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Title 78 Judicial Code Chapter 12 Article 2: Other than Real Property - 1987 Replacement Volume

Utah Code Annotated

ARTICLE 2
OTHER THAN REAL PROPERTY

78-12-22. Within eight years.

Within eight years:

an action upon a judgment or decree of any court of the United States or of any state or territory within the United States.

an action to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-22; L. 1975, ch. 96, § 26.

Cross-References. — Execution to issue within eight years, Rule 69(a), U.R.C.P.

Judgment a lien for eight years, § 78-22-1.

Uniform Act on Paternity, § 78-45a-1 et seq.

Uniform Civil Liability for Support Act, § 78-45-1 et seq.

Uniform Reciprocal Enforcement of Support Act § 77-31-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Judgments or decrees.

Where judgment was rendered in favor of creditor in an action founded on contract, the debt did not thereafter retain its original character as a contract debt, but a new cause of action on the judgment was substituted, and the statute of limitation with respect to judgments applied to an action to renew the judgment. Yergensen v. Ford, 16 Utah 2d 397, 402 P.2d 696 (1965).

This section was not a bar to an action to impress judgment lien on property where complaint alleged that property had been transferred to defraud creditors, and that property was held in trust for defendant. Moulton v. Morgan, 115 Utah 119, 202 P.2d 723 (1949).

Where judgment payable in installments provided that plaintiff could have execution for total amount due if default in payments should be made, plain intent was that execution should issue for only such amounts as were due at time of default so that statute did not begin to run from date of default. Buell v. Duchesne Mercantile Co., 64 Utah 391, 231 P. 123 (1924).

In case of a judgment payable in installments, statute runs from time fixed for payment of each installment for the part then payable, and not from date of the judgment. Buell v. Duchesne Mercantile Co., 64 Utah 391, 231 P. 123 (1924).

Notwithstanding former § 104-37-6 permitting enforcement of judgment after lapse of eight years, an action upon a money judgment could not be brought after expiration of eight years. Youngdale v. Burton, 102 Utah 169, 128 P.2d 1053 (1942).

Mortgage foreclosure decree could not be collaterally attacked for mortgagee's failure to serve proper representative of estate of deceased mortgagor, where defendants in that action defaulted, no appeal was taken and foreclosure decree had become final, and where foreclosure record did not show such error or defect on its face; this section afforded no defense to subsequent action to quiet title instituted by mortgagee who purchased at foreclosure sale. Zion's Benefit Bldg. Soc'y v. Geary, 112 Utah 548, 189 P.2d 964 (1948).

Judgment may be sued upon if the action is brought within the 8-year statute of limitation; the limitation does not bar renewal or revival of the judgment by filing an action within the prescribed period. Mason v. Mason, 597 P.2d 1322 (Utah 1979).

In actions for fraud, statute does not begin to run until fraud is discovered or could have been reasonably discovered, but even when ac-

tion is not based on fraud, in equity where cause of action is concealed from one in whom it resides by the one against whom it lies, the statute will not run. Attorney Gen. v. Pomeroy, 93 Utah 426, 73 P.2d 1277, 114 A.L.R. 726 (1937).

Statute of limitations begins to run from time of the rendition and entry of judgment or decree. Sweetser y. Fox, 43 Utah 40, 134 P. 599, 47 L.R.A. (n.s.) 145, 1916C Ann. Cas. 620 (1913).

Paternity proceedings.

This section imposes no time limitation upon the institution of a suit to establish paternity and enforce an obligation for support arising on account thereof. Nielsen v. Hansen, 564 P.2d 1113 (Utah 1977).

Pleadings.

Trial court did not abuse discretion in permitting defendants to amend answer to set up defense of limitations at conclusion of plaintiff's evidence, where defendants, as condition of amendment, agreed to pay costs from time of first answer to time of offering amendment. Attorney Gen. v. Pomeroy, 93 Utah 426, 73 P.2d 1277, 114 A.L.R. 726 (1937).

Complaint based on judgment is timely under this section though filed one day after expiration of eight-year limitation period where previous day was Sunday, in view of former §§ 88-2-7 and 88-2-8 (Code 1943). Nelson v. Jorgenson, 66 Utah 360, 242 P. 945 (1926).

Stipulations.

Parties to contract may stipulate for period of limitations shorter than that fixed by statute of limitations. Clark v. Lund, 55 Utah 284, 184 P. 821 (1919).

Support or maintenance.

The eight-year statute of limitations applies to past due unpaid installments for alimony or support of minor children, and therefore execution may issue only for the arrearages accumulated within a period of eight years. Seeley v. Park, 532 P.2d 684 (Utah 1975).

A Utah action brought in 1978 to enforce a 1975 Ohio action for support arrearages, which also included a 1967 Ohio action for support arrearages, was timely filed under this section. Logan v. Schneider, 609 P.2d 943 (Utah 1980).

Tolling.

Action to renew a judgment brought more than eight years after the date of entry of the original judgment was barred by this section even though defendant had signed a written agreement acknowledging the obligation and had made some payments thereon less than eight years before commencement of the action. The common-law rule which tolled the limitation period in case of acknowledgment or part payment is limited by § 78-12-44 so that it now applies only to contract actions. Yergensen v. Ford, 16 Utah 2d 397, 402 P.2d 696 (1965).

In action by administrator, indebtedness created by check was held to be barred, and statute was not tolled by unauthorized acts of plaintiff. Bingham v. Walker Bros., Bankers, 75 Utah 149, 283 P. 1055 (1929).

COLLATERAL REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d Divorce and Separation §§ 1073, 1074; 46 Am. Jur. 2d Judgments § 897 et seq.

C.J.S. — 27C C.J.S Divorce §§ 684 to 693; 50 C.J.S. Judgments §§ 854, 871; 67A C.J.S. Parent and Child §§ 73 to 89.

A.L.R. — Statute of limitations: effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued, 28 A.L.R.3d 1141.

Key Numbers. — Divorce ⇦ 311; Judgment ⇦ 910, 934; Parent and Child ⇦ 3.3(4), 3.4(2).

78-12-23. Within six years — Mesne profits of real property — Instrument in writing — Distribution of criminal proceeds to victim.

Within six years:

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

(2) an action upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in § 78-12-22.

(3) an action instituted under § 78-11-12.5 regarding distribution of criminal proceeds to any victim.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-23; L. 1984, ch. 16, § 2.

Amendment Notes. — The 1984 amendment added Subsection (3).

Cross-References. — Product Liability Act, statute of limitations, § 78-15-3.

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

NOTES TO DECISIONS

Analysis

Breach of contract.

Action for damages to property growing out of city's construction of canal over right of way, granted to city in consideration of city's covenant to do work so as not to damage grantor's property, was action for breach of contract, and hence limitation on action was controlled by this section. Thomas E. Jeremy Estate v. Salt Lake City, 87 Utah 370, 49 P.2d 405 (1935).

Where parties entered into contract whereby defendant was to ship goods to plaintiff at a specific price "f.o.b." York, Penn., and plaintiff instructed defendant to ship some of the goods to a point close to York, freight collect, and then plaintiff paid the freight and also paid defendant the specific price for the goods, an action by plaintiff to recover the freight charges that he paid was founded on a contract rather than an action to recover money paid under mistake. Hardinge Co. v. Eimco Corp., 1 Utah 2d 320, 266 P.2d 494 (1954).

Where land contract contained no provision for return of payments in case seller should default, purchaser's action for payments was as one for money had and received, and consequently four-year limitation on actions for relief not otherwise provided for was applicable rather than predecessor to this section. Brown v. Cleverly, 93 Utah 54, 70 P.2d 881 (1938), distinguished, Hardinge Co. v. Eimco Corp., 1 Utah 2d 320, 266 P.2d 494 (1954).

Duty of stockholder to pay company's taxes arose out of implied contract and not an express contract; accordingly, it was not governed by this section. Petty & Riddle, Inc. v. Lunt, 104 Utah 130, 138 P.2d 648 (1942), distinguished, Hardinge Co. v. Eimco Corp., 1 Utah 2d 320, 266 P.2d 494 (1954).

Breach of warranty.

Suit based on breach of warranty in contract for sale of horse was governed by this section, and not by § 78-12-26. Clark v. Lund, 55 Utah 284, 184 P. 821 (1919).

Contractor's bond.

This section is applicable to an action by an unpaid materialman to recover from a subcontractor or his surety on a bond executed at the request of the prime contractor. Arnold Mach. Co. v. Prince, 550 P.2d 193 (Utah 1976).

Corporate mismanagement action.

Three-year statute of limitation under § 78-12-27 was applicable to violation by directors of corporation grounded upon failure to meet requirements of Investment Company Act of 1940, notwithstanding argument that since personal check, promissory note and stock certificates were written indicia of agreement, statute providing six-year limitation period for action based upon written contract should have been applied. Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928, 89 S. Ct. 1194, 22 L. Ed. 2d 459 (1969).

Corporate stock purchase.

This section was applicable to action on written obligation of one who united with several others to purchase corporate stock, in which all were interested in proportion to number of shares subscribed for. McMillan v. Whitley, 38 Utah 452, 113 P. 1026 (1911).

Instrument in writing.

A cause of action is "founded" upon an instrument in writing, so as to be subject to this section, when the contract, obligation or liability grows out of the written instrument, not remotely or ultimately, but immediately; section would have same meaning if word "founded" was deleted. Bracklein v. Realty Ins. Co., 95 Utah 490, 80 P.2d 471 (1938).

Farmer's obligation to pay for work performed in leveling a portion of his land was founded upon a written instrument and thus governed by six-year statute of limitations under this section rather than four-year period under § 78-12-25 where, after preliminary negotiations and oral estimate, parties executed a written instrument, stating the price to be paid, in form of documents supplied by federal agency which was paying portion of cost. Evans v. Pickett Bros. Farms, 28 Utah 2d 125, 499 P.2d 273 (1972).

Written lien on real estate granted by aged couple to division of public welfare in order to qualify for old-age assistance and to secure reimbursement of moneys paid by division was not "obligation created by statute" but was rather an "obligation based upon an instrument in writing" and hence was subject to a six-year statute of limitations. Juab County Dep't of Pub. Welfare v. Summers, 19 Utah 2d 49, 426 P.2d 1 (1967).

Insurance policy.

Recovery on health and accident policy was barred where action was not filed until 32 years after loss. Amundson v. Mutual Benefit Health & Accident Ass'n, 13 Utah 2d 407, 375 P.2d 463 (1962).

Action to recover automatic insurance benefits on war risk insurance which accrued in 1917 was barred by this statute, where claim was not presented to bureau until 1931, and suit was not brought until 1932, more than six years after accrual of action. United States v. Preece, 85 F.2d 952 (10th Cir. 1936).

Judgment lien.

Statute was not a bar to action to impress judgment lien on property, where complaint alleged that property had been transferred to defraud creditors, and that property was held in trust for defendant. Moulton v. Morgan, 115 Utah 119, 202 P.2d 723 (1949).

Mortgage foreclosures.

Mortgage foreclosure proceedings are governed by this section. Crompton v. Jenson, 78 Utah 55, 1 P.2d 242 (1931).

Liability pursuant to purchaser's assumption of mortgage on real estate was "founded upon an instrument in writing" and thus subject to six-year limitation prescribed by this section where deed contained an assumption clause; fact that purchaser did not sign deed and that assumption clause was inserted pursuant to his prior oral promise to pay mortgage note did not render liability one "not founded upon an instrument in writing" so as to be subject to four-year limitation of § 78-12-25. Bracklein v. Realty Ins. Co., 95 Utah 490, 80 P.2d 471 (1938).

This section prescribes the limitation for bringing action to foreclose corporate mortgage securing its bonds. Weir v. Bauer, 75 Utah 498, 286 P. 936 (1930).

Junior mortgagee or grantee may invoke this section when statute has run against prior grantee or mortgagee. Crompton v. Jenson, 78 Utah 55, 1 P.2d 242 (1931).

In an action to foreclose on a note secured by a mortgage, the defense of laches was not available, even though foreclosure is an equity action, where the six-year statute of limitations on obligations in writing had two years yet to run when the action was commenced. F.M.A. Fin. Corp. v. Build, Inc., 17 Utah 2d 80, 404 P.2d 670 (1965).

Though tax deed through which defendant claimed was inoperative to convey good title, this did not prevent defendant from invoking aid of statute of limitations in suit by mortgagee to foreclose mortgage, since equitable lien acquired by payment of taxes gave defendant interest in property. Graves v. Seifried, 31 Utah 203, 87 P. 674 (1906).

Open account.

The statute of limitations governing open accounts (§ 78-12-25), not this section governing written contracts, was applicable to a claim by a warehouse owner and retail distributor against a tire company, alleging that the company had breached an agreement to ship merchandise through the plaintiff's warehouse whenever possible, since the parties had engaged in a series of transactions in which the warehouse owner was debited for the tires it purchased and credited for its commissions, which constituted an "open account." Firestone Tire & Rubber Co. v. Pearson, 769 F.2d 1471 (10th Cir. 1985).

Pleadings.

Where complaint was filed and no summons was issued, amended complaint filed seven years thereafter was not barred by this section, since original complaint constituted commencement of action, and it not having proceeded to its merits or not being dismissed was

still pending. Askwith v. Ellis, 85 Utah 103, 38 P.2d 757 (1934).

If plaintiff claims that bar of this statute was tolled or otherwise inapplicable, he must plead and prove same. Clawson v. Boston Acme Mines Dev. Co., 72 Utah 137, 269 P. 147, 59 A.L.R. 1318 (1928).

Where complaint was filed within period of limitations, action was not barred, notwithstanding summons was not served until after such period had expired. Keyser v. Pollock, 20 Utah 371, 59 P. 87 (1899).

Promise to return amount paid on note.

Six-year, and not four-year, statute of limitations held applicable to action by landowners to recover from real estate brokers amount owners were compelled to pay on note which brokers promised in writing would be returned to them. Kennedy v. Griffith, 98 Utah 183, 95 P.2d 752 (1939).

Running of statute.

Mere dissolution of partnership did not of itself give rise to a cause of action in partners so as to start running of statute; absent proof to establish claim was barred by statute of limitations, it was error to nonsuit plaintiff in his action for accounting. Kimball v. McCornick, 70 Utah 189, 259 P. 313 (1927).

In action for breach of warranty as to quality of certain elevators to be installed, where contract of 1912 expressly provided that elevator company should retain title until elevators were accepted and paid for, held action for breach of warranty commenced in 1919 was not barred by six-year statute of limitations, in view of fact that elevators were not accepted and paid for until 1915. M.H. Walker Realty Co. v. American Sur. Co., 60 Utah 435, 211 P. 998 (1922).

In action for breach of warranty as to quality, statute of limitations does not begin to run until there is sale of article warranted. M.H. Walker Realty Co. v. American Sur. Co., 60 Utah 435, 211 P. 998 (1922).

Statute of limitations begins to run on action on breach of warranty of title from time of eviction, and when title is in United States, from time purchaser recognized and yielded to such paramount title, so that such an action was not barred by this section where it was commenced within year after purchaser found that title was in United States. East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 65 Utah 560, 238 P. 280 (1925).

This section did not bar depositor's action against bank on certificate of deposit, even though depositor had left funds with bank for fifteen years during which time a third party wrongfully cashed the certificate, since depositor had no cause of action, and statute did not begin running, until he demanded payment. Esponda v. Ogden State Bank, 75 Utah 117, 283 P. 729 (1929).

Attorney's written receipt for promissory notes, delivered to him for collection, held, for purposes of limitations, to have constituted contract; client's right of action against attorney, in matter of notes not accounted for by him, did not begin to run until attorney refused or failed to return notes on demand therefor. Stevens v. Rogers, 16 Utah 105, 51 P. 261 (1897).

A covenant against encumbrances in warranty deed is, in effect, a covenant to indemnify where encumbrance is charge or lien against land which can be extinguished by payment, and hence statute of limitations begins to run when grantee is damnified so that action by grantee to recover amount paid to extinguish tax lien brought within six years from time of payment, but more than six years from time deed was given, was not barred by limitations. Soderberg v. Holt, 86 Utah 485, 46 P.2d 428, 99 A.L.R. 1041 (1935).

A cause of action for a breach of a covenant against encumbrances in a warranty deed remains viable for six years after the grantee first receives notice, either actual or constructive, of an encumbrance against his property. Christiansen v. Utah-Idaho Sugar Co., 590 P.2d 1251 (Utah 1979).

