be successfully contended that the evidence proves that there is "other sufficient cause" why the sequestration order should not have been made.

His Honor was correct in not allowing the objection to the making of the sequestration order founded on the appellant's tender of the amount of the assigned debt after service of the petition (*In re Gentry* (1) ).

*Appeal dismissed.*

Solicitor for the appellant, *D. R. Hall.*

Solicitors for the respondent, *W. A. Windeyer, Fawl & Co.*

J. B.

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McTiernan J.

Dist A-Gs Ref No2 of 1987 46 SASR 275

Cons Attorney-General's Reference (No2 of 1993) (1994) 73 ACrimR 567

Cons R v Simmons (1997) 68 SASR 81

1) (1910) 1 K.B. 825.

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[HIGH COURT OF AUSTRALIA.]

CHEERS . . . . . APPLICANT;
DEFENDANT,

AND

PORTER . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*Evidence—Larceny—Witness—Child—Intelligent, but no religious beliefs—Competency to take oath—Declaration in lieu—"Any person"—Corroboration—Conviction upheld—Oaths Act* 1900 (*N.S.W.*) (*No.* 20 *of* 1900), *sec.* 13*—*Crimes Act* 1900-1929 (*N.S.W.*) (*No.* 40 *of* 1900—*No.* 2 *of* 1929), *sec.* 418—*Child Welfare Act* 1923 (*N.S.W.*) (*No.* 21 *of* 1923), *sec.* 110.

A charge of larceny against the defendant was proved by the unsworn and uncorroborated evidence of a boy aged nine years. Prior to the giving of

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SYDNEY, *Nov.* 26; *Dec.* 17.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

* The *Oaths Act* 1900 (N.S.W.), by sec. 13, provides as follows:—"(1) Whenever any person—(*a*) called as a witness in any Court or before any justice or other person authorized to administer an oath, whether in a civil or criminal proceeding, or (*b*) having to make a statement in any information, complaint, or proceeding in any Court or before any justice, or (*c*) required or

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such evidence the boy was examined on the *voir dire* by the Magistrate, who found "him to be an exceptionally intelligent child and thoroughly to understand the obligation of speaking the truth. He did not, however, understand the meaning of an oath." The Magistrate allowed the boy to make a declaration under the provisions of sec. 13 (1) (i.) of the *Oaths Act* 1900 (N.S.W.); to which no objection was taken, at the time, by the defendant.

*Held*, by *Gavan Duffy* C.J., *Starke* and *Evatt* JJ. (*Dixon* and *McTiernan* JJ dissenting), that in the circumstances the boy's evidence, received as above, was admissible.

Decision of the Supreme Court of New South Wales (*K. W. Street* J.) affirmed.

APPLICATION for special leave to appeal from the Supreme Court of New South Wales.

William James Cheers was convicted by a Police Magistrate on a charge of larceny laid against him by Joseph Arthur Porter, a sergeant of police, stationed at Wauchope. The only evidence which tended to prove the commission of the theft by Cheers was that given by a boy, Robert Pead, aged nine years, who, not understanding the nature of an oath, was allowed by the Magistrate to give his evidence on declaration, no objection thereto being raised on the part of the defendant.

Cheers appealed to the Supreme Court by way of case stated, in which the Magistrate stated (*inter alia*):—"When the boy Robert Pead was tendered as a witness I examined him on the *voir dire*. I found him to be an exceptionally intelligent child and thoroughly to understand the obligation of speaking the truth. He did not, however, understand the meaning of an oath. I accordingly allowed him to make a declaration under the provisions of sec. 13 (1) (i.) of the *Oaths Act* 1900. No objection was taken to this procedure at the time, but the defendant now complains that I was in error in admitting the evidence, the boy being of tender years and his

desired to make an affidavit or deposition, objects to take an oath, or is reasonably objected to as incompetent to take an oath, or appears to such Court or justice, or person so authorized, incompetent to take an oath, he may in lieu of such oath—(i.) when so called as a witness make a declaration in the form in the Sixth Schedule hereto, or (ii.) in any other case make a solemn affirmation in the form in the Seventh Schedule hereto. (2) Whosoever, having made such declaration or affirmation, wilfully gives any false evidence before such Court, justice, or person so authorized, or makes any false statement in such information, complaint, proceeding, affidavit, or deposition, knowing the same to be false, shall be deemed guilty of perjury if the evidence or statement, had it been on oath, would by law have been perjury."

evidence unsworn." The declaration, or affirmation, made by the boy was to the effect of the Schedule referred to in sec. 13 (1) (i.) of the *Oaths Act* 1900, and was as follows: "I, Robert Pead, solemnly declare and affirm that the evidence now about to be given by me shall be the truth, the whole truth, and nothing but the truth."

The question as to whether the course adopted by the Magistrate was erroneous in point of law was answered by *K. W. Street* J. in the negative.

From this decision Cheers now applied for special leave to appeal to the High Court.

*Boyce* K.C. (with him *Webb*), for the applicant. The words "any person" in sec. 13 of the *Oaths Act* 1900 do not include children; therefore the provisions of that section cannot be applied to them (*R.* v. *Lewis* (1); see also *R.* v. *Peters* (2)). Although the Magistrate found that the child was "incompetent to take an oath," it does not appear that he tested the child's ability to understand a declaration. The reception of unsworn evidence from children is provided for in sec. 418 of the *Crimes Act* 1900 (N.S.W.), but it is an express requirement of the section that such evidence must be corroborated. In all cases not covered by sec. 418 the child must be treated as an adult and in accordance with the common law which requires evidence to be given on oath, so that if a child does not understand the nature of an oath that child is incompetent to give evidence. The competency of a child to take an oath is challengeable (*R.* v. *Keightley* (3)). In construing statutes general words must be construed, if possible, so as not to alter the common law (*Nolan* v. *Clifford* (4); *Hawkins* v. *Gathercole* (5); *Hardcastle on the Interpretation of Statutes*, 3rd ed., p. 197).

*Berne*, for the respondent. The history of the legislation on this matter makes it clear that the infant witness in this case was quite capable of making a declaration under sec. 13 of the *Oaths Act* 1900. The special provision in sec. 418 of the *Crimes Act* deals only with a particular class of offences, namely, sexual offences, where children

(1) (1877) Knox 8.
(2) (1882) 3 N.S.W.L.R. 455.
(3) (1893) 14 N.S.W.L.R. 45.
(4) (1904) 1 C.L.R. 429.
(5) (1855) 24 L.J. Ch. 332.

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of tender years are involved and who otherwise would not be able to give evidence. The necessity for such express statutory provision is obvious.

[STARKE J. referred to the *Child Welfare Act* 1923 (N.S.W.), sec. 110.]

