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Constitutional Law-Self-Incrimination- Denial of Privilege to General Partner Holding Subpoenaed Books and Records of Limited Partnership

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CONSTITUTIONAL LAW—SELF-INCRIMINATION—DENIAL OF PRIVILEGE TO GENERAL PARTNER HOLDING SUBPOENAED BOOKS AND RECORDS OF LIMITED PARTNERSHIPS—A special agent of the Internal Revenue Service sought enumerated books and records of four New York limited partnerships in

connection with petitioner's tax liability for prior years. A subpoena duces tecum was issued directing petitioner to produce the records,[1] which were in his possession as general partner. Petitioner, his son, and his son-in-law were the general partners of each limited partnership involved, with limited partners ranging from twenty-five to 119 in number and capitalization from 225,000 dollars to 2,740,000 dollars. The partnerships, together with a management company, were housed in a single office with a staff of one secretary. Petitioner claimed that the order to deliver the books and records to the special agent violated his constitutional privilege against self-incrimination.[2] On appeal from a district court order upholding the subpoena,[3] *held*, affirmed. Where the size and extent of limited partnership operations show that a general partner's personal interest in the company books and records is subordinate to the interest of the company as a whole, the partner is holding the books in a purely representative capacity and may not claim for himself the privilege against self-incrimination as to the books subpoenaed. *United States v. Silverstein*, 314 F.2d 789 (2d Cir. 1963).

Personal papers and records have long been sheltered by the individual's constitutional protection against self-incrimination.[4] Since the privilege is defined as a purely personal right, it cannot be claimed by a legal entity such as a corporation,[5] although corporations are protected by the fourth amendment sanction against unreasonable searches and seizures.[6] Since no person has standing to refuse testimony by claiming only that the evidence may incriminate another person,[7] a corporation may not withhold books and records tending to incriminate one of its officers personally, although the subpoena is directed to the officer who as record custodian has kept the corporation books.[8] The fact that the corporation must comply with a

1 Pursuant to INT. REV. CODE OF 1954, §§ 7402(b), 7602, 7604.

2 U.S. CONST. amend. V, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

3 United States v. Silverstein, 210 F. Supp. 401 (S.D.N.Y. 1962).

4 Boyd v. United States, 116 U.S. 616 (1886). The privilege has been held to apply to any proceeding where the defendant is asked to produce evidence which might tend to incriminate him of some offense, or subject him to fines, penalties, or forfeitures, Counselman v. Hitchcock, 142 U.S. 547 (1892), including a hearing before a special agent of the Internal Revenue Service, as in the principal case, see, *e.g.*, *In re* Turner, 309 F.2d 69 (2d Cir. 1962). The claim of privilege must be raised at the first instance of required production of books and records held by the claimant, even where the initial investigation is civil rather than criminal. *E.g.*, Grant v. United States, 291 F.2d 227 (2d Cir. 1961) (failure to claim privilege at time of civil audit of books by tax examiners). Moreover, the defendant is required at least to bring the subpoenaed material into court so that the court may make its own determination of the incriminating nature of the documents. Brown v. United States, 276 U.S. 134 (1928).

5 Hale v. Henkel, 201 U.S. 43 (1906). English courts hold to the contrary. Triplex Safety Glass Co. v. Lancegaye Safety Glass, [1939] 2 K.B. 395.

6 Hale v. Henkel, *supra* note 5, at 76.

7 *Id.* at 69-70.

