Denver Law Review

Volume 51 | Issue 1 Article 7

March 2021

# Real Property - The Colorado Recording Act: Race-Notice or Pure Notice? - Colo. Rev. Stat. Ann. 118-6-9

Charles G. Rogers

# NOTE

## REAL PROPERTY—THE COLORADO RECORDING ACT: Race-Notice or Pure Notice? COLO. REV. STAT. ANN. § 118-6-9

### INTRODUCTION

Every state currently has in force a statute providing for the recording of deeds and other instruments affecting the title to land.[1] Such laws are designed at least in part to determine the priority of competing claims to interests in real property.[2] Problems typically arise when a landowner makes successive conveyances of land to third parties, each of whom then claims title.[3]

At common law, as between successive conveyees of an interest in land, priority of title was determined by the priority in time of the conveyances. The rationale was that once a grantor had conveyed an interest in land to a grantee, he no longer had that interest to convey to any subsequent grantee.[4] The recording acts for the most part replace the common law rule with statutory schemes specifying the priorities in cases of successive conveyances of the sane interest in land. These acts are generally classified into any of three basic types—pure race, pure notice, or race-notice—depending upon the criteria used to determine the priority of competing title claims under a particular statute.

The Colorado recording act provides that:

> no such instrument or document [affecting the title to real property] shall be valid as against any class of persons with any kind of rights, except between the parties thereto, and such as have notice thereof, until the same shall be deposited with such recorder.[5]

This statute was labeled race-notice by the Colorado Supreme Court in the 1968 case of *Eastwood v. Shedd.*[6] Two years later, in *Plew v. Colorado Lumber Products*,[7] the Court of Appeals ap-

---

[1] 1 R. PATTON & C. PATTON, LAND TITLES 15 (2d ed. 1957) [hereinafter cited as PATTON].

[2] *Id.* at 15, 16.

[3] For the sake of simplicity, this paper discusses the problem in terms of successive conveyances of the same land by the same grantor.

[4] Aigler, *The Operation of the Recording Acts*, 22 MICH. L. REV. 405, 406 (1924).

[5] COLO. REV. STAT. ANN. § 118-6-9 (1963).

[6] 166 Colo. 136, 139, 442 P.2d 423, 425 (1968).

[7] 28 Colo. App. 557, 481 P.2d 127 (1970).

parently followed suit.

This comment discusses the Colorado statute in light of the distinction between a pure notice and a race-notice construction of the statute. Two propositions are advanced. First, the classification of the Colorado act as race-notice was not necessary in either *Eastwood* or *Plew*, as the same result would have been reached in both cases under either a pure notice or a race-notice construction of the statute. Second, given the conclusion that it would not affect the rights of the parties in those two cases, an interpretation of the Colorado act as one of the pure notice variety is urged.

## I. THE NOTICE/RACE-NOTICE DISTINCTION

### A. *Pure Notice Acts*

The central feature of pure notice statutes is the protection of subsequent claimants who have no notice of prior claims. In the early case of *Steele's Lessee v. Spencer*,[8] the United States Supreme Court said of such a statute:

> The . . . deed not being recorded, the statute avoids it in terms as against all subsequent purchasers for valuable consideration, without notice, whether their titles be recorded or not . . . . A deed not being recorded, avoids it as against *subsequent*, but not as *prior* purchasers.[9]

Thus, the two main features of a pure notice act emerge: first, for a subsequent purchaser to prevail over a prior unrecorded interest he must qualify as a good faith purchaser for value without notice;[10] and second, for an owner of an interest in land to prevail over later purchasers, he must record his interest before the *acquisition* of the later conflicting interest.[11] Under a pure notice system, a grantee without notice need not worry about having his interest defeated by the *subsequent recordation* of a *prior grant*. His interest may, however, be defeated by a *subsequent grant* by his grantor to another grantee without notice.

Pure notice acts appear to exist in about half of the states.[12]

---

[8]26 U.S. (1 Pet.) 552 (1828).

