Colorado Revised Statutes
Title 38 PROPERTY- REAL AND PERSONAL
Article 41 Limitations
Part 1 Limitations of Actions Affecting Real Property

38-41-101. Limitation of eighteen years.

(1) No person shall commence or maintain an action for the recovery of the title or possession or to enforce or establish any right or interest of or to real property or make an entry thereon unless commenced within eighteen years after the right to bring such action or make such entry has first accrued or within eighteen years after he or those from, by, or under whom he claims have been seized or possessed of the premises. Eighteen years' adverse possession of any land shall be conclusive evidence of absolute ownership.

(2) The limitation provided for in subsection (1) of this section shall not apply against the state, county, city and county, city, irrigation district, public, municipal, or quasi-municipal corporation, or any department or agency thereof. No possession by any person, firm, or corporation, no matter how long continued, of any land, water, water right, easement, or other property whatsoever dedicated to or owned by the state of Colorado, or any county, city and county, city, irrigation district, public, municipal, or quasi-municipal corporation, or any department or agency thereof shall ever ripen into any title, interest, or right against the state of Colorado, or such county, city and county, city, public, municipal, or quasi-municipal corporation, irrigation district, or any department or agency thereof.

(3) (a) In order to prevail on a claim asserting fee simple title to real property by adverse possession in any civil action filed on or after July 1, 2008, the person asserting the claim shall prove each element of the claim by clear and convincing evidence.

(b) In addition to any other requirements specified in this part 1, in any action for a claim for fee simple title to real property by adverse possession for which fee simple title vests on or after July 1, 2008, in favor of the adverse possessor and against the owner of record of the real property under subsection (1) of this section, a person may acquire fee simple title to real property by adverse possession only upon satisfaction of each of the following conditions:

(I) The person presents evidence to satisfy all of the elements of a claim for adverse possession required under common law in Colorado; and

(II) Either the person claiming by adverse possession or a predecessor in interest of such person had a good faith belief that the person in possession of the property of the owner of record was the actual owner of the property and the belief was reasonable under the particular circumstances.

(4) Notwithstanding any other provision of this section, the provisions of subsections (3) and (5) of this section shall be limited to claims of adverse possession for the purpose of establishing fee simple title to real property and shall not apply to the creation, establishment, proof, or judicial confirmation or delineation of easements by prescription, implication, prior use, estoppel, or otherwise, nor shall the provisions of subsections (3) or (5) of this section apply to claims or defenses for equitable relief under the common-law doctrine of relative hardships, or claims or defenses governed by any other statute of limitations specified in this article. Nothing in this section shall be construed to mean that any elements of a claim for adverse possession that are not otherwise applicable to the creation, establishment, proof, or judicial confirmation or delineation of easements by prescription, implication, prior use, estoppel, or otherwise are made applicable pursuant to the provisions of this section.

(5) (a) Where the person asserting a claim of fee simple title to real property by adverse possession prevails on such claim, and if the court determines in its discretion that an award of compensation is fair and equitable under the circumstances, the court may, after an evidentiary hearing separately conducted after entry of the order awarding title to the adverse possessor, award to the party losing title to the adverse possessor:

(I) Damages to compensate the party losing title to the adverse possessor for the loss of the property measured by the actual value of the property as determined by the county assessor as of the most recent valuation for property tax purposes. If the property lost has not been separately taxed or assessed from the remainder of the property of the party losing title to the adverse possessor, the court shall equitably apportion the actual value of the property to the portion of the owner's property lost by adverse possession including, as appropriate, taking into account the nature and character of the property lost and of the remainder.

(II) An amount to reimburse the party losing title to the adverse possessor for all or a part of the property taxes and other assessments levied against and paid by the party losing title to the adverse possessor for the period commencing eighteen years prior to the commencement of the adverse possession action and expiring on the date of the award or entry of final nonappealable judgment, whichever is later. If the property lost has not been separately taxed or assessed from the remainder of the property of the party losing title to the adverse possessor, such reimbursement shall equitably apportion the amount of the reimbursement to the portion of the owner's property lost by adverse possession, including, as appropriate, taking into account the nature and character of the property lost and of the remainder. The amount of the award shall bear interest at the statutory rate from the dates on which the party losing title to the adverse possessor made payment of the reimburseable taxes and assessments.

(b) At any hearing conducted under this subsection (5), or in the event that adverse possession is claimed solely as a defense to an action for damages based upon a claim for trespass, forcible entry, forcible detainer, or similar affirmative claims by another against the adverse possessor, and not to seek an award of legal title against the claimant, the burden of proof shall be by a preponderance of the evidence. If the defendant is claiming adverse possession solely as a defense to an action and not to seek an award of legal title, the defendant shall so state in a pleading filed by the defendant within ninety days after filing an answer or within such longer period as granted by the court in the court's discretion, and any such statement shall bind the defendant in the action.

Source: L. 27: p. 598, § 30. CSA: C. 40, § 136. CRS 53: § 118-7-1. C.R.S. 1963: § 118-7-1. L. 67: p. 351, § 1. L. 2008: (3), (4), and (5) added, p. 668, § 1, effective July 1.

Editor's note: Section 2 of chapter 190, Session Laws of Colorado 2008, provides that the provisions of the act enacting subsection (3)(a) apply to civil actions filed on or after July 1, 2008. Said section 2 provides that the remaining provisions of the act enacting subsections (3)(b), (4), and (5) apply to claims for title to real property for which fee simple title vests in

favor of the adverse possessor and against the owner of record of the real property on or after July 1, 2008.

Cross references: For the effect of this section of registration of land under the Torrens title system, see § 38-36-137.

ANNOTATION

Analysis

I. General Consideration.
II. Adverse Possession.
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I. GENERAL CONSIDERATION.

Am. Jur.2d. See 51 Am. Jur.2d, Limitation of Actions, §§ 66-68.

C.J.S. See 54 C.J.S., Limitations of Actions, § 64.

Law reviews. For article, "The Interest of Landowner and Lessee in Oil and Gas in Colorado", see 25 Rocky Mt. L. Rev. 117 (1953). For comment on Lovejoy v. Sch. Dist. No. 46, 129 Colo. 306, 269 P.2d 1067 (1954), appearing below, see 31 Dicta 279 (1954). For note, "Adverse Possession in Colorado", see 27 Rocky Mt. L. Rev. 88 (1954). For article, "Survey of Title Irregularities, Curative Statutes and Title Standards in Colorado", see 35 U. Colo. L. Rev. 21 (1962). For article, "One Year Review of Property", see 40 Den. L. Ctr. J. 181 (1963). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

Section should be construed as acting prospectively only, and does not apply to causes of action existing at the time of its adoption. Edelstein v. Carlile, 33 Colo. 54, 78 P. 680 (1904).

Not retrospectively. This section cannot be applied where to do so would be giving to this part a retrospective effect. Connell v. Clifford, 39 Colo. 121, 88 P. 850 (1907); Bonfils v. Pub. Utils. Comm'n, 67 Colo. 563, 189 P. 775 (1920).

The objection to retrospective statutes does not apply to remedial statutes such as the statute of limitations, and these statutes may be retrospective in nature, provided they do not impair contracts or disturb vested rights. Edelstein v. Carlile, 33 Colo. 54, 78 P. 680 (1904). See also Fisher v. Hervey, 6 Colo. 16 (1881).

The extended limitations period of 18 years set forth in this section does not apply outside the context of an adverse possession claim. San Juan Basin Consortium, Ltd. v. EnerVest San Juan Acquisition Ltd. P'ship., 67 F. Supp.2d 1213 (D. Colo. 1999).

General assembly cannot revive action once bar attaches. When the bar of the statute has once attached, the general assembly cannot, by an amendatory act, revive the action. Willoughby v. George, 5 Colo. 80 (1879); Edelstein v. Carlile, 33 Colo. 54, 78 P. 680 (1904).

Public easements are not subject to the bar of the statute of limitations. Bowen v. Turgoose, 136 Colo. 137, 314 P.2d 694 (1957).

Owner's disability no bar to statute. The fact that an owner is under disability until her death does not prevent the running of the statute of limitations. Nesbitt v. Jones, 140 Colo. 412, 344 P.2d 949 (1959).

For purposes of the exception to adverse possession in subsection (2), a "quasi-municipal corporation" is a public agency endowed with such attributes of a municipality as may be necessary in the performance of its limited objective. Goodwin v. Thieman, 74 P.3d 526 (Colo. App. 2003).

During the 18-year limitation period, the disputed property was owned by a corporation that was not a public entity or governmental agency; therefore, the corporation was not a "quasi-municipal corporation" for purposes of the exception to adverse possession. Goodwin v. Thieman, 74 P.3d 526 (Colo. App. 2003).

Applied in Swift v. Smith, 79 F. 709 (8th Cir. 1897); Riggs v. McMurtry, 157 Colo. 33, 400 P.2d 916 (1965); Glendale Water & San. Dist. v. City & County of Denver, 164 Colo. 557, 436 P.2d 669 (1968); Hayden v. Bd. of County Comm'rs, 41 Colo. App. 102, 580 P.2d 820 (1978); Crawford v. French, 633 P.2d 524 (Colo. App. 1981); Canady v. Shelden, 683 P.2d 1205 (Colo. App. 1983); City of Canon City v. Cingoranelli, 740 P.2d 546 (Colo. App. 1987); Whinnery v. Thompson, 868 P.2d 1095 (Colo. App. 1993).

II. ADVERSE POSSESSION.

A. In General.

Possession for 18 years becomes conclusive evidence of absolute ownership of the property, as provided by this section. Concord Corp. v. Huff, 144 Colo. 72, 355 P.2d 73 (1960).

Where plaintiffs and their predecessors in title have been in possession of easement for more than 18 years, a presumption arises that their possession was adverse and defendant has the burden to overcome such presumption by sufficient evidence of permissive use. Irvin v. Brand, 690 P.2d 1283 (Colo. App. 1984); Durbin v. Bonanza Corp., 716 P.2d 1124 (Colo. App. 1986).

Initial presumption in adverse possession case is in favor of the record title holder. Whinnery v. Thompson, 868 P.2d 1095 (Colo. App. 1993).

The doctrine of adverse possession recognizes the record owner's right to exercise dominion over the property, but holds that the right is lost if a claimant adversely possesses the property for the required time. Ocmulgee Prop. Inc. v. Jeffery, 53 P.3d 665 (Colo. App. 2001).

Record owner's application to subdivide property and for an exemption from county subdivision regulations did not constitute an exercise of control over the property sufficient to disrupt the period of adverse possession by the claimant in actual possession of the property. The proceedings on the application, standing alone, did not dispossess the claimant, did not constitute an entry on the land sufficient to reinstate the record owner in possession, did not constitute legal action to regain possession of the land or the equivalent of such an action, and did not result in the ejectment of plaintiff or its predecessors in interest. Ocmulgee Prop. Inc. v. Jeffery, 53 P.3d 665 (Colo. App. 2001).

Any act, other than abandonment, that is inconsistent with ownership and occurs after title by adverse possession is vested does not defeat that title. Welsch v. Smith, 113 P.3d 1284 (Colo. App. 2005).

The law of prescriptive easements permits acquisition of enforceable property rights through unlawful action, namely, trespass for the prescriptive period of time. Clinger v. Hartshorn, 89 P.3d 462 (Colo. App. 2003).

A party who claims a prescriptive easement must prove by a preponderance of the evidence continuous, open, and adverse use of the easement for the statutory period of 18 years. Proper v. Greager, 827 P.2d 591 (Colo. App. 1992).

A prescriptive easement is acquired when the use is open or notorious, continuous without effective interruption for an 18-year period, and either adverse or pursuant to an attempted but ineffective grant. Intermittent use on a long-term basis is sufficient to satisfy the open, notorious, and continuous use requirement, and using an easement for 18 years entitles the holder to the presumption that the use was adverse. Clinger v. Hartshorn, 89 P.3d 462 (Colo. App. 2003).

If a servient owner's use of land is truly adverse--that is, clearly incompatible or irreconcilable with the use of the easement--the trial court may grant relief even in the absence of the need for the right-of-way, demand made by the owner of the dominant tenement, and refusal to comply by the owner of the servient tenement. Proof of dominant estate owner's intent to abandon easement is not required. Abandonment is not an element of termination by prescription. Matoush v. Lovingood, 159 P.3d 741 (Colo. App. 2006).

Undisputed evidence showed that use of easement was sufficiently adverse and that the claim of right to use need not be made by a hostile or antagonistic act. Proper v. Greager, 827 P.2d 591 (Colo. App. 1992).

Adverse possessor's interest enforceable against everyone except owner. From the beginning of his possession period, an adverse possessor has an interest in a given piece of property enforceable against everyone except the owner or one claiming through the owner. Spring Valley Estates, Inc. v. Cunningham, 181 Colo. 435, 510 P.2d 336 (1973).

Grant of permission to use disputed property followed by subsequent inaction to disclaim permission would be sufficient to interrupt the running of the statutory period of adverse possession. McKenzie v. Pope, 33 P.3d 1277 (Colo. App. 2001).

A barrier established for the purpose of, and in fact, interrupting an adverse claimant's use is sufficient to interrupt the running of the statutory period, even if the barrier is removed by the adverse claimant. Trask v. Nozisko, 134 P.3d 544 (Colo. App. 2006).

Interest matures into absolute fee after statutory duration. It is not until the adverse possessor has possessed the land for the duration of the statutory period that his interest matures into an absolute fee and his possessory rights become enforceable against the former owner as well as third parties. Spring Valley Estates, Inc. v. Cunningham, 181 Colo. 435, 510 P.2d 336 (1973).

