is to be preferred. As Dixon J. has said, 'to allow any transaction for value to be placed under the category of gift is to abandon a definite *discrimen,* and to make the classification depend upon matters of degree and perhaps compel an enquiry into that purpose'.[11] It is difficult to see how a court can decide whether a commercial transaction is sham or genuine without such an enquiry. Suppose in the instant case the shareholders of the new company had been the sons of the shareholders of the old company. Would so blatant a gift escape duty through the device of incorporation? Herring C.J. considered the issue of new shares a new step which the *Cuming Campbell* case prevented the court from penetrating. But in that case, the High Court had the comforting assurance that one of the additional steps (the instrument of transfer by which 75,000 shares went to the trustees at a nominal sum) was itself probably taxable. The approach of O'Bryan J. and Hudson J. suggests that courts may well look to the additional steps to show what colour they lend to the nature of the instrument itself.

It cannot be pretended that the law is satisfactory as it stands. The original fault lies with a legislature which adopted the words of the New Zealand Stamps Act 1882 and made inappropriate additions scarcely intelligible in this context. The most attractive approach to the interpretation of Division IX is that of Latham C.J. in his dissenting judgment in the *Cuming Campbell* case.[12] He considered that such an instrument should be taxed as a sale on the consideration shown in the instrument, and taxable as a gift to the extent of the inadequacy of the consideration.[13] This provides a just and simple rule. Amending legislation along these lines would relieve the courts of the difficulties encountered in the instant case.

N. R. McPHEE

CROFT v. ROSE[1]

Delegated Legislative Power—Sub-Delegation—Maxim Delegatus Non Potest Delegare

The respondent was charged before a Stipendary Magistrate with a breach of Motor Car Regulation 1954, 192 B. The magistrate dismissed the information on the ground, *inter alia,* that the regulation involved an attempted delegation of power conferred upon the Governor-in-Council by the Motor Car Act 1951, s. 91, and was there-

[11] *Collector of Imports (Victoria) v. Cuming Campbell Investments Pty. Ltd.* (1940) 63 C.L.R. 619, 642.

[12] (1940) 63 C.L.R. 619, 634.

[13] See Gift Duty Assessment Act 1947, s. 17 (Cth); Administration and Probate Act 1951, s. 4 (1) for a similar legislative approach to imposing duties.

[1] [1957] Argus L.R. 148. Supreme Court of Victoria; Herring C.J., Gavan Duffy and Hudson JJ.

fore invalid. Regulation 192 B purported to impose a speed limit on any part of a highway 'in which there is provision for . . . street lighting'[2] or 'which is defined by means of a restriction sign and a de-restriction sign.'[3] Street lighting might be provided, and restriction and de-restriction signs erected, by a number of municipal and semi-governmental bodies. Upon order to review, the Supreme Court held that the regulation was valid. Since the Governor-in-Council had satisfactorily prescribed an objective test or standard which could be applied to any set of circumstances, there had been no delegation of power.

The court did not reach the point of having to determine whether the Governor-in-Council could validly delegate his legislative power to declare a speed limit, and to specify a 'locality or . . . road or part thereof'[4] in which such limit should apply, as it was unanimous[5] in holding that no delegation had in fact been attempted. The Governor-in-Council had merely conferred upon others power to determine when the legislative provisions of the regulation should operate.

Hudson J. drew an analogy between *Croft v. Rose* and three cases decided by the High Court[6] in which a Prices Commissioner with power to 'fix and declare' the prices of certain goods exercised this power by declaring a formula whereby the fixed price of the goods was calculated on the basis of the cost of manufacturing them.[7] These cases, however, are distinguishable from *Croft v. Rose,* as no official action by any other person was necessary before the fixed price of the goods in question could be calculated. On the other hand, Motor Car Regulations 192 B might be made to apply to a locality or road by the erection of restriction signs or the provision of street lighting by persons other than the donee of the legislative power. More apposite than the 'clothing prices' cases is *Arnold v. Hunt,*[8] where a Prices Commissioner 'fixed and declared' by an order as the maximum prices for the sale of spirituous liquors in the Melbourne metropolitan area 'those [prices] set out in the amended retail price list issued by the Victorian Associated Brewers.' The High Court held the order to be invalid as the Prices Commis-

[2] Motor Car Regulation 1954, 192 B (1) (a). [3] *Ibid.*, 192 B (1) (b).