[9]*Id.* at 560 (emphasis added).

[10]Note that under the Colorado act, lack of notice is the only qualification for the later grantees; nothing is said about valuable consideration. In Eastwood v. Shedd, 166 Colo. 136, 442 P.2d 423 (1968), the court in a liberal interpretation of the act extended its protection to donees of land.

[11]PATTON, *supra* note 1, at 39 (Supp. 1973).

[12]4 AMERICAN LAW OF PROPERTY 545 n.63 (A.J. Casner ed. 1952).

The general wording of this type of act is exemplified by the Massachusetts act, which provides that "a conveyance . . . shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless it . . . is recorded . . . ."[13]

B. *Race-Notice Acts*

A race-notice statute combines the requirement that the later claimant be without notice with the requirement that he *also* secure priority of record. These acts may be treated conceptually as "notice-plus" acts. The subsequent purchaser for value without notice will be protected against earlier unrecorded interests only if he in addition places his conveyance of record before the earlier conveyances are recorded.[14]

The typical wording of race-notice acts is found in the California statute, which provides:

> Every grant of an estate in real property is conclusive against the grantor, also against everyone subsequently claiming under him, except a purchaser or incumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument *that is first duly recorded.*[15]

C. *The Practical Effect of the Distinction*

The distinction between the pure notice and race-notice acts is highlighted by the following hypothetical. Assume *O*, the owner of Blackacre, conveys it to *S*, the senior grantee, and subsequently conveys it again to *J*, the junior grantee, who has no knowledge of the earlier grant to *S*. After the conveyance by *O* to *J*, *S* records his grant. Still later, *J* records his deed. As between *S* and *J*, who owns Blackacre?

Under a pure notice system, *J* owns Blackacre, since he bought without notice of the earlier unrecorded grant to *S*, and he is protected against such unrecorded grants. The fact that *S* thereafter beat *J* in the race to the county courthouse makes no difference, as long as *J* had no notice of *S*'s claim.[16]

However, with a race-notice system, *S* owns Blackacre. He

---

[13]MASS. GEN. LAWS ANN. ch. 183, § 4 (1958); PATTON, *supra* note 1, § 9.

[14]PATTON, *supra* note 1, at 43.

[15]CAL. CIV. CODE § 1107 (West 1954) (emphasis added). *See* B. WEBB, A TREATISE ON THE LAW OF RECORD OF TITLE § 13 (1890). See also the recording acts of Alaska, Hawaii, Idaho, Michigan, Minnesota, and New York for more examples of similarly worded acts.

[16]PATTON, *supra* note 1, at 39 (Supp. 1971).

has no notice of prior unrecorded claims (*J*'s claim is subsequent), and he secured priority of record by recording before *J* did.

Thus, the essential distinction between pure notice and race-notice acts is that under the former the dispute is decided solely on the basis of whether the second claimant paid value and had no notice of the earlier claim, while under the latter the priority of title is decided by the order in which the conflicting instruments are filed for record, with the race limited to the first purchaser and a subsequent grantee who must qualify as a purchaser for value without notice.[17]

However, it should be noted that such a case appears to be atypical. By far the more common pattern is that in which the junior grantee secures priority of record. In these cases, *O* conveys Blackacre to *S*, and then conveys it again to *J*, who records his grant. Later (generally upon hearing of *J*'s claim), *S* records the deed evidencing his claim. In such a case, under a pure notice recording system, *J*, being the subsequent or junior grantee and being without notice of *S*'s claim, would prevail. However, contrary to the first hypothetical discussed, in this case the same result would be reached under a race-notice act. The reason for this is that *J*, being (1) a subsequent purchaser without notice who (2) first recorded, is precisely the sort of person against whom the statute voids *S*'s instrument.