Title to property acquired by adverse possession matures into an absolute fee interest after the statutory prescriptive period has expired. Doty v. Chalk, 632 P.2d 644 (Colo. App. 1981).

Conveyance to adverse use begins statute's running. Conveyance of a water right, serving to transform a previous permissive use of water by a canal company to a use which is adverse and inconsistent with the previous relationship of the parties, begins the running of the statute of limitations against a suit for possession or to determine ownership of the water right. Nesbitt v. Jones, 140 Colo. 412, 344 P.2d 949 (1959).

Acquiescence in adverse use may divest prior right of use. Individuals in whom a prior right to the use of water is vested may lose such right by acquiescence in an adverse use thereof by another continued uninterruptedly for the statutory period. Lomas v. Webster, 109 Colo. 107, 122 P.2d 248 (1942).

Establishment of division line by parol agreement conclusive against owners. Where there is a doubt or uncertainty, or a dispute has arisen, as to the true location of a boundary line, the adjoining owners may, by parol agreement, establish a division line and, where the agreement is executed and actual possession is taken under such agreement, it is conclusive against the owners and those claiming under them. Schleining v. White, 163 Colo. 481, 431 P.2d 458 (1967).

Settlement of readjustments of boundary line. If one of two innocent parties must suffer a loss of land due to boundary line readjustments called for by later official surveys, it must fall upon the party who is later in time and who has never been in actual possession of the land in question. Marr v. Shrader, 142 Colo. 106, 349 P.2d 706 (1960).

Tacking possessions of area not described in deed. The tacking of successive adverse possessions of vendor and purchaser of an area not within the premises described in a deed, but contiguous thereto, requires that the grantor intend to transfer possession of such area to the purchaser. Doty v. Chalk, 632 P.2d 644 (Colo. App. 1981).

When title by adverse possession vanishes. Title by adverse possession vanishes when the treasurer issues his valid deed for unpaid taxes. Linville v. Russell, 168 Colo. 459, 452 P.2d 18 (1969).

Issuance of treasurer's deed creates virgin title. The issuance of a valid treasurer's deed creates a virgin title erasing all former interests in the land. Whiteman v. Mattson, 167 Colo. 183, 446 P.2d 904 (1968).

Title to lands derived from federal government. Statutory limitations affecting title to lands derived from the federal government begin to run in favor of an adverse claimant in possession when the entryman is legally entitled to a patent, and not from the date of filing a homestead or desert entry. Denver & R.G.R.R. v. Wilson, 28 Colo. 6, 62 P. 843 (1900); Prieshof v. Baum, 94 Colo. 324, 29 P.2d 1032 (1934).

Failure to institute action within limitation period constitutes bar. Where the pilasters of a building more than 50 years old encroached on plaintiffs' land, and had so encroached from the time the building was constructed, and no action had been instituted by plaintiffs or their predecessors in title within 18 years after the original encroachment, plaintiffs were barred from asserting any claim or right by reason of such encroachment. Williams v. Wills, 149 Colo. 213, 368 P.2d 558 (1962).

Ownership of water right may be deemed ownership of real property for purposes of adverse possession claims. Matter of Water Rights of V-Heart Ranch, 690 P.2d 1271 (Colo. 1984).

B. Actual, Adverse, Hostile, Exclusive, and Uninterrupted Possession.

"Possession" defined. "Possession", referred to in subsection (1), means a general holding and occupancy with complete dominion over the

property involved to the exclusion of others. Concord Corp. v. Huff, 144 Colo. 72, 355 P.2d 73 (1960).

Possession of one cotenant is possession of all. Atchison, T. & S.F. Ry. v. North Colo. Springs Land & Imp. Co., 659 P.2d 702 (Colo. App. 1982).

Proof required of adverse possessor. To prove adverse possession, the one claiming it must clearly show, not only that his possession was actual, adverse, hostile, and under claim of right, but that it has also been exclusive and uninterrupted for the statutory period. Segelke v. Atkins, 144 Colo. 558, 357 P.2d 636 (1960); Hayden v. Morrison, 152 Colo. 435, 382 P.2d 1003 (1963); Sanchez v. Taylor, 377 F.2d 733 (10th Cir. 1967); Dzuris v. Kucharik, 164 Colo. 278, 434 P.2d 414 (1967); Raftopoulos v. Monger, 656 P.2d 1308 (Colo. 1983); Matter of Estate of Qualteri, 757 P.2d 1093 (Colo. App. 1988); Schutten v. Beck, 757 P.2d 1139 (Colo. App. 1988); Smith v. Hayden, 772 P.2d 47 (Colo. 1989); Bd. of County Comm'rs v. Ritchey, 888 P.2d 298 (Colo. App. 1994); Goodwin v. Thieman, 74 P.3d 526 (Colo. App. 2003); Schuler v. Oldervik, 143 P.3d 1197 (Colo. App. 2006).

Actual occupancy means the ordinary use to which the land is capable and such occupancy as an owner would make of it. Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969).

Actual possession is established where the claimant shows that the property was used in a manner commensurate with its particular attributes. Doty v. Chalk, 632 P.2d 644 (Colo. App. 1981); Kroulik v. Knuppel, 634 P.2d 1027 (Colo. App. 1981).

Actual occupation required absent barriers or deed. Where the boundaries of the land claimed have not been established by fences or barriers and there is no deed describing the extent of their holding, the parties claiming title by adverse possession may not claim any property not actually occupied by them for the statutory period because the extent of actual occupancy must be determined by the court when ascertaining the extent of the adverse intent. Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969); Smith v. Hayden, 772 P.2d 47 (Colo. 1989).

Actual occupancy is not limited to structural encroachment which is common but is not the only physical characteristic of possession. Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969).

Adverse possession without enclosure need not be characterized by a physical, constant, visible occupancy or improved by improvements of every square foot of the land. Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969).

Mere occupancy insufficient notice of adverse possession. Mere occupancy is not sufficient to put any of the true owners on notice that the adverse claimant claimed the land, and the burden of proof, as to open, notorious, and hostile claim, is upon the adverse claimant when it claims title by adverse possession without color of title, and every reasonable presumption is made in favor of the true owner as against adverse possession. Lovejoy v. Sch. Dist. No. 46, 129 Colo. 306, 269 P.2d 1067 (1954).

Use of land for pasturage not hostile to owner. The use of land for pasturage, natural products, and timber does not ordinarily constitute adverse possession because the pasturage of cattle on unfenced lands cannot be regarded as hostile and adverse to the owner of such land. Smith v. Town of Fowler, 138 Colo. 359, 333 P.2d 1034 (1959); Sanchez v. Taylor, 377 F.2d 733 (10th Cir. 1967).

The practice of grazing cattle on unfenced land is not of itself sufficient to show adverse possession. Thomson v. Clarks, Inc., 162 Colo. 506, 427 P.2d 314 (1967); First Nat'l Bank v. Fitzpatrick, 624 P.2d 927 (Colo. App. 1981).

Claim sufficient upon erection of fence. A fencing in of the disputed tracts and an uninterrupted use by predecessors in interest for pasturage and haying, showed exclusive, open, notorious, continuous, and adverse possession for the requisite period. McKelvy v. Cooper, 165 Colo. 102, 437 P.2d 346 (1968).

Where, in addition to pasturing livestock, a fence is erected, the statutory period begins to run and the adverse possession claim will not be defeated because use for this purpose is seasonal. First Nat'l Bank v. Fitzpatrick, 624 P.2d 927 (Colo. App. 1981).

Whether a fence is sufficiently adverse to start the prescriptive period depends on the circumstances of each case. If the fence does not completely block the easement or is otherwise compatible with the use of the easement, it will not start the prescriptive period. If the fence frustrates the easement, it will trigger the prescriptive period. Matoush v. Lovingood, 159 P.3d 741 (Colo. App. 2006).

Although the mere existence of a fence does not establish adverse possession of land beyond the fence line, when both property owners believe that the fence has marked the true boundary between the property for 18 years, there is a presumption that the holding is adverse. Bd. of County Comm'rs v. Ritchey, 888 P.2d 298 (Colo. App. 1994); Welsch v. Smith, 113 P.3d 1284 (Colo. App. 2005).

Where landowners' predecessors in interest acquiesced in placement of fenceline set back from property line, strip of land between fence and property line became a public highway pursuant to § 43-2-201(1)(c) as a result of its adverse use by the public for over 20 uninterrupted years. Bd. of County Comm'rs v. Ritchey, 888 P.2d 298 (Colo. App. 1994).

Mere existence of fence erected south of true boundary of claimants' property did not establish adverse possession when neither the claimants nor their predecessor in interest had erected the fence or adversely claimed or occupied area of land between the boundary and the fence. Schutten v. Beck, 757 P.2d 1139 (Colo. App. 1988).

Removal of a fence after the land has been adversely possessed for more than the statutory period would not necessarily rebut the presumption of adversity. Welsch v. Smith, 113 P.3d 1284 (Colo. App. 2005).

Adjoining owner not clothed with possession by destruction of fence. The mere erasure of a common boundary fence in a flood disaster does not clothe an adjoining owner with possession of lands adversely to his neighbors. Smith v. Town of Fowler, 138 Colo. 359, 333 P.2d 1034 (1959).

Any actual visible means establishing dominion is sufficient. Any actual visible means, which gives notice of exclusion from the property to the true owner or to the public and of the defendant's dominion over it, is sufficient. Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969); Matter of Estate of Qualteri, 757 P.2d 1093 (Colo. App. 1988).

Possession must be hostile. The very essence of adverse possession is that the possession must be hostile, not only against the true owner, but against the world as well. Lovejoy v. Sch. Dist. No. 46, 129 Colo. 306, 269 P.2d 1067 (1954); Smith v. Town of Fowler, 138 Colo. 359, 333 P.2d 1034 (1959); Sanchez v. Taylor, 377 F. 2d 733 (10th Cir. 1967).

Adverse claim must be hostile at its inception, because, if the original entry is not openly hostile or adverse, it does not become so, and this section does not begin to run as against a rightful owner until an adverse claimant disavows the idea of holding for, or in subservience to another, it actually sets up an exclusive right in himself by some clear, positive and unequivocal act. Lovejoy v. Sch. Dist. No. 46, 129 Colo.306, 269 P.2d 1067 (1954); Smith v. Town of Fowler, 138 Colo. 359, 333 P.2d 1034 (1959).

The character of the possession must become hostile in order that it may be deemed to be adverse, and this hostility must continue for the full statutory period because this section begins to run at the time the possession of the claimant becomes adverse to that of the owner, and this occurs when the claimant sets up title in himself by some clear, positive, and unequivocal act. Lovejoy v. Sch. Dist. No. 46, 129 Colo. 306, 269 P.2d 1067 (1954).

Hostile and adverse requirement does not mean violence. The requirement that adverse possession be both hostile and adverse does not mean that there need be any violence connected with the entry onto the property or that there be any actual dispute as to ownership between the adverse possessor and the owner of the property. Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969).

Actual dispute with neighbor not necessary to show intent. A deliberate attempt to steal a neighbor's property, or an actual dispute at some previous time is not necessary in order to show an intention to hold adversely in Colorado. Moss v. O'Brien, 165 Colo. 93, 437 P.2d 348 (1968).

Hostility arises from intention of adverse possessor to claim exclusive ownership of the property occupied, and no specific intent directed toward the property owner is required. Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969); Niles v. Churchill, 29 Colo. App. 283, 482 P.2d 994 (1971); Bd. of County Comm'rs v. Ritchey, 888 P.2d 298 (Colo. App. 1994).

The court has found hostile and adverse possession even though the adverse possessor had stated that he was claiming only to what he believed to be the true boundary of his land and had no intention of claiming the land of another; all that is required to establish hostility is that the person claiming adverse possession occupy the property with belief that the property is his and not another's. Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969); Niles v. Churchill, 29 Colo. App. 283, 482 P.2d 994 (1971).

Hostility not determined only from parties' declarations. Hostile intent is to be determined not only from the declarations of the parties but from reasonable deductions from the facts as well. Moss v. O'Brien, 165 Colo. 93, 437 P.2d 348 (1968); Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969); Matter of Estate of Qualteri, 757 P.2d 1093 (Colo. App. 1988); Miller v. Bell, 764 P.2d 389 (Colo. App. 1988).

In cases of claimed adverse possession between close family members, the applicable rule is that "strong proof" of hostility is required if the claimant takes possession of property belonging to a relative and there exists no presumption that the possession of land of one family member by another family member is permissive and not adverse. Matter of Estate of Qualteri, 757 P.2d 1093 (Colo. App. 1988).

Actual visible possession may create adverse intent. Actual visible possession to a given line is a circumstance from which a court may find adverse intent, even though the intention was to claim only to the true line. Moss v. O'Brien, 165 Colo. 93, 437 P.2d 348 (1968).

Possession of successive disseizors may be joined for continuous possession. Where there is privity of title or estate, the possession of successive disseizors may be joined or tacked together so as to be regarded as continuous possession. Hodge v. Terrill, 123 Colo. 196, 228 P.2d 984 (1951).

Recognition of title in another is inconsistent with adverse possession. Where an occupant of land acknowledges or recognizes the title of the owner during the period of his claimed adverse possession, he fatally interrupts the continuity of his adverse possession because recognition of title in another is inconsistent with the theory of adverse possession, and the statute of limitations does not begin to run in his favor until he repudiates the owner's title. Segelke v. Atkins, 144 Colo. 558, 357 P.2d 636 (1960).

