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more complete curtailment, even a total one, should be necessary to prevent impairment of that policy, the Court will be free to reconsider today's holding."[51] In effect, the Court has established a policy of deciding in each kind of case how the tort remedy will affect the collective bargaining process. Instead of interpreting the intent of Congress through "elucidating litigation," the Court is exercising a type of conscious judicial legislation specifically prohibited in *Garmon*.[52] "The Court's decision," as the dissent concluded, "both underestimates the damage libel suits may inflict on the equilibrium, and overestimates the effectiveness of the restraint which will result from superimposed requirements of malice and special damages."[53]

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Negotiability of a Note Attached to a Contract in Texas

If a note, otherwise negotiable, is attached by perforation to a contract and both are transferred,[1] there may be a question as to whether or not the note remains negotiable. It is arguable that the attachment of a note and contract renders the note contingent or makes it impossible for one to be a holder in due course of the note. Texas courts have not squarely resolved this problem, nor does the Uniform Commercial Code specifically deal with it.[2] Those jurisdictions which have considered the issue have determined that the transfer of a note and contract which are attached by a perforation does not affect the negotiability of the note.[3]

[51] *Id.* at 67.

[52] In San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242 (1959), the Court stated:

> The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts on the entire scheme of federal labor policy and administration. Our task is confined to dealing with classes of situations. To the National Labor Relations Board and to Congress must be left those precise and closely limited demarcations that can be adequately fashioned only by legislation and administration.

[53] 383 U.S. at 73.

[1] Since the terms transfer, negotiate, and assign have specific meanings in the area of negotiable instruments, the word transfer is being used to designate a delivery of and change in ownership of an instrument by one party to another, without assuming either a valid negotiation or an assignment has been made.

[2] UNIFORM COMMERCIAL CODE §§ 3-105, 3-112, 3-119.

[3] Certified Motors v. Nolan Loan Co., 122 A.2d 227 (D.C. Cir. 1956); Commercial Credit Corp. v. Orange County Mach. Works, 214 P.2d 821 (Cal. 1950), *affirming en banc*, 208 P.2d 780 (Cal. Ct. App. 1949); Allison Ford Sales v. Farmers State Bank, 86 N.W.2d 896 (Iowa 1957); Northwestern Fin. Co. v. Crouch, 242 N.W. 771 (Mich. 1932); Shattuck

Only one Texas case has been found which bears directly on the question of the note's negotiability.[4] There a contract, attached to an otherwise negotiable note from which it was separated by only a perforated line, provided specifically for its detachment from the note. The court, turning to this specific provision, held that "it was the intention of the parties that the latter [*viz.*, the note] should constitute a negotiable instrument, and that the Burton-Parker Manufacturing Company was authorized to detach and use it as such."[5] The court did not consider the issues which would have been involved if the contract had not so clearly permitted detachment or if the contract with or without such provisions had still been attached to the note when negotiation of the note to a third person was attempted. Dictum by another civil appeals court indicated that a note's being "followed by a chattel mortgage form did not convert it into a contingent obligation."[6] The statement was irrelevant, however, since the plaintiff's cause of action did not depend on negotiability. In one case[7] a note attached to a contract was found to be non-negotiable, but this was because the note itself contained several conditions and was contingent upon the fulfillment of the contract.

Due to the paucity of cases which deal with this problem, its resolution must be derived from an examination of analagous situations. Some analogies may be made with transactions, substantively similar to the one under discussion, although the note is physically distinct from any collateral agreement that may or may not be involved. Other comparisons may be drawn with cases that consider the various problems which arise after a note actually attached to a contract has been detached.