Courts, even in pure notice jurisdictions, tend to blur the theoretical notice/race-notice distinction by couching their holding for *J* in the second hypothetical in terms of his securing priority of record. Such appears to be the case in the Colorado cases of *Eastwood v. Shedd*[18] and *Plew v. Colorado Lumber Products.*[19]

D. Eastwood *and* Plew

*Eastwood v. Shedd*, decided by the Colorado Supreme Court in 1968, was the first case to label the current Colorado statute race-notice. In this case the grantor had deeded the property by warranty deed to the defendant in December 1958. Subsequently, in October 1963, the grantor deeded the same property to the plaintiff, who recorded her deed 8 days later. Then, almost a year later, the defendant-senior grantee recorded her deed. Both trans-

[17] *Id.* at 100.

[18] 166 Colo. 136, 442 P.2d 423 (1968).

[19] 28 Colo. App. 557, 481 P.2d 127 (1970).

fers were gratuitous, and the plaintiff had no knowledge of the earlier grant until it was recorded a year after the plaintiff received and recorded her grant. The issue was whether a *donee* of real property was entitled to the protection of the recording act. The court answered in the affirmative on the basis of the broad language of the statute ("as against any class of persons with any kind of rights").[20]

Then the court proceeded to label the Colorado statute "race-notice," presumably as part of its holding for the plaintiff.[21] However, under a pure notice interpretation the plaintiff as junior grantee would have prevailed by virtue of having been without notice of the defendant's earlier claim (as in the second hypothetical above). Thus, the same result would have been reached had the court chosen to rely solely on the fact that the plaintiff was the junior grantee without notice as was reached by casting the outcome in terms of plaintiff's priority of record.

In *Plew*, the times of acquisition and recording were relatively the same. The owner granted timber rights to the defendant in the years 1955, 1957, and 1958, but these agreements were never recorded. Subsequently, in September 1965, the owner executed a contract for the sale of the entire property to the plaintiff. This contract was recorded within 2 months. When the plaintiff brought this action by virtue of its claim under the contract of purchase, the issues centered on two points. The first was whether the contract of sale was entitled to be recorded under the Colorado statute. The second issue was whether the fact that the plaintiff received notice of the earlier claim before the conveyance was actually made (but after the contract was entered into and recorded) prevented his being without notice under the statute. The court of appeals answered the first question in the affirmative and the second in the negative, again relying on the breadth and scope of the Colorado act.

However, following *Eastwood*, the court then went on to cast its holding (that the plaintiff-junior claimant had priority) in terms of priority of record: "[B]ecause of the legal impact of our recording act the unrecorded rights of Colorado Lumber Products [defendant] were rendered legally invalid as against Plew [plaintiff] *when Plew recorded his contract of purchase.*"[22]

---

[20] 166 Colo. at 138, 442 P.2d at 425.

[21] *Id.* at 139, 442 P.2d at 425.

[22] 28 Colo. App. at 563, 481 P.2d at 130 (emphasis added).

This was unnecessary in view of the fact that the plaintiff, Plew, being a junior grantee without notice, would prevail under a pure notice theory regardless of any recordation. Thus, the *Plew* case, as well as the *Eastwood* case, is of the same factual type as the second hypothetical discussed above, so that the result would be the same under a pure notice as under a race-notice interpretation of the act.

The result of *Plew* and *Eastwood* is that the Colorado courts, by casting their holdings in terms of the junior claimant's priority of record, have made what would appear on its face to be a pure notice statute into a race-notice statute. Presumably, therefore, in a case such as the first hypothetical above (where the senior grantee recorded after the grant to the junior grantee but before the latter recorded) the courts would hold in favor of the *senior grantee* by virtue of his priority of record.[23]

The power of the courts to construe the Colorado statute adding this requirement of recording and thereby effecting a change in the theoretical type of recording act is not questioned here. However, it is submitted that a change in interpretation may be desirable in view of current Colorado law in related areas.

