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oped a broader view, stating: "When Congress has spoken on this subject [what is a public purpose] its decision is entitled to deference until it is shown to involve an impossibility. Any departure from this judicial restraint would result in courts deciding on what is and what is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields."[44]

NOEL R. S. WOODHOUSE.

Negotiable Instruments—Adoption of Printed Seal

Suit was brought on a "note or bond" set out in detail in the complaint with the usual allegations of demand and non-payment.[1] The copy of the note disclosed the printed word "Seal" at the right of defendant maker's signature but there was no recital such as "Witness my hand and seal."[2] The answer admitted execution of the instrument set out in the complaint and pleaded the statute of limitations, "Said notes not bearing the seal of . . . defendants and were more than three years past due prior to the bringing of this action."[3] The trial judge excluded defendant's evidence that he neither sealed the note nor understood the significance of nor adopted the printed word as his seal.[4] He also declined to submit any issue on the question of defendant's intent to adopt the word as his seal.[5] Moreover in his charge to the jury the judge referred to the instrument as a bond.[6]

Thus hedged in and his instrument judicially classified against him, the defendant lost at trial and on appeal claimed the rulings and charge of the trial judge to have been error. That, if erroneous, they had been prejudicial could not be doubted.

The North Carolina Supreme Court in affirming said that after defendant had admitted executing the instruments set out by plaintiff it would violate the parol evidence rule to admit evidence that they were

in city] was not only novel . . . and that the precedent thus set, if followed to any extent, would not serve the public interest. *But these are not matters which are confided to this branch of the government.*").

[44] United States *ex rel.* Tennessee Valley Authority v. Welch, 327 U. S. 546 (1946) (case related to taking of land in Swain County, N. C., by the T. V. A.). *But see* the concurring opinion of Mr. Justice Reed.

[1] Bell v. Chadwick, N. C. Super. Ct., May term, Craven County, 1946.

[2] *Id.* Fall term, 1946, North Carolina Supreme Court, record on appeal, p. 3. It seems to be settled that the recital when present will conclusively establish the adoption of the printed word Seal. Jefferson Std. Life Ins. Co. v. Morehead, 209 N. C. 174, 176, 183 S. E. 606, 607 (1936), *semble*. *Cf.* Churchill v. Speight's Extrs., 3 N. C. 338 (1805).

[3] Record, pp. 7, 8. As to the necessity of pleading the facts see Murray v. Barden, 132 N. C. 136, 43 S. E. 600 (1903) and other cases in N. C. DIGEST, Limitation of Actions, §183(2).

[4] Record, pp. 21-23.

[5] Record, p. 24.

[6] Record, p. 25.

not sealed instruments: "The allegation and admission establish the word 'Seal' as a part of each instrument."[7]

To one who has in mind what we were told in *Jefferson Standard Life Insurance Co. v. Morehead*,[8] i.e., that "The [parol evidence] rule . . . is not violated . . . by showing that an instrument apparently under seal is a simple contract," the first thought is that defendant slipped up in his pleading; he should have denied that he executed a sealed instrument as alleged and then added his specific plea of non-adoption and the statute of limitations. Nothing can be learned, of course, from the *Morehead* case as to correct defense pleading to avoid the parol evidence pitfall since the judicial pronouncement there was dictum and no such state of facts was involved.

But in *Williams v. Turner*,[9] the case which first in recent years brought this question into prominence, the trial judge's seventh finding of fact recited that defendant admitted the execution of a note identical in all material respects with that in the instant case and yet he was permitted to assert his non-adoption of the printed word and to win on the short statute of limitations. And in *Currin v. Currin* the court said, "The defendant admitted the execution, which admission carries with it amongst other things, the burden of showing that he had not adopted the seal."[10] No doubt the defendant in the principal case would assert that this was exactly what he was trying to do, i.e., carry the burden with the evidence he wanted to introduce after he had admitted the execution but that the trial judge would not let him do it. If the Supreme Court here had been so inclined they could have treated his answer as sufficient denial of the execution of a sealed instrument to have permitted him to testify as to non-adoption of the printed seal if non-adoption could serve him as a valid defense. Considering that defendant admitted the execution of the instrument set out but followed it in another paragraph by a denial that he comprehended or adopted the seal, the plaintiff was certainly on sufficient notice that defendant was not intending to admit that the instrument he signed was a sealed instrument. Obviously he only intended admitting that he put his name to the form set out; and the legal status of that form as a sealed instrument depended on his intent—or so we were given to understand from the earlier decisions.