On insolvency of building and loan association and appointment of receiver to wind up affairs, mortgage indebtedness of borrowing members became immediately due and collectible by receiver, and statute of limitations began to run against mortgage from that time. Graves v. Seifried, 31 Utah 203, 87 P. 674 (1906).

In action by pledgee to recover loss sustained when it accepted shares of defendant's stock as pledgee, which stock was void because representing an overissue procured through fraud, statute of limitations did not begin to run until infirmity in certificate was discovered or, by reasonable diligence, could have been discovered; fact that no assessments had been made on certificate would not charge pledgee with constructive notice that certificate was spurious, when plaintiff had no actual knowledge of these facts, and as pledgee had no duty or occasion to inquire in regard to them. Commercial Bank v. Spanish Fork South Irrigation Co., 107 Utah 279, 153 P.2d 547 (1944).

Where bonds or warrants of state or political subdivision are payable only from certain money or funds in treasury, statute does not run so long as fund remains unprovided; but where obligation is payable unconditionally, statute runs from maturity of obligation notwithstanding no funds may be available from which to meet obligation, it being creditor's duty to reduce claim to judgment prior to expi-

ration of statutory limitation period. Parker v. Weber County Irrigation Dist., 68 Utah 472, 251 P. 11 (1926).

The statute of limitations does not begin to run against an action in replevin for return of the security on a note until the debt is due and demand is made for return of the security. Ketchum v. Lyon, 27 Utah 2d 138, 493 P.2d 645 (1972).

Where subcontractor brought action against a supplier and manufacturer within four years after delivery, the more specific UCC three-year limitation period applied, rather than the six-year limitation period for a contract in writing. Perry v. Pioneer Whsle. Supply Co., 681 P.2d 214 (Utah 1984).

Nature of cause of action that seller of piano and bench on title-retaining note had against third person who had possession as donee of original purchaser was determinative of whether Subsection (2) of this section or § 78-12-26(2) was applicable in action by seller for possession. Taylor Bros. Co. v. Duden, 112 Utah 436, 188 P.2d 995 (1948).

Action for specific performance of real estate contract in which a new deed was substituted for the deed originally placed in escrow was barred by statute of limitations since plaintiff had more than eight years prior to the filing of the complaint for reasonable inquiry that would have revealed the mistake or fraud. McConkie v. Hartman, 529 P.2d 801 (Utah 1974).

Surety bonds.

Indemnity or guaranty bond between manufacturer and its consignee, a retailer, was a contract or obligation in writing so that action to recover or bond for breach of contract was governed by this section. Victor Sewing-Machine Co. v. Crockwell, 3 Utah 152, 1 P. 470 (1881), aff'd, 112 U.S. 676, 5 S. Ct. 327, 28 L. Ed. 852, 112 U.S. 688, 5 S. Ct. 324, 28 L. Ed. 856 (1885).

Tolling.

The six-year statute of limitation applicable to plaintiff's breach of contract action was not tolled by defendant's settlement with other claimants where the plaintiff was not a joint obligee with the other claimants. Fredericksen v. Knight Land Corp., 667 P.2d 34 (Utah 1983).

Notwithstanding this section, where a wife and husband execute a mortgage on husband's real property to secure a debt of husband and wife or the debt of the husband, payments made upon debt by husband, or a written acknowledgment of debt by husband made prior to bar of statute of limitations, suspends running of statute as to wife's inchoate right in respect to foreclosure of mortgage. Tracy Loan & Trust Co. v. Luke, 72 Utah 231, 269 P. 780 (1928).

Part payment of principle or interest by one of two or more joint and several obligors does not of itself toll statute against other co-obligors; where there was no evidence that decedent's widow knew of, consented to or had anything to do with part payments made by decedent, those payments did not suspend operation of statute as to her. Holloway v. Wetzel, 86 Utah 387, 45 P.2d 565, 98 A.L.R. 1006 (1935).

An action on note, commenced six years, one month and 24 days after note fell due, was not barred as to endorser, where evidence justified finding that endorser had been out of state in excess of one month and 24 days. Upton v. Heiselt Constr. Co., 116 Utah 83, 208 P.2d 945 (1949).

Payments made by an assignee for benefit of assignor's creditors does not of itself toll statute as to assignor; widow's making of assignment and listing of creditors to be paid did not constitute a written acknowledgment of a particular note executed by her jointly and severally with her deceased husband. Holloway v. Wetzel, 86 Utah 387, 45 P.2d 565, 98 A.L.R. 1006 (1935).

Mortgagor's payment of taxes on mortgaged property in accordance with provision of mortgage did not constitute a "payment" on principal amount of mortgagor's obligation, within meaning of § 78-12-44, so as to toll statute of limitations in regard to mortgage. Upton v. Heiselt Constr. Co., 116 Utah 83, 208 P.2d 945 (1949).

Torts.

The word "liability" in this section does not extend to a tort. Thomas v. Union Pac. R.R., 1 Utah 235 (1876).

Waiver.

Provision in a promissory note waiving the right to plead statute of limitations as a defense is void as against public policy. Hirtler v. Hirtler, 566 P.2d 1231 (Utah 1977).

Cited in Travelers Express Co. v. State, No. 19216 (Utah Sup. Ct. filed Jan. 15, 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 92 et seq.

C.J.S. — 53 C.J.S. Limitations of Actions § 58 et seq.

A.L.R. — Time limitations as to claims based on uninsured motorist clause, 28 A.L.R.3d 580.

Insurer's failure to pay amount of admitted liability as precluding reliance on statute of limitations, 41 A.L.R.3d 1111.

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. — Limitation of Actions ⇐ 24, 25.

78-12-24. Actions against public officers — Within six years.

An action by the state or any agency or public corporation thereof against any public officer for malfeasance, misfeasance, or nonfeasance in office or against any surety upon his official bond may be brought within six years after such officer ceases to hold his office, but not thereafter.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-24.

Cross-References. — Governmental Immunity Act, § 63-30-1 et seq.

Misconduct by public servants, §§ 76-8-201, 76-8-202.

COLLATERAL REFERENCES

C.J.S. — 53 C.J.S. Limitations of Actions § 82 et seq.

Key Numbers. — Limitation of Actions ⇐ 58(2).

78-12-25. Within four years.

Within four years:

(1) an action upon a contract, obligation or liability not founded upon an instrument in writing; also on an open account for goods, wares and merchandise, and for any article charged in a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

(2) an action for relief not otherwise provided for by law.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-25.

Cross-References. — Antitrust Act actions, § 76-10-925.

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

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Assigned cause of action.

The fact that a cause of action is made assignable by a statutory enactment does not make the cause so assigned a liability created by statute, so that where employee assigned cause of action against third person to employer, limitation on such cause of action was fixed by Subsection (2) and not by § 78-12-26. Salt Lake City v. Industrial Comm'n, 81 Utah 213, 17 P.2d 239 (1932).

Breach of fiduciary duty.

In action by corporation against its secretary for wrongful surrender to a defaulting debtor of bank stock allegedly pledged as security for payment of promissory notes, where allegations of amended complaint charged deceit, but charge as a whole indicated that action clearly involved a breach of fiduciary duty, four-year limitation on actions for relief not otherwise provided for was applicable rather than predecessor to this section. Kamas Sec. Co. v. Taylor, 119 Utah 241, 226 P.2d 111 (1950).

Damage of private property for public use.

Right of abutting owner to recover damages resulting from change of street grade is given by Utah Const. Art. I, Sec. 22, providing that private property shall not be damaged for public use without compensation, and action to recover such damages was governed by predecessor to Subsection (1), and not by predecessor to § 78-12-26. Webber v. Salt Lake City, 40 Utah 221, 120 P. 503, 37 L.R.A. (n.s.) 1115 (1911).

Divorce actions.

Subsection (2) does not apply to divorce actions. Tufts v. Tufts, 8 Utah 142, 30 P. 309, 16 L.R.A. 482 (1892).

Excessive freight charges.

Suit by shipper to recover excessive freight charges collected by railroad was governed by Subsection (1) of this section, and not by §§ 78-12-26 and 78-12-29. Jeremy Fuel & Grain Co. v. Denver & R.G.R.R., 60 Utah 153, 207 P. 155 (1922).

Extension of period.

Where plaintiff performed legal services for defendant from 1921 to 1951 and defendant acknowledged the existing liability in a letter in 1948, plaintiff was not precluded from recovering for the services rendered earlier since under § 78-12-44 the action could be brought within the period prescribed after the acknowledgement. It was not necessary that there be both an acknowledgment and a promise to pay. Beck v. Dutchman Coalition Mines Co., 2 Utah 2d 104, 269 P.2d 867 (1954).

Allowance for room, board and pocket money could not be construed as part payment in recognition of obligation to pay wages, and did not extend period allowed for bringing action to recover wages. Morris v. Russell, 120 Utah 545, 236 P.2d 451 (1951), distinguished, Taylor v. E.M. Royle Corp., 1 Utah 2d 175, 264 P.2d 279, 26 A.L.R.2d 947 (1953).

Federal civil rights actions.

All 42 U.S.C. § 1983 federal civil rights actions brought in federal court in Utah are subject to the four-year limitations period provided in this section. Mismash v. Murray City, 730 F.2d 1366 (10th Cir. 1984), cert. denied, 471 U.S. 1052, 105 S. Ct. 2111, 85 L. Ed. 2d 476 (1985) (See now § 78-12-28 (3)).

Indemnity or guaranty bond.

Subsection (1) did not apply to action upon an indemnity or guaranty bond. Victor Sewing-Machine Co. v. Crockwell, 3 Utah 152, 1 P. 470 (1881), aff'd, 112 U.S. 676, 5 S. Ct. 327, 28

L. Ed. 852, 112 U.S. 688, 5 S. Ct. 324, 28 L. Ed. 856 (1885).

Judgment lien.

Neither subdivision of this section barred action to impress judgment lien on property where complaint alleged that property had been transferred to defraud creditors and that property was held in trust for defendant. Moulton v. Morgan, 115 Utah 119, 202 P.2d 723 (1949).

Land contract.

Where land contract contained no provision for return of payments in case seller should default, purchaser's action for payments was as one for money had and received, and consequently this section, and not § 78-12-23, was applicable. Brown v. Cleverly, 93 Utah 54, 70 P.2d 881 (1937), distinguished, Hardinge v. Eimco Corp., 1 Utah 2d 320, 266 P.2d 494 (1954).

Malpractice.

In action to recover attorney's fees, defendants' counterclaim for malpractice and negligence of plaintiff-counsel was barred by the four-year statute of limitations; any negligence would have occurred more than four years prior to the filing of the counterclaim and should have been discovered prior to that time. Hansen v. Petrof Trading Co., 527 P.2d 116 (Utah 1974).

Mortgages.

Fact that purchaser did not sign deed containing mortgage assumption clause and that clause had been inserted pursuant to his prior oral promise to pay mortgage note did not render liability one "not founded upon an instrument in writing"; therefore purchaser's liability on mortgage assumption was subject to six-year limitation on written instruments under § 78-12-23 and not by four-year limitation under this section. Bracklein v. Realty Ins. Co., 95 Utah 490, 80 P.2d 471 (1938).

Nuisances.

In action for depreciation of property resulting from construction and operation of railroad in street fronting property, any nuisance was permanent and only one action could be maintained for damages resulting therefrom; such an action was subject to four-year limitations period. Johnson v. Utah-Idaho Cent. Ry., 68 Utah 309, 249 P. 1036 (1926).

Open account.

Subsection (1) applies to goods and wares sold on open account. O'Donnell v. Parker, 48 Utah 578, 160 P. 1192 (1916).

The statute of limitations in this section governing open accounts, not the statute governing contracts (§ 78-12-23), was applicable to a claim by a warehouse owner and retail distributor against a tire company, alleging that the company had breached an agreement to ship merchandise through the plaintiff's warehouse whenever possible, since the parties had engaged in a series of transactions in which the warehouse owner was debited for the tires it purchased and credited for its commissions, which constituted an "open account." Firestone Tire & Rubber Co. v. Pearson, 769 F.2d 1471 (10th Cir. 1985).

Where, in claim by attorney for legal services allegedly rendered a corporation, it appeared that "the items of the account drifted along for ten years without demand for payment or a credit," and "the evidence tends to show that each item, if not constituting a separate employment, was susceptible of that interpretation," there was no "open account" as contemplated by the statute. Bishop v. Parker, 103 Utah 145, 134 P.2d 180 (1943).

In action to recover wages for services rendered which was brought in 1950 on a contract alleged to have been entered into in 1943, wherein the plaintiff alleged both an express contract and also sought to recover on a quantum meruit basis, such action was not an action upon an open account within the exception of this section. Morris v. Russell, 120 Utah 545, 236 P.2d 451 (1951), distinguished, Taylor v. E.M. Royle Corp., 1 Utah 2d 175, 264 P.2d 279, 26 A.L.R.2d 947 (1953).

Oral contract.

Mortgagee's right to recover deficiency judgment against grantee of mortgaged realty, who, as part of consideration for conveyance, orally agreed to pay mortgages, held barred by statute, where action to foreclose was not brought until after lapse of statutory period following time when mortgage notes became due. Thompson v. Cheesman, 15 Utah 43, 48 P. 477 (1897).

Under Subsection (1), an action for specific performance of alleged verbal contract to transfer certain shares of mining stock, upon which right of action accrued in 1884, was barred if not commenced until 1892. Whitehill v. Lowe, 10 Utah 419, 37 P. 589 (1894).

Action for specific performance of oral contract to convey land made a few days before execution of deed to real estate which was allegedly part of same transaction brought over five years after execution of deed, held barred. Last Chance Ranch Co. v. Erickson, 82 Utah 475, 25 P.2d 952 (1933).

Oral modification of written contract.

Oral modification changing some of the terms of written contract for construction of signal pole line (viz. agreement to cover all of contractor's losses and to pay depreciation and capital expense) rendered the contract part oral and part written so that four-year limitation on oral contracts governed contractor's action to recover under oral modifications.

Strand v. Union Pac. R.R., 6 Utah 2d 279, 312 P.2d 561 (1957).

Overpayment.

Where an action is brought to recover an excessive amount paid—either under a written contract or other agreement—where there is no written promise to return said amount, that action is founded on "implied contract" and the statute of limitations with reference to obligations not founded on a written instrument is applicable. Petty & Riddle, Inc. v. Lunt, 104 Utah 130, 138 P.2d 648 (1942), distinguished, Hardinge v. Eimco Corp., 1 Utah 2d 320, 266 P.2d 494 (1954).

Purpose of section.

Subsection (1), which may be designated as general statute of limitations, is statute of repose enacted as matter of public policy to fix limit within which action must be brought or obligation be presumed to have been paid, underlying purpose of which is to prevent unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution. Gray Realty Co. v. Robinson, 111 Utah 521, 184 P.2d 237 (1947).

Personal injuries.

Employee's action against third party for injuries received in course of employment was governed by Subsection (2). Salt Lake City v. Industrial Comm'n, 81 Utah 213, 17 P.2d 239 (1932).

Pleading and proof.

If plaintiff claims that bar of statute has been tolled or is otherwise inapplicable, he must sufficiently plead and prove the same. Clawson v. Boston Acme Mines Dev. Co., 72 Utah 137, 269 P. 147, 59 A.L.R. 1318 (1928).

Quieting title.

While actions by which nothing is sought except to remove a cloud from or to quiet title to real property as against apparent or stale claims are not barred by statute of limitations, all actions in which principal purpose is to obtain some affirmative relief clearly come within the provisions of Subsection (2). Branting v. Salt Lake City, 47 Utah 296, 153 P. 995 (1915).

Recovery of payments under note.

Six-year statute under § 78-12-23, and not four-year statute under Subsection (1) of this section was applicable to action by landowners to recover from real estate brokers amount owners were compelled to pay on note which brokers promised in writing would be returned to them. Kennedy v. Griffith, 98 Utah 183, 95 P.2d 752 (1938), construing R.S. 1933, §§ 104-2-22 and 104-2-23.

Reformation of instrument.

Lessor's counterclaim for reformation of lease with option to purchase was not barred by statute of limitations where reservation of oil and mineral rights had been omitted from lease-option agreement by mutual mistake of fact of the parties and plaintiff-lessees knew that such rights had been leased to a third party and made no claim to them until shortly before initiating suit for specific performance of option. Bench v. Pace, 538 P.2d 180 (Utah 1975).