## II. THE EFFECT OF A RACE-NOTICE INTERPRETATION

### A. *The Doctrine of Constructive Notice*

Under both race-notice and pure notice recording acts, the subsequent purchaser must be without notice of prior claims of interests in the land in order to avail himself of the act's protection.[24] Notice sufficient to make the protection of such acts unavailable to a purchaser may be either actual or constructive. Actual notice covers the cases where the purchaser had subjective knowledge of prior claims, as would be the case if he had been present when the earlier claim arose. Constructive notice, in the broadest sense, is notice which is imputed by law to a person not having actual notice.[25]

One basis for imputing notice under the doctrine of constructive notice centers on the recording acts. It has long been held in Colorado as elsewhere that recording of deeds is notice to all the world,[26] or at least to all those bound to search for it,[27] of the

[23]No such case has been found under the current statute.

[24]*See* text accompanying note 13 *supra*.

[25]Stone v. Bartsch, 76 N.D. 721, 725, 39 N.W.2d 1, 5 (1949).

[26]Botkin v. Pyle, 91 Colo. 221, 236, 14 P.2d 187, 192 (1932); Neslin v. Wells, 104 U.S. 428, 433 (1881).

interest claimed by the person recording. Furthermore, not only do the records afford a means of giving notice, but a purchaser of real estate is also bound to know what the record discloses concerning the title,[28] and he may rely on it for protection against outstanding claims of which he has no other notice.[29]

A race-notice act weakens the efficacy of the records as a means of giving constructive notice by restricting the class of persons entitled to rely on the records as notice of prior grants to those who secure priority of record. For example, a prospective buyer of Blackacre from the owner would (after tracing the title to the owner) search the index from the date of grant to the owner up until the present time in order to discover if the owner has previously conveyed all or part of Blackacre. Finding nothing, the purchaser buys Blackacre. Before he can record his conveyance the grantee of an earlier unrecorded deed records. If the act is of the pure notice variety, the buyer is protected, assuming that he had no actual notice of the earlier conveyance. If the act is a race-notice one, however, the earlier grantee prevails. Leaving aside for the moment the question of equities,[30] it is clear that in the latter case the records are no longer constructive notice to all the world nor to all persons bound to search them. Instead, the records constitute constructive notice only to all persons bound to search *who also obtain priority of record.* Thus, a race-notice act places a condition upon the buyer's being able to rely on the record as notice of previous conveyances by protecting him, if he so relies, only if he obtains priority of record. However, as mentioned above, a pure notice act protects the buyer unconditionally from claims by holders of prior unrecorded conveyances of which he had no notice.

B. *The Equities of Each Type of Recording Statute*

The preceding section demonstrated that under a pure notice theory, the later grantee is protected against prior unrecorded grants if he is without notice of them. However, under a race-notice theory, he is only protected if (1) he is without notice, *and* (2) he also secures priority of record. It is submitted that the

[27]Carroll v. Kit Carson Land Co., 24 Colo. App. 217, 219-20, 133 P. 148, 149 (1913).

[28]Delta County Land & Cattle Co. v. Talcott, 17 Colo. App. 316, 321, 68 P. 985, 987 (1902).

[29]Bray v. Trower, 87 Colo. 240, 247, 286 P. 275, 278 (1930). *See also* Earle v. Fiske, 103 Mass. 491, 493-94 (1870).

[30]*See* subsection B. *infra.*

equities in such cases are best protected by a pure notice interpretation.

In the typical case, as between the senior grantee and the later or junior grantee, the equities are not equal. If the senior grantee had recorded promptly upon receiving his grant, the records would have shown his claim, thereby preventing a subsequent purchaser from being without notice. Thus, where a controversy arises, it is due to the senior grantee's failure to record promptly.[31]

The Colorado courts have stated that "[w]here one of two innocent parties must suffer loss because of the fraudulent act of a third person, the law places the loss upon the one who put it in the power of the third person to commit the fraud."[32] In the instant hypothetical situation, it was the failure of the first or senior grantee to record which left a power in the grantor to commit a fraud on an innocent third party by conveying the same interest in land a second time. It would seem to be only just that he, and not the innocent purchaser, bear the loss. The subsequent innocent purchaser's equity comes from being without notice in his purchase, and it seems unfair that it could be defeated by the subsequent recordation by an earlier grantee whose lack of diligence allowed the difficulty to occur.