Before a child can give evidence on oath such child must understand the nature and obligation of an oath; the essence of an oath must be some belief in a Deity, some idea of future punishment in the event of an oath being violated (*R.* v. *Taylor* (1)). A child, incompetent to take an oath, may give evidence on affirmation or declaration if such child understands the meaning of an affirmation or a declaration. It is not essential that evidence so given be corroborated. The intelligence of the child is the important factor: the basic test is whether the child realizes that punishment follows untruthfulness (*R.* v. *Brasier* (2), and *Powell's Principles and Practice of the Law of Evidence*, 9th ed., pp. 214, 215; see also *R.* v. *Paul* (3)). An intelligent child who understands the duty of speaking the truth is competent to give evidence on affirmation (*Roscoe's Criminal Evidence*, 15th ed., p. 133). The distinction between the evidence of children who know the obligation of an affirmation and of children who merely understand the duty of speaking the truth is shown in *Best on Evidence*, 12th ed., pp. 138, 139.

*Boyce* K.C., in reply. The word "affirmation" is a term of art. There is no evidence to show that in the present case the child knew the nature and effect of an affirmation, yet, according to the Magistrate, the child "solemnly declared and affirmed." In the circumstances the child's unsworn testimony should not have been received; nor, having been received, should it have been acted upon without corroboration.

*Cur. adv. vult.*

Dec. 17. The following written judgments were delivered:—

DIXON J. The appellant was convicted summarily of larceny under sec. 501 of the *Crimes Act* 1900-1929 (N.S.W.), which provides that whosoever commits simple larceny, if the value of the property

(1) (1790) Peake 14; 170 E.R. 62. (2) (1779) 1 Leach 199; 168 E.R. 202.
(3) (1890) 25 Q.B.D. 202.

in respect of which the offence is charged does not exceed ten pounds, shall be liable on conviction in a summary manner to imprisonment for twelve months or to pay a fine of fifty pounds. The charge was proved by the evidence of a child nine years of age, who was not sworn but made an affirmation. He was examined upon the *voir dire*, and was found to be an exceptionally intelligent child and thoroughly to understand the obligation of speaking the truth but not to understand the nature of an oath. The express authority contained in sec. 418 of the *Crimes Act* to receive the unsworn evidence of a child of tender years is confined to charges under specified sections which relate to offences of a sexual character. Sec. 418 provides that, upon the hearing of a charge under one of these sections, the evidence of a child of tender years who does not understand the nature of an oath may be received although not given on oath, if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth, but unless the evidence given by virtue of this enactment is corroborated there cannot be a conviction. The state of intelligence and understanding of the child upon whose evidence the appellant was convicted was found to be exactly that described by this provision. The *Crimes Act* contains no other authority which allows the evidence of such a child to be received upon the hearing of charges under its provisions, except for the offences specified. But it is said that sec. 418 should not be interpreted as an exhaustive statement as to the admissibility upon charges under the *Crimes Act* of the testimony of a child who does not understand the nature of an oath, and that if his case can be brought within the terms of a general statute dispensing with the common law requirement of an oath, its operation is not excluded. The statutory provision to which the Magistrate resorted is contained in sec. 13 of the *Oaths Act* 1900, and the question for decision upon this appeal is whether it operates to enable the child's evidence to be received upon his affirmation.

The material parts of sec. 13 of the *Oaths Act* 1900 provide that whenever a person called as a witness, whether in a civil or criminal proceeding, objects to take an oath or is reasonably objected to as incompetent to take an oath or appears to the Court or justice

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incompetent to take an oath, he may, in lieu of such oath, make a declaration. By the form of declaration which is prescribed, he solemnly declares that the evidence about to be given by him shall be the truth, the whole truth and nothing but the truth. The enactment is taken from sec. 343 of the *Criminal Law Amendment Act* 1883 (N.S.W.), which was itself a revision of sec. 3 of the *Evidence Further Amendment Act* 1876 (40 Vict. No. 8 (N.S.W.)), from which it differs in no respect that is really material to the question to be decided on this appeal. In the year after this statute was passed, the Supreme Court decided that under its provisions the affirmation might be taken of a Pacific Islander who, although he professed to belong to a Christian Church, was found to have no idea of a future state, and not to be a competent witness at common law (*R.* v. *Lewis* (1)). In the course of his judgment *Faucett* J. said (2):— "I cannot agree that infants and persons incompetent from want of intelligence are included in the section. If a witness is objected to for the want of rational intelligence, his evidence will still be inadmissible. In my opinion the section was only intended to meet the case of the persons commonly called Atheists or persons without religious belief." *Manning* J. said (3):—"Of course promises could not be made under this section by children or persons incompetent from want of understanding; the only thing done here is to substitute a promise for an oath. Where an oath could not have been taken from want of understanding before this Act the same objection would still apply." But five years later *Faucett* J. and *Windeyer* J. held that an affirmation had rightly been taken from a child aged about seven, who was found to be intelligent and to have no defect of understanding, but not to understand the nature of an oath (*R.* v. *Peters* (4)). *Faucett* J. referred to the observations which he and *Manning* J. had made in *R.* v. *Lewis*, and expressed his adherence to them. He distinguished them upon the ground that in the case of *Peters*, then under discussion, the child had been found to have sufficient intelligence. *Windeyer* J. said (5):— "Two objections might have been made to the evidence, first, on the ground of defective intelligence, and secondly, on the ground of

(1) (1877) Knox 8.
(2) (1877) Knox, at p. 10.
(3) (1877) Knox, at p. 11.
(4) (1882) 3 N.S.W.L.R. 455.
(5) (1882) 3 N.S.W.L.R., at p. 459.

want of religious belief. It was for the Judge to decide whether she was competent or not, and he decided that she was competent as to intelligence, but incompetent as to religious belief. Under these circumstances he allowed her to make a promise under 40 Vict. No. 8, sec. 3. The question is, Was he right in so doing? I am of opinion that he was. Having been held to be competent as to intelligence, her age became immaterial, and she, like every other witness, became competent to make a promise under the Act."

No practice seems to have arisen in New South Wales as a result of this decision of allowing children ignorant of the nature of an oath, but alive to the duty of veracity, to testify upon an "affirmation." The "affirmation" was of the simplest character. It expressed a promise, not a declaration as it did later, that his evidence would be the truth, the whole truth and nothing but the truth, and it is hard to suppose that a child of the standard of intelligence and understanding required now by sec. 418 of the *Crimes Act* would find any difficulty in comprehending the making of such a promise. However this may be, in the *Criminal Law and Evidence Amendment Act* 1891, the New South Wales Legislature enacted the provisions which are now contained in sec. 418 of the *Crimes Act* 1900, adopting them from the British *Criminal Law Amendment Act* 1885 (48 & 49 Vict. c. 69), sec. 4. When the British Parliament passed this enactment, the provisions from which the New South Wales Legislature took sec. 3 of the *Evidence Further Amendment Act* 1876 had been in force for sixteen years, and in that period had not been used, it seems, for enabling children to give evidence (*Best on Evidence*, 12th ed. (by *Phipson*), pp. 144-145). This legislation was enacted in Great Britain as sec. 4 of the *Evidence Amendment Act* 1869 (32 & 33 Vict. c. 68). It provided that "If any person called to give evidence in any Court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding Judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: 'I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and

