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NOTICE REQUIREMENTS OF GUARANTY CONTRACTS

*Richard F. Dole, Jr.**

THERE are three types of notice which a creditor-offeree may be required to give a guarantor-offeror: (1) notice of intention to accept the offer of guaranty, (2) notice of transactions in reliance on the offer of guaranty, and (3) notice of the principal's failure to perform the obligation guaranteed. Litigation has been rife with regard to these notice requirements. Corbin has stated:

"The question of notice as a condition precedent has been litigated more extensively in connection with contracts of suretyship than in any other field. A superficial examination of hundreds of cases may seem to indicate a tremendous conflict of authority. It is believed, however, that a careful analysis and classification of the cases will bring order out of chaos and will show that the courts have been acting with a reasonable degree of uniformity and consistency."¹

Corbin, however, did not attempt to analyze and classify the cases.

The following is an attempt to verify Corbin's educated guess through the application of factual analysis. If significant facts can be isolated which produce the same result regardless of the theory applied by the court, no real conflict can be said to exist. An initial exploration of the problems involved is a prerequisite to delineating the area in which factual analysis must be used.

I. SURVEY OF THE PROBLEM

Contractual guaranties arise from dealings between the guarantor and the creditor. They may exist without the consent, or even the knowledge, of the principal.² Although the creditor frequently requests a guaranty,³ his solicitation seldom amounts to an offer. The contract commonly results from acceptance by the creditor of

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¹ 3A CORBIN, CONTRACTS § 726, at 393-94 (1960) [hereinafter cited as CORBIN; Vol. 1 (1950); Vol. 3A (1960)].

² See RESTATEMENT, SECURITY § 83, comment *b* (1941).

³ See Campbell, *Notice Due a Guarantor*, 35 MICH. L. REV. 529, 535 (1937) [hereinafter cited as Campbell].

an offer made by the guarantor.⁴ It may be bilateral or unilateral, though bilateral contracts of guaranty are rare.⁵

An offer for a bilateral contract of guaranty may request the creditor to promise the guarantor that he will or will not act with respect to the principal. For example, the creditor may be asked to promise not to press the principal on a debt. The creditor may be expressly directed by the offer to give notice to the guarantor as a condition precedent to formation of a bilateral contract or as a condition subsequent to its existence. On the other hand, such notice may be expressly dispensed with by the offer. When the offer does not refer to notice, principles relating to the formation and discharge of contracts provide a solution. Communication of the creditor's promise to the guarantor is ordinarily necessary to form a bilateral contract of guaranty.⁶ Notice of the creditor's performance of his promise or of the principal's failure to pay him is not needed to prevent discharge of the contract.

Similarly, an offer for a unilateral contract of guaranty may specify as consideration action or inaction by the creditor or a promise by the creditor running to the principal. For example, the creditor may be asked to extend credit to the principal or to promise the principal that he will do so. The creditor may be expressly charged by the offer to send notice to the guarantor as a condition precedent to formation of a unilateral contract or as a condition subsequent to its existence. Conversely, such notice may be expressly negated by the offer. When the offer does not mention notice, principles relating to the formation and discharge of contracts furnish an answer. The creditor need not communicate to the guarantor his intention to perform the requested act in order to create a unilateral contract of guaranty.⁷ Neither notice of the creditor's performance nor notice of the principal's default is essential to forestall the contract's discharge.

When the offer is silent concerning notice, conventional principles have not always been followed. At times the creditor has been compelled to give the guarantor notice in order to bind him to his promise. At other times no notice has been required.

⁴ See 1 CORBIN § 68, at 215.

⁵ See 1 WILLISTON, CONTRACTS § 69A, at 221-22 (3d ed. 1957) [hereinafter cited as WILLISTON].

⁶ See 1 WILLISTON § 70.

⁷ See *id.* § 68.

A. *Nature of the Notice Requirements*

All three notice requirements are conditions of the guarantor's liability. They are not promises creating a legal duty in the creditor and a right in the guarantor. They are operative facts which must exist for certain contracts of guaranty to be enforceable.⁸ Conditions may be express, implied, or constructive. The guarantor creates an express condition when he uses definite language in the offer to limit his liability.⁹ An implied condition is based on a mutual understanding of the parties that is not expressed in definite language.¹⁰ In contrast, a constructive condition is a circumstance which is treated as a condition on grounds of fairness and justice although the parties have manifested no intention whatever with regard to it.¹¹

The distinctions between the various types of conditions are clear; but in specific cases it is not always easy to classify the particular condition involved. Literal classification aside, in a sense all facts stated to be conditions by courts are constructive conditions unless the parties expressly and explicitly made them conditions. Considerations of fairness and reasonableness, the essence of constructive conditions, are given considerable weight in interpreting the words and actions of the parties.¹² The subsequent analysis will treat notice as a constructive condition in this broader sense.

B. *Distinctions Between the Notice Requirements*

Notice of intention to accept is notice to the guarantor by the creditor that the latter intends to extend credit in reliance on the guaranty.¹³ Its purpose is to enable the guarantor to plan his affairs intelligently.¹⁴ Notice of transactions is notice to the guarantor by the creditor of the total balance due on the principal's account,¹⁵ and, according to some authorities, notice of the terms of payment as well.¹⁶ Notice of transactions, like notice of intention to accept, aids the guarantor in the organization of his affairs.¹⁷ Notice of default is notice to the guarantor by the creditor that the principal

⁸ See 3A CORBIN § 627.

⁹ See *id.* § 631.

¹⁰ See *ibid.*

¹¹ See *id.* § 632.

¹² See *id.* § 639, at 58.

¹³ *Lowe v. Beckwith*, 53 Ky. (14 B. Mon.) 150 (1853).

¹⁴ See *Douglass v. Reynolds, Byrne & Co.*, 32 U.S. (7 Pet.) 113, 125 (1833).

¹⁵ *Louisville Mfg. Co. v. Welch*, 51 U.S. (10 How.) 461 (1850).

¹⁶ *E.g.*, *Craft v. Isham*, 13 Conn. 28, 40 (1838).

¹⁷ See 1 STORY, CONTRACTS 360 (1st ed. 1844).

has failed to perform the obligation guaranteed.¹⁸ The object of notice of default is to safeguard the guarantor's rights of recourse.¹⁹

Notice of intention to accept, notice of transactions, and notice of default all constitute requirements which must be met in some, but not all, contracts of guaranty. They are imposed by the courts as constructive conditions of the guarantor's liability on certain contracts unless negated by express terms.²⁰ Notice of intention to accept, however, is the only type of notice that is necessarily contractual in theory. It is considered either a condition precedent to formation of a contract²¹ or a condition precedent to the guarantor's duty of performance.²² Although notice of transactions and notice of default are also referred to as constructive conditions of the guarantor's liability,²³ failure to dispatch these notices actually operates as a suretyship defense, *i.e.*, the guarantor is permitted to offset against his contractual liability the amount of pecuniary loss that he can link to the failure to receive notice.²⁴

In theory, the notice requirements are due at different times. Precise delineation may be more difficult as a practical matter. Notice of intention to accept is due within a reasonable time after commencement of performance by the creditor;²⁵ notice of trans-

¹⁸ *Douglass v. Reynolds, Byrne & Co.*, 32 U.S. (7 Pet.) 113 (1833). The notice of default to which a guarantor of payment may be entitled should be distinguished from notice of inability to collect, which a creditor may be required to give a guarantor of collection. See text accompanying notes 240-41 *infra*.

¹⁹ See *Douglass v. Reynolds*, *supra* note 18. If the principal has defaulted, the guarantor can sue to require him to pay the creditor. See SIMPSON, SURETYSHIP § 46 (1950) [hereinafter cited as SIMPSON]. Alternatively, the guarantor can pay the creditor and become subrogated to the latter's rights and remedies as well as his security. Upon fulfillment of the principal's obligation the guarantor also has a right to seek full reimbursement from the principal and contribution from co-guarantors if he has paid more than his proportionate share of the obligation guaranteed. See *id.* §§ 47-49. The guarantor assumes the risk of the insolvency of the principal and his co-guarantors during the interim between default and exercise of his rights of recourse. Notice of default limits the time during which the guarantor bears this risk because of ignorance.

The notice of the creditor's inability to collect from the principal that may be due a guarantor of collection serves a distinct function. Since the creditor's failure to collect from the principal indicates that the guarantor's rights of recourse are already impaired, this notice requirement is principally designed to avoid unnecessary litigation, *i.e.*, to enable the guarantor of collection to meet his obligation on demand and thereby obviate legal proceedings by the creditor. See RESTATEMENT, SECURITY, Explanatory Notes § 134 (Tent. Draft No. 4, 1940).

²⁰ See Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903 (1942).

²¹ *Davis v. Wells*, 104 U.S. 159 (1881).

²² *Bishop v. Eaton*, 161 Mass. 496, 500, 37 N.E. 665, 667-68 (1894) (dictum).

²³ See, *e.g.*, 3A CORBIN § 726.

²⁴ *Louisville Mfg. Co. v. Welch*, 51 U.S. (10 How.) 461, 474-75 (1850) (dictum).

²⁵ *Douglass v. Reynolds, Byrne & Co.*, 32 U.S. (7 Pet.) 113 (1833), as explained in *Louisville Mfg. Co. v. Welch*, 51 U.S. (10 How.) 461, 474 (1850) (dictum).

actions, within a reasonable time after the close of transactions;²⁶ and notice of default, within a reasonable time after the principal's default.²⁷

II. NOTICE OF INTENTION TO ACCEPT

A. *The English Rule*

Lord Ellenborough inaugurated the concept of notice of intention to accept in 1813 when he held that it was a constructive condition of the following offer:

"Gentlemen, as I understand Messrs. David Anderson and Co., of Quebec, have given you an order for rigging, & etc., which will amount to about four thousand pounds, I can assure you, from what I know of D. A.'s honor and probity, you will be perfectly safe in crediting them to that amount; indeed I have no objection to guaranty you against any loss from giving them this credit."²⁸

The subsequent elaboration of this concept bears a striking similarity to the pattern of the American cases analyzed below.²⁹ Notice is a constructive condition in English and Commonwealth law whenever the phrasing of the guaranty should indicate to the creditor that the guarantor expects notice or needs it in order to make his plans.

Notice will be required when the offer indicates a willingness to guaranty only if the creditor signifies his intention to accept. Notice was required, for instance, when the guaranty stated: "If you can arrange matters to your mutual satisfaction, I am sure that Mr. Hugill will prove a very reliable person to deal with. I will myself, with pleasure, become security for anything he may be disposed to give an order for."³⁰ Notice is also necessary when the offer is extended to two or more prospective creditors and the guarantor does not know which one will accept,³¹ and when the offer indicates

²⁶ *Douglass v. Reynolds, Byrne & Co.*, 32 U.S. (7 Pet.) 113 (1833). Notice of transactions is due only once, regardless of whether a temporary or a continuing guaranty is involved. *Ibid.* The former usually secures a single transaction; the latter, multiple transactions. See STEARNS, SURETYSHIP § 4.7 (5th ed. 1951) [hereinafter cited as STEARNS].

²⁷ *Douglass v. Reynolds, Byrne & Co.*, *supra* note 26.

²⁸ *M'Iver v. Richardson*, 1 M. & S. 557, 105 Eng. Rep. 208 (1813).

²⁹ See text accompanying notes 98-180 *infra*.

³⁰ *Kastner v. Winstanley*, 20 U.C.C.P. 101, 101-02 (Can. 1869); *accord Symmons v. Want*, 2 Stark 371, 171 Eng. Rep. 676 (1818) (alternative holding). *But see A. A. Davison Pty. Ltd. v. Seabrook*, 37 Argus L.R. 156 (Vict. S.C. Austl. 1931).

³¹ *Lott v. Collins*, 8 S.C.R. 104 (N.S.W.S.C. Austl. 1869).

that the guarantor is unsure that he is a suitable guarantor, *e.g.*, when the offer names a reference who can vouch for the guarantor's credit standing.³²

Notice of intention to accept will not be demanded if the wording of the offer or the circumstances of the making of the offer should indicate to the creditor that the guarantor does not expect or need it. Thus, notice is unnecessary when the guarantor uses positive words of guaranty even though he does not expressly waive notice, for example: "Please pay to my tenant Imam Din whatever money he requires and settle your account every harvest, because he would require money for agricultural and seed purposes. I am responsible for the amount borrowed by Imam Din."³³ Circumstances which should lead the guarantor to anticipate acceptance are numerous. Illustrations include a request by the creditor to the guarantor for the guaranty,³⁴ and knowledge by the guarantor that he is an acceptable guarantor and that his offer was taken by the principal to a meeting at which it was expected that credit would be extended.³⁵ A request by the principal for the guaranty, however, does not affect the guarantor's expectations of acceptance unless he knows that the proposal originated with the creditor.³⁶

Notice of intention to accept can be waived by failure to object when the creditor tardily informs the guarantor that he intends to hold him liable.³⁷ The guarantor's seasonable knowledge of acceptance, although acquired from a source other than the creditor, is the equivalent of notice of intention to accept.³⁸

B. *The Division of the American Authorities*

The apparent conflict in the cases involves unilateral contracts of guaranty, since it is accepted that the creditor's promise must be communicated to the guarantor to form a bilateral contract of guaranty.³⁹ Treatise writers have attempted to mitigate the confusion concerning notice of intention to accept by isolating distinct

³² *Mozley v. Tinkler*, 1 C.M. & R. 692, 695-96, 149 Eng. Rep. 1258, 1260 (1835) (opinion of Parke, B.).

³³ *Ranga Ram-Thakar Das v. Raghbir Singh*, 1928 Lah. 938, 113 Indian Cas. 780 (India 1928); *accord*, *Manning v. Mills*, 12 U.C.Q.B. 515 (Can. 1855).

³⁴ *Oldershaw v. King*, 2 H. & N. 399, 403, 157 Eng. Rep. 165, 167, *rev'd on other grounds*, 2 H. & N. 517, 157 Eng. Rep. 213 (1857) (comment by Bromwell, B.); *Fraser v. Douglas*, 16 Man. Rep. 484, 487-88, 5 W.L.R. 52, 54-55 (Can. 1906) (dictum); see *Jenkins v. Ruttan*, 8 U.C.Q.B. 625 (Can. 1852).

³⁵ See *Luck v. Ilka*, 1951 Q.S.R. 281 (Austl. 1951).

³⁶ *Mozley v. Tinkler*, 1 C.M. & R. 692, 149 Eng. Rep. 1258 (1835).

³⁷ *Sorby v. Gordon*, 30 L.T.R. (n.s.) 528 (Ex. 1874).

³⁸ *Jays Ltd. v. Sala*, 14 T.L.R. 461 (Q.B. 1898).

³⁹ See 1 WILLISTON § 69A, at 219.

bodies of authority which support different legal principles or "rules." It has been suggested that there is (1) a "federal rule" requiring notice of intention to accept to form a unilateral contract of guaranty; (2) a "Massachusetts rule" treating notice as a condition precedent to the guarantor's duty to perform; (3) an "English rule" dispensing with notice of intention to accept altogether; and (4) a "majority rule" exacting notice only when the language of the offer or the surrounding circumstances should have led the creditor to believe that the guarantor expected it.⁴⁰

The labels given certain of these purported rules are misleading. The "federal rule," for instance, developed in the federal courts when they applied general principles of law in diversity cases.⁴¹ Today, of course, state substantive law governs.⁴² Since the use of this rule in federal diversity cases now depends on its adoption as state substantive law, it is deceptive to denominate it the "federal rule." The "Massachusetts rule" presents similar problems; it is no longer followed in Massachusetts.⁴³ The "English rule" bears an even more unfortunate name. It does not promote clarity to refer to a rule which repudiates the concept of notice of intention to accept as the "English rule" when the concept of such notice originated in English law.⁴⁴ Because of the inaccuracies of these designations, the "federal rule" will be referred to as the condition precedent theory and the "Massachusetts rule" as the condition subsequent theory. The "English rule" will not be alluded to at all.

The rules discerned by the treatise writers deal with two distinct issues: (1) when notice of intention to accept is necessary, and, (2) if notice is necessary, the effect of failure to send it. The rules pertaining to each question must be considered separately for the true state of the authorities to be understood.

1. *When Notice Is Necessary*

Simpson correctly indicated that the majority of American jurisdictions will consider both the terms of the offer and the

⁴⁰ See ARANT, SURETYSHIP § 26 (1931) [hereinafter cited as ARANT]; SIMPSON § 25. Williston was content to note that some cases required notice and others did not. See 1 WILLISTON § 69A, at 219-21. This statement appears in all three editions of *Williston*. Whenever this is the case reference will be made to *Williston* and citation will be to the third edition (1957).

⁴¹ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

⁴² *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

⁴³ See Campbell 550-51.

