

6-1-1948

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Recommended Citation

Herschiel S. Barnes and Charles K. Cosner, To What Extent Does the Privilege against Self-Incrimination Protect a Witness against Forced Production of Documents, 1 *Vanderbilt Law Review* 626 (1948)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol1/iss4/10>

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TO WHAT EXTENT DOES THE PRIVILEGE AGAINST SELF-INCRIMINATION PROTECT A WITNESS AGAINST FORCED PRODUCTION OF DOCUMENTS?

This comment is intended to be a companion piece to the Comment in *Vanderbilt Law Review*, Vol. I, No. 2¹ which discusses self-incrimination by means of physical disclosures. The preceding Comment gave a brief account of the privilege and pointed out that the Constitutions of the Federal Government and forty-six states have incorporated the common law privilege against self-incrimination. The two exceptions among the states, Iowa and New Jersey, have accepted the privilege, either by incorporation into their common law by judicial interpretation, or by statute. It is the purpose of this comment to discuss the possibility of the invocation of the privilege against self-incrimination by an individual who has been ordered by regular legal process to produce books, papers and other documents.

SCOPE

A witness may be compelled to produce documents in any case in which he may be compelled to give oral testimony,² and the same privileges against self-incrimination which may be invoked by a witness who is called upon to give oral testimony apply to a witness who is ordered to produce documents.³ From a study of the cases some general observations concerning the scope of the privilege may be made which will be helpful to a further discussion of the subject:

A. The privilege extends to testimony which incriminates the witness or furnishes a link in the chain of evidence that may convict him or tend to incriminate him.⁴ In this connection it may be remarked that the courts treat testimony which might subject the witness to penalties or forfeiture as being within the privilege.⁵

B. The privilege against self-incrimination is available to a witness only

1. Comment, *To What Extent Does the Privilege Against Self-Incrimination Protect An Accused from Physical Disclosure?* 1 VAND. L. REV. 243 (1948).

2. *Bull v. Loveland*, 27 Mass. (10 Pick.) 9 (1830); *Burnham v. Morrisey*, 80 Mass. (14 Gray) 226 (1859); see *Merchants' Nat. Bank v. State Nat. Bank*, 17 Fed. Cas. 53, No. 9, 448 (C.C.D. Mass. 1868) as to compelling production.

3. *Johnson v. United States*, 228 U.S. 457 (1913); *State v. Hollingsworth*, 191 N.C. 595, 132 S.E. 667 (1926); *People v. Zazove*, 311 Ill. 198, 142 N.E. 543 (1924); *Lamson v. Boyden*, 160 Ill. 613, 43 N.E. 781 (1896); *Byass v. Sullivan*, 21 How. Pr. 50 (N.Y. Sup. Ct. 1860).

4. *Ex parte Meyer*, 18 S.W. 2d 560 (Mo. App. 1929); *Ex parte Wilson*, 39 Tex. Cr. R. 630, 47 S.W. 996 (1898).

5. *Boyd v. United States*, 116 U.S. 616 (1886); *Lamson v. Boyden*, 160 Ill. 613, 43 N.E. 781 (1896); *Bull v. Loveland*, 27 Mass. (10 Pick.) 9 (1830); 8 WIGMORE, EVIDENCE § 2257 (3d ed. 1940).

in cases of testimonial compulsion, "testimonial" referring to legal proceedings in which oral or written words are extracted from a witness.⁶ *Boyd v. United States*⁷ qualified the preceding sentence somewhat by deciding that where government officers obtained books and papers from an accused by an illegal search and seizure, such a search violated not only the Fourth Amendment to the United States Constitution, but also the Fifth, in that the accused was being forced to give evidence against himself by means of the illegal search, and thus he could assert the privilege against self-incrimination to prohibit the use of such evidence, as well as the privilege against illegal search and seizure. But it should be noted in this connection that where papers of an accused were stolen by a *private* person, and turned over to the authorities, the Supreme Court ruled that the privilege of the accused was not violated.⁸ The Court held that stolen documents were admissible in evidence where there was no violation of petitioner's rights by *government authority*, although the documents were of an incriminating character.⁹ This comment will not attempt to discuss the admissibility of evidence obtained by illegal search and seizure.

C. The privilege in question is a privilege against self-incrimination, and if the witness is not subject to prosecution, he is not entitled to claim the privilege. Therefore, where a statute provides that no witness shall be excused from testifying as to a particular matter, and that he shall not be subjected to criminal proceedings because of any testimony which he may give, the right to claim the privilege is denied the witness. A complete immunity from prosecution is required and a provision that evidence given shall not be used against the witness is not sufficient to replace his constitutional privilege, because such a provision does not guard against the possibility that "leads" may be gained from his testimony whereby other evidence against the witness may be found.¹⁰

D. Sometimes peculiar circumstances will permit the courts to deny a claim of privilege by a witness. An illustration is found in statutes which require automobile drivers to stop at the scene of an accident in which they are involved and give their name, address and similar pertinent information to an officer, or to the injured party. In such cases it has been held that the witness cannot claim the privilege against self-incrimination because the state has required a waiver of the privilege in exchange for the right to use the highways of the state.¹¹

6. 8 WIGMORE, EVIDENCE § 2252e (3d ed. 1940).

7. 116 U.S. 616 (1886); *Gouled v. United States*, 255 U.S. 298 (1920).

8. *Burdeau v. McDowell*, 254 U.S. 465 (1921).

9. *Accord*, *State v. Barrett*, 121 Ore. 57, 254 Pac. 198 (1927).

10. *Brown v. Walker*, 161 U.S. 591 (1896); *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Hirsch v. State*, 67 Tenn. 89 (1874).

11. *People v. Rosenheimer*, 209 N.Y. 115; 102 N.E. 530 (1913); 8 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 5399 (1935).

PARTNERSHIPS

An individual is protected from the compulsory production of his private documents as fully as from oral utterances.¹² There seems to be no question that partnership records are privileged. The instances in which compulsory production of such documents has been sought are few.¹³

In *United States v. Brasley*¹⁴ three partners sought the return of partnership records which had been taken by government agents under circumstances amounting to an illegal seizure. The government contended that the failure of one of the partners to protest the search and seizure amounted to a waiver. The court doubted this contention but did not labor the point as "They were the private documents of the three petitioners. No one of them had any greater rights therein than each of the others."¹⁵ All records, memoranda and photostats were ordered returned. The court continually referred to the Fourth and Fifth Amendments to the United States Constitution, although the case could have been disposed of on the Fourth alone.

