

**SITTING ON YOUR RIGHTS: WHY THE STATUTE OF LIMITATIONS  
FOR ADVERSE POSSESSION SHOULD NOT PROTECT COUCH  
POTATO FUTURE INTEREST HOLDERS**

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**I. INTRODUCTION**

This Article suggests that vested future interest holders have legal recourse to remove adverse possessors during the preceding life tenant's estate. It explores the British and American legal history that engendered modern adverse possession. Further, it provides a survey of the public policy rationales behind adverse possession and an in-depth review of its requisite elements. After examining the legal rights of future interest holders in the fifty states, this Article assesses the options for the future interest holder to obtain relief against either the life tenant or the adverse possessor in the form of actions: on the case, to quiet title, for trespass, for waste, in ejectment, or in suits for an injunction. This Article contends that diligent adverse possessors who enter against life tenants should be successful in acquiring title against future interest holders who have slept on their rights.

While teaching Property I in my first semester as a tenure track professor at Thomas M. Cooley Law School, I discovered a bizarre inconsistency in arguably the leading property law text in the United

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States.<sup>1</sup> I was struck by the results of the following two problems from the text.

In the first problem, A, the adverse possessor, enters Blackacre and begins to adversely possess against O, the true owner.<sup>2</sup> Subsequently, O dies and devises his property to B for life, remainder to C.<sup>3</sup> B then fails to take action and oust A during his lifetime.<sup>4</sup> Assuming that A has satisfied all of the required elements for adverse possession<sup>5</sup> by the time B dies, A will prevail against C as the new owner of Blackacre.<sup>6</sup>

In the second problem, A enters against B, the life estate holder of Blackacre.<sup>7</sup> Again, B fails to take action and oust A during his lifetime.<sup>8</sup> Assuming that A has satisfied all of the required elements for adverse possession<sup>9</sup> by the time B dies, A will now lose in a contest against the remainderman C, and C will now prevail as the owner of Blackacre.<sup>10</sup> Dukeminier and Krier's rationale for A's loss under these facts is that C did not have the legal rights to remove A until C came into possession of the premises.<sup>11</sup>

The inconsistency with problem number two's answer in Dukeminier and Krier comes at the beginning of the chapter on future interests.<sup>12</sup> The introduction to the chapter discusses a myriad of legal rights for future interest holders.<sup>13</sup> Specifically, the text states that fu-

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<sup>1</sup> See JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, *PROPERTY* (6th ed. 2006) [hereinafter *PROPERTY*]. The text was then in its 5th edition; however, references to the text in this Article will be to the 6th edition.

<sup>2</sup> *Id.* at 142 (addressing problem number 2).

<sup>3</sup> *Id.* (addressing problem number 2).

<sup>4</sup> *Id.* (addressing problem number 2).

<sup>5</sup> See *infra* Part III (discussing the elements of adverse possession).

<sup>6</sup> JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, *TEACHER'S MANUAL FOR PROPERTY 76* (6th ed. 2006) [hereinafter *TEACHER'S MANUAL*].

<sup>7</sup> *PROPERTY*, *supra* note 1, at 142 (addressing problem number 3).

<sup>8</sup> *Id.* (addressing problem number 3).

<sup>9</sup> See *infra* Part III (discussing the elements of adverse possession).

<sup>10</sup> See *TEACHER'S MANUAL*, *supra* note 6, at 77.

<sup>11</sup> *Id.*

<sup>12</sup> *PROPERTY*, *supra* note 1, at 225.

<sup>13</sup> See *id.*

ture interest holders have a present right which is sufficient to protect the land that they have future interests in from those trying to hostilely claim title.<sup>14</sup> Adverse possessors certainly qualify as those trying to hostilely claim title.<sup>15</sup> How, then, can we reconcile the answer to problem number two above, where the adverse possessor loses against the remainderman because the remainderman lacks rights to remove the adverse possessor until the remainderman comes into physical possession of the premises? That is precisely the subject of this Article.

My contention is, if we as a nation allow adverse possession, we should force future interest holders to exercise their rights to protect their future interests in property.<sup>16</sup> My contentions are limited to vested remaindermen and reversioners only. In other words, we should not penalize the adverse possessor for failing to knock on the door of the party he plans to adversely possess against to ensure that fee simple absolute will be obtained. Rather, it would be appropriate to force the remainderman (or reversioner) to file an action on the case, an action to quiet title, or an action for trespass, pursue injunctive relief, assert waste against the life tenant, or file an action in ejectment.

In an attempt to properly flesh-out my contention, this Article begins with a brief history of adverse possession in America and elsewhere.<sup>17</sup> It then examines the primary public policy reasons behind allowing the existence of adverse possession<sup>18</sup> and reviews what is necessary to acquire title by adverse possession in most jurisdictions.<sup>19</sup>

Next, it surveys the fifty states' responses to problem number two above, highlighting both the majority and minority opinions.<sup>20</sup> The Article concludes with an in-depth examination of the legal means by which C may remove A from Blackacre and actively protect his future interests in the property, with the corresponding obligation to do so.<sup>21</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See infra* Part V.

<sup>17</sup> *See infra* Part II.A-B.

<sup>18</sup> *See infra* Part II.C.

<sup>19</sup> *See infra* Part III.

<sup>20</sup> *See infra* Part IV.

<sup>21</sup> *See infra* Part V.

## II. BACKGROUND INFORMATION

### A. *Adverse Possession's British Beginnings*

As feudalism declined in England, private ownership of land by a wage-earning middle class evolved.<sup>22</sup> The free alienability of property and the doctrine of adverse possession were engendered, in the British context, recognizing the need to define private property rights more clearly.<sup>23</sup> The English codification of adverse possession appears to begin in 1275 with the Statute of Westminster I, Chapter 39.<sup>24</sup> This statute set AD 1189 as the earliest date back to which title to real estate could be searched in an effort to receive evidence-supporting title.<sup>25</sup> Once a start date was set for searching the validity of title, current possession of property became protected, even if it was not legitimately acquired.<sup>26</sup>

This statute initially carved a path for the promulgation of adverse possession in England.<sup>27</sup> As time passed, however, it became more difficult for adverse possessors to be successful because title was being searched all the way back to AD 1189.<sup>28</sup> By 1540, these difficulties were lessened by the passing of a statute that limited the amount of time within which a true owner of real property could file an action protecting their property interests.<sup>29</sup> In 1623, this concept was built upon and solidified by what is now known as the “Statute of Limitations,” setting a twenty-year time limit for the aforementioned actions.<sup>30</sup> The purposes given for the statute were the “quieting of Men’s Estates”

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<sup>22</sup> See PROPERTY, *supra* note 1, at 179-80 (discussing the increase of land ownership by peasants and others who began earning wages through work outside of the land).

<sup>23</sup> See Brian Gardiner, Comment, *Squatters’ Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT’L & COMP. L. REV. 119, 126 (1997).

<sup>24</sup> See Limitation of Prescription Act, (1275) 1 STAT. OF THE REALM 26, 36 (Eng.).

<sup>25</sup> See *id.* (“It is Provided, That in conveying a Descent in a Writ of Right, none shall [presume] to declare of the Seisin of his Ancestor further, or beyond the time of King Richard[.]”); see also Gardiner, *supra* note 23, at 126.

<sup>26</sup> See Gardiner, *supra* note 23, at 126.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 126-27.

<sup>29</sup> Limitation of Prescription Act, (1540) § 3, 3 STAT. OF THE REALM 747, 747 (Eng.).

<sup>30</sup> See Gardiner, *supra* note 23, at 127 (referring to the Limitation Act as a Statute of Limitations); Limitation Act, (1623) § 1, 4 STAT. OF THE REALM 1222, 1222 (Eng.).

and the avoidance of actions at law.<sup>31</sup> The 1623 Statute of Limitations cleared up ambiguities regarding land ownership and made the land readily available for productive use.<sup>32</sup> By 1874, the “Real Property Limitation Act” shortened the twenty-year time limit to twelve years, and declared that at the end of the statutory period, the possessory interest holder’s rights (if not acted upon) would be extinguished.<sup>33</sup> Having set forth the basics of English legal history as it relates to adverse possession, it is time to examine adverse possession in the American context.

