Cr.A. 74/58.

ATTORNEY-GENERAL v. HORNSTEIN

In the Supreme Court Sitting as a Court of Criminal Appeal

Agranat J., Silberg J. and Goitein J.

Administrative Law—Delegatus non potest delegare—Delegation by municipality of its statutory powers to Mayor—Legislative and administrative functions—Delegation of powers to impose tax—Road Transport Ordinance, sec. 25 (1)—*Municipal Corporations Ordinance, sec.* 99 (1).

Section 25(1) of the Road Transport Ordinance and section 99(1) of the Municipal Corporations Ordinance provide as follows:

> "25(1) A municipal...council may, with the consent of the district commissioner and the licensing authority, make bye-laws in regard to the following matters-...
>
> (b) the regulation by prohibition or otherwise of vehicles when stationary within the municipal... area."
>
> "99(1) A municipal council may make by-laws to enable or assist it to carry out any of the matters it is required or empowered to do under...any other Ordinance... and may by such by-laws provide for the payment of any fees...by any person...in connection with such matters."

In bye-laws made by the Municipal Council of Tel-Aviv-Jaffa under the above sections provision was made for the designation by the Council of "parking places", and the Mayor was empowered, after consultation with certain officials, to set apart a "parking place", to regulate parking in a "regulated parking place" by an attendant or by means of mechanical devices, and to prescribe different scales of fees for the different regulated parking areas according to the hours of parking, the periods and types of vehicles. The by-laws also provided that a person who contravenes any of their provisions shall be liable to a fine of IL 100.

The respondent was convicted by a Municipal Court of an offence against the bye-laws in that he had parked his car in a "regulated parking place" regulated by means of mechanical devices, namely, parking meters, without depositing the fee prescribed in the Mayor's notice which appeared thereon. On appeal to the District Court the conviction was quashed on the grounds that the delegation of powers by the council to the Mayor was *ultra vires* the powers of the Council under the sections cited, and that the Mayor's regulations regarding the duty to pay a fee at a certain rate were of a legislative character and had not been published as required by law. The Attorney-General appealed.

Held, dismissing the appeal:

Per Agranat J. (Silberg J. concurring),

(1) the function of the Mayor in designating a parking place as a "regulated parking place" was of a legislative character, while the function of regulating parking thereon by an attendant or by means of mechanical devices was merely administrative in character.

(2) The principle of *delegatus non potest delegare* is not to be regarded, even to the extent that it applies to the authority of a secondary legislator, as an inflexible rule but merely as a presumption which may sometimes be rebutted, and at least one recognised qualification upon its application is that in the case of a secondary legislator upon whom full legislative authority has been conferred to regulate a number of different matters—power to make primary regulations and not merely rules of an executive nature in relation thereto—it may be inferred that the Law from which this authority derives intended by implication to permit him to place upon an administrative body the task of determining when or how the regulations prescribed by such legislator should come into effect.

(3) The provisions of the bye-laws therefore empowering the Mayor to prescribe "regulated parking places" in those places which had previously been designated as "parking places" by the Council itself, and having done so to determine whether parking thereon should be regulated by attendants or by means of parking meters, should be upheld.

(4) The fee imposed for parking was not only of the nature of a "price" but also of the nature of a "tax", and as the authority to levy a tax emanates from the sovereign character of the supreme legislative organ, if for this purpose it has chosen to be assisted by a subordinate law-making body, the latter must necessarily abide, even to a greater degree, by the principle of *delegatus non potest delegare;* and as moreover the Council could itself control the fixing of the price either by outlining a rational basis or mode of action for guiding the Mayor in prescribing the relevant scales of fees or by fixing a maximum rate for the parking fee, the determination of the scale by the Mayor alone was of no effect.

Per Goitein J. (dissenting),

the parking fee was not of the nature of a tax, and the Council had therefore not exceeded its powers in delegating the function of prescribing the fee to the Mayor.

Israel cases referred to:

(1) *Cr.A.* 213/56—*Attorney-General* v. *Yeshayahu and Genya Alexandrovitz* (1957) 11 P.D. 695.

(2) *H.C.* 220/51—*Jemal Mahmud Asslan and others* v. *Military Governor of Galilee, Nazareth* (1951) 5 P.D. 1480.

(3) *H.C.* 104/54—*Irgun Nehagei Moniot Sherut Le'Mehoz Tel-Aviv v. Mayor of Tel-Aviv, Haim Levanon, as Local Road Signs Committee within the meaning of Road Transport (Traffic) Regulations, 5713-1953 and others* (1955) 9 *P.D.* 100.

(4) *C.A.* 300/53—*Yosef Woszczyna* v. *Local Council of Kiryat Haroshet* (1955) 9 *P.D.* 1639.

(5) *H.C.* 21/51—*N. Binenbaum and others v. Tel-Aviv Municipality* (1952) 6 *P.D.* 375.

(6) *Cr.A.* 75/54—*Attorney-General v. B. Schreiber and A. Mitelman* (1954) 8 *P.D.* 927.

(7) *C.A.* 43/53—*The Local Council of Kfar Ata* v. *"Ata" Textile Company Ltd.* (1955) 9 *P.D.* 869.

English cases referred to:

(8) *Allingham and another* v. *Minister of Agriculture and Fisheries* [1948] 1 *All E.R.* 780.

(9) *Ferdinand Longfield Speight and others v. Isaac Gaunt* [1883-84] 9 *App. Cas.* 1.

(10) *The Queen v. Burah* [1877-78] 3 *App. Cas.* 889.

(11) *Charles Russell v. The Queen* [1881-82] 7 *App. Cas.* 829.

(12) *Archibald G. Hodge v. The Queen* [1883-84] 9 *App. Cas.* 117.

(13) *King Emperor v. Benoari Lal Sarma* [1945] 1 *All E.R.* 210; [1945] *A.C.* 14.

(14) *Shannon and others* v. *Lower Mainland Dairy Products Board* [1938] *A.C.* 708.

Australian cases referred to:

(15) *Croft v. Rose* (1957) *Argus Law Reports* 148.

American cases referred to:

(16) *Union Bridge Company* v. *United States* (1907) 51 *Ed.* 523.

(17) *May W. Borum* v. *H.S. Graham and others* (1935). 4 *Cal. App. (2d)* 331.

(18) *Minnie Gould and others* v. *Western Dairy Products, Inc., and others* (1936) 12 *Cal. App. (2d)* 188, 191.

(19) *Angelo Mecchi, Jr., a Minor, etc. and others* v. *Lyon Van & Storage Co.* (1940) 38 *Cal. App. (2d)* 674.

(20) *People* v. *Sullivan* (1930) 238 *N.Y. Supp.* 253; 72 *A.L.R.* 231.

(21) *Samuel C. Taylor v. Abel J. Roberts* (1922) 84 *Fla.* 654; 72 *A. L.R.* 231.

(22) *State ex rel. Harkov v. McCarthy* (1936) 171 *So.* 314; 108 *A.L.R.* 1153-1154.

(23) *J.W. Hampton Jr., & Co. v. United States* (1928) 48 *S. Ct.* 348.

(24) *City of Birmingham and others* v. *Hood-McPherson Realty Company* (1937) 108 *A.L.R.* 1140.

(25) *Marion L. Frost and others Co-partners, Doing Business under the Name and Style of Frost & Frost Trucking Company* v. *Railroad Commission of The State of California* (1926) 47 *A.L.R.* 457.

American Act referred to:

Constitution of the United States of America, 1787, Art. 1,2,3.

Zilbiger and Rivka Dinai for the appellant.

The respondent appeared in person.

AGRANAT J. The problem involved in this appeal is of a constitutional character, concerning the legislative powers of a local authority, the Municipal Council of Tel Aviv-Jaffa. The question arose in connection with the following statutory provisions:

(The learned judge cited sec. 25(1) of the Road Transport Ordinance and sec. 99(1) of the Municipal Corporations Ordinance, 1934, and continued)

Relying on these two statutory provisions, the above Municipal Council (hereinafter referred to as "the Council") enacted the "Bye-laws for Tel Aviv-Jaffa (Stationing and Parking of Vehicles), 1945" (Reshumot, 1954, no. 459, p. 1000—hereinafter referred to as "the Bye-laws").

Sec. 1 of the bye-laws contains the following definitions:

"'A parking place' is a place where the parking of vehicles is permitted under section 2.

"'A Regulated Parking Place' is a parking place set apart as a regulated parking place under section 3(a)."

The following are other sections of the bye-laws which are important in the present context.

> "2. With the approval of the Traffic Commissioner, and after consultation with the Chief of Police, the Council may prohibit, limit and regulate the stationing of vehicles or of a particular class of vehicles, and also designate a street or part thereof or some other place as a parking place in which the parking of vehicles or of a particular class of vehicles is permitted, prescribe the days and hours and the periods when

parking is permitted, and the number of vehicles which may at any one time park in such place.

