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federal government between 1905 and 1907 the offense would have been justifiable in the criminal courts of this state.

That sections 104-1 and 104-7 of our General Statutes are in conflict is recognized by the court in the principal case. However, since these statutes are prospective only, and since it must be recognized that jurisdiction over lands once ceded cannot be limited at a later date, such a situation seems inescapable.

It appears clear that while the act of 1907 remains in effect the court will be forced to admit lack of jurisdiction over lands acquired before 1905 or after 1907. The writer would agree that the principal case is a lucid example of the undesirable result which the application of this statute requires the court to reach.

Therefore, it is submitted that the legislature of North Carolina enact into law a provision reserving to the courts of this state concurrent jurisdiction with the federal courts over violations of our criminal laws occurring on such tracts of land hereafter acquired. It is clear that in special cases where conditions exist for removal to federal courts the federal judiciary will have jurisdiction over the cause, regardless of whether it may accrue from occurrences taking place on lands privately owned or owned by the state or federal governments. Therefore, the reservation of concurrent jurisdiction over those indicted for crimes in violation of our criminal laws would not create inconsistencies with the purposes for which the land is acquired by the federal government, and would facilitate the speedy adjudication of the ordinary cases arising from the relations of inhabitants of the community.20

CHARLES F. COIRA, JR.

Mortgages and Security Trust Deeds—Sale Under Power—Burden of Proof as to Regularity—Recital in Trustee’s Deed

The dissent of Barnhill, J. in Jefferson Standard Life Ins. Co. v. Booger1 charges the majority (Stacy, C. J., not participating) with overthrowing sub silentio a well established and long followed rule in this state as to burden of proving proper advertisement of a foreclosure2*: sale when the trustee’s deed contains a recital of advertisement duly made. The facts were these: on default in payment of money loaned defendants by plaintiff insurance company and secured by a trust deed of real property, the trustee advertised and sold the security to plain-

20 For a general discussion of jurisdiction over federal lands within the state see Note (1929) 8 N. C. L. Rev. 299.

1 224 N. C. 563, 31 S. E. (2d) 771 (1944).

2* The word “foreclosure” is for convenience used herein to include sales under a power granted in the security instrument whether trust deed or mortgage, and the words “mortgage” and “mortagor” are also used in a correspondingly enlarged and somewhat inaccurate sense where it seems to make no difference.
tiff, giving him a deed which recited that "after due advertisement as in said (trust) deed prescribed and by law provided, the said . . . trustee . . . did expose to public sale . . ., etc." Defendants thereafter refused to vacate, and plaintiff purchaser now sues to oust them.

The defense was that the advertisement had not been published as required and recited, that the sale was accordingly void and plaintiff acquired no title. It was apparently conceded that there must be strict compliance with provisions for notice before a valid sale could take place. No point was made that the recital itself was not specific enough or that it stated a mere conclusion and not the facts, but only that the recital was not true. Some one of several required postings, it was claimed, had not been made.

On this issue of fact the trial judge squarely put the burden on the defendant mortgagor (trustor), and he did so without any apparent reference to the recitals.

The supreme court, while granting the recitals some force as evidence for plaintiff, held that the burden of proof was on plaintiff throughout and the instruction below was error.

In coming to this decision the opinion of the court premises a state-
ment that, "the recitals . . . are *prima facie* evidence of the correctness of the facts therein set forth; and the burden of proving otherwise is on the person attacking the sale . . . ." (citing *Dillingham v. Gardner* wherein substantially identical language is found).

The first part of this sentence, that about *prima facie* evidence, sounds consistent with the holding that was made, i.e., burden on the grantee in the deed to prove the truth of the fact recited, the recital itself merely saving him from nonsuit if he offered no other evidence. The last of the sentence, however, sounds as if it put the burden of proof, i.e., of finally convincing the jury that the recital was false, upon him who disputes it. In fact, that is literally what it says. Further elaboration shows that the burden meant is not the burden of ultimate proof but the burden of going forward with evidence to offset the *prima facie* case the recital has made for the deed holder. So explained, the seemingly contradictory statement is not likely to confuse. But in the *Dillingham* case, the only one cited in the opinion, that explanatory elaboration was not added; it is thus understandable why the dissenting judge uses the majority's sole citation as one of several authorities for his opposing position. The *Dillingham* case is found in turn to have relied solely on a case wherein Clark, C. J., declared that recitals are *prima facie* evidence of the fact. So far as mere form of statement is concerned, that remark is support for the actual holding in the instant case; and, if that were all there was to it, we might dismiss the matter by observing that the dissent here was mistaken and should only have raised objection to some of the language of the majority opinion and not to the decision.