8 Wilson v. United States, 221 U.S. 361 (1911). The same seems to apply even where the custodian is the sole stockholder and officer of the corporation. See Grant v. United States, 227 U.S. 74 (1913); *In re* Greenspan, 187 F. Supp. 177 (S.D.N.Y. 1960); United States v. Hoyt, 53 F.2d 881 (S.D.N.Y. 1931). *But see* Application of Daniels, 140 F. Supp.

subpoena seeking its books, which might incriminate one of its officers, should not be altered by the circumstance that the officer involved has custody of the books. The denial to corporations and their officers of the privilege against self-incrimination was extended by the Supreme Court in *United States v. White*[9] to include non-corporate organizations and their officers, whenever any such group is found to more nearly embody a common or group interest rather than the purely personal interests of its members.[10]

Discussion of the policy bases of the organizational exception to the claim of privilege usually centers on the distinction between intimidation of the individual and of an impersonal entity.[11] In addition, three justifications are offered for denial of the right to custodians of organizational records. The first theory, advanced in the principal case,[12] is that by choosing a purely statutory form of business organization, a corporation or limited partnership and its constituents thereby elect to submit to the visitatorial power of the state over the company's record of dealings. This argument is unsatisfactory because it simply begs the question; the issue is whether that power may constitutionally be exercised.[13] Moreover, it fails to justify the exception in the case of a non-corporate group,[14] and has no application to an order by a federal agency for books of a state-chartered company. In neither of these two cases has the organization submitted to the visitatorial power of the authority actually demanding the evidence.

322 (S.D.N.Y. 1956). Despite the courts' refusal to allow organizational custodians to claim the privilege against self-incrimination when ordered to produce books and records which they hold, the government's subpoena power is still restricted by the unreasonable search and seizure sanction, Fleming v. Montgomery Ward & Co., 114 F.2d 384 (7th Cir.), *cert. denied*, 311 U.S. 690 (1940), and by the inability to elicit oral testimony from the officer other than to identify the records produced, Curcio v. United States, 354 U.S. 118 (1957); United States v. Daisart Sportswear, Inc., 169 F.2d 856 (2d Cir. 1948); United States v. Pollock, 201 F. Supp. 542 (W.D. Ark. 1962). The issuer of the subpoena must also prove that the records actually exist, and that they are within the control and possession of the subpoenaed party. Curcio v. United States, *supra*; United States v. Patterson, 219 F.2d 659 (2d Cir. 1955).

9 322 U.S. 694 (1944), involving a subpoena directed to an officer of a labor union ordering him to produce certain books and records of the union.

10 *Id.* at 701.

11 Thus it is said that fear of intimidation of the witness, from which the right against self-incrimination historically grew, has no bearing upon written evidence gathered from impersonal groups. 8 WIGMORE, EVIDENCE § 2259a (McNaughton rev. 1961).

12 Principal case at 791.

13 See 8 WIGMORE, *op. cit. supra* note 11, § 2259b. This visitatorial power theory underlies the categorical approach taken in cases involving corporate officers. See note 8 *supra*. The notion is closely related to the much-criticized public records doctrine, which would subject all records required to be kept by law to the state's inspection for any purpose. The doctrine was applied in Shapiro v. United States, 335 U.S. 1 (1948), but sharply criticized in Spilky, *Have We Lost Our Civil Rights in Tax Matters?*, 37 TAXES 603 (1959).

14 While a limited partnership, such as that in the principal case, is a state-chartered form of business association, the visitatorial power argument fails both for lack of an answer to the constitutional question, see note 13 *supra*, and because of the dangers of strict categorization, see note 29 *infra* and accompanying text.

Second, the argument is made that the custodian must share his view of the books with any stockholder, partner, or limited partner who wishes to see them. As justification for a requirement that the custodian turn over the records to the government, this idea is irrelevant; the fact that *someone* other than the custodian has the right to see the company's books is no reason why a government should share that right.[15] Finally, some suggest that effective law enforcement in the case of large enterprises faces special difficulties of proof not found in proceedings against individuals.[16] Such a policy, however, is not applicable to an investigation of individual criminality, as in the principal case.

