SUB-DELEGATED LEGISLATION AND *DELEGATUS NON POTEST DELEGARE*

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IN BOTH the United Kingdom and New Zealand, and presumably in Australia too, the legislative chain from Parliament to the Queen or Governor-General in Council is sometimes lengthened by at least a further link by which a Minister or an official is given or purportedly given legislative powers. For example, by s. 45 of the Samoa Act 1921 the Governor-General of New Zealand was authorized to make regulations; he purported to confer some of his powers on the Administrator of Western Samoa. The validity of this final transfer or "sub-delegation" of legislative power to the Administrator was challenged on the ground that the Governor-General, being a delegate, could not sub-delegate his powers without express authority. The significance of the maxim *delegatus non potest delegare* and its application to legislative powers has often been considered by the Courts and by constitutional lawyers.[1] Because there is a difference of opinion as to the scope of the maxim, the purpose of this article is to examine the various opinions that have been expressed and to attempt some reconciliation of them.

Sir William Graham-Harrison, writing in 1931,[2] remarked that:

> ". . . the question whether His Majesty in Council, or the Minister, or Department to whom the delegated power of legislation is given, can delegate the power to some other authority or person is one of some difficulty. The only case bearing on the point appears to be *R. v. Burah* (1878), 3 App. Cas. 889."[3]

That case, *Hodge v. The Queen* (1883) 9 App. Cas. 117, and *Powell v. Apollo Candle Co.* (1885 10 App. Cas. 282, established that colonial and provincial legislatures were not delegates of the Imperial Parliament, but that within the powers conferred, they had authority as plenary and as ample as the Imperial Parliament. The maxim *delegatus non potest delegare* could not therefore apply to colonial or provincial legislatures which were in no sense delegates. Such legislatures could therefore confer legislative powers on other authorities without re-

[1] In this article only the delegation of powers by the Executive will be considered. The problem is much wider as *Bailey v. Municipal Council of Sydney* (1927) 28 S.R., N.S.W., 149 and *Morrison v. Shire of Morwell* [1948] V.L.R. 73 demonstrate.

[2] *Notes on the Delegation by Parliament of Legislative Powers* (Oxford, 1931).

[3] Sir William apparently overlooked the New Zealand authorities prior to 1931 which are discussed in this article.

quiring express authorization from the Imperial Parliament. Sir William Graham-Harrison concluded that *R. v. Burah*

> ". . . leaves completely unanswered the question whether the principle, on which the decision of the majority of the High Court [of Calcutta] was based, does or does not apply in relation to delegated legislation. As pointed out above, there is no judicial authority on this point. It is however submitted that Mr. Justice Markby [of the High Court of Calcutta] was quite right as to the principle which he applied, and that the Courts of England, if the question came before them, would probably hold that when Parliament delegates legislative powers, . . . those powers cannot without express authorization from Parliament be passed on . . . to some other body or person."[4]

Sir William then referred to s. 2 (1) of the United Kingdom Emergency Powers Act 1920 which authorizes the delegation of legislative powers by Her Majesty in Council and remarked that

> ". . . such a specific enactment is clearly unnecessary except on the view that, without it, His Majesty cannot by Order in Council lawfully subdelegate to Government Departments the power of making subsidiary or supplemental provisions to carry out the Orders."[5]

C. T. Carr, C. K. Allen and the Donoughmore Committee expressed similar opinions.[6]

Stout C.J., in a dissenting judgment in *Taratahi Dairy Co., Ltd. & anor v. Attorney-General,* [1917] N.Z.L.R. 1, stated at 18-19:

> "There are no legal maxims so universal as these two: *Delegata potestas non potest delegari* and *Vicarius non habet vicarium.* His Excellency the Governor and his Executive, in issuing the Order in Council [giving legislative authority to 'the licensing authority'], were doing so by virtue of a delegated power from Parliament: Regulation of Trade and Commerce Act, s. 24. It is, I think, clear law that, acting only as a delegate, they could not delegate this authority to any Government Officer . . . What power is there to delegate . . . to the licensing authority? The authorities in our books are numerous to show that the maxims already quoted are of universal application and no authority was cited in support of this clause in the Order in Council."

[4] *ibid.* at p. 112.

[5] *ibid.* at p. 113.

[6] C. T. Carr, *Concerning English Administrative Law* (New York, 1941), pp. 64, 88-9; C. K. Allen, *Law and Orders* (London, 1945), p. 104; *Report of the Committee on Ministers' Powers,* Cmd., 4060 (1932), pp. 49-50.

