AFFIDAVITS AND STATUTORY DECLARATIONS: *R.* v. *NICHOLS*

R. v. *Nichols*[1] is an unfortunate example of bad practice by lawyers before whom affidavits are sworn and statutory declarations are made. It is an example also of a high degree of confusion between affidavits and statutory declarations which, upon the evidence of the case itself, affects the bar, the bench, and even the writers of headnotes. The charge was one of making a false statutory declaration, and the primary ground of acquittal was that the declaration was not properly taken.

Throughout the judgment the words "affidavit" and "declaration" are used interchangeably and indeed the crucial finding is that ". . . the document being Ex. 1, purporting to be a statutory declaration, is not an affidavit in the true sense of the word and merely amounts to a statement."[2] The judgment also says that there is no evidence of a Bible being present or that the "affidavit was sworn in the usual manner without the use of the Bible, commonly known as the Scotch form", which statements are not appropriate to a case involving a statutory declaration. The same confusion appears from the evidence given by the lawyer (who was at the time of the declaration an articled student) and the crown prosecutor. It is necessary to note the difference between the two kinds of statement; in the present state of the law the confusion can have serious consequences.

An affidavit involves an oath. The taking of an oath must be authorized by law, and it is authorized only in a limited number of cases.[4] In order to permit the verification of other statements, the British Parliament permitted certain officers to receive statements[5] and the Canada Evidence Act[6] and the Alberta Evidence Act[7] do likewise. It might or might not have been wiser to provide for affidavits in all cases where verification was required, but that was not what was done. Instead, an elaborate and somewhat unintelligible form of words was provided under which the person making the declaration purports to do so knowing that it is of the same force and effect as if made under oath. No Bible and no oath, Scotch or otherwise, is required for a statutory declaration, nor is an oath effective if administered.

Three cases are cited in *R.* v. *Nichols*.[8] In *R.* v. *Phillips*,[9] a British Columbia County Court Judge held that it was not sufficient that the commissioner merely asked the declarant whether he declared the declaration to be true; the swearing of a false oath in an affidavit is in itself an offence, but there is no offence in the case of a statutory declaration unless the statutory form is complied with. In the *Phillips* case[10] the form did not say that the declarant knew that the declaration was of the same force and effect as if under oath, and it may be that the decision is restricted to

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[1] [1975] 5 W.W.R. 600.

[2] *Id.* at 605.

[3] *Id.* at 604.

[4] Both Section 14 of the Canada Evidence Act, R.S.C. 1970, c. E-10, s. 38, and the Alberta Evidence Act, R.S.A. 1970, c. 127 permit a person to affirm when he has conscientious scruples about taking an oath (*e.g.*, atheists and members of certain religious denominations).

[5] 5 & 6 Will. 4, c. 62, s. 18.

[6] S. 38.

[7] S. 20.

[8] *Supra*, n. 1.

[9] (1908) 9 West. L.R. 634.

[10] *Id.*

that kind of case. In *R.* v. *Nier*[11] the Alberta Supreme Court en banc held that there is no law prescribing any particular form for the taking of a statutory declaration and that it was sufficient that the commissioner had read through to the declarant the whole statutory declaration, including the formal parts, and then asked the declarant whether it was satisfactory, to which an affirmative answer was made. In *R.* v. *Nichols*[12] the court distinguished the *Nier* case[13] "as no oath was required", but in each of the two cases it was a statutory declaration which was involved. In the third case *R.* v. *Rutherford*[14] the Saskatchewan Court of Appeal held that, when the commissioner had read the document all over to the declarant and explained it, and had then asked whether the declarant declared it to be true, the declaration was sufficiently made to comply with the Act.

The Attorney General's office issues sample instructions to notaries and others empowered to administer oaths, and lawyers would benefit from reading them. If a statutory declaration is involved, the commissioner should inquire whether the declarant has read it over and is aware of its contents. Upon receiving an affirmative answer the commissioner should then say: "You declare that this is your name and handwriting, and you make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath?" The person making the declaration should then say "I do". The instructions make it clear that "no oath is administered in the case of declarations".

