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Footnotes which contain material other than a mere listing of sources and authorities are indicated throughout the Notes and Comments section of this REVIEW *by an asterisk placed after the footnote number.*

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NOTES AND COMMENTS

Practice and Procedure—Evidence to be Considered on Motion to Nonsuit—North Carolina Rule*

What evidence is to be considered by the trial court on motion of nonsuit? The North Carolina Supreme Court in the recent case of *Atkins* v. *White Transportation Company*[1] has attempted to collect and clarify the rules pertaining to this important question.

In the principal case plaintiff's driver was operating a loaded truck at a speed approximating 25 miles per hour over a street 25 to 30 feet wide within 20 feet of defendant's bus ahead. As defendant's bus began to stop plaintiff's driver applied his brakes, but he was so near the

* The author wishes to thank Mr. Francis E. Winslow of the Rocky Mount, North Carolina, Bar, for his assistance in the preparation of this Note.

[1] 224 N. C. 688, 32 S. E. (2d) 208 (1944) (4-3 decision).

bus and traveling at such a rate of speed he could not stop the truck or turn so as to avoid collision. Plaintiff alleged negligence in the operation of the bus; the defendant denied negligence, pleading contributory negligence on the part of the truck driver. On motion of nonsuit made at the conclusion of all the evidence, it was held on appeal that such motion should have been granted. The plaintiff's driver was operating the truck so near the bus and at such a rate of speed that he created a hazard such as was his duty to avoid.

Cases in North Carolina are legion involving the question of evidence to be considered on motion of nonsuit. There is some apparent conflict of authority, but not a real one, on this issue. A careful analysis of the cases reveals that practically all the cases fall within well-defined limits under the statute.[2]

The Hinsdale Act[3] as amended expressly provides for motion of nonsuit at two points in the trial:

(1) At the conclusion of the plaintiff's evidence; or

(2) If the motion of nonsuit at the end of the plaintiff's evidence is overruled, the defendant may (a) either except and, upon adverse verdict and judgment, appeal immediately, or (b) waive the exception and introduce his evidence; then again move to dismiss after all the evidence is in. If this motion is refused, he may except; and after the jury has rendered its verdict, he has the benefit of the latter exception on appeal. When the defendant chooses to offer evidence after the court's refusal to grant a motion of nonsuit at the close of plaintiff's evidence, only the exception taken at the conclusion of all the evidence can be considered on appeal.[4] Furthermore, the motion actually must be made at the conclusion of defendant's evidence, else he cannot complain.[5] Where such motion is made, it is discretionary with the trial judge, before passing on it, to allow the plaintiff to introduce additional evidence.[6]

The trial court may grant a nonsuit on its own motion at the end of the defendant's evidence where the evidence would justify a directed verdict, since both a directed verdict and motion as of nonsuit have the same legal effect.[7] And in such case the court must consider the evidence as a whole without passing on its weight or probative force.[8]

[2] N. C. GEN. STAT. §1-183.

[3] *Ibid.*

[4] Choate Rental Co. v. Justice, 211 N. C. 54, 188 S. E. 609 (1936); Harrison v. N. C. Ry. Co., 194 N. C. 656, 140 S. E. 598 (1927); Nash v. Royster, 189 N. C. 408, 127 S. E. 356 (1925).

[5] Choate Rental Co. v. Justice, 211 N. C. 54, 188 S. E. 609 (1936).

[6] Featherston v. Wilson, 123 N. C. 623, 31 S. E. 843 (1898); *accord*, Pearson v. Simon, 207 N. C. 351, 177 S. E. 124 (1934) (Here the rights of the defendants under this section were not affected by the action of the court.).

[7] Ferrell v. Metropolitan Life Ins. Co., 208 N. C. 420, 181 S. E. 327 (1934).

[8] Lamb v. Perry, 169 N. C. 436, 86 S. E. 179 (1915).

But the judge cannot reserve his ruling on motion of nonsuit until after rendition of a verdict by the jury, then set aside the verdict for insufficiency of evidence *as a matter of law* and grant the motion of nonsuit made at the close of all the evidence.[9*] However, he can set the verdict aside as a matter within his discretion.[10]

Where the defendant has pleaded a counterclaim and moves at the conclusion of plaintiff's suit for a judgment of nonsuit, the defendant thereby submits to a voluntary nonsuit on his counterclaim.[11] But where the answer pleads counterclaim, the plaintiff may not take a voluntary nonsuit over the defendant's objection.[12] In a case where the defendant sets up a counterclaim arising out of a contract declared upon by the plaintiff, the defendant may not withdraw his counterclaim over exception by the plaintiff in order to enter a motion as of nonsuit.[13]

In the *Atkins* case,[14] *supra,* Mr. Justice Barnhill and Chief Justice Stacy in concurring opinions, seem to lay down five principal rules for determining the evidence to be considered on motion of nonsuit under the Hinsdale Act. The statute provides that the motion is to be decided upon consideration *of all the testimony,* but the following rules tend to clarify the meaning of the Act:

1. *Generally speaking, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment and every reasonable inference to be drawn therefrom.*[15] A few of the older cases permit only the plaintiff's evidence to be considered on motion of nonsuit,[16] but the court has long since aban-

[9*] Jones v. Dixie Fire Ins. Co., 210 N. C. 559, 187 S. E. 769 (1936); Batson v. City Laundry Co., 202 N. C. 560, 163 S. E. 600 (1932); same case, 205 N. C. 93, 170 S. E. 136 (1933); same case, 206 N. C. 371, 174 S. E. 90 (1934); same case, 209 N. C. 223, 183 S. E. 413 (1936); *accord,* Riley v. Stone, 169 N. C. 421, 86 S. E. 348 (1915) (Same rule applies where judge believes the verdict contrary to the evidence.); Wilson Cotton Mills v. Randleman, 115 N. C. 475, 20 S. E. 770 (1894) (An exception that there is no evidence on an issue can only be taken before the verdict.). See Winslow, *Transfer of Rule-Making Power from Legislative to Judicial Department, A Responsibility of the Bar* (1942) 21 N. C. L. REV. 16.

[10] Lee v. Penland, 200 N. C. 340, 157 S. E. 31 (1931); State v. Kiger, 115 N. C. 746, 20 S. E. 456 (1894).

It is interesting to note that the federal rule is *contra.* See FEDERAL RULE 50(b).

[11] Bourne v. Sou. Ry. Co., 224 N. C. 444, 31 S. E. (2d) 382 (1944).

[12] Aetna Ins. Co. v. Griffin, 200 N. C. 251, 156 S. E. 515 (1931); Yellowday v. Perkinson, 167 N. C. 147, 83 S. E. 341 (1914).

[13] McGee v. Frohman, 207 N. C. 475, 177 S. E. 327 (1934).

[14] Note 1, *supra.*

[15] Plumidies v. Smith, 222 N. C. 326, 22 S. E. (2d) 713 (1942); Queen City Coach Co. v. Lee *et al.,* 218 N. C. 320, 11 S. E. (2d) 341 (1940); Barnes v. Town of Wilson, 217 N. C. 190, 7 S. E. (2d) 359 (1940); Coltrain v. Atl. Coast Line Ry. Co., 216 N. C. 263, 4 S. E. (2d) 853 (1930) (This is true whether the evidence is offered by the plaintiff or elicited from the defendant's witnesses.); White v. N. C. Ry. Co., 216 N. C. 79, 3 S. E. (2d) 310 (1939).

