820.10 ADVERSE POSSESSION—COLOR OF TITLE.[1]

The (*state number*) issue reads:

"Does the plaintiff hold title to (*identify land*) by adverse possession under color of title?"[2]

Color of title means that the person claiming the land has a [deed] [will] [*state other document*] which appears to pass title, but which does not do so because of some legal deficiency.[3] (*Here identify the instrument claimed as color of title and describe the deficiency.*)

On this issue the burden of proof is on the plaintiff.[4] This means that the plaintiff must prove, by the greater weight of the evidence, four things:

First, that (*identify land*) described in the [deed] [will] [*identify other instrument*] was actually possessed[5] by the plaintiff (and those through whom the plaintiff claims).[6] Actual possession means physical possession, control and use of the land as if it were one's own property.[7] Actual possession includes any use that the land's size, character, nature, location and circumstances would permit.[8] A mere intention to claim the land is not enough. If the plaintiff is in actual possession of some part of the land described in the [deed] [will] [*identify other instrument*], the law presumes that person has possession of all it.[9]

Second, that this actual possession was exclusive and hostile[10] to the defendant (and those through whom the defendant claims). Possession is hostile when it is without permission and is of such a nature as to give notice that the exclusive right to the land is claimed. "Hostile" does not require a showing of heated controversy, animosity or ill will, or that the persons involved were enemies or even knew each other.[11] (If the possession begins

with permission,[12] it becomes hostile if the plaintiff (or one through whom the plaintiff claims) makes the defendant (or one through whom the defendant claims) aware by words or conduct that the plaintiff is no longer using the land by permission and claims the exclusive right to it as owner.)[13]

(*Use where there is a claim of actual ouster by a cotenant:* When two or more people possess the land by [deed] [will] [oral transfer] [inheritance], each has certain rights, including the right to share in the possession of the land, the right to share in the rents and profits, and the right to an accounting. Possession becomes hostile when one possessor clearly, positively and unequivocally denies rights of possession to the other(s).[14] However, mere [occupancy of the land] [payment of taxes] [collection of rents and profits] [failure to account voluntarily for rents and profits] [does] [do] not necessarily prove that the rights of possession have been denied.[15] Hostile possession begins when one of the possessors explicitly refuses to permit the other to share in possession of the land.)

Third, that this actual possession was open and notorious, and was under known and visible lines and boundaries.[16] The possession must have been so open, visible and well known that the defendant (and those through whom the defendant claims) knew or, under the circumstances, should have known of the possession.[17] The acts of possession must have been of such a nature that anyone claiming ownership, or anyone in the community, knew or by observing should have known that the plaintiff (and those through whom the plaintiff claims) claimed the land as [his] [her] [their] own and [was] [were] not merely (a) temporary or occasional trespasser(s).[18] Such possession must also have been under such known and visible lines and boundaries as to identify the extent of the possession claimed.

Fourth, that this actual, hostile, open and notorious possession of the (*identify land*) under color of title and known and visible boundaries must have been continuous and uninterrupted[19] for (*state statutory period*).[20] This means that the plaintiff (and those through whom the plaintiff claims) must continue actual, hostile, open and notorious possession of the land under known and visible boundaries for the entire (*state statutory period*) without interruption by [physical acts] [a lawsuit] [(*state other means*)].[21]

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff holds title to (*identify land*) by adverse possession under color of title, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. *See Vance v. Guy*, 223 N.C. 409, 27 S.E.2d 117 (1943); *Seals v. Seals*, 165 N.C. 409, 81 S.E. 613 (1914); *Currie v. Gilchrist*, 147 N.C. 648, 61 S.E. 581 (1908); *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889).

2. This instruction is to be used when the existence of an instrument which would be color of title that describes the land in dispute is admitted.

3. *State v. Taylor*, 60 N.C. App. 673, 300 S.E.2d 42 (1983).

4. "The party attempting to establish title by adverse possession has the burden of proof." *Town of Winton v. Scott*, 80 N.C. App. 409, 342 S.E.2d 560, 564 (1986) (citing *Power v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953)).

