

EVIDENCE BEFORE BOARDS AND COMMISSIONS.

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It is not unusual for a Government to appoint a Board or issue a Commission to persons to enquire into and present a report upon some happening or state of affairs. To enable such a Board or Commission to make its report it is usually necessary for it to obtain information from persons who for one reason or another would not give it voluntarily. But there is no prerogative power which entitles a Government or any governmental instrumentality to compel any person to attend or to give evidence, and so unless there were statutory provisions to assist it, such a Board or Commission would be frustrated in its task by the unwillingness of those who have the necessary information to disclose what they know.¹ The Victorian statutory provisions designed to enable a Board or Commission to conduct an effective enquiry are ss. 14-21 of the Evidence Act, 1928.

In enacting legislation to make Boards or Commissions effective implements for enquiry, it would have been possible to arm them with powers of compulsion similar to those possessed by Courts of Law. Such, for instance, as a power to commit for contempt any person who refused to comply with an order given by a Board or Commission. But this course has not been followed, and a Board or Commission still has no power to punish a witness who fails or refuses to attend or give evidence.

What has been done is to make it an offence for a person to fail or refuse to give evidence in certain cases; and to convict and punish for such an offence is a matter for the appropriate Court and not for the Board or Commission. Thus, if a person summoned by a Board or Commission to attend does so but in the course of the proceedings refuses to answer any question put to him, the Board or Commission cannot compel him to do so; it may advise or persuade him to answer and point out the unpleasant consequences that may follow from his refusal, but ultimately if he rejects its advice and resists its persuasion, all it can do is to set in train proceedings which may end in a penalty. The powers of a Board or Commission and the obligations of a witness before it are defined in ss. 14-21 of the Evidence Act. A Board or Commission has certain power to summon witnesses to attend and to administer an oath to and to question any person before it. The obligation of a witness happening to be present or summoned to attend must be dealt with in greater detail.

The only absolute duty created by ss. 16 and 18 is that imposed upon a person happening to be present before a Board or Commission to be sworn when requested to do so. The other obligations are qualified by the words "without lawful excuse" or "without reasonable excuse," and these phrases must be considered.

The phrase "without reasonable excuse" presents no difficulty. Whether the excuse which a person summoned to attend makes for his non-attendance is reasonable or not is a simple question of fact to be decided by the Court in which proceedings against him are taken. Incapacity

1. *Clough v. Leahy*, 2 C.L.R. 139, at pp. 155-7; *A.-G. v. The Colonial Sugar Refining Co.*, (1914) A.C. 257; *McGuinness v. Att.-Gen. of Vict.*, (1940) 63 C.L.R. 73.

to attend by reason of accident or sickness is as clear an example of a reasonable excuse as disinclination to give evidence is of an unreasonable one.

But the meaning of the phrase "without lawful excuse" is much more difficult to exhaust. The change in language from "reasonable" to "lawful" suggests that the question becomes one of law rather than fact, and that any person who, for example, refuses to answer a question, must justify his refusal by some law which excuses a witness from answering such a question. As the sections under consideration are the only law imposing an obligation upon persons to answer questions put by a Board or Commission, until they or their equivalent in earlier Acts were passed, there was no room for any law establishing excuses or justification for not answering such questions. So to understand the words "lawful excuse" it is not possible to resort to any learning related directly to evidence before Boards and Commissions, and to give the words a reasonable meaning the only alternative is to apply the rules relating to evidence before Courts and to say that a witness may lawfully refuse to answer a question which should not have been asked or which he would not have been obliged to answer if it had been asked in a Court of law. This view seems to be expressly, although inartistically, recognized in the case of a Commission by the proviso to s. 17.

Thus a lawyer to a question relating to communication from his client could plead his Common Law professional privilege. A clergyman or doctor could in an appropriate case successfully rely upon s. 28 of the Evidence Act. Many other instances could easily be given, but with reference to all these matters it must again be observed that the Common law rule and statutory enactments referred to can only be applied indirectly or by analogy for some of them provide for the rejection of questions, and any objections based on such a rule is determined then and there by a Court of law and a witness knows where he is. Before a Board or Commission the witness must take his stand at the risk that the Court before which he is charged subsequently will determine that the question which he refused to answer was one which would have had to be answered in a Court of law.

One excuse for refusing to answer a question which has been made in the past and which will no doubt be made again and which deserves detailed examination, is that the answer might tend to incriminate the witness or the husband or wife of the witness. Such an examination involves a consideration of:

- (1) The Common Law upon self incrimination as a ground for privilege;
- (2) The meaning and application of ss. 17, 29 and 30 of The Evidence Act, 1928.

(1) The Common Law rule was that a witness who claims privilege cannot be compelled to answer a question if the Court is satisfied that to answer might tend to expose him or his wife to a criminal prosecution penalty or forfeiture of any kind whatever.² Though at one time it was uncertain whether if a witness pledged his oath that to answer might

2. *Reg. v. Boyes*, 1 B. & S. 311; *Phipson*, 7th ed., pp. 205 *et seq.*; *Best*, 12th ed., pp. 115 *et seq.*; *Taylor*, 12th ed., Vol. 2, pp. 1453-1467; *Wymore*, 2nd ed., paras. 2250-2284.

incriminate him, a Court would require any further proof that such was the case, it is now well established that the Court must be satisfied that to compel an answer might put the witness in a position of real and appreciable danger, but that once the Court is satisfied that the line of questioning might do so, it ought not to compel a witness to show how an answer to any particular question might imperil him, for to do so would often defeat the purpose of the rule and force a witness to disclose the very thing which he desires to keep hidden. For the protection afforded to a witness covered not only answers which might be straight-out admissions, but also those which might afford clues or links in a chain of evidence to establish a criminal act.

(2) Section 30 of the Evidence Act was no doubt designed to encourage witnesses before Boards and Commissions to be frank by removing the fear that anything they might say might be used as a ground for or as evidence in legal proceedings against them. But there can be no doubt that the provision has restricted the use which might otherwise have been made of the Common Law rule which has already been stated, since the operation of the sections may well deprive an answer of any self-incriminatory tendency. If an answer cannot be used it may well be that it cannot incriminate. But the Common Law rule and the section are not co-extensive. The protection given by the section is both wider and narrower than the protection of the Common Law rule. It is not possible to discuss this exhaustively, but it should be noticed that the section does not afford any protection to the wife or husband of a witness. It does not ensure protection from penalties, and it does not fully protect a witness from the consequences of an incriminating answer leading to enquiries which result in a prosecution.

My conclusion is that notwithstanding s. 30 it is possible for an answer to a question before a Board or Commission to tend to incriminate the witness, and there is nothing in the section to show that it was intended to negative entirely the Common Law rule.

If, however, s. 29 applies to witnesses before a Board or Commission, that section does abrogate the Common Law rule and substitute for it the more limited protection there given. But I do not think that s. 29 applies to proceedings before a Board or Commission for the following reasons, although there is room for argument to the contrary—

(1) An enquiry by a Board or Commission is not the *trial* of any issue, matter or question, nor is it an enquiry arising in any suit, action or proceeding, civil or criminal.

(2) As a Board or Commission has no power to compel a witness to answer any question, the words "be permitted to refuse to answer" cannot apply to the examination of witnesses before such bodies.

(3) On an enquiry by a Board or Commission there is no "matter in issue" to which a question could be said to be relevant or material.

It follows then that on this point my conclusion is that a witness before a Board or Commission who refuses to answer a question when the answer might incriminate him in the Common Law sense notwithstanding s. 30 does not refuse to answer without lawful excuse.