

Enid Campbell*

PARLIAMENTARY APPROPRIATIONS

It is a well established rule of common law that moneys of the Crown cannot be expended except under the authority of some Act of Parliament. The rule dates back no further than the end of the seventeenth century and arose out of the English Parliament's insistence that it rather than the sovereign should decide how revenue raised by taxation should be spent¹. In Australia the rule rests wholly or partly on statute. S.83 of the Federal Constitution, for example, provides that "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law." An "appropriation made by law" means an appropriation by law of the Commonwealth Parliament. There is no exact counterpart of s.83 in State legislation, but the rule requiring parliamentary authority for spending of moneys of the Crown in right of the States is implied in most of the State Constitution Acts.

This article deals with the circumstances in which public spending must be authorized by Parliament, with the nature and form of appropriation Acts, the legal effects of appropriations and with legal controls and remedies against illegal expenditure.

When is appropriation necessary?

"No money can be taken out of the Consolidated Fund into which the revenues of the State have been paid", Viscount Haldane said in *Auckland Harbour Board v. The King*², "excepting under a distinct authorization from Parliament itself". This statement is correct as far as it goes, but as an expression of the circumstances in which parliamentary sanction for public spending is required it is incomplete. Parliamentary authority is needed for the expenditure of any moneys of the Crown, whether they are revenue or not, and irrespective of the fund into which they are paid. Moneys of the Crown include revenues such as the proceeds of taxation (even illegal taxation), of sales and other dispositions of Crown property, fees and charges for services rendered, monetary penalties, royalties and the profits of escheat and bona vacantia³. They also include moneys had and received by the Crown for the benefit of others, and moneys held by the Crown in trust, because when the Crown holds money in trust it is not, as is a private person, liable for the trust moneys in specie, "but is liable only to repay money of the same amount"⁴. Were the Crown bound to keep trust funds separate, presumably such funds would not be moneys of the Crown and therefore not subject to appropriation.

* Professor of Law, Monash University.

1. See Kenyon, *The Stuart Constitution* (1966) 388-96 and Williams, *The Eighteenth Century Constitution* (1960) 4-5, 50-3, 200-6.
2. [1924] A.C. 318, 326.
3. See *A.-G. of Ontario v. Mercer* (1882-3) 8 App. Cas. 767; *Re Bonner* [1963] Qd. R. 488.
4. *New South Wales v. Commonwealth* [No. 3] (1932) 46 C.L.R. 246, 260-1. See also *Haskins Bros. v. Morgenthau*, 85 F.2d. 677, cert. denied 299 U.S. 588 (1936); cf. *Varney v. Warehime*, 147 F.2d. 238, 245. cert. denied 325 U.S. 882, reh. denied 326 U.S. 805.

The Australian State Constitution Acts provide that all revenues arising within the State and over which the State Parliament has power of appropriation (meaning, revenues of the Crown in right of the State) shall form a Consolidated Revenue Fund to be appropriated for the public service of the State, subject to specified charges⁵. They further provide that after and subject to these charges, the Consolidated Revenue shall be subject to appropriation for such specific purposes as may be prescribed by statute⁶. These provisions do not, it should be noted, prevent the State Parliaments enacting legislation directing that certain revenues or other moneys be paid into separate funds. Separate funds have in fact been created for State business undertakings and for trust and loan accounts, and the Consolidated Revenue Fund is now little more than a general revenue fund. Whether the Commonwealth Parliament is competent to enact legislation directing that moneys of the Crown in right of the Commonwealth shall be credited to separate funds rather than to the Consolidated Revenue Fund is more doubtful. The source of this doubt will be explained presently in relation to the Loan Fund.

Moneys do not become moneys of the Crown until they are actually received by the Crown or credited to a bank account of the Crown. This means that if moneys are owed to the Crown, the variation or discharge of the debtor's obligation to pay does not constitute expenditure for which parliamentary authority must be obtained. If, however, the Crown were to refund to the debtor the amount paid by him, or part of it, the expenditure would need to be sanctioned by Parliament. Hence if the Crown remits fines already paid, no money can be returned unless Parliament has appropriated money for the purpose.

Normally monetary penalties are payable to the Crown, but sometimes it is provided by legislation that penalties may be recovered at the suit of private persons or may be awarded by a court to a person other than the Crown. Then again an officer of the Crown may be empowered to apportion penalties payable to the Crown and collected on its behalf. Alfred Deakin (as Commonwealth Attorney-General) advised the Commonwealth Treasury that:

If the Act imposing a penalty directs that one-half shall be paid to the informer and one-half to the Crown, the half which is to be paid to the informer is not revenue at all. Whether a penalty is, or is not, revenue depends upon the provision made for its application; and if it is not intended to be part of the public revenue it need not be paid into the Consolidated Revenue Fund⁷.

A mandatory provision requiring a proportion of a monetary penalty to be paid to someone other than the Crown serves to define what is payable to the Crown. Similarly when a court is empowered by statute to direct that penalties, otherwise payable to the Crown, shall be payable to another, the enabling statute authorizes the court to fix the sum due to the Crown. On the other

5. Constitution Act, 1902, s.39 (N.S.W.); The Constitution Acts, 1867 to 1961, s.34 (Q.); Constitution Act, 1855, s.XLIV (Vic.); Constitution Act, 1889, s.64 (W.A.).

6. Constitution Act, 1902, s.45 (N.S.W.); The Constitution Acts, 1867 to 1961, s.39 (Q.); Constitution Act, 1855, s.LV (Vic.); Constitution Act, 1889, s.72 (W.A.).

7. Auditor-General's Report, 1901-1902, p.164.

hand, if penalties collected on the Crown's behalf are distributed, no disbursement could properly be made without Parliament's sanction, though if an officer of the Crown were expressly authorized by statute to do so, the statute might be held to operate as a permanent appropriation.

The principle that moneys of the Crown cannot be spent without Parliament's authority applies even when expenditure is made in performance of the Crown's legal obligations whether they arise under contract, under statute, from a judgment or relationship of trust. However, subject to statutory restrictions, the Crown may enter into binding contracts involving payment of money, without prior appropriation of the funds necessary to cover the contractual commitment. By contractual arrangements, the Crown may also avoid the necessity of having to obtain parliamentary approval for spending. If, for example, \$20,000 is payable to the Crown under contract with X, the Crown may, by contract, arrange for X to pay the money as it falls due to Y in order to satisfy its contractual liability to Y. Similarly if the Crown enters into an agreement with Z whereby Z agrees to sell goods on behalf of the Crown for specified prices in return for a percentage of the proceeds of sale, the percentage allowed to Z, as distinct from the balance which he is contractually bound to pay to the Crown, is not money which the Crown is entitled to receive nor is it received on the Crown's behalf. So it is not money subject to parliamentary appropriation⁸.

When money has been expended pursuant to parliamentary authority and afterwards the amount expended is recouped by the Crown, the original appropriation does not authorize expenditure of the moneys recovered. Re-expenditure must be authorized by Parliament and has been so authorized by s.36C of the Federal Audit Act. The section provides that:

- (1) Money received in a financial year in repayment of expenditure made within that year from an annual appropriation in respect of that year shall be taken in reduction of the expenditure from that appropriation.
- (2) Money received in any financial year in repayment of expenditure from a special appropriation under any Act shall be taken in reduction of expenditure from that appropriation in respect of the year in which the repayment is made.

S.36C does not, it should be noted, authorize expenditure from income produced as a result of authorized expenditures. Such income cannot be spent without further appropriation. To facilitate the operations of those government agencies which engage in trade and to give a truer account of the expenditure actually defrayed from revenue, amendments were made to the Federal Audit Act to make it possible for such agencies to pay for their purchases out of the proceeds of their sales⁹. The Treasurer, Sir John Forrest, explained that

a strict reading of the law would probably require the proceeds to be paid into revenue, and the fresh purchases to be charged to a vote of

8. See Opinion of Alfred Deakin, A.-G., 25 April, 1903—Auditor-General's Report, 1902-1903, p.159.

9. Audit Act 1901-1969, s.62A.

Parliament. Such a course would, however, show the expenditure of the Commonwealth as much more than the amount which is really borne by the general taxation of the people; and it is thought that these special receipts should be devoted wholly to the purpose of replacing the goods sold¹⁰.

The amendments empowered the Treasurer to establish Trust Accounts for such purposes as he might designate, which accounts could be credited with moneys expressly appropriated for the purposes of the particular account; with moneys received from the sale of any articles purchased or produced, or for work paid for with moneys standing to the credit of the Trust Account; and with moneys paid by any person for the purposes of the Trust Account. The Act as amended authorized the expenditure of moneys standing to the credit of a Trust Account for the purposes of the Trust Account, i.e., for the purposes defined by the Treasurer when the Account was established. This general spending authority is liable to be overridden by subsequent legislation appropriating money credited to a Trust Account for a particular purpose. If such legislation is passed, the money appropriated can be spent only for the purpose specified by that legislation notwithstanding that the purposes of the Trust Account, as defined by the Treasurer, are wider¹¹.

