over of collaterals in favor of others less needy: *Conway* v. *Vizard*, 122 Ind. 266, particularly where the deceased never regarded them as probable objects of his bounty: *In re Skaat's Will*, 26 N. Y. S. 494.

It will be seen from the cases cited, as well as from many others excluded from want of space, that while the number of these contests is great the proportion of the successful is small. This is as it should be, for in most instances they are undertaken through personal animosity or in the hope of extorting a compromise from the beneficiaries under the will. Even in cases of seeming hardship it is seldom that success can be predicted with any degree of confidence. As a means of enforcing parental authority as a protection to the aged, and the friendless from indifference and neglect, the courts firmly maintain the testator's right to freely dispose of his property.

WM. HENRY LOYD, JR.

DEPARTMENT OF COMMERCIAL LAW.

LACHMAN ET AL. *v.* BLOCK ET AL.[1] SUPREME COURT OF LOUISIANA. APRIL 9, 1894.

Acceptance of a Guaranty—Concealment of Facts by Guarantee.

A contract of suretyship or guaranty, like other contracts, requires the concurrence of intention in two minds, one of whom promises something to another who accepts. Consequently, a mere offer to guaranty is not binding until acceptance by the person to whom it is made, and until acceptance it is revocable.

Of the acceptance of an absolute guaranty notice is not requisite; but of a mere offer of guaranty, the guarantee's acceptance must be notified to the guarantor, such notification being of the essence of the agreement.

Unless interrogated, a creditor is under no obligation to disclose facts in no manner connected with the business which is the subject of the

[1] Reported in 15 So. Rep. 649 (46 La. Ann.).

suretyship, though such facts would probably have a decided influence on the surety in entering into the contract; and the current and weight of authority supports the proposition, that unless inquiry be made by the guarantor, it is not obligatory upon the guarantee to volunteer a disclosure of the debtor's previous embezzlement, and his failure to make such a disclosure will not constitute a fraudulent concealment that will operate the surety's discharge.

REQUISITES OF CONTRACTS OF SURETYSHIP AND GUARANTY.

The contract of suretyship or guaranty is said to have been "coeval with the first contracts recorded in history."

The Proverbs of Solomon contain more than one allusion to sureties and suretyship, declaring it not only unwise, but as indicating a lack of understanding, to enter into such an obligation (Prov. 11, 17, 22). (See note, Story on Contracts, § 1107.)

However inconsistent it may be with the laws and teachings of Solomon, selfishness and prudence have yielded to friendship and to the demands of social and commercial affairs, and we find the contract of a guarantor or surety to be an important factor in commercial transactions, and an important feature of commercial law. It has long been established that "sureties are favorites of the law:" *Lafayette* v. *James*, 92 Ind. 240. "Nothing can be clearer," says Mr. Justice STORY, "both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner and under the circumstances pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness:" *Miller* v. *Stewart*, 9 Wheat. 680.

Not only has it been the inclination of the common law to preserve to the fullest extent the rights of guarantors and sureties in the construction and enforcement of their contracts, regarding them as *strictissimi juris*, but the statute law also

has intervened for their protection by regulating the form of their contracts; the fourth section of the Statute of Frauds (29 Car. 2, C. 3) providing that "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

In some states this statute is in force, while in most of the others the provision above quoted has been substantially re-enacted. (See Baylies on Sureties and Guarantors, 62.) Independent of this statutory requirement, the same essential elements are required in the formation of a contract of guaranty as in the formation of any other contract; they embrace (1) the mutual assent of the parties; (2) that the parties be capable of contracting: (3) that the contract be supported by a valuable consideration. (DeColyar on Guarantees, p. 2.)

With reference to the first element mentioned the same author says (p. 2): "Every contract includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. Until therefore an acceptance be given (which must be an absolute and unqualified acceptance of the previous offer), the promisor is not liable."

