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CASH SALES*

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The terms "cash sale" and "sale for cash," having equivalent meanings, are if used loosely in the dealings of parties very ambiguous on the question of whether the property is intended to pass at once or is intended to pass only on payment of the price. It is to be remembered that in an ordinary sale without any bargain for credit being included the property passes but the seller is entitled under his seller's lien to retain possession until the price is paid.[1] "Terms cash" or equivalent expressions may therefore frequently mean no more than that the seller thereby gives notice that he does not waive his lien.[2] The presumption that the property was intended to pass at once may therefore continue to be applicable although the parties have bargained that payment should be in cash on delivery.

On the other hand, the parties may affirmatively agree that the property is not to pass until the price is paid. Such agreement by the parties, if actually made, is of course decisive to show an intention contrary to the presumption that the property passes at the time of the bargain, and makes payment of the price rather than other circumstances the controlling element in fixing the exact time of the passing of the property. If the bargain is such that the property is to pass on the payment of the

* This article is a chapter from a forthcoming handbook on Sales now in preparation.

[1] Uniform Sales Act, Sec. 54, codifying the common law on the point.

[2] A convenient illustration is Sanitary Carpet Cleaner Co. v. Reed Mfg. Co., 145 N. Y. S. 218 (1913).

price the transaction is a "cash sale," using that term in its strictly limited technical sense. It is thus readily apparent that the legal consequences of a bargain for a cash sale are very different from the legal consequences of an ordinary sale bargain. In the ordinary sale bargain, if the goods are specific and the parties are agreed on all the terms the property passes at once to the buyer, neither delivery nor payment being necessary.[3] The seller in such cases has by operation of law a lien for the price enabling him to hold possession, in the absence of a bargain for credit, until the price is paid.[4] In a cash sale, strictly so called, on the other hand, the property by the understanding of the parties remains in the seller until the price is paid.[5] The ordinary incidents of ownership are still with the seller. He bears the risk of loss.[6] When he resumes possession he takes his own goods, not the buyer's.[7] The buyer acquires no property in the goods until payment is made, does not owe the seller the purchase price,[8] and cannot be garnished for it by the seller's creditors.[9] In an ordinary sale the property passes at once but with a seller's lien unless waived, while in a cash sale the property does not pass till payment of the purchase price is made. A technical cash sale, if established by the facts, thus readily shows the necessary contrary intention to make inapplicable the presumption that the property was intended to pass at once without delivery or payment.

Many difficult problems are encountered, however, in connection with litigation over cash sales. These problems come not

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[3] Uniform Sales Act, Sec. 19, rule 1, codifying the present-day common law on the point.

[4] See footnote 1, above.

[5] Ocean S. S. Co. v. Southern States Naval Stores Co., 89 S. E. 838, 145 Ga. 798 (1916); Gate City Coffin Co. v. Hall, 125 S. E. 503, 33 Ga. A. 70 (1924); Chicago Iron & Metal Co. v. Berkson, 186 Ill. App. 194 (1914); Loud v. Hanson, 164 P. 544, 53 Mont. 445 (1917); Blair v. Clark, 37 Pa. Super. Ct. 44 (1917); Halff Co. v. Jones, 169 S. W. 906 (1914).

[6] Hubbard v. Home Ins. Co. of New York, 222 S. W. 886, 205 Mo. A. 316 (1920); Sharp v. Hawkins, 107 S. W. 1087, 129 Mo. App. 80 (1908).

[7] Hall v. Frick Co., 106 S. W. 1186, 32 Ky. Law Rep. 768 (1908).

[8] Bussey v. Barnett, 9 M. & W. 312 (1842).

[9] Hamra Bros. v. Herrell, 200 S. W. 776 (1918); Paul v. Reed, 52 N. H. 136 (1872). Nor can the buyer's creditors levy on the goods though they happen to be found in the buyer's possession. Owens v. Jones-Kennedy Furniture Co., 111 S. E. 86, 28 Ga. A. 317 (1922).

so much from difficulty in determining the legal consequences of cash sales as they come from the difficulty of determining on the facts whether in the particular case the bargain was intended to be an ordinary sale with lien in the seller or a technical cash sale. In both, obviously, no delivery can be required of the seller until payment. Here, as in other sales transactions, the parties are likely to have framed the terms of their bargain with reference to their practical business problems, without directly adverting to the possible legal questions involved. Their intention on the question of whether the property was to pass at once with a seller's lien until payment, or whether it was not to pass at all until payment may be but obscurely expressed or may be left to inference from the expressed terms taken in connection with their surrounding circumstances.