Relief not otherwise provided for.

Subsection (2) applies to all actions, legal or equitable, where plaintiff seeks affirmative relief. Branting v. Salt Lake City, 47 Utah 296, 153 P. 995 (1915).

Statute relating to limitations of actions for relief not otherwise provided for was intended to deal with the time in which certain complaints in equity could be filed, and applied to all suits in equity not strictly of concurrent cognizance in law and equity. Fullerton v. Bailey, 17 Utah 85, 53 P. 1020 (1898).

Restraining actions.

Where defendant secured order restraining plaintiff from disposing of moneys collected on execution after defendant's motion for new trial was granted, and in subsequent trial judgment was rendered for plaintiff, defendant was entitled to have moneys collected on execution applied in satisfaction of such judgment under former § 104-9-4, and contention that statute of limitations barred such action was held without merit. Cox v. Dixie Power Co., 81 Utah 94, 16 P.2d 916 (1932).

Subsection (2) applies to action to enjoin an assessment levied on account of a municipal improvement, because it is not a "suit to quiet title," though assessment is a lien, as abutting owner's title is not questioned. Branting v. Salt Lake City, 47 Utah 296, 153 P. 995 (1915).

Running of statute.

Mere dissolution of partnership did not of itself give rise to a cause of action in partners so as to start running of statute; absent proof to establish claim was barred by statute of limitations, it was error to nonsuit plaintiff in his action for accounting. Kimball v. McCornick, 70 Utah 189, 259 P. 313 (1927).

Statute began to run against action for indemnification for sums paid to satisfy judgment only from time judgment was paid. Culmer v. Wilson, 13 Utah 129, 44 P. 833, 57 Am. St. R. 713 (1896).

Where written contract for sale of land did not provide for return to purchaser, on vendor's failure to convey, of part of purchase price paid, purchaser's cause of action for recovery thereof was on implied contract and accrued on day after one on which vendor should have ten-

dered deed. Duncan v. Gisborn, 17 Utah 209, 53 P. 1044 (1898).

Where money is loaned on understanding that repayment will be made at some unspecified, future time, the statute of limitations does not begin to run until a reasonable time has elapsed; what is a reasonable time is a question of fact. O'Hair v. Kounalis, 23 Utah 2d 355, 463 P.2d 799 (1970).

In action to obtain subrogation to mortgagee's rights under mortgage, statute of limitations began to run when mortgage notes became due and not when, to prevent foreclosure, plaintiff paid such notes. Fullerton v. Bailey, 17 Utah 85, 53 P. 1020 (1898).

The statute of limitations begins to run against an open account on the day following the last payment, and on an account stated on the day following the agreement. Woolf v. Gray, 48 Utah 239, 158 P. 788 (1916).

In action against administrator for services rendered decedent commencing in 1908 and continuing, with temporary intermission of a few months between December, 1915, and May, 1916, until death of decedent in 1922, contention that action for services, except those services rendered within four years immediately preceding death of decedent, was barred by Subsection (1), was without merit, since such services were deemed to be continuous, and the bar of the statute did not attach until the full period of time had elapsed, the statute having no application where there were merely temporary interruptions in the rendering of services. Gulbranson v. Thompson, 63 Utah 115, 222 P. 590 (1923).

Action against administratrix for collection of claim against estate based on open account was barred where action was not commenced within four years after last charge was entered in account as required by this section or within one year after issuance of letters of administration as permitted by former § 104-2-38, even though claim was presented to administratrix within time specified in notice to creditors and action was commenced within three months after notice of rejection of claim, and notwithstanding that claim was not barred during lifetime of debtor-decedent. Gray Realty Co. v. Robinson, 111 Utah 521, 184 P.2d 237 (1947).

In action to recover for services rendered where plaintiff established that services were compensable monthly, the statute of limitations would start to run at the end of each month, and plaintiff could not recover for wages for services rendered four years prior to time suit was instituted. Morris v. Russell, 120 Utah 545, 236 P.2d 451, 26 A.L.R.2d 947 (1951).

Claims of state and county against irrigation district for services rendered during its organization are general obligations of district, and statute begins to run from time last of services were rendered, notwithstanding no funds were ever provided out of which such obligations could be paid; Subsection (1) was applicable to such action by state or county against irrigation district, in view of § 78-12-33. Parker v. Weber County Irrigation Dist., 68 Utah 472, 251 P. 11 (1926).

In action by pledgee to recover loss sustained by plaintiff when it accepted shares of defendant's stock as pledgee, which stock was void because representing an overissue procured through fraud, statute did not begin to run until infirmity in certificate was discovered or, by reasonable diligence, could have been discovered. Fact that no assessments had been made on certificate would not charge pledgee with constructive notice that certificate was spurious, when plaintiff had no actual knowledge of these facts, and as pledgee had no duty or occasion to inquire in regard to them. Commercial Bank v. Spanish Fork South Irrigation Co., 107 Utah 279, 153 P.2d 547 (1944).

Statute of limitations runs against right to recover illegal tax, paid under protest, from date on which such tax was paid. Centennial Eureka Mining Co. v. Juab County, 22 Utah 395, 62 P. 1024 (1900); Neilson v. San Pete County, 40 Utah 560, 123 P. 334 (1912).

Statute of limitations began to run against claim for use taxes allegedly due from foreign corporation for years 1940 to 1943, inclusive, from time that returns on forms supplied by tax commission were actually filed by corporation, where commission had destroyed its own records upon which it based its claim. Illinois Powder Mfg. Co. v. State Tax Comm'n, 117 Utah 511, 217 P.2d 580 (1950).

Where trustee denies the obligation of his trust, and cestui que trust has notice of his repudiation, then statute of limitations begins to run against a suit to enforce the same and an accounting. Wood v. Fox, 8 Utah 380, 32 P. 48 (1893), aff'd sub nom., Whitney v. Fox, 166 U.S. 637, 17 S. Ct. 713, 41 L. Ed. 1145, 166 U.S. 648, 17 S. Ct. 1003, 41 L. Ed. 1149 (1897).

When a trustee denies the trust, or denies liability under the trust relation, and the beneficiary has notice of such repudiation, then the statute of limitations attaches, and under Subsection (2) an action to recover the interest of a beneficiary in the proceeds of a sale made by such trustee after four years had elapsed was barred by limitations. Felkner v. Dooly, 28 Utah 236, 78 P. 365, 3 Ann. Cas. 199 (1904).

Stockholder's duty to pay taxes.

Duty of stockholder to pay company's taxes was held to arise out of "implied contract" and not an express contract; accordingly, it was governed by this section. Petty & Riddle, Inc. v. Lunt, 104 Utah 130, 138 P.2d 648 (1942),

distinguished, Hardinge v. Eimco Corp., 1 Utah 2d 320, 266 P.2d 494 (1954).

Taking for public use.

Subsection (2) did not govern action for compensation for taking of land by railroad without landowner's consent and without condemnation proceedings; it was governed by § 78-12-6. Salt Lake Inv. Co. v. Oregon Short Line R.R., 46 Utah 203, 148 P. 439 (1915), aff'd, 246 U.S. 446, 38 S. Ct. 348, 62 L. Ed. 823 (1918).

Tolling.

Action by administrator upon check is barred by Subsection (1), and bar is not removed nor statute tolled by unauthorized application of payments by plaintiff. Bingham v. Walker Bros., Bankers, 75 Utah 149, 283 P. 1055 (1929).

In action to recover judgment for amount of rejected claim against estate of defendant's intestate, defended on ground statute of limitations had run, held, testimony of plaintiff that defendant's intestate promised to care for graves of plaintiff's children, and let value of such services apply on his indebtedness to plaintiff, was insufficient to toll statute where 35 years had elapsed since indebtedness sued on in action was incurred. Hawkley v. Heaton, 54 Utah 314, 180 P. 440 (1919).

Commencement of an action in justices' court saves the bar of the statute. Quealy v. Sullivan, 42 Utah 565, 132 P. 4 (1913).

Pendency of equity action in city court, which had no jurisdiction, held not to toll the statute of limitations. American Theatre Co. v. Glasmann, 95 Utah 303, 80 P.2d 922 (1938).

Trial court erred in failing to apply federal tolling policy (that statute does not begin to run until fraud is discovered) with result that action against corporation for failure to meet requirements of Investment Company Act of 1940 was not barred. Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928, 89 S. Ct. 1194, 22 L. Ed. 2d 459 (1969).

That one partner confessed judgment on an account before the statute had run has no effect as against the other after four years except to make the claim an account stated, so that in an action begun after such time it is immaterial whether one partner could bind the other. Woolf v. Gray, 48 Utah 239, 158 P. 788 (1916).

Part payment of principle or interest by one of two or more joint and several obligors does not of itself toll statute against other co-obligors; where there was no evidence that decedent's widow knew of, consented to or had anything to do with part payments made by decedent, those payments did not suspend operation of statute as to her. Holloway v. Wetzel, 86 Utah 387, 45 P.2d 565, 98 A.L.R. 1006 (1935).

Payments made by an assignee for benefit of assignor's creditors did not of itself toll statute as to assignor; widow's making of assignment and listing of creditors to be paid did not constitute a written acknowledgment of a particular note executed by her jointly and severally with her deceased husband. Holloway v. Wetzel, 86 Utah 387, 45 P.2d 565, 98 A.L.R. 1006 (1935).

Torts.

Action for damages to plaintiff's land, due to cement, dust and smoke emanating from defendant's cement plant, was not barred where brought ten years after plant's commencement of operation; it was not barred by three-year statute of limitations (§ 78-12-26, Subsection 1), since it was not an action for trespass, and it was not barred by Subsection (2) of this section, the nuisance constituting a recurring one, rather than a continuing one. Thackery v. Union Portland Cement Co., 64 Utah 437, 231 P. 813 (1924).

Subsection (2) does not govern an action to recover damages for pollution of a pond, brought by plaintiff who does not own any interest in land on which pond is located; it is governed by § 78-12-26(2). Reese v. Qualtrough, 48 Utah 23, 156 P. 955, 14 A.L.R. 94 (1916).

Action against railroad for damages to plaintiff's property by jar of passing trains was governed by Subsection (2), not by § 78-12-26. O'Neill v. San Pedro, L.A. & S.L.R.R., 38 Utah 475, 114 P. 127 (1911).

The tort of reckless misconduct or reckless disregard of safety is a form of negligence, not an intentional tort, and is subject to the four-year statute of limitations in this section. Matheson v. Pearson, 619 P.2d 321 (Utah 1980).

The word "liability" in Subsection (1) did not extend to a tort. Thomas v. Union Pac. R.R., 1 Utah 235 (1876).

Tort actions not otherwise provided for are embraced under provisions of Subsection (2). Thomas v. Union Pac. R.R., 1 Utah 235 (1876).

Trustees.

The defenses of limitations and laches are, as a general rule, not available to a trustee against a beneficiary while the latter is in possession of the property. Child v. Child, 8 Utah 2d 261, 332 P.2d 981 (1958).

Water rights.

While prior appropriator's dam, canal, or other works were in process of construction, but he was not yet ready to actually use the water for the purpose intended, its use by other persons, causing no injury to the first appropriator, gave him no cause of action for relief, either equitable or legal. Accordingly, action for declaratory judgment was not barred by his failure to bring action within four years after prior appropriator had recorded certificate is-

sued by state engineer showing allowance of change in point of diversion and return. Whitmore v. Murray City, 107 Utah 445, 154 P.2d 748 (1944).

Written instrument.

Farmer's obligation to pay for work performed in leveling a portion of his land was founded upon a written instrument and thus governed by six-year statute of limitations under § 78-12-23 rather than four-year period under this section where, after preliminary negotiations and oral estimate, parties executed a written instrument, stating the price to be paid, in form of documents supplied by federal agency which was paying portion of cost. Evans v. Pickett Bros. Farms, 28 Utah 2d 125, 499 P.2d 273 (1972).

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions §§ 100, 101.

C.J.S. — 53 C.J.S. Limitations of Actions §§ 67 to 72, 103.

A.L.R. — Application of statute of limitations to damage actions against public accountants for negligence in performance of professional services, 26 A.L.R.3d 1438.

When statute of limitations commences to run against claim for contribution or indemnity based on tort, 57 A.L.R.3d 867.

What statute of limitations applies to action for contribution against joint tortfeasor, 57 A.L.R.3d 927.

Statute of limitations in illegitimacy or bastardy proceedings, 59 A.L.R.3d 685.

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

Effect of injured employee's proceeding for workmen's compensation benefits on running of statute of limitations governing action for personal injury arising from same incident, 71 A.L.R.3d 849.

Tort claim against which period of statute of limitations has run as subject to setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident, 72 A.L.R.3d 1065.

Key Numbers. — Limitation of Actions ⇐ 26 to 28, 39.

78-12-25.5. Injury due to defective design or construction of improvement to real property — Within seven years.

No action to recover damages for any injury to property, real or personal, or for any injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than seven years after the completion of construction.

(1) "Person" shall mean an individual, corporation, partnership, or any other legal entity.

(2) Completion of construction for the purposes of this act shall mean the date of issuance of a certificate of substantial completion by the owner, architect, engineer or other agents, or the date of the owner's use or possession of the improvement on real property.

The limitation imposed by this provision shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.

This provision shall not be construed as extending or limiting the periods otherwise prescribed by the laws of this state for the bringing of any action.

History: C. 1953, 78-12-25.5, enacted by L. 1967, ch. 218, § 1.

Meaning of "this act". — The term "this act," referred to in Subsection (2), means Laws 1967, Chapter 218, which appears as this section.

Cross-References. — Product Liability Act, statute of limitations, § 78-15-3.

Wrongful death, §§ 78-11-6, 78-11-7.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Time statute commences to run.
—Completion of construction.
Cited.

Constitutionality.

Seven-year limitation is applicable to the owner or tenant in possession at time of construction, or to their successors; those in possession and control of realty have a continuing duty to make repairs, and should discover any fault in construction within seven years; claim that the statute is unconstitutional is without merit. Good v. Christensen, 527 P.2d 223 (Utah 1974).

Time statute commences to run.

—Completion of construction.

This section provides the time when the statute of limitations commences to run as being at the completion of construction, and not discovery of negligence. Hooper Water Imp. Dist. v. Reeve, 642 P.2d 745 (Utah 1982).

Cited in Katsos v. Salt Lake City Corp. (D. Utah 1986) 634 F. Supp. 100.

COLLATERAL REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d Building and Construction Contracts § 114.

A.L.R. — What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor, 1 A.L.R.3d 914.

A.L.R. — Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R.4th 972.

Key Numbers. — Limitation of Actions ⇐ 55(3).

78-12-26. Within three years.

Within three years:

(1) an action for waste, or trespass upon or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting such waste or trespass.

(2) an action for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant.

(3) an action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(4) an action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where

in special cases a different limitation is prescribed by the statutes of this state.

(5) an action to enforce liability imposed by § 78-17-3, except that the cause of action does not accrue until the aggrieved party knows or reasonably should know of the harm suffered.

History: L. 1951, ch. 58, § 1; c. 1943, Supp., 104-12-26; L. 1986, ch. 143, § 1.

Amendment Notes. — The 1986 amendment added Subsection (5) and made stylistic changes throughout the remainder of the section.

Cross-References. — "Action" includes special proceeding, § 78-12-46.

Livestock branding, Chapter 24 of Title 4.

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

Right of action for waste, § 78-38-2.

NOTES TO DECISIONS

Analysis

Accounting.

Action for accounting is not barred, and statute does not begin to run, so long as trust relationship continues to exist without friction. Simper v. Brown, 74 Utah 178, 278 P. 529 (1929).

Damage to personal property.

There is nothing in the statute indicating a legislative purpose to cut off remedies for tortious injuries to personal property, while making it inapplicable to remedies for injuries resulting from the breach of contract. Utah Poultry & Farmers' Coop. v. Utah Ice & Storage Co., 187 F.2d 652 (10th Cir. 1951).

The three-year statute of limitation provided in this section is applicable to actions for negligently caused damage to personal property. Holm v. B & M Serv., Inc., 661 P.2d 951 (Utah 1983).

Where plaintiff, who does not own any interest in real estate on which ponds are located, brings an action for damages for polluting same, such action is governed by Subsection (2) of this section, as it is an action for damages for injury to personal property. Reese v. Qualtrough, 48 Utah 23, 156 P. 955, 14 A.L.R. 94 (1916).