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nothing but the truth.' " In *Clarke* v. *Bradlaugh* (1) *Lush* L.J., in the course of considering some consequences which this section was said to have produced, made the following observations, which explain its general scope :—" That leads me to the material question which was brought here for our decision, namely, whether the defendant is a person within the 4th section who is permitted by law to make a solemn affirmation. Now, in order to construe rightly any statute, one must have before one's mind the state of the law at the time the statute was passed. By several statutes beginning with the early part of the reign of William IV. and ending in the early part of the present reign, members of certain religious bodies whose tenets were known to prohibit the taking of an oath as being contrary to their view of God's word, Quakers for example, were exempted from taking oaths. The first statute passed (3 & 4 Wm. IV. c. 49) enabled Quakers and Moravians to make a solemn affirmation in place of taking an oath in all places and for all purposes whatsoever. That was an immunity given to a particular class of religious persons who were to be exempted throughout the United Kingdom upon all occasions from taking an oath. Under no circumstances after that Act was passed could a Quaker or Moravian be called upon to take an oath. A subsequent statute (3 & 4 Wm. IV. c. 82) extended the same privilege to a class of persons called Separatists ; and a still later statute (1 & 2 Vict. c. 77) extended the privilege to persons who had belonged to the society of Quakers or Moravians, but who had seceded from these bodies, still retaining conscientious objection to take an oath. So that at the time this Act was passed four classes of persons were permitted on all occasions and at all times to dispense with an oath and make an affirmation in lieu of it ; Quakers, Moravians, Separatists, and those who had been Quakers or Moravians, and who had seceded from them, but still retained their conscientious objection to an oath. Now it must not be forgotten that at that time the *Common Law Procedure Act* 1854 was in force, which enacted by sec. 20 that ' if any person called as a witness or required or desired to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court or Judge, or other presiding officer or

(1) (1881) 7 Q.B.D. 38, at pp. 58, 59.

person qualified to take affidavits or depositions upon being satisfied of the sincerity of such objection, to permit such person instead of being sworn to make his or her solemn affirmation, which solemn affirmation or declaration shall be of the same force and effect as if such person had taken an oath in the usual form.' Therefore, besides the classes of persons to whom I have referred who were privileged to adopt an affirmation in all cases instead of an oath, a person called as a witness in an English Court—for the statute was confined to England—no matter what his religious creed might be, if he satisfied the Judge that he had a conscientious objection to take an oath, was permitted to give his evidence upon the sanction of an affirmation only." The provisions of sec. 20 of the *Common Law Procedure Act* 1854 had been extended to criminal proceedings by 24 & 25 Vict. c. 66—" An Act to give relief to persons who may refuse or be unwilling, from alleged conscientious motives, to be sworn in criminal proceedings." The Legislature of New South Wales has adopted the provisions of these statutes by 8 Wm. IV., No. 2; by sec. 10 of 20 Vict. No. 31 and by sec. 1 of 22 Vict. No. 7 which, in effect, anticipated 24 & 25 Vict. c. 66. Relief was thus given to persons " who refused or were unwilling, from alleged conscientious motives, to be sworn " from the necessity which the common law imposed upon them of taking some oath notwithstanding their scruples or of suffering imprisonment for contempt. (See *Re Lawrence* (1).) But witnesses were not made competent who, although willing to take an oath, might be objected to on the ground of infidelity or disbelief. In 1861 a notable example occurred. Upon the trial of an action in the County Court at Rochdale one of the plaintiffs was called as a witness and was about to be sworn when the defendant's solicitor interposed and was allowed to examine her upon the *voir dire*, for which purpose she was sworn. As a result of this inquiry into her opinions, it appeared that she did not believe in a God, or in a future state of rewards and punishments, but she believed she was responsible to her fellow-men and her own conscience if she failed to speak the truth, and that as a solemn declaration the oath which she had taken bound her morally to speak the truth. Thereupon she was rejected as a witness, and she and her

(1) (1852) 20 L.T. (O.S.) 16.

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co-plaintiff were nonsuited. An appeal to the Court of Exchequer was dismissed. *Pollock* C.B. said :—" We are all of opinion that the course of proceeding adopted by the Judge of the County Court was in accordance with the law and practice . . . in this country. It is unnecessary to say more than that the authorities cited abundantly show that such is the law and practice. Whether or no it ought to be is another question. We are not here to make the law, as we have been invited to do, but to administer it ; and by the law every witness must be sworn according to some religious ceremony ; or, if that is to be dispensed with, it can only be done by the authority of an Act of Parliament, and in this case there is no such authority " (*Maden* v. *Catanach* (1) ).

In view of the history of the legislation and of the existing state of the law, little doubt can remain that sec. 4 of the *Evidence Further Amendment Act* 1869 was directed to the admissibility of witnesses who, like the plaintiff in *Maden* v. *Catanach* (2), would be rejected because of their beliefs and opinions ; but it does not therefore follow that, by the use of the expression " incompetent to take an oath," it has not also included young children who have not arrived at an understanding of oaths. Indeed, the very expression " incompetent to take an oath " is found in the opinion of the Judges in *R.* v. *Brasier* (3), which fixed the test of the admissibility of children as witnesses. The Judges were unanimously of opinion " that no testimony whatever can be legally received except upon oath ; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence ; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court ; but if they are found incompetent to take an oath, their testimony cannot be received." But the difficulty is that the real ground of the exclusion of the evidence of children is

(1) (1861) 7 H. & N. 360, at pp. 366, 367 ; 158 E.R. 512, at p. 515.

(2) (1861) 7 H. & N. 360 ; 158 E.R. 512.

(3) (1779) 1 Leach 199, at p. 200 ; 168 E.R. 202, at pp. 202, 203.

the immaturity of their understanding, although this is or was tested by their capacity to appreciate the nature and effect of an oath. In *Buller's Nisi Prius* persons who may not be witnesses are classified into "such who are excluded for want of integrity, or discernment" (283 *a*). Among those disqualified for want of integrity are included "infidels . . . i.e. such who profess no religion that can bind their consciences to speak truth" (292 *a*). But infants belong to the second class. "As to those who are excluded from testimony for want of skill and discernment, they are idiots, madmen, and children. In regard to children, there seems to be no precise time fixed wherein they are excluded from giving evidence; but it will depend in a great measure on the sense and understanding of the child, as it shall appear on examination to the Court . . . the child shall be received as a witness if she appear to have any notion of the obligation of an oath" (292 *b*, 293 *a*). This classification was maintained in *Roscoe's Nisi Prius Evidence*. Under the heading "Incompetency from Want of Understanding" are included "Children not able to comprehend the moral obligation of an oath"; while the heading "Incompetency from Want of Religious Principle" covers "athiests and such infidels who profess no religion that can bind their consciences to speak the truth" (10th ed. (1861), p. 135).

