GUARANTIES AND THE SURETYSHIP PHASES OF LETTERS OF CREDIT

MORTON C. CAMPBELL †

This article was begun as an exploration into the suretyship aspects of letters of credit. The writer was soon led into the by-road of guaranty and other forms of suretyship risk, partly for the reason that in places the boundary line between the two ways is indistinct, and partly because the signs and rules of the road are in many respects the same for both, or at least are important for purposes of comparison. Thus, the processes of interpretation and construction are similar for guaranties and letters of credit; the principles governing defences have a more or less common application; and questions of corporate authority cannot be satisfactorily answered without considering both forms of undertaking.

I. IDENTITY OF THE PROMISEE

The question, to whom is the promise made, is quite important in guaranties. The latter may be defined as secondary promises made by one person for the fulfillment of the obligation or liability of another person. The same question becomes equally acute in some kinds of surety promises which are primary in form. Promises contained in letters of credit are frequently of this nature. The authorities adduced, however, will not be confined to promises of sureties, for certain cases involving primary principal promises have an equally cogent bearing on the questions of interpretation and construction to be discussed.

The letter or other communication containing the promise or promises may be addressed to persons generally, or it may be addressed to a particular person or persons and yet contain promises to another person or persons. For the sake of convenience, cases may be classified as those involving communications addressed generally, or to a particular buyer, seller or consignor of goods, or to a specified purchaser of bills.

A. Communications Addressed Generally or Lacking Any Addressee

A letter or other communication addressed "To whom it may concern," or otherwise generally addressed, and importing an undertaking of payment on the part of the writer, manifests a promise or promises to any person or persons, or, if addressed to a particular class, a promise or promises to

† A. B., 1896, LL. D., 1923, Washington and Jefferson College; LL. B., 1900, S. J. D., 1915, Harvard University; Professor of Law, Harvard University; editor of *CASES ON MORTGAGES* (1926); *CASES ON BILLS AND NOTES* (1928); *CASES ON SURETYSHIP* (1931); author of *Nonconsensual Subsuretyship* (1935) 83 U. of PA. L. REV. 326, and other articles in legal periodicals.

a person or persons within that class. Consequently, if any such person¹ performs the act stipulated for acceptance or compliance, a contract is created or perfected between him and the promisor.² This act of acceptance or compliance may consist in the furnishing of goods, money, services, and the like, on credit.³ Moreover, the promise may take the form of a simple engagement to pay, for instance, the purchase price of goods, or to pay the price if the buyer does not pay it, or it may be an undertaking to pay or accept and pay a draft for the amount of the purchase price.⁴ Furthermore, the right of the seller to the price may be assigned, or a bill drawn therefor may be negotiated, to a purchaser thereof, and the question then arises whether the purchaser is confined to working out his rights through the seller, that is, as an assignee of the seller's rights, or whether he is also a promisee within the import of the letter. The question would become acute in the case of fraud perpetrated on the writer of the letter by the seller of the goods⁵ or by the buyer thereof with the seller's knowledge. If the writer should rescind for the fraud, he would have a defence against a mere assignee of the nonnegotiable right of the seller, even though the assignee gave value in good faith and without notice.⁶ On the other hand, if the letter be interpreted as also including a promise running to the purchaser of the claim or bill, as the case may be, then, having given value in good faith and with-

1. But not a person who is outside of the particular class. *Johnson v. Brown*, 51 Ga. 498 (1874) ("any person living in Macon"; plaintiff lived in Griffin).

2. *Bank of Seneca v. First Nat. Bank*, 105 Mo. App. 722, 78 S. W. 1092 (1904) ("to whom it may concern").

3. A statement herein concerning a sale of goods on credit is equally applicable to a furnishing of money, services, and the like, on credit.

4. In *Second Nat. Bank v. Columbia Trust Co.*, 288 Fed. 17 (C. C. A. 3d, 1923), a letter of credit issued by the defendant on account of the sale of sugar was addressed to the plaintiff bank and contained a promise to pay a certain sum on presentation of specified shipping documents; while the plaintiff did not purchase a draft drawn by the seller, it did issue to the seller a letter of credit in much larger amount to enable him to buy sugar in Java. Judgment was properly given for the plaintiff.

5. Such fraud might consist, for example, in a false statement as to the quality of the goods, such statement being communicated to the writer, as was intended or reasonably to be foreseen by the seller, and relied on by the writer.

6. If, however, the seller should draw a negotiable bill on the defendant and the requisites of a "virtual" acceptance thereof be present, the acceptance would seem to partake of the negotiable quality of the bill, and the purchaser of the bill, receiving it for value in good faith without notice and before maturity, would occupy the position of a holder in due course and would take the acceptance free from a defence of fraud. The doctrine of "virtual" acceptance was established by *Coolidge v. Payson*, 2 Wheat. 66 (U. S. 1817). According to this decision at p. 75, "a letter written within a reasonable time before . . . the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise." The doctrine was modified by the legislature of New York [N. Y. CONS. LAWS (Cahill, 1930) c. 29, § 223] and as so modified carried into § 135 of the NEGOTIABLE INSTRUMENTS LAW: "An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value." It is to be observed that most letters of credit are conditional, for example, on delivery of shipping documents.

In *Russell v. Wiggin*, 21 Fed. Cas. No. 12, 165 at 74 (C. C. D. Mass. 1842) Story, J., stated that in the commercial world the letter of credit itself was treated as in the nature of a negotiable instrument; but this idea has received little legal recognition.

out knowledge or notice, he would have a right against the issuer of the letter unaffected by any fraud, duress, failure of consideration, violation of directions, counter-indebtedness, or the like matter, on the part of buyer, seller, or any other third person.⁷

It is also conceivable that the letter might be addressed to all purchasers, immediate and remote, of a bill drawn for the amount of the price of the goods. In that case any purchaser, immediate or remote, might maintain an action thereon according to the promise.⁸ If the letter or communication lacks an addressee, the promise is usually interpreted, in the absence of contrary manifestation of will, as running to persons generally, the result being that any person who furnishes goods, money, and the like, knowing of and relying on the letter, may maintain an action against the writer on the theory of formation of a unilateral contract,⁹ and in certain cases on the basis of compliance with a contract already formed.

Frequently, a guaranty of payment written on a negotiable instrument lacks an addressee or named promisee; less frequently is this true when the guaranty is separately written. In either case such a guaranty, if given in the inception of an instrument, doubtless imports a promise to the first holder for value, whoever he may be,¹⁰ rather than to an accommodation payee-indorser¹¹ and, if given in aid of transfer, to the first transferee.¹² By the better view and by the weight of authority, however, whether given in aid of the inception or transfer of the instrument, the guaranty is not only nonnegotiable,¹³ but imports no promise to a subsequent transferee of the instrument, be he immediate or remote. Hence, as far as the guaranty is concerned, he occupies the position of an actual or equitable assignee of a nonnegotiable chose in action, and as such, in the absence of a statute requiring or permitting an action to be brought in the name of the real party in

7. 3 WILLISTON, CONTRACTS (1920) § 1518; RESTATEMENT, CONTRACTS (1932) § 477; *In re Agra & Masterman's Bank*, L. R. 2 Ch. App. 391 (1867) (indebtedness of accredited party to issuing bank).

8. Travelers' letters of credit are frequently accompanied by a list of correspondent banks to whom the traveler may negotiate bills drawn against the latter.

9. *Russell v. Wiggin*, 21 Fed. Cas. No. 12, 165 (C. C. D. Mass. 1842); *Union Bank v. Coster's Ex'rs*, 3 N. Y. 203 (1850) ("Sir: We hereby agree to accept and pay any drafts"; drafts purchased by X and by plaintiff; judgment for plaintiff; word "Sir" taken in distributive sense); *Vanleer v. Crawford*, 2 Swan 117 (Tenn. 1852) (covenant of guaranty; alternative decision); *Lowry v. Adams*, 22 Vt. 160 (1850) (other supporting circumstances present).

10. See *Watson's Ex'rs v. McLaren*, 19 Wend. 557, 565 (N. Y. Sup. Ct. 1838) (guaranty in separate paper), *aff'd*, 26 Wend. 425 (N. Y. 1841).

11. *Baldwin v. Dow*, 130 Mass. 416 (1881) (holding that the first holder may sue in his own name).

12. See *Tucker v. Blandin*, 48 Hun 439, 1 N. Y. Supp. (Sup. Ct. 1888), *aff'd sub nom.*, *Tucker v. Abbott*, 125 N. Y. 699, 26 N. E. 751 (1890) (bona fide first assignee of nonnegotiable bond held not affected by external limitation as to identity of guarantee).

13. *Miller v. Gaston*, 2 Hill 188, 192, 193 (N. Y. 1842), and other cases cited *infra* note 14. But see *Partridge v. Davis*, 20 Vt. 499, 506 (1848).

interest, cannot maintain an action against the guarantor in his own name;¹⁴ moreover, he takes the guaranty subject to defences available to the guarantor against the guarantee. The reason for not implying a series of promises is that a choice is offered between indorsement (which involves the risk and the advantage of a negotiable obligation of the law merchant, that is, the risk of losing defences and the advantage of presentment and notice), and guaranty (which places one in the field of simple contracts without such risk and advantage). Choosing the latter, the guarantor should not be held to have intended a series of promises which would expose him to risks similar to those of an indorser without his being entitled to the benefits of that position.¹⁵

It remains to inquire what will effect an actual or equitable assignment of the guaranty. If it is written on the note or other negotiable instrument, a later indorsement or assignment of the instrument imports an intention to transfer not only the instrument proper but also the guaranty and therefore works an assignment of the nonnegotiable right to which it gave rise.¹⁶ If the guaranty is written on a separate paper, a delivery of the paper to the transferee of the negotiable instrument imports an intention to transfer the guaranty,¹⁷ but a mere indorsement of the negotiable instrument would not so import. Nevertheless, the right arising from the guaranty would pass to

14. *Belcher v. Smith*, 7 Cush. 482 (Mass. 1851) (guaranty on instrument); see *Gamwell v. Pomeroy*, 121 Mass. 207, 216 (1876) (guaranty on separate paper); *Lamourieux v. Hewitt*, 5 Wend. 307 (N. Y. 1830) (guaranty of collection on instrument); *Watson's Ex'rs v. McLaren*, 19 Wend. 557 (N. Y. Sup. Ct. 1838), *aff'd*, 26 Wend. 424 (1841) (guaranty in separate instrument); see *Miller v. Gaston*, 2 Hill 188, 193 (N. Y. 1842) (guaranty on instrument); *Snevily v. Ekel*, 1 W. & S. 203 (Pa. 1841) (guaranty on instrument interpreted as guaranty of collection); cf. *Partridge v. Davis*, 20 Vt. 499, 503 (1848).

15. *Watson's Ex'rs v. McLaren*, 19 Wend. 557, 568 (N. Y. Sup. Ct. 1838) (reasoning), *aff'd*, 26 Wend. 425 (N. Y. 1841).

