CIVIL ORIGINAL

Before Tek Chand, J.

THE PEOPLES INSURANCE COMPANY, LIMITED
(in liquidation),— Petitioner

versus

SARDUL SINGH CAVEESHAR,—*Respondent*

Liquidation Miscellaneous No. 38 of 1956

in

Civil Original No. 38 of 1956:

1961

Sept. 5th

Constitution of India (1950)—Article 20(3)—Nemo tenetur seipsum prodere—*Protection against self-incrimination—Scope and limitations of—Privilege—When to be claimed—Evidence Act (I of 1872)—Section 132—Scope of* vis a vis *Article 20(3) of the Constitution—Duty of a witness to depose to facts within his knowledge—Code of Criminal Procedure (V of 1898)—Sections 342 and 342-A—Purpose and extent of—Accusatorial and inquisitorial methods—Difference between the two.*

Held, that the principle *Nemo tenetur seipsum prodere*—No one is bound to criminate himself—embodied in Article 20(3) of the Constitution and elevated to the status of a fundamental right, protects a person accused of any offence from compulsion to be a witness against himself. The protection against self-incrimination confines itself to a person accused of an offence and does not include the cases of witnesses. Moreover, as the privilege under Article 20(3) is in the nature of an option, it can be waived by a person accused of an offence. The protection is against compulsion and a statement made voluntarily, is not affected by the constitutional inhibition. The prohibition against testimonial compulsion applies to criminal proceedings where a person is accused of having committed an offence, but not to a proceeding in which the penalty recoverable is civil in nature and the proceedings remedial in character. The essential principle of the rule, in favour of the privilege not to speak, is not divested of its vigour in any way, in a case in which the person proceeded against under section 185 of the Indian Companies Act, 1913, offers himself to be a witness but seeks protection from making a statement on the ground that criminal proceedings

are pending against him on the same facts in another Court.

Held, that the principle of protection against self-incrimination has its well-settled limitations. The protection does not exempt any one from the consequences of his crime and he is protected from the compulsion of himself producing the evidence leading to his conviction. Moreover, the protection against self-incrimination is restricted to real dangers and not to remote possibilities. The privilege of silence cannot be claimed for a fanciful or sentimental reason or for the purpose of securing from prosecution some third person, by allowing the witness to conceal the facts which are likely to testify to his guilt. In order to claim the privilege, it must be shown that there is rational connection between the possible answers to the questions of the prosecution for any crime and not merely remote possibility of prosecution. The privilege against self-incrimination has to be construed to effect a practical and beneficient purpose, not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice.

Held, that the appropriate time when the privilege against self-incrimination can be asserted, is when the question to which objection is taken is put and not in advance of the hearing or examination of the accused and it is then that the Court has to determine whether the fear of self-incrimination is well founded.

Held, that to the accused person who avails himself of the provisions of section 342-A of the Code of Criminal Procedure and comes forward as a witness, the provisions of section 132 of the Evidence Act would apply. This section takes away the privilege which a witness has under the English law of refusing to answer a question upon the ground that the answer might criminate him. The proviso substitutes the qualified protection that the answer shall not be used against him axcept where he has perjured himself. Section 132 confines itself to the cases of witnesses and does not come into conflict with Article 20(3) of the Constitution as that protects a person accused of any offence from compulsion to be a witness against himself.

Held, that a person properly summoned must appear and be sworn. The privilege guaranteed does not give him immunity from appearing in Court. True, he cannot be compelled to give self-incriminating testimony, but that does not mean that he can refuse to appear. It has to be remembered that giving of testimony is a public duty which every person properly summoned owes to the Court, to depose to facts within his knowledge. The proper course for such a person is to claim the protection at the time when a question, which has a tendency to incriminate him, is asked. If he then declines the protection or consents to make an answer, the constitutional guarantee is not violated. However, while the privilege against self-incrimination is to be construed liberally and not in a hostile or niggardly spirit, its scope cannot be enlarged beyond what is legitimately warranted by the language reasonably inferred without encroachment upon the limitations imposed. This privilege, despite the zeal of the Courts in protecting it, may not be used as a means for preventing investigation of civil matters, or as a subterfuge, or a pretence, for avoiding an investigation. A person has no legal right, either under the Constitution or under any other law, to refuse to appear when summoned as witness. The privilege against being compelled to answer questions which may incriminate him under our Constitution belongs to the accused and not to a witness. The privilege cannot be claimed by the accused with a view to avoid disclosure which may have the effect of subjecting him to a civil liability or to a pecuniary loss. What is, therefore, protected is compulsory self- incrimination which may result in punishment for crime. Other detriments consequent upon the disclosure are not protected. An accused person cannot refuse to answer a question which, for instance, embarrasses him or otherwise causes his disgrace, degradation, or humiliation.

Held, that a witness does not enjoy any privilege beyond the immunity conferred by section 132 of the Indian Evidence Act, but even if he has any that privilege cannot be claimed and allowed before he takes his stand, and before the question, whether incriminatory or otherwise, is considered by the Court in the light of the surrounding circumstances. This privilege can only be invoked at the time of answering a question having the tendency to incriminate him. It is after he has taken his stand, that he can

refuse to testify to a question on the ground of self-incrimination. It has to be remembered that the privilege is in the nature of a prohibition against involuntary subjection to questions. The emphasis is on a compulsory disclosure of a guilt by an accused in a criminal matter and the right does not extend to a roceeding which does not involve punishment for the commission of a crime.

