

**The Key to the Application of the Maxim
“Delegatus Non Potest Delegare”**

by

P. H. THORP

Parliament, in the exercise of its sovereign powers, has enacted that:¹

The Governor-General may from time to time, by Order in Council, make such regulations as appear to him to be necessary or expedient . . . generally for regulating civil aviation.

Under this authority, regulations were made whereby discretionary authority was conferred on the Director of Civil Aviation in these terms:²

Except with the prior permission of the Director and in accordance with such conditions as he may specify, an aircraft shall not be used for the purpose of:

(a) Towing any other aircraft or any drogue, banner, flag or similar article . . .

Further, the Director could have required some subordinate official or local body to make recommendations in particular cases, and the official or local body could in turn have conferred discretion on subordinates so that the power conferred was in fact exercised by a group of officials far inferior to that body named in the statute. It is generally recognised that some delegation of authority is essential for modern government to be practicable. Recent legislation abounds in provisions similar to that cited above, and in the majority of cases it is clear that Parliament must have intended the body named in the statute to delegate at least some of the authority conferred upon it.

¹ Civil Aviation Act, 1948, s. 3, considered in *Hookings v. Director of Civil Aviation* [1957] N.Z.L.R. 929.

² Civil Aviation Regulations, 1953 (S.R. 1953/108), Reg. 43.

But, this being so, the problem is immediately apparent. How are the Courts to construe such provisions? How are the Courts to decide whether Parliament intended to authorize any delegation at all? If it is clear that some delegation must have been envisaged, how is the degree to which delegation is authorized to be determined? Rarely will the statute expressly provide the answer to these questions, it being left to the courts to decide in each particular case according to the same principles of construction that apply in any case where the intention of the legislature is unclear.

The solution, then, lies essentially in the construction of the statute; and to assist the courts, there is a rule of construction embodied in the maxim *delegatus non potest delegare*.³ By this maxim any delegate is prohibited from subdelegating his powers unless the statute from which he draws his authority expressly or impliedly authorizes him to so subdelegate. The maxim applies to make all subdelegation prima facie unauthorized and void. This presumption can be rebutted only if the particular subdelegation is expressly or impliedly authorized by the empowering Act. If it is not so authorized, the maxim applies to make acts of the subdelegate void; if it is authorized, the prima facie rule is rebutted and the maxim is of no further application.⁴ It is clear, therefore, that the maxim itself is merely the pencil with which the court is able to draw the line between authorized and unauthorized subdelegation. The application of the maxim, however, is based on the central problem of the construction of the statute and is of far greater importance. To decide when the maxim will apply, the basic question of what Parliament has impliedly authorized must be answered. The way in which the court decides this question in each case is not only fundamental to the application of the maxim, but also to the court's entire supervisory jurisdiction over subordinate legislation.

On what grounds will the court find the subdelegation impliedly authorized to make the maxim inapplicable? It is submitted that the views of Professor John Willis, expressed nearly two decades ago,⁵ are the correct ones. In his opinion, the prima facie rule will readily give way to indications in the language, scope, and purposes of the

³ In *Geraghty v. Porter* [1917] N.Z.L.R. 554, at 556, the maxim was found to be of "general application". However, J. D. Merralls, in a note on *Croft v. Rose* [1957] A.L.R. 148, doubted whether *Geraghty's* case authoritatively established the applicability of the maxim in New Zealand; he believed that *F. E. Jackson & Co. Ltd. v. Collector of Customs* [1939] N.Z.L.R. 682 did this: (1958) 1 M.U.L.R. 105, 109-110.

⁴ The authorities are well-settled and it is not proposed to examine them here. For the relevant authorities see: John Willis, "*Delegatus Non Potest Delegare*" (1943) 21 C.B.R. 257, 258-259; J. F. Northey, "Sub-delegated Legislation and *Delegatus Non Potest Delegare*" (1952-1954) 6 Res. Jud. 294.

⁵ *Ibid.*

whole enactment. In particular, he continues, the court should consider such factors as the nature of the authority to which the discretion is entrusted, the situation in which it is to be exercised, and the object its exercise is expected to achieve. Generally, the court should weigh the strict literal interpretation of the provision against the common realities of modern government—that is, achieve a balancing of⁶

. . . 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.