Much the same reasoning underlies the rule supported by most authorities that an undertaking of guaranty on the part of a transferring holder impliedly excludes an intention to be bound as indorser. See cases cited *supra* note 14. *Contra*: *Partridge v. Davis*, 20 Vt. 449, 503 (1848) (guaranty on note); see CAMPBELL, *CASES ON BILLS AND NOTES* (1928) 232-236; Arant, *The Written Aspect of Indorsement* (1924) 34 YALE L. J. 144; *Notes* (1913) 29 ANN. CAS. 693, (1895) 36 L. R. A. 119, (1910) 41 L. R. A. (N. S.) 1009, L. R. A. 1915C 661, (1921) 21 A. L. R. 1375, (1922) 33 A. L. R. 97, (1926) 46 A. L. R. 1516.

Said Bronson, J., in *Birckhead v. Brown*, 5 Hill 634, 646 (N. Y. 1843), a case involving somewhat different facts: "I am aware that a great effort has been made within the last few years to have every thing in the form of paper credit turned into a circulating medium, or, at the least, placed upon the footing of bills of exchange and promissory notes; and if our overstrained credit system had held out a few years longer, I am not sure that the courts would have been able to resist the current which was setting so strongly in favor of negotiability. But now that the bubble has exploded, I trust the common law, which declares that choses in action are not assignable, will not be overturned. With us it is a settled question, that special contracts, other than bills of exchange and promissory notes, are not negotiable instruments, and that no one can sue in his own name but an original party to the contract. . . . And such is undoubtedly the law of England. . . . But with us the rule is settled the other way, and we must take the law as we find it."

16. *Wood v. Bragg*, 75 Minn. 527, 78 N. W. 93 (1899).

17. *Gould v. Ellery*, 39 Barb. 163 (N. Y. 1863); see *Watson's Ex'rs v. McLaren*, 19 Wend. 557, 566 (N. Y. 1838).

Of course, the case is clear if the guaranty is explicitly assigned in writing, and no relation of a personal nature exists between guarantee and principal. *Greene County v. Nat. Bank of Snow Hill*, 193 N. C. 524, 137 S. E. 593 (1927).

the indorsee in equity, whether he knew of it or not.¹⁸ The reasons are much the same as those which support the equitable assignment of a mortgage or other security res on the transfer of the indebtedness secured thereby; while transferor and transferee have not bargained for the transfer of the security, it passes to the latter by operation of principles of equity: the transferor no longer has need of the security, and equity, preferring the creditor, passes it to the transferee instead of extinguishing it in the debtor's favor. So here equity, still favoring the creditor, passes the personal security right to the transferee in preference to extinguishing it in favor of the guarantor. Moreover, if the guaranty is general in its terms so that it comes to secure a number of claims, the several rights of the creditor against the guarantor will pass in equity to the respective assignees of the claims, even though they do not know of the guaranty.¹⁹ If the guaranty is of limited amount, it is probably to be interpreted as giving rise to but one right, and the several assignees of the claims secured thereby will be equitably and, by the better view, ratably entitled to that right and to the proceeds thereof.²⁰

Likewise, when the purchaser of a draft in reliance on a letter of credit transfers the draft to another person who receives it without reliance on or even without knowledge of the letter of credit, the transferee should in equity succeed to the right of his transferor against the person issuing the letter, whether the latter is surety or principal in respect to the buyer of the goods. An analogous case is presented by a situation in which *R*, having already mortgaged land to secure his note or bond to *E*, conveys the land to *G* who assumes and agrees to pay the mortgage note or bond and hence becomes principal in respect thereto; if *E* transfers the note or assigns the bond to *A*, the latter succeeds in equity to the right which *E*, as creditor beneficiary, has against *G*.²¹

B. *Communications Addressed to a Particular Buyer of Goods or Person Obtaining an Advance of Money*

Letters or other communications to a prospective buyer of goods²² stating that the writer will become responsible for the price thereof usually

18. See *McGowan v. Wells' Trustee*, 184 Ky. 772, 783, 213 S. W. 573, 579 (1919); *McGowan v. People's Bank*, 185 Ky. 20, 24, 213 S. W. 579, 581 (1919); *Craig v. Parkis*, 40 N. Y. 181, 185 (1869) (reasoning of court supports proposition of text, although intended assignment might have been found in that the bond and mortgage were assigned and the guaranty was indorsed on the mortgage). *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999 (1892); *CAMPBELL, op. cit. supra* note 15, at 338, n. 1; *Page Trust Co. v. Wachovia Bank & Trust Co.*, 188 N. C. 766, 125 S. E. 536, 538 (1924).

19. *Tidioute Savings Bank v. Libbey*, 101 Wis. 193, 77 N. W. 182 (1898).

20. *Id.* at 199, 77 N. W. at 184. For the various theories governing the analogous situation in which several debts secured by one mortgage are assigned to different persons, and for the legal effects resulting from the assignor's assuming secondary liability for one or more of the claims, see *CAMPBELL, CASES ON MORTGAGES* (1926) 473-483.

21. *Cumberland Nat. Bank v. St. Clair*, 93 Me. 35, 44 Atl. 123 (1899).

22. Here again this statement should be regarded as equally applicable to transactions whereby money, services, and the like, are furnished on credit by one person to another.

import a promise to the seller of the goods. The communication must be interpreted in the light of the circumstances attending this transaction and usually attending transactions of this class. Now it is true that a situation may be conceived of in which the buyer wants the letter merely to be assured²³ that the writer or some other person will pay the seller if the buyer does not, or will pay the seller by way of an advance to be repaid later by the buyer; or that if the buyer draws a bill it will be paid, or accepted and paid, by the writer or other person and thus the buyer be relieved of secondary liability thereon and so his credit be maintained, whether the understanding between buyer and writer is that the former will put the drawee in funds with which to meet the bill or that the drawee will pay the bill by way of an advance to be later repaid by the buyer. Notwithstanding these possible motives for requiring the letter of credit, it seems that the buyer's normal and most probable motive is that he may use the letter with the seller as a means of inducing the transaction of sale, and hence it is most reasonable to interpret the letter as importing a promise of payment running to the seller and thus giving rise to a right in the seller against the writer of the letter.²⁴

Furthermore, a promise to one purchasing an assignment of the seller's claim against the buyer or to one purchasing a bill drawn for the purchase price may be implied in such a letter, since the seller might more readily enter the transaction of sale if he were assured of a means of realizing on his claim or on the bill so drawn. Like principles govern a situation where the letter or other communication is addressed to a person with a view to enabling him to borrow or otherwise obtain an advance of money. It should generally be interpreted as importing a promise to any person who makes the loan or advance.²⁵ All the more is this true if the letter also discloses an intention that it be exhibited to such person.²⁶

C. *Communications Addressed to a Designated Drawee of Bills*

If a letter of credit so addressed is delivered directly to the contemplated drawee, the inference is clear that it imports an undertaking running to the addressee that the drawer will put him in funds to meet the bills or repay advances so made. A more difficult question arises when the letter is deliv-

23. This assurance would be legally enforceable if supported by consideration; otherwise, merely of moral validity.

24. *Lawrason v. Mason*, 3 Cranch 492 (U. S. 1806); *Griffin v. Rembert*, 2 S. C. 410 (1871). All the more is this true if the letter contains words of promise running to the seller or lender. *Manning v. Mills*, 12 U. C. Q. B. 515 (1854) ("and this may be considered as a guaranty to the party from whom you may purchase").

25. *Franklin Bank v. Lynch*, 52 Md. 270 (1879); *Oil Well Supply Co. v. MacMurphey*, 119 Minn. 500, 138 N. W. 784 (1912) (telegram addressed to drawer and undertaking to honor his draft); *Ulster County Bank v. McFarlan*, 5 Hill 432 (N. Y. 1843); *Monroe v. Pilkington*, 14 How. Pr. 250 (N. Y. 1857).

26. *In re Agra & Masterman's Bank*, L. R. 2 Ch. App. 391 (1867) ("parties negotiating bills under it are requested to indorse particulars on the back hereof").

ered to the buyer of goods or his agent. It may be contemplated that the letter shall be exhibited and used by the buyer or his agent to aid in negotiating bills and hence constitute a promise to the purchaser of the bills or that it shall be exhibited to the drawee and used in establishing a credit with the latter to be evidenced by a letter of credit or otherwise. Thus, in *Birckhead v. Brown*,²⁷ a letter was given by New York bankers to a prospective buyer, which letter purported to open a credit on his account in favor of his foreign agent "to be negotiated by drafts at 60 days sight"; but it was addressed to London bankers and assured the latter that the buyer would put them in funds. In reliance on this letter, a foreign house purchased such a draft from the buyer's agent; the draft was later dishonored by the London house because of the buyer's insolvency. In an action brought on the letter by the foreign house against the New York bankers judgment was rendered for the latter. The decision seems to be sound. The letter was addressed to the London bankers and contained an express undertaking that the buyer would put them in funds. Hence a sufficient purpose appeared, that is, to assist the buyer indirectly by opening a credit for him with the addressees; consequently, the implication of an intention to accredit him to foreign sellers of goods or purchasers of drafts was unnecessary and probably unjustified.²⁸

A different situation was presented by *Carnegie v. Morrison*,²⁹ a leading Massachusetts case, in which Oliver, the authorized Boston agent of the defendants, who were bankers in London, gave to one Bradford a letter addressed to the defendants and stating that he had assured Bradford that a credit would be opened with the defendants in favor of the plaintiffs, merchants in Gottenburg; Oliver knew that Bradford intended to use the letter to satisfy his pre-existing debt to the plaintiffs; at the same time Bradford agreed in writing to put the defendants in funds to meet the drafts to be drawn on them. Bradford transmitted the letter to the plaintiffs. Drafts were drawn by the plaintiffs but dishonored by the defendants. In an action brought on the letter, judgment was rendered for the plaintiffs. While Chief Justice Shaw rested the decision on the ground that the plaintiffs were third-person-beneficiaries of a promise made to Bradford by the authorized agent of the defendants,³⁰ it seems that the case might better have been placed on the ground of an implied offer to the plaintiffs, who were named in the letter, which offer was properly transmitted by Bradford to the plaintiffs

27. 5 Hill 634 (N. Y. Sup. Ct. 1843), *aff'd*, 2 Denio 375 (N. Y. 1845).

28. See the excellent explanation of the case given in *Monroe v. Pilkington*, 14 How. Pr. 250, 253 (N. Y. 1857).

29. 2 Metc. 381, 402, 405 (Mass. 1841).