Contemporaneous Agreements Agreements executed contemporaneously with a negotiable instrument as part of the same transaction are generally construed together as one contract between the original parties unless this is contrary to the express intent of the parties[8] or unless the contract is repugnant to express provisions of

v. Reed, 190 N.W. 649 (Mich. 1922); First & Lumbermen's Nat'l Bank v. Buchholz, 18 N.W.2d 771 (Minn. 1945); First Nat'l Bank v. Newton, 229 N.W. 334 (Neb. 1930); Shawano Fin. Corp. v. Julius, 254 N.W. 355 (Wis. 1934); Annot., 44 A.L.R.2d 8, 63 (1955); 10 C.J.S. *Bills & Notes* § 44(b) (1938); 11 AM. JUR. 2d *Bills & Notes* § 70 (1963).

[4] Cedar Rapids Nat'l Bank v. Barnes, 142 S.W. 632 (Tex. Civ. App. 1912).

[5] *Id.* at 633.

[6] Strom v. Dickson, 360 S.W.2d 823, 824 (Tex. Civ. App. 1962).

[7] Southwest Contract Purchase Corp. v. McGee, 296 S.W. 912 (Tex. Civ. App. 1927).

[8] Head v. Wollmann, 272 F.2d 298 (5th Cir. 1960); Motor & Industrial Fin. Corp. v. Hughes, 294 S.W.2d 182 (Tex. Civ. App. 1956); First Prize, Inc. v. Fireman's Fund Ins. Co. of Cal., 269 S.W.2d 939 (Tex. Civ. App. 1954); Allied Bldg. Credits Inc. v. Ellis, 258 S.W.2d 165 (Tex. Civ. App. 1953); Schwab v. Schlumberger Well Surveying Corp., 195 S.W.2d 412 (Tex. Civ. App. 1946), *rev'd*, 120 Tex. 240, 36 S.W.2d 978; McFarland v. Shaw, 45 S.W.2d 193 (Tex. Comm. App. 1932); Stubblefield v. Copper, 37 S.W.2d 818

the note.[9] Such construction affects neither the negotiability of the contemporaneous note[10] nor the status of a third party as a holder in due course.[11] Due to the construction given to the contemporaneously executed note and contract, they are as much one unit as are the note and contract attached by perforation. Cases in other jurisdictions have, in fact, treated the attached note and contract as simultaneously executed instruments.[12]

References to Other Instruments Along similar lines references to extrinsic, executory contracts within a negotiable note do not destroy negotiability when the note is not conditioned upon the contract.[13] The Texas Supreme Court has held: "[T]he rule in this state undoubtedly is that before a reference in an otherwise negotiable instrument to another agreement will make the former non-negotiable, 'it must appear therefrom that the paper is to be burdened with the conditions of this agreement.' "[14] A fortiori, the mere securing of a negotiable note by a collateral, executory agreement does not alter the note's negotiability.[15] If reference in a note to an outside agreement does not impair the note's negotiability, the attachment of an outside agreement should have no different effect. The mere attachment neither imposes any further conditions on the terms of

(Tex. Civ. App. 1931) *error dism.*; Camp v. Dallas Nat'l. Bank, 21 S.W.2d 104 (Tex. Civ. App. 1929), *modified*, 36 S.W.2d 994 (Tex. Comm. App. 1931); 9 TEX. JUR. 2d *Bills & Notes* § 51 (1959); 11 AM. JUR. 2d *Bills & Notes* § 70 (1963); 10 C.J.S. *Bills & Notes* § 44b (1938).

[9] Peavey-Moore Lumber Co. v. First Nat'l Bank, 133 Tex. 467, 128 S.W.2d 1158 (Tex. Comm. App. 1939); 9 TEX. JUR. 2d *Bills & Notes* § 51 (1959); 11 AM. JUR. 2d *Bills & Notes* § 71 (1963); 10 C.J.S. *Bills & Notes* §§ 44b, 45 (1938).

[10] Motor & Industrial Fin. Corp. v. Hughes, 294 S.W.2d 182 (Tex. Civ. App. 1956); First Prize Inc. v. Fireman's Fund Ins. Co., 269 S.W.2d 939 (Tex. Civ. App. 1954); Allied Bldg. Credit Inc. v. Ellis, 258 S.W.2d 165 (Tex. Civ. App. 1953); Stubblefield v. Copper, 37 S.W.2d 818 (Tex. Civ. App. 1931) *error dism.*; 9 TEX. JUR. 2d *Bills & Notes* § 51 (1959); 11 AM. JUR. 2d *Bills & Notes* § 72 (1963); 10 C.J.S. *Bills & Notes* §§ 44b, 45 (1938).