When the Crown borrows money, the money borrowed becomes money of the Crown. In this case the situation of the Crown is no different from that of a private borrower. However, the Crown cannot spend the money borrowed, even to repay the loan, unless the expenditure has been authorized by Parliament. S.83 of the Federal Constitution leaves no room for doubt about the matter since no money at all can be drawn from the Treasury without parliamentary appropriation. For the purposes of this section, money is in the Treasury when it is banked. The nature of the fund or account to which it has been credited is immaterial¹².

S.55 of the Federal Audit Act creates a Loan Fund into which moneys lent to the Commonwealth are directly payable. Whether the Constitution allows such an arrangement is debatable. S.81 of the Constitution directs that "all revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund". If the revenues and moneys referred to in the section include loan moneys, then it is clear that the Parliament cannot create a Loan Fund except by appropriating moneys from the Consolidated Revenue Fund. At the Adelaide Convention, the word "moneys" was deleted from s.81 "to make it clear that loan moneys were not included, and a suggestion to restore it was negatived at Melbourne for the same reason"¹³. For reasons that are not apparent the word was re-inserted at a later stage¹⁴. Quick and Garran were nevertheless of the opinion that "the

10. 32 Cth. Parl. Deb. 2066.

11. See Opinion of R. R. Garran, Secretary to the Attorney-General's Department, 17 Jan. 1912—Commonwealth Auditor-General's Report, 1910-1911, p.240.

12. See Opinion of K. H. Bailey, Solicitor-General—Commonwealth Auditor-General's Report, 1950-1951, p.175.

13. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 811.

14. *Ibid.*

generic word 'moneys' must be controlled by the preceding specific word 'revenues', and limited to moneys in the nature of revenue"¹⁵. Sir Owen Dixon appears to have taken a contrary view. In his submissions to the Royal Commission on the Constitution, 1928-1929, he questioned whether it was constitutionally permissible for Parliament to legislate on the purposes for which loan moneys could be used at the same time as it authorized the raising of those moneys. Such a practice was, he said, "not altogether consistent with moneys after receipt passing into the Consolidated Revenue Fund". S.81 might be interpreted to mean "that the appropriation must follow the receipt but not precede it". However, it was more likely "that an interpretation would be adopted of s.81, which treated the Consolidated Revenue Fund as a continuous fund which might be appropriated irrespective of the character of the moneys that went into it". By specifying the purposes to which loan moneys, when received, were to be put, Parliament could be said to have appropriated the Consolidated Revenue Fund¹⁶.

For the purposes of s.83 of the Federal Constitution, the source of the funds borrowed by the Commonwealth is immaterial. Thus parliamentary appropriation is necessary even when the moneys borrowed have been borrowed outside the Commonwealth and are to be spent beyond the limits of the Commonwealth. But when the Commonwealth borrows other than Australian currency and then exchanges the money for Australian currency, parliamentary sanction is not required because the transaction does not involve expenditure. If, for example, United States dollars standing to the credit of the Commonwealth Public Account in the United States were transferred to the Commonwealth Bank, the Public Account in the United States would be debited but the amount standing to the credit of the Public Account in Australia would increase by a corresponding amount¹⁷.

Unforeseen expenditure

The general rule requiring parliamentary authority for expenditure of moneys of the Crown creates some practical difficulties. Annual appropriation Acts lapse at the end of the financial year in respect of which they are enacted¹⁸ and time elapses between their expiration and the enactment of the appropriation Act or Acts for the next financial year. Unexpended balances at the end of the financial year cannot be expended without further parliamentary authority. During the currency of the annual appropriation Act, circumstances can arise which were not anticipated when the estimates were voted upon, but which make it necessary for the government to outlay money immediately. The estimates themselves may prove inaccurate: votes for some purposes may be over-generous but for others insufficient. Occasionally it may happen that a government is denied supplies because of the refusal of the upper House to approve its financial proposals.

15. *Ibid.*

16. Minutes of Evidence, 779-80.

17. See Commonwealth Auditor-General's Report, 1950-1951, pp.14-15, and opinion of K. H. Bailey, Solicitor-General, *id.* 174-8.

18. Audit Act 1901-1969, s.36(1) (Cth.); Audit Act, 1902, s.32 (N.S.W.); Public Finance Act, 1936-1966, s.32(j) (S.A.); Audit Act 1918, s.16 (Tas.); Audit Act 1958, s.26 (Vic.); Audit Act, 1904, s.34 (W.A.).

From time to time it has been suggested that in cases of emergency the executive may spend public funds without waiting for parliamentary approval. In 1860 the House of Commons Committee on Packet and Telegraph Contracts stated that "in special emergencies expenditure unauthorized by Parliament becomes absolutely essential. In all such cases the executive must take the responsibility of sanctioning whatever immediate urgency requires; and it has never been found that Parliament exhibited any reluctance to supply the means of meeting such expenditure"¹⁹. The Secretary of State's advice to the Governor of New South Wales in 1868 was much the same. The Governor would be justified, the Secretary of State wrote, in signing a warrant for issue of money from the Treasurer, despite the absence of appropriation "first, on the ground of necessity; or secondly, on the ground that it [the expenditure] is sure to be subsequently sanctioned—joined to strong grounds of expediency, even though short of actual necessity"²⁰. Shortly afterwards the Governor signed a warrant for the issue of money for payment of certain official salaries, appropriation for which had been delayed by the adjournment of the legislature. According to the Colonial Secretary (Earl Granville), what had been done could not be justified on the ground of necessity.

Except in the case of absolute and immediate necessity [he said] (such, for example, as the preservation of life), no expenditure of public money should be incurred without sanction of law; unless it may be presumed not only that both branches of the legislature will hold the expenditure itself unobjectionable, but also that they will approve of that expenditure being made in anticipation of their consent²¹.

To say that there are circumstances when governments are justified in spending public moneys without waiting for Parliament's approval is not to say that there are circumstances in which parliamentary authority for such spending is not legally required. Were it possible for legal action to be brought to restrain the spending of the unappropriated moneys, a court of law would presumably hold the expenditure illegal. "We cannot see," Lukin J. said in *Australian Alliance Assurance Co. Ltd. v. John Goodwyn, The Insurance Commissioner*²²,

that the occasional or frequent breach or violation of the law in any way affects the question, even if such breach is counselled on an occasion of supreme public emergency, as justifiable or excusable—in the loose sense in which those words are used. The fact remains that all such actions are breaches of the law, and in a proper case brought properly before us, it seems to us, not only our right, but our duty to make the declaration as to illegality²³.

There are several ways in which unexpected demands for expenditure may be met under a system of annual appropriations. One is by the presentation of supplementary estimates after the enactment of the annual appropriation Act

19. H.C. Pap. 1860, vol 14, p.15; quoted Todd, *Parliamentary Government in England*, vol. 1 (1867) 546.

20. Duke of Buckingham to Lord Belmore, 30 Sept. 1868—c.2173, p.117 (1878).

21. Earl Granville to Lord Belmore, 16 June 1869—c.2173, p.119 (1878).

22. [1916] St. R.Q. 223, 255.

23. *Id.* 272.

either to obtain an additional grant for a service already provided for in the annual appropriations Act, or to obtain a grant for services or purposes in respect of which no provision was made in that Act. The supplementary estimates may be presented before any supplementary expenditure occurs, or afterwards, in which case what the executive is seeking is *ex post facto* approval of its expenditure. Many of the new constitutions of the Commonwealth require the presentation of supplementary estimates when it is found that the amount appropriated by the annual appropriation Act to any purpose is insufficient, or that a need has arisen for expenditure for a purpose for which no provision has been made in that Act, or that any moneys have been spent for a purpose in excess of the amount appropriated for it in the Act, or for a purpose to which no amount has been appropriated. S.96 of the Constitution of Bermuda, 1968, to take one example, provides that when supplementary estimates have been laid before the Lower House and approved by it, an appropriation bill shall be introduced as soon as practicable after the end of the financial year, to provide for appropriation to the purposes in questions of sums in such estimates that have been expended for that year.

Article 116(1) of the Indian Constitution empowers the House of the People to make grants for meeting "an unexpected demand on the resources of India when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement" or "to make an exceptional grant which forms no part of the current service in any financial year" and the Parliament is expressly empowered to sanction the withdrawal of funds from the Consolidated Fund for the purpose of such grants. These are termed votes of credit and exceptional grants.