30. *Ibid.*

and accepted by them in absolute satisfaction or conditional payment of the debt.³¹

D. Communications Addressed to a Particular Seller

When the communication is addressed to a particular seller the inference is strong that the promise runs to no seller other than the person addressed;³² unless, of course, there is language in the letter stating a promise to another seller, or to sellers generally, or clearly importing such a promise;³³ or unless the attendant circumstances are so strong as to require such an interpretation;³⁴ or unless the writer by a later admission of words or conduct acknowledges that the letter so imported.³⁵ Thus, in the absence of such special facts, the promise contained in a letter of credit, guaranty or other form of credit, addressed to one person is not available to a firm³⁶ or corporation of which that person is a member, or vice versa;³⁷ nor can such a letter addressed to one firm or corporation be taken advantage of by another firm or corporation conducting a separate business, although the selling firm or corporation is composed of the same members or stockholders as the firm or corporation addressed,³⁸ or the selling corporation owns all the stock of the other³⁹ or vice versa; nor can a letter addressed to one person, firm, or corporation be made of avail by a sale made by the addressee jointly with another person, firm, or corporation.⁴⁰ Moreover, a

31. If the letter was transmitted and accepted in absolute satisfaction of the debt, a novation of debtors resulted. At all events, whether the transaction was absolute or conditional, the plaintiffs gave sufficient consideration for the defendants' promise.

32. *Fletcher Guano Co. v. Burnside*, 142 Ga. 803, 83 S. E. 935 (1914) (although addressee procured the sale); *Robbins v. Bingham*, 4 Johns. 476 (N. Y. 1809). The inference is all the stronger if the promise relates to goods which "you" [the addressee] may sell to the principal and guarantees payment of the purchase price to "you". *King v. Batterson*, 13 R. I. 117 (1880).

33. *Cf. McClung v. Means*, 4 Ohio 196 (1829); *McNaughton v. Conkling*, 9 Wis. 316 (1859).

34. Nevertheless, in *Taylor v. Wetmore*, 10 Ohio 490 (1841), *G*, a guarantor, was held not liable to *C* under the following circumstances: *G* addressed a letter to *X*, a city merchant, undertaking limited responsibility for goods sold to *P*, a country merchant conducting a general store, who was about to go to the city to replenish his stock. *X*, who was a grocer, sold groceries, and *C*, a dry goods dealer, relying on this letter exhibited to him by *X*, sold dry goods to *P*. In an action brought by *C* against *G*, judgment was rendered for *G*.

In an earlier Ohio case, *McClung v. Means*, 4 Ohio 196 (1829), while the letter was addressed to *X*, the language was broad in its scope: "all the goods *P* may purchase in Philadelphia," etc. Nevertheless, the court interpreted the promise, which was unlimited in amount, as running only to *X* and such merchants as *X* might select and exhibit the letter to. *McNaughton v. Conkling*, 9 Wis. 316 (1859), was a case involving a similar letter, except that it was limited in amount; *X* showed the letter to the seller, and the seller was held entitled to judgment.

35. *Bleeker v. Hyde*, 3 Fed. Cas. No. 1,537 (C. C. D. Mich. 1843).

36. *Barns v. Barrow*, 61 N. Y. 39 (1874).

37. *Penoyer v. Watson*, 16 Johns. 99 (N. Y. 1819) (letter addressed to firm; money furnished by one partner after dissolution of firm).

38. *Taylor v. McClung*, 2 Houst. 24 (Del. 1858).

39. *Belle City Malleable Iron Co. v. Clark*, 172 Minn. 508, 215 N. W. 855 (1927).

40. *Stevenson v. McLean*, 11 U. C. C. P. 208 (1860); *Scott v. Alton Banking & Trust Co.*, 175 S. W. 920 (Mo. 1915) (guaranty addressed to *C* firm for performance of contract between *P* and that firm; *P*'s contract was with *C* firm and *X* firm jointly, and work was done by them jointly; held they could not recover on the guaranty).

promise made by *G* to *C*, to be responsible for goods sold by him to *P*, is not accepted by *C*'s procuring the goods to be sold by *X* to *P*,⁴¹ even though *C* guarantees payment therefor to *X*.⁴²

Certain situations, however, lie outside of the rules just stated:

(1) A mere mistake in the name of the person, firm, or corporation intended by the promisor to be the promisee should not be fatal to the creation of a contract.⁴³

(2) Succession in the ownership of a business may well raise a difficult question of interpretation. While ordinarily a letter addressed to one person, firm, or corporation does not import a promise to another person, firm, or corporation which succeeds to the business of the former,⁴⁴ still such special circumstances may exist that the letter is to be interpreted as containing a promise to any person, firm, or corporation which is or shall be carrying on the business for the time being.⁴⁵

(3) A letter may be addressed to an agent of a principal whose identity or existence is known to the writer with the intention that it shall avail the principal and that the principal, personally or by the agent, may give credit or extend time on the faith of the letter. The writer will be bound to the principal, whether individual, firm, or corporation, for in legal effect the promise ran not to the addressee but to the principal, and the letter will be a sufficient compliance with the Statute of Frauds.⁴⁶

(4) Even in the case of a fully undisclosed principal, though the agent receives the promise and gives the credit, the principal may recover on the promise, since it is not contained in a common-law or mercantile specialty.

While a letter addressed to a particular seller of goods ordinarily carries no promise to any other seller, it may impliedly import a promise not only to the addressee but also to one who purchases from him an assignment

41. *Philip v. Melville*, stated in *BURGE, SURETYSHIP* (1847) 68.

42. *Walsh v. Bailie*, 10 Johns. 179 (N. Y. 1813).

43. *Contra: Grant v. Naylor*, 4 Cranch 224 (U. S. 1808) ("To John and Joseph Naylor & Co.: By recommendation of *A*, I address you on behalf of *P*. I will guarantee", etc.; there was a firm of the name of John and Jeremiah Naylor & Co., of which *A* was agent, but none of the other name in the same place. In action by the partners of the latter firm against the guarantor, a judgment for defendant was rested on Parol Evidence Rule and Statute of Frauds).

44. *Myers v. Edge*, 7 T. R. 254 (K. B. 1797) (letter addressed to firm composed of *A*, *B*, and *C*; goods furnished by succeeding firm constituted of *B* and *C*).

45. Such circumstances might consist in the business being one of long standing and conducted under one continuing name, coupled with an absence of inquiry on the part of the writer as to the ownership of the business. Compare certain cases of goods furnished or money lent to a succeeding firm or individual, in which the surety was held liable. *United States F. & G. Co. v. Board of Comm'rs*, 145 Fed. 144 (C. C. A. 8th, 1906); *United States F. & G. Co. v. Naylor*, 237 Fed. 314 (C. C. A. 8th, 1916); *Richardson v. County of Steuben*, 226 N. Y. 13, 122 N. E. 449 (1919); *CAMPBELL, CASES ON SURETYSHIP* (1931) 2. *Contra: In re Hallock*, 226 Fed. 821, 823 (W. D. N. Y. 1915), 29 HARV. L. REV. 460 (1916).

46. *Bateman v. Phillips*, 15 East 272 (K. B. 1812) (letter addressed to creditor's attorney who extended time); *Garrett v. Handley*, 3 B. & C. 461 (K. B. 1824), 4 B. & C. 664 (K. B. 1825) (letter addressed to a partner but intended for the benefit of the firm).

of his claim against the buyer, or a draft for the purchase price, since the manifest purpose of the letter is to induce the sale, and that will be best accomplished by assuring the seller that he may readily realize on his claim or draft, and that in turn by giving the purchaser of the claim or draft a direct rather than a derivative right against the writer of the letter,⁴⁷ so that having given value in good faith he would not be affected by any fraud, duress, failure of consideration, violation of instructions, or the like matter, on the part of buyer, seller, or any other third person.⁴⁸ Thus the purchaser of a draft drawn and negotiated under a letter of credit will generally have a direct right against the issuing banker. He may also have certain rights against the buyer: (1) under an implied assignment of the seller's contractual right to the purchase price, or (2) a cause of action in tort, if the buyer induces the issuing banker to violate his obligation to the purchaser.⁴⁹

In *Evansville National Bank v. Kaufman*,⁵⁰ however, the Court of Appeals of New York adopted a different view. In that case defendants, doing business in New York, addressed to Bingham Brothers, distillers in Indiana, a letter guaranteeing payment of any drafts which the latter might draw on Feigelstock of New York, a merchant doing business on his own account and also on commission. The defendants had an indirect connection with Feigelstock but none with Bingham Brothers. This firm drew two drafts which the plaintiff bank discounted on the faith of the letter; the drafts were not accepted or paid. Final judgment was rendered for the defendants on the ground that the letter contained a promise only to the addressees, the court reasoning that it was quite improbable that the defendants would gratuitously undertake an unlimited and practically irrevocable responsibility for the engagements of Bingham Brothers, who were strangers to them. It is submitted, however, that the defendants must have intended to encourage transactions of sale or consignment between Bingham Brothers and Feigelstock and hence to facilitate negotiation of drafts by making promises running not alone to Bingham Brothers but also to purchasers of drafts. The decision would better have been rested on an alternative ground suggested by the court, namely, that use of the letter by Bingham Brothers

47. *Old Colony Trust Co. v. Continental Bank*, 288 Fed. 979 (S. D. N. Y. 1921) (court also relies on theory of assignment). See McCurdy in the second of his illuminating articles on letters of credit in (1924) 37 HARV. L. REV. 323, 333.

Of course, this result can be reached without difficulty if, as is frequently the case in modern letters of credit, the letter contains an explicit promise to drawers, indorsers and bona fide holders, or the like. *Banco Nacional Ultramarino v. First Nat. Bank*, 289 Fed. 169, 174 (D. Mass. 1923).

48. See *supra* note 7.

49. *Second Nat. Bank v. M. Samuel & Sons, Inc.*, 12 F. (2d) 963 (C. C. A. 2d, 1926). In this case the court also took the position that plaintiff might have quasi-contractual recovery from the buyer on a theory of benefit conferred. It is difficult to discover benefit, however, as the buyer came under contractual obligation for the purchase price of the goods and has not been relieved therefrom.

50. 93 N. Y. 273 (1883), *rev'd*, 24 Hun 612 (N. Y. 1881).

was impliedly conditioned on the sale or consignment of goods and that the plaintiff was not entitled to recover the amount of either draft, since it took the first with notice from its face that Bingham Brothers were drawing it merely for their own accommodation and so violating the condition and was thus put on inquiry as to the accommodation nature of the second draft. The facts of that case should be contrasted with those of a California case, *Postlethwaite v. Minor*,⁵¹ in which the *C* company and *G* entered into a written contract to form the *P* corporation and to make several transfers of property thereto in exchange for securities thereof; among other provisions *C* was to receive stock and bonds, and *G* undertook "to indorse and guarantee payment of the bonds." In an action brought by *A*, transferee of the bonds, judgment was properly rendered for *G*. Since the contract was with *C*, a specific company, and the promise was one not of *guaranty*, but to *guarantee*, that is, to execute a guaranty, the inference was unavoidable that the promise ran only to *C*.⁵²

E. Communications Addressed to a Particular Purchaser of Bills

In conformity with the authorities cited and reasoning developed in sub-topic *D* above, in the absence of special language or circumstances, the promise imported by the letter or other communication runs to the addressed purchaser,⁵³ and not to any other original purchaser,⁵⁴ although it may well be held to run to one purchasing a bill directly or indirectly from the addressed purchaser.

