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DELEGATA POTESTAS NON POTEST DELEGARI: A MAXIM OF AMERICAN CONSTITUTIONAL LAW

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I. HISTORY AND APPLICATION OF THE MAXIM

American lawyers are familiar with the maxim "*delegatus non potest delegare*" (or "*delegata potestas non potest delegari*"), but its history is little known and its true scope not always understood. The present study is an attempt to discover how the maxim came into existence, and how it was applied before the nineteenth century.¹

A climax may be found in the work of Story, who summed up the previous development, and, by lending the weight of his authority to the Latin phrase, gave it an otherwise inexplicable influence over the minds of later judges. In his *Commentaries on the Law of Agency*² he gives the following statement of the governing principles:

One, who has a bare power or authority from another to do an act, must execute it himself, and cannot delegate his authority to another; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or, if known, might not be selected by him for such a purpose³. . . The reason is plain; for, in each of these cases, there is an exclusive personal trust and confidence reposed in the particular party. And hence is derived the maxim of the common law; *Delegata potestas non potest delegari*. And the like rule prevailed, to some extent, in the civil law; *Procuratorem alium procuratorem facere non posse*⁴. . . .

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¹The second part of this article contains a study of the influence of the maxim in the development of the doctrine of American constitutional law, that legislative power cannot be delegated, with particular emphasis on the earlier cases. While the authors have cooperated, the first part is mainly the work of Mr. Duff; the second part, the work of Mr. Whiteside.

²(1839) § 13.

³This is taken almost verbatim from BACON'S ABRIDGMENT, AUTHORITY, D.

⁴This text (Digest 49.1.4.5) refers only to representation in litigation and before *litis contestatio*. Another text (D. 17.1.8.3) seems to assert the possibility of sub-delegation by *procuratores ad administrandum dati*, and was certainly so understood by Cujas, the greatest 16th century authority: see CUJACII OPERA, (ed. 1836) Vol. 8, col. 409, *Recitatio ad tit. de app. et rel., L. ab executore, § si procurator*. (D. 49.1.4.5).

14. In general, therefore, when it is intended, that an agent shall have a power to delegate his authority, it should be given to him by express terms of substitution. But there are cases, in which the authority may be implied; as where it is indispensable by the laws, in order to accomplish the end; or it is the ordinary custom of trade; or it is understood by the parties to be the mode, in which the particular business would or might be done. . . . In short, the true doctrine, which is to be deduced from the decisions, is, (and it is entirely coincident with the dictates of natural justice,) that the authority is exclusively personal, unless, from the express language used, or from the fair presumptions, growing out of the particular transaction, or of the usage of trade, a broader power was intended to be conferred on the agent.

In other words, delegated authority cannot be re-delegated unless there is some reason why it should be. This is not altogether self-evident and might determine the burden of proof in a particular case; but a maxim weighed down with such a very large exception needs strong support if it is to pose as "a primal axiom of jurisprudence."⁵

Kent gives us the rule with somewhat less qualification than Story:⁶

An agent ordinarily, and without express authority,⁷ . . . has not power to employ a sub-agent to do the business, without the knowledge or consent of his principal. The maxim is, that *delegatus non potest delegare*, and the agency is generally a personal trust and confidence which cannot be delegated; for the principal employs the agent from the opinion which he has of his personal skill and integrity, and the latter has no right to turn his principal over to another, of whom he knows nothing.

Earlier still (1808) Sugden had said:⁸

Wherever a power is given, whether over real or personal estate, and whether the execution of it will confer the legal or only equitable right on the appointee, if the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus non potest delegare*.

This refers only to powers of appointment, not to agency; but here again, as in Story, the wider Latin maxim is merely an after-thought, and delegation is only denied where the testator relied on the donee's "judgment and discretion."

⁵Parker v. Commonwealth, 6 Barr, 507, 515 (Pa. 1847).

⁶2 KENT'S COMMENTARIES (1st ed. 1827) 633.

⁷This follows the maxim too closely to be true; and Kent inserted here in the fourth edition "or a fair presumption of one, growing out of the particular transaction, or of the usage of trade." *Ibid.* (4th ed. 1840).

⁸SUGDEN, TREATISE ON POWERS (1st ed. 1808) 144.

Of course all these writers cite cases, but few of their citations have anything to do with our maxim. They show clearly that an authority involving "trust and confidence" cannot be delegated; and that some feudal rights and duties are too personal to be exercised or performed by a deputy.⁹ But they also show that where there is no "judgment and discretion" involved, where the sub-agent is to perform "mere ministerial acts,"¹⁰ there is no general rule forbidding subdelegation. The maxim itself is found in only three of the cases cited. In *Alexander v. Alexander*,¹¹ Sir Thomas Clarke, M.R., said: "If there is a power to A, of personal trust or confidence, to exercise his judgment and discretion, A. cannot say this money shall be appointed by the discretion of B. for *delegatus non potest delegare*."¹² In *Bristow v. Ward*¹³ counsel for the plaintiffs urged that *delegatus non potest delegare*, and opposing counsel did not dispute the maxim, but said it did not apply. And in *Blore v. Sutton*¹⁴ counsel said, *arguendo*, "Admitting the principle that *delegatus non potest delegare*, this is a case to be determined by the usual course of management," which would take it out of the rule.¹⁵ It also appears from a remark¹⁶ in *Doe dem. Duke of Devonshire v. Lord George Cavendish*¹⁷ that Lord Mansfield knew the maxim. But none of these four cases gives any hint of its origin; and none of the judgments rely on its authority.

On this state of the cases, it seems likely that a principal source of the citations is Branch's *Maxims*, a book published in 1753 which soon came into very general use. He gives the form "*Delegata Potestas non potest delegari*," and refers to Coke, 2 *Inst.* 597. In this passage Coke is discussing Distrain of Knighthood, the writ by which holders of knight's fees were compelled to accept knighthood or pay a fine. Attempts were made to have such cases tried by roving commissioners; on which Coke says:

⁹Combes' Case, 9 Co. Rep. 75. (C. P. 1613).

¹⁰Mason v. Joseph, 1 Smith, 406 (K. B. 1804).

¹¹2 Ves. 640, 643 (Ch. 1755), power of appointment under a will.

¹²The maxim looks here like an addition of the reporter's (in 1771).

¹³2 Ves. Jr. 336, 344, 345 (Ch. 1794), power of appointment under marriage articles.

¹⁴3 Mer. 237, 244 (Ch. 1817), power to make leases under a will.

¹⁵The court decided against him, saying "To go farther, and say, that a man shall be bound not only by his own parol agreement, but by the uncommunicated and unknown parol agreement of another person, would be to break in upon the statute of frauds, without the existence of any of the pretexts on which it has been already too much infringed."

¹⁶"Another objection was, that the power could not be delegated. That is a good maxim, but it does not apply to this case."

¹⁷4 T. R. 741 n, 744 *fin.* (K. B. 1782), power of appointment under a will.

This writ and the return thereof is by writ of *mittimus* transmitted into the court of exchequer, who cannot make a commission to others concerning this matter, but ought to proceed legally themselves, because they have but *delegatam potestatem, quae non potest delegari*, and they are learned, and sworn judges, and able to allow the parties their just exceptions.

This naturally means to us: "they have only a delegated power, and delegated power cannot be delegated;" but it may well have meant to Coke: "they have only a delegated power, and moreover one that cannot be delegated. In any case delegation of delegated *jurisdiction* is generally undesirable, and condemned by the Digest:¹⁸ *mandatam sibi jurisdictionem mandare alteri non posse manifestum est*. But Coke's latin tag certainly looks like a quotation from some authoritative source.

There was in fact more than one place where he could have found the words "*delegatus non potest delegare*" or something very like them. There is indeed nothing of the kind in the *Corpus Juris Civilis*, where *delegare* and *delegatus* are very seldom used in the sense of "delegate"; or among the maxims in the Decretals¹⁹ or the Sext; or in the collection of maxims of Bartholomew of Brescia.²⁰ But the identical phrase occurs in the gloss on texts restricting subdelegation of delegated *jurisdiction*,²¹ and in Tellez' commentary on the Decretals we find similar expressions in the same connection.²² Moreover, the maxim appears (as "*Delegatus delegare non potest*") in *Flores Legum*, published at Paris in 1566,²³ where it is supported by reference to D. 2.1.5. and C. 3.1.5.

¹⁸D. 1.21.5. pr. See this whole title, and also D. 2.1.5., D.50.17.70, and Code 3.1.5.

¹⁹Book 5, Title 41.

²⁰BROCARDA OF DAMASUS, edited by BARTHOLOMEW OF BRESCIA; TRACTATUS TRACTATUUM, Vol. 17, Folio 25.

²¹D. 1.21.5., D. 2.1.5., C. 3.1.5.

