CASE AND COMMENT.

EVIDENCE—WITNESS RETRACTING FORMER TESTIMONY. Where a person tells one story as a witness in a criminal proceeding and a different story in a subsequent civil action in which his own interests are involved, is his latter testimony admissible? And if admissible, how should it be regarded?

The situation arose in *Commercial Securities Limited* v. *Johnson*[1] in the British Columbia Courts. An automobile salesman had been convicted for fraud in connection with the sale of a motor car. At the criminal trial Johnson, the defendant in the present action, was a witness for the Crown. Then there followed a civil action in which the plaintiff, a "financing company," sued Johnson for conversion of the same car. In that action he told a story different from what he had told at the criminal trial. The trial judge[2] found no difficulty in accepting Johnson's story on the latter occasion, and gave judgment in his favour. This decision was affirmed by the Court of Appeal, by a majority of three to two.[3] The two dissenting judges seem to have been considerably influenced by the fact that the defendant's testimony was in direct conflict with his former testimony at the criminal trial. The trial judge had, however, been "much impressed with the defendant's rugged honesty and truthfulness" at the civil trial, and the other judges supported his judgment.

It is submitted that, in such a situation, there is no rule which prevents a court from accepting subsequent testimony in conflict with previous testimony by the same witness, if convinced that the witness is now telling the truth. Even where the witness admittedly perjured himself in his former testimony, his subsequent testimony is nevertheless—contrary to a view expressed in some early cases—admissible, although it may justly be received with the "most jealous scrutiny."[4] *A fortiori*, where, as in the British Columbia case, the court thinks that the former testimony was given with an honest belief in its truth at the time, should the subsequent contradictory testimony be received.

[1] [1931] 1 D.L.R. 861.

[2] Gregory, J., in 43 B.C.R. 61; [1930] 4 D.L.R. 509.

[3] [1931] 1 D.L.R. 861.

[4] *Merchants Bank* v. *Monteith* (1885), 10 Ont. P.R. 467 at p. 475; *Baldwin* v. *Hesler* (1916), 38 O.L.R. 172.

As to the early cases referred to above, the view was that one who came to the stand to testify that upon a former occasion he had sworn falsely, was a self-confessed perjurer incapable of trust. We find that view vigorously voiced by Jeffreys, L.C.J., in *Oates' Trial* for perjury in 1685:[5]

Attorney-General: "Pray acquaint my lord and the jury, how you came to swear at the former trial, by whom you were persuaded, and how you varied from the truth." *Jeffreys, L.C.J.*: "That is very nauseous and fulsome, Mr. Attorney, methinks, in a court of justice." *Attorney-General*: "What did you swear at the former trial and was that true you did swear then?" *L.C.J.*: "I tell you truly, Mr. Attorney, it looks rank and fulsome; if he did forswear himself, why should he ever be a witness again?" *Att.-Gen.*: "'Tis not the first time by twenty that such evidences have been given." *L.C.J.*: "I hate such precedents in all times; let it be done never so often. Shall I believe a villain one word he says, when he owns that he foreswore himself" *Solicitor-General*: "My lord, it was ever testimony allowed to be given to detect subornation." *L.C.J.*: "I am sure 'tis not fit to be allowed at any time: if he did forswear himself in a Court of Record, in my opinion he is not to be received as a witness any more . . . Argue the matter as long as you will, Mr. Solicitor, you will never convince me, but he that has once forsworn himself, ought not to be a witness after that in any cause whatsoever. If any man tell me otherwise till doomsday, I cannot be convinced of it." *Sol.-Gen.*: "I go but to ask him this question, whether or no what he swore was true." *L.C.J.*: "Mr. Solicitor, we are all of another opinion, that it is not evidence fit to be given."

A similar view was taken by the judges in 1754, in *Canning's Trial,*[6] though Baron Legge there conceded that it was customary in trials for subornation of perjury to receive the testimony of such witnesses. But he declared, "I will never admit or suffer a person that will say they have been perjured in another affair."[7]

Early in the nineteenth century, however, this earlier view was repudiated. In 1809, in *R.* v. *Teal,*[8] Lord Ellenborough said:

Though a person may be proved on his own showing, or by other evidence, to have forsworn himself as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath; though it may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his testimony altogether. But still that would not warrant the rejection of the evidence by the judge; it only goes to the credit of the witness, on which the jury are to decide.

