liability set up until a particular event happened and it was therefore part of the plaintiff's case to show that that event had happened by non-payment of an instalment. A plea of payment of the instalment in such a case is not a plea in confession and avoidance, but a traverse of the performance of a condition precedent. The provision of the *Local Courts Act* had therefore no application and the decision of the Supreme Court was quite right. In sec. 108 of that Act the word "transaction" applied to the case of an action of debt includes the whole transaction up to the time when the objection to pay arises. Under the Statute the mere appearance puts all that in issue. Leave to appeal must be refused.

Leave to appeal refused.

Solicitor, for the appellants, *E. E. Cleland.*

B. L.

[HIGH COURT OF AUSTRALIA.]

HARRIS . . . . . APPELLANT;
PLAINTIFF,

AND

THE MINISTER FOR PUBLIC WORKS (NEW SOUTH WALES) . . . RESPONDENT.
DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Land—Resumption by Crown—Action to determine value—City property—Evidence of value—Valuations made several years before resumption—Sales of similar land—Lands for Public Purposes Acquisition Act 1880 (*N.S.W.*) (44 *Vict. No.* 16).

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In an action to determine the value of certain land resumed by the Crown in 1910 under the *Lands for Public Purposes Acquisition Act* 1880, an affidavit sworn by the plaintiff in 1897, containing a statement of the value at that time, was tendered in evidence by the defendant and rejected. The Full Court having ordered a new trial on the ground that the evidence was wrongly rejected,

Held, that a new trial should not have been granted. By *Griffith* C.J. and *Barton* J. on the ground that the evidence was properly rejected, there being no sufficient evidence to connect the value in 1897 with that in 1910; and, by *Isaacs* J., on the ground that, although the evidence was admissible, if it had been admitted a verdict based on it would, in view of the other evidence, have been such as no reasonable jury could have found.

Held, also, that evidence of the price realized by voluntary sales of similar land in the same locality was properly rejected in the absence of evidence showing that the conditions attending those sales were so nearly like the transaction in question as to throw light on the matter.

Decision of the Supreme Court of New South Wales: *Harris* v. *The Minister for Public Works*, 12 S.R. (N.S.W.), 149, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by Matilda Duff Harris as executrix of George Harris, deceased, against the Minister for Public Works to recover compensation amounting to £100,000 in respect of certain land situated at Ultimo in the City of Sydney, which had been resumed by the Governor in Council under the *Lands for Public Purposes Acquisition Act* on 16th May 1910. The action was heard before *Cullen* C.J. and a jury.

One witness called by the plaintiff valued the land as at the date of resumption at £52,143 10s. In cross-examination he said :—" I think the land has increased between 1897 and 1910. I do not think it has increased from £11,000 to £52,000. . . . If the property was only worth £11,000 in 1897, I do not think it would have increased 500 per cent. since then. I should say that it should have doubled its value easily to what it was 14 or 15 years ago."

Another witness called by the plaintiff valued the land at £64,452 10s. In cross-examination he said :—" I should say that £11,000 for Ultimo House in 1897 would be a very low valuation. I would not say that there has been a jump of nearly 600 per cent.

in land values in the last 14 years." Counsel for the defendant tendered in evidence an affidavit made by the plaintiff on 16th March 1897 on an application by her for probate of her deceased husband's will, in which she stated that the market value of the land in question was £14,000. This affidavit was rejected by *Cullen* C.J. His Honor also rejected evidence tendered by the defendant of the prices other land in the neighbourhood of the land in question had been sold for about the time of the resumption.

The jury found a verdict for the plaintiff for £51,639.

On a motion by the defendant to the Full Court a new trial was granted on the ground of the wrongful rejection of the affidavit and of the evidence of the other sales : *Harris* v. *Minister for Public Works* (1).

From this decision the plaintiff now by leave appealed to the High Court.