This approach, it is submitted, must be the only real basis to the application of the maxim. The problem is essentially one of the construction of the statute, and in the construction of any statute, if the intention underlying a particular provision is unclear from the words of that provision, the court must turn to the language, scope, and purposes of the whole enactment. Indeed, in New Zealand this practice has statutory force in section 5 (j) of the Acts Interpretation Act 1924.⁷

However, there appear to be at least two other contenders for the position of key to the application of the maxim. The first is based on the fact that the maxim can only apply in case of subdelegation.⁸ Thus, if there is no subdelegation the maxim cannot apply, and, of course, if there is no initial delegation, there can be no subdelegation. There are two ways in which the courts may find that there has not been delegation, but something different:⁹ the powers conferred may be too wide to be termed delegated, or they may be such as to amount merely to administrative detail and therefore too narrow for the purposes of the maxim. To be too wide, it seems that they must be plenary. That is, the donee must have power equivalent to that of Parliament itself, in the area in which the power is to be exercised. The courts cannot interfere with the powers of Parliament to delegate, and thus neither can they interfere with delegation by a body possessing, in a certain area, the same powers as Parliament. Their power is limited to ensuring that the plenary powers are exercised only within the area prescribed by Parliament. How they are exercised

⁶ *Ibid.*, 261.

⁷ That the question as to whether the maxim applies is one of construction is also the view of Dr Northey, although he appears to consider the classification of the function as basic to the application of the maxim: *loc. cit.*, 303.

⁸ The reason is obvious. It would be a direct encroachment on the sovereignty of Parliament for the court to have the power to interfere at the initial delegation stage. See *Hodge v. The Queen* (1883) 9 App. Cas. 117.

⁹ Assuming there has been at least some discretionary authority conferred. For definition of “delegation” see Willis, *loc. cit.*, 257-258.

within that area is of no concern. A good example of this is *Nelson v. Braisby* (No. 2),¹⁰ where the court, following the decision in *Tagaloa v. Inspector of Police*,¹¹ found section 45 (1) of the Samoa Act 1921, to have conferred on the Governor-General in Council plenary powers.¹² As a result, the conferment of discretionary authority on the Administrator of Western Samoa by the Governor-General in Council was itself a delegation not a subdelegation of power, thereby making the maxim inapplicable. If the Administrator had in turn delegated his power to some official, then there would have been subdelegation and the maxim would have been applicable, but only at this level and not earlier.

For the power conferred to be too narrow for the purposes of the maxim, the donor of the power must have retained a substantial measure of control over the exercise of that power, or have set such standards and limitations on the exercise of the power that the discretion conferred is, in effect, only minor. Thus, in *Mackay v. Adams*¹³ the regulation was found to be a valid exercise of the power conferred on the Governor-General in Council to make regulations in relation to the classification of motor-lorries and the fixing of their speed limits, even though a power of dispensation was given to the local authorities. The power of dispensation was so limited that it could not be regarded as sufficient delegation for the purposes of the maxim. Also, in *Godkin v. Newman*¹⁴ Sim J. found that the Governor-General, in the exercise of his power to make regulations for the classification of all roads and streets in New Zealand with reference to their suitability for use by different classes of motor-lorries, could entrust the duty to others. However, he continued by saying that¹⁵

... if he does that he must first determine the basis on which the classification is to be made.¹⁶

But, is the finding in the various special circumstances that there has not been delegation, but something more or less than that, really

¹⁰ [1934] N.Z.L.R. 559.

¹¹ [1927] N.Z.L.R. 883.

¹² *Ibid.*, 597-600, per Herdman J., 613-614, per Reed J., 630 per Blair J. S. 45 (1) reads:

"In addition to all special powers of making regulations conferred upon the Governor-General by this or any other Act, the Governor-General in Council may make all such regulations as he thinks necessary for the peace, order and good government of Samoa."

¹³ [1926] N.Z.L.R. 518.

¹⁴ [1928] N.Z.L.R. 593.

¹⁵ *Ibid.*, 596.

¹⁶ This is apparently D. E. Paterson's interpretation of these cases: *An Introduction to Administrative Law in New Zealand* (1967) 25. Perhaps a more likely interpretation is that there was insufficient delegation only because the legislative power itself was not delegated. However, from the discussion of both cases (*infra*) it will appear that this distinction is irrelevant.