Acceptance may assume three forms: (1) simple assent; (2) the giving of a promise; (3) the doing of an act. (Anson on Contracts, 16). In the case of ordinary contracts any one of these three modes of acceptance usually involves *per se*, a communication of the fact of acceptance to the promisor, but in the case of a guaranty or suretyship, the acceptance or performance of the consideration by the guarantee does not necessarily involve a communication of that fact to the promisor or guarantor; especially is this likely to be true where performance of the consideration or acceptance consists in the "doing of an act," for the peculiarity of the guarantor's obligation is that the consideration for his undertaking moves

toward and is received by his principal, who thereby has notice of the acceptance, while the guarantor may not.

Such being the case a question of some nicety and importance frequently arises in determining under what circumstances it is necessary, in order to bind the guarantor, that he be notified of the acceptance of the guaranty by the guarantee.

This was one of the questions involved in the decision of the principal case by the Supreme Court of Louisiana. The suit was founded upon the following instrument, viz.: "New Orleans, June 4, 1891, Messrs. Lachman & Jacobi, San Francisco, Cal. Gentlemen: I hereby agree to become surety for Henry Block & Bro., for the sum of $10,000, jointly and severally with Henry Block & Bro. This agreement to bind me in the sum of $10,000, until the 15th day of October, 1891. Very respectfully, (Signed), C. Lazard."

It appears that in order to secure a continuance of business transactions (consignments of liquors) between the Lachman firm and the Block Bros., the latter were requested by the former to procure security; this, it seems, was necessitated by the fact that there had been an embezzlement or defalcation by one of the latter firm, connected with previous transactions. The above paper was executed and forwarded by the latter firm to the former. One of the defenses urged was that there was no acceptance of the guaranty on the part of the plaintiff.

Mr Justice WATKINS, after reviewing the provisions of the Civil Code, in regard to the formation of contracts, including the contract of suretyship, says (p. 651): "Applying them to the agreement or proposition of the defendant, and it seems to be clear that the plaintiffs were not bound to accept same before it became complete, because it was made in terms which evidence a design on the part of Lazard to give them the right to conclude it by their simple assent; and the facts disclosed by the record satisfy us that the plaintiffs acted on the defendants' agreement to become surety for Henry Block & Bro. by extending them a line of credit, they would not otherwise have extended to them, and that this line of credit began immediately after the receipt of the defendants' agreement, is evidenced by the items of the account sued on, and

which are undenied. And if acceptance be deemed essential, the circumstances clearly indicate plaintiffs' assent—such an assent as puts it beyond the power of the defendant Lazard to voluntarily withdraw from his engagement. Certain it is that no formal notification of the creditor's acceptance is required by our law as a condition precedent to the completion of a contract of suretyship." The court further considered the proposition of guaranty to be "absolute and unconditional in its terms" and distinguished it from a mere offer of guaranty which is not binding until acceptance by the person to whom the offer is made, and which remains revocable until such acceptance occurs."

This distinction is one which is recognized in principle, both in this country and in England: De Colyar on Guarantees, p. 2; Burge on Suretyship, 16; Pittman on Principal and Surety, 28; 9 Am. & Eng. Ency. of Law, p. 78. The difficulty, however, arises in applying it to the varying circumstances of cases and in reconciling some of the cases in which it has been applied. In this connection, Brandt, in his treatise on Suretyship and Guaranty, p. 278, says: "When the guaranty is a letter of credit, or is an offer to become responsible for a credit which may or may not be given to another at the option of the party to whom the application for credit is made, the great weight of authority is that the guarantor must, within a reasonable time, be notified of the acceptance of the guaranty . . . When the transaction is admitted to amount only to an offer of guaranty, it is universally held that in order to charge the party making the offer he must, within a reasonable time, be notified that his offer is accepted. The courts, however, differ more or less as to what is a guaranty and what is an offer to guaranty."

This doctrine has been firmly established by the Supreme Court of the United States in a line of cases, beginning with a dictum of Chief Justice MARSHALL, in *Russell* v. *Clark's Ex'rs*, 7 Cranch, 69–92 (1812), as follows: "The court cannot consider these letters as constituting a contract by which Clark and Nightingale undertook to render themselves liable for the engagement of Robert Murray & Co. to Nathaniel Russell.

Had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of his engagement."

This same rule was announced by STORY, J., in *Cremer* v. *Higginson*, 1 Mason, 323 (1817).