J. L. Campbell K.C., (with him Dr. *Waddell*,) for the appellant. The evidence of the value of the land in 1897 was irrelevant to the inquiry as to its value in 1910 and the affidavit was therefore properly rejected. It was not the evidence of an expert and if admissible would raise a collateral issue from which no inference could be drawn relative to the issue to be tried. Its admission was in the discretion of the Judge. There was no connecting link between the value in 1897 and that in 1910. The admissions of the witnesses on cross-examination as to the ratio of increase of value between 1897 and 1910 did not render the affidavit admissible, for those admissions were valueless unless the witnesses also admitted the correctness of the valuation in 1897. The evidence as to the sales of other land in the neighbourhood was inadmissible in the absence of evidence of the circumstances of those sales. [He referred to *Doe* v. *Langfield* (2); *Metropolitan Asylum District* v. *Hill* (3); *Attorney-General* v. *Nottingham Corporation* (4).]

[ISAACS J. referred to *Crease* v. *Barrett* (5).]

(1) 12 S.R. (N.S.W.), 149.
(2) 16 M. & W., 497, at p. 515.
(3) 47 L.T.N.S., 29.
(4) (1904) 1 Ch., 673.
(5) 1 Cr. M. & R., 919.

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Wise K.C., (with him *Kelynack*,) for the respondent. The affidavit by itself was admissible either to establish the defendant's case or to cut down the value of the evidence given for the plaintiff. The affidavit was an admission by the plaintiff as to the value at the time it was made and is admissible against him in subsequent proceedings: *Brickell* v. *Hulse* (1); *Powell on Evidence*, 9th ed., Ch. XII.; *Taylor on Evidence*, 9th ed., p. 499; *Richards* v. *Morgan* (2).

[ISAACS J. referred to *Phipson on Evidence*, 4th ed. p. 231.]

The affidavit if not by itself admissible was made so by the admissions of the plaintiff's witnesses on cross-examination. Those admissions connected the value in 1897 and that in 1910. The jury might properly have acted on the evidence if it had been admitted, and as it was rejected a new trial was properly granted: *Chitty's Archbold*, 12th ed., p. 1518. The evidence as to sales of land in the neighbourhood was admissible.

Campbell K.C. in reply.

Cur. adv. vult.

Aug. 31.

GRIFFITH C.J. The only question before the jury in this case was the value on 11th May 1910 of the plaintiff's property which was resumed by the Government of New South Wales. The jury assessed the value at £51,600. The Supreme Court, by a majority, granted a new trial on the ground of the erroneous rejection of evidence relating to the value of the property in 1897, thirteen years before the date of resumption.

The property itself is a block of land of about four acres in extent, within three hundred yards of the Sydney Central Railway Station, situated on a road leading to the Pyrmont Peninsula, on which large export wharves and the central goods station of the New South Wales railways are erected. It appeared that during the last ten years there has been a radical change in the conditions of that part of the City of Sydney. It has become an important industrial centre for manufactures, and also for carrying on the export trade in wool and other commodities. It

(1) 7 A. & E., 454. (2) 4 B. & S., 641.

appeared also that, having regard to these conditions and the area and situation of the property, it was of very exceptional value. Under these circumstances it is obvious that there is no apparent basis of comparison between its value in 1897 and that in 1910.

The question of the admissibility of evidence is one for the Judge. If the admissibility depends upon a question of fact or of inference of fact, the fact must be ascertained or the inference must be drawn by the Judge. The objection taken in this case by the plaintiff to the evidence rejected was that it was irrelevant. Of course all evidence must be relevant. Mr. Justice *Stephen* in his *Digest of the Law of Evidence*, p. 2 defined "relevancy" thus:—"The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other."

That has been described as logical relevance. The rule of the admissibility of evidence is perhaps rather narrower. Lord *Watson* in *Metropolitan Asylum District* v. *Hill* (1) referring to the admissibility of evidence of collateral facts which is admissible only if relevant, said:—"In order to entitle him to give such evidence, he must, in the first instance, satisfy the Court that the collateral fact which he proposes to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute." That is substantially the same rule as stated by *Stephen* J.

It is plain that the value of land at one time may be relevant to its value at another time, as, for instance, if it appears that there has been no change in the value in the interval. Or it may be obviously irrelevant, as in the case of a new settlement when property, at first of a nominal value, has suddenly become of great value. There may be an infinite number of intermediate cases. Whether such evidence is relevant or not in a particular case must therefore depend upon an inference of fact to be drawn from all the circumstances of the case including those of place, time and change of conditions. The learned Chief Justice

(1) 47 L.T., 29, at p. 35.