Later in the same year the application of the maxim was raised in *Geraghty v. Porter* [1917] N.Z.L.R. 554 where the Full Court, consisting of Denniston, Stringer and Sim JJ., declared sub-delegated legislation invalid. By s. 3 of the Motor Regulation Act 1908 the Governor was empowered, by Order in Council, to make regulations as to the identification of motor cars. An Order in Council made under this section purported to delegate certain powers to "registering authorities". A Borough Council, which was a registering authority, made a by-law prescribing the manner in which identification marks should be displayed on motor cars in the borough. At 556 the Court held that:

> "The effect of this regulation is to delegate to the registering authority the power of determining the manner in which the identification marks are to be fixed and to be rendered distinguishable. In making regulations such as these the Governor is exercising a delegated power of legislation. Such a delegated authority must be exercised strictly in accordance with the powers creating it: *Halsbury's Laws of England;*[7] and in the absence of express power to do so the authority cannot be delegated to any other person or body. The rule on the subject is expressed in the maxim *Delegatus non potest delegare,* and is of general application, although the cases in which for the most part it has been applied have been those arising out of the relation of principal and agent. There is nothing in the Motor Regulation Act which authorizes any delegation of the powers conferred by s. 3 thereof. . . ."[8]

In *Nelson v. Braisby* (No. 2), [1934] N.Z.L.R. 559 we find that the Court of Appeal anticipated the controversy to which the most recent contribution is probably that of Denning L.J. in *Lewisham Borough Council v. Roberts (infra). Nelson v. Braisby* concerned the validity of convictions under the Samoa Seditious Organizations Regulations 1930. By s. 45 of the Samoa Act 1921 the Governor-General in Council was authorized, *inter alia,* to "make all such regulations as he thinks necessary for the peace, order and good government of Samoa". By the Samoa Seditious Organizations Regulations 1930 issued under the powers given by s. 45 the Governor-General in Council delegated to the Administrator the power to declare the Mau or other organizations seditious for the

[7] Vol. xxvii, p. 124, s. 217.

[8] The Court of Appeal in *Godkin v. Newman* [1918] N.Z.L.R. 593 adopted the principle applied in *Geraghty v. Porter* (*supra*). The language of the judgment is similar to that found in the judgment of Hughes C.J. in *Panama Refining Co. v. Ryan* (1934) 29 U.S. 388, 415.

purposes of the regulations. Counsel for the appellant argued, *inter alia,* that:

(1) the 1930 Regulations were *ultra vires* s. 45 because they purported to delegate legislative powers to the Administrator;
(2) the current of authority in the Privy Council[9] to the effect that colonial legislatures may delegate certain of their powers is entirely consistent with the appellant's principal proposition. (What was attacked here was not the giving of legislative powers to the Governor-General in Council, but the sub-delegation of those powers to the Administrator);
(3) when the legislature wishes to avoid the application of the principle *delegatus non potest delegare* and intends to confer power to sub-delegate, it takes care to do so expressly, e.g. s. 28 (1) Board of Trade Act 1919.

Two members of the Full Court, which consisted of Myers C.J., Herdman, Reed and Blair JJ. considered that there had not been sub-delegation of legislative powers. Myers C.J. said at 589 that what was left to the Administrator was "a matter of administration only" and he cited in support the opinions of Isaacs and Higgins JJ. in *Welsbach Light Co. of Australasia Ltd. v. Commonwealth of Australia* (1916) 22 C.L.R. 268, 281 and 283-4. Reed J., at 613, described the power as "ministerial, executive or administrative", but he also said that, as the powers of the Governor-General were plenary, no question of sub-delegation could arise. Herdman J. also appeared to regard the powers of the Governor-General under s. 45 as plenary. Reed J., who considered that in this case there was no difference in principle between the powers of the New Zealand Parliament and those of the Governor-General in Council, stated at 613-14:

> "These observations [of the Judicial Committee in *R. v. Burah*] directly apply to the present case. . . . The only difference is that the jurisdiction of the Governor-General in Council is subject to greater limitations on its powers than was the Indian Legislature, but within those limitations it has plenary powers of legislation as large as the New Zealand Parliament. In all cases it is a question for consideration whether the powers conferred are plenary or delegated. No more comprehensive authority, within the subjects and area prescribed by the statute, could be conferred on a subordinate Legislature than the power given to the Governor-General in Council by s. 45. . . . These powers are plenary, and a power to delegate is as necessary an implication as arises in respect of legislation by the Parliament of New Zealand."

[9] The cases referred to *supra* were cited by counsel.

