order comport with the Memorandum Decision and with the evidence at trial, reflected in the Memorandum Decision or not, the Objection is overruled and this Memorandum will serve as Notice of Entry that the proposed Findings and Order have been adopted and docketed by the Court.

DATED this 15<sup>th</sup> day of September, 1993.

BY THE COURT



JUDGE GORDON J. LOW  
FIRST DISTRICT COURT

RECORDS aka GALLANT v. BRIGGS  
Case No. 920000001  
Page 2

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, Loretta Penfold Records aka Gallant v. Gary M. Briggs, Case No. 920000001, postage prepaid, this 15<sup>th</sup> day of September, 1993, to the following attorneys:

GREGORY SKABELUND  
Attorney for Plaintiff  
2176 North Main  
North Logan, Utah 84321

GEORGE W. PRESTON  
Attorney for Defendant  
Preston & Chambers  
31 Federal Avenue  
Logan, Utah 84321

GARY N. ANDERSON  
Attorney for Plaintiff  
Hillyard, Anderson & Olsen  
175 East 100 North  
Logan, Utah 84321

JOSEPH M. CHAMBERS  
Attorney for Defendant  
Preston & Chambers  
31 Federal Avenue  
Logan, Utah 84321

  
\_\_\_\_\_  
Court Secretary

Ge N. Anderson #8800  
HILL YARD, ANDERSON & OLSEN  
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175 EAST FIRST NORTH  
LOGAN, UTAH 84321  
TELEPHONE (801) 752-2610  
TELEFAX (801) 753-8895

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY  
STATE OF UTAH

---

LORETTA PENFOLD RECORDS,	)	
a/k/a LORETTA GALLENT,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
Plaintiff,	)	
VS.	)	
GARY M. BRIGGS,	)	Civil No. 92-01
Defendant.	)	Judge Gordon J. Low

---

This matter came before this Court on the basis of Defendant's motion for summary judgment on the grounds that Plaintiff's action is barred by an applicable statute of limitations or by an applicable statute of frauds. Plaintiff also filed a motion for summary judgment on the grounds that Plaintiff is entitled to judgment as a matter of law based on undisputed facts set forth in Defendant's deposition and Plaintiff's affidavit. Oral argument was had on both motions on July 27, 1993, at which time the Court took the matter under advisement and issued a memorandum decision which sets forth the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

1. As to the statute of limitations argument, the statutes of four states could be involved, namely:

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Louisiana, Colorado, Texas and Utah. Defendant asserted initially that the Utah statutes applied, but, being faced with the statute that tolls the time in Utah as long as the Defendant was out-of-state, he changed his position and claimed that the Texas statute for recovery of personal property was applicable. Defendant concedes that if Plaintiff's action is based on contract claims, none of the statutes in the four states would have run by the time the action was filed. The Court having examined the pleadings and exhibits finds that the issue in the case is one of contract.

2. On the statute of frauds argument, Defendant argues that exhibit 6 to Defendant's deposition, which has been filed with the Court and admitted to evidence along with the deposition and the remaining deposition exhibits, is the only admissible evidence of the transaction concerning the 32,190 shares of stock which is the subject of this action. Defendant claims that the exhibit is clear on its face and any other document or testimony explaining it is barred by the parole evidence rule. The Court has examined the evidence relating to the transaction between the Plaintiff and Defendant and finds that there is sufficient question as to why these shares of stock were transferred to support the admission of other evidence explaining the context and understanding of the parties at the time of transfer. The Court also finds that the complete transaction between the

parties can only be ascertained by reviewing the series of documents in evidence relating to the transaction.

#### FINDINGS OF FACT

##### RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

3. Plaintiff argues that the agreement between the parties is clear, leaving no genuine issue of material fact and entitling Plaintiff to judgment as a matter of law. It is undisputed that Defendant entered into an agreement to prepay the partnership note owed to Crane Development Limited Partnership, by paying the amount of \$30,400, half the value of the original note. Part of the consideration given to Defendant for the prepayment was: (1) Defendant's promissory note would be canceled and delivered to him; (2) Digicrane would execute an amendment to the Guaranty and Assumption Agreement; (3) Defendant would receive one share of Common Stock from Digitran for each \$0.75 contributed by Defendant in cash upon the execution of the Agreement. Defendant paid the \$30,400 and was guaranteed to receive the stock by June 1, 1986.

4. By October 1987, Defendant had still not received the stock from Digitran as promised. Defendant met with Plaintiff at this time and received 32,190 shares of Plaintiff's personal stock. Defendant's own testimony as to this transaction explained that the delivery of the stock was "security for the good faith performance ... by Digicrane/Digitran."

5. A year later, November 22, 1988, Defendant received a stock certificate from Digitran for 40,533 shares of stock, the amount of stock owed from the prepayment agreement. An interest payment was also paid in April 1988 to Defendant in the amount of \$1,824 to compensate him for the delay.