3. (a) The Mayor may, after consultation with the Traffic Commissioner and the Chief of Police, designate a parking place as a regulated place and regulate parking thereon by an attendant or by means of mechanical devices.

(b) Where parking is regulated by an attendant, a person leaving a vehicle in the parking place must comply with the instructions of such attendant in every manner pertaining to parking.

(c) Where parking is regulated by mechanical devices, a person leaving a vehicle in the parking area must leave it within one of the vacant spaces marked therefor, opposite the mechanical device allotted to such space, and set the mechanical device in operation in accordance with the directions stated thereon.

11. (a) No person shall station or park, or permit another to station or park, a vehicle in a regulated parking area unless he has paid a parking fee in accordance with the scale of fees prescribed for that parking place under subsection (c).

(c) The Mayor, with the consent of the Traffic Commissioner, may prescribe different scales of fees for different regulated parking areas, according to the hours of parking, the periods and types of vehicles.

(d) The scale of fees as prescribed under subsection (c) shall be set out in a notice by the Mayor and publicly displayed in the regulated parking area or upon the mechanical devices.

(f) Where parking is regulated by means of mechanical devices, the fee shall be inserted in the mechanical device by a coin or by a special metal token in accordance with the directions for use which shall be set out upon such devices.

14. A person who contravenes any of the provisions of these By-laws shall be liable to a fine of IL 100."

It is not in dispute that on November 19, 1956, the respondent stationed his car in one of the streets of the city of Tel Aviv-Jaffa in a place where parking was permitted under sec. 2 of the the bye-laws, which had been designated by the Mayor as a place where parking

was "regulated" by means of a mechanical device (hereinafter referred to as a "parking meter") under sec. 3; likewise, that the respondent did not deposit in the meter—and therefore did not pay—the fee prescribed in the Mayor's notice which appeared thereon. On these facts, the respondent was found guilty by the Municipal court, in his absence, of an offence under secs. 11(a) and 14 of the bye-laws, and ordered to pay a fine amounting to IL 4. He appealed against the conviction to the District Court and his appeal was allowed upon the following grounds:

(a) The effect of the provisions enacted in secs. 3(a), 11(a) and 11(c) of the Bye-laws is that the Council had delegated to the Mayor the authority conferred upon it at the time by Mandatory legislative organ pursuant to sec. 25 of the Road Transport Ordinance and sec. 99(1) of the Municipal Corporations Ordinance, but such delegation of that authority was not permissible and *ultra vires* the Municipality's powers in view of the principle *delegatus non potest delegare*. For this reason, the regulations made by the Mayor pursuant to secs. 3(c) and 11(c) of the bye-laws were likewise lacking in legal force. To support this ground, the District Court relied upon the rule in *Allingham* v. *Minister of Agriculture and Fisheries* (8).

(b) The Mayor's regulation regarding the duty to pay a fee at a certain rate made by virtue of sec. 11(c) of the bye-laws is of a legislative character and required publication in Reshumot in accordance with sec. 17 of the Interpretation Ordinance. As for this ground, the District Court based itself on the rule in *The Attorney-General v. Alexandrovitz* (1).

I shall now deal with the first and main reason of the District Court. In this regard, I shall first of all confine myself to the question of the validity of the provisions of sec. 3(a) of the bye-laws. I hold, contrary to the District Court, that the Council was authorized to enact these provisions and accordingly that the designation of the "regulated area" involved, which was made by the Mayor by virtue thereof, is valid. My reasoning on this point is as follows:

A. The decision in the *Allingham case* (8) is not relevant because all that was decided there is that the principle that an agent cannot delegate precludes the delegation to another of a function of an *administrative* character by the one upon whom such function has been imposed. That rule is construed in this sense in Allen, Law and Orders (2nd edition) pp. 204-5, and also in Griffith and Street, Principles of Administrative Law. I will merely content myself with citing the first author:

"...it is clear...that any administrator,...if certain specific *executive* functions are committed to him,...cannot, without authority, entrust them to a deputy of his own choice."

This rule is not germane to the present case since the authority conferred upon the Municipal Council under sec. 25 of the Road Transport Ordinance to enact by bye-law provisions regulating the parking of vehicles within its boundaries, is clearly of a *legislative* character. Moreover, in view of the wide language employed—"to regulate parking... by prohibition or otherwise"—the section is to be construed as vesting in the Council the power to determine even the "primary law-making" in this sphere and not merely the executory regulations. (As to the distinction between these two categories of secondary legislation, see an article by Professor H. Klinghoffer, Praeter Legem Regulations, in 14 Hed HaMishpat, 1957, p. 245, 257). Considering the broad character of the legislative authority conferred upon the Council, no doubt whatever can arise regarding its power to provide by bye-laws intended to regulate the parking of vehicles within its boundaries for the *administrative* functions which it has placed upon the Mayor to carry out for this purpose. Such bye-law provision would accordingly not involve any "delegation" to another of a function of this character by one charged to carry it out. Therefore, if the matter of designating a "regulated place" and the regulation of parking thereon by means of a parking meter constitutes a function of an administrative character, the provisions of sec. 3(a) of the bye-laws do not conflict howsoever with the principle of *delegatus non potest delegare* and are valid. But even if these provisions must be treated as conferring upon the Mayor a function of a legislative character, the question still remains whether the said principle is applicable to a situation in which a body which has been granted power to regulate a given matter by means of secondary legislation, purports to yield some of its legislative authority to another. This is evident from the following observation of Allen's (ibid.) when dealing with this question: "In respect of legislative functions, however, the position is not so clear." Be that as it may, the rule in *Allingham's case* (8) does not assist us in the present case.

B. From what has been said in the preceding paragraphs it follows that the first question which we must resolve is whether the function dealt with in sec. 3(a) of the bye-laws—the designation of a "regulated place", etc.—is administrative or legislative. We all know that it is sometimes difficult nowadays to determine the quality of a function assigned to some or other body or official, in regard to whether it belongs to one or the other of these two categories. One of the factors

giving rise to this difficulty is that in many instances the legislative and administrative characteristics of a given function are intermixed. Thus in England the report of the Committee on Ministers' Powers, (Cmd. 4060) published in 1932, emphasized (at p. 95):

> "It is indeed difficult in theory and impossible in practice to draw a precise dividing line between the legislative on the one hand and the purely administrative on the other; *administrative action so often partakes of both legislative and executive characteristics.*"

If we consider the content of sec. 3(a) carefully, we are persuaded that a dual function was placed upon the Mayor, or at least, one which is partly legislative and partly administrative. Firstly, he may determine that a place in which parking has been permitted by the Council, in accordance with sec. 2 of the bye-laws, shall be a "regulated" parking area. What such determination means is that any person who parks his vehicle in that place must comply with the directions of the attendant who is present or the "instructions" upon the parking meter found there which he is to set in operation (Sec. 3(b)). Secondly, after he has decided that a certain "parking place" shall be a "regulated" place, the Mayor must choose between two parking arrangements which are to be applied—regulation by an attendant, or by means of a mechanical device; and, having made the choice, it becomes his duty to put it into effect accordingly. Indeed, it may be supposed—since it is in the nature of things—that the Mayor will in practice carry out both such functions simultaneously and even be guided, as regards each of them, by the same considerations. In theory, however, it is possible to separate the two; for example, it is not impossible that the Council would assume the task of determining the "regulated" places, leaving to the Mayor only the decision as to the choice of one of the two parking arrangements—attendant or meter—which must be made with regard to such places.

Reverting now to the question posed at the beginning of this section, my answer is that the first function is to be regarded as of a legislative character but the second as of an administrative character. To support this conclusion, I rely on the decision in *Attorney-General v. Alexandrovitz* (1) from which it appears that the distinguishing features of a regulation of legislative effect are "first, that it should establish a legal norm" (rule of conduct) and thereby bring about a change in the law of the country, and secondly, "that this should be a general or 'abstract' norm, i.e. a norm directed to the public generally, or at least to an indefinite part thereof." It was accordingly held in that

case that the prescription of a mark of identity for merchandise subject to purchase tax by the Director of Customs and Excise (by virtue of the authority granted to him under sec. 15 of the Purchase Tax Law, 1952) constitutes a provision of legislative effect, inasmuch as it "adds an obligation which, apart from it, would not exist" (ibid, p. 702). In his judgment, Sussman J. followed the decision of the High Court of Justice in *Asslan v. Military Governor of the Galil* (2), which held that it was essential to treat as of legislative character an order issued pursuant to sec. 125 of the Emergency Defence Regulations, 1945, because the effect of the order was to limit freedom of movement enjoyed previously by citizens in the region which had been proclaimed a closed area by the order.