### ***B. America and Adverse Possession***

Early American law often emulated the English 1623 Statute of Limitations with respect to the twenty-year statutory period.<sup>34</sup> While unquestionably stemming from English legal history, adverse possession has firm roots in American soil as well.<sup>35</sup> America was founded upon the principles of adverse possession.<sup>36</sup> Francis Jennings argues in *The Invasion of America* that “[t]he so-called settlement of America was a resettlement, a reoccupation of a land made waste by the diseases and demoralization introduced by the newcomers.”<sup>37</sup>

Jennings also notes that Europeans sought dominion over the lands of one another, as well as native lands.<sup>38</sup> “At a time when chartered boundaries often overlapped and had rarely been surveyed, lords resorted to the ancient principle that actual possession, if maintained long enough, would sooner or later be recognized as legitimate jurisdiction.”<sup>39</sup> This concept is analogous to any standard definition of

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<sup>31</sup> See Limitation Act, (1623) § 1.

<sup>32</sup> *Id.*

<sup>33</sup> Real Property Limitation Act, 1874, 37 of 38 Vict., c.57 (Eng.).

<sup>34</sup> Gardiner, *supra* note 23, at 128.

<sup>35</sup> See FRANCIS JENNINGS, *THE INVASION OF AMERICA* 124 (Univ. of N.C. Press 1975) (1918) (claiming European lords competed for American land between each other and natives, and “resorted to the ancient principle that actual possession, if maintained long enough, would sooner or later be recognized as legitimate jurisdiction”).

<sup>36</sup> *See id.*

<sup>37</sup> *Id.* at 30.

<sup>38</sup> *Id.* at 124.

<sup>39</sup> *Id.*

adverse possession.<sup>40</sup> While there has been historic academic debate about the *legitimate* purchase of Native American lands, I contend that the native lands were taken in an open, notorious, hostile, actual, adverse, and continuous manner.<sup>41</sup>

What possible rationale could there be for depriving the Native Americans of their lands? At least four different theories have been proffered and will be discussed here: the “savage” and god-less nature of the Native Americans in the minds of the colonists;<sup>42</sup> the lack of cultivation of the lands by the Native Americans;<sup>43</sup> the taking of lands as an act of war;<sup>44</sup> and finally, the doctrine of discovery espoused by the Supreme Court of the United States in *Johnson v. M’Intosh*.<sup>45</sup>

Samuel Purchas legitimized the taking of Native American lands in 1625, while simultaneously touting the virtues of the rich lands in Virginia, by describing the Native Americans as “[so] bad [a] people, having little of Humanit[y] but [s]hape, ignorant of Civilit[y], of Arts, of Religion; more bruti[s]h th[a]n the bea[s]ts they hunt . . . .”<sup>46</sup> In other words, because the Native Americans had a different outward appearance than the colonists, embraced a different god, and had different cultural practices, they were unworthy of their own, rich lands.<sup>47</sup> In 1823, even Chief Justice John Marshall of the Supreme Court of the United States stated in *Johnson* that “the tribes of Indians inhabiting this country were fierce savages, whose occupation was war . . . .”<sup>48</sup> Acknowledgements of this type by the Chief Justice of the Supreme

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<sup>40</sup> See BLACK’S LAW DICTIONARY 54 (7th ed. 1999) (defining adverse possession as “[a] method of acquiring title to real property by possession for a statutory period under certain conditions”).

<sup>41</sup> See *infra* Part III (discussing the elements of adverse possession).

<sup>42</sup> 19 SAMUEL PURCHAS, PURCHAS HIS PILGRIMES 231 (Glasgow, James MacLehose & Sons 1906) (1625).

<sup>43</sup> *Id.*

<sup>44</sup> Edward Waterhouse, *A Declaration of the State of the Colony and . . . a Relation of the Barbarous Massacre . . .* (1622), in 3 THE RECORDS OF THE VIRGINIA COMPANY OF LONDON, 1607-1622, at 541, 557 (Susan Myra Kingsbury ed., 1933), available at [http://xtf.lib.virginia.edu/xtf/view?docId=2005\\_Q3\\_2/uvaGenText/tei/b002245360.xml;chunk.id=d226;toc.depth=1;toc.id=;brand=default](http://xtf.lib.virginia.edu/xtf/view?docId=2005_Q3_2/uvaGenText/tei/b002245360.xml;chunk.id=d226;toc.depth=1;toc.id=;brand=default).

<sup>45</sup> *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823).

<sup>46</sup> PURCHAS, *supra* note 42, at 231 (spelling modernized for clarity).

<sup>47</sup> See *id.*

<sup>48</sup> *Johnson*, 21 U.S. (8 Wheat.) at 590.

Court speak volumes as to the historical public sentiment. If the colonists could strip the Native Americans of their humanity, it was much easier to rationalize stealing their lands.

Another popular way of explaining the deprivation of Native American lands was that the Native Americans did not properly cultivate their lands, and thus, were not putting the lands to their most productive use.<sup>49</sup> Purchas described the Native Americans as “more wild and [u]nmanly th[a]n that [u]nmanned wild [country], which they range rather than inhabit[ ] . . . .”<sup>50</sup> The free-roaming nature of the Native Americans was a justification for usurping native lands.<sup>51</sup> The colonists were so attached to the land through ancient principles like livery of seisin (the ceremonial transfer of a clod of earth to evidence a land sale) that they had difficulty conceptualizing a mobile society with shared rights in the land.<sup>52</sup> Chief Justice Marshall stated in *Johnson* that “[t]o leave . . . [Native Americans] in possession of their country, was to leave the country a wilderness . . . .”<sup>53</sup> Leaving land a wilderness was of course seen as the antithesis of cultivation, profit, and progress.<sup>54</sup> As pointed out by Jennings in *The Invasion of America*, the 1630’s lawyer, John Winthrop, later Governor of Massachusetts, felt that Native Americans were legally wasting their lands because they had not subdued their lands by traditional English means and because they did not have deeds to their property.<sup>55</sup> The concept of waste as a legal recourse for the remainderman will be explored later in this Article.<sup>56</sup>

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<sup>49</sup> See PURCHAS, *supra* note 42, at 232; see also *infra* Part II.C (discussing the modern public policy rationale behind adverse possession).

<sup>50</sup> PURCHAS, *supra* note 42, at 231 (spelling modernized for clarity).

<sup>51</sup> See *Johnson*, 21 U.S. (8 Wheat.) at 590; see also PURCHAS, *supra* note 42, at 231.

<sup>52</sup> See *Johnson*, 21 U.S. (8 Wheat.) at 590-92; see also PROPERTY, *supra* note 1, at 205 (“[Livery of seisin] usually included both the grantor and the grantee going on the land and the grantor, before witnesses, delivering seisin to the grantee by some symbolic act such as handing over a clod of dirt . . . .”); BLACK’S LAW DICTIONARY 945, 1362 (7th ed. 1999) (defining “livery” as “[t]he delivery of the possession of real property” and “seisin” as “[p]ossession of a freehold estate in land; ownership”).

<sup>53</sup> *Johnson*, 21 U.S. (8 Wheat.) at 590.

<sup>54</sup> See JENNINGS, *supra* note 35, at 135.

<sup>55</sup> *Id.*

<sup>56</sup> See *infra* Part IV.

Not everyone agreed that Native Americans failed to cultivate their lands.<sup>57</sup> Edward Waterhouse, a Jamestown colonist, in his writing *A Declaration of the State of the Colony and . . . A Relation of the Barbarous Massacre . . .*, stated in 1622 that the cleared grounds in the Native American villages (in Virginia) were “situate[d] in the fruitfullest places of the land[.]”<sup>58</sup> He further acknowledged that the clearing of the land, or “grubbing of woods,” that the natives had done was “the greatest labour.”<sup>59</sup> Jennings concurred with Waterhouse and pointed out that Purchas knew that the Native Americans in Virginia were agricultural and that their cultivation of the land had actually saved the Jamestown colonists from starvation.<sup>60</sup> While it is certainly not accurate to assert that all native lands were cultivated, it is clear that some of them were, including some in Virginia, where the agricultural nature of the Native Americans had indeed saved the lives of the colonists.<sup>61</sup> As further proof of Native American land cultivation, Americans celebrate the holiday of Thanksgiving, which was founded upon the sharing of food between the Native Americans and the starving colonists.<sup>62</sup>

With respect to utilizing war as a justification for usurping native lands, Waterhouse, who was self-admittedly envious of the lush and cultivated native lands, justified the taking of that land as an act of war against the Native Americans in response to a Native American uprising in the early 1620s.<sup>63</sup> He stated that the colonists:

May now by right of War[ ], and law of Nations, in[v]ade the Country, and destroy them who sought to destroy [u]s: whereby we[ ] shall enjoy their culti[v]ated places, turning the laborious Mattocke into the victorious Sword (wherein there is more both ease, benefit, and glory) and possessing the fruits of others labours.<sup>64</sup>

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<sup>57</sup> See Waterhouse, *supra* note 44, at 557.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> JENNINGS, *supra* note 35, at 80.

