ISADORE JOSEPH KLEIN, ALBERT LOFTUS McLENNAN, GEORGE W. NORGAN, UNITED DISTILLERS OF CANADA LIMITED, UNITED DISTILLERS LIMITED, DUNCAN HARWOOD & COMPANY LIMITED, JOHN DUNBAR & COMPANY LIMITED and JOHN ADAMS & COMPANY LIMITED, (*Defendants*) APPELLANTS;

1954
*Oct. 21, 22
1955
*Apr. 6

AND

NETTA BELL, ANGELA BELL, JACK BELL and NATHAN INVESTMENTS LIMITED (in voluntary liquidation) (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Discovery, Examination for—Witness—Privilege against self-crimination —Validity of s. 5, Evidence Act (B.C.)—Order 31A, r. 370 (c) matter of practice and procedure—Application of common law rule—Evidence Act (B.C.)—Evidence Act (Can.)—Court Rules of Practice Act (B.C.) ss. 2, 4(3).

*PRESENT: Kerwin C.J. and Taschereau, Rand, Estey, and Fauteux JJ.

(*See Reporter's note at end of case.)

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S. 5 of the *Evidence Act*, R.S.B.C. 1948, c. 113 provides:

"No witness shall be excused from answering any question upon the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person: Provided that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering the question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence."

In an action for damages for fraud and deceit each of the individual appellants and an officer of the United Distillers of Canada Ltd., the appellant corporation, on their respective examinations for discovery refused to answer certain questions, or to produce certain documents, on the ground that such answers might tend to criminate him. Upon an application for an order directing the individuals to answer the questions and produce the documents in question the general objections were upheld by Clynne J. but his order was reversed by the majority of the Court of Appeal for British Columbia.

Held: (Affirming the Court of Appeal):—

1. Examinations for Discovery under Order 31A, r. 370 (*c*) of the British Columbia Supreme Court Rules are covered by s. 5 of the *Evidence Act*.
2. This rule does not go beyond the power contained in s. 2 of the *Court Rules of Practice Act*, R.S.B.C. 1948, c. 293, and its predecessors, and s. 4(3) thereof enacts that r. 370 (*c*) is a matter of practice and procedure.
3. "Criminal proceedings" in s. 5 of the *Evidence Act* is not confined to what are known as provincial crimes. *Staples* v. *Isaacs and Harris* 55 B.C.R. 189 overruled.

Held: further, on a point taken for the first time in this court, that s. 5 of the *Evidence Act* is *ultra vires* the Provincial Legislature as the proviso may not be disregarded. The common law rule that no one was obliged to criminate himself applies as well to an officer taking the objection on behalf of his company as to an individual litigant. In both cases, however, the objection must be made on the oath of the person under examination that to the best of his belief his answers would tend to criminate him, or the company, as the case may be. He must pledge his oath in his belief that his answers to particular questions *seriatum* would so tend. *Power* v. *Ellis* 6 Can. S.C.R. 1, applied. The officer may claim the privilege on behalf of his company, either as to answers to questions or as to documents, but the latter cannot hide behind any claim advanced by the officer on his own behalf in respect of documents. If he is put forward as the proper person on behalf of a company to make an affidavit on production he is not entitled to make a claim for personal privilege in respect of documents.

APPEAL by special leave from a judgment of the Court of Appeal for British Columbia (1), Sloan C.J.B.C. dissenting, reversing the order of Clynne J. (2) and holding that the individual defendants and an officer of the appellant corporation were not entitled to refuse to answer questions, or to produce documents on examination for discovery, on the ground that such answers might tend to criminate them.