The truth of the matter seems to be that since the *Morehead* dictum we have been inching along toward a new rule, counsel never having put their cases in such shape or the facts not being such as to force a square decision. Thus in one case[11] after the defendant had "admitted

[7] Bell v. Chadwick, 226 N. C. 598, 39 S. E. 2d 743 (1946).
[8] 209 N. C. 174, 183 S. E. 606 (1936), Note, 14 N. C. L. Rev. 311 (1936).
[9] 208 N. C. 202, 179 S. E. 806 (1935), Note, 14 N. C. L. Rev. 80 (1935).
[10] 219 N. C. 815, 817, 15 S. E. 2d 279, 281 (1941).
[11] Allsbrook v. Walton, 212 N. C. 225, 193 S. E. 151 (1937).

execution of the note, pleaded that it was not under seal and interposed by way of defense the three-year statute of limitations," and plaintiff had offered the note with its printed seal in evidence, defendant demurred to the evidence although he had been told by the *Morehead* dictum that he must take up the burden of proving non-adoption. He lost.[12]

In another case wherein defendant admitted execution of the note[13] and then to sustain the burden of proving non-adoption, testified to nothing more than that he could not remember what he had intended, such "negative testimony" got him nowhere.

In a still later case[14] where defendant desired to introduce evidence of his intent not to adopt the printed word "Seal," counsel had failed to plead its non-adoption and so had failed to put the issue into the case. "The absence of *allegata* is as fatal as the absence of *probata*."[15]

Other recent cases[16] of notes bearing "Seals" fall equally short of putting squarely to the court the ultimate issue, which may be stated in two ways: (1) As a matter of substantive law, does an intent, disclosed or undisclosed, not to adopt the printed word "Seal" leave the instrument legally a simple contract; (2) if the defendant so pleads as

[12] Correspondingly in Lee v. Chamblee, 223 N. C. 146, 25 S. E. 2d 433 (1943), where the trial judge nonsuited a plaintiff under the three-year statute (R. p. 6) after the note bearing the printed seal had been introduced, the judgment was reversed and a new trial granted. In that case defendant's pleading did not exactly admit the execution of the note. He said that after its execution by his co-maker he "signed said note as accommodation surety," adding a specific denial of an intent to adopt the printed word "Seal" and a plea of the statute (R. pp. 4-5).

[13] Currin v. Currin, 219 N. C. 815, 816, 15 S. E. 2d 279, 281 (1941). Here he admitted execution of the note at trial rather than in his pleadings. His testimony was only, "I can't say that I intended to show 'Seal'" and "I couldn't say right now that I remember seeing the word 'seal.'" This presented no question for the jury.

[14] Roberts v. Grogan, 222 N. C. 30, 21 S. E. 2d 829 (1942).

[15] He did plead the bar of the three-year statute of limitations which would be meaningless if he admitted that the instrument was sealed and so if the court had been disposed to help the defendant it could have treated the plea as fairly raising the issue of adoption and permitting relevant testimony. Obviously here, as in the principal case, the court did not want to come to defendant's aid and force itself to meet the issue discussed herein.

[16] In neither Hertford Banking Co. v. Stokes, 224 N. C. 83, 29 S. E. 2d 24 (1944) nor Perry v. First Citizens' Bk. & Tr. Co., 226 N. C. 667, 40 S. E. 2d 116 (1946) was any point made of the adoption of the word "Seal" and in neither is it certain that the word was printed. In the latter each note by its own terms was described both as "note" and "bond." Record, pp. 35-36. In both cases the respective notes were treated as sealed instruments. The *Hertford* case went off on the ground that an indorsement, even if sealed, takes the short statute. It might perhaps also have been disposed of on the common law ground that persons not appearing in sealed and negotiable instruments cannot be charged as parties thereto. See 2 MECHEM, AGENCY (1914) §§1734-1736; RESTATEMENT, AGENCY, §§151, 152, 186. The *Perry* case went on the ground that conditional delivery can be used as a defense (between the parties) to even a sealed note. It does not, however, sharply distinguish between oral conditions precedent and subsequent, i.e., between oral conditions to becoming obligated and to a duty to pay. The case also further fortifies the view that, though a seal on a note "imports" a consideration, failure of consideration is a defense (between the parties).

to avoid admitting the execution of a sealed instrument, is he then entitled to offer evidence of an intent, disclosed or undisclosed, not to adopt the printed word as his seal and have the matter passed on by the jury with a proper instruction. Whichever way the matter is presented it should receive the same answer. Notwithstanding the pretty strong past indications to the contrary, I venture to predict that the answer will be no, at least as to any secret, undisclosed intent. And even as to a disclosed intent (e.g., maker to payee: "I don't intend this to be a sealed instrument, you understand." Payee says nothing.) it seems that the answer should be the same unless defendant's silence in the face of such statments would be regarded as ground for reformation.[17]

A brief running survey of the situation then may be helpful particularly with reference to matters of pleading and proof.

