[HIGH COURT OF AUSTRALIA.]

DOBBS . . . . . APPELLANT;
DEFENDANT,

AND

THE NATIONAL BANK OF AUSTRALASIA LIMITED . . . . . } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *June* 4, 5; *July* 1.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Guarantee—Ousting jurisdiction of Court—Public policy—Certificate—Conclusive evidence of indebtedness — Validity — Joint and several guarantee — Securities furnished by co-guarantor—Release by bank—Authority.

A clause in a guarantee given to a bank provided that a certificate signed by the manager of the office at which the principal debtor's account was kept should be conclusive evidence of his indebtedness at a particular date.

Held (1) that the clause was not contrary to public policy as ousting the jurisdiction of the Court, and, therefore, was not void; (2) that a certificate given pursuant to the clause was conclusive upon the parties of the amount and existence of the principal debtor's indebtedness.

By another provision in the guarantee the bank was authorized to release any security held by it "without discharging or affecting in any way the guarantor's liability" under the guarantee. The word "guarantor" was defined to include each of three co-guarantors.

Held that the bank, without reference to the other co-guarantors, was entitled to release securities furnished by any of the guarantors.

Decision of the Supreme Court of New South Wales (Full Court): *National Bank of Australasia Ltd.* v. *Dobbs*, (1935) 35 S.R. (N.S.W.) 223; 52 W.N. (N.S.W.) 53, affirmed.

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APPEAL from the Supreme Court of New South Wales.

The National Bank of Australasia Ltd. brought an action in the Supreme Court of New South Wales against Frank Morris Dobbs to recover, under a guarantee, the sum of £998 8s. 7d. In its declaration the plaintiff set forth the substance of the guarantee, including a term that a certificate signed by the manager or acting manager for the time being of the office of the plaintiff bank at which the account of the principal debtor was kept should be conclusive evidence of his indebtedness as at the date of the certificate. The plaintiff averred that at a particular date a certificate in the form required showed that the principal debtor was indebted to it in the amount claimed in the action. By his first plea, on equitable grounds, the defendant alleged, in effect, that he was a co-surety with two other persons and that it was a term and condition of the guarantee that the plaintiff would not release the securities of his co-sureties, yet the plaintiff without his knowledge or consent did so. To this plea the plaintiff replied by pleading the whole of the document constituting the guarantee, whereupon the defendant demurred to that replication, and, in joining in demurrer, also demurred to the declaration. By his second plea, also upon equitable grounds, the defendant alleged that it was a term and condition of the contract that the plaintiff would use due care in honouring cheques purporting to be drawn by the principal debtor, yet the plaintiff acted so negligently and improperly that it wrongly honoured cheques to an amount equal to or exceeding the amount claimed. The plaintiff demurred to this plea, relying principally on the ground that the certificate of the manager was conclusive. By a third plea the defendant alleged that neither the amount claimed nor any part of it became or remained due to the plaintiff. To this plea also the plaintiff demurred, relying on the same clause in the document that the certificate of the manager should be conclusive evidence.

So far as material the instrument of guarantee was as follows:— "To the National Bank of Australasia Limited In consideration of advances now made or hereafter to be made by you to Manly and District Newspapers Limited hereinafter called the customer (and whether made to the customer alone or jointly with any other

