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May 19.

[IN THE COURT OF APPEAL.]

MARRIOTT *v.* CHAMBERLAIN.

Practice—Discovery—Interrogatories—Material Facts—Disclosure of Names of Persons, though probably to be Witnesses—Libel—Justification.

In an action for libel the defendant pleaded that the libel was true. The substance of the libel was that the plaintiff had fabricated a story to the effect that a certain circular letter purporting to be signed by the defendant had been sent round to the defendant's competitors in business. The plaintiff had in speeches and letters stated that he had seen a copy of the alleged letter, that two of such letters were in existence in the possession respectively of a firm of bankers and a firm of manufacturers at Birmingham, and that his informant in the matter was a solicitor of high standing at Birmingham.

In interrogatories administered by the defendant the plaintiff was asked to state the name and address of his informant, in whose hands he had seen the copy of the letter, and the names and addresses of the persons to whom the letter had been sent, and in whose possession the two letters existed; but he refused to do so on the ground that he intended to call those persons as his witnesses at the trial:—

Held, that the defendant was entitled to discovery of the names and addresses of such persons as being a substantial part of facts material to the case upon the issue on the plea of justification.

APPEAL from the decision of a Divisional Court (Mathew and A. L. Smith, JJ.), affirming an order of Field, J., whereby he directed that the plaintiff should make further answer to certain interrogatories.

The facts were as follows:—

The action was for libel, the alleged libel being contained in a letter written by the defendant on the 19th of November, 1885.

The material part of the libel as set out in the statement of claim was as follows: "A little later he (the plaintiff) published a pamphlet, chiefly occupied with personal abuse of myself. I have never read this libel, but I am told that it contained the first sketch of the forged letter of which he (the plaintiff) has assumed the authenticity. Like some other false witnesses, he appears to consider that he is entitled to invent or repeat slanders without the slightest shadow of proof and to quote them ever afterwards as established facts, if the persons libelled do not think it worth their while to contradict them. . . . .

According to his own account he founded himself on the gossip of anonymous informants, and printed as an accurate and verbatim copy the letter which he now admits to represent his recollection of the substantial effect of an alleged conversation. I regret to say that I do not believe his statement. I do not believe that any respectable man in Birmingham told him (the plaintiff) that such a letter existed, or had ever been written. I am convinced that the letter is a pure fabrication of Mr. Marriott himself, who thus secured his object and created a temporary sensation by the exceptional grossness and license of this attack on a public man whose position almost necessarily precludes reply."

The statement of defence admitted the writing and publication of the libel, and justified it in the following terms: "Before and at the time of the publication of the alleged libel the plaintiff was a candidate for the representation of Brighton in parliament, and the plaintiff had on various public occasions (and amongst others at Brighton during the course of and for the purposes of his said candidature) published of the defendant, in letters, pamphlets, and speeches, words charging the defendant with pretending to a character to which he was not really entitled, and alleging in particular that the defendant, when a member of a firm of screw-makers at Birmingham called Nettlefold & Co., had amassed a fortune by grinding down poor people and by (amongst other means) writing and sending to many persons, including the less wealthy competitors of the said firm, a certain threatening letter signed with the defendant's name, of which letter the plaintiff alleged that he had seen a copy, with intent (as suggested by the plaintiff) to compel them to enter into arrangements with the said Nettlefold & Co., or to discontinue their business. The said allegations so made by the plaintiff relating to the conduct of the defendant when and as a member of the said firm, and to the alleged writing and sending by the defendant of the said alleged threatening letter, were admitted by the plaintiff in his said letters, pamphlets, and speeches to be founded on hearsay, except as to the said copy letter which he alleged that he had seen. The said charges, imputations, and allegations so made by the plaintiff were false in every parti-

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cular, and the said allegations as to the said alleged letter had been publicly contradicted by the defendant (as the plaintiff then knew) before they were repeated by the plaintiff as aforesaid. There was no such letter, and the plaintiff had not seen a copy of any such letter. The defendant says that the words of the said libel are, according to their fair and ordinary meaning, true in substance and in fact."