Held, that section 342 of the Code of Criminal Procedure was enacted with a view to give effect to the elementary rule of justice contained in the maxim: *audi alteram partem,* to ensure that no man is condemned unheard. Section 342 completely eliminates questions which may be deemed inquisitorial. In so far as the provision leaves the matter of answering the question to the option of the accused, and is merely intended to afford him an opportunity, if he desires to utilize it, the provision is, in the nature of a right conferred upon the accused, and not in the nature of a compulsion, and is, therefore, corroborative of, and not contradictory to, the constitutional guarantee under Article 20. Section 342-A is a new provision inserted by Act 26 of 1955 which enables an accused person to be a competent witness for the defence if he chooses to offer himself as a witness and makes such a request in writing. This new provision renders the accused a competent, but not a compellable, witness. The further protection given to the accused under section 342-A is that he shall not be called as a witness, except on his own request in writing, and his failure to give evidence, shall not be made the subject-matter of any comments, or give rise to any presumption against him.

Held, that the accusatorial and the inquisitorial, methods represent fundamentally opposite approaches for investigating criminal cases and for discovering proof of offences. The accusatorial method compels investigators of the crime to get their case substantiated from sources other than the mouth of the accused, whereas, under the inquisitorial system the investigators try to get their case established from confessional answers to the questions put to the accused. It was the English opposition to the inquisitorial system which led ultimately to the acceptance of the right of silence.

Petition under section 151 of Civil Procedure Code and Article 20 of the Constitution of India, on behalf of the respondent praying that the proceedings in C.O. 38 of 1956, be adjourned till after the decision of the criminal case against the respondent.

D. D. KHANNA, ADVOCATE, for the Petitioner.

B. R. TULI AND MOHINDER SHARMA, ADVOCATES, for the Respondents.

ORDER

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TEK CHAND, J.—On 8th July, 1956, the official liquidator of the Peoples Insurance Company Limited, in liquidation, filed a petition under section 185 of the Indian Companies Act, 1913, against S. Sardul Singh Caveeshar praying that the respondent may be ordered to pay Rs. 5,73,100 to the petitioners. The company had been ordered to be compulsorily wound up by the District Judge, Delhi, on 29th April, 1955. The respondent was the managing-director of the company. In this petition the official liquidator maintained that several amounts totalling Rs. 5,73,100 belonging to the company were being wrongfully held by the respondent which, it was prayed, the respondent should be ordered to repay. The respondent denied that he was in possession of any moneys or property belonging to the company. On 30th November, 1956, the following issues were framed:—

(i) Whether the application is maintainable under section 185 of the Indian Companies Act, 1913 ?

(2) Whether the respondent is in possession of the sums in question belonging to the company ?

On 22nd July, 1960, the evidence for the official liquidator was closed and 19th August, 1960, was fixed for recording the evidence for the respondent, and on that day this application (L.M. 89 of 1960) was made praying for the adjournment of the proceedings in C.O. 38 of 1956 till after the decision of

the criminal case pending against the respondent. *Inter alia,* it was also said that the subject-matter of the petition C.O. 38 of 1956 also formed part of the subject-matter of the criminal complaint filed against the respondent in the criminal Court at Delhi. It was said, that if the respondent made any statement in this Court in C.O. 38 of 1956, the prosecution was bound to take advantage of it and it would seriously prejudice the defence of the respondent in the criminal case. On these grounds, it was stated that the respondent should not be examined till the criminal case was decided and he should not be compelled to depose to facts which were alleged against him in the criminal case, otherwise the protection guaranteed to him by Article 20 of the Constitution would be violated. This prayer is opposed by the official liquidator and the question which calls for decision is whether, in view of the provisions of Article 20(3) of the Constitution of India, the respondent should not be examined till the criminal case pending against him is decided.

Section 185 of the Indian Companies Act, 1913 provides:—

> "185. *Power to require delivery of property.*— The Court may, at any time after making a winding up order, require any contributory for the time being settled on the list of contributories and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, surrender or transfer, forthwith, or within such time as the Court directs, to the official liquidator any money, property or documents in his hands to which the company is ***prima facie*** entitled."

The respondent, along with others, is being prosecuted in the Court of a Magistrate at Delhi on the charge of his having committed offences punishable under section 120-B of the Penal Code read with sections 409/109, 409/34, 201 and 277-A of the Penal Code. It is admitted that the subject-matter of the criminal charges includes the subject-matter of the application under section 185 of the Indian Companies

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Act, 1913. In this Court, the respondent has to lead his evidence. He wants the adjournment of these proceedings till after the decision of the criminal case, on the ground, that if he makes any statement in this Court the prosecution is bound to take advantage of it and his defence in the criminal case is likely to be seriously prejudiced. The question for consideration is whether in these circumstances a case has been made out for extending to the respondent, the protection under Article 20(3) of the Constitution. This Article provides—

> "20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
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> (2) No person shall be prosecuted and punished for the same offence more than once.
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> (3) No person accused of any offence shall be compelled to be a witness against himself."

The principles of law embodied in Article 20(3) have a very ancient lineage. A brief reference to their ancestry and the historic process through which they passed, and their recognition and development in recent times in the countries of their origin and adoption, will be of help in understanding their scope and limitations. The naked words of the statute governing constitutional privileges are not always a safe guide for determining their applicability. Where fundamental rights are involved it is the *sententia legis* more than the *nuda verha*, which throws light and gives guidance.