Public use of part of property does not disprove exclusive possession. The public use of part of the property in question for picnicking does not disprove exclusive possession because, for possession to be exclusive, it is not necessary that all use of that property by the public be prevented. Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969).

Property used in common with public negatives exclusive possession. Proof that ever since 1917, the defendants and their predecessors, as well as other members of the general public similarly situated have used the property described in plaintiff's complaint for a public right-of-way negatives defendants' contentions that they were in the open, notorious, exclusive possession of the property, adverse to any and all other claimants. Nelson v. Van Cleve, 143 Colo. 117, 352 P.2d 269 (1960).

Casual intrusion does not defeat adverse claim. A mere casual intrusion by a fisherman, or even by several, did not deprive the plaintiff's adverse possession of its exclusive character or defeat their claim. McKelvy v. Cooper, 165 Colo. 102, 437 P.2d 346 (1968); Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969).

Legal titleholder prevails over common possession. In case of a mixed or common possession of land by both parties to a suit, the law adjudges the rightful possession to him who holds legal title, and no length of time of possession can give title by adverse possession as against the legal title. Dzuris v. Kucharik, 164 Colo. 278, 434 P.2d 414 (1967).

Statute does not run until ouster established. Until an actual ouster of the cotenant is established by conduct apart from mere use and occupation of the land by claimant, the statute giving rise to a claim of adverse possession does not begin to run. Atchison, T. & S.F. Ry. v. North Colo. Springs Land & Imp. Co., 659 P.2d 702 (Colo. App. 1982).

Permissive possession. The statute of limitations does not start to run where the possession is from inception permissive because a possession which is permissive or is otherwise consistent with a record owner's title is merely that of an owner at whose pleasure it continues. Nesbitt v.

Jones, 140 Colo. 412, 344 P.2d 949 (1959); Miller v. Bell, 764 P.2d 389 (Colo. App. 1988).

For permissive entry on land to become adverse notice or an explicit disclaimer must be given to the owner. Segelke v. Atkins, 144 Colo. 558, 357 P.2d 636 (1960); Matter of Estate of Qualteri, 757 P.2d 1093 (Colo. App. 1988); Miller v. Bell, 764 P.2d 389 (Colo. App. 1988).

County's initial entry on strip of land was not permissive, but rather by the assertion of ownership through county dedication of section and township lines as public highways. Bd. of County Comm'rs v. Ritchey, 888 P.2d 298 (Colo. App. 1994).

To assert a claim of adverse possession against a vendor, a vendee is required to unequivocally renounce the contract relationship between them and his rights thereunder prior to assertion of a right antagonistic to that of his vendor. White v. Widger, 144 Colo. 566, 358 P.2d 592 (1960).

Trespassers do not acquire possession. Trespassers who go upon lands for a special purpose, hunting, fishing, camping, surveying, etc., do not thereby acquire possession. Concord Corp. v. Huff, 144 Colo. 72, 355 P.2d 73 (1960).

Placing improvements on property not disseisin. The placing of a few improvements or structures on the property is not a taking possession thereof or a disseisin. Concord Corp. v. Huff, 144 Colo. 72, 355 P.2d 73 (1960).

Transfer of property acquired through adverse possession may only be effected by a validly executed deed, by adverse possession, or by other legal means. Doty v. Chalk, 632 P.2d 644 (Colo. App. 1981).

Void tax deeds. Void tax deeds do not convey title, and are wholly ineffective to interrupt another's right to possession of the property they purport to convey. Concord Corp. v. Huff, 144 Colo. 72, 355 P.2d 73 (1960).

Effect of disclaimer. Where title to disputed property vested in a party by adverse possession long before a disclaimer was executed, such disclaimer has no legal effect. Doty v. Chalk, 632 P.2d 644 (Colo. App. 1981).

Payment of taxes does not indicate sole ownership. Payment of all of the taxes on the subject property for many years does not indicate a claim of sole ownership, especially in view of the paying party's use and possession of the property rent-free. Atchison, T. & S.F. Ry. v. North Colo. Springs Land & Imp. Co., 659 P.2d 702 (Colo. App. 1982).

Adverse possession not found. Plaintiff's testimony that water was used from sump since 1949, that she and her husband worked side-by-side, that in 1966 they were irrigating 300 acres and now 800 acres, and that water has been used continuously on the farm for irrigation, along with all the other evidence presented, was not sufficient evidence to show adverse possession. Farmer v. Farmer, 720 P.2d 174 (Colo. App. 1986).

Adverse possession found where plaintiffs' possession of property for 24 years was: (1) Hostile, because plaintiffs used the property as their own; (2) exclusive and actual, because they acted as an average landowner would in utilizing the property for its ordinary use; and (3) adverse, because their use of the property was sufficiently open and obvious to apprise the defendant that they intended to claim the property adversely. Schuler v. Oldervik, 143 P.3d 1197 (Colo. App. 2006).

A concession by the adverse possessor of the record ownership of a parcel by another need not demonstrate the lack of intent to possess adversely. Smith v. Hayden, 772 P.2d 47 (Colo. 1989).

Common ownership of two tracts of land extinguishes any acquiescence in boundary lines attributable to the prior landowners of the tracts unless the deed adopts the boundary lines as previously acquiesced upon. Salazar v. Terry, 911 P.2d 1086 (Colo. 1996).

III. PLEADING AND PRACTICE.

All remedies may be utilized against record title holder after statutory period. Once the 18-year period has passed, all remedies, including those for quiet title, ejectment, and trespass, may be utilized even against the record title holder. Spring Valley Estates, Inc. v. Cunningham, 181 Colo. 435, 510 P.2d 336 (1973).

Damages recoverable when statutory period completed. In an action for trespass by an adverse possessor against a former title holder, damages are recoverable only from the time the 18-year statutory period has been completed. Spring Valley Estates, Inc. v. Cunningham, 181 Colo. 435, 510 P.2d 336 (1973).

Statute of limitations must be specially pleaded. The defense of the statute of limitations is in the nature of a special privilege, and it must be pleaded specially. Chivington v. Colo. Springs Co., 9 Colo. 597, 14 P. 212 (1886); Connell v. Clifford, 39 Colo. 121, 88 P. 850 (1907).

If not specially pleaded, the defense of the statute of limitations will be waived. Connell v. Clifford, 39 Colo. 121, 88 P. 850 (1907); Chivington v. Colo. Springs. Co., 9 Colo. 597, 14 P. 212 (1886).

Because the bar of the statute of limitations is a personal privilege, to be relied upon, or not, as a defendant may choose; being a strict defense, it should be interposed in apt time, and if not, it will be deemed waived. Walters v. Webster, 52 Colo. 549, 123 P. 952 (1912).

Plaintiff's success depends upon strength of his title. A plaintiff, claiming title to a disputed piece of land and being out of possession thereof, can succeed only on the strength of his own title and not on the weakness of defendants' title. Reinhardt v. Meyer, 153 Colo. 296, 385 P.2d 597 (1963).

A person not in possession, asserting title to real property and seeking to enjoin others from claiming an interest therein, has the burden of furnishing evidence of title in himself upon which the court can rest its decision, rather than upon the supposed weakness of others claiming an interest. Nelson v. Van Cleve, 143 Colo. 117, 352 P.2d 269 (1960).

Burden of proof is on owner following 18 years of exclusive possession in an adverse claimant. Nesbitt v. Jones, 140 Colo. 412, 344 P.2d 949 (1959).

Failure of required proof prevents statute as bar to plaintiff's action. Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

To establish abandonment, the relying party must show affirmative acts constituting an intention by the party claiming adverse possession to abandon. Rivera v. Queree, 145 Colo. 146, 358 P.2d 40 (1960).

Abandonment must be established by clear, unequivocal, and decisive evidence of affirmative acts on the part of the owner of the dominant estate that manifest an intention to abandon the easement. Clinger v. Hartshorn, 89 P.3d 462 (Colo. App. 2003).

Mere nonuse not abandonment. Mere nonuse of water rights acquired by deed, though for a period less than that fixed by this section, does not work an abandonment. Fruit Growers' Ditch & Reservoir Co. v. Donald, 96 Colo. 264, 41 P.2d 516, 98 A.L.R. 1288 (1935).

Defense of laches is not available in a quiet title action because courts will not invoke equitable defenses to destroy legal rights where statutes of limitations are applicable. Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008 (1957).

Whether possession is hostile or adverse is ordinarily a question of fact. Moss v. O'Brien, 165 Colo. 93, 437 P.2d 348 (1968); Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969); Bd. of County Comm'rs v. Ritchey, 888 P.2d 298 (Colo. App. 1994).

Trial court must make determination where evidence conflicting. Where evidence is conflicting on the issue of whether use of land was continuously adverse for the statutory period, the trial court is required to make a specific finding as to each of the prerequisites of adverse possession. Hayden v. Morrison, 152 Colo. 435, 382 P.2d 1003 (1963).

To acquire a prescriptive easement, a party must confine his or her use to a single, definite, and certain path. Minor deviations do not defeat the claimed easement. Whether the route remained substantially the same is a factual determination for the court. The development of a new subdivision, rather than a circumstance over which plaintiffs had any control, required plaintiffs to change their point of entrance to defendants' property. Accordingly, the record supports trial court's determination that plaintiffs adequately proved their use of a definite path across defendants' property for more than the prescriptive period of 18 years specified under this section. Weisiger v. Harbour, 62 P.3d 1069 (Colo. App. 2002).

Using an easement for more than 18 years entitles the holder to the presumption that use was adverse; however this presumption can be rebutted by showing the use was permissive. Trial court's conclusion that defendants' evidence of permissive use, based upon an arrangement of two locks on a gate separating defendants' property, one for each party, was insufficient to overcome the presumption of adverse use. Weisiger v. Harbour, 62 P.3d 1069 (Colo. App. 2002).

To satisfy the open and notorious element for establishment of a prescriptive easement, the use must be sufficiently obvious to apprise the owner of the servient estate; however, actual knowledge by the owner need not be proved. Unlike a party claiming title to land by adverse possession, a party claiming a prescriptive easement need not be in continuous physical possession of the land because a prescriptive easement is only a right to use the route whenever the holder desires passage. The record supports trial court's determination that plaintiffs' use was open and notorious because defendants knew plaintiffs were entering their property and using the mining road. In addition, the record also supports trial court's determination that plaintiffs crossed defendants' property whenever they wanted to reach their property. Intermittent use on a long-term basis satisfies the requirement for open, notorious, and continuous use. Weisiger v. Harbour, 62 P.3d 1069 (Colo. App. 2002).

If a servient owner's use of land is truly adverse--that is, clearly incompatible or irreconcilable with the use of the easement--the trial court may grant relief even in the absence of the need for the right-of-way, demand made by the owner of the dominant tenement, and refusal to comply by the owner of the servient tenement. Proof of dominant estate owner's intent to abandon easement is not required. Abandonment is not an element of termination by prescription. Matoush v. Lovingood, 159 P.3d 741 (Colo. App. 2006).

Reviewing court may reject trial court's finding where conclusions unsupported. Although it is true that whether possession is hostile or adverse is ordinarily a question of fact, and a finding on this issue made by the trial court would normally not be set aside on review, this restraint does not limit the power of the reviewing court to reject a trial court's findings and conclusions where they are not supported by evidence or where the law has not been correctly applied. Niles v. Churchill, 29 Colo. App. 283, 482 P.2d 994 (1971).

Trial court's finding that possession was hostile was supported by declarations in the record, actual use of the parcel by the claimants, and the marking of the supposed boundary line by iron pipes. Smith v. Hayden, 772 P.2d 47 (Colo. 1989).

There is no requirement in this section that a person be the exclusive payer of taxes on the property in order to comply with the taxpaying provisions of this section. Barnes v. Winford, 833 P.2d 756 (Colo. App. 1991).

38-41-102. How computed.

If such right or title first accrued to an ancestor, predecessor, or grantor of the person who brings the action or to any person from, by, or under whom he claims, the eighteen years shall be computed from the time when the right or title so accrued.

Source: L. 27: p. 599, § 31. CSA: C. 40, § 137. CRS 53: § 118-7-2. C.R.S. 1963: § 118-7-2.

ANNOTATION

Am. Jur.2d. See 51 Am. Jur.2d, Limitation of Actions, §§ 66-68.
C.J.S. See 54 C.J.S., Limitations of Actions, § 257.

38-41-103. Evidence of adverse possession.

If the records in the office of the county clerk and recorder of the county wherein the real property is situate show by conveyance or other instrument that the party in possession or his predecessors or grantors, through descent, conveyance, or otherwise, have asserted a continuous claim of ownership to the real property adverse to the record owner thereof for a period of eighteen years, then the record shall be deemed prima facie evidence of adverse possession during said period and compliance with the requirements of sections 38-41-101 and 38-41-102.

Source: L. 27: p. 599, § 32. CSA: C. 40, § 138. CRS 53: § 118-7-3. C.R.S. 1963: § 118-7-3.

ANNOTATION

Am. Jur.2d. See 3 Am. Jur.2d, Adverse Possession, §§ 297-310.
C.J.S. See 2 C.J.S., Adverse Possession, § 280.

Whether or not possession is adverse is generally a question of fact to be determined by the fact finder. Schoenherr v. Campbell, 172 Colo. 306, 472 P.2d 139 (1970).

Requirement of continuous possession construed. The requirement of continuous possession in order to establish a right-of-way by prescription does not mean that the claimant must physically possess it every moment of the day, because the nature of the right claimed is the right to passage whenever passage is desired. Gleason v. Phillips, 172 Colo. 66, 470 P.2d 46 (1970); Agric. Ditch & Reservoir Co. v. Gleason, 686 P.2d 802 (Colo. App. 1984), rev'd on other grounds, 723 P.2d 736 (Colo. 1986).

