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## Negligence -- Tort Liability of Public Employees

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cision; but, considering the nebulous understanding which must be generally assumed of a legal rule which has been the subject of such foggy judicial treatment, it is not imagined that the change will have any early appreciable effect on the foreclosure market. And this is the more patently true where, as in the instant case, the creditor is himself bidding in the security for the amount of the debt.

It has been noted that some of the cases were decided without regard to any recitals of proper advertisement.<sup>31</sup> It is not apparent what would have been decided in the instant case without this supporting factor. It might easily be held that a deed from a trustee even though it contained no recital of due advertisement would be *prima facie* evidence of a valid sale and conveyance. That would give the deed alone all the force given in the instant case to a deed with the usual recitals, and that is probably as far as we should go for the unusual conveyance not reciting proper advertisement.<sup>32\*</sup> Recitals do, however, add some measure of conviction. They may sometimes be erroneous. But less often will they be fraudulent because most trustees are not likely to make deliberately false statements.

That belief may argue for putting the burden in case of proved recitals back where it used to be in North Carolina, on the one disputing them, thus in effect making the claim of improper advertising an affirmative defense. Recognizing that this is a matter on which different views are understandable, it is believed that is where the burden should be even in case of a purchaser who was the secured creditor as was the present plaintiff.

### Negligence—Tort Liability of Public Employees

In a recent North Carolina case,<sup>1</sup> the defendants, employees of the North Carolina State Highway Commission, were held subject to personal liability for their negligence in operating a road sweeper so as to damage the goods of the plaintiff. Though three justices dissented as to the question of the negligence of the defendants, only one justice dissented as to the question of the immunity of the defendants because of

<sup>31</sup> *Elkes v. Interstate Trustee Corp.*, 209 N. C. 832, 187 S. E. 572 (1936); *Brown v. Sheets*, 197 N. C. 268, 148 S. E. 233 (1929); *Cawfield v. Owens*, 129 N. C. 286, 40 S. E. 62 (1901); *Lunsford v. Speaks*, 112 N. C. 608, 17 S. E. 430 (1893); *Dewberry v. Bk. of Standing Rock*, 227 Ala. 484, 150 So. 463 (1933); *Graham v. Pitts*, 53 Miss. 307 (1876). Similar general statement as to presumption of regularity in exercise of power of sale, *Bachrach v. Washington United Coop.*, — Md. —, 29 A. (2d) 822, 825 (1943).

<sup>32\*</sup> *Lunsford v. Speaks*, *supra*, note 31, seems, however, to have given more probative effect to a non-reciting deed than the present decision gives to one with recitals. The same is probably true of several others of the cases cited in that note. See also *Arey Brick & Lbr. Co. v. Waggoner*, 198 N. C. 221, 151 S. E. 193 (1930), where fraud was claimed.

<sup>1</sup> *Miller v. Jones*, 224 N. C. 783, 32 S. E. (2d) 594 (1945).

their public employment.<sup>2</sup>

It is the purpose of this note to discuss generally the personal liability of a public officer or employee for negligence in the performance of his duties to one injured thereby.

The generally established rule of law in North Carolina is that a public officer charged with the performance of a governmental duty involving *discretion* cannot be held for mere negligence with respect thereto; but he is individually liable for a breach of such duty only when he acts corruptly or with malice.<sup>3</sup> However, in proper instances a public officer may be held liable for breach of duty in the performance of his *ministerial* duties where injury has ensued. In North Carolina a public officer is not personally liable where the duty is ministerial in character and of a public nature, imposed entirely for public benefit, unless the statute creating the office expressly provides for such liability;<sup>4</sup> but if the duty imposed is one for the benefit of the individual the officer may be liable though there be no statutory provision for liability.<sup>5</sup>

While the law relative to the tort liability of public *officers* in North Carolina is well established, there seems to be a dearth of express declarations of the court as to the tort liability of public *employees*. No consideration of this question would be complete without first having examined just what does constitute a "public officer." Perhaps the leading case in North Carolina on this subject is *Nissen v. City of Winston-Salem*,<sup>6</sup> wherein the court distinguished between "employee" and "officer" by citing McQuillan<sup>7</sup> who quotes Judge Cooley: "The officer is distinguished from the employee in the greater importance, dignity and independence of his position; in being required to take an

<sup>2</sup> *Id.* at 790, 32 S. E. (2d) at 598.

<sup>3</sup> *Wilkins v. Burton*, 220 N. C. 13, 16 S. E. (2d) 406 (1941); *Old Fort v. Harmon*, 219 N. C. 245, 13 S. E. (2d) 426 (1941); *Old Fort v. Harmon*, 219 N. C. 241, 13 S. E. (2d) 423 (1941); *Moye v. McLawhorn*, 208 N. C. 812, 182 S. E. 493 (1935); *Carpenter v. Atlanta & C. A. L. Ry. Co.*, 184 N. C. 400, 114 S. E. 693 (1922); *Spruill v. Davenport*, 178 N. C. 364, 100 S. E. 527 (1919); *Hipp v. Ferrell*, 173 N. C. 167, 91 S. E. 831 (1917); *Templeton v. Beard*, 159 N. C. 63, 74 S. E. 735 (1912); *Hannan v. Grizzard*, 99 N. C. 161, 6 S. E. 93 (1888).

