PROOF OF TITLE--SUPERIOR TITLE FROM A COMMON SOURCE--SOURCE UNCONTESTED.[1]

The (*state number*) issue reads:

"Is the plaintiff's title to (*describe property*) superior to the title of the defendant?"

In this case, the plaintiff contends that *he* is the owner of (*describe property*) by virtue of a chain of [deeds] [wills] [transfer(s) by inheritance] [(*describe other transfer(s)*)][2] that began with (*name common source*) and ended with (*identify the most immediate link in chain of title to the plaintiff*). The defendant contends, on the other hand, that *he* is the owner of (*describe property*) by virtue of another chain of conveyances that began with a deed from (*name common source*) and ended with (*identify most immediate link in chain of title to the defendant*). The plaintiff and the defendant [agree] [do not contest] that (*name common source*) held valid title to (*identify property*).

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

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[1]*Meeker v. Wheeler*, 236 N.C. 172, 72 S.E.2d 214 (1952); *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889). *See also Poore v. Swan Quarter Farms*, 94 N.C. App. 530, 533, 380 S.E.2d 577, 578 (1989) (holding that plaintiffs failed to establish invalidity of the record title).

[2]For example, title passing by judgment or decree or title passing by operation of law (bankruptcy, forfeiture, etc.). In a proper case, adverse possession may be a link.

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First, that the first link in the plaintiff's chain of title from (*name common source*) is superior to the first link in the defendant's chain of title from (*name common source*).

[*Use where the first link in the plaintiff's chain is a deed*: The first link in the plaintiff's chain would be superior to the first link in the defendant's chain if the (*identify first deed from common source in the plaintiff's chain*) was [recorded in the _____ County registry prior to the recordation of the (*identify first deed from common source in the defendant's chain*)] [delivered to (*name first link in the plaintiff's chain*) prior to the death of (*name common source*)][3] [delivered to (*name first link in the plaintiff's chain*) prior to (*state other event or circumstance of transfer*)].

[*Use where the first link in the plaintiff's chain is a will*: The first link in the plaintiff's chain would be superior to the first link in the defendant's chain if (*name common source*) died with a will that was probated and such death occurred prior to (*state other event or circumstance of transfer*)].

[*Use where the first link in the plaintiff's chain is a transfer by inheritance*: The first link in the plaintiff's chain would be superior to the first link in the defendant's chain if (*name common*

[3]A prior, unrecorded deed has priority over a donee who do not pay a consideration. Thus, devisees and heirs take subject to a prior conveyance that was otherwise valid even if not recorded. *Bowden v. Bowden*, 264 N.C. 296, 141 S.E.2d 621 (1965).

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source) died without a will and such death occurred prior to (*state other event or circumstance of transfer*)].

[*Use where the first link in the plaintiff's chain is another type of transfer*: The first link in the plaintiff's chain would be superior to the first link in the defendant's chain if (*identify event giving rise to the title transfer, e.g., bankruptcy*) occurred [prior to the death of (*name common source*)] [prior to (*state other event or circumstance of transfer*)].

And Second, that each [deed] [will] [transfer by inheritance] [(*describe other conveyance*)] in the plaintiff's chain of title[4] was valid to pass title.

[*Use in connection with deeds*: Members of the jury, to convey valid title, a deed must meet certain requirements. [The parties have agreed] [The Court has already ruled] that many of these requirements are met by (*identify deed at issue*). However, [the parties have not agreed] [the Court has not already ruled] that (*state number of requirements listed below which remain for decision by the jury*) of these requirements [has] [have] been met. Whether [this] [these] (*state number to be decided*) requirement(s) [is] [are] met by

[4]There may be more than one link in the chain of title, the validity and sufficiency of which is being questioned. For each questioned link, the jury should be instructed as to the specific requirements at issue.

PROOF OF TITLE--SUPERIOR TITLE FROM A COMMON SOURCE--SOURCE UNCONTESTED. (Continued).

(*identify deed at issue*) is for you to decide. These include whether (*here select as appropriate*):

[the (*identify deed at issue*) names the grantor[5]]

[the (*identify deed at issue*) identifies a then-existing grantee[6]]

[the (*identify deed at issue*) has operative words of conveyance.[7] It is not necessary that the grantor actually use such words as "convey" or "grant" as long as the words used by the grantor show his intent to transfer his interest.[8]]

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[5]*Estis v. Jackson*, 111 N.C. 145, 16 S.E. 7 (1892); *C.f. Yates v. Dixie Ins. Co.*, 173 N.C. 473, 92 S.E. 356 (1917) (determining that where the names of the grantors are absent, but the name of the grantee is properly present, the deed is not invalid if the grantors are otherwise designated, and other certification formalities are met).