⁴⁴ See note 30 *supra*.

surrounding circumstances in determining whether notice of intention to accept is necessary.⁴⁵ If either should suggest to the creditor that the guarantor is uncertain whether his offer will be accepted, most jurisdictions make notice of intention to accept a constructive condition of the guarantor's liability.⁴⁶ However, no treatise writer has identified the minority rule as to when notice is necessary. Simpson did not attempt to do so.⁴⁷ Arant erroneously stated that some American jurisdictions never made notice a constructive condition.⁴⁸ His cases merely indicated that neither the majority nor the true minority rule made notice a constructive condition of all unilateral contracts of guaranty.⁴⁹

The true minority rule has been adopted at common law by Minnesota,⁵⁰ Nebraska,⁵¹ New York,⁵² Ohio,⁵³ and Tennessee.⁵⁴ This rule limits the courts to the terms of the offer in determining whether notice is requisite. If the wording should intimate to the creditor that the guarantor is uncertain whether his offer will be accepted, notice will be required. Otherwise, it is unnecessary. Other circumstances are not taken into account.⁵⁵

Virtually every American jurisdiction, including those with statutes on the subject,⁵⁶ adheres to either the majority or minority rule outlined above. The theoretical disagreement indicated by these two rules, however, has seldom led to varying results in practice. There are significant facts in almost every decision requiring or dispensing with notice which satisfactorily explain the result, regardless of the theory enunciated by the court. This reduces the actual area of disagreement between the majority and the minority rule to a few minority rule cases which allow positive and unqualified words of guaranty to relieve the creditor of the duty to send

⁴⁵ SIMPSON § 25.

⁴⁶ *E.g.*, *Davis Sewing Mach. Co. v. Richards*, 115 U.S. 524 (1885); *Atlanta Newspapers, Inc. v. Tyler*, 104 Ga. App. 707, 122 S.E.2d 591 (1961); *Black, Starr, & Frost v. Grabow*, 216 Mass. 516, 104 N.E. 346 (1914).

⁴⁷ SIMPSON § 25.

⁴⁸ ARANT § 26, at 64.

⁴⁹ *Id.* at 67 n.1.

⁵⁰ *Midland Nat'l Bank v. Security Elevator Co.*, 161 Minn. 30, 200 N.W. 851 (1924); see RESTATEMENT, CONTRACTS, MINN. ANNOT. § 56 (1934).

⁵¹ *Wilcox v. Draper*, 12 Neb. 138, 10 N.W. 579 (1881); see RESTATEMENT, CONTRACTS, NEB. ANNOT. § 56 (1933).

⁵² *Union Bank v. Coster's Ex'rs*, 3 N.Y. 203 (1850); see RESTATEMENT, CONTRACTS, N.Y. ANNOT. § 56 (1933).

⁵³ *Powers & Weightman v. Bumcratz*, 12 Ohio St. 273 (1861); see RESTATEMENT, CONTRACTS, OHIO ANNOT. § 56 (1933).

⁵⁴ *Bright v. McKnight*, 33 Tenn. 158 (1853).

⁵⁵ *E.g.*, *Smith & Crittenden v. Dann*, 6 Hill 543 (N.Y. Sup. Ct. 1844).

⁵⁶ See text accompanying notes 181-87 *infra*.

notice, although there are no other significant facts which justify this result.⁵⁷ Factual analysis of the American decisions will be undertaken below. The "rules" concerning the effect of failure to give notice will first be examined for other areas of disagreement.

2. *Effect of Failure To Give Notice*

There are two theories on the effect of failure to give notice in situations where notice is required: the condition precedent theory and the condition subsequent theory. The former holds that when notice is necessary⁵⁸ it is a condition precedent to formation of a contract.⁵⁹ If it is not given when essential, no contract exists between the guarantor and the creditor although the creditor has performed the requested act. The condition subsequent theory originated with the Massachusetts case of *Bishop v. Eaton*⁶⁰ and has proved extremely attractive to academic writers.⁶¹ Under this theory, performance of the requested act by the creditor effects a unilateral contract of guaranty, but the guarantor is under no obligation to perform his promise unless he receives seasonable notice of acceptance. Notice is needed to prevent the occurrence of a condition subsequent which terminates the contract created by the creditor's performance of the requested act.

Since an offer can be revoked before acceptance, the guarantor would appear to possess the power of revocation for a longer time under the condition precedent theory. It requires both performance of the requested act and notice of intention to accept for an effective acceptance. Performance of the requested act alone is

⁵⁷ A guaranty in the form of a bond in penal sum is a historical example. These bonds were phrased so as to create a present indebtedness of definite amount subject to a condition subsequent. See *Klosterman v. Olcott*, 25 Neb. 382, 41 N.W. 250, *rev'd on other grounds*, 27 Neb. 685, 43 N.W. 422 (1899); *Rochford v. Rothschild*, 16 Ohio C.C.R. 287, 9 Ohio C.C. Dec. 47 (1896); *accord*, *Snyder v. Hurdley-Pierce-Anderson Co.*, 23 Ohio C.C.R. (n.s.) 599, 34 Ohio C.C. Dec. 424 (1912), *aff'd*, 91 Ohio St. 375, 110 N.E. 1068 (1914) (mem.). When no other significant facts warrant dispensing with notice the majority rule does not allow positive and unqualified words of guaranty to have that effect. See, e.g., *Standard Sewing Mach. Co. v. Church*, 11 N.D. 420, 92 N.W. 805 (1902).

⁵⁸ The majority rule determines whether notice is necessary by examining both the terms of the offer and the surrounding circumstances. See text accompanying notes 45-46 *supra*. The minority rule considers only the terms of the offer. See text accompanying notes 50-55 *supra*.

⁵⁹ Majority rule: see ARANT § 26; SIMPSON § 25; STEARNS § 4.16. Minority rule: *Beekman v. Hale*, 17 Johns. Cas. 134 (N.Y. Sup. Ct. 1819); *Stafford v. Lowe*, 16 Johns. Cas. 67 (N.Y. Sup. Ct. 1819); *Irving Trust Co. v. Tourkoff*, 13 Ohio L. Abs. 663 (Ohio App. 1933); *M'Iver v. Richardson*, 1 M. & S. 557, 105 Eng. Rep. 208 (1813).

⁶⁰ 161 Mass. 496, 500, 37 N.E. 665, 667-68 (1894) (dictum).

⁶¹ See, e.g., 1 CORBIN § 68; 1 WILLISTON § 69AA; Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance I*, 48 YALE L.J. 1, 15 n.30 (1938).

sufficient according to the condition subsequent theory. Williston championed the latter theory for this reason. He stressed the injustice in permitting the guarantor to revoke his offer after performance by the creditor merely because notice of intention to accept had not been dispatched.⁶²

Jurisdictions following the condition precedent theory are not, however, as Draconian as the logical consequences of their theory suggest. While their courts refer to notice as essential to the formation of a contract, they also undoubtedly consider that commencement of performance by the creditor renders the offer irrevocable for a reasonable time.⁶³ The condition precedent and condition subsequent theories are thus indistinguishable apart from verbal formulation:

"When notice of acceptance is necessary it makes little practical difference whether the doing of the acts called for is said to complete a contract giving rise to a duty subject to notice as a condition precedent, or is conceived of as merely depriving the offeror of his normal power of revocation. Under either analysis the offeror cannot prevent imposition of a duty to pay and it is clear that the offeree cannot recover unless notice is given."⁶⁴

Nonetheless, strong objection has been taken to the theoretical implications of the condition precedent theory. It has been criticized as confusing unilateral contracts with bilateral contracts,⁶⁵ and as inconsistent with other propositions concerning notice of intention to accept.⁶⁶ These propositions include: (1) notice of intention to accept can be waived in the offer or by the guarantor's subsequent conduct; (2) knowledge of acceptance by the guarantor dispenses with notice of intention to accept; (3) in the case of a continuing guaranty, notice may be given within a reasonable time after the close of all transactions; (4) the guarantor is not discharged by lack of notice when he is not injured by its absence; (5) notice of intention to accept is not a counter-promise and does not bind the creditor; and (6) the guarantor can revoke his promise

⁶² *Kincheloe v. Holmes, Sturgeon & Co.*, 46 Ky. (7 B. Mon.) 5 (1846); 1 WILLISTON § 69, at 218. Protection of the offeree's reliance on an offer is a basic policy of contract law. See 1 RESTATEMENT, CONTRACTS § 90 (1932); Fuller & Perdue, *Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936).

⁶³ *Oaks v. Weller*, 13 Vt. 106, 110-11 (1841) (dictum); see RESTATEMENT, CONTRACTS, KY. ANNOT. 34 (1938); Rogers, *Notice of Acceptance in Contracts of Guaranty*, 5 COLUM. L. REV. 215, 219 (1905).

⁶⁴ ARANT § 26, at 69.

⁶⁵ See 1 WILLISTON § 69A, at 221.

⁶⁶ See Campbell 535.

between notification and act. It is submitted, however, that these propositions are all reconcilable with the view that notice of intention to accept is integral to certain unilateral contracts of guaranty.

Notice of intention to accept can be waived in the offer of guaranty.⁶⁷ Williston suggested that this indicated that the creditor's performance completed the contract, and notice, if necessary at all, was only a condition precedent to enforcement of the contract against the guarantor. The parties, he pointed out, could not waive an element required by law for formation of a contract.⁶⁸ This argument is based on a misunderstanding of the notice requirement. The requirement is not a mandatory rule of law applicable to all guaranties. Notice of intention to accept is a constructive condition of some unilateral contracts of guaranty when the parties have not provided otherwise. Notice is requisite when the terms of the offer or the surrounding circumstances indicate that the guarantor reasonably expects or needs it. If the offer expressly waives notice it is clearly consonant with the rationale of the notice requirement to respect this manifestation of intent.⁶⁹

Sending of notice of intention to accept can also be waived by the subsequent conduct of the guarantor, *e.g.*, by a subsequent promise to pay.⁷⁰ Williston considered this inconsistent with the idea that notice is a condition precedent to creation of a contract. He maintained that a "gratuitous promise" could not form a contract that had previously failed to come into being.⁷¹ Williston's argument is apparently based on the doctrine of consideration. The subsequent promise by the guarantor is typically made after credit is extended in reliance on the offer of guaranty and after the time for giving notice of intention to accept has elapsed. No contract exists, since the condition precedent theory makes timely notice a prerequisite to formation of a contract. In this situation, Williston inferentially dismisses the reliance of the creditor on the previous offer of guaranty as consideration for the subsequent promise. He invokes the proposition that past events are insufficient

⁶⁷ *E.g.*, *Bowdan v. Gooderham & Worts, Ltd.*, 272 F.2d 565 (D.C. Cir. 1959) (*per curiam*) (alternative holding).

⁶⁸ 1 WILLISTON § 69AA, at 223-24.

⁶⁹ In *Hughes v. Roberts, Johnson & Rand Shoe Co.*, 24 Ky. L. Rep. 2003, 72 S.W. 799 (1903) the court noted that, the defendant being *sui juris*, there was no legal reason why he could not waive notice of acceptance.

⁷⁰ *Farwell & Co. v. Sully*, 38 Iowa 387 (1874).

⁷¹ 1 WILLISTON § 69AA, at 223-24.

consideration for present promises.⁷² This rule, however, is subject to exceptions. One exception furnishes analogous support for the view that the creditor's reliance on the previous offer of guaranty constitutes consideration for the subsequent promise to pay:

"In the early history of the common law action of assumpsit, there were a good many cases in which this action was sustained upon an express promise to pay for a past service that had been rendered by the plaintiff at the defendant's request. There is some, but not very much, modern authority to the same effect."⁷³

Williston's criticism can also be met on other grounds. The subsequent conduct of the guarantor which constitutes a waiver of notice of intention to accept includes an acknowledgment of liability⁷⁴ as well as a subsequent promise. This suggests that the guarantor's conduct perfects the original arrangement between the parties and does not form a new contract. The subsequent behavior of the guarantor can be interpreted as a waiver of the defect in acceptance resulting from the creditor's failure to dispatch timely notice of intention to accept.

Williston objected to contract formation through the offeror's waiver of a flaw in acceptance.⁷⁵ He believed that it was unfair to permit the offeror to waive a defective acceptance since it allowed him to speculate at the expense of the offeree. If market conditions changed in his favor, he could assert the defect in acceptance and make a more advantageous contract elsewhere. If market conditions changed so that the offeree had made a bad bargain, the offeror could waive the defect in acceptance and hold him to it. However, this line of argument is not relevant to the unilateral contract of guaranty situation. There is no question of binding the creditor-offeree. He is not asked for a promise. The courts are concerned with protecting the creditor's reliance on the offer of guaranty. The creditor has typically extended credit to the principal in the belief that he is secured by a guaranty, but he has lost this security because he failed to give due notice of intention to accept. When the guarantor indicates by his subsequent conduct that he does not claim the release from liability afforded him by the notice

⁷² See 1 WILLISTON § 142, at 620-21.

⁷³ 1 CORBIN § 233, at 764.

⁷⁴ See *City Nat'l Bank v. Phelps*, 86 N.Y. 484 (1881).

⁷⁵ 1 WILLISTON § 82, at 336.

requirement, it is reasonable to hold that he has waived the omission in the creditor's acceptance.⁷⁶

Seasonable knowledge of acceptance is equivalent to receipt of notice of intention to accept.⁷⁷ Professor Campbell questioned whether this was consistent with the condition precedent theory.⁷⁸ The answer is in the affirmative when the offer does not specify a particular mode of acceptance.⁷⁹

Williston maintained that the condition precedent theory was based on an inept analogy to the principles governing acceptance of offers for bilateral contracts.⁸⁰ The analogy was noticeably strained, he pointed out, since notice of acceptance of a continuing guaranty may be given within a reasonable time after the close of transactions. The proper time for communication of acceptance of an offer for a bilateral contract is at the outset of transactions, not at their close.⁸¹ This criticism is directed at a straw man. Acceptance analogous to that of offers for bilateral contracts is not attempted or required. Notice of intention to accept is not a promise. Belated notice, however, would not give the guarantor the opportunity to protect himself which is the true foundation of the notice requirement. Thus, it is notice of transactions under a continuing guaranty which must be given within a reasonable time after the close of transactions.⁸² Notice of intention to accept must be given earlier.⁸³

Williston stated that lack of notice of acceptance discharged the guarantor only when he suffered consequent loss.⁸⁴ He then made the point that if notice were a condition precedent to formation of a contract the fact of injury would be immaterial.⁸⁵ The point is well taken, but Williston misreads the cases. If notice of intention to accept is necessary, failure to receive it does unconditionally

⁷⁶ See 3A CORBIN § 759, at 513.

⁷⁷ *Rich v. Clayton Mark & Co.*, 250 F.2d 622 (8th Cir. 1957).

⁷⁸ Campbell 535.

⁷⁹ See 1 CORBIN § 67, at 210.

⁸⁰ 1 WILLISTON § 69A, at 221.

⁸¹ *Id.* § 69AA, at 224.

⁸² The cases cited by Williston make this point with regard to notice of transactions, not notice of intention to accept. See 1 WILLISTON § 69AA, at 224 n.20.

⁸³ *Douglass v. Reynolds, Byrne & Co.*, 32 U.S. (7 Pet.) 113 (1833) held that notice of intention to accept must be given within a reasonable time after acceptance. This was clarified by the statement of Mr. Justice Nelson in *Louisville Mfg. Co. v. Welch*, 51 U.S. (10 How.) 461, 475 (1850) (dictum), that notice of intention to accept should be dispatched prior to notice of transactions at a time when the defendant's liabilities are still accruing.

⁸⁴ 1 WILLISTON § 69A, at 222.

⁸⁵ *Ibid.*

discharge the guarantor.⁸⁶ Actual loss only limits the consequences of failure to dispatch notice of transactions or notice of default.⁸⁷

Notice of intention to accept is not a promise.⁸⁸ Campbell suggested it was therefore inconsistent to treat it as a condition precedent to formation of a contract.⁸⁹ This, however, is a *non sequitur*. The guarantor can make notice a condition of acceptance by express stipulation, and the courts can achieve the same result through the device of constructive condition.⁹⁰

The guarantor may revoke his offer after receipt of notice of intention to accept as long as performance of the requested act has not begun.⁹¹ Campbell thought this was also inharmonious with the concept of notice as a condition precedent to contract formation.⁹² There is no incompatibility if it is borne in mind that notice is required, not a promise. Notice is a condition of acceptance, but it is the requested performance that is the consideration for the guarantor's promise. His offer remains revocable if notice alone is given. On the other hand, if the requested performance occurs without notice, the offer is supported by consideration and becomes irrevocable for a reasonable time.⁹³

The preceding analysis suggests that there is nothing unorthodox in treating notice of intention to accept as a condition precedent to the formation of certain unilateral contracts of guaranty. The American Law Institute, however, has rejected this approach because of its alleged deficiencies and has approved the condition subsequent theory.⁹⁴ The virtual identity of the condition precedent and condition subsequent theories makes the ALI position of little substantive importance except as a source of confusion.