In a later case¹⁶ an internal revenue agent sought production of corporate and partnership records. No issue was made as to corporate records, but the respondent refused to produce the partnership records on the ground that they might tend to incriminate him in pending criminal proceedings. The petition was denied but without prejudice in order that the agent might re-institute proceedings on completion of the criminal prosecution.

The conclusion to be drawn from these cases is that such documents are private papers, and that the individual partner is privileged from their compulsory production. The statement in the *Brasley* case that no partner has any greater rights in the partnership records is true, but cannot be pressed too far. There are apparently no cases where partner *A* has sought to prevent partner *B* from producing records of the *AB* partnership. It is submitted that *A* could not prevent their production or use. It is quite true that the documents are as much the property of *A* as they are the property of *B*, but, if the documents were the sole property of *A* and were stolen by *B* and turned over to the authorities, *A* could not assert the privilege.¹⁷ "A party is privileged from producing evidence, but not from its production."¹⁸

CORPORATIONS

That an individual may rely on the privilege against self-incrimination by

12. *Boyd v. United States*, 116 U.S. 616 (1886).

13. *Lisansky v. United States*, 31 F. 2d 846 (C.C.A. 4th 1929), *cert. denied*, 279 U.S. 873 (1929); *Internal Revenue Agent v. Sullivan*, 287 Fed. 138 (W.D.N.Y. 1923); *United States v. Brasley*, 268 Fed. 59 (W.D. Pa. 1920).

14. 268 Fed. 59 (W.D. Pa. 1920).

15. *Id.* at 63.

16. *Internal Revenue Agent v. Sullivan*, 287 Fed. 138 (W.D.N.Y. 1923).

17. *Burdeau v. McDowell*, 256 U.S. 465 (1921).

18. *Johnson v. United States*, 228 U.S. 457, 458 (1913).

refusing to submit his private papers to scrutiny is well settled.¹⁹ It is equally well settled that a corporation may not assert the privilege.²⁰

The reasons most frequently advanced for denying a corporation the privilege are:

1. A corporation is an artificial person as distinguished from a natural person and is created for lawful purposes only;
2. A corporation is not a "person" within the meaning of the privilege;
3. The reserved visitorial power of the sovereign, i.e., the power to create, implies the power to forfeit;
4. The policy behind the privilege is inapplicable to corporations.

The courts do not ordinarily select one of the above reasons to the exclusion of the others. Sometimes they seem to touch on all four reasons. It is also to be noted that the reasons are not mutually exclusive. For example, the first is included in the fourth.

A. *A Corporation Is An Artificial Person As Distinguished from a Natural Person.*

The distinction between a natural person and the artificial, state-created entity is often given as a basis for denying the privilege against self-incrimination to corporations.²¹ The individual exists for his own sake, has certain inalienable rights long antedating the formation of the government itself. He owes society nothing as long as he refrains from infringing the rights of others.

19. *Boyd v. United States*, 116 U.S. 616 (1886).

20. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946); *Essgee Co. v. United States*, 262 U.S. 151 (1923); *Hale v. Henkel*, 201 U.S. 43 (1906); *United States v. Cream Products Distributing Co.*, 156 F. 2d 732 (C.C.A. 7th 1946); *Porter v. Mueller*, 156 F. 2d 278 (C.C.A. 3d 1946); *Troy Laundry Co. v. Wirtz*, 155 F. 2d 53 (C.C.A. 9th 1946); *United States v. Goodner*, 35 F. Supp. 286 (D. Colo. 1940); *Nekoosa-Edwards Paper Co. v. News. Pub. Co.*, 174 Wis. 107, 182 N.W. 919 (1921); *Commonwealth v. Southern Express Co.*, 160 Ky. 1, 169 S.W. 517 (1914); *Cumberland Tel. & Tel. Co. v. State*, 98 Miss. 159, 53 So. 489 (1910).

The English rule makes no distinction between a corporation and an individual. "It is true that a company cannot suffer all the pains to which a real person is subject. It can, however, in certain cases be convicted and punished, with grave consequences to its reputation and to its members, and we can see no ground for depriving a juristic person of those safeguards which the law of England accords, even to the least deserving of natural persons. It would not be in accordance with the principle that any person capable of committing, and incurring the penalties of, a crime should be compelled by process of law to admit a criminal offence." *Triplex Safety Glass Co. v. Lancegaye Safety Glass Ltd.* [1939] 2 K.B. 395, 409 (1938). See also *Webster v. Solloway, Mills & Co.* [1931], 1 Dom. L.R. 831 (Alberta).

21. *Hale v. Henkel*, 201 U.S. 43 (1906); *Nekoosa-Edwards Paper Co. v. News. Pub. Co.*, 174 Wis. 107, 182 N.W. 919 (1921).

"... there is a clear distinction in this particular between an individual and a corporation... the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public." *Hale v. Henkel*, 201 U.S. 43, 74 (1906). And "While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges." *Id.* at 75.

On the other hand, the corporation is an artificial entity; it is created for a special purpose—to facilitate the transaction of *lawful* business; When it fails to perform the functions that led to its creation, its excuse for existence ceases. There is no capital punishment in the surrender of a corporate charter. Therefore, "if a corporation has made a record by its books or papers that shows it has violated the purposes for which it was created, why should not the State, which gave it birth for legitimate purposes only, have the right, either directly . . . or indirectly . . . to inspect the record thus made?"²²

This reasoning fails to consider the criminal capacity of the corporation.²³ Anciently, it was said by Holt²⁴ and Blackstone²⁵ that a corporation could not commit a crime. It has been suggested that such statements are too broad²⁶ and that there probably never was a time when a corporation was free from indictment.²⁷ But even if that were not true, corporations eventually became indictable for crimes of nonfeasance as distinguished from misfeasance.²⁸ Later, courts found it unnecessary to use this distinction and drew the line at crimes requiring specific intent or involving a special mental element.²⁹ There is authority to the effect that a corporation is not indictable for intentional crimes,³⁰ but today the real dispute seems to center around intentional crimes involving the element of personal violence. Corporations have been convicted of involuntary manslaughter³¹ but no case has been found convicting a corporation of voluntary manslaughter or murder.