This decision, and, in particular, the above extract from the judgment of Reed J. seemed to make the position clear. Although it was recognized (as had the earlier authorities) that the maxim did extend to the delegation of legislative powers the maxim had no application where the powers conferred were plenary. If the powers were plenary, the maxim no more applied than it did to the Parliament of New Zealand, but if the powers were merely delegated powers, then by their very nature the maxim precluded delegation without express or clearly implied power to do so. Of course the problem of deciding whether legislative, as distinct from administrative, powers had in fact been delegated remained. Some light on the nature of the powers delegated is provided by Myers C.J. and Reed J. and we shall be obliged to return to this question later.

The straightforward principle stated by Reed J. has been confused by the decision in *F. E. Jackson & Co. Ltd. v. Minister of Customs,* [1939] N.Z.L.R. 682. An importer challenged the validity of the Import Control Regulations 1938, made under the Customs Act 1913 and the Reserve Bank of New Zealand Amendment Act 1936, which prohibited the importation of any goods without an import licence. By these regulations the Governor-General had purported to delegate his discretion as to the importation of goods to the Minister of Customs. It was contended that this delegation was invalid. Callan J. decided that the company was entitled to succeed on the ground that the regulations involved "the complete delegation of power to the Minister of Customs, and the uncontrolled discrimination unguided by any settled principles which is possible under the regulations."[10] It is surprising that *Nelson v. Braisby* (No. 2) was not cited, but even if it had been it is possible that Callan J. would have held that the powers given by the Customs and Reserve Bank Acts were not plenary, but were merely delegated, and could not, therefore, be sub-delegated without express authority.

It is interesting to compare these cases with a decision of the Canadian Supreme Court in *In the matter of a Reference as to the Chemical Regulations,* [1943] S.C.R. 1.[11] The question to which the Supreme Court there addressed itself was whether regulations in relation to chemicals, dated 10 July 1941, were *ultra vires* the Governor-General in Council under the War Measures Act 1927.

[10] At 727.

[11] The question of the validity of sub-delegation arose in *R. v. Holmes,* [1943] 1 D.L.R. 241. In that case Parker J. held that the maxim applied to prevent delegation without legislative authority but the powers given to the Governor in Council were limited in nature and were therefore merely delegated, not plenary

These regulations had delegated to subordinate agencies power to make orders, rules and by-laws. The validity of this delegation was questioned. *Geraghty v. Porter* is mentioned in the judgments, but apparently *Nelson v. Braisby* (No. 2) and *F. E. Jackson & Co. Ltd. v. Minister of Customs* were not cited. The Supreme Court upheld the regulations on the ground that the War Measures Act 1927 attributed to the Executive "powers legislative in character described in terms implying nothing less than a plenary discretion for securing the safety of the country."[12] The case thus falls squarely under the principle so clearly stated in *Nelson v. Braisby* (No. 2) where the distinction was drawn between powers which are plenary and those which are delegated. Because the powers were plenary, the principle *delegatus non potest delegare* was inapplicable. This appears to have been the *ratio decidendi*, but some of the dicta are not consistent with one another or with the views expressed in the New Zealand cases.

Stout C.J. in the *Taratahi* case and the Court in *Geraghty v. Porter* said that the maxim was of general application and was not confined to agency. Rinfret J., however, believed that it "is a rule of agency [and] . . . has no reference to an authority to legislate conferred by Parliament."[13] Kerwin J. gave as his opinion, "at common law the maxim *delegatus non potest delegare* is not confined to agency, although it there has its widest application."[14] The learned judge suggested that the maxim might be applied as a canon of construction, and that, unless a power to delegate legislative functions was expressly or by necessary implication conferred in the statute, it should be declared that such a power had not been conferred. Hudson J. stated that "the maxim is most frequently applied in matters pertaining to principal and agent, but it it is also applied in respect of legislative grants of authority."[15]

An intelligible principle emerges from these cases. The legislative powers conferred must first be examined to determine their nature; are they plenary or delegated? Only if the powers are delegated does the maxim apply to prevent sub-delegation without express or clearly implied authority. As Kerwin J. has pointed out whether the maxim applies is essentially a question of statutory interpretation. If wide discretionary powers are given they will probably be regarded as plenary within the field determined by the statute and the maxim can have no application. Such powers

[12] [1943] S.C.R. 1, 12; see also the judgment of Rinfret J. at 17-18.
[13] *ibid.* at 18-19.
[14] *ibid.* at 31.
[15] *ibid.* at 34; he cited *Re Behari Lal et al.* (1908) 13 B.C.R. 415 as an example.

can be transferred by the body to whom the statute confides them to another authority without falling foul of the maxim.