It was inevitable when an oath was essential and no alternative was permitted that a capacity to understand its solemnity and significance should be made the test of a child's competence to testify. "It is not always possible to determine whether the language of the Courts is used in view of the oath-test or of an independent testimonial requirement" (*Wigmore, Evidence*, 2nd ed., sec. 505, vol. I., p. 922). But this difficulty is not confined to the case of childhood. The test adopted for ascertaining whether a lunatic retains sufficient understanding to give evidence is whether he understands the nature and sanction of an oath (*R.* v. *Hill* (1)). Indeed, it seems to have been included as a criterion in *Hartford* v. *Palmer* (2), when the question was whether the witness's capacity to testify had been destroyed by intoxication. Sec. 4 of the British *Evidence Further Amendment Act* 1869 did not, in my opinion, operate to affect incompetence from lack of understanding however

(1) (1851) 20 L.J. M.C. 222; 90 R.R. 822. (2) (1819) 16 Johns. (N.Y.) 143.

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arising, or the tests which the law recognized and adopted for ascertaining it. It was concerned only with the state of opinion, belief or faith in persons whose understanding was not, according to their race or class, abnormal or unripe. The requirement, which it contained that the Judge should be satisfied that the taking of an oath would have no binding effect on the witness's conscience, tends to prevent a wider application of the words "incompetent to take an oath." But, in any case, it is evident that the section did not mean, in spite of the form in which it was expressed, to impose the duty of giving evidence, by affirming, upon every person called who was objected to as incompetent to take an oath. A child so young that it is completely unable to comprehend what it is asked to do, and an imbecile, and a person unable through intoxication to appreciate what he is doing, are all "incompetent to take an oath." The statute does not turn their incompetence into a qualification to testify. Yet it supplies no new tests for ascertaining whether the person of immature or abnormal intelligence is of sufficient understanding to give evidence. Whether the capacity of such a person to understand the nature of an oath is a satisfactory test of his competence is not the question. Nor is it the question whether, if the oath were abolished, the reason of the law would give a new test. The question is whether the statute should be interpreted as dealing with such matters, and, in my opinion, it should not.

In a note to his *Digest on the Law of Evidence*, 4th ed., Sir *James Fitzjames Stephen* refers to the statute and says, at p. 181 :—"The practice of insisting on a child's belief in punishment in a future state for lying as a condition of the admissibility of its evidence leads to anecdotes and scenes little calculated to increase respect either for religion or for the administration of justice. The statute referred to would seem to render this unnecessary. If a person who deliberately and advisedly rejects all belief in God and a future state is a competent witness, a fortiori, a child who has received no instructions on the subject must be competent also." The statute remained in force until 1888, when it was repealed by the *Oaths Act*, 51 & 52 Vict. c. 46, but, with the exception of this statement, no reliance appears ever to have been placed upon it for the purpose of enabling children to give evidence. And in *Best on Evidence*,

12th ed., p. 144, Sir *James Fitzjames Stephen's* note is referred to and its correctness is impugned thus: "With all deference to the learned author, this view of the statute, which does not appear to have been taken in practice, or to have occurred to or been adopted by any other writer on the subject, is not (though very desirable to be argued) a correct one, on the ground that the child cannot 'object to' what it does not, *ex hypothesi*, know the nature of, and that the words 'objected to,' although grammatically they may include the case of a child, must from their collocation be cut down to the case of an adult."

When it enacted sec. 4 of the *Criminal Law Amendment Act* 1885, the British Legislature must, I think, have taken the view that children who did not understand the nature of an oath could not become witnesses by affirming, although possessed of enough intelligence to justify the reception of their evidence and to understand the duty of speaking the truth. The requirement of sec. 4 of the British *Evidence Further Amendment Act* of 1869, that the Judge should be satisfied that the oath would not bind the conscience of the witness, necessitated some discussion of his faith or beliefs, and it was omitted when the provision was adopted in New South Wales in 1876 by the statute of the same title (40 Vict. No. 8). Further, in the *Oaths Act* 1900 the compulsive "shall" has been changed to the permissive "may." These alterations do not, I think, lead to any different interpretation or application of the critical words "incompetent to take an oath." The external considerations affecting the Act exist in New South Wales as in Great Britain; the common law rule, the prior legislation, and the subsequent enactment of the provisions admitting the unsworn testimony of children in offences of a sexual character, are the same. It was suggested that perhaps the peculiar condition of aboriginals might have been contemplated in New South Wales. But so far as I can discover, after the disallowance of 3 Vict. No. 16 (*Callaghan's Acts*, p. 1) no statute was passed in New South Wales dealing with their evidence, notwithstanding the subsequent Imperial Act 6 & 7 Vict. c. 22, and no statute appears to have been needed. The strange provision contained in sec. 7 of the Victorian *Law of Evidence Act* 1854 (17 Vict.

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No. 11) in which afterwards infants under seven years were interpolated by sec. 7 of the *Law of Evidence Act* 1857, apparently was not adopted. See now sec. 23 of the Victorian *Evidence Act* 1928. It is not likely that as late as 1876 the Legislature would turn its attention to the subject, but it may well be that members of backward races may now affirm.

I think that upon the proper construction of sec. 13 of the *Oaths Act* 1900, it authorizes an affirmation when the incompetence of the witness to take an oath does not arise from immaturity, or from unripeness or disorder of the intelligence. The child which gave evidence against the appellant was unable to understand the nature of an oath, not because of opinions or beliefs with which an oath is incongruous, but because of a failure to comprehend what the oath signified. Whether that failure might or might not have been prevented or corrected by instruction or explanation, it was in fact due to immaturity and the unfamiliarity of the very young with such ideas. In my opinion such a condition is not within sec. 13 of the *Oaths Act* 1900. I think the conviction should not stand.

The matter was fully discussed upon an application on notice for special leave to appeal. I think leave should be given and the conviction quashed.

EVATT J. The question which arises upon this application for special leave to appeal from the judgment of the Supreme Court (*K. W. Street* J.) is whether the Magistrate was entitled, under sec. 13 of the New South Wales *Oaths Act* 1900, to allow a child of nine years of age, when called as a witness, to make a declaration to the following effect: "I solemnly declare that the evidence now about to be given by me shall be the truth, the whole truth, and nothing but the truth." The Magistrate was satisfied that the child had no religious belief, and he considered that he was "incompetent to take an oath." But it sufficiently appears, and it should be assumed, on this application for special leave, that the Magistrate considered that the child understood the nature of the solemn declaration which he made.

Attention should at once be directed to the words of sec. 13. The section deals expressly with three possible events which may

occur "whenever any person" is "called as a witness" in civil or criminal proceedings in New South Wales :—

(1) The witness may himself "object to take an oath."

(2) The witness may be "reasonably objected to as incompetent to take an oath."

(3) The witness may "appear" to the Court "incompetent to take an oath."

The first case involves no action on behalf of any party to the proceedings or by the Court itself. The witness's objection concludes the matter ; and he thereupon becomes entitled (1) to refuse to take the oath and (2) to make a declaration in place of it. But the section does not give such person who objects to take an oath any right to refrain from giving testimony, nor does it establish his general competency to testify. It merely enables him, by taking objection, to alter the form of the ceremony.