"Mere occupancy" not adverse possession. Where there is insufficient evidence that any of the defendants ever asserted that they owned the subject property until the commencement of this action, the "mere occupancy" of a part of the subject property from time to time does not add up to adverse possession. DeCola v. Bochatey, 161 Colo. 95, 420 P.2d 395 (1966).

The practice of grazing cattle on unfenced land is not of itself sufficient to show adverse possession. Thompson v. Clarks, Inc., 162 Colo. 506, 427 P.2d 314 (1967).

Presumption of adverse possession. Where the evidence is sufficient to establish that the defendants have been in open, notorious, and continuous possession of the easement since 1940, it must be presumed that the possession was adverse. Gleason v. Phillips, 172 Colo. 66, 470 P.2d 46 (1970); Raftopoulos v. Monger, 656 P.2d 1308 (Colo. 1983); Agric. Ditch & Reservoir Co. v. Gleason, 686 P.2d 802 (Colo. App. 1984), rev'd on other grounds, 723 P.2d 736 (Colo. 1986); Smith v. Hayden, 772 P.2d 47 (Colo. 1989).

Every reasonable presumption is made in true owner's favor as against one who claims to have acquired title through adverse possession. DeCola v. Bochatey, 161 Colo. 95, 420 P.2d 395 (1966).

Recognition of record title strengthens adverse possessor's claim. A recognition of record title does not demonstrate an intent not to possess adversely where there is no dispute in the evidence of adverse possession of the disputed property; the very fact that the plaintiffs recognized that the record title of a portion of the property was not in their names, enforced and strengthened the claim of adverse possession. Schoenherr v. Campbell, 172 Colo. 306, 472 P.2d 139 (1970).

Adverse possessor has burden of proof when trying to divest the record owner of his lawful title to real property. DeCola v. Bochatey, 161 Colo. 95, 420 P.2d 395 (1966).

Party claiming title by adverse possession has the burden of proving his claim by clear and convincing evidence. Schutten v. Beck, 757 P.2d 1139 (Colo. App. 1988).

Where the extent of the adverse possession is not defined by deed or by physical barriers, the claim is limited to the property actually occupied by the claimant and such occupancy is a question of fact for the trial court to determine. Such occupancy does not require constant, visible occupancy or physical improvement on all parts of the parcel, but rather the ordinary use for which the land is suitable and which an owner of the land would make of it. Similarly, possession need not be absolutely exclusive in order to attain the degree of exclusivity required for adverse possession. Smith v. Hayden, 772 P.2d 47 (Colo. 1989).

38-41-104. Time to make an entry or bring an action to recover land.

(1) The right to make an entry or bring an action to recover land shall be deemed to have first accrued at the following times:

(a) When any person is disseised, his right of entry or of action shall be deemed to have accrued at the time of disseisin.

(b) When he claims as heir or devisee of one who died seized or possessed, his right shall be deemed to have accrued at the time of such death, unless there is a tenancy or other estate intervening after the death of such ancestor or devisor, except as provided in section 38-41-112, in which case his right shall be deemed to accrue when such intermediate estate expires or when it would have expired by its own limitations.

(c) (I) When there is such an intermediate estate, and in all cases when the party claims by force of any remainder or reversion, his right, insofar as it is affected by the limitation prescribed in this section, shall be deemed to accrue when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof for which he might have entered at an earlier time.

(II) Subparagraph (I) of this paragraph (c) shall not prevent a person from entering when entitled to do so by reason of any forfeiture or breach of condition, but if he claims under such a title, his rights shall be deemed to have accrued when the forfeiture was incurred or the condition was broken.

(d) In all cases not otherwise specifically provided for, the right shall be deemed to have accrued when the claimant or the person under whom he claims first became entitled to the possession of the premises under the title upon which the entry or the action is founded.

Source: L. 27: p. 599, § 33. CSA: C. 40, § 139. CRS 53: § 118-7-4. C.R.S. 1963: § 118-7-4.

ANNOTATION

Am. Jur.2d. See 51 Am. Jur.2d, Limitation of Actions, § 260.
C.J.S. See 54 C.J.S., Limitations of Actions, § 257.

Section could be raised as an affirmative defense in an answer to a petition to set aside a decree of determination of heirship on the ground of fraud, but it could not be properly considered on motion to dismiss such petition. Cisneros v. Cisneros, 163 Colo. 245, 430 P.2d 86 (1967).

38-41-105. Abstract of title prima facie evidence.

An abstract of title certified by any reputable Colorado abstractor or abstract company incorporated under the laws of the state of Colorado may be used to establish prima facie evidence that the chain of title is as shown by the abstract, except as to any of the instruments of conveyance or record thereof or certified copy thereof which may be offered in evidence, and the court may take judicial notice of the repute of the abstractor. The absence of tax sale certificates from such abstract for any period of time covered by the abstract shall be prima facie evidence of the payment of taxes during such period by the party relying upon any chain of title shown by such abstract.

Source: L. 27: p. 600, § 34. CSA: C. 40, § 140. CRS 53: § 118-7-5. C.R.S. 1963: § 118-7-5.

ANNOTATION

C.J.S. See 32A C.J.S., Evidence, §§ 1045-1050.

Law reviews. For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 35 (1939). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Evidence in the Proof of Real Estate Titles", see 24 Rocky Mt. L. Rev. 424 (1952). For article, "Abstractors Ride Off Into Sunset," see 11 Colo. Law. 2585 (1982).

Document tendered not objectionable as proof of lesser status. A document, tendered as proof of title itself and so admitted, is not objectionable as proof of the lesser status of color of title since an abstract of title may serve both as color of title and as evidence of title itself. Marr v. Shrader, 142 Colo. 106, 349 P.2d 706 (1960).

Document offered as evidence solely as proof of color of title may not also be invoked as proof of title. Marr v. Shrader, 142 Colo. 106, 349 P.2d 706 (1960).

Introduction of judgment roll as additional proof deemed error. Where defendants offered the abstract of title to show their chain of title, it was error to rule that the defendants must go further and introduce into evidence the judgment roll of the cause in which the decree was rendered because the abstract of title was prima facie proof of the chain of title shown thereby. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

Applied in Hochmuth v. Norton, 90 Colo. 453, 9 P.2d 1060 (1932).

38-41-106. Limitation seven years - possession under official and judicial conveyance or orders.

Actions brought for the recovery of any lands, tenements, or hereditaments which any person may claim by virtue of actual residence, occupancy, or possession for seven successive years having a connected title in law or equity, deducible of record, from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, or from any sheriff, marshal, or other person authorized to sell such land on execution, or under any order, judgment, or decree of any court of record shall be brought within seven years next after possession has been taken as provided in this section; but when the possessor acquires such title after taking such possession, the limitation shall begin to run from the time of acquiring title.

Source: L. 27: p. 601, § 35. CSA: C. 40, § 141. CRS 53: § 118-7-6. C.R.S. 1963: § 118-7-6.

ANNOTATION

C.J.S. See 54 C.J.S., Limitations of Actions, § 257.

Law reviews. For note, "Adverse Possession in Colorado", see 27 Rocky Mt. L. Rev. 88 (1954). For article, "One Year Review of Property", see 35 Dicta 48 (1958).

Limitation begins when deed placed in record. The seven-year statute of limitations does not begin to run until a deed upon which a party in possession relies as being sufficient to give him color of title has been placed of record. Poage v. Rollins & Son, 24 Colo. App. 537, 135 P. 990 (1913); Fallon v. Davidson, 137 Colo. 48, 320 P.2d 976 (1958).

When actual ouster of cotenants established. Until an actual ouster of any cotenants has been established by conduct, apart from mere use and occupation of the land by a party, this section giving rise to a claim of adverse possession does not begin to run. Fallon v. Davidson, 137 Colo. 48, 320 P.2d 976 (1958).

Void deed sufficient to set limitation into motion. A deed void upon its face is sufficient color of title to set in motion the seven-year limitation. Silford v. Stratton, 54 Colo. 248, 130 P. 327 (1913).

Void deed is not conclusive of good faith of the party claiming thereunder. Silford v. Stratton, 54 Colo. 248, 130 P. 327 (1913).

Defenses involve questions of law and fact. The defenses of the statute of limitations and the statute of frauds both involve questions of fact as well as law. Bushner v. Bushner, 134 Colo. 509, 307 P.2d 204 (1957).

Equitable defenses not invoked where statute of limitations applicable. The defense of laches is not available in a quiet title action because courts will not invoke equitable defenses to destroy legal rights where statutes of limitations are applicable. Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008 (1957).

When mineral estate is severed from the surface estate, actual adverse possession of mineral estate must be established separate from any possession of the surface estate. Kriss v. Mineral Rights, Inc., 911 P.2d 711 (Colo. App. 1996).

Applied in Callbreath v. Hug, 50 Colo. 95, 114 P. 298 (1911); Empire Ranch & Cattle Co. v. Weldon, 26 Colo. App. 111, 141 P. 138 (1914).

38-41-107. Rights of heirs.

The heirs, devisees, and assigns of the person having such title and possession shall have the same benefit of sections 38-41-101 to 38-41-106 as the person from whom the possession is derived.

Source: L. 27: p. 601, § 36. CSA: C. 40, § 142. CRS 53: § 118-7-7. C.R.S. 1963: § 118-7-7.

ANNOTATION

Am. Jur.2d. See 51 Am. Jur.2d, Limitation of Actions, § 76.

38-41-108. Rights in possession seven years - color of title and payment of taxes.

Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, who for seven successive years continues in such possession and also during said time pays all taxes legally assessed on such lands or tenements shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his paper title. All persons holding under such possession by purchase, devise, or descent, before said seven years have expired, who continue such possession and continue to pay the taxes as provided in this section, so as to complete the possession and payment of taxes for the term, provided in this section, shall be entitled to the benefit of this section.

Source: L. 27: p. 602, § 37. CSA: C. 40, § 143. CRS 53: § 118-7-8. C.R.S. 1963: § 118-7-8.

ANNOTATION

Analysis

I. GENERAL CONSIDERATION.

Law reviews. For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 35 (1939). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "'Color of Title' in the Colorado Short Statutes of Limitation", see 21 Rocky Mt. L. Rev. 226 (1949). For note, "When Is Homestead Title Marketable?", see 28 Dicta 415 (1951). For comment on Fuschino v. Lutin, appearing below, see 24 Rocky Mt. L. Rev. 257 (1952). For note, "Adverse Possession in Colorado", see 27 Rocky Mt. L. Rev. 88 (1954). For article, "One Year Review of Real Property", see 36 Dicta 57 (1959). For note, "A Survey of Colorado Water Law", see 47 Den. L.J. 226 (1970).

For history of adverse possession, see Laughlin v. City of Denver, 24 Colo. 255, 50 P. 917 (1897); Munson v. Marks, 52 Colo. 553, 124 P. 187 (1912).

Adverse possession deemed creature of statute. The doctrine of adverse possession was not recognized by the common law, but is the creation of statute. Laughlin v. City of Denver, 24 Colo. 255, 50 P. 917 (1897).

Section provides an affirmative defense which defendants are required to set up and establish. Jewell v. Trilby Mines Co., 229 F. 98 (8th Cir. 1915).

And the statute of limitations must be specially pleaded, or the defense will be considered waived. Chivington v. Colo. Springs Co., 9 Colo. 597, 14 P. 212 (1886); Webber v. Wannemaker, 39 Colo. 425, 89 P. 780 (1907); Sedgwick v. Culp, 24 Colo. App. 566, 136 P. 88 (1913).

No waiver where issue of limitations tried by implied consent. Where it is apparent from the testimony, the exhibits, and the finding of the court that the issue of the statute of limitations was tried by implied consent, plaintiff will not be held to have waived his right to claim title under the provisions of this section because he did not specially plead the statute either by complaint, answer to interveners' petition or by motion. Rose v. Roso, 119 Colo. 473, 204 P.2d 1075 (1949).

Section 38-41-109 is a parallel provision to this section. Winslett v. Rozan, 279 F.2d 654 (10th Cir. 1960). See also Empire Ranch & Cattle Co. v. Howell, 22 Colo. App. 584, 126 P. 1096 (1912), rev'd on other grounds, 60 Colo. 192, 152 P. 1177 (1915).

Section 38-41-109 must be considered in relation to this section. Webermeier v. Pace, 37 Colo. App. 546, 552 P.2d 1021 (1976), aff'd, 193 Colo. 157, 563 P.2d 950 (1977).

To constitute a bar, a party must show a complete performance under either this section or § 38-41-109, and he cannot show part performance under one section and part under the other and, thus, blend the provisions of both sections; the bar must be complete and distinct under the one or the other section. A party cannot avail himself of the provisions of both sections at the same time. Vider v. Zavislan, 146 Colo. 519, 362 P.2d 163 (1961).

Nonresident chargeable with notice of public records. A nonresident is chargeable with notice of what appears by the public records, and of the actual possession of lands by another, within the limits of this state. Mulford v. Rowland, 45 Colo. 172, 100 P. 603 (1909).

One who relies upon this section must plead and prove with exactness all of the facts upon which it is based. Gibson v. Huff, 26 Colo. App. 144, 141 P. 510 (1914); Bowers v. McFadzean, 82 Colo. 138, 257 P. 361 (1927).