J. W. deB. Farris, Q.C. and *F. A. Sheppard, Q.C.* for the appellants.

D. H. W Henry for the Attorney General of Canada.

L. A. Kelley, Q.C. for the Attorney General of British Columbia.

R. H. Barron, for the respondents.

The judgment of Kerwin C.J. and of Taschereau, Estey and Fauteux JJ. was delivered by:—

THE CHIEF JUSTICE:—Reversing the order of Clyne J. the Court of Appeal for British Columbia held that the individual defendants, Klein, McLennan and Norgan, were not entitled to refuse to answer questions, or to produce documents on examination for discovery, on the ground that such answers might tend to criminate them. One, Norman Harold Peters, had also attended for examination for discovery as an officer of the appellant, United Distillers of Canada, Limited, and he had taken the same objection on behalf of his company. Peters died before the decision of the Court of Appeal. The judgment of the latter provides that upon the continuation of their respective examinations for discovery Klein, McLennan and Norgan shall answer all questions which they respectively refused to answer and produce all documents which they respectively refused to produce on their examinations for discovery held on September 10, 1953, and that upon the examination for discovery of any officer of United Distillers of Canada, Ltd. in the place of Peters such officer shall answer all questions which Peters had refused to answer and produce all documents which he had refused to produce. The defendants now appeal and ask for the restoration of the order of Clyne J.

(1) (1954) 12 W.W.R. (N.S.) 272; [1954] 4 D.L.R. 273.

(2) (1953-54) 10 W.W.R. (N.S.) 324; [1954] 1 D.L.R. 225.

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The appellants argued that examinations for discovery are not included in or covered by s. (5) of the *Evidence Act*, R.S.B.C. 1948, c. 113, which is in these terms:

> No witness shall be excused from answering any question upon the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person: Provided that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering the question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence.

Order 31A, Rule 370 (*c*) of the British Columbia Supreme Court Rules provides:

> A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest, and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination of a witness except as hereinafter provided.
>
> (1) In the case of a corporation, any officer or servant of such corporation may, without any special order, and any one who has been one of the officers of such corporation may, by order of a Court or a Judge, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness, save as hereinafter provided. Such examination or any part thereof may be used as evidence at the trial if the trial Judge so orders.
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> * * *

We were not referred to any exception "hereinafter provided" and, in view of the express terms that a party, officer or servant may be compelled to attend and testify "in the same manner, upon the same terms, and subject to the same rules of examination of (or as) a witness", the person being examined is subject to the direction contained in s. (5) of the Act and, of course, is entitled to the privilege. Order 31A is modelled from the Ontario Rules, 1897 and amendments, and in *Chambers* v. *Jaffray* (1), it was so held, although in the Divisional Court the majority apparently did so because they considered themselves bound by *Regina*

(1) (1906) 12 O.L.R. 377.

v. *Fox* (1). Without expressing any opinion as to the latter, the result arrived at in the *Chambers* case is, in my view, the correct one.

It was also contended that the rule went beyond the power contained in s. (2) of the *Court Rules of Practice Act,* R.S.B.C. 1948, c. 293, and its predecessors, by which authority is and was conferred upon the Lieutenant Governor in Council of the Province to make rules for regulating the practice and procedure of the Court. Power is given by s-s. (6) of s. (4) of the Act and was contained in an earlier enactment to add to or vary the rules, (which was done), and Rule 370 (*c*) now appears as above set forth. By s-s. (3) of s. (4) of the Act those rules "shall regulate the procedure and practice in the Supreme Court in the matters therein provided for", and, notwithstanding what was done in connection with the Divorce Rules by s-s. (1) of s. (2) of c. 37 of the British Columbia Statutes, now incorporated in R.S.B.C. 1948, c. 293, s-s. (3) of s. (4) of the latter stands by itself and must receive its full effect. This is a positive enactment that Rule 370 (*c*) is a matter of practice and procedure.

It is now necessary to deal with the point taken by the appellants for the first time in this Court that s. (5) of the *Evidence Act,* R.S.B.C. 1948, c. 113, is *ultra vires* the provincial Legislature. It should be noted that the earliest Evidence Acts of the Canadian Parliament had no provision such as is found in s. (5) of the *Canada Evidence Act,* R.S.C. 1952, c. 307. The forerunner of that section first appeared in c. 31 of the Statutes of 1893 and read as follows:

> 5. No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person: Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence.

This Act was amended by c. 36 of the Statutes of 1901 by adding thereto the following as s-s. (2) of s. (5):

> 2. The proviso to subsection (1) of this section shall in like manner apply to the answer of a witness to any question which pursuant to an enactment of the legislature of a province such witness is compelled to

(1) (1899) 18 P.R. 343.

