

N.C.P.I.—Civil 820.16
ADVERSE POSSESSION BY A COTENANT CLAIMING CONSTRUCTIVE
OUSTER.
GENERAL CIVIL VOLUME
FEBRUARY 2017

820.16 ADVERSE POSSESSION BY A COTENANT¹ CLAIMING
CONSTRUCTIVE² OUSTER.

The (*state number*) issue reads:

"Does the plaintiff hold exclusive title to the (*identify land*) by adverse possession?"³

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 the plaintiff (or one through whom *he* claims) and the defendant (or one through whom *he* claims) were cotenants in the (*identify land*). A cotenant is a person who, by legal interest in or title to property, has the right to use and enjoy the entire property as if *he* were the sole owner, limited only by the other cotenants having the same right.⁵

Second, that while the plaintiff (or one through whom *he* claims) was a cotenant, *he* (or one through whom *he* claims) began to possess the land exclusively and remained in exclusive possession of it for at least twenty consecutive years.⁶

Third, that at no time during the twenty consecutive years of exclusive possession did the plaintiff (or those through whom *he* claims) acknowledge the ownership of the defendant (or those through whom *he* claims). An acknowledgment is any expression or act which recognizes that ownership is shared with one or more other persons.⁷

NOTE WELL: Where there is evidence that an act constituting an acknowledgment occurred prior to the beginning of the alleged twenty-year period of exclusive possession, the jury should be instructed that such an acknowledgment continues in effect until disavowed. The following language is suggested as an addition to the third element in such a case:

N.C.P.I.—Civil 820.16
 ADVERSE POSSESSION BY A COTENANT CLAIMING CONSTRUCTIVE
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 GENERAL CIVIL VOLUME
 FEBRUARY 2017

[Once there is an act or expression of acknowledgment, the acknowledgment continues in effect, preventing adverse possession on the part of any possessor, until the acknowledgment is disclaimed. A disclaimer consists of an expression or act which is inconsistent with a recognition that title to the land is shared. In other words, if any possessor has acknowledged title in the cotenants, either *he* or *his* successor must disclaim the acknowledgment before the required twenty-year period of adverse possession can begin.]

Fourth, that at no time during twenty consecutive years of exclusive possession did the defendant (or those through whom *he* claims) or any other cotenant demand or request possession of the land, an accounting, or a share of any rents or profits from the land.⁸

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 acquired exclusive title to the (*identify land*) by adverse possession, 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.

1 This instruction presumes there is no legal issue that the cotenants were tenants-in-common. If the cotenancy arises out of joint tenancy with rights of survivorship or a tenancy by the entirety, constructive ouster does not apply. *Young v. Young*, 43 N.C. App. 419, 426, 259 S.E.2d 348 (1979).

2 If an actual ouster is claimed, use N.C.P.I.-Civil 820.00.

3 See *Dobbins v. Dobbins*, 141 N.C. 210, 53 S.E. 870 (1906); *Collier v. Welker*, 19 N.C. App. 617, 199 S.E.2d 691 (1973).

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 7 Richard R. Powell, *Powell on Real Property* § 50.03[1], at 50-14 (M. Wolf gen. ed., 2005), cited with approval in *Georgia v. Randolph*, 547 U.S. 103, 113-114 (2006). See 20 Am. Jur. 2d Cotenancy and Joint Ownership § 1 ("A 'cotenancy' is a tenancy under more

N.C.P.I.—Civil 820.16
 ADVERSE POSSESSION BY A COTENANT CLAIMING CONSTRUCTIVE
 OUSTER.
 GENERAL CIVIL VOLUME
 FEBRUARY 2017

than one distinct title, but with unity of possession”).

6 N.C. Gen. Stat. §§ 1-39, 1-40. See *Atl. Coast Properties, Inc. v. Saunders*, ___ N.C. App. ___, ___, 777 S.E.2d 292, 295 (2015) (citing *Herbert v. Babson*, 74 N.C. App. 519, 522, 328 S.E.2d 796, 798 (1985) for the proposition that the presumption of ouster arises if “one tenant in common has been in sole and undisturbed possession and use of the property for twenty years, without any demand for rents, profits or possession by the cotenants.”), *aff’d per curiam*, 368 N.C. 776, 783 S.E.2d 733 (2016); *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964); *Ange v. Owens*, 224 N.C. 514, 31 S.E.2d 521 (1944). 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 v. Welker*, 19 N.C. App. 617, 621, 199 S.E.2d 691, 695 (1973). Note that a cotenant’s adverse possession by *actual ouster* ripens into title in seven years. *Tharpe v. Holcomb*, 126 N.C. 365, 366-67, 35 S.E. 608 (1900).

7 The presumption of ouster does not arise if the party claiming adverse possession “does anything to recognize title of the cotenants during the twenty-year period.” See *Atl. Coast Properties, supra* endnote 6; *Hi-Fort v. Burnette*, 42 N.C. App. 428, 257 S.E.2d 85 (1979); *Mott v. Land Co.*, 146 N.C. 525, 60 S.E. 423 (1908); *Covington v. Stewart*, 77 N.C. 148 (1877).

In *Mott*, the Court indicated that the affirmative act constituting acknowledgment need not occur during the twenty year period in order to defeat the plaintiff’s claim of adverse possession. Once an acknowledgment is made by a possessor, the period of adverse possession cannot begin until there has been a disavowal of the acknowledgment, that is, an expression or act inconsistent with a recognition that title is shared. Usually, the acknowledging party will also be the disavowing party since an attempt to transfer a fee simple to another is sufficient to constitute a disavowal. Conceivably, however, possession could pass from the acknowledging party to another in a manner which would not constitute a disavowal as by will or through intestacy. In such a case, the acknowledging possessor’s successor would have to disavow the acknowledgment in order to trigger the running of the required period.

8 *Town of Winton v. Scott*, 80 N.C. App. 409, 342 S.E.2d 560 (1986); See, e.g., *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964); *Sheets v. Sheets*, 57 N.C. App. 336, 291 S.E.2d 300 (1982); *Brewer v. Brewer*, 238 N.C. 607, 78 S.E.2d 719 (1953).