person or persons . . . by allowing an overdrawn account or by discounting for the customer bills of exchange or promissory notes by giving letters of credit to or by incurring liabilities for the customer or by any other means whatsoever) and of forbearance on your part from pressing for payment of any such similar past advances (if any) or of either or any of the aforesaid considerations we Frank Morris Dobbs " and two other named persons " jointly and severally hereinafter called the guarantor (which expression shall include each of us . . .) undertake to pay to you on demand all such advances and all debts which are now or which may hereafter be owing to you on any account by the customer either directly or indirectly and either alone or jointly with any other person or persons . . . (including the amount of all drafts bills of exchange or promissory notes bearing the customer's name—alone or jointly with others—as maker drawer acceptor or indorser which are now held or may be held by you at the time of such demand) together with interest and bank charges . . . provided that the amount ultimately payable by the guarantor hereunder shall not exceed the sum of twelve hundred pounds and interest thereon . . . 2. You may without the guarantor's assent grant to the customer . . . or to any person or persons . . . liable to you in respect of the payment of such advances debts and liabilities or any of them or to any maker drawer acceptor or indorser of any such draft bill of exchange or promissory note any time or other indulgence or may renew wholly or in part or give up on any terms you think fit any such draft bill of exchange or promissory note and you may take any security from and compound with or release them or either or any of them respectively and release abandon vary or relinquish in whole or in part any security for the time being held by you without discharging or affecting in any way the guarantor's liability hereunder . . . 7. A demand shall be deemed to be duly made on the guarantor if the same be made in writing signed by an officer of the bank and be given to the guarantor or left at or duly posted to . . . the address given at the foot hereof, or otherwise as the guarantor shall from time to time notify to the . . . bank in writing. 8. A certificate signed by the manager or acting manager for the time being of your head office

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or of any other office of your bank at which the banking account of the customer shall for the time being be kept stating the balance of principal and interest due to you by the customer shall be conclusive evidence of the indebtedness at such date of the customer to you." The document bore the signature of the defendant and of his two co-sureties.

The Full Court of the Supreme Court held that the plaintiff's demurrer to the defendant's second and third pleas succeeded, and that on the whole judgment should be for the plaintiff in demurrer: *National Bank of Australasia Ltd.* v. *Dobbs* (1).

From that decision the defendant now, by leave, appealed to the High Court.

Mason K.C. (with him *McGechan*), for the appellant. The instrument of guarantee does not provide that a certificate shall be given as to the amount owed by the principal debtor; it is not a condition precedent to any action by the respondent. On the fair construction of the document it is a guarantee in the strict sense, not a promise to pay, with a machinery clause which is either good or bad. The certificate is not conclusive as to the amount payable. "Conclusive evidence" clauses which are intended to, or have the effect of, ousting the jurisdiction of the Court are invalid as being contrary to public policy (*Czarnikow* v. *Roth, Schmidt & Co.* (2); *Doleman & Sons* v. *Ossett Corporation* (3)). *London Tramways Co.* v. *Bailey* (4) was considered by the Court in *Armstrong* v. *South London Tramway Co.* (5).

[EVATT J. referred to *Scrutton* on *Charter Parties and Bills of Lading*, 13th ed. (1931), pp. 73, 74.]

This is an agreement to pay the amount actually due to the bank, and therefore the appellant is entitled to the aid of the Court. If the appellant is bound by a certificate he could be put into the position of being compelled to pay an amount which may not in fact be owing to the respondent, by reason, e.g., of items wrongly debited to the account, credit entries incorrectly posted, or not posted at all. The

(1) (1935) 35 S.R. (N.S.W.) 223; 52 W.N. (N.S.W.) 53.
(2) (1922) 2 K.B. 478.
(3) (1912) 3 K.B. 257, at pp. 266, 267, 273.
(4) (1877) 3 Q.B.D. 217.
(5) (1890) 6 T.L.R. 410; 7 T.L.R. 123.

decision in *Laidlaw* v. *Hastings Pier Co.* (1) was based entirely on the facts of that case, and, therefore, cannot be applied to this case. The limited effect, or the possible limited effect, of a certificate of this nature was mentioned in *Harris* v. *Byerley* (2). In every case it is a question of the construction of the particular contract. If the contract is to pay what is owing, then the Court is concerned to determine the amount owing. A contract whereby it is attempted to take away the right of a litigant to have an inquiry as to the amount owing constitutes an attempt to oust the jurisdiction of the Court and is bad (*Sharpe* v. *San Paulo Railway Co.* (3)). Clause 8 of the agreement contemplates the possibility of several certificates. The certificate merely indicates the indebtedness of the principal debtor, as at a certain date, according to the books of the respondent bank. A certificate may be given only by those who have personal knowledge as to the facts or matter certified (*Farmer* v. *Legg* (4)). A certificate as to the position according to the books is not a certificate as to actual indebtedness. The giving of a certificate under the guarantee is a ministerial act; the certifier is not an arbitrator (*Stevenson* v. *Watson* (5); *Chambers* v. *Goldthorpe*; *Restell* v. *Nye* (6)).