[16] See, for example, Allen v. Gardner, 182 N. C. 425, 428, 109 S. E. 260, 262 (1921); Brown v. N. C. Ry. Co., 172 N. C. 604, 607, 90 S. E. 783, 785 (1916); McAtee v. Branning Mfg. Co., 166 N. C. 448, 455, 82 S. E. 857, 865 (1914).

doned this theory. Today, where the evidence of the plaintiff and defendant is *conflicting,* the court disregards the evidence of the defendant and uses such expressions as ". . . only the evidence which is favorable to the plaintiff may be considered";[17] or ". . . the often repeated rule that the evidence which makes for the plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff";[18] or ". . . the plaintiff's evidence (on counterclaim) is disregarded, as the jury believed the evidence of the defendants."[19] On defendant's motion of nonsuit at the close of all the evidence, all of the plaintiff's evidence must be taken as true,[20] and if there is any substantial evidence, more than a scintilla, to support the plaintiff's allegations, then the case must be submitted to the jury.[21] The court must consider the evidence as a whole without passing on its weight or probative force,[22] and the mere fact that there are contradictory statements made by the plaintiff's witnesses is not sufficient grounds for sustaining a motion for nonsuit, provided there is any favorable evidence for the plaintiff.[23*]

2. *The evidence of the defendant may be considered when it is favorable to the plaintiff.* Although the statute requires a consideration of the whole evidence, only that part of the defendant's evidence which is favorable to the plaintiff can be taken into consideration on motion of nonsuit, since otherwise the trial court would necessarily pass upon the evidence, the credibility of which rests solely with the jury. In passing on the motion of nonsuit, the trial court's power is limited to ascertaining whether there is any evidence at all which has any probative value in any or all of the facts and circumstances offered in the guise of proof.[24]

3. *When not in conflict with plaintiff's evidence, the defendant's evidence may be used to explain or make clear the evidence offered by*

[17] Calhoun v. Nantahala Power and Light Co., 216 N. C. 256, 260, 4 S. E. (2d) 858, 861 (1939).

[18] Bechtler v. Bracken, 218 N. C. 515, 521, 11 S. E. (2d) 721, 724 (1940).

[19] Queen City Coach Co. v. Lee, 218 N. C. 320, 324, 11 S. E. (2d) 341, 343 (1940).

[20] Williams v. May, 173 N. C. 78, 91 S. E. 604 (1917).

[21] Calhoun v. Nantahala Power and Light Co., 216 N. C. 256, 4 S. E. (2d) 858 (1939).

[22] Lamb v. Perry, 169 N. C. 436, 86 S. E. 179 (1915).

[23*] Gunn v. Blue Bird Taxi Co., 212 N. C. 540, 193 S. E. 747 (1937); Matthews v. Cheatham *et al.*, 210 N. C. 592, 188 S. E. 87 (1936); Dozier v. Wood, 218 N. C. 414, 181 S. E. 336 (1935); Barnett v. Smith, 171 N. C. 535, 88 S. E. 770 (1916). The reason for this rule is that the jury must pass upon the evidence, and the judge is without power to take it away. Dickerson v. Reynolds, 205 N. C. 770, 172 S. E. 402 (1934).

[24] Wall v. Bain, 222 N. C. 375, 378, 23 S. E. (2d) 330, 331 (1942). *See* Davidson v. Western Union Telegraph Co., 207 N. C. 790, 792, 178 S. E. 603, 604 (1935). Also see Tarrant v. Pepsi Cola Bottling Co., 221 N. C. 390, 20 S. E. (2d) 565 (1942) and Means v. Carolina Central Ry. Co., 126 N. C. 424, 35 S. E. 813 (1900), which Chief Justice Stacy cites to support the above rule.

the plaintiff. This rule applies even though the evidence necessarily is not favorable to the plaintiff, provided, however, the evidence nowise conflicts with the plaintiff's.[25]

4. *The evidence of the defendant may be considered when, taken in connection with plaintiff's evidence, it makes manifest natural or physical circumstances which bar recovery.*[26] Under this rule, though there is some conflict of testimony, still if the facts and circumstances clearly show that the cause of the accident was due to plaintiff's negligence, the court can order a nonsuit.[27*]

Originally in North Carolina there was considerable doubt under the statute whether a plea of contributory negligence—the burden of such issue being on the defendant—could be taken advantage of on motion to nonsuit,[28] but it is now well settled that such may be done when the contributory negligence of the plaintiff is established either by the plaintiff or by the defendant.[29]

5. *The defendant's evidence may be considered when, taken in con-*

[25] Gregory v. Travellers Ins. Co., 223 N. C. 124, 25 S. E. (2d) 398 (1943); Godwin v. Atl. Coast Line Ry. Co., 220 N. C. 281, 17 S. E. (2d) 137 (1941); Haynes Funeral Home v. Dixie Fire Ins. Co., 216 N. C. 562, 5 S. E. (2d) 820 (1939); Sellars *et al.* v. First Nat. Bank of Henderson, 214 N. C. 300, 199 S. E. 266 (1938); Harrison v. N. C. Ry. Co., 194 N. C. 656, 140 S. E. 598 (1927); State v. Fulcher, 184 N. C. 633, 113 S. E. 769 (1922).

[26] Austin v. Overton, 222 N. C. 89, 21 S. E. (2d) 887 (1942); Powers v. Sternberg, 213 N. C. 41, 195 S. E. 88 (1938).

[27*] In Austin v. Overton, 222 N. C. 89, 21 S. E. (2d) 887 (1942) defendant, whose car had no tail light, slowed his car from 45 miles per hour to about 25 and turned left, whereupon plaintiff's car, which was trailing closely behind, struck defendant's car. The accident occurred on a straight highway 30 feet wide. There was a conflict in the testimony as to whether or not defendant's car came to a complete stop and whether or not defendant had said that it was his fault. The court held that the plaintiff had proved himself out of court by showing that his negligent act of trailing the car so closely contributed to the injury received.

In Powers v. Sternberg & Co., 213 N. C. 41, 195 S. E. 88 (1938) plaintiff was riding with a friend, who was driving on icy roads. They approached a wrecked automobile. Evidence of the estimated speed of approach conflicted—between 25 and 60 miles per hour. There was conflicting testimony also as to whether or not defendant flagged the driver of the car in which plaintiff was riding. Nevertheless, the car in which plaintiff was riding skidded 25 or 30 feet and struck defendant's parked truck with such an impact that the plaintiff's car was knocked five to ten feet. The court held that the force with which the driver of plaintiff's car struck the defendant's parked car established the negligence of the driver of the car in which plaintiff was riding as the proximate cause of the accident. The driver admitted that he could have stopped but for the ice and he knew the condition of the road.

Mr. Chief Justice Stacy applied this rule to the principal case.

[28] Powell v. Sou. Ry. Co., 125 N. C. 370, 34 S. E. 530 (1899); Whitley v. Sou. Ry. Co., 122 N. C. 987, 29 S. E. 783 (1898) (Note in these cases cited the motion was made at the conclusion of the plaintiff's evidence.).