<sup>61</sup> See *id.*

<sup>62</sup> See generally JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG 70-92 (rev. & updated ed. 2008) (explaining the truth about the first Thanksgiving).

<sup>63</sup> See Waterhouse, *supra* note 44, at 557.

<sup>64</sup> *Id.* (spelling modernized for clarity).

He further stated that the “commodities which the Indians enjoyed . . . shall now also be entirely possessed by [u]s.”<sup>65</sup> It was quite illustrative of him to admit that it is easier to steal the cultivated lands of others than to actually work the land oneself.

Finally, we turn to the doctrine of discovery as a rationale for taking native lands. The doctrine of discovery, as Chief Justice Marshall described in *Johnson*, stood for the idea that discovery of land gave title to the government of the discoverer against all other European nations, and that possession of the land could consummate title.<sup>66</sup> Again, this rationale, like many of the others, resonates of adverse possession.<sup>67</sup> This is a classic example of the aggressive trespasser-hostility requirement in modern adverse possession law.<sup>68</sup> Under the doctrine of discovery, Native Americans retained the right of occupancy but lost their ability to alienate freely because “discovery gave exclusive title to those who made it.”<sup>69</sup> What does occupancy entail in this context? What level of security does it bestow upon the possessor? The rights of the occupant are fleeting and subject to the whim of the discoverer. Implicit in the exclusive title of the colonists was the right to extinguish the Native Americans’ occupancy rights either by purchase or conquest.<sup>70</sup> The doctrine of discovery, as the Supreme Court of the United States proffered, formally justified depriving Native Americans of their lands simply because Europeans had “discovered” those same lands.<sup>71</sup> The Europeans’ discovery and subsequent possession was sufficient to strip the natives of both their rights to transfer the land—to anyone other than the government, as was ultimately held by the Court in *Johnson*—and their rights to occupy the land as well.<sup>72</sup> Both in England and America, adverse possession allowed the opportunistic to acquire land.

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<sup>65</sup> *Id.* (spelling modernized for clarity).

<sup>66</sup> *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823).

<sup>67</sup> *See infra* Part II.C.

<sup>68</sup> *See infra* Part III (defining the elements of adverse possession).

<sup>69</sup> *Johnson*, 21 U.S. (8 Wheat.) at 574.

<sup>70</sup> *Id.* at 587.

<sup>71</sup> *Id.* at 573.

<sup>72</sup> *Id.* at 573-74.

### C. *Public Policy Behind Adverse Possession*

We now shift to an examination of some of the public policy reasons for allowing adverse possession. The grand rationale for adverse possession according to one authority, Stoebuck, was “that title to land should not long be in doubt, that society will benefit from someone’s making use of land the owner leaves idle, and that third persons who come to regard the occupant as owner may be protected.”<sup>73</sup> While the public policy reasons which justify stealing someone else’s land are abundant, the present discussion will be restricted to three of the most popular expressions. They are the productive use, punishment, and alienation/title certainty arguments.

The first of these is the theory that society wants to encourage productive use of the land. If the true owner is not putting the property to productive use, then it stands to reason that the adverse possessor should be allowed to return the property to a productive state.<sup>74</sup> Allowing adverse possession promotes economic development in that it takes land out of dormancy and returns it to an active and efficient use.<sup>75</sup> Adverse possession favors the productive thief over the idle true owner.<sup>76</sup>

Next, we have the converse policy reason, the desire to punish those who are sleeping on their rights.<sup>77</sup> In other words, if you are a true owner who fails to utilize your property or put it to productive use, you deserve to have someone take it away from you.<sup>78</sup> Justice Oliver Wendell Holmes reasoned, “[a] thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”<sup>79</sup> In other words, it is in our nature to fight for what is our own. If we fail to put

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<sup>73</sup> William B. Stoebuck, *The Law of Adverse Possession in Washington*, 35 WASH. L. REV. & ST. B. J. 53, 53 (1960).

<sup>74</sup> Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have It Wrong*, 29 U. MICH. J.L. REFORM 939, 941 (1996).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

up a fight, or as Justice Holmes put it, neglect to enforce our rights, we cannot complain if, after a while, the law follows our example.<sup>80</sup> If it is innate in our beings, as Justice Holmes suggested, to protect that which is our own, why would the law provide safeguards to title to property which we, ourselves, have let lie dormant?<sup>81</sup> Such is the rationale for punishing those who have slept on their rights by awarding the title to the adverse possessor.

Finally, adverse possession furthers the alienability of land and promotes certainty of title.<sup>82</sup> If an absentee landowner were to let the land lie dormant for many years, it would presumably not be sold during that time. If, however, title to the land had been acquired by adverse possession (assuming a statutory period of fifteen years for example), it would be put to productive use during that fifteen-year time period and would be freely alienable thereafter.<sup>83</sup> Given the dramatic way in which land use changes over time, it is far preferable to allow adverse possession so that land may be easily transferred and put to its highest and best use over time.<sup>84</sup> As Ballantine remarked in his law review article, the great purpose of adverse possession “is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.”<sup>85</sup>

### III. ELEMENTS REQUIRED TO ESTABLISH ADVERSE POSSESSION

We turn now to an exploration of what is necessary to acquire title by adverse possession. In order to acquire title by adverse possession, “The tenant must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest.”<sup>86</sup> In terms slightly less poetic, the general consensus is that there must be actual entry giving exclusive possession that is open, notorious, adverse, under claim of

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<sup>80</sup> *Id.* at 476.

<sup>81</sup> *Id.* at 477.

<sup>82</sup> Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918).

<sup>83</sup> *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Barrell v. Renehan*, 39 A.2d 330, 333 (Vt. 1944) (citing *Scampini v. Rizzi*, 172 A. 619, 621 (Vt. 1934)).

right, and continuous for the statutory period for an adverse possessor to succeed in a claim for adverse possession.<sup>87</sup> The following Subsections will address each of the above elements.<sup>88</sup>

### **A. Actual Entry**

Actual entry or occupancy has been defined as “the ordinary use to which the land is capable and such as an owner would make of it. 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.”<sup>89</sup> “Actual possession is established where the claimant shows that the property was used in a manner commensurate with its particular attributes.”<sup>90</sup> “The nature and character of the land is taken into consideration in determining whether the claimant’s possession has been sufficient to establish ownership.”<sup>91</sup> Examples of actual entry include occupying, clearing, cultivating, pasturing, erecting fences, making improvements, paying property taxes, and renting out the land and collecting rental payments.<sup>92</sup>

### **B. Exclusive Possession**

“‘Exclusive possession’ means that the [adverse possessor] must hold the possession of the land for himself, as his own, and not for another.”<sup>93</sup> For possession to be exclusive, the true owner cannot be in

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<sup>87</sup> *Emerson v. Me. Rural Missions Ass’n*, 560 A.2d 1, 2 (Me. 1989) (citing *Glover v. Graham*, 459 A.2d 1080, 1085 n.7 (Me. 1983)).

<sup>88</sup> See *infra* Part III.A-G.

<sup>89</sup> *Anderson v. Cold Spring Tungsten, Inc.*, 458 P.2d 756, 759 (Colo. 1969) (quoting *Burkhardt v. Smith*, 115 N.W.2d 540, 544 (Wis. 1962)).

<sup>90</sup> *Doty v. Chalk*, 632 P.2d 644, 645 (Colo. App. 1981) (citing *Anderson*, 458 P.2d at 759).