If the intention of the parties is clear that the property was not to pass until payment the transaction of course is a cash sale. Thus, where the parties have expressly stipulated by their agreement that the property is to pass on payment of the purchase price the transaction, in the absence of other qualifying facts, is a cash sale.[10] So, where the parties manifestly contemplate an immediate exchange of the goods for the price at the time of the bargain with nothing left outstanding as an obligation on either side the transaction is intended to be a cash sale. The clearest illustration of this is the common case of sale of goods for cash over the counter in a retail shop.[11] Another reasonably clear illustration is the case where the seller in response to orders for goods makes delivery directly to the buyer, there being no arrangement for credit but the goods are to be paid for in cash as delivered.[12] On the other hand, the terms of the bargain may make it clear that the sale is not a cash sale, strictly so called. Thus, if credit is contracted for it is not a cash sale.[13] Similarly, ordinary auction sales, even though announced as

[10] Wong Foo v. Southern Pac. Co., 181 P. 823, 41 Cal. A. 42 (1919); Englehart v. Sage, 235 P. 767, 73 Mont. 139 (1925).

[11] Paul v. Reed, 52 N. H. 136 (1872). In Professor Williston's classic treatise on SALES, sales made by shopkeepers over the counter furnish the only class of cases that is treated as completely free from doubt. For an extended discussion of cash sales, presenting the historical perspective, see WILLISTON, SALES, Secs. 341-343.

[12] Bussey v. Barnett, 9 M. & W. 312 (1842).

[13] Menke v. First Nat. Bank, 206 S. W. 693 (1918).

sales for cash, are not cash sales in the strictly technical sense, but in the absence of other special conditions are sales passing the property when the bid is accepted, the bargain for the specific articles being then complete, while the seller has a lien on the goods for the price until payment.[14]

A common circumstance often raising possible doubts as to whether the parties in any particular instance intended an ordinary sale with lien or a technical cash sale is the fact that absolute simultaneousness in the exchange of goods for money is frequently as a practical matter impossible. The goods may be bulky and heavy, as for instance in sales of coal or lumber, making absolutely contemporaneous manual exchange of goods and price out of the question. Similarly, the delay necessarily involved for making inspection or verifying accounts, etc., may make it inconvenient for the seller or his agent to wait for its completion where he can in the interval attend to other matters of importance and return after the lapse of a few minutes or a few hours to get his purchase money. It must be remembered, too, that the term "present time" is a relative term, which may cover more than the infinitesimal moment forming the demarcation point between the past and the future in the lapse of time. It may for practical affairs often properly be regarded as covering a relatively short though consciously noticeable period of time. In view of these considerations it is therefore regarded as no obstacle to finding a transaction to be a technical cash sale that delivery and payment are not carried out with absolute contemporaneousness so long as the parties for the case in hand manifestly have agreed to regard the exchange as simultaneous.[15] Where in such cases unforeseen events interrupt the

[14] Uniform Sales Act, Sec. 21; Forbes v. Hunter, 274 Ill. App. 400 (1921); Russell v. Sammons, 217 Ill. App. 607 (1920); Clark v. Greeley, 62 N. H. 394 (1882); Jawitz v. Reitman, 217 N. Y. S. 480 (1926).

There is some law *contra*. Thus, in Hand v. Matthews, 57 A. 351, 208 Pa. 149 (1904), it was held that, in the absence of a special agreement for credit, a cash sale is presumed and the property does not pass, and that this rule applies to auction sales. The Uniform Sales Act has, however, been adopted in Pennsylvania since this case was decided.