This view was afterwards approved in a case decided in 1816,[9] and

[5] 10 How. St. Tr. 1079 at p. 1185; quoted by Wigmore, Evidence, sec. 527.
[6] 19 How. St. Tr. 283, 450, 609, 632.
[7] *Ibid.*
[8] 9 East 307.
[9] *Rands* v. *Thomas* (1816), 5 M. & S. 244, repudiating the "nisi prius" ruling on the same facts in *Nickson* v. *Thomas* (1815), 1 Stark. 85, and following *R.* v. *Teal, supra.*

may be said to be the view now generally accepted.[10] Of its intrinsic soundness there can be little doubt. As pointed out by Wigmore, "the witness *may* be telling the truth now; whether he is doing so can best be left to the jury to consider under all the circumstances affecting his credit. To exclude one who now admits a former perjury, much more to exclude one who merely contradicts his former oath, is to shut out a possible source of truth; and to admit him can hardly serve to mislead, since the testimony is of itself open to suspicion."[11]

Inconsistent with the rule may appear to be cases in which, on application for a new trial, affidavits have been rejected of persons deposing that the testimony they gave at the former trial was not true.[12] But probably such cases are to be explained in connection with the general policy expressed in the maxim *Interest reipublicae ut sit finis litium,* rather than by any rule against allowing a witness to retract former perjured testimony.[13]

It may be noted that Lord Ellenborough enunciated his rule in *R.* v. *Teal* some 34 years before the abolition of crime as a disqualification of a witness. It was not until 1843 that *Lord Denman's Act*[14] declared that "No person offered as a witness shall hereafter be excluded by reason of any incapacity from crime . . . from giving evidence . . . but that every person so offered may and shall be admitted to give evidence . . . notwithstanding that such person may have been previously convicted of any crime or offence." The abolition of that disqualification has removed the chief ground urged by counsel in the *Teal Case, supra,* against the admission of such evidence, viz., that the witness was incompetent on the ground of "acknowledged perjury and infamy," and that "it made no difference whether the infamy were found by verdict or by the confession of the party tendered as a witness."

This rule as to the admissibility of testimony in conflict with previous testimony is to be distinguished from the rule that previous conflicting testimony cannot, unless the witness is a party, be received as evidence of the facts stated. It is admissible only for the purpose of discrediting the witness in respect of his sub-

[10] For its acceptance in Courts of the United States, see Wigmore, sec. 527. For Ontario cases, see footnote (4), *supra.*

[11] Wigmore, Evidence, sec. 527.

[12] *Rushton* v. *G.T.R.* (1903), 6 O.L.R. 425; *R.* v. *Di Francesco* (1918), 44 O.L.R. 75 at p. 78.

[13] On the "fallacy of the whole idea" of trying to make the maxim *Nemo allegans turpitudinem suam audiendus,* see Wigmore, secs. 531, 525-530.

[14] 6-7 Vict. c. 85, s. 1. Adopted in Upper Canada by 12 Vict. c. 70. See Ont. *Evidence Act,* R.S.O., 1927, c. 107, s. 3, Can. *Evidence Act,* R.S.C., 1927, c. 59, s. 3.

sequent testimony.[15] But if the witness is himself a party, then his former statements may be used testimonially against him as admissions, i.e., as proof of the facts therein stated. And such admissions may be sufficient to support a verdict notwithstanding that the party denies them at the trial.[16]

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Fixtures — Conditional Sale of Chattel — Ontario Land Titles Act. Courts of Chancery constantly recognized and expressed that they had difficulty in determining questions of priority in disputes between two persons who acted in good faith and who were the innocent victims of the fraud or insolvency of a third person. To-day, in similar situations, the courts are experiencing no less a sense of difficulty in balancing the application of different statutes designed for the protection of those who act in good faith. In *Hoppe* v. *Manners*[1] an Ontario Court was presented with the problem of balancing the application of the *Land Titles Act*[2] and the *Conditional Sales Act*[3] both designed to protect purchasers who act in good faith from unregistered interests affecting the subject-matter of their purchase.