<sup>91</sup> *Catlett v. Whaley*, 731 S.W.2d 544, 546 (Tenn. Ct. App. 1987) (citing *Panter v. Miller*, 698 S.W.2d 634, 636 (Tenn. Ct. App. 1985)).

<sup>92</sup> *Payne v. Payne*, 728 S.W.2d 635, 639 (Mo. Ct. App. 1987); see also *A. Charles Bussen Trust v. Kertz*, 723 S.W.2d 922, 928 (Mo. Ct. App. 1987).

<sup>93</sup> *Walker v. Walker*, 509 S.W.2d 102, 106 (Mo. 1974) (citing *Gates v. Roberts*, 350 S.W.2d 729, 732 (Mo. 1961)).

occupancy,<sup>94</sup> and the adverse possessor cannot occupy the land with the permission of the true owner.<sup>95</sup>

Further, the adverse possessor should be “appropriating the land or its avails to his own use, and in preventing others from the use of it as far as reasonably practicable.”<sup>96</sup> In order to satisfy the element of exclusive possession, an adverse possessor does not have to be absolutely exclusive in his possession, rather it is sufficient if his possession is “of a type that would be expected of [the true] owner.”<sup>97</sup>

### *C. Adverse*

To satisfy the adverse element in a claim for adverse possession, the adverse possessor can show that entry and possession is an assertion of title, so long as he is denying title to all others and his interests are adverse to the true owner’s interests.<sup>98</sup> “If the possessor occupies the land in question intending to occupy that particular piece as his own, his occupancy is adverse.”<sup>99</sup>

### *D. Under Claim of Right*

A claim of right arises from an adverse possessor’s objective acts of ownership evidencing the intention to use and possess the land in a manner adverse to that of the true owner.<sup>100</sup> In order to assert a claim

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<sup>94</sup> See *Brown v. Ala. Great S. R.R. Co.*, 544 So. 2d 926, 930 (Ala. 1989); see also *Short Beach Cottage Owners Improvement Ass’n v. Town of Stratford*, 224 A.2d 532, 534 (Conn. 1966) (“One of the requisites to acquiring property by adverse possession is that the claimant maintain an exclusive possession of the disputed area during the running of the fifteen-year period. This condition is not met if the adverse user merely shares dominion over the property with other users.” (citations omitted)).

<sup>95</sup> *Hamilton v. Weber*, 62 N.W.2d 646, 650 (Mich. 1954) (citing *Le Roy v. Collins*, 142 N.W. 842, 845 (Mich. 1913)).

<sup>96</sup> *Bergen v. Dixon*, 527 So. 2d 1274, 1278 (Ala. 1988) (quoting *Goodson v. Brothers*, 20 So. 443, 445 (Ala. 1896)).

<sup>97</sup> *ITT Rayonier, Inc. v. Bell*, 774 P.2d 6, 8 (Wash. 1989) (quoting *ITT Rayonier, Inc. v. Bell*, 752 P.2d 398, 401 (Wash. Ct. App. 1988)).

<sup>98</sup> *Ross v. McNeal*, 618 S.W.2d 224, 227 (Mo. Ct. App. 1981) (citing *Walker*, 509 S.W.2d at 106).

<sup>99</sup> *Id.* (citing *Walker*, 509 S.W.2d at 107).

<sup>100</sup> *Tavares v. Beck*, 814 A.2d 346, 351-52 (R.I. 2003) (citing *Reitsma v. Pascoag Reservoir & Dam, LLC*, 774 A.2d 826, 832 (R.I. 2001)).

of right, the adverse possessor “must intend to hold the land for himself, and that intention must be made manifest by his acts.”<sup>101</sup> The best way to discern if the adverse possessor manifests the requisite intent to be successful in his claim is to assess whether or not his acts are those of an owner and are sufficient to give the true owner notice of his claim.<sup>102</sup>

Historically, requisite intent was divided into two categories: mistaken belief (the Connecticut doctrine) and the aggressive trespasser (the Maine Doctrine).<sup>103</sup> Most jurisdictions now hold that “under claim of right,” in the context of adverse possession, “does not require ill will or malevolence” on the part of the adverse possessor.<sup>104</sup> While ill will and malevolence are not required, they are permitted in some places.<sup>105</sup> “[E]ven when claimants know that they are nothing more than black-hearted trespassers, they can still adversely possess the property in question under a claim of right . . . .”<sup>106</sup>

The modern trend is not to require a specific intent on the part of the adverse possessor.<sup>107</sup> Courts “have long recognized that a claim for adverse possession does not require a good faith belief or an intention to claim another’s land, but can be founded upon ignorance, inadvertence, or mistake as to the actual boundary between two parcels.”<sup>108</sup>

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<sup>101</sup> *Smith v. Peterman*, 397 A.2d 793, 796 (Pa. Super. Ct. 1978) (quoting *Kaminski Bros., Inc. v. Grassi*, 352 A.2d 80, 81 (Pa. Super. Ct. 1975)).

<sup>102</sup> *Penn v. Ivey*, 615 P.2d 1, 3-4 (Alaska 1980) (citing *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826, 832 (Alaska 1974)).

<sup>103</sup> *Dombkowski v. Ferland*, 893 A.2d 599 (Me. 2006) (holding that the Maine Doctrine is not the law in Maine anymore); *see also Mannillo v. Gorski*, 255 A.2d 258, 261-62 (N.J. 1969) (discussing the criticism of the Maine doctrine “in requiring a knowing wrongful taking” compared to the Connecticut branch’s justification of such possession).

<sup>104</sup> *Metro. St. Louis Sewer Dist. v. Holloran*, 756 S.W.2d 604, 606 (Mo. Ct. App. 1988); *see also Smith v. Hayden*, 772 P.2d 47, 56 (Colo. 1989) (stating that “[t]here is no requirement that there be a deliberate attempt to steal a neighbor’s property or an actual dispute in order to show hostile intent”).

<sup>105</sup> *Tavares*, 814 A.2d at 351.

<sup>106</sup> *Id.*

<sup>107</sup> *Lewis v. Moorhead*, 522 N.W.2d 1, 5 (S.D. 1994) (citing *Lien v. Beard*, 478 N.W.2d 578, 580 (S.D. 1991)).

<sup>108</sup> *Id.* *But see Hannah v. Kenny*, 83 S.E.2d 1, 5 (Ga. 1954) (suggesting that aggressive trespassers might be barred from acquiring title to property through adverse possession as squatters); *DeShon v. St. Joseph Country Club Vill.*, 755 S.W.2d 265,

### *E. Open and Notorious*

“When possession of property is so conspicuous that it is generally known and talked of by the public or people in the neighborhood, such possession is said to be notorious.”<sup>109</sup> Possession of property in an open and notorious fashion must give the true owner the opportunity to be on notice of the occupancy, regardless of whether the true owner has actual notice.<sup>110</sup> Possession should be visible, apparent, and not hidden.<sup>111</sup> Acts warning the true owner that his property is being adversely possessed should be made with “sufficient obtrusiveness . . . , not carried out with . . . silent civility.”<sup>112</sup> The adverse possessor must exhibit possession that is typical of ownership.<sup>113</sup> “Open and notorious use is such use that would lead a reasonable person to assume that the claimant was the owner.”<sup>114</sup>

Examples of what constitutes open and notorious possession include: making objects or structures, the building of roads, or the storing of motor vehicles.<sup>115</sup> “Notoriety, exclusiveness and continuity of possession are often evidenced by the erection of physical improvements on the property, such as fences, houses or other structures.”<sup>116</sup> Other examples of open and notorious possession include surveying the property and installing roads and water lines.<sup>117</sup> Some courts have held that “[t]he land need not be fenced [and b]uildings are not necessary” in order to assert open and notorious possession.<sup>118</sup> These same courts have said, “cutting grass and pasturing cattle each year during the sea-

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268 (Mo. Ct. App. 1988) (stating a claim of right to possession as a requirement for adverse possession, which is partly meant to prevent squatters who may benefit from adverse possession).

<sup>109</sup> *Harrison v. Collins*, 444 S.W.2d 861, 862 (Ark. 1969) (citing *Terral v. Brooks*, 108 S.W.2d 489, 493 (Ark. 1937)).

<sup>110</sup> *Bryant v. Palmer Coking Coal Co.*, 936 P.2d 1163, 1169 (Wash. Ct. App. 1997) (citing *Hunt v. Matthews*, 505 P.2d 819, 822 (Wash. Ct. App. 1973)).