[EVATT J. referred to *In re Birmingham Brewing, Malting and Distilling Co.* (7).]

Clause 8 should be carefully scrutinized by the Court to ascertain if it has the effect of preventing the appellant from seeking the aid of the Court (*Newcastle Breweries Ltd.* v. *The King* (8); *Halsbury's Laws of England*, 2nd ed., vol. 13, p. 401, par. 453). All that was intended here was that a certificate should be conclusive evidence according to the books. The respondent has a duty not to be negligent in the keeping of its books. The concluding provision of clause 2 of the document only authorizes the respondent to release third persons and to release the securities of third persons without affecting the guarantor; it does not contemplate the release of a

(1) (1874) *Hudson* on *Building Contracts*, 4th ed. (1914), vol. II., p. 13.
(2) (1918) 25 C.L.R. 55.
(3) (1873) L.R. 8 Ch. 597, at p. 612.
(4) (1797) 7 T.R. 186, at pp. 191, 192; 101 E.R. 923, at p. 926.
(5) (1879) 4 C.P.D. 148.
(6) (1901) 1 Q.B. 624, at p. 635.
(7) (1883) 52 L.J. Ch. 358.
(8) (1920) 1 K.B. 854, at p. 865.

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co-surety, or any or all of his securities. It was not intended that the provision should extend to any of the guarantors.

Teece K.C. (with him *Herron* and *Keegan*), for the respondent. The promise on the part of the appellant as a guarantor was to pay the amount certified; that is, the certificate was to be conclusive evidence of the principal debtor's indebtedness to the respondent. Alternatively the promise was to pay the amount mentioned in the certificate if a certificate was given, or, if no certificate was given, to pay the amount which was in fact due. A proper demand under the guarantee can be made only if the amount due is stated. The intention of the document is shown by clause 7 read in collocation with clause 8, that is, the service on the surety of a demand accompanied by a certificate of the manager showing the amount due. The real promise is a promise to pay on demand the amount named in the certificate (*Toms* v. *Wilson* (1); *Massey* v. *Sladen* (2)). Although parties cannot make an agreement which confers upon some extra-judicial tribunal an absolute right to determine the liability of the parties under the agreement, completely ousting the jurisdiction of the Court, they can make an agreement for the determination by an extra-judicial tribunal of some of those factors which constitute the liability of the parties making the promise (*Lishman* v. *Christie & Co.* (3); *Carver's Carriage by Sea*, 7th ed. (1925), sec. 69 b, pp. 98, 99). It is competent for the parties to agree that one of the matters which may be the cause of dispute in determining liability can be settled or determined by some person or tribunal. An agreement of that nature receives recognition from the Court on the ground that it is an agreement to prevent disputes (*Lishman* v. *Christie & Co.* (4)). Here the manager's certificate is not merely based upon the position as disclosed by the books of account. In order to certify the indebtedness the manager must of necessity satisfy himself as to the correctness of the various items (*James Finlay & Co.* v. *N. V. Kwik Hoo Tong Handel Maatschappij* (5)). A certificate, when given, is binding on both

(1) (1862) 4 B. & S. 442; 122 E.R. 524.
(2) (1868) L.R. 4 Ex. 13.
(3) (1887) 19 Q.B.D. 333.
(4) (1887) 19 Q.B.D., at p. 338.
(5) (1929) 1 K.B. 400.

parties (*Laidlaw* v. *Hastings Pier Co.* (1); *Clemence* v. *Clarke* (2); *Chambers* v. *Goldthorpe*; *Restell* v. *Nye* (3)).