Referring to the privilege against self-crimination Professor Wigmore said, "the woof of its long story is woven across a tangled warp composed in part of the inventions of the early canonists of the momentous contest between the Courts of the common law and

of the church, and of the political and religious issues of that conclusive period in English history, the days of the dictatorial Stuarts. "(Wigmore on Evidence, Vol. VIII, Art. 2250). This privilege was asserted first by way of opposition to the "*ex officio*" oaths of the ecclesiastical Courts; and the second in opposition to the criminating questions put to the accused persons in the common-law Courts. The early conflict between the papal power and the legal power led to the assertion of this right in the first instance. In the middle of the reign of Elizabeth the First, a phrase was borrowed from an opinion of English canonists referring to the practice of ecclesiastical Courts stating the procedure of interrogation of the defendant and providing certain safeguards which were of a theoretical character. They said, "*Licet nemo tenetur seipsum prodere; tamen proditus perfamam tenetur seipsum ostendere, utrum possit suam innocentiam ostendere, at seipsum purgars,*" which means "though no one is bound to become his own accuser, yet when once a man has been accused by general report, he is bound to show whether he can prove his innocence and to vindicate himself." The Puritans and their counsel selected four words from the complete phrase "*nemo tenetur seipsum prodere*"—no one is bound to criminate himself—and in the course of the century made them into a household phrase which in the course of time travelled from England to the colonies and elsewhere, and became the foundation of the constitutional principle giving protection against compulsory self-accusation. The phrase was used by John Lilburn who was first committed to the prison by the Court of Star Chamber on a charge of printing heretical and seditious books. At this trial, he expressed his unwillingness to make answers to questions as they were put to ensnare him and was unwilling to assist the Court in furnishing answers self-accusatory in character (3 Howell's S. T. 1315). The State Trials which followed are full of instances where this plea was taken by the accused in the reigns of Tudors and Stuarts.

On the continent, the rule of compulsory self-incrimination held sway though during the arguments the counsel in France freely, though unsuccessfully,

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resorted to this principle by employing almost identical language: "*Nul n'est tenu se condamner soimeme par se boucha*" meaning that "no one is compelled to condemn himself from his own mouth". This marks a departure between the two systems: the accusatorial and the inquistorial, which represent fundamentally opposite approaches for investigating criminal cases and for discovering proof of offences. The accusatorial method compels investigators of the crime to get their case substantiated from sources other than the mouth of the accused, whereas, under the inquisitorial system the investigators try to get their case established from confessional answers to the questions put to the accused. It was the English opposition to the inquisitorial system which led ultimately to the acceptance of the right of silence. Frankfurter, J., delivering the opinion of the Supreme Court of the United States in *Watts* v. *Indiana* (1), said,—

> "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end..... Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skilful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.' 2 Hawkins, Pleas of the Crown c 46, Art. 34, (8th ed. 1824)."

In England the practice of questioning the prisoner continued even after 1700. From 1300 till the end of seventeenth century, the lawyers continued to express their repugnance to a system which required a person to furnish his own indictments from

(1) 338 U.S. 49 (54-55): 93 Law Ed. 1801 (1806).

his own lips. It was after a prolonged struggle that the rule against compulsory self-crimination was established after 1700. Between 1215 to 1625, the inquisitorial method held full sway and judicial interrogation, with a view to secure conviction of the accused from his own mouth, was the recognised procedure of the time. Firm roots were struck in the beginning of eighteenth century when the privilege against self-incrimination began to be successfully asserted. The privilege which received recognition as a rule of evidence did not earn the status of any constitutional landmark in England which it did in America, and now in this country. The freedom to remain silent was originally a rule of procedure, but in effect has become a rule of substantive law.

This common-law rule was recognised in England in a number of statutes. Section 2 of Evidence Act, 1851, 14 and 15 Vict. c. 99, rendered the parties to a cause competent and compellable to give evidence, and section 3 expressly provided that nothing therein contained "shall render any person compellable to answer any question tending to incriminate himself". Similarly, provision was made in section 5 of the Foreign Tribunals Evidence Act, 1856, 19 and 20 Vict. c. 113, and section 4 of Evidence by Commission Act, 1859, 22 Vict. c. 20. The protection of the English rule applies equally to parties and to witnesses and a witness cannot be forced to answer questions or interrogatories having such a tendency. As this rule, howsoever wholesome, was prone to be abused, certain limitations were recognised by Courts both in England and in America. In *Queen* v. *Boyes* (1), Cockburn C.J., said, that the object of the law was to afford to a party called upon to give evidence in a proceeding *inter alios,* protection, against being brought, by means of his own evidence, within the penalties of the law, but it would be to convert a salutary protection into a means of abuse, if it were to be held, that a mere imaginative possibility of danger, howeve remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. It was also said that the danger to be apprehended by the person must be real and appreciable

(1) 30 L.J.Q.B. (N.S.) 301.

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having regard to the ordinary operation of law in the ordinary course of things, and not a danger of any imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. It was also laid down that to entitle a party called as a witness to the privilege of silence, the Court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. *See also Re Reynolds* (1).