The argument for effective law enforcement as a justification for denial of the privilege to organizational record custodians reveals most strikingly the common failure of the courts to recognize that in many cases the record of a company's dealings may be equated with the dealings of an individual. If the individual custodian can show that the acts of his company are in fact his acts, executed in great measure in his own personal interest, then he should be allowed to withhold self-incriminating company records of those acts. In the *White* case the Supreme Court provided at least a clue to the determination of such an identity of company and personal action:

> "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 its constituents, but rather to embody their common or group interests only."[17]

The Court apparently meant this test to apply only to a claim of privilege by the organization itself, and by its officers acting in an official capacity;[18] the Court brushed aside the defendant's claim of self-incrimination on his own behalf by noting that he had not shown that included in the group records were any of "his own private papers."[19] In subsequent organizational cases the Court has never fully applied the *White* test; rather, in most instances the *White* case has been cited in support of summary conclusions that organizations represented by defendant custodians were impersonal.[20] Lower court cases involving partnerships have, however, applied the test to determine the impersonal nature of the partnership in each case.[21] In the only case in which it was argued that the *White* test

15 See 8 WIGMORE, *op. cit. supra* note 11, § 2259b.

16 See *ibid.*

17 United States v. White, 322 U.S. 694, 701 (1944).

18 *Ibid.*

19 *Id.* at 704.

20 See, *e.g.*, McPhaul v. United States, 364 U.S. 372 (1960) (Civil Rights Congress); Curcio v. United States, 354 U.S. 118 (1957) (labor union); Rogers v. United States, 340 U.S. 367 (1951) (Communist Party of Denver); United States v. Fleischman, 339 U.S. 349 (1950) (Joint Anti-Fascist Refugee Committee).

21 Privilege upheld: United States v. Linen Serv. Council, 141 F. Supp. 511 (D.N.J.

applied only to pleas of self-incrimination by organizations and not to cases of individual claims of self-incrimination, the court rejected the argument, holding that, regardless of who is in danger of being incriminated, the records must still be held in a purely personal capacity if the privilege is to apply.[22] This answer is correct if it means that in each case the test of the organization's personal or impersonal structure will show whether both the custodian on his own behalf and the organization itself may claim the privilege, or whether the organization is so impersonal that no one's individual acts may be equated with the group's acts. The issue, in a claim by either the individual or by the group, is the possible identity of personal and company dealings recorded in the subpoenaed material. If no such identity exists, neither the entity nor the individual has the right to withhold records. This will be a question of degree in most cases, since all organizations represent both personal and group interests to a certain extent.

The principal case, the first to face squarely the problem of a claim of the privilege against self-incrimination by a general partner of a limited partnership created under the Uniform Limited Partnership Act,[23] seems tacitly to recognize the distinction between wholly impersonal group acts and personal acts which may be identical in nature to the dealings of the entity. Despite an unfortunately drawn analogy between the nature of the limited partnerships involved and the structure of a corporation,[24] the court applied the *White* test to find that the limited partnerships were impersonal in structure and operation. This conclusion was based almost solely on the size of the capital fund and the number of limited partners in each company. In support of this limited examination, the court found authority in the emphasis which the *White* decision placed upon the scope of membership and activities as showing the impersonal nature of a group. By thus narrowing the range of the inquiry, the court may have overlooked other elements which are important in determining the personal or impersonal character of company acts.

1956); *In re* Subpoena Duces Tecum, 81 F. Supp. 418 (N.D. Cal. 1948). Privilege denied: United States v. Wernes, 157 F.2d 797 (7th Cir. 1946); United States v. Onassis, 133 F. Supp. 327 (S.D.N.Y. 1955); United States v. Onassis, 125 F. Supp. 190 (D.D.C. 1954). One pre-*White* case held the privilege applicable to a partnership. United States v. Brasley, 268 Fed. 59 (W.D. Pa. 1920).

22 United States v. Wernes, *supra* note 21.

23 8 UNIFORM LAWS ANNOTATED. Since its promulgation in 1915, thirty-seven states have adopted this uniform act. See, *e.g.*, N.Y. PARTNERSHIP LAW §§ 90-119.