In Australia it is common practice to include in the annual appropriation Act a vote by way of Advance to the Treasurer. The effect of this is to give the Treasurer power to approve applications from departments for additional funds to cover the cost of unforeseen contingencies and to make good deficiencies in the estimates²⁴. The vote is not a specific cash allocation but an authority to spend up to a specified maximum. Strictly speaking no further authority from parliament is necessary to authorize expenditure out of this vote²⁵. The annual Advances to the Treasurer serve substantially the same purpose as Civil Contingency Funds, however these funds are in a sense permanent and are replenished from time to time by supplementary estimates²⁶.

24. On the use of the Treasurer's Advance see Commonwealth Joint Committee of Public Accounts, Fourteenth Report (1954) p.7; Twenty-Fifth Report (1956) pp.6-7 and Appendix 1.

25. Before 1956-1957 the Commonwealth government submitted supplementary estimates after the close of the financial year to obtain approval of the allocations made from the Treasurer's Advance but the practice was discontinued after the Public Accounts Committee pointed out that it was unnecessary. Now details of expenditure from the Advance are simply a matter for report. See Joint Committee of Public Accounts, Thirty-First Report (1957); Thirty-Third Report (1957), p.5. In New South Wales, *ex post facto* approval of the allocations from the Treasurer's Advance is given in the annual appropriation Act of the next succeeding year. See N.S.W., *Manual of Governmental Accounting* (1967), 62.

26. The creation of Civil Contingency Funds and the purposes for which they may be used are expressly mentioned in many of the new Commonwealth Constitutions. See Constitution of India, 1950, art. 267; Constitution of Bermuda, 1969, s.98.

The comment has been made of the United Kingdom Contingency Fund that it "is as effective a method of by-passing prior parliamentary sanction of expenditure as could be imagined" and that it "gives the Executive substantial freedom from prior parliamentary scrutiny of its policy decisions"²⁷. The same might also be said of Advances to the Treasurer.

Parliamentary control over expenditure is further weakened by the authority which is given by statute to transfer expenditure between votes. In the United Kingdom, this authority is given in each Consolidated Fund (Appropriation) Act, but the Treasury claims further power in respect of civil votes to authorize transfers between sub-heads within individual votes²⁸. This practice, known in Britain as virement, is prevalent in Australia too. Many of the Audit Acts authorize the transfer of unexpended surpluses from one item in the annual Appropriation Act to meet deficiencies in funds for other related items in the same subdivision, though limits are imposed on the purposes for which such transfers may be made²⁹.

The problems created by the fact that annual appropriation Acts lapse at the end of the financial year and by the fact that it is not always possible for an appropriation Act for the next financial year to be enacted so to take effect immediately the Act for the previous year lapses has been met in two ways. The Audit Acts permit unexpended balances to be applied, during a limited period after the lapse of the annual appropriation Act for the purpose of meeting liabilities³⁰. In some States there is also statutory authority for limited expenditure from the time the annual appropriation Act lapses until the enactment of the appropriation Act for the next financial year, or during a specified time after the lapse of the annual appropriation Act³¹.

No special provision has been made in Australia for the granting of supply in cases where the legislature is dissolved before the passing of the appropriation Act. In the past, the view has been taken that a request for a dissolution ought not be granted if parliament has not appropriated funds sufficient for the carrying on of government until the new parliament meets. Such a condition may, of course, impose an unwelcome restraint upon the ministry advising dissolution. S.118 of the Constitution of the Bahamas, 1969

See also the Tasmanian Audit Act 1918, s.15(14) Second Schedule, regs. 20-22 on emergency spending.

27. Reid, *The Politics of Financial Control* (1966) 82, 83.

28. *Id.* 82.

29. Audit Act 1901-1969, s.37 (Cth.); Audit Act 1902, s.34 (N.S.W.); The Audit Acts 1874 to 1960, ss.7(7), 19 (Q.); Audit Act 1958, s.25 (Vic.); Audit Act 1904, s.35 (W.A.). The use of s.37 of the Federal Audit Act has been the subject of extensive and critical comment by the Joint Committee of Public Accounts. See Second Report (1952-3) p. 5; Twenty-Fifth Report (1956), p.10; Forty-First Report (1958), pp.7-8.

30. In Queensland the funds appropriated by the annual appropriation Act are available for seven days after the end of the financial year, and during that time may be applied for any of the purposes approved in that Act (The Audit Acts 1874 to 1960, s.18). In Tasmania, the Treasurer is empowered to satisfy outstanding liabilities (Audit Act 1918, s.16). In New South Wales, Victoria and Western Australia, unexpended balances which are needed to meet certain commitments may be transferred to suspense accounts Audit Act, 1902, s.32 (N.S.W.); Audit Act 1958, s.26 (Vic.); Audit Act, 1904, s.34 (W.A.).

31. Audit Act, 1902, s.33 (N.S.W.); Public Finance Act, 1936-1966, s. 32a (S.A.); Audit Act 1918, s.17 (Tas.); Public Account Act 1958, s.16 (Vic.).

has made the grant of supplies irrelevant to the question whether a dissolution should be granted by providing that if the legislature has been dissolved before any provision or insufficient financial provision has been made for the carrying on of the government, the Minister of Finance may issue a warrant for the issue out of public funds of such sums as he considers necessary for the continuance of the public services until the expiry of three months beginning on the date the House of Assembly first meets after the dissolution. If this course is followed, a statement of the sums the Minister has authorized to be issued must, as soon as practicable, be laid before and voted on by the House of Assembly, and the aggregate sums so voted must be included under the appropriate heads in the next appropriation Act.

Despite the existence of permanent statutory provisions authorizing expenditure for purposes for which no provision or insufficient provision has been made in the annual appropriation Act, Treasuries continue to approve spending in excess of that permitted by appropriation Acts and without prior parliamentary approval, in the expectation that the expenditure will be sanctioned by parliament *ex post facto*. It may be that this practice cannot be stopped in which case the best that can be done is that it be rigidly controlled. S.16 of the New South Wales Audit Act, 1902 expressly requires the Public Accounts Committee of the Legislative Assembly to enquire into and report to the Assembly on all expenditure by a Minister of the Crown made without parliamentary sanction or appropriation. In recent years the Committee's enquiries have been principally concerned with just this³².

What is an appropriation?

The answer to the question "What is a parliamentary appropriation?" might at first glance seem to be obvious. It is an Act by which parliament authorizes the expenditure of moneys of the Crown. But then it needs be asked, "What must an Act provide to confer such authority?" Must it specify the sum which may be spent? Must it specify the purposes for which money may be expended? If parliament enacts a statute creating a special fund and empowering a Minister of the Crown to direct disbursement of moneys standing to the credit of the fund for such purposes as he designates, does this statute itself authorize expenditure?

No particular form of words need be used for an Act to take effect as an appropriation³³. But the legislature may enact a rule of construction providing that no statute is to be construed as appropriating public moneys unless it uses a particular form of words or unless it specifically appropriates. The United States Congress, for example, has enacted that "No Act of Congress passed after June 30, 1906, shall be construed to make an appropriation out of the Treasury of the United States . . . unless such an Act shall in specific terms declare an appropriation to be made"³⁴. The existence of such a rule would not of course affect the power of the legislature to appropriate by implication.

32. N.S.W., *Manual of Government Accounting* (1967), 65-66.

33. Opinion of Alfred Deakin, Commonwealth Attorney-General/Auditor-General's Report, 1901-1902, pp.155-6. See also *Henderson v. Board of Commissioners of State Soldiers' and Sailors' Monument* 28 N.E. 127, 130 (1891).

34. 34 Stat. 764; 31 U.S.C.A. 627. The section was first enacted in, 1902: 32 Stat. 560.

The question of what constitutes a legislative appropriation is not one that the courts of the British Commonwealth have had to consider very often. In *Alcock v. Fergie*³⁵, Stawell C.J., delivering the opinion of the Full Court of Victoria, stated that an "appropriation ought to be of a sum certain, for some definite specific object, the value of which Parliament can estimate, and in consideration of which it is prepared to forego its privilege of an annual vote and appropriation, after full discussion". The provision in the Crown Remedies Act enabling the Governor to pay the judgment debts of the Crown out of Consolidated Revenue did not, he held, operate as a permanent or special appropriation. Parliament could, he thought, enact a permanent appropriation of an indefinite sum for a particular purpose, but he added:

Each special appropriation is a voluntary surrender by Parliament of what is supposed to be its most important power, and where that surrender is dependent solely on inference or intendment for its existence, we must be well assured of the intention of the Legislature before we presume that the general revenue of the country has been withdrawn from all direct control, by a measure which, so far as express terms are concerned, is silent on the subject³⁶.

