PRIVATE CLAIMS ON PUBLIC FUNDS

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This article is concerned with the ways and means by which citizens are able to obtain satisfaction of monetary claims against the government—the federal government or the government of a State—and with the law governing payments out of public funds for the purpose of satisfying such claims. Claims against the government the satisfaction of which requires expenditure of public funds may arise in several ways. They may arise out of contracts with the Crown, out of injuries inflicted by servants of the Crown and for which the Crown is vicariously liable to pay damages, out of injuries for which the Crown is directly responsible and out of transactions rendering the Crown liable in quasi-contract. They may also arise out of dealings which render the Crown liable as trustee, out of the exercise of statutory powers rendering the Crown liable to pay compensation for property compulsorily acquired, and out of the exercise by public officers of statutory powers to confer legal rights to receive payments. The circumstances in which the Crown and public officers become legally liable to pay money are not immediately relevant to the subject of this enquiry. The question to be considered is rather, given the existence of legal liability, what steps may the claimant take to obtain payment and what legal rules control the making of payment by or on behalf of the Crown?

The Appropriation Rule

It is now a well established principle of common law that expenditure of any moneys of the Crown is illegal unless the expenditure has been authorized by Parliament. When Parliament authorizes such expenditure, it is said to appropriate moneys for the purpose. If moneys of the Crown are spent without Parliament's authority and can be traced, they are recoverable at the suit of the Crown.[1]

The appropriation rule described above has been written into the Australian federal Constitution, s. 83 of which provides that: 'No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.' Sec. 83 has no exact counterpart in the Constitution Acts of the Australian States nor in other State legislation, but in some of the Constitution Acts there are provisions which clearly imply that State revenues cannot be spent unless Parliament has authorized their expenditure.[2]

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

2 N.S.W.: Constitution Act, 1902, ss. 39, 45; Qld.: The Constitution Acts, 1867 to 1961, ss. 34, 39; Vic.: Constitution Statute, 1855, s. XLIV, LV; W.A.: Constitution Act, 1889, ss. 64, 72.

Appropriation is necessary even though the money spent or to be spent is required to satisfy the Crown's legal liabilities. Parliamentary authority for expenditure is needed notwithstanding that the Crown's liability is a liability to pay moneys held in trust or to pay money had and received to another's benefit. However when the Crown enters into a contract under which it agrees to pay money, the validity of the contract is in no way affected by the fact that when the agreement was made, Parliament had not voted moneys to enable the commitment to be met. In other words, the absence of appropriation does not affect the Crown's contractual obligation, but only the enforceability of a judgment debt.[3]

When Parliament appropriates money for a particular purpose, it does not thereby impose a duty on the Crown to spend the money appropriated. In other words, the effect of the appropriation is enabling. If the Crown has a duty to pay, that duty arises not from the appropriation Act but from some other source. The spending authority which an appropriation confers may leave the Crown with considerable discretion in the choice of objects for which money is spent. A vote for 'Commonwealth shipbuilding' or for 'construction of ships' would, for example, give authority for expenditure of money in satisfaction of obligations incurred under contracts for ship construction.[4] Parliaments may, and customarily do, include within the annual appropriation Act for the ordinary annual services of government a vote by way of Advance to the Treasurer. Such a vote is not a specific cash allocation for particular items but an authority to spend up to a specified maximum. The Advance to the Treasurer is intended to be used for expenditure of an unforeseen nature, for expenditure incurred before the passing of a special appropriation Act or before the presentation of additional estimates. The exercise of the Treasurer's discretion in deciding how it shall be used is not judicially reviewable, though it can be reviewed by the Auditor-General and by parliamentary committees on public accounts.

In this connexion it is worth mentioning the existence of statutory provisions authorizing the executive to alter the sums voted for particular items in the annual appropriation Act by directing that the surplus arising on one item be applied in aid of any other item in the same subdivision which happens to be deficient.[5] These provisions enabling transfer between votes operate as permanent appropriations.

Warrant for Expenditure

Parliamentary appropriation is only one prerequisite for expenditure of moneys of the Crown. Parliaments may prescribe other prerequisites non-compliance with which renders any resulting expenditure illegal.

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3 *New South Wales* v. *Bardolph* (1935) 52 C.L.R. 455.
4 *Commonwealth* v. *Kidman* (1923) 23 S.R. (N.S.W.) 590.
5 Cwlth: Audit Act 1901-1966, s. 37; N.S.W.: Audit Act, 1902, s. 34; Qld.: The Audit Acts 1874 to 1960, ss. 7(7), 19; Vic.: Audit Act 1958, s. 25; W.A.: Audit Act, 1904, s. 35.

One such prerequisite is that no moneys of the Crown be issued or made issuable except in pursuance of a warrant under the hand of the Governor or Governor-General, as the case may be, directed to the Treasurer.[6] The purpose of this requirement is to ensure that the spending discretion conferred by Parliament is exercised through responsible Ministers of the Crown and with the Treasurer's approval.

The preparation of warrants for the Governor's or Governor-General's signature is the Treasurer's responsibility. The procedure to be followed in the preparation of the warrants is laid down in legislation on the audit of the public accounts.[7] In drafting a warrant, the Treasurer is obliged to adhere to the form of the estimates on which appropriation Acts are based and before a draft warrant is sent to the Governor or Governor-General, it must be sent to the Auditor-General for his counter-signature or certification. The Auditor-General's responsibility is to make sure that the executive does not exceed its spending authority. He is directed to ascertain whether funds are legally available for the purposes set out in the warrant and to withhold his counter-signature or certificate if they are not.[8] However the fact that he has counter-signed the draft warrant or given his certificate is not conclusive evidence that the funds are legally available.[9] The spending authority conferred by the Governor's or Governor-General's warrant can operate only for a limited period of time, usually one month.[10]

The writ of mandamus does not lie to compel the Governor or the Governor-General to sign a warrant for expenditure, nor does it lie to compel the Treasurer to prepare a warrant for signature.[11] Mandamus does not lie in these circumstances, (a) because it can never issue against the Crown or its servants or agents when acting as such servants or agents, and (b) because there is no public duty to issue a warrant for expenditure. An appropriation Act permits the expenditure of moneys by the Crown but does not subject the Crown to any legal obligation to spend on any of the approved objects. Since no moneys of the Crown can be lawfully issued without a warrant for expenditure,

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6 Cwlth: Audit Act 1901-1966, ss. 31, 32 N.S.W.: Constitution Act, 1902, s. 44; Qld.: The Constitution Acts 1867 to 1961, s. 19; S.A.: Constitution Act, 1934-1961, s. 71 and Public Finance Act, 1936-1966, ss. 32g, 32h; Tas.: Audit Act 1918, s. 15; Vic.: Constitution Statute, 1855, s. LVIII; W.A.: Constitution Act, 1889, s. 68.