In *Edmondston* v. *Drake*, 5 Peters, 624 (1831), the same court held that it was necessary, in order to charge the writer of a letter of credit, that the person acting upon it should give him notice that he had acted on it. In *Douglass* v. *Reynolds*, 7 Peters, 113 (1833), action was brought upon the following letter of guaranty: "Messrs. Reynolds, Byrne & Co.—Gentlemen: Our friend Chester Haring, to assist him in business, may require your aid from time to time, either by acceptances or endorsements of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time, for a sum not exceeding $8,000, should the said Chester Haring fail to do so."

It was held by Mr. Justice STORY, "that to entitle the plaintiffs to recover on the guarantee they must prove that notice had been given to the defendants of that fact in a reasonable time after the guarantee had been accepted. . . . A party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the giving of it or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate in a great measure his course of conduct and his exercise of vigilance in regard to the party in whose service it is given." This case further decides, that in a continuing guaranty notice need not be given of each credit allowed, but that notice should be given of the total responsibility of the guarantees following the last transaction; and also, that notice should be given of demand and non-payment by the principal debtor within a reasonable time.

Lee v. *Dick*, 10 Peters, 482 (1836), was based upon the following letter: "Messrs. N. & J. Dick & Co.—Gentlemen: Nightingale & Dexter, of Maury Co., Tenn., wish to draw on

you at 6 or 8 months date, you will please accept their draft for $2000, and I do hereby guaranty the punctual payment of it. Very respectfully your obedient servant, Sam'l B. Lee."

Mr. Justice THOMPSON held that the guarantees should have given notice either of an intention to accept, or that they had accepted and acted upon the guarantee, but the court refused to lay down any rule with respect to the time within which such notice must be given.

The case of *Douglass* v. *Reynolds, supra,* appeared before the court again in 1838 (12 Peters, 497), and the rule before laid down as to notice of acceptance was adhered to; Mr. Justice MCLEAN said, however, "this notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from facts and circumstances which shall warrant such inference."

In *Adams* v. *Jones,* 12 Peters, 207 (1838), Mr. Justice STORY used the following language: "and the question which under this view is presented, is whether upon a letter of guaranty addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty, and given the credit on the faith of it. We are all of the opinion that is necessary, and this is not now open to question in this court, after the decisions which have been made in *Russell* v. *Clarke,* 7 Cranch, 69; *Edmondston* v. *Drake,* 5 Peters, 624; *Douglass* v. *Reynolds,* 7 Id. 113; *Lee* v. *Dick,* 10 Id. 482; and again recognized at the present term in the case of *Reynolds* v. *Douglass.* It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses, which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity, to compel the other parties to discharge him from further responsibility."

The doctrine of the foregoing cases has been ably criticised by Judge HARE in his note to *Douglass* v. *Reynolds* (2 American Lead. Cases, 5th Ed. 59); on page 94, he says: "It

becomes plain that the numerous instances in which notice of acceptance has been held essential to the obligation of guaranties, imply and depend upon the single proposition that assent cannot give rise to a contract, unless each party knows or is informed that the other has agreed, which may be true when the obligation of the contract is meant to be reciprocal and mutual, but not when the sole object is to induce the performance of an act which is subsequently performed."

And Justice COWEN, in *Douglass* v. *Howland*, 24 Wend. 35, says: "The short answer which the English Cases, decided long before our revolution, furnish, is that the guarantor, by inquiring of his principal, with whom he is presumed to be on intimate terms, may inform himself perfectly whether the guaranty were accepted, the conditions fulfilled and payment made."

The next case was *Davis* v. *Wells*, 104 U. S. 159 (1881), concerning the following guaranty: "For and in consideration of $1 to us in hand paid by Wells, Fargo & Co., (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co. . . . to the extent of and not exceeding $10,000 for any overdrafts now made, or that may hereafter be made, at the bank of said Wells, Fargo & Co. This guaranty to be an open one and to continue one at all times to the amount of $10,000 until revoked by us in writing, &c."

Mr. Justice MATTHEWS, referring to the rule requiring notice of acceptance, said: "There seems to be some confusion as to the reason and foundation of the rule, and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of a contract of guaranty, which requires after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be

given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor. The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. . . . The rule in question proceeds upon the ground that the case in which it applies is an offer or proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete and may be withdrawn by the proposer."