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answer after having objected so to do upon any ground mentioned in the said subsection, and which, but for that enactment, he would upon such ground have been excused from answering.

In the Revised Statutes of Canada, 1906, c. 145, s. (5) of the *Canada Evidence Act* appeared as follows:

5. No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

In 1894 the British Columbia legislature revised its Evidence Act and therein enacted verbatim s. (5) of the Canadian Act of 1893 set out above. The provincial statutes were again revised in 1897, when s. (6) of the *Evidence Act,* c. 71, appeared in the same form as s. (5) of the Act of 1894. They were consolidated in 1911 when, for the first time, s. (5) of the *Evidence Act,* c. 78, appeared in practically the same form as the section now before us, R.S.B.C. 1948, c. 113.

It has been pointed out that in 1894 the British Columbia Legislature enacted the same provision as Parliament had passed in 1893. The enactment in 1911 in British Columbia was an endeavour to carry out the idea underlying s. (5) of c. 145 of the Revised Statutes of Canada, 1906. I have no doubt that this was done with the object of taking care of cases where the proper objection to testify was taken in proceedings over which the legislature had jurisdiction and then providing that such evidence might not be used later either in civil cases or a criminal trial. Looking at s. (5) as it appeared in the 1894 provincial enactment and considering its history since then, I am driven to the conclusion that "criminal proceeding" is not confined to what are known as provincial crimes, particularly when that part of the statute is followed by the words "other than the prosecution for perjury". The decision of the British Columbia

Court of Appeal on this point in *Staples* v. *Isaacs and Harris*, (1) (which, in fact, was overruled by the Court of Appeal in the present case) cannot be supported. Canada, of course, could only provide with reference to all proceedings over which it had legislative authority and the provincial legislature with reference to proceedings over which it had such authority, I am unable to agree with the contention on behalf of the respondent and the Attorney General of British Columbia that the proviso in the provincial enactment may be disregarded, because I am unable to hold that even if the constitutional point had been brought to the attention of the Legislature it would have enacted the section without some proviso and it is impossible to say what that proviso would have contained. Reliance was placed by the respondents and the Attorney General of British Columbia upon s. 36 of the *Canada Evidence Act*, which is in these terms:

> 36. In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings.

This, however, cannot assist, because, if s. (5) of the British Columbia Act is of no effect, it is not part of the provincial law of evidence. S. (5) must, therefore, be declared *ultra vires*. This conclusion is to be regretted, but the situation is not beyond remedy by the legislature.

In the absence of any such remedial legislation the common law applies as well to an officer taking the objection on behalf of his company as to an individual litigant. In both cases, however, the objection must be made on the oath of the person under examination that, to the best of his belief, his answers would tend to criminate him, or the company, as the case may be. Such person is not entitled to object to answer ordinary questions about his residence, place of business, etc., nor is he entitled to rest on a statement that on the advice of his solicitor, or the solicitor for the company, he refuses to answer any questions on the ground that the answers might tend to criminate him, or it. He must pledge his oath in his belief that his answers to particular

(1) (1939) 55 B.C.R. 189; 74 Can. C.C. 204; [1940] 3 D.L.R. 473.

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questions seriatim would so tend: *Power* v. *Ellis* (1). What occurred on the examinations for discovery in this case is not sufficient.

As to documents, each of the appellants, Klein, McLennan and Norgan, made an affidavit on production, but in each the only claim for privilege with respect to what was identified as "brief and confidential memoranda prepared by Counsel, or at the request of Counsel" was that "the said documents are privileged on the grounds of having been prepared confidentially for the purpose of being used in this litigation". A similar claim was made by Peters on behalf of United Distillers of Canada Ltd. We were told that orders had been made for further and better affidavits on production, which have not yet been complied with, but we are not aware that there has been any refusal. There are certain documents which Clyne J. ordered to be produced on the continuation of the examinations for discovery of Klein, McLennan and Norgan, namely, an agreement of July 22, 1947, and all documents mentioned in ss. 107, 108 and 121 (3) of the *Companies Act*, R.S.C. 1952, c. 53. Clyne J. also ordered that certain questions should be answered on the continuation of the examinations for discovery of the three individuals, but reserved for decision the right of the plaintiffs to further question them in relation to the documents referred to.