[15] Leven v. Smith, 1 Denio (N. Y.) 571 (1845) (boxes containing boots and shoes); Burns Bros. v. Bigelow, 122 N. Y. S. 253 (1910) (coal); Rehr v. Trumbull Lumber Co., 143 N. E. 558, 110 O. St. 208 (1924) (timbers); Dillard & Coffin Co. v. Beley Cotton Co., 263 S. W. 87, 150 Tenn. 195 (1924)

completion of the intended exchange and it becomes necessary to distinguish between the delivery and the payment as the operative fact by the happening of which the parties intended the property to pass it is understood, if the bargain was for a technical cash sale, that payment is the controlling element. In such cases the seller does not part with his property nor the buyer become the owner till payment is made, the parties expecting to accompany the payment with delivery, before, during, or after, as closely as the practical circumstances of the particular case will admit.[16] The application of this rule in the settlement of controversies is, however, sometimes rendered confusing by the loose use in sales contracts of the words "terms cash" or equivalent expressions when in reality a short period of credit is contemplated, and the buyer is free at once without limitation, just like any other owner, to use or dispose of the goods as he pleases. Obviously in such cases the facts when correctly analyzed show that the property was intended to pass at once, and that the seller has extended a short credit for the price.[17] Some cases, how-

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(cotton); Allen Lumber Co. v. Higuera, 85 A. 979, 86 Vt. 453 (1913) (lumber); Luce v. Brown, 118 A. 530, 96 Vt. 140 (1922) (horse trade).

[16] The seller of a bond has been held not to have waived payment as a condition to the passing of title, where his messenger delivered the bond to a broker and another messenger, according to the usual business custom, called to receive payment a few hours later, after allowing time for the making of comparisons and book entries and the drawing of checks. In re Perpall, 256 F. 758 (1919). So under the custom of trade at the grain exchanges the transaction is regarded as a cash sale though it may take till the following day or even longer to complete the processes of weighing, grading, delivery, and payment. Dalrymple v. Randall, Gee & Mitchell Co., 174 N. W. 520, 144 Minn. 27 (1919); Wright v. Mississippi Valley Trust Co., 129 S. W. 407, 144 Mo. App. 640 (1910).

Sometimes this conception is sought to be carried to absurd extremes. Thus in Groves v. Warren, 123 N. E. 659, 226 N. Y. 459 (1919), the seller claimed a delay of several months during which goods were under the agreement sold off by buyer and money turned over to seller did not prevent the transactions being a cash sale. The seller's view prevailed in the lower court but was reversed on appeal. So in Island Trading Co. v. Berg Bros. Inc., 146 N. E. 345, 239 N. Y. 229 (1924), the seller on the buyer's order shipped goods to a third party who was a customer of the buyer who paid the buyer for the goods. The seller waited several weeks for the buyer to pay. Finding the buyer who had ordered the goods thus shipped failed to pay, he stopped the goods in transit, claiming the transaction was intended as a cash sale. The court, however, held him liable for conversion.

[17] "Sale of goods to be paid for in ten or thirty days, is not in fact a cash transaction, and cannot by agreement of the parties, or a usage of mer-

ever, have disregarded these manifest facts and in charmed deference to the magical words "terms cash" have held even such transactions to be cash sales.[18]

The problem presented by the frequent practical impossibility of making an absolutely simultaneous exchange of the goods for the price shades off by degrees into a related problem of whether in the actual case in controversy there has been a waiver of the cash requirement and a short though indefinite period of credit accepted in its place. In many cases where delivery is made in the expectation of immediate payment but payment does not immediately follow, as for instance where the buyer cannot at the moment be found, or when asked to pay he makes excuses and promises to get the money at once but fails to do so, it may become a very close question on the facts whether or not the seller has acquiesced in the delay and permitted the buyer to use the goods as his own on his promise to pay, thus in fact extending credit. Since the delivery was conditioned on receiving immediate payment on which the property was to pass, if such payment is not forthcoming the seller is entitled at once to resume possession of his goods,[19] and this right is not affected by the fact that in the brief delay that has occurred the goods have been sold

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chants, be regarded as such within the meaning of the Bankrupt Law." In re Morrow, 134 F. 686 (1901).

Another illustration may be drawn from Maley-Thompson & Moffett Co. v. Thomas Forman Co., 146 N. W. 95, 179 Mich. 548 (1914), where lumber was shipped, the statement rendered ending: "Settlement in 10 days by cash less 2% of 60 day acceptance." There was also subsequent delay. It was held that the property had passed.