But that is not all there is to it and the dissent was not mistaken. In many of the North Carolina cases where the subject was broached there was, it is true, no square decision on the real question of burden of proof as to facts recited because either the matter was not in issue or because other factors controlled the result. Thus it has been held that where a mortgagor waives his right to object to irregularities in the notice or the sale, or is estopped, as perhaps he might be by attending

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7 219 N. C. 227, 13 S. E. (2d) 478 (1941).

8* That is, the transfer of the burden of proof from attacker to proponent of the deed is a simple and understandable change and the fact that the burden on the attacker is now something other and less than it used to be is simple. But the exact nature of his new burden is another matter. There appear to be at least five possible rules as to the effect to be given evidence which creates a presumption. See *Model Code of Evidence, Am. L. Inst. (1942), Ch. 8, Presumptions, 309-312 and Rule 704*. The phrase *prima facie* evidence is not there used but it is comprehended in the situations presented as one class of presumption. See 9 *Wigmore, Evidence (3d ed. 1940) §2494*. A vast and discordant literature on this subject belies any simplicity if it does not demonstrate the futility of most of the rules as a proper part of a system of handling trials. This angle of the matter is touched upon later herein.

9 *Brewington v. Hargrove, 178 N. C. 143, 145, 100 S. E. 308, 309 (1919).*
the sale and raising no objection, he loses his case and his property without regard to burden of proof as to recited facts in the deed.\(^{10}\)

Or where the property has later been sold to a *bona fide* purchaser, the recitals may become conclusive, and no rule as to burden of proof in regard thereto has any bearing.\(^{11}\)

It is also true that in several of these cases, as in some of the cases from other courts, there is a singularly indiscriminate use of the terms *prima facie* evidence, presumption and burden of proof;\(^{12}\) usually without any disclosure of what instructions were given below. All of which taken together sheds little light on the specific matter in hand. But, notwithstanding the presence of complicating factors and murky language which obscures the holding in many cases, it is still true, as the dissent asserted, that in North Carolina we have in the past put the burden where the trial judge here put it and got reversed for doing.

In *Lunsford v. Speaks*\(^ {13}\) about half a century ago the trial court had instructed the jury "that the burden was upon the plaintiff (purchaser) to show that the power of sale contained in the mortgage had been complied with, and, having failed to do so, he could not recover."\(^{14}\)

\(^{10}\) *Lunsford v. Speaks*, 112 N. C. 608, 614, 17 S. E. 430, 431 (1893) *semble*, citing Olcutt v. Bynum, 17 Wall. 44, 21 L. ed. 70 (U. S. 1872), in which case, however, the mortgagor waited several years to protest the sale and then did so on the ground of alleged defects in the manner of sale which he was aware of all the time. In most other cases of acquiescence, waiver, or estoppel the facts were similar to the mortagor. Carroll v. Hutton, 91 N. C. 143, 145, 100 S. E. 308, 309 (1919); Norwood v. Lassiter, 132 N. C. 53, 58, 59, 43 S. E. 509, 510-511 (1903); Lamb v. Goodwin, 32 N. C. 320 (1849). And see Woods v. Klein, 223 Pa. 256, 72 Atl. 523, 525 (1909). *Cf.* Murphy v. May, 243 Ala. 66, 8 So. (2d) 442 (1942). And cf. where mortgagor did not know the facts and was held not estopped, Burnett v. Dunn Comm. & Supply Co., 180 N. C. 117, 119, 104 S. E. 137, 138 (1920); Eubanks v. Becton, 158 N. C. 231, 237, 73 S. E. 1009, 1012 (1912). The mortgagor might well be ignorant of defects in advertising. See *infra*, note 28. Reference in this footnote is to estoppel from conduct or inaction of the mortgagor and not to an estoppel from the recitals themselves (31 C. J. S. 215) on the theory that they were made by the mortgagor himself through his representative. See note 3 *infra*. And see discussion as to whose the recitals really are. Union Bk. & Tr. Co. v. Royall, 226 Ala. 670, 148 So. 399 (1933).