No objection is taken to these terms, as the appellants seek merely the restoration of that order. It should be so directed, subject to the omission of the reference to Peters and the inclusion of an officer of United Distillers of Canada, Ltd., who is to take his place; and subject to amending paragraph (4) of the order by providing that the refusal is subject to the objection being taken in the proper form as above indicated. The order should also be subject to an alteration to take care of the difference in the positions of an officer of a company and an individual litigant. The officer may claim the privilege on behalf of his company, either as to answers to questions or as to documents, but the latter cannot hide behind any claim advanced by the officer on his own behalf in respect of documents. If he

(1) (1881) 6 Can. S.C.R. 1.

is put forward as the proper person on behalf of a company to make an affidavit on production he is not entitled to make a claim for personal privilege in respect of documents.

Clyne J. gave no costs of the application before him and that provision may stand. There should be no costs in the Court of Appeal, but the appellants are entitled to their costs in this Court as against the respondents. There should be no costs to or against either Attorney General.

RAND J.:—This appeal is concerned with the privilege against crimination on discovery. The judgment of the Court of Appeal was attacked by Mr. Farris on several grounds. Among them was the scope of the word "witness" in s. 5 of the *Canada Evidence Act*. His argument was that a person examined as a party or agent was not within that word notwithstanding marginal rule of court, (B.C.) No. 370(*c*), providing for oral discovery, which declares a party or an agent to be examinable "in the same manner and upon the same terms and subject to the same rules of examination as a witness".

S. 5 expressly prohibits the use of incriminating evidence furnished under the compulsion of provincial legislation. The purpose of this provision is to liberate the disclosure of evidentiary matter. It is non-disclosure which the rule guards and the Act modifies; and the prohibition of use contemplates the entire machinery of the administration of justice in provincial proceedings. A witness, in a broad sense, is one who, in the course of juridical processes, attests to matters of fact; and in the multiplying procedures directed to the elicitation of such matters, the object of the statute, dealing as it does with a basic right, would be defeated by limiting its protection to part only of coerced disclosure. Since, as assumed by all parties, the Province is within its jurisdiction in that compulsion, I have no difficulty in interpreting the challenged word to extend to one of the most effective instruments to the function of litigation. That was the expressed view of Mulock C.J. in *Chambers* v. *Jaffray* (1) and, as I read their reasons, the implied view of the members of the Court of Appeal who affirmed his judgment.

(1) 12 O.L.R. 377.

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Mr. Farris next disputes the validity of rule 370(*c*), to the extent that it affects the privilege, as an encroachment upon a substantive right and consequently beyond the limits of "practice and procedure". But by c. 56 of the statutes of 1943, amending c. 249, R.S.B.C. 1936, it was declared that the present orders and rules should thereafter "regulate the practice and procedure" in the Supreme Court. This categorical enactment dispenses with any enquiry into whether rule 370(*c*) is within "procedure": it has been declared to be so, and in my opinion, that concludes the question.

But the validity of s. 5 of the Provincial Act also is contested. Its language is:

> No witness shall be excused from answering any question upon the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person: Provided that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering the question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence.

This, originally passed in 1894, was given its present form in 1897. In 1893 what is now s. 5 of the *Canada Evidence Act*, in enacting that, in criminal and other proceedings respecting which Parliament has jurisdiction, no person should be excused from answering any question on the ground of crimination, provided that no evidence so given should "be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence." This was the law of Parliament at the time of the enactment of s. 5 of the Provincial Act, and it will be observed that its immunity does not reach one who has been compelled to answer by provincial law. It was not until 1901 that the protection of the Dominion Act was extended to evidence so adduced; and the critical question is, what was the law regarding compulsion to answer, say, in 1898? This depends upon the interpretation of s. 5 of the provincial Act and whether or not the proviso can be severed from the main clause.