<sup>111</sup> *Id.* (citing *Hunt*, 505 P.2d at 822).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* (citing *Hunt*, 505 P.2d at 822-23).

<sup>114</sup> *Id.* (citing *Anderson v. Hudak*, 907 P.2d 305, 309 (Wash. Ct. App. 1995)).

<sup>115</sup> *Id.* at 1170.

<sup>116</sup> *Ky. Women’s Christian Temperance Union v. Thomas*, 412 S.W.2d 869, 870 (Ky. 1967).

<sup>117</sup> *In re Ark. Cmtys., Inc.*, 741 F.2d 185, 187-88 (8th Cir. 1984).

<sup>118</sup> *Monroe v. Rawlings*, 49 N.W.2d 55, 57 (Mich. 1951).

son, and planting trees . . . was held to be evidence of a practically continuous, exclusive, and hostile possession.”<sup>119</sup> “The occupation of the land by the plaintiffs, the payment of the taxes, the transfer by warranty deeds, the leasing, inventorying and listing of this property as their own, [have been held to be] outward acts of exclusive ownership of an unequivocal character, overt, and notorious.”<sup>120</sup> Other courts have stated that “[i]t is hard to imagine more visible activities than trucking in fill, smoothing it out with bulldozers, planting gardens, bushes, and trees, parking cars and trucks, picnicking, and snowmobiling.”<sup>121</sup> Posting the property, marking its boundaries, planting tree sprigs and seedlings, executing hunting and grazing leases, bringing an action to quiet title, hunting on the property, attempting to sell timber off of the land, and increasing the acreage assessment for property taxes have been held to constitute open and notorious possession.<sup>122</sup>

### F. *Continuous*

To satisfy the continuous element, the adverse possessor must occupy the premises without interruption for the statutory period.<sup>123</sup> “[P]eriodic or sporadic acts of ownership are not sufficient to constitute adverse possession.”<sup>124</sup> “Occasional entries or temporary use or occupation (of disputed land) are insufficient to establish” the requisite continuity for an adverse possessor,<sup>125</sup> as are occasional picnics.<sup>126</sup>

Continuity does not, however, require that the adverse possessor occupy the property every moment of the statutory period.<sup>127</sup> In *Howard v. Kunto*, the court rejected the conclusion that summer occupancy only, of a summer beach home, destroyed the continuity of possession required by the statute and stated that “[i]t has become firmly estab-

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<sup>119</sup> *Id.* (citing *Sauers v. Giddings*, 51 N.W. 265, 267 (Mich. 1892)).

<sup>120</sup> *Id.* (quoting *Corby v. Thompson*, 163 N.W. 80, 82 (Mich. 1917)).

<sup>121</sup> *Emerson v. Me. Rural Missions Ass’n*, 560 A.2d 1, 3 (Me. 1989).

<sup>122</sup> *Houston v. U.S. Gypsum Co.*, 652 F.2d 467, 473 (5th Cir. 1981).

<sup>123</sup> *McCarty v. Sheets*, 423 N.E.2d 297, 300 (Ind. 1981).

<sup>124</sup> *Id.* at 301 (citing *Ky. Women’s Christian Temperance Union v. Thomas*, 412 S.W.2d 869, 870 (Ky. 1967)).

<sup>125</sup> *Willy v. Lieurance*, 619 S.W.2d 866, 872 (Mo. Ct. App. 1981) (quoting *Brown v. Evans*, 182 S.W.2d 580, 583 (Mo. 1944)).

<sup>126</sup> *Harkins v. Del Pozzi*, 310 P.2d 532, 535 (Wash. 1957).

<sup>127</sup> *Howard v. Kunto*, 477 P.2d 210, 213-14 (Wash. Ct. App. 1970).

lished that the requisite possession requires such possession and dominion ‘as ordinarily marks the conduct of owners in general in holding, managing, and caring for property of like nature and condition.’”<sup>128</sup> Other cases have held that continuous occupancy of a hunting shack during hunting season was sufficient exclusive possession;<sup>129</sup> that the use of property for a summer home for recreational purposes constituted adverse possession;<sup>130</sup> and that even seasonal physical absence from a summer residence did not break the chain of continuous peaceable possession for the purpose of establishing adverse use.<sup>131</sup>

### G. *For the Statutory Period*

In order to promote the certainty of titles and make land more alienable, adverse possessors must adhere to all elements required to establish adverse possession for a certain period of time, determined by statute.<sup>132</sup> This statutory period varies by jurisdiction and ranges from five to twenty-one years.<sup>133</sup>

The statute of limitations for adverse possession also “fosters a policy of compelling litigants to bring claims before evidence and mem-

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<sup>128</sup> *Id.* (quoting *Whalen v. Smith*, 167 N.W. 646, 647 (Iowa 1918)).

<sup>129</sup> *Kay v. Biggs*, 475 P.2d 1, 4 (Ariz. Ct. App. 1970) (citing *Kraus v. Mueller*, 107 N.W.2d 467, 472 (Wis. 1961)).

<sup>130</sup> *Id.* (citing *Nechtow v. Brown*, 120 N.W.2d 251, 252 (Mich. 1963)).

<sup>131</sup> *Id.* (citing *Mahoney v. Heebner*, 178 N.E.2d 26, 27 (Mass. 1961)).

<sup>132</sup> *See* PROPERTY, *supra* note 1, at 112-13. *But see* PROPERTY, *supra* note 1, at 141-43. An exception to the statutory period includes situations where the true owner is disabled at the time that the adverse possessor enters. *Id.* at 142-43. Another exception to the statutory period is situations where the adverse possessor has been on the property less than the statutory period, but may have requisite privity (be it of contract, estate, or possession) to tack his period of possession on to that of his predecessor. *Id.* at 141.

<sup>133</sup> MONT. CODE ANN. § 70-19-411 (1947); OHIO REV. CODE ANN. § 2305.04 (West 1990); *see* *J & M Land Co. v. First Union Nat'l Bank*, 766 A.2d 1110, 1113 (N.J. 2001) (citing *Braue v. Fleck*, 127 A.2d 1, 9 (N.J. 1956)) (holding the statutory time for adverse possession is thirty or sixty years for woodland or uncultivated tracts). *But see* *B. Fernandez & Bros. v. Ayllon*, 266 U.S. 144, 145-46 (1924) (noting that in cases where no just title is held, the statutory time is thirty years).

ories begin to fade.”<sup>134</sup> Promoting the certainty of titles has long been a concern.<sup>135</sup> In early Bavaria,

The ceremony of livery of seisin included compelling half-a-dozen small boys from the neighborhood to watch the event, and at the end of the ceremony, the grantor struck each boy forcefully on the side of the head. The purpose of striking the boys was for them to remember the accompanying ceremony and provide evidence of that transfer of title for their lifetimes.<sup>136</sup>

Statutes of limitations in the adverse possession context provide clarification regarding property ownership without the historical violence of the livery of seisin ceremony.<sup>137</sup>

#### IV. THE FIFTY STATES

Having laid the groundwork for adverse possession’s British and American beginnings, its public policy rationalizations, and its requisite elements, we return our focus to the query at hand. If the adverse possessor enters against the life tenant, the life tenant does not act to remove the adverse possessor, and the adverse possessor adheres to all requirements for the statutory period, when the life tenant dies, who will own the property? My contention is that the adverse possessor should prevail and not be penalized for entering against a life tenant rather than the fee owner. As mentioned in the *Restatement of Property*,

Predominantly the courts have chosen to give full protection to future interest holders, although, . . . some concessions to the security of adverse possessory claims have been made. In a very few states this trend has been reversed by statutes declaring a bona fide claimant under certain circumstances to be “the legal owner” at the end

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<sup>134</sup> Carl C. Risch, Comment, *Encouraging the Responsible Use of Land by Municipalities: The Erosion of Nullum Tempus Occurrit Regi and the Use of Adverse Possession Against Municipal Land Owners*, 99 DICK. L. REV. 197, 199 (1994).

<sup>135</sup> Joyce Palomar, *The 2006 ALTA Title Insurance Policies: What New Protection Do They Give?*, 42 REAL PROP. PROB. & TR. J. 1, 2 (2007).