An action against a warehouseman for injury to the personal property stored sounds in tort, and was barred under this section where the warehouse receipt provided that the liability of the warehousemen under the storage contract was limited to the "diligence and care required by law," and thus did not create any duty beyond the legal duty imposed by statute. Utah Poultry & Farmers' Coop. v. Utah Ice & Storage Co., 187 F.2d 652, (10th Cir. 1951).

Damage to real property.

Right of abutting owner to recover damages resulting from change of street grade was given by Utah Const. Art. I, Sec. 22, providing that private property shall not be damaged for public use without compensation, and action to recover such damages was not governed by predecessor to this section but by limitation on actions for relief not otherwise provided for. Webber v. Salt Lake City, 40 Utah 221, 120 P. 503, 37 L.R.A. (n.s.) 1115 (1911).

Action against railroad for damages to plaintiff's property by jar of passing trains was not governed by this section, which applied to common-law trespass, but not trespass on the case. O'Neill v. San Pedro, L.A. & S.L.R.R., 38 Utah 475, 114 P. 127 (1911).

Action for damages to plaintiff's land, due to cement, dust and smoke emanating from defendant's cement plant, was not barred where brought ten years after plant's commencement

of operation; it was not barred by this section since it was not an action for trespass, and it was not barred by predecessor to § 78-12-25(2) since the nuisance was a recurring one rather than a continuing one. Thackery v. Union Portland Cement Co., 64 Utah 437, 231 P. 813 (1924); Ludlow v. Colorado Animal By-Products Co., 104 Utah 221, 137 P.2d 347 (1943).

Fraud.

This section applies to the fraud of a bank in loaning the money of a depositor in a different manner than he directs, for the benefit of the bank, though the fraud is not intentional. Larsen v. Utah Loan & Trust Co., 23 Utah 449, 65 P. 208 (1901).

Suit based on breach of warranty in contract for sale of horse was governed by predecessor to § 78-12-23 rather than predecessor to this section. Clark v. Lund, 55 Utah 284, 184 P. 821 (1919).

The rule that statute of limitations is regarded as a statute of repose, and must be given a fair and reasonable construction and application, obtains in cases of fraud as well as in other cases. Gibson v. Jensen, 48 Utah 244, 158 P. 426 (1916).

Action to recover corporate stock, sold for nonpayment of assessment, on ground of fraud and noncompliance with statute, held barred, where plaintiff, who was one of directors of corporation, voted for assessment, received notice of sale of delinquent stock, and acquiesced in sale of his shares and slept on his rights for more than three years. Raht v. Sevier Mining & Milling Co., 18 Utah 290, 54 P. 889 (1898).

Grantor not in possession, who sought to quiet title to land, which required cancellation of deed on ground of fraud or mistake, held barred by three-year statute of limitations provided by this section, as against contention that it was controlled by the seven-year limitation period of statute relating to recovery of realty. Davidsen v. Salt Lake City, 95 Utah 347, 81 P.2d 374, 118 A.L.R. 195 (1938), explained, Calder v. Third Judicial Dist. ex rel. Salt Lake County, 2 Utah 2d 309, 273 P.2d 168 (1954).

Action to set aside deeds on grounds of fraud and forgery was not barred by three-year limitation where plaintiff did not know she had been cheated out of her property for more than three years prior to commencement of action. De Vas v. Noble, 13 Utah 2d 133, 369 P.2d 290, cert. denied, 371 U.S. 821, 83 S. Ct. 37, 9 L. Ed. 2d 61 (1962).

Under rule that party will not be relieved of consequences of executing instrument without reading it in absence of deceit or misrepresentations by other party, grantors were not entitled to cancellation of simple, one-page deed on claim that three-year limitation period had not run because they were unaware that certain property was included in deed until nineteen years after execution of deed. McKellar v. McKellar, 23 Utah 2d 106, 458 P.2d 867 (1969).

Action for reformation of warranty deed, which had been substituted for the warranty deed originally placed in escrow, was barred, since plaintiff had more than eight years prior to the filing of the complaint to discover the mistake or fraud. McConkie v. Hartman, 529 P.2d 801 (Utah 1974).

Where deed was held in escrow for seven years while grantee paid off a real estate contract, action to reform deed after delivery was not barred by this section since the conveyance was not effective until delivery and statute of limitations did not begin to run until that time; grantor's counterclaim, also seeking reformation, was not barred even though filed after statute would otherwise have run since it arose out of same transaction alleged in complaint, was in existence at time of its filing and was not at that time barred by statute of limitations. Doxey-Layton Co. v. Clark, 548 P.2d 902 (Utah 1976).

In action for unpaid legacies claimed under a will, under plaintiffs' theory of wrongful distribution and constructive trust, the period within which the action should have been commenced ran from the time the persons entitled to the property knew, or by reasonable diligence and inquiry should have known, the relevant facts. Auerbach v. Samuels, 10 Utah 2d 152, 349 P.2d 1112 (1960).

Suit to set aside alleged fraudulent conveyance to corporation was not barred by statute of limitations although filed over four years after conveyance, where evidence was conflicting as to whether plaintiffs knew or should have known of the transfer, and exact method and time of notification were not alleged. Smith Land Co. v. Johnson, 100 Utah 342, 107 P.2d 158 (1940).

Statute of limitations on actions premised on fraud or mistake was not a bar to an action to impress judgment lien on property, where complaint alleged that property had been transferred to defraud creditors, and that property was held in trust for defendant. Moulton v. Morgan, 115 Utah 119, 202 P.2d 723 (1949).

In action to recover damages for fraud in connection with sale of mining claims, evidence supported finding that vendors had not discovered the alleged fraud more than three years before instituting suit. Holland v. Moreton, 10 Utah 2d 390, 353 P.2d 989 (1960).

Action filed October 17, 1960 to set aside deed of interest in mining claims on ground of grantee's fraud was barred where grantor was sufficiently apprised of his cause of action prior to October 17, 1957. Horn v. Daniel, 315 F.2d 471 (10th Cir. 1962).

If a cause of action is barred against the agent of an undisclosed principal, it is also barred against such principal, unless there was fraudulent concealment of the principal; but mere concealment of the agency, if such be done, is not such fraud as will toll the statute. Gibson v. Jensen, 48 Utah 244, 158 P. 426 (1916).

Action against broker for fraud in inducement of contract to buy lot begun more than three years after purchaser learned subdivider did not have title to the lot and refused to make further payments was barred by this section. Ross v. Olson, 25 Utah 2d 342, 481 P.2d 675 (1971).

In the case of fraud, the statute of limitations does not begin to run until the fraud is discovered by the injured person. Esponda v. Ogden State Bank, 75 Utah 117, 283 P. 729 (1929).

Where action to set aside conveyances, consideration for which were stated to be for one dollar and other good and valuable consideration, was not brought until seven years after conveyances were made and recorded, action was barred by this section, since discovery was made, or situation was such as to furnish full opportunity for the discovery of fraud, if any existed, more than three years before bringing of the action, and this section began to run from time reasonably prudent person would have investigated the other valuable consideration and discovered the falsity, if any. Smith v. Edwards, 81 Utah 244, 17 P.2d 264 (1932), distinguished, Leach v. Anderson, 535 P.2d 1241 (Utah 1975).

The time of discovery of fraud is a question of fact; the possession of all information necessary to discovery of fraud satisfies the requirements of Subsection (3) of this section. Horn v. Daniel, 315 F.2d 471 (10th Cir. 1962).

A city is as much bound by the limitation herein provided for as are private corporations and individuals, and it cannot claim ignorance of fraud or mistake if its officers had knowledge thereof or the means of knowledge. Salt Lake City v. Salt Lake Inv. Co., 43 Utah 181, 134 P. 603 (1913), overruled, Nunnelly v. First Fed. Sav. & Loan Ass'n, 107 Utah 381, 154 P.2d 620 (1944).

Time within which an action to obtain relief against mistake or fraud must be commenced is within time fixed by statute, and time begins to run from time aggrieved party acquired, or sought to have acquired, knowledge of the facts constituting the fraud or mistake. Weight v. Bailey, 45 Utah 584, 147 P. 899 (1915).

One informed of such facts as will put a person of ordinary intelligence and prudence on inquiry has received such information as will start the running of limitations, for whatever is notice to excite attention and put one on guard, and call for inquiry, is notice of what inquiry will lead to. Gibson v. Jensen, 48 Utah 244, 158 P. 426 (1916).

There is no discovery of facts by the aggrieved party, where notice is merely given to independent contractor, such as stray gatherer of sheep, who acted for both parties to the suit. Madsen v. Madsen, 72 Utah 96, 269 P. 132 (1928).

Utah statute of limitations pertaining to fraud controlled filing of complaint under § 10(b) of Securities Exchange Act of 1934 and the rules promulgated pursuant thereto because neither federal statute nor rule under which action was brought provided period of time for bringing action. Chiodo v. General Waterworks Corp., 380 F.2d 860 (10th Cir. 1967).

In action for alleged violations of § 10(b) of Securities and Exchange Act and Rule 10b-5 promulgated by securities and exchange commission and for common-law fraud, three-year statute of limitations provided for by this section applied since there is no federal statute of limitations applicable to such alleged violations. Reynolds v. Texas Gulf Sulphur Co., 309 F. Supp. 548 (D. Utah 1970), aff'd as modified sub nom. Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir.), cert. denied, 404 U.S. 1004, 92 S. Ct. 564, 30 L. Ed. 2d 558 (1971).

Application of this section in action based on violation of § 10b of Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder was proper since such actions are based on "fraud or mistake." Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir.), cert. denied, 404 U.S. 1004, 92 S. Ct. 564, 30 L. Ed. 2d 558 (1971), 405 U.S. 918, 92 S. Ct. 943, 30 L. Ed. 2d 788 (1972). Statute began running when the facts constituting the fraud were or should have been discovered. Richardson v. MacArthur, 451 F.2d 35 (10th Cir. 1971).

The three-year statute of limitation provided in this section is applicable to actions under § 206 of the federal Investment Advisers Act. Brown v. Producers Livestock Loan Co., 469 F. Supp. 27 (D. Utah 1978).

The three-year statute of limitation provided in this section is applicable to actions under the antifraud provision of the federal Securities Act, § 17(a). Brown v. Producers Livestock Loan Co., 469 F. Supp. 27 (D. Utah 1978).

The three-year statute of limitation provided in this section is applicable to actions under § 10(b) of the federal Securities Exchange Act and Rule 10(b)-5 promulgated thereunder. Brown v. Producers Livestock Loan Co., 469 F. Supp. 27 (D. Utah 1978). Hackford v. First Sec. Bank, 521 F. Supp. 541 (D. Utah 1981).

Action to recover bonds which were exchanged for stock, on ground that Securities Act of state in which exchange was made was

not complied with, was action for fraud or mistake within this section. Gillespie v. Blood, 81 Utah 306, 17 P.2d 822 (1932).

Three-year statute of limitations applies to claims of fraud brought under Utah blue sky laws (§ 61-1-22). Clegg v. Conk, 507 F.2d 1351 (10th Cir. 1974), cert. denied, 422 U.S. 1007, 95 S. Ct. 2628, 45 L. Ed. 2d 669 (1975).

Additional stock given to plaintiff without consideration after plaintiff had the reasonable ability to discover any fraud could not be construed as a modification of the stock purchase contract so as to toll statutes of limitation. Burningham v. Ott, 525 P.2d 620 (Utah 1974).

Action to have corporate officers declared trustees and as holding in trust for use and benefit of corporation certain mining claim, held barred by this section, where action was brought more than three years after discovery of fraud, since even if relationship between corporation and officers was that of trustee and cestui que trust, trust was not express trust as to which only limitations do not run. Jones Mining Co. v. Cardiff Mining & Milling Co., 56 Utah 449, 191 P. 426 (1920).

An action to impress trust upon real property was not barred by predecessor to Subsection (3) where there was no allegation of fraud or mistake in complaint. Haws v. Jensen, 116 Utah 212, 209 P.2d 229 (1949).

In action by corporation against its secretary for wrongful surrender to a defaulting debtor of bank stock allegedly pledged as security for payment of promissory notes, where allegations of amended complaint charged deceit, but charge as a whole indicated that action clearly involved a breach of fiduciary duty, applicable statute of limitations was that on actions not otherwise provided for rather than statute on actions premised on fraud or mistake. Kamas Sec. Co. v. Taylor, 119 Utah 241, 226 P.2d 111 (1951).

Mistake.

Lessor's counterclaim for reformation of lease with option to purchase was not barred by statute of limitations where reservation of oil and mineral rights had been omitted from lease-option agreement by mutual mistake of fact of the parties and plaintiff-lessees knew that such rights had been leased to a third party and made no claim to them until shortly before initiating suit for specific performance of option. Bench v. Pace, 538 P.2d 180 (Utah 1975).

Under Subsection (3) a mistake in a deed in describing grantee's right in regard to use of a passageway, delivered to grantee thirty years before suit, was barred, since he will be presumed to have known of the mistake. Reese Howell Co. v. Brown, 48 Utah 142, 158 P. 684 (1916).

Pleading and proof.

If plaintiff claims that bar of this statute has been tolled or is otherwise inapplicable, he must sufficiently plead and prove the same. Clawson v. Boston Acme Mines Dev. Co., 72 Utah 137, 269 P. 147, 59 A.L.R. 1318 (1928).

This statute, being an affirmative defense, must be expressly pleaded and proved. De Vas v. Noble, 13 Utah 2d 133, 369 P.2d 290, cert. denied, 371 U.S. 821, 83 S. Ct. 37, 9 L. Ed. 2d 61 (1962).

In one leading case in this state it was held that "a general allegation" in the complaint that plaintiff "did not discover the fraud until a date within three years of the commencement of the action should be sufficient to get him past a demurrer" (now motion to dismiss); a rule requiring plaintiff to set out in great detail his avoidance of said anticipated defense did not seem to have practical merit. The court had already remarked that the statute of limitations is a matter of defense, and that it is rather unusual to require plaintiff to anticipate such a defense by allegations in his complaint. Nunnelly v. First Fed. Bldg. & Loan Ass'n, 107 Utah 347, 154 P.2d 620 (1944); Bennion v. First Fed. Sav. & Loan Ass'n, 107 Utah 381, 154 P.2d 634 (1944).

While a cause of action for fraudulently taking, commingling, and concealing animals is not stated under Subsection (2) by merely alleging that such acts were "fraudulently" done, still where complaint alleges that defendant took the animals (sheep) into his possession; that he knew of plaintiff's ownership of them; that he commingled them with his own; that he took the wool and lambs from them and appropriated them, and that he earmarked and branded them with his own earmark and brand, which facts were concealed, a cause of action is stated. Madsen v. Madsen, 72 Utah 96, 269 P. 132 (1928).

If defendant foreign corporation sets up that action is barred by this section, plaintiff must in his reply state facts and circumstances tolling statute; corporation need not prove it had complied with §§ 16-8-1 and 16-8-3 (since repealed). Clawson v. Boston Acme Mines Dev. Co., 72 Utah 137, 269 P. 147, 59 A.L.R. 1318 (1928).

Substitution of parties related back to time complaint was filed in action in which both the complaint and the counterclaim sought reformation of a deed, since both the old and new parties had a substantial identity of interest, and the new parties were involved in the litigation, though unofficially, from an early stage. Doxey-Layton Co. v. Clark, 548 P.2d 902 (Utah 1976).

Statutory liability.

The fact that a cause of action is made assignable by a statutory enactment does not

make the cause so assigned a liability created by statute, so that where employee assigned cause of action against third person to employer, limitation on such cause of action was fixed by statute on actions for relief not otherwise provided for rather than statute on actions for liability created by statute. Salt Lake City v. Industrial Comm'n, 81 Utah 213, 17 P.2d 239 (1932). For further history of this case, see Johanson v. Cudahy Packing Co., 101 Utah 219, 120 P.2d 281 (1941).

As gist of action against county treasurer and his surety for money lost in closed bank was liability imposed by statute, limitation on such action was controlled by this section. Box Elder County v. Harding, 83 Utah 386, 28 P.2d 601 (1934).

Cause of action to recover damages for injury based upon claimed negligence of plaintiff's employer, who did not carry compensation insurance and had not qualified as a self-insurer, did not involve a liability created by statute within this section. Peterson v. Sorensen, 91 Utah 507, 65 P.2d 12 (1937).