The language employed does not vary materially from that of s. 5 of the Dominion Act of 1893. The provincial Act came before the Court of Appeal in the case of *Staples* v. *Isaacs and Harris* (1). The effect of the judgment was that, in both its compulsory and protective features, the section was limited to matters that relate to what are called "provincial crimes", for example, breaches of municipal by-laws or violations of the provincial government Liquor Act. This is made clear in the reasons of Sloan J.A. (now C.J.B.C.). The view expressed was that as the party examined could be afforded no safeguard by the provincial Act in a prosecution under the *Criminal Code,* the legislature could not be taken to have abrogated the privilege generally. At the same time it was held that the word "witness" in s. 5 of the Dominion Act did not extend to a person being examined on discovery.

To attribute such a limited scope to s. 5 of the provincial Act would, of course, dispose of this appeal without more; the matters of incrimination here have nothing to do with provincial offences. But the Court of Appeal has declined to follow *Staples* v. *Isaacs* (*supra*), and it becomes necessary to examine the statutory language more closely. The proviso declares that the answer "shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence." I think it would be distorting the natural meaning of these words to say that they are restricted to provincial crimes. The opening clause of the section is equally broad: the witness is not to be excused from answering any question upon the ground of crimination.

I entertain no doubt that a province cannot exclude from testimony in a criminal prosecution admissions made in the course of discovery or of trial in a civil proceeding; to do so would be to legislate in relation to procedure in criminal matters which is within the exclusive jurisdiction of Parliament. Can the proviso be taken in the sense that the compulsory feature is to be effective where and when under any law the answer is not available for use in criminal proceedings against the person making it? The amendment

(1) 55 B.C.R. 189.

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made in 1901 would in that case feed the proviso and bring into operation the compulsory clause. But the language excludes such a construction. The purpose and intention were to create by force of what was looked upon as effective legislation a protection complementary to the broadest compulsion.

Is the proviso, then, severable? Can it be taken not as a condition bound up with the preceding clause, but as an independent and consequential declaration which may be struck out without affecting it? The Act, as declared in s. 3, undoubtedly includes proceedings over which the legislature has jurisdiction, and a residue can be found in the proviso for purely provincial matters which would leave the general compulsion intact. But if the question had arisen in 1895, can any one doubt what the answer would have been? Considering the obvious purpose of the legislation, in a radical departure from the ancient rule, such an interpretation would be repugnant to the vital considerations the legislature had in mind. The entire section consequently was inoperative *ab initio*.

That being so in 1894, it could not be revived by the amendment of 1901; nor could the general revisions of the Act made since that time furnish any efficacy to the section. It seems quite evident that the significance of the amendment in relation to the provincial Act was not appreciated. The result is unfortunate, but I see no way of escaping it.

The relation of the privilege to the production of documents is also in issue. In the case of the individual defendants the privilege extends to documents in their personal possession which contain incriminating matter and which, accordingly, they may object to produce.

But a distinction must be made in the case of documents of the corporation. The claim of privilege raised on an examination by a company's officer in whose custody its documents may, at any time, be, may be related either to the criminality of the company or to that of himself. In this I take the privilege to be as open to a body corporate as to an individual: *Triplex Safety Glass Co.* v. *Lancegaye Safety Glass (1934) Ltd.* (1). Although a witness may not set up the claim for the benefit of a third person yet since in

(1) [1939] 2 K.B. 395.

an affidavit of documents the privilege may be taken by a corporation acting through its officer, it would be little short of absurd that it could be defeated on the examination of the officer having custody of them. If the custody is that of the corporation for the purposes of production following an affidavit, the custodian to that extent represents the corporation, and if documents are privileged in the one case, they must be also in the other.

But the claim may be that the document may tend to criminate the officer personally. In such a case I can see no sound reason for conceding it when the matter is one of authentication only and he is no more intimately associated with the corporation than as an officer, custodian or recorder of its proceedings, actions or transactions. He may be involved in some of the latter, but to admit the privilege would be to enable the corporation to prevent production on an examination by maintaining him as custodian. His custody is the possession of the company and no inference can be drawn against him from either fact: and if he chooses or is chosen to continue as custodian, he must submit to its incidental consequences. But this does not touch questions arising out of the documents so produced.