The law relating to this question has recently been expanded as the result of three English decisions. In *Blackpool Corporation v. Locker,* [1948] 1 K.B. 349, [1948] 1 All E.R. 85, the appellant had purportedly requisitioned unoccupied premises under powers given by the Supplies & Services (Transitional Powers) Act 1945.[16] The Minister of Health, who was a "competent authority" to requisition premises, had delegated to local authorities, including the appellant, the power to requisition houses for families inadequately housed. The validity of the requisition was challenged, but it does not seem to have been doubted that the delegation by the Minister of his statutory powers was authorized by the relevant regulations. The Court was satisfied that the circulars issued by the Ministry to local authorities were legislative in form and not merely "executive directions",[17] but it also found that paragraph 5 of regulation 51 of the Defence (General) Regulations 1939 authorized the delegation of powers to local authorities.[18] This paragraph read:

> "(5) A competent authority may, to such extent and subject to such restrictions as it thinks proper, delegate all or any of its functions under paras. (1) to (3) of this regulation to any specified persons or class of persons."

Because the power to delegate was expressly conferred, there could be no question of the maxim applying to invalidate the departmental circulars.

In *Jackson Stansfield & Sons v. Butterworth,* [1948] 2 All E.R. 558 Scott L.J. made some observations, which are *obiter,* on the validity of the delegation by the Minister of Works of powers conferred on him by regulation 56A of the Defence (General) Regulations 1939. At 564-5 Scott L.J. stated:

> "Regulation 56A is delegated legislation, but it, in turn, delegates, within certain narrow limits, power to the Minister of Works to make sub-delegated legislation by order. Parenthetically I observe that such orders, being sub-delegation, do not call for publication under the Statutory Instruments Act, 1946, but the Minister of Works very properly had them so published,

[16] This case is of considerable importance for the remarks of the Court concerning the publication of "sub-delegated" legislation. Scott L.J. stated at p. 361 [87]: "there is one quite general question affecting all such sub-delegated legislation, and of supreme importance to the continuance of the rule of law under the British constitution, namely, the right of the public affected to know what that law is. That right was denied to the defendant in the present case."

[17] Per Scott L.J. at 367 [90].

[18] Scott L.J. at 369 [91]; Evershed L.J. at 383 [99].

though not bound to do so, thus recognizing the interest of the public in publication. But I regard the Minister of Health's "circulars" and the Minister of Works "notes for guidance of local authorities" as also containing sub-delegated legislation in two respects – (i) in the elaboration of the instructions about licences (a) in the circulars and (b) in the "notes" for guidance, and (ii) in the effective delegation of power and discretion to the local authorities to perform the function of licensing which the regulation had entrusted to the Minister of Works, and to no other authority. As to (i) it is patent that the licensing instructions in the circulars and "notes" were intended to be enforced – in other words, to bind the public, and that means legislation. As to (ii) the position is this. The regulation authorized the Minister of Works and no one else to operate its provisions. Those provisions, of course, authorized him to choose his own servants for the detailed tasks involved, but they did not authorize him to transfer his own functions either to the Minister of Health or to the local authorities, and it is interesting to observe in the letter from the Treasury Solicitor's office, which I have quoted, that a denial appears of any such transfer to local authorities. But, in my opinion, both the "circulars" to the local authorities from the Minister of Health and the "notes" for their guidance from the Minister of Works in fact do that; for they confer a very wide discretion on the local authorities themselves, and in the circulars and "notes", throughout the series, and especially in those of 1947, the function of prosecuting is plainly entrusted to the local authorities. For these reasons I am satisfied, in spite of the argument of the Attorney-General, that some of the directions there contained were intended to have legislative effect, although I accept the Attorney-General's contention that the regulation contained no such power of delegation. If it be argued that the Minister of Works could choose his licensing officers, I reply that he could have, but did not purport to do so. The delegation to another Minister or to local authorities of powers of administration and discretion was not within the authority of the Minister of Works. *Delegatus delegare non potest,* but the intention to delegate power and discretion to the local authorities is clear. The method chosen was convenient and desirable, but the power so to legislate was, unfortunately, not there."

The learned Lord Justice concluded that as the regulations conferred "delegated", not plenary, powers on the Minister of Works, he could not sub-delegate without express authority; that authority

had not been given. He believed that the maxim applied to legislative powers.