This rule is also applicable to the designation of a particular parking area as a "regulated" place, since the two distinguishing features which characterize a legislative regulation exist in relation thereto: (a) the designation constitutes a provision directed to an indefinite portion of the public, namely, the class of persons who need to park their vehicles in a place as aforesaid; (b) its effect is that those persons have to obey the attendant present at the regulated place, or to set the parking meter in motion, whereas before the designation they were under no obligation to observe either of these rules of conduct. I must add that it is possible that the definition upon which I have based this conclusion cannot be reconciled with the view expressed in *Irgun Nehagei Moniot Sherut v. Mayor of Tel Aviv* (3), with regard to the character of a decision to erect traffic signals, made pursuant to Reg. 111 (a) (2) of the Transport (Traffic Rules) Regulations, 1953. I do not intend to dwell at length upon this matter except to observe that that view was obiter and was not required for determining the question which was considered in that case (see, ibid. (3) p. 102, between the letters C and D).

As for the function of regulating parking in a "regulated" place by the use of one of the two methods provided therefor in the bye-laws, I find that the decision of the Mayor thereon lacks the distinguishing feature of a "change in the law" and that consequently its character is merely administrative. The duty resting upon one who has put his vehicle in a parking place as aforesaid—to obey the attendant or to activate the meter—flows from the provisions of sec. 3, subsecs. (b) and (c) of the bye-laws, as well as from the designation of the place by the Mayor as a "regulated" place. The fact that the choice of one or the other of the two forms of regulating parking requires the exercise of a certain discretion on the part of the Mayor cannot bestow upon this function any legislative character whatever. If it were otherwise, it would mean

that it is impossible to impart to any function whatever an administrative character when to carry it into effect demands the exercise of discretion. Such is not the case.

I have deemed it proper to dwell on the theoretical distinction which is to be drawn between these two functions, not only in order to give a precise answer to the above-mentioned question but also to forewarn that due to the close connection which exists between them the distinction may have an important legal consequence. For example, it can be argued that whilst the act of designating a "regulated" place requires public notice, the same does not apply to the function of regulating parking in such a place by means of an attendant or a parking meter. In the report of the English Committee above-mentioned it was likewise stressed that

> "to take any set of regulations and conclude that, because they are primarily administrative, they can be disregarded as having no legislative aspect may often be wrong."

C. The upshot of this is that the question which we have to answer at this stage is whether the District Court was right in holding that the Council did not have the power to delegate to the Mayor the legislative function of designating "regulated" places.

To justify this conclusion, the respondent stressed that sec. 25(1) of the Road Transport Ordinance—the source of the Council's authority to regulate parking—says that it "may make *by-laws*" for this purpose, from which it is inferred that it has the power to carry out such function in this matter alone and that therefore it may not be aided to this end by the Mayor or anyone else. The respondent found support for his argument in *Woszczyna v. Local Council of Kiryat Haroshet* (4), in which it was decided that since Art. 40(2) of the Palestine Order in Council 1922 provided that the appellate jurisdiction of the District Courts may be extended "as may be prescribed by any *ordinance,*" the Palestine legislator could not thereby nominate any other person for this purpose with the result that sec. 84(a) of the Local Councils Order (A), 1950, made by the Minister of the Interior by virtue of sec. 5(2) of the Local Councils Ordinance, 1941, (as amended in 1947), according to which the District Courts were authorized to hear appeals from a decision of the appeals committee in connection with tax assessments, was not lawfully enacted. In other words, just as the limitation inherent in the words "as may be prescribed by any ordinance" in the Palestine Order in Council prevented the High Commissioner from nominating another to carry out the task of extending the appellate jurisdiction of

the District Courts, so the limitation implicit in the words "may make by-laws" precluded the Council from designating the Mayor as the person to make legislative arrangements for regulating parking within its boundaries.

It should be noted that there is nothing in common between this argument and the principle of *delegatus non potest delegare* by which the District Court judges were guided, since this argument relies upon the language used by the legislator, which in the respondent's opinion forbids in and by itself the Council to give up to another any of its powers in the matter under consideration, whereas the said principle is invoked—for the purpose of deciding whether to nullify the transfer of power which some Law has conferred upon an authority—when no prohibition is expressly prescribed in that law. Similarily in the *Woszczyna* case (4) from which the respondent drew an analogy to the instant case, the Deputy President (Cheshin D.P.) emphasized that "there is no question here of a delegation of authority from one agent to another, but of adhering to *express* limitations which have been laid down by superior legislation" (at p. 1646).

As for the argument itself, I think it is untenable. In the *Woszczyna* case, the enabling provision was devoted to a specific limited objective, to enable the appellate jurisdiction of the District Courts to be extended, and since the provision had clearly prescribed that the method to be followed for extending such jurisdiction was by enactment of an "ordinance", there was no avoiding the conclusion that this restriction constituted an express prohibition upon the delegation of the power for achieving the result to one not authorized to enact "ordinances". On the other hand, we have seen earlier that the enabling provision in the present case, in sec. 25(1) of the Road Transport Ordinance, is devoted to regulating the entire field of matters pertaining to parking of vehicles within the boundaries of local authorities, and in view of the wide terms conferring the power upon the Municipality to do so within its own area, which indicates that it was also empowered to prescribe "the primary regulations" in this connection, it is impossible to hold *ipso facto*—merely in reliance upon the words prescribing that the Council may effect this purpose by means of bye-laws—that it is forbidden to delegate to the Mayor the task of formulating the "details" required for the putting into effect of the regulations prescribed by it in the bye-laws it has enacted. Such an "automatic" inference is not possible even if the prescription of such details bears a legislative character. This may be seen from the view expressed by Griffith and Street, op. cit. (p. 69), that

"If the Minister is empowered to make subordinate legislation, it is suggested that his power to authorize himself or others by such subordinate legislation to make subdelegated legislation depends on the generality of the statute and the extent to which the powers to legislate are there defined. If the statute is so widely phrased that two or more 'tiers' of subordinate legislation are necessary to reduce it to specialised rules on which action can be based, then it *may be* that the courts will *imply the power* to make the necessary subdelegated legislation."

Nevertheless, I do not in this part of my judgment adopt this view and have only mentioned it to show that in face of the "generality" of the language of the enabling provision in the present case and the extent of the powers thereby granted to the Council in order to enable it to regulate matters of this kind, it is impossible to hold that there is an *express* prohibition on delegating the function of designating "regulated" parking places to the Mayor, and that therefore the real problem calling for solution is whether it is possible for us to hold that this provision *impliedly* confers upon the Council power to authorize the Mayor to perform that function. The solution of this problem does indeed depend foremost upon the answer to the question whether the principle of *delegatus non potest delegare,* the principle invoked (if at all) only in those cases in which the statute has not expressly forbidden the delegation of powers granted to some authority, is applicable here. Whatever the answer to that question, it is clear in any event that the grounds upon which the respondent sought to support the decision of the learned judges below are quite baseless.

D. To persuade us that that principle is irrelevant in the present context Mr. Zilbiger who appeared for the appellant pointed out, firstly, the dictum of Witkon J in the *Woszczyna* case (4), that "in the absence of a different provision" "the legislative power granted to a non-sovereign legislative organ may be delegated" (at p. 1646). He argued further that the extended form—in sec. 25(1) of the Road Transport Ordinance—of the Council's powers to regulate parking arrangements within its area indicates to us that within the limits of these powers it constitutes a sovereign body which in such matters may either itself legislate, or delegate the power to legislate to another. Counsel for the appellant found support and an analogy for this submission in what the Deputy President (Cheshin D. P.) said in the *Woszczyna* case (4) about the position of the Palestine legislator of the time, namely, that "he was not in any sense the delegate or proxy of the King

in Council" even though "he drew his strength and derived his authority from the provisions comprised in the Palestine Order in Council" but that "within the limits of this authority, he was himself sovereign and might himself legislate directly or delegate his law-making power to another, even as those who had promulgated the Order in Council" (ibid). Finally, Mr. Zilbiger emphasized the politically "autonomous" and "independent" character of the Municipal Council, in the sense that its members were chosen by the local inhabitants in free elections. The democratic character of this body, so he argued, is enough to negative any possibility of regarding it as a kind of delegate, i.e. a representative or agent of the sovereign legislator as to the matters which it was empowered to regulate by legislative means and that also from this point of view the principle aforesaid is not to be applied in the instant case. In this connection appellant's counsel drew our attention to a passage in Hart, Local Government and Administration (5th ed.) p. 6, on the independent status of local authorities in England:

> "In the first place local authorities are legally independent entities. They have separate legal existence as corporate bodies; they are not mere off-shoots of the Central Government....
>
> "Secondly, in modern times local government is administered by local authorities each acting in a particular area and elected by the inhabitants of that area. This dependence on local election serves in the political sphere to support the legal independence of local authorities. Local authorities are neither legally nor politically the agents of the Central Government."