Because the ALI action can be construed as treating the verbal difference between the two rules as a real difference, several of the annotations to the *Restatement of Contracts* indicated that the jurisdiction surveyed adopted the condition precedent theory

⁸⁶ *E.g.*, *Davis Sewing Mach. Co. v. Richards*, 115 U.S. 524 (1885).

⁸⁷ *Louisville Mfg. Co. v. Welch*, 51 U.S. (10 How.) 461, 474-75 (1850) (dictum). 1 WILLISTON § 69A, at 222 n.14 actually cites notice of transactions and notice of default cases.

⁸⁸ See Campbell 535.

⁸⁹ *Ibid.*

⁹⁰ The English, for instance, do not question this. See SALMOND & WILLIAMS, *CONTRACTS* 83 (2d ed. 1945).

⁹¹ See Campbell 535.

⁹² *Ibid.*

⁹³ *Oaks v. Weller*, 13 Vt. 106, 110-11 (1841) (dictum).

⁹⁴ 1 RESTATEMENT, *CONTRACTS* § 56 (1932); RESTATEMENT, *SECURITY* § 86 (1941).

and did not follow the restatement.⁹⁵ The Montana annotation, for instance, suggested that the apparent espousal by the Montana code of the condition precedent theory rejected the restatement approach.⁹⁶ The Oklahoma annotation, on the other hand, interpreted an identical statute as probably in accord with the restatement.⁹⁷ The fog caused by the ALI position is unfortunate. There are two theories concerning the effect of failure to give notice, but they both lead to the same result.

C. *Factual Comparison of the American Authorities*

The only substantial conflict of authority with regard to notice of intention to accept relates to the method of determining whether notice is necessary. Courts following the majority rule consider both the terms of the offer and the circumstances surrounding the offer in making this judgment. Courts adopting the minority rule regard only the face of the offer. The following is an analysis of what is believed to be the majority of American decisions on this question. Significant facts in these decisions are emphasized. It is submitted that these facts justify the result reached by the court as to the exigency of notice in the particular case. If this is true, the theoretical distinction between the majority and minority rule is relatively unimportant in practice. The greater number of the cases analyzed are reconcilable by means of the factual approach.

1. *When Notice Is Necessary*

Notice is required by either rule whenever the language in the offer should indicate to the creditor that the guarantor is uncertain whether his offer will be accepted. An offer "to whom it may concern," for instance, shows on its face that the guarantor has no reasonable expectation that it will be accepted by a particular creditor or by anyone at all.⁹⁸ Other examples include the following language:

⁹⁵ See, e.g., RESTATEMENT, CONTRACTS, ALA. ANNOT. § 56 (1937); RESTATEMENT, CONTRACTS, CONN. ANNOT. § 56 (1933); RESTATEMENT, CONTRACTS, IOWA ANNOT. § 56 (1934); RESTATEMENT, CONTRACTS, MO. ANNOT. 23 (1933); RESTATEMENT, CONTRACTS, S.D. ANNOT. § 56 (1937).

⁹⁶ RESTATEMENT, CONTRACTS, MONT. ANNOT. § 56 (1940).

⁹⁷ RESTATEMENT, CONTRACTS, OKLA. ANNOT. § 56 (1939).

⁹⁸ See *Lawson v. Townes, Oliver & Co.*, 2 Ala. 373 (1841); *Gano v. Farmers' Bank*, 103 Ky. 508, 45 S.W. 519 (1898); *Mussey v. Rayner*, 39 Mass. (22 Pick.) 223 (1839); *Hill & Henderson v. Calvin & Hurst*, 5 Miss. (4 How.) 231 (1834); *Columbia Baking & Mfg. Co. v. Schissler*, 35 Pa. Super. 621 (1908).

"I will, if you please, stand responsible for the payment of it, at the time you and James may agree on."⁹⁹

"I would be willing to guarantee payment of Mr. Tourkoff's drafts providing you would grant him ninety day terms, as it was my understanding he requested this of you previously."¹⁰⁰

On the other hand, only the majority rule considers the circumstances surrounding the offer in assessing the utility of notice. The following are typical resolutions of the question.

Unsolicited Offer. When the offer is unsolicited by the creditor, the guarantor, absent other circumstances, has no indication that it will be accepted.¹⁰¹ A classic example of an unsolicited guaranty is provided by the case of *Tuckerman v. French*,¹⁰² in which the offer of guaranty was made on the initiative of the guarantor without the knowledge of the principal. An offer of guaranty contained in a letter introducing the principal is more typical.¹⁰³ But notice is usually found necessary whenever an unsolicited offer is involved.¹⁰⁴

Solicitation of the guaranty by the principal does not affect the necessity of notice.¹⁰⁵ The principal's request gives the guarantor little indication whether his offer is acceptable to the creditor. Nor does the fact that the principal requests the guarantor to execute one of the creditor's forms dispense with notice when the creditor did not authorize him to do so.¹⁰⁶ If the guarantor knows that the creditor asked the principal to obtain his guaranty, however, the guarantor should reasonably anticipate acceptance, and notice is unnecessary.¹⁰⁷

Principal Transaction Incomplete. It is not uncommon for an

⁹⁹ See *Beekman v. Hale*, 17 Johns. Cas. 134 (N.Y. Sup. Ct. 1819).

¹⁰⁰ See *Irving Trust Co. v. Tourkoff*, 13 Ohio Law Abs. 663 (Ohio App. 1933); *accord*, *Meyer v. Ruhstadt*, 66 Ill. App. 346, 347 (1896); *Central Sav. Bank v. Shine*, 48 Mo. 456 (1871).

¹⁰¹ *New Haven County Bank v. Mitchell*, 15 Conn. 206, 217 (1842) (dictum).

¹⁰² 7 Me. 115 (1830).

¹⁰³ See *McCollum v. Cushing*, 22 Ark. 540 (1861); *Rapelye & Purdy v. Bailey*, 3 Conn. 438 (1820); *Lowe & Co. v. Beckwith*, 53 Ky. (14 B. Mon.) 150 (1853); *Wardlaw, Walker & Burnside v. Harrison*, 40 S.C.L. (11 Rich.) 626 (1858); *Russell v. Clarke's Ex'rs*, 11 U.S. (7 Cranch) 69, 93-94 (1812) (dictum).

¹⁰⁴ See *Douglass v. Reynolds, Byrne & Co.*, 32 U.S. (7 Pet.) 113 (1833); *Smith v. Anthony*, 5 Mo. 504 (1838); *Taylor v. Wetmore*, 10 Ohio 490 (1841); *Rothchild Bros. v. Lomax*, 75 Ore. 395, 146 Pac. 479 (1915); *Kellogg v. Stockton & Fuller*, 29 Pa. 460 (1857); *Edmondston v. Drake*, 30 U.S. (5 Pet.) 624, 636-37 (1831) (dictum).

¹⁰⁵ See *Lee v. Dick*, 35 U.S. (10 Pet.) 482 (1836); *Winnebago Paper Mills v. Travis*, 56 Minn. 480, 58 N.W. 36 (1894).

¹⁰⁶ See *Ladd & Bush v. Hayes*, 105 F.2d 292 (9th Cir. 1939); *Standard Sewing Mach. Co. v. Church*, 11 N.D. 420, 92 N.W. 805 (1902).

¹⁰⁷ See text accompanying notes 124-26 *infra*.

offer of guaranty to be made before the transaction between the creditor and the principal has been agreed upon. Indeed, if the consideration for the guaranty is the creditor's promise to the principal, the guaranty must be given before this promise is made. Otherwise the creditor's promise will be a past event and insufficient consideration for the guaranty.¹⁰⁸ The guarantor cannot be sure that his offer will be accepted if he knows that a contemplated contract between the creditor and the principal has not been executed. Notice is requisite unless other circumstances should lead the guarantor to anticipate or to learn of acceptance.¹⁰⁹ *Asmussen v. Post Printing & Publishing Co.*,¹¹⁰ for instance, held notice necessary to obligate guarantors who had signed a guaranty on an application for a newspaper agency submitted by the principal to the creditor. There are a number of cases in accord with *Asmussen*, especially if an application or order sent by the principal provides that it is binding when accepted at the creditor's place of business.¹¹¹ This provision should put the creditor on notice that the guarantor is not likely to obtain prompt knowledge of acceptance.

Receipt of consideration from the creditor should also lead the guarantor to anticipate acceptance.¹¹² Thus, *McConnon & Co. v. Laurson*¹¹³ held that an acknowledgment of receipt of consideration in the guaranty precluded the guarantor from introducing evidence that the contract between the creditor and principal had not been agreed upon when the offer of guaranty was made.¹¹⁴

Intimation of Rejection. An intimation to the guarantor by the creditor or his agent that the guaranty may not be acceptable

¹⁰⁸ *Tomihiro v. United Hotel Corp.*, 145 Ore. 629, 28 P.2d 880 (1934).

¹⁰⁹ See *Asmussen v. Post Printing & Publishing Co.*, 26 Colo. App. 416, 143 Pac. 396 (1914); *Linro Medicine Co. v. Moon*, 190 Mo. App. 366, 177 S.W. 322 (1915); *Coe & Richmond v. Buchler*, 110 Pa. 366, 5 Atl. 20 (1885) (per curiam); *William Deering & Co. v. Mortell*, 21 S.D. 159, 110 N.W. 86 (1906).

¹¹⁰ 26 Colo. App. 416, 143 Pac. 396 (1914). See also *Snyder v. Click*, 112 Ind. 293, 13 N.E. 581 (1887); *United States Fid. & Guar. Co. v. Riefler*, 239 U.S. 17 (1915) (contract of indemnity).

¹¹¹ See *Davis Sewing Mach. Co. v. Richards*, 115 U.S. 524 (1885); *Barnes Cycle Co. v. Reed*, 84 Fed. 603 (C.C.W.D. Pa. 1898), *rev'd on other grounds*, 91 Fed. 481 (3d Cir. 1899); *Greer Mach. Co. v. Sears*, 119 Ky. 697, 66 S.W. 521 (1902); *American Agricultural Chem. Co. v. Ellsworth*, 109 Me. 195, 83 Atl. 546 (1912); *Texas Co. v. Stanberry*, 165 S.W.2d 696 (Mo. App. 1942) (per curiam); *John Deere Plow Co. v. McCullough*, 102 Mo. App. 458, 76 S.W. 716 (1903); *Deering Harvester Co. v. Sulser*, 78 Mo. App. 670 (1899); *T. & H. Smith & Co. v. Thesmann*, 20 Okla. 133, 93 Pac. 977 (1908).

¹¹² See text accompanying note 146 *infra*.

¹¹³ 22 N.D. 604, 135 N.W. 213 (1912).

¹¹⁴ See text accompanying notes 147-54 *infra* for further discussion of acknowledgment of receipt of consideration.

is enough to require notice of intention to accept.¹¹⁵ But an intimation to the principal which is not communicated to the guarantor does not have this effect.¹¹⁶ The intimation of rejection must decrease the guarantor's expectations of acceptance, but it cannot constitute a categorical objection to his offer.¹¹⁷ If it does, the creditor's power of acceptance will be terminated,¹¹⁸ and the question of notice of intention to accept will not arise. In *J. E. Taylor & Co. v. Empire Lighting Fixture Co.*,¹¹⁹ for instance, the creditor requested the guarantor to indorse a promissory note executed by the principal after receipt of the offer of guaranty. The guarantor declined. It was held that the creditor could not thereafter hold the guarantor on the guaranty without notice of intention to accept. On the other hand, *American Woolen Co. v. Moskowitz*¹²⁰ did not require notice. The creditor's overture for a more formal guaranty was not considered to destroy the guarantor's expectations of acceptance when the original guaranty was retained and credit later extended in reliance on it. It is significant that the formal guaranty sought did not alter the material terms of the original offer.

Geographical Separation. When the guarantor lives a considerable distance from the creditor and the principal, notice of intention to accept is requisite provided no other significant facts are present.¹²¹ Conversely, if the creditor knows that the guarantor and the principal are in close proximity, notice is not necessary.¹²²

2. When Notice Is Not Necessary

Guarantor's Anticipation of Acceptance. Circumstances which should raise a reasonable expectation of acceptance in the mind of

¹¹⁵ See, e.g., *M. E. Smith & Co. v. Kimble*, 31 S.D. 18, 139 N.W. 348 (1913) (alternative holding).

¹¹⁶ *Caton v. Shaw & Tiffany*, 2 Har. & Gill 13 (Md. 1827).

¹¹⁷ See 1 CORBIN § 84.

¹¹⁸ See 1 RESTATEMENT, CONTRACTS §§ 35, 38 (1932). The courts are unlikely to reach this conclusion if the creditor subsequently relies on the original offer of guaranty and the guarantor does not change his position in reliance on the intimation of rejection. See cases cited note 120 *infra*.

¹¹⁹ 273 Fed. 739 (D.C. Cir. 1921).

¹²⁰ 159 App. Div. 382, 144 N.Y. Supp. 532 (1913); *accord*, *Bryant v. Food Mach. & Chem. Corp.*, 130 So. 2d 132 (Fla. App. 1961) (per curiam); *Marx & Blum v. Luling Co-op Ass'n*, 17 Tex. Civ. App. 408, 43 S.W. 596 (1897).

¹²¹ See *Black, Starr & Frost v. Grabow*, 216 Mass. 516, 104 N.E. 346 (1914); *Bishop v. Eaton*, 161 Mass. 496, 37 N.E. 665 (1894); *Oaks v. Weller*, 13 Vt. 106 (1941); *Miami County Nat'l Bank v. Goldberg*, 133 Wis. 175, 113 N.W. 391 (1907).

¹²² *Lascelles v. Clark*, 204 Mass. 362, 90 N.E. 875 (1910); see *Standard Oil Co. v. Hoesse*, 57 Neb. 665, 78 N.W. 292 (1899) (minority rule) (guaranty indicated that both guarantor and principal were located in Hartington, Nebraska).

the guarantor enable him to plan for the future. The *raison d'être* for making notice a constructive condition thus disappears.

Notice is patently non-functional when the guarantor knows that his personal guaranty is both acceptable and in proper form. This situation occurred in *Schuman v. Arsht*,¹²³ where the guarantor offered to furnish security and the creditor thereupon prepared a guaranty which he executed. Direct solicitation of the guaranty by the creditor has the same effect in most jurisdictions as long as the guaranty is responsive to the request.¹²⁴ So does a request to the principal by the creditor for a particular person's guaranty when the desired individual furnishes a guaranty with knowledge of the request.¹²⁵

*Newman v. Streater Coal Co.*¹²⁶ underscores the key element in the cases involving a request to the principal for a particular guaranty. Notice was required in *Newman* although the creditor specified an acceptable guarantor and furnished an appropriate form. This was because the principal did not inform the guarantor that the creditor had requested his personal guaranty, and the guarantor was consequently uncertain whether his offer would be accepted. The principal's knowledge that the offer would be accepted did not affect the result. The guarantor's reasonable expectations, not the principal's, are material.

When the creditor requests the principal to obtain a guaranty but does not specify an acceptable guarantor, a different situation is presented. Although the guarantor may know that a guaranty is required, he does not know that his is acceptable.¹²⁷ A number of

¹²³ 249 Ill. App. 562 (1928); *accord*, *State Nat'l Bank v. Wernicke*, 185 Mich. 281, 151 N.W. 1033 (1915).

¹²⁴ *Commercial Nat'l Bank v. Richardson*, 163 La. 933, 113 So. 152 (1927); *Standard Plumbing Supply Co. v. LaConte*, 277 Mass. 497, 178 N.E. 611 (1931); *Drucker v. Heyl-Dia*, 52 Misc. 142, 101 N.Y. Supp. 796 (Sup. Ct. 1906) (minority rule); *Hunsley Paint Mfg. Co. v. Gray*, 165 S.W.2d 486 (Tex. Civ. App. 1942); see *Weil v. Free State Oil Co.*, 200 Md. 62, 71, 87 A.2d 826, 830 (1952) (dictum). *Contra*, *T. G. Evans & Co. v. McCormick*, 167 Pa. 247, 31 Atl. 563 (1895) (per curiam).

¹²⁵ *Frost v. Standard Metal Co.*, 215 Ill. 240, 74 N.E. 139 (1905); *N. O. Nelson Mfg. Co. v. Shreve*, 94 Mo. App. 518, 68 S.W. 376 (1902); *Royal Tailors v. Newton*, 66 Utah 154, 239 Pac. 949 (1925); *Bowdan v. Gooderham & Worts, Ltd.*, 272 F.2d 565 (D.C. Cir. 1959) (per curiam) (alternative holding); *Oklahoma City Nat'l Bank v. Ezzard*, 58 Okla. 251, 159 Pac. 267 (1916) (alternative holding), *aff'd per curiam on other grounds*, 243 U.S. 631 (1917); see *Manry v. Waxelbaum Co.*, 108 Ga. 14, 33 S.E. 701 (1899); *Jackson v. Yandes*, 7 Ind. 526 (1845); *Great W. Mfg. Co. v. Porter*, 103 Kan. 84, 172 Pac. 1018 (1918); *Caton v. Shaw & Tiffany*, 2 Har. & Gill 13 (Md. 1827); *Lenox v. Murphy*, 171 Mass. 370, 50 N.E. 644 (1898).