<sup>136</sup> *Id.* at 2-3.

<sup>137</sup> *Id.* at 3.

of the statutory period . . . and by decisions that a right of action to quiet title causes the statutory period to commence running even though the person having the right of action owns only a future interest . . . . These few statutes and decisions may indicate a tendency to re-examine the major premises of the law of limitations as applied to future interests, but at the present time they have not enlisted sufficient support to be treated otherwise than as variations from current practice and opinion.<sup>138</sup>

This Article advocates for the re-examination of the law of limitations as applied to future interests. Prior to examining the legal recourses available to future interest holders, we need to first survey the status of the law as it exists today in the fifty states. Two states agree with the position being asserted in this Article: Florida and Iowa.<sup>139</sup> Two states seem open to the idea: Nebraska and Kentucky.<sup>140</sup> The other forty-six states adhere to the traditional rule that statutes of limitations do not start to run against a future interest holder until his estate becomes possessory.<sup>141</sup> I have selected two of those states, Delaware and Arizona, as representatives of the traditional viewpoint.<sup>142</sup>

### A. *Delaware*

The standard interpretation of the answer to our query above is that the adverse possessor must reassert all of the requisite elements in order to establish adverse possession once the life tenant dies.<sup>143</sup> In other words, the clock restarts once the life tenant dies. Like many other states, Delaware courts have held that:

The general principle with respect to all typical statutes of limitations is that the period of adverse possession does not begin to run until the future interest becomes

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<sup>138</sup> RESTATEMENT (FIRST) OF PROP.: FUTURE INTERESTS ch. 15, intro. note (1936).

<sup>139</sup> See *infra* Part IV.E-F.

<sup>140</sup> See *infra* Part IV.C-D.

<sup>141</sup> *Old Time Petroleum Co. v. Tsaganos*, No. 5218, 1978 WL 4973, at \*5 (Del. Ch. Nov. 8, 1978).

<sup>142</sup> See *infra* Part IV.A-B.

<sup>143</sup> See *Old Time Petroleum Co.*, 1978 WL 4973, at \*5.

possessory. This is for the reason that the owner of the future interest, prior to that time, has no right to possession and so has no cause of action. While the doctrine of title by adverse possession involves something more than the mere barring of a remedy, there must, as a rule, be a remedy available to the owner of an interest before a period of adverse possession begins to run against him.<sup>144</sup>

This recitation of the general/traditional rule presupposes that there are no remedies available to the future interest holder. Part V of this Article will address a variety of actions available to the future interest holder prior to the expiration of the preceding life estate.<sup>145</sup>

### ***B. Arizona***

The Court of Appeals of Arizona has held “that until a party has a possessory right to the real property which would allow a cause of action against an adverse possessor, the statute of limitations on an action for recovery for real property will not run.”<sup>146</sup> My contention is that the possessory right to the property is not necessary for all potential remedies of the future interest holder.

### ***C. Nebraska***

The Supreme Court of Nebraska stated in *Maxwell v. Hamel*, “Adverse possession begins to run when a right of entry and a right of possession exist in the remainderman and not when the remainderman has a right to bring an action to quiet title as to his future interest.”<sup>147</sup> The Court in *Maxwell* distinguishes itself factually from *Criswell v. Criswell*, another Supreme Court of Nebraska decision.<sup>148</sup> The *Criswell* Court held, “As against the remaindermen, it would seem equitable that the adverse holding should commence the running of the statute whenever they have actual knowledge of such possession, or whenever, in

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<sup>144</sup> *Id.* (quoting *McDonald v. Burke*, 288 S.W.2d 363, 365-66 (Ky. 1956)).

<sup>145</sup> *See infra* Part V.

<sup>146</sup> *Stat-O-Matic Ret. Fund v. Assistance League of Yuma*, 941 P.2d 233, 233-34 (Ariz. Ct. App. 1997).

<sup>147</sup> *Maxwell v. Hamel*, 292 N.W. 38, 45 (Neb. 1940) (citing *Maring v. Meeker*, 105 N.E. 31, 33 (Ill. 1914)).

<sup>148</sup> *Id.* at 42; *see Criswell v. Criswell*, 163 N.W. 302 (Neb. 1917).

the exercise of reasonable care and prudence, they should have acquired such knowledge.”<sup>149</sup> *Criswell* supports my contention that a remainderman can and should take some responsibility for protecting his future interests in real property.<sup>150</sup> The *Maxwell* Court clarified that the *Criswell* rule applies in situations “where land is held by a stranger to the title”—meaning a third party, not the life tenant acting adversely.<sup>151</sup>

#### D. Kentucky

The Court of Appeals of Kentucky reiterated the traditional rule:

Since the remainderman has no right of possession until the particular estate is terminated, the general rule is that laches, estoppel, or the statute of limitations will not run against a remainderman prior to the termination of the life tenancy, or, as some writers say, till the life estate falls in.<sup>152</sup>

After stating the majority rule, the court noted two exceptions to it:

[F]irst, where the life tenant undertakes to dispose of, or enlarge, upon the estate and brings home to the remaindermen notice of the adverse holding in such manner as to indicate a repudiation of life tenancy. The other is where the person, under whom the remainderman asserts a derivative right, undertakes to transfer title to the real estate, in which case possession thereunder for the statutory period bars the remainderman’s right to recover the land.<sup>153</sup>

The court explained that “[t]he basis of the general rule above is that the life tenant is presumed to be the person in possession, and an uninterrupted continuation of the relation of life tenant and remaindermen is presupposed.”<sup>154</sup> But, the court stated, when the adverse posses-

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<sup>149</sup> *Criswell*, 163 N.W. at 305.

<sup>150</sup> *See id.*

<sup>151</sup> *Maxwell*, 292 N.W. at 42.

<sup>152</sup> *Brittenum v. Cunningham*, 220 S.W.2d 100, 102 (Ky. 1949).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 103.

sor is a stranger, the remainderman is in a better position to be on notice.<sup>155</sup> The court creatively reasoned that the remainderman's right of possession accrues at the extinguishment of the life tenant's estate.<sup>156</sup> It noted that the death of the life tenant is not the only way to extinguish his life estate.<sup>157</sup> The court held that the remainderman's right of possession accelerates once the life estate has terminated and that the right can be terminated, in essence through an adverse possessor acquiring the life estate, so long as the remainderman has knowledge of the adverse possession.<sup>158</sup> This means that once the adverse possessor has complied with all requisite elements, and before the life tenant dies, the remainderman has lost his opportunity to obtain possession, so long as he had prior notice of the adverse possession.<sup>159</sup> These exceptions to the general rule, the latter in particular, directly espouse my theory that adverse possessors who have satisfied the requisite elements should succeed in their claim to the property at issue, regardless of the estate in land held by the party that they entered against.

### *E. Florida*

The Florida Supreme Court has held that where actual knowledge of abandonment by a life tenant and "the setting up of title in the property hostile to that of remaindermen, the statute may operate to divest the title of the remaindermen and vest title in the property to such adverse claimant."<sup>160</sup> Restated, if the remainderman knows about the adverse possessor and does nothing to stop the adverse possession from occurring, the remainderman will lose and the adverse possessor will win in an action to establish title to the property.<sup>161</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *See id.* (holding that "[u]nder such circumstances the life tenancy was in effect terminated as much so as if the life tenant had died").

<sup>159</sup> *See id.*

<sup>160</sup> *Scott v. Fairlie*, 89 So. 128, 131 (Fla. 1921) (citing *Anderson v. Northrop*, 12 So. 318, 323 (Fla. 1892)).