And also to Klinghoffer, op. cit. (p. 257):

> "Such secondary legislation"—meaning, secondary legislation of the *praeter legem* variety— "is made by independent local authorities chosen by the residents of their defined jurisdictional area. Like the rule of Law, municipal autonomy is also a combination of democratic and liberal elements."

These submissions of counsel—which signify that within the limits of its legislative competence a municipal council constitutes an "omnipotent" body—strike me as excessively far-ranging. I shall deal with them in the reverse order.

(1) Notwithstanding the democratic nature of the Council's composition, it is impossible to hold that it is independent of the control and supervision of the central government in matters which it has been charged to regulate by secondary legislation. For example, sec. 99(4) of the Municipal Corporations Ordinance expressly provides that no bye-law enacted by a council shall have effect until it is approved by the Minister of the Interior. Professor Klinghoffer also concedes that "our local government is subject to onerous control and supervision by the central government and, in many matters, to its discipline and benevolence as well". He says further:

> "As to secondary legislation entrusted to local councils, the said nexus of subordination expresses itself in that bye-laws and certain kinds of general local government decisions require the approval of the central government."

It follows that a comparison of the status of a municipal council in Israel with that of a local government council in England is not one which can be of assistance for the needs of the present case.

It is true that when enacting bye-laws on a matter committed to its competence, the council acts in its own name and not in that of the sovereign legislative authority. It is conceivable that by emphasizing this point, counsel for the appellant started from the premise that the term "delegatus" in the Latin maxim has only the meaning of "representative" or "agent", since one of the characteristic qualities of the agency relationship is that the agent is a person who acts for or on behalf of the principal so that whatever the former does within the scope of his authority is attributable to the latter. Accordingly Mr. Zilbiger argues that the Council is not the legislative "delegatus" of the sovereign law-making authority. One answer to this argument is that the authorising body possesses additional qualities the existence of which also characterizes the legal relationships subsisting between the municipal council and the sovereign law-making authority in connection with the competence of the former to enact auxiliary laws, no less than they are characterized by the absence of the quality referred to by counsel. I refer here to the principal's power to control and maintain continuous supervision over his agent's activities, to limit his authority at any time and to revoke it, and even to take independent action in matters which he has been authorized to do.

My other and the main answer to that argument is that the terms "delegatus" and "agent" are not regarded today as necessarily synonymous for the purpose of applying the principle *delegatus non potest*

delegare. For example, in English private law, a distinction is drawn between agent and trustee in that the former is limited by the instruction he has received from his principal, from which he may not deviate to any extent whatsoever, whereas the latter may generally exercise a wide discretion as to the subject matter of the trust. And so in the Common law the rule has been established that because of this quality characterizing the function of the trustee—namely, precisely because those who appoint another to act as trustee do so in reliance upon his personal qualification to exercise the discretion proper to the matter in which he is required to act—the prohibition of the principle applies to him and therefore he may never delegate his authority (except as to matters of a technical or ministerial character) to a third person (See *Speight v. Gaunt* (9); also Richards, Delegation in Local Government, p. 33). This approach, behind which lies the rule aforesaid and which enables the principle forbidding the delegation of delegated authority to be applied even to one who does not act as such in the legal technical sense, embraces the justification for its application also to matters relating to constitutional law. Thus, Dr. de Smith in his recent books, Principles and Scope of Judicial Review (p. 171), writes:

> "A discretionary power must, in general, be exercised only by the authority to which it has been committed. It is a well known principle of law that when a power has been confided to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another. This principle, which has often been applied in the law of agency, trusts and arbitration, is expressed in the form of the maxim *delegatus non potest delegare*....The widespread assumption that it applies only to the sub-delegation of legislative powers...is unfounded."

It is superfluous to emphasize that the exercise of any kind of law-making power necessitates recourse to discretion by the one exercising such power, which explains the view of this scholar that generally the said principle applies equally to one upon whom the power to enact secondary legislation has been lawfully conferred, and this even

> "where *legislative* powers are delegated by Parliament, or validly sub-delegated by Parliament's delegate, the delegate or sub-delegate exercises his powers in his own name."

Plainly the fact that the municipal council when it makes bye-laws acts in its own name does not—even though it permits the inference that that body is not then acting as the agent of the sovereign legislative authority—strengthen the argument of counsel for the appellant. Moreover, in as far as it is necessary to take account of the fact that the council constitutes a body of a democratic complexion and that the responsibility of its members is primarily to the electorate, the local residents, I think that this fact is antithetical to the argument. Just because the exercise of wide discretion is involved in the operation of the power, those resident—voters are entitled to expect that their representatives will not rid themselves of the responsibility they bear towards them but will themselves exercise the said discretion—as far as it relates to carrying out of the law-making task imposed upon them—and not delegate it to others.

(2) Likewise, there is no firm basis for the analogy which counsel drew between what Cheshin D.P. said in the *Woszczyna Case* (4) and the present case, that just as the Palestine legislator was sovereign in the law-making sphere with the authority he had derived from the Palestine Order in Council and was therefore permitted to delegate it, so the municipal council is also sovereign in the realm of the legislative power conferred upon it and it also may delegate part thereof to another.

The justification for the view which attributes a "sovereign" character to the legislative authority of the Palestine legislator lies in the broad and inclusive phraseology in which this is formulated in Art. 17(1) (a) of the Palestine Order in Council (as amended in 1923), pursuant to which the High Commissioner (subject to certain restrictions not germane here) had the power to enact any Ordinance required for ensuring "peace, order and good government" in Palestine. What this power meant was that the High Commissioner could currently, within the limits of his jurisdiction, enact any Ordinance he pleased, whether it was desirable or undesirable, reasonable or unreasonable. It is clear that the same does not apply to the bye-laws which a municipal council may make and which, as is generally known, must always pass the test of reasonableness *(Binenbaum v. Municipality of Tel Aviv,* (5)). This difference in the nature of the legislative competence conferred upon each of the authorities aforesaid requires us to attribute a "sovereign" character to that which the Palestine legislator at the time used to exercise and a non-sovereign character to that which a municipal council exercises. In their book The Constitutions of the Commonwealth, at p. 47, Jennings and Young observe:

"Within its powers a legislature, unlike a local authority ...can pass what legislation it pleases. It has been said that a colonial legislature is 'sovereign' within its powers. To a political scientist this phrase is nonsense, for the essence of sovereignty is that powers are unlimited. But it is a convenient way of stating that a power to legislate for the peace, order and good government of a colony is a power to enact any kind of legislation, reasonable or unreasonable, desirable or undesirable...The bye-laws of a local authority may be declared invalid because they are unreasonable. There is no such power over colonial legislation."

Thus as soon as we attribute a "sovereign" character to the legislative authority which the Palestinian law-maker possessed, we are compelled to concede his power to make it over to others. In contrast, since we have not found it at all possible to attribute such a character to the authority of the council to enact secondary legislation, it is impossible that we should, on the basis of the "sovereignty" theory or the "analogy" rule, render valid the delegation of that authority to anyone in the absence of an express provision in that behalf by the sovereign legislator (see Jennings and Young, op. cit., pp. 47-8.)

(3) From what has already been said, the rule would seem to be that the principle *delegatus non potest delegare* operates equally in the legislative sphere and therefore I cannot agree to the generalization that "in the absence of a provision to the contrary, the law-making power granted to a non-sovereign legislator may be delegated". I said that this "would seem" to be the rule because I think it would not be right for us to treat it as a rigid rule from which one may not depart whatever the conditions. Even Allen—while expressing the view that "in principle" it would amount to *ultra vires* if the "legislative agent" were to put another in his place—admits that it is still impossible in the absence of a line of clear decisions to speak of this with "confidence" (op. cit. p. 205). I have also noted the views of Griffith and Street about the possibility that the court might construe a particular statute as *impliedly* authorizing the secondary legislator to charge some other organ with the task of enacting "detailed regulations" whereby the arrangements prescribed by the secondary legislator would be put into effect. However, they also emphasize that no authority exists upon this point and that therefore a "more dogmatic" view cannot be expressed (op. cit. p. 69). Finally, de Smith (op. cit. pp. 175-6) indicates his approval of the following view:

> "The maxim *delegatus non potest delegare* does not enunciate a rule that knows no exception; it is a rule of construction to the effect that a discretion conferred by a statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary indications found in the language, scope or object of the statute."

In my opinion therefore the said principle is not to be regarded—even to the extent that it applies to the authority of a secondary legislator—as an inflexible rule but merely as a *presumption*, a presumption which may sometimes be rebutted. The question under what circumstances this can be done when no express provision exists, what are the limits within which the application of the principle in the legislative sphere is to be confined—this question has not as yet been fully answered. But I am certain that there exists at least one qualification upon its application, which all acknowledge and which is pertinent in the present context.