[DIXON J. referred to *Ex parte Young*; *In re Kitchin* (4).]

The law relating to the release of a co-surety is stated in *Rowlatt* on *Principal and Surety*, 2nd ed. (1926), p. 275. Upon a fair construction the words "any security" in clause 2 of the document should not be limited to securities of third persons. The provision was intended to extend to the securities of each of the guarantors. The extent to which certain matters can be made the subject of a plea of cross-action or a direct plea in answer to the declaration was dealt with in *Bow, McLachlan & Co.* v. *Ship "Camosun"* (5).

Mason K.C., in reply. *Lishman* v. *Christie & Co.* (6) is distinguishable; there there was not any inconsistency, as exists here, between the agreement in the bill of lading and the special agreement as to what was to be conclusive evidence of the amount payable. *Mediterranean and New York Steamship Co.* v. *A. F. & D. Mackay* (7) was decided upon the facts; there was not any question of law involved. It is contrary to public policy that a mere certifier should by his certificate decide questions of law. An agreement which purports to oust, or has the effect of ousting, the jurisdiction of the Court is illegal and void on grounds of public policy (*Halsbury's Laws of England*, 2nd ed., vol. 8, p. 532, par. 1177). In *Harris* v. *Byerley* (8) it was held that the evidence produced was conclusive evidence as to the books. The release of one surety without the consent of his co-sureties has the effect of releasing all sureties (*Smith* v. *Wood* (9)).

Cur. adv. vult.

July 1.

The following written judgments were delivered:—

RICH, DIXON, EVATT AND MCTIERNAN JJ. This is an appeal by leave against a judgment in favour of the plaintiff given by the Supreme Court of New South Wales. Leave was given because the

(1) (1874) *Hudson* on *Building Contracts*, 4th ed. (1914), vol. II., p. 13.
(2) (1880) *Hudson* on *Building Contracts*, 4th ed. (1914), vol. II., p. 54.
(3) (1901) 1 Q.B. 624.
(4) (1881) 17 Ch. D. 668, at p. 672.
(5) (1909) A.C. 597, at p. 610.
(6) (1887) 19 Q.B.D. 333.
(7) (1903) 1 K.B. 297.
(8) (1918) 25 C.L.R. 55.
(9) (1929) 1 Ch. 14.

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demurrers raise two questions which go to the validity of the appellant's defences to the action.

The action is brought upon a joint and several guarantee given by the appellant and two other sureties to the respondent bank to secure a customer's account.

The appellant relies apparently upon two matters by way of defence. The first is a denial that the customer is indebted to the bank. The case intended to be made in support of the customer's denial of his indebtedness appears to be that the adverse balance is produced by debiting to the account cheques drawn in a manner not conforming to the authorization upon which they depended. The second matter of defence set up by the appellant is the breach of an alleged collateral promise on the part of the respondent bank that it would not release certain securities given by one of the sureties who joined the appellant in giving the guarantee.

The respondent bank contends that neither of these defences can avail against the provisions of the instrument of guarantee. One provision which it contains purports to make the certificate of an officer of the bank conclusive of the customer's indebtedness. The bank relies upon this as destructive of the appellant's denial of indebtedness. Another provision authorizes the bank to release any security held by it without discharging the guarantors or any of them. The bank contends that this provision applies to securities given by any one of the guarantors and is inconsistent with the collateral promise or agreement set up.

The Supreme Court has decided both contentions in favour of the bank.

The appeal against the decision depends upon the construction and the validity of the provision relating to the certificate of the customer's indebtedness and upon the construction of the provision relating to the release of securities.