²²GONZALEZ TELLEZ, COMMENTARIA PERPETUA IN SINGULOS TEXTUS QUINQUE LIBRORUM DECRETALIUUM, (ed. 1715), Vol. 1, p. 614 (6 on Decr. 1.29.3). Compare chapters 3, 6, 18, 27, 29, 37 and 43 of this title (*de officio et potestate iudicis subdelegati*), with Tellez' comments.

²³Bentham may have had it from some French source. He says, in a note first published among the corrections at the end of the first edition (1789) of his INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION and printed in subsequent editions under section 11 of chapter 2: "When I know not what ingenious grammarian invented the proposition *Delegatus non potest delegare*, to serve as a rule of law, it was not surely that he had any antipathy to delegates of the second order, or that it was any pleasure to him to think of the ruin which, for want of a manager at home, may befall the affairs of a traveller, whom an unforeseen accident has deprived of the object of his choice: it was, that the incon-

Coke had probably heard the phrase used by the Doctors who practised both civil and canon law; and since he was discussing jurisdiction, he was fairly entitled to claim their support. For it is clear that the maxim was originally meant to define the powers of delegated judges; and no authority earlier than Branch's *Maxims* is cited for a more general application. But it is unlikely that Coke relied primarily on either civilian or canonist authority; for our maxim, or what Maitland²⁴ took to be our maxim, is to be found in the printed text of Bracton.

In Coke's day Bracton was the highest, as he is still the most venerable, authority on the common law, and in the printed text of his *De Legibus*, from the first edition²⁵ to the last but one,²⁶ there appeared the following words:—

Est enim corona regis facere iustitiam et iudicium, et tenere pacem, et sine quibus, corona consistere non potest, nec tenere. Huius modi autem iura sive iurisdictiones ad personas vel tenementa transferri non poterunt, nec a privata persona possideri, nec usus nec executio iuris, nisi hoc datum fuerit ei de super, sicut iurisdictione delegata non delegari poterit, quin ordinaria remaneat cum ipso rege.

This Sir Travers Twiss translates,

For the crown of the king is to do justice and judgment, and to maintain peace, and without which the crown cannot consist nor hold. But rights and jurisdictions of this kind cannot be transferred to persons or to tenements, nor be possessed by a private person, nor can the use nor the execution of right, unless it be given from above, as delegated jurisdiction cannot be delegated, but ordinary jurisdiction remains with the crown,

—whatever that may mean. Certainly Coke had read the passage. Presumably he noticed the words "*iurisdictione delegata non delegari poterit*," and took them for an authoritative endorsement of the Doctor's maxim about jurisdiction; and this would fully explain his use of similar language in a common law connection.

But if we look at the latest edition of Bracton,²⁷ our maxim is no longer there. The change of two letters has annihilated it. For Professor Woodbine has discovered that between *delegata* and

gruity of giving the same law to objects so contrasted as *active* and *passive* are, was not to be surmounted, and that *-atus* chimes, as well as it contrasts, with *-are*."

²⁴I POLLOCK and MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 572.

²⁵1569 (reprinted 1640), folio 55 b.

²⁶1878 (ed. Sir Travers Twiss).

²⁷BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE, edited by G. E. Woodbine, Yale University Press (1922), Vol. 2., p. 167.

delegari all good MSS give not *non* but *nec*. He accordingly inserts a comma at *delegata*, reading

"nisi hoc datum esset ei desuper, sicut iurisdictio delegata, nec delegari poterit, quin ordinaria remaneat cum ipso rege;"^{27a}

and we may translate

. . . . unless it be given from above like delegated jurisdiction; nor can it be so delegated, that the primary (or regulating) power does not remain with the King himself—

the King's power is not diminished by its delegation to others. This change, restoring the MSS reading and substituting sense for non-sense, is entirely convincing; and we thus learn that the "maxim" which was to serve the turn of Coke, to command the respect of Kent and Story, and to leave its mark on the constitutional history of the United States, owes its origin to medieval commentators on the Digest and Decretals, and its vogue in the common law to the carelessness of a sixteenth century printer.²⁸

II. THE MAXIM IN AMERICAN CONSTITUTIONAL LAW: A STUDY IN DELEGATION OF LEGISLATIVE POWER

A. Introduction

In *Field v. Clark*²⁹ Mr. Justice Harlan, delivering the opinion of the court, said:³⁰

That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The Act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. . . . He was the mere agent of

^{27a}This passage is given in STUBBS, SELECTED CHARTERS (1921) 413 as follows: "Nisi hoc ei datum fuerit desuper sicut iurisdictio delegata. Nec delegari poterit quin ordinaria remaneat cum ipso rege." Professor Woodbine, *loc. cit. supra* note 27, footnote, gives "fuerit" as an alternate reading for "esset".

²⁸For the material here collected I am indebted to Professor Woodbine of the Yale Law School, Dean Pound and Professors Frankfurter and Plucknett of the Harvard Law School, and Professor Buckland of Cambridge University.

²⁹143 U. S. 649, 12 Sup. Ct. 495 (1892), upholding the constitutionality of the flexible provisions of the McKinley tariff. For contemporary discussion, see 31 AM. L. REG. (N. S.) 65, 173.

³⁰*Ibid.* 692-3. The Court relied upon *The Brig Aurora*, *Cincinnati, W. & Z. R. R. v. Comm'rs of Clinton County*, *Mocrs v. City of Reading*, and *Locke's Appeal*, all of which are discussed *infra*. A large number of statutes which depended for their force and effect upon a subsequent contingency were referred to.

the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

Mr. Justice Lamar dissented, saying:³¹

We think that this particular provision is repugnant to the first section of the first article of the Constitution of the United States, which provides that 'all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' That no part of this legislative power can be delegated by Congress to any other department of the government, executive or judicial, is an axiom in constitutional law, and is universally recognized as a principle essential to the integrity and maintenance of the system of government ordained by the Constitution. The legislative power must remain in the organ where it is lodged by that instrument. We think that the section in question does delegate legislative power to the executive department,

It is significant that the prevailing and dissenting opinions were in entire agreement that Congress could not delegate legislative power to the President, as a fundamental principle of constitutional law. There seem to be three points of origin for this supposed doctrine of American constitutional law: (a) In the earliest cases in which the point was raised the basis seems to be that our state and federal governments are representative democracies, in which it is fundamental that the business of legislation is referred by the people to the legislative department, as a mandate or trust, and the legislature cannot refer the task back to the people, or to any group, without a change in the fundamental constitutional structure of government. The courts have at times fortified this doctrine by invoking the "genius of our representative institutions," or even "liberty and the rights of man," outworn concepts of the eighteenth century, which became the heritage of the nineteenth century demagogue. (b) When the question arises in a case which does not involve a referendum to the people, but a delegation to the executive or judicial department, this doctrine derives added strength from its corollary, separation of powers, or from some more obvious constitutional provision.³² (c)

³¹*Ibid.* 697. Mr. Chief Justice Fuller concurred with him.

³²Professor Walter E. Treanor, of the University of Indiana, has called my attention to a most interesting constitutional provision found in section 25 of the Bill of Rights of the Indiana Constitution of 1851: "No law shall be passed the taking effect of which shall be made to depend upon any authority except as provided in this constitution." It appears from the Proceedings of the Convention of 1850-51 (vol. 2, pages 1256, 1269) that this section was designed to prevent the legislature from evading responsibility by calling on the voters to aid

But in cases which involve a supposed delegation to an independent board or commission, as well as those where the delegation is to the executive or judiciary, the maxim *delegata potestas non potest delegari*, or its English equivalent, has been the chief reliance of the courts, and has attained in their eyes the dignity of a principle of constitutional law. The language quoted from *Field v. Clark* seems to subsume all three of the above propositions, and since *Field v. Clark* judges and commentators have had no hesitancy in announcing a general doctrine that legislative power cannot be delegated,³³ though

in the business of legislation, as a sort of lower house, in a manner not provided for in the Constitution.

The section was construed in *Maize v. State*, 4 Ind. 342, 348, 350 (1853), involving a local option liquor statute. The court said, "By the adoption of that instrument, both the honor and the responsibility of passing general laws were devolved on the general assembly. Hence, the idea of any other power to make, sanction, or to suspend the laws, or to give them effect, is necessarily excluded.

"If the people desire to resume directly the law-making power which they have delegated to the general assembly, they have only to change the constitution accordingly.

"Again, if this system of drafting bills with a double aspect, . . . is to prevail, . . . it ingeniously shifts the responsibility . . . from the legislature to the people."

But in *Jasper County Comm'rs v. Spitler*, 13 Ind. 235 (1859), a statute providing for the formation of new counties by administrative boards was upheld. And in *Lafayette, etc., R. R. v. Geiger*, 34 Ind. 185 (1870), a railroad aid statute, made dependent on a majority vote in each county, was upheld on the ground that the law was in force generally and only its execution in each county delayed. So also, in *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40 (1901), the pure food law which provided for enforcement through rules and regulations of the Board of Health to be adopted in the future, was upheld.