Statute of limitations did not begin to run until judgment creditor attempted to enforce his judgment and trust was asserted against him as defense to collection, even though assets of trust were conveyed to trustee more than three years before the action. Leach v. Anderson, 535 P.2d 1241 (Utah 1975).

Suit by shipper to recover excessive freight charges collected by railroad was governed by predecessor to § 78-12-25(1) rather than predecessor to this section. Jeremy Fuel & Grain Co. v. Denver & R.G.R.R., 60 Utah 153, 207 P. 155 (1922).

A summary proceeding to seize and sell a car does not constitute an "action" within meaning of former provision setting forth limitation period for actions to enforce a liability created by statute. Crystal Car Line v. State Tax Comm'n, 110 Utah 426, 174 P.2d 984 (1946).

This section was inapplicable to suit to foreclose tax lien. Jones v. Box Elder County, 52 F.2d 340 (10th Cir. 1931).

The right of abutting owner to recover damages for change of grade is not governed by this section. Webber v. Salt Lake City, 40 Utah 221, 120 P. 503, 37 L.R.A. (n.s.) 1115 (1911).

Proceeding by tax commission for appointment of administrator to collect and pay inheritance taxes upon estate which had been held in joint tenancy with right of survivorship, held a statutory action within one-year limitation period. In re Swan's Estate, 95 Utah 408, 79 P.2d 999 (1938).

Claims of state and county against irrigation district for salaries, clerical work, etc., are barred by this section. Parker v. Weber County Irrigation Dist., 68 Utah 472, 251 P. 11 (1926).

Written lien on real estate granted by aged couple to government agency in order to qualify for old-age assistance and to secure reimbursement of money paid by division was not an "obligation created by statute" and hence was not subject to three-year statute of limitation. Juab County Dep't of Pub. Welfare v. Summers, 19 Utah 2d 49, 426 P.2d 1 (1967).

An action for damages against a railroad for alleged negligent killing of cattle due to failure to maintain cattle guards as required by former C.L. 1907, § 456x, was not an "action for liability created by statute" within meaning of this section, the action being grounded upon negligence as well as upon the statute. Preece v. Oregon Short Line R.R., 48 Utah 551, 161 P. 40 (1916).

Return on tax commission's form 71, whereon taxpayer made entries only as to sales tax and signed printed certification at bottom of form, but did not place figures, words, or marks of any kind in space reserved for use tax entries, did not constitute "return" within meaning of Use Tax Act (§ 59-16-1 et seq.) so as to start statute of limitations running against use tax. Whitmore Oxygen Co. v. State Tax Comm'n, 114 Utah 1, 196 P.2d 976 (1948).

Statute of limitations began to run against claim for use taxes allegedly due from foreign corporation for years 1940 to 1943, inclusive, from time that returns on forms supplied by tax commission were actually filed by corporation, where commission had destroyed its own records upon which it based its claim. Illinois Powder Mfg. Co. v. State Tax Comm'n, 117 Utah 511, 217 P.2d 580 (1950).

Action to rescind transaction not complying with Blue Sky Law was governed by predecessor to Subsection (4), as being liability created by statute. Wilson v. Guaranteed Sec. Co., 73 Utah 157, 272 P. 946 (1928).

Procedure to collect special improvement taxes as provided in city ordinance was held not to be an "action" within meaning of former provision setting forth limitation period for actions to enforce liability created by statute. Petterson v. Ogden City, 111 Utah 125, 176 P.2d 599 (1947). But see § 78-12-46.

This section governs actions for family expense under § 30-2-9. Walker Bros. Dry Goods Co. v. Woodhall, 61 Utah 259, 212 P. 523 (1923).

Claim for injuries must be made by employee within one year, and filing of a settlement receipt by insurer within such period, upon which commission took no action, does not constitute a claim. Aetna Life Ins. Co. v. Industrial Comm'n, 66 Utah 235, 241 P. 223 (1925).

Filing claim with state insurance fund is equivalent to filing with industrial commission for purpose of stopping the running of statute of limitations. Utah Delaware Mining Co. v.

Industrial Comm'n, 76 Utah 187, 289 P. 94 (1930).

Findings of commission on issues of estoppel and mental incompetency as excuse for not filing compensation proceeding within one year, on conflicting evidence against applicant, were binding on Supreme Court. Lowe v. Industrial Comm'n, 87 Utah 413, 49 P.2d 948 (1935).

The plea of limitation must be interposed at the first opportunity; it comes too late if interposed for first time at the rehearing. Utah Delaware Mining Co. v. Industrial Comm'n, 76 Utah 187, 289 P. 94 (1930).

In a compensation case, plea of statute of limitations must be interposed at first opportunity when its applicability is apparent, though upon application, leave may be given to interpose it later, if proper showing is made. The plea comes too late if first interposed at close of case and just before its final submission. Chief Consol. Mining Co. v. Industrial Comm'n, 78 Utah 447, 4 P.2d 1083 (1931).

All injuries mentioned in the application and relied upon will be saved from the bar of the statute, even though application is crudely drawn and deficient as to dates. Horton v. Industrial Comm'n, 88 Utah 306, 54 P.2d 249 (1936).

In compensation cases it has been assumed that the applicant is in time if he files his petition with the industrial commission within a year (now three years) after the last payment of compensation in cases where liability has been voluntarily recognized by the employer or insurance carrier, and payment of compensation made to the injured employee. Chief Consol. Mining Co. v. Industrial Comm'n, 78 Utah 447, 4 P.2d 1083 (1931).

Proceeding for workmen's compensation was barred where it was not filed within year (now three years) from date of accident or injury. Lowe v. Industrial Comm'n, 87 Utah 413, 49 P.2d 948 (1935).

In workmen's compensation cases, this section begins to run, not from time of accident as was held in numerous previous decisions, but from time of employer's failure to pay compensation when disability can be ascertained and duty to pay compensation arises; not until there is an accident and injury and a resultant disability or loss does the duty to pay arise. Salt Lake City v. Industrial Comm'n, 93 Utah 510, 74 P.2d 657 (1937).

Commission's ruling that limitation statute began to run from date of accident to worker's eye, held error where testimony did not reveal when impairment of eye became noticeable, and commission made no finding that injury was due to accident. Williams v. Industrial Comm'n, 95 Utah 376, 81 P.2d 649 (1938).

Although Utah Industrial Act fixed no limitation within which a proceeding for compensation must be commenced, such a proceeding had to be commenced within one year (now three years), as being a liability created by statute, regardless of whether the proceeding was denominated an action or a special proceeding of a civil nature. Utah Consolidated Mining Co. v. Industrial Comm'n, 57 Utah 279, 194 P. 657, 16 A.L.R. 458 (1920); Maryland Cas. Co. v. Industrial Comm'n, 74 Utah 170, 278 P. 60 (1929).

This section applied to applications for compensation under the Workmen's Compensation Act. Inter-Urban Constr. Co. v. Industrial Comm'n, 58 Utah 310, 199 P. 157 (1921); Utah Delaware Mining Co. v. Industrial Comm'n, 76 Utah 187, 289 P. 94 (1930); Salt Lake City v. Industrial Comm'n, 93 Utah 510, 74 P.2d 657 (1937).

Workmen's Compensation Act applies where employer carries insurance, and a proceeding under the act involves a liability created by state, and must be brought within one year (now three years). Peterson v. Sorensen, 91 Utah 507, 65 P.2d 12 (1937).

Since this section is not part of Workmen's Compensation Act, where no plea was made before commission that this section was relied upon, claim for compensation filed over year (now three years) after occurrence of accident was not barred. Hartford Accident & Indem. Co. v. Industrial Comm'n, 64 Utah 176, 228 P. 753 (1924).

Failure to make or file a claim for compensation within limitation period may for good cause be excused. Aetna Life Ins. Co. v. Industrial Comm'n, 66 Utah 235, 241 P. 223 (1925).

This section did not apply to application for additional compensation under § 35-1-78, where original application was presented within the year (now three years). Utah Apex Mining Co. v. Industrial Comm'n, 77 Utah 542, 298 P. 381 (1931).

Subsection (3).

The three-year statute of limitations provided in this section for actions on the ground of fraud is applicable to actions under the Federal Racketeer Influenced and Corrupt Organizations Act. Argosy 1981-B, Ltd. v. Bradley, 628 F. Supp. 1359 (D. Utah 1986).

Taking personal property.

Where there is a bailment of chattels and no time is fixed for the return of the bailed articles, the statute of limitations does not begin to run against the bailor's action to recover the property or for loss or conversion until demand for the return of the property is made upon the bailee. Wasden v. Coltharp, 631 P.2d 849 (Utah 1981).

Statute begins to run against an action of claim and delivery from time of commission of wrongful act, and not from time of knowledge

of act by plaintiff. Dee v. Hyland, 3 Utah 308, 3 P. 388 (1883).

Action by residuary legatees against executor for conversion of automobile, commenced within three years after entry of decree of distribution, was not barred by limitations where evidence would not support a finding that executor at any time prior to entry of decree of distribution, either by his acts or declarations, repudiated his trust with respect to estate property. Jones v. Cook, 118 Utah 562, 223 P.2d 423 (1950).

In absence of fraud or mistake, a cause of action is, by Subsection (2) of this section, barred absolutely in three years except in cases where the property is a domestic animal yet in existence and the action is for its recovery. If, however, it is sought to be charged that the animals were fraudulently taken, commingled, and concealed by defendant, the action falls within Subsection (3), and is not tolled until three years after discovery of the facts constituting the fraud or mistake. Madsen v. Madsen, 72 Utah 96, 269 P. 132 (1928).

Action against sheriff and judgment creditor to recover damages sustained by reason of alleged wrongful seizure and sale of property claimed to be exempt from execution was within predecessor to this section rather than predecessor to § 78-12-28 which applied only to officers and did not include judgment creditors. Snow v. West, 35 Utah 206, 99 P. 674, 136 Am. St. R. 1047 (1909).

Counterclaim by former employee alleging wrongful conversion of a discovery by him that was thereafter patented by his former employer and assigned to the employer's successor in interest, and claim that ownership of the patent should be in the former employee, was an action based on taking or detaining personal property, and was subject to the three-year statute of limitation provided in this section. Becton Dickinson & Co. v. Reese, 668 P.2d 1254 (Utah 1983).

The words "personal property" in Subsection (2) mean the right or interest which a person has in things personal. Reese v. Qualtrough, 48 Utah 23, 156 P. 955, 14 A.L.R. 94 (1916).

The statute of limitations did not begin to run against borrower's right to recover possession of pledge property as long as pledgor was accepting payments on the loans, extending time for future payments, and promising to keep property for pledgee. Conner v. Smith, 51 Utah 129, 169 P. 158 (1917).

Where defendant secured order restraining plaintiff from disposing of moneys collected on execution after defendant's motion for new trial was granted and in subsequent trial judgment was rendered for plaintiff, defendant was entitled to have moneys collected on execution applied in satisfaction of such judgment, and contention that statute of limitations barred such action was held without merit. Cox v. Dixie Power Co., 81 Utah 94, 16 P.2d 916 (1932).

Where property was sold on title-retaining note under contract providing that purchaser could not sell, mortgage or otherwise dispose of property before title passed without written consent of seller, but seller knew that purchase was made for purpose of giving property to third person as gift and consented to such transfer of possession, third person's possession as donee of original purchaser was not wrongful but her right thereto was subject to conditions of contract, and seller's cause of action for detaining personal property under Subsection (2) would not arise until third person refused to surrender possession after request, notice or demand therefor, and period of limitations would not commence to run until such right of action accrued. Taylor Bros. Co. v. Duden, 112 Utah 436, 188 P.2d 995 (1948).

Taking of real property.

Subsection (1) of this section did not govern action by landowner for compensation for taking his land without his consent and without condemnation proceedings by railroad company. Salt Lake Inv. Co. v. Oregon Short Line R.R., 46 Utah 203, 148 P. 439 (1915), aff'd, 246 U.S. 446, 38 S. Ct. 348, 62 L. Ed. 823 (1918).

Trespass.

Evidence held to show that plaintiff bringing action for trespass for removal of ore from mine did not have actual knowledge of trespass prior to few months before bringing action, and hence was not barred by this section. Bullion Beck & Champion Mining Co. v. Eureka Hill Mining Co., 36 Utah 329, 103 P. 881 (1909).

Use of property.

Where lessee was held liable for rent for use of premises under option in lease contract, lessor was not allowed to recover rent for entire period of use but only period not barred by this section. Fredrickson Bldrs. Supply & Constr. Co. v. Boise Cascade Corp., 22 Utah 2d 405, 454 P.2d 288 (1969).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law, 1986 Utah L. Rev. 95, 130.

Am. Jur. 2d. — 37 Am. Jur. 2d Fraud and Deceit § 400 et seq.; 51 Am. Jur. 2d Limitation of Actions §§ 82, 85 to 87, 89 et seq.

C.J.S. — 53 C.J.S. Limitations of Actions §§ 76, 78, 83.

A.L.R. — Statutes of limitation concerning actions of trespass as applicable to actions for injury to property not constituting a common-law trespass, 15 A.L.R.3d 637.

Key Numbers. — Limitation of Actions ⇐ 32(1), 34(1), 96, 98 et seq.

78-12-27. Action against corporate stockholders or directors.

Actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created, by law must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability accrued, and in case of actions against stockholders of a bank pursuant to levy of assessment to collect their statutory liability, such actions must be brought within three years after the levy of the assessment.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-27.

Cross-References. — Corporations generally, Title 16.

Liability of bank stockholders, Utah Const., Art. XII, Sec. 18.

Stock ownership by banks, § 7-3-21.

NOTES TO DECISIONS

ANALYSIS

Applicability of section.

—Corporate mismanagement.

——Federal statute.

This section, rather than § 78-12-23 dealing with actions on written contracts, was applicable to investors' class action based on failure of incorporators and directors to comply with Federal Investment Company Act; federal tolling policy was applicable to the action so that statute did not begin to run until investors discovered, or in the exercise of reasonable diligence should have discovered, the alleged fraudulent practices of defendants. Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928, 89 S. Ct. 1194, 22 L. Ed 2d 459 (1969).

—Foreign law.

Lessor's action in Utah against stockholder in lessee California corporation to enforce stockholder's liability under California statute was controlled by this section and not by § 78-12-29. Daynes-Beebe Music Co. v. Chase, 23 F.2d 648 (8th Cir. 1927).

"Liability created by law."

—Stockholder or director.

The "liability" referred to by this section is one arising out of the fact of being a director or stockholder, that is, a liability founded on or imposed because of the relationship of being a stockholder or director; statute had no application to suit by judgment creditor against principal stockholder who had acquired assets of judgment debtor corporation, without consider-

ation, while winding up its business. American Theatre Co. v. Glasmann, 95 Utah 303, 80 P.2d 922 (1938).

Pleading and practice.

—Action against defendants in representative capacity.

This section is applicable only when the action is against the defendants in their representative capacities as directors or stockholders of a corporation. Grosjean v. Ross, 572 P.2d 1383 (Utah 1977).

—Burden of proof.

——Discovery of wrong.

Defendant asserting this statute of limitation as a defense has the burden to prove that the action was not commenced within three years after the plaintiff discovered, or in the exercise of reasonable care should have discovered, the wrong giving rise to the action. Stewart v. K & S Co., 591 P.2d 433 (Utah 1979).

—Specificity.

Section of statute of limitations applicable to suit must be specifically pleaded; if section pleaded is not applicable, it does not avail defendant that the action may be barred by another section not pleaded. American Theatre Co. v. Glasmann, 95 Utah 303, 80 P.2d 922 (1938).

Running of statute.

—Funds wrongfully withheld.

——Discovery.

In an action by a stockholder against the corporation for funds wrongfully withheld from the stockholder, the statute of limitations does not begin to run until the stockholder discovers, or in the exercise of reasonable care should discover, that there is a wrong. Stewart v. K & S Co., 591 P.2d 433 (Utah 1979).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law, 1986 Utah L. Rev. 95, 130.

Am. Jur. 2d. — 18B Am. Jur. 2d Corporations § 1819; 19 Am. Jur. 2d Corporations § 2315.

C.J.S. — 53 C.J.S. Limitations of Actions § 87.

Key Numbers. — Limitation of Actions ⇐ 34(5).

78-12-28. Within two years.