[18] McCall v. Hunter, Pearce & Batty, 70 S. E. 59, 8 Ga. App. 612 (1911); Strother v. McMullen Lumber Co., 98 S. W. 34 (1906), 200 Mo. 647; Stone v. Perry, 60 Me. 48 (1872).

[19] Anundson v. Standard Printing & Mfg. Co., 118 N. W. 789, 140 Iowa 464 (1908); Taylor v. Applebaum, 118 N. W. 492, 154 Mich. 682 (1908); Leven v. Smith, 1 Denio (N. Y.) 571 (1845); Allen Lumber Co. v. Higuera, 85 A. 979, 86 Vt. 453 (1913).

Careful analysis of the legal relations involved undoubtedly indicates that the original delivery in such cases is merely a handing over of the goods to the buyer's custody, the seller being still in possession and the seller's intent to control still persisting till getting his contemporaneous payment. Such cases shade off gradually into cases where the possession is given the buyer conditioned on his paying cash at once. It does not seem necessary to go into this feature of the question in ordinary cash sale cases, though the distinction might become important on the question of larceny.

to some third party by the defaulting buyer.[20] If agreement or usage shows that credit was in fact extended the condition requiring cash payment is waived.[21] While delivery without securing payment is if nothing is said about it presumptive evidence of a waiver such evidence is not conclusive.[22] If the seller permits the buyer to retain the goods for a considerable time without objection that delay is conclusive evidence of a waiver.[23] While the cases are not entirely in accord as to the effect of delay where the seller protests but does nothing[24] the rule that seems best supported in reason is that failure promptly to reclaim possession constitutes a waiver of the cash payment.[25] Manifestly failure promptly to reclaim possession under such circumstances indicates either that the seller assents to the buyer's continuing in possession without the title's passing or that he assents to the buyer's becoming owner, trusting him to pay. If the latter, it is an ordinary sale, with property passing to the buyer but payment postponed. If the former, it is an arrangement in every aspect like a conditional sale, the buyer having the beneficial use and enjoyment but title reserved in the seller as security. In either view of such facts, therefore, such cases of prolonged delay in payment after the delivery of possession are incompatible with the cash sale arrangement which contemplates an immediate

[20] People v. Mills Sing, 183 P. 865 (1919); Maxherman Co. v. Alper, 206 N. Y. S. 233 (1924); Dillard & Coffin Co. v. Beley Cotton Co., (1924), 150 Tenn. 195, 263 S. W. 87.

[21] Ruediger v. Dennis, 201 S. W. 943, 199 Mo. App. 102 (1918); Baltimore & O. S. W. Ry. Co. v. Good, 92 N. E. 435, 82 Ohio St. 278, 29 L. R. A. (N. S.) 713 (1910).

[22] Merrill Furniture Co. v. Hill, 32 A. 712, 87 Me. 17 (1894); Ballard v. First Nat. Bank of Bolivar, 195 S. W. 559 (1917).

[23] In re O'Callaghan, 225 F. 133 (1914) (three weeks); Oldridge v. Sutton, 137 S. W. 994, 157 Mo. App. 485 (1911) (two weeks); Hirsch Lumber Co. v. Hubbell, 128 N. Y. S. 85, 143 App. Div. 317 (1911) (five weeks); King v. Adams, 265 F. 9 (1920) (under payment caused by mistake in weights); H. K. Porter Co. v. Boyd, 171 F. 305, 96 C. C. A. 197 (1909) (five months).

[24] Some cases apparently hold that in the absence of estoppel mere delay in securing payment does not constitute a waiver where the delivery in fact was made in expectation of immediate payment. Graham v. John Flannery Co., 124 S. E. 729, 32 Ga. A. 713 (1924); Skinner & Kennedy Stationery Co. v. Lammert Furniture Co., 166 S. W. 1079, 182 Mo. App. 549 (1914).