[29] Godwin v. Atl. Coast Line Ry. Co., 220 N. C. 281, 17 S. E. (2d) 137 (1941); Hayes v. Western Union Telegraph Co. *et al.*, 211 N. C. 192, 189 S. E. 499 (1937); Hinshaw v. Pepper, 210 N. C. 573, 187 S. E. 786 (1936); Lincoln v. Atl. Coast Line Ry. Co., 207 N. C. 787, 178 S. E. 601 (1935); Baker v. Atl. Coast Line Ry. Co., 205 N. C. 329, 171 S. E. 342 (1933); Thompson v. Purcell Const. Co., 160 N. C. 390, 76 S. E. 266 (1912); Neal v. Carolina Central Ry. Co., 126 N. C. 634, 35 S. E. 117 (1900).

nection with plaintiff's evidence, it puts an end to the suit as a matter of law. Note that the rule states "in connection with plaintiff's evidence." These words imply that such evidence of defendant must not conflict with that of plaintiff, but rather explain it.[30]

It appears that these rules may be condensed into two major premises: (1) Where the evidence of the plaintiff and defendant is in conflict, on motion of nonsuit by the defendant the court shall disregard the evidence of the defendant and consider only that evidence of the plaintiff which is favorable to his cause of action. (2) Where the defendant's evidence shows affirmative facts and circumstances which do not conflict with the plaintiff's evidence, but merely serve to explain and clarify and complete the picture as drawn by plaintiff's evidence, the court takes into consideration all the evidence favorable to the plaintiff, and also the independent facts and circumstances proven by the defendant, which are uncontradicted by the plaintiff.

There is no essential conflict between the two lines of cases today. While the court has used expressions such as ". . . the reviewing court cannot consider the evidence of the defendant, whether contradicted or uncontradicted, except in such respect as it may tend to support plaintiff's case," they were used in cases in which they were unnecessary to a decision and were, therefore, obiter dicta.[30a] Where there is no evidence on the part of defendant of independent facts and circumstances unchallenged by the plaintiff, the defendant's evidence is disregarded; and there is no occasion to explain that if there had been such evidence, it would have been considered. Neither line of cases attempts to overrule the other line, and both together develop a sound rule. Neither line of cases, if considered as overruling the other, would express the intent of the legislature as set forth in the Hinsdale Act as amended.

Under the constitution of this state, the rule-making power for courts inferior to the Supreme Court is vested, initially at least, in the General Assembly,[31] and its statutes are binding on the courts. The Supreme Court has expressed the intent of the legislature in many cases. In *Parlier* v. *Sou. Ry. Co.*, the first case to be decided after the 1901 amendment to the Hinsdale Act, Chief Justice Furches said: "But at the close of all the evidence, he (defendant) might renew his motion to dismiss, and this motion stood upon a consideration of the whole evidence introduced by the plaintiff and the defendant."[32] The late Judge Adams in *Butler* v. *Holt-Williamson Manufacturing Co.* said that

[30] Crawford v. Crawford, 214 N. C. 614, 200 S. E. 421 (1939); Hare v. Weil, 213 N. C. 484, 196 S. E. 869 (1938).

[30a] Mitchell v. Saunders, 219 N. C. 178, 181, 13 S. E. (2d) 242, 244 (1941).

[31] See N. C. GEN. STAT. §§7-20, 7-21.

[32] 129 N. C. 262, 263, 39 S. E. 961, 962 (1901).

upon defendant's exception to denial of both motions to dismiss: ". . . all the evidence introduced at the trial must be accepted as true and construed in the light most favorable to the plaintiff."[33] Chief Justice Stacy in *Davidson* v. *Telegraph Co.* said: "The defendant's evidence, which conflicts with that tending to support plaintiff's claim, is not to be considered on demurrer or motion of nonsuit."[34] And in *Lynn* v. *Pinehurst Silk Mills* Justice Clarkson wrote: "An exception to a motion to dismiss in a civil action, taken after the close of plaintiff's evidence, and renewed by the defendant after the introduction of its own evidence, does not confine the appeal to plaintiff's evidence alone."[35]

By express terms of the statute as construed by the Supreme Court, the unchallenged evidence of the defendant, serving to explain and clarify and fill out the facts of the case, must be considered on such a motion. When each decision is analyzed on the basis of its facts, there are no *modern* decisions of our court to the contrary. If so, it must have been an inadvertence.

The rule is also in accord with reason and logic. Where the burden of proof is on a defendant to prove an affirmative defense and his evidence is unchallenged by the plaintiff, and he moves for a peremptory instruction on the ground that only one inference can be drawn, and that in his favor, the court considers his evidence—all of which is uncontradicted by the plaintiff.[36] Since this is true, it would be highly illogical to hold that where the burden is upon the plaintiff, rather than the defendant, no part of the defendant's evidence may be considered on a motion of nonsuit or to direct a verdict when such evidence is not contradicted or impeached.

The effect of defendant's evidence on motion to nonsuit can be considered for purposes other than to strengthen the plaintiff's case. If it could not, there could never be a nonsuit at the close of all the evidence in a court which is intellectually honest. If a plaintiff's case is strong enough to overrule the first motion, it could never be weakened, but only strengthened, by defendant's evidence. Unless the purpose of the statute was to permit the defendant to break down plaintiff's case, if he can do so by evidence unchallenged and unimpeached, which explains away the inferences which the court first decided made a prima facie case, then what was its purpose? Before the statute when a defendant demurred to the plaintiff's evidence and the demurrer was overruled, he had the election to keep his exception, put on evidence and go to the jury. He could not do both. It has been said that the statute

[33] 182 N. C. 547, 550, 109 S. E. 559, 560 (1921).
[34] 207 N. C. 790, 792, 178 S. E. 563, 564 (1921).
[35] 208 N. C. 7, 11, 179 S. E. 11, 13 (1935).
[36] Warren v. Pilot Life Ins. Co., 217 N. C. 705, 9 S. E. (2d) 479 (1940); McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §574 (1929).

changed the rule so that a defendant can now put on his evidence and still preserve his exception to denial of nonsuit,[37*] but this is no longer true. The first exception is waived. It is only the second exception which is preserved.[38] And under the Hinsdale Act, as amended or in its previous form, the first motion is determined on plaintiff's evidence; but the second on "all the evidence." If it were the first exception only which was preserved, the legislature would have said so. It expressly provided otherwise. So there must have been some other purpose for the legislation. And if it be asserted that the purpose was merely to allow a defendant an *exception on appeal,* weaker than the first one, as the price for permitting him to develop his case, no second motion could or would ever be allowed in the trial court. Yet the statute provides that the trial court shall rule on the second motion on "all the evidence," and it is constantly being done. If the purpose was merely to *reserve* its decision on the *first* motion until the whole of the evidence was in, the legislature could easily have so provided. Instead, it said the first motion and exception should be "waived" by putting on evidence. The court cannot reserve its decision. There seems to be no logical excuse for evading the enforcement of the terms of the Act, that the defendant may "again move to dismiss" (a new motion), and that it shall be determined upon "all the evidence," "accepted as true and construed in the light most favorable to the plaintiff,"[39] including the independent facts and circumstances proven by defendant, unchallenged and unimpeached, which serve to "explain or make clear that which has been offered by the plaintiff."[40]

But what must the court do about facts of common knowledge which come to it by the route of judicial notice? If such judicial knowledge is favorable to the plaintiff, there is no difficulty. But it may be very unfavorable to him. In such case the court has always taken it into consideration on any motion to nonsuit. This is a point which probes the reasonableness and consistency of the rule.[41]

That a court should give judgment on the whole truth, rather than a half-truth which may be no better than a falsehood, is implicit in the very concept of the word "court." That term implies the essence of justice, fair-dealing, mental integrity. For a court to give judgment

[37*] Means v. Carolina Central R. R. Co., 126 N. C. 424, 35 S. E. 813 (1900). This case was decided on the Act of 1897, as amended by the Act of 1899, which provided that the defendant might "renew his motion." But the Act was amended again in 1901, and for the phrase "renew his motion" was substituted the phrase "again move to dismiss." The Supreme Court has never averted to this change of language, nor discussed the purpose of the legislature in making it.