In *Winters v. Hughes*, 3 Utah, 443 (1861), a statute providing for a special term of court in any judicial district upon petition of one hundred voters, was held void as a delegation of legislative power in contravention of the organic act which required time and place of terms of court to be determined by law.

In *Scott v. Clark*, 1 Iowa, 70 (1855), it was held that the legislature could not delegate to the governor power to determine what laws should be given effect by publication in newspapers, in view of express provisions of the constitution.

In *State v. Elwood*, 11 Wis. 17 (1860), an express constitutional provision was held to prohibit the legislature from dividing a county without submitting the question to a vote of the people.

³³COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927), 224, "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall

in its application the courts have quite often been guided by considerations of the practice and necessities of government.³⁴ If there is such a constitutional principle, it is not apparent how it can be so easily avoided. It will be worth while to examine the earlier cases for the purpose of ascertaining how Lord Coke's maxim has become the main support for a most inconvenient doctrine of American constitutional law, newly invoked in the last quarter of the nineteenth century.

B. Review of Early Cases

*The Brig Aurora*³⁵ is the earliest case cited in which the question of delegation of legislative power was raised. The question involved was whether Congress could make the revival of the non-intercourse acts of March 1, 1809, depend upon a subsequent proclamation of the President that Great Britain or France had not revoked or modified certain edicts so that they ceased to violate neutral rights. In the course of argument, Mr. Ingersoll said,

But Congress could not transfer legislative power to the President; to make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of law.

Mr. Law answered this by the assertion,

The legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect.

Mr. Justice Johnson, for the court, said,

We can see no sufficient reason why the legislature should not exercise its discretion in reviving the act of March 1, 1809, either expressly or conditionally, as their judgment should direct.

be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." The learned writer cites LOCKE, CIVIL GOVERNMENT § 142, "... The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have."

BURDICK, LAW OF THE AMERICAN CONSTITUTION (1923) § 60, "It is universally recognized as a fundamental principle of American constitutional law that the legislative branch of the government cannot delegate its essential legislative function to any other agency. This results from the clear declarations in our constitutions, both federal and state, that all legislative power shall vest in the law-making bodies which are thereby created." This is followed by a statement of the usual qualifications.

See also Cheadle, *Delegation of Legislative Functions* (1918) 27 YALE L. J. 892.

³⁴See *Southern Ry. v. Melton*, 133 Ga. 277, 65 S. E. 665 (1909); *People v. Reynolds*, 10 Ill. 1 (1848), discussed *infra*; *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349 (1904). Cf. Taft, C. J., in 257 U. S. xxv, xxvi.

³⁵7 Cranch, 382 (U. S. 1813).

No authorities were cited by counsel or court, nor was our maxim invoked. The case certainly affords no support to the doctrine that legislative power cannot be delegated. The result of the decision is that the legislature may enact a statute and provide that it shall become effective upon the happening of some subsequent event or contingency, to be determined by the executive, or possibly by some other agency. This doctrine has been followed generally, and indeed it has been extended by construction to cases quite unlike *The Brig Aurora*.³⁶

One of the earliest cases on the question of delegation of legislative power to the voters is *Rice v. Foster*,³⁷ involving the constitutionality of a statute which authorized the voters of each county to decide by ballot on a given day whether the license to retail intoxicating liquors should be permitted among them. The election was held and the majority voted against license in certain counties. In debt on a lease, expressly made conditional on the continuance of the license system, plaintiff's counsel argued,³⁸

The general assembly is the depository of legislative power; which is a trust to be executed with judgment and discretion, and cannot be delegated to any other body, or persons,

and that this act delegated legislative power to a majority of the voters in each county and the restriction on licenses might be imposed and revived without further action by the general assembly. Counsel for the defendant argued,³⁹

³⁶*People v. Reynolds*, *supra* note 34; *Field v. Clark*, *supra* note 29; *J. W. Hampton, Jr. & Co. v. U. S.*, 48 Sup. Ct. 348 (1928). *Field v. Clark* certainly was not a case of a simple contingency readily ascertainable by objective criteria. The President was required to exercise discretion in determining *unreasonable* and *unequal* operation of the tariff, costs of production, etc. This point is discussed further *infra*.

The following cases illustrate the proper use of the contingency doctrine: *Lothrop v. Stedman*, 13 Blatch. 134, Fed. Cas. No. 8519 (1875), statute repealing charter, not to take effect if corporation made up deficit to satisfaction of commissioner, valid; *State v. New Haven, etc., Co.*, 43 Conn. 351 (1876), statute requiring railway to stop trains at given point if inhabitants erected a station within six months, valid; *Walton v. Greenwood*, 60 Me. 356 (1872), statute changing sitting of the supreme court from one town to another on condition latter furnish certain accommodations, not unconstitutional.

³⁷4 Harr. 479 (Del. 1847).

³⁸*Ibid.* 481.

³⁹*Ibid.* 482. Cf. the language of the court in *Cincinnati, W. & Z. R. R. Co. v. Comm'rs of Clinton County*, 1 Ohio St. 77, 88 (1852), where it is said that the true distinction "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

It does not delegate legislative power. Legislative power is the power of making laws; not merely voting for or against laws made by others, but of proposing and maturing laws. The legislature passed this law. They expressed the judgment that such a law was beneficial to the community; and they declared the legislative will that such a law should exist, *if* a certain number, to wit, a majority of the people of either county, should vote in a certain way.

The defendant also relied on similar legislation in other states and on *The Brig Aurora*. The court held that the statute was an attempt by the legislature to delegate its legislative powers to the people in violation of the constitution of the state and in contravention of principles of free government. The reasoning of the court will best appear in the following extracts from the opinion:⁴⁰

The proposition that an act of the legislature is not unconstitutional unless it contravenes some express provision of the constitution is, in the opinion of this court, untenable. The nature and spirit of our republican form of government; the purpose for which the constitution was formed, which is to protect life, liberty, reputation and property, and the right of all men to attain objects suitable to their condition without injury by one to another; to secure the impartial administration of justice; and generally, the peace, safety and happiness of society, have established limits to the exercise of legislative power, beyond which it cannot constitutionally pass. An act of the legislature directly repugnant to the nature and spirit of our form of government, or destructive of any of the great ends of the constitution, is contrary to its true intent and meaning; and can have no more obligatory force, than when it opposes some express prohibition contained in that instrument. . .

Wherever the power of making laws, which is the supreme power in a State, has been exercised directly by the people under any system of polity, and not by representation, civil liberty has been overthrown. Popular rights and universal suffrage, the favorite theme of every demagogue, afford, with-

⁴⁰Booth, C. J., *ibid.* 485, 486, 487, 488, 489, 491, and 492. Cf. *State v. Swisher*, 17 Tex. 441 (1856), holding void a statute prohibiting license unless a majority vote was cast for license. It was said (at 448), "But, besides the fact that the Constitution does not provide for such reference to the voters, to give validity to the Acts of the Legislature, we regard it as repugnant to the principles of the Representative Government formed by our Constitution. Under our Constitution, the principle of law making is, that laws are made by the people, not directly, but by and through their chosen representatives. By the Act under consideration, this principle is subverted, . . ."

Cf. also to the same effect, *State v. Field*, 17 Mo. 529 (1853), section void which authorized county courts to suspend the road act; *Lammert v. Lidwell*, 62 Mo. 188, 21 Am. Rep. 411 (1876).

out constitutional control or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society. In every government founded on popular will, the people, although intending to do right, are the subject of impulse and passion; and have been betrayed into acts of folly, rashness and enormity, by the flattery, deception, and influence of demagogues. A triumphant majority oppresses the minority; each contending faction, when it obtains the supremacy, tramples on the rights of the weaker: the great aim and objects of civil government are prostrated amidst tumult, violence and anarchy; and those pretended patriots, abounding in all ages, who commence their political career as the disinterested friends of the people, terminate it by becoming their tyrants and oppressors. History attests the fact, that excesses of deeper atrocity have been committed by a vindictive dominant party, acting in the name of the people, than by any single despot. In modern times, the scenes of bloodshed and horror enacted by the democracy of revolutionary France, in the days of her short-lived, misnamed republic, shocked the friends of rational liberty throughout the civilized world. . .

To guard against these dangers and the evil tendencies of a democracy, our republican government was instituted by the consent of the people. The characteristic which distinguishes it from the miscalled republics of ancient and modern times, is, that none of the powers of sovereignty are exercised by the people; but all of them by separate, co-ordinate branches of government in whom those powers are vested by the constitution. These co-ordinate branches are intended to operate as balances, checks and restraints, not only upon each other, but upon the people themselves; to guard them against their own rashness, precipitancy, and misguided zeal; and to protect the minority against the injustice of the majority. . .