The argument is made, however, that under a race-notice system the condition imposed upon later purchasers (the requirement of priority of record) before they can rely on the records provides an incentive for prompt recordation. Furthermore, it could be said that a subsequent purchaser, whose rights were defeated by the recordation of an earlier grant after the subsequent purchase, suffers only by virtue of his own failure to record promptly.

These arguments overlook two aspects of pure notice as opposed to race-notice statutes. First, it is under a pure notice stat-

---

[31]RESTATEMENT OF PROPERTY § 3 (1936). *See generally* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). In Hohfeldian terms, the senior grantee's failure to record his claim leaves a *power* in the owner to again convey the land to another and subjects him to the corresponding *liability* that the grantor will exercise that power by conveying the land again.

[32]Moore v. Ellison, 82 Colo. 478, 481, 261 P. 461, 462 (1927), *cited with approval and quoted in* Bray v. Trower, 87 Colo. 240, 247, 286 P. 275, 278 (1930); Brown v. Driverless Car Co., 86 Colo. 216, 219, 280 P. 488, 490 (1929); Federal Acceptance Corp. v. Dillamn, 82 Colo. 598, 600, 262 P. 85, 86 (1927). *See* Greenless v. Chezik, 68 Colo. 521, 523, 190 P. 667, 668 (1920).

ute that there is the greatest incentive to record promptly. This is because a given purchaser's rights can be more quickly cut off in a pure notice case, since a subsequent second *conveyance* by the grantor to another party without notice cuts off the first grantee's rights.[33] Under a race-notice system, it is not the *conveyance* to the second grantee that cuts off the nonrecording grantee's rights; it is the *recordation* of the subsequent grant which does so. Since recordation may occur no sooner than contemporaneously with the grant, and usually occurs a matter of days or weeks thereafter, the senior claimant in a race-notice system may regain his priority by recording at any time after the grant to the second grantee and before the latter records. The following example is illustrative.

*O* owns Blackacre and conveys it on Monday to *S*, the senior grantee. On Tuesday, *O* conveys it again to *J*, the junior grantee. On Thursday, *J* records.

Looking at the senior grantee, *S*, it is apparent that he must record before Tuesday (the date of the subsequent *grant*) to prevail in a pure notice system. In a race-notice system, however, *S* has until the time that *J* actually records (Thursday) in which to perfect his title. Therefore, contrary to what the names of the statutes seem to imply, for a given grantee to be protected against subsequent grants it is more important that he record immediately in a pure notice system than in a race-notice system.

In addition, should the junior grantee fail to record immediately, he, too, begins to run an increasing risk that his claim may be impaired by a subsequent conveyance. Thus under a pure notice system a nonrecording grantee may also have to bear the burden of his own neglect, but only as to *subsequent* grants. By not recording his claim the junior grantee is placing it within the power of the grantor to work another fraud, and the resulting loss should fall upon him. But the same argument does not apply where a junior grantee's claim is defeated by the subsequent recordation of a prior grant, since it is thereby possible for one who has long slept on his rights to take away the claim of an innocent later grantee who delayed only a few days in placing his grant of record. If such were the case, the Colorado rule on priorities among the competing equities of two or more innocent purchasers[34] would be violated.

---

[33] *See* text accompanying note 8 *supra*.

[34] *See* text accompanying note 32 *supra*.

## III. CASES IN OTHER JURISDICTIONS

The foregoing sections have examined the Colorado courts' construction of the Colorado recording act as race-notice. It has been submitted that a pure notice interpretation of the act is to be favored in view of the Colorado rule on priority in cases of competing equities.

It should be remembered, however, that cases in which the rights of the parties have turned on the notice/race-notice distinction are rare and that the courts of many states with supposedly pure notice statutes have, like the Colorado courts, cast their holdings for innocent junior grantees without notice who were also prior on record in terms of the priority of record. However, in those few cases where the rights of the parties have turned on the distinction, states with statutes similar to the Colorado act appear to have applied the pure notice interpretation.