Is the corporation, in the circumstances here, bound to produce its books generally? I have no doubt that it is. No allegation or suggestion is made from which it could be reasonably inferred that the production might expose the corporation to criminal or penal proceedings. The only possibility offered is that of liability to penalties under the *Income Tax Act*. But that Act gives to the Income Tax Department the widest powers to require the production of any document belonging to the corporation bearing relation to its income or to a violation of the Act. Among the things sought here are details of liquor sales, i.e. the names of purchasers, prices, etc., made by the corporation during the years in question. The production of such records will effect nothing not already done or open to be done by the Department. And as a prosecution for penalties under that Act can be instituted only under the actual or presumed authority of the Minister, the privilege so far has been effectually abolished.

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Rand J.

The defendants have, by order, been directed to make a further and better affidavit of documents, and when that is done inspection may be made of all books containing matter relating to the issues in the action. Their production by an officer on a further examination can therefore be required and their authentication by him as company documents cannot be the subject of a claim of personal privilege.

Several observations are called for on the mode of procedure followed by the defendants in setting up the protection. In almost every instance counsel first objected to the question and then "instructed" the witness either not to answer or to claim the privilege. This misconceives the nature of what is being considered. The questions were entirely proper since they were relevant to the issues. The privilege can be invoked only after the question is put, and the function of counsel on such an examination does not go beyond informing the witness of his right, if he sees fit, to exercise it; and the examining party may insist that the claim be made in answer to each question severally.

The witnesses declined to pledge their oath that they "believed" their answers might tend to criminate them. I must say that if their statement under oath that their answers "might tend to criminate" is not taken by them to carry an avowal of their belief that it may do so, it so far negatives the good faith of the claim; and a refusal to engage belief should be treated as evidence against them accordingly. It is the witness himself, not counsel, who is concerned with resisting disclosure; and the availability of the privilege assumes the honest belief and genuine apprehension of a possible exposure to prosecution or a penalty. Less than that would be trifling with the security the rule is intended to afford.

The appeal must then be allowed and the judgment of Clyne J., with certain modifications, restored. The reference to Peters will be struck out and the name of an officer of the United Distillers of Canada Ltd. substituted: paragraph 4 will be amended by providing that the claim of privilege shall be made in the form indicated in these reasons; the order will provide, (*a*) that the officer of the company may on the examination claim the privilege on behalf

of the company either in respect of questions asked or documents to be produced; (*b*) that the officer can claim personal privilege against questions put to him but not as against the production of company documents; (*c*) and that no claim for the non-production of company documents can be made on the ground of personal privilege of the officer making the affidavit of documents. There will be no costs in the Court of Appeal but the appellants will be entitled to their costs in this Court against the respondents. There will be no costs to or against the Attorney General.

Appeal allowed and order of trial judge restored subject to a variation.

Solicitors for the appellants: *Guild, Lane, Sheppard & Locke.*

Solicitor for the respondents: *R. H. Barron.*

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*Reporter's Note: Following the handing down of judgment on April 6, 1955, the respondent moved for a re-hearing or in the alternative for alterations. Judgment was reserved, but as the parties agreed that the references in the Order of Clynne J. to s-s. (3) of s. 121 of *The Companies Act*, R.S.C. 1952, c. 53 should have been to s-s. (1), ordered that its judgment be amended accordingly. It appeared that after the argument of the appeal, and before delivery of the judgment of this Court, new Affidavits on Production had been sworn to and therefore in view of the reference to the *Income Tax Act* in the reasons of Clynne J. in relation to the ground of claim of privilege, as to which no pronouncement was made by this Court, that matter was remitted to the Court of Appeal to have that Court pass upon the question if necessary, including any right to inspection of documents that might exist and in order to determine the validity of any claim of privilege by reason of incrimination not covered by the judgment of this Court. It was further ordered that the Order of Clynne J. be amended accordingly but that such amendment was not to affect any documents dealt with by such Order. Nothing

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was said as to the point desired to be argued by the respondents that because United Distillers of Canada Ltd. was incorporated under the Companies Act of Canada, s. 5 of the Canada Evidence Act applies to that company in these proceedings. No costs of the motion were awarded.