The correctness of this principle of interpretation was subsequently questioned in *Fisher v. The Queen*³⁷. In that case Madden C.J. emphasized that Parliament has the power to appropriate indefinitely and unspecifically.

Parliament [he said] has . . . authority to make special appropriations which may be definite or indefinite in amount as it pleases. If it can arrive safely at a specific amount, and yet a special appropriation is desirable to protect the public interest by preventing delay in payments, and by making them certain, there is nothing *ultra vires* or even unwise in providing that when moneys of a definite kind, not at present ascertainable, can be and shall be ascertained later, the consolidated revenue shall be specially appropriated to meet them.

The Chief Justice concluded that s.25 of the Crown Remedies Act did operate as a special appropriation and that *Alcock v. Fergie* was authority only for the proposition that the section did not appropriate consolidated revenue for the satisfaction of confessed judgments³⁸.

In interpreting constitutional provisions similar to s.83 of the Australian Federal Constitution, State Supreme Courts in America have taken the view that to appropriate public funds a statute must set apart, allot or assign a certain or ascertainable amount for a specific purpose³⁹. In *State v. Moore*⁴⁰ the Supreme Court of Nebraska said that:

35. (1867) 4 W.W. & A'B (L.) 285, 318.

36. *Id.* 319.

37. (1901) 26 V.L.R. 781, 800.

38. *Id.*, 796-9.

39. *Journal Publishing Co. v. Kenney*, 24 P. 96, 98 (Supreme Court of Montana, 1890); *Carr v. State*, 26 N.E. 778 (Supreme Court of Indiana, 1891); *State v. La Grave*, 41 P. 1075, 1076 (Supreme Court of Nevada, 1895); *State v. Moore*, 69 N.W. 373, 376 (Supreme Court of Nebraska, 1896); *Menefee v. Askew*, 107 P. 159, 161 (Supreme Court of Oklahoma, 1910); *People v. Kenehan*, 136 P. 1033, 1035 (Supreme Court of Colorado, 1913); *Epperson v. Howell*, 154

Having in view the origin and history of appropriations, as well as the general lexicographic meaning of the word, "to appropriate" is to set apart from the public revenue a certain sum of money for a specific object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and for no other.

The requirement that a certain sum be set apart is, it seems, satisfied if the amount available, though not specified, can be ascertained. "In order to constitute a valid appropriation by the Legislature", the Supreme Court of Arizona said in *Crane v. Frohmiller*⁴¹,

it must, if the appropriation is to be paid from the general fund, fix at least a maximum amount beyond which such appropriation may not go, although, if the payment is to be made from a special fund which is itself limited in amount, no limit need be stated in the act authorizing the expenditures and specifying for what purpose the money is to be expended.

An Act may authorize the spending of money for a particular purpose without specifying the maximum amount which may be spent, but if the terms of the Act are such that the amount which may be spent from time to time is ascertainable, the Act can be interpreted as an appropriation measure. Legislation which authorizes payment of the judgment debts of the Crown falls into this category, for on the occasions when the legislation applies, the amount that may be expended is ascertainable by reference to the judgment. Provision of this kind has been made with respect to the judgment debts of the Crown in right of South Australia, Victoria and Western Australia⁴². The corresponding Federal, New South Wales and Queensland legislation, on the other hand, requires the Treasurer to pay the Crown's judgment debts out of moneys which are "legally available" or "legally applicable" to that purpose⁴³. This means that before a judgment debt can be satisfied, Parlia-

P. 621, 622-3 (Supreme Court of Idaho, 1916); *State ex rel. Davis v. Eggers*, 91 P. 819, 823 (Supreme Court of Nevada, 1907); *State v. Holmes*, 123 N.W. 884, 886 (Supreme Court of North Dakota, 1909); *Bonsteel v. Allen*, 26 A.L.R. 735 (Supreme Court of Florida, 1922); *Jackson v. Gallet*, 228 P. 1068 (Supreme Court of Idaho, 1924); *Herrick v. Gallet*, 204 P. 477, 478 (Supreme Court of Idaho, 1922); *Hunt v. Callaghan*, 257 P. 648, 649 (Supreme Court of Arizona, 1927); *State v. Sortie*, 219 N.W. 105, 108 (Supreme Court of North Dakota, 1928); *State ex rel. Dean v. Brandjord*, 92 P. 2d. 273 (Supreme Court of Montana, 1939); *Crane v. Frohmiller*, 45 P. 2d. 955 (Supreme Court of Arizona, 1935).

40. 69 N.W. 373, 376 (1896).

41. 45 P. 2d. 955, 959 (1935).

42. Supreme Court Act, 1935-1936, s.77 (S.A.); Crown Procedure Act 1958, s.26 (Vic.); Crown Suits Act, 1947, s.10 (W.A.). The Victorian Crown Proceedings Act considered in *Alcock v. Fergie* (1867) 4 W.W. & A'B. (L.) 285 and *Fisher v. The Queen* (1901) 26 V.L.R. 781 did not contain words of appropriation.

43. Judiciary Act 1903-1966, ss.65, 66 (Cth.); Claims against the Government and Crown Suits Act, 1912, s.11 (N.S.W.); Claims against the Government Act [of 1866], s.8 (Q.). Even if judgment is given against a State in a court exercising Federal jurisdiction, the Federal Parliament cannot authorize expenditure of moneys of the Crown in right of a State to satisfy the judgment nor can it, except in one case, override the requirement of State law that expenditure of State moneys be authorized by the State Parliament (*A.R.U. v. Victorian Railways Commissioners* (1930), 44 C.L.R. 319, 352, 389; *New South Wales v. Commonwealth* (No. 1) (1931) 46 C.L.R. 155, 176). The exception relates to moneys

ment must have appropriated money for that purpose though in many cases the necessary authority for expenditure may be found in the annual appropriation Act, if not under some specific vote, then under the Advance to the Treasurer⁴⁴. The Tasmanian legislation also requires the Treasurer to satisfy judgment debts, but only after Parliament has appropriated the necessary money⁴⁵.

An Act which authorizes expenditure of public moneys for a particular purpose, but which does not specify the maximum amount that may be spent or establish criteria for ascertaining what sums may be spent probably would not be construed as an appropriation. An American State court has held that a statute directing that revenue from annual licence fees paid by members of the Bar should form a trust fund and providing that money standing to the credit of the fund should be disbursed by the Treasurer on the order of a board of commissioners, does not constitute an appropriation Act⁴⁶. The statute in question gave complete discretion to the Board to determine the purposes for which the fund was to be applied and imposed no limits on the time, manner and mode of disbursement. It was not, Budge J. concluded, "an appropriation by the Legislature of a specific sum from a designated fund out of the treasury for a specific object or demand against the state"⁴⁷.

In *Attorney-General for Victoria, ex rel. Dale v. Commonwealth*⁴⁸ Latham C.J. held that even if a statute fixed the maximum sum that might be spent, it would not operate as an appropriation Act unless it defined the purpose for which the money might be spent. In his view

There cannot be appropriations in blank, appropriations for no designated purposes, merely authorizing expenditure with no reference to purpose. An Act which merely provided that a minister or some other person could spend a sum of money, no purpose of expenditure being stated, would not be a valid Appropriation Act⁴⁹.

If a statute authorizing a Minister or some other person to spend money but not defining the purpose for which he may spend it does not have the effect of an appropriation by parliament, a number of provisions in Federal Acts have not had the effect they were intended to have and large amounts of Commonwealth money have been spent illegally. The annual vote by way of Advance to the Treasurer is intended to give the Treasurer authority to spend up to a specified maximum but the purposes for which he may apply that sum are never defined by legislation. Under s.62A of the Audit Act 1901-1966, the Federal Treasurer is empowered to create Trust Accounts for such

payable by a State to the Commonwealth pursuant to a financial agreement within the meaning of s.105A(1) of the Constitution. See *New South Wales v. Commonwealth (No. 1)* (1931) 46 C.L.R. 155.

44. *New South Wales v. Bardolph* (1934) 52 C.L.R. 455.

45. Supreme Court Civil Procedure Act 1932, s.68.

46. *Jackson v. Gallet* 228 P. 1068 (1924). See also *Dickenson v. Clibourne*, 187 S.W. 909, 911; cf. *Edwards v. Childers*, 228 P. 472.

47. 228 P. 1068, 1069.

48. (1945) 71 C.L.R. 237.

49. *Id.* 253.

purposes as he designates and to spend moneys standing to their credit for the purposes of the particular Account. Parliament determines what moneys shall be credited to these Accounts and in doing so might be said to approve the purposes for which the Accounts have been established by the Treasurer, however under s.5 of the Surplus Revenue Act 1908 the executive has been empowered to increase the amount standing to the credit of a Trust Account in respect of which an "appropriation" has been made, by directing that moneys be credited to the Account out of the Consolidated Revenue Fund⁵⁰.