The colonists to America brought with them the rule cherished in England. In their anxiety to give greater permanence to the traditional rule of common law, the framers of the State Constitutions, gave it statutory recognition in order to put it beyond the reach of ordinary legislative interference. The variety of phraseology does not in any way affect the basic core of the principle against compulsory self-incrimination. The inequalities of early English inquisitorial system so impressed the American colonist that they made the privilege a part of their fundamental law. This rule is included in the Fifth Amendment of the Federal Constitution of United States of America. The Fifth Amendment is reproduced *in extenso* and the underlined portions refer to the particular constitutional privilege.—

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor *shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process

(1) (1882) 20 Chancery Division 294=15 Cox's C.C. 108 (C.A.).

> of law; nor shall private property be taken for public use, without just compensation."

In America, the constitutional privilege applies alike to civil and criminal proceedings whenever the answer might tend to subject a person giving the answer to criminal responsibility. The privilege equally protects the party accused as also a witness (*vide Mc Carthy* v. *Arndstein* (1), *and Counselman* v. *Hitchcock* (2).The judicial pronouncements on this constitutional guarantee runs into two streams; one for liberal interpretation, and the other, for keeping the privilege within reasonable bounds, lest administration of criminal justice be unduly hampered. In *Boyd* v. *United States* (3), Bardley, J., said,—

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

In *Counselman* v. *Hitchcock* (2), the Supreme Court of United States observed:—

> "Legislation cannot abridge a constitutional privilege; and no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United State."

The principle when held applicable has been liberally construed in order to give fullest effect to the immunity and the protection afforded to a person against compulsory self-accusation (*see* also *Arndstein* v. *McCarthy* (4), *Hoffman* v. *United States* (5).

(1) 266 U.S. 34.
(2) 142 U.S. 547 (586, 587) — 35 Law Ed. 1110 (1122).
(3) 116 U.S. 616(635) — 29 Law Ed. 746 (752).
(4) 254 U.S. 701 (702, 703).
(5) 341 U.S. 479 (486).

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Hoffman's case, which was decided in 1951 by the Supreme Court was followed in 1954 by the Court of Appeals in *Maffie* v. *United States* (1), and Magruder C.J., said—

> "Our forefathers, when they wrote this provision into the fifth Amendment of the Constitution, had in mind a lot of history which has been largely forgotten to-day. *See* VIII Wigmore on Evidence (3rd ed. 1940) Art. 2250 *et seq;* Morgan, The Privilege Against Self-Interimination, 34 Minn. L. Rev. 1(1949). They made a judgment and expressed it in our fundamental law, that it "were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused. The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application. *Hoffman* v. *United States,* (2) If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the stuble encroachments of judicial opinion."

In *Ullaman* v. *United States* (3), Justice Frankfurter said,—

> "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.
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> No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a more far-reaching evil a recurrence of the inquisition and

(1) 209 F. 225 (227).
(2) (1951) 341 U.S. 479, 486: 71 S.C. 814: 85 L. Ed. 1118.
(3) 350 U.S. 422 (427).

the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the jurisdiction against future abuses by law-enforcing agency."

Again in *Gompers* v. *United States* (1), it was said,—

" ....Provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their consequence is vital, not formal; it is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth."

Gajendragadkar, J., after referring to *Boyd* v. *United States* (2), and to *Counselman* v. *Hitchcock* (3), in *Raja Narayanlal Bansilal* v. *Manek Phiroz Mistry* (4), said.—

"In regard to this eloquent statement of the law it may, however, be permissible to state that under the English Law the doctrine of protection against self-incrimination has never been applied in the departments of Company Law and Insolvency Law."

Both in England and in the United States, a reaction against the excesses of the privilege became noticeable. In 1882, Jessel M. R. in *Ex parte Reyuolds* (5), said,—

"Perhaps our law has gone even too far in the direction of protecting a witness from the chance of convicting himself."

(1) 230 U.S. 604 (610).
(2) 116 U.S. 616 (634).
(3) 142 U.S. 547 (586).
(4) A.I.R. 1961 S.C. 29 (36).
(5) 15 Cox's C.C. 108 (115) — (1882) 20 Ch. Dn. 294 (300).

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In 1937, *Cordozo*, J., in *Palko* v. *Connecticut* (1), observed—

> "Indeed, today as in the past, there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly enquiry."

On this matter, Professor Wigmore expressed himself as follows:—

> "In preserving the privilege, however, we must resolve not to give it more than its due significance. We are to respect it rationally for its merits, not worship it blindly as a fetish. We are not merely to emphasise its benefits, but also to concede its shortcomings and guard against its abuses. Indirectly and ultimately, it works for good,—for the good of the innocent accused and of the community at large. But directly and concretely, it works for ill,—for the protection of the guilty and the consequent derangement of civic order. The current judicial habit is to ignore its later aspect and to laud it indiscriminatingly with false cant..... The privilege, therefore, should be kept within limits the strictest possible.. .. The Courts should unite to keep the privilege strictly within limits dictated by historic facts, cool reasoning and sound policy." (Wigmore on Evidence, Vol. VIII, paragraph 2251.)

In modern times, this principle has its well settled limitations. The protection does not exempt anyone from the consequences of his crime and he is

(1) 302 U.S. 319—82 Law Ed. 288.

protected from the compulsion of himself producing the evidence leading to his conviction. Moreover, the protection against self-incrimination is restricted to real dangers and not to remote possibilities. The privilege of silence cannot be claimed for a fanciful or sentimental reason or for the purpose of securing from prosecution some third person, by allowing the witness to conceal the facts which are likely to testify to his guilt. In order to claim the privilege, it must be shown that there is rational connection between the possible answers to the questions of the prosecution for any crime and not merely remote possibility of prosecution. The Fifth Amendment has been construed, as was said in *Brown* v. *Walker* (1), to affect a practical and beneficent purpose not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice.