[4] Motor Car Act 1951, s. 91 (1) (e).

[5] [1957] Argus L.R. 148, 151, *per* Herring C.J. and Gavan Duffy J.; 163, *per* Hudson J.

[6] Without referring to these three cases in this connection, Herring C.J. and Gavan Duffy J. adopted similar reasoning.

[7] *Bendixen v. Coleman* (1943) 68 C.L.R. 401; *King Gee Clothing Co. Pty. Ltd. v. The Commonwealth* (1945) 71 C.L.R. 184; *Cann's Pty. Ltd. v. The Commonwealth* (1946) 71 C.L.R. 210; also *Fraser Henleins Pty. Ltd. v. Cody* (1945) 70 C.L.R. 100, 128.

[8] (1943) 67 C.L.R. 429. This case was cited to the court by counsel, but was not referred to in the judgments. See also the American cases *The Brig Aurora* 7 Cranch 382 (1813); *Field v. Clark* 143 U.S. 649 (1892); Duff and Whiteside, *'Delegata Potestas Non Potest Delegari:* A Maxim of American Constitutional Law', (1929) 14 *Cornell Law Quarterly,* 168, 174, and the cases cited there.

sioner had not himself fixed a price, but had merely attempted to incorporate a list of prices (subject to alteration) prepared by another person.[9] It is submitted that Motor Car Regulation 192 B is similar to the prices order in *Arnold v. Hunt,* insofar as the regulation (or order) is not self-executing.[10] Further, it would appear that the Supreme Court's holding that the Governor-in-Council had 'at the most conferred power on others to determine when [the regulation's] legislative provisions would operate'[11] is straw-splitting which in the light of *Arnold v. Hunt* is not open to the court. The conclusion that some legislative discretion was delegated by the Governor-in-Council is not inconsistent with agreement with the court's decision as a matter of statutory interpretation that the Governor did in fact 'specify' a locality or road in the regulation.[12]

If there was a delegation of legislative power by the Governor-in-Council, what are the consequences at law? Although argument was presented on this point by the Solicitor-General, it was side-stepped by the court. Two questions are involved, whether the Governor-in-Council could properly be regarded as a delegate of the Victorian Parliament, and if he could so be regarded, whether sub-delegation of legislative power by him is valid. This, in turn, involves consideration of the application of the maxim *delegatus non potest delegare* to the field of public law.

There is no Australian authority on the preliminary question,[13] but the Canadian case of *Reference re Regulations (Chemicals) Under War Measures Act*[14] contains persuasive authority that the Governor-

[9] (1948) 67 C.L.R. 429, 432.

[10] In *Croft v. Rose* [1957] Argus L.R. 148, 164, Hudson J. expressed the view that if Motor Car Regulation 192 B involved an unlawful delegation of power, so also did the *King Gee* and *Cann's* cases, because the cost of the goods in those cases was used as one of the criteria in ascertaining the price fixed by the Prices Order, and 'this [cost] obviously depended on the acts of persons over whom the Prices Commissioner had no control.' But the High Court in the *King Gee* case held that the Commissioner's power to 'fix and declare' prices was validly exercised by reference to the standards stated in the order, as the standards were not 'a matter of estimate, discretionary allocation, or apportionment, resulting in the attribution of an amount or figure as a matter of judgment.' [*King Gee Clothing Co. Pty. Ltd. v. The Commonwealth* (1945) 71 C.L.R. 184, 197, *per* Dixon J.]. In *Croft v. Rose,* it is submitted that the Governor-in-Council *is* delegating a discretionary power to municipal councils, the Country Roads Board and similar bodies to erect and remove restriction signs where they choose to, and that because of the nature of the discretion involved this power is legislative in nature.

[11] [1957] Argus L.R. 148, 151.

[12] *Cann's Pty. Ltd. v. The Commonwealth* (1946) 71 C.L.R. 210, 227-228 *per* Dixon J. Such ambiguities 'must be resolved by construction and interpretation as in the case of other documents. They do not go to power.'