E. I now turn to the qualification dealt with by appellant's counsel in his further submission which is less far-reaching than the "sovereignty" argument upon which he relied. The qualification is that in the case of a secondary legislator upon whom full legislative authority has been conferred to regulate a number of different matters—power to make primary regulations (and not merely "rules of an executive nature") in relation thereto—it may be inferred that the Law from which this authority derives intended by implication to permit him to place upon an administrative body the task of determining when or how the regulations prescribed by such legislator should come into effect. The justification for making this qualification is based upon the demands of political reality, with the object of ensuring that the affairs of state are regulated and conducted efficiently, and in the general recognition that otherwise the "wheels of government", especially in the complexities of modern life, will not be able to "turn". What I wish to say is that the time is not always appropriate for enforcing the legislative arrangements in which the secondary legislator is interested and its introduction to a particular place is not always expedient, since the matter depends upon the prevailing factual conditions, and such conditions are likely to vary in respect of both time and place. Nonetheless, it is sometimes desirable, prevention being better than cure, that the arrangements should be fixed in anticipation and the actual execution thereof be subject to future decision on the question whether in point of time or place the

conditions suitable therefor exist. Thus a secondary legislator charged with the task of finding fundamental solutions to broad topics, varied and numerous, has no available time—and if it is comprised of a body pursuing the legislative process along parliamentary lines, will find it difficult—to inquire daily whether the factual conditions are appropriate and suitable for putting into effect the special arrangements with which it is concerned. It is therefore better for it to assign the task to an administrative body and delegate to the latter the function of deciding, in the light of the factual inquiry it has carried out, whether the time is ripe or the place suitable for bringing the arrangements into force.

It is true that such a decision on the part of this administrative body cannot be reached without prior exercise of its discretion. It is also true that the determination of time or place in which the arrangements of the secondary legislator should apply constitutes—so the definition with which we dealt above in paragraph A requires—the enactment of regulations of legislative import. It follows that the approach which countenances the delegation of such a task by the secondary legislator to an administrative body represents indeed a departure from the principle *delegatus non potest delegare.* Yet, as to the first concomitant, it may be observed that even the carrying out of obvious administrative functions sometimes requires the exercise of discretion by those charged therewith. Furthermore, the fact that the result of the factual inquiry which the administrative body has made must be its sole guide when making its decision means that the exercise of its discretion will cover a rather narrow area. As to the second concomitant, it may be said that for all the legislative character of the function carried out by administrative body in this situation it also represents the "apparatus" which enables the implementation of the arrangements prescribed by the secondary legislator in its regulation and from this point of view there is really nothing extraordinary in committing such a task to one who is accustomed to carry out executive functions. These two points which I have singled out—restricting the area in which the administrative body exercises discretion and devoting its legislative function toward an "operational"—"executive"—purpose minimize to some extent the deviations from the basic principle with which we are concerned.

Authority for the said qualification and for its justification is to be found in English and American decisions to most of which counsel for the appellant drew our attention. Before citing some part of what has been said on the subject in these authorities, I must by way of preface make one observation. A perusal of these authorities makes it apparent

that the courts in approving the said rule do not admit that they are thereby validating a departure from our fundamental principle. The magic formula which they invoke—this is mainly true of the English decisions—is that the legislation which makes the implementation of the arrangements, the object of the legislation, dependent upon the "factual" decision of an administrative body is merely conditional legislation and does not therefore involve the delegation of legislative authority to anyone. A different formula—and this is mostly true of the American cases—is that the function of determining when and where the legislative reform which has been prescribed shall apply is of an *administrative* character. In my opinion no other explanation exists for this unusual approach by the judiciary than that traceable to their strong desire to remain loyal to the principle that an agent may not appoint a sub-agent, in the light of their premise that this principle does not tolerate—in the absence of any provision in that behalf by the sovereign legislator—the slightest derogation. This is also the view of de Smith, (op. cit. p. 176):

> "the Courts have sometimes assumed that the maxim does lay down a rule of rigid application, so that devolution of power cannot (in the absence of express authority) be held to be valid unless it is held to fall short of delegation. *In this way an unreasonably restricted meaning has often been given to the concept of delegation.*"

I proceed now to the authorities which I divide into these three categories: (1) English decisions; (2) Decisions of the Supreme Court of the United States; (3) American decisions dealing with a secondary legislator being a local authority.

(1) To the first category belong: The *Queen v. Burah* (10); *Russell v. The Queen* (11); *Hodge v. The Queen* (12); *King-Emperor v. Benoari Lal Sarma* (13).

In the *Burah* (10) case, the question was whether the then Indian legislature might prescribe by a statute in which it had revoked the criminal jurisdiction of the High Court in certain regions in Bengal province and vested it in the local courts of those regions that this provision should come into effect only from such a day and in such regions as would be determined by the Lieutenant Governor of Bengal. This question was answered in the affirmative by the Privy Council in holding:

"*Where plenary powers of legislation exist as to particulat subjects*...they may...be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, *or on the exercise of a limited discretion,* entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in certain circumstances, *it may be highly convenient*....It cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers it from time to time conferred."

I am fully alive to the fact that this case involved a "territorial" legislature which derived broad legislative powers from a statute of the British Parliament and that the decision of the Privy Council was influenced by the notion that such legislature is "sovereign" within the area of its authority and may not therefore be regarded as the "legislative agent" of the British Parliament (p. 904). Nevertheless, I think that the words I have quoted from the judgment reflect an additional reason, and perhaps even the main reason, for the decision since otherwise they would have been superfluous. Thus this reason is equally valid as to a secondary legislator to whom "plenary" legislative powers have been granted for the purpose of regulating "particular" matters, in the sense of the authority to prescribe therefor "primary regulations"; hence the *qualification* to the prohibition under consideration, which we discussed above.

The same is also true of the three other cases. For example, in the *Hodge* case (12) the justification for making the said qualification is explained in language which differs in no respect from the "sovereignty" approach, as follows:

"Such an authority is ancillary to legislation, and without it an attempt to provide for *varying details and machinery* to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its *necessity and convenience.* It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another or take the matter directly into its own hands.''

Similarly in the *Benoari Lal Sarma* case (13):

> "This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity."

The Australian case of *Croft v. Rose* (15) in which the *Burah* decision was applied to the regulation of a secondary legislator is of inestimable importance. The regulation involved was enacted by the Governor General in Council and provided that driving above a certain speed on those parts of the state highways which required to be lighted was forbidden. In adopting this regulation, the Governor General relied upon a 1951 statute under which he was granted the power to fix a maximum driving speed limit along any highway or section thereof. The Australian court held that regulation to be lawful, notwithstanding the fact that care of the light arrangements of parts of the highways was in charge of others. In their reasons, the judges constituting the majority emphasized these three points: (i) Whilst the matter involves a question concerning the effect of a regulation passed by a subordinate law-making authority, the question must be examined against the wide power which it derived from the statute which authorized it to regulate the matter of the speed of driving upon the highways. (ii) This approach justifies the application of the rule in the *Burah* case to the matter under consideration with the inevitable result that there was no defect in the regulation providing that the direction as to maximum speed should come into effect for those portions of the highways which would be designated by others. (iii) While it is true that such a regulation amounts to a delegation to others of legislative power committed to a subordinate law-making authority, the delegation of the task of determining the limited question as to when and where the regulation should operate is permissible. As to this third point, it is as well to quote from the judgment:

> "The most that could be said in favour of delegation was that the Governor-in-Council had placed in the hands of persons other than himself the power to determine when and where the provisions of the regulation should operate. But this does not amount to a delegation that has, as we understand the matter, ever been considered as objectionable or as going to power."

(2) In the Supreme Court of the United States the question before us arose in connection with the authority of Congress to bestow some

of its legislative power upon an executive authority in view of the doctrine of the separation of powers which constitutes a corner stone of the constitution of the United States (Articles 1, 2 and 3) and which seems to prescribe that none of the legislative, executive or judicial branches should encroach upon the domains of each other (See Corwin, The Constitution and What It Means Today , pp. 2-3). Notwithstanding this doctrine—and it is *pari passu* with the principle *delegatus non potest delegare* (ibid. p. 113)—the Supreme Court ruled in keeping with the above-stated qualification. I shall content myself here with quoting from one decision to that effect. In the case of *Union Bridge Co. v. U.S.* (16), the statute considered was one which required the Secretary of War, upon finding that any bridge constitutes an obstacle to navigation upon a navigable water-way, to effect appropriate changes to remove the hindrance. It was argued at the trial that this provision violates the Constitution because it constitutes a delegation to an executive authority of the legislative power which belongs to Congress. Rejecting this argument, the Supreme Court said (at pp. 533-4):

> "But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation, and direct legislation covering each case separately, would be impracticable, in view of the vast and varied interests which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be free from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with the declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases come within the rule prescribed by Congress, as well as the duty of enforcing the rule prescribed in such cases. In performing that duty the Secretary of War will only execute the clearly-expressed will of Congress, and will not, in any true sense, ...exert legislative... power."