[11] Continental Nat'l Bank v. Conner, 147 Tex. 218, 214 S.W.2d 928 (1948); Fortner v. Johnson, 404 S.W.2d 892 (Tex. Civ. App. 1965); Industrial Acceptance Corp. v. Corey, 29 S.W.2d 978 (Tex. Civ. App. 1930).

[12] Certified Motors v. Nolan Loan Co., 122 A.2d 227 (D.C. Cir. 1956); Commercial Credit Corp. v. Orange County Mach. Works, 214 P.2d 821 (Cal. 1950) *affirming en banc*, 208 P.2d 780 (Cal. Ct. App. 1949); First & Lumbermen's Nat'l Bank v. Buchholz, 18 N.W.2d 771 (Minn. 1945); First Nat'l Bank v. Newton, 229 N.W. 334 (Neb. 1930).

[13] Zarsky Lumber Co. v. Guiberteau, 270 S.W.2d 630 (Tex. Civ. App. 1952); Arrington v. Mercantile Protective Bureau, 24 S.W.2d 383 (Tex. Comm. App. 1930); C. H. Mountjoy Parts Co. v. San Antonio Nat'l Bank, 12 S.W.2d 609 (Tex. Civ. App. 1928); American Exch. Nat'l Bank v. Steeley, 10 S.W.2d 1038 (Tex. Civ. App. 1928); Lane Co. v. Crum, 291 S.W. 1084 (Tex. Comm. App. 1927); Cramer v. Dallas Lumber Co., 283 S.W. 596 (Tex. Civ. App. 1926); UNIFORM COMMERCIAL CODE §§ 3-112, 3-119.

[14] Continental Bank v. Conner, 147 Tex. 218, 214 S.W.2d 928, 931 (Tex. 1948).

[15] Continental Bank v. Conner, 147 Tex. 218, 214 S.W.2d 928 (1948); Steves & Sons, Inc. v. Lippman, 254 S.W.2d 184 (Tex. Civ. App. 1952); Harrison v. Ingham, 223 S.W.2d 267 (Tex. Civ. App. 1949), *rev'd on other grounds*, 224 S.W.2d 1019 (Tex. 1949); White v. Womack, 65 S.W.2d 373 (Tex. Civ. App. 1933).

the note nor gives any greater notice to a taker of the note than would a reference contained in the note itself.

Notations Notations written on and contemporaneously with a negotiable instrument may become part of the instrument if the parties thereto have so understood, intended, or agreed, but this does not affect negotiability.[16] In addition, the notation will not control if there is a discrepancy between it and a positive provision of the instrument.[17] Similarly, if a note is attached to a contract, the note itself should control over the contract provisions, the note being an entire instrument in itself.

Detachment Cases dealing with detached notes (notes, formerly attached to collateral agreements, then separately transferred) provide further support for the contention that the note should be negotiable while it is still attached to the agreement. Generally the separation of a note from a collateral agreement does not serve to put the taker of such note on notice and deprive him of his standing as a holder in due course.[18] In *Security Fin. Co. v. Floyd*[19] where the appellant had purchased notes already detached from a contract of sale by the payee (the contract authorizing such detachment) the court stated:

> The fact that the note had some 'perforated or rough edges' does not affect the status of appellant as an innocent purchaser. At most, it could but raise the surmise that it had been detached from something else. If appellant, so surmising, had inspected the contract from which they