Within two years, an action:

(1) against a marshal, sheriff, constable, or other officer upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this section does not apply to an action for an escape;

(2) for recovery damages for the death of one caused by the wrongful act or neglect of another; or

(3) for injury to the personal rights of another as a civil rights suit under 42 U.S.C. 1983.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-28; L. 1971, ch. 212, § 1; 1976, ch. 23, § 13; 1987, ch. 19, § 3.

Amendment Notes. — The 1987 amendment added Subsection (3) and made minor changes in phraseology and punctuation.

Compiler's Notes. — Laws 1987, ch. 19, § 6 provides that the amendment to this section applies only to causes of action that arise after April 27, 1987 and has no retroactive application.

Cross-References. — Coal miners, limitation on wrongful death actions against mine owners, operators, etc., § 40-2-16.

Death of person entitled to sue, effect on statute of limitations, §§ 78-12-37, 78-12-38.

Escape by prisoner, limitation on actions for, § 78-12-29.

Improvements to realty, limitation on actions for wrongful death due to defective design or construction, § 78-12-25.5.

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

Right to recover damages for death generally, Utah Const., Art. XVI, Sec. 5; §§ 78-11-6, 78-11-7.

Survival of cause of action, §§ 78-11-12, 78-11-13.

NOTES TO DECISIONS

ANALYSIS

Act or omission of official duty.
Applicability of section.
Malpractice.
Wrongful death.

Act or omission of official duty.

Action against sheriff and judgment creditor to recover damages sustained by reason of alleged wrongful seizure and sale of property claimed to be exempt from execution was within predecessor to § 78-12-26 and not predecessor to this section, which applies only to officers and does not include judgment creditors. Snow v. West, 35 Utah 206, 99 P. 674, 136 Am. St. R. 1047 (1909).

Commencement of limitations period was not delayed as to sheriffs from whom damages were sought for willful and wanton failure to investigate burglary either on theory of insufficient time for commencement of investigation (four months) or that statute did not start to run until damage occurred. Obray v. Malmberg, 26 Utah 2d 17, 484 P.2d 160 (1971).

Applicability of section.

This section does not apply to actions under Federal Employers' Liability Act. Peterson v. Union Pac. R.R., 79 Utah 213, 8 P.2d 627 (1932).

Malpractice.

Although cause of action against physician arose prior to the 1971 amendment which included malpractice in two-year statute of limitations (since deleted), the action was barred where not filed within two years from effective date of the amendment. Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975).

Wrongful death.

Action for wrongful death against a third person instituted under § 35-1-62 was barred where death occurred on the third day of June, 1938, and the action was not commenced until the twenty-seventh day of June, 1942. Johanson v. Cudahy Packing Co., 107 Utah 114, 152 P.2d 98 (1944).

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. Rhoades v. Wright, 622 P.2d 343 (Utah 1980), cert. denied, 454 U.S. 897, 102 S. Ct. 397, 79 L. Ed. 2d 212 (1981).

The statute of limitations on wrongful death is not a limitation on liability but is a limitation on the remedy. Seely v. Cowley, 12 Utah 2d 252, 365 P.2d 63 (1961).

Where guardians did not discover the death of their ward, and therefore had no knowledge that a cause of action for wrongful death existed until after two years had expired from the date of the death of the ward, and the guardians alleged due diligence in searching for the missing ward, it was improper for trial court to dismiss guardians' action for wrongful death on the pleadings on the basis of the statute of limitations. Myers v. McDonald, 635 P.2d 84 (Utah 1981).

Right of action for wrongful death accrues at time of death, and hence this statute of limitations begins to run from that time and not from time of appointment of personal representative, since wrongful death statute gives right of action to heir and to personal representative. Platz v. International Smelting Co., 61 Utah 342, 213 P. 187 (1923).

Where only surviving heir or lien enemy was mother of deceased, likewise alien enemy, statute of limitations for wrongful death was tolled as against her by predecessor to § 78-12-39, and hence also tolled as against personal representative of decease. Platz v. International Smelting Co., 61 Utah 342, 213 P. 187 (1923), explained, Seely v. Cowley, 12 Utah 2d 252, 365 P.2d 63 (1961).

Section 78-12-35 which provides that if, after a cause of action accrues against a person he departs from the state, the time of his absence is not part of the time limited for commencement of the action, applies to a personal representative of an estate who absents himself from the state; where the administratrix of an estate of a deceased motorist absented herself from the state after her appointment, her absence tolled the running of the two-year statute of limitations for wrongful death. Seely v. Cowley, 12 Utah 2d 252, 365 P.2d 63 (1961).

In a wrongful death action based on the decedent's exposure to suspected carcinogens, the statute of limitations must be tolled until the plaintiff knows or should know through means of due diligence of facts supporting the likelihood that a particular suspected carcinogen was the cause of the decedent's cancer, and has identified the likely source of exposure to that carcinogen. Maughan v. SW Servicing, Inc., 758 F.2d 1381 (10th Cir. 1985).

The limitation period prescribed by this section is tolled in a wrongful death action by § 78-12-36(1), so an action on behalf of minor

heirs of a decedent could be brought more than two years after the death and at a time when an action by the decedent's widow is barred.

Switzer v. Reynolds, 606 P.2d 244 (Utah 1980); In re Estate of Garza, 725 P.2d 1328 (Utah 1986).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law, 1986 Utah L. Rev. 95, 130.

Am. Jur. 2d. — 22 Am. Jur. 2d Death § 35 et seq.; 51 Am. Jur. 2d Limitation of Actions § 103; 63A Am. Jur. 2d Public Officers and Employees § 548 et seq.; 70 Am. Jur. 2d Sheriffs, Police and Constables § 164.

C.J.S. — 53 C.J.S. Limitations of Actions §§ 74, 84.

A.L.R. — Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 A.L.R.3d 933.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R.4th 972.

Key Numbers. — Limitation of Actions ⇐ 31, 34(3).

78-12-29. Within one year.

Within one year:

(1) an action for liability created by the statutes of a foreign state.

(2) an action upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

(3) an action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state.

(4) an action for libel, slander, assault, battery, false imprisonment or seduction.

(5) an action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned upon either civil or criminal process.

(6) an action against a municipal corporation for damages or injuries to property caused by a mob or riot.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-29.

Cross-References. — Libel, Chapter 2 of Title 45.

Riot, response and recovery, Chapter 5a of Title 63.

Seduction, §§ 78-11-4, 78-11-5.

NOTES TO DECISIONS

ANALYSIS

Dismissal of action.
—Institution of second action.
Excessive freight charges.
"False arrest."
Foreign statute.
—Stockholder's liability.
Pleading.
—Amendment of answer.
——Conditions.
—Specificity.
Reckless misconduct.
—Negligence.
Running of statute.
—Delinquent taxes.
——Filing of return.

Dismissal of action.

—Institution of second action.

Where action for false imprisonment brought within one year was dismissed because, after action had been called and jury impanelled, it was discovered for first time that copy of complaint which defendant's counsel had obtained from clerk's office was not copy of original complaint filed, held dismissal of action was not trial upon merits and second action having been instituted within one year after order of dismissal, action was not barred by statute in view of § 78-12-40. Salisbury v. Poulson, 51 Utah 552, 172 P. 315 (1918).

Excessive freight charges.

Suit by shipper to recover excessive freight charges collected by railroad was governed by § 78-12-25(1), and not this section. Jeremy Fuel & Grain Co. v. Denver & R.G.R.R., 60 Utah 153, 207 P. 155 (1922).

"False arrest."

"False arrest" is an aspect of the tort of false imprisonment, and the statute of limitations applicable to the latter also applies to the former. Tolman v. K-Mart Enters. of Utah, Inc., 560 P.2d 1127 (Utah 1977).

Foreign statute.

—Stockholder's liability.

Lessor's action in Utah against stockholder in lessee California corporation to enforce stockholder's liability under California statute was controlled by § 78-12-27, and not by this section. Daynes-Beebe Music Co. v. Chase, 23 F.2d 648 (8th Cir. 1927).

Pleading.

—Amendment of answer.

——Conditions.

Trial court did not abuse discretion in permitting defendants to amend answer to set up defense of limitations under former statute at conclusion of plaintiff's evidence, where defendants, as condition of amendment, agreed to pay costs from time of first answer to time of offering amendment. Attorney Gen. v. Pomeroy, 93 Utah 426, 73 P.2d 1277, 114 A.L.R. 726 (1937).

—Specificity.

Contention that party failed to plead the specific subdivision of this section relied upon as required by statute would not be considered on appeal where question was raised for first time, but since subdivision relied upon was first one, no one could have been misled. Attorney Gen. v. Pomeroy, 93 Utah 426, 73 P.2d 1277, 114 A.L.R. 726 (1937).

Reckless misconduct.

—Negligence.

The tort of reckless misconduct or reckless disregard of safety is a form of negligence, not an intentional tort, and is subject to the four-year statute of limitations in § 78-12-25. Matheson v. Pearson, 619 P.2d 321 (Utah 1980).

Running of statute.

—Delinquent taxes.

——Filing of return.

Failure of taxpayer to file returns of sales taxes collected for more than two years, though statute required monthly return, suspended operation of three-year (now one year) statute of limitations, as statute did not begin to run until return was filed, because tax commission could not sue for delinquent taxes until such time. State Tax Comm'n v. Spanish Fork, 99 Utah 177, 100 P.2d 575, 131 A.L.R. 816 (1940).

—Fraud.

——Discovery.

In actions for fraud, statute does not begin to run until fraud is discovered or could have been reasonably discovered, but even when action is not based on fraud, in equity where cause of action is concealed from one in whom it resides by the one against whom it lies, the statute will not run. Attorney Gen. v. Pomeroy, 93 Utah 426, 73 P.2d 1277, 114 A.L.R. 726 (1937).

Unpaid taxes.

—Extension of statutory time period.

Where claim for unpaid taxes had not been barred by one-year statute, amendment extending limitation period to three years applied thereto. State Tax Comm'n v. Spanish Fork, 99 Utah 177, 100 P.2d 575, 131 A.L.R. 816 (1940) (decided under prior law).

COLLATERAL REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d Forfeitures and Penalties § 95 et seq.; 50 Am. Jur. 2d Libel and Slander § 390 et seq.; 51 Am. Jur. 2d Limitation of Actions §§ 68, 102 to 106, 401; 70 Am. Jur. 2d Sheriffs, Police and Constables § 164.

C.J.S. — 53 C.J.S. Limitations of Actions §§ 74, 82 to 84.

A.L.R. — What constitutes "publication" of libel in order to start running of period of limitations, 42 A.L.R.3d 807.

Key Numbers. — Limitation of Actions ⇐ 31, 34(1) to (3), 35(1).

78-12-30. Actions on claims against county, city or town.

Actions on claims against a county, city or incorporated town, which have been rejected by the board of county commissioners, city commissioners, city council or board of trustees, as the case may be, must be commenced within one year after the first rejection thereof by such board of county or city commissioners, city council or board of trustees.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-30.

Cross-References. — Counties, presentation of claims, §§ 17-15-10, 17-15-12.

Governmental Immunity Act, limitation on claims, §§ 63-30-13, 63-30-15.

Municipal bond proceedings, limitations on actions contesting, § 11-14-21.

NOTES TO DECISIONS

Sufficiency of claim.

—When raised.

City rejecting claim for injuries could not upon subsequent action by claimant contest sufficiency of claim, since former § 10-7-77 required that if claim was deemed insufficient or defective in certain particulars, city had to point out defect or insufficiency at time. Burton v. Salt Lake City, 69 Utah 186, 253 P. 443, 51 A.L.R. 364 (1926).

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 401.

C.J.S. — 20 C.J.S. Counties § 325; 63 C.J.S. Municipal Corporations § 931; 64 C.J.S. Municipal Corporations § 2201.

Key Numbers. — Counties ⇐ 216; Limitation of Actions ⇐ 58(2); Municipal Corporations ⇐ 742(3), 813, 1025.

78-12-31. Within six months.

Within six months:

an action against an officer, or an officer de facto:

(1) to recover any goods, wares, merchandise or other property seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to, any goods, wares, merchandise or other personal property seized, or for damages done to any person or property in making any such seizure.

(2) for money paid to any such officer under protest, or seized by such officer in his official capacity, as a collector of taxes, and which, it is claimed, ought to be refunded.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-31.

NOTES TO DECISIONS

ANALYSIS

Taxation.
—Applicability.
——Taxes paid to state.
——Unconstitutional statute.
——Void tax.

Taxation.

—Applicability.

——Taxes paid to state.

Action for taxes paid to the state is limited to the six-month period available under this section. State v. District Court, 102 Utah 284, 115 P.2d 913 (1941).

——Unconstitutional statute.

Action against secretary of state to recover taxes paid under unconstitutional statute was barred where not brought within six months. Sperry & Hutchinson Co. v. Mattson, 64 Utah 214, 228 P. 755 (1924).

——Void tax.

This provision was not intended to limit time for commencement of action against city for money had and received by it in payment of void sprinkling tax paid under protest. Raleigh v. Salt Lake City, 17 Utah 130, 53 P. 974 (1898) (decided under prior law).

COLLATERAL REFERENCES

C.J.S. — 53 C.J.S. Limitations of Actions § 84.

Key Numbers. — Limitation of Actions ⇐ 34(3).

78-12-31.1. Habeas corpus — Three months.

Within three months:

For relief pursuant to a writ of habeas corpus. This limitation shall apply not only as to grounds known to petitioner but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner.

History: C. 1953, 78-12-31.1, enacted by L. 1979, ch. 133, § 1.

Cross-References. — Habeas corpus, Rule 65B, U.R.C.P.

78-12-31.2. Post-conviction remedies — 30 days.

Within 30 days:

No post-conviction remedies may be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless the grounds therefor are based on facts or circumstances which developed or first became known within that period.

History: C. 1953, 78-12-31.2, enacted by L. 1979, ch. 133, § 2.

Cross-References. — Capital sentencing, §§ 76-3-206, 76-3-207.
Post-conviction hearings, Rule 65B, U.R.C.P.

78-12-32. Action on mutual account — When deemed accrued.

In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-32.

Cross-References. — Complaint on an account, Form 4, U.R.C.P.

NOTES TO DECISIONS

Scope and operation of section.

Under predecessor to this section where it appeared from the allegations of the parties that there was an open, mutual and current account between the parties down to the commencement of the action, no part of the account was barred. Toponce v. Corinne Mill, Canal & Stock Co., 6 Utah 439, 24 P. 534 (1890), aff'd, 152 U.S. 405, 14 S. Ct. 632, 38 L. Ed. 493 (1894).

COLLATERAL REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d Accounts and Accounting §§ 14 to 16.

C.J.S. — 54 C.J.S. Limitations of Actions § 165.

A.L.R. — When is account "mutual" for purposes of rule that limitations run from last item in open, current, and mutual account, 45 A.L.R.3d 446.

Key Numbers. — Limitation of Actions ⇐ 54.

78-12-33. Actions by state.

The limitations prescribed in this article shall apply to actions brought in the name of or for the benefit of the state in the same manner as to actions by private parties.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-33.

NOTES TO DECISIONS

ANALYSIS

"Action."

—Appointment of administrator.

Proceeding by tax commission for appointment of administrator to collect and pay inheritance taxes upon estate which had been held in joint tenancy with right of survivorship, held a statutory "action." In re Swan's Estate, 95 Utah 408, 79 P.2d 999 (1938).

—Summary proceeding to seize property.

A summary proceeding to seize and sell a car did not constitute an "action" within the meaning of former provision setting forth limitation

on action for liability created by statute. Crystal Car Line v. State Tax Comm'n, 110 Utah 426, 174 P.2d 984 (1946). But see § 78-12-46.

Applicability of section.

—Actions by county.

This section is applicable to actions brought on behalf of county, as well as actions by the state. Parker v. Weber County Irrigation Dist., 68 Utah 472, 251 P. 11 (1926).

Loss of property by adverse possession.

—School lands.

Board of education may, by adverse possession, lose title to property not used for school purposes, but held for sale as business property. Pioneer Inv. & Trust Co. v. Board of Educ., 35 Utah 1, 99 P. 150, 136 Am. St. R. 1016 (1909).

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions §§ 399, 416.

C.J.S. — 53 C.J.S. Limitations of Actions § 15; 81A C.J.S. States § 222.

Key Numbers. — Limitation of Actions ⇐ 11; States ⇐ 201.

78-12-34. Repealed.