fundamental to the application of the maxim? In the writer's opinion, it cannot be. For, the question whether plenary or delegated powers have been conferred must still be a question of the construction of the empowering statute. Thus Myers C.J. in *Nelson v. Braisby* (No. 2)¹⁷ was of the opinion that, whether the powers conferred by section 45 of the Samoa Act were delegated or not, their extent was a matter purely of interpretation.¹⁸ Therefore, if the intention of the legislature is unclear, resort must be had to the scope and purposes of the whole enactment. In *Nelson's* case the question of interpretation was much simplified by the earlier decision in *Tagaloa v. Inspector of Police*,¹⁹ and the inevitable comparison of section 45 with section 53 of the New Zealand Constitution Act 1852 (U.K.). Nonetheless, the scope and purpose of the Act was still referred to, as, it is submitted, an extra indication of the intent of Parliament. Thus the Chief Justice said:²⁰

It has to be borne in mind that the New Zealand Parliament is not always in session, that Samoa is some twelve hundred miles away, and that a state of emergency may at any time arise which requires to be dealt with promptly and to cope with which the existing laws may be inadequate.

Similarly the questions as to how substantial must the measure of control be, and how stringent the standards and limitations imposed on the power, are necessarily questions of the construction of the statute. In *Mackay v. Adams*²¹ Sim J., early in his judgment, said:²²

The first question to be determined on this appeal is whether or not the Magistrate was right in holding that subclause 6 was *ultra vires*. If it does amount to a delegation of the legislative power conferred on the Governor-General, then it is *ultra vires*, for there is nothing in the Public Works Amendment Act, 1924, which authorises any delegation of the power conferred by s. 19.

Clearly his starting point was the construction of the Act. To find (as he did) that the regulation was valid he must have decided, be there delegation or no delegation, that it was impliedly authorized by the 1924 Act. Also, it is submitted that the same approach must have led Sim J. two years later in *Godkin v. Newman*²³ to his finding that the Governor-General could entrust his statutory duty to classify roads and streets to others, so long as he first determines the basis on which the classification is to be made. This may be to read too much into this case. However, in the writer's opinion the suggested implications are clear in *Mackay's* case, and it is likely that this is why Sim J. felt there was no need to elaborate in the *Godkin* case. Cer-

¹⁷ [1934] N.Z.L.R. 559.

¹⁸ *Ibid.*, 583.

¹⁹ [1927] N.Z.L.R. 883.

²⁰ [1934] N.Z.L.R. 559, 584.

²¹ [1926] N.Z.L.R. 518.

²² *Ibid.*, 521.

²³ [1928] N.Z.L.R. 593.

tainly both cases concerned the same section of the Public Works Amendment Act.²⁴

The second possible contender for the position of key to the application of the maxim is based on the classification of powers into legislative, administrative, and judicial. Professor Willis once described the law surrounding this classification as "highly acrobatic",²⁵ and Professor S. A. de Smith, in a complex and illuminating chapter devoted to an attempt to define the limits of the three functions,²⁶ illustrates the point well. Yet this classification has permeated the whole field of administrative law. In relation to the application of the maxim its effect, it is submitted, has been to confuse rather than to illuminate. The impression left by the cases is that the court has looked at the function of the subdelegate, fitted it into one of the three categories, and decided whether the subdelegation is impliedly authorized according to that category. The essential basis of the application of the maxim often appears to have been not what Parliament intended, according to the language, scope, and objects of the whole enactment, but whether the subdelegated function fits into the legislative, administrative, or judicial categories, whatever they may be. Nevertheless, it is the writer's submission that the views of Professor Willis are still supported by the common law in New Zealand. Though the classification of functions undoubtedly plays its part, the true crux of the application of the maxim in each case is still the fundamental problem, often obscured, of the construction of the statute to determine the intention of the legislature.

In *Geraghty v. Porter*²⁷ the law as to subdelegation in New Zealand was, in the opinion of Turner J. in *Hookings v. Director of Civil Aviation*²⁸ correctly and clearly summarized. But Turner J. concluded from *Geraghty's* case as follows:²⁹

If, therefore, the power to be exercised by the Director pursuant to Reg. 43 is a legislative power, and not the mere administration of regulations validly made, then this regulation must be invalid as ultra vires.

It is submitted that this is misleading as to the true method in which the maxim was applied in *Geraghty v. Porter*. For in that case the learned judge first stated the rule and found the maxim to be of "general application". He then considered the scope and purpose

²⁴ In *Hookings v. Director of Civil Aviation* [1957] N.Z.L.R. 929, a dispensing power was found to be analogous to that in *Mackay's* case. As to this case see infra.

²⁵ "Administrative Law and the British North America Act" (1939) 53 Harv. L.R. 251, 281.

²⁶ *Judicial Review of Administrative Action* (2nd ed., 1968) Chapter 2.

²⁷ [1917] N.Z.L.R. 554.