"Frequently the only consideration contemplated is, that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation, on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt or it may be supported by some consideration distinct from the advance to the principal debtor passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt such a consideration is necessary to support the undertaking as a binding obligation.

In both these cases no notice of assent other than the performance of the consideration is necessary to perfect the agreement, for, as Professor Langdell has pointed out in his summary of the Law of Contract, p. 987: 'Though the acceptance of an offer and the performance of the consideration are different things, and the former does not imply the latter, yet the latter does necessarily imply the former, and as the want of either is fatal to the promise, the question whether an offer has been accepted can never in strictness become material in those cases in which a consideration is necessary, and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration.'" The court held in this case that the recital of considerations in the instrument, made it a "complete and perfect obligation of guaranty" upon delivery, and that, therefore, notice of acceptance was unnecessary.

It is interesting to compare this case with the following case of *Davis Sewing Machine Co.* v. *Richards*, 115 U. S. 524 (1885), which involved the following writing: "For value received, we

hereby guarantee to the Davis Sewing Machine Company, of Watertown, N. Y., the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis Sewing Machine Company, for property sold to said John W. Poler under this contract to the amount of $3000."

It was held by Mr. Justice GRAY, that there was "no evidence of any request from the plaintiff corporation to the guarantors, or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of the guaranty, "value received," without stating from whom, are quite as consistent with a consideration received by the guarantees from the principal debtor only."

The contract was held to be incomplete, and the guarantee was not liable for the price of goods sold by the company to the agent and not paid for by him.

The court summarized the rules upon the subject as follows: "A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor, at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty; or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor, without any previous request of the other party, and in his absence, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract."

These latest two decisions by the court, which was foremost in announcing the doctrine in this country, illustrate how closely the line is drawn in applying the principles to cases where the facts differ but slightly.

The rules of law (*supra*) upon which the decision in the *Davis Sewing Machine Co.* case was based, seem to be somewhat in conflict with those which governed the ruling of the Supreme Court of Louisiana in the principal case. The latter decision is based upon the provisions of the Rev. Civ. Code (La.), relating to contracts in general, article 1802 of which declares that a proposer "is bound by his proposition, and the signification of his dissent will be of no avail *if the proposition be made in terms which evidence a design to give the other party the right of concluding the contract by his assent, etc.*" The court considered, in the first place, that the absolute character of the instrument *implied* a waiver of any acceptance, further than a mental one, uncommunicated, followed by acting upon the proposition; second, that no notice of acceptance was required, inasmuch as a failure by the guarantee to dissent from the proposition within a reasonable time *implied* notice of such fact. The court referred to the case of *Pope* v. *Andrews*, 9 Car. & P., 564, as supporting the latter proposition, this case, however, does not seem to have been a suit upon a guaranty, nor did it involve the question as to the right of a guarantor to insist upon notice of acceptance in order to bind him. And *McIver* v. *Richardson*, 1 M. & S., 557, which did involve that question, appears to have been decided the other way.

Upon the first point the court differs from those decisions, which seem to place the contract of guaranty upon a slightly different footing from ordinary contracts, as regards the question of acceptance. For instance, in *Oaks* v. *Weller*, 13 Vt. 110, it was said: "When a proposition is made by a man for a thing to be done for himself, he must know, when done, that it is done on his proposition. But when he proposes, his responsibility for a thing to be done for another, he may not know that it is done, or even if he does, he will not know whether it is done on his proposition or on the sole credit of the third person, or some other security. The responsibilities and duties of a guarantor imply certain correlative rights and privileges, which, withont notice of his condition, he can never exercise."

PETERS, J., in *Steadman* v. *Guthrie*, 4 Met., (Ky.,) 156, said: "It is a general rule, that if a person offer to pay money upon the performance of an act by another, the performance of the act by the latter, without any notice of his acceptance of the offer, or of his intent to act upon it, gives him a right to demand the money. . . . But where the offer is to guaranty, a debt for which another is primarily liable in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor, but the creditor must notify the guarantor of his acceptance of the offer, or of his intent to act upon it."