Repeals. — Section 78-12-34 (L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-34), providing that there is no limitation in actions to recover bank deposits of money or property, was repealed by Laws 1981, ch. 16, § 1.

ARTICLE 3

MISCELLANEOUS PROVISIONS

78-12-35. Effect of absence from state.

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-35; 1987, ch. 19, § 4.

Amendment Notes. — The 1987 amendment substituted "Where" for "If when," substituted "as limited by this chapter" for "herein limited" and made minor changes in phraseology and punctuation.

Compiler's Notes. — Laws 1987, ch. 19, § 6 provides that the amendment to this section applies only to causes of action that arise after April 27, 1987 and has no retroactive application.

NOTES TO DECISIONS

ANALYSIS

"Absence" from state.

—Nonresident motorists.

Nonresident motorists were not "absent" from the state so as to toll running of statute of limitations, although they left state immediately after automobile collision and remained without state, as they had an agent in person of secretary of state upon whom process could have been served. Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915 (1964).

Applicability of section.

—Nonresidents.

The words "return" and "departs" in this section comprehend all persons who are without the state, and are not confined to the inhabitants thereof. Burnes v. Crane, 1 Utah 179 (1876).

Word "return" as used in this section includes nonresidents as well as citizens of state who have gone abroad and returned to state; the words "return to the state" are held to be equivalent to "come into the state." Lawson v. Tripp, 34 Utah 28, 95 P. 520 (1908).

—Personal representative of estate.

This section applies to a personal representative of an estate who absents himself from the state; where the administratrix of an estate of a deceased motorist absented herself from the state after her appointment, her absence tolled the running of the two-year statute of limitations for wrongful death provided under § 78-12-28. Seely v. Cowley, 12 Utah 2d 252, 365 P.2d 63 (1961).

Burden of proof.

Plaintiff seeking to toll statute has burden of proof; mere proof of nonresidence is not a prima facie showing of absence from state. Tracey v. Blood, 78 Utah 385, 3 P.2d 263 (1931).

Computation of time.

—Periods of absence.

Statute runs only during time debtor is openly in state, and immediately on his leaving it the statute again ceases to run until his return; in computing time all periods of absence must be considered and added together. Keith-O'Brien Co. v. Snyder, 51 Utah 227, 169 P. 954 (1917).

Construction of section.

—Strict.

Although generally statutes of limitation are to be liberally construed, it is also a well-recognized doctrine that when such statutes contain provisions excepting certain persons or classes from operation of statutes, those exceptions are to be strictly construed. Lawson v. Tripp, 34 Utah 28, 95 P. 520 (1908).

Foreign corporation.

—Pleadings and evidence.

Where answer of defendant foreign corporation set up statute of limitations as defense and face of pleadings and uncontradicted evidence indicated statute had run, it was incumbent on plaintiff to state in his reply conditions tolling the statute; in Utah, foreign corporation's privilege of pleading statute of limitations was not conditioned on its compliance with "doing business within the state" statutes. Clawson v. Boston Acme Mines Dev. Co., 72 Utah 137, 269 P. 147, 59 A.L.R. 1318 (1928).

Laches.

—Accounting.

Absence of defendant from state does not preclude interposition of defense of laches to suit for an accounting, even though statute of limitations has not barred proceeding. Smith v. Smith, 77 Utah 60, 291 P. 298 (1930).

Purpose of section.

The objective of this section was to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation. Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915 (1964).

Residence within state.

—Continual.

——Proof of presence.

A finding that defendant had his home, family and residence in state continuously from time debt was contracted is sufficient finding of continuous presence in the state. Woolf v. Gray, 48 Utah 239, 158 P. 788 (1916).

—Defendant's family.

The full time that the debtor is out of the state must be excluded in computing the time, notwithstanding fact that debtor's family may have residence or place of abode in state and that service of process could be made upon some member of debtor's family at its residence or place of abode. Keith-O'Brien Co. v. Snyder, 51 Utah 227, 169 P. 954 (1917).

—Statute tolled.

Maintenance of residence within state with persons living therein did not prevent tolling of statute of limitations. Buell v. Duchesne Mercantile Co., 64 Utah 391, 231 P. 123 (1924).

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: Graham v. Sawaya, 1981 B.Y.U. L. Rev. 937, 945.

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 154 et seq.

C.J.S. — 54 C.J.S. Limitations of Actions § 211.

A.L.R. — Tolling of statute of limitations during absence from state as affected by fact that party claiming benefit of limitations remained subject to service during absence or nonresidence, 55 A.L.R.3d 1158.

Key Numbers. — Limitation of Actions ⇐ 84, 85.

78-12-36. Effect of disability.

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either under the age of majority or mentally incompetent and without a legal guardian, the time of the disability is not a part of the time limited for the commencement of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-36; L. 1975, ch. 67, § 16; 1987, ch. 19, § 5.

Amendment Notes. — The 1987 amendment deleted the subsection references in this section as set out in the bound volume, and deleted "imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than for life" following "without a legal guardian" and made minor changes in phraseology and punctuation throughout the section.

Compiler's Notes. — Laws 1987, ch. 19, § 6 provides that the amendment to this section applies only to causes of action that arise after April 27, 1987 and has no retroactive application.

Cross-References. — Actions to recover real property, effect of disability, § 78-12-21.

Age of majority, § 15-2-1.

Disaffirmance of contract by minor, §§ 15-2-2, 15-2-3.

Guardians of incapacitated persons, § 75-5-301 et seq.

Medical malpractice actions, limitations provisions applicable regardless of disability, § 78-14-4.

Product Liability Act, limitations provisions applicable regardless of disability, § 78-15-3.

NOTES TO DECISIONS

ANALYSIS

Notice of claim requirements.

—Failure to file.

——Action barred.

This section had no application to action against town which was barred because of failure to file claim. Hurley v. Town of Bingham, 63 Utah 589, 228 P. 213 (1924).

This section does not operate to extend statutory time for filing claims against a city until after a minor claimant has obtained majority. Gallegos v. Midvale City, 27 Utah 2d 27, 492 P.2d 1335 (1972).

Specific requirement of timely notice to city of claim against it takes precedence over provision tolling statute of limitations during minority of a child; failure to comply with statutory notice provisions barred action against city hospital by parents on behalf of newborn infant. Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975).

——Action not barred.

Notice of claim requirements in the Utah Governmental Immunity Act, § 63-30-13, are tolled by this section during the period of minority; therefore, failure to comply with such notice requirements by a minor does not bar his claim. Scott v. School Bd. of Granite School Dist., 568 P.2d 746 (Utah 1977).

Paternity action.

—Minority.

Any statute limiting the time within which a paternity action must be commenced under the Uniform Act on Paternity, § 78-45a-1 et seq., is tolled for all statutorily qualified plaintiffs during the period of the child's minority. Szarak v. Sandoval, 636 P.2d 1082 (Utah 1981).

Wrongful death.

—Minority.

The limitation period prescribed by § 78-12-28 is tolled by Subsection (1) of this section as to a wrongful death action, so an action on behalf of minor heirs of a decedent can be brought more than two years after the death and at a time when an action by the decedent's widow is barred. Switzer v. Reynolds, 606 P.2d 244 (Utah 1980); In re Estate of Garza, 725 P.2d 1328 (Utah 1986).

Cited in Hargett v. Limberg, 801 F.2d 368 (10th Cir. 1986).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law, 1986 Utah L. Rev. 95, 130.

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 182 et seq.

C.J.S. — 54 C.J.S. Limitations of Actions § 216 et seq.

A.L.R. — Tolling of statute of limitations, on account of minority of injured child, as applicable to parent's or guardian's right of action arising out of same injury, 49 A.L.R.4th 216.

Key Numbers. — Limitation of Actions ⇦ 70, 72, 74 to 76.

78-12-37. Effect of death.

If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced against the representatives after the expiration of that time and within one year after the issue of letters testamentary or of administration.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-37.

Cross-References. — Decedent's cause of action, statute of limitation on, § 75-3-108.

Decedent's creditors, statute of limitation on claims by, § 75-3-802.

Survival of cause of action, §§ 78-11-12, 78-11-13.

NOTES TO DECISIONS

ANALYSIS

Action by personal representative.

—Existence of right of action.

Where right of action existed in decedent at time of his death, it should have been brought within year from his death by administrator. Rasmussen v. Sevier Valley Canal Co., 40 Utah 371, 121 P. 741 (1912).

Claims and actions against estate or personal representative.

—Common law.

At common law, neither death of debtor nor pendency of probate proceedings prevented statute of limitations from running. Gray Realty Co. v. Robinson, 111 Utah 521, 184 P.2d 237 (1947).

—Effect of Probate Code.

Action against estate of decedent not barred at latter's death was to be commenced within period of general statute of limitations pertaining to particular cause of action or within one year after issuance of letters testamentary or of administration, whichever was greater; such period was not lengthened by former Probate Code provisions requiring some claims to be presented within certain time and action thereon to be commenced within three months after rejection although time allowed for commencing action might be shortened by such provisions. Gray Realty Co. v. Robinson, 111 Utah 521, 184 P.2d 237 (1947).

——Open account.

Action against administratrix for collection of claim against estate based on open account was barred where action was not commenced within four years after last charge was entered in account as required by former § 104-2-23 or within one year after issuance of letters of administration as permitted by this section, even though claim was presented to administratrix within time specified in notice to creditors and action was commenced within three months after notice of rejection of claim, and notwithstanding that claim was not barred during lifetime of debtor-decedent. Gray Realty Co. v. Robinson, 111 Utah 521, 184 P.2d 237 (1947).

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 194 et seq.

C.J.S. — 54 C.J.S. Limitations of Actions § 243 et seq.

Key Numbers. — Limitation of Actions ⇐ 80, 83.

78-12-38. Effect of death of defendant outside this state.

If a person against whom a cause of action exists dies without the state, the time which elapses between his death and the expiration of one year after the issuing, within this state, of letters testamentary or letters of administration is not a part of the time limited for the commencement of an action therefor against his executor or administrator.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-38.

Cross-References. — Decedent's creditors, statute of limitation on claims by, § 75-3-802. Survival of cause of action, §§ 78-11-12, 78-11-13.

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 196.
C.J.S. — 54 C.J.S. Limitations of Actions § 246.

Key Numbers. — Limitation of Actions ⇐ 82.

78-12-39. Effect of war.

When a person is an alien subject or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-39.

NOTES TO DECISIONS

Wrongful death.
Statute of limitations against action for wrongful death of alien enemy by personal representative of deceased was tolled by this section where only surviving heir of deceased was mother, likewise alien enemy. Platz v. International Smelting Co., 61 Utah 342, 213 P. 187 (1923).

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 175.
C.J.S. — 54 C.J.S. Limitations of Actions § 259.

Key Numbers. — Limitation of Actions ⇐ 113.

78-12-40. Effect of failure of action not on merits.

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-40.

Cross-References. — Survival of cause of action, §§ 78-11-12, 78-11-13.

NOTES TO DECISIONS

ANALYSIS

Amendment of pleadings.
—Nonsuit.
Application of section.
—Writs to enforce judgments.
Commencement of one-year extension.
—Affirmance of lower-court decision.
Conflict of laws.
—Action dismissed in other state.
Contestability of insurance policy.
—Initiation of contest.

Amendment of pleadings.

—Nonsuit.

If statute of limitations has been tolled by nonsuiting plaintiff, it is not prejudicial error to refuse to allow an amendment to the pleadings since plaintiff can file a new complaint. Sumsion v. Streator-Smith, Inc., 103 Utah 44, 132 P.2d 680 (1943) (decided under prior law).

Application of section.

—Writs to enforce judgments.

This section deals exclusively with the commencement of a new action after the first action has failed or the judgment thereon has been reversed; it does not apply to writs to enforce judgments. Billings v. Brown, 639 P.2d 189 (Utah 1981).

Commencement of one-year extension.

—Affirmance of lower-court decision.

Where judgment of nonsuit was rendered, and on appeal affirmed after the expiration of the limitation period, plaintiff had one year after such affirmance within which to commence a new action. Gutheil v. Gilmer, 27 Utah 496, 76 P. 628 (1904) (decided under prior law).

Conflict of laws.

—Action dismissed in other state.

In wrongful death action by Utah resident against Colorado residents, in which Utah court had quasi in rem jurisdiction, Utah court applied this section to extend the time to bring suit beyond the time allowed by Colorado law, and fact that Colorado court had dismissed action based upon the same facts due to the running of its statute of limitations did not require Utah court to give full faith and credit to such dismissal, and did not bar the action in the Utah court. 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).

Contestability of insurance policy.

—Initiation of contest.

Insurer's filing of answer and counterclaim in federal court, to which insured's action on policies had been removed, did not constitute the initiation of a contest within meaning of policies' incontestability clauses; therefore this section did not operate to render timely insurer's subsequent answer and counterclaim in state court after action was remanded for want of federal jurisdiction. Tracey Loan & Trust Co. v. Mutual Life Ins. Co., 79 Utah 33, 7 P.2d 279, 284 (1932).

Joint tort-feasors.

—Dismissal.

Where defendants were sued as joint tort-feasors, and suit against one of defendants was subsequently dismissed, held on appeal by other joint tort-feasor from adverse judgment that it was not necessary to serve notice of appeal on codefendant, since latter no longer had any interest in appeal and was in no sense adverse party, notwithstanding provision in this section that party failing in action, such as plaintiff, might commence new action within one year after reversal or failure. Badertscher v. Independent Ice Co., 55 Utah 100, 184 P. 181 (1919).

"Merits" of action.

—Dismissal.

Dismissal of action is not determinative of case upon merits. Gutheil v. Gilmer, 27 Utah 496, 76 P. 628 (1930); Williams v. Nelson, 45 Utah 255, 145 P. 39 (1914); Platz v. International Smelting Co., 61 Utah 342, 213 P. 187 (1923).

Where action for false imprisonment, brought within one year as provided in former § 104-2-26, was dismissed because after action had been called and jury impanelled it was discovered for first time that copy of complaint which defendant's counsel had obtained from

clerk's office was not copy of original complaint filed, held dismissal of action was not trial upon merits, and second action having been instituted within one year after order of dismissal, action was not barred by predecessor statute. Salisbury v. Poulson, 51 Utah 552, 172 P. 315 (1918).

Voluntary dismissal of action by plaintiff without prejudice held failure of action otherwise than upon merits. Luke v. Bennion, 36 Utah 61, 106 P. 712 (1909); Jones v. Jenkins, 22 F.2d 642 (8th Cir. 1927).

A judgment is not on the "merits" within meaning of this section where a case in justice's court, argued and submitted on the pleadings, was dismissed on plaintiff's motion, without any ruling on motion for judgment on the pleadings; therefore action brought within one year after dismissal is not barred by limitations. Quealy v. Sullivan, 42 Utah 565, 132 P. 4 (1913).

—Nonsuit.

Where a nonsuit is granted, the action fails "otherwise than upon the merits," and the reason for which nonsuit was granted is immaterial. A new action may be commenced within one year after granting the nonsuit, if causes of action in both complaints are the same. Williams v. Nelson, 45 Utah 255, 145 P. 39 (1914) (decided under prior law).

Decree that "plaintiffs take nothing by their complaint, that the same be and hereby is dismissed," rendered pursuant to conclusions of law finding defendants "entitled to an order of nonsuit," was a judgment of nonsuit, and not a decision of the case on its merits. Braby v. Rieban, 54 Utah 87, 179 P. 383 (1919) (decided under prior law).

Nonpayment of costs.

—Presumption that second suit vexatious.

Nonpayment by plaintiff of judgment for costs in first action, which was dismissed without prejudice, did not, under statute, raise presumption that second suit begun by plaintiff was vexatious, and trial court erred in suspending further proceedings until payment of costs taxed against plaintiff in first action. Peterson v. Evans, 55 Utah 505, 188 P. 152 (1920).

Operation and effect of section.

—Advantages.

Because of this section, a defendant moving to dismiss on other than the merits, although his motion be sustained, can gain no permanent advantage, since plaintiff has the right at any time within a year to bring another action. Wright v. Howe, 46 Utah 588, 150 P. 956, 1916B L.R.A. 1104 (1915).

Pleading and proof of tolling.

—Judicial notice.

Where there was nothing on face of complaint in wrongful death action to indicate that there had been a former action which had failed otherwise than on its merits so as to bring this section into play, Supreme Court could not invoke section by judicially noticing proceedings and records of a previously determined case. Johanson v. Cudahy Packing Co., 107 Utah 114, 152 P.2d 98 (1944).