²⁸ [1957] N.Z.L.R. 929.

²⁹ *Ibid.*, 935.

of the Motor Regulation Act 1908, and satisfied himself that no sub-delegation could have been intended by Parliament. Therefore, it was unauthorized:³⁰

There is nothing in the Motor Regulation Act which authorises any delegation of the powers conferred by s. 3 thereof, and there is every reason for concluding that the Legislature intended the subject to be dealt with by one regulation operating throughout the Dominion instead of being left to be settled in different ways by the various registering authorities.

In *Hookings*' case the judgments of Sim J. in *Mackay v. Adams*³¹ and *Godkin v. Newman*³² were, with respect, similarly stated in a misleading manner in relation to the application of the maxim. In *Mackay*'s case, as has already been submitted, the regulation was upheld because the apparent subdelegation was in the court's opinion *intra vires* the empowering act, being impliedly authorized by it. The clear statement³³ that if the regulation had amounted to a delegation of the “legislative power” conferred on the Governor-General it would then have been *ultra vires* shows that the function conferred on the subdelegate was regarded as important, if not decisive in that case. However, that the category of function was not the basic reason for the decision not to apply the maxim appears from the finding³⁴ that the Act did not authorize *any* delegation of the power conferred by section 19. The implication is that, even if the regulation was found to have delegated an administrative or judicial function, the subdelegation still would have been unauthorized and void. As for *Godkin*'s case, the classification of functions was not even mentioned. Yet in *Hookings*' case, both cases were, it seems, taken as authority for the proposition that subdelegation of a legislative function is invalid because of the maxim, while subdelegation of an administrative function is not. Indeed, such conclusion cannot be said to be wrong. But the writer's contention is that to so construe these cases is misleading as to the real key to the application of the maxim.

In *F. E. Jackson & Co. Ltd. v. Collector of Customs*³⁵ Callan J. stated the issue before him as whether Parliament had empowered the Governor-General in Council to confer the powers contained in the Import Control Regulations 1938, upon the Minister of Customs. This could only be a question of the interpretation of the statute:³⁶

The duty of the court is to search for the intention of Parliament and to support regulations that keep within that intention, and to disallow such as do not. The intention of the Legislature as revealed by its enactments is the controlling factor.

³⁰ [1917] N.Z.L.R. 554, 556.

³¹ [1926] N.Z.L.R. 518.

³² [1928] N.Z.L.R. 593.

³³ [1926] N.Z.L.R. 518, 521.

³⁴ *Idem*.

³⁵ [1939] N.Z.L.R. 682.

³⁶ *Ibid.*, 721.

He then proceeded, after considering the language of the two relevant provisions, the purpose and history of the legislation containing these provisions, and the nature and effect of the powers conferred, to decide that the regulations were invalid. Thus, if this finding had been due to the application of the maxim the approach taken would clearly support the initial submission in this paper. However, Callan J. saw fit to rely on the maxim only in the interpretation of the second provision considered, that is, section 10 (2) of the Reserve Bank of New Zealand Amendment Act 1936. Even then, the main reason for finding the regulations not to have been authorized by section 10 (2) seemed to be that the Governor-General, by subdelegating his powers, was not *regulating* which was all he was empowered to do.³⁷ Nevertheless, it is submitted that the case still lends weight to the views of Professor Willis. The legislative classification of the function was referred to when the rule concerning the maxim was stated as being:³⁸

[d]elegated legislative power cannot be sub-delegated except in so far as Parliament, which created the power, has said that it might be sub-delegated.

But, even if this rule had been the basis of decision throughout, the fundamental question constantly before Callan J. was what Parliament had authorized. Whatever the content of the regulations made by the Governor-General, the crux of the matter was that it was not within the intention of Parliament that he legislate in the way he had.

Thus, it is submitted that the cases do show the approach propounded by Professor Willis as being the real key to the application of the maxim in New Zealand. So too does the decision in the *Hookings* case itself. The court, in the process of construing section 3 of the Civil Aviation Act 1948, found the regulation complained of to be *intra vires* the empowering Act. That is, it satisfied itself that the *prima facie* unauthorized subdelegation was in fact impliedly authorized since sufficient standards for the exercise of the discretion had been set down in the empowering Act, and that the subdelegation was necessary to carry into effect the true purpose of the regulation. This, it is submitted, is the correct interpretation of the conclusion of Turner J. concerning the appellant's second submission:³⁹

Reg. 43 does not purport completely to subdelegate the legislative power given to the Governor-General, as in *Geraghty v. Porter* . . . nor even any substantial part thereof, but is analogous to the dispensing power granted by the Regulation in *Mackay v. Adams*. . . . The Director is empowered by Reg. 43 to grant or withhold permission in certain cases in order the more efficiently to carry into effect the true purpose of the regulations namely, "the safety of aircraft and of persons . . . carried therein".