\(^{11}\) *Elkes v. Interstate Trustee Corp.*, 209 N. C. 832, 187 S. E. 572 (1936), (admitted); Phipps v. Wyatt, 199 N. C. 727, 155 S. E. 721 (1930); *Brewington v. Hargrove*, 178 N. C. 143, 146, 100 S. E. 308, 310 (1919); *Hinton v. Hall*, 166 N. C. 477, 480, 82 S. E. 847, 848 (1914). In *Brown v. Sheets*, et al., 197 N. C. 268, 272, 148 S. E. 233, 235 (1929), a purchaser with notice took a clear title by his purchase from a prior purchaser who was without notice. Headnote No. 3 is believed to be in error in stating that a *bona fide* purchaser at the foreclosure sale is likewise protected.


\(^{13}\) See more recently, *Lunsford v. Speaks*, 112 N. C. 608, 17 S. E. 430 (1893)
The supreme court reversed, after noting a conflict of authority elsewhere. It spoke of the title shown by plaintiff as being *prima facie*, and "based upon the general presumption in favor of meritorious parties as purchasers for value that the power has been properly exercised." This language taken alone sounds in accord with the instant case. But at the outset the court stated the principal question to be "whether the burden is on the plaintiff to show that the power of sale has been duly exercised." The trial court had said it was and the supreme court said it was not, and that without reference to recitals. Whatever uncertainties might be thought to exist because of the equivocal language of the opinion, the trial courts were warranted in understanding that thereafter they should instruct juries that the burden was on the one contesting the validity of the sale and deed given under it. Later one trial judge seems to have acted on that understanding and to have received terse and emphatic supreme court approval of his action. "Was it error in his Honor to charge that the burden of proof was on the plaintiff to show that the land was not properly advertised for sale under said mortgage?" This question "is decided against the contention of the plaintiff . . . in *Lunsford v. Speaks*."187

Granted then that the rule heretofore followed in this state has been changed by the present decision and that the change has brought North Carolina into line with what is probably the majority rule elsewhere,17* two questions remain. First, as a result of the new rule, stated but instructed them that since the purchaser had failed to show that the power of sale had been complied with, they should find the first issue, "No." Had the judge been held correct on the location of the burden his binding instruction for the defendant would have been unexceptionable.

187* "Meritorious" persons here seem to be those without knowledge of defects, *i.e.*, bona fide purchasers. But the immediate purchaser is not treated as a bona fide purchaser as that term is usually used. See comment on a mistaken headnote in footnote 11, supra.

188* Troxler v. Gant, 173 N. C. 422, 425, 92 S. E. 152, 153 (1917), also citing for the same point, Cawfield v. Owens, 129 N. C. 288, 40 S. E. 62 (1901), whose language perhaps supports the decision although it is not clear there what instruction, if any, the trial judge gave the jury on burden of proof, the defendant not having introduced any evidence of defective notice. In Brewington v. Hargrove, 178 N. C. 143, 100 S. E. 308 (1919), "the court properly refused to instruct the jury that the burden was upon the plaintiff to show that the land was advertised by notice published at the courthouse door and in three other public places," but as plaintiff was a subsequent purchaser this would appear immaterial. In Little v. Harrison, 209 N. C. 360, 183 S. E. 293 (1936) "the burden being upon the plaintiffs to establish the failure to properly advertise, the judgment for nonsuit was correctly entered," although the plaintiff mortgagor had offered some evidence, considered insufficient, to show defective advertising. Herein occurs also the same language as that so often used, that recitals are *prima facie* evidence and the burden (what burden?) is on the mortgagor to show improper advertisement. Cf. Edwards v. Hair, 215 N. C. 662, 2 S. E. (2d) 859 (1939), where the burden of proof was held to be on the mortgagor who claimed that foreclosure was after the statute of limitations had run. See also Price v. Reeves, 91 S. W. (2d) 862, 865 (Ft. W. Ct. App., Tex., 1936).

17* Cleveland v. Bateman, 21 N. M. 675, 695, 158 Pac. 648, 654 (1916); Crabtree v. Price, 212 Ala. 387, 102 So. 605 (1924); Horton v. Little, 176 Ala. 267, 57
what does the trial judge now do? And second, is the change a desirable one? As to the first of these questions, much has been written (and not all of it harmonious) on the general subject of *prima facie* evidence, presumptions and burden of proof. The intricacy and confusion staggers the reader, often perhaps the writer. Within the limits of this note it could not be hoped to answer the first question adequately; but for some light on the present application of the doctrine we turn to the principal opinion itself and undertake with not too great assurance to elaborate.