Whether such a letter imports a promise to the seller, or to an agent acting in behalf of the buyer, as the case may be, raises a difficult question of fact. A negative answer was given in *Second National Bank of Peoria v. Diefendorf*.⁵⁵ In that case *E*, resident in Peoria, requested *D*, a commission merchant of Chicago, to buy grain for him. Desiring to draw a bill on *E* and negotiate it to *C*, a Chicago bank, *D* declined to buy the grain until the *G* bank, of Peoria, should guarantee payment of the bill to *C*. At *E*'s request and for his accommodation *G* telegraphed *C* to that effect. Having bought the grain with knowledge of and in reliance on this telegram, *D* drew the bill on *E*, negotiated it to *C*, the payee, and after its dishonor by *E* took it up from *C*. In an action brought by *D* against *G*, a judgment for the plaintiff was reversed. The decision seems sound. In the first place, the telegram stated only a promise to *C*, to be accepted by purchase of the bill, and probably did not imply a promise to *D*, to be met by purchase of the

51. 168 Cal. 227, 142 Pac. 55 (1914).

52. The court also held, with less propriety, that the right of *C* against *G*, which was not assigned to *A*, did not pass to the latter by operation of principles of equity.

53. *First Nat. Bank of Decatur v. Home Savings Bank of St. Louis*, 21 Wall. 294 (U. S. 1875).

54. See *Dickins v. Beal*, 10 Pet. 572, 576 (U. S. 1836) (alternative decision).

55. 90 Ill. 396 (1878).

grain as *E*'s agent; for *D* might merely have wanted assurance that he could negotiate the bill; moreover, the consequences of such implication would have been too far reaching, for *G* would have been thereby interposed as a surety between *E* and *D*. In the second place, *D* could not claim subrogation to the right of *C* against *G*, because, as the court held, *G* was surety for *D* as well as for *E*; for, as interpreted by the court, the telegram imported that *G* was undertaking responsibility to *C* for the payment of the draft by *E* and *D*, the parties thereto, and *D* had manifested no intention inconsistent with the relation thus indicated.⁵⁶ On the other hand, in *Wilson & Co. v. Niffenegger*,⁵⁷ the *E* corporation, which was engaged in the packing business, addressed a letter to the *C* bank undertaking to honor drafts drawn by *D* with express receipt for poultry attached. *D* bought poultry from *S*, drawing a draft for the price; *S* took the draft after being informed of the letter by the *C* bank, negotiated it by indorsement to the *C* bank and later took it up on its dishonor by *E*. In an action brought against *E* judgment was given for *S* on the ground that, since the addressee bank was not in the poultry business, the letter must have been intended to assure other persons who were and to whom it should be communicated. The cases may probably be distinguished by the circumstances: in the former the guarantor was not self-serving, whereas in the latter the packer issued the letter to advance its business interests⁵⁸ and was more likely to undertake the larger responsibility, that is, to the seller of the goods as well as the bank purchasing the draft, and so, as among the three persons bound to the bank, be interposed between buyer and seller.

F. *Communications Addressed to a Consignor of Goods*

A consignor of goods for sale, who already owns them or is about to buy them, may possibly, in procuring a letter of credit or other undertaking from the consignee or another person, desire merely to be assured that the latter, relying on the security of the goods,⁵⁹ will accept the bill for his accommodation or will pay, or accept and pay, the bill by way of an advance to him.⁶⁰ But he more likely purposes to use the letter in effecting immediate negotiation of the bill. Hence, although the consignee or other writer

56. *Craythorne v. Swinburne*, 14 Ves. 160 (Ch. 1807).

57. 211 Mich. 311, 178 N. W. 667 (1920).

58. On the other hand it must be observed that the plaintiff required the establishment of credit in the former case but not in the latter.

59. If the writer of the letter is the consignee, his security would consist of a factor's lien; if he is not the consignee, he may obtain a lien or other security right by agreement contained in the letter of credit or otherwise manifested, as in *Union Bank v. Cole*, 47 L. J. Q. B. 100 (C. A. 1877).

60. In *Gelpcke v. Quentell*, 74 N. Y. 599 (1878), it was held that a letter written by bankers to consignor confirming a credit opened by the consignee was irrevocable after the consignee had drawn the drafts, and hence that the bankers were entitled to judgment against the consignee on the latter's implied agreement of indemnity. This decision presupposes that the letter constituted an offer to the consignor accepted by drawing of the drafts.

addresses the letter to the consignor alone, he should ordinarily be taken to have intended that it should be exhibited or its contents communicated to any prospective purchaser of the bill from the consignor and thus result in a promise to him. Accordingly, the purchaser who knows of and relies on the promise⁶¹ may maintain an action against the promisor on the theory of formation of or compliance with a contract to pay the bill or to accept and pay it.⁶² If, however, the terms of the letter are dependent on other communications between them, it is clear that their objective intention is that the one communication should not be exhibited without the others or else that the various communications, because lacking simplicity and certainty, should not be exhibited at all but serve merely to consummate a transaction between consignor and consignee.⁶³ Moreover, even a letter of credit or other single writing may contain such conditions or be so complex that the inference of a promise running to a person other than the consignor-addressee is unjustified.⁶⁴

II. CONTENT OF THE PROMISE OF A LETTER OF CREDIT

In view of the usages of business, a letter authorizing drafts to be drawn on the writer impliedly imports a promise to honor the drafts;⁶⁵ and a letter advising a person of the opening of credit with the writer has been held to be of like import.⁶⁶ It must be observed, however, that the letter or other communication may be so indefinite as not to import a promise. Thus, in *Atlanta Nat. Bank v. Northwestern Fertilizing Co.*,⁶⁷ a written statement by the payee of a note that he would "carry" the maker was not sufficiently definite to constitute a promise to honor a draft drawn on the

61. *Worcester Bank v. Wells*, 8 Metc. 107 (Mass. 1844) (to be rested on this ground rather than absence of promise to plaintiff).

All the more is this true if the writer expressly consented to the exhibition or communication of the letter to the purchaser of the bill. *Belton Nat. Bank v. Armour & Co.*, 11 F. (2d) 929 (C. C. A. 5th, 1926).

62. *Smith v. Ledyard*, 49 Ala. 279 (1873) (draft drawn, according to local practice, to provide consignor with funds to buy cotton later consigned; contents of letter communicated to purchaser of draft); *Barney v. Newcomb*, 9 Cush. 46 (Mass. 1851); *Valle v. Cerre's Adm'r*, 36 Mo. 575 (1865).

63. *Nevada Bank v. Luce*, 139 Mass. 488, 1 N. E. 926 (1885) (intervening countertelegram not exhibited).

64. *Brett, L. J.*, in *Union Bank v. Cole*, 47 L. J. Q. B. 100 (C. A. 1877).

65. *Barney v. Newcomb*, 9 Cush. 46 (Mass. 1851); *Bissell v. Lewis*, 4 Mich. 450 (1857); *Valle v. Cerre's Adm'r*, 36 Mo. 575 (1865); see *Ulster County Bank v. McFarlan*, 5 Hill 432, 434 (N. Y. 1843); FINKELSTEIN, *LEGAL ASPECTS OF COMMERCIAL LETTERS OF CREDIT* (1930) 29, n. 5. An authority to draw at ninety days has been held to mean a bill payable at ninety days after sight rather than after date. *Ulster County Bank v. McFarlan*, *supra*; see *Greele v. Parker*, 5 Wend. 414, 418 (N. Y. 1830).

66. *Carnegie v. Morrison*, 2 Metc. 381 (Mass. 1841); see *Old Colony Trust Co. v. Continental Bank*, 288 Fed. 979, 982 (S. D. N. Y. 1921).

This situation must be sharply distinguished from one in which a correspondent bank writes advising a seller of goods or other person that a credit has been opened with the issuing bank. Such a letter does not involve an offer or promise to pay the seller of goods or purchaser of drafts, unless of course the correspondent bank confirms the credit. FINKELSTEIN, *op. cit. supra* note 65, at 154-155.

67. 83 Ga. 356, 9 S. E. 671 (1889).

payee of the note by its maker and negotiated to the plaintiff for the purpose of raising money to pay the note; the payee might have "carried" the maker in other ways, for example, by sending money to him directly or by transmitting accommodation paper to him.

III. ANALYSIS OF THE OBLIGATIONS OF A LETTER OF CREDIT

There has been much difference of opinion as to the nature of the promises and resulting obligations of various forms of letters of credit. These opinions have been adequately set out in other publications.⁶⁸ Several theories are of such importance as to justify summarization here and the addition of brief comments.⁶⁹

(1) Professor William E. McCurdy⁷⁰ recognizes that in many situations the promises contained in a letter of credit are offers directed to the future formation of contracts—one binding the issuing banker to the seller of the goods on completion of the sale and the other to a purchaser of the draft on completion of his purchase. Professor McCurdy, however, distinguishes a very common situation, that is, where a contract of sale is first made in which the buyer promises to procure a letter of credit and the seller's obligation is conditioned on such procurement, and the buyer accordingly brings about the issue of the letter and transmits it or causes it to be transmitted to the seller. In this last situation he acutely discriminates between the promises of the letter. In his opinion the promise running to the seller of the goods, a designated person, is usually to pay or to accept and pay drafts to be drawn by the seller and is supported by consideration moving from the buyer and hence gives rise to an immediate obligation which, however, is usually conditioned on the concurrent surrender of specified shipping documents and not infrequently on other contingencies. On the other hand, according to his view, the promise made to a bona fide purchaser of the draft is an offer which may be accepted by the act of purchase and will then give rise to an obligation conditioned in like manner as the promise made to the seller of the goods. Thus Professor McCurdy's view⁷¹ varies from that

68. FINKELSTEIN, *op. cit. supra* note 65, at 277 *et seq.*; McCurdy, *Commercial Letters of Credit* (1922) 35 HARV. L. REV. 539, 563-592.

69. A third theory is advanced by Hershey, in his interesting article, *Letters of Credit* (1918) 32 HARV. L. REV. 1, 12, 18, 38. Its purport is that the bank issuing the letter impliedly represents that the buyer has already put it in funds to be held for the use of the promisees, and hence that the bank is estopped to deny this representation as against a promisee who has changed his position in reliance thereon. While this theory is not without support in the cases, the writer is not inclined to approve it, because in truth the issuing bank is rarely thus put in funds; hence it is difficult to find an implied representation to that effect or reliance thereon.