¹²⁶ 19 Ill. App. 594 (1886); see *Balfour, Guthrie & Co. v. Knight*, 86 Ore. 165, 167 Pac. 484 (1917); *cf.* *Taylor v. Shouse*, 73 Mo. 361 (1881).

¹²⁷ *Detroit Free Press v. Pattengill*, 155 Mich. 272, 118 N.W. 927 (1908); *DeCremer v. Anderson*, 113 Mich. 578, 71 N.W. 1090 (1897); *Tolman Co. v. Means*, 52 Mo. App. 385, 388-89 (1893) (dictum).

cases hold notice of intention to accept essential for this reason.¹²⁸ Another group of cases dispenses with notice when the guarantor executes the creditor's form with knowledge that the creditor requested the principal to obtain a guaranty.¹²⁹ Since the guarantor knows his financial condition and knows that the creditor will extend credit when a satisfactory guaranty is given, these cases apparently reason that the guarantor should be able to estimate whether his guaranty will suffice.

Other facts may dispense with notice when the creditor requests the principal to obtain a guaranty but does not designate a guarantor. In *Niles Tool-Works Co. v. Reynolds*,¹³⁰ for instance, the offer of guaranty was made on a purchase order for a single machine at a definite price. Most jurisdictions dispense with notice when a sum certain is guaranteed.¹³¹ Since the guarantor knows the extent of his potential liability, it is not considered unreasonable to require him to discover the fact of it. It is also the general rule that notice is unnecessary when the guarantor has led the creditor to believe that he will receive prompt knowledge of acceptance from the principal.¹³² Thus, in *Lascelles v. Clark*¹³³ notice was not essential because the guarantor had informed the creditor that he expected to go into business with the principal. The fact that he did not do so was unimportant.

Dealings between the creditor and the guarantor, such as a direct request by the creditor to the guarantor, can render notice superfluous. Dealings which involve an understanding relating to the transaction guaranteed naturally have this effect,¹³⁴ but prior

¹²⁸ See *Kresge Dep't Stores, Inc. v. Young*, 37 A.2d 448 (D.C. Munic. Ct. 1944); *Milroy v. Quinn*, 69 Ind. 406 (1879); *German Sav. Bank v. Drake Roofing Co.*, 112 Iowa 184, 83 N.W. 960 (1900); *Lane Bros. Co. v. Sheinwald*, 275 Mass. 96, 175 N.E. 148 (1931).

¹²⁹ See *United States Fid. & Guar. Co. v. Riefler*, 239 U.S. 17 (1915) (contract of indemnity); *Hartford-Aetna Nat'l Bank v. Anderson*, 92 Conn. 643, 103 Atl. 845 (1918) (contract of indemnity); *Ferguson v. Atlanta Newspapers, Inc.*, 93 Ga. App. 622, 92 S.E.2d 321 (1956), transaction described in *Ferguson v. Atlanta Newspapers, Inc.*, 91 Ga. App. 115, 85 S.E.2d 72 (1954); *Mayo v. Bloomberg*, 290 Mass. 168, 195 N.E. 99 (1935); *Southdale Center, Inc. v. Lewis*, 260 Minn. 430, 110 N.W.2d 857 (1961) (*semble*) (minority rule); *Stone-Ordean-Wells Co. v. Helmer*, 142 Minn. 263, 171 N.W. 924 (1919); *Cowan v. Roberts*, 134 N.C. 415, 46 S.E. 979 (1904).

¹³⁰ 4 App. Div. 24, 38 N.Y. Supp. 1028 (1896) (minority rule); *accord*, *Wall v. Eccles*, 61 Utah 247, 211 Pac. 702 (1922).

¹³¹ See text accompanying notes 169-76 *infra*.

¹³² See text accompanying notes 141-45 *infra*.

¹³³ 204 Mass. 362, 90 N.E. 875 (1910).

¹³⁴ *Kierulff & Ravenscroft v. Koping*, 94 Cal. App. 473, 271 Pac. 353 (1928); *Vacuum Oil Co. v. Smookler*, 282 Mass. 361, 185 N.E. 13 (1933); see *Ferguson v. Atlanta Newspapers, Inc.*, 93 Ga. App. 622, 92 S.E.2d 321 (1956), transaction described in *Ferguson v. Atlanta Newspapers, Inc.*, 91 Ga. App. 115, 85 S.E.2d 72 (1954); *American Woolen Co. v. Moskowitz*, 159 App. Div. 382, 144 N.Y. Supp. 532 (1912) (minority rule); *Powers & Weightman v.*

dealings alone may be enough. In *J.R. Watkins Medical Co. v. McCall*,¹³⁵ for example, the guarantors had guaranteed three successive contracts between the creditor and the principal; the court rejected the contention that the third offer of guaranty stood in need of notice of intention to accept.

Guaranty as Acceptance. Judges sometimes state that notice of intention to accept is unnecessary when the creditor has asked the guarantor for a guaranty, because the request constitutes an offer which is accepted by the promise to guaranty.¹³⁶ They reason that a creditor-offeror has no obligation to notify a guarantor-offeree of receipt of his acceptance.¹³⁷ This explanation is fallacious with regard to the typical unilateral contract of guaranty. The creditor is not the offeror in the ordinary situation,¹³⁸ so that the guarantor's response to his request cannot be an acceptance. Notice is dispensed with because the creditor's request should make the guarantor anticipate acceptance.

It is likewise erroneous to justify dispensing with notice on the ground that the guaranty is an "acceptance," when the guaranty was sought by the creditor as partial consideration for a promise to the principal.¹³⁹ While the guaranty does constitute a partial acceptance of the creditor's proposal, the offer of a guaranty must itself be accepted in accordance with its terms. Thus notice of intention to accept could be required. It is not essential only because the creditor's offer should cause the guarantor to expect acceptance.

It is, of course, possible for a creditor to propose a unilateral contract of guaranty in which he would be the promisor. The guarantor's accomplishment of the requested act, *e.g.*, pledging a chattel, would constitute an acceptance in this case, and, since the guarantor is the offeree, the creditor would not be obliged to send him notice. However, the guaranty is more likely to be an acceptance when a bilateral contract of guaranty is involved. If the creditor promises the guarantor to extend credit in return for a

Bumcratz, 12 Ohio St. 273 (1861) (*semble*) (guaranty named the parties in definite terms) (minority rule).

¹³⁵ 116 Minn. 389, 133 N.W. 966 (1911); *accord*, *Public Fire Ins. Co. v. Weatherly*, 148 Ore. 407, 412, 36 P.2d 989, 991 (1934) (dictum). *But see* *Ladd & Bush v. Hayes*, 105 F.2d 292 (9th Cir. 1939).

¹³⁶ See *Campbell* 538.

¹³⁷ *Cf.* *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915).

¹³⁸ See 1 CORBIN § 68, at 215.

¹³⁹ See *Cooke v. Orme*, 37 Ill. 186 (1865); *Wildes v. Savage*, 29 Fed. Cas. 1226 (No. 17653) (C.C.D. Mass. 1839) (alternative holding).

promise to guarantee, the guaranty is an acceptance which forms a bilateral contract.¹⁴⁰

Guarantor's Knowledge of Acceptance. Prompt knowledge of acceptance enables the guarantor to know where he stands; there is no occasion for notice of intention to accept.

Receipt of notice of transactions¹⁴¹ or notice of default within a reasonable time after the creditor has entered upon performance furnishes this knowledge. So does knowledge that the creditor has done the requested act.¹⁴² *Detroit Free Press v. Pattengill*,¹⁴³ makes it clear, however, that the latter type of knowledge must be coupled with reasonable grounds to believe the act was performed with intention to accept the guaranty.

If the guarantor is present at the time that the creditor performs, notice is obviously unnecessary. The guarantor, for example, might be looking on when the creditor sells the principal goods in reliance on the guaranty¹⁴⁴ or signs a contract with the principal which the guaranty secures.¹⁴⁵

Consideration moving from the creditor to the guarantor provides knowledge of intention to accept. In *Barker v. Scudder*,¹⁴⁶ for instance, the creditor sold land to the guarantor in return for cash and the notes of a third party guaranteed as to collectibility. Notice was not required. Transfer of the land by the creditor manifested his intention to accept the guaranty.

Acknowledgment of receipt of consideration in the guaranty is evidence that the guarantor has knowledge of intention to

¹⁴⁰ Cf. *Shows v. Steiner*, 175 Ala. 363, 57 So. 700 (1911), for an example of the relatively rare bilateral contract of guaranty.

¹⁴¹ *Straight v. Wight*, 60 Minn. 515, 63 N.W. 105 (1895).

¹⁴² *Rich v. Clayton Mark & Co.*, 250 F.2d 622 (8th Cir. 1957); *Powell v. Chicago Carpet Co.*, 22 Ill. App. 409 (1887); *First Nat'l Bank v. Carpenter, Stibbs & Co.*, 41 Iowa 518 (1875); *R. F. Grace Printing & Mfg. Co. v. Arnaud's Drug Stores, Inc.*, 10 La. App. 298, 121 So. 359 (1929); *Menard v. Scudder*, 7 La. Ann. 385 (1852); *Train & Co. v. Jones*, 11 Vt. 444 (1839); see *Harvey v. First Nat'l Bank*, 56 Neb. 320, 76 N.W. 870 (1898).

¹⁴³ 155 Mich. 272, 118 N.W. 927 (1908); accord, *Coe & Richmond v. Buehler*, 110 Pa. 366, 5 Atl. 20 (1885). Compare *Bascom v. Smith*, 164 Mass. 61, 41 N.E. 130 (1895).

¹⁴⁴ *Mitchell & Bro. v. Railton*, 45 Mo. App. 273 (1891).

¹⁴⁵ *Closson v. Billman*, 161 Ind. 610, 69 N.E. 449 (1904). When the offer of guaranty is appended to the contract between the principal and the creditor and bears an even date, it is presumed that they were executed contemporaneously. *Siegel & Co. v. Baily*, 252 Pa. 231, 97 Atl. 401 (1916); see *Beeson v. LaVasque*, 144 Ark. 522, 223 S.W. 355 (1920); *Davenport v. Stratton*, 24 Cal. 2d 232, 149 P.2d 4 (1944); *Times-Picayune Pub. Co. v. Badon*, 17 La. App. 114, 135 So. 631 (1931); *Steinberg v. Gonzales*, 215 Md. 100, 135 A.2d 631 (1957); *Davis Sewing Mach. Co. v. Jones*, 61 Mo. 409 (1875); *Douglass v. Howland*, 24 Wend. 35 (N.Y. Sup. Ct. 1840) (minority rule). But see *American Agricultural Chem. Co. v. Ellsworth*, 109 Me. 195, 83 Atl. 546 (1912).

¹⁴⁶ 56 Mo. 272 (1874); see *International Supply Co. v. Chem. Process Co.*, 190 Okla. 224, 122 P.2d 137 (1942).

accept¹⁴⁷ if the acknowledgment affirmatively indicates that the consideration was paid to the guarantor by the creditor.¹⁴⁸ The mere words "for value received" are not adequate.¹⁴⁹ On the other hand, a proper acknowledgment of consideration will be ignored when it is fictitious. In *American Agricultural Chem. Co. v. Ellsworth*,¹⁵⁰ for instance, the court disregarded an acknowledgment of consideration with these words: "The real consideration lay in the contract between the creditor and Berry [the principal]."¹⁵¹ Since this contract had not been executed when guaranty was given, notice of intention to accept was required. There is language in some opinions which, contrary to the *Ellsworth* case, suggests that a recital of consideration conclusively dispenses with notice.¹⁵² It is submitted, however, that this conclusion is seldom necessary to the result. There are other significant facts in these decisions which explain why notice was not required. In *Davis v. Wells*,¹⁵³ for example, the guaranty was given primarily to secure the existing indebtedness of the principal.¹⁵⁴

The Insider Rule. If the guarantor has a close relationship with the principal which enables him to obtain inside information, he will ordinarily be treated as though he anticipated acceptance or gained prompt knowledge of it. This is true when the principal is a small corporation and the guarantors are stockholders, officers or directors,¹⁵⁵ or where the principal is a partnership and the

¹⁴⁷ See *Davis v. Wells*, 104 U.S. 159 (1881); *Huckaby v. McConnon & Co.*, 213 Ala. 631, 105 So. 886 (1925); *Taylor v. Tolman Co.*, 47 Ill. App. 264 (1893); *Buhrer v. Baldwin*, 137 Mich. 263, 100 N.W. 468 (1904); *Howe v. Nichols*, 22 Me. 175 (1842) (alternative holding); *Century Indem. Co. v. Bloom*, 329 Mass. 508, 513, 109 N.E.2d 166, 168 (1952) (dictum) (contract of indemnity).

¹⁴⁸ *Barnes Cycle Co. v. Reed*, 84 Fed. 603 (C.C.W.D. Pa. 1898), *rev'd on other grounds*, 91 Fed. 481 (3d Cir. 1899).

¹⁴⁹ *Davis Sewing Mach. Co. v. Richards*, 115 U.S. 524 (1885).

¹⁵⁰ 109 Me. 195, 83 Atl. 546 (1912); see *Greer Mach. Co. v. Sears*, 119 Ky. 697, 66 S.W. 521 (1902); *Tolman Co. v. Means*, 52 Mo. App. 385 (1893); *Coe & Richmond v. Buehler*, 110 Pa. 366, 5 Atl. 20 (1885).

¹⁵¹ 109 Me. 195, 198, 83 Atl. 546, 547 (1912).

¹⁵² See, e.g., *Davis v. Wells*, 104 U.S. 159, 167 (1881).

¹⁵³ 104 U.S. 159 (1881).

¹⁵⁴ *Wells, Fargo & Co. v. Davis*, 2 Utah 411 (1878), *aff'd on other grounds, sub nom. Davis v. Wells*, 104 U.S. 159, 167 (1881); see text accompanying notes 169-72 *infra*.

¹⁵⁵ *Bond v. John V. Farwell Co.*, 172 Fed. 58 (6th Cir. 1909) (alternative holding) (shareholders and directors); *Hibernia Bank & Trust Co. v. Succession of Cancienne*, 140 La. 969, 74 So. 267 (1917) (alternative holding) (director); see *Rawleigh, Moses & Co. v. Kornberg*, 210 F.2d 176 (8th Cir. 1954) (officers); *Thorpe v. Story*, 10 Cal. 2d 104, 73 P.2d 1194 (1937) (shareholders and directors); *Sanders v. Etcherson*, 36 Ga. 404 (1867) (shareholders); *New Idea Spreader Co. v. Satterfield*, 45 Idaho 753, 265 Pac. 644 (1928) (directors); *McGowan v. Wells' Trustees*, 184 Ky. 772, 213 S.W. 573 (1919) (shareholders and officers); *Gentzel v. Dodge*, 271 Mass. 499, 17 N.E. 454 (1930) (officer); *Goodhue County Nat'l Bank v. Fleming*, 168 Minn. 50, 209 N.W. 533 (1926) (shareholder) (minority rule); *Doehler Die Casting Co.*

guarantor is a partner.¹⁵⁶ It is sufficient if the guarantor has a personal interest in acceptance plus an opportunity to obtain inside information. These individuals include: a salesman who guarantees payment of a customer's order on which he receives a commission;¹⁵⁷ a landlord who guarantees his tenant's debt to forestall collection proceedings which would deprive the tenant of the ability to pay rent;¹⁵⁸ and the exclusive brokers or sales agents of the principal who guarantee payment to his suppliers.¹⁵⁹

Waiver. The offer may expressly¹⁶⁰ or impliedly waive notice.¹⁶¹ The most common form of implied waiver is a provision in the offer which deals with notice but does not specifically mention notice of intention to accept. For instance, notice has been dispensed with when the following provisions were present:

"I also waive my rights to notice of any and all transactions with said L. E. McKinnon and his failure to pay his indebtedness to you."¹⁶²

v. Holmes, 52 N.Y.S.2d 321 (Sup. Ct. N.Y. County 1944) (officer) (minority rule); Wise v. Miller, 45 Ohio St. 388, 14 N.E. 218 (1887) (shareholder) (minority rule); State Bank v. King, 244 Pa. 29, 90 Atl. 453 (1914) (shareholders); Continental Life Ins. Co. v. Barnes, 56 S.D. 410, 228 N.W. 809 (1930) (shareholders); Mountain City Mill Co. v. Lindsey, 8 Tenn. App. 337 (1928) (shareholders) (minority rule).