6. Defendant has not returned the 32,190 shares of stock given him in 1987 by Plaintiff. He claims they were to act as security not only for the 40,533 shares of stock, but to ensure good faith efforts from the company for other difficulties Defendant was having, particularly the payment of royalties from Digicrane. Plaintiff brought this action to recover this stock.

Based on the foregoing findings of fact, the Court sets forth the following:

#### CONCLUSIONS OF LAW

1. The Court having determined that Plaintiff's action is based on contract, there is no applicable statute of limitations barring Plaintiff's complaint.

2. The transaction between the Plaintiff and Defendant is reflected in a series of documents and there is sufficient question as to why the 32,190 shares of stock were transferred to support the admission of other evidence explaining the context and understanding of the parties at the time of transfer. Consequently, the Court finds as a matter of law that exhibit 6, the Irrevocable Stock Power,



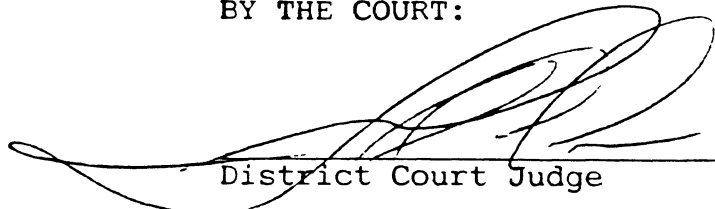
must be construed together with other documents which are in evidence and with Defendant's own testimony, and Defendant's motion for summary judgment on the basis of the statute of frauds must be denied.

3. The Court having determined that the 32,190 shares of stock given to Defendant by Plaintiff were admittedly given as "security for a good faith performance"; they were delivered at a time when Digitran had still not delivered the 40,533 shares of stock pursuant to the prepayment agreement; and there was no other obligation at that time owed to Defendant; Plaintiff is entitled, as a matter of law, to the return of the stock certificates, or if that is not possible, to damages equal the value of said shares.

4. The Court has examined the relevant documents and while it is apparent that Defendant feels he may have a claim for royalties, that claim is not an issue before the Court. Defendant received the stock promised him in the prepayment agreement and has failed to establish why he is entitled to retain the other 32,190 shares. Plaintiff is entitled to judgment as a matter of law since there is no genuine issue of material fact at issue in this case.

DATED this <sup>13<sup>th</sup></sup> ~~12<sup>th</sup>~~ day of <sup>September</sup> ~~August~~, 1993.

BY THE COURT:

  
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed, postpaid, to the following this 16th day of August, 1993:

George W. Preston  
Joseph M. Chambers  
Preston & Chambers  
Attorneys for Defendant  
31 Federal Avenue  
Logan, UT 84321

Ruth Bolton  
Secretary

G. N. Anderson #8800  
HILLIARD, ANDERSON & OLSEN  
A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW  
175 EAST FIRST NORTH  
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TELEPHONE (801) 752-2610  
TELEFAX (801) 753-8895

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY  
STATE OF UTAH

---

LORETTA PENFOLD RECORDS,	)	
a/k/a LORETTA GALLENT,	)	ORDER
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
GARY M. BRIGGS,	)	Civil No. 92-01
	)	
Defendant.	)	Judge Gordon J. Low

---

This matter came before this Court on the basis of Defendant's motion for summary judgment on the grounds that Plaintiff's action is barred by an applicable statute of limitations or by an applicable statute of frauds. Plaintiff also filed a motion for summary judgment on the grounds that Plaintiff is entitled to judgment as a matter of law based on undisputed facts set forth in Defendant's deposition and Plaintiff's affidavit. Oral argument was had on both motions on July 27, 1993, at which time the Court took the matter under advisement and issued a memorandum decision. Based upon the foregoing and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant's motion for summary judgment based on statute of limitations be and is hereby denied.


2. Defendant's motion for summary judgment based on the basis of the statute of frauds be and is hereby denied. 92-01

3. Plaintiff is entitled, as a matter of law, to the return of the 32,190 shares of stock given to Defendant as security for a good faith performance, plus any benefit received by Defendant while this stock has been in his possession; or, if that is not possible, to damages equal to the value of said shares, plus any benefits derived therefrom.

4. Plaintiff is awarded judgment as a matter of law since there is no genuine issue of material fact remaining in this case, and Defendant is hereby ordered to return the stock plus any benefits received. If this cannot be effected, then Plaintiff shall be granted money damages in an amount to be established upon further order of this Court.

DATED this 15<sup>th</sup> day of September, 1993.

BY THE COURT:

  
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ORDER was mailed, postpaid, to the following this 16th day of August, 1993:

George W. Preston  
Joseph M. Chambers  
Preston & Chambers  
Attorneys for Defendant  
31 Federal Avenue  
Logan, UT 84321

Ruth Bolton  
Secretary