If a plaintiff alleged that the defendant executed a promissory note to a named payee but said nothing about a seal, he might in some jurisdictions and in days gone by, have been guilty of a variance when later he offered in evidence, not a simple promissory note but a sealed instrument—a bill single.[18] Absent actual prejudice to the defendant from this technical variance, no such consequence would have befallen the plaintiff holder in North Carolina, even before the Negotiable Instruments Law.[19] Yet even here a plaintiff out of caution now and then recites that the defendant executed his promissory note "or bond."[20]

There was once the possibility also that a complaint on a more than three years overdue simple note would be met by a demurrer on the ground that the staleness appeared on the face of the complaint.[21] But that risk no longer faces the plaintiff in North Carolina as the defense of the statute must be "taken by answer."[22]

[17] This might be predicated either on a mutual mistake of law or on some sort of fraud by the payee on the maker, matters sufficient for an independent study. Chadbourn and McCormick, *The Parol Evidence Rule in North Carolina,* 9 N. C. L. REV. 169 at footnotes 60, 63 (1931). See generally, 5 WILLISTON, CONTRACTS §§1549, 1581-1586, 1525 (1937). The case for the maker would seem to be stronger if the printed insignia was "(L. S.)." Mistake of fact, see Malone, *Reformation of Writings for Mutual Mistake of Fact,* 24 GEO. L. J. 613 (1936), seems to be out of the question.

[18] Reed v. Scott, 30 Ala. 640 (1857) (but amendment was permitted).

[19] Lily v. Baker, 88 N. C. 151 (1883).

[20] Currin v. Currin, 219 N. C. 815, 15 S. E. 2d 279 (1941), complaint, par. 2.

[21] Sturges v. Burton, 8 Oh. St. 215, 220, 72 Am. Dec. 582 (1858). *Cf.* Hosterman v. First Nat. Bk. & Tr. Co. of Springfield, —— Oh. App. ——, 68 N. E. 2d 325 (1946); Roy N. DeVault v. Harry S. Truman and another, —— Mo. ——, 194 S. W. 2d 29, 32 (1946), motion to dismiss, Pendergast & Kohn for defendant Truman; Robinson v. Lewis, 45 N. C. 58, 60 (1852), where in equity not even a demurrer was required and the defense was permitted on hearing. (These are not promissory note cases.)

[22] N. C. GEN. STAT. (1943) §1-15 and annotations; N. C. DIGEST, Limitation of Actions, §§180, 182(3); Note, 14 N. C. L. REV. 396 (1936). Similarly elsewhere as to motion to dismiss. Woolery v. Smith, 302 Ky. 725, 196 S. W. 2d 115 (1946). *Cf.* where used by plaintiff against a set-off. Stanly's Extr. v. Green, 1 N. C. 66 (1795). But note Editor's Quaere, 1901 Reprint.

The problems just discussed, however, are largely academic today because of the more or less standardized practice[23] of setting out the note *ipsissimis verbis,* thus disclosing the presence of the word "Seal" after the maker's signature. That is certainly sufficient for all purposes and as just noted the defendant must plead the bar of the statute. But the defendant is advised by the instant case that he had better not in his answer admit execution of the note thus set forth in the complaint. Perhaps he should deny the allegations of that paragraph of the complaint "except that he admits that he placed his signature on the printed form set out in said paragraph of the complaint without adopting but, to the contrary, with the intent not to adopt as his seal the word 'Seal' printed thereon but with the intention of executing a simple unsealed promissory note." To this he might also add, though it would seem to be a conclusion of law, the allegation that the instrument is not the sealed promise of the defendant. He would then plead the three-year statute of limitations.

There seems to be no requirement under our practice that the plaintiff reply.[24] The cause is then at issue.