As to the appropriate time when the privilege against self-incrimination can be asserted, it is when the question to which objection is taken is put and not in advance of the hearing or examination of the accused *Marcello* v. *United States* (2). When the question is put and objection taken as to its incriminating character, it is then that the Court has to determine whether the fear of self-incrimination is well founded.

As a result of frequent resort to the privilege claimed by the accused persons and the witnesses, a new threat was presented to the just administration of criminal law, and it was felt, that the constitutional protection had become, in practice, a shield to the criminal and an obstruction to justice. The remedy to overcome this obstacle was found in immunity provisions. These provisions called upon the witnesses to give testimony under oath, but indemnified them against incrimination in consequence thereof.

It will thus be seen that the constitutional principle enshrined in Article 20(3) of our Constitution,

(1) 161 U.S. 591 — 40 Law Ed. 819.
(2) 196 F. 2d. 437 (441).

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and elevated to the status of a fundamental right, had behind it, a very long history spread over centuries which have witnessed submission to, struggle with, and triumph over, tyranny. In India, prior to the Constitution, the principle was given a limited recognition in the Criminal Procedure Code, in respect of accused persons, and in the Indian Evidence Act, so far as it affected witnesses. The earlier criminal procedures for Courts in the presidency towns, and in the mofussil, were consolidated for the first time by the Criminal Procedure Code (Act 10 of 1882). The law of criminal procedure, as it stood before the enactment of Act 10 of 1882, gave a great latitude to the Courts relating to the examination of an accused person. The power of interrogating the accused was limited by the framers of Criminal Procedure Code (Act 10 of 1882), so that the accused may not be interrogated with a view to elicit from him some statement which might lead to his conviction. With this object in view, the words in the first paragraph of section 342—"for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him"—were added. The object was, that the accused should have an opportunity of explaining, before a decision as to his having committed a crime is arrived at. Section 342 was enacted with a view to give effect to the elementary rule of justice contained in the maxim *audi alteram partem* to ensure that no man is condemned unheard. Section 342 completely eliminates questions which may be deemed inquisitorial. In so far as the provision leaves the matter of answering the question to the option of the accused, and is merely intended to afford him an opportunity, if he desired to utilize it, the provision is, in the nature of a right conferred upon the accused, and not in the nature of a compulsion, and is, therefore, corroborative of, and not contradictory to, the constitutional guarantee under Article 20. Section 342-A is a new provision inserted by Act 26 of 1955 which enables an accused person to be a competent witness for the defence if he chooses to offer himself as a witness and makes such a request in writing. This new provision renders the accused a competent, but not a compellable, witness. The further protection given to the accused under section 342-A is that he shall not be called as a

witness, except on his own request in writing, and his failure to give evidence, shall not be made the subject-matter of any comments, or give rise to any presumption against him. In the words of Clark, J.,—

> "The privilege against self-incrimination would be reduced to hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. (*Slochower* v. *Board of Education of the city of New York* (1),"

To the accused person, who avails himself of the provisions of section 342-A and comes forward as a witness, the provisions of section 132 of the Evidence Act, would apply. Section 132 runs as under—

> "132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose , or tend directly or indirectly, to expose, such witness to a penalty or forfeiture of any kind.
>
> Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

The first paragraph which embodied the law prior to the addition of the proviso, denied to the witness a protection which was recognised by English law. By the addition of the proviso a qualified protection is extended to the witness who is indemnified against criminal prosecution, except where he has perjured himself. The privilege of silence embodied in the principle that no one is bound to criminate himself: *nemo tenetur seipsum prodere,* extended the privilege

(1) 350 U.S. 551 (557) = 100 Law Ed. 692 (700).

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to the accused persons and witnesses alike both in England and in America. Similar privilege was formerly recognised in India, but it was withdrawn by section 32 of Act 2 of 1855. By the addition of the proviso, a compromise has been effected. The legislature in India thought that the existence of the privilege "in some cases tended to bring about a failure of justice, for, the allowance of the excuse, when the matter to which the question related was in the knowledge solely of the witness, deprived the Court of the information which was essential to its arriving at a right decision." (per Turner, C.J., in *R.* v. *Gopal Dass,* (1). The rigour of the rule has now been mitigated by the addition of the proviso.

Section 132 takes away the privilege which a witness has under the English law of refusing to answer a question upon the ground that the answer might criminate him. The proviso substitute the qualified protection that the answer shall not be used against him.

Section 132 of the Indian Evidence Act, confines itself to the cases of witnesses and does not come into conflict with Article 20(3) of the Constitution as that protects a person accused of any offence from compulsion to be a witness against himself. The protection against self-crimination confines itself to a person accused of an offence and does not include the cases of witnesses. Moreover, as the privilege under Article 20(3) is in the nature of an option, it can be waived by a person accused of an offence. The protection is against compulsion and a statement made voluntarily, is not affected by the constitutional inhibition.