[38] Harrison v. N. C. R. R. Co., 194 N. C. 656, 140 S. E. 598 (1927).

[39] Holt-Williamson Mfg. Co., 182 N. C. 547, 550, 109 S. E. 559, 560 (1921).

[40] Harrison v. N. C. R. R. Co., 194 N. C. 656, 660, 140 S. E. 598 (1927).

[41] *See* Jennings v. Standard Oil Co. of N. J., 206 N. C. 261, 263, 173 N. C. 582, 583 (1934).

on a false picture, when the truth is before it, though from the lips of one witness rather than from another, is to depart from that concept. Our court has never done so.

Hence, it appears that the decision in the *Atkins* case is correct. Furthermore, the Bar should welcome the distinctions laid down therein as guides for the consideration of this all-important problem.

CECIL J. HILL.

Negligence—Rescue—Aid to Victim After Accident as Rescue*

The plaintiff alleged that he was at home in bed and heard his ambulance passing on its way to deliver a patient to the hospital. Subsequently a loud crash was heard and the siren stopped blowing. Plaintiff, realizing that his ambulance had collided with something at a nearby intersection, got up and rushed to the scene of the accident, where he found that it had been struck by a gasoline truck due to the negligence of defendant in parking its truck so as to obstruct the view of the intersection. It was bitter cold; and several persons, either wounded or dead, were lying on the ground. The peril of the wounded being obvious, the plaintiff determined to dispatch them to the hospital; and, in his attempt to aid in lifting them into another ambulance, he overexerted himself causing the injury complained of. Upon demurrer it was *held* that the petition set forth a cause of action for damages resulting from the injuries received in the attempted rescue, the court stating that if defendant injured a person by negligence someone might reasonably be expected to come to his aid, and that it was of no moment by what circumstances the rescuer appeared on the scene.[1] The dissenting judge strongly argued that the injury to the plaintiff was too remote to be predicated on the alleged negligence of defendant in parking its truck in this illegal manner.[2]

It is generally held that when a person is exposed to imminent peril of life or limb, through the negligent act of another, the latter will be liable in damages for the injuries sustained by a third party in a reasonable effort to rescue the one so imperiled,[3] the rescuer not being

* The scope of this note is limited to those cases in which a human being is imperiled, purposely excluding those cases dealing with the jeopardizing of property.

[1] Blanchard v. Reliable Transfer Co., —— Ga. App. ——, 32 S. E. (2d) 420 (1944).

[2] *See id.* at ——, 32 S. E. (2d) at 423 (dissenting opinion).

[3] Cote v. Palmer *et al.*, 127 Conn. 321, 16 A. (2d) 595 (1940); Taylor Coal Co. v. Porter's Adm'r., 164 Ky. 523, 175 S. W. 1014 (1915); Hatch v. Globe Laundry Co., 137 Me. 379, 171 Atl. 387 (1934); Dixon v. N. Y., N. H. & H. R. Co., 207 Mass. 126, 92 N. E. 1030 (1910); Eckert v. Long Island Ry. Co., 43 N. Y. 502, 3 Am. Rep. 72 (1871); Norris v. Atl. Coast Line Ry. Co., 152 N. C. 505, 67 S. E. 1017, 27 L. R. A. (N.S.) 1069 (1910) (This case is seemingly the sole authority

precluded from recovery because of his apparent immunity from danger or his voluntary incurrence of risk,[4] provided his acts do not constitute contributory negligence, as being rash and reckless in the minds of men of ordinary prudence acting in emergency.[5*] If the rescuer were required to stop and weigh the danger, and compare it with that "overhanging" the person in peril, it would be tantamount to a denial of the right to rescue altogether where the peril is imminent. Therefore, under the "rescue doctrine," where human life is involved, a liberal rule prevails with relation to the contributory negligence of the rescuer. Under such rule the conduct of the rescuer is not limited, or subjected, to the same exacting rules which obtain under ordinary conditions, and a mere lack of judgment under such circumstances cannot be regarded as negligence on his part.[6*]

If the peril is such as to justify an ordinarily prudent person in taking the risk, the negligent party must answer for his breach of duty

in North Carolina.); Ridley v. Mobile & O. R. Co., 114 Tenn. 727, 86 S. W. 606 (1905); Shultz *et al.* v. Dallas Power & Light Co., 147 S. W. (2d) 914 (Tex. Civ. App. 1910); Bond v. B. & O. R. R. Co., 82 W. Va. 557, 96 S. E. 932, 5 A. L. R. 201 (1918).

[4] Bond v. B. & O. R. R. Co., 82 W. Va. 557, 96 S. E. 932, 5 A. L. R. 201 (1918).

[5*] Seaboard Air Line Ry. Co. v. Johnson, 217 Ala. 251, 115 So. 168 (1928), *cert. granted*, 277 U. S. 579, 48 S. Ct. 436, 72 L. ed. 997 (1928), *cert. dismissed*, 278 U. S. 576, 49 S. Ct. 95, 73 L. ed. 515 (1928); Louisville & N. R. Co. v. Orr, 121 Ala. 489, 26 So. 35 (1899); McClure v. Southern Pac. Co., 41 Cal. App. 652, 183 Pac. 248, 249 (1919) ("While concededly deceased could have escaped except for his efforts to save the life of . . . [the imperiled victim], it is not claimed that he acted with . . . recklessness . . . and it is only in such cases that one, in attempting to rescue another placed in peril by the negligent act of a third person, can be said to be guilty of contributory negligence."); Peyton v. Texas & P. Ry. Co., 41 La. Ann. 861, 6 So. 690, 17 Am. St. Rep. 430 (1889); Wagner v. International Ry. Co., 232 N. Y. 176, 180, 133 N. E. 437, 438, 19 A. L. R. 1, 3 (1921) ("The risk of rescue, if only it be not wanton, is born of the occasion."); Eckert v. Long Island Ry. Co., 43 N. Y. 502, 506, 3 Am. Rep. 721, 723 (1871) ("The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness. . . ."); Norris v. Atl. Coast Line Ry. Co., 152 N. C. 505, 67 S. E. 1017, 27 L. R. A. (N. S.) 1069 (1910); Shultz *et al.* v. Dallas Power & Light Co., 147 S. W. (2d) 914 (Tex. Civ. App. 1940); Ridley v. Mobile & O. R. Co., 114 Tenn. 727, 86 S. W. 606 (1905); Christiansen v. Los Angeles & S. L. R. Co., 77 Utah 85, 291 Pac. 926 (1930).

[6*] Jones v. Mackay Tel. Cable Co. *et al.*, 137 La. 121, 68 So. 379 (1915); Hatch v. Globe Laundry Co., 137 Me. 379, 171 Atl. 387 (1934); Linnenhan v. Sampson, 126 Mass. 506, 30 Am. Rep. 692 (1879) (Mere cowardice and absolute inaction is not required, but he may take some risks, short of recklessness.); Wagner v. International Ry. Co., 232 N. Y. 176, 181, 133 N. E. 437, 438, 19 A. L. R. 1, 4 (1921) ("The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion."); Norris v. Atl. Coast Line Ry. Co., 152 N. C. 505, 514, 67 S. E. 1017, 1021, 27 L. R. A. (N. S.) 1069, 1074 (1910) (". . . he is not required to pause and calculate as to the court decisions, nor recall the last statute as to the burden of proof, but he is allowed to follow the promptings of a generous nature and extend the help which the occasion requires. . . ."); Sarratt *et al.* v. Holston Quarry Co. of S. C. *et al.*, 174 S. C. 262, 177 S. E. 135 (1934); Highland *et al.* v. Wilsonian Inv. Co., 171 Wash. 34, 17 P. (2d) 631 (1932).