Adverse possession not found. Plaintiff's testimony that water was used from sump since 1949, that she and her husband worked side-by-side, that in 1966 they were irrigating 300 acres and now 800 acres, and that water has been used continuously on the farm for irrigation, along with all the other evidence presented, was not sufficient evidence to show adverse possession. Farmer v. Farmer, 720 P.2d 174 (Colo. App. 1986).

To obtain title pursuant to this section, a person must demonstrate color of title, possession, and payment of taxes for the full seven-year period. The statute of limitations does not begin to run until all three elements are met. Peters v. Smuggler-Durant Mining Corp., 930 P.2d 575 (Colo. 1997).

Applied in Barker v. Hawley, 4 Colo. 316 (1878); Kannaugh v. Quartette Mining Co., 16 Colo. 341, 27 P. 245 (1891); Lougee v. Beeney, 22 Colo. App. 603, 126 P. 1102 (1912); Poage v. E.H. Rullins & Sons, 24 Colo. App. 537, 135 P. 990 (1913); Heini v. Bank of Kremmling, 93 Colo. 350, 25 P.2d 1113, 89 A.L.R. 1442 (1933); Loveland Camp No. 83 v. Woodmen Bldg, & Benevolent Ass'n, 108 Colo. 297, 116 P.2d 195 (1941); Coryell v. Robinson, 118 Colo. 225, 194 P.2d 342 (1948); Hand v. Rhodes, 125 Colo. 508, 245 P.2d 292 (1952); Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008 (1957); Cleveland v. Dow Chem. Co., 168 Colo. 388, 451 P.2d 741 (1969).

II. PROCEEDINGS TO WHICH STATUTE APPLIES AND PERSONS ENTITLED TO BENEFIT.

Section applies as defense to recovery of possession and ousters. This section is meant to apply as a defense only to actions for the recovery of possession, and the ouster from the land of someone in possession. Munson v. Marks, 52 Colo. 553, 124 P. 187 (1912); Morris v. St. Louis Nat'l Bank, 17 Colo. 231, 29 P. 802 (1892).

Section applies to all "lands or tenements" possessed. Webermeier v. Pace, 37 Colo. App. 546, 552 P.2d 1021 (1976), aff'd, 193 Colo. 157, 563 P.2d 950 (1977).

Section applies to disputes concerning title to severed mineral interests. This section has been applied as the pertinent statute in situations where title to severed mineral interests is sought to be quieted on the basis of

adverse possession. Webermeier v. Pace, 37 Colo. App. 546, 552 P.2d 1021 (1976), aff'd, 193 Colo. 157, 563 P.2d 950 (1977).

Section applicable for protection of right-of-way. A railroad company is entitled to the benefit of this section for the protection of its right-of-way. Keener v. Union Pac. Ry. 31 F. 126 (D. Colo. 1887); Denver & R.G.R.R. v. Doelz, 49 Colo. 48, 111 P. 595 (1910).

Section is apparently not limited to cases where a fee is claimed, and whoever is in possession of lands claiming a title, full or not, a title supported by some written document or under some legal color and claim of title who pays the taxes assessed upon that property, is, to the extent of that claim, protected. Keener v. Union Pac. Ry., 31 F. 126 (D. Colo. 1887).

Leasehold interest. If one who claims to have the leasehold interest of a tract of land for a period of 99 years, making no claim to the fee, and possessing that land for five years (now seven years), should pay the taxes assessed upon it, this section protects that title to the extent of that claim, that is, to the extent of his claim of a leasehold interest for 99 years. Keener v. Union Pac. Ry., 31 F. 126 (D. Colo. 1887).

At least seven full years to the day must elapse between the first payment of taxes and the date the initial complaint is filed in an action brought pursuant to this section. Payment of taxes on September 27, 1983, and filing of the action on February 22, 1990, was not sufficient to meet the requirements under this section. Peters v. Smuggler-Durant Mining Corp., 930 P.2d 575 (Colo. 1997).

Section inapplicable to part of vein apexing without claim's boundary lines. This section does not extend to that part of a vein apexing without the boundary lines of the claim under which the limitation is asserted. Davis v. Shepherd, 31 Colo. 141, 72 P. 57 (1903).

Applicability of section to patented ground doubtful. It is extremely doubtful if this section was intended to apply in cases where the disputed territory was patented ground. Lebanon Mining Co. v. Rogers, 8 Colo. 34, 5 P. 661 (1885); Arnold v. Woodward, 14 Colo. 164, 23 P. 444 (1890); Silford v. Stratton, 54 Colo. 248, 130 P. 327 (1913).

Proof not required in actions to quiet title to irrigation ditches. One who pleads the seven-year statute of limitations, in an action to quiet title to irrigation ditches, is not required in the first instance either to prove payment of taxes or nonassessment. Frey v. Paul, 69 Colo. 244, 193 P. 560 (1920).

The statute of limitations does not apply to a claim for quiet title when the property was sold after the complaint was filed. The seven-year statute of limitations may have been applicable, but the quiet title claim became moot. Tafoya v. Perkins, 932 P.2d 836 (Colo. App. 1996).

III. PARTICULAR REQUISITES CONSIDERED.

A. Possession.

Section requires actual, exclusive, and continuous possession of the property in question for seven years as one of the conditions to quieting title. Ginsberg v. Stanley Aviation Corp., 193 Colo. 157, 568 P.2d 35 (1977).

Continuous, actual, adverse possession of a water right for seven successive years under color of title accompanied by payment of all taxes legally assessed thereon during that period, fixes title in the possessor, and as real property it may be passed by deed. Kountz v. Olson, 94 Colo. 186, 29 P.2d 627 (1934).

Exclusive possession of land under color of title and payment of taxes for seven consecutive years constitutes a good title. Whitehead v. Desserich, 71 Colo. 327, 206 P. 384 (1922).

Where the plaintiff in an action to quiet title was in actual possession of the land in controversy in good faith, under color of title under a tax deed and through divers mesne conveyances from the common source, and had paid taxes on the land for more than seven successive years, she acquired a valid title under the limitation law then in force. Laws v. Newkirk, 39 Colo. 78, 88 P. 861 (1907).

Where a right-of-way deed contained language which created a possibility of reverter, upon termination of the use, the estate of the grantees and those claiming through them would ordinarily be terminated; however, the right of the land board to reacquire the property was subject to statutory conditions which were not complied with by the state, thus the plaintiffs, who have established prima facie color of title by successive grants which are free of condition, who have been in possession adverse to the state for over 20 years and who have been in possession and paid taxes under color of title for over seven years, were entitled to a decree against the state. State v. Franc, 165 Colo. 69, 437 P.2d 48, cert. denied, 392 U.S. 928, 88 S. Ct. 2284, 20 L. Ed.2d 1385 (1968).

Section inapplicable where all requirements not met. This section cannot apply to create a fee under color of title and payment of taxes for the statutory period in one out of possession. Radke v. Union P.R.R., 138 Colo. 189, 334 P.2d 1077 (1958).

Mixed or common possession of land by parties to suit. In case of a mixed or common possession of land by both parties to a suit, the law adjudges the rightful possession to him who holds legal title, and no length of time of possession can give title by adverse possession as against the legal title. Vider v. Zavislan, 146 Colo. 519, 362 P.2d 163 (1961).

Possession in conjunction with other landowners falls far short of adverse possession which deprives the true owner of his title. Webber v. Wannemaker, 39 Colo. 425, 89 P. 780 (1907).

Maintenance of lawn, bush, and fences were sufficient acts and evidence of possession as to fulfill the requirements of this section. Koch v. Ilgen, 154 Colo. 59, 388 P.2d 254 (1964).

Actual possession of contiguous property. When plaintiff took possession of the premises upon which the home, barn, and corral were located, he took actual possession of the contiguous property because, where one owns several tracts of land adjoining each other, and all of which he holds under deeds, patents, or other writings, and claims to the extent of his boundaries, he is in the actual possession of the adjoining tract, as well as the one upon which he lives, if there is no actual adverse occupancy of either one of the tracts. Vider v. Zavislan, 146 Colo. 519, 362 P.2d 163 (1961).

Land used to graze flocks thereon is sufficient continuous possession. Munro v. Eshe, 113 Colo. 19, 156 P.2d 700 (1944).

Possession of surface not possession of severed mineral estate. After title to oil and gas had been severed from the title to the surface by reservation in deed conveying the surface, possession of the surface did not constitute possession of the severed mineral estate. Calvat v. Juhan, 119 Colo. 561, 206 P.2d 600 (1949).

Actual adverse possession cannot be established by inference or implication, and the admission that plaintiff was in possession at, and for, some time prior to the time when suit was commenced, was not sufficient because the nature of the defense relied upon requires strict proof. Fleming v. Howell, 22 Colo. App. 382, 125 P. 551 (1912).

Constructive possession sufficient to maintain action to quiet title. Where one not in actual occupation claims the right of exclusive occupation and no person is in occupation opposing his claim, his possession is constructive and sufficient to enable him to maintain an action to quiet title. O'Reilly v. Balkwill, 133 Colo. 474, 297 P.2d 263 (1956).

Burden of proof. A person not in possession asserting title to real property and seeking to enjoin others from claiming an interest therein or possessing the same has the burden of furnishing evidence which would enable the court to rest its decision on the strength of his title, rather than on the supposed weakness of the title of others claiming interests in the property. Nelson v. Van Cleve, 143 Colo. 117, 352 P.2d 269 (1960).

Proof required where plaintiff not in possession of property. Where plaintiff is not in possession of the property, a defendant in an action to quiet title may effectually resist a decree against himself by showing simply that the plaintiff is without title since, if the plaintiff has no title, he cannot complain that someone else, also without title, asserts an interest in the land. Nelson v. Van Cleve, 143 Colo. 117, 352 P.2d 269 (1960).

B. Color of Title.

Section protects person under colorable title. This section, when its conditions are complied with, is intended as a protection to a person holding in good faith under a mere colorable title, that is, under a title which is really no title. Bennet v. North Colo. Springs Land & Imp. Co., 23 Colo. 470, 48 P. 812 (1897). See also Knight v. Lawrence, 19 Colo. 425, 36 P. 242 (1894); De Foresta v. Gast, 20 Colo. 307, 38 P. 244 (1894); Sullivan v. Scott, 73 Colo. 451, 216 P. 515 (1923).

Color of title is mere pretense of title, but not a valid title; it purports to be a good title, but is not so in fact. Jackson v. Larson, 24 Colo. App. 548, 136 P. 81 (1913).

Paper title must be shown. Gibson v. Huff, 26 Colo. App. 144, 141 P. 510 (1914).

The phrase, "color of title" refers to a paper writing purporting to convey title, or to some writing whereby title is sought to be acquired. Knight v. Lawrence, 19 Colo. 425, 36 P. 242 (1894).

Color of title created by conveyance in fee simple with a possibility of reverter. Barnes v. Winford, 833 P.2d 756 (Colo. App. 1992).

Color of title can only arise out of conveyance purporting to convey title to real estate. Omaha & Grant Smelting & Ref. Co. v. Tabor, 13 Colo. 41, 21 P. 925 (1889); Warren v. Adams, 19 Colo. 515, 36 P. 604 (1894); Minter v. King, 27 Colo. App. 233, 148 P. 275 (1915).

Color of title must arise out of some conveyance purporting to vest in the grantee an interest in his own right adverse to the true owner, and not from one that constitutes him a trustee of the title for the use and benefit of such owner; and, furthermore, such claim or color of title must be made in good faith. Warren v. Adams, 19 Colo. 515, 36 P. 604 (1894); Silford v. Stratton, 54 Colo. 248, 130 P. 327 (1913).

Deed is color of title only to the premises described therein. Denver Trackage & Imp. Co. v. Colo. & S. Ry., 58 Colo. 313, 145 P. 707 (1914).

Color of title placed of record required to invoke limitation. The seven-year statute of limitations does not begin to run until a deed upon which a party in possession relies as being sufficient to give him color of title has been placed of record. Fallon v. Davidson, 137 Colo. 48, 320 P.2d 976 (1958).

Successor of grantee established color of title by general warranty deed from grantor who retained a reversionary interest in property. Grantor had conveyed right-of-way to railroad with a provision that if the railroad abandoned use of the right-of-way, the property would revert to the grantor. The grantor's warranty deed conveyed all the estate, right, title and interest to the property, including reversions and remainders to the grantee, with the exception of the right-of-way conveyed to the railroad. When the railroad abandoned use of the right-of-way, the interest reverted to the grantee. Barnes v. Winford, 833 P.2d 756 (Colo. App. 1991).

Tax deed does not, until recorded, constitute color of title, so as to set in motion the seven-year statute of limitations. Morris v. St. Louis Nat'l Bank, 17 Colo. 231, 29 P. 802 (1892); Wason v. Major, 10 Colo. App. 181, 50 P. 741 (1897); Sayre v. Sage, 47 Colo. 559, 108 P. 160 (1910); Hughes v. Webster, 52 Colo. 475, 122 P. 789 (1912); Empire Ranch & Cattle Co. v. Gibson, 22 Colo. App. 617, 126 P. 1103 (1912); Upham v. Weisshaar, 23 Colo. App. 277, 128 P. 1129 (1913); Parks v. Roth, 25 Colo. App. 296, 137 P. 76 (1914); Minter v. King, 27 Colo. App. 233, 148 P. 275 (1915).

Void deed is, color of title. Parker v. Betts, 47 Colo. 428, 107 P. 816 (1910); Munro v. Eshe, 113 Colo. 19, 156 P.2d 700 (1944); Bennet v. North Colo. Springs Land & Imp. Co., 23 Colo. 470, 48 P. 812 (1897); Silford v. Stratton, 54 Colo. 248, 130 P. 327 (1913).