It is convenient to deal first with the question of the effect of the certificate of indebtedness. The instrument of guarantee is divided into numbered clauses. The first of these contains a joint and several undertaking to pay on demand all advances made by the bank to the customer and all debts which may be owing to the bank on any account by the customer, together with interest and

bank charges, subject to a proviso limiting the amount of the guarantors' liability. The eighth clause is as follows :—"A certificate signed by the manager or acting manager for the time being of your head office or of any other office of your bank at which the banking account of the customer shall for the time being be kept stating the balance of principal and interest due to you by the customer shall be conclusive evidence of the indebtedness at such date of the customer to you." This clause does not purport to impose upon the bank the necessity of obtaining the certificate it describes. It is not a qualification of the undertaking to pay contained in the first clause. It does not make a certificate a condition precedent to recovery. The promise remains a promise to pay the amount owing ; it does not become a promise to pay the amount owing if certified or a promise to pay only what is certified as owing. The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that, for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate. It was contended, however, for the appellant that, upon its true construction, the clause did not make the certificate conclusive of the legal existence of the debt but only of the amount. It is not easy to see how the amount can be certified unless the certifier forms some conclusion as to what items ought to be taken into account, and such a conclusion goes to the existence of the indebtedness. Perhaps such a clause should not be interpreted as covering all grounds which go to the validity of a debt ; for instance, illegality, a matter considered in *Swan* v. *Blair* (1). But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness. The clause means what it says, that a certificate of the balance due to the bank by the customer shall be conclusive evidence of his indebtedness to

(1) (1835) 3 Cl. & Fin. 610, at pp. 632, 635, 636 ; 6 E.R. 1566, at pp. 1574, 1575, 1576 ; *sub nom. Swan* v. *Bank of Scotland*, 10 Bli. (N.S.) 627, at pp. 632, 637, 638 ; 6 E.R. 231, at pp. 233, 234, 235.

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the bank. Upon this construction the appellant contends that the clause is void. The contention is based upon the view that it attempts to oust the jurisdiction of the Court upon an issue essential to the guarantor's liability and to substitute for the judgment of the Court the determination or opinion of an officer of the bank. This argument appears to us to involve a misunderstanding of the principle upon which it professes to rely. It confuses two different things. A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the Courts and positive provisions giving efficacy to the award of an arbitrator when made or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might have been required to adjudicate. It has never been the policy of the law to discourage the latter. The former have always been invalid. No contractual provision which attempts to disable a party from resorting to the Courts of law was ever recognized as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the Courts to enforce them. Parties may agree in the sense of arriving at a common intention as to their future action but, because they do not contemplate legal relations, avoid the creation of rights and thus preclude resort to the Courts (see *Rose and Frank Co.* v. *J. R. Crompton & Bros. Ltd.* (1); *Cohen* v. *Cohen* (2)).

Parties may contract with the intention of affecting their legal relations, but yet make the acquisition of rights under the contract dependent upon the arbitrament or discretionary judgment of an ascertained or ascertainable person. Then no cause of action can arise before the exercise by that person of the functions committed to him. There is nothing to enforce; no cause of action accrues. But the contract does not attempt to oust the jurisdiction (*Scott* v. *Avery* (3); *Caledonian Insurance Co.* v. *Gilmour* (4)).

What no contract can do is to take from a party to whom a right actually accrues, whether *ex contractu* or otherwise, his power

(1) (1923) 2 K.B. 261; (1925) A.C. 445.
(2) (1929) 42 C.L.R. 91, at p. 96.
(3) (1856) 5 H.L.C. 811; 10 E.R. 1121.
(4) (1893) A.C. 85.