The defendant administered interrogatories to the plaintiff, among which were the following:—

"(6.) Did you ever prior to the making of your said speeches (certain speeches referred to in a previous interrogatory, extracts from which were annexed to the interrogatories), and when first and where and in whose hands see the original or any written copy of the letter alleged by you in your said speeches to have been signed by the defendant, and to have been sent by him to the competitors of the firm of Nettlefold & Co.? If yes, did you at the time or afterwards, and when, make or cause to be made or obtain any copy of the said letter? Is such copy, if any, now, and if not when was it last in your possession, custody, or control?

"(8.) Give the names and addresses of the manufacturers of screws to whom you allege in your said letter (a letter written by plaintiff to defendant on the 16th of November, 1885, and referred to in a previous interrogatory) and speeches that the said letter alleged by you therein to have been signed by the defendant was sent by the defendant?

"(9.) Did you not on or about the 21st November, 1885, write and cause to be published in the *Standard* newspaper of 24th November, 1885, the letter a copy of which is annexed to these interrogatories and marked E.? If yes, give the names and addresses of the 'solicitor of high standing in Birmingham,' the 'eminent banking firm,' and the 'firm of manufacturers at Birmingham' therein mentioned."

An extract from a speech made by the plaintiff at a public meeting on the 4th of April, 1884, was annexed to the interrogatories, from which it appeared that the plaintiff had spoken to the following effect: "Mr. Chamberlain was a very rich man, and the question he" (the speaker) "wanted the working classes

and all people whom Mr. Chamberlain addressed and before whom he posed as their saviour, to consider was: what his personal character had been as a business man? In Birmingham he was in business in the screw trade, which was a monopoly of a certain company called Nettlefold & Co. When he was in that company there were a number of small and honest and intelligent workers in the same business; but to make his fortune he wished to crush or buy up these small opponents. He" (the speaker) "knew that for a fact, for there was a letter which was sent not to one but to many of these opponents and signed by Mr. Chamberlain's name. He had seen a copy of one of those letters, and, although he could not give the exact words, he could give the spirit of it, and if it was not true let Mr. Chamberlain deny it. The letter was headed 'Nettlefold & Co.,' and was to this effect: 'Dear Sir—We must make hay while the sun shines. Are you prepared to sell your screws at 70 per cent. discount? If you are not, we are, and we have 100,000*l.* behind us. At the same time we are willing to come to terms if you are.—Yours, truly.—J. Chamberlain.'"

Another extract was annexed to the interrogatories from a speech made by the plaintiff on the 12th of October, 1885, to a somewhat similar effect as that already set out.

The letter, a copy of which was annexed to the interrogatories and marked E, was as follows. It was a letter written by the plaintiff to the *Standard* by way of answer to a letter written by the defendant to a Brighton newspaper, and contained this passage: "I quoted a specimen of the letters which were sent out to establish this monopoly. Of the monopoly Mr. Chamberlain wisely takes no notice. Of the letters he says they are my invention. He must know this to be untrue. My informant is a solicitor of high standing in Birmingham, one whose name is as well known to Mr. Chamberlain as to myself, and at a proper time I shall be ready to make it public. Two such letters at least are now in existence, one in the keeping of an eminent banking firm, and the other of a firm of manufacturers at Birmingham."

The plaintiff's answer to the interrogatories above set forth, which was objected to as insufficient, was as follows: He admitted

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writing the letter referred to in the 9th interrogatory, and proceeded: "To the 6th interrogatory I answer that prior to the making of the speeches therein referred to I did not see the original, but I did see for the first time on or about the 29th day of February or the 1st of March, 1884, at Brighton, a written copy of the letter in the said interrogatory referred to, and I did at the time obtain a copy of the said letter, which was for some time in my possession, but I have since lost the same, and cannot say when it was last in my possession. I did not allege in any of my said speeches that the said letter was signed by the defendant. I stated that it was signed by the name Joseph Chamberlain. I decline to state in whose hands I saw the said written copy on the ground that I intend to call such person as a witness at the hearing of this action, and on the same ground I decline to give the names and addresses asked for in the 8th and 9th interrogatories."

Field, J., at chambers, ordered that further answers should be made by the plaintiff to the 6th, 8th, and 9th interrogatories, and on appeal the Divisional Court affirmed his order.