5. *See State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70, *later app*. 279 N.C. 45, 181 S.E.2d 553 (1969); *Lindsay v. Carswell*, 240 N.C. 45, 81 S.E.2d 168 (1954); *Alexander v. Cedar Works*, 177 N.C. 137 98 S.E. 312 (1919); *Locklear v. Savage*, 74 S.E. 47, 159 N.C. 236 (1912); *Shaffer v. Gaynor*, 117 N.C. 15, 23 S.E. 154 (1895).

6. "Tacking" is defined in *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974) ("Tacking is the legal principle whereby successive adverse users in privity with prior adverse

users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years."). *Vanderbilt v. Chapman*, 172 N.C. 809, 90 S.E. 993 (1916). *BUT NOTE WELL*: *North Carolina does not follow the majority rule to allow tacking when a grantor adversely possessing property beyond the bounds of a deeded parcel conveys the deeded parcel to a grantee who continues adversely possessing the same additional property.* Cole v. Bonaparte's Retreat Prop. Owner's Ass'n, Inc*., ___ N.C. App. ___, ___, 815 S.E.2d 403, 409 (2018). In North Carolina, a grantee is not permitted to tack a grantor's adverse possession of land that lies outside the boundary of the grantor's conveyance, because "there is no privity of title between him and his predecessors in title as to [that] land."* See Ramsey v. Ramsey*, 229 N.C. 270, 273, 49 S.E.2d 476, 477 (1948).*

7. *See, e.g.*, *Taylor v. Johnston*, 289 N.C. 690, 224 S.E.2d 567 (1976); *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

8. *See, e.g.*, *Wiggins v. Taylor*, 31 N.C. App. 79, 228 S.E.2d 476 (1976); *Wilson Cty. Bd. of Educ. v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970).

9. If the claimant by adverse possession under color of title possesses a part of the land described in the instrument, color of title makes the claimant the constructive possessor of the rest of the land adequately described in the instrument that is not actually possessed by another person. Patrick K. Hetrick & James B. McLaughlin Jr., *Webster's Real Estate Law in North Carolina* § 264 (6th ed. 2014).

Special rules resolve the situation where the color of title claims of rival claimants overlap. Where neither claimant actually possesses any part of the lappage, the senior claimant is deemed to constructively possess the entire lappage. If only one claimant actually possesses a part of the lappage, that claimant is deemed to constructively possess the entire lappage. If both claimants actually possess a part of the lappage, the senior claimant is deemed to possess all parts of the lappage not actually possessed by the junior claimant. *Price v. Tomrich*, 275 N.C. 385, 167 S.E.2d 766 (1969); *see Parker v. Desherbinin*, __ N.C. App. __, __, 810 S.E.2d 682, 689-90 (2018) (standing for the proposition that when only the adverse claimant actually possesses the land subject to the dispute of overlapping ownership, the adverse claimant's ensuing possession is commensurate with the limits of the tract to which the adverse claimant's instrument purports to give title); *Webster's Real Estate Law in North Carolina* § 274(b).

10. *See State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70 (1969); *Brown v. Hurley*, 243 N.C. 138, 90 S.E.2d 324 (1955); *Barbee v. Edwards*, 238 N.C. 215, 77 S.E.2d 646 (1953).

11. *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985) (holding that when a landowner acts under mistake as to the boundary of the landowner's property and that of another, the landowner's claim of title is adverse).

12. There is a presumption that possession is permissive as between the following: cotenants, *see Collier v. Welker*, 19 N.C. App. 617, 620, 199 S.E.2d 691, 694 (1973); trustee and *cestui que trust*, *see Evans v. Brendle*, 173 N.C. 149, 153, 91 S.E. 723, 725 (1917); spouses, *see Hancock v. Davis*, 179 N.C. 282, 284, 102 S.E. 269, 270 (1920); tenant and

landlord, *see Pitman v. Hunt*, 197 N.C. 574, 576, 150 S.E.13, 14 (1929); and agent and principal, *see Hall v. Davis*, 56 N.C. 413, 415 (1857).