[13] *Roche v. Kronheimer* (1921) 29 C.L.R. 329, and *Victorian Stevedoring and General Contracting Co. Pty. Ltd., Meakes v. Dignan* (1931) 46 C.L.R. 73 are concerned with similar problems in the context of the federal constitution, and are further removed by argument relating to the separation of powers. But see *Dignan's* case (1931) 46 C.L.R. 73, 99, *per* Dixon J., which passage may be read as suggesting that the power conferred upon the Governor-in-Council in circumstances such as in *Croft v. Rose* might be regarded as plenary 'within the limits of the subject matter.'

[14] [1943] Dominion Law Reports, 248; also (1943) 21 *Canadian Bar Review,* 141 ff.

in-Council ought not to be regarded as the delegate of Parliament. The case concerned a delegation of power conferred upon the Governor-General of Canada by a war emergency act to make 'such orders and regulations as he may by reason of the existence of real or apprehended war, invasion, or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada.' The Canadian Supreme Court was unanimous in holding the delegation to be valid, although some judges based their decisions upon other grounds peculiar to Canadian constitutional law. However, Rinfret and Taschereau JJ. in a joint judgment considered the applicability of the maxim *delegatus non potest delegare,* and concluded that the Governor-General was not a delegate. 'Within the limits prescribed, the authority of the Governor-General-in-Council is as plenary and as ample as the Parliament in the plenitude of its power possessed and could bestow.' *Quaere,* courts will not readily invalidate this type of sub-delegation in time of war or other emergency.

The leading cases of *The Queen v. Burah,*[15] *Hodge v. The Queen,*[16] and *Powell v. Apollo Candle Co. Ltd.*[17] may be invoked by analogy to suggest that the Governor's powers are plenary within their limits, but this argument may be vitiated by the width of the powers conferred upon the colonial legislatures in those cases. However, support may be derived from observations by Kerwin J. in the *Chemicals Regulations* case that a statute does not have to be as widely drawn as the Canadian War Measures Act for the maxim not to be applicable.

This invites consideration of the maxim itself, and its relevance to public law. Although its origin is doubtful,[18] the maxim *delegatus non potest delegare* is firmly established in trust and agency law,[19] but there has been a wide divergence in judicial opinion whether it applies to delegated legislation, or, indeed, to the field of public law in general.

Again there are no Australian authorities in point,[20] although it is possible to argue from *dicta* in the opinion delivered by Lord Selborne L.C. in *The Queen v. Burah*[21] to the effect that a person or

[15] (1878) 3 App. Cas. 889, 904.
[16] (1883) 9 App. Cas. 117, 132.
[17] (1885) 10 App. Cas. 282, 290.
[18] Duff and Whiteside, *op. cit., supra,* n. 8, trace the history of the maxim from Bracton to the twentieth century. They conclude, *ibid.,* 173, that it '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.'
[19] *Halsbury's Laws of England* (3rd ed. 1952) i, 169-170; but see also *Halsbury's Laws of England* (2nd ed. 1939) xxxiii, 250.
[20] *Supra,* n. 13. Other cases, such as *Bayly v. Municipal Council of Sydney* (1928) 28 S.R. (N.S.W.) 149, and *Morrison v. Shire of Morwell* [1948] V.L.R. 73 deal with the sub-delegation of administrative powers.
[21] *Supra,* n. 15.

body 'restricted in the area of its powers'[22] may exercise such powers either absolutely or conditionally, but that the powers cannot be delegated.[23] As it was held that there was no delegation of power in *Burah's* case, this argument is at the best a tenuous one.

The maxim was referred to by four of the judges who heard the Canadian *Chemicals Regulation* case.[24] Rinfret and Taschereau JJ. were of the opinion that it was a maxim of agency only; Kerwin J. thought that whilst it was not confined to agency at common law it had no application to the Chemicals Regulation; and Hudson J., whilst stating that the maxim applied to legislative grants as well as agency, thought that at the most it was a rule of construction.