of invoking the jurisdiction of the Courts to enforce it (*Kill* v. *Hollister* (1); *Thompson* v. *Charnock* (2); *Czarnikow* v. *Roth, Schmidt & Co.* (3)). Accordingly a contract providing for arbitration did not, apart from statute, prevent the institution of an action or suit, even although an actionable breach of contract was committed by the refusal to refer (*In re Smith & Service and Nelson & Sons* (4), per *Bowen* L.J.). But if, before the institution of an action, an award was made, it governed the rights of the parties and precluded them from asserting in the Courts the claims which the award determined. By submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. That authority enables him to extinguish an original cause of action. His award will do so if it negatives the existence of liability. It will do so if it operates, not merely to ascertain the existence and measure of the original liability, but to impose a new obligation as a substitute, whether the obligation results from the tenor of the award or from an antecedent undertaking of the parties to give effect to the determination it embodies (*Crofts* v. *Harris* (5); *Allen* v. *Harris* (6); *Freeman* v. *Bernard* (7); *Allen* v. *Milner* (8); *Commings* v. *Heard* (9)). The award given under authority of the parties operates as a satisfaction pursuant to their prior accord of the causes of action awarded upon (cf., per *Fletcher Moulton* L.J., *Doleman & Sons* v. *Ossett Corporation* (10)). It is true that, apart from statute, such an authority was revocable. It must subsist up to the making of the award. The authority was by its nature countermandable and no act or contract of the party could make it otherwise (*Vynior's Case* (11)). He might be bound by his own deed or agreement, or by a rule of Court, or a Judge's order, not to revoke his submission, but the result was no more than to make it a breach of duty to countermand the authority of the arbitrator. None the less the arbitrator's authority was revoked. But, when an arbitrator, exercising a subsisting authority, delivered his award, the law gave full effect

(1) (1746) 1 Wils. 129; 95 E.R. 532.
(2) (1799) 8 T.R. 139; 101 E.R. 1310.
(3) (1922) 2 K.B. 478.
(4) (1890) 25 Q.B.D. 545, at p. 554.
(5) (1691) Carth. 187; 90 E.R. 713; 12 Mod. Rep. 4; 88 E.R. 1127.
(6) (1696) 1 Ld. Raym. 122; 91 E.R. 978.
(7) (1697) 1 Ld. Raym. 247; 91 E.R. 1061.
(8) (1831) 2 Cr. & J. 47; 149 E.R. 20.
(9) (1869) L.R. 4 Q.B. 669.
(10) (1912) 3 K.B., at p. 267.
(11) (1609) 8 Co. Rep. 80 a; 77 E.R. 595.

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to it. A valid award was recognized by the Courts as precluding recourse to the original rights the determination of which had been referred to arbitration. In *Cleworth* v. *Pickford* (1) Lord *Abinger*, referring to the rule that an agreement to refer is not binding, said :—" It is true that such an agreement is not binding unless it is acted upon, but when the reference has taken place, and the award is made, it becomes so. In one sense it does not oust the Court of its jurisdiction, but in another sense it does ; for when the award is made, the jurisdiction of the Courts is gone ; and all the Courts have to say is, whether it is a good award or not." Any issue might be submitted to arbitration, and upon that issue the award would be as conclusive upon the parties as an award upon the whole cause of action if that had been submitted. What at common law could not be done was to abandon by contract the power of invoking the Court's jurisdiction before the cause of action had been extinguished by an award and the power of countermanding the authority of the arbitrator. But it was never considered that the Court's jurisdiction was ousted by an award, notwithstanding that it concluded the parties with respect to matters which otherwise would be determined by the Court. It is therefore a mistake to suppose that the policy of the law exemplified in the rule against ousting the jurisdiction of the Court prevents parties giving a contractual conclusiveness to a third person's certificate of some matter upon which their rights and obligations may depend. In *Ex parte Young* ; *In re Kitchin* (2) *James* L.J. says :—" If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract he must abide by it."

There are many familiar kinds of contracts containing provisions which make the certificate of some person, or the issue of some document, conclusive of some possible question. The most conspicuous example, perhaps, is the certificate of the engineer or architect under contracts for the execution of works or the construction of buildings.

For these reasons we think the certificate of the officer of the bank is conclusive upon the parties of the amount and existence of the customer's indebtedness.