Deed, purporting to convey title, may be defective and thereby convey no title, yet give color of title. Whitehead v. Desserich, 71 Colo. 327, 206 P. 384 (1922).

Deed even though void on its face will make color of title as fully and as effectually as though the deed had been regular on its face. De Foresta v. Gast, 20 Colo. 307, 38 P. 244 (1894); Brinker v. Union Pac. D. & G. Ry., 11 Colo. App. 166, 55 P. 207 (1898).

Deed disclosing unauthorized sale gives color title. A deed, notwithstanding the fact that it discloses a sale unauthorized by this section, gives color of title. Hoge v. Magnes, 85 F. 355 (8th Cir. 1898).

Void deed admissible to show color of title. A treasurer's deed, upon sale of land for taxes, void upon its face, is admissible to show color of title. Jackson v. Larson, 24 Colo. App. 548, 136 P. 81 (1913).

Thus, attack of invalidity unimportant. No importance is attached to the ground of invalidity of an apparent or colorable title. Richards v. Beggs,

31 Colo. 186, 72 P. 1077 (1903); Jackson v. Larson, 24 Colo. App. 548, 136 P. 81 (1913).

Where void deed fails to describe land no color of title. A treasurer's deed which fails to describe the lands sold, is void and does not give the color of title necessary under this section. Riley v. Lemieux, 24 Colo. App. 184, 132 P. 699 (1913).

And quit claim deed failing to convey land not color of title. A quitclaim deed does not constitute color of title, if it does not purport to convey the land in controversy, but designates a lot whose metes and bounds are specifically described in the map then on file, which description entirely excludes it. Lebanon Mining Co. v. Rogers, 8 Colo. 34, 5 P. 661 (1884); Laughlin v. City of Denver, 24 Colo. 255, 50 P. 917. (1897);

Actual possession and tax payments without color of title insufficient. Actual possession and payment of taxes for seven years, without color of title acquired in good faith, prior to the commencement of the seven-year period, is not sufficient to sustain a plea under this section. King v. Foster, 26 Colo. App. 120, 140 P. 930 (1914).

Color of title invoked as evidence of title impermissible. One offering a deed as color of title merely cannot afterwards invoke it as evidence of title in fact. Parks v. Roth, 25 Colo. App. 296, 137 P. 76 (1914).

But abstracts of title admitted for the purpose of proving title may also be used as evidence of color of title, since the same instrument may serve both as color of title and as evidence of title itself. Marr v. Shrader, 142 Colo. 106, 349 P.2d 706 (1960).

Title acquired after the institution of the action does not avail. Empire Ranch & Cattle Co. v. McPherin, 26 Colo. App. 225, 142 P. 419 (1914).

Document tendered not objectionable as proof of lesser status. A document tendered as proof of title itself and so admitted is not objectionable as proof of the lesser status of color of title. Marr v. Shrader, 142 Colo. 106, 349 P.2d 706 (1960).

But a document offered as evidence solely as proof of color of title may not also be invoked as proof of title. Marr v. Shrader, 142 Colo. 106, 349 P.2d 706 (1960).

Record entry of judgment without judgment roll inadmissible. The mere record entry of a judgment, without the judgment roll is not admissible as evidence of title. King v. Foster, 26 Colo. App. 120, 140 P. 930 (1914).

C. Payment of Taxes.

Pleading which fails to comply with section's requirements is insufficient. Where there is no allegation that plaintiff paid for seven successive years all taxes legally assessed on the lands, nor does the plaintiff set up any paper title as a basis for color of title, nor is there any allegation of possession under claim and color of title made in good faith, the pleading falls far short of the requirements of this section and is insufficient. United States Security & Bond Co. v. Wolfe, 27 Colo. 218, 60 P. 637 (1900); Eberville v. Leadville Tunneling, Mining & Drainage Co., 28 Colo. 241, 64 P. 200 (1901); Webber v. Wannemaker, 39 Colo. 425, 89 P. 780 (1907).

Proof of tax payment required to invoke section. To invoke successfully the provisions of this section, one must prove payment of taxes for the full period next prior to the commencement of a suit to quiet title claimed thereunder. Whitehead v. Bennett, 92 Colo. 549, 22 P.2d 168 (1933).

Seven full years must elapse between date of first payment of taxes that has become due and payable after color of title is taken and the date of the institution of the suit to recover the land. Empire Ranch & Cattle Co. v. Howell, 22 Colo. App. 584, 126 P. 1096 (1912), rev'd on other grounds, 60 Colo. 192, 152 P. 1177 (1915); DeFord v. Smith, 23 Colo. App. 78, 127 P. 453 (1912); Cristler v. Beardsley, 25 Colo. App. 369, 138 P. 68 (1914); Empire Ranch & Cattle Co. v. McPherin, 26 Colo. App. 225, 142 P. 419 (1914).

A tax deed which has not been of record for seven years preceding an action by the original owner for the recovery of the lands does not support a plea of the seven-year statute of limitations. Stephens-Wilmot Co. v. Howell, 23 Colo. App. 396, 128 P. 476 (1913).

Taxes paid after an action is brought are of no avail to support a plea of the seven-year statute of limitations. Empire Ranch & Cattle Co. v. Gibson, 22 Colo. App. 617, 126 P. 1103 (1912). See also Empire Ranch & Cattle Co. v. Howell, 22 Colo. App. 389, 125 P. 592 (1912), rev'd on other grounds, 60 Colo. 192, 152 P. 1177 (1915).

Only taxes falling due subsequent to issue of tax deed counted. Only taxes, falling due subsequent to the issue of a tax deed which is relied upon as color of title, are to be counted. Empire Ranch & Cattle Co. v. Weldon, 26 Colo. App. 111, 141 P. 138 (1914).

Tax receipts dated after the institution of an action are inadmissible. Upham v. Weisshaar, 23 Colo. App. 277, 128 P. 1129 (1913).

Payment of taxes on severed minerals. Once the validity of a mineral deed is established, creating a separate mineral estate in the grantor, possession of the surface did not constitute possession of the minerals, and, payment of assessed taxes on the surface does not constitute payment of taxes on severed minerals, unless a specific reference to the contrary is made of record. Winslett v. Rozan, 279 F.2d 654 (10th Cir. 1960).

Fact that a person in possession was not the exclusive taxpayer on the property is not of significance. The requirement is that a person in possession must pay all taxes legally assessed on the land. The prior owner of a right-of way who abandoned the property and failed to inform county government can not be used to defeat title by adverse possession when the person in possession paid all taxes legally assessed on the land. Barnes v. Winford, 833 P.2d 756 (Colo. App. 1992).

Proof must be clear and satisfactory. Where payment of taxes under color of title is relied upon to defeat the original title the proof must be clear and satisfactory. Brinker v. Union Pac. D. & G. Ry., 11 Colo. App. 166, 55 P. 207 (1898); Eberville v. Leadville Tunneling, Mining & Drainage Co., 28 Colo. 241, 64 P. 200 (1901); Upham v. Weisshaar, 23 Colo. App. 277, 128 P. 1129 (1913); Sullivan v. Scott, 73 Colo. 451, 216 P. 515 (1923); Huffman v. Smith, 87 Colo. 265, 286 P. 861 (1930).

Title should not be overcome by loose and uncertain testimony, or upon any conjecture or violent presumption. Upham v. Weisshaar, 23 Colo. App. 277, 128 P. 1129 (1913).

Payment of taxes by nonclaimant insufficient. It is not sufficient if the taxes were paid any one of the years by a person who at the time made no claim to the property under color of title. Ballard v. Golob, 34 Colo. 417, 83 P. 376 (1905); Webber v. Wannemaker, 39 Colo. 425, 89 P. 780 (1907).

Payment of interest on taxes. If a party pays to the collector all taxes assessed and extended against him on the tax book, he has complied with this requisite of the law; although he may not have paid interest on the taxes due because of nonpayment of the same at the time they were due, if such interest has not been ascertained and charged to him by the collector, he has not been required by such collector to pay the same. Latta v. Clifford, 47 F. 614 (D. Colo. 1891).

D. Good Faith.

Good faith is essential. Silford v. Stratton, 54 Colo. 248, 130 P. 327 (1913).

In order to justify a decree quieting his title, it is incumbent upon defendant to produce clear and convincing evidence that he, in good faith, acquired color of title to the property in question; that for a period of seven years he paid the taxes legally assessed against the same; and that the property claimed by plaintiff was included in his color of title. Kelly v. Sinclair, 129 Colo. 226, 268 P.2d 1035 (1954).

Therefore, party must act bona fide. A party, who sets up an adverse possession under color of title, must act bona fide, or, in other words he must be honest; he must believe his deed to be valid in law and he must believe that it conveys to him a good title to the land, although it may turn out that another person has a better title. Sullivan v. Scott, 73 Colo. 451, 216 P. 515 (1923).

Color of title made in good faith is shown by any deed or instrument which purports on its face to convey title which a party is willing to, and does, pay his money for, apart from any fraud; the deed itself purports good faith, unless facts and circumstances attending its execution show the party accepting it had no faith or confidence in it. Lebanon Mining Co. v. Rogers, 8 Colo. 34, 5 P. 661 (1884); Knight v. Lawrence, 19 Colo. 425, 36 P. 242 (1894).

Good faith of the claimant is a question of fact. Jackson v. Larson, 24 Colo. App. 548, 136 P. 81 (1913).

Party aware of fraud cannot render claim availing. A party receiving color of title, knowing it to be worthless or in fraud of the owner's rights, although he holds the color and asserts the claim, cannot render the claim availing because of the want of good faith. Knight v. Lawrence, 19 Colo. 425, 36 P. 242 (1894); Sullivan v. Scott, 73 Colo. 451, 216 P. 515 (1923).

Grantee's knowledge of grantor's insanity not conclusive of bad faith. The insanity of the grantor, even although known to the grantee at the time of accepting the conveyance, is not conclusive of bad faith on the part of the grantee. Parker v. Betts, 47 Colo. 428, 107 P. 816 (1910).

Test of claim of title in good faith. If good faith will be presumed by the taking of the deed itself, unless the facts and circumstances attending its execution showed that the party accepting it had no faith or confidence in the deed, it is plain that confidence in the title and purpose in acquiring it constitute the test of claim of title in good faith. Sedgwick v. Culp, 24 Colo. App. 566, 136 P. 88 (1913).

Faith depends upon purpose with which deed is obtained, and the reliance placed upon the claim and the color, and a party receiving color of title, knowing it to be worthless, or in fraud of the owner's rights, although he holds the color and asserts the claim, cannot render it availing, because of the want of good faith. Silford v. Stratton, 54 Colo. 248, 130 P. 327 (1913).

Deeds unaffected by insertion of treasurer's name following recording. Where the treasurer's name was omitted from the acknowledgment of tax deeds and, after they were recorded, he inserted his name with a rubber stamp and the county clerk's record was changed accordingly; while such procedure is condemned, it does not affect the validity of the deeds, nor to show claim of title made in bad faith on the part of the person causing the alterations to be made. Langley v. Young, 75 Colo. 44, 224 P. 231 (1924).

Possession and payment of taxes must be affirmatively shown. Knight v. Lawrence, 19 Colo. 425, 36 P. 242 (1894).

38-41-109. When in possession under color of title - unoccupied lands.

Whenever a person having color of title, made in good faith, to vacant and unoccupied land pays all taxes legally assessed thereon for seven successive years, he shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his paper title. All persons holding under such taxpayer, by purchase, devise, or descent, before said seven years have expired, who continue to pay the taxes as provided in this section, so as to complete the payment of taxes for the period of time provided in this section, shall be entitled to the benefit of this section. If any person, having a better paper title to said vacant and unoccupied land, shall during the said term of seven years pay the taxes assessed on said land for any one or more years during the said term of seven years, then such person seeking title under claim of taxes paid, his heirs and assigns, shall not be entitled to the benefit of this section. For the purposes of this part 1 a redemption from a sale for taxes by the party claiming under any of the limitations set forth in this section shall be considered as the equivalent of a payment of taxes.

Source: L. 27: p. 602, § 38. CSA: C. 40, § 144. CRS 53: § 118-7-9. C.R.S. 1963: § 118-7-9.

Cross references: For rights of a person in actual possession of lands and tenements for seven years, with color of title and payments of taxes, see § 38-41-108.

ANNOTATION

Analysis

I. GENERAL CONSIDERATION.

C.J.S. See 2 C.J.S., Adverse Possession, § 223.

Law reviews. For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "'Color of Title' in the Colorado Short Statutes of Limitation", see 21 Rocky Mt. L. Rev.

226 (1949). For note, "Adverse Possession in Colorado", see 27 Rocky Mt. L. Rev. 88 (1954).

This section is constitutional. Towner v. Schaffnit, 59 Colo. 242, 149 P. 625 (1915).

This section is intended as a protection to a person holding in good faith under a mere colorable title, that is, under a title which is really no title. De Foresta v. Gast, 20 Colo. 307, 38 P. 244 (1894).

This section is clearly designed to operate as a limitation upon actions involving conflicting titles to vacant and unoccupied lands. Morris v. St. Louis Nat'l Bank, 17 Colo. 231, 29 P. 802 (1892).

Section focuses only on surface occupancy. Webermeier v. Pace, 37 Colo. App. 546, 552 P.2d 1021 (1976), aff'd, 193 Colo. 157, 563 P.2d 950 (1977).