<sup>161</sup> *Id.*

## **F. Iowa**

The Iowa Supreme Court has held that “a remainderman neglecting to avail himself of such right of action for more than the statutory period of limitation is thereby barred.”<sup>162</sup> In other words, future interest holders in Iowa have the statute of limitations start to run against them as soon as the cause of action accrues.<sup>163</sup> The cause of action accrues not at the life tenant’s death, but rather at the moment the adverse possessor enters the life tenant’s property.<sup>164</sup>

## **V. REMEDIES AVAILABLE TO FUTURE INTEREST HOLDERS**

Now we turn to the legal means by which the future interest holder (reversioner or remainderman) can seek redress. I am advocating on behalf of the commencement of the statute of limitations for adverse possession prior to the death of the life tenant because, as will be illustrated in this Part, there are a variety of legal means by which the remainderman can be made whole prior to the expiration of the life estate. As the *Restatement* suggests,

Future interests present a dilemma in the law of limitation of actions. If the courts focus their attention upon the protection of future interest holders by refusing to permit the statutory period to run against them until their estates become present interests, the effectiveness of the statutes as means of quieting titles is greatly impaired.<sup>165</sup>

*Powell on Real Property* acknowledges that future interest holders can establish ownership by legal petition.<sup>166</sup> Because these means of recourse are available to future interest holders, Powell suggests that future interest holders might avail themselves of these rights of action

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<sup>162</sup> Ward v. Meredith, 173 N.W. 246, 249 (Iowa 1919) (citing Murray v. Quigley, 92 N.W. 869, 872 (Iowa 1902)).

<sup>163</sup> *Id.*

<sup>164</sup> See *id.* (citing *Murray*, 92 N.W. at 871) (explaining that a court will determine the nature and extent of the remainderman’s interest before the termination of the life estate).

<sup>165</sup> RESTATEMENT (FIRST) OF PROP.: FUTURE INTERESTS ch. 15, intro. note (1936).

<sup>166</sup> 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 22.07 (Michael Allan Wolf ed., 2000).

within the statutory period for adverse possession.<sup>167</sup> The legal remedies which will be explored in this Article are ejectment actions, quiet title actions, suits for an injunction, actions for damages, trespass actions, and actions for waste.

### A. *Ejectment*

Despite the fact that actions for ejectment are one of the primary legal means for removing an adverse possessor from one's property, the general rule regarding ejectment actions is that the cause of action accrues to future interest holders at the death of the life tenant.<sup>168</sup> The logic is that since remaindermen have no right to possession until the death of the life tenant, there can be no possession adverse to them, and since they have no possessory rights, they have no right to maintain an action for possession of the lands; "thus, the statute of limitations cannot run against them."<sup>169</sup>

However, in some jurisdictions, like Iowa, the statute of limitations can bar a remainderman from asserting his rights against an adverse possessor, if the remainderman knew that his rights were being assailed and the remainderman failed to act during the statutory period.<sup>170</sup> In these types of jurisdictions, actions in ejectment are available to the remainderman prior to the expiration of the life estate.<sup>171</sup> Additionally, in Florida, a remainderman may have his remedy (file an action in ejectment, trespass, etc.) prior to expiration of the preceding life estate, if his estate in the land is threatened or damaged.<sup>172</sup>

Thus, one who has a vested remainder in land has a right to protect the estate so that he may receive the same

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<sup>167</sup> *Id.* (expressing concern that allowing the statute to run before the expiration of the life tenancy could injure those future interest holders who had no notice of the adverse possessor).

<sup>168</sup> *Luster v. Arnold*, 458 S.W.2d 414, 417 (Ark. 1970) (citing *Ogden v. Ogden*, 28 S.W. 796, 797 (Ark. 1894)).

<sup>169</sup> *Hinesley v. Davidson*, 335 So. 2d 380, 382 (Ala. 1976) (citing *Hammond v. Shipp*, 289 So. 2d 802, 807 (Ala. 1974)).

<sup>170</sup> *Ward v. Meredith*, 173 N.W. 246, 250 (Iowa 1919) (quoting *Crawford v. Meis*, 99 N.W. 186, 189 (Iowa 1904)).

<sup>171</sup> *Id.*

<sup>172</sup> *Weed v. Knox*, 27 So. 2d 419, 420 (Fla. 1946).

when it ought to come to him by the terms of the limitation, and he may maintain a proper action for any injury to the inheritance, committed or threatened, whether by the tenant in possession or by a stranger.<sup>173</sup>

Actions in ejectment are not universally available to the future interest holder prior to the death of the life tenant, but in a few jurisdictions, actions in ejectment are a viable option for protection of the future interest holder's rights.<sup>174</sup>

### ***B. Quiet Title Action***

Black's Law Dictionary defines a quiet title action as "[a] proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it."<sup>175</sup> Future interest holders may obtain a quiet title action while the life tenant is still in possession of the property.<sup>176</sup> "It is settled that a remainderman may bring an action of this character, which is an action to quiet title, during the life of the life tenant in order to establish his claim and be in a condition to make it available when the life tenancy terminates."<sup>177</sup> The *Restatement* agrees that a future interest holder is entitled to obtain a quiet title action during the life of the life tenant if a third party's conduct amounts to a claim inconsistent with the rights of the future interest holder.<sup>178</sup> *Powell on Real Property* concurs, stating, "[f]requently the owner of a future interest, in his capacity as such a claimant, can establish his ownership by legal petition. This action could be a suit in equity to quiet title or to remove a cloud upon title, or it could be by an analogous statutory proceeding."<sup>179</sup> State statutes

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<sup>173</sup> *Id.*

<sup>174</sup> *See id.*

<sup>175</sup> BLACK'S LAW DICTIONARY 32 (8th ed. 2004).

<sup>176</sup> *Broaddus v. Tevis*, 177 S.W.2d 901, 902 (Ky. 1943) (citing *Simmons v. McKay*, 68 Ky. (5 Bush) 25, 29 (1868)).

<sup>177</sup> *Id.*; *see also Powe v. Payne*, 94 So. 587, 587-88 (Ala. 1922) (stating remaindermen may file a bill for protection of their estate even though they are not in possession).

<sup>178</sup> RESTATEMENT (FIRST) OF PROP.: FUTURE INTERESTS § 213 (1936).

<sup>179</sup> 3 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 22.07[3][a][i] (Michael Allan Wolf ed., 2000).

often codify the ability to pursue a quiet title action.<sup>180</sup> For example, Michigan's quiet title statute states that any person, whether in possession of the land or not, may bring an action to quiet title.<sup>181</sup> Future interest holders have access to quiet title actions as a means of legal clarification of the ownership interest in their land prior to the life tenant's death.<sup>182</sup>

### C. Injunction

The Massachusetts Supreme Judicial Court held that a future interest holder may maintain an action for an injury done to his future interest.<sup>183</sup> "In order to recover, [the future interest holder] must show an invasion of his rights."<sup>184</sup> One of the reasons for allowing recovery during the life tenant's lifetime is that with the death of witnesses, evidence could be lost.<sup>185</sup> The *Restatement*,<sup>186</sup> the New York State Court of Appeals,<sup>187</sup> and the Supreme Court of Georgia also agree that remaindermen can sue to enjoin a continuing trespass.<sup>188</sup>

### D. Action on the Case (a.k.a. Action for Damages)

Remaindermen can also bring an action for damages (a.k.a. action on the case) when their interest in the property has been dam-

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<sup>180</sup> See, e.g., MICH. COMP. LAWS ANN. § 600.2932(1) (West 2010).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* See generally *Weed v. Knox*, 27 So. 2d 419, 420 (Fla. 1946).

<sup>183</sup> *Frawley v. Forrest*, 38 N.E.2d 631, 635 (Mass. 1941).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 636.

<sup>186</sup> RESTATEMENT (FIRST) OF PROP.: FUTURE INTERESTS § 212 (1936) ("When conduct of a third person consists of a threat of acts, or omissions to act, affecting the thing in which a future interest exists, and satisfies the requirements stated in § 211, then the owner of such future interest is entitled to obtain an injunction appropriate to prevent such acts or omissions.").

<sup>187</sup> *Thompson v. Manhattan Ry. Co.*, 29 N.E. 264, 265 (N.Y. 1891). "[A] person seised of an estate in remainder or reversion may maintain an action of waste or trespass for an injury done to the inheritance, notwithstanding an intervening estate for life or years." *Id.*; N.Y. REAL PROP. ACTS. LAW § 831 (McKinney 2008). "It will be observed that the right to an injunction is not limited to wastes, but covers 'any other damage to the property.'" *Thompson*, 29 N.E. at 265; REAL PROP. ACTS. § 871.

