It is clear that this action is deemed to have been commenced on 28 July 1978 since this endorsement to the summons was made more than 90 days after the last previous endorsement. See G.S. 1A-1, Rule 4(e). The plaintiff contends this action is not barred by G.S. 1-52(1) because it is based on a contract under seal. The defendant contends the contract is not under seal but if it is, the action is nevertheless barred because there has been a voluntary dismissal followed by a lapse of the action for failure to serve the summons. We examine first the argument of the defendant.

The defendant's argument that we should not reach the statute of limitations question is based on its reading of Rule 4 in conjunction with Rule 41. A party who takes a second dismissal under Rule 41 is barred from bringing another action for the same cause and the defendant contends the same rule should apply where there has been a discontinuance under Rule 4(e) after a dismissal under Rule 41. The defendant says this is so because when the plaintiff failed to observe the requirements of Rule 4(d)(1) by not having the summons endorsed within 90 days after the endorsement of 8 August 1977, it was a failure to prosecute the action which led to the same type of dismissal as provided for by Rule 41(b). G.S. 1A-1, Rule 41(b) provides in part:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him . . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits.

G.S. 1A-1, Rule 4(e) provides:

When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or

an extension be endorsed by the clerk, but as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

We believe a comparison of the two sections shows that a discontinuance under Rule 4(e) is not analagous to a dismissal under Rule 41(b). Under Rule 41(b), actions are dismissed by the court on motion of defendants. Under Rule 4(e), actions are discontinued by operation of law but may be revived by an endorsement on the summons or the issuance of an alias or pluries summons. Without

more substantial guidance from the words of the rule, we do not feel we should hold a discontinuance under Rule 4(e) is the same as a dismissal under Rule 41(b).

As to the statute of limitations, the question posed by this appeal is whether the contract between the parties was under seal in which case G.S. 1-47(2), the ten year statute of limitations, would apply. If it is not under seal, G.S. 1-52(1), the three year statute of limitations, would apply. The defendant signed the contract in form as follows:

In witness whereof the parties hereto have executed (d) this agreement under seal, the day and month and year written above.

Attest:

General Heating and Air-Conditioning Co. of Greenville, Inc.

s/ Charles L. McClain

s/ A.G. Clark, Pres.

s/ Riddick Craven

s/ W.D.(Illegible)

The adoption of a seal by a party to a contract has been dealt with in the following cases: Bank v. Cranfill, 297 N.C. 43, 253 S.E.2d 1 (1979); Oil Corp. v. Wolfe, 297 N.C. 36, 252 S.E.2d 809 (1979); Bank v. Insurance Co., 265 N.C. 86, 143 S.E.2d 270 (1965); Bell v. Chadwick, 226 N.C. 598, 39 S.E.2d 743 (1946). From a reading of these cases we believe that if it appears without

ambiguity on the face of the contract that a party signed under seal, it is held as a matter of law that the contract is under seal. If it is ambiguous as to whether a party adopted a seal, it is a jury question as to whether the party signed under seal. A corporation may adopt a seal different from its corporate seal for a special occasion. In the case sub judice, the defendant expressly stated that it "executed this instrument under seal." The word "seal" appeared under the names of Charles L. McClain and Riddick Craven. Charles L. McClain and Riddick Craven were not parties to the contract. The word "seal" could have no effect as to them. We hold that when the defendant stated it "executed this contract under seal" and the word "seal" appeared close by the place where the defendant executed the contract that as a matter of law the defendant executed the contract under seal.

We hold the superior court committed error by dismissing this action. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Disposition

Reversed and remanded.