The Jurisprudence of Paper Clips

Robert A. James

We occasionally republish classic works from the obscure but excellent *Journal of Attenuated Subtleties*, invariably pleasing our readers. What we have here is a *JAS* work-in-progress (for decades) that never made it into print (until now), preceded by a reflection by the author.

— *The Editors*

THE EDITORS OF that short-lived law review *The Journal of Attenuated Subtleties* saw much of their endeavors expended – or wasted, depending on your point of view – on matters of public law. Inquiries into the two Titles of Nobility Clauses, the personal jurisdiction challenge for suits against Satan, and various quirks of Supreme Court history consumed most of both issues, published in 1982.[1] The editors

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[1] Three pieces have reappeared in these pages: Benjamin C. Zuraw, *The Supreme Court and the Westward Movement: A Demographic Study,* 1 J. ATTEN. SUBT. 9 (1982) (updated by Zuraw & James at 11 GREEN BAG 2D 341 (2008)); Robert A. James, *Are Footnotes in Opinions Given Full Precedential Effect?* 1 J. ATTEN. SUBT. 33 (1982) (republished at 2 GREEN BAG 2D 267 (1999)); and Robert A. James, *Instructions in Supreme Court Jury Trials,* 1 J. ATTEN. SUBT. 5 (1982)) (republished at 1 GREEN BAG 2D 377 (1998)). Additional articles include John J. Little, *Suing Satan: A Jurisdictional Enigma,* 1 J. ATTEN. SUBT. 27 (1982) (cited in

were embarking on business practices, and used their last clear chance to comment in law school on trivia relating to the courts and the court-focused academy.

One editor's attention was drawn to private law late in his third year, when a student's concentration is bound to falter in even the most controlled environment. While studying for a Commercial Transactions examination, he came across the original version of U.C.C. § 3-202(2) (additional indorsements must be written "on a paper so firmly affixed . . . as to become a part [of the negotiable instrument]") and the following footnote in the then regnant edition of White and Summers:

> The paper affixed is known as an allonge. See James Talcott, Inc. v. Fred Ratowsky Ass'n, Inc., 2 UCC 1134 (Pa.C.P.1965) (plaintiff failed to qualify . . . because indorsement on paper "clipped" to instrument was not "firmly affixed" to the instrument); . . . Lamson v. Commercial Credit Corp., 187 Colo. 382, 531 P.2d 966, 16 UCC 756 (1975) (stapling, but not pinning or paper-clipping, is an adequate method of firmly affixing the indorsement).[2]

"Pulling on this thread, he found that even the tiniest fray in legal fabric could produce an immense amount of material."[3]

Sure enough, there were cases and treatises addressing the means of sticking papers together. The judges and learned writers soberly considered whether glue, paste, paper clips, staples, and other devices provide the requisite firm annexation. The commercial law must face the evolving state of technology, no matter how humble – just as constitutional jurisprudence must cope with methods of surveillance unknown to the Founding Fathers (or even to Big Brother).[4]

GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 158 n.193 (1985)); Manley W. Roberts, *The Titles of Nobility Clauses: Rediscovering the Cornerstone,* 1 J. ATTEN. SUBT. 20 (1982); and J. David Kirkland, Jr., *Rethinking United States v. Detroit Timber & Lumber Co.,* 1 J. ATTEN. SUBT. 16 (1982).

[2] JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 504 n.55 (2d ed. 1980).

[3] Davison M. Douglas, *Attenuated Subtleties Revisited,* 2 GREEN BAG 2D 375, 376 (1998).

[4] *See* Kyllo v. United States, 533 U.S. 27 (2001) (Scalia, J.) (infrared imaging to detect heat emanating from a home is a "search" for Fourth Amendment purposes).

