DELEGATUS NON POTEST DELEGARE

The administrative law which has grown up around the Latin maxim *delegatus non potest delegare*, a delegate may not re-delegate, deals with the extent to which an authority may permit another to exercise a discretion entrusted by a statute to itself. The maxim is derived from and is most frequently applied in matters relating to principal and agent but it is not confined thereto;[1] it is basic in administrative law, the law relating to discretions conferred by statute. The maxim does not state a rule of law; it is "at most a rule of construction" and in applying it to a statute "there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects".[2] As a rule of construction for a section in the statute which confers a discretion on an authority named therein, the maxim applies: to an authority empowered to lay down general rules (legislative power);[3] to an authority empowered to decide a particular issue affecting the rights of an individual, be it a magistrate, a municipal authority, a wartime controller or a minister of the Crown (judicial and quasi judicial power);[4] to an authority empowered to determine whether legal proceedings shall or shall not be initiated against an individual;[5] and even to an authority empowered to do an act involving the exercise of practically no discretion, such as a utility company operating under a charter,[6] and a person serving a distress warrant,[7] It applies, in short, to all persons who are empowered by statute to do anything. Its most important application, however, is to authorities which are by statute empowered to exercise discretions affecting the rights and interests of the public, and it is this aspect of it that will be dealt with here.

The maxim deals with "delegation" by an authority of its statutory discretion. What is "delegation"? "Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to

[1] The contrary statement of Rinfret and Taschereau JJ. in *Reference re Regulations re Chemicals*, [1943] 1 D.L.R. 248, 261, is incorrect; Hudson J. at pp. 275-276 of the same case correctly states the law.

[2] Per Hudson J. at p. 276 of the case cited above.

[3] See such cases as *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Re Behari Lal*, 13 B.C.R. 415; *Geraghty* v. *Porter* [1917] New Zealand Law Reports 554.

[4] See such cases as *Caudle* v. *Seymour*, 113 E.R. 1372; *R.* v. *Stepney*, [1902] 1 K.B. 317; *Mills* v. *London County Council*, [1925] 1 K.B. 213; *Fowler (John) & Co. (Leeds)* v. *Duncan*, [1941] Ch. 450; *R.* v. *Chiswick Police Superintendent*, [1918] 1 K.B. 578.

[5] See such cases as *Kyle* v. *Barbor* (1888), 58 L.T. 229; *Firth* v. *Staines*, [1897] 2 Q.B. 70; *R.* v. *Halkett*, [1910] 1 K.B. 50.

[6] See such cases as *Eccles Corporation* v. *South Lancashire Tramways Company*, [1910] 2 Ch. 263 and *Spurling* v. *Dantoft*, [1891] 2 Q.B. 384, 392.

[7] *Symonds* v. *Kurz* (1889), 61 L.T. 559, 560, per Field J.

the conferring of an authority to do things which otherwise that person would have to do himself. . . . it is never used by legal writers, so far as I am aware, as implying that the delegating person parts with this power in such a way as to denude himself of his rights."[8] The fact that the authority named in the statute has and retains a general control over the activities of the person to whom it has entrusted the exercise of its statutory discretion does not, therefore, save its act of so entrusting to him the discretion from being "delegation" and so falling within the ambit of the maxim. If, however, the authority exercises such a substantial degree of control over the actual exercises of the discretion so entrusted that it can be said to direct its own mind to it, there is in law no "delegation" and the maxim does not apply. A provincial legislature which, being empowered by the B.N.A. Act to legislate on "property and civil rights within the Province" permits a commission to make regulations affecting taverns;[9] the Governor in Council who, being empowered by the War Measures Act to "make. . . such. . . regulations as he may by reason of the existence of . . .war. . . deem necessary or advisable for the . . . defence . . . of Canada" permits the Controller of Chemicals to make regulations affecting chemicals;[10] a committee which hands over its statutory powers to one of their number to be exercised according to his own unaided judgment;[11] a municipal council which, being empowered by statute to award compensation, adopts from the Treasury a standard of compensation and does not apply its own judgment to the amount it will give;[12] all these are delegating their powers and the question then is "Does the Act expressly or impliedly permit such delegation"?

A wartime controller who appoints someone to assist him in carrying out his duties but does not authorize him to exercise any of his powers,[13] and a Minister of Justice who signs an order suppressing s newspaper but acts, in accordance with ordinary departmental practice, not of his own knowledge but on the

[8] *Huth* v. *Clarke* (1890), 25 Q.B.D. 391, 395, per Wills J. This case held, therefore, that the executive committee of a local authority which, acting under a section permitting it to "delegate" its powers to a sub-committee, had so delegated them, did not thereby preclude itself from continuing to exercise itself the powers delegated by it.