Section does not pertain to severed mineral interests, i.e., its applicability is dependent upon there being no one in possession of the surface which would give notice of a potential adverse claim to the surface or fee estate. Webermeier v. Pace, 37 Colo. App. 546, 552 P.2d 1021 (1976), aff'd, 193 Colo. 157, 563 P.2d 950 (1977).

Section is parallel provision to § 38-41-108. Winslett v. Rozan, 279 F.2d 654 (10th Cir. 1960).

Section must be considered in relation to § 38-41-108. Webermeier v. Pace, 37 Colo. App. 546, 552 P.2d 1021 (1976), aff'd, 193 Colo. 157, 563 P.2d 950 (1977).

To constitute a bar, a party must show complete performance under either this section or § 38-41-108. He cannot show part performance under one section and part under the other and, thus, blend the provisions of both sections. The bar must be complete and distinct under the one or the other section, and a party cannot avail of the provisions of both sections at the same time. Vider v. Zavislan, 146 Colo. 519, 362 P.2d 163 (1961).

Bar to be raised by pleadings. The benefit of this section cannot be allowed, where its bar was neither raised by the pleadings nor sustained by the facts developed at the trial. Fleming v. Howell, 22 Colo. App. 382, 125 P. 551 (1912).

Failure to plead limitations constitutes waiver. A defendant who, with full knowledge of all the facts, goes to trial without pleading this statute of limitations waives the defense, and he may not present the defense by a supplemental answer tendered months after the trial. Empire Ranch & Cattle Co. v. Chapin, 22 Colo. App. 538, 126 P. 1107 (1912).

Applied in Sullivan v. Collins, 20 Colo. 528, 39 P. 334 (1895); Gibson v. Staghorn Cattle Co., 26 Colo. App. 148, 141 P. 507 (1914); Heini v. Bank of Kremmling, 93 Colo. 350, 25 P.2d 1113, 89 A.L.R. 1442 (1933); Wright v. Yust, 118 Colo. 449, 195 P.2d 951 (1948); Hand v. Rhodes, 125 Colo. 508, 245 P.2d 292 (1952).

II. PARTICULAR REQUIREMENTS.

A. In General.

Additional requirements for title. Under this section, in addition to the fact that the land must have been vacant and taxes paid for seven successive years, three things are essential: (1) There must be color of title; (2) the party must claim under it; and (3) that claim must be made in good faith. If any one of these elements is lacking, the title will be defeated. Silford v. Stratton, 54 Colo. 248, 130 P. 327 (1913). See Empire Ranch & Cattle Co. v. Howell, 22 Colo. App. 584, 126 P. 1096 (1912), rev'd on other grounds, 60 Colo. 192, 152 P. 1177 (1915).

No possession whatever is necessary under this section and a court has no power to read such a condition of possession into the section. Thatcher v. Gottlieb, 59 F. 872 (8th Cir. 1894).

Void deed does not confer constructive possession of land, and the paramount owner is, in law, deemed to continue in possession until actual entry and possession taken by another, or until payment of taxes for the requisite period, concurrent with color of title made in good faith, as provided by this section shall, in the case of vacant lands, have become equivalent in law to an actual ouster. Fleming v. Howell, 22 Colo. App. 382, 125 P. 551 (1912).

B. Color of Title.

Judgment record may be color of title. Marvin v. Witherbee, 63 Colo. 469, 168 P. 651 (1917).

Treasurer's deed must describe the land in order to be color of title. Riley v. Lemieux, 24 Colo. App. 184, 132 P. 699 (1913).

A tax deed not recorded is not color of title to vacant lands under this section. Carnahan v. Hughes, 53 Colo. 318, 125 P. 116 (1912); Marks v. Morris, 54 Colo. 186, 129 P. 828 (1913); Empire Ranch & Cattle Co. v. Howell, 23 Colo. App. 348, 129 P. 521 (1913).

The mere record entry of a decree quieting title, not accompanied by the judgment roll, is not admissible as evidence of title. Miller v. Weldon, 26 Colo. App. 108, 140 P. 930 (1914).

C. Payment of Taxes.

One who holds under color of title must himself pay the taxes during the period he is in possession. Ballard v. Golob, 34 Colo. 417, 83 P. 376 (1905); Webber v. Wannemaker, 39 Colo. 425, 89 P. 780 (1907); Bowers v. McFadzean, 82 Colo. 138, 257 P. 361 (1927).

Payment of taxes alone ineffective to perfect title. The payment of taxes on land and improvements is ineffective to perfect title where the party claiming fails to show color of title. Tilbury v. Osmundson, 143 Colo. 12, 352 P.2d 102 (1960).

Proof of tax payment required. One claiming unoccupied lands under a treasurer's deed must, to avail himself of this section, show seven years' payment of taxes subsequent to the record of his deed and before the commencement of an action by the owner of the paramount title. Johnson v. Gibson, 24 Colo. App. 392, 133 P. 1052 (1913). See Bloomer v. Cristler, 22 Colo. App. 238, 123 P. 966 (1912).

When section available as defense to recovery action. This section is not available as a defense to an action to recover vacant land unless seven full years elapse between the first payment of taxes under color of title and the institution of the action. Evans v. Howell, 23 Colo. App. 219, 128 P. 879 (1912).

This section is not available to one claiming under a tax deed not of record for the full term of seven years, at a time when an action for the recovery of lands is instituted. Empire Ranch & Cattle Co. v. Howell, 22 Colo. App. 584, 126 P. 1096 (1912), rev'd on other grounds, 60 Colo. 192, 152 P. 1177 (1915); Terry v. Gibson, 23 Colo. App. 273, 128 P. 1127 (1913).

Where one holding color of title pays all taxes upon the land for seven successive years, the payment of subsequent taxes by the holder of paramount title is of no avail. Newsom v. DeFord, 25 Colo. App. 582, 140 P. 207 (1914).

When section not available as defense. If the paramount owner brings his action to recover the land before the lapse of seven years succeeding the recording of a tax deed, the limitation of this section has no place. Empire Ranch & Cattle Co. v. Howell, 23 Colo. App. 348, 129 P. 521 (1913), rev'd on other grounds, 60 Colo. 192, 152 P. 1177 (1915); Empire Ranch & Cattle Co. v. Brownson, 26 Colo. App. 228, 142 P. 421 (1914).

Tax past due when deed issued not counted. A tax past due when a treasurer's deed is issued is not to be counted to sustain a plea of the seven-year statute of limitations. Miller v. Weldon, 26 Colo. App. 108, 140 P. 930 (1914).

Effect of payment of part of total tax. One who assumes to pay taxes solely on improvements on land, or solely on the land, is merely paying a part of the total tax on the realty. French v. Golston, 105 Colo. 578, 100 P.2d 581 (1940).

D. Good Faith.

Good faith must be affirmatively shown. To entitle one claiming lands by virtue of this section under color of title, good faith must be affirmatively shown. Marvin v. Witherbee, 63 Colo. 469, 168 P. 651 (1917).

Sufficient evidence of good faith. In the absence of proof to the contrary, the fact that a person has acquired, and for a period of 11 years has held, a tax deed to land, and has during said period paid all the taxes on the land, is sufficient evidence of his good faith in the transaction. De Foresta v. Gast, 20 Colo. 307, 38 P. 244 (1894).

III. COMMENCEMENT AND INTERRUPTION OF STATUTE.

Claimant must show lapse of statutory period. One who, claiming under a void tax deed, would avail himself of the seven-year limitation prescribed by this section, must show the lapse of the statutory period, not only between the first payment of taxes and the institution of the action of the paramount owner, but between the record of his deed and the institution of this action. Marks v. Morris, 54 Colo. 186, 129 P. 828 (1913).

Only way this section can be arrested, after color of title has been acquired and payment of taxes for a term of seven years thereunder has been made, is by the commencement of suit within seven years from the time the first payment under said color was made. Newsom v. DeFord, 25 Colo. App. 582, 140 P. 207 (1914).

38-41-110. Payment of delinquent taxes by owner of less than whole property.

The owner of not less than one-tenth undivided interest in real property which he has owned not less than one year may pay and the county treasurer shall receive from him all delinquent taxes due upon the entire or any other fractional interests therein by redemption from prior or subsequent tax sales or by payment of any taxes which are delinquent, or otherwise, and if at the time of such payment he records with the county clerk and recorder a statement describing the property and showing the payment of such taxes under this article, he shall be subrogated to the first and prior lien of the state of Colorado for such taxes and may foreclose such lien at any time after four years from the date when any part of the taxes so paid first became delinquent, in the same manner and with like remedies as a first mortgage; or he shall be entitled to have any such payment allowed as a setoff in any accounting with any other person interested in such property, whether under the provisions of article 44 of title 34, C.R.S., or otherwise. The owner of any other fractional interest may at any time prior to foreclosure pay to the treasurer his pro rata share of such payments, with interest and recording fees which shall be repaid to the lien claimant and for which a redemption certificate shall issue, which, when recorded, shall release such interest from such lien.

Source: L. 27: p. 602, § 38. L. 33: p. 796, § 1. CSA: C. 40, § 145. CRS 53: § 118-7-10. C.R.S. 1963: § 118-7-10.

ANNOTATION

Am. Jur.2d. See 72 Am. Jur.2d, State and Local Taxation, § 743.

Rights of co-owners under this section distinguished from right of redemption. Unlike the right of an interest holder to redeem under § 39-12-103, the right granted to certain co-owners to pay delinquent taxes under this section does not result in issuance of a redemption certificate or acquisition of an interest in the delinquent co-owner's estate. Rather, the paying co-owner is granted the right to foreclose the lien for unpaid taxes. Notch Mountain Corp. v. Elliott, 898 P.2d 550 (Colo. 1995).

Applied in Sine v. Stout, 119 Colo. 254, 203 P.2d 495 (1949); Latta v. Stout, 119 Colo. 257, 203 P.2d 496 (1949).

38-41-111. When action will not lie against person in possession.

(1) No action shall be commenced or maintained against a person in possession of real property to question or attack the validity of or to set aside, upon any ground or for any reason whatsoever any final decree or final order of any court of record in this state or any instrument of conveyance, deed, certificate of sale, or release executed by any private trustee, successor in trust, public trustee, sheriff, marshal, county treasurer, or any public official whatsoever, whether named in this section or not, or officer or any appointee of any court when such document is the source of or in aid of or in explanation of the title or chain of title or right of the party in possession or any of his predecessors or grantors insofar as the same may affect the title or explain any matter connected with the title in reference to said real property if such document has been recorded and has remained of record in the office of the county clerk and recorder of the county where said real property is situated for a period of seven years. All defects, irregularities, want of service, defective service, lack of jurisdiction, or other grounds of invalidity, nullity, or causes or reasons whereby or wherefore any such document might be set aside or rendered inoperative must be raised in a suit commenced within said seven-year period and not thereafter.

(2) This section shall not apply to any of the following cases:

(a) Forged documents;

(b) During the pendency of an action, commenced prior to the expiration of said seven-year period, to set aside, modify, or annul or otherwise affect such document, and notice of such action has been filed as provided by law;

(c) When such document has been, by proper order or decree of competent court, avoided, annulled, or rendered inoperative;

(d) Where the party, or his predecessor, who brings the action to question, to attack, or to set aside the validity of such documents, has been deprived of possession within two years of the commencement of said action.

Source: L. 27: p. 603, § 39. CSA: C. 40, § 146. L. 45: p. 272, § 1. CRS 53: § 118-7-11. C.R.S. 1963: § 118-7-11. L. 75: (2)(d) amended, p. 225, § 84, effective July 16.

ANNOTATION

Law reviews. For note, discussing this section as a limitation of action, see 6 Dicta 14 (1929). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 35 (1939). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "'Color of Title' in the Colorado Short Statutes of Limitation", see 21 Rocky Mt. L. Rev. 226 (1949). For article, "Check Lists for Court Proceedings in Which Titles to Real Estate are Involved", see 23 Rocky Mt. L. Rev. 371 (1951). For article, "New Real Estate Standard", see 29 Dicta 331 (1952). For note, "The Effect of the Presumption of Death on Marketability of Title", see 25 Rocky Mt. L. Rev. 90 (1952). For article, "Marketable Title: What Certifiable Copies of Court Papers Should Appear of Record", see 34 Dicta 7 (1957).

Purpose of sections. The purpose of this section through § 38-41-114 is to make real estate titles more safe, secure, and marketable. Federal Farm Mtg. Corp. v. Schmidt, 109 Colo. 467, 126 P.2d 1036 (1942).

Sections to be construed harmoniously. In interpreting this section through § 38-41-114, it was necessary to construe them harmoniously. Federal Farm Mtg. Corp. v. Schmidt, 109 Colo. 467, 126 P.2d 1036 (1942).

Actual possession is prerequisite. Actual possession, at least at the time of the commencement of the action, is a prerequisite to the benefits of the section. Ginsberg v. Stanley Aviation Corp., 193 Colo. 454, 568 P.2d 35 (1977).

When mineral estate is severed from the surface estate, actual adverse possession of mineral estate must be established separate from any possession of the surface estate. Kriss v. Mineral Rights, Inc., 911 P.2d 711 (Colo. App. 1996).

Lack of actual possession is fatal to any claim under this section. Calvat v. Juhan, 119 Colo. 561, 206 P.2d 600 (1949).

Tax deed virtually invulnerable to attack. This section makes a title acquired by tax deed virtually invulnerable to attack after it has been of record seven years. Smith v. Town of Fowler, 138 Colo. 359, 333 P.2d 1034 (1959); Bald Eagle Mining & Ref. Co. v. Brunton, 165 Colo. 28, 437 P.2d 59 (1968).