[6]*Neal v. Nelson*, 117 N.C. 393, 23 S.E. 428 (1895). *See also Campbell v. Everhart*, 139 N.C. 503, 52 S.E. 201 (1905). This statement of the law may require elaboration in certain cases, particularly where the deed is to a dead grantee "or his heirs" or to the "heirs" of a living person. Hetrick and McLaughlin, *Webster's Real Estate Law in North Carolina* (4th Ed), §§10-28 and 29. In addition, unborn infants are considered "then-existing" if they are *in esse*. *Id.* §10-27.

[7]*New Home Bldg. Supply Co. v. Nations*, 259 N.C. 681, 131 S.E.2d 425 (1963); *Pope v. Burgess*, 230 N.C. 323, 53 S.E.2d 159 (1949).

[8]*New Home Bldg. Supply Co.*, 259 N.C. at 683, 131 S.E.2d at 423. *Waller v. Brown*, 197 N.C. 508, 149 S.E. 687 (1929); *Cobb v. Hines*, 44 N.C. 343 (1853); *Armfield v. Walker*, 27 N.C. 580 (1845).

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[the (*identify deed at issue*) adequately identifies the property conveyed.[9] A description is adequate if it is sufficiently definite to identify the land being conveyed or refers to something by which the land may be identified with certainty.[10] A description is not adequate if it leaves the identity of the land in a state of absolute uncertainty and fails to refer to something by which it might be identified with certainty.[11]]

[the (*identify deed at issue*) was properly signed by the grantor (or *his* authorized agent).[12] (A signature may consist of a mark or a symbol made by the grantor with the intent that it constitute a

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[9]A deed seeking to convey an interest in land "is void unless it contains a description of the land sufficient to identify it or refers to something extrinsic by which land may be identified with certainty." *Overton v. Boyce*, 289 N.C. 291, 293, 221 S.E.2d 347, 348 (1976). An adequate description must allow the court to fit the description to the property conveyed by the deed without the aid of parol evidence that adds to, enlarges or changes the description. *See Foreman v. Sholl*, 113 N.C. App. 282, 286, 489 S.E.2d 169, 173 (1994). An inadequate description fails to allow the Court to determine that the description is "sufficient to serve as a guide to the ascertainment of the location of the land." *Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 590, 248 S.E.2d 430, 432 (1978). However, a latent ambiguity does not necessarily void the deed. If the Court determines that the "essential element" of a "description identifying" the land is present but ambiguous, (for example, a description such as "the old Fletcher Homestead" is latently ambiguous), then parol evidence may be admitted to fit the description to the land. *Foreman,* 113 N.C. App. at 286, 489 S.E.2d at 173.

[10]*Overton v. Boyce*, 289 N.C. at 293, 221 S.E.2d at 348.

[11]*Kidd v. Early*, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (1976); *Holloman v. Davis*, 238 N.C. 386, 78 S.E.2d 143 (1953). Parol evidence may be used to establish that the land at issue is the same as the land in the description. N.C.G.S. §8-39 (identifying land with parol evidence).

[12]*Devereux v. McMahon*, 108 N.C. 134, 12 S.E. 902 (1891). *See also New Hanover Rent-A-Car, Inc. v. Martinez*, 136 N.C. App. 642, 645, 525 S.E.2d 487, 491 (2000).

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signing of the deed.[13]) (A mark or symbol put on a deed by someone other than the grantor is nonetheless the grantor's signature if *he* adopts it as *his* signature.[14])]

[*Note Well: Use only for deeds executed prior to June 17, 1999:*[15] the (*identify deed*) was properly sealed.[16] (A deed is sealed when the signature of the grantor is accompanied by a mark, impression or words which indicate that he adopts his signature as his seal. The word "seal" beside (or near) the grantor's name is sufficient.[17])]

[the (*identify deed at issue*) was properly acknowledged by the grantor before an official authorized by law to take such

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[13]*Sellers v. Sellers*, 98 N.C. 13, 3 S.E. 917 (1887).

[14]*Devereux*, 108 N.C. at 136, 12 S.E. at 903.

[15]**Effective June 17, 1999, the seal requirement for deeds was eliminated. N.C.G.S. §39-6.5.** *See* N.C.G.S. §47-43.1 (eliminating requirement that powers of attorney empowering the attorney-in-fact to convey real estate be under seal); §47-18.3 (eliminating attestation and corporate seal requirement for corporate conveyances).

[16]*Williams v. North Carolina State Bd. of Educ.*, 284 N.C. 588, 201 S.E.2d 889 (1974). A recital of the seal in the instrument creates a rebuttable presumption that the seal was affixed to the original deed even though it is absent from the recorded deed. *Id.* Note, however, that there are numerous statutes which "cure" seal deficiencies (e.g., N.C.G.S. §§45-20.1, 47-51, 47-53, 47-53.1, 47-71.1, 47-108.5 and 47-108.11) and no seals were required on deeds during the March 7, 1879 to March 5, 1881 interval.