Sir R. E. Webster, Q.C., and *Ram*, for the plaintiff. The rule is, that a party to an action is entitled to discovery of material facts which are in issue, but not of the names of the witnesses by whom or of the evidence by which they are to be proved: *Eade* v. *Jacobs* (1); *Benbow* v. *Low* (2); *Attorney-General* v. *Gaskill.* (3) The persons of whose names the defendant claims discovery are the witnesses by whom the plaintiff must necessarily prove his case in answer to the plea of justification.

[FRY, L.J. referred to the case of *Storey* v. *Lord Lennox.* (4)]

But the names of these persons are not facts directly material which are in issue. The fact in issue is, whether the plaintiff fabricated the existence of this letter or not. Who the persons are in whose hands such letters exist, or in whose hands the copy was seen by the plaintiff is not a matter in issue, but merely evidence of such matters. Similar considerations apply in regard to the name of the plaintiff's informant, and the names of the persons

(1) 3 Ex. D. 335.
(2) 16 Ch. D. 93.
(3) 20 Ch. D. 519.
(4) 1 Keen, 341.

to whom the original letters were sent. An original letter might never have existed, and yet, if the plaintiff had reasonable grounds for thinking that it did, the defendant would fail to prove his plea of justification. Therefore the existence or non-existence of the original is not material, except by way of evidence. A party is not bound to discover in answer to interrogatories every collateral fact from which an inference may be drawn as to the existence or non-existence of a fact in issue. If it were so, every question that could be put in cross-examination would be admissible by way of interrogatory. The questions which the defendant seeks to compel the plaintiff to answer are questions as to collateral matters as to which the plaintiff may be cross-examined at the trial, but it does not follow that they are properly matter for interrogatories. The names of these persons are mere details of the case for the plaintiff, which he will have to prove at the trial; they are not part of the defendant's case, and the defendant is not entitled to discovery of them. The defendant's case is that there was no such letter: if so, there can be no persons in whose possession such letters exist. The defendant says that the story is all a fabrication, and that the plaintiff had seen no copy of the letter. Therefore he could not have seen such a copy in any one's hands according to defendant's case. A party is not entitled to cross-examine by interrogatories as to the collateral details of his opponent's case in order to disprove it. These interrogatories do not go to matters which tend to prove the defendant's case, but the reverse.

Sir Charles Russell, Q.C., A.G., Sir Henry James, Q.C., and *R. S. Wright*, for the defendant. The plaintiff may bonâ fide intend at the present moment to call these persons as witnesses, but it does not follow that they will be called at the trial. If a fact is material, the right to discovery of it is not ousted, because such discovery may involve disclosure of the names of persons who probably will be witnesses. The issue on the plea of justification must turn on the questions whether these alleged letters existed, and whether the plaintiff had grounds for supposing that they did. The plaintiff having shewn by his statements what the facts are on which he will rely for disproving the justification, the defendant is entitled to information as to the material circum-

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stances of such facts. He is entitled to know the names of the persons alluded to by the plaintiff in order to identify them and to ascertain how far their status and character could have afforded the plaintiff any trustworthy ground for believing in the existence of the letter. The defendant has to prove a negative; but how can he do so except by disproving the facts as alleged by the plaintiff, and how can he disprove such facts without information as to their material circumstances? They cited *Saunders* v. *Jones* (1); *Stainton* v. *Chadwick* (2); *Grumbrecht* v. *Parry* (3); *Attorney-General* v. *Corporation of London.* (4)

Sir R. E. Webster, Q.C., in reply.

LORD ESHER, M.R. In this case the plaintiff has brought an action for libel. The libel complained of appears in substance to be a statement that he fabricated a story with regard to his having seen a copy of a certain letter alleged to have been written by the defendant's firm. The defendant justifies, and undertakes to prove that the plaintiff did fabricate the story. What does that proof involve? It would in the first place be material for the defendant to prove that no such letter was ever written. That, if it could be proved, would go to shew that there could not have been any copy of such letter, and that it was unlikely that any alleged copy really existed. Secondly, it would be material to prove that no copy or alleged copy of any such letter ever existed. If those two facts could be established, the defendant would have proved his case, because, if there never was such a letter, or any such copy, or alleged copy, it follows that the plaintiff must have fabricated the story. It would on the other hand be material for the plaintiff by way of destroying the case set up by the defendant to prove the existence of the original letter, the existence of the copy, and that the copy was shewn to him. Those are facts which he need not necessarily put on the record, for all that he need do in his pleadings is to deny what the defendant asserts when he alleges the truth of the libel; but they are facts which, if proved, would be material as disproving the defence set up by the defendant. Now it appears from documents that

(1) 7 Ch. D. 435.
(2) 3 Mac. & G. 575.
(3) 32 W. R. 558.
(4) 2 Mac. & G. 247.