Briefly, the problem that arose in *Hoppe* v. *Manners* was this: May a conditional vendor of a chattel who has filed his conditional sale agreement with the County Court Clerk, but who has not registered it in the Land Titles office, enforce his right to repossess the article sold as against a subsequent purchaser of the land to which the article has been affixed, if the subsequent purchaser acquired the land by a transfer under the *Land Titles Act* without notice of the conditional sale agreement. The contention of the subsequent purchaser of the land was that he was protected by the *Land Titles Act* since his vendor appeared on the register as the absolute owner of the property. The contention of the condi-

[15] *R.* v. *Duckworth* (1916), 37 O.L.R. 197. Cf. *Green* v. *Tress* (1927), 60 O.L.R. 151 at p. 155. And see other cases collected in 4 C.E.D. (Ont.), sec. 89, at p. 698, notes (e) and (f).

[16] See *Palmby* v. *McCleary* (1886), 12 O.R. 192. Cf. 4 C.E.D. (Ont.), sec. 71, at p. 616, note (r).

For related problems, such as whether a witness can be heard to testify that though he attested a document he attested it falsely, and whether a witness who has by his signature acknowledged an instrument to be valid, should be heard to testify to facts destroying its validity, see Wigmore, secs. 528, 529. Cf. 4 C.E.D. (Ont.), sec. 76, at p. 641.

[1] (1931), 39 O.W.N. 444 (App. Div.).

[2] R.S.O. 1927, c. 158.

[3] R.S.O. 1927, c. 165.

tional vendor of the subsequently annexed chattel was that his right of repossession was preserved as against subsequent purchasers of the land by section 8 of the *Conditional Sales Act*.[4] The Court held that the subsequent purchaser of the land was protected. They accepted the purchaser's contention that section 8 of the *Conditional Sales Act* does not exclude the operation of the provisions of the *Registry Act* or the *Land Titles Act* which are designed to protect bonâ fide purchasers of land from unregistered claims against the lands of which they have no notice.[5] With respect, it is suggested that the Court did not give sufficient effect to the plain language of section 8 especially having regard to the legislative purpose of the section and the fact that both the *Land Titles Act* and the *Registry Act* were on the statute books when this section of the *Conditional Sales Act* was enacted.

Section 8 was passed by the Ontario legislature in 1905.[6] Prior to this date there had been a difference of opinion between the English Courts and the Ontario Courts as to the effect of a conditional sale agreement on the rights of a vendor of a chattel which had become affixed to the realty. The English Courts took the view that the agreement between the vendor and purchaser of the chattel did not affect the question whether the chattel had become a part of the realty; that question, in their view, depended on the degree of annexation and the apparent or objective purpose of annexation to the land. The only effect that the conditional sale agreement had was to give the vendor a right to remove the article and reconvert it into a chattel. Such a right of removal was equitable only and could not be enforced against a subsequent purchaser of the legal title for value without notice.[7]

The Ontario Courts had taken an entirely different view of the

[4] Sec. 8: "Where the goods other than building material have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other encumbrancer thereof shall have the right as against the seller or lender or other person claiming through or under him to retain the goods upon payment of the amount owing on them."

[5] It should be noted, however, that neither the *Land Titles Act* nor the *Registry Act* affords complete protection to a purchaser who relies on the register. The *Land Titles Act*, section 23, enumerates several rights and interests which registered land is subject to and the *Registry Act* affords no protection to a purchaser against statutory incumbrances, forgery or legal rights which do not arise by virtue of an instrument, *In re Cooper, Cooper* v. *Vesey* (1882), 20 Ch. D. 611, *Israel* v. *Leith* (1890), 20 O.R. 361, *Myers* v. *Johnston* (1922), 52 O.L.R. 658.

[6] 5 Ed. VII., c. 13, s. 14.

[7] The view of the English courts may be deduced from the following cases. *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, *Reynolds* v. *Ashby*, [1904] A.C. 466, *Ellis* v. *Glover*, [1908] 1 K.B. 388.