[9] *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] A.C. 708.

[10] *Reference re Regulations re Chemicals*, [1943] 1 D.L.R. 248.

[11] *Cook* v. *Ward* (1877), 2 C.P.D. 255.

[12] *R.* v. *Stenney*, [1902] 1 K.B. 317.

[13] *Fowler (John) & Co. (Leeds)* v. *Duncan*, [1941] Ch. 450.

recommendation of his subordinates[14] are not delegating their powers and no further question arises. A county council which is empowered to grant movie licences "on such terms and conditions . . . as the Council may by the respective licences determine" delegates its powers if it inserts a condition "that no film be shown which has not been certified for public exhibition by the British Board of Film Censors",[15] but does not delegate them if it adds thereto a rider reserving to itself the right to dispense with that condition.[16] A local authority which is required by statute to "approve" the acts of one of its committees or officers delegates its powers and so does not "approve" if it passes a resolution allowing them to decide any matter independently of the authority and requiring them only to report quarterly the number of cases decided;[17] it does not delegate its powers and so does "approve" if in a particular case the committee or officer has decided a matter independently of the authority and the authority later ratifies the decision but without inquiring into it.[18]

When is delegation permissible? The answer to this question depends entirely on the interpretation of the statute which confers the discretion. A discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary indications found in the language, scope or object of the statute; to put the matter in another way, the word "personally" is to be read into the statute after the name of the authority on which the discretion is conferred unless the language, scope or object of the statute shows that the words "or any person authorized by it" are to be read thereinto in its place. This prima facie rule of construction dealing with delegation is derived in part from the "literal" rule of construction, in part from the political theory known as "the rule of law," and in part from the presumption that the naming of a person to exercise some discretion indicates that he was deliberately selected because of some aptitude peculiar to himself. The literal rule of construction prescribes that nothing is to be added to a statute unless there are adequate grounds to justify the inference that the legislature intended something which it

[14] *Yasnyj* v. *Lapointe*, [1940] 3 D.L.R. 204; *R.* v. *Chiswick Police Superintendent*, [1918] 1 K.B. 758 (Secretary of State signing deportation order in fact issued by a civil servant) is to the same effect.
[15] *Ellis* v. *Dubowski*, [1921] 3 K.B. 621.
[16] *Mills* v. *L.C.C.*, [1925] 1 K.B. 213.
[17] *High* v. *Billings* (1903), 67 L.T. 550.
[18] *Firth* v. *Staines*, [1897] 2 Q.B. 70.

omitted to express;[19] to read in the word "personally" adds nothing to the statute, to read in the words "or any person authorized by it" does. The "rule of law" says that, since the common law recognizes no distinction between government officials and private citizens, all being equal before the law, no official can justify interference with the common law rights of the citizen unless he can point to some statutory provision which expressly or impliedly permits him to do so; to point to a provision justifying interference by A does not, of course, justify interference by B. The presumption that the person named was selected because of some aptitude peculiar to himself requires the authority named in the statute to use its own peculiar aptitude and forbids it to entrust its statutory discretion to another who may be less apt than it, unless it is clear from the circumstances that some reason other than its aptitude dictated the naming of it to exercise the discretion. Because, however, the courts will readily mould the literal words of a statute to such a construction as will best achieve its object; because they will, recognizing the facts of modern government, readily imply in an authority such powers as it would normally be expected to possess; because the presumption of deliberate selection, strong when applied to the case of a principal who appoints an agent or a testator who selects a trustee, wears thin when applied to a statute which authorizes some governmental authority, sometimes with a fictitious name such as "Governor-in-Council" or "Minister of Justice", to exercise a discretion which everyone, even the legislature, knows will in fact be exercised by an unknown underling in the employ of the authority, the prima facie rule of *delegatus non potest delegare* will readily give way, like the principles on which it rests, to slight indications of a contrary intent.

