4-18-2013

Guzman v. Piercy Appellant's Reply Brief Dckt. 39708

IN THE SUPREME COURT OF THE STATE OF IDAHO

LUIS JESUS GUZMAN, individually,

Plaintiff-Defendant-
Respondent-Cross Appellant,

v.

DALE PIERCY, individually,

Defendant-Plaintiff-
Appellant.-Cross Respondent

v.

CANYON COUNTY

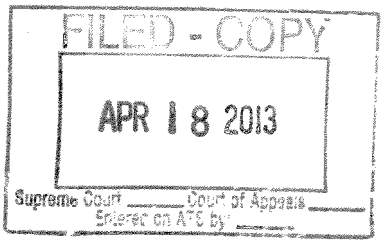
Defendant-Respondent,

JENNIFER L. SUTTON, individually

Defendant-Defendant-
Respondent-Cross Appellant.

Supreme Court Case No.: 39708-2012

Case No. CV05-4848



Appealed from the District Court of the Third Judicial District in and for the County of Canyon

APPELLANT'S REPLY BRIEF

HONORABLE BRADLEY S. FORD District Judge

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I. THE ILLEGALITY OF THE 1982 ORDINANCE A SIGNIFICANT FACTOR IN THIS CASE

The fact that the Canyon County Commissioners in 1982 violated state law and thereby enacted a void herd district ordinance is critical to this appeal. The other parties' attempt to gloss over the fact that in 1982 the Canyon County Commissioners chose to enact a herd district wholly outside of the statutory framework for taking such an action. The Commissioners failed to comply with Idaho Law by failing to obtain a landowner petition and did not provide notice to the public or provide for the required hearing prior to acting. By failing to act pursuant to a petition, the void ordinance was flawed by failing to designate the boundaries of the district, the type of animal to which it would apply and in failing to provide a beginning date as required by statute. Idaho Code § 25-2402 et seq.

Judge Petrie acknowledged this in his ruling stating:

> Piercy contended these flaws overcome the presumption of validity of the herd district; hence, this court must strike it down. At that time, the court did not adopt with Piercy's position. After the benefit of a trial on the issue, and seeing firsthand how the county failed at virtually every level to follow the Code, the court no longer disagrees with Piercy.

R. Vol. 6, p. 968. Interestingly, Judge Petrie also included the following statement in footnote no. 9:

> At the time of Piercy's original motion for summary judgment, Canyon County had not entered as a party and the other parties did not have the benefit of any "inside" information of what the County may have done to satisfy the Code requirements. Ironically, in hindsight, the court could just as easily have entered judgment on behalf of Piercy based upon his original motion for summary judgment.

Id.

Piercy proved at trial that the Canyon County Commissioners violated state law in creating the 1982 ordinance, the parties defending the ordinance want this Court to rule that this void ordinance is now unassailable due to the statute of limitations in I.C. § 31-857. This argument

would allow legislative bodies to insulate their illegal acts by creating preventing challenges to those actions after the actions have already been ruled illegal.

Even more stunning is Respondent's argument that all other laws, ordinances or statutes become unassailable from any challenge after four years due to I.C. § 5-224 despite the nature or severity of any potential defect in the law. While I.C. § 31-857 limits its effect to challenges to procedural requirements, there is no such limitation under Respondents' interpretation of I.C. § 5-224. Based upon Respondents' interpretation, I.C. § 5-224 would prevent any challenge to an ordinance after four years unless specifically allowed in a more specific section of the Idaho Code. Surely, the Idaho Legislature did not intend to use such a vague and blunt instrument as a catch-all statute of limitations to categorically prevent people from challenging illegal ordinances after four years.

Adopting the arguments of Respondents would create a legislative environment in Idaho where legislators, county commissioners and city board members would be emboldened to disregard procedural and substantive limits on lawmaking and pass laws in violation of the statutory protections. As long as the government is able to keep their abuses secret long enough, then the law would become free from challenges.

This case is the prime example. It was proven that the Canyon County commissioners disregarded the law at "every level" in passing the 1982 Ordinance. R. Vol. 6, p. 968. Due to the abuses of not acting according to a landowner petition and without proper notice, the people of Canyon County had little or no chance of knowing what had occurred. Now, the Respondents want to ignore the illegal actions of the commissioners and have the void 1982 ordinance made valid by preventing anyone from challenging the ordinance. This method of validating illegally enacted districts could be used by county commissioners in enacting, modifying or disbanding herd districts,

school districts, highway districts and canal districts. Therefore, it is important in this matter to recognize that the 1982 Ordinance was proven to have been illegally passed.

II. THE 2009 AMENDMENT TO IDAHO CODE § 31-857 DOES NOT PREVENT MR. PIERCY FROM CHALLENGING THE 1982 ORDINANCE

The evidence and law establish that the Idaho Legislature's 2009 amendment of I.C. § 31-857 does not prevent Mr. Piercy's challenge to the 1982 Ordinance. The 2009 amendment is not retroactive based upon the plain language of the amendment and the evidence surrounding the enactment of the legislation. Further, even if the 2009 amendment does apply to all previously established herd districts, the statute of limitations created by the 2009 amendment would have begun to run on the date of enactment of July 1, 2009.

A. The Plain Language of the 2009 Amendment does not Clearly Indicate an Intention that the Statute of Limitation be Retroactive.

The amendatory language of I.C. § 31-857 states "No challenge to the proceedings or jurisdictional steps preceding such an order, shall be heard or considered after seven (7) years has lapsed from the date of the order." This sentence is separated from the preceding sentence by a period. The first sentence reads:

> Whenever any school district, road district, herd district or other district has heretofore been, or shall hereafter be, declared to be created, established, disestablished, dissolved, or modified, by an order of the board of county commissioners in any county of the state of Idaho, a legal prima facie presumption is hereby declared to exist, after a lapse of two (2) years from the date of such order, that all proceedings and jurisdictional steps preceding the making of such order have been properly and regularly taken so as to warrant said board in making said order, and the burden of proof shall rest upon the party who shall deny, dispute, or question the validity of said order to show that any such preceding proceedings or jurisdictional steps were not properly or regularly taken; such prima facie presumption shall be a rule of evidence in all courts in the state of Idaho.

The previously cited amended language does not use the same retroactive language as the original sentence. Nor does the added sentence as a part of the paragraph, by its structure or verbiage, require an interpretation that includes the retroactive language of the original sentence. It

is just as consistent with the structure of the paragraph to read the amendatory language as not being retroactive.

When reading the plain language of the statute, the paragraph describes two different statutes of limitation. The original limitation in the first sentence creates a presumption of validity after two years have passed since the enactment of the district. This limitation makes it much more difficult for an entity or person to challenge the validity of a district. The new statute of limitation creates an absolute bar on challenging the validity of the districts. A plain reading of the amendment to I.C. § 31-857 shows that the absolute bar was not to be applied retroactively whereas the first limitation creating a presumption does state that it is to be applied retroactively.

Idaho Code § 73-101 states, "No part of these compiled laws is retroactive, unless expressly so declared." There is no express language in the amendatory language of I.C. § 31-857 that the absolute bar to recovery is to be applied retroactively. The amendatory language of I.C. § 31-857 simply does not include retroactive language. Since the express language of the amendment does not include retroactive language, then the amendment should be applied prospectively.

B. The Statute of Limitations in Amended I.C. § 31-857 Began to Run on July 1, 2009, Even if the Statute was Retroactively Applied to All Previous Herd Districts.