¹⁵⁶ Union Bank v. Coster's Ex'rs, 3 N.Y. 203 (1850) (*semble*) (minority rule); Cozzani v. Fioravanti, 51 R.I. 433, 155 Atl. 409 (1931). *Contra*, Farmers' Bank v. Tatnall, 12 Del. (7 Houst.) 287, 31 Atl. 879 (1885) (*semble*).

¹⁵⁷ See McCarroll v. Red Diamond Clothing Co., 105 Ark. 443, 151 S.W. 1012 (1912); Richmond Paper Co. v. Bradley, 115 Miss. 307, 75 So. 381, *new trial ordered on other grounds*, 115 Miss. 534, 76 So. 544 (1917). *But cf.* Dondero v. Standard Emblem Co., 45 R.I. 329, 332-33, 121 Atl. 401, 402 (1923) (*dictum*).

¹⁵⁸ See Greene v. Simon Brown's Sons, 128 S.C. 91, 121 S.E. 597 (1924); F. C. Palmer & Co. v. Chaffee, 129 Wash. 408, 225 Pac. 65 (1924).

¹⁵⁹ See Hassell-Hughes Lumber Co. v. Jackson, 33 Tenn. App. 477, 232 S.W.2d 325 (1949) (minority rule). The insider rule is also applicable to the owner of a lot on which a building is being constructed who guarantees his contractor's suppliers. See Wehle v. Baker, 97 Ga. App. 111, 102 S.E.2d 661 (1958); Squires v. Hoffman, 278 S.W. 803 (Mo. App. 1926); Wilcox v. Draper, 12 Neb. 138, 10 N.W. 579 (1881) (minority rule). It is also applicable to an individual who guarantees payment by a principal with whom he has a profit-sharing agreement. Pittsburgh Plate Glass Co. v. Cassidy, 194 Ky. 81, 238 S.W. 172 (1922).

¹⁶⁰ Hickey Pipe & Supply Co. v. Fitzgerald, 3 Cal. App. 2d 389, 39 P.2d 472 (1934); Guggenheimer & Co. v. Gilmore, 29 Ga. App. 540, 116 S.E. 67 (1923); Valley Nat'l Bank v. Cownie, 164 Iowa 421, 145 N.W. 904 (1914); Hughes v. Roberts, Johnson & Rand Shoe Co., 24 Ky. L. Rep. 2003, 72 S.W. 799 (1903); Industrial Bank & Trust Co. v. Hesselberg, 195 S.W.2d 470 (Mo. 1946); Penner v. International Harvester Co., 171 Okla. 41, 41 P.2d 843 (1935); International Text Book Co. v. Mabbott, 159 Wis. 423, 150 N.W. 429 (1915).

¹⁶¹ If notice is lacking when required and there is no waiver, the guarantor is released from liability on his guaranty. Texas Co. v. Stanberry, 165 S.W.2d 696 (Mo. App. 1942) (*per curiam*).

¹⁶² Phillips-Boyd Pub. Co. v. McKinnon, 197 Ala. 443, 444, 73 So. 43, 44 (1916); *cf.* Holmes v. Schwab & Sons, 141 Ga. 44, 80 S.E. 313 (1913); Crittenden v. Fiske, 46 Mich. 70, 8 N.W. 714 (1881).

"[W]e hereby hold ourselves accountable to you for the payment of the same, in case Mr. Daniel Totty should not be able so to do, or should make default; of which default you are required to give us reasonable and proper notice."¹⁶³

"I reserve the right to terminate my liability on this guarantee by written notice thereof to the bank, except as to obligations and indebtedness incurred by the debtor prior to such notice; but I agree nothing shall affect my liability on this guarantee except such notice, or the surrender or cancellation of this guarantee by the bank."¹⁶⁴

It appears that if the offer shows that the guarantor was notice-conscious it must expressly provide for notice of intention to accept or it will be waived. Notice is also impliedly waived when the guaranty states that it is unconditional¹⁶⁵ or that the guarantor is jointly or jointly and severally liable with the principal.¹⁶⁶

*Farwell & Co. v. Sully*¹⁶⁷ signifies that a subsequent waiver is as efficacious as a waiver in the offer. When the creditor in *Sully* informed the guarantor that the principal was bankrupt, the guarantor replied: "Prove up your claim in bankruptcy and draw dividends. I will make my guarantee good." The court held that this subsequent promise to pay put the question of notice of intention to accept out of the case. A subsequent acknowledgment of liability is given the same effect.¹⁶⁸

Definite Principal Performance. An offer to guaranty a single specified transaction of definite amount does not normally require notice of intention to accept. *Smith & Crittenden v. Dann*, for

¹⁶³ *Wadsworth v. Allen*, 49 Va. (8 Gratt.) 174, 175 (1851); *Platter v. Green*, 26 Kan. 252 (1881) (alternative holding). *But cf.* *David B. Taylor & Co. v. McClung's Ex'r*, 7 Del. (2 Houst.) 24 (1858).

¹⁶⁴ See *Century Indem. Co. v. Bloom*, 329 Mass. 508, 109 N.E.2d 166 (1952) (contract of indemnity); *Midland Nat'l Bank v. Security Elevator Co.*, 161 Minn. 30, 32, 200 N.W. 851, 852 (1924).

¹⁶⁵ *Jones v. McConnon & Co.*, 100 Fla. 1158, 130 So. 760 (1930); *McConnon & Co. v. Prine*, 128 Miss. 192, 90 So. 730 (1922).

¹⁶⁶ *Dayton Rubber Mfg. Co. v. Sabra*, 31 F.2d 9 (9th Cir. 1929). This result has been justified both on the theory that a joint or joint and several promise is not a guaranty and thus does not require notice, see *Campbell* 532 n.12, and on the theory that the joint relationship between the principal and the guarantor entitles the creditor to assume that the guarantor will be apprised of acceptance, see *RESTATEMENT, SECURITY* § 86, comment c (1941).

¹⁶⁷ 38 Iowa 387 (1874); *accord*, *Swisher v. Deering*, 104 Ill. App. 572 (1902) (alternative holding), *aff'd on other grounds*, 204 Ill. 203, 68 N.E. 517 (1903).

¹⁶⁸ *Trefethen v. Locke*, 16 La. Ann. 19 (1861); *City Nat'l Bank v. Phelps*, 86 N.Y. 484 (1881) (minority rule); see *Gunther v. Pfaffman*, 18 Ohio C.C.R. (n.s.) 311, 33 Ohio C.C. Dec. 54 (1911), *aff'd mem.*, 88 Ohio St. 528, 106 N.E. 1072 (1913) (minority rule); *cf.* *Reynolds, Byrne & Co. v. Douglass*, 37 U.S. (12 Pet.) 497 (1838).

instance, concerned a guaranty of a single sale in the amount of one hundred dollars.¹⁶⁹ Other examples include: guaranties of notes;¹⁷⁰ guaranties of payment for a specified amount of goods;¹⁷¹ and guaranties of payment of existing debt.¹⁷² Since the guarantor can plan on the extent of his liability, most jurisdictions have found that it is not unreasonable to require him to discover whether the transaction has been consummated. Pennsylvania, however, seems to require notice. *T. G. Evans & Co. v. McCormick*¹⁷³ held that notice was necessary despite the guarantor's knowledge that the principal's obligation amounted to "about seven hundred dollars."

Countervailing circumstances may make notice vital although a definite principal performance is the subject of the guaranty. If the guaranty is made "to whom it may concern,"¹⁷⁴ or contains qualified language,¹⁷⁵ or the offeror is particularly uncertain as to whether he is an acceptable guarantor,¹⁷⁶ notice may be required.

Presence of a Seal. Campbell has suggested that notice of intention to accept is unnecessary when the offer of guaranty is under seal.¹⁷⁷ This is an over-generalization even aside from statutory modification of the effect of the seal.¹⁷⁸ Although a sealed document is effective on delivery rather than on acceptance, delivery may be constructively conditioned on receipt of notice of intention to accept.¹⁷⁹ The guaranty in *Farmer's Bank v. Tatnall*,¹⁸⁰ for instance, was sealed and contained a witnessing clause. The court neverthe-

¹⁶⁹ 6 Hill 543 (N.Y. Sup. Ct. 1844) (minority rule); see *Hays v. Smith*, 65 Okla. 113, 164 Pac. 470 (1916).

¹⁷⁰ See *Empire Security Co. v. Berry*, 211 Ill. App. 278 (1918); *Shropshire v. Smith*, 37 S.W. 174, *rev'd on other grounds*, 37 S.W. 470 (Tex. Civ. App. 1896).

¹⁷¹ *Pressed Radiator Co. v. Hughes*, 155 Ill. App. 80 (1910); *Kline v. Raymond*, 70 Ind. 271 (1880); see *Bank of Plant City v. Canal-Commercial Trust & Sav. Bank*, 270 Fed. 477 (5th Cir. 1921); *Murphy v. Continental Supply Co.*, 188 Ark. 183, 65 S.W.2d 25 (1933).

¹⁷² *Winnebago Paper Mills v. Travis*, 56 Minn. 480, 58 N.W. 36 (1894); *Wells, Fargo & Co. v. Davis*, 2 Utah 411 (1878), *aff'd on other grounds, sub nom. Davis v. Wells*, 104 U.S. 159 (1881); see *Klein v. Kern*, 94 Tenn. 34, 37, 28 S.W. 295, 296 (1894) (dictum) (minority rule).

¹⁷³ 167 Pa. 247, 31 Atl. 563 (1895) (per curiam).

¹⁷⁴ See *Adams, Cunningham & Co. v. Jones*, 37 U.S. (12 Pet.) 207 (1838).

¹⁷⁵ See *Meyer v. Ruhstadt*, 66 Ill. App. 346 (1896).

¹⁷⁶ See *Dondero v. Standard Emblem Co.*, 45 R.I. 329, 332-33, 121 Atl. 401, 402 (1923) (dictum).

¹⁷⁷ Campbell 543-44; see *United States Fid. & Guar. Co. v. Riefler*, 239 U.S. 17 (1915) (contract of indemnity).

¹⁷⁸ Over half of the states no longer recognize the seal as a substitution for consideration. See Braucher, *Status of the Seal Today*, 9 PRAC. LAW. 97 (1963).

¹⁷⁹ See 1 CORBIN § 245, at 812.

¹⁸⁰ 12 Del. (7 Houst.) 287, 31 Atl. 879 (1885); *accord*, *Winnebago Paper Mills v. Travis*, 56 Minn. 480, 58 N.W. 36 (1894); *Acme Mfg. Co. v. Reed*, 197 Pa. 359, 47 Atl. 205 (1900); *Columbia Baking & Mfg. Co. v. Schissler*, 35 Pa. Super. 621 (1908).

less held that notice was essential, stressing that the guarantor had no assurance that his offer would be accepted.

3. Statutes

Four states currently have in effect a version of section 1539 of David Dudley Field's Draft New York Civil Code:

"A mere offer to guaranty is not binding until notice of its acceptance is communicated by the guarantee to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance."¹⁸¹

Although this statute was drafted to express New York's version of the minority rule, it has been construed in accord with the majority rule.¹⁸²

California has amended the section as follows:

"Unless notice of acceptance is expressly required, an offer to become surety may be accepted by acting upon it, or by acceptance upon other consideration. An absolute suretyship obligation is binding upon the surety without notice of acceptance."¹⁸³

No cases construing the California amendment have been found. On its face, however, it appears to adopt the minority rule that the exigency of notice turns on the wording of the offer. Two New York minority rule cases suggest that implication of a need for notice from the terms of the offer would constitute an express requirement for notice within the statute.¹⁸⁴

North Dakota has a unique statute requiring notice of intention to accept unless the benefit of the statute is specifically renounced:¹⁸⁵

"In every case in which a manufacturer, wholesaler or distributor hereafter requires a present or prospective agent, salesman, or dealer to secure the signature of a surety or guarantor to a bond or guaranty for the purpose of delivery of merchandise

¹⁸¹ MONT. REV. CODES ANN. § 30-106 (1947); N.D. CENT. CODE § 22-01-06 (1960); OKLA. STAT. tit. 15, § 326 (1937); S.D. CODE § 26-0106 (1939).

¹⁸² See *Standard Sewing Mach. Co. v. Church*, 11 N.D. 420, 92 N.W. 805 (1902); *William Deering & Co. v. Mortell*, 21 S.D. 159, 110 N.W. 86 (1906); *Abbott v. National Bank of Commerce*, 176 Okla. 629, 630, 56 P.2d 886, 888 (1936) (dissenting opinion). *Contra, id.* at 630, 56 P.2d at 887 (dictum).

¹⁸³ CAL. CIV. CODE § 2795.

¹⁸⁴ *Beckman v. Hale*, 17 Johns. Cas. 134 (N.Y. Sup. Ct. Albany County 1819); *Stafford v. Low*, 16 Johns. Cas. 67 (N.Y. Sup. Ct. Albany County 1819), as explained in *Douglass v. Howland*, 24 Wend. 35, 51 (N.Y. Sup. Ct. 1840) (dictum).

¹⁸⁵ Cf. *J. R. Watkins Co. v. Vangen*, 116 N.W.2d 641 (N.D. 1962).

to such agent, salesman or dealer, such manufacturer, wholesaler or distributor shall furnish such surety or guarantor a correct copy of the bond or obligation, together with notice of acceptance by the manufacturer, wholesaler or distributor, and setting forth to such surety or guarantor his right to withdraw as herein provided, either by registered or certified mail or personal delivery prior to the first shipment of any merchandise for which such surety or guarantor might become liable."¹⁸⁶

A related North Dakota statute gives a statutory right of revocation to the guarantor:

"Each surety or guarantor to any such bond or obligation shall have ten days time after his receipt of such copy and notice during which he may give notice either by mail or personal delivery to the manufacturer, wholesaler or distributor of his withdrawal from any such bond or obligation, and shall in the event of his giving such notice of withdrawal as herein provided incur no liability under any such bond or obligation to such manufacturer, wholesaler or distributor."¹⁸⁷

4. Conclusion

There is substantial uniformity among the American decisions regarding notice of intention to accept. The principal theoretical disagreement concerns the method of determining when notice is necessary. Factual comparison of the authorities, however, indicates that this disagreement has seldom led to varying results.

III. NOTICE OF TRANSACTIONS

Notice of transactions was first considered a constructive condition of unilateral contracts of guaranty by Justice Story in *Douglas v. Reynolds, Byrne & Co.*¹⁸⁸ Notice of transactions was not requisite under English law unless called for by express and explicit language.¹⁸⁹ Story later emphasized that the American departure from the English position was limited to exceptional situations.¹⁹⁰

¹⁸⁶ N.D. CENT. CODE § 22-01-06.1 (1960).

¹⁸⁷ N.D. CENT. CODE § 22-01-06.2 (1960).

¹⁸⁸ 32 U.S. (7 Pet.) 113, 126 (1833) (dictum).

¹⁸⁹ *Somersall v. Barneby*, Cro. Jac. 287, 79 Eng. Rep. 246 (K.B. 1611) (contract of indemnity); cf. *Oxley v. Young*, 2 H. Bl. 613, 126 Eng. Rep. 734 (1796); see ROWLATT, *PRINCIPAL AND SURETY* 91 (3d ed. 1936).

¹⁹⁰ See *Wildes v. Savage*, 29 Fed. Cas. 1226, 1230-31 (No. 17653) (C.C.D. Mass. 1839) (dictum); see 1 STORY, *CONTRACTS* 359-60 (1st ed. 1844).

The existence of the concept of notice of transactions has not been generally recognized. Arant, Simpson, Stearns, and Williston do not mention it.¹⁹¹ The last three authors actually confused notice of transactions with notice of intention to accept. In referring to "notice of acceptance" they stated that failure to receive notice discharged the guarantor only when he suffered loss. The cases they cited, however, made this point with regard to notice of transactions, not notice of intention to accept.¹⁹² Professor Campbell, on the other hand, found three strands of authority concerned with notice of transactions: (1) jurisdictions which sometimes required notice of transactions; (2) jurisdictions which never did; and (3) Massachusetts, which, under *Bishop v. Eaton*,¹⁹³ demanded notice when the creditor should have known that the guarantor would not receive prompt information concerning the creditor's performance.¹⁹⁴

It is submitted that Professor Campbell was substantially correct in his analysis except for the weight that he gave to *Bishop v. Eaton* as a distinctive approach. Although the case has enjoyed academic approval,¹⁹⁵ *Bishop v. Eaton* has not been widely followed. Furthermore, subsequent Massachusetts decisions have treated it as in accord with cases in other jurisdictions,¹⁹⁶ as Professor Campbell was forced to concede.¹⁹⁷

The principal theoretical division of authority consists of (1) a rule which makes notice a constructive condition when the offer leaves indefinite the amount of credit which may be extended; and (2) a rule which refuses to make notice of transactions a constructive condition. There are also a few cases which indicate that notice of transactions can be only a constructive condition of guaranties of collection.¹⁹⁸

A. *Notice as a Constructive Condition:*
The Old Majority Rule

It is doubtful whether the ensuing discussion of notice of transactions as a constructive condition deals with living law. The

¹⁹¹ ARANT § 26; SIMPSON § 25; STEARNS §§ 4.15-.17; 1 WILLISTON §§ 69A-69AA.