It, therefore, follows that if S. Sardul Singh, Caveeshar volunteers to be his own witness, he can only claim such rights as fall within the ambit of the proviso to section 132. Such answers as a witness is compelled to give cannot be proved against him in any criminal proceeding, but they may not save him against a prosecution for perjury. Article 20(3) is narrower in scope than the analogous law in England

(1) I.L.R. 3 Madras 271 (279-280).

and America. On the other hand, if in criminal proceedings an accused person volunteers to be at witness in accordance with section 342-A, Criminal Procedure Code, he will be subject to the usual duties, liabilities, limitations, rights, and privileges, of ordinary witnesses and he subjects himself to all the rules of evidence governing other witnesses. It follows that he may be cross-examined and, in cross-examination, questions tending to incriminate him may be put. Section 342-A, as worded, does not expressly say so unlike section 1(c) of the English Criminal Evidence Act, 1898, which specifically provides that—

> "A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged."

In that event, Article 20(3) of our Constitution does not come into conflict as the privilege under it can be waived, and the waiver of the privilege will be implied because of the accused's own option given in writing to appear as a witness.

It is urged, that S. Sardul Singh, Caveeshar, has a dual status; so far as the proceedings in this Court are concerned he will only be a witness but in the proceedings pending in the Court of the Magistrate, he is an accused person and the criminal charge there and the enquiry here under section 185 of the Indian Companies Act cover the same ground. I may now address my self to the respective contentions of the parties.

Mr. B. R. Tuli, learned counsel for the respondent, has relied upon *M. P. Sharma* v. *Satish Chandra, District Magistrate, Delhi* (1), *M/s Allen Beery Co., Private Ltd.* v. *Vivian Bose* (2), *Shankerlal* v. *Collector of Central Excise, Madras* (3), *Farid Ahmed* v. *The State* (4), *and Madhya Naik* v. *Popular Bank Ltd.*, (5).

(1) A.I.R. 1954 S.C. 300 = 1954 S.C.R. 1077.
(2) A.I.R. 1960 Pb. 86.
(3) A.I.R. 1960 Mad. 225.
(4) A.I.R. 1960 Cal. 32.
(5) A.I.R. 1961 Kerala 14.

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Mr. D. D. Khanna, learned counsel for the official liquidator, sought support from *Maqbool Hussain* v. *State of Bombay* (1), *S. A. Venkataraman* v. *Union of India* (2), *Raja Narayanlal Bansilal* v. *Manek Phiroz Mistry* (3), *and G. L. Salwan* v. *The Union of India* (4).

Before referring to these cases, I may observe that these decisions do not cover the entire ground of this case and are helpful as analogues with certain distinctive features peculiar to each.

In *M. P. Sharma,* v. *Satish Chandra,* (5), the District Magistrate had issued warrants, for simultaneous searches at a number of places, and a mass of records was seized from various places. The petitioners, in an application under Article 32 of the Constitution, had prayed that the search-warrants might be quashed as being absolutely illegal and had asked for the return of the documents seized. They had placed reliance upon Article 20(3) of the Constitution. The judgment of the Supreme Court was delivered by Jagannadhadas, J., and Mr. Tuli has relied upon the following observations—

> "Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion cannotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the Court room.
>
> The phrase used in Art 20(3) is to be a witness' and not to 'appear as a witness'. It follows that the protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room, but may well

(1) A.I.R. 1953 S.C. 325.
(2) A.I.R. 1954 S.C. 375.
(3) A.I.R. 1961 S.C. 29.
(4) A.I.R. 1960 Pb. 351.
(5) A.I.R. 1954 S.C. 300.

extend to compelled testimony previously obtained from him. It is available, therefore, to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case."

While dismissing the applications, the Supreme Court expressed the opinion that the searches in question could not be challenged as illegal on the ground of violation of any fundamental rights. These observations were also relied upon by a Division Bench of this Court in *Messrs. Allen Berry and Co., Private Ltd.* v. *Vivian Bose* (1). They were also referred to in a later decision of the Supreme Court in *Mohammad Dastagir* v. *The State of Madras* (2). After citing the above passage, it was observed by Imam, J., who delivered judgment of the Supreme Court, "these observations were unnecessary in *Sharma's case* (3), having regard to the fact that this Court held that the seizure of documents on a search warrant was not unconstitutional as that would not amount to a compulsory production of incriminating evidence." At p. 760, dealing with the scope of Article 20(3) of the Constitution, Imam, J., said, "before this provision of the Constitution comes into play, two facts have to be established, (1) that the individual concerned was a person accused of an offence and (2) that he was compelled to be a witness against himself. If only one of these facts and not the other is established, the requirements of Article 20(3) will not be fulfilled."

In *Shankarlal* v. *Collector of Central Excise, Madras* (4), notices had been issued to the petitioners under section 171-A, of the Sea Customs Act, 1878, to appear before Customs Officer to show cause why penalty should not be imposed under section 167(8). It was held that as the proceedings were not judicial and petitioners were not accused, provisions of Article

(1) A.I.R. 1960 Pb. 86.
(2) A.I.R. 1960 S.C. 756 (761).
(3) 1954 S.C.R. 1077 — A.I.R. 1954 S.C. 300.
(4) A.I.R. 1960 Mad. 225.

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20(3) of the Constitution were not attracted, but if petitioners were likely to be proceeded against in a Criminal Court they became accused and could then claim protection under Article 20(3). I have not been able to find anything in this decision which can be deemed to be remotely helpful to the respondent's case. Similarly, the decision of the Calcutta High Court in *Farid Ahmed* v. *The State* (1), is hardly to the point. It was held that an order of the Magistrate allowing the investigating officer to take specimen writings and signatures of the accused person was violative of the fundamental right mentioned in Article 20(3) of the Constitution as the phrase "to be a witness against himself" was not confined to the oral evidence of the accused but it meant to furnish evidence against himself. Reliance had been placed upon the decision of the Supreme Court in *Sharma's case* (2).