As the corporation is amenable to the criminal law where the penalty provided is appropriate, this distinction alone does not seem to be a substantial basis for denying corporations the privilege against self-incrimination.

B. *A Corporation Is Not a Person Within the Meaning of the Privilege.*

If the corporation is chargeable with criminal acts, is it a person within the meaning of the privilege under discussion? This question poses two additional ones. Is a corporation included within the protection of the privilege at common law? Is it a "person" within the meaning of the Fifth Amendment?

Apparently the English courts believe that a corporation is within the

22. *Nekoosa-Edwards Paper Co. v. News Pub. Co.*, 174 Wis. 107, 182 N.W. 919, 922 (1921).

23. 8 WIGMORE, EVIDENCE § 2259 a (3d ed. 1940).

24. "A corporation is not indictable, but its particular members are." Anonymous, 12 Mod. 559, 88 Eng. Rep. 1518 (1701).

25. "A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities." 1 BL. COMM. *476.

26. 10 FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4942, n. 2 (rev. ed., Jones 1931).

27. *Id.* at § 4942.

28. *Id.* at § 4943.

29. *Id.* at § 4944.

30. Canfield, *Corporate Responsibility for Crime*, 14 COL. L. REV. 469 (1914).

31. *United States v. Van Schaick*, 134 Fed. 592 (C.C.S.D.N.Y. 1904); *State v. Lehigh Valley R.R.*, 94 N.J.L. 171, 111 Atl. 257 (1920); 5 MINN. L. REV. 74 (1920).

protection of the privilege at common law.³² American courts hold that a corporation cannot invoke the privilege but do not make it clear whether they mean at common law or under the Fifth Amendment to the United States Constitution. *Hale v. Henkel*³³ was the pioneer case but sheds little light on the problem.³⁴ *Wilson v. United States*³⁵ adopts the view that a corporation is not within the protection of the privilege at common law,³⁶ relying on *Hale v. Henkel*.³⁷

Other state and federal courts have followed this lead. Some say that the corporation is not a "person" within the meaning of the Fifth Amendment;³⁸ others dispose of the problem with the cryptic statement that the privilege has no application to corporations.³⁹ In a lower federal court case the only question before the court was whether or not a corporation was a person within the meaning of the Fifth Amendment, and the court said that *Hale v. Henkel* and companion cases precluded consideration of the question.⁴⁰

Regardless of the answers given to these questions, they do not seem to furnish an adequate reason for denying the privilege to corporations.

C. Reserved Visitorial Power of the Sovereign.

The reserved visitorial power of the sovereign is another reason advanced for denying the privilege against self-incrimination to corporations.⁴¹ What

32. *Triplex Safety Glass Co. v. Lancegay Safety Glass Ltd.* [1939] 2 K.B. 395 (1938).

33. 201 U.S. 43 (1906).

34. "The question whether a corporation is a 'person' within the meaning of this Amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employes." *Hale v. Henkel*, 201 U.S. 43, 70 (1906) (obviously referring to oral testimony and not the production of documents).

For a contemporary analysis of this case written prior to the case of *Wilson v. United States*, see Proskauer, *Corporate Privilege Against Self-Incrimination*, 11 *Col. L. Rev.* 445 (1911).

35. 221 U.S. 361 (1911).

36. "It [corporation] cannot resist production on the ground of self-incrimination." *Wilson v. United States*, 221 U.S. 361, 382 (1911).

37. "This view, and the reasons which support it, have so recently been stated by this court in the case of *Hale v. Henkel* . . . that it is unnecessary to do more than refer to what was there said. . . ." *Wilson v. United States*, 221 U.S. 361, 382-3 (1911).

38. *Troy Lumber Co. v. Wirtz*, 155 F. 2d 53 (C.C.A. 9th 1946); *Standard Oil Co. v. Roxana Petroleum Corp.*, 9 F. 2d 453 (S.D. Ill. 1925); *United States v. Goodner*, 35 F. Supp. 286 (D. Colo. 1940); *Nekoosa-Edwards Paper Co. v. News Pub. Co.*, 174 Wis. 107, 182 N.W. 919 (1921).

39. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946); *Essgee Co. v. United States*, 262 U.S. 151 (1923); *United States v. Cream Products Distributing Co.*, 156 F. 2d 732 (C.C.A. 7th 1946); *Porter v. Mueller*, 156 F. 2d 278 (C.C.A. 3d 1946); *Grasselli Chemical Co. v. National Aniline Chemical Co.*, 282 Fed. 379 (S.D.N.Y. 1920); *Commonwealth v. Southern Express Co.*, 160 Ky. 1, 169 S.W. 517 (1914); *Cumberland Tel. & Tel. Co. v. State*, 98 Miss. 159, 53 So. 489 (1910).

40. *Orvig Dampskibsselskap v. New York and Bermudez Co.*, 229 Fed. 393 (E.D.N.Y. 1915).

41. "There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that

the state can give it can take away. The corporation "cannot resist production upon the ground of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitorial power of the State. . . ." ⁴² State courts have voiced the same theory, ⁴³ and courts using this reasoning have also emphasized the distinction between the natural person and the artificial entity. ⁴⁴

The contention that the power to create implies the power to forfeit is disarmingly logical. It advances a proposition difficult to attack, and appears to many as the real basis for denying the privilege to corporations. But the Supreme Court itself recently labeled this visitorial power as merely "a convenient vehicle for justification of governmental investigation of corporate books and records." ⁴⁵

D. The Policy Behind the Privilege Is Inapplicable to Corporations.

Professor Wigmore says that the policies behind the privilege against self-incrimination are inapplicable to corporations. He advances two principal reasons in support of this statement. "The first is that the sentiment of fundamental fairness, on which the privilege is in part based, applies only between man and man. It is a sentiment which recoils from forcing another human being to supply by his own act the incriminating evidence. It guards against the abuses of physical compulsion which are apt to grow out of the license to interrogate. . . . This sentiment and these dangers are not applicable when the accused is not a human being but only an artificial entity." ⁴⁶

His second reason is that a corporation virtually acts by written record only, and, inasmuch as one of the primary purposes of the privilege is to require the prosecutor to ferret out the information, to place a protective cloak around corporate records would place a task on the prosecutor which would be impossible to perform.