Latham C.J. did not explain why he thought that a Federal Act which authorized someone to spend money without indicating the purpose for which it might be spent was not a valid appropriation Act. His remarks were made in relation to s.81 of the Constitution which provides that Federal revenues and moneys shall form a Consolidated Revenue Fund "to be appropriated for the purposes of the Commonwealth", but he did not regard s.81 as the source of the Federal Parliament's power to appropriate⁵¹, nor did he regard it as restricting the exercise of that power, for in his opinion "the purposes of the Commonwealth" were any purposes the Parliament chose to treat as Commonwealth purposes. It is one thing to apply a rule against construing statutes as appropriation Acts unless they clearly express authority to spend public funds, quite another to say that an Act cannot be a valid appropriation Act if it delegates to a Minister or some person power to decide the purposes for which the money may be spent. If the terms of a statute clearly delegate the power to decide on the objects of expenditure, I can see no constitutional basis for denying Parliament power to make such a delegation⁵².

To constitute an appropriation by parliament an Act must authorize the expenditure of money. "The appropriation of public revenue is", Griffith C.J. explained in *New South Wales v. The Commonwealth*⁵³, "in form, a grant to the Sovereign, and the Appropriation Acts operate as an authority to the Treasurer to make the specified disbursements". An Act which merely provides that certain revenues or moneys of the Crown shall be paid into a specified fund or account and which does not state the purposes for which the money in the fund or account may be applied is clearly not an appropriation. The Act creating the fund may provide for the transfer of moneys from another fund and may use words of appropriation, but still not operate as an Act authorizing expenditure. S.5 of the National Welfare Fund 1943 provided that certain moneys be paid out of the Consolidated Revenue Fund of the Commonwealth, which was declared to be appropriated accordingly, for the purposes of the National Welfare Fund, a trust account established under the Act. The Act further provided that moneys standing to the credit of the

50. S.5 provides that "Where a Trust Account has been established under the Audit Act 1901-1906, and moneys have been appropriated by the Parliament for the purposes of the Trust Account, or for any purpose for which the Trust Account is established . . . (b) the Treasurer may in any year pay to the credit of the Trust Account, out of the Consolidated Revenue Fund, such moneys as the Governor-General thinks necessary for the purposes of the appropriation".

51. He thought the power was an implied incidental power.

52. In *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 322 (1936), the United States Supreme Court held that an appropriation of a sum to be spent as designated by a government agency was not an invalid delegation of legislative power.

National Welfare Fund should be applied in making such payments as were directed by any law of the Commonwealth to be made from that fund, in relation to designated social services. In *Attorney-General for Victoria, ex rel. Dale v. Commonwealth*⁵⁴ Latham C.J. held that although s.5 of the National Welfare Act used words of appropriation, its only effect was "to establish a fund into which moneys are paid". It did "not itself contain any authority for expenditure of Commonwealth moneys in the sense of payment out of the Treasury". The National Welfare Act, it is true, indicated in general terms the purposes for which the National Welfare Fund was to be applied, but it also made it clear that the particular purposes and occasions for payment were to be defined by other Commonwealth statutes.

When parliament has established or authorized the establishment of a fund, and has enacted that moneys standing to the credit of the fund may be spent for certain purposes, then it seems that a subsequent Act which expressly appropriates money for the purposes of that fund will be construed as authorizing expenditure, even though the purposes for which the moneys may be spent cannot be ascertained except by reference to previous statutes or executive acts thereunder. In *New South Wales v. The Commonwealth*⁵⁵, the High Court held that Commonwealth Acts passed in 1908 which purported to appropriate certain sums for the purposes of the Harbour and Coastal Defence (Naval) Account and the Invalid and Old-Age Pensions Fund were appropriation Acts and that the moneys they appropriated constituted expenditure for the purpose of determining whether there was any surplus Commonwealth revenue payable under the Constitution to the States. The two funds in question had been created under the Audit Act 1901-1906, s.62A of which, as has been mentioned, empowers the Treasurer to establish Trust Accounts for such purposes as he designates and which provides that moneys standing to the credit of a Trust Account "may be expended for the purposes of the account". Whether the two Acts of 1908 considered by the High Court in *New South Wales v. The Commonwealth* themselves authorized expenditure or whether their effect as appropriation Acts depended on the provisions of s.62A of the Audit Act, the judges did not say. However, since the provisions of the two Acts made it possible to ascertain the purposes for which the moneys in question might be spent, the conclusion that they be operated as appropriation Acts must be taken to have depended on what had previously been enacted in the Audit Act.

S.62A of the Audit Act itself confers spending authority, albeit limited authority. The Commonwealth government has been advised that the Treasurer cannot, under the Audit Act, alter the purposes of a Trust Account once it has been established by him⁵⁶, though if it were thought necessary or desirable that moneys standing to the credit of a particular Trust Account be expended for purposes other than those defined by the Treasurer when the Account was established, authority to do so could be supplied by Act of

53. (1908) 7 C.L.R. 179, 190; see also *per* Isaacs J., *id.* 200.

54. (1945) 71 C.L.R. 237, 249.

55. (1908) 7 C.L.R. 179.

56. Opinion of J. Q. Ewens, Acting Solicitor-General, 6 May 1953—Auditor-General's Report, 1952-1953, p.109.

Parliament. S.62A of the Audit Act, the Acting Attorney-General, Andrew Fisher, advised in 1912

does not stand in the way of Parliament exercising control over the expenditure, if it thinks fit to do so. By specifically voting certain items to be paid out of a Trust Account, Parliament does . . . exercise control of such expenditure as regards the items, and the general authority should be read as being subject to the specific votes. In other words, the general authority is superseded as regards items which are specifically voted by the specific authority⁵⁷.

An Act does not appropriate simply because it imposes on the government an obligation to pay money⁵⁸. Nor does an Act appropriate public money if it merely empowers officials to grant allowances, pensions, compensation or other rights to payment. Such legislation deals only with the creation of rights and liabilities and the authority which it confers on officials to make determinations imposing liabilities on the government may in some cases be qualified by a requirement that money for the purpose of meeting liabilities shall have been appropriated by the legislature. One reason for not interpreting this kind of legislation as giving authority to spend is that the amount of money necessary to meet claims against the government is neither specified nor capable of ascertainment. However, that difficulty does not present itself where an Act fixes the salary for a particular office and declares that the amount so fixed is payable to the occupant of the office. Such an Act may be construed as having authorized payment for the purpose mentioned⁵⁹.

A distinction must also be drawn between legislation which appropriates public moneys and legislation which merely lays down rules for determining what amount of money is legally due to the Crown. A statute which creates an obligation to pay money to the Crown, e.g., a taxing statute, but which empowers an official to reduce the amount otherwise payable is a statute enabling a determination to be made about the extent of liability to the Crown. Similarly, when a statute provides that moneys paid to the Crown shall be refundable or provides for rebates of such moneys, it does no more than impose a liability on the Crown or else authorise the creation of such a liability. Parliament must still appropriate funds for the payment of any liabilities created⁶⁰.

Whether the provision, which appears in most of the State Constitution Acts, that the Consolidated Revenue Fund "shall be permanently charged with all the costs, charges and expenses incident to the collection, management and receipt thereof" permanently appropriates the revenue for those purposes is not settled. The question was raised in Victoria in 1865 and again in 1878 and on both occasions legal opinion was unanimous that s.45 of the Constitution Act, 1855 did operate as a permanent appropriation for the purposes therein

57. Auditor-General's Report, 1911-1912, p.218.

58. See *Butler v. Hatfield*, 152 N.W. 2d. 484, 493 (Supreme Court of Minnesota, 1967).

59. See *Reed v. Huston*, 132 P. 109, 110-11 (Supreme Court of Idaho, 1913).

60. *Cobb & Co. Ltd. v. Kropp* [1965] Qd. R. 285 *per* Gibb J.,

mentioned and that as a result it was not necessary that any further appropriation be made in the annual appropriation Act for these costs, charges and expenses⁶¹. The problem was considered again in connexion with the drafting of the Federal Constitution. Clause 2 of chapter IV of the 1891 Bill for a Constitution was substantially the same as the provision appearing in the colonial constitutions, the terms of which have been mentioned above⁶². However, the provision which was eventually approved, the present s.82 of the Constitution, was significantly different. It provided that "The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon". According to Quick and Garran, the word "permanently" was omitted to meet the objection that the section might be interpreted as permanently appropriating the Consolidated Revenue Fund to the extent necessary to meet the costs, charges and expenses of collecting, managing and receiving Commonwealth revenue⁶³, but Dr. Quick apparently was not satisfied that the objection was met in this way for at the Melbourne convention in 1898, he suggested that s.82 be amended to make it clear that the section did not operate as an appropriation. Edmund Barton gave an assurance that the matter would be considered by the drafting committee and Dr. Quick did not press the point⁶⁴, but the reports of the convention debates do not supply any further information about the effect s.82 was assumed to have.