which is the direct or proximate cause of injuries to the benevolent actor.[7] In order to justify one in risking his life, or serious bodily injury, in rescuing another person from danger, the danger threatened must be imminent and real, and not merely imaginary or speculative.[8] However, it is sufficient, if to a reasonably prudent person, the existing circumstances create the apprehension of danger, even though danger to a definite person was not actually imminent at the moment.[9] In the application of these rules, to determine whether or not there was negligence on the part of the rescuer, the jury[10*] must consider circumstances surrounding the attempt. Among the circumstances to be considered the following have been stressed by the courts: alarm, excitement, confusion, the promptness required, uncertainty of the means to be employed, the liability to err in the exercise of judgment, the seriousness and imminence of the danger (both to the person threatened and the rescuer), the likelihood that harm can be averted, and the close relationship of blood or affection between the rescuer and the person imperiled.[11] If the jury, upon considering these elements, determines that the deliverer acted as an ordinarily prudent man under the circumstances, his act will be absolved of the possible taint of rashness, thus eliminating the question of contributory negligence. Nevertheless, even if the plaintiff is at fault, should the defendant be aware of it in time to avoid injuring him by reasonable diligence, the failure to use such diligence is held, under the "last clear chance doctrine," to be the proximate cause of the injury.[12]

To come within the protective measures of this rule, even though

[7] Seaboard Air Line Ry. Co. v. Johnson, 217 Ala. 251, 115 So. 168 (1928); Louisville & N. R. Co. v. Orr, 121 Ala. 489, 26 So. 35 (1899); Dixon v. N. Y., N. H. & H. R. Co., 207 Mass. 126, 92 N. E. 1031 (1910); Brown v. Col. Amusement Co., 91 Mont. 174, 6 P. (2d) 874 (1932); Wolfinger v. Shaw *et al.*, 138 Neb. 229, 292 N. W. 731 (1940); Eckert v. Long Island Ry. Co., 43 N. Y. 502, 3 Am. Rep. 721 (1871); Woodward v. Gray, 46 Ohio App. 177, 188 N. E. 304 (1933) (The rule is said to be true regardless of the origin of the peril.); Ridley v. Mobile & O. R. Co., 114 Tenn. 727, 86 S. W. 606 (1905).

[8] Eversole v. Wabash R. Co., 249 Mo. 523, 155 S. W. 419 (1913); Wolfinger v. Shaw *et al.*, 138 Neb. 229, 292 N. W. 731 (1940); Highland v. Wilsonian Inv. Co., 171 Wash. 34, 17 P. (2d) 631 (1932); *cf.* Devine v. Pfaelzer, 277 Ill. 255, 115 N. E. 126 (1917) (There must be some one specifically in danger.).

[9] *Ibid.*

[10*] Okla. Power & Water Co. v. Jamison, 188 Okla. 118, 106 P. (2d) 1097 (1940) (It was there held that the constitutional provision, requiring the defense of contributory negligence to be a question of fact, prohibited the application of the "rescue doctrine" in Oklahoma. The court felt that the jury was not to be limited in its determination of this question by being confined to determining whether or not the rescuer's act was "rash" or "reckless." This view would appear to be rather strict, and is peculiar to Oklahoma.).

[11] Cote v. Palmer *et al.*, 127 Conn. 321, 16 A. (2d) 595 (1940); Bracey *et al.* v. Northwestern Improvement Co. *et al.*, 41 Mont. 338, 109 Pac. 706, 137 Am. St. Rep. 738 (1910); Penna. Co. v. Langendorff, 48 Ohio St. 316, 28 N. E. 172, 13 L. R. A. 190, 29 Am. St. Rep. 553 (1891).

[12] The Evansville & Crawfordsville Ry. Co. v. Hiatt, 17 Ind. 102 (1861); Jones v. Mackay Tel. Cable Co. *et al.*, 137 La. 121, 68 So. 379 (1915).

acting from the most unselfish motives and prompted by the noblest impulses, the rescuer must show the negligence of the defendant. The negligence of the defendant as to the person in danger is negligence with respect to him who attempts the rescue; but, if defendant is not guilty of any breach of duty to the imperiled person, he is only liable for negligence occurring after the rescuer's efforts have commenced.[13] Thus in *Taylor Coal Co.* v. *Porter's Adm'r.*,[14] where plaintiff's intestate, while in the employ of defendant, went to the rescue of the latter's foreman, who had been overcome by "black damp" in the air shaft of the defendant's coal mine, it was held that there could be no recovery. The court stated: "No person who is free from negligence himself can be made liable in damages on account of injuries sustained by a person who, at his request, comes to the assistance of one who is in danger or exposed to peril."[15] Likewise, in *Shultz* v. *Dallas Power & Light Co.*,[16] it was held that there could be no recovery where the plaintiff's intestate was electrocuted in attempting to rescue a fellow servant who was trying to retrieve a hoe, with a discarded wire, from a vault containing the defendant's transformers. It was there said that the mere fact that no cover was provided for the vault, being otherwise sufficiently protective, was not a showing of negligence on the part of defendant towards either the imperiled party or his would-be rescuer.

In close concert with this situation several cases have presented the nice question as to whether the deliverer may recover from the delivered, or imperiled party, where the latter has placed himself in peril, devoid of any wrongful act of a third party. Such recovery is usually denied on the theory that the individual violates no *legal* duty by incurring such dangers and risks, no matter how guilty he is *morally* in negligently subjecting his own safety to jeopardy.[17]* A holding of like

[13] Taylor Coal Co. v. Porter's Adm'r., 164 Ky. 523, 175 S. W. 1014 (1915); Dixon v. N. Y., N. H. & H. R. Co., 207 Mass. 126, 92 N. E. 1030 (1910); Donahoe v. Wabash, St. Louis & Pac. Ry. Co., 83 Mo. 560, 53 Am. Rep. 594 (1884); Woodward v. Gray, 46 Ohio App. 177, 188 N. E. 304 (1933); Shultz *et al.* v. Dallas Power & Light Co., 147 S. W. (2d) 914 (Tex. Civ. App. 1940).

[14] *Supra,* note 13.

[15] *Id.* at 531, 175 S. W. at 1017.

[16] *Supra,* note 13.

[17]* Alabama Power Co. v. Conine *et al.,* 213 Ala. 228, 104 So. 535 (1925) (When the party in danger created his own peril by grasping an energized wire, no recovery was allowed the administratrix for the death of the "would be rescuer."); Saylor v. Parsons *et al.,* 122 Iowa 679, 98 N. W. 500 (1904) (Plaintiff, seeing that defendant had placed himself in a position of danger from the collapse of a wall which he was taking down, went to the defendant's rescue and in so doing was himself injured. No recovery was allowed.). *But cf.* Butler v. Jersey Coast News Co., 109 N. J. L. 255, 160 Atl. 659 (1932) (Where defendant's truck negligently driven, left the road and struck a power line pole causing the wire to fall across the highway and pin the driver thereof beneath the truck, it was held that plaintiff, a passer-by and user of the highway, could recover from the defendant for injuries sustained from coming into contact with the electric wire in going to the driver's assistance. The court stated that this case was not under

tenor is presented by those cases where the "rescuer," by his own voluntary act, has induced the danger, due to the existence of which another is placed in a perilous situation.[18*] In propounding this principle it has been held that no recovery was permissible when the decedent went upon a long, high trestle, encumbered with a small child, and was killed in an attempt to remove the child from the path of an oncoming train,[19*] or where a mother was injured in attempting to aid her child, who had become imperiled by a defective portion of the sidewalk, over which the mother had knowingly led such child.[20]