What are these indications? The prima facie rule is displaced, of course, by a section in the statute which expressly permits the authority entrusted with a discretion to delegate it to another.[20] In the absence of such a provision, how does the court decide whether the rule is or is not intended to apply; how does it decide whether to read in the word "personally" or the words "or any person authorized by it"? The language of the statute does not, ex hypothesi, help it; it is driven therefore

[19] See *Maxwell, Interpretation of Statutes*, 7th ed., 12 and such cases as *Ex p. Sharps* (1864), 5 R. & S. 322 (successor in office incapable of acting); *Peebles* v. *Oswaldtwistle Urban District Council*, [1897] 1 Q.B. 384 (statutory forum exclusive); *Liverpool Corporation* v. *Hope*, [1938] 1 K.B. 751 (statutory method of enforcement exclusive).

[20] As in two well known English Acts, Education Act, 1921, sec. 4 (2) and Emergency Powers (Defence) Act, 1939, sec. 1 (3).

to the scope and object of the statute. Is there anything in the nature of the authority to which the discretion is entrusted, in the situation in which the discretion is to be exercised, in the object which its exercise is expected to achieve to suggest that the legislature did not intend to confine the authority to the personal exercise of its discretion? This question is answered in practice by comparing the prima facie rule with the known practices or the apprehended needs of the authority in doing its work; the court inquires whether the policy-scheme of the statute is such as could not easily be realized unless the policy which requires that a discretion be exercised by the authority named thereto be displaced; it weighs the presumed desire of the legislature for the judgment of the authority it has named against the presumed desire of the legislature that the process of government shall go on in its accustomed and most effective manner and where there is a conflict between the two policies it determines which, under all the circumstances, is the more important.

These propositions are abundantly illustrated by the Canadian cases on the delegation of legislative power. In *Hodge* v. *The Queen*, the Privy Council held that the Ontario legislature could delegate to a commission the power to regulate taverns which by the terms of the B. N. A. Act was given to the legislature; the Ontario legislature, it said, was "in no sense a delegate"; it was Westminster seen through the wrong end of the telescope; it was intended to govern Ontario in the same way as the British Parliament governed England; it pointed out that to hold otherwise would paralyze the process of government in a province.[21] In *Shannon* v. *Lower Mainland Dairy Products Board*, where it was argued that a provincial legislature could not delegate its power to legislate except as to details, the Privy Council countered with a reference to the everyday practice of twentieth century legislatures and said that "it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial have entrusted various persons and bodies with similar powers to those contained in this Act".[22] In the fall of 1943 the question arose whether the Governor-in-Council could delegate to wartime boards and controllers the power conferred upon him by section 3 of the War Measures Act "to make . . . . such . . . . regulations as he may by reason of . . . war . . . deem necessary or advisable for the . . . defence . . . . of Canada." An Ontario County Court Judge decided that he could not; "for one must realize that the Government of

[21] (1883), 9 App. Cas. 117.
[22] [1938] A. C. 708, 713.

Canada cannot go on without the delegation of wide legislative authority to the executive, but one must also realize that delegation cannot develop to the extent that our democratic government blossoms into a bureaucracy or a dictatorship".[23] The Supreme Court of Canada resolved this conflict of policies in the opposite direction and held otherwise . Chief Justice Duff succeeded in satisfying himself that the words of section 3 authorized delegation, but the other Judges held the prima facie rule against delegation to be displaced not by the words but by the circumstances of the Act. Rinfret J., for instance, equated the wartime relationship of the Government and the Parliament to the peacetime relationship of a provincial legislature to the Imperial Parliament and so concluded that for the duration of the war the Government was intended to be a Parliament in miniature to which, in accordance with *Hodge* v. *The Queen*, the maxim would not even apply.[24] Kerwin J. referred to "the purpose and intent of the Act which was to place in the hands of the Governor-General in Council all possible power in order that the war should be carried to a successful conclusion".[25] Hudson J. said that "in the light of the necessity for delegation and what took place during the last war. . . . I think it must be held that the Governor in Council has the power to delegate to others the performance of such duties as has been done in the present case."[26] In each of these cases the courts set about interpreting the statute the same way; they admitted the prima facie rule, balanced against it their knowledge of the practice of government through subordinate agencies and their appreciation of the impossibility of achieving the purpose of the Act without it, weighed the conflicting policies in the balance and came to a conclusion.

The same technique is to be observed in the English cases dealing with local authorities. May a local sanitary authority, whose approval to the initiation of nuisance proceedings is required by the statute, permit its inspector to decide for himself whether they shall be initiated or not and then, after he has initiated them, ratify his act by subsequent formal approval? In such a case the court balances the consideration that "it is important that (the authority) should exercise a discretion in each case and it is not enough that (the inspector) does what he pleases and then relies on his acts being afterwards approved by the authority"[27]

[23] *Rex* v. *Holmes*, [1943] 1 D.L.R. 241 247.