The second case postulates the raising of an objection to the competency of the proposed witness to take an oath. The objection must be reasonably taken, and of its reasonableness the Court will judge. The ground of objection must necessarily be directed to the witness's attitude or belief in relation to the Deity, because the only result of the success of the objection is to enable the witness to take part in the substituted ceremony of declaration. This part of the section does not render a person competent to testify who is incompetent because of mental imbecility ; nor does it enable a person reasonably objected to as incompetent to take an oath, to refrain from testifying.

Both the cases so far considered deal with persons who will not be affected by the religious sanction involved in the imprecation. In the case of the witness himself taking objection, it may be assumed either that he has no belief, or else disbelieves, in God. In the case of a party objecting to a witness, the objection raised may be established by showing, on the *voir dire*, either the absence of any belief in God or the presence of positive disbelief.

What cases are left unprovided for ? There may be instances where a proposed witness may not have enough self-confidence to object to take an oath, or, by his very lack of training in religious matters, may not be unwilling to take an oath although the religious

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sanction will not bind him. In each case there may be a failure to take objection. The classes of witness which immediately suggest themselves are children and aboriginal natives of Australia. With respect to both, it may well be that the absence of religious training, belief or knowledge should disqualify them from taking an oath and yet neither they, nor the party not calling them as witnesses, may raise objection. In such cases, the actual appearance of the witness in the box will often justify an inquiry in the interests of justice, and the right of inquiry is committed to the Court itself. The inquiry will be whether the proposed witness is incompetent to take an oath. It is intended that the scope of the inquiry should be limited to religious belief, because the only necessary result of the decision that there is incompetence is the authorization of the alternative ceremony. Sec. 13 is, therefore, not concerned with such incompetence to testify as results from mental incapacity or defective intellect. It is designed to prevent possible loss of testimony by the fact of religious unbelief or religious disbelief. It applies to "any person" called as a witness, and therefore infants under the age of twenty-one years are included in its scope. It would seem that the authority given to the Court to act of its own motion is intended to cover the very cases where there is a possibility or probability that the witness does not believe in God, but will, unless prevented, not hesitate to take the oath in obedience to the direction of the Court or its officer.

From an analysis of the section itself, therefore, it would appear that sec. 13 applies as much to children as it does to all other witnesses. No distinction is made by the section between entire absence of belief in God and the positive presence of disbelief in the existence of God. The oath is not to be administered to those upon whom, as an oath calling upon God, it will not be binding; but when such fact is ascertained by the Court, or the witness himself impliedly admits it by objecting, a solemn declaration may be administered, lest the testimony be lost. Until the doctrines of Bentham and his followers prevailed, witnesses were excluded as incompetent, either for "the absence of religion, or this or that erroneous opinion in regard to it." (*Rationale of Judicial Evidence, Bentham*, vol. v., p.

126). By sec. 13 of the *Oaths Act* 1900, witnesses were not excluded, either for the absence of religion, or for any opinion in regard to it.

The Magistrate, therefore, acted within the authority of sec. 13 when he inquired into the boy's lack of religious training, and concluded that he was incompetent to take the religious oath. The boy thereupon became entitled to affirm in lieu thereof, unless the Magistrate was satisfied that, from defective intelligence or mental incapacity, his evidence should not be received at all. But it appears, on the contrary, that he was satisfied with the intelligence of the lad. He therefore properly allowed him to affirm.

The *Oaths Act* is a consolidating statute. In such circumstances inquiry into the various stages by which the Legislature gradually moulded the previous law upon the subject, is seldom justified or required. In the case of *Administrator-General of Bengal* v. *Prem Lal Mullick* (1) Lord *Watson* for the Judicial Committee said:—

> "The respondent maintained this singular proposition, that, in dealing with a consolidating statute, each enactment must be traced to its original source, and, when that is discovered, must be construed according to the state of circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it. The very object of consolidation is to collect the statutory law bearing on a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed."

It was strongly contended, however, that the history of sec. 13 compels the Court to adopt a construction contrary to that suggested by the wording finally adopted by the Legislature in 1900. In these circumstances, a short reference to origins may be made.

A convenient commencing point is the decision in *Maden* v. *Catanach* (2). In that case Mrs. Maden was called as a witness in a Lancashire County Court, and was about to be sworn when counsel for the defendant objected to her competency to be sworn. The Judge refused to swear her in the cause, but, for the purpose of the *voir dire*, himself administered the oath. The defendant's advocate then questioned her about her views upon matters of religion. Mrs. Maden stated that she had no belief in a God or in any future state of rewards or punishments, but that she was under a moral responsibility to her fellow-men and to her own conscience to speak the truth.

(1) (1895) L.R. 22 Ind. App. 107, at p. 116.

(2) (1861) 7 H. & N. 360; 158 E.R. 512.

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The Judge refused to admit her to be examined in the cause and the plaintiffs were compelled to ask for a nonsuit. On appeal, the Court of Exchequer affirmed the Judge's ruling. *Pollock* C.B. said (1): "We are not here to make the law, as we have been invited to do, but to administer it; and by the law every witness must be sworn according to some religious ceremony; or, if that is to be dispensed with, it can only be done by the authority of an Act of Parliament, and in this case there is no such authority."

His Honor Judge *Parry*, commenting on this decision, has said :—

> "One cannot blame the Judges for yielding in these matters to popular bigotry, for they had to administer the bigotry of the law. As late as 1863, when Mrs. Maden in a Lancashire County Court was not allowed to give evidence because she honestly stated her views on matters of religion, the ruling was upheld in the High Court. But Baron *Bramwell*, whilst accurately administering the law, pointed out that the judgment he was giving involved the absurdity of ascertaining Mrs. Maden's disbelief by accepting her own testimony on the subject and then ruling that she was a person incompetent to speak the truth" (*What the Judge Thought*, pp. 93, 94).

Partly as a result of such cases, no doubt, in the year 1869 the English Parliament passed the Act 32 & 33 Vict. c. 68. Sec. 4 was in the following terms :—

> "If any person called to give evidence in any Court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding Judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: 'I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth.' And any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried, and convicted for perjury as if he had taken an oath."

The application of sec. 4 to the case of children not otherwise disqualified from giving evidence, was thus referred to by Sir *James Fitzjames Stephen* in his well-known digest (5th ed. (1887) pp. 190-191) :—

> "The practice of insisting on a child's belief in punishment in a future state for lying as a condition of the admissibility of its evidence leads to anecdotes and to scenes little calculated to increase respect either for religion or for the administration of justice. The statute referred to would seem to render this unnecessary. If a person who deliberately and advisedly rejects all belief in God and a future state is a competent witness, a fortiori, a child who has received no instructions on the subject must be competent also."

(1) (1861) 7 H. & N., at pp. 366, 367; 158 E.R., at p. 515.

It is convenient to refer now to the New South Wales statute of 1876 (40 Vict. No. 8). Sec. 3 of such Act provided as follows:—

"Whenever any person called to give evidence in any Court or before any justice or other person authorized to administer an oath whether in a civil or criminal proceeding shall object to take an oath or be reasonably objected to as incompetent to take an oath such person shall make the following promise in lieu of such oath—In the case in which I am now called as a witness I promise to tell the truth the whole truth and nothing but the truth And any person who having made such promise shall wilfully and corruptly give any false evidence shall be deemed guilty of perjury."