In the case of *Gardner* v. *Lloyd*, 110 Pa., 278, the court, DEAN, J., said: "Men are bound to pay their own debts; in the absence of an express contract, the law implies one, but it will imply no contract to pay other men's debts, nor any essential element of such contract, such as waiver of notice where the settled law requires notice that an offer to guarantee has been accepted."

Mr. Justice KNOWLTON, in the recent case of *Bishop* v. *Eaton*, 37 N. E. (Mass.) 665 (1894), lays down a doctrine which seems to be on the medium line and very reasonable. The proposition of guaranty was in these words: "If Harry needs more money, let him have it or assist him to get, and I will see that it is paid." The court held it to be "an offer to become effectual as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer, and furnishes the consideration. Ordinarily, there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer.

"But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that, which constituted the acceptance.

"In such a case it is implied in the offer that to complete the

contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act, so far that the promisee cannot be affected by a subsequent withdrawal of it, if, within a reasonable time afterwards, he notifies the promisor. In accordance with these principles it has been held in cases like the present, when the guarantor would not know of himself from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration."

These principles are in harmony with those announced in the principal case, excepting that notice is held requisite when the act of acceptance is "of such a kind that knowledge of it will not quickly come to the promisor."

But it is a difficult and not altogether profitable task to attempt to distinguish cases and reconcile decisions upon this question: "The rights and duties of parties to guaranties must, from the variety of circumstances under which they have been entered into, be materially governed by the particular circumstances of each case:" 2 Am. L. C. 87.

The distinguishing feature of the guaranty in the principal case was, that it purported to be a present, absolute undertaking, in which the liability was limited and made certain as to duration and amount; no consideration, however, was mentioned or suggested therein.

In the following cases the guaranty was held to be complete, and notice not necessary: *Davis* v. *Wells*, *supra*; *Johnson* v. *Bailey*, 15 S. W. (Texas) 499; *Klosterman* v. *Olcott*, 41 N. W. (Neb.) 250; *Taylor* v. *Tolman Co.*, 47 Ill. App. 264; *Nading* v. *McGregor*, 23 N. E. (Ind.) 283; *Currie Fertilizer Co.* v. *Byfield*, 34 N. E. (Ind.) 451; *Hall* v. *Weaver*, 34 Fed. 104; *Doud* v. *Nat. Park Bank*, 54 Fed. 846.

Where the contract guarantied or agreement to accept is contemporaneous with the guaranty, notice is not necessary: *Wildes* v. *Savage*, 1 Story, 22; *Bechtold* v. *Lyon*, 29 N. E. (Ind.) 912; *Wright* v. *Griffith*, 121 Ind. 478; *Lemp* v. *Armen-*

gol, 26 S. W. (Tex.) 941. Nor where there has been a precedent request: *Hasselman* v. *Japanese Co.*, 27 N. E. (Ind.) 318; *contra*, *Kay* v. *Allen*, 9 Pa. 320.

Where the consideratiou for the guaranty moves indirectly toward the guarantor, no notice is necessary: *Doud* v. *Nat. Park Bank*, 54 Fed. 846; *Nading* v. *McGregor*, 23 N. E. (Ind.) 283.

In these cases the rule requiring notice of acceptance to complete the contract of guaranty has been adopted: *Davis Sewing Machine Co.* v. *Richards*, *supra*; *Winnebago Paper Mills* v. *Travis*, 58 N. W. (Minn.) 36; *Patterson* v. *Reed*, 7 W. & S. 144; *Emerson* v. *Graff*, 5 Casey, 358; *Kay* v. *Allen*, 9 Pa. 320; *Kellogg* v. *Stockton*, 29 Pa. 464; *Coe* v. *Buehler*, 110 Pa. 366; *Gardner* v. *Lloyd*, 110 Pa. 278; *Steadman* v. *Guthrie*, 4 Met. (Ky.) 156; *Ruffner* v. *Love*, 33 Ill. App. 60; *Newman* v. *Streator*, 19 Ill. App. 594; *Rankin* v. *Childs*, 9 Mo. 674; *Mussey* v. *Rayner*, 22 Pick. 223; *Allen* v. *Pike*, 3 Cush. 238; *Bishop* v. *Eaton*, *supra*; *Wilkins* v. *Carter*, 19 S. W. (Texas) 997; *Oaks* v. *Weller*, 13 Vt. 110; *Hill* v. *Calvin*, 4 How. (Miss.) 231; *Walker* v. *Forbes*, 25 Ala. 139; *McCollum* v. *Cushing*, 22 Ark. 540; *Bank* v. *Sloo*, 16 La. 539, and see cases cited in Brandt on Suretyship, sec. 186, note 1; and in 9 Am. & Eng. Ency. of Law, p. 78, 79.