The editor jotted notes from his brief research and pounded the text of a brief and intemperate article on the keys of his Smith-Corona typewriter. He hung at least one footnote number on practically every sentence, apparently with the childlike expectation that the documentation would spontaneously germinate. That was as far as he got. Like a mosquito in pine sap, the piece lay for thirty-three years, wrapped in a manila folder inside a corrugated cardboard banker's box encased in a storage cabinet.

On unearthing the manuscript, the editor found it essentially sound. The *James Talcott* and *Lamson* cases are regularly cited in more general surveys of bank U.C.C. practices.[5] The savings and loan and banking crises drew related attention to the time at which bankers belatedly attached allonges to their portfolios of transferred and re-transferred notes, a practice that can only be called back-stapling.[6]

Technology as well as time marches on. In 2011, a federal judge in Arizona was compelled to ponder the status of an upstart, the Acco® prong paper fastener. Is that contraption more like a paper clip (in which case judgment for defendant) or more like a staple (in which case judgment for plaintiff), with untold sums of money at issue? A better example of how

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[5] *Compare* Douglas J. Whaley, *Mortgage Foreclosures, Promissory Notes, and the Uniform Commercial Code*, 39 W. St. U. L. Rev. 313, 319 n.12 (2012) ("unlikely a court would hold [a paper clip] would 'firmly affix' one piece of paper to another") *with* Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 Creighton L. Rev. 503, 568 (2002) (revised U.C.C., omitting "firmly," "leav[es] open the possibility that allonges could merely be paper-clipped"). *See also* M.B.W. Sinclair, *The Case of the Air-Conditioned Allonge*, 9 Ann. Rev. Banking L. 143 (1990) (noting repudiation of Wisconsin decisions in other states, and discussing Adams v. Madison Realty & Dev., Inc., 853 F.2d 163 (3d Cir. 1988) (folding the alleged allonge around the note insufficient – $19.5 million at stake)).

[6] The requirement in the currently promulgated 1990 version of U.C.C. § 3-204(a) is "affixed," bereft of the adverb "firmly." *See* Lawrence Safran & Joshua Stein, *Getting Attached: When do allonges meet the requirements of the New York UCC?* N.Y.L.J., Nov. 27, 2006, at 3 (arguing that stapling suffices for affixation, citing Southwestern Resolution Corp. v. Watson, 964 S.W.2d 262 (Tex. 1997), and distinguishing the original Official Comment 3 ("pin[ning] or clip[ping] . . . not sufficient for negotiation")); James M. Haddad & Frederick M. Brodie, *New York's Proposed UCC Amendments: Back to the Future,* N.Y.L.J., June 21, 2012, at 4 (original U.C.C. allonge rules are "archaic requirements . . . inconsistent with modern practices" that "increase cost to banks and, ultimately, consumers").

the law must derive profound significance from the slimmest of distinctions can hardly be found.[7]

The *Journal of Attenuated Subtleties* article is itself an artifact of an earlier time. Younger readers should know that the xxxxx typewriter overstrikes constituted the DELETE key of the first seven-eighths of the twentieth century. Since the work's conception, several authors have chronicled the development of mundane utilitarian objects, including but not limited to the paper clip.[8]

The editor is grateful that this draft is now exposed to the light of day. Like the DNA inside an insect embedded in tree resin,[9] a long-lost article may serve some useful purpose. Doubtless other legal authors have other incomplete pieces in their vaults that, even in an unpolished state, deserve to be similarly released. It is hoped that from this amber may emerge not velociraptors but butterflies.

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[7] Fed. Home Loan Mortg. Corp. v. Madison, 2011 WL 2690617, 76 UCC Rep. Serv. 2d 80 (D. Ariz. July 12, 2011) ("sufficiently affixed" for purposes of 1990 version of Code; result unclear in jurisdictions using the original version).

[8] *See, e.g.,* HENRY PETROSKI, THE EVOLUTION OF USEFUL THINGS: HOW EVERYDAY ARTIFACTS – FROM FORKS AND PINS TO PAPER CLIPS AND ZIPPERS – CAME TO BE AS THEY ARE (1992).