³⁷ *Ibid.*, 734-735.

³⁸ *Ibid.*, 733.

³⁹ [1957] N.Z.L.R. 929, 938.

Also, clear support can be found in *Hawkes Bay Raw Milk Producers' Co-operative Co. Ltd. v. New Zealand Milk Board*.⁴⁰ Cleary J. posed the question before him as whether the Order in Council, which was authorized by the statute to fix (inter alia) the price payable to milk producers in accordance with recommendations made by the Minister after consultation with the Board, could authorize the Minister himself to fix that price after consultation with the Board. He continued, to point out that *ex facie* the order was not authorized by the Act, and then considered whether the Act impliedly authorized the subdelegation. In so doing, he found that the power conferred on the Minister by the Order in Council was legislative, and that *Geraghty v. Porter*⁴¹ and *F. E. Jackson & Co. Ltd. v. Collector of Customs*⁴² were authorities against the subdelegation of legislative power. That he interpreted these cases, and applied the maxim, in the manner suggested as correct in this paper is clear from his next statement that the Canadian decisions of *Reference re Regulations (Chemicals) under War Measures Act*⁴³ and *Attorney-General of Canada v. Brent*⁴⁴ are quite consistent with the New Zealand position. He continued:⁴⁵

[In the former case] the Supreme Court of Canada held that the Governor in Council could, under extremely wide powers to make regulations . . . delegate to subordinate agencies legislative powers, but the judgments make it clear that the language of the War Measures Act—“in as wide terms as may be imagined”—was considered as impliedly authorising the delegation of the powers conferred.

At this point, Cleary J. concluded that:⁴⁶

[The empowering provision] contains no express power of delegation nor does the language used permit of the implication of any such power. Since a power to delegate to the Minister the fixing of the price was not conferred either expressly or by necessary implication, it follows that the function professed to be conferred on the Minister . . . is not authorised by the statute.

Thus, the basis of the application of the maxim in this case is clear. However, Cleary J. saw fit to continue, presumably to give further reasons for finding the subdelegation not to be impliedly authorized, to distinguish between the subdelegation of legislative and administrative powers. He concluded that:⁴⁷

⁴⁰ [1961] N.Z.L.R. 218. Cf. *Augustine Farm Dairy v. Milk Commission of Ontario* (1970) 17 D.L.R. (3d) 155.

⁴¹ [1917] N.Z.L.R. 554.

⁴² [1939] N.Z.L.R. 682.

⁴³ [1943] 1 D.L.R. 248.

⁴⁴ (1956) 2 D.L.R. (2d) 503.

⁴⁵ [1961] N.Z.L.R. 218, 223.

⁴⁶ *Idem*.

⁴⁷ *Ibid.*, 224.

. . . even more clearly than in *Godkin v. Newman* . . . the regulation purports to place in the hands of the Minister the legislative function itself.

It is submitted, with respect, that it was unnecessary to introduce such a troublesome distinction. The difficulties that can arise are exemplified by C. C. Aikman who explains⁴⁸ that, by labelling the function of fixing prices as legislative, Cleary J. took a different position from that expressed in the dicta of Rich J. and Williams J., delivering the judgment of the High Court of Australia in *Arnold v. Hunt*⁴⁹ where Orders fixing prices were suggested as being "executive in character" rather than legislative.⁵⁰ Nevertheless, it is clear that the legislative character of the power was not the real reason behind the application of the maxim in this case. The subdelegation in the writer's opinion was not bad so much because of the legislative classification of the power conferred. Rather it was invalid because there was nothing to suggest that the court should disregard the clear language of the Act and allow someone other than the body named to exercise the power delegated by Parliament.

So far the cases discussed have concerned only powers classified as legislative or administrative.⁵¹ It remains to consider a case involving the subdelegation of a judicial function, namely the House of Lords decision in *Vine v. National Dock Labour Board*.⁵² Professor D. E. Paterson considers a judicial function an exception to the general rule,⁵³ and Dr C. C. Aikman points to a general assumption that the legislature intends judicial functions to be exercised by the person expressly authorized to do so.⁵⁴ Further, Hardie Boys J. in *Jefferies v.*

⁴⁸ "Subdelegation of Legislative Powers" (1960) 3 V.U.W.L.R. 69, 80, n.15. (1943) 67 C.L.R. 429, 432, 433.

