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IN RE
BURLEY.Rich J.
McTiernan J.

Crimes Act. That section is referring to the maximum term to which the offender exposes himself when he commits the offence. It is distinguishing crimes according to their gravity and adopting a period of punishment as the test of their seriousness. It is not concerned with the powers of one Court or another, but with the nature of the crime. The fact that one Court is made incompetent to inflict the full period of imprisonment assigned to the offence by the provision creating it ought not, we think, to be taken into consideration in determining within which of the three categories made by sec. 21 of the *Crimes Act* the offence falls.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Coy & England.*

Solicitor for the respondents, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.

[HIGH COURT OF AUSTRALIA.]

IN RE THE STATE OF NEW SOUTH WALES;
EX PARTE THE ATTORNEY-GENERAL FOR THE
COMMONWEALTH.

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1932.SYDNEY,
May 4.Gavan Duffy
C.J., Rich,
Starke, Dixon,
Evatt and
McTiernan JJ.

Constitutional Law—Financial Agreements—Money “due and payable and unpaid” thereunder by a State to the Commonwealth—Amount—Certificate of the Auditor-General—Right of set-off by State—Declaration by High Court—Financial Agreements Enforcement Act 1932 (No. 3 of 1932), secs. 5 (1), 6, 7, 13 (2), 18—Financial Agreement Act 1928 (No. 5 of 1928), Sched.

In an application by the Commonwealth for a declaration, under sec. 6 (3) of the *Financial Agreements Enforcement Act* 1932, that an amount stated in a resolution passed by both Houses of the Commonwealth Parliament, or any part thereof, is “due and payable and unpaid” by a State to the Commonwealth, the State is not permitted by the Act to claim a set-off.

MOTIONS.

By separate motions, on notices dated 17th March 1932 and 26th April 1932 respectively, the Acting Attorney-General of the Commonwealth applied for declarations, under sec. 6 (3) of the *Financial Agreements Enforcement Act* 1932 (a), that the sum of "£924,082 3s. 4d. being the amount stated in a resolution passed by " both Houses of the Commonwealth Parliament on 16th March 1932 under and in pursuance of sec. 6 (1) of that Act, was due and payable and unpaid by the State of New South Wales to the Commonwealth of Australia, and (b) that the sum of "£1,362,346 10s. 6d. being the amount set forth in a further certificate of the Auditor-General dated 9th April 1932 given to the Treasurer during the currency of a proclamation dated 7th April 1932 issued after " the resolution referred to above, was " due and payable and unpaid to the Commonwealth of Australia by the State of New South Wales, being the State specified in a prior certificate of the Auditor-General dated 15th March 1932 approved and adopted by each House of Parliament " in the said resolution.

The sum of £924,082 3s. 4d. referred to in the notice of motion dated 17th March 1932 was the sum certified on 15th March 1932 by the Auditor-General under sec. 5 (1) of the *Financial Agreements Enforcement Act* 1932 as being then due and payable and unpaid by the State of New South Wales to the Commonwealth. A copy of such certificate was published in the *Commonwealth Government Gazette*, No. 21, of 15th March 1932. On 7th April 1932 a proclamation under sec. 7 of the Act was published in the *Commonwealth Government Gazette*, No. 28, fixing that date as the date as from which revenue from taxation imposed by the State of New South Wales on incomes—other than taxation imposed under the *Unemployment Relief Tax Act* 1931—should become payable to the Commonwealth Treasurer or to authorized persons. A copy of the further certificate given on 9th April 1932 by the Auditor-General under sec. 13 (2) of the Act was published in the *Commonwealth Government Gazette*, No. 30, of that date.