¹⁹² See SIMPSON § 25, at 68 n.5; STEARNS at 81 n.9; 1 WILLISTON § 69A, at 22 n.14.

¹⁹³ 161 Mass. 496, 500, 37 N.E. 665, 667-68 (1894) (dictum).

¹⁹⁴ Campbell 545-551.

¹⁹⁵ See authorities cited note 61 *supra*.

¹⁹⁶ See, e.g., *Black, Starr & Frost v. Grabow*, 216 Mass. 516, 104 N.E. 346 (1914).

¹⁹⁷ See Campbell 550.

¹⁹⁸ See text accompanying notes 216-17 *infra* for the distinction between a guaranty of collection and guaranty of payment.

basic principles were laid down in old cases that have not been reaffirmed.¹⁹⁹ Nevertheless, analysis of notice of transactions is more than empty scholarship, for inadvertent confusion of notice of transactions and notice of intention to accept has produced unfortunate conclusions.

The majority of American jurisdictions made notice of transactions a constructive condition when it would aid the guarantor in planning his affairs. If the offer of guaranty left indefinite the amount of credit for which the guarantor might ultimately become liable within a reasonable time, notice of transactions was considered essential unless other circumstances rebutted this inference. Notice of transactions was demanded when the guaranty was not expressly limited either as to duration or as to the amount of credit guaranteed;²⁰⁰ when it was limited in amount of credit but not in duration;²⁰¹ and when it was limited in duration but not in amount of credit.²⁰² If the guaranty was for both a limited duration and a limited amount of credit, notice of transactions was not exacted.²⁰³

The significant facts which rendered notice of intention to accept redundant had the same effect on notice of transactions. Thus, if the guarantor should have anticipated the transactions guaranteed, notice was not a constructive condition. In *Caton v. Shaw & Tiffany*,²⁰⁴ for example, notice was not required when the principal had informed the guarantor that the creditor desired his personal guaranty. Notice was also unnecessary when the guarantor received prompt knowledge of transactions.²⁰⁵ If he had a close relationship with the principal which would enable him to obtain inside information, *e.g.*, he was an officer, director, or stockholder of the principal, the guarantor was usually treated as though he had anticipated the transactions guaranteed or had gained prompt

¹⁹⁹ See Campbell 548.

²⁰⁰ Davis Sewing Mach. Co. v. Mills, 55 Iowa 543, 8 N.W. 356 (1881); Clark v. Remington, 52 Mass. (11 Met.) 361 (1846) (alternative holding); Lester Piano Co. v. Romney, 41 Utah 436, 126 Pac. 325 (1912) (alternative holding).

²⁰¹ See Rapelye & Purdy v. Bailey, 3 Conn. 438 (1820); M. Ferst & Co. v. Blackwell, 39 Fla. 621, 22 So. 892 (1897); Whiting v. Stacy, 81 Mass. (15 Gray) 270 (1860); Douglass v. Reynolds, Byrne & Co., 32 U.S. (7 Pet.) 113, 126 (1832) (dictum); Beidler v. Rudkin, 104 Conn. 404, 410-12, 133 Atl. 214, 216 (1926) (dictum); Bank v. Sloo & Byrne, 16 La. 539 (1840) (alternative holding).

²⁰² See Babcock v. Bryant, 29 Mass. (12 Pick.) 133 (1832).

²⁰³ See Wildes v. Savage, 29 Fed. Cas. 1226 (No. 17653) (C.C.D. Mass. 1839); Montgomery v. Kellogg & Sandusky, 43 Miss. 486 (1870).

²⁰⁴ 2 Har. & Gill 13 (Md. 1827).

²⁰⁵ Noyes & Co. v. Nichols, 28 Vt. 159 (1855); see Menard v. Scudder, 7 La. Ann. 385 (1852).

knowledge of them.²⁰⁶ The offer of guaranty could expressly²⁰⁷ or impliedly waive notice of transactions. A provision that the guaranty was in force until revoked by written notice was one form of implied waiver.²⁰⁸ Receipt of notice of default or notice of intention to accept affected the utility of notice of transactions. If notice of default was given within the time that notice of transactions was due, the latter was rendered superfluous.²⁰⁹ Notice of intention to accept usually had the same effect because it should have led the guarantor to anticipate transactions in reliance on the guaranty.²¹⁰

The guarantor was discharged to the extent that loss followed from delayed notice of transactions.²¹¹ If lack of notice prevented him from protecting his rights of recourse against the principal, he was totally discharged.²¹² If it misled him into allowing special damage to occur, he was discharged *pro tanto*.²¹³

In *Cremer v. Higginson*²¹⁴ the principal passed from a solvent to an insolvent condition between the time when notice should have been received and the time that it actually was received. The court held that the guarantor was wholly discharged. *Cremer* involved a situation in which courts have presumed that the guarantor was irreparably injured by tardy notice of transactions. Timely notice would have alerted him to the extent of his possible liability before it accrued. He could then have endeavored to protect himself from deterioration in the principal's financial condition. He could have demanded security and been prepared to assert his rights of subrogation, exoneration, contribution, and reimbursement immediately upon default. Because the actual amount of loss

²⁰⁶ See *Standard Roller Bearing Co. v. Bergdoll*, 214 Fed. 175 (E.D. Pa. 1914) (Louis J. Bergdoll guarantor, Louis J. Bergdoll Motor Co. principal); *Boyd & Rickets v. Snyder*, 49 Md. 325 (1878) (directors of brewing company guarantors, their agent principal); *Gloucester Mut. Fishing Ins. Co. v. Boyer*, 294 Mass. 35, 200 N.E. 557 (1936) (guarantors shareholders of principal); cf. *Eastern Shore Brokerage & Comm'n Co. v. Harrison*, 141 Md. 91, 118 Atl. 192 (1922).

²⁰⁷ *New Haven County Bank v. Mitchell*, 15 Conn. 206 (1842); see *Merchants Nat'l Bank v. Ayers*, 37 Wyo. 136, 259 Pac. 804 (1927). An express waiver of notice of transactions may be considered impliedly to waive notice of intention to accept. *Phillips-Boyd Pub. Co. v. McKinnon*, 197 Ala. 443, 73 So. 43 (1916).

²⁰⁸ *Century Indem. Co. v. Bloom*, 329 Mass. 508, 109 N.E.2d 166 (1952) (contract of indemnity); *Frieden v. Cluett, Peabody & Co.*, 142 Va. 738, 128 S.E. 61 (1925).

²⁰⁹ See *Ajax Rubber Co. v. Gam*, 30 Del. (7 Boyce) 479, 108 Atl. 276 (1919) (per curiam).

²¹⁰ See 1 STORX, *op. cit. supra* note 190, at 359-60. But see *Cremer v. Higginson*, 6 Fed. Cas. 797 (No. 3383) (C.C.D. Mass. 1817) (alternative holding).

²¹¹ *Louisville Mfg. Co. v. Welch*, 51 U.S. (10 How.) 461, 475 (1850) (dictum).

²¹² See *Campbell* 548-49.

²¹³ See *ibid.*; *Louisville Mfg. Co. v. Welch*, 51 U.S. (10 How.) 461 (1850).

²¹⁴ 6 Fed. Cas. 797 (No. 3383) (C.C.D. Mass. 1817).

that the guarantor might thus have avoided was not capable of precise determination, his interests were safeguarded by the assumption that he could have fully protected his rights of recourse and was irreparably damaged when deprived of the opportunity to do so. Later cases like *German Sav. Bank v. Drake Roofing Co.*²¹⁵ established that the time at which the principal became insolvent was crucial. In the *German Sav. Bank* case the principal was insolvent at the time at which notice of transactions was due. Since the prior insolvency of the principal precluded the guarantor from taking effective steps to protect his rights of recourse, the court held that failure to receive prompt notice did not discharge the guarantor. Even in this situation, however, dilatory notice of transactions could cause the guarantor to incur special damage and obtain a *pro tanto* discharge. For example, he might be misled into surrendering security in the belief that the debt had been paid by the principal.

B. *Notice as a Constructive Condition of Guaranties of Collection: A Questionable Rule*

The typical guaranty is a guaranty of payment. The guarantor undertakes to pay if the principal does not.²¹⁶ But the guarantor may restrict his undertaking to the solvency of the principal debtor. If he promises to pay only if payment can not be procured from the principal by legal proceedings, his guaranty is called a guaranty of collection.²¹⁷ The Supreme Court of Kentucky declared in *McGowan v. Wells' Trustee*²¹⁸ that notice of transactions might be a constructive condition of a guaranty of collection but not of a guaranty of payment. Alabama can also be deemed to have adopted this view. *Walker v. Forbes*²¹⁹ stated that a creditor might have to give notice of transactions to a guarantor of collection. *Cahuzac & Co. v. Samini*²²⁰ found notice unnecessary with regard to a guarantor of payment.

The "rule" of the above cases is more fiction than fact. Each would have been decided the same way under the former majority rule. *McGowan v. Wells' Trustee* dispensed with notice when the

²¹⁵ 112 Iowa 184, 83 N.W. 960 (1900) (alternative holding); see *Beebe v. Dudley*, 26 N.H. 249 (1853).

²¹⁶ See STEARNS § 1.5, at 5.

²¹⁷ See *id.* at 6.

²¹⁸ 184 Ky. 772, 780-81, 213 S.W. 573, 578 (1919) (dictum).

²¹⁹ 25 Ala. 139, 147-48 (1854) (dictum).

²²⁰ 29 Ala. 288 (1856).

guarantors were officers and directors of the principal. *Cahuzac & Co. v. Samini* did likewise when notice of intention to accept had been received. On the other hand, *Walker v. Forbes* demanded notice for a guaranty unlimited in duration.

C. *Notice as an Express Condition:*
The New Majority Rule

Jurisdictions which do not readily require notice of intention to accept²²¹ should take a similar position with regard to notice of transactions. Although all these jurisdictions do not have authority on point, this seems to be the case.²²² Notice of transactions is not called for unless the offer expressly and explicitly provides for it. The atrophy of the old majority rule has made this the prevailing opinion. A recent Florida case, for example, approves it.²²³

D. *Statutes*

Five states have enacted substantially the following statute: "A suretyship obligation is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor."²²⁴ Although the provision seems relevant to notice of transactions, it has been neglected by the courts.²²⁵

North Dakota has supplemented this section with a unique provision requiring notice in certain situations unless the application of the statute is explicitly waived:²²⁶

"In every case in which the manufacturer, wholesaler or distributor is furnishing merchandise to any agent, salesman or dealer whose execution of bond or obligation to such manufacturer, wholesaler or distributor has been joined in by any surety or guarantor, such manufacturer, wholesaler or distributor shall each month during the life of such bond or obligation furnish each such surety or guarantor either by mail

²²¹ Minnesota, Nebraska, New York, Ohio, and Tennessee imply a requirement of notice of intention to accept only from a term of the offer. The majority of American jurisdictions also imply a requirement from circumstances surrounding the making of the offer.

²²² *M. Lowenstein & Sons, Inc. v. Roselle Mfg. Co.*, 9 Misc. 2d 617, 171 N.Y.S.2d 7 (Sup. Ct. N.Y. County 1958), *aff'd mem.*, 8 App. Div. 2d 592, 185 N.Y.S.2d 216 (1959); *Whitney & Schuyler v. Groot*, 24 Wend. 82 (N.Y. Sup. Ct. 1840); *Hassell-Hughes Lumber Co. v. Jackson*, 33 Tenn. App. 477, 232 S.W.2d 325 (1949).

²²³ *Bryant v. Food Mach. & Chem. Corp.*, 130 So. 2d 132 (Fla. App. 1961) (per curiam).

²²⁴ CAL. CIV. CODE § 2806; MONT. REV. CODES ANN. § 30-201 (1947); N.D. CENT. CODE § 22-01-09 (1960); OKLA. STAT. tit. 15, § 331 (1937); S.D. REV. CODE § 26-0109 (1939).

²²⁵ See, e.g., RESTATEMENT, CONTRACTS, MONT. ANNOT. 28 (1940).

²²⁶ *Cf. J. R. Watkins Co. v. Vangen*, 116 N.W.2d 641 (N.D. 1962).

or personal delivery a statement showing the debit and credit items incurred and made in the account between the manufacturer, wholesaler or distributor and such agent, salesman or dealer during the immediately preceding month and the exact balance owing from the agent, salesman or dealer thereon at date of such notice."²²⁷

E. *Position of the American Law Institute*

Section fifty-six of the *Restatement of Contracts* provides:

"Where forbearance or an act other than a promise is the consideration for a promise, no notification that the act or forbearance has been given is necessary to complete the contract. But if the offeror has no adequate means of ascertaining with reasonable promptness and certainty that the act or forbearance has been given, and the offeree should know this, the contract is discharged unless within a reasonable time after performance of the act or forbearance, the offeree exercises reasonable diligence to notify the offeror thereof."²²⁸

Williston, the reporter for this section of the *Restatement of Contracts*, patterned it after a dictum in the celebrated Massachusetts case of *Bishop v. Eaton*.²²⁹ The cases cited by the Massachusetts court in support of the dictum dealt with notice of transactions;²³⁰ but the court seemed to be referring to notice of intention to accept when it stated that "notice of acceptance" should be received within a reasonable time after performance by the creditor in order to forestall the guarantor's discharge. The significance of the resultant

²²⁷ N.D. CENT. CODE § 22-01-063. See text accompanying notes 186-87 *supra* for two companion North Dakota statutes requiring notice of intention to accept and permitting revocation of the offer of guaranty within ten days of its receipt.

²²⁸ 1 RESTATEMENT, CONTRACTS § 56 (1932). RESTATEMENT, SECURITY § 86 (1941) is similar.

²²⁹ 161 Mass. 496, 500, 37 N.E. 665, 667-68 (1894) (dictum). See 1 WILLISTON § 69AA n.15.

²³⁰ *Whiting v. Stacy*, 81 Mass. (15 Gray) 270 (1860); *Babcock v. Bryant*, 29 Mass. (12 Pick.) 133 (1831); *Schlessinger v. Dickinson*, 87 Mass. (5 Allen) 47 (1862) (alternative holding). Although there was language in the above opinions suggesting that the guarantor would be wholly discharged by tardy notice, the context generally made it clear that the court was assuming that the principal had become insolvent after the creditor's failure to send notice. The loss presumed to have been incurred by the guarantor, not mere lack of notice, was the reason that these cases referred to total discharge.

Whiting v. Stacy is an exception. The *Whiting* court referred solely to the laches of the creditor in giving notice as the reason for full discharge. The cases it relied on, however, all required injury to the guarantor plus belated notice for unconditional release of the guarantor. See *Bickford v. Gibbs*, 62 Mass. (8 Cush.) 154 (1851) (notice of default); *Clark v. Remington*, 52 Mass. (11 Met.) 361 (1846) (alternative holding); *Courtis v. Dennis*, 48 Mass. (7 Met.) 510 (1844); *Babcock v. Bryant*, 29 Mass. (12 Pick.) 133 (1832).

ambiguity differs depending on whether a temporary or a continuing guaranty is considered.

The time at which the dictum obliges the creditor to give notice is unobjectionable in the case of a temporary guaranty. Notice of intention to accept is due within a reasonable time after commencement of performance by the creditor; notice of transactions, within a reasonable time after conclusion of the transaction.²³¹ The two coalesce under a "one-shot" guaranty so that a single notice given after completion of the transaction is sufficient.²³² But if the dictum refers to notice of transactions under a temporary guaranty, it is incorrect in stating that failure to receive notice completely discharges the guarantor. As the cases cited by the *Bishop v. Eaton* dictum indicate, belated notice of transactions discharges the guarantor to the extent of resultant prejudice. Unconditional discharge only follows from inadequate notice of intention to accept.²³³

The *Bishop v. Eaton* dictum can be criticized for both the time at which it declares that notice is requisite and the effect that it attributes to failure to receive notice with reference to a continuing guaranty. If the dictum deals with notice of intention to accept, it permits this notice after completion of the creditor's performance. This is a departure from the precept that notice of intention to accept should be given within a reasonable time after initiation of performance by the creditor. If the dictum refers to notice of transactions, it states that failure to receive this notice wholly discharges the guarantor. The accepted rule is that failure to dispatch notice of transactions releases the guarantor to the extent of resultant loss.

When Williston wrote the *Bishop v. Eaton* dictum into the *Restatement of Contracts*, he incorporated its vices as well as its virtues. Section fifty-six, like the dictum, does not specify whether it refers to notice of intention to accept or notice of transactions. Section fifty-six, like the dictum, is more appropriate to "one-shot" guaranties than continuing guaranties. Williston's treatise is more helpful. The text indicates that Williston favored the dictum largely for its espousal of the condition subsequent theory concerning notice of intention to accept.²³⁴ Williston evidently meant to endorse this theory in section fifty-six; he was not concerned with notice of transactions.