⁵⁰ Price orders are also discussed in *F. E. Jackson & Co. Ltd. v. Price Tribunal* [1950] N.Z.L.R. 433.

⁵¹ No case has been mentioned where subdelegation of an administrative power was invalidated by the application of the maxim. Possibly such a case is *Allingham v. Minister of Agriculture* [1948] 1 All E.R. 80. However, the Court does not describe the function according to the legislative-administrative-judicial classification, and the case clearly supports the views of Professor Willis as to the application of the maxim. The problem of delegation continues to come before the High Court of Australia. In the recent case of *Esmond's Motors Pty., Ltd. v. Commonwealth of Australia* (1970) 120 C.L.R. 463, Menzies J. said at 476: ". . . I disregard as unimportant a distinction that has sometimes been drawn between legislative power and administrative power and . . . I find no basis upon which to limit Parliament's power to grant subordinate legislative authority." In *Blackpool Corporation v. Locker* [1948] K.B. 349, and *Jackson Stansfield v. Butterworth* [1948] 2 All E.R. 558, the legislative-administrative distinction was much discussed, but it is submitted that it is irrelevant since it applied only to such questions as whether circulars should be published as Statutory Instruments. See J. F. Northey loc. cit., 302.

⁵² [1957] A.C. 488.

⁵³ Op. cit., 25.

⁵⁴ Loc. cit., 70-71.

*New Zealand Dairy Production and Marketing Board*⁵⁵ found *Vine's* case to state a principle that:⁵⁶

. . . whilst an administrative function can often be delegated, a judicial function rarely can be. . . .

However, these views cannot lend weight to the proposition that the classification of powers is the crucial factor in the application of the maxim. For, in *Vine's* case Somervell L.J. (with whom Viscount Kilmour L.C. expressly agreed) had this to say:⁵⁷

In deciding whether a “person” has power to delegate one has to consider the nature of the duty and the character of the person.

Thus he was able to conclude that:⁵⁸

I am . . . clear that disciplinary powers, *whether judicial or not*, cannot be delegated. The non-entitlement to pay, the suspension, the notice or the dismissal must be a step taken by the board and not by a delegate. [Emphasis added.]

The crux of the application of the maxim in this case was plainly that submitted as correct in this paper, and not the judicial classification of the power concerned.

Finally, in New Zealand there are three broad statutory provisions which purport to authorize subdelegation in a wide range of cases. What effect do these have on the application of the maxim?

First, and most important, subdelegation in regulations⁵⁹ is apparently authorized by section 2 (2) of the Statutes Amendment Act 1945, which states:

No Regulation shall be deemed to be invalid on the ground that it delegates to or confers on the Governor-General or on any Minister of the Crown or on any other person or body any discretionary authority.

Clearly the problem is the width of this provision. *Prima facie* it purports to enable the Executive to sidestep existing safeguards against improper delegation, such as the opportunity for Parliament to review the regulations and the requirement that they be published, merely by subdelegating its authority to “any person or authority”. That such cannot have been the intention of Parliament is indisputable. However, how is section 2 (2) to be limited? Dr Aikman, in a detailed analysis of section 2 (2), suggests a “semantic approach” based on the difference between delegating and conferring,⁶⁰ but his problem is that this approach has not been adopted by the court.

⁵⁵ [1965] N.Z.L.R. 522.

⁵⁶ *Ibid.*, 538.

⁵⁷ [1957] A.C. 488, 512.

⁵⁸ *Idem.* See also: *Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18; *R. v. College of Physicians and Surgeons of British Columbia* (1970) 18 D.L.R. (3d) 197.

⁵⁹ As defined in the Acts Interpretation Act, 1924, s. 4.

⁶⁰ *Loc. cit.*, 101.

Another possibility is to construe the phrase "discretionary authority" with reference to the legislative—administrative—judicial classification of powers. This appears to have the implied support of Cleary J. in *Hawke's Bay Raw Milk Producers' Co-operative Ltd. v. New Zealand Milk Board*,⁶¹ which was the first of the only two cases in which section 2 (2) has been discussed. In his opinion, whatever was meant by "discretionary authority" and indeed by the whole provision, it did not and could not authorize subdelegation of the "very matter entrusted [to the Governor-General] for decision."⁶² That is, the legislative power itself. However, he expressly declined to define exactly what is permissible under section 2 (2), and thus his judgment is of limited value.