[16] Union Bank & Trust Co. v. Service Trust Co., 385 S.W.2d 707 (Tex. Civ. App. 1965) (dealing with a trust receipt); Weaver v. Weaver, 171 S.W.2d 898 (Tex. Civ. App. 1943); Peavey-Moore Lumber Co. Inc. v. First Nat'l Bank, 133 Tex. 467, 128 S.W.2d 1158 (Tex. Comm. App. 1939); Bryson v. Oliver Farm Equip. Sales Co., 61 S.W.2d 147 (Tex. Civ. App. 1933); Meads v. Sandidge, 30 S.W. 245 (Tex. Civ. App. 1895); 9 TEX. JUR. 2d *Bills & Notes* § 49 (1959); Annot., 13 A.L.R. 251 (1928); Annot., 155 A.L.R. 218 (1945). On the other hand, if the parties' intention is to the opposite effect, the notation may constitute material alteration. See Clifton Mercantile Co. v. Gillaspie, 7 S.W.2d 906 (Tex. Civ. App. 1928); Landon v. Halcomb, 184 S.W. 1098 (Tex. Civ. App. 1916); Meade v. Sandidge, 9 Tex. Civ. App. 360, 30 S.W. 245 (Tex. Civ. App. 1895); Bowser v. Cole, 11 S.W. 1131 (Tex. 1889). For cases holding that a notation is not a material alteration due to the specific facts of such cases, see, *e.g.*, Foster v. Iowa City State Bank, 201 S.W. 733 (Tex. Civ. App. 1918); Yost v. Watertown Steam Engine Co., 24 S.W. 657 (Tex. Civ. App. 1894).

[17] Huth v. Huth, 110 S.W.2d 1011 (Tex. Civ. App. 1937); Reed v. Watson, 262 S.W. 178 (Tex. Civ. App. 1924); Clem v. Chapman, 262 S.W. 168 (Tex. Civ. App. 1924); Washington County State Bank v. Central Bank & Trust Co., 168 S.W. 456 (Tex. Civ. App. 1914); Dark v. Middlebrook, 45 S.W. 963 (Tex. Civ. App. 1898). See also Marrow v. Richardson, 6 S.W. 763, 764 (Tex. 1887) holding that an erasure of the marginal words on a note "renewed" or "renewed by another note" was immaterial since the note was otherwise negotiable and the body of the note itself contained no erasures to make it irregular: an erasure of a notation found to comprise part of a negotiable instrument was held to be a material alteration in Metropolitan Nat'l Bank v. Vanderpool, 192 S.W. 589 (Tex. Civ. App. 1917).

[18] Security Fin. Co. v. Schoenig, 292 S.W. 556 (Tex. Civ. App. 1927). See also notes 29 and 30 *infra*; 3 TEX. JUR. 2d *Alteration of Instruments* § 30 (1959).

[19] Security Fin. Co. v. Floyd, 294 S.W. 1113 (Tex. Civ. App. 1927).

> were in fact detached, it would have found printed thereon the authority of the payee to detach the note. Inspecting the contract, it would have found nothing to arouse any suspicion respecting the validity of the obligations evidenced by the note.[20]

Meade v. Sandige[21] goes further by stating that the liability of the maker of a negotiable instrument to the endorsee is "placed upon the ground that the maker of a negotiable paper is liable to the bona fide holder on account of his own negligence in executing and issuing a note that invited tampering with."[22]

The detachment of a note from an agreement, however, may constitute material alteration as between the original parties when the parties thereto have specifically intended that there be no such separation.[23] If the detachment is authorized by the contract, it will not result in material alteration of the note.[24] One civil appeals case[25] holds that separating a note from a collateral agreement, along a perforated line voids the note on the ground that the note is "an entire contract"[26] itself. Thus, since "the contract which defendant executed was in no sense a negotiable instrument . . . it is immaterial that the alteration gave to an otherwise non-negotiable instrument [the note] the form and semblance of negotiability."[27] These conclusions are not supported by the cited cases. Most of the cases cited by the court stand for the proposition that detachment of a note from a contract constitutes material alteration only when the parties do not intend that such detachment occur.[28] One of the cited cases held that erasure of a notation on a note, the notation being part of such note, constituted material alteration.[29]

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[20] *Id.* at 1114. See also Iowa City State Bank v. Milford, 200 S.W. 883 (Tex. Civ. App. 1917); Landon v. Huston Drug Co., 190 S.W. 534 (Tex. Civ. App. 1916).