70. McCurdy, *Commercial Letters of Credit* (1922) 35 HARV. L. REV. 539, 715 (1924), *Right of the Beneficiary under a Commercial Letter of Credit* (1925) 37 HARV. L. REV. 323, 324-337.

71. Professor McCurdy cites the following cases, among others, as supporting his analysis: *International Banking Corp. v. Irving Nat. Bank*, 283 Fed. 103, 104 (C. C. A. 2d, 1922); *Brown v. Rosenstein Co.*, 120 Misc. 787, 200 N. Y. Supp. 491 (Sup. Ct. 1923); see also *Doelger v. Battery Park Nat. Bank*, 201 App. Div. 515, 521, 194 N. Y. Supp. 582, 587 (1st Dep't, 1922) (reasoning). Professor Williston approves his position. WILLISTON, *SALES* (2d ed. 1924) § 469e.

expressed in some cases that the promise made to the seller of the goods, like that made to the purchaser of the draft, is a mere offer.

The two views lead to several points of difference, of more or less practical importance: (a) Language of dissatisfaction expressed by the seller to the issuing bank might conceivably be interpreted as a conditional acceptance or a counter-offer and hence held to constitute rejection of an offer,⁷² and yet be insufficient to import disclaimer of a promissory right already vested in the seller.⁷³ (b) Words of revocation on the part of the issuing banker may have the legal effect of terminating an offer not previously accepted but cannot affect a right already vested in the seller. The writer submits, however, that even under the theory of offer, if the letter purports to be irrevocable, the possibility of effective revocation is relatively remote; for any offer contained in such a letter has the legal quality of irrevocability⁷⁴ (that is, by manifestation of will on the part of the issuing banker)⁷⁵ and, it seems, of interminability (by his death or insanity), if it is supported by consideration.⁷⁶ Such consideration may consist in the buyer's then placing the banker in funds to meet drafts when presented; or in the buyer's promise not only to put the banker in funds for that purpose but to pay a commission or other compensation for the banker's risk;⁷⁷ or, where it is their understanding that payment in pursuance of the letter shall constitute an advance to the buyer, consideration may be found in the latter's promise later to repay the amount thereof to the banker with interest. Furthermore, if the letter purports to be irrevocable, the representation to that effect is one containing a sufficient element of fact, as distinguished from law or opinion,⁷⁸

72. 1 WILLISTON, CONTRACTS §§ 51, 77; RESTATEMENT, CONTRACTS §§ 35, 38.

73. See *Lamborn v. Nat. Park Bank*, 212 App. Div. 25, 30, 31, 208 N. Y. Supp. 428, 433, 434 (1st Dep't, 1925), *aff'd*, 240 N. Y. 520, 526, 148 N. E. 664, 666 (1925).

Hence Professor McCurdy finds fault with the reasoning in *Moss v. Old Colony Trust Co.*, 246 Mass. 139, 140 N. E. 803 (1923), on the ground that the counter-communication of the seller could not be the rejection of an offer, as the court held, but, if it had significance at all, was a disclaimer of a right already vested.

74. Analytically, this quality is more far-reaching than a promise not to revoke, even though supported by consideration.

75. Aside from the question of what the proper theory may be, the cases hold that the banker is committed beyond the possibility of withdrawal or modification from and after the issue of an "irrevocable" letter, the issue of which is supported by consideration. *Lamborn v. Nat. Park Bank*, 212 App. Div. 25, 208 N. Y. Supp. 428 (1st Dep't, 1925), *aff'd*, 240 N. Y. 520, 148 N. E. 664 (1925); *First Wisconsin Nat. Bank v. Forsyth Leather Co.*, 189 Wis. 9, 206 N. W. 843 (1926) (buyer could not effectively direct the bank not to accept and pay the draft).

76. So, also, if it were under seal, where the efficacy of seals has not been abolished. See 1 WILLISTON, CONTRACTS § 61; and RESTATEMENT, CONTRACTS §§ 46, 47. Cf. the analysis of an option contract supported by seal or consideration as set forth in 1 WILLISTON, CONTRACTS § 61. See also RESTATEMENT, CONTRACTS §§ 24, 46, 47.

77. But a mere promise to put the banker in funds would not bind the banker to pay according to the letter any more than a promise made by an accommodated payee-indorser to exonerate or to reimburse the accommodating maker of a promissory note suffices to bind the maker to the indorsee-creditor; the banker in the one case and the maker in the other cannot possibly gain by the transaction; they are gratuitous lenders of credit. In each case other consideration must be found.

78. Cf. EWART, ESTOPPEL (1900) 72-78; BOWER, ESTOPPEL BY REPRESENTATION (1923) §§ 55, 56.

to estop the issuing banker from denying the truth of the representation, and hence the presence of consideration, to the prejudice of a seller who has changed his position in reliance thereon, for example, by shipping the goods or, perhaps, by purchasing them, beginning their manufacture, or otherwise making preparation for the fulfillment of his contract.⁷⁹ (c) Ignorance of the existence of the letter on the part of the seller may also present a point of difference. Such ignorance is inconsistent with the acceptance of an offer,⁸⁰ but not necessarily inconsistent with fulfillment of condition. Nevertheless, this difference is of little practical importance, for usually the letter of credit requires the draft to be noted on the letter, or vice versa, or both, and it is then clear, even under the conditional-contract theory, that the contract is to pay or to accept and pay a draft drawn with knowledge and in pursuance of the letter and not otherwise.

Indeed, in the interest of simplicity, it may well be thought desirable to analyze the promises of the issuing banker, one running to the seller of the goods and the other to the purchaser of the draft, in the same way, whatever that way may be. Thus both might conceivably be viewed as offers which have the quality of irrevocability, legally as a consequence of consideration or practically through estoppel. On the other hand, both might be regarded as giving rise to conditional contractual rights—immediately, in the case of a designated seller of goods or purchaser of a draft, and eventually in case the seller of goods or purchaser of the draft is not designated in the beginning. There is no juristic objection to postponement of the creation of the right until the identity of the person is fixed;⁸¹ in the meantime the bearer of the letter has an interminable power to communicate the promise to and vest the right in such person, when ascertained. It suffices that consideration was given when the letter was issued.

(2) Mr. Finkelstein⁸² agrees in general with Professor McCurdy's analysis of the legal nature of letters of credit but believes that the "irrevocable" commercial letter of credit, especially if issued by a bank, is a new form of mercantile specialty, somewhat analogous to the acceptance of a bill of exchange.⁸³ He regards it as containing promises running from the issuing bank to the seller of goods and the purchasers of drafts, respectively. He recognizes the necessity of consideration but argues that, as in the case

79. Also, the seller, being entitled under the contract of sale to have an irrevocable letter of credit and having received the particular letter in discharge of that obligation, may in truth have refrained from taking effective steps against the buyer which he could and would otherwise have taken and which he cannot now take.

For what constitutes change or other impairment of position, see BOWER, *op. cit. supra* note 78, §§ 157-163.

80. RESTATEMENT, CONTRACTS §§ 23, 53.

81. This is permissible in the analogous case of contracts for the benefit of third persons. RESTATEMENT, CONTRACTS § 139.

82. FINKELSTEIN, *op. cit. supra* note 65, at 289-295.

83. And see the desire for legislative or judicial development of the law along this line, expressed by Hershey, *Letters of Credit* (1918) 32 HARV. L. REV. 38-39.

of negotiable bills and notes,⁸⁴ it may move from the promisee to a third person or from third person to promisor and may here consist in act or promise moving from the seller to the buyer or from the buyer to the issuing banker. Mr. Finkelstein reasons with considerable cogency that by thus treating the letter of credit as a commercial specialty, the understanding of merchants is fully effected and the interests of commerce best served. Professors Williston⁸⁵ and McCurdy⁸⁶ decline to go so far.

(3) One who approves of Mr. Finkelstein's position advocating reception of the commercial letter of credit into the law merchant must nevertheless recognize that, whether revocable or irrevocable, it is usually not a negotiable instrument because lacking the formal requisites. While extended consideration of this topic pertains more properly to a treatise on negotiable instruments, it is well to indicate two matters of importance:

(a) The Negotiable Instruments Law in Section 135 contains the following provision: "An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who upon the faith thereof receives the bill for value." Thus it is seen that the promises to pay or accept and pay bills later to be drawn, found in most letters of credit, are usually not negotiable undertakings, because they are conditioned on the presentation and surrender of shipping or other documents or on the happening or non-happening of some other event.⁸⁷ In this respect the Negotiable Instruments Law, following the Revised Statutes of New York,⁸⁸ departs from the rule governing "virtual acceptances" laid down by the Supreme Court of the United States in *Coolidge v. Payson*,⁸⁹ in which case the promise was in fact conditional and the promisor was held bound as an acceptor.

(b) On the other hand, the letter need not be shown to the plaintiff. It suffices that he or his predecessor in title is informed of the contents in that or some other way and on the faith thereof receives the bill for value. Here also the Negotiable Instruments Law, following the New York statute, varies from the rule of *Coolidge v. Payson*, under which the letter must have been shown to the person receiving the bill.⁹⁰

84. See *Munroe v. Bordier*, 8 C. B. 862 (1849), which recognizes that even in England the consideration for the acceptance of a bill may move from the drawer to the acceptor, although it is generally there held that consideration for a simple contract must move from the promisee. 2 WILLISTON, CONTRACTS § 114.

85. WILLISTON, SALES § 469e.

86. McCurdy, *supra* note 70, at 563-566.

87. *Banco Nacional Ultramarino v. First Nat. Bank*, 289 Fed. 169, 176 (D. Mass. 1923). BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (5th ed. by Beutel, 1932) 997.

88. 2 N. Y. REV. STAT. (1828) c. 4, tit. 2. *New York & Virginia State Stock Bank v. Gibson*, 5 Duer 574, 583 (N. Y. Super. Ct. 1856).

89. 2 Wheat. 66 (U. S. 1817).

90. *Bank of Michigan v. Ely*, 17 Wend. 508 (N. Y. 1837); cf. *Lewis v. Kramer*, 3 Md. 265 (1852).

"Whether the promise must describe a particular bill or bills and, if so, with what minuteness, has been a disputed question. It was held in *Boyce v. Edwards*, 4 Pet. 111 (U. S. 1830),

(4) Lastly, in the most common situations involving letters of credit, it is hardly possible to protect the seller of goods or a purchaser of the draft as a third person beneficiary. It is true that the banker promises the buyer of goods, as well as the seller, to honor a draft drawn for the purchase price, but all that the banker usually then receives is the promise of the buyer to put him in funds, or later to repay him as one who has made a loan. In either case the creditor beneficiary obtains no right, equitable or legal, against the banker because, in the first place, the buyer has no cause of action for substantial damages and, secondly, the banker is not sure of being relieved from performance in the one case or of receiving the agreed equivalent of his performance in the other.⁹¹ While Chief Justice Shaw, in the leading case of *Carnegie v. Morrison*,⁹² rested recovery for the plaintiff on the ground that he was a creditor beneficiary,⁹³ it seems that it would have been better based on an implied promise running to and accepted or fulfilled by the creditor.⁹⁴ It is only when the banker receives the equivalent of his promise in the beginning, for example, by then being put in funds to perform his promise, that the doctrine of *Lawrence v. Fox*⁹⁵ becomes applicable.