Notice may be inferred from facts and circumstances: *Reynolds* v. *Douglass*, 12 Peters, 497; *Raffner* v. *Love*, 33 Ill. App. 601.

Knowledge from any source is equivalent to notice: *Powell* v. *Chicago Carpet Co.*, 22 Ill. App. 409; *Tolman Co.* v. *Means*, 52 Mo. App. 385; *Mitchell* v. *Railton*, 45 Mo. App. 273; *Webster* v. *Smith*. 30 N. E. (Ind.) 139.

Notice may be waived: *Fisk* v. *Stone*, 50 N. W. (Dakota) 125.

Closely allied to the guarantee's duty to give notice of acceptance is the duty to make disclosure of facts affecting the liability of the guarantor and material to the subject-matter of his contract.

This was a second question involved in the case under consideration: "Was it the duty of Lachman & Jacobi to have

given information to C. Lazard, of Henry Block's defalcation and embezzlement in anticipation of the former becoming the surety or guarantor for the latter's firm?" The court disposed of the question as follows: "It is our deliberate conviction that such embezzlement did not constitute a fact material to the agreement, or transaction of suretyship, or guaranty, and it was not necessary for the guarantees to disclose it, and that their failure to disclose it does not operate the release or discharge of the defendant." A review of the decisions upon this question does not come within the scope of this annotation, as such relates to the discharge of the surety by the fraud of the creditor.

De Colyar points out (p. 260) that, under the English authorities, "no concealment will vitiate a guaranty unless it be *fraudulent*."

It was said in *Insurance Co.* v. *Lloyd*, 10 Ex. 523, that "the mere relation of principal and surety does not require the voluntary disclosure of all the material facts in all cases. The same rule as to disclosures does not apply in cases of principal and surety as in cases of insurance on ships and lives."

Lord CAMPBELL'S criterion as to whether a disclosure should be made voluntarily was "whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction:" *Hamilton* v. *Watson*, 12 C. & F. 109.

In *Magee* v. *Manhattan Ins. Co.*, 92 U. S. 93, Mr. Justice SWAYNE said: "But there is a duty incumbent on him, (the surety). He must not rest supine, close his eyes and fail to seek important information within his reach. If he does this and a loss occurs he cannot, in the absence of fraud on the part of the creditor, set up as a defence, facts then first learned, which he ought to have known and considered before entering into the contract." The decision in this case was similar to the one under discussion.

STAYTON, C. J., in *Screwmen's Assn.* v. *Smith*, 7 S. W. (Texas) 793, suggests the difficulty in the surety securing from his principal truthful admissions of moral delinquency as distinguished from matters showing him to be merely negli-

gent, dilatory or unskillful, though not dishonest. The court thinks that in the one case disclosure should be made, while in the other it need not.

See cases cited in 24 Am. & En. Ency. of Law (Suretyship), 793, and Brandt on Suretyship, Sec. 419, *et seq.*

It does seem that in those cases where the opportunity to obtain information exists, the creditor should be entitled to presume that the surety has availed himself of it, and not be required to volunteer the disclosure, especially in view of the fact that the very purpose of a guaranty or suretyship is to provide against possible risk, and the relation between the principal and surety being presumed to be intimate, the latter should be vigilant and guard himself, else he must realize the truth of Solomon's saying: "He that is surety for a stranger shall smart for it; *and he that hateth suretyship is sure.*"

G. HERBERT JENKINS.

Philadelphia, April, 1895.