7 Cwlth: Audit Act 1901-1966, s. 32 N.S.W.: Audit Act, 1902, ss. 38, 39; Qld.: The Audit Acts 1874-1960, ss. 10-11; S.A.: Public Finance Act, 1936-1966, s. 32g; Tas.: Audit Act, 1918, s. 15, Second Sched., regs. 21-22; Vic.: Audit Act 1958, s. 21.

8 If the Commonwealth Auditor-General is not satisfied that moneys are legally available, he must send a statement to that effect to the Treasurer.

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

10 Three months in New South Wales and Tasmania.

11 *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.

mandamus cannot lie against a public officer to compel him to pay moneys of the Crown if payment has not been sanctioned by warrant.[12]

Legislative Control of Departmental Spending

After the Governor or Governor-General has signed a warrant authorizing expenditure, it is customary for the Treasurer to issue what are called warrant authorities authorizing departmental spending. The Audit Acts and regulations made thereunder regulate the procedure by which funds shall be disbursed in some detail. Sec. 34 of the Commonwealth Audit Act, for example, prohibits the payment of accounts unless payment is authorized by an authorizing officer appointed by the Treasurer and the account is certified as correct by a certifying officer, also appointed by the Treasurer. It is the duty of the certifying officer to ascertain whether the expenditure has been approved, whether the account is correct, whether the proposed expenditure is in accordance with law and is charged against the proper head of expenditure. The authorizing officer has no power to authorize payment unless the account has been certified and until he has ascertained that payment will not exceed appropriation. The Treasury Regulations made under the Act prohibit him from authorizing expenditure not covered by a Treasury warrant authority. The provisions of s. 33 of the Western Australian Audit Act are similar. Payment of accounts is prohibited unless payment is duly authorized. It is declared that:

> every account shall be considered duly authorized if it is in accordance with any existing law or regulation or has been directly sanctioned by the Treasurer, and, if chargeable on the Consolidated Revenue Fund, is covered by any Appropriation Act or any Act authorising the issue and application of moneys out of such fund in force at the time of payment.

Some of the other State Acts prohibit the payment of accounts unless payment has been authorized by the responsible Minister or his delegate.[13]

Whether or not the legislative provisions governing disbursement of public moneys by public officers are mandatory or directory is not altogether clear. If they are mandatory, any expenditure resulting from their breach will be illegal and recoverable at the suit of the Crown. Some of the Audit Acts distinctly prohibit the drawing of money standing to the credit of the public account,[14] except in the manner

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

13 See N.S.W.: Audit Act, 1902, s. 41; Qld.: The Audit Acts 1874 to 1960, s. 15; S.A.: Public Finance Act, 1936-1966,s. 32h; Tas.: Audit Act 1918, Second Sched.; Vic.: Audit Act 1958, s. 23.

14 The public account is defined to include all public moneys whatever. Cwlth: Audit Act 1901-1966, ss. 2, 21(2); N.S.W.: Audit Act, 1902, s. 21; Qld.: The Audit Acts 1874 to 1960, ss. 8. 9; S.A.: Public Finance Act, 1936-1966, s. 32f; Vic.: Audit Act 1958, s. 21(1); W.A.: Audit Act, 1904, s. 22(2).

laid down in the Act.[15] The existence of such provisions may be taken to signify that it was Parliament's intention that the prescribed procedures for disbursement of public moneys should be mandatory but, having regard to the fact that persons who receive payment do not always have means of ascertaining whether the legislative requirements have been fulfilled, a court could take the view that an intention that the requirements be mandatory should have been more clearly expressed.

Where the Parliament's intention is not manifest, the principle on which the courts have acted is this: if relevant statutory provisions

> relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature,

the provisions are directory only.[16] When Parliament has prescribed certain things to be done by an accounting officer before payment is made, it is highly unlikely that failure to do those things would in itself render any payment made in consequence illegal in the sense that the Crown might recover what was disbursed. Certainly, if the default consisted of failure to ascertain whether payment was authorized by parliamentary appropriation, no court is likely to treat the breach of statutory duty sufficient to justify recovery by the Crown of the money paid for, if payment has in fact been made in the absence of parliamentary appropriation, the money is recoverable anyway. If the default be one for which the officer is liable to surcharge or to disciplinary proceedings, the very existence of these alternative remedies affords further grounds for treating the legislative provisions which have been infringed as directory only.

In considering the legal effect of the legislative provisions on the disbursement of public moneys, it is essential to distinguish between those provisions which regulate the conduct of public officers acting within the scope of their authority and those which define and delimit the scope of authority to pay or authorize payment. The distinction is an important one because if payment is made by someone who has no authority to pay or is made pursuant to the direction or instruction of someone who had no power to authorize payment, the expenditure is unauthorized and recoverable at the suit of the Crown. It is the moneys of the Crown that are spent and the Crown, acting through its responsible Ministers, that determines who shall have authority to decide when and to whom money shall be paid. Even when spending power, or the power to decide how much shall be paid and to whom,

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15 Cwlth: Audit Act 1901-1966, s. 31; N.S.W.: Audit Act, 1902, s. 37; Qld.: The Audit Acts 1874 to 1960, s. 7; W.A.: Audit Act, 1904, ss. 30, 31.