To avoid misapprehension, however, it is proper to state that there are situations in which, while there is no promise running to the plaintiff, a right accrues to him as a third person beneficiary against a guarantor or other surety-promisor. In one type of case the plaintiff is a creditor of the promisee; for example, for an executed consideration furnished by *A* to *B*, *B* and *S* may jointly promise *A* to pay *A*'s debt to *C*, or *B* may so promise and *G* guarantee to *A* performance of that promise; under the principle of *Lawrence v. Fox*⁹⁶ *C* obtains a direct right against *B* and *S* jointly, or several rights against *B* and *G*, as the case may be.⁹⁷ The fact that *G*'s promise

and *Franklin Bank v. Lynch*, 52 Md. 270 (1879), that the promise must describe the particular bill or bills; and it was so stated in a leading case on letters of credit, *Carnegie v. Morrison*, 2 Metc. 381, 406 (Mass. 1841). On the other hand, it was thought in *Nelson v. First Nat. Bank*, 48 Ill. 36, 39 (1868), that a promise in general terms would suffice; and it was so held in *Leach v. Hill*, 106 Iowa 171, 76 N. W. 667 (1898)." CAMPBELL, *op. cit. supra* note 15, at 195, n. 3.

91. *Garnsey v. Rogers*, 47 N. Y. 233 (1872) (assuming second mortgagee held not bound to first); 2 WILLISTON, CONTRACTS § 387. See the treatment of *Washburn v. Interstate Investment Co.*, 26 Ore. 436, 38 Pac. 620 (1894), *infra* note 97.

92. 2 Metc. 381, 402, 405 (Mass. 1841).

93. It should be observed that the general doctrine governing creditor-beneficiary promises has been repudiated by later decisions in Massachusetts. 2 WILLISTON, CONTRACTS § 381, nn. 27, 29.

94. The fact that the banker is secured by shipping documents or otherwise makes no difference, for the security may depreciate. *Garnsey v. Rogers*, 47 N. Y. 233 (1872).

95. 20 N. Y. 268 (1859).

96. 2 WILLISTON, CONTRACTS § 381.

97. *Claffin v. Ostrom*, 54 N. Y. 581, 584 (1874) (alternative decision). In further support of this proposition may be cited the great body of cases in which a person furnishing labor or materials is held to have a direct right against the surety on a non-statutory contractor's bond given to the owner of private property which is subject to a statutory lien for such claims. See cases collected in Campbell, *The Protection of Laborers and Materialmen Under Construction Bonds* (1935) 3 U. OF CHI. L. REV. 1, 19, 22, n. 97.

is conditional is not fatal.⁹⁸ Again, the third person may be a donee beneficiary. As such he will have rights against a guarantor⁹⁹ or other surety-promisor.

IV. IRREVOCABILITY AND INTERMINABILITY OF LETTERS OF CREDIT

The question of irrevocability¹⁰⁰ may be of importance in three different situations:

(1) Where the letter of credit purports to be irrevocable:¹⁰¹ as pointed out in the preceding sub-topic, the promises are often legally irrevocable, either because of the presence of consideration or through the operation of an estoppel.

(2) Where the letter imports nothing as to revocability or irrevocability: under Professor McCurdy's view, stated in the preceding sub-topic, if there is consideration for the issue of the letter, the promise generally gives immediate rise to a contractual right vested in the designed seller of the goods, and probably in any designated purchaser of the draft, which right is necessarily irrevocable.¹⁰² If, however, the theory of offer is received, the promise must be deemed revocable until accepted, whether consideration

The following cases are opposed to the proposition of the text: *Horstmann Co. v. Waterman*, 103 Wash. 18, 23, 173 Pac. 733, 734 (1918); *Campbell v. Lacock*, 40 Pa. 448, 452 (1861) (case rejected general doctrine of creditor-beneficiary); see *Holloway v. Blum*, 60 Tex. 625, 627 (1884). In the *Horstmann* case the court relied on *Washburn v. Interstate Investment Co.*, 26 Ore. 436, 38 Pac. 620 (1894), where *B* promised the *A* corporation to pay the latter's debts, including one due to *C*, and the *A* corporation promised *B* to issue stock to him when the debts were paid; and it was held that *C* could not recover the amount of his debt from *B*. That was a sound decision. If the right given to a creditor-beneficiary is a legal substitute for the process of equitable execution, *A*'s asset was valueless, since he was not entitled to specific performance and his cause of action at law was only for nominal damages in the absence of a showing of special damage (2 WILLISTON, CONTRACTS § 387); secondly, if the right of a creditor-beneficiary rests on intention, it is improbable that the promisor would so intend in the case of an executory consideration where he would not be sure of receiving the equivalent promised to him by his promisee; and, lastly, if the protection of a creditor-beneficiary consists in the equitable or legal creation of a substantive right in the peculiar asset in the hands of the debtor-promisee, still the creation of such a right should not be extended to an executory transaction because of the lack of mutuality of performance. The leading case of *Garnsey v. Rogers*, 47 N. Y. 233 (1872), involving the assumption of a first mortgage debt by a second mortgagee, is to the same effect. *Springfield Marine Bank v. Mitchell*, 48 Ill. App. 486 (1892), holding to the contrary, seems to be unsound. In the *Horstmann* case, however, the defendant-guarantor was not promised any equivalent by the debtor-promisee; he could only expect reimbursement from his principal. For this reason the case is clearly distinguishable from the *Washburn* case.

98. *Riordan v. First Presbyterian Church*, 6 Misc. 84, 26 N. Y. Supp. 38 (N. Y. City Ct. 1893). RESTATEMENT, CONTRACTS § 134; see 2 WILLISTON, CONTRACTS § 394.

99. *Punta Gorda Bank v. State Bank of Fort Meade*, 52 Fla. 399, 42 So. 846 (1906).

100. What is here said concerning irrevocability is equally applicable to interminability by death or insanity of the issuing banker.

101. The mere fact that a limitation of time is expressed in the letter does not manifest intention that it shall be irrevocable. See *Federal Coal Co. v. Royal Bank*, 10 F. (2d) 679, 681 (C. C. A. 2d, 1926). If no limit is set the letter expires after a reasonable time. See *Lamborn v. Nat. Pk. Bank*, 212 App. Div. 25, 208 N. Y. Supp. 428 (1st Dep't, 1925), *aff'd*, 240 N. Y. 520, 526, 148 N. E. 664, 666 (1925).

102. 2 WILLISTON, SALES § 469e. *Accord*: *Foglino & Co., Inc. v. Webster*, 217 App. Div. 282, 296, 216 N. Y. Supp. 225, 237 (1st Dep't, 1926), 244 N. Y. 516, 155 N. E. 878 (1926) (judgment below modified in court of appeals only as to quantum of damages).

be given at the time of issue or not, since there was no manifestation of will to the contrary.

(3) Where the letter purports to be revocable: if there be no consideration or estoppel to deny consideration, it seems that the letter constitutes a mere offer which may be revoked¹⁰³ before acceptance but not after;¹⁰⁴ usually the shipment of the goods would constitute acceptance by the seller,¹⁰⁵ as would payment of the price of the draft be acceptance by the purchaser thereof.¹⁰⁶ Indeed, after shipment is made by the seller, his interest requires that the offer to the prospective purchaser of the draft be legally irrevocable; such would seem to be the proper interpretation of the letter; and consideration, moving from the seller, may be found in the shipment of the goods.¹⁰⁷ Where there is original consideration or an estoppel to deny consideration, the word "revocable" probably imports that the legal obligation of the issuing bank should be determinable under the same circumstances as if consideration or estoppel were not present and not otherwise; it seems that the mercantile community intends no distinction between this situation and that of mere offer.¹⁰⁸

Obviously, where the letter imports nothing as to revocability or irrevocability,¹⁰⁹ or even where it purports to be irrevocable, if there is no consideration for its issue or estoppel to deny consideration, the offer contained in it is legally revocable until acceptance, but not afterwards; in other words, it is governed by the same rules as an expressly revocable letter unsupported by consideration or estoppel. Lastly, modification of a letter is governed by the same principles as revocation.¹¹⁰

103. Revocation is effective only upon receipt. *De Tastett v. Crousillat*, 7 Fed. Cas. No. 3,828 (C. C. D. Pa. 1807). See RESTATEMENT, CONTRACTS §§ 41, 69.

104. It is to be observed that mere advice by a correspondent bank of the opening of a credit by an issuing bank involves no offer which needs to be revoked; nor does it impose a duty to notify the advisee that the credit has been withdrawn. *Cape Asbestos Co., Ltd. v. Lloyd's Bank, Ltd.* [1921] W. N. 274 (K. B. D.).

105. If the letter contemplates manufacture and shipment of the goods as the consideration for the offer, it would seem that manufacture, or even the start thereof, would make the offer irrevocable. RESTATEMENT, CONTRACTS § 45.

106. Revocation after shipment of the goods or purchase of the draft, as the case may be, although before presentment of the draft for acceptance or payment, would be too late. *Ilsey v. Jones*, 12 Gray 260 (Mass. 1858) is easily distinguishable.

107. It is to be observed that the usual purpose of the seller of goods in requiring a letter of credit is not only to assure eventual payment of the purchase price but a ready means of realizing thereon in the meantime.

108. For the various views of bankers on this question see WARD, BANK CREDITS AND ACCEPTANCES (1931) 101-114.

109. *Gelpcke v. Quentell*, 74 N. Y. 599 (1878) (letter written by New York bankers at request of consignee of goods to be shipped abroad, confirming opening of credit and agreeing to accept drafts of consignor without bill of lading attached; consignee revoked credit and bankers wrote to consignor revoking confirmation; bankers accepted and paid drafts drawn by consignor before he received the letter revoking the confirmation; held that the bankers were bound to accept and pay such drafts and hence were entitled to reimbursement therefor from the consignee); *Michigan State Bank v. Estate of Leavenworth*, 28 Vt. 209, 216 (1855) (letter of credit held terminated by death of writer).

110. *Lamborn v. Nat. Pk. Bank*, 212 App. Div. 25, 208 N. Y. Supp. 428 (1st Dep't, 1925), *aff'd*, 240 N. Y. 520, 526, 148 N. E. 664, 666 (1925). *United States Steel Products Co. v. Irving Bank-Columbia Trust Co.*, 9 F. (2d) 230, 231 (C. C. A. 2d, 1925) (revocable letter; modification before shipment held effective).