Professor Wigmore would accept the distinction between the natural person and the artificial entity but add to it the clinching fact that the corporation can act only by written records. Our highest court has apparently

a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose." *Hale v. Henkel*, 201 U.S. 43, 75 (1906).

42. *Wilson v. United States*, 221 U.S. 361, 382 (1911).

43. *Nekoosa-Edwards Paper Co. v. News Pub. Co.*, 174 Wis. 107, 182 N.W. 919 (1921); *Cumberland Tel. & Tel. Co. v. State*, 98 Miss. 159, 53 So. 489 (1910).

44. An excellent illustration of the fusion of these two views is *Hale v. Henkel*, 201 U.S. 43 (1906).

45. *United States v. White*, 322 U.S. 694, 700 (1944), (labor unions).

46. 8 WIGMORE, EVIDENCE § 2259a (3d ed. 1940).

accepted this reasoning as the real basis for denying the privilege to group activity.⁴⁷

OFFICERS OF CORPORATIONS

Denial of the privilege to corporations is not difficult to accept when we consider the policies underlying the privilege. Nor is it difficult to see that the corporation cannot assert the privilege of its officers on the ground that the documents might tend to incriminate them. The privilege is personal to the witness and may not be asserted for the benefit of another.⁴⁸

But should not an officer of a corporation be privileged from the compulsory production of documents that not only may tend to show corporate guilt but also reflect his complicity in the transaction? The English courts have allowed him to assert the privilege,⁴⁹ but the American courts are in almost universal accord that he may not rely on his personal privilege in such a situation.⁵⁰ The reason is that they are not his private papers but are corporate documents and as to such documents no privilege exists; and further, that in assuming the duties of a corporate officer, he accepts the conditions incidental to it—one of which is production of corporate documents when required by lawful process.⁵¹

There was some indication in the earlier cases that a corporate officer could refuse to produce corporate documents if the corporate misconduct was so tied in with his own as to amount virtually to his own acts. This was indicated in an early Michigan case,⁵² but the statements made were unnecessary to the decision of the case. A lower federal court in *Ex parte Chapman*⁵³ held that a corporate officer might refuse to produce corporate books if the acts reflected therein were virtually his own. This case might have turned on the question of the breadth of the subpoena duces tecum. While it has

47. "The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. . . . The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of privilege to be thrown around the impersonal records and documents, effective enforcement of many federal and state laws would be impossible. *United States v. White*, 322 U.S. 694, 700 (1944).

48. *Hale v. Henkel*, 201 U.S. 43 (1906); *McAlister v. Henkel*, 201 U.S. 90 (1906); *Commonwealth v. Southern Express Co.*, 160 Ky. 1, 169 S.W. 517 (1914).

49. *Rex v. Heydon*, 1 Bl. W. 351, 96 Eng. Rep. 195 (1762); *Rex v. Purnell*, 1 Wl. Bl. 37, 96 Eng. Rep. 20 (1748); *Rex v. Cornelius*, 2 Strange 1210, 93 Eng. Rep. 1133 (1744); *Regina v. Mead*, 2 Ld. Raym. 927, 92 Eng. Rep. 119 (1703).

50. *Essgee Co. v. United States*, 262 U.S. 151 (1923); *Dreier v. United States*, 221 U.S. 394 (1911); *Wilson v. United States*, 221 U.S. 361 (1911); *McAlister v. Henkel*, 201 U.S. 90 (1906); *Ex parte Bott.*, 146 Ohio St. 511, 66 N.E. 2d 918 (1946); *Bleakley v. Schlesinger*, 294 N.Y. 312, 62 N.E. 2d 85 (1945); *Commonwealth v. Southern Express Co.*, 160 Ky. 1, 169 S.W. 517 (1914); *Burnett v. State*, 8 Okla. Cr. 639, 129 Pac. 1110 (1913).

51. *Wheeler v. United States*, 226 U.S. 478 (1913); *Wilson v. United States*, 221 U.S. 361 (1911); *Bleakley v. Schlesinger*, 294 N.Y. 312, 62 N.E. 2d 85 (1945).

52. *In re Moser*, 138 Mich. 302, 101 N.W. 588, 593 (1904).

53. 153 Fed. 371 (D. Idaho 1907).

not been expressly overruled, its effect as authority has been nullified by later decisions. It was a result of a misconception of the holding in *Hale v. Henkel*—there an immunity statute was involved and it was not unnatural to assume that but for the statute Hale might have asserted his privilege.⁵⁴ The Supreme Court of Nevada was faced with the identical problem the same year and in an attempt to distinguish the *Chapman* case arrived by implication at the result that a corporate officer could claim the privilege.⁵⁵

*Wilson v. United States*⁵⁶ involved the validity of a subpoena duces tecum issued to the corporation and the right of the officer to refuse to produce the documents on the ground that they might incriminate him. The Court recognized that an individual could not be required to produce his *private* papers but pointed out that corporation records signed by its president were as much the documents of the corporation as were its minute books. The fact that they were in the officer's possession or custody was immaterial. The nature of the documents and not the capacity in which they were held was determinative. The officer held the documents "subject to the corporate duty." If it were otherwise the state's visitatorial power would be seriously hampered. The Court pointed out that to permit Wilson to assert the privilege would not be a recognition of it but an unwarranted extension of the privilege.

Later cases have pointed out that it is immaterial if the individual is the legal custodian or merely in possession of the documents. Similarly, it is immaterial if he is legal owner of the records—the right to compulsory production is determined by the nature of the documents and not by title thereto.⁵⁷

Although a much closer case, the fact that an individual is owner of all the stock of a corporation is immaterial.⁵⁸ In *United States v. Hoyt*⁵⁹ such an individual was not permitted to claim the privilege. "The fact that . . . it was . . . his corporate alter ego, does not render the principle inapplicable. . . . The corporate nonconductability is as effectual in this situation as the defendant undoubtedly expected it to be in the event of civil claims against him."⁶⁰

A still closer case is presented when individual defendants are required to produce the corporate records and also required to authenticate them. Such

54. See Mr. Justice McKenna dissenting in *Wilson v. United States*, 221 U.S. 361, 390 (1911).

55. *Ex parte Hedden*, 29 Nev. 352, 90 Pac. 737, 741-2 (1907).