16 *Montreal Street Railway Co.* v. *Normandin* [1917] A.C. 170, 175. See also *Caldow* v. *Pixell* (1877) 2 C.P.D. 562; *Clayton* v. *Heffron* (1960) 105 C.L.R. 214, 247.

is directly conferred on a public officer, money paid as a result of excesses of statutory power is money which the Crown can recover as money had and received.[17] In the absence of legislative provisions defining authority to make payments out of public funds or to authorize the making of such payments, the scope of a public officer's authority to spend or authorize spending falls to be determined by reference to the instruments whereby the responsible Ministers of the Crown delegate authority. Notwithstanding that these instruments may not be public documents, the Crown is not bound by acts in excess of its agents' actual authority or in excess of the authority ostensibly conferred on him by a responsible Minister.[18]

Payment of Judgment Debts

As has been stated, the judgment debts of the Crown cannot legally be paid unless Parliament has appropriated funds for the purpose. Whether it has done so is a question of statutory interpretation. No particular form of words is necessary for an Act to operate as an appropriation of moneys of the Crown, so an Act may have the effect of authorizing expenditure even though it does not expressly appropriate.[19] The fact that the expenditure which an Act authorizes is not limited as to amount does not it seems affect its operation as a parliamentary appropriation.[20] In some jurisdictions legislation has been passed permanently appropriating money for the satisfaction of the Crown's judgment debts, but in no case is any limit placed on the amount of money which may be paid for that purpose.

In some of the Australian States the legislation authorizing payment of the judgment debts of the Crown expressly appropriates public moneys for that purpose. Sec. 77 of the South Australian Supreme Court Act, 1935-1936, for example, empowers the Governor to pay any judgment debt out of the general revenue and declares that the Act is a sufficient authority and appropriation of revenue for payment. Sec. 26 of the Victorian Crown Procedure Act 1958 is virtually identical.[21] These provisions, it should be noted, do not impose a duty on the Governor to sign a warrant for the issue of money to pay a judgment debt. Hence if there are insufficient funds standing to the credit of the public account, the Treasurer may decide not to prepare

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17 *Commonwealth* v. *Thomson* (1962) 1 C.C.R. (Vic.) 37. See also *Heidt* v. *United States*, 56 F. 2d 559 (5th Circ. Court of Appeals, 1932).

18 See *Attorney-General (Ceylon)* v. *Silva* [1953] A.C. 461, 479, 481; *Howell* v. *Falmouth Boat Construction Co. Ltd.* [1951] A.C. 837, 844-845.

19 Opinion of Alfred Deakin, Commonwealth Attorney-General—Auditor-General's Report 1901-1902, Appendix C, pp. 155-156; *Henderson* v. *Board of Commissioners of State Soldiers and Sailors Monument*, 28 N.E. 127, 130 (1891).

20 *Fisher* v. *The Queen* (1901) 26 V.L.R. 781, 796-800 *per* Madden C.J. The Chief Justice rejected the contrary opinion expressed by Stawell C.J. in *Alcock* v. *Fergie* (1867) 4 W.W. & A'B (L.) 285, 315, 319.

21 The Victorian Crown Remedies and Liabilities 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.

a warrant for the Governor's signature. As has been mentioned, mandamus cannot be granted either to compel the Treasurer to prepare a warrant or to compel the Governor to sign a warrant.

Sec. 10 of the Western Australian Crown Suits Act, 1947, does not expressly appropriate but it seems to imply that authority is given for payment of judgment debts and that no further authority is required. It provides that after receipt of the certificate of the Registrar of the Supreme Court certifying that judgment was given against the Crown, 'the Governor shall cause to be paid out of the Consolidated Revenue Fund the amount of judgment and costs to the person entitled to recover the same.' Whereas the South Australian and Victorian legislation uses words of permission, the Western Australian legislation states that the Governor 'shall cause to be paid.' If, as has been suggested, s. 10 of the Act appropriates, the mandatory terms of the section may mean that the Governor is under a statutory duty to sign a warrant for the issue of money from the Treasury, and that performance of the duty may be enforceable by mandamus.

The corresponding provision in the Tasmanian Supreme Court Civil Procedure Act 1932, s. 68, imposes a duty on the Treasurer to satisfy judgment debts of the Crown, but this duty arises only when Parliament has appropriated the moneys necessary to satisfy the debt. Sec. 8 of the Queensland Claims against the Government Act of 1866 and s. 11 of the New South Wales Claims against the Government and Crown Suits Act, 1912, oblige the Treasurer to pay the judgment debts of the Crown 'out of any moneys in his hands then legally applicable thereto and forming part of or belonging to the Consolidated Revenue or voted by Parliament for that purpose.' Moneys are 'legally applicable' to the payment of judgment debts of the Crown when they have been appropriated for a purpose that embraces payment of such debts.[22] The Queensland and New South Wales legislation further provides that if judgment debts are not paid, execution may be levied against certain Crown property. Execution of process against the Crown is not permitted at common law and is expressly forbidden in Tasmania, Western Australia and Victoria, and by the federal Judiciary Act.

Sec. 66 of the Judiciary Act provides that on receipt of a certificate of judgment against the Commonwealth or a State, the Commonwealth or State Treasurer, as the case may be, shall satisfy judgment 'out of moneys legally available,' meaning moneys appropriated by Parliament.[23] So far as it relates to States, s. 66 only operates when the judgment was given in the exercise of federal jurisdiction. It is doubtful whether the federal Parliament has power to appropriate moneys of the Crown in right of the States to satisfy judgments against the States even when judgment has been given by a court exercising federal

22 *New South Wales* v. *Bardolph* (1934) 52 C.L.R. 455.
23 *Ibid.*

jurisdiction. The federal Parliament may, it is true, make laws with respect to any matter incidental to the execution of the judicial power of the Commonwealth, but its appropriation power may be exercised only in relation to the moneys of the Crown in right of the Commonwealth.[24] The power of the federal Parliament to enact legislation for the enforcement of federal-State financial agreements rests upon the express provisions of the Constitution. Sub-sec. 5 of s. 105A of the Constitution provides with respect to federal-State agreements regarding the public debts of the States that every such agreement shall be binding on the Commonwealth and party States 'notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.' The effect of this provision is to place the operation and efficacy of agreements falling within s. 105A 'beyond the control of any law of any of the seven Parliaments, and to prevent any constitutional principle or provision operating to defeat or diminish or condition the obligatory force of the Agreement.'[25] In particular, the provision removes federal-State agreements of the required description from the operation of the State laws requiring parliamentary appropriation of funds to satisfy State liabilities and enables the federal Parliament in exercise of its express incidental power and of s. 105A(3)[26] to make laws for the enforcement of judgment against a State which has defaulted in performance of its obligations under such an agreement.[27]

Authority for payment of judgment debts of the Crown is often found within annual appropriation Acts. Such debts may be satisfied out of the moneys voted annually as an Advance to the Treasurer. As stated earlier, such a vote authorizes the Treasurer to spend money not exceeding a certain amount on any purposes he designates. Authority to spend money in satisfaction of the Crown's judgment debts may also be found in specific items in the annual appropriation Act. If, for example, there is an appropriation covering expenditure pursuant to a certain class of Crown contracts and judgment is awarded against the Crown in an action to recover money owed by it under one of such contracts, the vote in the annual appropriation Act appropriating money for the purpose of expenditure under contracts of that class probably provides sufficient authority for payment of the judgment debt.