If s.82 does not permanently appropriate revenue for the purposes therein mentioned, it, together with s.81, can only be construed as imposing some limitations on Parliament's power to appropriate. S.81 speaks of the Consolidated Revenue Fund being "appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution". In *Attorney-General for Victoria, ex rel. Dale v. Commonwealth*⁶⁵, Latham C.J. said with reference to s.81 that "there may be difficulty in finding any effective meaning for the words referring to . . . 'charges and liabilities'", though in *New South Wales v. Commonwealth*⁶⁶ Isaacs J. seemed to think that "'the charges and liabilities' once provided for, the Parliament has unrestricted power 'to appropriate for the purposes of the Commonwealth' every penny of the revenue in the Consolidated Revenue Fund". These observations are equivocal. Isaacs J. perhaps meant that the Parliament was at liberty to appropriate the balance of the Consolidated Revenue Fund remaining after extraction of the moneys necessary to meet the charges and liabilities imposed by the Constitution, in which case s.82 would presumably operate as an appropriation, but Latham C.J.'s difficulties can

61. L. C. Journals, 1877-8, pp. 195, 203-7, 211, Appendix A; Parliamentary Papers, 1878, vol. 2, Paper No. 25, pp.61-3; H.C. Papers 1878, C. 2173, pp.32-45, 60, 1878, vol. 2, Paper No. 25, pp.61-3; H.C. Papers, 1878, c.2173, pp.32-45, 60, 97; Todd, *Parliamentary Government in the British Colonies* (1880) 174-5, 504-5.

62. The clause, which was based on s.103 of the British North America Act, 1867, provided that "the Consolidated Revenue Fund shall be permanently charged with the costs, charges and expenses incident to the collection, management and receipt thereof, which costs, charges and expenses shall form the first charge thereon".

63. Quick and Garran, *op. cit.*, 813.

64. Convention Debates, Melbourne, 1898, pp.900-1, 907-8.

65. (1945) 71 C.L.R. 237, 253.

66. (1908) 7 C.L.R. 179, 200.

only have stemmed from uncertainty about the effect of s.82. If it permanently appropriates part of the Consolidated Revenue Fund, the Parliament's power of appropriation operates only with respect to the balance remaining after the charges and liabilities imposed by the Constitution have been subtracted from the Consolidated Revenue Fund. If it does not, then presumably its effect is to qualify the exercise of the appropriation power by requiring the Parliament to appropriate the Consolidated Revenue Fund so as to make provision for the costs, charges and expenses incident to its collection, management and receipt.

Effect of appropriation

The authority Parliament gives by appropriating public moneys is authority to spend and only authority to spend. By authorizing expenditure for certain purposes, Parliament does not thereby impose any obligation on the Crown to spend the money voted for the purposes for which it was appropriated or to do anything towards accomplishing those purposes. Thus if Parliament votes money for the repair of a bridge, the Crown cannot be compelled to spend the money for that purpose nor can it be held liable for injuries caused as a result of the disrepair of the bridge solely on the ground that it failed to spend the money voted to effect repairs⁶⁷. Whether moneys appropriated by Parliament are actually spent for the purposes authorized and how they are spent within the authorized limits is for the executive to decide. Moneys which Parliament has appropriated cannot lawfully be issued or made issuable except in pursuance of the warrant of the Governor-General or the State Governor, as the case may be, directed to the Treasurer⁶⁸. Mandamus will not be granted either to compel the Queen's representative to issue the warrant or to compel the Treasurer to prepare the warrant for signature⁶⁹.

An appropriation Act does not authorize the Crown to enter into binding contracts, nor does it create binding contractual obligations. "A contractual obligation may or may not be added by some statutory provision or by authorized agreement, but it does not arise from the appropriation"⁷⁰. If the Crown enters into a contract to pay money, it cannot discharge its contractual liability unless parliament has appropriated money for the purpose, but the validity of the contract is not affected by the absence of appropriation, and the Crown may be sued on the contract even though it is clear that it has no authority to satisfy a judgment against it⁷¹.

67. *Wakely v. Lackey* (1880) 1 N.S.W.L.R. 274, 284.

68. Audit Act 1901-1969, ss.31-33B (Cth); Constitution Act, 1902, s.44 (N.S.W.); The Constitution Acts 1867 to 1961, s.19 (Q.); Constitution Act, 1934-1966, s.71 (S.A.); Public Finance Act, 1936-1966, s.329 (S.A.); Audit Act 1918, s.15 (Tas); Constitution Act, 1855, s.LVIII (Vic.); Constitution Act, 1889, s.68 (W.A.). In some new Commonwealth constitutions the warrant of the finance Minister is sufficient. See, for example, the Constitution of Bermuda, 1968, s. 95(1).

69. *Ex p. Krefft* (1876) 14 S.C.R. 446; *Reg. v. Colonial Treasurer* (1878) 4 N.Z. Jur. (N.S.) 47; *Awatere Road Board v. Colonial Treasurer* (1887) 5 N.Z.L.R. 372. See also Campbell, "Private Claims on Public Funds" (1969) 3 U. Tas. L.R. 138.

70. *New South Wales v. Commonwealth* (1908) 7 C.L.R. 179, 190 *per* Griffith C.J.

71. *New South Wales v. Bardolph* (1934) 52 C.L.R. 455, 496, 502-3, 574.

If an appropriation Act does not create legal duties, neither does it confer any power to take measures to accomplish the purposes for which money has been voted other than the expenditure of public funds. So if Parliament appropriates money for the provision of family planning services, it does not thereby grant authority for the Crown's provision of that particular service, though, according to Sir Ivor Jennings, "it can hardly be contended that [in such a case] the Crown has no power to establish the service"⁷². The practice of relying on appropriations for authority to provide services has been criticized by the British Parliament's Public Accounts Committee and by the Comptroller and Auditor-General. "There is even some doubt," Jennings commented, "upon its legality, though it has never been challenged in the courts"⁷³. When what is done towards provision of the service cannot legally be done without a distinct legal provision authorizing it to be done, then clearly a mere vote of money for the purpose cannot give the requisite power. Similarly if an action for damages is brought against the Crown or the public authority administering the services for injury resulting from activities associated with provision of the service, the defendant cannot avoid liability by showing that what was done was done pursuant to power conferred by the vote of moneys for the service in question. Again, if Parliament has invested the Crown with certain powers which powers are to be exercised in a certain way, the subsequent appropriation of funds for the purpose of carrying out the powers previously given does not modify the legislation governing the manner in which the power is to be exercised. This means that when the Parliament has prescribed mandatory forms for the making of a certain class of Crown contracts, a subsequent appropriation authorizing payment under those contracts will not cure any defects resulting from non-compliance with the statutory requirements as to form. "The object of Parliament in such a case," Isaacs and Rich JJ. observed in *Commonwealth v. Colonial Ammunition Co.*⁷⁴

is financial, not regulative. In doing that, it is not concerned with general legislation, and is acting wholly *alio intuito* (see May's *Parliamentary Practice*, 10th ed., p. 562). It thereby neither betters nor worsens transactions in which the Executive engages within its constitutional domain, except so far as the declared willingness of Parliament that public moneys should be applied and that specified funds should be appropriated for such a purpose is a necessary legal condition of the transaction. It does not annihilate all other legal conditions.

Similarly, if Parliament has enacted that a sum of money shall be payable for a certain purpose if certain conditions are satisfied, a subsequent appropriation Act authorizing payments for that purpose but omitting reference to the conditions will not be construed as dispensing with the statutory conditions⁷⁵. This is not to say that an appropriation Act can never have the effect of

72. *Parliament* (2nd ed., Cambridge, reprinted 1961), 286.

73. *Id.* 287. Indian courts have held that an appropriation Act cannot be construed as sanctioning the activity for which money is appropriated. See *Moti Lal v. Uttar Pradesh Government* (1951) A.I.R. All. 257, 312, 331; *Ram Jawaya v. State of Punjab* (1955) A.I.R. S.C. 549, 557.

74. (1924) 34 C.L.R. 198, 224-5.