"The defendants," said the court, "had a right to introduce evidence to rebut the *prima facie* case made out by the recitals in the trustee's deed or to decline to introduce evidence and thereby assume the risk of an adverse verdict on plaintiff's evidence. The most that a *prima facie* case does, when made out, is to warrant but not to compel a verdict." It seems clear under this and succeeding portions of the opinion that when the trustee's deed with its recital of proper advertising had been introduced, the grantee, notwithstanding his having the burden of proof, might rest without risk of nonsuit or of a directed verdict for the attacker at that point. In other words, absent opposing evidence, the judge would then send the case to the jury presumably with the statement that they might find the recital to be true and the recited events to have taken place (but not that they must so find). If, then, they

So. 851 (1911); McSwain v. Young, 111 Miss. 688, 72 So. 129(1) (1916), but here the purchaser's own additional evidence rebutted the presumption; Dryden, Admr. v. Stephens, 19 W. Va. 1, 14-17 (1881) (involved subsequent purchaser); criticizing dictum in Gibson’s Heirs v. Jones, 5 Leigh 370 (Va. 1834); Burke v. Adair, 23 W. Va. 139, 160 (1883). Tartt v. Clayton, 109 Ill. 579, 585 (1884) seems in accord although the opinion like that in the instant case speaks both of *prima facie* evidence from recitals and burden of proof on the attacker, and there the appeal was from a judge sitting in equity. The matter is not later clarified in that state because only sale under judicial proceedings has been lawful there for many years. But evidently that system did not prove satisfactory. See Note (1940) 8 U. Chi. L. Rev. 90. See generally but not over helpfully, 3 Jones, Mortgages (8th ed. 1928) §§2370, 2437; 1 Devlin, Deeds (3d ed. 1911) §425; 2 Wilsie, Mortgage Foreclosure (5th ed., 1939) §§895, 898; 41 C. J., Mortgages §1449; 37 Am. Jur., Mortgages, §710. Cf. Niles v. Ransford, 1 Mich. 338, 341 (1849) (“The person so foreclosing must see to it that he in all material matters keeps within the powers given to him, for there are no legal presumptions or intendments raised by the law to support his proceedings, as might be if the sale was made pursuant to a decree and order of a court of chancery.”); Wehrum v. Wehrum, 179 App. Div. 814, 167 N. Y. S. 295, 297 (1st Dep't 1917).


Although compare language of Nash, J. in State v. Floyd, 35 N. C. 382, 386 (1852) quoted in McCormick, Charges on Presumptions, (1927) 5 N. C. L. Rev. 289, 294; also language quoted in the instant case from Brock v. Metropolitan L. Ins. Co., 156 N. C. 112, 116, 72 S. E. 213, 215 (1911), that “the *prima facie* case is only evidence, *stronger, to be sure, than ordinary proof...*” (Italics mine). This, taken alone, would suggest that ‘a verdict should be directed for the proponent in absence of any rebutting evidence. And see note 23, infra.
did so find, it would mean that the grantee would have carried his burden of convincing them by the same facts which, serving as a *prima facie* case, got him to the jury in the first place. If, after the grantee rested as above, the attacker offered some evidence tending to throw doubt on the truth of the recitals but not so "clear and convincing" as to call for a directed verdict in his favor, the trial judge would let the jury know that they must be finally persuaded that the facts recited had taken place and that they might consider the fact that they were so recited as well as the testimony contra (e.g., that a witness recalled seeing no notice posted on a certain store door although he traded there regularly throughout the period) in coming to their verdict.

From the above, it appears that we have not only abandoned the old doctrine that the burden of finally persuading the jury was on the attacker of the deed, but we have swung past an intermediate position suggested by the language of some cases, that proof of a deed with recitals created a presumption of the happening of the recited events which the attacker must dislodge by the greater weight of his evidence, a position sometimes known as the "Pennsylvania rule." It is definitely excluded by the present opinion as it is by Wigmore in the slogan, "the burden of proof never shifts."

In our transition we may even have swung by another intermediate position less positive than the Pennsylvania rule, that of giving to the *prima facie* case the force of conclusiveness in the absence of any evidence by the mortgagor. If the deed with recitals is introduced and proved genuine and both parties then rest, the trial judge now should apparently not instruct the jury to find for the plaintiff or possibly not even to find for plaintiff if they believe the evidence, but only to find for the plaintiff if they believe *from* the evidence, including the trustee's recitals, that the sale was duly advertised.*

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* To go further than this and include any instruction to the effect that the recitals created a *prima facie* case or a presumption of the happening of the events would be to run the risk of error. See McCormick, *Charges on Presumption and Burden of Proof* (1927) 5 N. C. L. Rev. 289, 299-300.