Even though money is permanently appropriated for the satisfaction of the Crown's judgment debts, the Crown is not thereby obliged to pay such debts in priority to others; payment of which has been

[24] See *Australian Railways Union* v. *Victorian Railways Commissioners* (1930) 44 C.L.R. 319, 352 *per* Isaacs C.J., 389-390 *per* Starke J.; *New South Wales* v. *Commonwealth* [No. 1] (1931) 46 C.L.R. 155, 176-177 *per* Rich and Dixon JJ.

[25] *New South Wales* v. *Commonwealth* [No. 1] (1931) 46 C.L.R. 155, 177 *per* Rich and Dixon J.J.

[26] Sec. 105A(3) authorizes Parliament to make laws for the carrying out of the agreements.

[27] *New South Wales* v. *Commonwealth* [No. 1] (1931) 46 C.L.R. 155, 177-178.

authorized under an annual appropriation Act. What this means is that if expenditure pursuant to annual appropriation Acts exhausts the funds of the Crown, no judgment creditor who awaits payment by the Crown can complain of the non-exercise of the spending authority conferred by the Act permanently appropriating money for payment of judgment debts.

Money Held in Trust and Money Had and Received

When the Crown holds or receives money in trust, it may be obliged to pay the money so held to persons beneficially entitled, but it is not obliged to keep trust moneys in separate accounts nor can it discharge its obligations to pay without Parliament's authority.

> The doctrines of equity which enable a cestui que trust to fasten upon moneys received by a trustee in his fiduciary capacity and to treat any bank account into which they go, or any sort of property into which they are transformed, as trust property specifically, or as subject to a charge in favour of the trust, [do not] apply to moneys received by the Crown.[28]

The Crown's obligation is merely to repay money of the same amount. 'It has always been considered by Courts of Equity,' Dixon and Rich JJ. explained,

> that the highest form of security for trust funds was an investment upon the public credit of the country, and conformably with this view moneys received by the Crown might properly be conceived as represented no longer by specific property retaining its identity and charged with an equity in favour of the subject, but as transformed into an obligation of the State to repay an equivalent sum.[29]

Statutory provision has been made for the crediting of moneys held by the Crown for the use and benefit of others to special accounts[30] and moneys so credited have been permanently appropriated so that they are ever ready against fulfilment of the Crown's obligations. The Commonwealth Audit Act, for example, permanently authorizes expenditure of moneys standing to the credit of a Trust Account for any of the purposes of the Account.[31] Power to establish such an Account is vested in the Treasurer and the purposes of the Account are those defined by him when the Account is established.[32] He cannot thereafter alter or re-define the purposes.[33] In New South Wales, trustee moneys are credited to the Special Deposits Account which is permanently appropriated. Such moneys may, however, be transferred to the Consolidated Revenue Account and when so transferred cannot

28 *New South Wales* v. *Commonwealth* [No. 3] (1932) 46 C.L.R. 246, 260-261.
29 *Id.* 262.
30 Cwlth: Audit Act 1901-1966, ss. 27-30; N.S.W.: Audit Act, 1902, ss. 29-31; Qld.: The Audit Acts 1874 to 1960, ss. 4-7; Vic.: Audit Act 1958, ss. 18-19; W.A.: Audit Act, 1904, ss. 26-9.
31 See ss. 61 and 62A(6).
32 Sec. 62A.
33 Opinion of J. Q. Ewens, Acting Solicitor-General, 6 May 1953—Auditor-General's Report 1952-1953, Appendix F, p. 109.

be withdrawn except in pursuance of a special parliamentary appropriation or in pursuance of the Governor's warrant. The Governor is empowered to sign a warrant authorizing payment if a claim is made out to his satisfaction.[34] The Queensland Audit Acts 1874 to 1960 prohibit the Treasurer from spending money in Trust and Special Funds except under the authority of an annual or special appropriation or other Act, but this provision is declared not to apply to moneys which have been received for or on account of or for the use or benefit of any person or to a refund authorized by the Acts or any other Acts.[35]

Even where statutory provision has been made for the separation of trust moneys from other moneys of the Crown, it does not necessarily follow that moneys received and held in trust will always be credited to the appropriate account and will thereby be continually available for expenditure under the relevant appropriating section. Parliament may provide that moneys held in trust or for the use and benefit of others shall be deemed to have been credited to a particular account permanently appropriated for the satisfaction of the Crown's liabilities, but usually it is left to the executive and Parliament to decide what moneys shall be credited to what account.

Moneys received by the Crown and commonly credited to the Consolidated Revenue Fund include moneys that the Crown is liable to refund, *e.g.* excess taxes. The practice of treating refundable moneys as revenue and their subsequent payment as expenditure has been criticized.[36] For accounting purposes, it is better that such moneys should be credited to trust accounts which are permanently appropriated, but the Crown's liabilty to refund may not be apparent until well after the money has been received. It was to meet this practical difficulty that the federal Audit Act was amended in 1961 so as to provide that, when the Commonwealth is liable to repay any person any amount received by the Commonwealth and paid into the Consolidated Revenue Fund and no other Act appropriates the Fund to enable repayment, the Fund is appropriated to the extent necessary to make payment.[37]

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34 Audit Act, 1902, s. 31.

35 The Audit Acts of 1847 to 1960, s. 7(3).

36 Opinions of Alfred Deakin, Commonwealth Attorney-General—Auditor-General's Report, 1901-1902, Appendix C, p. 161; Auditor-General's Report, 1902-1903, Appendix C, pp. 167-8; Auditor-General's Report, 1952-1953, para 7, p. 11.