In 1877 the Supreme Court of New South Wales interpreted this Act in the case of *R.* v. *Lewis* (1). A native of one of the Pacific Islands had prosecuted the prisoner for larceny. After the "Kanaka" was sworn in the usual way and had given his evidence, it was suggested by a juryman that he was not sensible of the obligation of the oath. The Chairman of Quarter Sessions came to the conclusion that the prosecutor had no idea of a future state and that he was therefore not competent as a witness at common law. But he then directed the witness to make in lieu of an oath the promise prescribed by 40 Vict. No. 8, sec. 3; and then the witness gave his evidence again. The Supreme Court affirmed the conviction. Sir *James Martin* C.J. said (2):—

"I think the Legislature has been made to do a thing which it never intended. There seems no escape from the conclusion that by the third section of that Act any person who objects (no matter for what reason) must be relieved from the necessity for taking an oath. And in the same way, if a person is reasonably objected to as incompetent, on whatever ground, either for want of religious belief, or want of intelligence or any other ground of objection, he may make a promise and give evidence without an oath."

But the majority of the Court (*Faucett* and Sir *William Manning* JJ.) were of a different opinion. *Faucett* J. said (3):—

"A witness may be reasonably objected to on very different grounds, amongst others, the want of religious belief and the want of intelligence. I cannot agree that infants and persons incompetent from want of intelligence are included in the section. If a witness is objected to for the want of rational intelligence, his evidence will still be inadmissible. In my opinion the section was only intended to meet the case of the persons commonly called Atheists or persons without religious belief."

Sir *William Manning* J. said (4):—

"It may be that it is a concession to infidelity, and it may be that infidelity is growing side by side with the increased growth of vital religion amongst us.

(1) (1877) Knox 8.
(2) (1877) Knox, at p. 9.
(3) (1877) Knox, at p. 10.
(4) (1877) Knox, at p. 11.

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Under these circumstances the Legislature has thought fit to meet the altered state of public opinion. No doubt it is desirable that all evidence should be given upon oath, but it is better to have evidence not upon oath than not to have it at all." He added (1) :—" Of course promises could not be made under this section by children or persons incompetent from want of understanding; the only thing done here is to substitute a promise for an oath. Where an oath could not have been taken from want of understanding before this Act the same objection would still apply."

Next came the important case of *R.* v. *Peters* (2). A prisoner was tried before Sir *William Manning* J. and convicted on a charge of having committed an indecent assault upon a female child under the age of twelve years. The principal witness for the prosecution was a child, six years and eleven months of age. *Manning* J. came to the conclusion that, although she was intelligent and had no defect of understanding, yet she did not understand the nature of an oath. He directed that her evidence should be taken in the alternative method provided by sec. 3 of 40 Vict. No. 8. The Full Court (*Faucett* and *Windeyer* JJ., Sir *J. Martin* C.J. dissenting) affirmed the conviction. It appeared that neither the prisoner nor the Crown Prosecutor nor the child herself objected to the administration of the usual form of oath. It was solely at the direction of the presiding Judge that the oath was not taken. The Chief Justice dissented, only because he considered that 40 Vict. No. 8 did not empower the Judge to act of his own motion and without any objection being made. *Faucett* J. said (3) that the Legislature intended by the statute

" that although the witness is not fit to give evidence on oath, yet, if he is otherwise competent, he shall make an affirmation, but there is no need for anyone in particular to take the objection ; the presiding Judge may take it. If an aboriginal, for instance, is called as a witness, and the Judge sees reason to doubt whether he understands the nature of an oath, he may come to the conclusion that an oath would not bind him, but that he may understand the nature of a promise to speak the truth : and he is called upon to decide upon the reasonableness of the objection upon a view and examination of the witness."

*Faucett* J. referred (4) to the observations of Sir *William Manning* J. in *Lewis's Case* (5), that children incompetent for want of intelligence were not rendered competent by sec. 3, and said that the child in the present case " had sufficient intelligence."

(1) (1877) Knox, at p. 11.
(2) (1882) 3 N.S.W.L.R. 455.
(3) (1882) 3 N.S.W.L.R., at p. 458.
(4) (1882) 3 N.S.W.L.R., at p. 459.
(5) (1877) Knox 8.

*Windeyer* J. said (1) :—

"As I understand the question, no doubt would arise as to the admissibility of her evidence, if counsel, or the witness, or the prisoner had objected to her being sworn ; but, it is said that, as no such objection was made, the evidence was inadmissible. I cannot put such a construction on the Act." He also said (2) :—"It cannot, in my opinion, be a condition precedent to her promise being taken, that someone must object to her competency. If it were so, this might follow—An undefended prisoner calls an intelligent aboriginal as a witness. The Judge discovers that by reason of defective religious belief he is incompetent to take an oath, but he thinks that he is sufficiently intelligent to understand the promise required by the Act. The witness is willing to give evidence. Nobody objects to his competency to take an oath. In the interests of justice, in order that this aboriginal may become a competent witness, the absurd form must be gone through of the Judge telling the prisoner that he must object to his own witness giving evidence on oath, or he must tell the aboriginal, who does not understand the nature of an oath, to object to take an oath. As I do not believe that the Legislature ever intended such an absurdity as this, I think the construction which I have put on the Act is the correct one."

The principle common to all three judgments in *Peters's Case* (3) has never been questioned by the Supreme Court of New South Wales. All the Judges accepted the position that, if a step merely procedural in character had been taken and objection duly made, the child's evidence would have been admissible after her promise was made, although, because of lack of belief, she did not understand the nature of the religious oath.

Shortly after *Peters's Case* (3) was decided, the New South Wales Legislature passed the *Criminal Law Amendment Act* 1883, and took occasion to insert sec. 343 for the very purpose of removing the doubt which had been raised by Sir *James Martin* C.J. Sec. 343 was enacted as follows :—

"Whenever any person called as a witness or having to make a statement in an information complaint or proceeding in any Court or before any justice objects to take an oath or is reasonably objected to as incompetent to take an oath or appears to the Court or justice to be incompetent to take an oath he may make the following declaration instead of being sworn—I solemnly declare that the evidence now about to be given (or the statement now about to be made) by me shall be the truth the whole truth and nothing but the truth And whosoever having made such declaration wilfully makes any false statement before such Court or justice knowing the same to be false shall be deemed guilty of perjury if the statement had it been on oath would by law have been

(1) (1882) 3 N.S.W.L.R., at p. 459. (2) (1882) 3 N.S.W.L.R., at p. 460.
(3) (1882) 3 N.S.W.L.R. 455.

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perjury or may be found guilty if the evidence warrants such finding under the two hundred and ninety-second section of this Act and shall be liable to punishment accordingly."