At trial, plaintiff would offer the note, prove defendant's signature (or rely on the admission if, as here assumed, there was one) and any indorsements necessary to his title.[25] If the burden of proof consistently followed the burden of pleading it would now be on defendant to prove the fact that the statute had run. The burden of proof, however, is otherwise in North Carolina.[26] For rather obvious reasons the plaintiff must put in evidence and convince the jury that the claim is not barred, as, e.g., that there was a later promise by defendant which tolled the statute. Where, however, the question of whether the debt is barred depends not

[23] See N. C. GEN. STAT. (1943) §1-156; 1 DOUGLAS, FORMS (1941), no. 378; ILL. CIV. PRAC. ACT, Ann. Bar Ass'n Ed. (1933) Apdx. I, 24, no. 19; I WINSLOW, FORMS OF PLEADING AND PRACTICE (2d ed., 1915), 555, no. 884. Or by adding it as an exhibit. PELL'S FORMS (1912), no. 187; CONN. PRACTICE BOOK (1934) 148, no. 73. *Cf.* GREGORY'S COMMON LAW FORMS (1927) 34, no. 27; WHITTELSEY, MISSOURI PRACTICE (1876) 260, no. 44. Nearly all the cases commented on herein set out the notes in full. Even that style of complaint, however, would not always show that the word "Seal" was printed as part of a form.

[24] N. C. GEN. STAT. (1943) §1-141; Oldham v. Rieger, 145 N. C. 254, 148 S. E. 548 (1907). Notwithstanding that rule, one case said there may be judgment of nonsuit on the pleadings where "the statute of limitations having been properly pleaded it appears from the face of the complaint and the uncontroverted evidence that the plaintiff's cause of action is barred by statutory limitation of time." This sounds as if it denied plaintiffs a hearing on the facts but the court was probably satisfied from the record that plaintiffs had nothing more relevant to offer than something Uncle Samuel had told them. Latham v. Latham, 184 N. C. 55, 113 S. E. 623 (1922). Followed in Jones v. Bankers Life Co., 131 F. 2d 989, 994 (C. C. A. 4th 1942).

[25] In case of indorsements plaintiff might be a holder in due course in which case certainly no defense of non-adoption of the word "Seal" should be available.

[26] "Incumbent on plaintiff to show." Powers v. Planters Nat. Bk., 219 N. C. 254, 13 S. E. 2d 431 (1941). *Contra* by rule of court. *In re* McKeyes Est., 315 Mich. 369, 24 N. W. 2d 155 (1946).

on such extraneous matter but on a matter appearing on the face of the instrument, i.e., the word "Seal" and the intent of the defendant regarding it, the plaintiff has already done enough and the defendant has now the burden of showing non-adoption.[27] This it would seem he might do by showing that he had made marks through the word "Seal."[28] Perhaps he could do it by testimony that when he signed he said to the payee, "I do not intend this print to be a seal."[29] From past decisions we would understand that he could do it also by testimony that, "I then intended not to adopt the printed word, though I said nothing about my intent one way or the other," it being for the jury whether to believe him or not.

The present case does not squarely tell us that such negative intent is immaterial or that testimony concerning it is inadmissible if the defendant has not admitted execution of the instrument. If a future case does tell us those things it will have scrapped a good deal of what has been said and implied in the past, for it is idle to talk of defendant's having a burden of proving what he will not be permitted to prove. It may be that the line will be drawn between offers to prove disclosed and those to prove undisclosed intent, though it is not easy to see why the one violates the parol evidence rule more than the other.[30] The rule we have come to or near to is better than the one we had or seemed to have. A carefully piloted test case is awaited.

M. S. BRECKENRIDGE.

[27] Currin v. Currin, 219 N. C. 815, 15 S. E. 2d 279 (1941). Evidently the burden of convincing the jury not just the burden of going forward. If "Execution" had meant the same thing in this case as it does in the principal case the court would never have reached this point. See text at note 10 *supra.*

[28] Though those very marks would be sufficient under present day conditions to constitute the maker's seal if the jury believe they were put there with that intent—an unlikely thing when put over the printed word "Seal" but less unlikely if the printed matter was "(L. S.)," at least to one who knew exactly what is meant by that insignia. See 14 N. C. L. REV. 80, 83, 87, footnotes 12, 31 (1935).

[29] Here, too, this might be thought more convincing when the print in question was "(L. S.)."

[30] See I RESTATEMENT, CONTRACTS §98(1) (1932), and same with Van Hecke, *N. C. Annotations,* 13 N. C. L. REV. 1, 67, §98(1) (1934): "A promisor who delivers a written promise to which a seal has been previously affixed or impressed with apparent reference to his signature, thereby adopts the seal. *Comment:* (a) ". . . extrinsic evidence is not admissible." Quoted and followed in Federal Res. Bk. of Richmond v. Kalin, 81 F. 2d 1003, 1007 (C. C. A. 4th 1936), involving North Carolina instrument. That was before Erie R. R. v. Tompkins, 304 U. S. 64 (1938). While there would seem little room for arguing in the face of present day practice that the printed word "Seal" was not a seal within the meaning of this section it would be less clear if the insignia were only "(L. S.)." See 14 N. C. L. REV. 80, 87 (1935).