V. DEFENCES OPEN TO THE PROMISOR

The most important of such defences is that arising from nonfulfillment of the conditions or other requirements of a letter of credit. It is thought best to reserve treatment of that topic until the last part of this article. Several other defences, however, may well be considered at this time:

A. Fraud or Failure of Consideration

It is obvious that fraud perpetrated on the writer of the letter by a third person, for example, by the buyer, by the consignor¹¹¹ or consignee of goods, or by a stranger, or nonperformance of a promise on the part of the third person or other failure of consideration between him and the writer,¹¹² will not afford to the latter a power of rescission as against a promisee who gives value or suffers an impairment of position in good faith and without notice.¹¹³ Moreover, a promisee who receives the letter of credit¹¹⁴ or a bill drawn by the seller or consignor of goods, in absolute or conditional payment of an antecedent debt or, it seems, as security therefor even without an extension of time, takes the promise of the letter for value. Although the promise is not negotiable, the commercial interest in the protection of the bona fide promisee is even stronger here than in the case of ordinary nonnegotiable choses in action.¹¹⁵ This interest appears to be just as potent as that supporting the bona fide acquisition of a document of title or certificate of stock,¹¹⁶ and sufficiently compelling to distinguish our case from a purchase of real or chattel property.¹¹⁷

111. *Valle v. Cerre's Adm'r*, 36 Mo. 575, 591 (1865).

112. *Oil Well Supply Co. v. MacMurphy*, 119 Minn. 500, 138 N. W. 784 (1912).

113. This proposition follows from the rule protecting promisees (as distinguished from assignees) of nonnegotiable choses in action generally. *Trevitt v. Converse*, 31 Ohio St. 60, 71 (1876) (plaintiff transferred property to defendant, who, induced by fraud of X, gave back a note and mortgage; decree for foreclosure); *Law v. Grant*, 37 Wis. 548 (1875). See also *Atkinson v. Reed*, 49 S. W. 260 (Tex. Civ. App. 1898) (*A* conveyed land to *B* for money paid by the latter; *A* was induced to do so by fraudulent representation of *X* that the deed was only one of mortgage; held for *B*). If no value or impairment of position, the transaction may be rescinded whether executed or unexecuted. *Huguenin v. Baseley*, 14 Ves. 273, 289 (Ch. 1807) (settlement of land); *Scholefield v. Templer*, 4 De G. & J. 429 (Ch. 1859) (release of surety); *Hubbard v. Hart*, 71 Iowa 668, 33 N. W. 233 (1887) (surrender of note to principal-maker, co-maker being surety); *Clark v. Young*, 231 Mass. 156, 120 N. E. 397 (1918) (same except co-maker was co-principal); *Marine Bank & Trust Co. v. House*, 299 S. W. 276 (Tex. Civ. App. 1927); *Notes* (1897) 33 L. R. A. 628; (1909) 13 ANN. CAS. 921; (1912) 23 ANN. CAS. 485. RESTATEMENT, CONTRACTS § 477; 3 WILLISTON, CONTRACTS § 1518, n. 83.

114. See *Johannessen v. Munroe*, 158 N. Y. 641, 647, 53 N. E. 535, 536 (1899) (absolute satisfaction; court inclined to place case on ground of estoppel by representation; but, if absolute satisfaction will suffice for impairment of position there, it should be value here).

115. A counter-promise is value there (RESTATEMENT, CONTRACTS § 477); all the more should absolute or conditional satisfaction of an antecedent debt, as for instance in a novation, constitute value. Compare NEGOTIABLE INSTRUMENTS LAW §§ 25 and 54.

116. UNIFORM BILLS OF LADING ACT § 53; UNIFORM WAREHOUSE RECEIPTS ACT § 58; UNIFORM TRANSFER OF STOCK ACT § 22.

117. Indeed, under the UNIFORM SALES ACT § 76, an antecedent or preexisting claim, whether for money or not, constitutes value where goods or documents of title are taken in satisfaction thereof or as security therefor.

B. Violation of Purpose, Directions, or Conditions Pertaining to the Use of the Letter

Under this heading several different situations may be considered:

(1) The letter or other communication may merely state the purpose of establishing the credit or for which the letter may be used. While violation of or diversion¹¹⁸ from purpose affords the writer a defence as against the promisee if the latter has knowledge or constructive notice thereof,¹¹⁹ it will not affect a promisee who gives value in good faith and without such knowledge and notice.¹²⁰

(2) The letter may import a direction addressed to the bearer of the letter and relating to its use. Violation of the direction gives no defence, unless the promisee, for example, the purchaser of a draft drawn under the letter, knew or had constructive notice of the violation.

(3) Even though the letter imposes a limitation or condition *on its use*,¹²¹ still the violation thereof will give no defence to the writer, unless the promisee knew or had constructive notice of such violation.¹²²

(4) While the beneficiary of a guaranty or letter of credit is usually not the agent of the writer, since he is not acting in behalf of and under the control of the latter, there are exceptional situations in which the requisites of agency are present, the consequence being that the effect of violation of directions and the like will be determined by rules of agency. Thus, one desiring to buy goods through an agent may give the latter a letter of guaranty or other form of credit¹²³ stating certain directions, limitations or conditions governing its use, the fulfillment of which lies peculiarly within

118. See *Johannessen v. Munroe*, 158 N. Y. 641, 647, 53 N. E. 535, 536 (1899).

119. *Dickins v. Beal*, 10 Pet. 572, 576 (U. S. 1836).

120. *Bissell v. Lewis*, 4 Mich. 450, 457 (1857).

121. Indeed, revocation of the authority to use the letter seems to be ineffective as against a promisee without knowledge and notice. FINKELSTEIN, *op. cit. supra* note 65, at 159.

122. This follows from general principles governing the delivery of instruments, formal or informal, negotiable or nonnegotiable. Thus, if one signs an instrument as surety and delivers it to the principal or some other person with the express or implied understanding that it shall be delivered over to the obligee only on fulfillment of a condition, for example, the genuineness of a purported signature of a co-surety, or the later procurement of such signature, the obligee who parts with value in good faith and without knowledge and constructive notice of the violation of the condition obtains an enforceable right against the surety. See Notes (1918) ANN. CAS. 1918D, 512, 513, (1899) 45 L. R. A. 321, 323, (1900) 49 L. R. A. 315; 2 WILLISTON, CONTRACTS § 1246; AMES, CASES ON SURETYSHIP (1901) 311, n. 6; CAMPBELL, *op. cit. supra* note 45, at 345, 346, nn. 1 and 2.

Whether there is any duty to see to the application of proceeds. In *Oelbermann v. Nat. City Bank*, 79 F. (2d) 534 (C. C. A. 2d, 1935), a letter of credit had been issued by a Philadelphia bank at the request of the plaintiff firm to enable a merchant in China to procure funds with which to buy wool, and a branch of the defendant bank in China had advanced money to the merchant under the letter by giving him credit on his deposit account; it was soundly held that the defendant bank was not under obligation to the plaintiff to see that the merchant properly applied the proceeds, that is, to purposes agreed on between the merchant and the plaintiff firm.

123. Such a letter would tend to further the purpose of the agency, if the writer desired not to disclose that he was the principal in the transaction or if the agent should draw a draft for the purchase price in his own name.

the agent's knowledge; if the agent is general rather than special, the writer impliedly invites the seller to rely on the agent's expressed or implied representation of fulfillment and is bound notwithstanding the violation.¹²⁴

(5) On the other hand, a condition or limitation which qualifies the promise of the letter or other communication, as distinguished from a direction, limitation or condition in respect to its use, must be fulfilled,¹²⁵ whether it governs the acceptance of offer and hence affects the rise of any obligation, or merely goes to performance of obligation; giving value and the absence of knowledge and notice on the part of the accrediting person will not protect him. Thus, if a promise to accept a draft is conditioned on the shipment of goods¹²⁶ or the transmission of a described bill of lading or warehouse receipt, along with or separately from the draft, the writer is not under an enforceable obligation unless the goods are shipped or the document of title is transmitted.¹²⁷ The effect of violation of a limitation on the writer's liability is considered under the next heading.

C. Drafts Exceeding Limitations of Amount

The scarcity of authorities on this topic reflects the honesty of the mercantile community. Yet the sense of satisfaction thus brought to the commentator is not unalloyed. Many questions occur to his mind which have not received the impress of authority. He is not in the ideal position of having his head in the air and his feet on the ground. The latter requisite being absent, all that he can do is to inclose his speculations in a "trial balloon" and send it aloft. The simile is not inapt, for the gaseous content is the same and the risk of puncture approaches certainty.

A case decided by the Court of Appeals of Missouri¹²⁸ may be first considered. It presents an interesting question. The defendant bank gave to one B a letter of credit to facilitate the purchase of livestock. The letter contained a promise to pay checks up to the amount of \$1,000, but, while providing that checks negotiated under the letter should be noted on the back thereof, it did not provide that a notation concerning the letter should be

124. *Merchants' Bank v. Griswold*, 72 N. Y. 472 (1878) (limitation to such drafts as may be necessary for the purchase of lumber).

125. *Peoples Savings Bank & Trust Co. v. Landstreet*, 80 Fla. 853, 87 So. 227 (1920) (promise to honor drafts, "amount not to exceed \$500", held to mean \$500 in the aggregate); *Union Bank v. Cole*, 47 L. J. Q. B. 100 (C. A. 1877) (condition that grain in transit or in warehouse be appropriated as security, and that draft specify such grain; no grain was appropriated or specified; in action by purchaser of draft against writer of letter, judgment for defendant).

126. *First State Bank v. Thuet*, 88 Minn. 364, 93 N. W. 1 (1903).

127. In *Schimmelpennich v. Bayard*, 1 Pet. 264 (U. S. 1828), a letter of credit, issued by a firm in the Netherlands and addressed to bankers in New York, was confined to drafts negotiated by an agent of the issuing firm for raising funds with which to procure consignment of goods to that firm and requested the New York bankers to exercise supervision over such advances; it was held not to cover drafts drawn by the agent against consignments made by the agent on his own account and negotiated to the New York bankers.