Neither Judge Ford or Respondents recognize that even if a statute of limitations is applied retroactively, the statute will begin to run at the time of enactment or a reasonable time will be provided to accrued cases.

The point is best illustrated by the case *Stuart v. State,* 149 Idaho 35, 232 P.3d 813 (2010), that Respondent Sutton relies upon in her brief. Defendant/Respondent/Cross Appellant Jennifer Sutton's Respondent Cross-Appellant's Brief at 26. The Supreme Court in *Stuart* was considering a statute of limitations that was enacted after the Appellant's conviction as part of I.C. § 19-2719. *Stuart v. State*, 149 Idaho 35, 232 P.3d 813 (2010). This Court analyzed some important concepts

regarding statute of limitations, holding that, "we have noted that where a statute is procedural or merely 'draws upon facts antecedent to its enactment' it will be held to be prospective in nature." *Id.* at 43, 232 P.3d at 821; citing: *Bryant v. City of Blackfoot*, 137 Idaho 307, 313, 48 P.3d 636, 642 (2002). This Court continued holding:

> The original enactment of I.C. § 19-2719 included language making it applicable to convictions prior to the statute's enactment, but it was not, itself, "retroactive" in any substantive sense. 1984 Idaho Sess. Laws, ch. 159, § 8, p. 390 ('This act shall apply to all cases in which capital sentences were imposed on or prior to the effective date of this act but which have not been carried out, and to all capital cases arising after the effective date of this act.').

Id. at 43, 149 Idaho at 821. The enacting language cited above is very similar to the language in I.C. § 31-857 that Respondents argue makes the statute of limitation in the amendment to I.C. § 31-857 substantively retroactive. The Respondents mistakenly attempt to make the argument that if the amendment to I.C. § 31-857 applies to previously enacted herd districts then it necessarily follows that the statute retroactively began to run on the date that the previous herd districts were enacted. This Court in *Stuart* rejected that approach holding that: "As I.C. § 19-2719 is a statute of limitations, the requirement that a petition be timely filed in compliance with the requirements of the statute began at the date of enactment for those cases involving convictions occurring at an earlier date." *Id.*

In holding that statutes of limitation applied retroactively to previous cases begin to run on the date the statute of limitation was enacted, this Court in *Stuart* was following a long line of authority. One such case is *University of Utah Hosp. on Behalf of Harris v. Pence,* 104 Idaho 172, 174, 657 P.2d 469, 471 (1982). The facts in *Pence* are similar to those in the present case. In *Pence,* Plaintiff hospital filed an application for aid for the medically indigent with the Twin Falls County Clerk within a year of the hospital admission. The medical indigency statute, Idaho Code § 31-3504, was then amended reducing the one-year statute to a 45-day period of

limitations from the date of admission to file the application. This statutory provision became effective July 1, 1976 (1976 Idaho Sess. Laws, ch. 121), a time subsequent to the admission and release of the Harrises' child from the hospital. The hospital's claim for payment was denied; suit was filed; and summary judgment was granted to defendant. The hospital then appealed.

This Court stated:

> Applied retroactively, the 1976 version of I.C. § 31-3504 would have required the application to have been made by April 10, 1976, some two and a half months before the effective date of the law. Clearly, such retroactive application would unfairly penalize the appellant for failure to comply with a statute of which it had no notice.

University of Utah Hosp. on Behalf of Harris v. Pence, 104 Idaho at 174, 657 P.2d at 471 (1982).

This Court then quoted from *Olivas v. Weiner*, 127 Cal.App.2d 597, 274 P.2d 476 (1954) as follows:

> A statute is not made retroactive merely because it draws upon facts existing prior to its enactment. Thus changes in procedural law have been held applicable to existing causes of action. The effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future. *National Automobile & Cas. Ins. Co. v. Downey*, 98 Cal.App.2d 586, 590, 220 P.2d 962; *Argues v. National Superior Co.*, 67 Cal.App.2d 763, 778, 155 P.2d 643; *Earle v. Froedtert Grain & Malting Co.*, 197 Wash. 341, 85 P.2d 264. *Olivas v. Weiner*, 274 P.2d at 478, 479.

University of Utah Hosp. on Behalf of Harris v. Pence, 104 Idaho at 175, 657 P.2d at 472 (1982).

Finally, this Court quoted from a Washington case stating, "Similarly, in *Earle v. Froedtert Grain & Malting Co., supra*, the court stated that '[t]he limitation prescribed by the new statute commenced when the cause of action was first subjected to the operation of the statute, that is, upon its effective date.' 85 P.2d at 266."

The reasoning of *University of Utah Hosp. on Behalf of Harris v. Pence*, has been followed by Idaho's appellate courts in cases involving Idaho Code § 14-4902, Idaho's version of the Uniform Post-Conviction Procedure Act [UPCPA]. *Esquivel v. State,* 128 Idaho 390, 391, 913 P.2d 1160, 1161 (1996); *Martinez v. State,* 130 Idaho 530, 534, 944 P.2d 127, 131(Ct. App.

1997); *LaFon v. State,* 119 Idaho 387, 389-90, 807 P.2d 66, 68-69 (Ct. App. 1991); and *Mellinger v. State,* 113 Idaho 31, 32, 740 P.2d 73,74 (Ct. App. 1987). Effective July 1, 1979, the UPCPA was amended to provide a five-year limitation period for filing an application for post-conviction relief. Prior to 1979, the UPCPA, like Idaho Code § 31-857 prior to 2009, had no period of limitations at all. In *Mellinger,* the Idaho Court of Appeals decided the issue of whether the five-year limitation period mandated by the amendment applied to a conviction entered before the effective date of the amendment. In finding that it did, the Court of Appeals cited and followed *University of Utah Hosp. on Behalf of Harris v. Pence* agreeing with the district court that the five-year period of limitations for filing an application began on the date of July 1, 1979, the effective date of the amended statute. The Court of Appeals stated further that the amendment was being applied prospectively because retroactive application of such a time limitation would be contrary to general principles of law and Idaho Code § 73-101. *Mellinger v. State*, 113 Idaho 31, 33-34, 740 P.2d 73, 74-75 (Ct. App. 1987).

Thus, following the reasoning of this Court and the Idaho Court of Appeals the statute of limitations in the amendment to Idaho Code § 31-857 should be considered to have begun running on the date of enactment with regard to all previously enacted herd districts. Therefore, Mr. Piercy's challenge to the 1982 Ordinance that was decided by trial prior to the enactment of the period of limitations in the amendment to I.C. § 31-857 should not be barred by the limitation. To do so would unfairly penalize litigants, including Mr. Piercy, for failure to comply with a statute of which he had no notice.

Respondent Guzman attempts to rely upon the case of *Chase Securities Corporation v. Donaldson,* 325 U.S. 304, 65 S. Ct. 1137 (1945) in arguing that the statute of limitations in the amended I.C. § 31-857 should bar Mr. Piercy from challenging the 1982 Ordinance. However,

the facts in *Chase* are distinguishable from the facts in our case. In *Chase*, Plaintiff Donaldson wanted to rescind a purchase of securities as void under the Minnesota Blue Sky Laws. Defendant Chase argued that the action was barred by the existing statute of limitations. Defendant argued that once it had a decision in its favor, the state legislature could not revive Plaintiff's cause of action and put a new statute of limitations in place. The new statute of limitations allowed actions under the Blue Sky Laws to be brought within six years after delivery of the securities, or where delivery had occurred more than five years prior to the effective date of the act, one year after the date of enactment.