And further:

> "Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some factor of the state of things upon which the enforcement of its enactment depends, would be 'to stop the wheels of Government' and bring about confusion, if not paralysis, in the conduct of the public business."

(3) In the State courts of the United States it has been decided on many occasions that whenever a municipal council is empowered to regulate traffic and parking within its area it may provide by the bye-law in which it prescribes the various arrangements for these purposes that these should apply to such places and at such times as should be determined by an official or body named in the bye-law: see *Borum v. Graham* (17); *Gould v. Western Dairy Products Inc.* (18); *Mecchi v. Lyon Van and Storage Co.* (19); *People v. Sullivan* (20); *Taylor v. Roberts,* (21); *State ex rel. Harkov v. McCarthy* (22).

In the *Gould* case it was said (at p. 191):

> "The right of legislative bodies to delegate power to administrative officials to determine facts in carrying out provisions of legislative enactments has been upheld in many cases.... Even a casual observer of government growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs—national, state and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many quasi-legislative and quasi-judicial functions...are intrusted to departments, boards, commissions and agents... These things must be done in this way or they cannot be done at all."

To the same effect in the *Mecchi* case (at p. 682):

> "To enforce an ordinance, a legislative body—in this case the board of supervisors—may delegate to the board or commission the right to determine a state of facts upon which an ordinance shall operate.... A denial of such right would be 'to stop the wheels of government'".

And also, in the *Taylor* case (at pp. 658):

> "It is contended, however, that vesting in 'the Chief of Police with the approval of the Mayor' the authority to regulate traffic...at any...congested portion of the city, is an unlawful delegation of power to the Chief of Police. The power vested in the Chief of Police was an administrative and not a legislative power.
>
> The organization and government of municipalities, particularly with regard to the regulation and control of

traffic on streets, necessarily contemplates a certain power and discretion being vested in the police officers in carrying into effect the ordinances of the city, and if the rules and regulations, adopted by the police under the authority vested in them by the Ordinances, are within the express general purpose of the ordinance...they are not subject to the criticism that they are an unlawful delegation of authority."

Finally, in the *Harkov* case (22), the Supreme Court of the State of Florida uphold a bye-law adopted by the Miami Municipal Council, whereby the city manager was given the authority to determine the parking areas and to erect parking meters there.

In the face of the uniform reasoning in all these authorities, I am persuaded that the rule limiting the principle of *delegatus non potest delegare* has its place in the legislative field and should be applied in Israel as well.

F. By virtue of this rule it is possible to uphold the provisions of sec. 3 of the bye-laws empowering the Mayor to prescribe "regulated parking places" in those streets of the city Tel Aviv-Jaffa, which have previously been designated therefor by the Council itself (sec. 2), and having done so to determine whether parking thereon should be regulated by means of attendants or parking meters.

Firstly, the authority to solve the problem of parking vehicles moving within its boundaries, which the council has been granted by sec. 25(1) of the Road Transport Ordinance, was phrased, as I have indicated, in very broad terms, embracing also the making of "primary regulations". The fact that the section says that the council must do this by means of bye-laws does not derogate from the wide extent of that authority.

Secondly, it is manifest from the provisions of the bye-laws that the Council's policy is to solve the problem of the existing traffic load, or of the one likely to arise, in certain of the city's streets, by regulating the parking of vehicles which happen to be there, by means of attendants or meters. It is clear that the designation of the specific places in which one or the other of the two arrangements is to be adopted in those streets requires a preliminary investigation of the conditions bearing upon such problem; and that these conditions are likely to change at any moment. It follows that the task which the Mayor must carry out in the matter is at bottom merely one to institute an enquiry into the factual question whether the conditions in one or other place are suitable

for the employment of one of the said parking arrangements and so to determine, in the light of the results of this enquiry, the precise time and the specific place for putting into effect the arrangement which he has selected. Indeed, the proper fulfilment by the Mayor of this task requires that he should in some degree exercise his discretion, but only in a rather narrow area. Although imposition of this task upon him constitutes a delegation of the legislative authority of the Council and therefore some departure from the principle forbidding such delegation, the significance of vesting such power in him is only that the Council has set up the "machinery" to serve the purpose of *executing* the legislative policy which it has laid down with the object of solving the problem of parking for vehicles which move about the streets of the city. Sec. 3 of the bye-laws merely means that the Mayor would serve as the auxiliary arm of the Council for operating part of the primary regulations which it regarded as necessary and indispensable, so that the matter should be properly and efficiently ordered.

Finally, I take into consideration the fact that this problem is not the only one committed to the Council to deal with and that the area of its legislative activity comprises and extends to a number of other subjects (secs. 96 and 98 of the Municipal Corporations Ordinances); likewise, that the Council constitutes a body whose members carry out the legislative procedures in which they engage in a parliamentary fashion. Under these circumstances, it would not be practical for us to make it obligatory upon this body to take into its own hands the task of making the continuing factual investigations, upon the result of which depends the realization of the policy which it had laid down for regulating the matter. It is therefore only right that the Council should possess the power to be assisted in this regard by the person who serves as its executive arm, the Mayor (ibid, sec. 59 (a)). Otherwise, "the wheels of (municipal) government will not be able to turn."

Accordingly, in my opinion, the delegation of the authority mentioned in sec. 3 of the bye-laws is legally supportable, and the determination of the Mayor regarding the location of regulated parking, which is the subject of our considerations, rests upon firm foundations.

G. Was it competent for the council also to delegate to the Mayor the task of prescribing the parking fees which anyone parking his vehicle in such a place must pay by depositing it into the adjoining mechanical device (secs. 11 (a), 11 (c), and 11 (f) of the bye-laws)? It will be recalled that the charge filed against appellant in the present case is based upon his non-fulfilment of this duty to make payment.

After some hesitation, I have come to the conclusion that the learned judges were right in answering this question in the negative.

(1) It is superfluous to explain at this stage—in view of the definition of a regulation having legislative effect, with which we were concerned in the first part of this judgment—that the enactment in sec. 11 of the bye-laws regarding the *obligation* itself to pay a fee is of such a character. The same is true of the determination which the Mayor was to make regarding the scale of this fee, since the obligation would not be complete unless its amount were also determined. Thus subsection (a) of the said section provides that no one shall park a vehicle in a regulated parking place "unless he has paid a parking fee *in accordance with the scale of fees prescribed for that parking place under subsection (c)*"; whilst under that subsection the task of fixing the scale of this fee is put upon the Mayor. The rule laid down in *Attorney-General v. Schreiber* (6), upon which appellant's counsel relied, is not pertinent here, since it dealt with the non-payment of a fee for a building permit, the rate of which had been previously determined, and the fact that the municipality refused to accept this fee from the applicant for the permit—this is the essence of the decision—did not affect his absolute duty to pay it before starting to build.

(2) The relevant provision—concerning the Council's authority for prescribing the various kinds of fees, and pursuant to which it acted when enacting the provisions of sec. 11 aforesaid—is to be found in sec. 99(1) of the Municipal Corporations Ordinance. It will be recalled that the latter states that with regard to the matters which the Council may or is empowered to regulate or to carry into effect by means of bye-laws, it may "provide" in such bye-laws "for the payment of any fees". Appellant's counsel emphasized the words quoted, and inferred therefrom that the terms of the power were wide enough to permit the Council to be assisted by others in fixing the scale of fees, upon the payment of which it had decided. The proof lies in the fact that when the Mandatory legislator wished a council (or some other authority) itself to define the extent of the payment which it was empowered to demand, he made use of narrower expressions such as "prescribe", "fix", "levy", etc.

In my opinion, appellant's counsel cannot rely upon such a distinction. The breadth of language which the legislator employed in sec. 99(1) of the above Ordinance may be explained by his desire to express three things in "one breath": (1) the Council may impose the obligation of paying fees and their scales; (2) it may do so with regard to matters

the regulation of which is part of its functions; (3) it must incorporate its directions in these matters in the bye-laws which it enacts. Compare, by way of contrast, sec. 5(5) of the Trades and Industries (Regulation) Ordinance, which contains a provision concerning the payment of fees for trade permits "at the rates prescribed" in the Schedule. It is quite obvious that here the legislator used the narrow expression "prescribed" in connection with the scale of the fees alone. Nonetheless, I think that the terms of sec. 99(1) do not exclude from consideration the possibility that the Council could to some extent depart from our basic principle (against the delegation of legislative authority). But the answer to the question whether it may do so in the present case—and to what extent—depends upon other factors, namely, (a) the character of the fee under consideration, and (b) the extent of the need to be aided by others in fixing the scale.