(1) (1840) 7 M. & W. 314, at p. 321 ; 151 E.R. 786, at p. 789.
(2) (1881) 17 Ch. D., at p. 672.

The second question in the appeal is whether the terms of the instrument of guarantee are consistent with the collateral promise intended to be set up that the bank would not release the securities furnished by one of the appellant's co-sureties. Unless they are consistent with it, the collateral promise cannot be relied upon (*Wren* v. *Bank of New Zealand* (1); *Hoyt's Pty. Ltd.* v. *Spencer* (2)). The question depends upon the few concluding lines in the second clause in the guarantee. The passage authorizes the bank to release, abandon, vary, or relinquish, in whole or in part, any security for the time being held by it without discharging or affecting in any way the liability of the guarantors, or any of them, thereunder. In the instrument the expression is "the guarantor's liability," but the word "guarantor" is defined to include each of the guarantors. It is contended for the appellant that the clause has no application to securities furnished by one of the guarantors. In support of the contention the preceding portion of the clause is relied upon as showing that the guarantors are regarded as, so to speak, a unit and the clause is directed to enabling the bank, without prejudicing its rights against them, to act with respect to other persons, e.g., the principal debtor, or the makers and indorsers of bills of exchange. The context does not, in our opinion, require any restriction upon the natural meaning of the concluding passage of the clause, which extends to every security without regard to the character of the person who furnished it. In this view the clause is inconsistent with the collateral contract set up.

It is unnecessary to consider some questions which might arise upon the form of the pleadings if the defendant's contentions were well founded in substance.

In our opinion the decision of the Supreme Court is right and the appeal should be dismissed.

STARKE J. The appellant, Dobbs, was sued by the bank upon a joint and several guarantee, given by him and others to the bank, of the account of the Manly and District Newspapers Ltd. The guarantee contained the following stipulation:—"A certificate signed by the manager or acting manager for the time being of your

(1) (1935) Unreported. [Noted, 9 A.L.J. 38.] (2) (1919) 27 C.L.R. 133.

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Starke J.

head office or of any other office of your bank at which the banking account of the customer shall for the time being be kept stating the balance of principal and interest due to you by the customer shall be conclusive evidence of the indebtedness at such date of the customer to you." The pleadings, which it is unnecessary to state at length, raised on demurrer the validity of this clause. It was argued that the clause was contrary to public policy as ousting the jurisdiction of the Courts. An agreement not to sue on a contract would doubtless be void, and so, I should think, would be a stipulation in a contract that no proceedings at law or in equity should be brought in respect of matters referred to arbitration (*Lee* v. *Page* (1); *Cooke* v. *Cooke* (2); *Czarnikow* v. *Roth, Schmidt & Co.* (3); but see *Dimsdale* v. *Robertson* (4)). But it has never been thought that the submission of disputes to arbitrators whose award was final and conclusive ousted the jurisdiction of the Courts. True, in some cases the award was a condition precedent to the right to sue, and in other cases the submission did not bar legal proceedings unless an award were made, in which case "the original rights of the parties . . . disappeared, and their place was taken by their rights under the award" (*Scott* v. *Avery* (5); *Harris* v. *Reynolds* (6); *Doleman & Sons* v. *Ossett Corporation* (7)). Again, the "conclusive evidence" clauses in various mercantile contracts have never been held to oust the jurisdiction of the Courts (*Lishman* v. *Christie & Co.* (8); *Mediterranean and New York Steamship Co.* v. *A. F. & D. Mackay* (9); *James Finlay & Co.* v. *N. V. Kwik Hoo Tong Handel Maatschappij* (10); *South American Export Syndicate Ltd. and La Frigorifica Uruguaya* v. *Federal Steam Navigation Co.* (11)). As Lord *Esher* M.R. said of such a clause in *Lishman* v. *Christie & Co.* (12), "the provision is a good business provision for the purpose of avoiding disputes. . . . Of course, if there were fraud, such a provision would not take effect, for fraud overrides all such