effect of a conditional sale agreement. The Ontario view was that the reservation of title in the vendor by the agreement prevented the chattel from ever becoming a part of the realty in the hands of the purchaser or hirer. The Ontario view was expressed by Burton, J.A., thus, "it is too simple a proposition to require authority that a person who has only the use of a chattel belonging to another cannot by annexing it to the soil make it part of the realty."[8] In 1904, however, the House of Lords in *Reynolds* v. *Ashby*[9] followed and applied the prevailing English view. Thus, by virtue of this judgment of the House of Lords the opinion of the Ontario courts as epitomized by Burton, J.A., was overruled even for Ontario.[10] It was at this stage that the Ontario legislature in 1905 enacted what is now section 8 of the *Conditional Sales Act*. As has been judicially pointed out this section was passed "for the purpose of preventing the law as laid down in England prevailing in this Province."[11] In other words, the legislative purpose in enacting section 8 was to restore as law the proposition enunciated by Burton, J.A., and in effect to declare that in any consideration of the rights of the conditional vendor his rights must be worked out on the basis that the article sold is still a chattel and not a part of the realty. Thus, by this section, as far as the conditional vendor whose article has been affixed to the realty is concerned, he is not claiming an interest in land nor as far as his rights are in question can the conditional sale agreement be said to be "an instrument affecting land." Neither the *Land Titles Act* nor the *Registry Act*, which deal with unregistered interests *in land* can deprive the conditional vendor of a chattel of his interest in that which, quoad himself, remains a chattel.

It might also be suggested that since the *Registry Act* and the *Land Titles Act* were in force at the time section 8 of the *Conditional Sales Act* was enacted,[12] the legislature had it intended to reserve the application of these statutes would have specifically said that the operation of the new section 8 was to be subject to the

[8] *Hall Manufacturing Co.* v. *Hazlett* (1885), 11 O.A.R. 749; see also *Polson* v. *Degeer* (1886), 12 O.R. 275.

[9] [1904] A.C. 466.

[10] *Robins* v. *The National Trust Co.*, [1927] A.C. 515.

[11] Middleton, J., in *Liquid Carbonic Co., Ltd.* v. *Rowntree* (1923), 54 O.L.R. 75.

[12] The Land Titles system was introduced in Ontario in 1885. The first *Registry Act* in Upper Canada was passed in 1795 by 35 Geo. III., c. 5, but it was not until 1867 by 31 Vict., c. 20, that the Ontario *Registry Act* assumed its present general form.

existing statutes."[13] The latest expression of the will of Parliament must always prevail."[14]

Finally, from a practical standpoint, the decision in the principal case places a very heavy burden on conditional vendors of chattels who wish to protect themselves. The conditional vendor must file the agreement with the Clerk of the County Court of the county in which the proposed purchaser resides at the time of the sale to protect himself as long as the article remains a chattel[15] and then some way or other he must keep in touch with the whereabouts of the article sold, ascertain if and where it has been affixed to realty and then register another copy of the agreement in the registry office of the district in which the lands to which the article has been affixed are situate.

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EASEMENTS—CREATION BY IMPLIED GRANT OR RESERVATION.—*Aldridge* v. *Wright*,[1] in the language of Scrutton, L.J., in the Court of Appeal[2] "raises again the troublesome question which is frequently arising as to the rights of tenants of houses forming part of a row to the use of a back passage for conveyance of their dust, coal, or other matters, either against their fellow tenants or their landlord."

The plaintiff and defendant were tenants of adjoining houses under the same landlord, the lease to the plaintiff's predecessor having been granted in 1901, and that of the defendant's predecessor in 1904. The action concerned the right of the defendant to use a path across the back garden of the plaintiff's lot. The County Court Judge, before whom the action was tried, found that from the time when there had been unity of possession of the two lots the path had been used by the occupiers of the defendant's lot for the limited purpose of removing dust and refuse and for bringing in coal, but the evidence was not clear whether the user was permissive. Apparently confusing the dates of the two assignments, and thinking that the

[13] For example in the Ontario *Executions Act*, R.S.O. 1927, c. 112, s. 9(1), the legislature expressly preserved the application of the *Land Titles Act* thus, "*Subject to the provisions of the Land Titles Act*, a writ of execution shall bind . . . the lands against which it is issued from the time of the delivery thereof to the sheriff for execution."

[14] *Goodwin* v. *Phillips* (1907), 7 Austr. C.L.R. 1 at p. 7.

[15] *Conditional Sales Act*, R.S.O. 1927, c. 165, s. 2.

[1] 98 L.J.K.B. 582; [1929] 1 K.B. 381; [1929] 2 K.B. 117.

[2] 98 L.J.K.B. 582 at p. 587; [1929] 2 K.B. 117 at p. 123.

defendant's lease had been granted first, he made a declaration that the defendant had a right of way for the limited purpose mentioned.