As in all negligence cases, so in those preceded by the epithet "rescue," the breach of duty by the actor must be the proximate cause of the ensuing damage, and, where the rescuer is injured, it must be the act of the person whose negligence created the peril.[21*] The proposition is expounded in *Lashley et al.* v. *Dawson*[22] as follows: "Where there is a complete continuance and unbroken sequence between the act complained of and the act finally resulting in the injury, so that the one may be regarded by persons of ordinary judgment as the logical and probable cause of the other, the former may be regarded as the proximate cause of the injury." Nor will the causal connection between the defendant's negligent act and the injury resulting therefrom be deemed severed because the rescuer's act is deliberate and voluntary.[23] The proximate cause as to the rescued's peril is the proximate cause as to the rescuer's injury.[24*] The Texas Court has followed this rule in the case of *Wichita Falls Traction Co.* v. *Hibbs et al.*[25] There the defendant's street car conductor had negligently set a smoking stove on

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the "rescue doctrine," but that plaintiff was a user of the highway and as such had the right to aid in removing an obstruction therefrom or assisting any one who appeared to be in danger.). For a collection of authorities on this point and a criticism of the case last cited, see Notes (1933) 13 B. U. L. REV. 371, (1932-33) 31 MICH. L. REV. 584.

[18*] Atl. & C. A. L. Ry. Co. v. Leach, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47 (1893); White v. Chicago, 120 Ill. App. 607 (1905); Brown v. Col. Amusement Co., 91 Mont. 174, 6 P. (2d) 874 (1932) (If the emergency is the culmination of a train of events set in motion by the negligent act of the party attempting the rescue, there can be no recovery.); *cf.* Bond v. B. & O. R. R. Co., 82 W. Va. 557, 96 S. E. 932, 5 A. L. R. 201 (1918).

[19*] Atl. & C. A. L. Ry. Co. v. Leach, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47 (1893) (If recovery be allowed in such a case, it would be allowing the rescuer to take advantage of his own wrong.).

[20] White v. Chicago, 120 Ill. App. 607 (1905).

[21*] Perpich v. Letonia Mining Co., 118 Minn. 508, 137 N. W. 12 (1912) (It is so held, whether or not the rescuer owed a duty to the rescued or the careless actor.).

[22] 162 Md. 549, 562, 160 Atl. 738, 743 (1932).

[23] Wagner v. International Ry. Co., 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1 (1921).

[24*] Gibney v. State, 137 N. Y. 1, 33 N. E. 142 (1893) (Where a child fell through the state's bridge into water below and the father plunged in after the child resulting in both being drowned, it was held that the proximate cause of both deaths was the unsafe condition of the bridge.).

[25] 211 S. W. 287 (Tex. Civ. App. 1919).

the street in front of the plaintiff's residence, in proximity to where plaintiff's daughter was playing. The child's clothing caught fire therefrom and she ran into the kitchen where her mother was working, and the latter put out the fire with her hands, sustaining permanent injuries. On the defendant's contention that plaintiff's injuries were too remote, it was held that the injuries were the natural and probable consequence of the negligent act, which should have been anticipated by a person of ordinary prudence.[26*] On the basis of these decisions, could it be successfully contended that the plaintiff's alleged injury, in the principal case, was the direct and proximate cause of the alleged negligence of the defendant? Seemingly, to so hold would be to project "directness" and "proximateness" into the shadowy confines of "remoteness." When the plaintiff arrived at the scene of the accident, after having arisen from his bed at home upon the apprehension that his ambulance was the victim of the "crash," denoting a collision at a nearby intersection, the active negligence of the defendant had come to rest. Would it not be stretching the "reasonable man theory" to conclude that it should have been anticipated that some benevolent deliverer some time after the collision might come to grief because of the alleged parking of the defendant's truck in this illegal manner?

Problems arise when the rescued, or imperiled person, is deemed guilty of contributory negligence. Such antecedent negligence of the person rescued is not imputable to the rescuer.[27] Thus the negligent defendant may not invoke the principle of subrogation as a test of the rescuer's right to recover. This situation presents a question, which the writer has been unable to find answered by the courts, to wit: If the deliverer is not precluded from recovery where the producer of the danger is negligent and the party placed in peril is guilty of contributory negligence, might it not be strongly argued, in a suit by the rescuer against the originally negligent party, that the former would be warranted in joining the rescued party as a party defendant or that the defendant might enforce contribution, as in the case of joint tort-feasors? The case of *Arnold* v. *Northern States Power Co. et al.*[28] bears on this point, but is distinguishable in that the negligence of the power com-

[26*] *Cf.* De Mahy v. Morgan La. & T. R. Co., 45 La. Ann. 1329, 14 So. 61 (1893) (Where it was held that the railroad's "negligence" in not providing a station at the point in question was too remote to be causally connected with the plaintiff's injury in rescuing her child, who had fallen from the platform of a train into a dangerous position.).

[27] Pierce v. United Gas & Elec. Co., 161 Cal. 176, 118 Pac. 700 (1911); Hatch v. Globe Laundry Co., 137 Me. 379, 171 Atl. 387 (1934); Norris v. Atl. Coast Line Ry. Co., 152 N. C. 505, 67 S. E. 1017, 27 L. R. A. (N. S.) 1069 (1910); Highland *et al.* v. Wilsonian Inv. Co., 171 Wash. 34, 17 P. (2d) 631 (1932); Bond v. B. & O. R. R. Co., 82 W. Va. 557, 96 S. E. 932, 5 A. L. R. 201 (1918). For a further collection of authorities on this point see Note (1918) 5 A. L. R. 206.

[28] 209 Minn. 551, 297 N. W. 182 (1941).

pany produced no peril towards the person intended to be rescued. There a motorist negligently ran into the power company's electric pole carrying high tension wires, causing such wires to sag across part of the highway. Upon being notified, some of the company's linemen visited the scene, observed the surroundings, and were on notice of the gathering crowd, but left the premises unguarded with the intention of later returning. In the interim plaintiff's intestate, a motorist, observed the plight of the motorist, who had negligently run into the company's pole, and prepared to give assistance. The intestate contacted a sagging wire. Recovery was allowed against the rescued and the power company. The argument propounding the joinder of the contributorily negligent party would seemingly be both convincing and reasonable.

A striking analogous situation to that wherein the rescued is contributorily negligent is that in which a parent is contributorily negligent in allowing a child *non sui juris* to be present in a known place of danger. Although there is authority supporting the contrary holding,[29] the better reasoned rule would seem to be that such parent will not be precluded from recovery for injuries received in his attempted rescue of the child.[30] It is said in the *Donahoe* case[31] that the contributory negligence of the parent in permitting the child to be in a dangerous position would not prevent a stranger from recovering damages for an injury sustained in attempting its rescue, and that a parent, possessing a much greater inclination to effect such deliverance, would also be protected.

The Pennsylvania Court has given the rescuer his just due when it said: "A rescuer . . . ought not to hear from the law words of condemnation of his bravery, because he rushed into danger, to snatch from it the life of a fellow creature imperiled by the negligence of another; but he should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence."[32] But despite these words of praise, upon the basis of the cases and materials above discussed, it is submitted that the recent Georgia case under discussion[33] presents an unreasonable extension of the "rescue doctrine," through an unwarranted projection of the doctrine of "proximate cause." In the writer's research no decisions permitting such an extension have been discovered, and it is hoped that upon trial of this case on its merits this undesirable result will not be reached.

