

*Judgement of the Lords of the Judicial Committee
of the Privy Council on the Appeal of James
Mackellar in his capacity of Acting General
Manager of the Natal Bank v. Emma Charlotte
Bond, from the Supreme Court of the Colony of
Natal; delivered 25th June 1884.*

Present:

LORD WATSON.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

SIR ARTHUR HOBHOUSE.

THIS Appeal is taken in an action brought at the instance of the Appellant, in his capacity of Acting General Manager of the Natal Bank, for the purpose of enforcing the rights of the Bank under a mortgage bond granted upon the 13th October 1882. By that bond one Granger professed, as attorney for the Respondent, Mrs. Bond, to bind her personally as a surety to the Bank for the floating balance that might be due by a firm of Johnstone and Company, at any time, to the extent of 1,500*l.*, and also to mortgage to the Bank a property in Church Street, Pietermaritzburg, in further security. By the law which prevails in Natal a lady cannot be effectually bound as a surety, even where she executes the deed by her own hand, unless she specially renounces the benefits of the *senatus Consultum Velleianum*, and also the benefits of another rule, *de authenticá*. The effect of these privileges is to render her deed altogether void, unless she has expressly renounced her right to plead them. Mr. Granger has renounced that right on her behalf. He was merely a sub-attorney, authorised specially to that

effect by Mr. Bond, the Respondent's husband, who held a general power of attorney from the Respondent dated the 20th November 1874. If that power of attorney gives Mr. Bond authority to make such a renunciation on behalf of his wife, then these legal privileges were well renounced by his attorney, Mr. Granger, because the general deed of November 1874 gives him authority to delegate. We must, therefore, look to the bond of the 20th November 1874 for the purpose of ascertaining whether the Respondent had any power to impose an obligation of suretyship upon his wife, and also to renounce the protection which the law gave her against the consequences of entering into such an obligation. It appears to their Lordships to be doubtful whether the power of attorney gives Mr. Bond any power to bind his wife as a surety. It may be plausibly argued that the words "securities, of what nature or kind soever," from their position in the context, can only be held to mean securities for money taken or money given; and the general words that follow,—“to perform all such acts and things,” and so forth,—which were strongly founded upon by the Counsel for the Appellant, may very naturally be read as powers to perform such acts as are necessary or for the advantage of the wife in relation to the management of her estate. But it is not necessary to determine the precise limits of the power of attorney in that direction, because their Lordships are of opinion that there is no power given by this deed to dispense, on behalf of the lady, with the protection which the law affords her in case of a deed being executed by her, or for her, binding her as a surety. There are no express words in this power of attorney giving her husband such authority, nor do there appear to their Lordships to be any words from which it can be fairly implied that the lady had in view the renunciation of her legal privileges, or that she intended to

confer any authority to renounce them on her behalf.

These observations dispose of the whole case that is before the Board. But it is necessary to advert to one or two other points which have been raised at the Bar, not for the purpose of deciding them, but for the purpose of showing that they do not arise, and cannot be decided, in this Appeal.

First of all it is maintained that, by the law of Natal, Mr. Bond had, by the virtue of his *jus mariti* and right of administration, one or other, or both, power to dispose of all property belonging to this lady which was not expressly reserved as her separate estate, after marriage. And it was contended that there was evidence, or at least that it might fairly be inferred as a matter of fact, that the property in question, which was mortgaged by the deed of the 13th October 1882, was really property the administration and power of disposal of which rested entirely with the husband. But the mortgage deed, which embodies the transaction between the parties, proceeds on the plain footing that the property thereby given over as security was the separate estate of the lady, and that the husband had only authority to dispose of it—indeed, he professes that he has no other authority—by virtue of the power of attorney which he had got from his wife in the year 1874. It would be a very strong thing in the face of that profession, upon which the mortgage transaction proceeds, to infer from some mere scintilla of evidence—for there is nothing more in this case—that this property stood in such a position that by law Mr. Bond had the sole power of alienation. The authorities that were cited at the Bar may or may not be well decided in the circumstances to which they apply. Upon that point it is unnecessary to offer any opinion. It is sufficient to say that there are no facts proved or pleas stated in this case

which can raise any question in which they would be available as precedents. The declaration is laid wholly on the bond. It is framed upon the footing that the husband had power to dispose of his wife's property because he was her attorney. There is an attempt, no doubt, to validate his exercise of the power by alleging that the lady had an interest in the firm to cover whose debit balances in account with the Bank the security was given; but that is not proved to have been the fact.

Then another point was taken, the third plea in the replication being an averment to the effect that at the time of the marriage the value of her estate was very small, and that the property in question, the mortgaged property, had been entirely acquired by the husband's trading, and had been under his uncontrolled administration. It is possible that if those facts had been made out some of the authorities we were referred to might apply. It might be that these facts, if established, would give the husband full authority to alienate the property. But not one word of that allegation has been established by proof. Therefore the only point really raised by the pleadings and by the evidence being whether or not Mr. Bond had, under the power of attorney, authority to renounce these legal exceptions on the part of his wife, their Lordships have no hesitation in coming to the conclusion that the judgement of the Court below is well founded. They will, therefore, humbly advise Her Majesty to affirm the judgment of the Court below, and to dismiss the Appeal with costs.