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are before the Court, viz., letters and reports of speeches of the plaintiff which he does not deny, that the plaintiff actually does assert those facts in answer to the defendant's allegation that the story of the letter is a fabrication. He asserts in terms that there was a copy of the letter, and that it was shewn to him, or at any rate he was informed of its contents by persons on whose statements he was entitled to rely and did rely. Again, the defendant having denied the existence of the original letters which were alleged to have been sent round to the smaller manufacturers, the plaintiff has asserted in answer to him that there were such letters, and that two such letters are in the hands of certain bankers and others. He has condescended upon the facts on which he relies, and has declared that his case in answer to the defendant's depends upon certain facts which he is in a position to prove, and which if proved will be fatal to the defendant's case upon the plea of justification. Under these circumstances the question is, whether the defendant has not a right to insist on being informed in answer to his interrogatories of all the material circumstances, of all the substantial part of these facts so asserted by the plaintiff.

Various grounds are relied upon on behalf of the plaintiff in support of the contention that he is not bound to answer further. First it is said that, even if the names of the persons in question are a substantial part of material facts and the defendant would otherwise be entitled to discovery of them, the defendant has no right to have them disclosed, because the plaintiff has sworn that he intends to call these persons as witnesses. I cannot see how that can be any sufficient reason for exempting the plaintiff from the obligation to disclose the names, assuming that he would otherwise be bound to disclose them. Assuming that the plaintiff does bonâ fide intend at present to call these persons as witnesses, it does not follow that they will be called at the trial. Then it is said that the defendant is not entitled to interrogate as to these facts, because the plaintiff did not set them up till after the cause of action arose; but I cannot see why, if a party sets up certain material facts as constituting his case at any time, the other party should not be entitled to interrogate as to the substantial portion of them. Again, it is said that the facts required to be

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stated are merely matter for cross-examination of the plaintiff. But cross-examination, however skilful, unless there are some materials in the possession of the cross-examining counsel for contradicting or checking the witness, is often a very unsatisfactory mode of getting at facts. It does not appear to me that there is anything in any of the reasons that have been put forward to shew why the plaintiff should not answer further, assuming that the matters as to which the further answer is required are matters forming a substantial part of the facts material to the issue, and not merely the names of witnesses or mere evidence of such facts.

We must then consider the various matters in question to see whether they are a substantial part of any fact material to the issue. First, as to the persons in whose possession it is alleged that the original letters are. No doubt it will be a matter in dispute at the trial, though not directly in issue on the pleadings, whether such letters were ever written. I cannot help thinking that the existence or non-existence of such letters is a fact material to the issue. I think it must at any rate reduce the damages very much, if it were proved that there never was any such letter written by the defendant or his firm. Be that as it may, in any case the existence or non-existence of the original letters, though not a fact directly in issue, is a very material fact with regard to the inference that may be drawn from it as to the fact in issue. The plaintiff says that there are such letters in existence in the hands of persons in Birmingham. It being a fact in dispute whether such letters ever existed, it seems to me to be a material part of the fact as alleged by the plaintiff who such persons are. It is one of the substantial circumstances of a fact that will be in dispute between the parties at the trial upon the issue on the plea of justification, and the plaintiff, having condescended on the facts on which he relies, must state the substantial circumstances of them. Next, with regard to the copy of the letter; the issue on the pleadings apparently being whether the plaintiff fabricated the story, it will be a matter material to such issue, though not itself directly in issue, whether any such copy existed, or whether statements were made to the plaintiff leading him to think that it did exist. Here, again, the plaintiff has condescended on certain facts in

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relation to the matter. He has stated that he has been shewn a copy, and has vouched a certain solicitor and others in relation to the existence of such copies. That, again, is in my opinion a material fact which will be in dispute at the trial, and which, if proved, may be fatal to the defendant's justification; and it seems to me that it is a substantial portion of the fact who these persons are. It does not, to my mind, signify, in dealing with these questions, on whom it lies to prove the facts with regard to which the interrogatory is put. These facts may be called part of the plaintiff's case, but, if they are, I think the defendant has a right to interrogate with regard to them, because they are part of the plaintiff's case. The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute, but forms no part of the facts themselves. But with these exceptions it seems to me that pretty nearly anything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue.