[17]*Williams v. Turner*, 208 N.C. 202, 179 S.E. 806 (1935). *See Mobile Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E.2d 809 (1979).

PROOF OF TITLE--SUPERIOR TITLE FROM A COMMON SOURCE--SOURCE UNCONTESTED. (Continued).

acknowledgments.[18] (probated and recorded).[19]]

[the (*identify deed*) was validly delivered[20] to [the grantee] [someone on the grantee's behalf].

[*Use where the plaintiff relies on a presumption of valid delivery*: You may find, though you are not compelled to do so, that a valid delivery has occurred if (*identify deed*) [is in the possession of the grantee][21] [has been probated and recorded in the public registry].[22]]

[*Use where the plaintiff relies on proof of grantor's intent to deliver, and a physical transfer*: A valid delivery

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[18]Acknowledgment is not a prerequisite to the validity of a conveyance; however, a proper acknowledgment is a prerequisite to a valid registration. N.C.G.S. §47-1. Registration is necessary to protect the grantee from third party purchasers for value and lien creditors. *Bowden v. Bowden*, 264 N.C. 296, 141 S.E.2d 621 (1965). It is also permissible for an attesting witness to appear before an officer authorized to take acknowledgments and to acknowledge under oath that the grantor signed the deed in his presence or acknowledged to him the execution thereof. N.C.G.S. §§47-12 and 47-13.

[19]The probate of a deed by the Clerk of Superior Court (prior to October 1, 1967) or the Register of Deeds (after October 1, 1967) is not a prerequisite to the validity of a conveyance. It is, however, a prerequisite to registration, *Woodlief v. Woodlief*, 192 N.C. 634, 135 S.E. 612 (1926), and registration is a prerequisite to protection from the claims of third party purchasers for value and lien creditors. N.C.G.S. §47-18. Note that, as with acknowledgments, there are many curative statutes for deficient or defective probates. *See* N.C.G.S. §§47-47 through 47-108.16.

[20]*Williams*, 284 N.C. at 593, 201 S.E.2d at 892.

[21]Valid delivery may be presumed from the fact the deed is in the possession of the grantee. *Tarlton v. Griggs*, 131 N.C. 216, 42 S.E. 591 (1902). *See also Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 54, 269 S.E.2d 117, 123 (1980).

[22]Valid delivery may be presumed from the fact the deed has been duly probated and recorded. *Williams*, 284 N.C. at 592-93, 201 S.E.2d at 892-93.

PROOF OF TITLE--SUPERIOR TITLE FROM A COMMON SOURCE--SOURCE UNCONTESTED. (Continued).

requires two things.[23] First, the grantor must intend to transfer the deed beyond his possession and beyond his legal control. Second, the grantor must actually physically transfer the deed from his possession with the intent that it shall pass to [the grantee] [someone on the grantee's behalf].[24]]]

[the (*identify deed at issue*) was accepted by the grantee in a legally adequate manner.

[*Use where the plaintiff relies on a presumption of legal acceptance*: You may find, though you are not compelled to do so, that the grantee accepted the deed [if the conveyance was beneficial to him[25] (even though the grantee [had no knowledge of the conveyance][26] [was an infant][27] [lacked mental capacity to understand what *he* was receiving][28] [*name other disability*])] [the

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[23]*Vinson v. Smith*, 259 N.C. 95, 130 S.E.2d 45 (1963); *Jones v. Saunders*, 254 N.C. 644, 119 S.E.2d 789 (1961); *Elliot v. Goss*, 250 N.C. 185, 108 S.E.2d 475 (1959).

[24]Valid delivery may be presumed from the fact the deed is in the possession of the grantee or the fact the deed is recorded. *See* Hetrick and McLaughlin, *Webster's Real Estate Law in North Carolina* (4th Ed), §§10-51 and 52. Both presumptions are rebuttable. *See Ballard v. Ballard*, 230 N.C. 629, 632, 55 S.E.2d 316, 319 (1949).

[25]*Ballard*, 230 N.C. at 632, 55 S.E.2d at 318.

[26]*Id.*

[27]*Buchanan v. Clark*, 164 N.C. 56, 80 S.E. 424 (1913).

[28]Hetrick and McLaughlin, *Webster's Real Estate Law in North Carolina* (4th Ed), §10-58, at 365, n. 287.

PROOF OF TITLE--SUPERIOR TITLE FROM A COMMON SOURCE--SOURCE UNCONTESTED. (Continued).

deed has been probated and recorded in the public registry][29] [the deed is found in the possession of the grantee][30].]