Irregularities prior to expiration of limitation period. Although the statute of limitations provides sufficient protection for the purchasers of property under tax deeds without further limitations being imposed by the courts, until the applicable periods of limitation have expired, tax deeds, even though valid on their face, are subject to attack for irregularities in the proceedings; otherwise, there would be no need for statute of limitations. Bald Eagle Mining & Ref. Co. v. Brunton, 165 Colo. 28, 437 P.2d 59 (1968).

The statute of limitations does not apply to a claim for quiet title when the property was sold after the complaint was filed. The seven-year statute of limitations may have been applicable, but the quiet title claim became moot. Tafoya v. Perkins, 932 P.2d 836 (Colo. App. 1996).

Subsection (2)(d) exempts from operation of section persons who have been deprived of their possession within two years of the commencement of the action. Concord Corp. v. Huff, 144 Colo. 72, 355 P.2d 73 (1960).

Party must plead subsection (2)(d) exception. It is necessary for a party, if he wishes to take advantage of subsection (2)(d), to assert this exception in his pleading. Federal Farm Mtg. Corp. v. Schmidt, 109 Colo. 467, 126 P.2d 1036 (1942).

Applied in Cisneros v. Cisneros, 163 Colo. 245, 430 P.2d 86 (1967); Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970); Joseph v. Joseph, 43 Colo. App. 533, 608 P.2d 839 (1980); LeSatz v. Deshotels, 757 P.2d 1090 (Colo. App. 1988); Dynasty, Inc. v. Winter Park Assocs., Inc., 5 P.3d 392 (Colo. App. 2000).

38-41-112. Legal disability - extension of two years.

Persons under legal disability at the time the right of action first accrued who, at the time of the expiration of the limitation applicable, are still under such disability shall have two years from the expiration of a limitation to commence action, and no action shall be maintained by such persons thereafter.

Source: L. 27: p. 604, § 40. CSA: C. 40, § 147. CRS 53: § 118-7-12. C.R.S. 1963: § 118-7-12.

Cross references: For extension of limitation period for persons under disability in personal actions, see § 13-81-103; for extension of redemption time for tax deeds for those under disability, see § 39-12-104.

ANNOTATION

Am. Jur.2d. See 51 Am. Jur.2d, Limitation of Actions, § 216.

C.J.S. See 54 C.J.S., Limitations of Actions, § 135.

Law reviews. For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 35 (1939). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For note, "'Color of Title' in the Colorado Short Statutes of Limitation", see 21 Rocky Mt. L. Rev. 226 (1949). For article, "Check Lists for Court Proceedings in Which Titles To Real Estate Are Involved", see 23 Rocky Mt. L. Rev. 371 (1951). For article, "Marketable Title: What Certifiable Copies of Court Papers Should Appear of Record?", see 34 Dicta 7 (1957). For article, "Due Process in

Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?", see 46 Den. L.J. 516 (1969).

Effect of section where owner under disability until death. The fact that an owner is under disability until her death does not prevent the running of the statute. This section and § 38-41-101 merely add two years to the period of limitations, it does not suspend the running of the statute. Nesbitt v. Jones, 140 Colo. 412, 344 P.2d 949 (1959).

38-41-113. Limitations may be asserted affirmatively or by way of defense.

The limitations provided for in this part 1 may be asserted either affirmatively or by way of defense and may be used in any action as a source of or as a means to establish title or the right of possession or as an aid or explanation of title. Actions may be maintained affirmatively to establish such limitations provided for in this part 1.

Source: L. 27: p. 604, § 41. CSA: C. 41, § 148. CRS 53: § 118-7-13. C.R.S. 1963: § 118-7-13.

ANNOTATION

Am. Jur.2d. See 51 Am. Jur.2d, Limitation of Actions, §§ 122-126.

C.J.S. See 54 C.J.S., Limitations of Actions, § 356.

Law reviews. For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 16 Dicta 71 (1940). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949). For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "'Color of Title' in the Colorado Short Statutes of Limitation", see 21 Rocky Mt. L. Rev. 226 (1949).

Section is exception to general rule. The general rule that statutes of limitations are held to be available only as a matter of defense or bar to the bringing of an action has no application to the limitations contained in this part of article 41, since this section expressly provides that the limitations therein contained "may be asserted affirmatively or by way of defense". Federal Farm Mtg. Corp. v. Schmidt, 109 Colo. 467, 126 P.2d 1036 (1942).

Applied in Crawford v. French, 633 P.2d 524 (Colo. App. 1981); Childers v. Quartz Creek Land Co., 946 P.2d 534 (Colo. App. 1997), cert. dismissed, 964 P.2d 509 (Colo. 1998).

38-41-114. When limitations apply.

The limitations established in this part 1 shall apply to causes of action that have accrued prior to March 28, 1927, as well as to all causes of action accruing thereafter. This part 1 shall not be construed as reviving any action barred by any former or other statute.

Source: L. 27: p. 604, § 42. CSA: C. 40, § 149. CRS 53: § 118-7-14. C.R.S. 1963: § 118-7-14. L. 2003: Entire section amended, p. 915, § 25, effective August 6.

ANNOTATION

Am. Jur.2d. See 51 Am. Jur.2d, Limitation of Actions, §§ 118-121.

Law reviews. For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "'Color of Title' in the Colorado Short Statutes of Limitation", see 21 Rocky Mt. L. Rev. 226 (1949).

38-41-115. Setting aside judgments against unknown parties.

No action shall be brought after the expiration of one year from March 14, 1923, to set aside any decree or judgment entered in any action brought against unknown parties where there has been a substantial compliance with the requirements of the Colorado rules of civil procedure as to jurisdiction, pleadings, and service of process.

Source: L. 23: p. 218, § 1. Code 35: § 50(f). CRS 53: § 118-7-15. C.R.S. 1963: § 118-7-15. L. 67: p. 84, § 1.

Cross references: For service of process on unknown parties, see C.R.C.P. 4(g).

ANNOTATION

For when section may be raised as affirmative defense, see Cisneros v. Cisneros, 163 Colo. 245, 430 P.2d 86 (1967).

Applied in Stonewall Estates v. CF & I Steel Corp., 197 Colo. 255, 592 P.2d 1318 (1979).

38-41-116. Actions to enforce contracts of sale.

No action or proceeding whatsoever shall be brought or maintained by any person to enforce or procure any right or title accorded to the purchaser under any contract for the purchase and sale of real property if such person is not in possession of the real property described in and the subject of such contract of purchase and sale unless such action or proceeding is commenced within ten years of the day or the happening of the event appointed in said contract for the delivery by the seller of a deed of conveyance of the property therein agreed to be purchased and sold. If no day is appointed in such contract for the delivery of such conveyance, then such action or proceeding shall be commenced within ten years of the day on which the last and final installment of the purchase price would have been paid but not thereafter.

Source: L. 53: p. 205, § 1. CRS 53: § 118-7-16. C.R.S. 1963: § 118-7-16. L. 75: Entire section amended, p. 225, § 85, effective July 16.

ANNOTATION

C.J.S. See 54 C.J.S., Limitations of Actions, § 185.

Application of section's bar precluded. Since the owner of a mineral estate does not lose possession or title by mere nonuse and since ownership and occupancy of the surface does not constitute possession of the mineral estate, absent evidence that the fee simple owner of the surface actually dispossessed plaintiffs of the mineral estate by drilling or exploration for minerals, plaintiffs retained the requisite possession of a mineral interest so as to preclude application of the bar of this section. Brian v. Valley View Cattle Ranch, Inc., 35 Colo. App. 428, 535 P.2d 237 (1975).

Where person, as a purchaser not in possession, was attempting to enforce his right or equitable title pursuant to the contract of sale, this

section was the most specific and the most applicable, and not § 38-41-101 or former § 13-80-114. Bent v. Ferguson, 791 P.2d 1241 (Colo. App. 1990).

A question of fact remained on claim to quiet title where this section allowed purchaser to bring an action to enforce any right or title he may have under a contract within ten years from the date of delivery of general warranty deed and parties intent concerning when delivery of the deed was to take place required determination. Bent v. Ferguson, 791 P.2d 1241 (Colo. App. 1990).

38-41-117. Actions to enforce bonds for deeds.

No action or proceeding whatsoever shall be brought or maintained by any person who is or may become entitled to have conveyed to him any real property under the terms of any bond for a deed to real property or under the terms of any agreement in the nature of a bond for a deed to real property and who is not in possession of the real property which is the subject of such bond or agreement, to enforce or procure any right or interest granted or assured under the terms thereof or any law or custom relating thereto unless such action or proceeding is commenced within ten years of the day limited therein for the performance of the acts and things upon which the conveyance of such real property is conditioned.

Source: L. 53: p. 205, § 2. CRS 53: § 118-7-17. C.R.S. 1963: § 118-7-17.

ANNOTATION

C.J.S. See 54 C.J.S., Limitations of Actions, § 175.

38-41-118. Construction of sections.

(1) Sections 38-41-116 to 38-41-118 shall not be construed to alter, modify, amend, or repeal any of the terms and provisions of section 38-35-111.

(2) The limitations imposed by sections 38-41-116 to 38-41-118 shall not apply to any action or proceeding that has been commenced prior to June 1, 1953.

Source: L. 53: p. 206, § 3. CRS 53: § 118-7-18. C.R.S. 1963: § 118-7-18. L. 2003: (2) amended, p. 916, § 26, effective August 6.

ANNOTATION

Law reviews. For article,"Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 281 (1949). For note, "'Color of Title' in the Colorado Short Statutes of Limitation", see 21 Rocky Mt. L. Rev. 226 (1949).

38-41-119. One-year limitation.

No action shall be commenced or maintained to enforce the terms of any building restriction concerning real property or to compel the removal of any building or improvement on land because of the violation of any terms of any building restriction unless said action is commenced within one year from the date of the violation for which the action is sought to be brought or maintained.

Source: L. 27: p. 606, § 47. CSA: C. 40, § 154. CRS 53: § 118-8-4. C.R.S. 1963: § 118-8-4. L. 72: p. 616, § 146.

ANNOTATION

Law reviews. For article, "Future Interests in Colorado", Part I, see 21 Rocky Mt. L. Rev. 227 (1948); Part II, 21 Rocky Mt. L. Rev. 1 (1948); Part III, 21 Rocky Mt. L. Rev. 123 (1949).

Section applies to actions pertaining to public land. While this section does not bar an action brought by the state, there is no exception to its applicability to private citizens who bring actions pertaining to public land. Styers v. Mara, 631 P.2d 1138 (Colo. App. 1981).

The one-year statute of limitations embodied in this section applies to actions which accrued respecting estates in airspace after 1972, the year in which that statute was amended. Association of Owners, Satellite Apt., Inc. v. Otte, 38 Colo. App. 12, 550 P.2d 894 (1976).

This section, rather than general statute of limitations, controls. Since this section of specifically drafted to relate to actions to enforce restrictions concerning real property, it controls an action to enforce a restriction on the use of an estate and to compel removal of the improvement erected in violation of the terms of that restriction to the exclusion of the general statute of limitations relating to actions on a contract. Association of Owners, Satellite Apt., Inc. v. Otte, 38 Colo. App. 12, 550 P.2d 894 (1976).

Administrative hearing is not the commencement of an action for purposes of this section. Styers v. Mara, 631 P.2d 1138 (Colo. App. 1981).

Action to enforce restriction commenced 21 months after expiration date barred. A covenant in a warranty deed, requiring grantee to construct a house of a stated value within a prescribed time upon the land conveyed, and providing that upon grantee's default the property was to revert to the grantor, is a "restriction concerning real property" within the meaning of this section; thus, an action to enforce the restriction, commenced 21 months after the expiration date stated in the covenant, was barred by this section. Wolf v. Hallenbeck, 109 Colo. 70, 123 P.2d 412 (1942).

But where each day of noncompliance with an ordinance constitutes a separate violation, enforcement of the ordinance is not barred. Town of Grand Lake v. Lanzi, 937 P.2d 785 (Colo. App. 1996).

Zoning ordinance is not a "building restriction" within the meaning of this section. Town of Grand Lake v. Lanzi, 937 P.2d 785 (Colo. App. 1996).

Section held to provide no defense. Seeger's Estate v. Puckett, 115 Colo. 185, 171 P.2d 415 (1946).

Statute of limitations defense was not preserved on appeal where defendants raised the defense in their answer to plaintiffs' second amended complaint and in the trial management order, but failed to bring the defense to the court's attention in opening or closing statements, in an oral motion for a directed verdict, or in a motion for a new trial. Highland Meadows Estates v. Buick, 994 P.2d 459 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 21 P.3d 860 (Colo. 2001).

A setback requirement contained within a duly adopted planned unit development plat is a building restriction concerning real property as contemplated by § 38-41-119. McDowell v. U.S., 870 P.2d 656 (Colo. App. 1994).

Equitable relief and money damages barred. The word "enforce", as used in § 38-41-119 in relation to contractual obligations, embraces a remedy of money damages as well as equitable relief. Section 38-41-119 was meant to apply to any action to enforce a building restriction, regardless of the nature of the relief requested. The nature of the right that plaintiff seeks to exercise controls the applicability of the statute of limitations. Therefore, plaintiff's tardy claim for equitable relief, in the form of removal of encroaching improvements that violate the PUD setback area requirement, and money damages is barred by the statute of limitations of § 38-41-119. McDowell v. U.S., 870 P.2d 656 (Colo. App. 1994).

Applied in Nicol v. Nelson, 776 P.2d 1144 (Colo. App. 1989), cert. denied, 785 P.2d 917 (Colo. 1989).