In the case of an affidavit there are two procedures which are clearly sufficient. The passage in the Attorney General's instuctions appears correct, and, insofar as it applies to the usual case, reads as follows:

> The person making the affidavit shall first sign the same and hand it to the officer, who will then hand to such person a Testament. . . . The officer will then address the person taking the oath as follows: 'You have read over this affidavit and are aware of its contents.' If he answers in the affirmative the officer shall then say: 'You swear that this is your name and handwriting, and you swear that the contents of this you affidavit are true. So help you God.' The person taking the oath should then either kiss the Bible, or hold the same up in his right hand, at the same time saying 'I do'.

The second, which is not mentioned in the Attorney General's instructions, is known as the "Scotch oath", apparently having become established in Scotland to assuage conscientious objections to swearing on the Bible. It was approved by the Supreme Court of Canada in *Curry* v. *The King*[15] where it was described by Fitzpatrick C.J. as "the adjuratory invocation of the Deity with uplifted hand",[16] which description is in accordance with that in Section 18 of the Alberta Evidence Act. The phrase "Scotch oath" is widely misunderstood in Alberta, where many do not realize that it requires the uplifted hand.

That leaves open the question whether anything less than the "Scotch oath" is acceptable. Certainly the more common practice in Alberta omits the uplifted hand, but there is a question whether widespread practice can justify a departure from what was clearly the common law.[17] There are many statements which suggest that the essential part of the oath is the

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[11] (1915) 9 W.W.R. 838.

[12] *Supra*, n. 1.

[13] *Supra*, n. 11.

[14] [1923] 2 W.W.R. 963.

[15] (1913) 48 S.C.R. 532.

[16] *Id.* at 534.

[17] See the scholarly judgment of Graham C.J. in the Nova Scotia Supreme Court in *R.* v. *Curry* (1913) 12 D.L.R. 17 *et seq.*

invocation of the Deity,[18] and if that is so it seems to follow that there is no absolute requirement of a particular procedure, whether kissing the Bible or raising a hand. In *Crown Lumber Co. Ltd.* v. *Hickle and O'Connor*[19] Mr. Justice Beck, with whom Mr. Justice Hyndman concurred, said that all that is necessary is that something be done in the presence of the officer which is understood by him and the affiant to constitute the act of swearing. The court was divided in such a way that it is not possible to extract a majority view in support of that proposition, but it seems to be the better view.

I submit that the minimum practice below which no administration of an oath should go is that outlined in the Attorney General's instructions as quoted above, save that the presence of the Bible be dispensed with. There may be some doubt as to whether that is sufficient, but anything less is in grave danger of being held insufficient.

It is an offence for a commissioner to sign a document purporting to be an affidavit or statutory declaration as having been sworn or declared if it was not so sworn or declared. It is also, of course, highly embarrassing for a lawyer, upon a serious occasion, to have to admit to sloppy practice which invalidates the proceeding. Since the administering of an oath or receiving a statutory declaration is a matter of small moment which will usually not be remembered, the only safe practice is rigid adherence to proper procedure so that the commissioner may truthfully say that he followed the procedure on a particular occasion because he followed it on all occasions.

Insofar as affidavits are concerned this note has dealt only with the usual case and not with the case of a person who wishes to affirm rather than take an oath, or a person who, for religious reasons, objects to the usual oath or does not regard it as binding upon his conscience. It does not deal with special problems such as persons who are blind, illiterate, or unable to understand or speak English. These cases are also dealt with in the Attorney General's instructions.

—W. H. HURLBURT, Q.C.*

[18] For example: McGillivray J.A. said in *R.* v. *Defillyii* [1932] 1 W.W.R. 545, 546: "The essence of an oath is an appeal to a Supreme Being in whose existence the person taking the oath believes and whom he believes to be a rewarder of truth and an avenger of falsehood."

[19] [1925] 1 W.W.R. 279 (Alta. App. Div.).

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