Rowlatt on Principal and Surety (4th ed.), by David G. M. Marks and Gabriel S. Moss, Sweet and Maxwell, 1982, li + 275 pp. (incl. index), $55.50 (approx.).

The law of guarantees, at least by the Law Schools in this country, is kept secret from students. It is put in the category of matters best left to be "picked up" in practice. If pressed to explain themselves, those charged with teaching contract and commercial law will point to the pressure of abundant subject matter upon limited curriculum space and suggest or imply that the law of guarantees lacks sufficient intellectual weight to merit academic analysis. So endless teaching hours are consumed with interminable agonising over offer and acceptance, and the contractual capacities of drunks and lunatics, whilst the company law student has pressed upon him the factual minutiae of so many cases (a number merely interlocutory injunction applications at that) dealing with directors' duties that he must wonder how in the real world any board ever manages to get on with making profits for shareholders. But is the fundamental point ever made to him that the taking of guarantees from directors and shareholders of proprietary companies has been perhaps the most common method adopted by creditors to meet the obstacles of limited corporate liability?

Of course, if the student has available to him a course in equitable doctrines and remedies then he will at least encounter sureties in dealing with subrogation and contribution. But in this country the majority of Law Schools do not (perhaps could not) offer such a course, and in any event guarantees involve much more than that.

For over eighty years the answer for the lawyer who has had to face a problem in this area has been to go to *Rowlatt*. This work (under the editorship of the future Sir Alan Mocatta) reached its third edition in 1936. Copies became hard to come by. Any barrister owning a copy was wise to keep it in closest custody. Once "borrowed" by a colleague, recapture might prove a lengthy business.

Now there is a fourth edition, with two editors, both members of the English bar. One of them also has an American background which has given the new edition a valuable leavening of United States authority. An effort has been made to refer to Commonwealth authority. For example, there is repeated reference to the exhaustive judgment of Isaacs, J. in *Cellulose Products Pty. Ltd.* v. *Truda*[1] (dealing with the vexed question of the availability to a surety of a set-off for unliquidated damages claimed by the principal debtor against the creditor). But the effort is far from complete. Ignored are the valuable treatments of guarantee/indemnity distinction by Sir Frederick Jordan in *Jowitt* v. *Callaghan,*[2] and of the "bank guarantee" in *Australasian Conference Association Ltd.* v. *Mainline Construction Pty. Ltd.*[3] Nor is there any treatment of the High Court's decision in *The Bank of Adelaide* v. *Lorden,*[4] as to difficult questions that

[1] (1970) 92 W.N. (N.S.W.) 561.
[2] (1938) 38 S.R. (N.S.W.) 512.
[3] (1978) 141 C.L.R. 335.
[4] (1970) 127 C.L.R. 185.

can arise when a surety alleges a discharge of his obligation by reason of the creditor accepting a composition of debts. In the same vein, attention might also have been paid to *Walker* v. *Bowry*[5] and *McDonald* v. *Dennys Lascelles.*[6] And if, as the editors believe it is still expedient to deal (in Chapter 6) with undue influence in this field, what of *Bank of New South Wales* v. *Rogers*?[7] The omission of so many leading Australian authorities will seriously impair the utility of this edition not only for Australians, but readers throughout the common law world. The interrelation between the members of that community has changed beyond recognition since the third edition of *Rowlatt* was published in the year Edward VIII abdicated. One hopes by the time of the fifth edition the publishers, if they seek markets outside England for their costly product, will have appreciated this.

There was in *Rowlatt,* for all the classic status accorded it by judges in innumerable cases, a further serious weakness, one not removed in this edition. It appears in footnote 3 on page 1 of the new text. There the reader is told in the one breath that the term "guarantee" has many usages, technical and specific, loose and general, that some concepts are "analogous" to suretyship, that there are doctrinal and practical distinctions between guarantee and indemnity, that "letters of comfort" are not guarantees. But for elaboration the reader is invited to look elsewhere, not to this text. It might have been added that even in a document drawn by lawyers, use of the term "guarantee" will not be determinative. Thus, in *Wood Hall Ltd.* v. *The Pipeline Authority*[8] Barwick, C.J. held that the term "guarantee" used in the documents before him was a misnomer for a bond. But what distinguishes a bond from a guarantee? Chapter 17 of the new edition of *Rowlatt* contains a discussion (complete with sample documents in the first Appendix) of performance bonds, but the reader would be none the wiser as to why Barwick, C.J. in the above citation was correctly putting the position that a bond carried none of the rights or obligations of suretyship.

The limitation imposed upon the scope of the work, as above discussed, is made the more curious by inclusion of a miscellany of topics of no more than peripheral importance to the immediate subject of guarantees. Thus, there are chapters devoted to stamp duty, landlord and tenant, illegality and undue influence, which inevitably fall between the two stools of comprehensive coverage to be found in specialist texts and a basic summary which will encourage the reader to seek fuller particulars elsewhere. The Appendix includes several forms of guarantee which are suggested as suitable to be taken by a banker. However, they are so constricted in scope as to bear little resemblance to forms in common use in this country.

A particularly tacky passage appears at pages 69-70 of the new edition, carried over without comment from the third edition, page 93. *Kenny* v.

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[5] (1924) 35 C.L.R. 48.
[6] (1933) 48 C.L.R. 457.
[7] (1941) 65 C.L.R. 42.
[8] (1979) 141 C.L.R. 443 at 445.