37 Sec. 37A. At the same time provision was made to authorize payment of refunds from the Trust Fund, but this provision was replaced in 1962 by another providing as follows:

62A . . .

(7) Where—

(a) an amount has been received by the Commonwealth and paid to the credit of the Trust Fund; and

(b) the repayment of that amount, or a part of that amount, to any person is required or permitted by or under any Act or otherwise by law,

the repayment may be made from moneys standing to the credit of the Trust Fund.

Enforcing Payment by Mandamus

If and when it is available, mandamus is obviously one of the most efficient remedies by which the citizen can obtain satisfaction of a claim upon public funds, for mandamus is one of the few common law remedies which gives specific relief. It is, however, a remedy of very limited application. The person or body against whom the writ is sought must be shown to have a public duty to perform whatever it is that the applicant demands to be performed. The applicant must have a special interest in the performance of that duty and must have requested performance and have had his request denied. Furthermore, since the writ is framed as a command of the sovereign, it will not lie against the Crown or against the servants of the Crown, at least when they are acting in that capacity and not as *persona designata.*[38]

Mandamus will be denied if there is a suitable alternative legal remedy. When an applicant seeks mandamus to compel payment out of public funds, the circumstances may be such that civil action for recovery of the money might be brought against the Crown. Most of the actions in which mandamus has been sought to compel such payment were brought at a time when the Crown was immune from civil suit, though, according to *R.* v. *Inland Revenue Commissioners, re Nathan,*[39] the fact that the Crown might be sued on a petition of right was a bar to mandamus. Whether a civil action for liquidated damages can properly be regarded as a suitable alternative to the prerogative remedy is debatable. Mandamus, it should be remembered, affords specific relief whereas a judgment debt may prove to be unenforceable.[40]

The situations in which mandamus is likely to be the preferred remedy for enforcing claims to be paid out of public funds fall into three main categories. The first comprises those cases in which it is alleged that a statutory duty to pay has been imposed on the defendant which duty he has refused to perform. The second comprises cases in which what is alleged is refusal to perform a duty to pay arising out of a valid exercise of a statutory power to create a right to and corresponding duty of payment. The third comprises cases where what is claimed is an order directing a public officer to perform an act the doing of which is a condition precedent to the payment of the money alleged to be due.

As has been mentioned, mandamus will not lie to compel the Governor or Governor-General to issue his warrant for the issue of moneys appropriated by warrant, nor will it issue to compel the Treasurer to prepare the warrant for the Governor's or Governor-General's signature. Denial of mandamus in these cases may be explained either on the basis that the writ does not lie against the

38 See *R.* v. *Secretary of State for War* [1891] 2 Q.B. 326.
39 (1884) 12 Q.B.D. 461.
40 On mandamus generally see S. A. de Smith, *Judicial Review of Administrative Action* (2nd ed., Lond, 1968), 559-587.

Crown or its servants when they are acting as such, or on the basis that there is no duty to spend what Parliament has authorized to be spent. If mandamus does lie to compel payment from public funds, it can lie only after parliamentary appropriation and after the necessary warrant for expenditure has been signed.

Whether or not mandamus lies to compel a servant of the Crown to pay money out of public funds is said to depend on the capacity in which the servant holds the funds or deals with them. 'Where,' de Smith writes,

> . . . a duty has been directly imposed by statute for the benefit of the subject upon a Crown servant as *persona designata,* and the duty is to be wholly discharged by him in his own official capacity, as distinct from his capacity as an adviser to or instrument of the Crown, the courts have shown readiness to grant applications for mandamus by persons who have a direct and substantial interest in securing the performance of the duty.[41]

But, he cautions,

> it would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by mandamus on the application of a member of the public, for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown.[42]

As de Smith recognizes, the availability of mandamus against a Crown servant turns mainly on the effect of the relevant statutory provisions. This point needs to be emphasized for although the decided cases reveal some inconsistency in the way similar legislative provisions have been interpreted, the principles of law which have been applied in determining whether the writ lies have been fairly uniform.

The importance of reading each decision as a decision involving a ruling on the legal effect of the relevant legislative provisions and, in particular, on whether the defendant owed a duty to be performed in his own official capacity, is particularly well illustrated by the judicial commentary on the Queen's Bench's decision in *R.* v. *The Lords Commissioners of the Treasury*[43] hereafter referred to as *Smyth's Case* to distinguish it from other cases of the same or a similar name. There has been disagreement about what the case decided and also about the grounds on which it was decided. Some judges have said that the case was wrongly decided, though they are not completely agreed on the reasons why. Others have cited it with approval but at the same time have distinguished it.

Smyth had been granted a retiring allowance by the Lords Commissioners pursuant to 50 Geo. III, c. 117 (1810) and 3 Geo. IV, c. 113 (1822). He made successive applications for payment, but on

41 *Op. cit.,* 575-576.
42 *Id.* 576.
43 (1835) 111 E.R. 794.

each occasion the paymaster informed him that payment could not be made because no authority for payment had been received. It had been provided by the statute that no retiring allowance should be granted, paid or allowed without the concurrence of the Treasury Commissioners. Nevertheless Smyth had been informed that he would receive his allowance on application to the paymaster of civil services at the Treasury, and it was only when that application failed that he was told that authority for receiving his pension had to be obtained from the Treasury Commissioners. When he requested that the requisite instructions for payment issue, the Treasury informed him that he would first be asked to sign a document undertaking not to institute legal proceedings. Smyth made it clear that this condition was not acceptable to him. Payment of the allowance claimed by Smyth was authorized by an appropriation Act and the funds for payment were paid into the Treasury. Application was made for mandamus to order the Lords Commissioners to issue a Treasury minute or authority to the paymaster directing him to pay the allowance. The Attorney-General, Sir John Campbell, in opposing the application, contended that the statutes 50 Geo. 111, c. 117 and 3 Geo. IV, c. 113 did not confer any rights to receive retiring allowances and that mandamus would not lie to compel payment by the King or his servants. In granting the application, the judges of the King's Bench accepted that the Lords Commissioners were officers of the Crown, but since they had exercised their statutory power to grant a retiring allowance and since they had control over the money appropriated, they were liable to pay. They were, Lord Denman C.J. stated, 'merely parties who have received a sum of money as trustees for an individual, under the provisions of an Act of Parliament.'[44] It was within the power of the Lords Commissioners to pay, Patteson J. reasoned, 'because they have shewn by their correspondence that they exercised a dominion over the money.'[45] According to Coleridge J. a grant under the statute 3 Geo. IV, c. 113 could not be revoked, and once Parliament appropriated money for the purpose of carrying out the grant and the money was in the hands of the Lords Commissioners they were bound to pay what had been granted. The King was 'not in possession of the sum applied for, and . . . [had] no control over it.' The sum, he continued,