The U.S. Supreme Court pointed out that the Minnesota Supreme Court, in the initial appeal, had ruled only that the Blue Sky Law six-year statute of limitations had not been tolled on the grounds that Chase was absent from the state. All other issues were remanded without prejudice to the trial court. While the proceedings were pending in the trial court, the Minnesota legislature amended the Blue Sky Law adding a specific statute of limitation applicable to actions raised by plaintiff in the suit based on violations of the Blue Sky Laws as above. The effect of the amendment was to abolish any defenses Chase might make under the previous statute of limitation. In a second appeal, the Minnesota Supreme Court found that securities had to be registered, and this was violated by the sale. It also held that the action was one for damages in tort to recover the purchase price of unregistered securities, that the newly enacted statute of limitations was applicable, and that this had the effect of lifting the bar of the general limitation statute, and in doing so, did not violate the Fourteenth Amendment.

The U. S. Supreme Court held that as the case stood in the state court, Chase's statutory immunity was not fully judged. Thus, the action of the legislature in amending the statute of limitations did not deprive it of a judgment in its favor. The Supreme Court relied upon the case

of *Campbell v. Holt*, 115 U.S. 62, 5 S.Ct. 209 (1885), which had held that a lapse of time had not invested a party with title to real or personal property, and a state legislature, consistent with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after the right of action had been barred. The plaintiff was then restored his remedy, and the defendant was deprived of his defense that the action was barred by the previous statute of limitations. The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation.

The facts in *Chase* were that a securities purchaser tried to get his money back because defendant sold him unregistered securities. Purchaser waited longer that the general statute of limitations to bring his action against defendant. While the case was pending, the state legislature amended the specific securities statute of limitation to, in effect revive plaintiff's cause of action. In our case, instead of reviving a cause of action, Respondents would have this Court extinguish the defense of Mr. Piercy by retroactively applying a newly enacted statute of limitations when Mr. Piercy had no notice of the statute. In addition, instead of a case pending on procedural motions prior to a trial, as in *Chase*, in our case, there has been a full trial and a decision by the finder of fact and law, Judge Petrie. Both the facts and the application of the law in *Chase* are distinguishable from the facts and law in the present case. *Chase* should not be followed.

The net effect of the 2009 amendment to I.C. § 31-857 is to extend the Canyon County Commissioners' liability on the 1982 Ordinance for seven years until 2016. The amendment to I.C. § 31-857 is not retroactive not only because there is no evidence of legislative intent to do so, but because Idaho's appellate courts have ruled that it is prospective beginning on the date of its enactment on July 1, 2009.

Based upon the law and facts, Mr. Piercy requests this Court find that the statute of limitations in amended I.C. § 31-857 does not prevent Mr. Piercy's challenge to the 1982 Ordinance or rescind Judge Petrie's decision following the trial on the merits that the 1982 Ordinance is void.

III. THE CATCH-ALL STATUTE OF LIMITATIONS IN I.C. § 5-224 DOES NOT PREVENT MR. PIERCY FROM CHALLENGING THE 1982 ORDINANCE

Idaho Code § 5-224 does not apply to Mr. Piercy's challenge to the 1982 Ordinance because (1) a more specific statute controlled the issue of challenging districts; (2) the application of I.C. § 5-224 would lead to an absurd result and (3) statutes of limitation do not apply to affirmative defenses.

A. The Pre-2009 Version of I.C. § 31-857 Exclusively Controlled the Time Frames for Bringing Challenges to Ordinance Involving Districts

Idaho Code § 5-201, states, "Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have accrued, ***except when, in special cases, a different limitation is prescribed by statute.***" I.C. § 5-224 (2012) (Emphasis added). Also, this Court has stated the rule that courts apply the more specific statute of limitations when there is more than one which could apply. *Farmers Nat'l. Bank v. Wickhap Pipeline,* 114 Idaho 565, 569, 759 P.2d 71, 75 (1988).

The Idaho Legislature chose to create a special statute governing the procedure for challenges to the different district ordinances enacted by counties. This statute is I.C. § 31-857. As discussed extensively by all parties in the briefing, I.C. § 31-857 prior to the 2009 amendment contained a specific time limitation to challenges to the formation, modification or dissolution of various districts. The time limitation forced litigants challenging the procedural requirements of a county ordinance to face a presumption of validity after two years had passed

since the ordinance's enactment. The burden of challengers to overcome a presumption of validity is a significant protection to an existing ordinance.

Despite having specifically limited challenges to county ordinances regarding districts, the Idaho Legislature did not place any other time limitation on challenging the ordinances. The lack of any absolute time bar in the pre-2009 I.C. § 31-857 shows the Idaho Legislature's intention that the two-year limitation in I.C. § 31-857 was the only statutory time limitation to challenges to county ordinances affecting districts.

Respondents argue that the lack of an absolute time barring limitation in the pre-2009 I.C. § 31-857 meant that the Idaho Legislature intended for such challenges to be limited by I.C. § 5-224. The Idaho Legislature, however, made its contrary position clear in the matter when they adopted the 2009 amendment to I.C. § 31-857.

Judge Ford, Respondents, and Mr. Piercy have cited extensively to the legislative history of the 2009 amendment to I.C. § 31-857. Mr. Piercy agrees that it is clear the Idaho Legislature felt the need to adopt an additional statute of limitations that would establish an absolute time bar on challenges to county ordinances involving districts. The undisputed purpose of the Idaho Legislature was to limit "unreasonably delayed legal challenges to the procedures used by the County Commission ..." Appendix B to Appellant's Brief.

Based upon the Idaho Legislature's actions and stated purpose, it would be absurd to think that the legislature was trying to prevent delayed legal challenges by changing the applicable statute of limitation from a four-year statute of limitation to a seven-year statute of limitation. It would be embarrassing and futile to find that the Idaho Legislature is spending time, effort and tax dollars to create legislation that operates in opposition to its stated purpose. The Idaho Legislature certainly recognized that under the current laws there was no statute of

limitations that created an absolute time bar to challenges to county ordinances involving districts and therefore passed legislation amending I.C. § 31-857 to create one. Any other interpretation of the legislature's actions in this regard would defy logic.

Further, the history of the passage of I.C. § 31-857 also shows that there was no limitation barring challenges to ordinances prior to the enactment of I.C. § 31-857. Idaho Code § 31-857 was originally enacted in 1935. *See*: Appendix A. I.C. § 31-857 when originally enacted stated that after five years, there would be a presumption of validity of county ordinances. *Id.* It was not until 1989 that limit was changed to two years.

Idaho Code § 5-224 was previously designated as R.C. § 4060. *See*: Appendix B. Revised Codes § 4060 was also a four year catch-all statute of limitation and it pre-dated the 1935 enactment of I.C. § 31-857.

If I.C. § 5-224 or its previous enactments applied to challenges to districts created by counties, then the enactment of I.C. § 31-857 would have been meaningless. For this statute would create a presumption of validity for ordinances that would take effect one year after I.C. § 5-224 would apply. Therefore, the statute of limitations would prevent challenges to the ordinance before the presumption of validity would come into effect.

It is clear from the legislative history that the Idaho Legislature never intended to have I.C. § 5-224 apply to challenges to county ordinances or any other law. Mr. Piercy requests that this Court find that I.C. § 5-224 does not apply to Mr. Piercy's challenge to the 1982 Ordinance.