Sec. 343 came up for consideration before the Full Court of the Supreme Court of New South Wales in 1888 in the case of *R.* v. *Singh* (November 2nd). The prisoner had been found guilty at a trial before *Stephen* J. upon the charge of indecent assault upon a boy aged six years. At the trial the learned Judge submitted the boy to an examination in order to ascertain whether he understood the nature of an oath. He was not satisfied that he did, and it appeared to him that he was incompetent to take the oath. The Judge, however, allowed the boy to make a declaration under sec. 343, and he then gave evidence. The trial Judge reserved for the Full Court the question whether he was right in allowing such declaration to be made. The Full Court unanimously held that the conviction should be affirmed. *Darley* C.J. said that the Court must assume that the child was of sufficient age and sufficiently intelligent to know that he was called upon to speak the truth in giving his evidence, and as, in the opinion of the trial Judge, the boy was sufficiently intelligent to give evidence, a declaration under sec. 343 was admissible. *Windeyer* and *Innes* JJ. concurred. I have obtained the reference to this case from the columns (at p. 16) of the *Sydney Morning Herald*, dated November 3rd, 1888, a journal very accurate in its reporting of law cases; inspection of the original note-books of the learned Judges has proved its accuracy in the present instance.

The position, therefore, is that, prior to the passing of the *Oaths Act* 1900, a series of decisions of the Supreme Court of New South Wales had established that an enactment, in terms not distinguishable from sec. 13, enabled a person, whether a child, adult, or aboriginal, to make a declaration in lieu of taking an oath, for the purpose of giving evidence. It was held to be within the power of the Court itself to ascertain whether the proposed witness was "incompetent to take an oath." For that purpose an inquiry was necessary as to his belief in the God to be invoked in the oath. Sir *James Fitzjames Stephens's* observations upon the English Act of 1869 have been criticized upon the ground that the child who is devoid of any knowledge of God cannot himself "object" to take an oath, and

so the statute could not apply to cases where religious belief was entirely absent. But such criticism lost its force as soon as power was given to the Court itself to act, and "objection" was no longer necessary. Whether the precise decision of the majority in *Peters's Case* (1) can be justified by the terms of 40 Vict. No. 8, is a question rendered entirely academic by the subsequent action of the New South Wales Legislature. The decision in *R.* v. *Singh* followed upon such action, and it is clear that, in the case both of aboriginal natives and of children, declarations were allowed to be made as and when occasion arose. Whatever the position was elsewhere, the conclusion is that, before 1890, New South Wales law and practice had become settled so that a declaration could be made by a witness in lieu of an oath, whether there was a conscious rejection of belief in God, or an entire lack of knowledge of or belief in God.

Reference was made in argument to sec. 110 of the *Child Welfare Act* 1923 and to sec. 418 of the *Crimes Act* 1900. Under each of these sections, the evidence of a child of tender years may be received though not given upon oath, if the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. These sections have an application strictly limited to sexual offences, including unnatural sexual offences and offences against children under the *Child Welfare Act*. Corroboration of the child's testimony is required by each enactment.

Emphasis was laid upon the use of the word "oath" in these sections in order to suggest that the only cases in which the evidence of children can be elicited are (1) where the child understands the nature of an oath and takes it, and (2) the instances covered by sec. 418 of the *Crimes Act* and sec. 110 of the *Child Welfare Act*.

But the source from which sec. 110 of the *Child Welfare Act* is taken, is 55 Vict. No. 30, sec. 24, passed in the year 1892. The source of sec. 418 of the *Crimes Act* is sec. 7 of 55 Vict. No. 5, a statute passed in 1891. And it has already been shown that the law and practice relevant to the point now being considered, was well established before either of those special enactments became law. In my opinion, sec. 110 and sec. 418 make special provision in two cases for the examination of children who may or may not be within

(1) (1882) 3 N.S.W.L.R. 455.

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the provisions of sec. 13 of the *Oaths Act* 1900, but they do not exclude children from the operation of that section if they would otherwise be within it.

The result is that historical inquiry into the previous New South Wales decisions and enactments, supports the interpretation suggested by the words of sec. 13 itself. All that need be added is that a case like the present will not be of frequent occurrence because most children are trained in some religious belief or other at a very early age. It was said that the administration of justice must be endangered if the law allows persons to be convicted of serious crimes, other than those specified in sec. 418 of the *Crimes Act* and sec. 110 of the *Child Welfare Act*, upon the uncorroborated evidence of children. But this danger is not one which arises from substituting a declaration for an oath. The safeguard in such cases is not to be found in the rejection of testimony because religious belief is absent, but in a proper attention to its weight and cogency.

Special leave to appeal should therefore be refused. There should be no order as to costs.

McTIERNAN J. The rule of common law governing the admissibility of the testimony of a child is enunciated in *Brasier's Case* (1) in these terms :—" That no testimony whatever can be legally received except upon oath ; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence ; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court ; but if they are found incompetent to take an oath, their testimony cannot be received." In *Best on Evidence*, 12th ed., at p. 142, the learned author writes : " *Brasier's Case* (2) settled the modern law and practice relative to the admissibility of the testimony of children." The child Robert

(1) (1779) 1 Leach, at p. 200 ; 168 E.R., at pp. 202, 203.
(2) (1779) 1 Leach 199 ; 168 E.R. 202.

Pead appeared to be a proper subject for the abovementioned test, and, as he was shown not to understand the nature of an oath, his testimony would, under that rule, have been inadmissible. It is not stated that his incompetence to take an oath was due to any cause other than his immaturity. The *Oaths Act* 1900 does not expressly purport to abrogate or affect the rule of common law which has been mentioned. Nor is there any expression in that Act from which it can be inferred that the Legislature intended to enact that a child of tender years may make a "declaration" or a "solemn affirmation" in the forms prescribed by the 6th and 7th Schedules respectively, in lieu of an oath, merely upon his incompetence to take an oath becoming apparent, after examination by the Court, and without more ado. In the present case, it is true that the Magistrate did not act upon the view that it was lawful for a child to make a declaration, merely because it became apparent that the child was incompetent to take an oath. Although the child failed to pass the test which was prescribed by common law to rebut the presumption against his competence as a witness arising from his apparent immaturity, the Magistrate nevertheless admitted him as a witness because he found him to be "an exceptionally intelligent child and thoroughly to understand the obligation of telling the truth." His testimony was inadmissible at common law because of his immaturity, but it was admitted by the Magistrate upon the making by the child of a "solemn affirmation" under the *Oaths Act*. It is admitted that, in the absence of the child's evidence which was admitted in that fashion, the appellant could not have been convicted. Moreover, there was no corroboration of that evidence. The Magistrate must have engaged the child in some examination by which he was able to arrive at the findings as to the child's intelligence and understanding of "the obligation of telling the truth." It does not appear what questions he asked the boy or what his answers were. Whatever the test may have been by which the Magistrate elicited the information which we have about the state of the child's intelligence and his understanding of "the obligation of telling the truth," it is clear, upon the further finding that the child did not "understand the meaning of an oath," that the admission of the child's testimony in the case was not