13. *Collier v. Welker,* 19 N.C. App. at 620, 199 S.E.2d at 694 ("One cotenant may not be deprived of his rights by another cotenant unless the allegedly disseized has actual knowledge or constructive notice of a co-owner's intent to dispossess."). If the allegedly disseized cotenant (defendant) has actual knowledge of the ouster, the co-owner's (plaintiff's) title ripens in seven years. *Tharpe v. Holcomb*, 126 N.C. 365, 366-67, 35 S.E. 608 (1900). If the allegedly disseized cotenant has constructive notice only, then twenty years is required to ripen the co-owner's title. *See* endnote 15*, infra;* if constructive ouster is claimed, use N.C.P.I-Civil 820.16.

14. *Clary v. Hatton*, 152 N.C. 107, 67 S.E. 258 (1910); *Town of Winton v. Scott*, 80 N.C. App. 409, 342 S.E.2d 560 (1986).

15. *Collier v. Welker,* 19 N.C. App. at 620, 199 S.E.2d at 694; *see also* N.C. Gen. Stat. §§ 1-39, 1-40. But, "sole and undisturbed possession and use of the property [by one tenant in common] for twenty years, without any demand for rents, profits or possession by the cotenants" gives rise to a presumption of constructive ouster, *see Atl. Coast Props., Inc. v. Saunders*, 243 N.C. App. 211, 212, 777 S.E.2d 292, 295 (2015) (citing *Herbert v. Babson*, 74 N.C. App. 519, 522, 328 S.E.2d 796, 798 (1985), *aff'd per curiam,* 368 N.C. 776, 783 S.E.2d 733 (2016)), provided "the sole possession for 20 years must have continued without any acknowledgment on the possessor's part of title in his cotenant." *Hi-Fort, Inc. v. Burnette*, 42 N.C. App. 428, 434, 257 S.E.2d 85, 90 (1979). The twenty years necessary to establish the presumption also satisfies the twenty years required for adverse possession by constructive ouster to ripen into title. This is because, "[u]pon completion of the requisite 20-year period, ouster relates back to the initial taking of possession." *See Collier*, 19 N.C. App. at 621, 199 S.E.2d at 695.

16. *McDaris v. "T" Corp.*, 265 N.C. 298, 144 S.E.2d 59 (1965); *Bowers v. Mitchell*, 258 N.C. 80, 128 S.E.2d 6 (1962); *Shelley v. Grainger*, 204 N.C. 488, 168 S.E. 736 (1933); *May v. Mfg. Co.*, 164 N.C. 262, 80 S.E. 380 (1913); *Locklear v. Savage*, 159 N.C. 236 74 S.E. 47 (1912); *Kennedy v. Maness*, 138 N.C. 35, 50 S.E. 450 (1905); N.C. Gen. Stat. §§ 1-38, 1-40.

17. *Marlowe v. Clark*, 112 N.C. App. 181, 435 S.E.2d 354 (1994).

18. *Lake Drive Corp. v. Portner*, 108 N.C. App. 100, 103, 422 S.E.2d 452, 454 (1992).

19. *See Sessoms v. McDonald*, 237 N.C. 720, 75 S.E.2d 904 (1953); *Cross v. Railroad*, 172 N.C. 120, 90 S.E. 14 (1916); *Williams v. Wallace*, 78 N.C. 354 (1878).

20. Possession for twenty years is required for acquisition of title against an individual without color of title (N.C. Gen. Stat. §§ 1-39, 1-40), and for seven years is under color of title (N.C. Gen. Stat. § 1-38). As against the State, possession for thirty years without color of title and for twenty-one years under color of title (N.C. Gen. Stat. § 1-35). For an instruction on adverse possession without color of title, *see* N.C.P.I.-Civil 820.00.

21. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971); *Price v. Tomrich Corp*., 275 N.C. 385, 167 S.E.2d 766 (1969).