‡ WIGMORE, *Evidence* (3d ed. 1940) §2489.

§ As we seem to have done in several trustee deed cases heretofore. Elkes v. Interstate Trustee Corp., 209 N. C. 832, 184 S. E. 826 (1936), nonsuit of mortgagor who offered no evidence; Little v. Harrison, 209 N. C. 360, 183 S. E. 293 (1936), same where insufficient evidence; Biggs v. Oxendine, 207 N. C. 601, 178 S. E. 216 (1935), verdict directed for purchaser where no evidence to rebut presumption of regularity in sale. The record on appeal in Dillingham v. Gardner, 219 N. C. 227, 13 S. E. 478 (1941), seems to show the same doctrine was applied there also. Accord, Crabtree v. Price, 212 Ala. 387, 102 So. 605 (1924); Clark v. Womack, 195 Ark. 895, 95 S. W. (2d) 891 (1936); Cleveland v. Bateman, 21 N. M. 675, 158 Pac. 648 (1916).

* The last part of this sentence contradicts, of course, the cases in footnote 23 and would seem to give to the presumption only the weight of an inference (see Note (1943) 17 So. CAL. L. Rev. 48, 50) such as e.g. in *res ipsa* cases (see Note (1941) 19 N. C. L. Rev. 617, 620). The statement is based on language above.
That brings us to the final question: Is the change a desirable one? On the whole it is believed not. The contest is commonly between the mortgagor and the immediate purchaser. A purchaser is usually expected to investigate the title to land he buys and to take subject to defects which a reasonable investigation would disclose. But it may be a different thing to say that he should tramp about the community to see if notice of a trustee's sale had been tacked up "at Holshouser's Store" and, what is worse, to assure himself that it was tacked up there thirty days previous and not removed after posting for any time during the required interim or take the risk of a contrary jury verdict on that matter. The mortgagor is interested in holding his property. It may not be asking too much of him to require him to do the walking and the looking and to raise objections at the sale if objections are in order.

But this line of argument proves too much. It would not only put the burden on the mortgagor to prove that the preliminaries were not proper. It would make the sale conclusive against him unless he appeared and gave notice of the deficiencies in advertising. It would go further even than the estoppel earlier mentioned which might arise if he attended the sale and offered no protest. It would require him to come and protest. Considering that North Carolina, in line with most quoted from the opinion that the attacker might decline to introduce and take the risk of an adverse verdict. If the trial judge could direct outright for the proponent, there would seem to be not just a risk but a certainty of an adverse verdict. And this would be true even should the judge's charge be, "If you believe the evidence you should find for the proponent" (on this issue), since, absent a claim of forgery, there could be no room for disbelieving that the recitals were made.

The statement in the text is also based on the remaining language quoted, that even when a prima facie case is made out it only warrants but does not compel a verdict. That the distinction between warranting and compelling a verdict is not always definitely present to the mind of the judges, compare the language of Walker, J., in Winslow v. Norfolk Hardwood Co., 147 N. C. 275, 277, 60 S. E. 1130, 1131 (1908), "takes the chance of an adverse verdict," with language from Elliott on Contracts quoted by the judge a few lines later in the same paragraph, "when the actor has . . . made a prima facie case, the other party is compelled in turn to go forward or lose his case." (Italics mine.)

It must be admitted that the general rule gives to a presumption based on believed facts (often referred to as a prima facie case) the effect of conclusiveness when no opposing evidence is introduced, 9 Wigmore, op. cit. §2491. And the statement often made that a presumption has no force as evidence means that it has no such artificial force as against actual opposing evidence. The fact which gives rise to the presumption continues to have for the jury its normal persuasive force. In the language of Wigmore in the section just cited, "they (the jury) may estimate it for just such intrinsic effect as it seems to have under all the circumstances."

Hinton v. Hall, 166 N. C. 477, 480, 82 S. E. 847, 848 (1914).

Although see Campbell, J. in a very lucid opinion, Graham v. Fitts, 53 Miss. 307, 313 (1876), that if a sale were to be invalidated by the acts of mischievous people in pulling down notices "titles would be so insecure under it as to forbid competition at such sales and lead to the sacrifice of property." And see Pac. States Sav. & Loan Co. v. O'Neill, 7 Cal. (2d) 596, 61 P. (2d) 1160 (1936).