24 Principal case at 791. Since general partners bear a far greater burden as to both control and assumption of personal liability in a limited partnership than do corporate officers, this analogy is inaccurate. See statutes cited notes 25 & 26 *infra*. Such a comparison may have an undesirable impact upon subsequent cases involving claims of self-incrimination by limited partnerships should the courts use the same categorical approach as was applied in the one-man corporation cases cited note 8 *supra*. *Cf.* 46 IOWA L. REV. 632 (1961). A better comparison may be found in cases involving business or Massachusetts trusts. See United States v. Field, 193 F.2d 92 (2d Cir.), *cert. denied*, 342 U.S. 894 (1951); Mulloney v. United States, 79 F.2d 566 (1st Cir. 1935); United States v. Invader Oil Corp., 5 F.2d 715 (S.D. Cal. 1925).

Where a limited partnership is involved, at least four elements should be relevant to the test of impersonality. The restriction against participation by any but general partners in the control and management of the limited partnership[25] indicates a more personal type of control than is present in the typical corporation. The peculiar form of liability for the limited partnership's debts shouldered by each individual member also shows a high personal stake of the general partner in the acts of the company; each general partner is liable for the debts of the whole enterprise,[26] as in ordinary partnerships, while limited partners are liable only to the extent of their investment,[27] as with corporate stockholders. On the other hand, any limited partnership is impersonal when measured by the interest which each limited partner has in the profit of the venture.[28] To that end, as the court pointed out in the principal case, each limited partner has the right to inspect the company books and to receive a full accounting at any time.[29] The court, however, also considered the statutory means by which the limited partnership is created as an additional controlling factor in the determination of impersonality of the organizational structure. While a limited partnership is certainly a creature of statute,[30] this argument is questionable: first, because attention to the visitatorial power of the state forces the court to a strict categorization of a group as "state-licensed-therefore-impersonal," and second, because the method of formation is irrelevant to the question of operational structure. The amount of capitalization and number of partners, both general and limited, may have evidentiary value as to the impersonal nature of each group,[31] but should not be controlling as against the personal factors represented by the total control exercised by, and special liability borne by, the general partners. If physical size and the availability of particular state sanctions are accepted as important factors in determining the impersonal character of a group, then every limited partnership can be found impersonal. If the limited partners' stake in the company's profits is sufficient to place the organization in the impersonal category, small partnerships desiring to use the limited partnership device to reach additional funds must be prepared, in return for the privilege of obtaining increased capital, to give up any rights, as individuals or entities, to withhold books and records from

25 UNIFORM LIMITED PARTNERSHIP ACT § 7.

26 UNIFORM LIMITED PARTNERSHIP ACT § 9.

27 UNIFORM LIMITED PARTNERSHIP ACT § 7. Limited partners may even transact business and deal with the firm in the same manner as strangers. See 56 MICH. L. REV. 285 (1957).

28 UNIFORM LIMITED PARTNERSHIP ACT § 10.

29 *Ibid.* This fact is pertinent at this point in the analysis of structure for signs of impersonality, whereas the right of limited partners to see the company books and records is irrelevant as a policy basis for the exception to the self-incrimination privilege made for organizational record custodians.

30 See Nadler, *The Limited Partnership Under the Uniform Limited Partnership Act*, 65 COM. L.J. 71 (1960).

31 See especially the two *Onassis* cases cited note 21 *supra*.

governmental inspection. Upon fuller consideration, however, the elements of control and liability, in the typical limited partnership, should show that most such companies are more personal than impersonal, at least where the number of general partners is small. Thus a general partner should be allowed his right to claim the privilege against self-incrimination as to the company books and records. As the court so correctly admitted,[32] the fact that such a general partner was unable to do so in the principal case reveals forcefully the personal danger to individuals inherent in the organizational records exception to the privilege against self-incrimination.

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[32] Principal case at 791.