75. See *Auckland Harbour Board v. The King* [1924] A.C. 318.

repealing or amending prior statutory provisions. In the *Auckland Harbour Board* case the New Zealand Supreme Court drew a distinction between an appropriation in general terms and one in specific terms. An appropriation in general terms for railway purposes was held not to dispense with a prior statutory condition on fulfilment of which the Board became entitled to payment. Had the appropriation Act specifically mentioned the sum payable to the Board, then, according to Chapman J., Parliament might be taken to have waived the condition⁷⁶. Whether an appropriation Act could repeal existing statutory provisions was considered in *Fisher v. The Queen*⁷⁷. In this case, the salary of a public officer had been fixed by statute, but had later been reduced by the amount of rent charged for official quarters. The salary so reduced was itemized in several appropriation Acts. Commenting on the effect of these Acts, Madden C.J. said:

It would be very improbable that the Legislature meant, by providing 468 *l.* only instead of 540 *l.*, the petitioner's fixed salary, to repeal the Public Service Act, which gave it to him, and that retrospectively. It contains no negative or prohibitory words on the subject. If it did, although, while involving the unconstitutional expedient of tacking a repeal of the Public Service Act *pro tanto* to the Appropriation Act, it might, being once passed, have such an effect. But it says nothing whatever as to the Public Service Act or as to petitioner's contractual rights under it—it merely provides 468 *l.* to discharge an unquestioned obligation of 540 *l.*⁷⁸.

It is interesting to note in this connexion that in *Hollinshead v. Hazleton*⁷⁹, Lord Atkinson held that the Crown was bound by statute to pay salaries to members of parliament, although the only statute authorizing payment was an appropriation Act passed after a resolution by the House of Commons that provision be made for the payment of salaries. Lord Atkinson did not say whether the Crown's statutory obligation depended on the appropriation Act or on the fact that following the passage of the Act, the Treasury had been directed by royal order to pay the sum appropriated for parliamentary salaries.

If the Governor or Governor-General has issued his warrant for expenditure, there may be circumstances in which payment of moneys appropriated by Parliament can be compelled by mandamus. However, if an occasion arose on which mandamus did lie, the writ could hardly lie on the ground that a duty to pay had been imposed by the appropriation Act for, as already stated, such an Act is enabling only. From time to time, Parliaments have appropriated specific sums of money for the purpose of payment to named individuals. In 1866, the New South Wales Parliament voted £1,000 to be paid to one Kelly as compensation for wrongful conviction⁸⁰. The assignee of Kelly's insolvent estate sought a writ of mandamus to compel the Colonial Treasurer to pay,

76. [1919] N.Z.L.R. 419, 434. See also *New South Wales v. Bardolph* (1934) 52 C.L.R. 455, 470 *per* Evatt J.

77. (1901) 26 V.L.R. 781; *affd.* *R. v. Fisher* [1903] A.C. 158.

78. (1901) 26 V.L.R. 781, 793.

79. [1916] 1 A.C. 428, 449.

80. 29 Vict. No. 24.

but the application was refused on the ground that no warrant for the issue of the money had been signed. Stephen C.J. expressly left open the question whether the result would have been different if the warrant had issued⁸¹. The matter was more fully canvassed in *Grenville-Murray v. Earl of Clarendon*⁸². In that case application was made for a declaration that the Secretary of State held moneys voted for the Foreign Office in trust for a former diplomat who had incurred expenses in the carrying out of his official functions. The suit failed but in his reasons for judgment, Lord Romilly M.R. drew a distinction between voting a lump sum for a department of State and voting a sum for a named person.

The case that was cited [he said] was to this effect: that if Parliament votes a sum of £1,000 to John Smith, and the Treasury devote in their books the payment of that sum to other purposes, then a mandamus will lie to the Treasury to order to pay that £1,000 to John Smith. But there is nothing of the sort here. Parliament has merely voted certain sums to Her Majesty, and of these sums £600,000 are to be applied to the Foreign Office to apply in such a manner as is most subservient to Her Majesty's service, and to the due support of the Foreign Office, and there is nothing whatever to connect the plaintiff with a penny of this money in any aspect⁸³.

Martin C.J. drew the same distinction in *Ex p. Kreff*⁸⁴. He had "no doubt" that "if an Act of Parliament appropriates certain money to A.B., and votes it to A.B. by name, and that money comes into the hands of a public officer in pursuance of the Act of Parliament [i.e., the appropriation Act], if the public officer does not obey the direction of the statute a mandamus might lie"⁸⁵.

What is implied in Martin C.J.'s remarks is that an appropriation Act may create a legal obligation to pay, albeit the obligation is not perfected until the Governor issues his warrant for expenditure and the money comes into the hands of a public officer. The better view, it is submitted, is that any liability that arises, arises not under the appropriation Act but under the exercise of powers vested in the Crown by common law or some other statute, that the appropriation Act merely permits that liability to be discharged and that mandamus lies against a public officer to enforce payment, if it lies at all, because a duty to pay has been imposed on that officer by virtue of a lawful exercise of powers vested in the Crown⁸⁶.

Controls over expenditure

The position of the Auditor-General vis-à-vis the Executive branch is similar to that of judges of the superior courts. He is appointed by the Queen's representative, holds office during good behaviour, receives a salary for which there is a special appropriation, and he cannot be removed from office except

81. *Ex p. Mackenzie* (1867) 6 S.C.R. 306.

82. (1869) L.R. 9 Eq. 11.

83. *Id.* 20.

84. (1876) 14 S.C.R. 446.

85. *Id.* 452-3.

86. See my article "Private Claims on Public Funds" (1969) 3 U. Tas L.R. 138.

upon address from the Houses of Parliament. He is not subject to ministerial control or direction, or to the ordinary rules governing the public service, though like public servants he is disqualified from holding parliamentary office⁸⁷. His principal function is to police the administration of parliamentary appropriations and to assist parliament in maintaining ultimate control of public spending.

In practice the courts have little to do with the enforcement of the law governing public expenditure. This responsibility devolves principally on Treasuries, Auditors-General and ultimately on Parliaments. The legal machinery for control is laid down in the Audit Acts and regulations made thereunder. Under this legislation government agencies are prevented from obtaining access to public funds without Treasury approval, and the Treasury's access to these funds is in turn controlled by the requirement that the Auditor-General should have first been satisfied that the funds sought are funds which Parliament has appropriated. Expenditure must be accounted for and the accounts audited by the Auditor-General who is then obliged to report to Parliament.

As has been mentioned earlier, moneys of the Crown cannot be issued or made issuable except in pursuance of warrants under the hand of the Queen's representative directed to the Treasurer. This rule gives expression to the principle that the Crown should decide how to exercise the spending authority which Parliament has conferred upon it. The warrants to be signed by the Queen's representative are prepared in the Treasury following receipt of requisitions from other government agencies and they set out the funds required under the same classifications that appear in the relevant appropriation Acts. Before a draft warrant is transmitted for signature it must be sent to the Auditor-General for his signature or certification. It is his duty to ascertain whether moneys are legally available for the purposes set out, that is to say whether Parliament has authorized the expenditure which is contemplated and to the extent claimed⁸⁸. However, if at a later stage the validity of the expenditure is challenged, his signature or certification of the draft warrant is not conclusive of the question whether Parliament did authorize that expenditure⁸⁹.

Controls are also imposed on the disbursement of public moneys at the departmental level. S.34 of the Federal Audit Act, for example, prohibits payment of accounts unless payment has been authorized by an authorizing officer and the account has been certified as correct by a certifying officer. The authorizing officer cannot authorize payment unless the account has been certified and he has ascertained that payment will not exceed appropriation. The duty of the certifying officer is to ascertain whether the expenditure

87. See Audit Act 1901-1969, ss.3-8 (Cth.); Audit Act, 1902, ss.6-10 (N.S.W.); The Audit Acts 1874 to 1960, ss.26-28 and the Audit Acts Amendment Act of 1926 (Q.); Audit Act 1921-1957, ss.5-8 (S.A.); Audit Act 1918, ss.4-8 (Tas); Audit Act 1958, ss.4-5 (Vic.); Audit Act, 1904, ss.5-9 (W.A.).

88. On the procedure for issue of warrants see Audit Act 1901-1969, s.32 (Cth); Audit Act, 1902, ss.38-39 (N.S.W.); The Audit Acts 1874 to 1960, ss.10, 11 (Q.); Public Finance Act 1936-1966, s.32g (S.A.); Audit Act 1918, s.15, Second Schedule, regs. 21, 22 (Tas.). The warrant confers spending authority for a limited period of time, in most cases one month.

89. *Auckland Harbour Board v. The King* [1924] A.C. 318.

has been approved, is in accordance with law and charged against the proper head of expenditure and also whether the account is correct⁹⁰.