(1) (1861) 30 L.J. Ch. 857.
(2) (1867) L.R. 4 Eq. 77.
(3) (1922) 2 K.B. 478.
(4) (1844) 7 I. Eq. R. 536; 2 Jo. & Lat. 58.
(5) (1856) 5 H.L.C. 811; 10 E.R. 1121.
(6) (1845) 7 Q.B. 71; 115 E.R. 414.
(7) (1912) 3 K.B. 257.
(8) (1887) 19 Q.B.D. 333.
(9) (1903) 1 K.B. 297.
(10) (1929) 1 K.B. 400.
(11) (1909) 25 T.L.R. 272.
(12) (1887) 19 Q.B.D., at p. 338.

provisions." Certificates of engineers and architects under engineering and building contracts are common; they may certify facts, or approval, or sums to be paid. The "conclusive evidence" clause is not unknown even in guarantees. It may be found in precedents of guarantees. (See *Encyclopædia of Forms and Precedents*, 2nd ed. (1925), vol. 7, Guarantees, Forms 20, 21, 22, pp. 45-54.) Lastly, parties may make admissions of rights or facts in the Courts. In none of these cases is the jurisdiction of the Court ousted: all that has been done or attempted is to provide for the ascertainment of rights or facts by the parties or by some agreed person or tribunal, and to leave the enforcement of the parties' rights, so ascertained or flowing from the facts so found, to the determination of the Courts of law. The clause in question here contains no stipulation, express or implied, that any party shall not resort to the jurisdiction of the Courts of law: it is an evidentiary stipulation for use before those Courts. It is quite optional with the bank whether it will or will not avail itself of the benefit of the stipulation; but the appellant has agreed to be bound by the certificate of an officer of the bank, and there is nothing in the policy of the law which requires the decision of the Court that he should not abide by his agreement.

It was contended that, upon a proper construction of the clause, the certificate was conclusive only of amount and not of liability. The words, however, are "conclusive evidence of the indebtedness . . . of the customer to you." That provision involves a consideration not only of the items that should go into the account, but of the liability of the appellant in respect of them.

Another question is also raised by demurrer upon the pleadings. It is alleged, in substance, that the appellant was co-surety with two other persons, and that the bank promised that it would not release the securities lodged with the bank by his co-sureties, yet the bank without his knowledge and consent did so. The guarantee, which is stated at length in the pleadings, provides that the bank may release, abandon, vary, or relinquish in whole or in part any security for the time being held by the bank without discharging or affecting in any way the guarantor's liability thereunder. But it was contended that this clause gave no authority to release

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securities deposited by a party to the guarantee itself. The authority to release is, however, general in its terms, and is not controlled by reference to other authority contained in the same clause. The promise alleged by the appellant therefore contradicts the terms of the guarantee, which must prevail.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *McMaster, Holland & Co.*

Solicitors for the respondent, *Minter, Simpson & Co.*

J. B.

[HIGH COURT OF AUSTRALIA.]

AMALGAMATED ENGINEERING UNION . APPLICANT;

AND

THE METAL TRADES EMPLOYERS' ASSOCIATION AND OTHERS . } RESPONDENTS.

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SYDNEY, *Aug.* 8; *Sept.* 4-6.

EVATT J.

Industrial Arbitration (Cth.)—Industrial dispute—Award—Parties—Employees' organization—Employers' organization—Persons who joined employers' organization after the dispute—Jurisdiction of the Court to bind those persons—Commonwealth Conciliation and Arbitration Act 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), sec. 29.

The Commonwealth Court of Conciliation and Arbitration has jurisdiction to make an award binding present and future members of an employers' organization party to a dispute, in respect of members of an employees' organization, party to the same dispute, employed by them.

Burwood Cinema Ltd. v. *Australian Theatrical and Amusement Employees' Association*, (1925) 35 C.L.R. 528, applied.