A third possibility is that "discretionary authority" means any authority whatsoever, so long as it is *intra vires* the empowering Act, and not repugnant to this Act, to subdelegate this authority. This, it is submitted, was the approach taken in the recent case of *Attorney-General v. Mount Roskill Borough*.⁶³ Concerning the validity of Ordinance 13 of the Mount Roskill district town planning scheme, McMullin J. had this to say:⁶⁴

My conclusion that ord. 13 is *ultra vires* is not based, however, solely on its breadth but also on its summary nature. To me the presence of such a wide dispensing power to be exercised summarily is repugnant to the [Town and Country Planning Act, 1953] because the Act is not only concerned with laying down of schemes but with the establishment of proper safeguards for the protection of the rights of objectors. This point, in my opinion, is the answer to the contention that section 2 (2) of the Statutes Amendment Act 1945 provides that no regulation shall be deemed to be invalid on the ground that it delegates to or confers on any person or body, a discretionary authority.

In the writer's opinion, this approach to section 2 (2) is the correct one, and, therefore, section 2 (2) has at most only minimal effect on the application of the maxim. It cannot authorize something which the empowering Act does not authorize and thus the basic problem of what Parliament has authorized must be solved. Further, this view has long had the support of Dr Aikman. Having explained that section 2 (2) cannot apply to cure regulations which do not, as regards subject-matter, fall within the scope of the relevant statutory authority, he considers⁶⁵ that it is possible that section 2 (2) does not change the law at all. His suggestion is that at most it could uphold the validity of borderline cases of subdelegation by justifying the most liberal approaches to the common law. Indeed, he continues, the approach

⁶¹ [1961] N.Z.L.R. 218.

⁶² *Ibid.*, 225.

⁶³ (1972) 4 N.Z.T.C.P.A. 44.

⁶⁴ *Ibid.*, 56.

⁶⁵ *Loc. cit.*, 103-105.

propounded by Professor Willis could thus be assisted by the provision, in that it may enable account to be more readily taken of⁶⁶

... the presumed desire of the legislature that the process of government shall go on in its accustomed and most effective manner.

This interpretation is to be preferred to any based on the classification of functions, both because of the clear statement of McMullin J. in the *Mount Roskill Borough* case, and simply because of the difficulties, referred to earlier, surrounding the legislative—administrative—judicial classification. Also, Cleary J. himself in the *Hawke's Bay Raw Milk Producers* case could be taken as impliedly supporting the views of McMullin J. His reason for finding legislative power not to be covered by section 2 (2) was, it is submitted, because such delegation was not authorized by the empowering Act. Thus he said:⁶⁷

It could be a negation of the statutory authority given if the Governor-General, who is appointed to decide the matter by Order in Council, were free by virtue of this section to delegate completely the very matter entrusted for decision.

The problem is, however, that to so interpret section 2 (2) is to virtually construe it out of existence.⁶⁸ Perhaps section 2 (2) could authorize borderline cases of subdelegation. Indeed, it could be construed as rebutting the presumption against subdelegation embodied in the maxim, so that all subdelegation in regulations is prima facie authorized, unless the power to subdelegate is expressly or impliedly denied. But, either way the key to the application of the maxim must remain untouched, since McMullin J. in the *Mount Roskill Borough* case has clearly indicated that the provision cannot authorize that which is not authorized by the empowering Act. It seems that at least one thing is clear. It will take a far more precise and explicit provision than section 2 (2) for the court to admit to any limitation at all on its common law powers over subdelegation.

Second, in the case of bylaws, section 13 of the Bylaws Act 1910 applies.⁶⁹ Although this provision seems to be wider than section 2 (2) of the Statutes Amendment Act, in the writer's opinion the

⁶⁶ Willis, loc. cit., 261.

⁶⁷ [1961] N.Z.L.R. 218, 225.

⁶⁸ Though C. C. Aikman for one does not regard this as important since there is no presumption that a statute is intended to change the law: loc. cit., 104.