Employers' Liability Insurance[9] is cited as authority (as indeed on one reading it may well be) that even in the absence of a trust, B may sue A to recover loss suffered by C, although A's legal obligation was to B only. But is this correct? It probably is wrong.[10] The point is that in *Rowlatt* its authority is assumed, without comment.

There is a flaw in the structure of the work which requires fuller discussion. It is an unwillingness (one should not assume an inability) to explore the doctrinal fundament upon which rests the rules governing the rights and liabilities of sureties. At times this can invite mischief where there should be no occasion for it. An example appears at page 91 (page 120 of third edition). It is there said that a surety "is not discharged by a variation [in the principal obligation] to which he assents afterwards, even though there may be no fresh consideration for the assent". For authority there is citation of *Mayhew* v. *Cricket*[11] and *Smith* v. *Winter*.[12] It is then said that the assent can operate as a waiver of something in the nature of a condition, or of an equitable claim to the cancellation of a security whose express terms cover the contract as varied. A footnote states that the above two cases are instances of waiver of an equitable claim. There is a similar passage at page 175 of the new text (pages 275-276 of third edition).

But what does all this mean? What is waiver of an equitable claim? Why indeed is it "settled law" that any relevant variation of the terms of the obligation between a creditor and a principal debtor will discharge a guarantor, as was said in *Trade Credits Ltd.* v. *Burnes*?[13]

By 1872 (in *Phillips* v. *Foxall*)[14] it was stated in the Court of Queen's Bench, that a surety after he had been discharged from his contract by the act of the creditor may revive his liability by a subsequent promise or assent. But it should be observed that both in this case and in *Polak* v. *Everett*,[15] the pleas in question were stated to be equitable, a step possible with revised system of pleading instituted under the Common Law Procedure Act 1854. In 1897 in the third edition of de Colyar's *Treatise of the Law of Guarantees* (at 363) it was asserted that even before the introduction of the judicature system of 1873, the same principles which were held to discharge the surety in equity also discharged him at law. But, as Sir Samuel Griffith had pointed out in *Queensland Investment and Land Mortgage Company Limited* v. *Hart*,[16] it is hard to see how a new promise to meet an obligation discharged at law could be effective either as an estoppel *in pais* or, in the absence of fresh consideration, as a contractual promise.

How then is the subsequent promise or assent effective? A satisfactory answer is only to be found in the operation of equity principles upon legal

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[9] [1901] 1 I.R. 301.
[10] See Jacobs' *The Law of Trusts in Australia* (4th ed.) para. 219, *Woodar Investment Development Ltd.* v. *Wimpey Construction U.K. Ltd.* [1980] 1 All E.R. 571.
[11] (1818) 2 Swans. 185.
[12] (1838) 4 M. & W. 454.
[13] [1979] 1 N.S.W.L.R. 630 at 633; reversed, on other grounds, [1981] 1 N.S.W.L.R. 93.
[14] L.R. 7 Q.B. 666 at 676-677.
[15] (1875) 1 Q.B.D. 669.
[16] (1894) 6 Q.L.J. 186.

rights. It is clear upon a reading of *Story on Equity,*[17] White and Tudor's *Leading Cases in Equity,*[18] *Mayhew* v. *Crickett, Hawkshaw* v. *Parkins,*[19] *Tyson* v. *Cox,*[20] *Eyre* v. *Everett*[21] and *Smith* v. *Winter* that (i) a variation did not discharge the surety at law, and he might at law be sued to judgment on his guarantee, (ii) however, the variation might give him an equity to obtain a common injunction restraining the exercise of the creditor's legal rights against him and thus it might be said, equity treated him as discharged, (iii) but equity would stay its hand and let the law run its course if the surety had acknowledged or assented to the continuation of his liability, so that it was not a question of "waiver" but of there being a defence to any application in Chancery by the surety for a common injunction, (iv) the common law judges, in the language of Lord Eldon in *Eyre* v. *Everett,* "fell in love with" the equitable concepts as to discharge and imported them into the law so as to administer such relief as originally was to be had in Chancery only; by 1838 Baron Parke (in *Smith* v. *Winter*) would state flatly that "the whole of this is an equitable doctrine which has crept into the law", (v) thus, where previously the surety had to go to Chancery he could now, perhaps even before the legislation of 1854 and 1873, get at law the same result, but no better result, so that a subsequent promise or assent was fatal to him at law as in equity, (vi) there is no question of estoppel *in pais* or of waiver or of a promise that fails for want of fresh consideration.

As to all of this the reader of *Rowlatt* will be none the wiser. If he were made aware of it then he would, by reversion to first principles, be enabled to cope with new situations as they arise. It is the task of what purports to be the leading text in the field so to equip him. As more and more graduates know less and less of the history of our legal institutions, the responsibility in question becomes all the greater.

The resuscitation of *Rowlatt* is a welcome event and no doubt the fourth edition will be cited in judgments as frequently as was the third. But for all that, one is left wondering whether the continued success of the enterprise is not *faute de mieux.*

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[17] Paras. 324-326.
[18] 9th ed., Vol. II, 521-554.
[19] (1819) 2 Swans. 540.
[20] (1823) Turn. and Rus. 395.
[21] (1826) 2 Russ. 381.

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