[25] Frech v. Lewis, 67 A. 45, 218 Pa. 141 (1907); Lehman v. People's Furniture Co., 142 P. 986, 42 Okl. 761, L. R. A. 1915D 355 (1914).

exchange of the goods for the price before the buyer is to acquire any interest in the goods.[26]

A special application of the problem of waiver is frequently presented in cases where the bargain contemplates a cash sale and the buyer pays not by legal tender currency but by his personal check. Payment by check is without special agreement commonly regarded as only conditional payment until cashed.[27] Following this analysis it is held by the great weight of American authority that delivering the goods to the buyer and taking his check for the price is not a waiver of the condition of payment in cash but that the property passes when the check is cashed. If, then, the check is dishonored on presentation, as for instance where it was forged or where the drawer had no funds, it is held that the goods still belong to the seller[28] unless the seller is shown to have accepted the check in absolute payment,[29] and that he can recover them from subsequent purchasers[30] from the buyer even when they are purchasers in good faith for value

[26] E. I. Dupont Co. v. John Shields Construction Co., 162 F. 198; Blackshear v. Burke, 74 Ala. 239; Upton v. Sturbridge Cotton Mills, 111 Mass. 446.

[27] This view manifestly is adopted from the law of negotiable paper where it is held by the great weight of authority that the giving of a note does not prevent the creditor's having recourse to the original obligation if the note is dishonored at maturity instead of merely suing on the note. Obviously, in note cases, credit has been extended.

[28] South San Francisco Packing & Provision Co. v. Jacobson, 190 P. 628 (1920); John N. Sims & Sons v. Bolton, 74 S. E. 770, 138 Ga. 73 (1912); Everroad v. Dickson Planing Mill Co., 106 S. E. 193, 26 Ga. A. 329 (1921); Moore v. Walker, 108 S. E. 809, 27 Ga. A. 428 (1921); Firestone Tire & Rubber Co. v. Anderson, 180 N. W. 273 (1920); Lewis v. James McMahon & Co., 271 S. W. 779, 307 Mo. 552 (1925); Thomas v. Farmers' Nat. Bank of Ludlow, 217 S. W. 860 (1920); Crocker State Bank v. White, 226 S. W. 972 (1920); Maxwell v. Dunham, 297 S. W. 94 (1927); First Nat. Bank v. Griffin & Griffin, 120 P. 595, 31 Okl. 382, 49 L. R. A. (N. S.) 1020 (1911); C. M. Keys Commission Co. v. Beatty, 142 P. 1102, 42 Okl. 721 (1914); Gose v. Brooks, 229 S. W. 979 (1921); Quality Shingle Co. v. Old Oregon Lumber & Shingle Co., 187 P. 705, 110 Wash. 60 (1920).

Under certain special statutes this position has been upheld even though the facts may indicate assent to a temporary delay in payment. See Hardeman v. Reynolds, 101 S. E. 804, 149 Ga. 660 (1920); Skinner v. Hillis, 104 S. E. 508 (1920); Morris & Co. v. Walker Bros. Co., 116 S. E. 201 (1923); Graham v. John Flannery Co., 124 S. E. 729 (1924).

[29] Cox Hat Co. v. Adams, 70 So. 203, 14 Ala. App. 426 (1915); Eaton v. State, 78 So. 321 (1918); Continental Bank & Trust Co. v. Hartman, 129 S. W. 179 (1910); Goodwin v. Bear, 209 P. 1080, 122 Wash. 49 (1922).

[30] Mott v. Nelson, 220 P. 617, 96 Ok. 117 (1923).

without notice.[31] The course of reasoning to sustain this result is that as the buyer never acquired the property, the transaction having been a cash sale and there never having been payment, subpurchasers from him can get nothing. While this reasoning seems superficially plausible closer analysis readily reveals serious doubts as to its logical correctness. Is payment by check in such cases conditional in any different sense than in cases of payment by note where manifestly credit is extended and the property passes?[32] As a matter of fact is there not assent in check cases to the buyer's dealing with the goods as owner before the check is finally collected? Failure to recognize this leads to great hardship on innocent purchasers from the defaulting buyer.[33] On the other hand, the contrary view would lead to great hardship on original sellers in cash transactions, and might have wider unfortunate social consequences more than outweighing any general benefit to be derived from the resulting increased negotiability of goods.[34] It therefore seems very unlikely that logical strictures upon the rule generally prevailing in this country will bring about any change in the law on the matter.