⁶⁹ Section 13 reads: “(1) No bylaw shall be invalid because it requires anything to be done within a time or in a manner to be directed or approved in any particular case by the local authority making the bylaw, or by any officer or servant of the local authority, or by any other person, or because that bylaw leaves any matter or thing to be determined, applied, dispensed with, ordered or prohibited from time to time in any particular case by the local authority making the bylaw, or by any officer or servant of the local authority, or by any other person. (2) This section shall not apply to any case in which the discretion so left by the bylaw to the local authority, or to any officer, servant, or other person, is so great as to be unreasonable.”

reasonableness test in section 13 (2) of the Bylaws Act incorporates the common law position as to the application of the maxim. That is, any common law principles would, it is submitted, be relevant in deciding how reasonable the bylaw is, and thus section 13 cannot affect the basis of the application of the maxim. Third, comparable to section 13 is section 390 (b) of the Municipal Corporations Act 1954.⁷⁰ It is submitted that neither can this provision affect the application of the maxim. For, as Mr P. E. Kilbride contends⁷¹ the court in an appropriate case would probably fall back on its general power under section 17 of the Bylaws Act to declare any bylaw invalid on the ground of unreasonableness.

In conclusion, there have been two main objects throughout this paper. First, to place the maxim *delegatus non potest delegare* in its correct perspective in the field of administrative law, and second, to distinguish between the so-called functional and conceptual approaches to administrative law. The first is relatively straightforward. The maxim itself is merely a rule of construction which establishes a presumption from which the court must start in construing a provision. Depending on the construction of the relevant provision, the presumption may be rebutted, or it may be left and the maxim applied in full to invalidate the subdelegation. The writer has attempted to show that the application of the maxim must and can only depend on the construction of the relevant statute. The key to the application of the maxim is the basic question of vires, of what Parliament has and has not authorized, and is not to be found in any body of rules that may appear to have developed around the maxim itself. Thus the maxim itself plays a minor role, while the law as to its application is fundamental to the courts' jurisdiction over subordinate legislation and the subdelegation of statutory authority.

However, the second object is a more difficult one. A concerted plea for a functional rather than a conceptual approach to administrative law was made by Professor Peter Brett in an article in the New Zealand Journal of Public Administration. The sort of thing he meant is indicated by the following passage:⁷²

⁷⁰ Section 390 (b) reads: "A bylaw may leave any matter or thing to be determined, applied, dispensed with, prohibited, or regulated by the Council from time to time by resolution, either generally or for any classes of cases, or in any particular case." Section 390 (b) is compared with s. 13 of the Bylaws Act by Wild C.J. in *Mandeno v. Wright* [1967] N.Z.L.R. 385, 386.

⁷¹ "Regulation, Prohibition, and Subdelegation" (1965-1968) 1 Otago L.R. 97, 101, n.9.

⁷² "Administrative Law: A Conceptual or a Functional Discipline." (1964) 26 N.Z.J.P.A. 46, 60.

The Court's function is that of ensuring that the official has kept within any limits which Parliament may have laid down, and that in arriving at his decision, he has addressed his mind to the proper aspects of the matter and adopted fair procedures. Whether he has done these things is best decided by examining what he has to do, rather than by attempting to put what he has done into a pigeon-hole neatly labelled "legislation" or some other term.

In this paper an attempt has been made to adopt a functional approach to the key to the application of the maxim. That is, to look at the function of the court in applying the maxim, at the problem it has before it in each particular case, and in the light of this, at how the problem has in fact been solved in each case. In so doing the object has been to go behind the various concepts of what is and is not delegation or subdelegation, and of whether the subdelegation is of legislative, administrative, or judicial power, to establish the fundamental reason behind the application of the maxim. To have adopted a conceptual approach could not, it is submitted, have exposed the real basis. For, to have looked at whether the court in each case found there to have been subdelegation or something different, or at whether it found the subdelegation to be of legislative, administrative, or judicial power would only have been to obscure exactly what the court was trying to do in each case. De Smith, in a chapter already referred to,⁷³ shows clearly the inconsistencies that result from any attempt to reconcile the cases from a conceptual viewpoint. However, at first reading, the cases appear to have adopted this conceptual approach, and indeed this is what Peter Brett was complaining of. Nevertheless, that the real key to the application of the maxim lies behind the delegated-plenary distinction, or the legislative-administrative-judicial classification, is, it is submitted, still apparent from and supported by the cases. The views of Professor Willis still apply in New Zealand today, and remain unaffected by the apparent conceptual approach to the application of the maxim, and even by the three statutory provisions discussed. The central issue in the application of the maxim is the construction of the empowering Act—what Parliament has authorized according to what may be summarised as the language, scope, and objects of the statute. The maxim cannot apply to invalidate that which is within the intention of Parliament, just as it must apply to invalidate that subdelegation which is beyond the intention of Parliament.

⁷³ Ante, n.26.