B. The Application of Idaho Code § 5-224 to Challenges to Void Ordinances Should not be Allowed.

This Court has held that, "The Court interprets statutes according to their plain, express meaning, but will resort to judicial construction when the statute is 'ambiguous, incomplete, absurd, or arguably in conflict with other laws.' *Id.* This Court disfavors a statutory construction

that would lead to absurd or unreasonably harsh results. *Id.* at 690, 85 P.3d at 666." *Ada County Highway District v. TSI*, 145 Idaho 360, 368, 179 P.3d 323, 331 (2008).

Respondents argue that I.C. § 5-224 would prevent all procedural and substantive challenges to statutes and ordinances after four years. Surely if the Idaho Legislature had meant to take such a drastic step in limiting the rights of citizens to challenge flawed and void laws, it would have specifically set forth that limitation and not left it to a vague catch-all statute of limitation.

Respondents cite the case of *Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho 77, 120 P. 830 (1911) in support of their position that I.C. § 5-224 would apply to bar challenges to the present challenge to the 1982 Ordinance. At first blush, *Canady* seems to bear a resemblance to the present case in that a property owner was challenging a city ordinance based partially upon there being no citizen petition or means whereby damages could be ascertained as required by the Idaho Code. *Id.* at 86, 120 P. at 839. The city in part, was claiming that the property owner's claims were barred by estoppel and statutes of limitation. *Id.* This is where the similarities end. A close reading of the opinion's analysis shows that it is unhelpful in our present case.

Before reaching any reasoning regarding the statutes of limitation, this Court reasoned that the action taken by Coeur d'Alene was not the type of action that required a petition by the property holders. *Id.* at 87, 120 P. at 840. After citing the statute that required a property owner petition where a city sought to sell or convey a street or alley, the opinion stated, "We do not understand this to be a case where the city has sought to sell or convey the streets and alleys within the city, ..." *Id.*

The opinion also found that only property owners that abutted the streets or alleys to be vacated could bring the type of claim for damages that was being attempted and that the

Appellant was not such a property owner. *Id.* at 89, 120 P. at 842.

It was only after deciding the issue on other grounds that the opinion discussed the raised statutes of limitation. It stated:

> It is next contended that appellant's cause of action, if she had one, was barred by the statute of limitations, subd. 1 of sec. 4054 and secs. 4037, 4038 and 4060, Rev. Codes. We think under the facts of this case that this action is barred by the statute of limitations, and that this action should have been brought at least within five years from the date such cause of action arose.

Id. at 93, 120 P. at 846. The opinion does not state which statute of limitation it applied nor does it provide any further reasoning for its rule. This part of the opinion is certainly dicta considering entire matter was decided upon other grounds. It is also unhelpful to the present case in that the opinion cited a five-year statute of limitation where the catch-all statute is a four-year limitation. Also, since the opinion had already held that the city did not violate any procedural requirements in enacting the ordinance, the application of the statutes of limitation would only refer to the damage claim of the property owner. Therefore, this Court's dicta does not create precedent. It is not persuasive in analyzing the present case where we are dealing with a void ordinance. The Respondents cannot rely upon *Canady* for their argument that I.C. § 5-224 should apply to the present case.

Therefore, Mr. Piercy requests that this Court find that the 1982 Ordinance was void and that I.C. § 5-224 does not apply to challenges to the enforcement of void ordinances.

C. Statutes of Limitation do not Apply to an Affirmative Defense

Idaho cases have held that statutes of limitation do not apply to pure defenses, but are applicable only where affirmative relief is sought. *Morton v. Whitson,* 45 Idaho 28, 260 P. 426 (1927). This Court stated:

> The general rule is that the statutes of limitation are not applicable to defenses. . . . And where the defendant in an action on a note pleads total failure of consideration, and

> alleges a parol warranty of property for which the note was given, the plaintiff cannot avoid the defense by insisting on the statute of limitations. (Citation omitted).

Id., 45 Idaho at 33, 260 P. at 427.

Mr. Piercy answered Mr. Guzman's complaint with an affirmative defense. Mr. Piercy did not ask for affirmative relief until required to do so when the declaratory judgment action was ordered to be filed by Judge Petrie. Appellant's Brief at p. 3-4.

Respondents only response to these facts is that Mr. Piercy did end up requesting affirmative relief. This was not Mr. Piercy's action, but Judge Petrie's. Mr. Piercy's defense was that there was no valid herd district ordinance that required him to keep his cattle contained. The defense was then made as a matter of a motion for summary judgment. Judge Petrie then ordered that a separate declaratory relief action be filed to require a trial on the validity of the 1982 Ordinance.

Mr. Piercy should not be penalized for being forced into a situation where his affirmative defense became a separate trial. This discussion not only shows the injustice that would occur if Mr. Piercy is not allowed his defense, but supports the arguments below regarding Respondents' waiver of any statute of limitation defenses. Respondents encouraged the district court to delay ruling on Mr. Plercy's motion for summary judgment and then sat by while the Court ordered a separate trial on the issue of the validity of the 1982 herd district ordinance. In fact, it was Respondent Sutton that insisted that the district court order Canyon County to be a party in the trial regarding the validity of the 1982 Ordinance. R. Vol. 2, p. 274-275. The district court appears to have the power to order in a party and realign if necessary I.R.C.P. 19(a)(1).

Judge Petrie even acknowledged that "in hindsight" he should have just granted Mr. Piercy's motion for summary judgment based upon Mr. Piercy's affirmative defense. R., Vol. 6, p. 968.

Mr. Piercy therefore requests that this Court find that I.C. § 5-224 does not apply to Mr. Piercy's affirmative defense regarding the validity of the 1982 Ordinance.

IV. RESPONDENTS WAIVED THEIR STATUTE OF LIMITATION DEFENSES

Judge Ford and the Respondents incorrectly analyze the issue of waiver (1) regarding the Respondents' initial waiver of their statute of limitation defenses, (2) regarding the stipulation and order barring defenses regarding the timing of the Amended Action for Declaratory Relief and (3) the effect of having allowed the trial on the merits of the 1982 Ordinance without objecting to timeliness.

A. The Respondents Waived any Statute of Limitation Defenses Barring Mr. Piercy from Challenging the 1982 Ordinance.

As set forth in detail in the Appellant Brief, the Respondents failed to raise I.C. § 5-224 or any other statute of limitation that would prevent Mr. Piercy's challenge until one month prior to the trial and after the parties had entered into a stipulation to reorder the parties and Judge Petrie issued an order adopting the language of the stipulation. Appellant's Brief, p. 2-11.

Idaho Rule of Civil Procedure 8(c) states: "In pleading to a preceding pleading, a party shall set forth affirmatively ... statute of limitations ...." Idaho Rule of Civil Procedure 9(h) states: "In pleading the statute of limitations it is sufficient to state generally that the action is barred, and allege with particularity the Session Law of the section of the Idaho Code upon which the pleader relies."

The Idaho Court of Appeals has held that, "Under the civil rules, compliance with the governing statute of limitations is not a requirement for subject matter jurisdiction; rather, the time bar of the statute of limitations is an affirmative defense that may be waived if it is not pleaded by the defendant." *Anderson v. State*, 133 Idaho 788, 791, 992 P.2d 783, 786 (Ct.App. 1999).