[*Use where the plaintiff relies on proof of actual acceptance*: A grantee's acceptance may be [express] [implied from the circumstances]. [Acceptance is express when, by word or conduct, the grantee assents to the conveyance for his benefit.] [Acceptance is implied where a reasonable person, under the same or similar circumstances, would conclude that the grantee accepted the deed].[31]]]

[(*state other criteria at issue and supported by the evidence*)].]

[*Use in connection with wills*: Members of the jury, to pass valid title, a will must meet certain requirements. The Court has already found that some of these requirements have been met. You must decide, by the greater weight of the evidence, whether the remaining requirements have been met. These include whether (*here select as appropriate*):

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[29]*Frank v. Heiner*, 117 N.C. 79, 23 S.E. 42 (1895).

[30]*Whitman v. Shingleton*, 108 N.C. 193, 12 S.E. 1027 (1891).

[31]*See* Hetrick and McLaughlin, *Webster's Real Estate Law in North Carolina* (4th Ed), §10-58 at 366.

PROOF OF TITLE--SUPERIOR TITLE FROM A COMMON SOURCE--SOURCE UNCONTESTED. (Continued).

[the will is legally sufficient.[32] For a will to be legally sufficient, the plaintiff must prove, by the greater weight of the evidence, (*state number*) things: (*Here give, as appropriate*, the elements of N.C.P.I.--Civil 860.05 (Attested Written Will) or N.C.P.I.--Civil 860.10 (Holographic Will).]

[the testator was competent.[33] For the testator to be legally competent, the plaintiff must prove, by the greater weight of the evidence, (*state number*) things: (*Here read, as appropriate, the elements of* N.C.P.I. 860.15 (Wills--Testamentary Capacity).]

[the will was properly probated and recorded[34]]

[(*state any other criteria at issue and supported by the evidence*)].]

[*Use in connection with transfers by inheritance*: Members of the jury, to pass valid title, a transfer by inheritance must meet certain requirements. The Court has already found that some of these

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[32]For the requirements of a legally sufficient will, see N.C.G.S. §31-3.3 (attested will), §31-11.6 (self-proving will), and §31-3.4 (holographic will).

[33]Most of the issues that arise with respect to the competency of the testator involve his age. Under N.C.G.S. §31-1, a single person must be eighteen years of age to make a valid will.

[34]N.C.G.S. §31-29. Assuming this question is answered in the affirmative, further collateral attack is limited to two narrow issues. First, does the probate order appear regular on its face, indicating that the will was proved as required by law? *Jones v. Warren*, 274 N.C. 166, 161 S.E.2d 467 (1968). Second, does the probate order show affirmatively on its fact that the court had no jurisdiction to enter the order of probate and issue letters testamentary? *In re Estate of Davis* 277 N.C. 134, 176 S.E.2d 825 (1970).

PROOF OF TITLE--SUPERIOR TITLE FROM A COMMON SOURCE--SOURCE UNCONTESTED. (Continued).

requirements have been met. You must decide, by the greater weight of the evidence, whether the remaining requirements have been met. These include whether:

(*State any requirements at issue for transfers by inheritance and supported by the evidence*).]

[*Use in connection with other types of transfer*: Members of the jury, to pass valid title, a (*describe other transfer*) must meet certain requirements. The Court has already found that some of these requirements have been met. You must decide, by the greater weight of the evidence, whether the remaining requirements have been met. These include whether:

(*State requirements at issue for any other method of passing title supported by the evidence.*)[35]]

The (*describe property*) must be included in each link in the chain of conveyances starting with the (*name the alleged first link in the plaintiff's chain*) and ending with the [deed] [will] [transfer by inheritance] [(*describe other conveyance*)] to the plaintiff.[36]

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[35]*E.g.*, title by judgment or decree, by adverse possession or by operation of law (bankruptcy, forfeiture, etc.). If the basis for title is adverse possession, see N.C.P.I.--Civil 820.00 (Advance Possession -- Holding for Statutory Period), 820.10 (Adverse Possession -- Color of Title) and 820.16 (Adverse Possession by Cotenant Claiming Constructive Ouster).

[36]*West Virginia Pulp & Paper Co. v. Richmond Cedar Works*, 239 N.C. 627, 80 S.E.2d 665 (1954). *See also Taylor v. Johnston*, 289 N.C. 690, 698, 224 S.E.2d 567, 572 (1976).

PROOF OF TITLE--SUPERIOR TITLE FROM A COMMON SOURCE--SOURCE UNCONTESTED. (Continued).

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff's title to (*describe property*) is superior to the title of the defendant, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.[37]

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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[37]In a complex case, separate interrogatories to the jury should be given for each questioned link, e.g., the 1889 deed, the 1922 will, etc.