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[29] De Mahy v. Morgan La. & T. R. & S. Co., 45 La. Ann. 1329, 14 So. 61 (1893).
[30] Donahoe v. Wabash, St. Louis & Pac. Ry. Co., 83 Mo. 560, 53 Am. Rep. 594 (1884).
[31] *Ibid.*
[32] Corbin v. City of Phila., 195 Pa. 461, 468, 54 Atl. 1070, 1072 (1900).
[33] *Supra*, note 1.

Courts—Jurisdiction—Construction of Statutes Relative to Lands Within State Acquired by Federal Government

The Supreme Court of North Carolina, in the recent case of *State* v. *DeBerry*,[1] construed the statutes of this state pertinent to the jurisdiction of state and federal courts over lands within the state which have been acquired by the federal government.[2]

The defendant was tried and convicted in the municipal court of the city of Winston-Salem on a criminal charge of assault and battery and was sentenced to thirty days on the roads. The assault had occurred in the Federal courtroom in the Post Office Building in the city of Winston-Salem; and the defendant, upon appeal to the Superior Court of Forsyth County, entered a plea in abatement, for that the scene of the alleged assault was on property over which the United States Government has exclusive jurisdiction. For the purposes of the plea it was admitted that the federal government acquired the property in question on July 28, 1899, and that acquisition was confirmed in 1900. The motion to abate was denied, and the defendant took exception thereto and appealed from an adverse judgment.

The Supreme Court held the motion to abate to be well founded, but Chief Justice Stacy, in writing the opinion of the court, indicated that the result which was reached, although governed by the pertinent statutes and decisions, was clearly questionable in its desirability.

The authority of the federal government to accept and govern lands within the boundaries of the sovereign states was conferred by the provision of the Federal Constitution that "Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district . . . (District of Columbia) . . . and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."[3]

Pursuant to this provision, the sovereign states have, through their legislative bodies, enacted laws governing the cession of jurisdiction of such lands to the federal government. It is the tendency of the wording of these provisions to limit the authority of the federal government that gives rise to cases necessitating construing of the statutes. The major problems facing the courts in their interpretation of these statutes are: (1) What type of cession is required by the provision of the Federal Constitution? (2) What classes of structures, not specifically mentioned in the Federal Constitution, may be classed as "other needful buildings?" (3) What manner and degree of jurisdiction may be re-

[1] 224 N. C. 834, 32 S. E. (2d) 617 (1945).
[2] N. C. GEN. STAT. (1943) §§104-1, 104-7.
[3] U. S. CONST. Art. I, §8, cl. 17.

tained by the states over lands so ceded without creating incompatibility with the jurisdiction required for the purpose for which the land is sought?

In general there are three methods of acquisition employed by the federal government in acquiring lands within the states. The type of acquisition known as the constitutional method is that expressly provided for by clause 17, section 8, article 1 of the Federal Constitution, which method is purchase of private land by the federal government from the owners, with the consent of the state wherein the land is located. Acquisition by this method transfers to the federal government such dominion as the consent statute confers, which in most cases is subject to the single exception of the right by the state to serve criminal and civil process through its officers. The second method is that of purchase without obtaining the consent of the state, or by condemnation. In such a case the federal government owns the land thus acquired in the same manner as would an individual, and the state has full jurisdiction thereover for all purposes, with the exception that its jurisdiction cannot be so exercised as to interfere with the essential and necessary operations of the federal government. The third method is that in which the land acquired by the federal government was the property of the state, such acquisition being by a cession by the state to the federal government in the nature of a gift. If such a method be pursued, the state can annex any conditions or reservations to the cession as it may see fit; and if the federal government takes the land, it accepts its subject to such conditions or reservations.[4]

But what types of buildings, beyond the description "needful," were intended by the framers of the Constitution when they recorded their intention that lands so used should be under exclusive federal jurisdiction as a result of mere purchase with state consent? Since those structures specifically named in clause 17 of section 8 of article 1 are predominantly military in character, it is not always facile to bring non-military areas within the term "other needful buildings." However, a clear majority of the courts include post offices within the term,[5] and North Carolina has so recognized them by specific mention within the statutes bearing on the point.[6]

But, in arriving at its decision in the principal case, the North Carolina court was required to consider the third question; that of the pertinence of our statutes concerning post offices as affecting the release

[4] Lowe v. Lowe, 150 Md. 592, 133 Atl. 729 (1926); *cf.* United States v. Tucker, 122 Fed. 518 (W. D. Ky., 1903).

[5] Battle v. U. S., 209 U. S. 36, 28 Sup. Ct. 422, 52 L. ed. 670 (1908); Martin v. House, 29 Fed. 694 (E. D. Ark., 1888); State *ex rel.* Jones v. Mack, 23 Nev. 359, 47 Pac. 763 (1897); People v. Marra, 4 N. Y. Crim. Rep. 304 (1886).

[6] N. C. GEN. STAT. (1943) §§104-1, 104-7.

or reservation of jurisdiction over the lands so ceded. The initial legislation, enacted in 1887, contained a provision conferring upon the federal government, without reservation, the authority to acquire title to tracts of land on which were to be erected certain public buildings. Among these buildings was the specific designation of post offices.[7] No additional legislation was forthcoming concerning such federal acquisition until the year 1905, when the legislature formulated a provision[8] to reserve to the state concurrent jurisdiction with the federal government over such lands for the service of civil and criminal process, and for the punishment of all violations of the criminal laws of North Carolina which might be committed on such tracts of land as were covered by the statute of 1887. This act of 1905 is still incorporated in our General Statutes as section 104-1.

Two years later, in 1907, an act was passed which ceded to the federal government all jurisdiction over these lands, excepting only the right to serve civil and criminal process. This provision made no mention of the existence of the former acts, and is now section 104-7 of our General Statutes.

Since none of these legislative acts makes reference to their applicability to lands previously acquired by the federal government, the court held in the principal case, under the general rule of construction, that they must be prospective only.[9] Thus, the law applicable to a particular parcel of federal land within the state would have to be that which was in force at the time of the acquisition of the property.

Under this construction, and it appears legally sound, the law applicable to the post office building in the city of Winston-Salem, the scene of the offense in the principal case, which site was acquired in 1899 while the act of 1887 was effective, would be that the federal government has exclusive jurisdiction. This is subject to the later construction of the Supreme Court of the United States that even an express cession of exclusive jurisdiction to the federal government implies a reservation of the right of service of state civil and criminal process.

The undesirability of the situation becomes evident with the realization that, following this line of reasoning, any property acquired by the federal government within the state during the two-year period from 1905 to 1907 would be within the jurisdiction of the state courts while all other lands acquired at any other time would be without such jurisdiction. Thus, in the present case, had the defendant committed the assault in another post office, the site of which had been ceded to the

[7] Public and Private Laws of North Carolina, 1887, ch. 136.
[8] REVISAL OF 1905, §5426.
[9] Ashley v. Brown, 198 N. C. 369, 151 S. E. 725 (1930); State v. Pridgen, 151 N. C. 651, 65 S. E. 617 (1909).