The Missouri recording statute is almost identical to the Colorado law and states that "[n]o such instrument . . . shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record."[35] The Federal Circuit Court for Missouri in 1890 construed this statute as a pure notice one in a case with precisely the fact pattern in which the notice/race-notice distinction becomes crucial.[36] There *G* conveyed land to *B* and subsequently conveyed the same land to *H*, after which *B* recorded his deed first. In concluding that the Missouri recording act protected *H* over *B*, regardless of the fact that *B* recorded first, the court noted that in those states where priority of record must be obtained to have superior title, their statutes clearly so express it by terms such as "the unregistered conveyance shall be void against a subsequent *bona fide* purchaser *whose conveyance is first recorded.*"[37]

The Texas recording statute provides:

> All bargains, sales and other conveyances whatever, of any land . . . and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be . . . filed with the clerk, to be recorded as required by law.[38]

---

[35]MO. REV. STAT. § 442.400 (1959).

[36]Miller v. Merine, 43 F. 261 (C.C.W.D. Mo. 1890).

[37]*Id.* at 264 (emphasis added).

[38]TEX. REV. CIV. STAT. ANN. art. 6627 (1960).

In 1876 the Texas Supreme Court held, with regard to the recording statute then in effect (which is identical in operative language to current Texas law), that the subsequent registration of a claim or title would not destroy the rights of a bona fide purchaser or creditor whose claim arose after the earlier claim arose but was not recorded until after the subsequent recordation of the earlier claim.[39] The court said:

> [I]t would be equally as absurd to say that the right acquired by the creditor by his lien . . . when once secured, can be taken away by subsequent record of such instrument [evidencing a prior but unrecorded grant] . . . .[40]

The Kentucky recording act states that "[n]o deed or deed of trust or mortgage . . . shall be valid against a purchaser for valuable consideration, without notice thereof . . . until such deed or mortgage is . . . lodged for record."[41] Regarding this statute the Kentucky Supreme Court stated:

> This section has uniformly been held to be for the protection of subsequent purchasers, and, where the first purchaser fails to record his deed, if another person without notice thereof innocently purchases the land and accepts a deed therefore, the latter's title will not be affected by the subsequent recording of the first deed, even though prior in point of time.[42]

## CONCLUSION

The Colorado recording act is on its face very similar to the bulk of the recording acts which have been termed pure notice,[43] and on its face it has no requirement of priority of record, as seems to be the case in most race-notice acts. However, the leading cases in both the supreme court and the court of appeals appear to have been decided on the basis of priority of record (as well as lack of notice) on the part of the junior grantee. No Colorado case has been found under the current statute which depends for its outcome on the notice/race-notice distinction.

The power of the courts to require priority of record in construing the Colorado statute is not doubted. However, it is submitted that in a case which turns on the notice/race-notice distinction, the courts should give careful scrutiny to the compet-

---

[39]Grace v. Wade, 45 Tex. 522 (1876).

[40]*Id.* at 527. *See also* Simpson v. Chapman, 45 Tex. 560 (1876).

[41]KY. REV. STAT. ANN. § 382.270 (1969).

[42]Rouse v. Craig Realty Co., 203 Ky. 697, 699, 262 S.W. 1083, 1084 (1924).

[43]Indeed, at least two authorities have suggested that the Colorado act is pure notice. PATTON, *supra* note 1, at 36; 4 AMERICAN LAW OF PROPERTY 545 n.63 (A.J. Casner ed. 1952).

ing equities of the parties in light of the rule of letting the loss fall on that innocent party who put it within the power of the grantor to commit the fraud of conveying the same property more than once. Should such a case arise, it is urged that the courts treat the recording act as being for the purpose of protecting *subsequent purchasers* and that they accordingly adopt a pure notice construction of the statute.

*Charles G. Rogers*