In Madhva Naik v. *Papular Bank Ld.*, (3), the official liquidator of a bank had filed a petition against the directors and other office-bearers under sections 45-G, 45-H and 45-J of the Banking Companies Act and had also accused them of the offences punishable under sections 538, 539, 541 and 545 of the Companies Act and on that petition the Court had directed their public examination under section 478 of the Companies Act, 1956, read with section 45-G, of the Banking Companies Act. It was held that the object of the public examination was to elicit facts from the mouth of the counter-petitioners themselves and, therefore, they were compelled to be witnesses against themselves and to give evidence in support of the accusations against them and, therefore, the protection guaranteed by Article 20(3) was violated. In the case before me, the facts are entirely different. The respondent is not being compelled to appear as a witness, and, on the basis of such statement as he might choose to make, his prosecution is not being contemplated.

I may at this stage turn to the authorities relied upon by the learned counsel for the official liquidator.

(1) A.I.R. 1960 Cal. 32.
(2) A.I.R. 1954 S.C. 300.
(3) A.I.R. 1961 Kerala 14.

In *Raja Narayanlal Bansilal* v. *Manek Phiroz Mistry,* (1), the previous decisions of the Supreme Court had been reviewed and it was held that when a person is called upon under section 240 of the Companies Act, 1956, to give evidence and to produce documents, he cannot be said to be a person who is accused of any offence as required by Article 20(3), and, therefore, the provisions of section 240 do not offend against the fundamental rights guaranteed by Article 20(3), as, at the commencement of the enquiry and throughout its proceedings there is no accused person, no accuser and no accusation against anyone, that he has committed an offence. On the basis of the above reasoning Mr. Khanna argued, with some justification, that when an application under section 185 of the Indian Companies Act, 1913, is made, the respondent is not an accused person and the official liquidator is not the accuser and there is no investigation as to the commission of any offence. The Supreme Court in *Narayanlal's case* also referred to its earlier decision in *S. A. Venkataraman* v. *The Union of India,* (2), and also to the case of *Maqbool Hussain* v. *State of Bombay,* (3), which, though were not under Article 20(3), but in which the general scope of Article 20 had also been considered. In *Maqbool Hussain's* case, Bhagwati, J., said,—

> "The very wording o Article 20 and the words used therein: 'convicted', 'commission of the act charged as an offender', 'be subjected to a penalty', 'commission of the offence', 'prosecuted and punished', 'accused of any offence', would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a Court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."

(1) A.I.R. 1961 S.C. 29.
(2) A.I.R. 1954 S.C. 375.
(3) A.I.R. -953 S.C. 325.

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Referring to Sharma's case (1), the Supreme Court in *Narain Lal's* case said,—

> "The effect of this decision thus appears to be that one of the essential conditions for invoking the constitutional guarantee enshrined in Article 20(3) is that a formal accusation relating to the commission of an offence, which would normally lead to his prosecution, must have been levelled against the party who is being compelled to give evidence against himself, and "this conclusion, in our opinion, is fully consistent with the two other decisions of this Court to which we have already referred."

It was also observed on the same page—

> "Similarly, for invoking the constitutional right against testimonial compulsion guaranteed under Article 20(3), it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution. Here again the nature of the accusation and its probable sequel or consequence are regarded as important."

Referring to section 240 of the Companies Act, 1956, it was said,—

> "Unless it is shown that an accusation of a crime can be made in such an enquiry, the appellant's plea under Article 20(3) cannot succeed. Section 240 shows that the enquiry which the inspector undertakes is in substance an enquiry into the affairs of the company concerned."

(1) A.I.R. 1954 S.C. 300.

In *G. L. Salwan* v. *The Union of India* (1), it was observed by Falshaw, J., with whom Chopra, J., agreed—

> "In my opinion, it cannot be said that the interim attachment of certain property and a notice calling on a person who may be prosecuted for an offence in relation to the property to show cause why attachment order should not be made absolute, in any way compel him to be a witness against himself, and even a person in this position has for the purpose of securing the release of the property from attachment to reveal incidentally the whole or part of what his answer to the charge against him will be, I still do not consider that the provisions of Article 20(3) of the Constitution are violated."

In this case, a criminal case was pending against the petitioner and others on the basis of a case registered by the police under section 120-B, read with sections 420, 409 and 477-A, Indian Penal Code. Ordinance No. 38 of 1944, was passed with the object of securing the return to the Government of the money or property in question on the conclusion of the criminal case if it results in the conviction of the accused. The District Judge acting under the Ordinance had passed an *ad interim* order to the effect that the property mentioned in the schedule be attached and consequently a notice was issued to the petitioner and others for appearance to show cause why the order should not be made absolute. In the writ petition made to the High Court, the contention of the petitioners that the Ordinance was violative of the provisions of Article 20(3) of the Constitution did not prevail.

The cases cited above cannot be said to be on all fours with facts of the present case, but they

(1) A.I.R. 1960 Pb. 351.

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do throw a considerable light in understanding the principles underlying Article 20(3) and in delimiting its scope.