[21] Meade v. Sandidge, 9 Tex. Civ. App. 360, 30 S.W. 245 (Tex. Civ. App. 1895).

[22] *Id.* at 247.

[23] Stevens v. Wheeler, 3 S.W.2d 122 (Tex. Civ. App. 1928); Landon v. Halcomb, 184 S.W. 1098 (Tex. Civ. App. 1916); 3 TEX. JUR. 2d *Alteration of Instruments* § 30 (1959). See also Spencer v. Tripplett, 184 S.W. 712 (Tex. Civ. App. 1916) where there was no perforation separating the attached note and contract and the court held that subsequent detachment voided the note on the grounds of material alteration.

[24] Stevens v. Floresville Quick Serv. Station, 25 S.W.2d 949 (Tex. Civ. App. 1930); Commercial Credit Co. v. Giles, 207 S.W. 596 (Tex. Civ. App. 1918); Iowa City State Bank v. Milford, 200 S.W. 883 (Tex. Civ. App. 1917); Harrison v. Hunter, 168 S.W. 1036 (Tex. Civ. App. 1914).

[25] Citizen's Nat'l Bank v. Campbell, 6 S.W.2d 799 (Tex. Civ. App. 1928).

[26] *Id.* at 800.

[27] *Ibid.*

[28] State Bank v. Williams, 277 S.W. 773 (Tex. Civ. App. 1923); Commercial Security Co. v. Hull, 212 S.W. 986 (Tex. Civ. App. 1919); Spencer v. Tripplett, 184 S.W. 712 (Tex. Civ. App. 1916); Landon v. Halcomb, 184 S.W. 1098 (Tex. Civ. App. 1916).

[29] Metropolitan Nat'l Bank v. Vanderpool, 192 S.W. 589 (Tex. Civ. App. 1917).

CONCLUSION

The mere fact that the question of negotiability of a note attached to a collateral agreement has so infrequently been raised or discussed by Texas courts[30] appears to indicate that the negotiability of the note is an accepted fact.[31]

Other jurisdictions have reached the result argued for here, *i.e.*, negotiability, principally by considering the transfer of an attached note and contract to be like a transaction involving simultaneously executed instruments.[32] The rationale behind such conclusions would seem to be a recognition of the need to permit broad use of negotiable instruments.[33] A California court of civil appeals in upholding the negotiability of a note attached to a conditional sales contract stated: "If defendant's contention were to be enforced financing of this type of business transaction would become too hazardous for the risking of capital employed in it."[34]

This attitude is reflected in the Uniform Commercial Code since the "underlying purposes and policies of this Act are . . . to simplify, clarify and modernize the law governing commercial transactions."[35] To disallow the negotiability of a note attached by perforation to a contract would be antithetical to this statement of policy.

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[30] See notes 8-12 and accompanying text *supra*.

[31] *E.g.*, in Adams v. Eastex Fin. Co., 379 S.W.2d 355 (Tex. Civ. App. 1954), holding that the appellee as owner of the chattel mortgages (due to an assignment) had authority to repossess and sell the cars. The chattel mortgages had been attached to notes and executed by appellant's customers, as security for payment, authorizing repossession and sale. The appellant had assigned all mortgages to appellee for the note. The court made no mention of the notes or of the fact that they were attached to the chattel mortgages, apparently assuming that the notes were negotiable.

[32] See note 12 and accompanying text *supra*.

[33] Commercial Credit Corp. v. Orange County Mach. Works, 208 P.2d 780 (Cal. Ct. App. 1949); Allison Ford Sales v. Farmers State Bank, 86 N.W.2d 896 (Iowa 1957).

[34] Commercial Credit Corp. v. Orange County Mach. Works, 208 P.2d 780, 783 (Cal. Ct. App. 1949).

[35] UNIFORM COMMERCIAL CODE § 1-102(2)(a).