On the grounds which I have stated I think that the decision of the Court below was right.

BOWEN, L.J. I am of the same opinion. It appears to me that it is impossible, in considering what the right of a party to have discovery by interrogatories may be, to look only to the issue as apparent on the pleadings, for it may well be that at the trial the case may depend on matters not directly put in issue by the pleadings. The parties may shew, and I think in this case they have shewn, by the way in which they have conducted their controversy, that, when the case comes to trial, the matter will be fought out on certain lines, though such lines are not disclosed by the pleadings. It seems to me that in the present instance the plaintiff has placed his case on a certain basis, the firmness or infirmity of which will make all the difference at the trial; and

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that the defendant will not have a fair chance of disproving the case so set up by the plaintiff, unless he is told with somewhat greater particularity what it is. The libel charges the plaintiff with having fabricated a story about a copy of a letter supposed to have been written. So the plaintiff has two strings to his bow. He may say, first, that the letter existed in fact, or secondly, by way of alternative, that, though it did not exist, he had reasonable grounds for supposing that it did exist. If he succeeds in establishing either of these positions he wins the action. The defendant's case must be that no such letter existed, and that the plaintiff had no reason for thinking that it did. He has not two strings to his bow, but must prove both these propositions. If he fails to prove both, he fails to support the onus thrown upon him. Anything, therefore, which tends to prove or disprove either of those propositions is material to his case. The plaintiff in the course of the controversy between himself and the defendant in order to make good his position has condescended on certain facts as constituting his case. He says in effect that he was shewn a copy of the letter by a person on whom he could rely, and that duplicates are now in the possession of particular persons. The truth or falsehood of these statements will make all the difference in the aspect of the case. Suppose that it is shewn that there was no such letter written as alleged, and that the plaintiff had no sufficient reason for thinking there was, the effect must be at any rate greatly to reduce the damages, because it would be shewn that the plaintiff's attack on the defendant was groundless. It is obvious therefore that the facts so asserted by the plaintiff will be, to say the least, very material, if proved at the trial, and it is most essential to the defendant's case to be able to disprove them. In order to do so and to prove his negative he wants the plaintiff's affirmative made somewhat more specific. It is said by the plaintiff's counsel that to compel the plaintiff to give the fuller information asked for will be to compel him to disclose the names of his witnesses. But, although one party cannot compel the other to disclose the names of his witnesses as such, yet, if the name of a person is a relevant fact in the case, the right that would otherwise exist to information with regard to such fact is not displaced by the assertion that such information involves the

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disclosure of the name of a witness. It seems to me that, as the controversy between these parties has shaped itself, the information required is relevant to the defendant's case and must therefore be given. The case of *Storey* v. *Lord Lennox* (1), cited by my Brother Fry, appears to me to shew that the mere fact that the discovery sought will involve the disclosure of the names of witnesses is not a sufficient reason for refusing such discovery. The case of *Eade* v. *Jacobs* (2) is not at all inconsistent with our present decision. What was there asked for was evidence; not information as to a material fact which could be proved at the trial, but mere evidence by which material facts were to be proved.

