820.00 ADVERSE POSSESSION—HOLDING FOR STATUTORY PERIOD.[1]

The (*state number*) issue reads:

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

On this issue the burden of proof is on the plaintiff.[2] This means that the plaintiff must prove, by the greater weight of the evidence, four things:

First, that (*identify land*) was actually possessed[3] by the plaintiff (and those through whom the plaintiff claims) by [deed] [will] [(written) (verbal) agreement] [inheritance].[4] Actual possession means physical possession, control and use of the land as if it were one's own property.[5] Actual possession includes any use that the land's size, character, nature, location and circumstances would permit.[6] A mere intention to claim the land is not enough.

Second, that this actual possession was exclusive and hostile[7] 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.[8] (When the possession begins with permission,[9] 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.)[10]

(*Use where there is a claim of actual ouster by a cotenant:* When two or more people possess the land by [deed] [will] [(written) (verbal)

agreement] [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).[11] 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.[12] Hostile possession begins when one of the possessors explicitly refuses to permit the other(s) 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.[13] 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.[14] 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).[15] 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 under known and visible boundaries must have been continuous and uninterrupted[16] for (*state statutory period*).[17] 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*)].[18]

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, 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. 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 under color of title (N.C. Gen. Stat. § 1-38). As against the State, possession is required 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 under color of title, *see* N.C.P.I.-Civil 820.10. *See generally Barbee v. Edwards*, 238 N.C. 215, 77 S.E.2d 646 (1953); *Alexander v. Cedar Works*, 177 N.C. 137, 98 S.E. 312 (1919); *Vanderbilt v. Chapman*, 172 N.C. 809, 90 S.E. 993 (1916); *Locklear v. Savage*, 159 N.C. 236, 74 S.E. 347 (1912); *Bland v. Beasley*, 145 N.C. 168, 58 S.E. 993 (1907).

2. "The party attempting to establish title by adverse possession has the burden of proof." *Town of Winton v. Scott*, 80 N.C. App. 409, 415, 342 S.E.2d 560, 564 (1986) (citing *Power v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953)).

3. *See State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70, later appeal after remand, 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*, 159 N.C. 236, 74 S.E. 47, (1912); *Shaffer v. Gaynor*, 117 N.C. 15, 23 S.E. 154 (1895); *see also Minor v. Minor*, 366 N.C. 526, 531, 742 S.E.2d 790, 793 (2013) (where the pleadings and evidence support a claim of adverse possession of an identified portion of a parcel of land, the trial court is obligated to give a jury instruction permitting the jury to find adverse possession of that portion).

4. "Tacking" is defined in *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (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."). *See also Vanderbilt v. Chapman*, 172 N.C. at 812, 90

S.E. at 994. *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).*

5*. 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).

6. *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).

7. *See State v. Brooks*, 275 N.C. at 180, 166 S.E.2d at 73; *Brown v. Hurley*, 243 N.C. 138, 140-41, 90 S.E.2d 324, 326 (1955); *Barbee*, 238 N.C. at 220, 77 S.E.2d at 650 (1953).

8*. 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).

9. 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).

10*. Hi-Fort, Inc. v. Burnette*, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

11*. 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).

12. *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."); *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 Properties, 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.

13. *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. Manufacturing 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.

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

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

16. *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).

17. *See supra* endnote 1 (identifying the various statutory periods).

18. *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).