The Respondents all had multiple opportunities to raise any statutes of limitation to prevent

the challenge to the 1982 Ordinance, but it was not until a month before the trial on the merits that they raised a statute of limitations defense. The Respondent's did not offer any evidence of the statute of limitations at trial. The evidence is clear that prior to the stipulation entered into by the parties on September 4, 2008, the Respondents had not raised a statute of limitations as a defense barring Mr. Piercy's challenge to the 1982 Ordinance.

Respondent Sutton attempts to argue that somehow arguing equitable estoppel and laches preserved the Respondents' ability to raise statute of limitations defenses. Defendant/Respondent /Cross-Appellant Jennifer Sutton's Respondent/Cross-Appellant's Brief at 9. This point actually bolsters Mr. Piercy's position. Respondent Sutton is admitting that the Respondents had many opportunities to raise defenses relating to the timing of Mr. Piercy's challenge to the 1982 Ordinance. The fact that Respondents raised defenses of estoppel and laches underscores the fact that they should have raised any other defenses regarding timing long before a month before the trial on the merits.

Therefore, Respondents had certainly waived their statute of limitation defenses prior to the stipulation of September 4, 2008.

B. The Plain Language of the Stipulation to Realign the Parties and the Judge's Subsequent Order is an Express Waiver of any Statute of Limitation Defenses.

The critical question is whether the stipulation and subsequent order of the district court adopting the stipulation revive the waived claims. Judge Ford and Respondents incorrectly analyze the interpretation and effect of the stipulation and order. Judge Ford and Respondents both took the approach of combining an analysis of the plain language of the stipulation and order with an analysis of the possible intent behind the stipulation and order. Judge Ford is required to have looked at the plain language and only looked at the intent if the plain language was ambiguous.

The plain language of Judge Petrie's order that adopted the parties' stipulation is as follows:

1. That the parties to the Action for Declaratory Judgment filed by Co-Defendant Sutton against Canyon County on October 15, 2007 be changed to reflect Dale Piercy as Plaintiff and Canyon County, Luis Guzman and Jennifer Sutton as Defendants.

2. That Mr. Piercy be allowed to file an Amended Action for Declaratory Relief attached hereto as Exhibit A;

3. That the suit created by Mr. Piercy's filing of the Amended Action for Declaratory Relief remains combined with the above-captioned action between Plaintiff Guzman and Co-Defendant Sutton and Piercy;

4. That Canyon County, Mr. Guzman and Ms. Sutton may Answer the Amended Action for Declaratory Relief filed by Mr. Piercy as provided for in the Idaho Rules of Civil Procedure;

5. That all rulings, orders, decisions and scheduling dates and deadlines which have been entered by the Court in the above-captioned case be applied to the action created by Dale Piercy's filing of the Amended Action for Declaratory Relief as they applied to the original Action for Declaratory Relief filed by Co-Defendant Sutton;

6. That Canyon County, Mr. Guzman and Ms. Sutton waive any defenses they may have regarding the timing of the filing of Mr. Piercy's Amended Action for Declaratory Relief.

R., Vol. 4, p. 671-672.

The plain language of this order allows the defending parties to file answers. Judge Ford found that this meant that Respondents could include whatever defenses were available in their answers. Looking at the plain language of paragraph four by itself, Judge Ford's interpretation would be justified. That interpretation, however, ignores the more specific language of paragraph 6 that causes a waiver of "any defenses they may have regarding the timing of the filing of Mr. Piercy's Amended Action for Declaratory Relief." *Id.* If you take the common meaning of the words in paragraph 6, their meaning would encompass statutes of limitation defenses.

It is the same with paragraph 5. While paragraphs 2 and 3 read by themselves would suggest that a new action is being initiated that would allow the parties to start over with a new litigation; paragraph 5 limits that by applying all rulings, orders and decisions to the new action.

The prior orders include discovery limits, motion limits and a trial schedule that includes a trial beginning a month from the order. The prior orders also included Judge Petrie's order that the legitimacy of the 1982 Ordinance be determined by a trial on the merits with Canyon County as a defendant.

Judge Petrie's order allows for the parties to be realigned and for those parties to draft their own pleadings, but then limits the action to the same issues that existed prior to the order.

An analysis of the facts beyond the plain language of the stipulation and order also shows that neither the parties to the stipulation or Judge Petrie, intended to create new issues or to resurrect waived issues. As stated previously, the subject stipulation and order were filed about one month prior to the trial. The district court had already ruled on a motion to reconsider the equitable estoppel and laches issues (R. Vol. 4, p. 572-592) and Mr. Piercy's motion regarding other legal challenges to the 1982 Ordinance. R. Vol. 4, p. 593-595. The parties had already filed their pre-trial memorandums. R. Vol. 4, p. 599-661. Not one of the Respondents included any indication that they would be raising statute of limitations defenses to attempt to prevent Mr. Piercy from challenging the validity of the 1982 Ordinance.

The facts show without a doubt that the issues regarding the 1982 Ordinance had, for more than a year, been painstakingly litigated and reduced to the sole question of whether the evidence showed that the Canyon County Commissioners had illegally attempted to create a herd district in 1982. After all this time and litigation it would defy all reason to think that Judge Petrie or the parties involved intended to enter into a stipulation that would create a entirely new line of defenses or issues just prior to trial. Especially where there was no provision for additional discovery or motion practice.

Mr. Piercy, therefore, requests that this Court find that the stipulation and subsequent order

did not resurrect or allow Respondents to raise statute of limitation defenses.

C. Respondents Waived any Statutes of Limitation Defenses by Failing to Raise them at the Trial.

Even had the Respondents Guzman and Sutton timely raised a statute of limitations defense by filing it in their answers to Mr. Piercy's Amended Action for Declaratory Relief, they waived those defenses at the trial on the merits.

Respondent Guzman and Sutton filed their answers to Mr. Piercy's Amended Action for Declaratory Relief on September 19, 2008 and September 23, 2008, respectively. The trial was set for October 8, 2008. None of the Respondents made any motion in limine or other motion to prevent Mr. Piercy from proceeding to present his challenge to the 1982 Ordinance at trial.

At the trial, the Judge started by making a statement and Mr. Piercy's counsel argued a motion in limine. Tr. p. 83-102. Mr. Piercy's counsel made opening statements. Tr. p. 102-109. Respondent Guzman's attorney then made opening statements. Tr. p. 110-115. At no time during these opening proceedings did Respondents make an objection or motion claiming that Mr. Piercy should not be allowed to proceed because the challenge was time barred by a statute of limitations.

Evidence was submitted by stipulation and by live testimony. None of the evidence or testimony regarded statutes of limitation defenses. Tr., p. 116-188. Canyon County then made an opening statement and additional evidence was taken by live testimony. Tr. p. 189-214. Respondent Guzman then called a witness. Tr., p. 215-227. Following the bulk of the live testimony, the parties engaged in extensive discussions with the Judge regarding other witnesses and potentially other evidence. Tr. 228-248. Eventually, all parties rested and the trial was ended. At no time during any of the trial proceedings, did any of the Respondents object to Mr. Piercy challenging the statute or presenting evidence to challenge the 1982 Ordinance because of a statute of limitations.

This Court has held that waiver is, "the intentional relinquishment of a known right. It is a voluntary act and implies election by a party to dispense with something of value or to forego some right or advantage which [the party] might at [the party's] option have demanded and insisted upon." *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992).