Subra, text at footnote 10.
states, does not require special notice to the mortgagor or his privies, this would seem to be an unwarranted hardship. In some mortgages it has been provided that recitals in a trustee's deed should be conclusive on the mortgagor, but it is doubtful if full effect would be given to this severe provision. Of course, mortgagors as a class stand to benefit by higher bids and bidders are encouraged to go up by rules which diminish the possible defects of titles they acquire at foreclosure sales and reduce the burden of later proving their validity. The rule we have just abandoned and the one we now adopt, both give the buyer some assistance in sustaining his title. But while the assurance provided buyers by our former rule was real and substantial, that under the instant case is negligible. If the difference were well understood, it is quite likely that some future bidding would be chilled by this de-

Craig v. Price, 210 N. C. 739, 188 S. E. 321 (1936); Biggs v. Oxendine, 207 N. C. 601, 178 S. E. 216 (1935); 41 C. J. Mortgages, §§1397-1399. The Model Power of Sale Mortgage Foreclosure Act, §3(1) (d), (e), HANDBOOK, NAT’L CONF. COM’RS ON UNIFORM STATE LAWS, (1940) 258, provides for notice to both the mortgagor and occupant, and for recording affidavits of due notice given. Id. §7. Though, except as to subsequent bona fide purchasers, it makes the certificate of sale only prima facie evidence of compliance with requirements of law. Id. §54. See also note, Proposed Illinois Legislation Providing for Foreclosure of Mortgages by Means of Power of Sale, (1940) 8 U. CHI. L. REV. 90, 92. It may be that the best solution of the problem would be to require notice to all such interested parties and then cut off their rights to upset the sale for irregularities in advertising, etc., after a specified reasonable period. See Patton, LAND TITLES (1938) §234 at page 765, footnote 251, urging a procedure in court following sale to settle the validity of the sale. (Citing statutes of Maryland and Minnesota.) And see, interpreting a statute which requires mortgagor to be named in advertisement for foreclosure, Melchor v. Casey, 173 Miss. 67, 161 So. 692 (1935).

This provision seemingly common in the Far West appears not to have been generally given full effect in the cases even in that area. Zadar v. Duke, 212 Cal. 621, 299 Pac. 524 (1931); Seidell v. Tuxedo Land Co., 1 Cal. App. 406, 36 P. (2d) 1102 (1934); Petring v. Kuhs, 350 Mo. 1197, 171 S. W. (2d) 653 (1943) (conclusive except where mortgagor entitled to equitable relief); Holland v. Pendleton Mfg. Co., 61 Cal. App. (2d) 570, 143 P. (2d) 493, 496 (1943).

An English variant is a provision in the mortgage that the purchaser shall not have to see that the stipulated notice (to the mortgagor) has been given. Held, however, no protection to one with knowledge of the want of such notice. Parkinson v. Hanbury, 1 Dr. & Sm. 143, 62 Eng. Rep. 332 (Ch. 1860). See Annotation (1917) 31 D. L. R. 300, 301.

It is often provided that the recitals shall be prima facie evidence of what they state. Scott v. Lambert, 24 Colo. App. 260, 132 Pac. 1145 (1913); Melchor v. Casey, 173 Miss. 67, 161 So. 692 (1935); Phipps v. Wyatt, 199 N. C. 727, 155 S. E. 721 (1930). This adds nothing to their force in most states. Scott v. Lambert and Melchor v. Casey, both supra. Statutes sometimes enact some similar rule. Petring v. Kuhs, 350 Mo. 1197, 171 S. W. (2d) 653 (1943) ("Prima facie evidence of their truth."")Court says evidence to rebut must be "clear and satisfactory," and from what follows it appears that it must be more than a mere preponderance. This sounds like putting the ultimate burden of proof on the mortgagor and then some]. Ashworth v. Cole, 180 Va. 108, 21 S. E. (2d) 778 (1942). See Miller v. Shaw, 103 Ill. 277, 285-286 (1882) (May refer to evidential effect of abstract rather than recitals as headnote states); Deutsch v. Haba, 135 App. Div. 756, 119 N. Y. Supp. 911 (2d Dep't 1909) (Construing statute by which affidavits relative to notice, etc., are made "presumptive evidence of the matter of fact stated.").

On the other hand, theoretically at least, carrying out requirements relative to advertising and notice will be likely to get more people out.
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. 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. 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, 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

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32Lunsford 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.