FRY, L.J. The questions which arise in this case are three in number. One relates to the names of persons who were said to have given information as to these letters, or to have shewn a copy to the plaintiff; another relates to the names of persons in whose possession originals of the supposed letters were said to be and the third relates to the names of persons to whom the letters were sent. It seems to me that slightly different considerations apply to these three questions respectively. I think that the defendant is clearly entitled to discovery of the names of persons comprised in the first question. The defendant has taken on himself the burthen of proving what the libel asserts, viz., that the whole story as to the letters has been fabricated by the plaintiff. To prove this he must shew two things; first, that the alleged letter was never written; and secondly, that the plaintiff had no ground for believing in its existence. It is material to the latter branch of his case to know who the persons are from whom the plaintiff asserts that he derived his information. If such persons exist and are persons of respectability and character, whose statements would afford sufficient ground for belief in the existence of the letter, the case for the plaintiff is made out; but, if the persons whose authority is vouched by the plaintiff are persons whose statements no reasonable man could suppose to be trustworthy, this fact would go far to support the defendant's case. It seems to me, therefore, that the names of these persons are material and

(1) 1 Keen, 341. (2) 3 Ex. D. 335.

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relevant to the fact which the defendant has to prove. This question then arises: the general rule being that a party is entitled to discovery of material facts, but not of the names of the witnesses by whom they are to be proved, and it being impossible for the other party to disclose the facts without also disclosing the names of his witnesses, is the right to discovery to give way to the right to protection from giving the names of the witnesses, or vice versâ? That question seems to me to have been answered by Lord Langdale in the case of *Storey* v. *Lord Lennox* (1) fifty years ago. He there says, "the defence here is that the letters may disclose the names of the witnesses and the evidence; and so indeed may every discovery which the defendant may be required to give. In telling the truth, as he is bound to do, he may incidentally disclose to the plaintiff that which will enable the plaintiff to learn the names of the witnesses and the nature of the evidence; and if this consequence could be used as a ground for resisting a discovery, one of the most extensively useful parts of the jurisdiction of the Courts of Equity would be lost."

I think that the law still is as there laid down, and the mere circumstance that in making discovery of relevant facts the names of witnesses must be disclosed is not sufficient to take away the right to discovery. The present case is remarkable in one point of view, because the plaintiff has himself volunteered the statement that these persons will be his witnesses. It would not have been apparent that they would be, but for his statement; for it is quite possible that the statements made by them could be proved by other persons who heard them. With regard to this part of the case, I think that the appeal entirely fails. With regard to the other two questions I confess that I feel more doubtful. It would no doubt be a relevant fact that originals of these letters exist; but I feel some doubt how far the question in whose hands they exist is a substantial part of the case which the plaintiff is bound to disclose on interrogatories. However, as the majority of the Court are clear on the point I fully believe that my doubts are groundless. With regard to the remaining question also, I should have felt some doubt, but for the opinion of the Master of the Rolls and my Brother Bowen, whether we

(1) 1 Keen, 341.

are not going too far in ordering discovery of the names of the persons to whom it is alleged that the letters were sent; but I yield to their view of the case. For these reasons the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Gedge, Kirby & Millett.*

Solicitors for defendant; *Sharpe, Parkers, & Co., for Rylands, Martineau & Co.*

E. L.

IN RE ARMSTRONG. EX PARTE GILCHRIST.

May 10, 11.

Bankruptcy — Married Woman — Separate Property — Settlement — General Power of Appointment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 24 —*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 5, *s.* 19.

Real property was by a marriage settlement vested in a trustee in trust for the married woman for life for her separate use without restriction on anticipation, with remainder to such persons for such estates as she might, whether covert or sole, by deed or will appoint, and in default of appointment to her children in fee. The settlement also contained a provision under which the property could be sold or mortgaged by her direction, and the proceeds paid to her:—

Held, that she was subject to the provisions of the bankruptcy laws in respect of such property as being her separate property, under s. 1, sub-s. 5, of the Married Women's Property Act, 1882, and should therefore be directed to exercise the power of appointment in favour of the trustee in bankruptcy of her estate under s. 24 of the Bankruptcy Act, 1883.

APPEAL from the refusal by a county court judge of an application by the trustee of the property of a bankrupt for an order under s. 24 of the Bankruptcy Act, 1883, directing the bankrupt to execute a deed of appointment of certain freehold property.

The bankrupt was a married woman who had carried on a trade separately from her husband. Previously to the marriage in November, 1881, she had executed a marriage settlement by which she conveyed the freehold property in question, which consisted of certain houses, to a trustee in trust to pay the residue of the rents and profits, after keeping down the interest on a mortgage, to her during her life without impeachment of waste, for her sole and separate use, without any restriction on