> is appropriated by Act of Parliament, and in the power of a public board. Would money had and received lie? The paymaster of civil services holds the money for Mr Smyth's use, but would not be liable for omitting to pay it over, till Mr Smyth came to him with a proper authority from the Lords of the Treasury, supposing that he would be liable then.[46]

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44 (1835) 111 E.R. 794, 797.
45 (1835) 111 E.R. 794, 798.
46 (1835) 111 E.R. 794, 798-799.

A few years later Coleridge J. refused an application by Baron de Bode for mandamus to command the Lords of the Treasury to pay him compensation out of money received by them under the statute 59 Geo. III, c. 31.[47] The fund out of which the Baron sought payment was, he said, a fund 'in the hands of the Crown by its servants.'[48] He distinguished *Smyth's Case* as follows:

> there it appeared prima facie, that a pension had been granted; that funds applicable to its payment had been placed by Parliament in the hands of the Lords of the Treasury as *public* officers *charged by statute with the payment of such pensions;* that the Lords had allotted the fund for payment, and acknowledged to the claimant that they held it for his use, and that they only refused to pay, because he declined to take it clogged with conditions which they had no right to impose.[49]

In the present case it was clear that the relevant statute did not confer any right to payment on the Baron nor had there been any exercise of power under it which would have conferred any right upon him. The legislation had been passed following agreement by France to pay Great Britain money in settlement of claims on behalf of British nationals for compensation in respect of French expropriation of British properties in Alsace. The statute 59 Geo. III, c. 31 appointed commissioners to receive the money to be provided by France and to distribute it amongst registered claimants. It further provided that any surplus remaining after payment of the registered claimants should be applied to such purposes as the Lords of the Treasury should direct. The Baron was not a registered claimant, but sought payment out of the surplus to compensate him for the loss of his Alsatian properties. At no time had payment been promised. It seems therefore that this case could have been decided solely on the ground that the defendants were under no duty to pay.

Smyth's Case was distinguished again in *R.* v. *Lords Commissioners of The Treasury; In re Hand,*[50] decided in 1836. In that case, as in *Smyth's,* a pension had been granted pursuant to 50 Geo. III, c. 117 and 3 Geo. IV, c. 113. The grant of pension was revoked following a decision by the Lords Commissioners to grant Hand an annuity under later legislation (1 & 2 Will. c. 56, s. 53). In refusing Hand's application for a mandamus to the Lords Commissioners to issue a minute directing payment of arrears of pension, the King's Bench stated that the legislation enabling the grant of pensions did not confer power to grant a pension for life nor did it prevent revocation of pensions. The fact that Parliament had voted money to cover payment of Hand's pension did not, Lord Denman C.J. explained, bind the Lords Commissioners to continue the pension; it merely enabled the

47 *The Matter of Clement de Bode, Baron de Bode* (1838) 6 Dowl. P.C. 776.
48 *Id.* 792.
49 *Ibid.*
50 (1836) 111 E.R. 1053.

Crown to continue payment if it chose to do so.[51] *Smyth's Case*, he said, did not apply.

> In that case the Lords of the Treasury had stated, from year to year, that they had received money on account of Mr Smyth's pension, and that it was lying by them for his use. When he applied for it he was told that they merely held the money for the use of a party to whom it had been voted. All that the Court said there was, that the Lords of the Treasury must make a return, and shew why the money was not paid over. No decision was given on the point of law.[52]

The point of law presumably was whether the statutes authorized the granting of irrevocable pensions.

In *R.* v. *Lords Commissioners of the Treasury*,[53] *Smyth's Case* was described as being of doubtful authority since the court had misunderstood the effect of s. 13 of 4 & 5 Will. IV, c. 15, since repealed. The section had made it possible for moneys charged on the Consolidated Fund or specially appropriated to be issued without a royal order under the sign manual. In cases to which the section applied, the Commissioners of the Treasury were both empowered and required to authorize and require the Comptroller to accredit the persons who were bound to pay the charges with the moneys necessary to make payment. In *R.* v. *Treasury Lords Commissioners; Ex p. Brougham and Vaux*,[54] the section was interpreted as imposing a duty to issue their warrant, which duty was enforceable by mandamus. This interpretation was rejected by the court in *R.* v. *Lords Commissioners of the Treasury*.[55] Why the judges should have regarded *Smyth's Case* as having been wrongly decided is not clear because the decision in the case did not even refer to s. 13. Leaving aside the question whether the pension granted to Smyth was irrevocable, the decision in *Smyth's Case* is not at all inconsistent with that in *R.* v. *Lords Commissioners of the Treasury* for in the latter case there was clearly no duty to pay nor any right to receive payment.

The applicant in *R.* v. *Lords Commissioners of the Treasury* based his claim solely on a vote of moneys by Parliament. The relevant appropriation Act had authorized the expenditure of a sum of money to defray the charges for criminal prosecutions. A county treasurer sent taxed bills of costs to the Treasury claiming reimbursement of the costs paid out. Treasury officials disallowed certain items whereupon the county treasurer applied for a mandamus to compel the Lords Commissioners to issue a minute or other authority directing the paymaster to pay the balance claimed. This application was refused. The Court's conclusion that the Lords Commissioners held the money as agents of

51 (1836) 111 E.R. 1053, 1058.
52 (1836) 111 E.R. 1053, 1058.
53 (1872) L.R. 7 Q.B. 387.
54 (1851) 16 Q.B. 357.
55 (1872) L.R. 7 Q.B. 387.