(3) *The nature of the fee.* The dispositive question is, does the parking fee possess the character of a tax? This is a question which cannot easily be answered. In his Introduction to Taxation Law (p.4), Witkon J. defines the term "fee" as an obligatory payment payable "in consequence of some service". It seems to me right to reconcile this definition with the term employed in the present matter as follows: a "parking fee" means a payment made in consequence of some *privilege* which a person parking his vehicle in a regulated parking place receives. The privilege consists in that he is entitled against this payment to park for a time in excess of that required for taking up or putting off passengers, or for immediate and uninterrupted loading and unloading (compare the provision in sec. 5(a) of the bye-law.) In the above-cited *Harkov* case (22), the American court said—according to the digest of the decision published in 108 A.L.R. p. 1154—that

> "those who enjoyed the privilege of parking, rather than the general public, paid the extra cost of providing and maintaining the means for the enjoyment of the privilege, and the extra cost of the supervision and policing of it."

On the other hand, it is not to be supposed that the scale of a parking fee will be determined—even if a yardstick exists for enabling this to be done—by taking into account the monetary value of the privilege; "the absence of a direct *quid pro quo*" is "one of the indicia of a tax in its primary sense" (Witkon, loc. cit.), Moreover, a person who in the course of attending to his business needs to park his vehicle in a street in which parking is regulated by means of parking meters, must do so only in a "regulated" parking place and then he has no choice

but to pay a parking fee. Indeed, the use of different vehicles for essential needs is on the increase in this country as well, especially, in a large and busy city like Tel Aviv-Jaffa, and it can therefore be said that in practice if not in theory such a person is not free to waive the benefit which he receives by utilizing the privilege (see Berinson J.'s judgment in *Local Council of K'far Ata v. Ata* (7) at pp. 873-4). It follows that in the payment of such a fee there also exists the element of "compulsion", which likewise constitutes a distinguishing feature of a tax.

The result is that the fee with which we are dealing is of the nature both of a "price" and a "tax", and therefore the description which Witkon J. has given to this type of payment—"something of a hybrid creature" (op. cit. p. 8)—also fits it. Nevertheless, as will subsequently appear more clearly, for the purpose of the problem which claims our attention, I attach greater importance to the tax element which it embraces.

(4) As I have indicated, the second consideration to be considered arises from the need of the Council to be assisted by someone in order that such fee should be set at an appropriate level. According to sec. 11(c), the Mayor may prescribe "different scales of fees for different regulated parking places, according to the hours of parking, the periods and types of vehicles". I infer from this provision that upon its enactment the city fathers acted on the assumption that conditions in any regulated parking place, such as the size of the place and its capacity, the traffic load and the overcrowding of cars, change or are likely to change from place to place and from time to time, as well as in the light of the type of vehicle that is parked there. They decided therefore that it would not always be expedient in practice to fix a standard fee for every place nor to classify the fees in advance in different groups. In other words, I attribute to the members of the Council the view that since they themselves are unable always to follow the development of the situation at every regulated parking place in the city, it is equally impossible for the Council to be saddled at all times with the task of prescribing the scale of the fee to be received from drivers who park their vehicles. Hence they found the solution to the problem by delegating to the Mayor the entire function of fixing the various scales. I think that these considerations which faced them—as distinguished from the solution which they found acceptable—constitute practical and legitimate considerations which even we must take into account for the purposes of our decision.

(5) How do the conclusions which I have reached in the preceding

two paragraphs affect the question with which we are occupied? The first conclusion—that a privilege fee possesses the two elements characteristic of a compulsory payment of the nature of a tax—requires that the Council should not rid itself of the task of determining the level of this fee. The accepted view is that the authority to levy a tax emanates from the sovereign character of the supreme legislative organ and that theoretically it alone can do so and if for this purpose it has chosen to be assisted by a subordinate law-making body, the latter must necessarily abide, even to a greater degree, by the principle of *delegatus non potest delegare*. The second conclusion—that one should take into account the practical considerations which the members of the Council put to themselves as described above—requires that this body should be able to be assisted in discharging its task by its executive arm so that the matter should not prove unduly burdensome and in order that it might achieve its purpose. This conclusion therefore involves some deviation from the confines of our principle. It is essential to bridge these two conclusions and the question is how this is to be done.

My answer is that for this purpose two possibilities exist as to the means to be pursued by the Council. One possibility is to outline a rational basis or mode of action capable of guiding the Mayor in prescribing the relevant scales of fees. Even if the employment of such a mode required prior examination and appraisal of the factual conditions in the light of which the fee scales have to be calculated, it does not matter since this may be reconciled with the qualification of our principle to which my remarks were devoted in the earlier part of my judgment. Moreover, in carrying out the task of investigation and appraisal of the facts lies the justification for following this method. On this point, the judgment of the Supreme Court of the United States in the case of *Hampton v. U.S.* (23) is instructive. That case involved a congressional Law which empowered the President to increase or decrease up to 50% the customs rates prescribed by the Law; the increased or decreased rate had to be determined by the President with reference to any imported article in an amount equal to the difference between the costs of production of that article in a foreign "competing" country and the costs of production of a similar article in the United States. Chief Justice Taft pointed out in his judgment the factual difficulties which confronted Congress, in the light of changing conditions, and prevented it from dealing itself with the procedure for increasing or decreasing the customs rates. He said at p. 350:

> "Because of the difficulty in practically determining what that difference is, Congress seems to have doubted that

the information in its possession was such as to enable it to make the adjustment accurately, and also to have apprehended that with changing conditions the difference might vary in such a way that some readjustments would be necessary to give effect to the principle on which the statute proceeds."

Therefore, he continued, the solution to devise a plan and to be assisted in its operation by the executive branch occurred to Congress.

> "To avoid such difficulties, Congress adopted...the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out its policy and plan and to find the changing difference from time to time and to make the adjustment necessary to conform the duties to the standard underlying that policy and plan....He was provided with a body of investigators who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments."

Approving this solution, he stated at p. 353:

> "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose."

Mr. Zilbiger argues that likewise in the present case the Council laid down in subsect. 11(c) of the bye-laws principles adequate to guide the Mayor in determining the scales. This argument is inherently erroneous because there is nothing in those principles which serve as any *rational* basis for calculating the scales.

(6) The other possibility which the Council might have pursued, in my opinion, was to fix a maximum rate for the parking fee and to authorize the Mayor to vary it downwards with regard to different, regulated parking places and upon consideration of the other factors set out in subsec. 11(c). I have not found any direct authority for this view, but it commends itself to me both on account of the practical reasons above referred to, as well as because after all the fee—and here I emphasize its other aspect—also partakes of being "a price", due to the "benefit" derived, and does not constitute a pure tax. Although the adoption of this method means vesting a discretion in the Mayor

in respect of the level itself of the fee, he is restricted by the maximum which the Council has prescribed, and to a certain extent by the principles mentioned in subsec. 11(c). I think that in the absence of any possibility of prescribing any other method for calculating the scales, the factor of effectiveness justifies resort to this method.

In this connection I have given thought to the idea whether that part of the bye-laws now being considered may not be interpreted as impliedly providing that the scales which the Mayor prescribes must pass the test of reasonableness, i.e. whether this test may be regarded as a yardstick for the *maximum* rate at which he may fix the parking fee. But I have been convinced that it is not right to rely on such an idea, since on the one hand the Council itself is bound to put the scales prescribed by it to the touchstone of this test; any one of a number of fees could be thought reasonable and the duty devolves upon the members of the Council themselves to chose the amount which they regard as suitable to constitute the maximum rate of parking fee. On the other hand, resort to the yardstick of reasonableness—especially when it relates to the rate of any kind of payment,—necessitates the exercise of too wide a discretion. In other words, an attempt to validate in this manner the determination of the Mayor, under sec. 11 of the bye-laws, would result in removing the task of exercising such discretion from the shoulders of the members of the Council and transferring it to those of the Mayor—and this cannot be.

Finally, I have borne in mind the possibility of attributing to the secondary law-maker the intention that the Mayor should calculate the scales according to the expenses involved in erecting and maintaining the mechanical devices in the relevant places within the city. But I have rejected this possibility also, firstly, because it was not clearly established during the trial whether the collection of the parking fees was for the purpose only of covering these expenses—whether, for example, it does not also serve the purpose of increasing the general income of the city: *Shannon v. Lower Mainland Dairy Products Board* (14). Secondly, it is difficult to assume that it is within the range of practical possibility to calculate the scales on such an arithmetical basis. (Consider Dalton, Public Finance, pp. 30-1, regarding the impossibility of calculating the price of the services obtained from the British Post Office, or any other public enterprise, according to the expense involved in providing these services.)