The people of the State of Delaware, have vested the legislative power in a General Assembly, consisting of a Senate and House of Representatives; the supreme executive powers of the State in a Governor; and the judicial power in the several Courts mentioned in the sixth article. The sovereign power therefore, of this State, resides with the legislative, executive, and judicial departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. To do so, would be an infraction of the constitution, and a dissolution of the government. . . These trusts must be exercised in strict conformity with the spirit and intention of the constitution, by those with whom they are deposited; and in no case whatever can they be transferred or delegated to any other body or persons; not even to the whole people of the State; and still less to the people of a county. It is a plain proposition of law, that a power, or authority, vested in one or more persons to act for others, involving in its exercise judgment and discretion, is a trust and confidence reposed in the party, which cannot be transferred or delegated. . .

A law when passed by the legislature, is a complete, positive, and absolute law in itself, deriving its authority from the legislature; and not depending for the enactment of its provision, upon any other tribunal, body, or persons. It may be limited to expire at a certain period; or not to go into operation until a future time, or the happening of a contingency, or some future event; or until some condition be performed. . . . But the legislature are invested with no power to pass an act, which is not a law in itself when passed, and has no force or authority as such, and is not to become or be a law, until it shall have been created and established by the will and act of some other persons or body, by whose will also existing laws are to be repealed, or altered and supplied.

• The court distinguished *The Brig Aurora* on the ground that the act of Congress was complete and perfect when it left the hands of Congress and the President's proclamation was simply the evidence of the happening of the event or contingency specified in the law. And an earlier Delaware decision,⁴¹ upholding a statute authorizing the levy of a school tax in each district, by a vote of the majority of the school voters in such district, in accordance with general legislation, was distinguished on the ground that the school district was a local governmental corporation with limited powers and was merely carrying into effect the policies of the legislature. The earlier case of *Gray v. State of Delaware*⁴² was also distinguished on the ground that there the power of making local ordinances on matters of local concern, subject to the control of the legislature, was conferred on a municipal corporation, a practice recognized long before the adoption of the constitution. A dictum of Gibson, C. J., in the *Case of the Borough of West Philadelphia*⁴³ was quoted with approval. This case involved a statute authorizing the Court of Quarter Sessions to incorporate any town or village containing three hundred inhabitants

⁴¹Steward v. Jefferson, 3 Harr. 335 (Del. 1841).

⁴²2 Harr. 76 (Del. 1835).

⁴³5 W. & S. 281, 283 (Pa. 1843). The learned Chief Justice said: "Under a well-balanced constitution, the legislature can no more delegate its proper function than can the judiciary. It is on the preservation of the lines which separate the cardinal branches of the government, that the liberties of the citizen depend; . . . In the very constitution of things, the whole people of a State cannot assemble together to exercise their sovereign power in person; and it is not to be regretted that they cannot, for their rule being untrammelled by anything but their own will, would be as arbitrary and fitful in its exercise as any other uncontrolled domination. When they delegate it to an undivided agency, they slip their hold on it, and in turn become its slaves. . . . The Legislature may certainly authorize a corporation to enact ordinances and by-laws; for these are not only incidental, but rules of self-government. . . ."

on the petition of a majority of the freeholders residing in such town or village.⁴⁴ The argument of Judge Gibson was directed against an extension of the statute to authorize the incorporation of two separate villages into one.

The question soon arose in Pennsylvania in substantially the same form in which it had been presented in Delaware, and the same result was reached.⁴⁵ Under an act of the legislature authorizing certain counties to decide by ballot whether the sale of intoxicating liquors should be continued in such counties, and the vote having been adverse to the sale of liquors in the fourth ward of Pittsburg, Parker was indicted for selling in that ward. The court pointed out that an act might be void if in conflict with the spirit of the Pennsylvania constitution though contravening no express provision of that instrument, that the government of the community was not a pure democracy, but for the protection of the minority a representative democracy was established, wherefore the people in the fundamental law

decreed that the legislative power *shall* be vested in a General Assembly, to consist of a Senate and House of Representatives, to be elected at stated periods by the citizens of the respective counties. They thus solemnly and emphatically divested themselves of all right, directly, to make or declare law, or to interfere with the ordinary legislation of the state,⁴⁶

and continuing the court said:

Among the primal axioms of jurisprudence, political and municipal, is to be found the principle that an agent, unless expressly empowered, cannot transfer his delegated authority to another, more especially when it rests in a confidence, partaking the nature of a trust, and requiring for its due discharge, understanding, knowledge, and rectitude. The maxim is,

⁴⁴The county court may be given power to incorporate towns. This is not a delegation of legislative power, but judicial: *Kayser v. Trustees*, 16 Mo. 88 (1852); *State v. Weatherby*, 45 Mo. 17 (1869). *Contra*: *People v. Nevada*, 6 Calif. 143 (1856), relying on *delegatus non potest delegare* and the proposition that the legislature cannot impose ministerial duties on the courts. *Burgoyne v. Board of Sup'rs.*, 5 Calif. 11 (1855), relied on separation of powers. Both were overruled in *People v. Provines*, 34 Calif. 520 (1868).

Cf. City of Emporia v. Smith, 42 Kan. 433, 22 Pac. 616 (1889), act valid which authorized cities to extend boundaries; *Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107 (1874), village incorporation act void which delegated fixing of boundaries and provided for incorporation of some without consent on ground of abdication by legislature; *Manly v. City of Raleigh*, 57 N. C. 370 (1859), act to extend boundaries of town, to be void unless accepted by mayor and commissioners within one month, valid.

⁴⁵*Parker v. Commonwealth*, *supra* note 5.

⁴⁶*Ibid.* 514, 515, 516, 520.

delegata potestas non potest delegari. And what shall be said to be a higher trust, based upon a broader confidence, than the possession of the legislative function? What task can be imposed on a man, as a member of society, requiring a deeper knowledge and a purer honesty? It is a duty which cannot, therefore, be transferred by the representative; no, not even to the people themselves; for they have forbidden it by the solemn expression of their will that the legislative power *shall* be vested in the General Assembly; much less can it be relinquished to a portion of the people. . . An attempt to do so would be not only to disregard the constitutional inhibition, but tend directly to impress upon the body of state those social diseases that have always resulted in the death of republics, and to avoid which the scheme of a representative democracy was devised and is to be fostered.

Thus it appears from this and other language that the court, though quoting Lord Coke's maxim, relied primarily upon the language of the constitution and the frame of government therein outlined. *Rice v. Foster* was cited with approval as directly in point. School statutes, powers conferred on corporations, and conditional laws, like that in *The Brig Aurora*, were distinguished, but whether distinguishable or not,

A bad precedent, suffered to pass *sub silentio*, cannot be set up to justify the continuance of an abuse in which it originated; and this is especially true where the question is of the constitutional exertion of a delegated power.

Parker v. Commonwealth was soon limited by subsequent decisions,⁴⁷ and was overruled in *Locke's Appeal*,⁴⁸ which upheld a similar license statute as a law enacted by the legislature and to become effective on a contingency, though in the latter case it was expressly recognized.⁴⁹

"That a power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another, is a general and admitted rule. Legislatures stand

⁴⁷*Commonwealth v. Judges*, 8 Barr, 391 (Pa. 1848), upholding statute authorizing the people to determine by vote whether a new township should be annulled or continued; *Comm. v. Painter*, 10 Barr, 214 (Pa. 1849), authorizing vote on removal of county seat; *Sharpless v. Mayor of Phila.*, 21 Pa. 147 (1853), authorizing vote upon subscription to stock of a railway; *Moers v. City of Reading*, 21 Pa. 188 (1853), same; *City of Phila. v. Lombard & S. St. Pass. Ry.*, 4 Brewst. 14 (Pa. 1866), legislature may create street railway corporation, subject to condition of obtaining assent of city to use of streets; *Smith v. McCarthy*, 56 Pa. 359 (1867), authorizing vote on annexations to city of Pittsburgh.

⁴⁸72 Pa. 491 (1873).

⁴⁹*Ibid.* 494. Read, C. J., and Sharwood, J., dissented, relying on *Parker v. Commonwealth*.

in this relation to the people whom they represent. Hence it is a cardinal principle of representative government, that the legislature cannot delegate the power to make laws to any other body or authority."

In 1848 the Supreme Court of Illinois held valid a law providing for the division of a county and the creation of a new county, to take effect upon approval by the voters, on the ground that the law, as passed by the legislature, was complete and perfect though it was to take effect upon a contingency.⁵⁰ The court thought the maxim against delegation of legislative power had been applied too strictly in *Rice v. Foster* and *Parker v. Commonwealth*. It will be sufficient to quote two extracts from the opinion:⁵¹

. . . . The extent to which this maxim should be applied to a legislator depends upon a proper understanding of legislative powers; upon a proper determination of what may legitimately be done in the exercise of those powers. It is easy to say that it is the business of the legislature to make laws; but then we must inquire, what kind of laws may be made? Must they be full, complete, perfect, absolute, depending upon no contingency and conferring no discretion? This would be absolute legislation, exhausting legislative power on the subject matter of the law. We presume that no where has constitutional learning advanced so far as to assert this doctrine. . .