128. *Bank of Seneca v. First Nat. Bank*, 105 Mo. App. 722, 78 S. W. 1092 (1904).

made on the checks. *B* drew and negotiated checks aggregating \$300 in amount independently of the letter, which checks were paid by the defendant bank without knowledge that they had been so negotiated. *B* later negotiated checks aggregating \$1,000 to the plaintiff, who took them on the faith of the letter and made appropriate notations on the back thereof. Defendant paid some of these latter checks but refused to pay others on the ground that such payment would exceed the limited amount. Judgment was rendered for the plaintiff for the amount of the latter checks. This seems to be a sound result. Since the promises made by the writer of the letter ran only to purchasers of checks to whom the letter was shown, or its contents communicated, and contractual obligations arose in favor only of purchasers who relied on and met the terms thereof, the limitation of amount was to be interpreted as referring only to checks so negotiated, and hence checks not so negotiated were not to be counted in ascertaining whether the limit had been reached.¹²⁹

On the other hand, a case may easily be supposed in which no notation of a draft negotiated under the letter was made on the letter. In such case, whether the notation was required or not, it seems that the writer of the letter is not obligated to pay in the aggregate more than the stated amount, although checks in excess thereof may have been negotiated under the letter.¹³⁰ Such are the terms of the writer's promise. Thus a situation might be presented where persons having several rights against the writer are subject to a provision for limited aggregate liability. In equity the claims of

129. Although a particular draft is not purchased on the faith of the letter, a person who represents, actively or passively, that it has been so purchased will be estopped to assert the contrary to the prejudice of the issuing bank. Thus, in *Omaha Nat. Bank v. First Nat. Bank*, 59 Ill. 428, 433 (1871), the plaintiff bank, having already purchased one draft on the faith of the letter and collected it from the issuing bank with advice that it had been so purchased, bought another and collected it without explicit advice one way or the other. In an action brought to recover the amount of a third, excessive draft, taken by the plaintiff under the letter, judgment was rendered for the issuing bank, the court saying that it was unnecessary to inquire whether the second draft was purchased in reliance on the letter, inasmuch as the plaintiff knew that when it should be collected from the defendant the latter would be justified in assuming that the letter was discharged to that extent.

130. See *Roman v. Serna*, 40 Tex. 306 (1874). In *Ranger v. Sargent*, 36 Tex. 26 (1871), a letter written by the defendant gave authority to *W* to draw for \$600. The defendant paid a draft for \$172 which had been discounted by *X* on the faith of the letter and was noted thereon; also, it seems, drafts aggregating \$302 drawn in favor of *W* himself and paid to him; and drafts aggregating at least \$463 in favor of *Y*. It did not appear whether these last-described drafts were taken on the faith of the letter. The plaintiff sued on a draft for \$350 which he took in reliance on the letter. The trial court instructed the jury that the plaintiff was entitled to recover the amount of this draft. This peremptory instruction was held to be erroneous, and properly so. It is true that the drafts for \$302 paid to *W* himself did not fall within the coverage of the letter; it is also true that if the only two drafts purchased on the faith of the letter were the one to *X* for \$172 and the other to the plaintiff for \$350, the limit of the letter would not be exhausted and the instruction was proper. Nevertheless, the drafts discounted by *Y* might have been taken on the faith of the letter. That question should have been submitted to the jury. If they were so taken, the plaintiff would not be entitled to recover the full amount of the draft he purchased, or indeed any part thereof, since the defendant seems to have paid *Y*'s drafts without knowledge and notice of the plaintiff's draft.

each should be ratably abated. The writer of the letter, if he be cognizant of the situation, may interplead the various promisees and should not be completely discharged in equity unless he does so. If, however, acting in good faith and without knowledge and notice of the excessive drawing, he pays one or more of several promisees to the full limit of his liability, he should be discharged in equity as well as at law, and the disappointed promisees be left to quasi-contractual or other appropriate redress against the recipients.

To protect himself against the danger disclosed by the first case discussed, the writer of the letter usually includes a provision that the letter shall be noted on each draft. Thus he will know which drafts to pay. If a draft carries no such notation, the writer will normally decline to pay it unless, of course, he is willing to exceed the limit. It is to be observed, however, that the requirement of notation on the draft does not give complete protection to the writer. A draft might conceivably be negotiated independently of the letter and yet a false notation of negotiation under the letter be made. If the writer pays this draft he will not be discharged thereby and may have to pay the entire limited amount to other persons who have purchased drafts on the faith of the letter.¹³¹ Furthermore, to protect himself, and especially purchasers of drafts on the faith of the letter, against the danger of exceeding the stated limit, the writer of the letter usually inserts a provision that each draft shall be noted on the letter.

The question now arises whether these requirements that the letter be noted on the draft and the draft on the letter are conditions or merely duties. Unless clear words of condition are used, it seems that such requirements should not be interpreted as conditions going either to the creation or performance of the contract, since such an interpretation would relieve the writer from liability on the particular draft, although it, along with other drafts negotiated under the letter, would not exceed the limit. The better view is that the writer of the letter is offering a contract to the purchaser of the draft, to be completed by such purchase, with the stipulation that the latter concurrently assumes duties of notation¹³²—duties which run not only to

131. Of course, in that situation, the writer of the letter would have certain rights over against persons connected with the draft which bore the false notation, more or less valuable according to their solvency and availability: (1) If the drawer of the draft made the false notation as part of the draft, the drawer, the immediate purchaser of the draft, and one purchasing the draft from him with knowledge, will all be guilty of deceiving the innocently-paying writer of the letter and responsible to him in an action of deceit for damages, or in quasi contract for the benefit received. (2) If it is the immediate, independent purchaser of the draft who makes the false notation, not only is he deceiving the writer but he is also, it seems, altering the original draft, and hence the writer could recover the payment even from a remote independent purchaser who received and collected the draft in the belief that it had been previously negotiated under the letter. CAMPBELL, *op. cit. supra* note 15, at 913, n. 1; WOODWARD, *QUASI-CONTRACTS* (1913) § 80; Ames, *The Doctrine of Price v. Neal* (1891) 4 HARV. L. REV. 297, 306.

132. A closely analogous situation is that in which an offeror transmits a chattel or a deed of real estate to a distant person with a statement that title to the chattel or the land may be

the writer but to other purchasers of drafts.¹³³ Thus the currency of the letter of credit will be enhanced without the writer's being in any way prejudiced. Non-notation is therefore seen to be a breach of duty,¹³⁴ but not such a breach as justifies the writer in rescinding the letter or excuses him from rendering payment; for it was the paying of the purchase price of the draft that constituted the equivalent of the writer's promised performance.¹³⁵ Thus the writer of the letter would be confined to the recovery of damages, if any there can be,¹³⁶ proximately resulting from the breach of duty, which right to damages he may assert in a separate action or by way of counterclaim in one brought by the purchaser.

Several situations of omission or commission in respect to one or both of the two stated requirements may be now considered:

(1) If *A* should fail to note his purchase of a draft on the letter, and *B* and *C*, without knowledge of *A*'s purchase, should later buy drafts and make the proper notations, which later drafts exhaust the limit of liability, *B* and *C* would be equitably entitled to the limited amount before *A*, because the duty of *A* ran to *B* and *C* as well as to the writer of the letter, and the writer of the letter on paying *B* and *C* would be equitably relieved of all liability; or, if the drafts of *B* and *C* should not entirely exhaust the limited amount, *A* would be entitled only to the residue, and the writer would be discharged by paying *A*, *B* and *C* accordingly. Any doubt on the part of the writer could be resolved through interpleader.

(2) If *A*, *B*, and *C* should each fail to note the draft he purchases on the letter, and if *B* and *C* should each have no knowledge of prior negotiations, it seems that they should be equitably entitled to the limited amount in reverse order, that is, *C*, *B*, and *A*, the reason being that the duty of each purchaser runs not only to the writer of the letter, but to all subsequent purchasers of drafts.

(3) If in either case (1) or (2) the writer of the letter pays *A* without knowledge or notice of his breach of duty, the writer will be discharged from liability to *B* and *C* (except so far as the limited amount may not be thus exhausted), but they will be equitably entitled to the payment or overpayment, as the case may be, thus received by *A*.

taken by the offeree if he assumes an obligation to pay a certain price. Acceptance of the chattel or land binds the offeree accordingly. 1 WILLISTON, CONTRACTS § 25.

133. The fact that the subsequent purchaser, to whom the duty runs, was not a party to the stipulation, is not fatal. Closely analogous situations are: (1) Where a chattel is delivered to *A* with the understanding that title shall vest immediately and unconditionally in *B*, or a deed of real estate is delivered to *A* with the understanding that the title shall so vest in *B*, the grantee; and (2) donee-beneficiary promises.

134. It is believed that a requirement that the last purchaser within the limit take up the letter of credit and transmit it to the writer gives rise to a similar duty.

135. See 2 WILLISTON, CONTRACTS §§ 814, 872.

136. No damage resulted to the writer in *Omaha Nat. Bank v. First Nat. Bank*, 59 Ill. 428, 432 (1871) (failure to note draft on letter).

(4) If *A* notes the draft which he purchases on the letter, but *B* and *C* each fail to observe the notation and make advances exhausting the entire limited amount, clearly in equity *A* should be first entitled; for while at law *B* and *C* acquired contractual rights they had constructive notice of the notation.¹³⁷

(5) If *A* properly notes the draft he purchases on the letter and this notation is later erased by the bearer of the letter or another person, it seems that the loss resulting from excessive negotiation of drafts would not fall on the writer of the letter, since he limited the aggregate amount of his obligations and assumed no responsibility for the continuing integrity of the notation. Moreover, the loss should fall on *A*, *B*, and *C* ratably, rather than on *A* alone, no matter how skillful and imperceptible the erasure was and how careful *B* and *C* may have been. This conclusion is not to be rested on the ground of alteration of the *letter*, for if the letter were altered in any material term neither *B* nor *C* would acquire any rights against the writer: the letter signed by the writer would be a different letter from that exhibited to *B* and *C* and hence the promises reasonably anticipated by the writer would be different from those reasonably understood by *B* and *C*, respectively. The better view is that the alteration pertains only to the *notation*, a writing on but not of the letter, and the sole effect of the erasure is to prevent knowledge or notice from coming to *B* and *C*. Hence, since each of the three purchasers has properly complied with a promise running to him, and since *A* has not failed in the performance of his duties owed to *B* and *C* and the latter have never been under duties to *A*, they stand on an even footing and should be ratably entitled.

(6) If *X*, a purchaser of a draft negotiated independently of the letter, or some other person, should note on the draft the number of the letter or other matter falsely importing that the draft had been negotiated under the letter, and the writer should pay it under that misapprehension, quasi-contractual recovery of the amount paid could be had by him from the recipient on the ground of mistake, or an action of deceit might be maintained against such person or persons as were guilty of fraud; but the writer would have no defence to later actions brought by *A*, *B*, and *C*, who on the faith of the letter purchased drafts in an aggregate amount not exceeding the stated limit; the writer was not liable to *X* under the letter; he was so liable to *A*, *B*, and *C*.

[To be concluded]

¹³⁷ It is believed that if *A* should fail to note his draft on the letter, and *B* and *C* note theirs, *B* with knowledge and *C* without knowledge of *A*'s purchase, an apparent circuity of interest would result: *A* would seem to be preferred to *B*, *B* to *C*, and *C* to *A*. Several different solutions might be suggested here, as in the similar case of apparent circuity of liens on real or personal property. The writer suggests that the determinative factor is to be found in the unperformed duty that *A* owed to *C* and the necessity of assuring to *C* full protection against the consequences of such nonperformance. The solution would be similar to that suggested by him in analogous situations in his article on *Protection Against Indirect Attack*, *HARVARD LEGAL REVIEWS* (1924) 2, 16-20.