Delegatus non potest delegare has been invoked and accepted in American constitutional practice, but because of its close alliance with the doctrine of the separation of powers in the United States, Australian courts can derive little assistance from American decisions.[25]

Two New Zealand cases categorically apply the maxim to public law. In *Geraghty v. Porter*[26] the Governor-in-Council was given power to make regulations with respect to number plates on motor cars. He delegated to borough and county councils power to fix the manner in which the licence plates should be fixed, the arrangement of the letters and numerals etc. The Supreme Court held the sub-delegating regulation to be invalid. The maxim *delegatus non potest delegare* was held to be of general operation 'although the cases in which it has been applied have for the most part been those arising out of the relation of principal and agent.'[27] However, the joint judgment of the court added that there was an inference from the statute 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. *Quaere,* an implication by the legislature that a delegated power cannot be sub-delegated is equivalent to a rule of substantive public law that such delegations are subject to the operation of the maxim. Callan J., in *F. E. Jackson & Co. Ltd. v. Collector of Customs,*[28] however, sought no such implication, but delivered his judgment in the widest possible terms. 'Delegated legislative power cannot be sub-

[22] *Powell v. Apollo Candle Co. Ltd.* (1885) 10 App. Cas. 282, 290.

[23] *Quaere, Hodge v. The Queen, loc. cit.*, n. 16, *supra,* is inconsistent with such an interpretation of Lord Selborne's speech.

[24] *Supra,* n. 14 (1943) 21 *Canadian Bar Review,* 141, 146.

[25] American practice is discussed in (1943) 28 *Harvard Law Review,* 95-96. An analysis and criticism of leading American cases is made by Professor Whiteside, *op. cit.*, n. 8, 174 ff., 196. Cases illustrating the American doctrine of 'filling in the details' are cited in Kerr, *The Law of the Australian Constitution* (1925), 41.

[26] [1917] N.Z.L.R. 554.

[27] *Ibid.,* 556.

[28] [1939] N.Z.L.R. 682.

delegated except in so far as Parliament, which created the power, has said it might be sub-delegated. The principle is well settled.'[29] *Geraghty v. Porter,* which was argued on appeal by one, the successful, party only, was the principal authority cited in argument for invalidity in *Jackson v. Collector of Customs.* In view of the dearth of authority and the extremely narrow ground upon which *Geraghty v. Porter* was decided, there seems scant justification for the breadth of Mr Justice Callan's *dictum.* It is submitted that *Geraghty v. Porter* must be considered a shaky authority for any general proposition concerning the applicability of the maxim. Nevertheless, *Jackson v. Collector of Customs* would probably be followed in any future case in New Zealand.

The problem has not assumed any importance in England because there is a drafting practice normally to indicate whether or not power may be sub-delegated. An *obiter dictum* of Scott L.J. in *Jackson, Stansfield and Sons v. Butterworth*[30] states that the maxim applies in England to unauthorized sub-delegation of legislative power.[31]

Speculation as to the attitude a Victorian court would take if forced to decide between the divergent approaches of the Canadian and New Zealand courts would be idle. It is submitted that the Canadian view is supported by legal history,[32] and better suits the practical requirements of modern government.[33] One salutory lesson to be learnt from *Croft v. Rose* is that costly litigation can best be avoided by specific provision in legislation that a power may or may not be sub-delegated.

An attractive point not argued by the respondent can be made from interpretation of the Motor Car Act 1951, s. 91 (1), which confers power upon the Governor-in-Council to declare a speed limit for 'any specified locality or any specified road or part thereof.' Assuming 'thereof' to relate to the words 'specified road', it would appear that the Governor must declare a limit for 'specified roads' or 'parts of specified roads.' However, by specifying 'any part of a highway in which there is provision for . . . street lighting *etc., etc.*', the Governor has legislated with respect to specified parts, not of *specified* roads, but of *all* roads.

J. D. MERRALLS

[29] *Ibid.,* 733.
[30] [1948] 2 All E.R. 558.
[31] *Ibid.,* 559. See *Report of the Committee on Ministers' Powers* 1931 (Cmd. 4060), 49-50.
[32] Duff and Whiteside, *op. cit.,* n. 8.
[33] *Cf.* J. F. Northey, 'Sub-delegated Legislation and *Delegatus non potest Delegare*' (1954) 6 *Res Judicatae,* 294, where the approach of the New Zealand courts is supported.