⁵⁰*People v. Reynolds*, *supra* note 34. *Cf. People v. Nally*, 49 Calif. 478 (1875), statute authorizing vote upon question of annexation of portion of adjoining county, valid; *People v. McFadden*, 81 Calif. 489, 22 Pac. 851 (1889), statute requiring two-thirds vote for creation of new county valid as conditional legislation; *Jasper County Comm'rs v. Spitler*, *supra* note 32, formation of new counties by board valid, not delegation of legislative power but administrative.

So also, the legislature may provide for the location, or change in location of a county seat by vote of the people interested: *Ex parte Hill*, 40 Ala. 121 (1866); *Upham v. Sutter County Sup'rs.*, 8 Calif. 379 (1857); *Lake County Comm'rs. v. State*, 24 Fla. 263, 4 So. 795 (1888), involving express constitutional provision; *Commonwealth v. Painter*, *supra* note 47; *Peck v. Weddell*, 17 Ohio St. 271 (1867), involving express constitutional provision; *Walker v. Tarrant County*, 20 Tex. 16 (1857).

⁵¹By *Caton, J.*, at 11, 19, 20. This case settled the law for Illinois. In *People v. Salomon*, 51 Ill. 37, 54 (1869), upholding delegation of taxing power to local corporate authorities, the court said: "If the saying be true, that the legislature cannot delegate its power, it is so only in its most general sense. We may well admit that the legislature cannot delegate its general legislative authority, still it may authorize many things to be done by others which it might properly do itself." These cases were followed in *Home Ins. Co. v. Swigert*, 104 Ill. 653 (1882), where the rate of taxation of foreign insurance companies was made to depend upon the treatment of Illinois companies in such foreign states; *Meyers v. Baker*, 120 Ill. 567, 12 N. E. 79 (1887).

We think enough has already been said, to show that the Legislature may delegate authority, either to individuals or to bodies of people, to do many important legislative acts, not only similar to that authorized by the law, the validity of which is here questioned, but also others of a more important, and, upon principle, of a much more questionable propriety; but in doing this it does not divest itself of any of its original powers. It still possesses all the authority it ever had. It is still the repository of the legislative power of the State.

In 1849 the Supreme Court of Vermont upheld as constitutional a licensing statute, which provided for licensing by commissioners in each county, and that the freemen should meet in town meeting each year and vote on the subject of licenses, and that no licenses should be granted if the vote was adverse.⁵² The principle that legislative power could not be delegated was recognized, as embodied in *Rice v. Foster* and *Parker v. Commonwealth*, but the court distinguished the Vermont statute on the ground that it was a law in itself when passed by the legislature, and⁵³

Laws are often passed, and, by the terms of the statute, made to take effect upon the happening of some event, which is expected to occur; and we are not aware, that such laws, for that reason, have been regarded as invalid.⁵⁴

The Vermont court did not reject the doctrine of *Rice v. Foster* and *Parker v. Commonwealth*, but taking its cue from Illinois and Pennsylvania, seized upon the contingency principle as a means of escape, though in no proper sense were these laws enacted by the legislature, to become effective on the happening of a contingency.

In 1851 the New York "free school law," by which it was left to the electors at the next annual election in November to determine whether the act should become a law, came before the Supreme Court of that state. It was held constitutional in *Johnson v. Rich*.⁵⁵ In October of the same year the act was held unconstitutional by the Supreme Court in Kings County⁵⁶ on the ground that it was not a law when it left the legislature, but depended for its validity on the vote of the people. The court emphasized that by the constitution the legislative power was vested in the senate and assembly, and not in the people who reserved no power to make laws under the constitution, and it was a breach of the trust and confidence reposed in

⁵²*Bancroft v. Dumas*, 21 Vt. 456 (1849).

⁵³*Ibid.* 464.

⁵⁴Followed in *State v. Parker*, 26 Vt. 357 (1854), which submitted to a vote of the people the time when a liquor statute should go into effect.

⁵⁵9 Barb. 680 (N. Y. Sup. Ct. 1851).

⁵⁶*Thorne v. Cramer*, 15 Barb. 112 (N. Y. Sup. Ct. 1851).

them for the members of those bodies to transfer the power to any other person or persons;⁵⁷

And, above all, he (the legislator) cannot delegate to others the trust which has been expressly confided to him, by reason of his supposed knowledge and sound judgment. *Delegata potestas, non potest delegati (sic)*, is a settled maxim of the common law, in full force at the present day; and never more applicable than to the case of a legislator. (*Story on Agency*, 15. 2 *Kent's Com.* 633).

Parker v. Commonwealth was cited with approval. The same result was reached in the Court of Appeals,⁵⁸ upon the ground that by the

⁵⁷*Ibid* 116. The same result was reached in *Bradley v. Baxter*, 15 Barb. 122 (N. Y. Sup. Ct. 1853).

⁵⁸*Barto v. Himrod*, 8 N. Y. 483 (1853). *Cf.* *City of N. Y. v. Ryan*, 2 E. D. Smith, 368 (N. Y. 1854), statute which authorized the city to confer on a dock master authority to give orders to masters and owners of vessels, held valid without discussion; *Corning v. Greene*, 23 Barb. 33 (N. Y. Sup. Ct. 1856), upholding a statute *re* wharfage dues at Albany, the last section of which provided that the bill should be void unless the corporation of Albany filed their consent to it within sixty days. The court commented on the constitutional provisions vesting the whole legislative power in the senate and assembly, and that no bill could have the force of law unless it was the expression of the legislative will alone, and said, (at 48): "An attempt, therefore, to call in another party to aid in the business, and divide the responsibilities, of legislation, so that the act shall not be the single expression of the legislative will, but the sovereign function is discharged in part, at least, by a party unknown and unrecognized by the fundamental law, would be in contravention of the constitution and render the act void. But this should be patent and manifest on the act itself. . . . It is true, the 12th section provides that the bill shall be void, unless the corporation of Albany file their assent to it within sixty days after its passage. But this was the unaided act of the legislature, and as such an expression of the legislative will alone, as any other provision of the bill. That the legislature may constitutionally pass a law, and provide that it shall take effect at some future period or upon the happening of some future event, we cannot doubt. Indeed, we entertain no doubt of their constitutional power to declare that an act passed by them shall cease to exist as a law, unless, within a specified period, an act specified in it to be done shall be performed by the person or body to be affected by it."

In *Clarke v. City of Rochester*, 24 Barb. 446, 5 Abb. Pr. 107 (1857), *aff'd* 28 N. Y. 605 (1864), a statute which authorized a subscription to the stock of a railway by the municipal corporation, with the consent of a majority of the voters, was upheld. The opinion in the Court of Appeals was given by Denio, J. He said in part, at 633, 634: "The principles settled in these cases [citing railway aid cases and *Barto v. Himrod*] are, first, that the legislature cannot commit the power of enacting laws to any other body than itself, not even to all the electors of the state; and that this principle can not be evaded by a statute which shall prescribe the details of a particular legislative act, and then provides that the question whether it shall be established as law shall be determined by a vote of the electors. This was the plan resorted to in respect to the free school act which was in question in *Barto v. Himrod*. . . . The government organized by the

constitution the people had surrendered the power to enact laws to the legislature, and the constitution did not authorize the legislature to redelegate it to the people, but provided in detail how the legislature should exercise the power. The maxim was not mentioned. In subsequent cases, the Court of Appeals had some difficulty in distinguishing this decision.⁵⁹

The next case to be considered is *Cincinnati, W. & Z. Railroad Co. v. Commissioners of Clinton County*,⁶⁰ where a statute authorizing county commissioners to subscribe to stock of a railway, but providing that the subscription should not be made unless assented to by a majority of the electors of the county at an election to be held for that purpose, was upheld as a conditional statute. The court, however, asserted:⁶¹

That the General Assembly cannot surrender any portion of the legislative authority with which it is invested, or authorize its exercise by any other person or body, is a proposition too clear for argument, and is denied by no one. This inability arises no less from the general principle applicable to every delegated power requiring knowledge, discretion, and rectitude, and its exercise, than from the positive provisions of the consti-

constitution was considered to be, as it undoubtedly is, that of a representative republic, and no power existed in the legislature to convert it, on any occasion, or for any purpose into a pure democracy. . . . But while general statutes must be enacted by the legislature, it is plain the power to make local regulations, having the force of law in limited localities, may be committed to other bodies representing the people in their local divisions, or to the people of those districts themselves. Our whole system of local government in cities, villages, counties and towns, depends upon that distinction. The practice has existed from the foundation of the state, and has always been considered a prominent feature in the American system of government." See also *Stanton v. Board of Sup'rs.*, 191 N. Y. 428, 84 N. E. 380 (1908).