Under the Audit Acts the Auditors-General are required to audit the accounts of accounting officers, of departments and of the Treasurer. They are also directed to examine the Treasurer's Statement of Receipts and Expenditure and report on it to Parliament. The auditorial functions are of three main types: the accountancy audit, which involves investigation of arithmetical details and receipts; the appropriation audit, which is concerned with whether payments have been charged to the proper head of expenditure and have been charged to the proper head of expenditure and have been authorized by Parliament; and the administrative audit, which is concerned with ascertaining whether payments were authorized at the administrative level. In performing their auditorial functions the Auditors-General exercise wide investigatory powers and may take evidence on oath or affirmation. Public officers who refuse or fail to answer questions or produce documents are liable to incur criminal sanctions⁹¹. Advice on legal questions may be requested from the Crown law officers⁹².

The Audit Acts empower the Auditors-General to surcharge individual officers who misapply funds or who spend them without authority or contrary to law⁹³ and the sum surcharged is then recoverable as a debt⁹⁴. However, this remedy is not appropriate if the initial decision to spend public moneys without Parliament's authority has been made by a Minister of the Crown or senior departmental official. In those cases, the most that is ever likely to happen is that the Auditor-General will report the matter to Parliament. Unless the Parliament happens to have an active public accounts committee as does the Federal Parliament⁹⁵, the Auditor-General's reports do not, as a

90. See extracts from Commonwealth Public Service Board, *Financial Administration* (Training Handbook No. 6) reprinted in W. R. C. Jay and R. L. Mathews, *Government Accounting in Australia* (1968), 78-83. See also Audit Act, 1902, s.40 (N.S.W.); The Audit Acts 1874 to 1960, s.15 (Q.); Public Finance Act, 1936-1966, s.32h (S.A.); Audit Act 1918, Second Schedule (Tas.); Audit Act, 1904, s.33 (W.A.).
91. Audit Act 1901-1969, ss.11, 13, 14, 14B, 67 (Cth.); Audit Act, 1902, ss.12, 13, 14 (N.S.W.). The Audit Acts of 1874 to 1960, ss.35, 41, 42, 43 (Q.); Audit Act 1921-1957, ss.11, 13, 14, 15, 44, 45 (S.A.); Audit Act 1918, ss.10, 12, 13, 37 (Tas.); Audit Act 1958, ss.44, 45 (Vic.); Audit Act, 1904, ss.12, 14, 15, 67 (W.A.).
92. Audit Act 1901-1969, s.15 (Cth.); Audit Act, 1902, s.15 (N.S.W.); Audit Act, 1921-1957, s.16 (S.A.); Audit Act 1918, s.14 (Tas.); Audit Act, 1904, s.16 (W.A.).
93. Audit Act 1901-1969, s.42 (Cth.); Audit Act 1902, s.47 (N.S.W.); The Audit Acts 1874 to 1960, ss.34, 35 (Q.); Audit Act, 1921-1957, s.27 (S.A.); Audit Act 1918, s.22 (Tas.); Audit Act 1958, s. 36 (Vic.); Audit Act, 1904, s.41 (W.A.). In Tasmania the Treasurer is surcharged, but having been surcharged he is required to take proceedings to recover the surcharge from the officer at fault. According to one view, a surcharge must be imposed if liability is established. See Commonwealth Auditor-General's Report, 1950-1951, p.172 (opinion of Solicitor-General). But the Auditor-General may revoke a surcharge.
94. Audit Act 1961-1969, s.43 (Cth.); Audit Act, 1902, s.48 (N.S.W.); The Audit Acts, 1874 to 1960, s.39 (Q.); Audit Act, 1921-1957, s.28 (S.A.); Audit Act 1918, s.23 (Tas.); Audit Act 1958, ss.37, 37A (Vic.); Audit Act, 1904, s.42 (W.A.). Under s.73A of the Victorian Audit Act surcharges may be deducted from an officer's wages or salary. There is a statutory right of appeal against surcharges to the Governor-General or Governor as the case may be.
95. There are public accounts committees in New South Wales, Tasmania and Victoria too.

rule, receive much attention from parliamentarians nor are they often the subject of debate⁹⁶. This is not to say that the audit of public expenditures or the activities of the public accounts committees have no effect. The real situation now is that Auditors-General and the public accounts committees exercise by delegation as it were the censorial function which constitutionally resides in Parliament. Although they report to Parliament, the expectation is that Treasuries will take action to deal with matters raised in the reports without prompting from Parliament⁹⁷.

The expenditure of moneys of the Crown without the authority of parliament is illegal and presumably money so spent may be recovered at the suit of the Crown. The authorizations contained in annual appropriation Acts are usually expressed in such broad terms and the discretion thus conferred so wide that in practice it may be difficult to establish that expenditure was not in fact authorized. However where as in the *Auckland Harbour Board* case⁹⁸ parliament authorizes expenditure only if certain conditions are fulfilled, proof of the illegality of payments should not be difficult. In that case the New Zealand Parliament authorized the Minister for Railways to pay the Harbour Board £7,500 out of the Public Works Fund when the Board granted a lease to a certain company. Although the Board did not grant the lease, £7,500 was paid to it out of the vote in the annual appropriation Act for public works. Notwithstanding the generality of the vote in the annual appropriation Act, it was held that the money paid to the Board had been paid illegally and might be set off against the sum owed to the Board by the Crown for compulsory acquisition of property.

In the course of its opinion the Privy Council hinted at a possible limitation on the Crown's right of recovery. Money illegally paid, it was stated, may be recovered "if it can, as here, be traced"⁹⁹. The reference to tracing suggests that the Crown may be limited to an equitable remedy, but why it should be so limited or why ability to trace the moneys expended should be relevant, is not clear. Where it can be shown that moneys of the Crown were paid to a person and that parliament had not authorized the payment, the obvious remedy seems to be a common law action for money had and received to the Crown's use¹⁰⁰.

Expenditure in the absence of or in excess of parliamentary appropriation should not be confused with expenditure which is illegal or unauthorized for reasons other than the absence of parliamentary appropriation. If by mistake, whether of law or fact, a public servant is paid more than the sum to which he is entitled under statute, the overpayment is unauthorized in the sense that it is not permitted by the legislation defining public servants' rights to payment. Whether or not parliament has appropriated moneys for the purpose of paying public servants is irrelevant to the question of whether the money

96. Bland, "Control of Government Expenditure" in Jay and Mathews (eds.), *Government Accounting in Australia*, 1968, 6.

97. See Reid, "The Parliamentary Joint-Committee of Public Accounts" in Jay and Mathews (eds.) *op. cit.*, 24-35.

98. *Auckland Harbour Board v. The King* [1924] A.C. 318.

99. *Id.* 326.

100. See *The Commonwealth v. Thompson* (1962) 1 C.C.R. 37, 54.

paid was authorized to be paid and whether it is recoverable¹⁰¹, and the appropriation Act could not itself be taken to have supplied authority for overpayment¹⁰². Similarly, in the absence of statutory provisions to the contrary, the Crown's legal liability to pay money is not affected by whether or not parliament has authorized the expenditure of sums sufficient to discharge the liability¹⁰³.

Expenditure without parliament's authority probably can be restrained by injunction at the suit of the Attorney-General, though not, it seems, at the suit of a taxpayer¹⁰⁴. Whether the Auditor-General's statutory functions in relation to the expenditure of public moneys give him sufficient standing to sue for a declaration or injunctive relief is still undecided.

101. The Commonwealth has successfully recovered money overpaid to a public servant as a result of a mistake in calculation, held to be a mistake of fact. See *The Commonwealth v. Thompson* (1962) 1 C.C.R. 37. Whether the general rule precluding recovery of money paid under mistake of law applies to claims by the Crown for recovery of money paid in excess of statutory authority is still undecided in this country, though Judge Stafford's remarks in *Thompson's* case suggest that the general rule does not apply to such claims. In the United States it is accepted that the rule does not apply to payments of public money. See *United States v. Burchardt*, 125 U.S. 176, 180 (1888); *Wisconsin Central R.R. Co. v. United States*, 164 U.S. 190, 212 (1896); *Heidt v. United States*, 56 F.2d. 559, cert. denied 287 U.S. 601 (1932); *United States v. Wurts*, 303 U.S. 414 (1938); 91 *Corpus Juris Secundum*, title "United States", para. 134.

102. *Commonwealth v. Colonial Ammunition Co.* (1924) 34 C.L.R. 198, 224-5.

103. *New South Wales v. Bardolph* (1934) 52 C.L.R. 455.

104. *Dalrymple v. Colonial Treasurer* [1910] S.A.L.R. (Transvaal Div.) 372; *Logan Downs Pty. Ltd. v. F.C.T.* (1965) 112 C.L.R. 177, 188. Remedies in relation to unauthorized expenditure are considered in Campbell, "The Federal Spending Power" (1968) 8 West. Aust. L.R. 443.