<sup>4</sup> *Wilkins v. Burton*, 220 N. C. 13, 16 S. E. (2d) 406 (1941); *Old Fort v. Harmon*, 219 N. C. 241, 13 S. E. (2d) 423 (1941) (No individual liability where the statute imposing the duties does not provide for personal liability.); *Noland v. Board of Trustees of Southern Pines School*, 190 N. C. 250, 129 S. E. 577 (1925); *Carpenter v. Atlanta & C. A. L. Ry. Co.*, 184 N. C. 400, 114 S. E. 693 (1922); *Hipp v. Ferrell*, 173 N. C. 167, 91 S. E. 831 (1917) (No individual liability where duties are of a public nature and imposed entirely for public benefit.); *Fore v. Feimster*, 171 N. C. 551, 88 S. E. 977, L. R. A. 1916F 481 (1916); *Hudson v. McArthur*, 152 N. C. 445, 67 S. E. 995 (1910).

<sup>5</sup> See *Hipp v. Ferrell*, 173 N. C. 167, 91 S. E. 831, 833 (1917); *Hudson v. McArthur*, 152 N. C. 445, 450, 67 S. E. 995, 997 (1910). For Notes on Liability of Public Officers in North Carolina, see (1935-36) 14 N. C. L. Rev. 307 (1941-42) 20 N. C. L. Rev. 110.

<sup>6</sup> 206 N. C. 888, 175 S. E. 310 (1934).

<sup>7</sup> 2 McQUILLAN, MUNICIPAL CORPORATIONS (2d ed. 1928) p. 38.

official oath, and perhaps give an official bond; *in the liability to be called to account as a public offender for misfeasance or nonfeasance in office*,<sup>8</sup> and usually, though not necessarily in the tenure of his position."<sup>9</sup> This statement represents the great weight of authority in the United States.<sup>10</sup>

From an examination of the statement of the court in the *Nissen* case, quoted *ante*, there is no doubt but that the defendants in the principal case are public *employees*, and not officers; this was even conceded by the dissent of Justice Schenck.<sup>11</sup> From a further examination of the above quotation (see italicized section) it seems that one of the primary distinctions between public employees and public officers is the extent of their tort liability, with the inference that the public employee is subject to a greater range of liability than an officer. In *Meares v. Wilmington*<sup>12</sup> the court says: "We think the plaintiff had her election to sue the individuals who did the work or to sue the defendants as a corporation, in which capacity they procured the work to be done, and are liable for the damage done by their agent, under the rule *respondereat superior*. \* \* \* If the work be done according to the directions of the superior, and the agent is sued and pays damage, he has his redress against the superior; if the work is done contrary to the directions of the superior, and the superior is sued and pays damage, he has his redress against the agent." In the case of *Lewis v. Hunter*,<sup>13</sup> the plaintiff's intestate was hit and run over by an automobile driven by the defendant Hunter. While the intestate was thus lying prostrate on the street, the defendant Spear, driving a police car, ran over the intestate. The defendant Spear was employed by the city to keep the police radio in the automobile he was driving in good working order; and, at the time of the accident, Spear was returning the car from his shop to the city's garage after having repaired the radio. No issue was made as to any immunity of Spear by or through the nature of his temporary employment, and the judgment against Spear was allowed to stand on appeal; but in reversing the judgment against the defendant city, the

<sup>8</sup> Italics supplied.

<sup>9</sup> *Nissen v. City of Winston-Salem*, 206 N. C. 888, 892, 175 S. E. 310, 312 (1934).

<sup>10</sup> *Wetzel v. McNutt*, 4 F. Supp. 233, 234 (S. D. Ind. 1933); *Mason v. City of Los Angeles*, 13 Cal. App. 224, 20 P. (2d) 84, 86 (1933); *Hudson v. Annear*, 101 Colo. 550, 75 P. (2d) 587 (1938); *Dade County v. State*, 95 Fla. 465, 477, 116 So. 72, 76 (1928); *Hyde v. Board of Com'rs of Wells County*, 209 Ind. 245, 255, 198 N. E. 333, 337 (1935); *State ex rel. Wickens v. Clark*, 208 Ind. 402, 408, 196 N. E. 234, 237 (1935); *Bowden v. Cumberland County*, 123 Me. 359, 366, 123 Atl. 166, 169 (1924); *City of Baltimore v. Lyman*, 92 Md. 591, 611, 48 Atl. 145, 146 (1901); *State ex rel. Cameron v. Shannon*, 133 Mo. 139, 164, 33 S. W. 1137, 1144 (1896).

<sup>11</sup> *Miller v. Jones*, 224 N. C. 783, 790, 32 S. E. (2d) 594, 598 (1945).

<sup>12</sup> 31 N. C. 73, 79 (1848).

<sup>13</sup> 212 N. C. 504, 193 S. E. 814 (1937).

court said “. . . Spear was performing duties incident to the police power of the city, whether he was engaged in repairing or testing the radio or whether in returning the automobile to the police garage after such repairing or testing, and everything that he did for the city with the automobile *in the scope of his employment*<sup>14</sup> was done as an incident to the police power of the city—a purely governmental function.”<sup>15</sup> In *Carpenter v. R.R.*<sup>16</sup> the court said: “. . . we concede the proposition that the immunity of the State from suit does not save its officers and agents from liability for a trespass committed in breach of an individual's legal rights under conditions prohibited by law, even when they act or assume to act by authority of the State.”

From these cases it is evident that though North Carolina has never actually decided the proposition before, that the rule laid down by the majority of the court in the principal case is clearly correct, and merely reiterates the established rule of other jurisdictions—that an employee of a municipality or state is personally liable to one injured by his negligence while in the discharge of his duties.<sup>17</sup>

R. I. LIPTON.

<sup>14</sup> Italics supplied.

<sup>15</sup> *Lewis v. Hunter*, 212 N. C. 504, 509, 193 S. E. 814, 817 (1937).

<sup>16</sup> 184 N. C. 400, 404, 114 S. E. 693, 695 (1922).

<sup>17</sup> Note (1926) 40 A. L. R. 1358.