the Crown could have been supported solely on the ground that the appropriation Act operated only to authorize the expenditure of funds of the Crown for a particular purpose and did not impose any duty on anyone to pay. The absence of a duty to pay was clearly recognized by counsel for the defendants, Sir George Jessel. He said that

> Where the legislature has constituted the Lords of the Treasury agents to do a particular act, in that case a mandamus might lie against them as mere individuals designated to do that act; but in the present case, the money is in the hands of the Crown or of the Lords of the Treasury as ministers of the Crown; in no case can the Crown be sued even by writ of right. If the Court granted a mandamus they would be interfering with the distribution of public money; for the applicants do not shew that the money is in the hands of the Lords of the Treasury to be dealt with in a particular manner.[56]

Although mandamus was refused, the Court did say that in retaxing the bills of costs presented for payment, the officers of the Treasury had acted without authority—had acted, that is, contrary to the appropriation Act. If the Lords Commissioners were under any legal duty, their duty was to the Crown. 'When the money gets to the hands of the Lords Commissioners of the Treasury, who are responsible for dispensing it,' Lush J. observed, 'it is in their hands as servants or agents of the Crown, and they are accountable theoretically to the Crown, but practically to the House of Commons, and in no sense are they accountable to this or any other court of justice.'[57] At the very least, an appropriation Act limits the legal authority of the Crown to spend its funds. The Crown may in certain circumstances recover those of its moneys not appropriated for the purpose on which they were spent and those of its servants or agents who have misspent Crown moneys may be held by statute to be personally liable.

Smyth's Case was disapproved by the Court of Appeal in *Reg.* v. *Commissioners of Inland Revenue; In re Nathan*[58] but only on the ground that the circumstances of the case disclosed that an action at law would lie against the defendants and, that being so, the discretion to grant mandamus ought not to have been exercised. *Smyth's Case,* Brett M.R. said,

> is put upon the ground that a relation was established between the parties of depositor and depository, that is to say, although the money had been paid by the Crown into the hands of the Commissioners of the Treasury, it never having been the money of the claimant, yet the Commissioners of the Treasury by the acts which they had done, had, as in common law it would be called, attorned to the claimant and agreed to hold the money for

56 (1872) L.R. 7 Q.B. 387, 389-390.
57 *Id.* 402.
58 (1884) 12 Q.B.D. 461.

> him. The moment that they came to that conclusion, they shewed that he could have maintained an action for money had and received against the Commissioners of the Treasury, and if so, of course a mandamus ought not to have issued.[59]

The Court in *Smyth's Case* may have erred in supposing that the enabling legislation conferred power to grant irrevocable pension rights and in thinking that there was suitable remedy alternative to mandamus, but it cannot be said that the central principle on which the case was decided has been emphatically repudiated. The principle is simply this: that where a public officer has statutory power to create a right to receive payment out of public fund, where he validly exercises that power and where he has power to effect payment (where, that is, payment does not depend on action being taken by others over whom he has no power of direction), then mandamus may lie to compel payment. In *Baron de Bode's Case,* mandamus was refused because the power or discretion to grant a right to payment had not been exercised. In *R.* v. *Lords Commissioners of the Treasury,* any power the Lords Commissioners had to authorize reimbursement of county treasurers was clearly not a power conferred on them by statute. If anything it was a power delegated to them by the Crown. And whatever the source of the power might have been, the power itself had not been exercised and there was no duty on anyone to exercise it.

When legislation confers power on a public officer to make determinations establishing a right to payment, the question whether exercise of the power is wholly discretionary or whether there is a duty to exercise it once certain conditions are fulfilled is a question of statutory interpretation. In *Ex p. Miller; Re New South Wales Ambulance Transport Service Board,*[60] a mandamus to compel the Board to pay money to a district ambulance committee was refused. The Ambulance Transport Service Act, 1919, directed the Treasurer to pay the Board money voted by Parliament. But the Board was not required to use the subsidy for any particular purpose. In *Minister of Finance of British Columbia* v. *The King,*[61] the Canadian Supreme Court interpreted a statute empowering the Minister of Finance to pay compensation out of a statutory assurance fund in defined circumstances and when certain conditions were met, as imposing a duty on the Minister to pay, the performance of which duty could be compelled by mandamus.[62] Again in *The King ex rel. Lee* v. *Workmen's Compensation Board,*[63] the British Columbia Court of Appeal construed pensions legislation as imposing on the defendant Board a statutory duty to expend public money in a designated manner

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59 *Id.* 475-476. Bowen L.J. agreed—*id.* 480.
60 (1950) 67 W.N. (N.S.W.) 179.
61 [1935] 3 D.L.R. 316.
62 See *per* Davis J., *id.* 322-323.
63 [1942] 2 D.L.R. 665.

and as giving the Board complete control over the funds voted by Parliament for the particular purpose.[64]

Whether the statutory power to create rights to payment is a power conferred on public officers or on the Crown is also a question of statutory interpretation. If the power is one conferred on the Crown to be exercised by the Crown's delegates, the exercise of the power may create a liability enforceable against the Crown by action at law, but the liability cannot be enforced by mandamus since the writ does not lie against the Crown or its servants when they act merely as servants. It is sometimes difficult to determine on whom the statutory power is conferred. This difficulty is well illustrated by *Reg.* v. *Commissioners of Internal Revenue; In re Nathan.*[65] The relevant statute here provided that when certain circumstances were proved to the Commissioners' satisfaction, it should be lawful for them to return the probate duty paid.[66] An application for mandamus to compel payment was refused. In the opinion of the Court of Appeal, money received by the Commissioners as probate duty was money received to the use of the Crown by its servants, and they had no right to hold or deal with it contrary to the orders of the Crown. The statute merely enabled the Commissioners to get back the money to be paid from another source without a direct order of the Crown. Any right to refund of duty was a right against the Crown.[67]