Res judicata.

—Dismissal.

Judgment dismissing plaintiff's suit for foreclosure of certain mortgages on ground it had been prematurely brought, the court making no finding as to the amount due on the mortgages and notes secured thereby, not being on the merits, is not res judicata at common law or under predecessor statute. Stephens v. Doxey, 58 Utah 196, 198 P. 261 (1921).

Who may invoke section.

—Party affirmatively seeking relief.

This section may be invoked by anyone affirmatively seeking relief; "plaintiff" includes not only the party bringing the action but also any party affirmatively seeking relief; defendants, in quiet title suit, who sought to have title quieted in them could invoke statute. Thomas v. Braffet's Heirs, 6 Utah 2d 57, 305 P.2d 507 (1956).

Wrongful death action.

—Action brought by wrong party.

Where original wrongful death action was dismissed after it was discovered that plaintiff was not the natural son of the deceased, and the parents of the deceased subsequently filed a wrongful death action after the two-year statute of limitation had run, the fact that their suit was based upon their status as the decedent's statutory heirs did not qualify them for a limitation period extension since there was no actual legal relationship between them and the plaintiff in the first suit. Dunn v. Kelly, 675 P.2d 571 (Utah 1983).

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: Graham v. Sawaya, 1981 B.Y.U. L. Rev. 937, 945.

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 301 et seq.

C.J.S. — 54 C.J.S. Limitations of Actions § 287 et seq.

A.L.R. — Statute permitting new action, after failure of original action commenced within period of limitation, as applicable in cases where original action failed for lack of jurisdiction, 6 A.L.R.3d 1043.

Applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on merits, 13 A.L.R.3d 848.

Effect of statute permitting new action to be brought within specified period after failure of original action other than on the merits to limit period of limitations, 13 A.L.R.3d 979.

Application to period of limitations fixed by contract, of statute permitting new action to be brought within specified time after failure of prior action for cause other than on the merits, 16 A.L.R.3d 452.

Key Numbers. — Limitations of Actions ⇐ 130.

78-12-41. Effect of injunction or prohibition.

When the commencement of an action is stayed by injunction or a statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-41.

Cross-References. — Injunctions, § 78-3-4; Rule 65A, U.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions §§ 170, 171.

C.J.S. — 54 C.J.S. Limitations of Actions §§ 253, 254.

Key Numbers. — Limitation of Actions ⇐ 111.

78-12-42. Disability must exist when right of action accrues.

No person can avail himself of a disability, unless it existed when his right of action accrued.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-42.

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 179.

C.J.S. — 54 C.J.S. Limitations of Actions § 216.

Key Numbers. — Limitation of Actions ⇐ 70(1).

78-12-43. All disabilities must be removed.

When two or more disabilities coexist at the time the right of action accrues, the limitation does not attach until all are removed.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-43.

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 178.

C.J.S. — 54 C.J.S. Limitations of Actions § 220.

Key Numbers. — Limitation of Actions ⇐ 77.

78-12-44. Effect of payment, acknowledgment, or promise to pay.

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

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

Cross-References. — Statute of frauds, § 70A-2-201.

NOTES TO DECISIONS

ANALYSIS

Acknowledgment or promise.
—Acknowledgment alone.
—Acknowledgment to stranger.
—Action against corporation.
—Admission of liability.
—Amount of claim.
—Bankruptcy.
—Conditions or contingencies.
—Denial of indebtedness.
—Direct and unqualified admission.
—Intention to pay. noh —Language.
—Letter by endorser.
—Letter by note maker.
—New promise.
—Option to purchase.
—Pleading.
—Stating of account.
Burden of proof.
—Defendant.
Consideration.
—Moral obligation.
—Original debt.
"Contract."
—Judgment.
—Merger of contract into judgment.
Estoppel.
—Trust deed.
Evidence.
—Testimony of plaintiff.
Mortgage debt.
—Extension by mortgagee.
Payment.

—By assignee.
—By mortgagor.
—Part payment.
—Taxes on mortgaged property.
Verbal agreement.

Acknowledgment or promise.

—Acknowledgment alone.

An acknowledgment alone is sufficient to toll statute; it is unnecessary that acknowledgment be accompanied by a promise to pay; word "or" cannot be construed as "and." Weir v. Bauer, 75 Utah 498, 286 P. 936 (1930).

It is sufficient if there be in writing either an acknowledgment of existing liability or a promise to pay; both are not necessary. Salt Lake Trans. Co. v. Shurtliff, 83 Utah 488, 30 P.2d 733, (1934).

—Acknowledgment to stranger.

Written acknowledgment of existing liability, signed by party to be charged, is sufficient to stop running of statute; but it is otherwise as to acknowledgment to stranger, not intended to be communicated to creditor. Weir v. Bauer, 75 Utah 498, 286 P. 936 (1930).

—Action against corporation.

In action by bondholder against corporation to foreclose trust deed securing bonds, it was held that annual reports of defendant company, income tax reports, etc., did not toll statute. Weir v. Bauer, 75 Utah 498, 286 P. 936 (1930).

Vice president, secretary or general manager of a private corporation may not, without express authority, bind his company by acknowledgment or promise so as to prevent bar of the statute. Salt Lake Valley Loan & Trust Co. v. St. Joseph Land Co., 73 Utah 256, 273 P. 507 (1928).

—Admission of liability.

A mere acknowledgment of an existing liability is insufficient to revive the debt, but no set phrase or particular form of language is required. Anything that will indicate that the party making the acknowledgment admits that he is still liable on the claim is sufficient to revive the debt. O'Donnell v. Parker, 48 Utah 578, 160 P. 1192 (1916).

—Amount of claim.

This statute is satisfied by the acknowledgment of a claim and it does not require that the amount of the claim be acknowledged or that the claim be liquidated. Beck v. Dutchman Coalition Mines Co., 2 Utah 2d 104, 269 P.2d 867 (1954).

—Bankruptcy.

Merely scheduling a claim in petition in bankruptcy does not operate to waive the statute of limitations, or constitute an acknowledgment that will revive the debt. O'Donnell v. Parker, 48 Utah 578, 160 P. 1192 (1916).

—Conditions or contingencies.

Under former statute, promise sufficient to create new or continuing contract and to remove bar of statute was required to be express, clear, and unequivocal; if there were any conditions or contingency annexed, proof was required to show that such conditions had been performed and such contingency had happened, so as to raise qualified promise into one which was absolute and unqualified. Kuhn v. Mount, 13 Utah 108, 44 P. 1036 (1896).

—Denial of indebtedness.

Letter from defendant to plaintiff held denial that defendant was indebted to plaintiff in any sum at time of letter's date, rather than acknowledgment of and promise to pay amount formerly owing to plaintiff by defendant. Thomas v. Glendinning, 13 Utah 47, 44 P. 652 (1896).

—Direct and unqualified admission.

Acknowledgment from which by implication of law promise is to be raised ought to be direct and unqualified admission of previous, subsisting debt for which debtor is liable and which he intends to pay. Kuhn v. Mount, 13 Utah 108, 44 P. 1036 (1896).

—Intention to pay.

Where promise or acknowledgment raises at best — because vague and indeterminate — mere probable inference of intention to pay, and may affect minds of different persons differently, it should not be held sufficient to evidence new cause of action. Kuhn v. Mount, 13 Utah 108, 44 P. 1036 (1896).

—Language.

What constitutes an acknowledgment or promise in writing depends, of course, upon the language thereof. Boukofsky v. Powers, 1 Utah 333 (1876).

—Letter by endorser.

Letters by endorsers on note to effect that they would no longer be liable for their endorsements because of unreasonable delay in bringing action against maker and letter expressing surprise that interest was not paid and stating that endorser would put pressure on maker, held, not acknowledgment under former section. Salt Lake Transf. Co. v. Shurtliff, 83 Utah 488, 30 P.2d 733 (1934).

—Letter by note maker.

Under former statute, held that letters writ-

ten by maker of note to payees thereof contained, not only admission of, but also promise to pay, debt evidenced by note, and, under evidence, etc., were sufficient to remove bar of statute. Kuhn v. Mount, 13 Utah 108, 44 P. 1036 (1896).

—New promise.

A written acknowledgment of an indebtedness upon open account, already barred, and a promise in writing to pay the same, contained in a letter from debtor to creditor, becomes a new promise in writing, and will not be barred until four years from date of new promise. Gruenberg v. Buhring, 5 Utah 414, 16 P. 486 (1888).

New promise does not revive barred obligation, but creates new obligation which, in its turn, is subject to bar of time as original promise. Ireland v. Mackintosh, 22 Utah 296, 61 P. 901 (1900). For comment unfavorable to result reached in this case, see 14 Harv. L. Rev., p. 229.

—Option to purchase.

Acknowledgment made by debtor in option to purchase its property was held to be sufficient to toll statute where option was signed and specifically referred to debt or obligation and the amount thereof. Weir v. Bauer, 75 Utah 498, 286 P. 936 (1930).

—Pleading.

It is questionable whether acknowledgment in writing under this section applies to any liability other than one founded on contract, but in any event the acknowledgment must be made before statute has run and the same pleaded to show tolling of statute, or if made after statute has run, such acknowledgment must be pleaded as basis of action. Attorney Gen. v. Pomeroy, 93 Utah 426, 73 P.2d 1277, 114 A.L.R. 726 (1937).

—Stating of account.

Stating of account between the parties will not take case out of statute, unless such stating is "in writing, signed by the party to be charged thereby." Anthony & Co. v. Savage, 2 Utah 466 (1877).

Burden of proof.

—Defendant.

Defendant has burden, in order to avoid effect of acknowledgment of and promise to pay debt, to show that writings, containing such acknowledgment and promise, referred to debt other than one sued on. Kuhn v. Mount, 13 Utah 108, 44 P. 1036 (1896).

Consideration.

—Moral obligation.

In order for a contract to be valid and binding, each party must be bound to give some legal consideration to the other by conferring a benefit upon him or suffering a legal detriment at his request, and a moral obligation cannot constitute a valid consideration. Manwill v. Oyler, 11 Utah 2d 433, 361 P.2d 177 (1961).

—Original debt.

A debt within the statutory bar is a good consideration for a new promise, although made by an agent, if within the scope of his powers. Leavitt v. Oxford & Geneva Silver Mining Co., 3 Utah 265, 1 P. 356 (1883).

Original debt is sufficient consideration in law to support new contract, but promise ought not to have effect of creating such new contract unless it is distinct admission of debtor's obligation to pay debt. Kuhn v. Mount, 13 Utah 108, 44 P. 1036 (1896).

"Contract."

—Judgment.

Since an action on a judgment (at common law) would not lie in assumpsit, and since this section applies only to contracts based on a promise enforceable in assumpsit, a judgment is not a "contract" within meaning of this section. Yergensen v. Ford, 16 Utah 2d 397, 402 P.2d 696 (1965).

—Merger of contract into judgment.

Where a judgment was entered in favor of creditor in action founded on contract, the debt did not thereafter retain its original character as a contract debt, but a new cause of action on the judgment was substituted, the contract was merged into such judgment, and this section was inapplicable to extend the limitation period within which an action to renew the judgment could be brought. Yergensen v. Ford, 16 Utah 2d 397, 402 P.2d 696 (1965).

Estoppel.

—Trust deed.

Under former section, defendant corporation and majority stockholder could be estopped from asserting bar of statute of limitations in action by minority stockholder to foreclose trust deed given to secure bonds, executed by defendant company. Weir v. Bauer, 75 Utah 498, 286 P. 936 (1930).

Evidence.

—Testimony of plaintiff.

In action on rejected claim against estate of defendant's intestate, defended on ground statute of limitations had run, testimony of plaintiff that defendant's intestate promised to care for graves of plaintiff's children and let value of such services apply on his indebtedness to plaintiff was insufficient to toll statute, where 35 years had elapsed since indebtedness sued on in action was incurred. Hawkley v. Heaton, 54 Utah 314, 180 P. 440 (1919).

Mortgage debt.

—Extension by mortgagee.

Extension of time of payment by mortgagee by receipt of part payment or new promise by mortgagee, which has effect of reviving debt or extending time of payment, will not be binding on junior claimant without his consent so as to affect his right successfully to interpose bar of statute, if such extensions are made after he has acquired his interest in mortgaged premises. Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117, 26 L.R.A. (n.s.) 898 (1909).

Payment.

—By assignee.

Payment made by an assignee for benefit of creditors of assignor does not of itself toll the statute. Holloway v. Wetzel, 86 Utah 387, 45 P.2d 565, 98 A.L.R. 1006 (1935).

—By mortgagor.

Payments on mortgage by mortgagor or his authorized agent preclude payor from claiming that mortgage is barred by statute of limitations. Crompton v. Jenson, 78 Utah 55, 1 P.2d 242 (1931).

—Part payment.

Part payment of either principal or interest by one of two or more joint and several obligors does not of itself suspend the running of the statute of limitations against the other co-obligors. Holloway v. Wetzel, 86 Utah 387, 45 P.2d 565, 98 A.L.R. 1006 (1935).

Where plaintiff's right to recover certain money deposited with defendant had been barred for more than twelve years by statute of limitations at time this section was adopted, subsequent payment of a small sum by defendant did not revive plaintiff's right to sue. Francis v. Gisborn, 30 Utah 67, 83 P. 571 (1905).

—Taxes on mortgaged property.

Payment of taxes on mortgaged property, by mortgagor, in accordance with provision of mortgage, did not constitute a "payment" on principal amount of mortgagor's obligation, within meaning of former § 104-2-45, so as to toll statute of limitations in regard to mortgage. Upton v. Heiselt Constr. Co., 116 Utah 83, 208 P.2d 945 (1949).

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 § 316.

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.

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).

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 66 et seq.

C.J.S. — 53 C.J.S. Limitations of Actions § 31.

Key Numbers. — Limitation of Actions ⇐ 169.

78-12-46. "Action" includes special proceeding.

The word "action," as used in this chapter, is to be construed, whenever it is necessary to do so, as including a special proceeding of a civil nature.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-46.

NOTES TO DECISIONS

Special proceeding.

Proceeding by tax commission for appointment of administrator to collect and pay inheritance taxes upon estate which had been held in joint tenancy with right of survivorship was a "special proceeding of a civil nature." In re Swan's Estate, 95 Utah 408, 79 P.2d 999 (1938).

A "special proceeding" applies to proceedings in courts of justice or quasi-judicial bodies in which the rights of parties thereto are determined, but which proceedings were not known as common-law actions or proceedings in equity. A summary proceeding to seize and sell a car does not constitute an action. Crystal Car Line v. State Tax Comm'n, 110 Utah 426, 174 P.2d 984 (1946).

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 81.

C.J.S. — 53 C.J.S. Limitations of Actions § 3; 54 C.J.S. Limitations of Actions § 296.

Key Numbers. — Limitation of Actions ⇐ 3(1), 131.

78-12-47. Separate trial of statute of limitations issue in malpractice actions.

In any action against a physician and surgeon, dentist, osteopathic physician, chiropractor, physical therapist, registered nurse, clinical laboratory bioanalyst, clinical laboratory technologist, or a licensed hospital, person, firm or corporation as the employer of any such person for professional negligence or for rendering professional services without consent, if the responsive pleading of the defendant pleads that the action is barred by the statute of limitations, and if either party so moves the court, the issue raised thereby may be tried separately and before any other issues in the case are tried. If the issue raised by the defense of the statute of limitations is finally determined in favor of the plaintiff, the remaining issues shall then be tried.

This act shall not be construed to be retroactive.

History: C. 1953, 78-12-47, enacted by L. 1971, ch. 212, § 2.

Meaning of "this act". — The phrase "this act," appearing in the second paragraph, refers to Laws 1971, Chapter 212, which enacted this section and amended § 78-12-28.

Cross-References. — Utah Health Care Malpractice Act, limitation section, § 78-14-4.

NOTES TO DECISIONS

Summary judgment.

The statute of limitations issue in a medical malpractice action may be disposed of by summary judgment if no genuine issues of material fact are raised. Reiser v. Lohner, 641 P.2d 93 (Utah 1982).

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions §§ 487, 488.

C.J.S. — 54 C.J.S. Limitations of Actions § 398.

Key Numbers. — Limitation of Actions ⇐ 176 et seq.

CHAPTER 13
PLACE OF TRIAL — VENUE