[24] *Reference re Regulations re Chemicals*, [1943] 1 D.L.R. 248 at pp. 260-261.

[25] *Ibid*, at p. 272.

[26] *Ibid*, at p. 278.

[27] *Bowyer, Philpott & Payne, Limited* v. *Mather*, [1919] 1 K.B. 419 429, per Avory J.

against the consideration that "in practice (the authority) are probably satisfied by the report of their medical officer, and I do not suppose that they ever go to the premises for the purpose of satisfying themselves (of the existence of a nuisance)".[28] The policy of maintaining the exercise by the sanitary authority named of the discretion entrusted to it is here balanced against the policy of maintaining the established practice whereby the real business of sanitary government is carried on by the inspector. Must an inspector of nuisances, who is by statute empowered to "procure any sample of food. . . . and if he suspect the same to have been sold to him contrary to any provision of this Act" to send it to the district analyst and thereafter to take proceedings to recover a penalty, go in person to the store and "personally procure" a sample? In *Horder* v. *Scott*,[29] the court rejected the argument that only a competent person, viz., the inspector of nuisances, was intended by the statute to procure the sample and based its decision on the ground that "inspectors of nuisances. . . . have numerous duties to perform, and if we held that to procure a sample under s. 13, the inspector must personally visit the shop, we should limit the operation of a very beneficial Act." Here again may be observed the same balancing of the same policies. Further illustration from the field of local government would be tedious[30] and this discussion will be concluded by referring to a case where it was held that the General Medical Council could not delegate to an executive committee its power to discipline dentists. Farwell J. there thought that a power of such importance to the dentist disciplined and to the dental profession as a whole should remain with the whole council and that the convenience of swift action through a committee, and the fact that the statute itself provided that "The General Council shall. . . . have power to act by an executive committee of the Council", were not enough to tip the balance against the application of the prima facie rule.[31]

The time has now come to sum up. The maxim *delegatus non potest delegare* enunciates a rule of construction for interpreting statutes which confer upon governmental authorities the power to decide questions affecting the rights of the public; it applies to all types of authority, central, local or professional, and all types

[28] *R.* v. *Chapman, ex parte Arlidge*, [1918] 2 K.B. 298, 307, per Avory, J.

[29] (1880), 5 Q.B.D. 552, 556, per Field J. See also *Tyler* v. *Dairy Supply* (1908), 98 L.T. 867, where the argument rejected in *Horder* v. *Scott* is forcibly put by the Court but again rejected.

[30] References may be made to similar balancing of the two conflicting policies in *High* v. *Billings* (1903), 67 L.T. 550, and *Firth* v. *Staines*, [1897] 2 Q.B. 70.

[31] *General Medical Council* v. *United Kingdom Dental Board*, [1936]Ch. 41.

of discretion, legislative, judicial, quasi-judicial and administrative. The rule of construction prescribes that to any statute which confers a discretion upon a named authority, the word "personally" should be added after the name of the authority. Where an authority, although entrusting to its employees the task of exercising the discretion in the first instance. retains nonetheless such a substantial degree of control over the actual exercise by them of the discretion so entrusted that it can be said to direct its own mind to it, the authority is exercising the discretion personally and there is no delegation. Where, however the control exercised by the authority over the actual exercise of the discretion by its employees is absent or falls short of being substantial the authority does not exercise the discretion personally and is delegating its powers; it then becomes necessary to turn back to the statute and inquire whether its language, scope or object is such as to displace the prima facie rule of construction. To determine whether in place of the word "personally" the words "or any person authorized by it" should be read into the statute and thus permit the delegation, the court weighs the importance of maintaining in the particular situation the policy of requiring the named authority to exercise the discretion itself against the importance of maintaining in the particular situation the established procedure followed by the authority, and of furthering the most convenient method of achieving the object of the Act. As in all cases where the decision turns on a court's estimate of the comparative value of two conflicting policies it is not easy to predict what a court will do with the instant case, but it is worth remarking that in their application of the maxim *delegatus non potest delegare* to modern governmental agencies the Courts have in most cases preferred to depart from the literal construction of the words of the statute which would require them to read in the word "personally" and to adopt such a construction as will best accord with the facts of modern government which, being carried on in theory by elected representatives but in practice by civil servants or local government officers, undoubtedly requires them to read in the words "or any person authorized by it."

JOHN WILLIS.

Dalhousie University,
Faculty of Law.