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authorized by the law and practice as laid down in *Brasier's Case* (1). We have not been referred to any other rule sanctioned by law which prescribes any other test for dispelling the presumption which existed against the competence of this child to give evidence in the case out of which this appeal arises. The Magistrate apparently engaged the child in some examination by which it was revealed that he had a fitness to be a witness, akin to that required by sec. 418 of the *Crimes Act* 1900 to be possessed by a child of tender years who does not understand the nature of an oath. The section says that the unsworn testimony of a child, who does not, in the opinion of the Court or justices, understand the nature of an oath, may be received in proceedings under sections of the *Crimes Act* therein enumerated, "if in the opinion of the Court, or justices, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth." But, as has been pointed out, that section applies only to proceedings under some sections of the *Crimes Act*, and the section under which the appellant was prosecuted is not included. Moreover, sec. 418 provides that no person shall be convicted unless the testimony admitted by virtue of sec. 418 and given on behalf of the prosecution is corroborated by some other material evidence in support of the charge implicating the accused. The evidence of the child Robert Pead was not corroborated. It will also be noticed that the unsworn testimony of a child which may be received subject to the conditions mentioned in sec. 418 is not required to be made on "solemn affirmation" or "declaration." The section imposes no such form in lieu of an oath upon the child whose unsworn testimony is rendered admissible. Though the complete harmony of one statute with another is not a distinctive mark of legislation, yet it is a very relevant and cogent consideration that the provisions which are sec. 418 of the *Crimes Act* became law after the provisions which are now sec. 13 of the *Oaths Act* 1900 were first enacted. If a child who is incompetent to be sworn because he does not understand the nature of an oath, is enabled by sec. 13 of the *Oaths Act* to make "a solemn affirmation" or "declaration" in lieu of an oath and thereupon give evidence, the necessity for enacting the provisions of

(1) (1779) 1 Leach 199; 168 E.R. 202.

sec. 418 of the *Crimes Act* must be explained. In my opinion there was no legal authority for the Magistrate to import into the proceedings the standards of fitness prescribed by sec. 418 in order to determine whether the testimony of the child Robert Pead was admissible. The principle upon which the Magistrate decided that the testimony of the child was admissible, notwithstanding that he failed to satisfy the test in *Brasier's Case* (1), is, in my opinion, not known to the law of New South Wales. If the law had fashioned a test to be passed by a child, e.g., this child, who did not know the nature of an oath, for the purpose of determining whether his faculties were sufficiently developed to make an affirmation, it is reasonable to assume that such a test would have been designed to elicit whether the child knew the nature of a solemn affirmation and the consequences of making it. The resemblance of an examination, conducted on that principle, to that which existed at common law, would be apparent. However, the wide difference between religious and secular sanctions for securing truthful evidence may render it difficult to attempt to formulate a test of the capability of a child to give evidence on affirmation by reference to the existing rule by which the Court formed an opinion as to the fitness of a child to give evidence on oath. As was stated in *Brasier's Case*, the admissibility of children as witnesses depends upon the sense and reason they entertain of the danger and impiety of falsehood. If the *Oaths Act* has affected that rule, it should be possible to point to some other legal rule, derived from statutory enactment or the common law, which makes the admissibility of children as witnesses depend upon the proof of some other quality or disposition. If the Legislature contemplated that failure to pass that test should not finally exclude a child as a witness, it has not said what is the additional or other test to which the child should be submitted. The fact that it has not provided another criterion is, I think, a clear indication that it did not intend that the established criterion should be abandoned. As the rule which was laid down in *Brasier's Case* was in force when the provisions of the *Oaths Act* were first enacted, an intention should not, in my opinion, be attributed to the Legislature to defeat the consequences of that rule, by admitting

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the testimony of a child who satisfied some indeterminate standard of fitness, residing *in gremio judicis*, such as was applied to the child witness in the proceedings in which the appellant was convicted. If the Legislature had intended to set up a new standard, it may be assumed that it would have enacted at least that elements in the qualifications of a child to testify would be a realization that he was about to give evidence in a Court of law rather than to narrate a story to a gathering of people, and that he had some appreciation of his responsibility to tell the truth. "It is here proper to observe that the law places no reliance on testimony not given on oath or affirmation. Consequently, in general, no person, whatever functions he may have to discharge in relation to the cause in question, or whatever be his rank, age, country, or belief can give testimony upon any trial, civil, or criminal, until he have, in the form prescribed by law, given an outward pledge that he considers himself responsible for the truth of what he is about to narrate, and rendered himself liable to the temporal penalties of perjury, in the event of his wilfully giving false testimony" (*Taylor on Evidence*, 11th ed., vol. II., p. 937). As no new or supplemental test or criterion of the competence of a child of apparent immaturity has been introduced as a concomitant to the *Oaths Act*, the only test known to the law for deciding the admissibility of Robert Pead as a witness, is that which he failed to satisfy.

The form of affirmation, described by the *Oaths Act* as a solemn affirmation, which was tendered to the child and made by him, was in these words: "I Robert Pead, do solemnly sincerely and truly affirm and declare . . ." The making of an affirmation in this form by a child would be an empty formality unless he were sufficiently mature to have some understanding of the nature of it. The policy of the law in ordaining the making of a "solemn affirmation" in certain cases would not be achieved if the affirmant did not understand its nature. It is not abnormal in a Christian community to find a child of eight or nine years who believes in God and that He will punish the wicked and reward the good. It would, I think, be quite abnormal—perhaps a mark of rare precocity—if a child of that age exhibited any knowledge of the secular sanction for truth arising from the making of an affirmation. The Legislature would not have contemplated that a child who did not understand the nature of an oath would understand the nature of a declaration, or that a child who was not mature enough to take an

oath would be called upon in Court to make a solemn affirmation. The form in which the Legislature has cast a "solemn affirmation" affords no reason for suggesting that the Legislature had in its mind the idea that the words, by which a person who was to make an affirmation should pledge himself to tell the truth, would be spoken aloud in Court by a child of nine years of age, who had been examined as to his understanding of the nature of an oath and failed on account of his immaturity to satisfy that test. Though the examination which was made of Robert Pead revealed that he was of the degree of intelligence which has been described, his incompetence to take an oath was due to childhood and to no other cause. It would probably be an exhibition of precocity if a child of his age were to deny the sanctity of an oath or to profess atheism and, probably also, to declare that his religion forbade him to take an oath in a Court of law. However, Robert Pead did not entertain any such views.

In my opinion, sec. 13 of the *Oaths Act* does not authorize a child, who on account of immaturity of intellect does not understand the nature and consequences of an oath, to make an affirmation in lieu of an oath, and thereupon give evidence. It follows from this view that the testimony of Robert Pead, who for that reason was incompetent to take an oath, should not have been received. I have formed my opinion in the light of the decisions and the history of the legislation. These matters have been reviewed by my brothers *Dixon* and *Evatt*, and it is not necessary to set them forth again in detail.

I think special leave should be granted, and the appeal allowed.

EVATT J. I am authorized by the Chief Justice and my brother *Starke* to say that they concur with the reasons contained in my judgment, and that they are of opinion that the application for special leave to appeal should be refused.

*Special leave to appeal refused.*

Solicitors for the applicant, *L. O. Martin & Son*, Taree, by *L. O. Martin & Lamport*.

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B