[9] *See* MICHAEL CRICHTON, JURASSIC PARK (1990).

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James/Allonge text 1

The Jurisprudence of Paper Clips: Affixation of Allonges to Negotiable Instruments

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Transfer of a negotiable instrument is effected by delivery of the instrument as indorsed by the payee.[1] The new holder may similarly transfer its interest by indorsing and delivering the paper to yet another holder.[2] This process may repeat several times before the payor is finally called upon to pay its obligation to the ultimate holder.[3] A classic corundrum emerges from an unavoidable physical fact: all these signatures take up a lot of room on the back of a rather small piece of paper.[4] Sloppy or spasmodic penmanship, or indiscriminate placement of rubber stamp impressions, may result in the filling up of all blank space on the check or note several steps before the ultimate discharge of the claim.[5] Space must be found for future signatures, and all indorsements must be kept together so that the identity of all parties liable on the instrument may be established.[6]

The commercial law, with its characteristic resourcefulness, has responded with the allonge:[7] a second piece of blank paper that, under the Uniform Commercial Code, is "so firmly affixed [to the instrument] as to become a part thereof."[8] Thus, one merely firmly affixes an allonge, and further indorsements may be made and transfers accomplished. The allonge makes good sense and good law,[9] but how firmly must affixation be? The answer is far from clear, and a notable schism has developed

in American jurisprudence over the validity of affixation by paper clips.[10]

The former rule on affixation was usually put in a phrasing far more liberal than that of the Code; for example, Mr. Justice Story, in his commercial writings of the 1840's, opined that allonges were merely to be "annexed" to the instrument.[11]

The laxity in definition of the connection between allonge and draft is brought to a nadir in a pair of cases representing what may be derisively called the Wisconsin rule. In Crosby v. Roub,[12] the Wisconsin Supreme Court squarely held that "pinning" an allonge to a note constituted proper annexation.[13] Similarly, in Bange v. Flint,[14] that Court held "tacking" sufficient, and held further that allonges may be used whenever "convenien[t]," rather than necessary.[15] The Wisconsin courts have apparently never faced an allonge question since.[16]

With the twentieth century came the Uniform Negotiable Instruments Law, with its more stringent requirement that the allonge be "attached,"[17] and The Uniform Commercial Code raised the standard still higher to "firm[] affix[ation]."[18] Under the NIL and the U.C.C., modern American courts have sounded the death knell of the paper clip as a method of affixing allonges. The highly influential Pennsylvania Court of Common Pleas[19] ruled specifically in James Talcott, Inc. v. Fred Ratowsky Ass'n, Inc.[20] that a paper clip did not render an allonge "firmly affixed."[21] In accord is the highest court of the State of Colorado, which in Lamson v. Comm'l Credit Corp.[22] praised staples but damned paper clips and pins as methods of affixation.[23]

Curiously, no reported case has involved the use of cellophane tape: such a fixative would be clearly superior to both staples and paper clips by virtue of its transparance (permitting easy review of previous indorsement) and its extremely

sticky character (rendering removal by thieves or renegers more problematic). ~~and~~ ~~The~~ ~~for~~ Commissioners on Uniform State Laws would be well advised to include in the official comment to section 3-202(2) of the next edition of the Uniform Commercial Code a discussion a preferred methods of affixation in the wake of the demise of the paper clip, and ~~the~~ cellophane tape should rank high in such a census.[24] It is also high time that Wisconsin rejoined the Union in this matter; while that State ~~is~~ has traditionally been a maverick,[25] its approach to allonge affixation is entirely too casual for the modern tightly-worded codes,[26] ~~and~~ Its supreme court ought to overrule or distinguish ~~from the unique factual circumstances of~~ Crosby and ~~and~~ Bange at the next available opportunity. The paper clip, whatever its virtues in other contexts, is incompatible with twentieth-century allonge theory.[27]

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