56. 221 U.S. 361 (1911).

57. *Grant v. United States*, 227 U.S. 74 (1913); *Wheeler v. United States*, 226 U.S. 478 (1913).

58. *Grant v. United States*, 227 U.S. 74 (1913) (by implication); *United States v. Hoyt*, 53 F. 2d 881 (S.D.N.Y. 1931).

59. 53 F. 2d 881 (S.D.N.Y. 1931).

60. *Id.* at 884-885.

a procedure was upheld in *United States v. Austin Bagley Corp.*,⁶¹ in spite of the fact that the United States Supreme Court had previously said that corporate officers "may decline to utter upon the witness stand a single self-incriminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony. . . ." ⁶² The court recognized that this presented a borderline case by saying, "While . . . there is here a possible, if tenuous, distinction, we think the greater includes the less, and that, since the production can be forced, it may be made effective by compelling the producer to declare that the documents are genuine. . . . [T] estimony auxiliary to the production is as unprivileged as the documents themselves. By accepting the office of custodian the holder not only exposes himself to producing the documents, but to make their use possible without requiring other proof than his own." ⁶³

Thus it is apparent that the corporate officer stands in no better position than the corporation. When demand is made by lawful process, he may be required to produce the documents although their contents may incriminate him. It is immaterial whether or not he is the custodian—nor does it matter if he has title to the documents or is owner of all the stock in a corporation. He must produce the corporate records, if in his possession, and, if need be, authenticate them to make the production effective.

UNINCORPORATED ASSOCIATIONS

In determining the scope of the privilege the courts have said that an individual *may* assert the privilege and that a corporation *cannot*. These views have become fairly crystallized. In dealing with group activity between these extremes, it was natural that the courts would look to these settled principles for analogy. Partnership activity naturally fell on the individual side of the ledger. But activity by unincorporated associations presented a more perplexing problem. Situations involving these associations were slow in reaching the courts. The early cases involving unincorporated associations came up under such circumstances that they could be disposed of without defining the scope of the privilege as to such organizations,⁶⁴ or arose under statutes

61. 31 F. 2d 229 (C.C.A. 2d 1929), *cert. denied*, 279 U.S. 863 (1929). See also *Carolene Products Co. v. United States*, 140 F. 2d 61 (C.C.A. 4th 1944) where requiring defendants to identify corporate records was upheld accompanied by a cautionary note that "it is obvious that the practice of calling individual defendants to the stand in a criminal case is a dangerous one which should be employed only with scrupulous regard for their constitutional rights." *Id.* at 67.

62. *Wilson v. United States*, 221 U.S. 361, 385 (1911).

63. *United States v. Austin-Bagley Corp.*, 31 F. 2d 229, 234 (C.C.A. 2d 1929), *cert denied*, 279 U.S. 863 (1929).

64. *Brown v. United States*, 276 U.S. 134, 143 (1928). Brown was secretary of an unincorporated association and the Court expressly found it unnecessary to determine the scope of the privilege inasmuch as he refused to produce the documents. *But see Corretjer v. Draughon*, 8 F. 2d 116, 118 (C.C.A. 1st 1937) where it is indicated that the secretary

that rendered the association subject to being proceeded against as a legal entity.⁶⁵

However, when an individual who described himself as an "assistant supervisor" appeared with labor union records in response to a subpoena duces tecum and refused to surrender them to the grand jury on the ground that they might incriminate him, the time for decision was at hand. The Circuit Court of Appeals of the Third Circuit felt that his refusal was justified if he were a member of the union.⁶⁶ The government pressed the analogy between corporations and labor unions, but the court felt that a labor union was quite different in that it does not derive its existence from a charter from the government as does a corporation, and therefore, there is no reserved visitorial power as in the case of corporations. "Its books and records are not of public or even semi-public character. They are the private documents of the union members who had they so chosen, did not need to keep records in the first instance. . . . For the purpose of the privilege against self-incrimination the members of the union are in the same position as ordinary individuals who maintain books and records of their transactions."⁶⁷

But the Supreme Court felt that whether or not the witness was a member of the union was immaterial.⁶⁸ The Court referred to the privilege as "essentially a personal one, applying only to natural individuals," and pointed out that it should be limited to its historical purpose. That the state did not have reserved visitorial power over such groups was recognized but Mr. Justice Murphy pointed out that mechanical comparisons were not determinative. "The test . . . is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of the constituents, but rather to embody their common or group interests only."⁶⁹

The Court limited itself to the precise question before it—that is, whether or not a member of a labor union could refuse to submit its documents as evidence on the ground that they might tend to incriminate him and decided that the union official could not so refuse. To that extent the question is no longer an open one, but there may be voluntary associations of a character so personal that its members may assert their personal privilege against the

of a Puerto Rican political party would be privileged in refusing to turn them over to the grand jury. The case was, however, decided on the defendant's open defiance of the court order to produce them.

65. *Davis v. S.E.C.*, 109 F. 2d 6 (C.C.A. 7th 1940) (Securities Act of 1933), *cert. denied*, 309 U.S. 687 (1940); *United States v. Goedde & Co.*, 40 F. Supp. 523 (E.D. Ill. 1941) (Sherman Anti-Trust Act).

66. *United States v. White*, 137 F. 2d 24 (C.C.A. 3d 1943) (2-1 decision).

67. *Id.* at 26.

68. *United States v. White*, 322 U.S. 694 (1944).