Based upon the above record of the pre-trial proceedings and trial proceedings, the Respondents by clear, knowing, intentional and unambiguous action waived any argument they had with regard to statutes of limitation by participating without objection to the trial on the merits of the 1982 Ordinance. It is not surprising that Judge Petrie ignored the statute of limitations arguments in Respondents' post-trial briefing in his decision finding the 1982 Ordinance void. At that point, the statute of limitations arguments were completely irrelevant, because they had been waived. It would be unjust to allow a party after the evidence is closed at a trial to argue a statute of limitations defense that was not brought up during the trial.

It should be noted that from the point in time that Respondents Guzman and Sutton raised the statute of limitations arguments in their post-trial briefing, Mr. Piercy has consistently objected to their attempt to make those arguments. Mr. Piercy has always claimed that these arguments were improper and has not consented in Judge Ford's decision to consider them.

Therefore, even if Judge Petrie's order regarding the Amended Action for Declaratory Relief allowed the Respondents to raise statutes of limitation defenses, the Respondents waived those defenses by failing to raise them at trial, or making any such objection at trial.

V. THE UNIQUE PROCEDURAL DEVELOPMENT OF THIS CASE MAKES RESPONDENTS GUZMAN'S AND SUTTON'S STATUTES OF LIMITATION ARGUMENTS IRRELEVANT

The facts in the record undisputedly show that Respondent Canyon County never raised the statute of limitations defense under I.C. § 31-857 or I.C. § 5-224. Based upon the cases cited above,

Respondent Canyon County thereby waived those defenses. It is also undisputed that Respondent Canyon County was a wholly separate party from Respondents Guzman and Sutton. The record shows that Respondent Canyon County was specifically brought into the case in order to defend its ordinance. Respondent Canyon County was originally the only defendant in the declaratory judgment action. *See*, Tr. p. 43, L. 18-25 and Tr. p. 44-49 (colloquy between counsel for Defendant Sutton and Judge Petrie on bringing Canyon County into the case); R. Vol. 3, p. 445, 468 (Order Denying Defendant Percy's Motion for Summary Judgment, Joining Canyon County, and Holding all Other Motions in Abeyance Until Canyon County's Herd District Validity is Determined).

Once Respondent Canyon County consented to the challenge to its ordinance by Mr. Piercy, the other Respondents' statutes of limitation arguments appear irrelevant, even assuming that they had been properly raised. A ruling against Respondent Canyon County that the 1982 Ordinance is void, makes it the law in Canyon County.

Respondent Sutton argues that Mr. Piercy failed to properly support this argument with case citations. Defendant/Respondent /Cross-Appellant Jennifer Sutton's Respondent/Cross-Appellant's Brief at 11. This appears to be a matter of first impression for this Court. Mr. Piercy could not find any cases where a county was ordered into a case and then acquiesced in allowing a challenge to one of its ordinances where other private persons were also parties to the lawsuit. This is simply a matter of procedure. Mr. Piercy has cited the procedural rules and cases regarding waiver of non-jurisdictional defenses.

The uniqueness of this case is demonstrated by the irrelevance of the authority cited by Respondent Sutton in response to Mr. Piercy's argument. Respondent Sutton cites I.C. § 10-1202 and argues that it provides her the right to argue that the 1982 Ordinance is valid.

Defendant/Respondent /Cross-Appellant Jennifer Sutton's Respondent/Cross-Appellant's Brief at 12. Mr. Piercy agrees. Respondent Sutton had the opportunity to argue for the 1982 Ordinance's validity and did so the trial. Respondent Sutton's ability to argue the 1982 Ordinance's validity under I.C. § 10-1202 is irrelevant to the question of whether a private citizen's invocation of a statute of limitations regarding a challenge to a county ordinance is effective where the county itself has agreed to allow the challenge to proceed to a trial on the merits. It is certain that neither Respondent Sutton nor Guzman were representing Respondent Canyon County. The County had its own attorney.

Therefore, Mr. Piercy requests that this Court find that Judge Petrie's order that the 1982 Ordinance is void is the law of Canyon County and that it applies to Mr. Piercy's case.

VI. APPLYING THE STATUTE OF LIMITATIONS IN I.C. § 31-857 OR I.C. § 5-224 TO MR. PIERCY'S CHALLENGE IS PROCEDURALLY AND SUBSTANTIVELY UNCONSTITUTIONAL

The 2009 amendment to I.C. § 31-857 and the application of I.C. § 5-224 in this matter would violate the substantive and procedural due process rights guaranteed by the Idaho and U.S. Constitutions.

A. The Application of Statute of Limitations to Challenges to the 1982 Ordinance Would Violate Mr. Piercy's Rights to Procedural Due Process

This Court has stated: Procedural due process requires that "there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999); quoting: *State v. Rhoades*, 121 Idaho 63, 72, 822 P.2d 960, 969 (1991).

This Court also held, "Due process 'is not a concept to be applied rigidly in every matter. Rather, it 'is a flexible concept calling for such procedural protections as are warranted by the particular situation.'" *Aberdeen-Springfield Canal Co.*, 133 Idaho at 91; quoting: *City of Boise v.*

Industrial Comm'n, 129 Idaho 906, 910, 935 P.2d 169, 173 (1997); quoting: *In re Wilson*, 128 Idaho 161, 167, 911 P.2d 754, 760 (1996).

"A procedural due process inquiry is focused on determining whether the procedure employed is fair. The due process clause of the Fourteenth Amendment 'prohibits deprivation of life, liberty, or property without 'fundamental fairness' through governmental conduct that offends the community's sense of justice, decency and fair play.'" *Bradbury v. Idaho Judicial Council*, 136, Idaho 63, 72, 28 P.3d 1006, 1015 (2001); quoting: *Maresh v. State of Idaho Dep't of Health and Welfare*, 132 Idaho 221, 225-226, 970 P.2d 14, 19-20 (1998); citing: *Moran v. Burbine*, 475 U.S. 412, 432-34, 106 S.Ct. 1135, 1146-47, 89 L.Ed.2d 410, 428-29 (1986).

This Court must engage in a two-step analysis in determining whether there has been a violation of procedural due process. *Bradbury v. Idaho Judicial Council*, 136, Idaho 63, 72, 28 P.3d 1006, 1015 (2001). The first step is to ascertain either a liberty or property under the Idaho Constitution or under the U.S. Fourteenth Amendment. *Id.* Once a court has determined that a property interest exists, it can determine what process is due. *Id.* A court must determine if sufficient notice and hearing were afforded to meet the due process requirements. *Simmons v. Board of Trustees of Independent School Dist. No. 1*, 102 Idaho 552, 553, 633 P.2d 1130, 1131 (1980).

"Whether a property interest exists can be determined only by an examination of the particular statute, rule or ordinance in question." *Bradbury*, 136 Idaho at 72, 28 P.3d at 1015; *See also*: *Fergusen v. Board of Trustees of Bonner County Sch.*, 98 Idaho 359, 363, 564 P.2d 971, 975 (1977).

Open range is a property right. 'Open range' is defined as all areas of the state not within cities, villages, or already created herd districts. *Adamson v. Blanchard*, 133 Idaho 602, 606, 990 P.2d 1213, 1217 (1999). Therefore, the default land status in Idaho is open range, when you are

outside of a city or a village. The Idaho Legislature then allowed private citizens to change the status of the land to a herd district through the petition process. *See*: I.C. § 25-2402-2404.

A herd district would require specified animals to be contained by fencing. This would abrogate the previous right of landowners to allow their animals to roam at large. It also changed the ability for landowners to be free of liability in the event cattle were to cause damage to other persons' property. I.C. § 25-2118. Interestingly, if the 1982 Ordinance is upheld, the only animal it controls is swine by operation of the statutory language and the failure of the Commissioners to identify the controlled animals in the Ordinance.