²³¹ See text accompanying notes 25-26 *supra*.

²³² See RESTATEMENT, CONTRACTS, KY. ANNOT. 33 (1938).

²³³ See text accompanying notes 21-24 *supra*.

²³⁴ See 1 Williston § 69A-AA, at 221-24.

F. Conclusion

There was once a division of the American authorities with regard to notice of transactions. Time seems to have blurred, if not erased, its mark. The prevailing view now is that notice of transactions is not a constructive condition of contracts of guaranty.

IV. NOTICE OF DEFAULT

An American court first considered notice of default a constructive condition of contracts of guaranty in 1833.²³⁵ English law recognized notice of default only as an express condition.²³⁶ The subsequent conflict in the American decisions relates to unilateral contracts of guaranty; but notice of default may also be an issue with respect to bilateral contracts of guaranty.

There is more recognized agreement concerning notice of default than the other notice requirements. Historically, notice of default was not made a constructive condition of guaranties of payment if the principal's obligation was certain in amount and due at a certain time. There was a fairly even split of authority when the guaranteed performance was uncertain in either respect.²³⁷ The modern trend dispenses with notice unless it is expressly and explicitly requested. When the collection of a negotiable bill or note is guaranteed, the Uniform Commercial Code takes a similar position.²³⁸ Previously, there was general agreement at common law that notice of the creditor's inability to collect from the principal was a constructive condition of guaranties of collection.²³⁹

Guaranties of Collection. When a guarantor offers a guaranty of collection he promises to pay if payment cannot be procured from the principal by legal proceedings.²⁴⁰ Thus, it is notice of continuance of default after the creditor has attempted to enforce performance, not notice of the principal's original failure to pay, which may be a constructive condition.²⁴¹ Lack of due notice has been said

²³⁵ *Douglass v. Reynolds, Byrne & Co.*, 32 U.S. (7 Pet.) 113 (1833), *modified*, 37 U.S. (12 Pet.) 497 (1838).

²³⁶ *Brookbank v. Taylor*, Cro. Jac. 685, 79 Eng. Rep. 594 (Ex. 1624); *Sommersall v. Barneby*, Cro. Jac. 287, 79 Eng. Rep. 246 (K.B. 1611) (contract of indemnity); see ROWLATT, *op. cit. supra* note 189, at 143-44.

²³⁷ See SIMPSON § 41; 4 WILLISTON, *CONTRACTS* § 1237, at 3542-44 (rev. ed. 1936); RESTATEMENT, *SECURITY* 67-68 (Tent. Draft No. 4, 1940).

²³⁸ *UNIFORM COMMERCIAL CODE* §§ 3-416(2), (5).

²³⁹ See SIMPSON § 41.

²⁴⁰ See text accompanying note 217 *supra*.

²⁴¹ *Becker v. Saunders*, 28 N.C. (6 Ired.) 380 (1846) (per curiam) (*semble*); *Bashford v. Shaw*, 4 Ohio St. 263 (1854); *Woodson v. Moody*, 23 Tenn. 304 (1843); *Sylvester v. Downer*, 18 Vt. 32 (1843); *Brown v. Curtiss*, 2 N.Y. 225, 228 (1849) (*dictum*).

to release the guarantor to the extent that he suffers consequent loss.²⁴² It is relatively unlikely that such loss will occur, however, for the creditor's inability to collect from the principal indicates that the guarantor's rights of recourse are already impaired.²⁴³ A principal function of the notice due a guarantor of collection is to permit him to meet his obligation without unnecessary legal proceedings by the creditor.²⁴⁴

A number of the cases which required notice of inability to enforce performance involved guaranties of bills and notes.²⁴⁵ The Uniform Commercial Code overturns these cases when the guaranty appears on a negotiable instrument or on a piece of paper firmly attached to it. The guarantor of collection is then regarded as an indorser who waives formal presentment, notice of dishonor, and protest. The Uniform Negotiable Instruments Law did not contain a similar provision.²⁴⁶

Guaranties of Payment. The need for dispatching notice of default to the guarantor turns on the nature of the principal's obligation. If this involves a sum certain and is due at a certain time, notice of default is not generally requisite.²⁴⁷ The guarantor has ample information to be able to protect himself. For instance, notice of default is virtually never required when the guarantor secures payment of a bill or note for a sum certain with a fixed maturity date.²⁴⁸ On the other hand, notice of default may be called for when either a negotiable or non-negotiable demand instrument is guaranteed, since neither has a definite maturity date.²⁴⁹

The Uniform Commercial Code abrogates the foregoing principles. Under the Uniform Negotiable Instruments Law, a guarantor of payment was treated as either a guarantor alone or as both a guarantor and an unqualified indorser.²⁵⁰ In either event, surety-

²⁴² See Campbell 552.

²⁴³ A guarantor could, of course, surrender security in blissful ignorance of the creditor's failure to collect.

²⁴⁴ See RESTATEMENT, SECURITY, Explanatory Notes § 134 (Tent. Draft. No. 4, 1940).

²⁴⁵ This is true of all the cases cited in note 250 *supra*, with the exception of *Brown v. Curtiss*, which involved a guaranty of payment.

²⁴⁶ UNIFORM COMMERCIAL CODE §§ 3-416(2), (5) and related comments; see 1 ANDERSON, UNIFORM COMMERCIAL CODE 668-69 (1961).

²⁴⁷ See STEARNS § 4.18.

²⁴⁸ See *O'Neal v. Peaden*, 228 Ala. 21, 151 So. 877 (1933); *Gammell v. Parramore*, 58 Ga. 54 (1877); *Peterson v. Swanson*, 259 Ill. App. 80 (1930); *Allen v. Rightmere*, 20 Johns. Cas. 365 (N.Y. Sup. Ct. 1823); *Taylor & Williams v. Ross*, 11 Tenn. 330 (1832); *Woodstock Bank v. Downer*, 27 Vt. 482 (1854); *accord*, *Ray v. Spencer*, 208 S.W.2d 103 (Tex. Civ. App. 1947) (negotiable bonds). *But see* *Oxford Bank v. Haynes*, 25 Mass. (8 Pick.) 423 (1829) (guarantor discharged when injured by lack of notice).

²⁴⁹ Cf. *Whiton v. Mears*, 52 Mass. (11 Met.) 563 (1846).

²⁵⁰ See BRITTON, BILLS AND NOTES § 59 (2d ed. 1961).

ship rules were relevant to his liability. The Code adopts a different approach. A guarantor of payment is considered an indorser who waives presentment, notice of dishonor, protest, and demand on the maker or drawee.²⁵¹ His liability appears to be governed exclusively by the Code and not by common-law principles of suretyship.

Certainty as to the amount and time of the guaranteed performance has also dispensed with notice of default in the following circumstances: guaranty of payment of a judgment at a certain time;²⁵² guaranty of payments required by a lease²⁵³ or bailment contract;²⁵⁴ guaranty of payment for services rendered or goods sold;²⁵⁵ and guaranty of delivery at a fixed time of goods having an ascertained value.²⁵⁶

If the principal's obligation is uncertain in either time or amount some jurisdictions make notice of default a constructive condition of the guarantor's liability.²⁵⁷ The creditor is excused from giving notice when the guarantor obtains prompt information;²⁵⁸ when the guarantor has a close relationship with the principal (*e.g.*, is a director or officer of the principal) which permits him to procure inside information;²⁵⁹ and when the guaranty expressly or impliedly negatives the guarantor's desire for notice.²⁶⁰

If notice is required but not given, the guarantor may be re-

²⁵¹ UNIFORM COMMERCIAL CODE § 3-416(1), (5) and related comments; see ANDERSON, *op. cit. supra* note 246, at 668-69.

²⁵² See *Frash v. Polk*, 67 Ind. 55 (1879).

²⁵³ *Welch v. Walsh*, 177 Mass. 555, 59 N.E. 440 (1901); *Kratz v. Rally*, 47 S.W.2d 221 (Mo. App. 1932); *Weiler v. Henarie*, 15 Ore. 28, 13 Pac. 614 (1887); *Shore v. Lawrence*, 80 W. Va. 493, 92 S.E. 729 (1917); see *Dixon v. Schwartz*, 205 Ill. App. 349 (1917).

²⁵⁴ *American Taximeter Co. v. Smith*, 199 N.Y. Supp. 578 (App. Term 1923) (*per curiam*).

²⁵⁵ *Sherman, Clay & Co. v. Turner*, 164 Wash. 257, 2 P.2d 688 (1931); see *Stewart v. Sharp County Bank*, 71 Ark. 585, 76 S.W. 1064 (1903); *International Accountants' Soc'y, Inc. v. Fell*, 144 S.C. 64, 142 S.E. 34 (1928); *Smith v. Ide*, 3 Vt. 290 (1831).

²⁵⁶ *Heyman v. Dooley*, 77 Md. 162, 26 Atl. 117 (1893); see *Hunter v. Dickinson*, 29 Tenn. 37 (1849); *Mallory v. Lyman*, 3 Pin. 443 (Wis. 1852).

²⁵⁷ *Douglass v. Reynolds, Byrne & Co.*, 32 U.S. (7 Pet.) 113 (1833); *Cahuzac & Co. v. Samini*, 29 Ala. 288 (1856); *Taussig v. Reid*, 145 Ill. 483, 30 N.E. 1032 (1893); *Rankin & Rankin v. Childs*, 9 Mo. 665 (1846); *McCollum v. Cushing*, 22 Ark. 540 (1861) (alternative holding); *Milroy v. Quinn*, 69 Ind. 406 (1879) (alternative holding); *Howe v. Nickels*, 22 Me. 175 (1842) (alternative holding).

²⁵⁸ *Heberling Medicine Extract Co. v. Smith*, 201 Ill. App. 126 (1916) (alternative holding); *Sherman, Clay & Co. v. Turner*, 164 Wash. 257, 2 P.2d 688 (1931) (alternative holding); see *Palmer v. Schrage*, 258 Mich. 560, 242 N.W. 751 (1932).

²⁵⁹ *Mamerow v. National Lead Co.*, 206 Ill. 626, 69 N.E. 504 (1903) (stockholder and director); *Fort Dearborn Nat'l Bank v. Miller*, 178 Ill. App. 450 (1913) (alternative holding) (corporate secretary); see *Walker v. Mississippi Menhaden Prods., Inc.*, 242 Miss. 856, 136 So. 2d 607 (1962) (stockholder).

²⁶⁰ *Davis v. Wells*, 104 U.S. 159 (1881); *Bloom v. Bender*, 48 Cal. 2d 793, 313 P.2d 568 (1957).

leased from liability.²⁶¹ If the absence of notice of default debars the guarantor from effectively exercising his rights of recourse against the principal, he is completely discharged. This generally occurs when the principal is solvent at the time that notice should have been given but becomes insolvent before it is sent.²⁶² On the other hand, if the principal is insolvent at the time when notice should have been sent²⁶³ or is solvent and remains so until notice is dispatched,²⁶⁴ the guarantor's recourse is not affected by the tardy notice. Absent special damage, he is not discharged. Special damage, which results in a *pro tanto* discharge of the guarantor, includes: depreciation of security;²⁶⁵ surrender of security;²⁶⁶ failure to obtain available security;²⁶⁷ and wasting or disposal of assets by the principal which the guarantor could have seized.²⁶⁸

The trend of authority requires notice of default only if the guarantor expressly requests it.²⁶⁹ If a non-compensated surety so stipulates he is totally discharged by lack of notice.²⁷⁰ A compensated surety, however, may have to show both failure to receive notice and actual prejudice to obtain discharge.²⁷¹

Statutes. Five states have enacted substantially identical versions of the following provisions:

"A surety who has assumed liability for payment or perform-

²⁶¹ See Campbell 561-64.

²⁶² Wildes v. Savage, 29 Fed. Cas. 1226, 1231 (No. 17654) (C.C.D. Mass. 1839) (dictum).

²⁶³ Reynolds, Byrne & Co. v. Douglass, 37 U.S. (12 Pet.) 497 (1838); Beebe v. Dudley, 26 N.H. 249 (1853); Sullivan Drew & Co. v. Field, 118 N.C. 358, 24 S.E. 735 (1896).

²⁶⁴ Salisbury v. Hale, 29 Mass. (12 Pick.) 416 (1832); Montgomery v. Kellogg & Sandusky, 43 Miss. 486 (1870).

²⁶⁵ Detroit Trust Co. v. Lange, 267 Mich. 69, 255 N.W. 320 (1934).

²⁶⁶ Cf. Detroit Steel Prods. Co. v. Daily Tel. Printing Co., 85 W. Va. 530, 102 S.E. 139 (1920).

²⁶⁷ Cf. Clark v. Remington, 52 Mass. (11 Met.) 361 (1846) (alternative holding).

²⁶⁸ Mamerow v. National Lead Co., 206 Ill. 626, 637-40, 69 N.E. 504, 508-09 (1903) (dictum).

²⁶⁹ Stewart v. Knight & Jillson Co., 166 Ind. 498, 76 N.E. 743 (1906); Booth v. Irving Nat'l Exch. Bank, 116 Md. 668, 82 Atl. 652 (1911); Douglass v. Howland, 24 Wend. 35 (N.Y. Sup. Ct. 1840); Noyes & Co. v. Nichols, 28 Vt. 159 (1855); Yancey v. Brown & Appleton, 35 Tenn. 89, 95-97 (1855) (dictum).

²⁷⁰ Yama v. Sigman, 114 Colo. 323, 165 P.2d 191 (1945); Pergament v. Herrick Credit Corp., 200 N.Y.S.2d 535, 540-41 (Sup. Ct. 1960) (dictum); *accord*, Lakemore Plaza, Inc. v. Shoenterprise Corp., 188 N.E.2d 203 (Ohio C.P. 1962).

²⁷¹ School Dist. v. McCurley, 92 Kan. 53, 142 Pac. 1077 (1914); *accord*, Rose v. Ramm, 254 Mich. 259, 237 N.W. 60 (1931). *Contra*, Knight & Jillson Co. v. Castle, 172 Ind. 97, 87 N.E. 976 (1909); see Wilhoit v. Furnish, 295 Ky. 356, 174 S.W.2d 515 (1943). See generally Annot., *Effect of Failure to Give Notice, or Delay in Giving Notice or Filing of Proofs of Loss, Upon Fidelity Bond or Insurance*, 23 A.L.R.2d 1065 (1952); Annot., *Liability of a Surety Company as Distinguished From That of a Gratuitous Surety*, 12 A.L.R. 382 (1921).

ance is liable to the guarantee immediately upon the default of the principal, and without demand or notice."²⁷²

"Where one assumes liability as a surety upon a conditional obligation, his liability is commensurate with that of the principal, and he is not entitled to notice of default of the principal, unless he is unable, by the exercise of reasonable diligence, to acquire information of such default, and the creditor has actual notice thereof."²⁷³

When a guaranty of collection is involved, this statute restricts the necessity for notice to a greater degree than the common-law rule.²⁷⁴ In the case of guaranties of payment, the statute adopts the modern rule.²⁷⁵

Position of the American Law Institute. The Restatement of Security provides:

"Subject to the rules pertaining to negotiable instruments, the surety's obligation to the creditor is not affected by the creditor's failure to notify him of the principal's default unless such notification is required by the terms of the surety's contract."²⁷⁶

"Where a surety has guaranteed the collectibility of a principal's debt, the creditor has the duty of giving the surety reasonable notice of his inability to enforce performance, and if such notice is not given, the surety is discharged to the extent of resulting prejudice."²⁷⁷

The restatement approves the modern rule with regard to guaranties of payment. It reflects the general common-law rule concerning guaranties of collection.²⁷⁸

²⁷² CAL. CIV. CODE § 2807; MONT. REV. CODES § 30-202 (1947); N.D. CENT. CODE § 22-01-10 (1960); OKLA. STAT. tit. 15, § 332 (1937); S.D. CODE § 26-0110 (1939).

²⁷³ CAL. CIV. CODE § 2808; MONT. REV. CODES § 30-203 (1947); N.D. CENT. CODE § 22-01-11 (1960); OKLA. STAT. tit. 15 § 333 (1937); S.D. CODE § 26.0111 (1939).

²⁷⁴ No cases applying the statute were found.

²⁷⁵ The cases relying on the statutory discard of the requirement of notice to a guarantor of payment would have been decided the same way in jurisdictions which recognized notice as a constructive condition. See *Kierulff & Ravenscroft v. Koping*, 94 Cal. App. 473, 271 Pac. 353 (1928) (guarantor wife of principal); *McConnon & Co. v. Laursen*, 22 N.D. 604, 135 N.W. 213 (1912) (alternative holding) (no damage from lack of notice); *Masters v. Boyes*, 44 Okla. 526, 145 Pac. 363 (1914) (alternative holding) (guarantors officers of principal); *Bloom v. Bender*, 48 Cal. 2d 793, 799, 313 P.2d 568, 572 (1957) (dictum) (express waiver of notice of default).