69. *Id.* at 700.

production of the group documents. It is submitted, however, that the question is virtually closed. As has been said about Mr. Justice Murphy's test: "Such a test would be met by most voluntary associations of any importance."⁷⁰

PUBLIC AND QUASI-PUBLIC RECORDS

A. Public Records

"Public Record" may be defined as a written memorial made by a public officer authorized by law to perform that function and intended to serve as evidence of something written, said, or done.⁷¹ Such records are, by their nature, available for inspection for all lawful purposes, and their custodian cannot refuse to produce these records on the ground that they contain evidence which tends to incriminate him. One of the most-quoted cases on this subject arose in England and held that a vestry clerk who is called as a witness cannot, on the ground that it may incriminate him, object to producing the vestry book which the law required him to keep.⁷²

The courts, in denying claims of privilege against self-incrimination, have called some items public records which hardly fit within the above definition, although they may be within the "spirit" of it. Thus, the Minnesota court has said that records of bank deposits were to a certain extent of a public nature, in that they pertained to people's deposits.⁷³ The case of *People v. Coombs*⁷⁴ involved a coroner who made fictitious reports of inquests in order to collect more money from the exercise of his office. He had a number of reports lying around his office which he had made out, but had not placed among his official records. The court held that such reports must be produced as against a claim of privilege, saying that such were public records—they were public on their face and were in a public office in the custody of a clerk paid by the city. The Kentucky court has stated that a tariff sheet which the law required to be posted in the railroad station is not a private paper.⁷⁵

The reason for denying a claim of privilege of a public official in so far as the records of his office are concerned is probably best set forth by the Supreme Court of Virginia. This court stated that such documents belong to the office and not to the officer; they are the property of the state and not the citizen and are in no sense private memoranda.⁷⁶

70. Morgan, *The Law of Evidence, 1941-45*, 59 HARV. L. REV. 481, 528 (1946).

71. 3 BOUVIER'S LAW DICTIONARY 2843 (3d rev., 8th ed. 1914).

72. *Bradshaw v. Murphy*, 7 Car. & P. 612, 173 Eng. Rep. 269 (Ex. 1836).

73. *State v. Strait*, 94 Minn. 384, 102 N.W. 913 (1905).

74. 158 N.Y. 532, 53 N.E. 527 (1899).

75. *L.&N.R.R. v. Commonwealth*, 21 Ky. Law Rep. 239, 51 S.W. 167 (1899).

76. *Coleman v. Commonwealth*, 25 Gratt. 865 (Va. 1874).

B. *Quasi-Public Records*

Suppose that a statute of State *A* provides that all druggists must keep a record of all sales of certain types of drugs, such records to be subject to inspection by designated persons. If *X*, a druggist, is indicted for the unlawful sale of drugs, may this record of his sales be placed in evidence against him over his protest that such introduction is forcing him to give evidence against himself in a criminal proceeding? The answer is *yes*. Such records are required by law to be kept, and *X* has no privilege to withhold their production.⁷⁷

Records which are required by law to be kept in order that there may be suitable information of transactions which are appropriate subjects of governmental regulation, and enforcement of restrictions validly established are called quasi-public records.⁷⁸ From a practical point of view, the chief difference between public and quasi-public records, in so far as the question of self-incrimination is concerned, would seem to be a matter of definition, for quasi-public records must be surrendered to the proper authority for inspection on demand, regardless of the evidence contained therein, just as public records must be surrendered.⁷⁹ The courts have not always been careful to distinguish between the two, sometimes denominating either class as public.⁸⁰ There are instances which involve records which are hard to classify as either to the exclusion of the other.⁸¹

Suppose that the statute of State *A*, in addition to requiring a record of sales, also provided that inspecting officers should be allowed, on demand, to inspect the account books and records of the druggist in order to check the accuracy of the sales record. Does such a provision eliminate the druggist's claim of privilege against self-incrimination? The New York Court of Appeals held that such a provision was not valid in a statute which required a broker to keep specified records and allow his books of account to be inspected for the purpose of enforcing a stamp tax.⁸² The court stated that since the statute provided a penalty for tax evasion, the sequel to the examination of the broker's books was penalties and criminal prosecution. And therefore the attempt to secure evidence from the broker by examining his books of ac-

77. *Wilson v. United States*, 221 U.S. 361 (1911); *State v. Farnum*, 73 S.C. 165, 53 S.E. 83 (1905); *State v. Donovan*, 10 N.D. 203, 86 N.W. 709 (1901). See also *State v. Pence*, 173 Ind. 99, 89 N.E. 488 (1909), where the court interpreted a statute requiring druggists to keep records of liquor sales for one year as requiring only the keeping of the records, and held that such statute did not require the druggist to produce the records pursuant to subpoena, since the statute made no provision for inspection.

78. See *Wilson v. United States*, 221 U.S. 361 (1911) for discussion of the classification of public and quasi-public records, and the application of the privilege against self-incrimination to such classification.

79. *Wilson v. United States*, 221 U.S. 361 (1911).

80. *E.g.*, *State v. Donovan*, 10 N.D. 203, 86 N.W. 709 (1901).

81. For instance, what should we call the records kept by the dispenser in a state-owned liquor store? The South Carolina Supreme Court called such records public. *State v. Farnum*, 73 S.C. 165, 53 S.E. 83 (1905).

82. *People v. Reardon*, 197 N.Y. 236, 90 N.E. 829 (1910).

count was, in reality, compelling him to give evidence against himself. A federal district court in *Internal Revenue Agent v. Sullivan* held that a provision in the Internal Revenue Code which required that the taxpayer permit his business records to be inspected for the purpose of checking the accuracy of his tax return could not compel the taxpayer to permit inspection of his books when he claimed that such an inspection might disclose incriminating evidence, because to compel production of the books under such circumstances would be a violation of the Fifth Amendment to the United States Constitution.⁸³

But whether the two foregoing decisions are entitled to much, if any, weight at the present time is a matter of conjecture, at least in so far as the federal courts are concerned. The case of *Bowles v. Insel*⁸⁴ held that when the law required X to keep certain records, the records were not private, but public, or quasi-public, and the mere fact that they were records of the sort which a private person ordinarily keeps with regard to private business transactions did not detract from their public character. The constitutional guaranties protecting private records have no application to public or quasi-public records. In view of the tremendous expansion of federal regulation of business in the past fifteen years, it seems inevitable that some of the records which the law requires to be kept for enforcement purposes should also be the records which the businessman keeps in the normal course of business. Several recent cases did not involve an objection that the records were of the type normally kept by a man engaged in business, although if there were a valid objection to surrender of the records on this ground, it would seem that it would have been made.⁸⁵ It is possible that the difference between a provision, such as that in the *Sullivan* case, that private records shall be *submitted for inspection*, and a regulation which requires the *keeping* of certain records, as did the regulation under scrutiny in the *Insel* case is a sufficient difference to make the latter records quasi-public, while the records which need only be submitted for inspection retain their private character. We have, however, no authority to indicate that such is the distinction between the two cases.