⁵⁹*Corning v. Greene*, *supra* note 58; *Bank v. Village of Rome*, 18 N. Y. 38 (1858); *Starin v. Genoa*, 23 N. Y. 439 (1861); *Clarke v. City of Rochester*, *supra* note 58.

⁶⁰*Supra*, note 39.

⁶¹*Ibid.*, at 87. Other cases in which railway aid statutes, or statutes providing for aid to other public service corporations, effective upon the approval of the voters in a local political subdivision, were held valid, are: *Chicago, B. & Q. Ry. v. Otoe Co.*, 83 U. S. 667, 678 (1872); *Blanding v. Burr*, 13 Calif. 343 (1859), statute provided for issue of bonds only if objection not taken in a specified manner, held valid as act to be suspended on a contingency; *Hobart v. Butte County*, 17 Calif. 23 (1860); *Lafayette, etc., R. R. v. Geiger*, *supra* note 32; *Slack v. Maysville, etc., R. R.*, 52 Ky. (13 B. Monroe) 1 (1852), but *cf.* dissenting opinion of Hise, J., at 39, 90; *Police Jury v. McDonough*, 8 La. Ann. 341 (1853); *Augusta Bank v. City of Augusta*, 49 Me. 507 (1860), railway aid statute required consent of both city and railway; *Clarke v. City of Rochester*, *supra* note 58; *Louisville & N. Ry. v. Davidson*, 33 Tenn. (1 Sneed) 637 (1854), express constitutional provision *re* local matters.

tution itself. The people, in whom it resided, have voluntarily relinquished its exercise, and have positively ordained that it shall be vested in the General Assembly. It can only be reclaimed by them, by an amendment or abolition of the constitution, for which they alone are competent. . . While it continues in force, every citizen has a right to demand that his civil conduct shall only be regulated by the associated wisdom, intelligence, and integrity of the whole representation of the State.

In *Maize v. State*,⁶² the Indiana license statute which provided that no licenses could be issued unless the majority of the voters of the proper township had voted "for license," was held void. The court relied upon the fact that legislative authority was vested by the constitution in the general assembly, and the further provision that no law should be enacted, the taking effect of which should be made to depend upon any outside authority, except as provided in the constitution.

The whole question was argued at great length in *People v. Collins*,⁶³ in which the question at issue was the validity of the Michigan statute prohibiting the manufacture of intoxicating beverages and the traffic therein, provision being made for submitting the act to the people for approval or disapproval, and if it should appear that a majority voted for its adoption, then it should become effective December 1, 1853; if the majority disapproved, it should become effective March 1, 1870. On this proposition the judges were equally divided, two opinions arguing that the act was constitutional. Green, P. J., pointed out that the people had divested themselves entirely of all legislative power, subject to be recalled or controlled by them only in the manner provided in the constitution, and that this power was vested in the legislature but, he continued:⁶⁴

It is not a mere delegation of power to an agent to act for and in the name of the principal, which the principal may exercise concurrently with his agent, and which the agent may at any time surrender into the hands of the principal at his discretion. It is an agency, but it is something more. It is an authority to exercise all that judgment and discretion which the principal might have exercised, without consultation with or in opposition to the will of such principal, and without being subject to any direct control by the grantor of the power. It is an incident to inherent legislative power that it may be delegated; that incident adheres to the power in the hands of the legislative department of the government, qualified and limited only by the

⁶²*Supra* note 32. See also *Meshmeier v. State*, 11 Ind. 482 (1853), and discussion in note 32.

⁶³3 Mich. 343 (1854).

⁶⁴*Ibid.* 350-51.

express provisions of the organic law, and the nature of constitutional organization. Those in whom this power primarily resided, necessarily possessed the power to organize a Constitutional Government, and in doing so, to divide the powers of such government into such departments as they might judge best. It was competent for them to divest themselves of the right to exercise directly any of the functions of government. Not so, however, with the departments which they have created. The Constitution vests the power of legislation in a select body of men, and there it must remain until the Constitution itself is changed or abrogated. They have no authority to delegate *their* powers and exclude themselves from the right to their exercise. But it does not follow that they cannot create subordinate bodies with certain powers of legislation. . . . It would seem to be sufficiently clear then, that it is in the very nature of legislative power, that it may, to some extent at least, be delegated, and that the maxim, *delegata potestas, non potest delegari*, has no application, as has been supposed by a learned judge.⁶⁵

He then concluded that there was no delegation of legislative power by the statute in question. Pratt, J.,⁶⁶ argued that the entire legislative power had been conferred by the people on the legislature exclusively, and without a change in the constitution it was not possible for the legislature to divest itself of this power or appeal to any other body to decide the question for them. The central thought of his opinion is embodied in this sentence:⁶⁷

There is no proposition more clear, and no principle more plain or certain, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.

Martin, J., thought the maxim had no application, though recognizing that the legislature could not abdicate its functions:⁶⁸

The much abused maxim, then, that delegated power cannot be delegated—which has been forced and distorted into every conceivable shape, in order to reconcile it with instances of its apparent infraction, and to assist courts to overrule legislative action—has limitations to its application. . . . If the saying be true, that the legislature cannot delegate its powers, it is only so in its most general sense. We may well admit that the legislature cannot delegate its general legislative authority; still, it may authorize many things to be done by others, which it might properly do itself.

In this case he thought the statute was complete when it left the legislature, and none will deny the legislature may pass an act to take

⁶⁵Cf. Cheadle, *op. cit. supra* note 33, at 896-7, for suggestion that our maxim has no application to the legislature because it is a delegating or duty assigning body. ⁶⁶*Supra* note 63, at 364 *et seq.* ⁶⁷*Ibid.* 366. ⁶⁸*Ibid.* 400-1.

effect upon a condition. Douglas, J.,⁶⁹ emphasized the point that the legislature could not delegate the power of enacting general laws (to which the whole court agreed), and thought that the statute under consideration constituted such a delegation in violation of the constitutional scheme of government.

In 1854 the question arose in a slightly different form in Rhode Island,⁷⁰ where the temperance act provided that a vote should be taken on the question of repealing the statute, and if a majority of the votes should be for repeal, then on a certain day thereafter the statute should become void. As it turned out a majority of the votes cast were against repeal. To the objection that the statute was an unconstitutional delegation of legislative power, the court said that the constitution had vested the power of enacting laws in the General Assembly as a high trust, which could not be delegated, and the General Assembly could not call to their aid any other body or make the existence of a law depend, in whole or in part, upon the will of such other body. The conclusion of the court was that the section for submitting the measure to a vote of the people was void, and the balance of the statute good, and *semble* that a majority vote for repeal would have been of no effect.⁷¹ The same doctrines were announced and the same result reached by the Supreme Court of Iowa.⁷² The legislature had provided that a vote should be taken, and if favorable to the prohibition law, then the law should take effect on a certain day thereafter. It was held that neither the validity nor the taking effect of a law could be made to depend upon a vote of the people, but the act being complete took effect regardless of the invalid section.⁷³

⁶⁹*Ibid.* 413.

⁷⁰*State v. Copeland*, 3 R. I. 33 (1854). To the writer there seems to be no difference in principle between an act which is to take effect only when approved by a majority vote in a given district (*Santo v. State*, *infra* note 72); one which is to be void unless so approved (*Corning v. Greene*, *supra* note 58); one which may be repealed by popular vote (*State v. Copeland*); and one in respect of which the time of going into effect may be accelerated or postponed at the will of the voters (*People v. Collins*, *supra* note 63). Some courts have attempted to base distinctions on these variations in form.

⁷¹Compare *State v. Field*, *supra* note 40, provision in a general road law authorizing county courts to suspend it, void and remainder of statute valid.

⁷²*Santo v. State*, 2 Cole, 165 (Iowa, 1855), especially at 203-9.

⁷³Wright, C. J., dissented, that the law depended for its life and effect on a favorable popular vote, at 223 *et seq.* A statute providing for a vote of the people, by counties, on the repeal of the prohibition law of 1855, and in favor of license, was held void in *State v. Geebrick*, 5 Cole, 491 (Iowa, 1857). These cases were followed in *State v. Beneke*, 9 Iowa, 203 (1859); *State v. Weir*, 33 Iowa, 134 (1871); *Weir v. Crain*, 37 Iowa, 649 (1873); but *cf.* *State v. Forkner*, 94 Iowa, 1, 62 N. W. 683, 772 (1895).

Perhaps one other case should be mentioned before we proceed to summarize the results of these early cases on delegation of legislative power. In *Bull v. Read*,⁷⁴ an act for establishing a system of free schools in a particular district in a given county and providing it should not be carried into effect until approved by a vote of the district was held constitutional. The court pointed out that there was no express constitutional inhibition on such a provisional mode of legislation, and in regard to measures of a local character it was eminently just and proper that the wishes of a majority of those affected by the measure should be consulted. Since the legislature could provide that an act should not take effect until a future day or upon a contingency, the voters were in no sense performing a legislative function as they could not amend the act or substitute some other measure. The court rejected the contention that the statute provided for an illegal delegation to the district of the taxing power, saying,⁷⁵

The maxim *potestas delegata non potest delegari* however true in the abstract can have no application here. The authority of the legislature to delegate to other bodies the power of taxation for certain purposes can no longer be considered an open question.⁷⁶

Thus after wading through hundreds of pages of discussion, we find here a simple statement of the problem raised by the foregoing referenda cases, and a sound and practical solution.