Where the bargain is for specific goods and the parties are agreed on all the terms but there is serious doubt as to whether the parties intended an ordinary sale with the property passing

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[31] Barksdale v. Banks, 90 So. 913 (1921); Johnson v. Iankovitz, 57 Or. 28, 102 P. 799, 110 P. 398 (1910); Young v. Harris-Cortner Co., 268 S. W. 125, 152 Tenn. 15 (1924), rehearing denied 268 S. W. 1120 (1924); John S. Hale & Co. v. Beley Cotton Co., 290 S. W. 994, 154 Tenn. 689 (1927).

[32] Krummenacher Drug Co. v. Chouteau, 296 S. W. 255 (1927); Durham v. Stuyvesant Ins. Co. of the City of New York, 182 N. Y. S. 887 (1920); Klingstein v. Vaughan, 140 S. E. 275 (1927).

[33] For elaborate argument on this point criticizing the position taken by the great weight of American authority see WILLISTON, SALES (2nd ed.) Sec. 346a.

[34] In Young v. Harris-Cortner Co., 268 S. W. 125 (1924), at p. 127, the court, by McKinney J. said: "We feel safe in saying that, as a matter of custom and convenience, most of the cash transactions of the country are paid with checks. A farmer brings in his cotton, tobacco, or wheat to town for sale and sells same, and, as a general rule, is paid by check, although all of such sales are treated as cash transactions. If, in such a case, the purchasers can immediately resell to an innocent party and convey good title, it would follow that vendors would refuse to accept checks and would require the actual money, which would result in great inconvenience and risk to merchants engaged in buying such produce, since it would require them to keep on hand large sums of actual cash. This would result in revolutionizing the custom of merchants in such matters."

at once or whether they intended a cash sale with the property not to pass till payment, it is submitted that the transaction should be held to be an ordinary sale rather than a technical cash sale. The goods being specific and the parties agreed on all the terms, the case falls directly within the presumption that unless a contrary intent appears the property was intended to pass at once.[35] In other words, unless the intent to make it a technical cash sale can be affirmatively made out, the case falls within the ordinary rule that the property passes at once and neither delivery nor payment is necessary. As discussed elsewhere, however, the rule in the early law was the other way,[36] and many courts unless carefully cautioned in this respect still readily repeat the old phrase that sales in which no time is agreed upon for payment are *prima facie* cash sales. Sometimes such statements still seem to form the substantial basis for decision of controversies.[37] Very frequently, however, in cases where such language appears in the opinions examination of the facts reveals that the actual result can be sustained on other grounds.[38] Prominent among these is the fact that the seller often had a lien and therefore in any event was entitled to hold possession until payment,[39] and delivery in expectation of immediate payment could therefore in any event properly be held to be a merely conditional delivery.

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[35] See Sales Act, Sec. 19, rule 1. For a good judicial exposition of this view see In re Liebig, 255 F. 458 (1918).

[36] See WILLISTON, SALES, Sec. 342.

[37] Sharp v. Hawkins, 107 S. W. 1087, 129 Mo. App. 80 (1908); Luce v. Brown, 118 A. 530, 96 Vt. 140 (1922). Statutes may even accentuate this position. See the Civil Code of Georgia (1910), sec. 4126, which has been frequently litigated. See for instance Atlantic Coast Line R. Co. v. W. W. Gordon & Co., 73 S. E. 594, 10 Ga. App. 311 (1912).

[38] Hart-Wood Lumber Co. v. Bonaly, 219 P. 432, 192 Cal. 180 (1923); Puritas Coffee & Tea Co. v. De Matini, 206 P. 96, 56 Cal. A. 628 (1922); Lumley v. Miller, 119 N. W. 1014, 23 S. D. 16 (1909); Ewing v. Musser, 42 Pa. Super. Ct. 177 (1910).

[39] Hudson & Thompson v. Barrett, 77 So. 428 (1917); Canadian Northern Ry. Co. v. Northern Mississippi Ry Co., 209 F. 758, 126 C. C. A. 482 (1913); Wong Foo v. Southern Pac. Co., 181 P. 823, 41 Cal. A. 42 (1919); Broughton v. Hunter's Bank, 264 S. W. 469 (1924); Davidson v. Diamond Furniture Co., 97 S. E. 480, 176 N. C. 569 (1918).