<sup>188</sup> *Oliver v. Irvin*, 135 S.E.2d 376, 377-78 (Ga. 1964).

aged.<sup>189</sup> In some jurisdictions, all that a future interest holder must do to recover damages for permanent injury to his interest is state facts sufficient to constitute a cause of action.<sup>190</sup> Despite the fact that in many jurisdictions a future interest holder cannot succeed in a trespass action, actions on the case to recover damages are widely available.<sup>191</sup> A reversioner may maintain an action at law for damages for injury done to the reversion.<sup>192</sup>

### *E. Trespass*

“The gist of the action of trespass upon the freehold is the injury to the possession.”<sup>193</sup> In a majority of jurisdictions, a remainderman has no right of possession, and thus no right to file an action for trespass, until the preceding life estate is terminated.<sup>194</sup> This means that, in the aforementioned jurisdictions, an adverse possessor cannot succeed against a remainderman until after the life tenant has died and all of the elements of adverse possession have been reasserted.<sup>195</sup>

Not all jurisdictions agree. In Iowa, for example, the rule is that “[t]he owner of an estate in remainder or reversion may maintain [an action for trespass or waste] for injuries done to the inheritance, not-

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<sup>189</sup> *Frawley*, 38 N.E.2d at 635.

<sup>190</sup> *Crowder v. Fordyce Lumber Co.*, 125 S.W. 417, 418 (Ark. 1910) (“At common law, the action of trespass on the case would have been the appropriate remedy. But under our Civil Code of Practice, the forms of actions are abolished, and all that is necessary is to state facts sufficient to constitute a cause of action within the jurisdiction of the court.” (citations omitted)).

<sup>191</sup> *AmSouth Bank, N.A. v. City of Mobile*, 500 So. 2d 1072, 1074 (Ala. 1986) (“[T]he prevailing doctrine is that a lessor cannot maintain an action of trespass, even though there is an injury to the reversion . . . [although] an action in some form lies, usually an action on the case . . .” (alteration in original) (quoting 63 C.J.S. *Trespass* § 41 (1933)) (internal quotation marks omitted)).

<sup>192</sup> *Putney v. Lapham*, 64 Mass. (10 Cush.) 232, 234 (1852); *Ingraham v. Dunnell*, 46 Mass. (5 Met.) 118, 124 (1842); RESTATEMENT (FIRST) OF PROP.: FUTURE INTERESTS § 214(a) (1936); 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 22.06[2][a] (Michael Allan Wolf ed., 2000).

<sup>193</sup> *Austin v. Hallstrom*, 86 A.2d 549, 549 (Vt. 1952) (citing *Ripley v. Yale*, 16 Vt. 257, 260 (1844)).

<sup>194</sup> *Id.* at 550.

<sup>195</sup> *See id.*

withstanding any intervening estate for life or years.”<sup>196</sup> Despite the fact that California adheres to the majority principle—that “[i]n an action of trespass upon real property [the] plaintiff must prove the fact of his possession of the premises”<sup>197</sup> in order to be successful—it also acknowledges “an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest.”<sup>198</sup> The California Court of Appeals has held that if an intruder damages property in a way that hurts the nonpossessory owner’s ownership interest, the nonpossessory owner can maintain an action for trespass or waste to seek recovery.<sup>199</sup> It is evident that an action for trespass on real property, while not available everywhere, is a viable option for the future interest holder to remove the adverse possessor in some jurisdictions.

### F. Waste

An action for waste has evolved to “a legal means by which any concurrent non-possessory holders of interest in the land are enabled to prevent or restrain harm to the land committed by persons in possession.”<sup>200</sup> In other words, remaindermen can use waste as a means to protect their future interests in the land from the wrongdoings of those in possession of the land.<sup>201</sup> To be successful in asserting waste, one must show an injury to the inheritance<sup>202</sup> resulting in a substantial depreciation in the market value of the land.<sup>203</sup>

The future interest holder may bring an action in waste against someone who is not an owner of the land<sup>204</sup>: either the life estate holder or the adverse possessor himself.<sup>205</sup> If the future interest holder decides to sue the life tenant, he may do so under the theories of either permis-

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<sup>196</sup> IOWA CODE § 658.5 (1998).

<sup>197</sup> *Smith v. CAP Concrete*, 184 Cal. Rptr. 308, 310 (Ct. App. 1982) (quoting *Williams v. Goodwin*, 116 Cal. Rptr. 200, 209 (Ct. App. 1974)).

<sup>198</sup> *Id.* (citing *Rogers v. Duhart*, 32 P. 570, 571 (Cal. 1893)).

<sup>199</sup> *Id.* at 310.

<sup>200</sup> *Id.* at 311 (citing *Cornelison v. Kornbluth*, 542 P.2d 981, 986-87 (Cal. 1975)).

<sup>201</sup> *See id.*

<sup>202</sup> *Id.* (citing CAL. CIV. CODE § 818 (West 1872)).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Lane v. Thompson*, 43 N.H. 320, 322-23 (1861).

sive or voluntary waste.<sup>206</sup> The life tenant has the duty to exercise the ordinary care of a prudent man for the preservation and protection of the future interest in the land.<sup>207</sup> If the life tenant fails to exercise this duty, he has committed permissive waste.<sup>208</sup> Further, the life tenant is prohibited from the commission of any act tending to permanently injure the future interest holder.<sup>209</sup> If the life tenant commits one of these prohibited acts, he is liable for voluntary waste.<sup>210</sup> If either voluntary or permissive waste is found, actual damages resulting from the waste will be assessed against the life tenant.<sup>211</sup>

## VI. CONCLUSION

This Article began with a historical glimpse into the beginnings of adverse possession in England and America. Next, it established that doctrines closely related to adverse possession served as mechanisms through which this nation evolved and amassed its vast quantities of land. This Article then illustrated three of the prevailing public policy rationales behind adverse possession. It then detailed the legitimization of the stealing of land through actual entry, and exclusive possession that is open and notorious, adverse, under claim of right, and continuous for the statutory period. Finally, it examined the way in which the fifty states provide legal recourse for future interest holders who have been adversely possessed against.

This background served as the underpinning for the ultimate focus of this Article: should a future interest holder succeed against an adverse possessor who has complied with all necessary requirements for the statutory period, simply because the adverse possessor originally entered against the life tenant? I contend that the future interest holder should be unsuccessful against the adverse possessor, not because I am an advocate of adverse possession, but because I believe it to be better overall policy. The rationale asserted for protecting the remainder inter-

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<sup>206</sup> Grimm v. Grimm, 113 S.E. 91, 91-92 (Ga. 1922).

<sup>207</sup> *Id.* at 92.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

est—the absence of a cause of action—does not square with the law applicable in nearly all states.

When I teach adverse possession in my Property I classes, I invariably have at least one student per term that asks, “isn’t that stealing?” I always answer in the affirmative. As a property owner myself, the idea of someone being able to steal my land from me is infuriating. Stepping away from the personal emotion, however, one cannot deny the efficacy of the public policy rationales. If we decide to accept adverse possession as a necessary evil, which clearly we have in this country for centuries, then we should award possession to all adverse possessors in an egalitarian manner.

The rationale for denying possession to the adverse possessor, who has complied with all required elements, does not hold water when the adverse possessor’s only shortcoming is entry against a life tenant. Dukeminier and Krier assert that the adverse possessor who enters against the life tenant shall be unsuccessful against the remainderman. This is because the remainderman lacks the right to remove the adverse possessor, and thus protect his estate, until he comes into possession. As was detailed in the final substantive Part of this Article, this does not paint an accurate portrait of the remainderman’s rights.

In at least two states, the remainderman may file an action in ejectment to remove the adverse possessor. A couple of states also permit the remainderman to file an action for trespass. While ejectment and trespass are only available to a remainderman in a handful of jurisdictions, there are at least four other legal means by which a remainderman can protect his future interest: quiet title actions, actions for damages, actions for waste, and suits for injunctions. Many jurisdictions permit a remainderman (or reversioner) to file a suit for an injunction or an action to quiet title. A remainderman also has actions for damages and actions to establish waste to protect his future interest, both of which are widely available to him.

In summary, a remainderman can get a court order designating the specific owner(s) of the property; he can get an adverse possessor removed from the property; he can force the life tenant to remove the adverse possessor; and he can get monetary compensation for the damage suffered to his future interest—all before he comes into possession

of the premises. Due to the multiplicity of options available to a remainderman, he should be forced to safeguard his interest in the property and actively protect it before he is entitled to possession. Adverse possession should either be done away with or applied uniformly across the board.