Denning L.J. in *Lewisham Borough Council v. Roberts,* [1949] 2 K.B. 608, [1949] 1 All E.R. 815, took the opportunity to dissociate himself from the views of Scott L.J. expressed in *Blackpool Corporation v. Locker.* In that case Scott L.J. said that the circulars issued by the Minister of Health were legislative in character, but Denning L.J. does not so regard them. At pp. 621-2 [824] he asserted:

> "When the government department delegates its functions to a town clerk under reg. 51 (5), it is really only putting someone in its place to do the acts which it is authorized to do. The town clerk is, so to speak, an agent of the department, and a sub-agent of the Crown. The delegation to the town clerk is simply administrative machinery so as to enable the administrative function of requistioning to operate smoothly and efficiently; and, like all administrative functions, the act of delegating can be exercised by an authorized official of the government department. The delegation, whether general or specific, is not a legislative act, but an administrative one (see the principles stated in *R. v. Burah; Hampton v. United States;* and *King-Emperor v. Benoari Lal Sarma*); and it does not divest the government department of its powers (see *Huth v. Clarke,* and *Gordon Dadds v. Morris*). Having regard to those authorities, I cannot agree with the observations of Scott L.J. to the contrary in *Blackpool Corporation v. Locker.* They were, I think, unnecessary for the decision, which turned on the fact that the town clerk there acted outside his actual authority and his action could not be ratified."[19]

We have then a clear difference of opinion as to the nature of the act of delegation, but although that difference is important in other fields[20] it does not appear to affect the question being examined in this article—does the maxim *delegatus non potest delegare* apply to prevent the delegation of legislative powers? Both Scott L.J. and Denning L.J. agree that the Minister had delegated his powers and it is with this act that we are concerned. Whether the circulars were legislative, ministerial or administrative in character does not seem to be relevant to the issue here being discussed. We are not concerned with the means by which the legislative powers become exercisable by a body other than one named in the statute.

[19] Case references omitted.

[20] See, e.g. W. Friedmann, *Law and Social Change in Contemporary Britain* (London, 1951), pp. 167-9; Sir Alfred Denning, "The Spirit of the British Constitution" (1951) 29 *Canadian Bar Review* 1184-6; A. E. Currie, "Delegated Legislation" (1948) 22 *A.L.J* 110-13.

We may now attempt to formulate the principles that govern the question here being discussed.

First, the maxim does apply to legislative powers. For this proposition there is support in *Taratahi Dairy Co. v. Attorney-General,*[21] *Geraghty v. Porter, Nelson v. Braisby* (No. 2),[22] *F. E. Jackson & Co. Ltd. v. Minister of Customs, The Chemicals Reference,*[23] *R. v. Holmes* and *Jackson Stansfield & Sons v. Butterworth.*[24] There is also support from writers, including Sir William Graham-Harrison, C.T. Carr, C. K. Allen, D. J. Hewitt[25] and the Donoughmore Committee cited *supra.* A. E. Currie in his note on the *Locker* case[26] also assumes that the maxim applies. At least one learned writer disagrees. Professor Friedmann asserts that the maxim does not apply to delegated legislation, but apart from Rinfret J., he appears to be alone in this.[27]

Secondly, the maxim cannot apply if the powers given are plenary. Support for this proposition is clearly found in *Nelson v. Braisby* (No. 2) and the *Chemicals Reference.*

Thirdly, if the powers are delegated in the strict sense in which that word has been used here, the maxim prevents sub-delegation without express or clearly implied authority. *Nelson v. Braisby* (No. 2), the *Chemicals Reference,*[22] *R. v. Holmes* and *Jackson Stansfield & Sons v. Butterworth*[29] bear out this proposition.

Fourthly, the question whether the maxim applies in any particular case is one of construction; it will depend on the nature of the powers given in the statute itself.[30]

[21] The judgment of Stout C.J. supports this proposition.
[22] The judgment of Reed J. is especially helpful.
[23] The judgments of Kerwin and Hudson JJ. support it, but Rinfret J. does not.
[24] The *obiter dicta* of Scott L.J. clearly support the proposition.
[25] *The Control of Delegated Legislation* (Wellington, 1953), p. 69.
[26] (1948) 22 *A.L.J.* 110.
[27] W. Friedmann, *Principles of Australian Administrative Law* (Melbourne, 1950), p. 33.
[28] The judgments of Kerwin and Hudson JJ. are most helpful on this point.
[29] Only Scott L.J., at 564-5 cited above, addressed himself to this question.
[30] Kerwin J. in the *Chemicals Reference* clearly regards the problem as essentially one of statutory interpretation.