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Griffith C.J.

thought that under the circumstances of this case he could not draw the necessary inference, and accordingly rejected the evidence. All the Judges of the Full Court agreed if the matter were taken *simpliciter*. But then it was sought by the defendant to make the evidence relevant in another way. A witness for the plaintiff had said in cross-examination that he thought the value of the property in question had not increased fivefold in the thirteen years, and it was contended that it thereupon became relevant to ascertain the value in 1897 in order to show that the value claimed by the plaintiff was more than fivefold the previous value. But it seems to me, with all respect to the learned Judges who formed the majority of the Full Court, that there is an obvious fallacy in this argument. The real comparison is between the present value and the former value. The ratio between them is a mere matter of arithmetic, and may be stated in the form of a fraction of which the former value is the numerator and the later value is the denominator. If the amount of the numerator is irrelevant the ratio is also irrelevant. For instance, if two witnesses agree that the present value of land is £4,000 and one of them thinks that the former value was £1,000 and the other that it was £2,000, it follows that one thinks that the value has doubled and the other that it has quadrupled. But the argument that, because one thinks that the value has quadrupled, the jury may infer that the present value is £8,000 is obviously misleading. It is not a fair inference from the evidence. The Court must have regard to the substance and not to the form of the question, and evidence which is irrelevant in itself cannot be made relevant by putting the question in the form of a proportion between two sums, if the proportion is irrelevant.

I express no opinion on the question how far the opinion of a Judge on a question of fact on which the admissibility of evidence depends can be reviewed on appeal. In this case, so far from thinking that the decision of the learned Chief Justice was wrong, I think that it was clearly right. The evidence to my mind was properly rejected.

On the motion for a new trial points were raised as to the admissibility of other evidence tendered and rejected relating to sales of other properties more or less near to the property in

question. The admissibility of such evidence also depended on questions of fact, whether the conditions attending the transactions relating to those other properties were so nearly like that in question as to throw any light on the matter. No evidence was given as to those conditions, and I think the learned Chief Justice was right in rejecting the evidence.

It follows that a new trial should have been refused and that the verdict of the jury should be restored.

BARTON J. I am of the same opinion and think it unnecessary to add anything.

ISAACS J. read the following judgment:—I agree in allowing the appeal but for somewhat different reasons. The main question is with reference to the rejection of the plaintiff's affidavit of 1897 which stated for probate purposes the value of the land then.

Simpliciter it was not admissible, because not relevant, the issue being confined to the value of the land in May 1910. The Crown contends however that a portion of Mitchell's evidence, substantially to the effect that between those years the value of the property easily doubled made the affidavit admissible. The learned Chief Justice of New South Wales rejected the affidavit notwithstanding that and some other evidence relied on but of a weaker nature.

All questions as to the admissibility of evidence whether of fact or law are necessarily for the Judge at the trial, and are subject to review by the appellate Court. *Cleave* v. *Jones* (1); *Boyle* v. *Wiseman* (2); *In re Daintrey*; *Ex parte Holt* (3). Two learned Judges of the Full Court thought the affidavit admissible and that its rejection involved a new trial, the third learned Judge thought the learned primary Judge was not bound to admit the evidence if he thought it would be of no material assistance to the jury, and added that no question arose as to impeaching the credibility of a witness. I am of the same opinion as the majority of the Full Court so far as concerns the

(1) 7 Ex., 421.

(2) 11 Exch., 360, at p. 365.

(3) (1893) 2 Q.B., 116, at p. 119.

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strict admissibility of the document. Though, if taken by itself it is irrelevant, because it stops at 1897, yet with the added fact, deposed to by the plaintiff's own witness, it becomes part of a combined statement which reaches down to the material point of time. If the issue had been the age of the plaintiff in 1910, an admission by her, in 1897, that she was 30, would be relevant because the common knowledge of mankind supplies the connecting arithmetical link of 13 years. And though the instance is simpler, the principle is the same if the link is supplied by oral testimony. In *Caermarthen and Cardigan Railway Co.* v. *Manchester and Milford Railway Co.* (1) a receipt given by a third person, inadmissible *per se*, was held to be admissible because connected with a cheque given in payment, and so forming part of a mercantile transaction.