The plaintiff appealed to a Divisional Court on the ground that the case was governed by the rule laid down by the Court of Appeal in *Wheeldon* v. *Burrows*,[3] where it was said that if a grantor wishes to reserve any rights over land granted, he must do so expressly, except in the case of an easement of necessity. The defendant on the other hand, abandoning the reason for decision of the County Court Judge, contended that the rule in *Wheeldon* v. *Burrows* should not be taken too implicitly, and that the case should be governed by *Thomas* v. *Owen*,[4] another Court of Appeal decision, which he contended was in conflict with *Wheeldon* v. *Burrows*. In *Thomas* v. *Owen*, the plaintiff and defendant had for some years been tenants from year to year of adjoining farms under the same landlord, and the plaintiff had been accustomed to use a well defined ancient lane over the defendant's farm which admittedly was not a way of necessity. The landlord granted a lease for years to the defendant and subsequently a lease for years to the plaintiff, no mention being made of the lane in either lease, and the parties were holding their respective terms at the time of action. It was held that there was an implied reservation of the right of way out of the defendant's lease as it was a continuous and apparent easement, and no demise free from the right of way could be made to the defendant without derogating from the plaintiff's subsisting tenancy from year to year.

Shearman, J., in *Aldridge* v. *Wright*, after stating that *Wheeldon* v. *Burrows* held that there was only one exception to the need for express reservation, the easement of necessity, and that there was an obvious conflict beween *Wheeldon* v. *Burrows* and *Thomas* v. *Owen*, said: "On the whole I can only say I prefer, and I think we are bound to prefer, the decision in *Wheeldon* v. *Burrows*, and the *Wheeldon* v. *Burrows* line of cases, to the decision in *Thomas* v. *Owen* and the *Thomas* v. *Owen* line of cases. . . Therefore, it is not necessary to send this case back to the County Court Judge to decide whether there was an apparent and continuous easement when the properties were severed."[5] [i.e. to bring it within *Thomas* v. *Owen*.]

Finlay, J., doubtfully concurred on the ground that *Thomas* v. *Owen* "did apparently depart from the principles which had been

[3] (1879), 48 L.J. Ch. 853; 12 Ch. D. 31.
[4] (1887), 57 L.J.Q.B. 198; 20 Q.B.D. 225.
[5] 98 L.J.K.B. 582 at p. 586; [1929] 1 K.B. 381 at p. 386. (The language of the two reports differs slightly).

laid down in *Wheeldon* v. *Burrows*, and did apparently recognize exceptions to those rules—exceptions of which, in *Wheeldon* v. *Burrows*, there is not the slightest suggestion."[6] He, however, concluded that the true rule was stated in *Wheeldon* v. *Burrows* and that as there were no exceptions to it, there was no necessity to send the case back for a new trial.

The effect of the decision of the Court of Appeal may be stated shortly: *Wheeldon* v. *Burrows* lays down the general rule; there are exceptions to it, some of which are set out, but there may be others, and as the defendant has not brought herself within any of the exceptions, she must fail. It is perhaps best expressed in the language of Scrutton, L.J.: "The cases on the subject are numerous and difficult to distinguish[7]. . . There are exceptions to the doctrine of *Wheeldon* v. *Burrows*. I do not see my way to attempt an exhaustive statement of those exceptions, as facts would immediately turn up to prove my absence of foresight, and I find some of the suggested exceptions difficult to understand, but I do not find any suggested exception which covers the facts of this case."[8]

Beyond setting out instances of exceptions to the rule in *Wheeldon* v. *Burrows* in a manner that cannot be said to be too analytical, the Court of Appeal decision can hardly be said to have clarified, or added much to, this difficult branch of the law of easements. It is to be regretted that the members of the Court did not avail themselves of the opportunity of investigating more exhaustively the subject of easements by implied reservation. Possibly it may be said without any reflection upon the Court, that the real reason for not doing so was that they were unable to state in a definitive way the result of the authorities and to indicate clearly the way in which the law should be developed—a pardonable confession for anyone to make.

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[6] 98 L.J.K.B. 582 at p. 587; [1929] 1 K.B. 381 at p. 387.
[7] 98 L.J.K.B. 582 at p. 587; [1929] 2 K.B. 117 at p. 123.
[8] 98 L.J.K.B. 582 at p. 588; [1929] 2 K.B. 117 at p. 124.