In the light of these authorities, the important facts which emerge in this case are that S. Sardul Singh, Caveeshar, is not being compelled "to be a witness against himself". The official liquidator has closed his evidence, and he never cited the respondent as his witness. It is for the respondent to determine for himself, whether he desires to appear in person in the witness-box or contents himself by relying on other evidence, oral or documentary. If he chooses to appear as his witness, and on the supposition, that the matter is determined against him, the power of the Court is confined to requiring the respondent to pay any money or deliver property or documents in his hands, to which the company may be *prima facie* entitled, to the official liquidator. This Court is not exercising any criminal jurisdiction in this matter and its powers are restricted to requiring the delivery of property moneys, etc. So far as the proceedings under section 185 are concerned, there is neither an accusation of any offence nor is the respondent compelled to be a witness against himself.

It is then said that, if he decides not to appear as a witness, his case under section 185 of the Indian Companies Act, 1913, would be prejudiced. It is contended that, even if there is no compulsion or coercion in fact, but, in view of the interest of the respondent, and in view of the onerous consequences involved, the respondent is being compelled, though not by this court, but by the necessity of the circumstances, to appear as a witness. This, to my mind, is stretching the language of Article 20(3), far beyond its legitimate scope. In view of the limited scope of the proceedings under section 185 of the Indian Companies Act, 1913, it cannot be said that in these proceedings the respondent is being prosecuted for commission of any offence. It cannot be argued, that the result of this enquiry is likely to bring out from the lips of the accused,

facts which may lead to his incrimination in future. Proviso to section 132 adequately protects him, against such answers which the witness may be compelled to give, which shall not subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answers. The statement which would be made in this Court, assuming that it would contain self-incriminating matters, is no evidence in the criminal proceedings. For these reasons, I am not at all satisfied that, by volunteering to appear as his witness in proceedings under section 185, the respondent is being deprived of the protection guaranteed under Article 20(3). The constitutional interdiction relied upon by the respondent would operate only where a person accused of any offence is being compelled to be a witness against himself, but in this case he is absolutely a free agent and it is within his own volition to appear or not in these proceedings.

The prohibition against testimonial compulsion applies to criminal proceedings where a person is accused for having committed an offence, but not to a proceeding in which the penalty recoverable is civil in nature and the proceedings remedial in character. The essential principle of the rule, in favour of the privilege not to speak, is not divested of its vigour in any way, in a case like the present.

There is yet another limitation. A person properly summoned must appear and be sworn. The privilege guaranteed does not give him immunity from appearing in Court. True, he cannot be compelled to give self-incriminating testimony, but that does not mean that he can refuse to appear. It has to be remembered that giving of testimony is a public duty which every person properly summoned owes to the Court, to depose to facts within his knowledge. The proper course for such a person is to claim the protection at the time when a question, which has a tendency to incriminate him, is asked. If he then declines the protection or consents to make an answer, the constitutional guarantee is not violated. However, while the privilege

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against self-incrimination is to be construed liberally and not in a hostile or niggardly spirit, its scope cannot be enlarged beyond what is legitimately warranted by the language reasonably inferred without encroachment upon the limitations imposed. This privilege, despite the zeal of the Courts in protecting it, may not be used as a means for preventing investigation of civil matters, or as a subterfuge, or a pretence, for avoiding an investigation. In a case like the present, the privilege to keep silent is not being undermined. The constitutional right to refrain from giving incriminating evidence is not being infringed in the circumstances of this case. A person has no legal right, either under the Constitution or under any other law, to refuse to appear when summoned as witness. The privilege against being compelled to answer questions which may incriminate him under our Constitution belongs to the accused and not to a witness. The privilege cannot be claimed by the accused with a view to avoid disclosure which may have the effect of subjecting him to a civil liability or to a pecuniary loss. What is, therefore, protected is compulsory self-incrimination which may result in punishment for crime. Other detriments consequent upon the disclosure are not protected. An accused person cannot refuse to answer a question which, for instance, embarrasses him or otherwise causes his disgrace, degradation, or humiliation.

I do not think that a witness has any privilege beyond the immunity conferred by section 132 of the Indian Evidence Act, but even if he has any that privilege cannot be claimed and allowed before he takes his stand, and before the question, whether incriminatory or otherwise, is considered by the Court in the light of the surrounding circumstances. This privilege can only be invoked at the time of answering a question having the tendency to incriminate him. It is after he has taken his stand, that he can refuse to testify to a question on the ground of self-incrimination. It has to be remembered that the privilege is in the nature of a prohibition against involuntary subjection to questions. The

emphasis is on a compulsory disclosure of a guilt by an accused in a criminal matter and the right does not extend to a proceeding which does not involve punishment for the commission of a crime.

For the following, among other, reasons, S. Sardul Singh, Caveeshar, cannot claim the privilege under Article 20(3) of the Constitution in proceedings under section 185 of the Indian Companies Act, 1913,—

(a) The proceedings under section 185 of Indian Companies Act, 1913, do not partake of the character of criminal prosecution, and he is not an accused person;

(b) He is not being subjected to a compulsion to make any statement, and it is within his option to offer or not;

(c) As a witness, he cannot claim protection beyond what is contained in the proviso to section 132 of the Indian Evidence Act;

(d) The appropriate time when the privilege can be claimed is after the question is put and not in advance of the examination; and

(e) The privilege of silence is restricted to real danger and not to remote possibilities.

In the light of the above discussion, the arguments of the learned counsel for S. Sardul Singh, Caveeshar are unpersuasive. In the result, the application, L.M. 89 of 1960, is dismissed; but there will be no order as to costs.

B. R. T.