One aspect in which the affidavit would be relevant was to challenge the reliability of Mitchell's figures. The plaintiff put him forward as a competent witness, and he pledged his opinion to £52,000 as the value in 1910. He also said the value in 1910 was easily double that in 1897; if then the value in 1897 was only £11,000, as the plaintiff stated in her affidavit, it might be argued with more or less weight dependent on the rest of the evidence that the accuracy of his judgment as to £52,000 was open to doubt. As his estimate was closely followed by the jury this might be considered important.

Therefore I think the affidavit was admissible. It does not however follow that a new trial must result from its rejection. And it is here I am compelled to part company with the majority of the Full Court of New South Wales.

In my opinion the case of *Crease* v. *Barrett* (2) contains the principle applicable to the law of New South Wales where the beneficial provision of Order 39 rule 6 of the English Rules of Court has not yet been adopted. *Parke* B. after stating the strictness of the law in forbidding the rejection of admissible evidence mentions instances where the Court may refuse a new trial, which are substantially those of *injuria sine damno*. One is stated in these terms (3):—"Where, assuming the rejected

(1) L.R. 8 C.P., 685.

(2) 1 C.M. & R., 919, at pp. 932, 933.

(3) 1 C.M. & R., 919, at p. 933.

evidence to have been received, a verdict in favour of the party for whom it was offered would have been clearly and manifestly against the weight of evidence, and *certainly* set aside upon application to the Court as an improper verdict."

There was abundant evidence given for the defendant to entitle the jury to have arrived at a verdict more favourable to him, and, if this evidence had been admitted, such a verdict given generally could not have been set aside, because no one could have told on what materials the jury's opinion rested. But as it happens this question must now be determined on the assumption that it is this rejected evidence which might have induced the jury to alter their opinion, and on that basis I am clear that such a verdict founded on that material would be such as no reasonable men could find, and therefore I cannot suppose it would ever be arrived at.

The statement relied on as the connecting link, namely, the ratio of increase, is manifestly not an independent estimate, but is, so to speak, the mechanical result of Mitchell's opinion, after considering the absolute values of the land in 1910 and 1897 respectively—namely, £52,000 in 1910 and something appreciably less than £26,000 in 1897. To adopt him as a trustworthy expert witness for the secondary result is necessary to the defendant's position for the purpose of introducing the affidavit; but it is the height of inconsistency to discard at the same time the accuracy of the process by which he arrives at that result. Therefore the affidavit cannot by the aid of Mitchell's testimony become affirmative evidence as to the value of the land. It might, however, conceivably be used to disparage the accuracy of his absolute valuation. But on this point his estimate as to 1910 as sworn to is based on the consideration of present circumstances, and however much it is conjecture, as more or less all these estimates are (see *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (1)), yet a retrospective estimate of the value of the land thirteen years ago, before commercial and industrial changes took place, must, comparatively speaking, become conjecture of the most nebulous character. The value stated in the affidavit is on the face of the document founded on a valuation

(1) (1901) A.C., 373, at p. 391.

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given by another person, of whose capacity and method of ascertainment there is no evidence.

A verdict then founded upon the solitary fragment of Mitchell's evidence as to the proportional increase over the period in question, detached from and in opposition to this formal evidence of actual present value, arrived at in the light of visible surroundings, would in my opinion be such as no reasonable men could arrive at, and therefore such as no Court could assume possible.

There was a question asked of the witness Wylie as to the amount by which the property increased from 1897 to 1910. This was disallowed. Having regard to the plaintiff's affidavit, I think the question a proper one. If, for instance, the plaintiff had made a further affidavit that the property had increased by £14,000 from 1897 to 1910, the two affidavits could have been put in together, notwithstanding the separate irrelevancy of their respective statements. If a second affidavit would be admissible, so would a sworn statement of a witness in Court. But again the matter is immaterial. Assume the witness's answer had been £14,000, it would only have been a repetition of his statement that the property was worth £25,000 in 1910, and the jury did not accept his opinion as one to be followed.

The appellant should therefore succeed on the questions raised in her appeal.

As to the independent points raised by the respondent, I agree they should fail.

On the whole, I concur in the order to be stated by the learned Chief Justice.

Appeal allowed. Order for new trial discharged. Motion for new trial dismissed with costs. Verdict of jury restored. Respondent to pay costs of appeal.

Solicitors, for the appellant, *Bradley & Son.*

Solicitor, for the respondent, *H. V. Tillett*, Crown Solicitor for New South Wales.

B. L.