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.[10]

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. *Boogher*[1] 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 foreclosure[2*] 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-

[10] 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,[3*] 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.[4*] It was apparently conceded that there must be strict compliance with provisions for notice before a valid sale could take place.[5*] No point was made that the recital itself was not specific enough or that it stated a mere conclusion and not the facts,[6] 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-

[3*] Purchase by the creditor (beneficiary under the trust deed) at the sale conducted by the "independent" trustee is not rendered invalid by the doctrine which bars a *mortgagee* from conclusively purchasing at his own sale no matter how well advertised or honestly conducted. Peedin v. Oliver, 222 N. C. 665, 24 S. E. (2d) 519 (1943); Phipps v. Wyatt, 199 N. C. 727, 155 S. E. 721 (1930). *Cf.* Whitehead v. Hellen, 76 N. C. 99 (1877), per Pearson, C. J. (mortgagee buys through agent); Taylor v. Heggie, 83 N. C. 244 (1880). But a voidable title is acquired which may become absolute on the mortgagor's acquiescence or his non-action for ten years. Jones v. Pullen, 115 N. C. 465, 20 S. E. 624 (1894). Pueblo R. E. Loan & Inv. Co. v. Johnson, 342 Mo. 991, 119 S. W. (2d) 274 (1938), similar. Whether the principal doctrine itself is wise has been doubted. WALSH, MORTGAGES (1934) 349; Note (1940) 18 N. C. L. Rev. 350, 354. And see Goenen v. Schroeder, 18 Minn. 66 (1871). But the exception first mentioned in favor of purchase by the secured creditor when the sale is by a trustee seems unrealistic, for, notwithstanding the remark in McLawhorn v. Harris, 156 N. C. 107, 110, 72 S. E. 211, 212 (1911), that the trustee is "appointed by the mortgagors," the fact is that he is often, perhaps generally, named by and is generally friendly to the creditor. And see Brown v. Jennings, 188 N. C. 155, 161, 124 S. E. 150, 153 (1924), to the effect that the trustee's duty is "primarily" to the creditor.

[4*] This extreme contention has been held untenable since the trustee holds the legal title and can pass it subject to the same trusts. Lunsford v. Speaks, 112 N. C. 608, 17 S. E. 430 (1893); followed in Brett v. Davenport, 151 N. C. 56, 59, 65 S. E. 611, 612 (1909); Savings & Loan Assn. v. Deering, 66 Cal. 291, 5 Pac. 353 (1885). *Cf.*, Savings & Loan Assn. v. Burnett, 106 Cal. 514, 37 Pac. 180 (1894).

[5*] As held in Lunsford v. Speaks, 112 N. C. 608, 17 S. E. 430 (1893); Ferebee v. Sawyer, 167 N. C. 199, 201, 83 S. E. 17, 18 (1914), per Hoke, C. J.; Brown v. Jennings, 188 N. C. 155, 160, 124 S. E. 150, 153 (1924). *Cf.* Ivrey v. Karr, —— Md. ——, 34 A. (2d) 847, 853 (1943), slight misdescription of lots corrected by announcement at sale, no prejudice shown; Douglas v. Rhodes, 188 N. C. 580, 125 S. E. 261 (1924), statute *re* description. The sale must be in accord with the notice. Sale by parcels unwarranted where notice was of a sale in gross. Hahn v. Pindell, 64 Ky. 538, 541 (1867).

[6] Sometimes contended. See Sorensen v. Hall, 219 Cal. 680, 28 P. (2d) 667 (1933). *Cf.* recitals in Berry v. Boomer, 180 N. C. 67, 103 S. E. 914 (1920).

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*[7] 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.[8*] 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.[9] 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

[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 similarly known to the mortagor. Carroll v. Hutton, 91 Md. 379, 46 Atl. 967 (1900); Fox v. Jacobs, 289 Mich. 619, 286 N. W. 854 (1939); Hill v. Albemarle Fert. Co., 210 N. C. 417, 421, 187 S. E. 577, 579 (1936); Dennis v. Dixon, 209 N. C. 199, 202, 183 S. E. 360, 361 (1935); Brewington v. Hargrove, 178 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 *supra.* 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.

[12] See among others, Clark v. Wommack, 192 Ark. 895, 95 S. W. (2d) 891 (1936); Melchor v. Casey, 173 Miss. 67, 161 So. 692 (1935); Phipps v. Wyatt, 199 N. C. 727, 731, 155 S. E. 721, 723 (1930); Brown v. Sheets, 197 N. C. 268, 148 S. E. 233 (1929) (Trial judge sits without jury.); Berry v. Boomer et al., 180 N. C. 67, 103 S. E. 914 (1920). Where delivery of deed is in question, see Wolf v. Wolf, 59 S. D. 418, 240 N. W. 349 (1932).

[13] 112 N. C. 608, 17 S. E. 430 (1893).

[14*] The trial court not only announced to the jury that the burden was as above

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."[15*] 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.*"[16*]

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,

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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.

[15*] "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.*

[16*] 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.[18] 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).[19*] If, then, they

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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; I DEVLIN, DEEDS (3d ed. 1911) §425; 2 WILTSIE, 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 there 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).

[18] See *e.g.*, 9 WIGMORE, EVIDENCE (3d ed., 1940) §§2483-2540; Morgan, *Technique in the Use of Presumptions,* (1939) 24 IOWA L. REV. 413; McCormick, *Charges on Presumptions and Burden of Proof,* (1927) 5 N. C. L. REV. 289; Markham, *Why a Burden of Going Forward?* (1937) 16 N. C. L. REV. 12.

[19*] 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[20*] 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."[21] It is definitely excluded by the present opinion as it is by Wigmore in the slogan, "the burden of proof never shifts."[22]

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.[23*] 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.[24*]

[20*] 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.

[21] MODEL CODE OF EVIDENCE, Am. L. Inst. (1942) 311.

[22] 9 WIGMORE, EVIDENCE (3d ed. 1940) §2489.

[23*] 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).

[24*] 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.[25] 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.[26*] 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.[27] It would require him to come and protest. Considering that North Carolina, in line with most

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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."

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

[26*] 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).

[27] *Supra,* text at footnote 10.

states, does not require special notice to the mortgagor or his privies,[28*] 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.[29] 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.[30*] 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-

[28*] 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).

[29] 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). *Cf.*, Pacific States Sav. & Loan Co. v. O'Neill, 7 Cal. (2d) 596, 61 P. (2d) 1162 (1936) (conclusive except where mortgagors entitled to equitable relief); Holland v. Pendleton Mtge. 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. Haab, 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.").

[30*] 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.[31] 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.[32*] 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,[1] 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

[31] 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. Fitts, 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).

[32*] 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.

[1] Miller v. Jones, 224 N. C. 783, 32 S. E. (2d) 594 (1945).

their public employment.[2]

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.[3] 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;[4] 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.[5]

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,*[6] wherein the court distinguished between "employee" and "officer" by citing McQuillan[7] 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

[2] *Id.* at 790, 32 S. E. (2d) at 598.

[3] 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).

[4] 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).

[5] *See* Hipp v. Ferrell, 173 N. C. 167, 170, 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.

[6] 206 N. C. 888, 175 S. E. 310 (1934).

[7] 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,*[8] and usually, though not necessarily in the tenure of his position."[9] This statement represents the great weight of authority in the United States.[10]

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.[11] 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*[12] 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 *respondeat 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,*[13] 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

[8] Italics supplied.

[9] Nissen v. City of Winston-Salem, 206 N. C. 888, 892, 175 S. E. 310, 312 (1934).

[10] 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).

[11] Miller v. Jones, 224 N. C. 783, 790, 32 S. E. (2d) 594, 598 (1945).

[12] 31 N. C. 73, 79 (1848).

[13] 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*[14] was done as an incident to the police power of the city—a purely governmental function."[15] In *Carpenter* v. *R.R.*[16] 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.[17]

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[14] Italics supplied.
[15] Lewis v. Hunter, 212 N. C. 504, 509, 193 S. E. 814, 817 (1937).
[16] 184 N. C. 400, 404, 114 S. E. 693, 695 (1922).
[17] Note (1926) 40 A. L. R. 1358.