INTRODUCTION: ADVERSE POSSESSION & SPECIFIC PERFORMANCE

This paper is divided into two parts. The first part is focused on adverse possession while the second part is focused on specific performance of contracts for the purchase and sale of land. Both portions will explore the theoretical basis and historical background of each issue, as well as explain how the law has evolved to its current state and how it may be reformed moving forward. Examples have been pulled from case law to bring these issues to life and explain their practical application. Some notable topics include whether one can adversely possess a portion of a river and if an application for specific performance would be awarded because a family wanted to buy a house located in a specific school zone.

BACKGROUND: ADVERSE POSSESSION

Theoretical Basis

Adverse possession is a strange concept. It allows someone to come onto land and take it by using it. Two different theories have been put forth to justify its continued use by suggesting it either increases the productivity of land or that it provides certainty of title.

Increasing Productivity

One theory submits that as land has the unique ability to convey status, wealth, and power, it should be used to its fullest potential and if the title owner fails to do so, then someone else should. Simply put, the theory is ‘use it or lose it’. However, this concept fails to consider that some landowners often wait to use their land to increase its value – such as with waiting to subdivide, to re-zone, or for general speculative purposes. Also, land does not have to be developed in the traditional sense to reach its ‘full potential’. It may, for example, be subject to conservation laws or used as collateral for a loan. In any event, it is no longer the case that land has to be farmed or otherwise improved to be productive. Idle lands are no longer due to idle hands.

Certainty of Title: As to Proper Owner

A prior owner loses all rights to their land when the limitation period for adverse possession has run out. By eliminating possible owners, the second theory of adverse possession submits that it aides in providing certainty of title as to the land’s proper owner. However, a bifurcation of purpose arises when a jurisdiction, such as Alberta, also has a land titles registry system. The system’s major
purpose is to provide certainty of title in regards to the land’s proper owner. If someone is able to walk onto the lands and claim title through possession, it clouds certainty and disrupts the system.

Certainty of Title: As to Boundaries

A subset under the certainty of title theory is that adverse possession may provide clear title by settling boundary disputes. A land titles registry system may confirm that a landowner is in receipt of title, but it does not guarantee the accuracy of the legal description on that title. Through adverse possession, an individual is able to retain possession of land that she has used in the mistaken belief it belonged to her. While fixing boundary errors falls under the theory of providing clear title, it has an added justification. After the error has been made, the individual will likely rely on that error and she may end up building a deck or her whole house on the land in question. When this occurs, the case has evolved past an abstract dispute of the location of the boundary line and becomes an emotional plea to retain the property.

Historical Background: William the Conqueror to Alberta’s Homesteads

England’s Limitations

In 1066, William the Conqueror captured England, seized all its land and parcelled it out to those who were loyal to him. Not long after, disputes began to arise as to who actually owned the land. In this largely illiterate society, possession was strong evidence of ownership. But without a written record, it was difficult to prove the veracity of any claim of ownership. By the twelfth century, England had a solution – it created a statutory period of limitation on those claiming prior seisen. If the landowner failed to bring a claim within the time period, he lost all legal remedies to recover possession of land. Fast forward to the reign of King Henry VIII and the limitation period was set to sixty years. However, the legislation did not invoke or remove title. It simply allowed a trespasser to remain on the property and the original landowner kept all prior rights to the land. As a result, landowners often resorted to their own methods to eject trespassers. Self-help remained the status quo until the Real Property Limitation Act (GB), 3 & 4 Will IV, c 27, came into force in 1833 and brought two major changes. First, the limitation period was reduced to twenty years. Second, after this new limitation period ran out, all prior rights to the land were extinguished and the prior landowner lost all rights of recovery. Against this historical backdrop, Alberta adopted a Torrens land titles system in the Territories Real Property Act, SC 1886, c 26.

2 The Act of Limitation with Proviso (Eng), 32 Hen VIII, c 2.
To tame the West, the Federal Government enacted the *Dominion Lands Act*, SC 1872, c 23, wherein a claimant could become a landowner of a full quarter section (160 acres) for an administrative fee of $10.00. The fine print to this transaction was that to keep the land, the individual was required to clear at least 10 acres, undertake some cultivation, build a habitable dwelling and farm buildings, and live on the land for six months a year for three years. After all the conditions had been met, the claimant could submit an application for title to the land.3

This one piece of legislation established Alberta’s population, cleared the province’s land and ushered in an era of farming in the prairies. The reliance on homesteading also explains the resulting dichotomy between limitation legislation and a land titles system in Alberta. A land title system is put in place to provide certainty of title; however limitation legislation allows title to be taken by possession. The two co-exist in Alberta and their relationship is best explained by the Alberta Supreme Court in *Harris v Keith (1911)*, 3 Alta LR 222. Here, the Court favoured the defendant who was in possession of the land against the plaintiff who was the registered owner. In considering the application of the limitations legislation against the land titles system, the Court held:

“...in English law actual possession still counts for a great deal. There is not from beginning to end of our *Land Titles Act* any suggestion, as far as I can find, that the Act intended or attempted to deal with the question of actual possession. Questions of title alone were the subject matter of the Act” (at para 25).

The Court went onto hold that the effect of the limitation legislation was to protect the interests of someone who has adversely possessed land and this protection also applied against a titled owner as the titled owner lost all their rights to the land.

While adverse possession protects a trespasser’s interest in the land, it does not confer title.

This issue was first addressed in an Alberta case in *Wallace v Potter (No 2) (1913)*, 4 WWR 738, where the Court granted a declaration that the trespasser had become the owner of land by adverse possession. However, the Court refused to direct the Registrar of Land Titles to issue title, finding that the *Land Titles Act*, 1906 c 24, did not authorize such an action. Instead, the Court directed Parliament to fix the problem. It did and in 1921, a provision was added which became section 74 of our current Act and is reproduced below.

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3 *Homestead Records*, online: Provincial Archives of Alberta  