Further, a herd district allows the district to tax the members of the district in order to construct fencing and put in livestock guards. So, the creation of a herd district also directly affects a persons' property.

In taking away this property right, the Idaho Legislature required that counties provide notice and an opportunity to be heard prior to the property right being taken by creation of a herd district. *See*: I.C. § 25-2402-2404.

By providing for the right to have notice and an opportunity to be heard, Mr. Piercy should have the right to challenge that process. Any statutes of limitation applied to his right would eliminate that the process provided under the state herd district laws by making it impossible to challenge the lack of the process after four or seven years had expired.

Respondents argue that a four or seven year limitation to challenges to a county ordinance impacting districts of all kinds is reasonable. Respondent Sutton equates it to time limitations on post-conviction relief actions. Defendant/Respondent/Cross-Appellant Jennifer Sutton's Respondent/Cross-Appellant's Brief at 37.

This argument emphasizes the problem with the Respondents' claims. A person is certain to

know when the clock is ticking on a post-conviction relief action, because it begins upon the date of conviction. The person whose right is at stake would be present for the event that triggers the statute of limitations and therefore would have actual notice. With the ordinance in question, no one would know their rights had been impacted until it was too late to attempt to challenge the ordinance. The actual act making the ordinance challengeable would be hidden.

In making a change to a highway district for example, county commissioners could make the change in complete secret violating all statutory safeguards. The district could then structure the ordinance so that the obvious effects of the passage of the ordinance would not occur for seven years and one day from the date of passage. This would essentially ensure that no one would know about the ordinance until it was too late to challenge. Application of any statutes of limitation to this type of county action is inviting the worst type of government abuse, because the abused would be powerless to challenge the ordinance.

Again, this case is the perfect example. Mr. Piercy had his right to notice, petitioner, and an opportunity to be heard taken from him. Without realizing it, Mr. Piercy's land allegedly became a herd district and he was now legally liable to be sued if his cows escaped his property. It became a trap. The first time Mr. Piercy knows of the herd district is the first time he was sued in court for damages. Now Respondents argue that it does not matter that the herd district was illegally enacted, because Mr. Piercy's action is barred by a vague statute of limitations or a recently enacted statute of limitations. Preventing Mr. Piercy from challenging the 1982 Ordinance essentially creates the recipe book for governmental abuse.

B. Mr. Piercy's Substantive Due Process Rights Would be Violated by the Application of a Statute of Limitation to His Challenge of the 1982 Ordinance.

The parties cited cases are in agreement regarding the standards for reviewing this type of action. The arguments cited above are equally applicable to Mr. Piercy's substantive due process

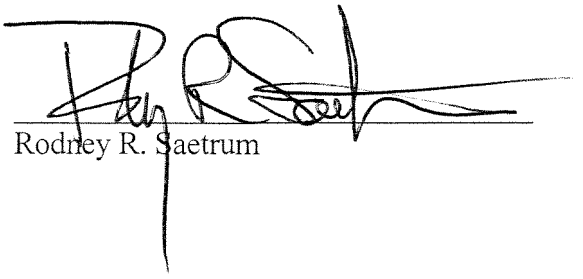
argument. It would be incredible to think that a government could limit the ability for the citizens to challenge illegal and void ordinances in circumstances where the abuse of process both makes the ordinance illegal and unable to detect the defective ordinance until it is too late. The application of statute of limitations to challenges to ordinances based upon lack of due process in the enactment is not rationally related to a legitimate governmental function and is unconstitutional.

IV. CONCLUSION

Mr. Piercy has shown that Judge Ford erred in his ruling allowing Mr. Guzman and Ms. Sutton to raise the statutes of limitation found in I.C. § 5-224 and amended I.C. § 31-857 in order to overturn Judge Petrie's ruling that the 1982 Ordinance was illegal and void. Judge Ford also erred in finding that statutes of limitation on challenges to ordinances that effect property rights are constitutional. For these and the above stated reasons, Mr. Piercy requests that this Court reverse Judge Ford's rulings.

Respectfully submitted this 17 day of April 2013,

SAETRUM LAW OFFICES

By 

Rodney R. Saetrum

APPENDIX A

SECTION 1. That Section 29-904 Idaho Code Annotated be and the same is hereby amended as follows:

"29-904. Capital Deemed Security.—Whenever such companies shall receive and accept the office or appointment of assignees, receivers, guardians, executors, administrators, or be directed to execute any trust whatever, or engage in the compiling of abstracts, the capital of the said company shall be taken and considered as the security required by the law for the faithful performance of their duties as aforesaid, and shall be absolutely liable in case of any default whatever * ; *provided that it shall be the duty of the commissioner of finance of the State of Idaho to annually make a thorough investigation of the fiscal affairs of such companies and if it be found after such examination that the capital of such company is impaired, the commissioner of finance is given the power, and it is hereby made his duty, to suspend the right of such company to make and certify abstracts of title until such time as the commissioner of finance shall have determined that such capital is no longer impaired, and the commissioner of finance is hereby authorized to promulgate such rules and regulations as are necessary to carry this Act into effect.*"

Approved March 2, 1935.

CHAPTER 78

(S. B. No. 135)

AN ACT

AMENDING SECTION 6-507 OF THE IDAHO CODE ANNOTATED RELATING TO THE SERVICE OF WRITS OF ATTACHMENT AND OF EXECUTION AND GARNISHMENTS, AND PROVIDING FOR THE METHOD, MANNER AND EFFECT OF SUCH SERVICE ON BANKING CORPORATIONS OPERATING BRANCH BANKS OR MORE THAN ONE OFFICE WHERE DEPOSITS ARE RECEIVED, AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 6-507 of the Idaho Code Annotated shall be and the same is hereby amended to read as follows:

"6-507. GARNISHMENT.—Upon receiving information in writing from the plaintiff or his attorney, that any person or corporation, public or private, has in his possession or control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person, or corporation, a copy of the writ, and a notice that such credits, or other property, or debts, as the case may be, are attached in pursuance of such writ. Provided, that in case of service upon a corporation the same may be had by delivering a copy of the paper to be served, if upon a private corporation, to any officer or agent thereof, and if upon a public or municipal corporation, to the mayor, president of the council or board of trustees, or any presiding officer, or to the secretary or clerk thereof. *Provided, further, that no service of any writ of attachment, nor of execution, nor any garnishment, shall be made under this or the preceding section, or otherwise, on any banking or trust corporation operating branch banks or more than one office where deposits are received, except by delivery of copies of the writs, notices and/or other papers required in other cases, to one of the officers or managing agents of such corporation employed in and at, and in charge of some particular office or branch of said corporation, and being so made, such writ or garnishment shall be valid and effective only as to moneys to the defendant's credit in that particular office or branch and as to other personal property belonging to the defendant held in the possession or control of the officers or managing agents of said corporation employed in and at, and in charge of such office or branch.*"

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in force and effect from and after its passage and approval.

Approved March 2, 1935.

CHAPTER 79

(S. B. No. 114)

AN ACT

CREATING A PRIMA FACIE LEGAL PRESUMPTION THAT AN ORDER OF A BOARD COUNTY COMMISSIONERS CREATING, ESTABLISHING, DISESTABLISHING, OR DISSOLVING ANY SCHOOL DISTRICT, ROAD DISTRICT, HERD DISTRICT, OR OTHER DITRICT, HAS BEEN MADE PURSUANT TO THE

APPENDIX B

possession of them. Havird v. Lung (1911) 19 I. 790, 115 P. 930.