²⁷⁶ RESTATEMENT, SECURITY § 136 (1941).

²⁷⁷ *Id.* § 137.

²⁷⁸ The annotations to the *Restatement of Security* generally support its black letter rule on both points. See RESTATEMENT, SECURITY, CAL. ANNOT. §§ 136-37 (1953); RESTATEMENT, SECURITY, KY. ANNOT. §§ 136-37 (1950); RESTATEMENT, SECURITY, NEB. ANNOT. §§ 136-37 (1950); RESTATEMENT, SECURITY, R.I. ANNOT. §§ 136-37 (1953).

Conclusion. The previous scope of agreement concerning notice of default has perceptibly broadened in recent years. Since the new consensus regards notice as unnecessary unless expressly and explicitly required, notice of default appears destined to join notice of transactions among the *curiosa* of legal history.

V. ASSESSMENT OF THE NOTICE REQUIREMENTS

A. *What Are the Notice Requirements?*

The foregoing discussion has compared academic treatment of the notice requirements with the cases. It has been suggested that writers have failed to perceive the underlying agreement with reference to notice of intention to accept and have failed to recognize notice of transactions as a distinct, if disappearing, concept. On the other hand, the essence of notice of default has been fairly captured by text and treatise.

The shortcomings of the academic authorities have found their way into the *Restatement of Contracts* and *Restatement of Security* sections dealing with notice of intention to accept.²⁷⁹ This has impeded recognition of these restatements as "prima facie a correct statement of what may be termed the general common law of the United States."²⁸⁰

The following indicates one way in which section fifty-six of the *Restatement of Contracts* might be redrafted to restate the law more lucidly:

"Where forbearance or an act other than a promise is the consideration for a promise, no notification that the act or forbearance (has been) *will be* given is necessary to complete the contract. But if the offeror has no adequate means of ascertaining with reasonable promptness and certainty that the act or forbearance has been given, and the offeree should know this, the contract is discharged unless within a reasonable time after *commencement* of performance of the act or forbearance, the offeree exercises reasonable diligence to notify the offeror (thereof) *of his intention to accept the offer*.

²⁷⁹ Although § 56 of the *Restatement of Contracts* applies to all unilateral contracts, it is derived from guaranty cases. See Llewellyn, *Our Case-Law of Contract: Offer and Acceptance*, II, 48 YALE L.J. 779, 796 n.24 (1939). Section 86 of the *Restatement of Security* is exclusively devoted to unilateral contracts of guaranty.

²⁸⁰ 1 RESTATEMENT, CONTRACTS xiv (1932). See notes 95-96 *supra* for annotations to § 56 of the *Restatements of Contracts* which suggest that it does not reflect the law of jurisdiction surveyed. *Rich v. Clayton Mark & Co.*, 250 F.2d 622 (8th Cir. 1957) similarly states that § 86 of the *Restatement of Security* is not representative of Illinois law. *But see* *Ross v. Leberman*, 298 Pa. 574, 148 Atl. 858 (1930).

"Comment a. In the formation of a unilateral contract where the offeror is the party making the promise, as is almost invariably the case, a compliance with the request in the offer fulfills the double function of a manifestation of acceptance and of giving consideration. It is only in the exceptional case where the offeror has no convenient means of ascertaining whether the requested act has been done that notification is requisite. [Remainder omitted.]

"Comment b. *Notice to Guarantor.* This section has an important application in the field of suretyship. Although many of the earlier guaranty cases requiring notice state that notice is essential to the inception of a contract, they also recognize that initiation of performance by the offeree causes the offer to become irrevocable for a reasonable time. This approach produces the same result as the second sentence of § 56. Once the offeree begins performance under either analysis the offeror cannot avoid imposition of a duty to pay if notice is received and the offeree cannot recover unless notice is given.

"Comment c. *Waiver.* § 56 does not apply if the parties manifest contrary intent.

"Caveat: § 56 takes no position respecting notice of performance of the requested act or forbearance." [Matter in parentheses deleted. Matter in italics supplied.]

B. *What Is the Relative Significance of the Notice Requirements?*

If notice of intention to accept is required but lacking, the guarantor is unconditionally discharged. Notice of transactions and notice of default only insulate the guarantor from actual loss. The rationale of this distinction lies in the function which notice of intention to accept is intended to fulfill. Justice Story found the following reasons for requiring it: (1) notice enables the guarantor to be vigilant with regard to the principal; (2) it aids the guarantor in determining whether to revoke his offer; and (3) it assists the guarantor in gauging his ability to undertake other commitments and in regulating his financial affairs.²⁸¹ In other words, notice of intention to accept is intended to allow the guarantor to take steps to protect himself. If notice is not sent and the guarantor does not take such steps, it is difficult for him to establish the resulting loss. Damages should be proved to a reasonable certainty; yet it verges on guesswork for the guarantor to attempt to demonstrate that he would have revoked his offer if he had received notice and if so,

²⁸¹ See *Douglass v. Reynolds, Byrne & Co.*, 32 U.S. (7 Pet.) 113, 125 (1833).

when, or that he would have avoided specific commitments if he had obtained prompt information. This problem of proof is circumvented by a presumption of total loss—an unconditional discharge of the guarantor.²⁸²

Notice of transactions and notice of default do not have as great utility as notice of intention to accept. By the time these notices are due it is too late for the guarantor to revoke his offer. It is in all likelihood too late for him to alter his other commitments materially. His principal courses of action are to obtain further security, to hold on to the security that he has, and to seek recourse without delay. The limited usefulness of notice of transactions and notice of default reduces the probability that the guarantor will incur substantial unprovable loss if they are not received. This justifies releasing the guarantor only if he can establish that he has sustained actual damage.

C. *What Interests Do the Notice Requirements Protect?*

Notice of intention to accept and notice of transactions protect the interest of the guarantor in being able to plan his affairs. Notice of intention to accept is more important in this respect. If the guarantor knows that his offer will be accepted he can usually provide adequately for the future. The interest of the guarantor in being able to plan his affairs derives, in part, from the commercial nature of many guaranties. Businessmen have to be able to balance their books to know where they stand.²⁸³ The interest also derives from traditional judicial concern for the uncompensated surety.²⁸⁴ Guaranties are frequently given by sanguine friends of the principal in favor of seasoned businessmen. A reminder to the former by the latter that they have undertaken serious obligations may make them more aware of their legal rights and liabilities. The courts are cognizant of the Biblical adage: "He who gives surety for a stranger will smart for it; and he who hates suretyship is secure."²⁸⁵

Notice of default protects the legal and equitable rights of the guarantor. His rights of exoneration, subrogation, contribution,

²⁸² Professor Fuller has analogously suggested that measuring the damages caused by breach of commercial contracts by the value of the expectancy reflects the difficulty in computing reliance losses. Fuller & Perdue, *Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52, 60 (1936).

²⁸³ See *Edmondston v. Drake*, 30 U.S. (5 Pet.) 624, 637 (1831) (dictum) (per Marshall, C.J.).

²⁸⁴ *Stone-Ordean-Wells Co. v. Helmer*, 142 Minn. 263, 265-66, 171 N.W. 924, 925, (1919) (dictum); see *STEARNS* § 1.2.

²⁸⁵ *Proverbs* 11:15.

and reimbursement are operative upon default. Prompt notice enables him to bring them into play without injurious delay. But the importance of this notice is greatly reduced by the relative ease with which the guarantor can obtain expeditious information about default.

On the other hand, the creditor has almost invariably relied on the offer of guaranty. His reliance interest is of a high order. It is closely tied to basic policies in the enforcement of promises. Yet the courts have often supported the competing interests of the guarantor. One reason is the ease with which the notice requirements can be waived. Since the creditor can ask that the notice requirements be expressly excluded, he may be said to assume the risk of possible hardship when he does not do so. Inasmuch as many creditors exact the use of form guaranties²⁸⁶ which they have prepared, judicial insistence on notice requirements which are not waived by the forms is buttressed by the *contra proferentem* rule of construction.

D. *Are the Notice Requirements Theoretically Justifiable?*

Contractual theory helps to explain judicial preference for the interests of the guarantor when the guaranty does not mention notice. Although the notice requirements seem to be exceptions to generally accepted principles concerning formation and discharge of contracts, they reflect other recognized principles.

The traditional approach is that an offer for a bilateral contract requires communication of intention to accept by the offeree, but that an offer for a unilateral contract does not. The argument has been made that requiring notice of intention to accept exemplifies "modern tendencies toward obliterating the distinction between unilateral and bilateral contracts."²⁸⁷ While notice of intention to accept does modify a legal incident of the traditional unilateral contract, it is submitted that it is not of the same order as other modifications.

A unilateral contract is based on the exchange of a promise for an act. Its traditional legal incidents are (1) the offeror can withdraw his offer at any time before the requested act has been completely performed; (2) the offeree has the option of performing or

²⁸⁶ See 2 PATON, DIGEST 1945 (2d ed. 1942).

²⁸⁷ Saxena, Selected Modern Problems in Offer and Acceptance: A Comparative Study of the Law of India, England, and the United States 70 (1961) (unpublished thesis in Cornell University Library).

refusing to perform the requested act; and (3) communication of acceptance is unnecessary.²⁸⁸ These incidents have come under searching criticism in recent years.

The traditional unilateral contract did not protect an offeree who had commenced performance against revocation by the offeror. The modern tendency is to safeguard the offeree by making an offer for a unilateral contract irrevocable after part performance.²⁸⁹

The traditional unilateral contract gave an offeree who had begun performance the opportunity to speculate at the expense of the offeror. If market conditions became favorable, he could complete performance. If they turned unfavorable, he could abandon it. This occasion for speculation is enhanced by the modern tendency to consider an offer for a unilateral contract irrevocable after part performance by the offeree. Under this view part performance by the offeree deprives the offeror of the power to revoke while the offeree retains unfettered freedom to forsake performance.

The Sales Article of the Uniform Commercial Code contains a provision designed to correct this imbalance by limiting the time for speculation by the offeree.²⁹⁰ Subsection 2-206(2) provides:

“Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.”²⁹¹

This subsection leaves an offeree who has given seasonable notice free to abandon performance. But if he elects to complete performance and has not given due notice the offeror has the option of treating the offer as rejected.

The traditional unilateral contract did not stand in need of notice of acceptance. The offeror had no use for it since he customarily received, or could obtain, prompt knowledge of acceptance.²⁹² This was not true of a unilateral contract of guaranty. Since the creditor accepted by dealing with the principal, a third party, there was no assurance that the guarantor would learn of acceptance in time to plan his affairs. Thus the concept of notice of intention to accept was conceived in order to aid the guarantor.

All three modifications of the traditional unilateral contract can

²⁸⁸ See *id.* at 34.

²⁸⁹ See 1 RESTATEMENT, CONTRACTS § 45 (1932).

²⁹⁰ See HAWKLAND, SALES AND BULK SALES 8 (ALI & ABA pamphlet 1958).

²⁹¹ UNIFORM COMMERCIAL CODE § 2-206(2) (1958).

²⁹² See 1 RESTATEMENT, CONTRACTS § 56, comment *a* (1932).

be dispensed with by express agreement. Notice of intention to accept, however, is materially different from the other two.

The tendency to make an offer for a unilateral contract irrevocable after part performance by the offeree is an innovation which applies to all offers for unilateral contracts. Subsection 2-206(2) of the Uniform Commercial Code is a variation which embraces all offers within the scope of the Sales Article of the Code. On the other hand, notice of intention to accept is neither a novelty nor a concept of across-the-board latitude. It can be satisfactorily explained as an application of the following generally accepted principles concerning notice to certain unilateral contracts of guaranty.

"Notice need not be given to a promisor who has the same or substantially equivalent sources of information with respect to the facts or events . . . as those that are available to the promisee. If the promisor can find out the facts for himself as easily as the promisee can find them out and give notice of them, the giving of notice will not be a condition precedent to the promisor's duty of performance, unless he has clearly so specified in . . . [his offer]. If, on the other hand, the sources of information available to the two parties are not equivalent and it is much more difficult for the promisor to find out facts for himself than it is for the promisee to find out and give notice, it should usually be held that the giving of notice to the promisor is, by construction of law, a condition precedent to his duty to perform. It is obvious that this latter rule involves questions of degree."²⁹³

The significant facts examined in the sections dealing with the specific notice requirements relate in part to the adequacy of the guarantor's sources of information concerning acceptance. Certain of these facts should indicate to the creditor whether, in the light of his sources of information, the guarantor can speedily ascertain whether his offer has been accepted. For example, when the guarantor is a director or an officer of the principal, or a stockholder who has the legal right²⁹⁴ as well as the factual power to inspect the books, his sources of information obviously suffice. On the other hand, if the guarantor is in the West Indies and the principal and the creditor are in New York, the guarantor's sources of information may well be inadequate.²⁹⁵ There exists an area between such extremes in which a policy decision must be made concerning the

²⁹³ 3A CORBIN § 724, at 386.

²⁹⁴ See HENN, *CORPORATIONS* § 201 (1961).

²⁹⁵ See *Black, Stair & Frost v. Grabow*, 216 Mass. 516, 104 N.E. 346 (1914).

necessity of notice of intention to accept. The *Restatement of Contracts* states that it should be required only in an "exceptional case."²⁰⁶ It has been suggested that this restricts the notice requirement to situations in which the creditor knows that the guarantor cannot obtain information from the principal. If the creditor knows, for instance, that the principal himself has not learned about performance of the requested act or, although he does know of it, has concealed this information from the guarantor, notice is essential.²⁰⁷

While notice should be required in these situations, it may be desirable in others as well. The significant facts discussed above also relate to the creditor's reasonable expectations concerning the guarantor's anticipation of acceptance. Notice of intention to accept, unless expressly or impliedly waived, has historically been requisite when the creditor should know that the guarantor is unsure that his offer will be accepted, as well as when the creditor should know that the guarantor cannot promptly obtain data concerning acceptance from the principal. The crucial question is not whether the principal has and is willing to divulge information, but whether the guarantor both stands ready to and can secure the news quickly.

To the extent that the necessity of notice of intention to accept turns on the information readily available to the guarantor, it is not surprising that the concept developed and flourished in the nineteenth century, when communications were relatively undeveloped. In 1825, when a guarantor in Charleston, South Carolina, gave the principal a guaranty which was to be used in Havana, Cuba, the creditor should have known that the guarantor could not obtain adequate information regarding acceptance.²⁰⁸ The highly developed communications of today unquestionably alter the situation. In the vast majority of situations the guarantor should be able to contact the principal without undue delay. The revolution in communications also minimizes the importance of the guarantor's uncertainty as to whether his offer will be accepted. His lack of assurance can often be dissipated by the simple expedient of picking up a telephone or sending a telegram. The improvement in communications may explain why most of the cases dealing with notice of intention to accept are old ones. A plausible argument can be made that the significance of the concept vanished with the clipper ship and the pony express.

²⁰⁶ 1 RESTATEMENT, CONTRACTS § 56, comment *a* (1932).

²⁰⁷ See Campbell 547.

²⁰⁸ See *Edmondston v. Drake*, 30 U.S. (5 Pet.) 624 (1831).

The limited modern importance of notice of intention to accept raises the question whether the *Restatement of Contracts Second* should contain the present section fifty-six even in recast form. Perhaps the Biblical admonition to put new wine into new wine-skins²⁹⁹ should be followed. Deletion of section fifty-six and the addition of an appropriate illustration to the section of the *Restatement of Contracts* which defines "constructive condition" should suffice. If this is done, section eighty-six should likewise be excised from the *Restatement of Security Second*.

Notice of transactions and notice of default are also explainable in terms of notice theory. Their continued utility, however, is even more doubtful.³⁰⁰ Once notice of intention to accept is required or dispensed with, there would appear little need for other constructive conditions. The guarantor should ordinarily be able to find out whatever else he needs to know.

²⁹⁹ *Matthew* 9:17.

³⁰⁰ This contention has been disputed. An early writer, for instance, rated notice of transactions as more important than notice of intention to accept. Rogers, *Notice of Acceptance in Contracts of Guaranty*, 5 COLUM. L. REV. 215, 224 (1905). Simpson has suggested that notice of default should be given all guarantors in order to facilitate payment of claims without unnecessary litigation. SIMPSON 168-69. Such proposals deserve consideration; but the historical common-law concepts of notice of transactions and notice of default should not be revitalized. Their wane is a genuine reflection of the notice theory upon which they are based. If novel uses of notice of transactions or notice of default are found desirable they should be enacted in statutes devoid of the labyrinthine characteristics of the common-law notice requirements. See N.D. CENT. CODE §§ 22-01-06.1 to 22-01-06.3 (1960); UNIFORM COMMERCIAL CODE § 2-206(2).