In an affidavit sworn on 2nd May 1932 and filed on behalf of the applicant, Ernest William Tyson Yandell, Accountant to the Commonwealth Treasury, stated that the sum of £924,082 3s. 4d. referred to in the notice of motion dated 17th March 1932 had been

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reduced to the sum of £659,043 9s. 7d. by credits given by the Commonwealth to the State of New South Wales in the following manner:—1st January 1932, the sum of £1,326 5s. 9d. being exchange at the rate of £25 7s. 6d. per cent on remittance to London of £5,226 15s. interest over-reimbursed by New South Wales to the Commonwealth in London on 1st January 1932. (The amount of £5,226 15s. was allowed as a credit in the Auditor-General's certificate dated 15th March 1932.) 31st March 1932, the sum of £12,552 2s. being rebate of interest as from 2nd October 1931 to New South Wales by the Commonwealth in respect of a loan to that State for soldier land settlement the interest having been reduced by the Commonwealth from 5 per cent to 4 per cent per annum. 31st March 1932, the sum of £243,118 being the amount of the monthly contribution to be provided by the Commonwealth for New South Wales under clause 2 (b) of Part III. of the Financial Agreement (see Schedule to *Financial Agreement Act* 1928). 8th April 1932, the sum of £7,047 10s. being the amount collected on behalf of the Commonwealth under the *Financial Agreements Enforcement Act* 1932. 9th April 1932, the sum of £994 16s. being the further amount collected on behalf of the Commonwealth under the said Act.

On behalf of the State of New South Wales, indebtedness was denied generally. Alternatively, liability was denied in respect of an amount of £1,906 9s. 4d. representing interest charged by the Commonwealth at the rate of 4 per cent per annum on the balance of the amount outstanding from day to day calculated from the respective dates of the providing by the Commonwealth of the various items included in such amount to 9th April 1932. The State also claimed a set-off in the sum of £1,603,134 0s. 6d. made up as follows: The sum of £977,138 alleged to have been made available to the State from time to time by the Australian Loan Council with the approval of the Commonwealth Bank Board but withheld from, or otherwise not received by, the State; the sum of £213,068 16s. 4d. moneys alleged to be due and payable by the Commonwealth to the State under the Federal Aid Roads Agreements of 1927 and 1931 respectively; the sum of £243,118 alleged to be due and payable to the State for the month of April 1932 by the Commonwealth under clause 2 (b) of Part III. of the Financial Agreement referred

to above; and, the sum of £169,809 4s. 2d. being State moneys alleged to have been collected by or on behalf of the Commonwealth under the *Financial Agreements Enforcement Act* 1932 between 9th April and 23rd April 1932.

The motions were heard together.

During argument the Court was informed that in respect of the amounts included in the first certificate the Commonwealth was prepared to allow certain minor adjustments in favour of the State, with the result that the sum now claimed thereunder was £656,999 18s. 1d.

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E. M. Mitchell K.C. (with him *Ham* K.C. and *Nicholas*), for the applicant. The moneys claimed by the Commonwealth are "due and payable and unpaid" by the State in respect of certain obligations of the State liquidated by the Commonwealth out of Commonwealth funds under and by virtue of the provisions of the *Financial Agreements Enforcement Act* 1932, and having regard to the object of that Act, the State has no right of set-off in applications of this nature. The only question in issue is the amount payable under the instrument indicated by Parliament to originate the procedure under the Act, that is, the certificate of the Auditor-General, not only as to the total amount shown therein but also as to the several items. Both the Commonwealth and the State are limited to the items included in the relevant certificates, and neither party is entitled to introduce claims or items not so included. By sec. 6 (4) of the Act the right of a State is limited to disproving that the amount shown in the relevant resolution is wholly or in part "due and payable and unpaid." The Act provides no machinery to deal with a set-off or cross-claim (*New South Wales v. The Commonwealth* [No. 1] (1)). The State is not entitled to elect that moneys provided under the Federal Aid Roads Agreements for the construction, reconstruction and maintenance of roads shall be used for paying overdue interest. Such moneys may only be used for the specific purpose for which they are provided. Moneys advanced by the Commonwealth to a State under clause 2 (b) of the Financial