C. Comment and Conclusion

We have now examined in some detail nearly all of the early cases in which the question of delegation of legislative power was raised, with particular emphasis on those which give consideration to Lord Coke's Maxim, or its English equivalents, as a doctrine of American constitutional law. On the whole, these cases, and in fact many more decided after 1860,⁷⁷ raise the simple problem whether it is a violation

⁷⁴13 Gratt. 78 (Va. 1855).

⁷⁵*Ibid.* 98.

⁷⁶*Accord*: *Alcorn v. Hamer*, 38 Miss. 652 (1860), reviewing cases. See also *State v. Swisher*, *supra* note 40.

⁷⁷See especially the following: *Ex parte Wall*, 48 Calif. 279 (1874), local option liquor statute held void on ground legislature alone must determine expediency and cannot delegate this task; *Haney v. Board of Comm'rs.*, 91 Ga. 770, 18 S. E. 28 (1893), road law valid though not to go into effect until consent of grand jury of each county, no delegation; *State v. District Court*, 33 Minn. 235, 22 N. W. 625 (1885), vote of city whether laws as to acquisition of park lands and in reference to assessments should go into operation, held valid; *In re Thirty-fourth St. Ry.* 102 N. Y. 343, 7 N. E. 172 (1886), statute requiring consent of existing roads before new road could be built on street, valid; *City of Phila. v. Lombard*, *supra* note 47, legislature may create street railway corporation, subject to condition of obtaining consent of city as to use of streets.

of the constitution in question for the legislature to provide that a law is to take effect upon a favorable vote of designated electors, either locally or by a general referendum. The difference in principle is not apparent where the provision is that the law shall be void unless a majority vote shall be cast in favor of it, or where the time of taking effect depends upon the outcome of a popular vote.⁷⁸ In each situation the essential question is whether the legislature can call upon the electorate to aid in the business of lawmaking, after that function has been referred to the legislature by the constitution. In solving this problem, the courts have agreed: (a) that the legislature cannot abdicate or delegate its general legislative power;^{78a} (b) that it can provide that a statute shall become effective upon the happening of a contingency, the determination of which is left to some other person or body, but in the application of this principle there has been the widest divergence; (c) that the legislature can delegate to others powers not essentially legislative, which it might rightfully exercise itself;⁷⁹ (d) that the legislature may grant extensive

⁷⁸*Cf.* note 70, *supra*.

^{78a}The present writer does not wish to be understood as asserting that there is no constitutional principle under which the legislature can be prevented from repudiating its responsibility entirely, or abdicating in favor of some other department or person. In *Maxwell v. State*, 40 Md. 273 (1874), a statute was held void which adopted as law the "rules and regulations, forms and blanks, prescribed and adopted by the comptroller." In *State v. Gaunt*, 13 Or. 115, 9 Pac. 55 (1885), it was held that the legislature could not delegate to code commissioners power to amend laws.

This question is raised by the flexible provisions of the tariff act of 1922 (42 Stat. 858, c. 356, §§ 315-317).¹ Section 315 has been upheld by the Supreme Court in *J. W. Hampton, Jr., & Co. v. U. S.*, 48 Sup. Ct. 348 (1928). While rendering lip service to the doctrine, the Supreme Court has never found an unconstitutional delegation of legislative power by Congress.

Cf. the following cases on the validity of statutes adopting acts or regulations of a foreign jurisdiction or body: *Clark v. Port of Mobile*, 67 Ala. 217 (1880), statute requiring deposits of foreign insurance corporations when such deposits required in foreign jurisdiction of Alabama corporations, held unconstitutional. *Contra*: *Phoenix Ins. Co. v. Welch*, 29 Kan. 672 (1883); *People v. Phila. Fire Ass'n.*, 92 N. Y. 311, 44 Am. Rep. 380 (1883). In *Opinion of Justices*, 239 Mass. 606, 133 N. E. 453 (1921), the opinion was expressed that a statute adopting the standards of the Volstead act would be valid. *Contra*: *State v. Gauthier*, 121 Me. 522, 118 Atl. 380 (1922); *Commonwealth v. Alderman*, 275 Pa. 483, 119 Atl. 551 (1923). In *Sante Mills v. Query*, 122 S. C. 158, 115 S. E. 202 (1922), a South Carolina income tax statute incorporating existing provisions of federal statute was held valid. In *St. Louis, etc., Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616 (1907), a statute adopting standards for railway drawbars, as fixed by unofficial body, was held valid.

⁷⁹*Wayman v. Southard*, 10 Wheat. 1, 42 (U. S. 1825); *U. S. Bank v. Halstead*, 10 Wheat. 51, 61 (U. S. 1825), no delegation to judiciary in statute *re* rules.

powers of local self-government to municipalities and other established political subdivisions.⁸⁰

Those cases which apply a rule against delegation of legislative power base it largely on the language of the constitution in question by which legislative power is vested in the legislative body, or on the proposition that the government is a representative democracy wherein the people have divested themselves of all legislative power and cannot resume it without a change in the fundamental law. Whether or not a violation of the supposed doctrine is found, our maxim, or its English equivalent, is generally invoked as *dictum*, or as a makeweight, but not usually as the basis of decision. The over-worked genius of our representative institutions and the spirit of our constitutions and the sacred trust imposed on the legislature play prominent parts in those decisions which find an illegal delegation of legislative power. These phrases shade off by insensible degrees into the supposed doctrine that legislative power cannot be delegated.

It should be noted with reference to this matter that a delegation to an agent is not final, and the agent always owes the duty of obedience to his principal.⁸¹ Under a political theory that legislation is predicated on the consent of the governed, the maxim has little or no application to the cases discussed above. Its proper field of operation is jurisdiction, discretionary acts of a true agent, and abdication, though the last is more than delegation. This may explain why our maxim was not mentioned by the New York Court of Appeals in *Barto v. Himrod*, *supra*, though relied on by the Supreme Court. In *People v. Collins*, *supra*, Green, P. J., thought an agent could at any time surrender his power to his principal, but that the delegation of power to the legislature was more than the creation of an agency, and further that our maxim had no application to the case before him.

Indeed we must look to a later series of cases, decided in the closing years of the nineteenth century, to inject new vitality into this maxim. It is then asserted as a principle of constitutional law, though not mentioned in any constitution and admittedly of limited application in its own particular field of agency.

In the period following the civil war, the local option statute was recognized as an established and valid institution,⁸² but judges con-

⁸⁰BURDICK, *loc. cit.* *supra* note 33.; Howard L. McBain, *Delegation of Power to Cities*, 32 *Polit. Sc. Q.* 276, 391. *Cf.* *State v. Noyes*, 30 N. H. 279 (1853).

⁸¹Suggested by Holmes, J., in *Opinion of the Justices*, 160 *Mass.* 586, 594, 595, 36 N. E. 488, 23 L. R. A. 113 (1894).

⁸²COOLEY, *op. cit.* *supra* note 33, at 244-5.

tinued to pay lip service to our maxim in local option cases. Statutes providing for general referenda were not, however, upheld by most courts,⁸³ although here the basis of decision has in recent years shifted.⁸⁴ Cases involving local assessments,⁸⁵ municipal home rule,⁸⁶ administrative action as to details,⁸⁷ and the making of rules and regulations

⁸³*Ibid.* 238 *et seq.*, but *cf.* McBain, *op. cit. supra* note 80, at 278-284; State v. Hayes, 61 N. H. 264 (1881); Bradshaw v. Lankford, 73 Md. 428, 21 Atl. 66 (1891), legislature cannot make operation of a statute, affecting the common right of all the people of the state to take oysters in certain districts depend for its validity on a vote of the people in certain districts of Somerset county. The court recognized the principle of delegation in local matters, but relied on the principles of representative government and the English equivalent of our maxim. This case was recently followed in Brawner v. Supervisors, 141 Md. 586 (1922), act providing for soldiers' homes void because of provision for general referendum, maxim cited.

⁸⁴Pacific States T. & T. Co. v. Oregon, 223 U. S. 118, 32 Sup. Ct. 224 (1911); Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260 (1917); Gillilan v. Gillilan, 278 Mo. 99, 113, 212 S. W. 348 (1919); Kadderley v. Portland, 44 Or. 118, 144, 74 Pac. 710, 75 Pac. 222 (1903); Hudspeth v. Swayze, 85 N. J. L. 592, 89 Atl. 780 (1914), upholding jury act providing for referendum as conditional legislation.