Although the power to create a right to payment is conferred directly on a public officer, a determination that money should be paid may not of itself create a duty to pay. The enabling statute may require in addition that funds be available for making payment. *Desailly* v. *Brunker,*[68] though not a mandamus case, is illustrative. There the plaintiff sued a Minister of the Crown for money which he claimed was due to him as a result of the exercise of power under the Rabbit Act. The Act empowered the Minister to authorize the payment to certain persons of up to three-quarters of the cost incurred by them in exterminating rabbits. It created a special fund and from moneys standing to the credit of the fund—the Rabbit Account—the Treasurer was directed to pay all subsidies, expenses and all other sums authorized by the Act to be paid. If the Account was inadequate, such sums were directed to be paid out of money appropriated by Parliament for the purposes of the Act. The Minister had approved the plaintiff's claim to a subsidy but, at the relevant time, there were no moneys standing to the credit of the Rabbit Account nor had there been a parliamentary appropriation to provide the requisite funds. The Full Court held that the defendant Minister was under no liability. According to Owen J., the plaintiff had no remedy until an appropriation

64 See *per* O'Halloran J.A., *id.* 680 and Fisher J.A., *id.* 698.
65 (1884) 12 Q.B.D. 461.
66 5 & 6 Vic., c. 79, s. 23.
67 (1884) 12 Q.B.D. 461, 471-473, 477-478.
68 (1888) 9 L.R. N.S.W. (L.) 536.

had been made or until there were moneys to the credit of the Rabbit Account.

The cases considered so far have all been cases in which the applicant based his claim on legislative provisions. Where the claim is based solely on refusal to exercise power delegated by the Crown in exercise of the royal prerogative, the tendency has been to regard the delegate as one who is acting as an agent of the Crown and therefore one whose non-exercise of the delegated power is beyond the reach of mandamus. In *Reg.* v. *Secretary of State for War*,[69] application was made for a writ of mandamus to compel the Secretary of State to carry out a royal warrant regarding the pay and retiring allowances of officers and soldiers. Charles J., whose decision was upheld by the Court of Appeal, held that, in executing the warrant, the Secretary of State acted solely as a servant of the Crown. Though he might owe a duty to the Crown, the warrant did not impose any duty on him in relation to that section of the public for whose benefit he might act. In the Court of Appeal, Brett M.R. made the further point that even the Crown was under no obligation to make payment. Kay L.J. referred to *Kinloch* v. *Secretary of State for India*[70] in which a royal warrant granting war booty to the Secretary of State for the purposes of distribution amongst certain officers and men was held not to create a trust enforceable at the suit of those whom the Crown intended to reward. Similarly no duty existed in the instant case.

To maintain an application for mandamus the applicant must show that he belongs to a class of persons to whom the statutory duty is owed. The application for mandamus in *Walmsley's Case*[71] failed for this reason. By statute (19 & 20 Vic., c. 108, s. 85), the Commissioners of the Treasury were directed to pay the expenses of county courts out of moneys to be provided from time to time by Parliament for that purpose. The applicant had supplied books, printing and stationery to the Liverpool County Court. In refusing the application the Court stated that the statute did not mean that the Commissioners were themselves bound to pay creditors. Whether payment could be compelled by the treasurers of the county courts was left open.

The duty that the legislature imposes and the performance of which may be compelled by mandamus may not be to pay money, but to do something which is a statutory condition precedent to the issue of public money. *Reg.* v. *Commissioners for Special Purposes of Income Tax*[72] was such a case. The legislation in question provided for the payment of overpaid taxes. The defendant commissioners were obliged by statute to issue orders for repayment after having received the certificate of another authority of the amount overpaid. The Court of

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69 [1891] 2 Q.B. 326.
70 (1880) 15 Ch. D.1; (1882) 7 App. Cas. 619.
71 *In the Matter of the Lords Commissioners of the Treasury, Ex p. Walmsley* 121 E.R. 644.
72 (1888) 21 Q.B.D. 313.

Appeal held that mandamus would lie to compel the commissioners to issue an order. The application was not, Lindley L.J. explained, to enforce payment of money by the Crown, but to enforce the making of an order by the commissioners which it was their duty to make and without which repayment could not be made.[73] The applicant, of course, had a statutory right to repayment.[74] In *R.* v. *Dickson; ex p. Barnes*[75] the Queensland Supreme Court granted a writ of mandamus against the Clerk of the Legislative Assembly directing him to certify the amount of salary payable to a member of Parliament. Salaries were payable to members of Parliament under s. 4 of the Constitution Amendment Act of 1896. Sec. 6 of the Act provided that: 'All such amounts shall be certified fortnightly by the Clerk of the Legislative Assembly, and when so certified shall be paid out of the Consolidated Revenue.' The Full Court held that this section imposed a statutory duty on the Clerk of the Legislative Assembly to certify as provided which duty was enforceable by mandamus.[76]

The principles which emerge from the cases discussed may be summarized as follows. Mandamus may lie to compel payment from moneys of the Crown when by or pursuant to legislation a public duty is imposed on the defendant to pay and the applicant has a right to payment. For the remedy to lie, payment of the money claimed must have been authorized by parliamentary appropriation, and by such officer or officers whose sanction or approval is required before the moneys may be lawfully paid. In some instances, the requisite parliamentary authorization for payment may have to be sought in annual appropriation Acts; but in others the spending authority may be supplied by permanent appropriations. Normally, the expenditure will also have to have been authorized by the Governor's or Governor-General's warrant, though it is possible that the legislation under which the applicant claims may have dispensed with that requirement. The availability of mandamus may also depend on fulfilment of mandatory requirements concerning disbursement of public funds laid down in legislation on the audit of public accounts. The correct view, it is submitted, is that there can be no duty upon the defendant to pay unless all the requisite authorities for payment have been provided. In some circumstances, an officer who is invested with power to authorize payment may himself have a public duty to exercise his authority, the performance of which is enforceable by mandamus.

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73 *Id.*, 322.

74 See also *R.* v. *Postmaster General* (1878) 3 Q.B.D. 428.

75 [1947] St. R.Q. 133.

76 *Cf. Kariapper* v. *Wijesinha* [1967] 3 W.L.R. 1460, 1476. In this case application was made by a member of the Ceylon Parliament for a mandate in the nature of mandamus requiring the clerks of the House of Representatives to recognize him as a member and to pay him his parliamentary salary. The case turned mainly on the validity of special legislation disabling the applicant from sitting in Parliament. The Privy Council held the legislation *intra vires* but held also that the application for a mandate to the clerks of the House was properly refused since they had not been shown to owe any duty to the applicant.

In most cases, it is unlikely that an application for mandamus to compel payment would succeed unless it is established that the defendant has immediate access and power of disposition over funds from which payment can be made.