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Agreement are by way of contribution only for interest, and do not constitute a debt due from the Commonwealth to the State. State moneys collected by the Commonwealth under sec. 6 of the *Financial Agreements Enforcement Act* 1932 are collected in anticipation of the order of the Court, and must be repaid or retained according to the determination of the Court. Adjustment in respect of such moneys can be made only after the order of the Court is made. The Commonwealth is not liable to the State for money in excess of the amount actually made available by the Commonwealth Bank of Australia although conditionally approved by the Australian Loan Council. The provisions of sec. 13 (2) of the Act indicate that a declaration should be made in respect of the first certificate and that such declaration should precede the declaration in relation to the second certificate.

Browne K.C. (with him *Berne*), for the respondent. Whether there is anything due from the State to the Commonwealth depends only upon the construction of the Financial Agreement. Under the Agreement the Commonwealth does not make itself liable with regard to debts taken over from the States, but the Agreement merely gives rise to the liability as between the Commonwealth and the States that the liability shall be shouldered by the Commonwealth and not by the States. The Commonwealth is not under any liability to pay the debts as between itself and the bondholders, nor can it impose any obligation on the State by voluntarily paying the bondholders a debt which it does not owe. It is entirely a matter for the State to say whether it will or will not pay its creditors. The Commonwealth has no power to direct the State to pay its debts. The provision in the Financial Agreement with regard to payment of interest only authorizes the Commonwealth to pay its appropriation, and does not authorize the Commonwealth to compel the State to pay its portion. The States only agreed to pay such amounts as might be required in excess of the amounts provided annually by the Commonwealth. If a State fails in its obligation under the Financial Agreement to pay the Commonwealth the only remedy available to the Commonwealth is to sue the State for breach of contract.

[STARKE J. Is not the only question whether or not an amount of money is “ due and payable and unpaid ” under the Financial Agreement ?]

There is no debt due at all. There is nothing in the Act which precludes a State from setting up any proper defence—including set-off and cross-action—on the question of whether the whole or any part of the money is due and payable.

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The following judgments were delivered :—

GAVAN DUFFY C.J. In this suit the State of New South Wales has attempted to rely on certain items by way of set-off. We are of opinion that the Act of Parliament does not permit that to be done.

The Court will make one declaration stating that the State of New South Wales is indebted to the Commonwealth in the sum of £2,029,432 6s. 1d., being £910,203 15s. 7d. of the amount stated in the first certificate and £1,119,228 10s. 6d. of the amount stated in the further certificate.

STARKE J. I should like to say for myself that the item of £243,118 should be excluded from the amount on which the first certificate is founded and should be carried into the next certificate, and that the two items £7,047 10s. and £994 16s. should be wholly excluded from both certificates. The other items which have been deducted are simply the interest items.

DIXON J. I agree with what my brother *Starke* has said. It appears to me that very great difficulty would arise under sec. 18 of the *Financial Agreements Enforcement Act* if the items of £7,047 10s. and £994 16s., which sums were collected under the proclamation, were applied in reduction of the amount shown under the Auditor-General’s certificate before the judgment of this Court is given and not afterwards, because I think sec. 18 contemplates that the sums collected under a proclamation shall be applied after the judgment in satisfaction of the amount declared to be due, payable and unpaid, and not otherwise. As to the sum of £243,118,

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it is really immaterial how it is distributed, as we are making one declaration. It appears to me that on a correct construction of sec. 13 (2) only one declaration is contemplated where the order of events is that which has taken place in this case, namely, where two certificates are issued before the Court makes any declaration. The proviso to sec. 13 (2) applies only to cases in which a second certificate is given by the Auditor-General after the Court has made a declaration upon the first.

Declare that the State of New South Wales is indebted to the Commonwealth in the sum of £2,029,432 6s. 1d.

Solicitor for the applicant, *W. H. Sharwood*, Commonwealth Crown Solicitor.

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

J. B.