⁸⁵Police Jury v. McDonough, *supra* note 61, act to authorize police juries and municipal corporations to subscribe for stock of companies prosecuting works of internal improvement, effective only on consent of majority of land owners, held legislature can delegate to municipal corporations power to tax for local purposes. Counsel spoke of vesting legislative power in the legislature, and the court referred to the spirit of our institutions and conditional legislation. *Accord:* City of N. O. v. Graihle, 9 La. Ann. 561 (1854); Talbot v. Dent, 9 B. Mon. 536 (Ky. 1849).

Alcorn v. Hamer, *supra* note 76, held valid a levee tax to be submitted to voters of the district, and contains elaborate argument and exhaustive citation of authorities. *Cf.* also Hardenburgh v. Kidd, 10 Calif. 402 (1858), assessment of county taxes by court, held legislative act; Auditor of State v. Atchison, etc., 6 Kan. 500 (1870), hearing of appeals on appraisals, void; Marshall v. Donovan, 73 Ky. 681 (1874), vote of district on tax for building school, valid; Columbia Bottom Levee Co. v. Meier, 39 Mo. 53 (1866), legislature can delegate authority to private corporation to levy assessments on lands benefitted by authorized local improvement, where legislature might itself have made the improvement and levied the assessment; State v. Gazlay, 5 Ohio, 14 (1831), tax on professional men levied by courts valid.

⁸⁶*Supra* note 80.

⁸⁷See, in particular, Franklin Bridge Co. v. Wood, 14 Ga. 80 (1853); State v. Armstrong, 35 Tenn. 634 (1856); City of Morristown v. Shelton, 38 Tenn. 24 (1858); Fogg v. Union Bank, 60 Tenn. 435 (1872), act leaving it to trustee to fix time for presentment of claims of creditors, held unconstitutional delegation; Kinney v. Zimpleman, 36 Tex. 554 (1871), legislature may employ other agencies to district the state for educational purposes, maxim does not apply; Winters v. Hughes, *supra* note 32.

by administrative officers,⁸⁸ have all contributed their quota of praise for the supposed principle of constitutional law, that legislative power cannot be delegated, despite the fact that these forms of legislation have been uniformly upheld. In a long line of cases in the Supreme Court of the United States, the dogma has been recognized in terms while in not one such case has it been applied. It has even been questioned in some of our state courts whether the legislature could leave works of mechanical improvements to other agencies,⁸⁹ or use commissions under its control for the ascertainment of facts and the supervision of such works.⁹⁰

New questions are raised by the creation of boards and commissions, bureaus and departments, to all of which are entrusted functions of governing which in a pioneer age were performed by the legislature. Also, that inconvenient political doctrine of separation of powers (with which we are not here concerned) is invoked when powers formerly exercised by the legislature are delegated to the executive or judiciary. It is no longer either appropriate or in good taste to talk about the genius of our representative institutions, or the

⁸⁸*Ingram v. State*, 39 Ala. 247 (1864), statute prohibiting distillation of liquor except under authority and direction of governor, valid; *Martin v. Witherspoon*, 135 Mass. 175 (1883), making of pilotage regulations may be delegated to governor and council; *U. S. v. Williams*, 6 Mont. 379, 12 Pac. 851 (1887), rules and regulations of Secretary of Interior for cutting timber on public lands; *In re Griner*, 16 Wis. 423 (1863), rules and regulations by President for calling out militia.

The following cases in the Supreme Court should also be referred to: *Buttfield v. Stranahan*, *supra* note 34, in which the court confuses delegation, due process and the rule that a commission must live up to the rules and regulations laid down for it; *Union Bridge Co. v. U. S.*, 204 U. S. 364, 27 Sup. Ct. 367 (1906); *U. S. v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480 (1910); *Mutual Film Corp. v. Ohio Indust. Comm.*, 236 U. S. 230, 35 Sup. Ct. 387 (1914); *Wichita R. R. v. Pub. Util. Comm.*, 260 U. S. 48, 43 Sup. Ct. 51 (1922). The case last referred to also confuses delegation, due process and the principle that the commission must live up to rules and regulations laid down for it. *Cf. d. c.*, 268 Fed. 37 (C. C. A. 8th, 1920), pointing out that no provision of the Kansas or U. S. Constitution was violated.

⁸⁹*In re N. O. Draining Co.*, 11 La. Ann. 338 (1856); *Columbia Bottom Levee Co. v. Meier*, *supra* note 85; *State v. Stockholm*, 14 S. C. 417 (1880), referees to construct highways.

⁹⁰*Salem Turnpike, etc., Corp. v. Essex County*, 100 Mass. 282 (1868); *Dow v. Wakefield*, 103 Mass. 267 (1869). These cases upheld acts providing for laying out certain roads and bridges of a turnpike corporation for a public highway, upon the report of a commission as to damages and apportionment thereof among counties, assessments, maintenance and repair of bridges, etc. The commission was to be appointed by the court. The commission was obviously performing judicial functions, but in reasonable aid of the legislature.

dangers of a pure democracy, or liberty and the rights of man.⁹¹ The truth of the matter seems to be that Lord Coke's maxim, kept alive by discussion and *dicta* in the earlier cases, rises as a ghost to hamper the efficient and proper distribution of the functions of government. It is often thinly disguised as the "sacred trust" imposed on the legislature, or concealed in the spirit of the constitution or in the provisions of that document from which the separation of powers is derived. The courts almost always handle it with deference and respect even in those cases where it is declared to be inapplicable.⁹² No doubt its prominence as a supposed principle of constitutional law is in large measure due to this practice.

It is not surprising, then, when the point of emphasis shifts from local option statutes to those involving the question of delegation of legislative power to the executive or judiciary, that here the political dogma of separation of powers is bolstered up by Lord Coke's maxim, in some of its various disguises.⁹³ Far from being a principle of con-

⁹¹"It is, however, contended . . . that this is a transfer of legislative power to the people, which is contrary to our republican system of government, as set up in the constitution, as well as its genius and cardinal principles.

"With these latter tests, it may be remarked, we have nothing to do, except so far as they may tend to illuminate what is written in the constitution. If the construction and administration of our laws, supreme or subordinate, were to be governed by the opinions of judges as to the genius or general principles of republicanism, democracy, or liberty, there would be no certainty in the law; no fixed rules of decision. These are proper guides for the legislature where the constitution is silent, but not for the courts. It is not for the judiciary or the executive department to enquire whether the legislature has violated the genius of the government, or the general principles of liberty, and the rights of man, or whether their acts are wise and expedient, or not; but only whether it has transcended the limits prescribed for it in the constitution. . . ." *Louisville & N. Ry. v. Davidson*, *supra* note 61, at 667-8.

Cf. the language used by Black, C. J., in *Sharpless v. Mayor of Phila.*, *supra* note 47, at 161-2.

⁹²See the language used in *Franklin Bridge Co. v. Wood*, 14 Ga. 80, 83 (1853); *Alcorn v. Hamer*, *supra* note 76, at 749. *Cf.* *Taft, C. J., in J. W. Hampton, Jr., & Co. v. U. S.*, 48 Sup. Ct. 348 (1928).

⁹³One of the earliest cases on this point was *State v. Armstrong*, *supra* note 87, where it was held that the legislature could not delegate to courts the power to grant charters of incorporation, that power having been expressly conferred on the legislature by the constitution. McKinney, J., delivering the opinion of the court, said, at 655, 656: "If the Legislature might do what has been attempted by this act under consideration, that system of checks and balances introduced into our forms of government, both state and federal, and founded on the distribution of powers between the several departments, on which the safety of our free institutions has ever been found mainly to depend, might soon be destroyed. . . ."

stitutional law, it seems that our maxim has little, if any, application to the distribution of the work of government by the legislature. There is no mention of it in any American constitution, nor any remote reference to it. The whole doctrine, insofar as it is asserted to be a principle of constitutional law, is built upon the thinnest of implication, or is the product of the unwritten super-constitution.

"We therefore hold, that the act under consideration is inconsistent with the constitution and void. First, because it attempts to vest the judicial department with the exercise of a power which belongs exclusively to the Legislature; and, in addition, it assumes to transfer, what the Legislature did not possess, unlimited power to grant charters of incorporation, for all conceivable purposes, at the will and pleasure of the applicants, wholly irrespective of the 'public good,' and even contrary thereto.

"And, secondly, because the Legislature itself is but *an agent* of the people. Its entire authority is merely a delegation of power from the constituent body—the people; its members are the chosen and confidential depositories of the law-making power of the government; to whom, in the most emphatic sense, are confided *personally* the most important and sacred governmental trusts—trusts which, in their very nature and intention, must be exercised in person, the idea of a transfer or delegation thereof, being in direct opposition to the design and ends of their creation."

Cf. Buttfield v. Stranahan, supra note 34; *Wichita R. R. v. Publ. Util. Comm., supra* note 88.