The Interstate Commerce Act contains a provision for immunity of a witness from criminal prosecution resulting from certain testimony which he is compelled to give by the terms of the Act,⁸⁶ and this provision has been incorporated into some later acts, such as the act creating the Office of Price

83. *Internal Revenue Agent v. Sullivan*, 287 Fed. 138 (W.D.N.Y. 1923). The case of *Ryan v. Amazon Petroleum Corp.*, 71 F. 2d 1, 8 (C.C.A. 5th 1934), contains dicta to the effect that one required to keep production and shipment records for government inspection might assert a privilege to withhold a particular portion of his records.

84. 148 F. 2d 91 (C.C.A. 3d 1945).

85. *E.g.*, *United States v. Shapiro*, 159 F. 2d 890 (C.C.A. 2d 1947). *Bowles v. Seitz*, 62 F. Supp. 773 (W.D. Tenn. 1945).

86. 27 STAT. 443 (1893), 49 U.S.C.A. 46 (1929). The decision in *Brown v. Walker*, 161 U.S. 591 (1896) contains an interpretation of this provision.

Administration.⁸⁷ However, this provision has been interpreted as granting immunity only to testimony which would otherwise be privileged, and therefore does not apply to evidence gained from inspection of the records which the law requires to be kept.⁸⁸

Suppose that a statute of State *A* requires *X* to keep certain records, such records to be subject to inspection for the purposes of tax collection. Then if *X* is indicted for obtaining money by false pretenses, or for some other crime which bears no relation to tax collection, may such records be placed in evidence against him on the ground that they are quasi-public records despite *X*'s claim that introduction of such records is forcing him to self-incrimination? There seems to be a scarcity of cases directly bearing on this question, and any answer given at the present time would seem to be no more than an expression of opinion. On the one hand, we have the consideration that the records, being required by law, acquire a character which is different from that of private records which are subject to *X*'s claim of privilege. Opposed to this consideration, we have the argument that the records were required to be made available for inspection for a particular purpose, and that the records lost their private character with regard to that purpose only, and should be subject to claims of privilege as private records in so far as purposes other than tax collection are concerned.

BANKRUPTCY

A. Schedules of Property

Suppose that *X* becomes hopelessly insolvent and wishes to take advantage of the Bankruptcy Act,⁸⁹ or his creditors force him into the bankruptcy court. *X* will find that the Bankruptcy Act requires him to file a schedule with the court which lists his assets and liabilities, indicates his creditors and the security they hold, and certain other information. Suppose, further, that *X* has recently acquired some property on credit from *Y* by painting for *Y* a more rosy picture of his (*X*'s) financial status than was true in fact. If *Y* has *X* indicted for obtaining property by false pretenses, or some other crime as to which the schedules might be important evidence, may the schedules of *X* be obtained from the bankruptcy court for use in evidence against him over *X*'s objection that he is being forced to give evidence against himself?

This question made trouble for the courts in their early interpretations

87. 56 STAT. 30 (1942), 50 U.S.C.A. App. 922g (1944).

88. *United States v. Shapiro*, 159 F. 2d 890 (C.C.A. 2d 1947); *Bowles v. Seitz*, 62 F. Supp. 773 (W.D. Tenn. 1945). *Bowles v. Chu Mang Poo*, 58 F. Supp. 841 (N.D. Cal. 1945) is not necessarily contra, since the court there found a waiver of any privilege which the defendants might assert, and did not decide whether or not the defendants were entitled to a claim of privilege.

89. 30 STAT. 544 (1898), as amended, 11 U.S.C.A. § 1 *et seq.* (1927).

of the Act. Section 25 of the Act⁹⁰ required the bankrupt to attend the first meeting of his creditors, examine the correctness of claims filed against his estate and to give certain other information. Subsection 8 of § 25 (Subsec. 9 of the present, amended Act) required the schedules. Subsection 9 (Subsec. 10 of the present Act) provided that when present at the first meeting of his creditors, and at such other times as the court shall order, the bankrupt shall submit to an examination regarding his property, "but no testimony given by him shall be offered in evidence against him in any criminal proceeding."⁹¹ Did subsection 9 mean that the schedules required by subsection 8 could not be used in a criminal proceeding against the bankrupt?

The courts were not faced squarely with this question until after 1910 because it was found that the schedules were within the protection of § 860 of the Revised Code.⁹² *Cohen v. United States*,⁹³ decided in 1909, held that the schedules were protected by § 860 of the Code, and also that subsection 9 of the Bankruptcy Act forbade their use in criminal proceedings against the bankrupt. However, § 860 was repealed in 1910⁹⁴ and the question of the use of the schedules in criminal proceedings against the bankrupt came before the Supreme Court of the United States in 1913. The Court decided⁹⁵ that the immunity provisions of subsection 9 referred only to testimony given under the particular subsection and did not protect a bankrupt against the use of the schedules which were required by a different subsection. The Court explained that it was reasonable for Congress to distinguish between schedules, which could be prepared at leisure and scrutinized by the bankrupt, and the oral testimony required by subsection 9 in providing for immunity. This case seems to have settled the question.⁹⁶ Since the Supreme Court has thus interpreted the meaning of the statute, there would seem to be no reason why the state courts would not also allow the schedules to be used in evidence against the bankrupt in state criminal proceedings,⁹⁷ if the bankruptcy court will release them to state authorities.

Suppose that *before X* has filed his schedule in bankruptcy, he has been

90. 30 STAT. 548 (1898), as amended, 11 U.S.C.A. § 25 (Supp. 1947).

91. *Id.* at subsec. 10. This provision was subsec. 9 of the original Act, and was amended by 52 STAT. 847 (1938).

92. *Johnson v. United States*, 163 Fed. 30 (C.C.A. 1st 1908). REV. STAT. § 860 (1875), 15 STAT. 37 (1868) provided: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: . . ."

93. 170 Fed. 715 (C.C.A. 4th 1909).

94. 36 STAT. 352 (1910).

95. *Ensign v. Commonwealth*, 227 U.S. 592 (1913).

96. *Accord, Optner v. United States*, 13 F. 2d 11 (C.C.A. 6th 1926); *Slakoff v. United States*, 8 F. 2d 9 (C.C.A. 3d 1925).