Where the possession of property is acquired by a tort no demand is necessary prior to the institution of suit for its recovery; consequently the statute of limitations is set in motion without such demand. Havird v. Lung (1911) 19 I. 790, 115 P. 930.

Fraud or mistake: The provisions of subd. 4 have no application to the action for taking, detaining or injuring goods or chattels, the period for commencing which is prescribed by subd. 3. Havird v. Lung (1911) 19 I. 790, 115 P. 930.

One who sustains damage by reason of the mistake and false and fraudulent representation contained in an abstract may commence his action to recover damages against the abstracter within three years after discovering the fraud or mistake. Hillock v. Idaho etc. Co. (1912) 22 I. 440, 126 P. 612, 42 L. R. A. (N. S.) 178.

The test, under subd. 4, is not whether the fraud or mistake occurred in a contract or independently of contract, but the test is whether the action seeks relief from or on account of a fraud or mistake. Ib.

Under subd. 4 knowledge of such facts as would put a reasonably prudent person upon inquiry is equivalent to knowledge of fraud, and will start commencement of statute. Williams v. Shrope (1917) 30 I. 746, 168 P. 162.

§ 4055. Actions against officers, for penalties, on bonds and for personal injuries. Within two years:

1. An action against a sheriff, coroner or constable, upon the 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.

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 a county or to the people of the state.

4. An action to recover damages for an injury to the person, or for the death of one caused by the wrongful act or neglect of another.

5. An action for libel, slander, assault, battery, false imprisonment or seduction.

6. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process. ['03, p. 56, § 1.]

Hist. (See C. C. P. '81, § 159) R. S. § 4055; am. '03, p. 56, § 1, reenacted R. C. § 4055.

Comp. leg.—Cal. See C. C. P. 1872, § 339; as amended: Kerr's C. ib.

N. D. Analogous: C. C. P. §§ 7376, 8.

Cross ref. Claims against state two years: § 109.

Cited: Collman v. Wanamaker (1915) 27 I. 342, 346, 149 P. 292; Pindel v. Holgate (1915) 221 F. 342, 137 C. C. A. 158, 343, Ann. Cas. 1916C 983.

§ 4056. Actions to recover goods or money from officers. Within one year: An action against an officer or 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. [R. S. § 4056.]

Hist. (See C. C. P. '81, § 160) R. S. § 4056, reenacted R. C. ib.

Comp. leg.—Cal. Almost identical except time is six months: C. C. P. 1872, § 341; as amended, same through subd. 1: Kerr's C. ib.

Cross ref. Recovery of fines in police courts one year: § 2221.

§ 4057. Actions on claims against county. Actions on claims against a county which have been rejected by the board of commisisoners must be commenced within six months after the first rejection thereof by such board. [R. S. § 4057.]

Hist. (See C. C. P. '81, § 161) R. S. § 4057, reenacted R. C. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 342; Kerr's C. ib.

Cited: Weil v. Defenbach (1918) 31 I. ——, 170 P. 103.

§ 4058. Actions on open accounts. 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 is deemed to have accrued from the time of the last item proved in the account on either side. [R. S. § 4058.]

Hist. (See C. C. P. '81, § 162) R. S. § 4058, reenacted R. C. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 344; Kerr's C. ib.

N. D. Similar: C. C. P. § 7379.

Application: This section has no application to fees charged by the county for recording of instruments. Lincoln Co. v. Twin Falls etc. Co. (1913) 23 I. 438, 130 P. 788.

§ 4059. Actions to recover deposits. To actions brought to recover money or property deposited with any bank, banker, trust company or saving and loan society, no limitation begins to run until after an authorized demand. [R. S. § 4059.]

Hist. (See C. C. P. '81, § 163) R. S. § 4059, reenacted R. C. ib.

Comp. leg.—Cal. No such provision in C. C. P. 1872; different: Kerr's C. § 348.

Cited: Gwinn v. Melvin (1903) 9 I. 202, 72 P. 961; Bates v. Cap. S. Bk. (1910) 18 I. 429, 110 P. 277.

§ 4060. Actions for other relief. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued. [R. S. § 4060.]

Hist. (See C. C. P. '81, § 164) R. S. § 4060, reenacted R. C. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 343; Kerr's C. ib.

N. D. Analogous: C. C. P. § 7381.

Cited: Re Counties v. Alturas Co. (1894) 4 I. 145, 87 P. 349; Chemung M. Co. v. Hanley (1904) 9 I. 786, 77 P. 226; Nelson v. Steele (1906) 12 I. 762, 88 P. 95; Hill v. Empire State etc. Co. (1908) 158 F. 881, 885; Hailey v. Riley (1908) 14 I. 481, 95 P. 686, 17 L. R. A. (N. S.) 86; Bashor v. Beloit (1911) 20 I. 592, 119 P. 55; Canady v. Coeur d'Alene L. Co. (1911) 21 I. 77, 120 P. 830; (erroneously as § 454) Olympia etc. Co. v. Kerns (1913) 24 I. 481, 496, 135 P. 255.

Action against officer: An action by a county to recover from the clerk of court, auditor and recorder moneys illegally allowed by the county commissioners to the clerk, etc., and fees illegally collected by the clerk, etc., from the county, is barred after four years. Bannock Co. v. Bell (1901) 8 I. 1, 65 P. 710.

Appointment of administrator: A proceeding for the appointment of an administrator is an action within the meaning of this section and it is barred if not commenced within four years from the death of the decedent. Gwinn v. Melvin (1903) 9 I. 202, 72 P. 961.

Actions for damages: Actions for damages against real property come under this section. Boise Dev. Co. v. Boise (1917) 30 I. 675, 167 P. 1032.

§ 4061. Limitations apply to state. The limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties. [R. S. § 4061.]

Hist. (See C. C. P. '81, § 165) R. S. § 4061, reenacted R. C. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 345; Kerr's C. ib.

N. D. Similar: C. C. P. § 7382.

Application to state: The statute of limitations applies to the state as well as to private individuals. Small v. S. (1904) 10 I. 1, 76 P. 765.

Limitation of section: This section is specifically restricted to the limitations "prescribed by this title," that is, of actions of a private nature and against private individuals. It does not apply to an action to enforce a public duty, such as an action on behalf of a county to compel the commissioners of another county to appoint an accountant for the apportionment of the indebtedness of the counties as prescribed by a county division act. Re Counties v. Alturas Co. (1894) 4 I. 145, 37 P. 349.

Action by county: The statute runs against the county in a civil action brought by it against the clerk, auditor and recorder for illegal fees and compensation collected by him from the county during his term of office. (Overruling Fremont Co. v. Brandon, 6 I. 482, 58 P. 264; Quarles, C. J. dissenting) Bannock Co. v. Bell (1901) 8 I. 1, 65 P. 710.

§ 4062. Action to redeem mortgage. An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage. [R. S. § 4062.]

Hist. (See C. C. P. '81, § 166) R. S. § 4062, reenacted R. C. ib.

Comp. leg.—Cal. Same: C. C. P. 1872, § 346; Kerr's C. ib.

Cited: Fountain v. Lewiston Nat. Bk. (1905) 11 I. 451, 83 P. 505.

§ 4063. Same: Partial redemption. If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action under the provisions of this title, any one of them who is entitled to maintain such an action may