97. *Contra: State v. Drew*, 110 Minn. 247, 124 N.W. 1091 (1910), in which the court held the schedules inadmissible and made a distinction between a voluntary proceeding and an involuntary proceeding.

indicted or fears an indictment. If he believes that there is certain information about his property which might be used in a criminal proceeding against him, may he omit such information from his schedule? The answer is *yes*—there is no privilege against the use of the schedules against him, but he has the protection of the Fifth Amendment of the United States Constitution in *preparing* his schedules. Before filing the schedule, the bankrupt may eliminate therefrom such matter as he honestly believes might be used against him in a criminal case, although, as in all claims of the privilege, the reasonableness of the apprehension must satisfy the bankruptcy court.⁹⁸ If the bankrupt does not assert his privilege at the time of filing the schedules, they become admissions of fact and are available for use in evidence against him after they are filed.⁹⁹

An interesting aspect of the privilege against self-incrimination, which should be noticed at this point is, that in order for a witness to claim the privilege, the evidence must be incriminating under the law of the jurisdiction which is seeking to compel the answer. Thus the fact that a witness under examination in a federal court claims that his testimony would indicate that he is guilty of a violation of a state law of a sister state will not justify his claim of the privilege, according to several Supreme Court opinions.¹⁰⁰ In *United States v. Murdock*¹⁰¹ the Court reasoned that it could not be presumed that a prosecution under a foreign jurisdiction would take place, and the danger was too unsubstantial and remote for the courts to consider it.

B: *Books of Account and Records Pertaining to the Bankrupt Estate*

May a bankrupt refuse to surrender books of account and papers pertaining to his estate to the bankruptcy court because such documents contain evidence which tends to incriminate him? The answer today seems to be an unqualified *no*.

Some of the earlier cases decided under the Bankruptcy Act indicated that the courts were willing to recognize a privilege against the production of books and papers containing incriminating information about the bankrupt. In 1899 a federal district court decided¹⁰² that the bankrupt must produce his papers despite a claim of privilege, but the court based its holding on the fact that the proceedings were voluntary, and that the bankrupt had

98. *In re Naletsky*, 280 Fed. 437 (D. Conn. 1921).

99. *Carlinsky v. United States*, 54 F. 2d 889 (C.C.A. 10th 1931), *cert. denied*, 285 U.S. 549 (1932). As to whether a bankrupt may refuse to answer questions concerning property which he has listed in his schedule, see *Arndstein v. McCarthy*, 254 U.S. 71 (1920) and *In re Tobias*, 215 Fed. 815 (S.D.N.Y. 1914).

100. *United States v. Murdock*, 284 U.S. 141 (1931); *Jack v. Kansas*, 199 U.S. 372 (1905); *Brown v. Walker*, 161 U.S. 591 (1896).

101. *United States v. Murdock*, 284 U.S. 141 (1931).

102. *In re Sapiro*, 92 Fed. 340 (E.D. Wis. 1899).

thereby waived his privilege. A case in 1902¹⁰³ held that the privilege of the bankrupt must be recognized and that he need not produce his papers when he claimed a privilege against self-incrimination, while in 1905 a brief opinion in a district court stated that the books must be brought before the court for the court to decide whether they must be surrendered or not.¹⁰⁴

But the Supreme Court has since decided the question against the bankrupt. In 1911 the Court decided that the question was not one of compelling the bankrupt to be a witness against himself, but of surrendering property which he was no longer entitled to keep.¹⁰⁵ The Court stated that title to the books vests in the trustee by express terms of the Bankruptcy Act¹⁰⁶ and the bankrupt can not withhold possession of what he no longer owns on the ground that otherwise he might be punished. Two years later the Court bolstered this holding. In *Johnson v. United States*¹⁰⁷ the Court explained that a person is privileged from producing evidence against himself, not from its production, and that a party is not privileged to withhold the documents, although they contain incriminating evidence, when the title has passed from him to the trustee. The privilege is personal and does not follow the documents after the law has transferred ownership of them. Later federal decisions affirm the opinion that once a party comes before the bankruptcy court, he must surrender his books and papers to the disposition of the court. Further, he loses all claim of privilege pertaining to these documents, and they may be placed in evidence against him in criminal proceedings, both in federal and state courts.¹⁰⁸ *Dier v. Benton*¹⁰⁹ contains the statement that the only restriction on the use of the documents in state courts is that the permission of the bankruptcy court must be obtained, such court having a discretion as to their release, subject to the considerations of comity.

The relatively recent ease of *United States v. Hoyt*¹¹⁰ was a rather perplexing decision. In this case a creditors' agreement had been reached and the bankrupt moved the court to return his books, claiming that if they were left where the district attorney could reach them, the petitioner's rights under the Fourth and Fifth Amendments to the United States Constitution would be violated. The court held, however, that the privilege against self-incrimination was a personal one, and did not follow the documents, and thus the petitioner was deemed to have waived any objection to the use of the papers until such time as they were returned to him. If the court in this case intended to hold

103. *In re Kanter*, 117 Fed. 356 (S.D.N.Y. 1902).

104. *In re Hess*, 134 Fed. 109 (E.D. Pa. 1905).

105. *In re Harris*, 221 U.S. 274 (1911).

106. 30 STAT. 565 (1898), as amended, 11 U.S.C.A. § 110 (Supp. 1947).

107. 228 U.S. 457 (1913).

108. *Ex parte Fuller*, 262 U.S. 91 (1923); *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

109. 262 U.S. 147 (1923).

110. 53 F. 2d 881 (S.D.N.Y. 1931).

that, although the bankruptcy proceedings had terminated, the bankrupt had waived any privilege in connection with his business books and papers, then it is hard to understand how the taking of property from an individual by operation of law could amount to a waiver of anything on his part. However, if the court merely was holding that it will keep the bankrupt's estate before it until it decides to terminate the proceedings at an appropriate time, then the decision can be justified by the fact that the title to the documents is in the trustee, and the bankrupt has no right to the documents until the court returns them to him.

However, the *Hoyt* case does not disturb the conclusion that the bankrupt is required to surrender the documents pertaining to his estate to the bankruptcy court, and having done so, loses any immunity against their production or use against him in a criminal proceeding.

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