It is hardly necessary to observe that in subsec. 11(c) the Council did not resort to either of the above described methods for fixing the

rates of the parking fee, nor did it determine such fees itself. (It is an interesting fact that in the two American cases I found, which turned upon the legality of regulating parking by means of parking meters, the city council itself prescribed the scale in the body of the regulation which it adopted: *Birmingham v. Hood-McPherson Realty Co.* (24) and *Harkov* (22)). Such being the case, and in view of the principle of *delegatus non potest delegare,* the said provision must be regarded as invalid.

It follows that the determination of the scale by the Mayor for the non-payment of which the appellant was prosecuted, was of no effect, and his acquittal from the charge against him was well founded.

I must add that I have not ignored the fact that the scale which had been fixed in the present case is of such an insignificant amount that it is difficult to envisage that any citizen would refuse to pay it. In this regard the appellant's attitude is undoubtedly extraordinary. On the other hand, had we validated the method whereby that scale was prescribed, it might have opened the door wide to municipal and local councils divesting themselves of the responsibility resting upon them to give their attention to the level of the fees which they are authorized to levy in many other spheres. Briefly, the principle that the amount involved is not relevant is no less valid in constitutional law than it is in private law.

This conclusion relieves me of the duty to deal with the reasons of the judges below that the fixing of the scales was invalid by reason of its non-publication in Reshumot pursuant to sec. 17 of the Interpretation Ordinance. For myself, I think that this requirement has been sufficiently met by virtue of the provisions of subsec. 11(d) of the bye-laws, since in these provisions—which were published in Reshumot—the public is referred to the Mayor's notice (concerning the scales prescribed by him) which he was to display "upon the regulated parking area or upon the mechanical device" (see, by way of analogy, *Irgun Nehagei Moniot Sherut v. Mayor of Tel Aviv* (3) at p. 102).

The conclusion is that the appeal should be dismissed and the judgment of the District Court affirmed.

SILBERG J. I concur,

GOITEIN J: I agree with the first part of the judgment of my learned colleague, Agranat J., and I have nothing to add to it. I regret that I do not see my way clear to agree with him as to the latter part and, with all due respect, I take issue with him thereon.

If I understand this part of his judgment correctly, my colleague is prepared to dismiss the appeal of the Tel Aviv-Jaffa Municipality on two grounds:

(a) The fee which a driver has to pay, if he wants to use a parking place regulated by meters, is a tax. And if this fee is really deemed to be a tax, then it is for the whole Council to determine its amount and the Mayor has no right to prescribe it.

(b) If a bye-law of the Tel Aviv-Jaffa Municipality authorizes the Mayor to prescribe the level of the fee, the bye-law is *ultra vires,* the authorization being repugnant to the principle that an agent may not delegate.

I find it difficult to agree that the payment which a driver makes for using a certain parking space for a particular time is to be considered a tax. In his judgment my learned colleague says that this fee partakes of the quality of a tax because we do not know whether the receipts, or part thereof, which the city obtains in this way, will not be included in its general income as would be the case with any other tax.

There is not a scintilla of evidence before us to prove that the use of regulated parking areas in which meters have been installed will produce a profit for the Municipality, or that this profit will be included in the city's budget.

It is clear that money is required to acquire these meters. It is equally clear that to keep them in working condition and the special supervision required of the police or municipal officials, likewise involve expenditure.

I am prepared to assume that the lion's share of the receipts from the use of these meters was intended for their purchase and maintenance and that a small part will perhaps be left over and diverted into the city's budget, but I would not agree to hold that the fee is not a payment for a definite service, only because the possibility exists that a small percentage of the receipts will find its way to the municipality's treasury.

I do not think that this court has to decide that the installation of these parking meters—the purpose of which is to regulate traffic in a city in which transport problems have reached a critical stage—was designed in order to exact taxes in a round-about way; I do not see here any conspiracy between the Mayor and Council to levy taxes unlawfully.

It appears that my colleague's judgment reveals concern lest the grant of authority to the Mayor to determine the level of the fee carries with it the danger that the citizen will be called upon to pay taxes which have not been levied upon him in accordance with law.

It may be that I am mistaken, but it seems to me—and I say this respectfully—that this concern flows from the political struggle with the monarchy of past centuries, at first in England and afterwards across the Atlantic Ocean in the United States. There were times when the citizen fought for his right not to pay taxes unless his representatives in Parliament agreed to the imposition of these taxes (no taxation without representation). But the echoes of the historical past in other countries need not reach as far as Israel where, during the thirty years of the Mandate, we all paid taxes without having any right to elect our representatives to approve the levy of any tax whatever. We received an edict from above and paid the taxes which were demanded from us. Even income tax which takes away an appreciable part of our income was imposed upon us by the High Commissioner in Council and to this very day that is the law which applies in Israel. The same may be said of the Municipal Corporations Ordinance. We received this Law also from the High Commissioner in Council and after eleven years of statehood it is still valid and subsisting, and determinative of the rights of city dwellers. It is true that the citizens elect those who will manage the affairs of the city, but it is not they who decide the levying of taxes. A veto or approval of the taxes which the representatives of the electors desire is dependent upon the will of the Minister of the Interior. Therefore, the whole theory according to which no taxes are to be imposed unless they are prescribed by the representatives of the people is of small value in the cities of Israel.

Moreover, if the respondent wanted to prove that a part of the meter fee is ultimately to be included in the city's budget, like other taxes, he should have produced evidence to that effect. I have not forgotten that we are dealing with a criminal trial in which it is for the prosecution to prove the offence, but the burden of proof shifted to the respondent the moment when the Attorney-General produced to the court the Municipality's bye-laws which have been published in Reshumot and bear the signatures of the Mayor, the acting Minister of Transport, and the Minister of the Interior. Prima facie these bye-laws are valid. This court will assume that *omnia rite et solemniter acta* and if the respondent wishes to adduce facts to prove that it is not so, the burden is upon him. It follows that in the case before us the respondent has not endeavoured to shift the burden of proof back upon the Attorney-

General and we have no evidence at all that what is called a fee—i.e., a payment for a service and not a tax—is not really a fee, a payment which covers the expenses of purchasing the meters, their supervision and maintenance. Without evidence I am not prepared to accept as a fact that part of the receipts from the use of the meters goes to the municipality's budget.

I am, respectfully, in agreement with Berinson J. who in the appeal of the *Local Council of Kfar Ata v. Ata Textile Co. Ltd* (7) (at p. 874), says:

> "There are services which the Council may conduct on a purely business basis and make available to residents or property owners who will use them according to their free choice, in consideration of a certain payment for each use and service, such as a local transport enterprise, a swimming pool, a place of public entertainment, water supply which is not exclusively in the hands of the council etc."

It is my view that although the object of installing the meters is not for the purpose of doing business but for regulating traffic, payment for use of parking space is purely a business matter and there is prima facie no difference between a swimming pool, for example, as Berinson J. remarked, and a service regulated by parking meters.

Instead of a driver roaming around the streets in his car for a quarter of an hour or more in search of a place where to park and instead of wasting petrol and thereby foreign currency, he pays a fixed amount so that he should be permitted to use a regulated parking space in different parts of the city. I cannot therefore adopt this part of my learned colleague's judgment which treats this fee not as a fee for a definite service but as a payment for the benefit of the city's taxes.

Agranat J. regards as an additional indication that this is a fee of a tax character and not a price, that the driver is compelled in some areas to use only a regulated parking place and, as is known, compulsion constitutes one of the indicia of a tax. I respectfully disagree with this view. If a driver were permitted to park his vehicle only in a regulated parking place, it is conceivable that I might agree that there is an element of compulsion, but it is not so. There are numerous parking places in Tel Aviv-Jaffa which are not regulated parking places and if there is no sign forbidding parking in a certain place any driver may park his vehicle there (subject, of course, to prohibitions prescribed by the Transport Regulations). In many streets, non-regulated parking places

are found some small distance away from a regulated parking place.

In an announcement pursuant to the Transport (Traffic Signs) Regulations, 1949, regarding the determination of classes of signs, their form and meaning (Official Gazette, 1950, no. 61, p. 505), we find (at p. 507) in class B, Directional signals—(1) Prohibitory Traffic Signs, the sign no. 2A-19, which forbids waiting and parking and sign no. 2A-20 forbidding parking; and also, in class C—Information Traffic Signs—sign no. 1-3, for the parking of vehicles. Even though the municipality has installed parking meters and permanent parking places, there are still to be found parking places for vehicles where sign no. 1-3 is posted, and many places where signs no. 2A-19 and no. 2A-20, which prohibit parking, are absent.

It follows then that a driver is under no obligation to park his vehicle in a regulated parking place alone but is entirely free to find for himself some other place in the city where parking is not prohibited.

In my opinion therefore the two foundations upon which my learned colleague based that part of his judgment which holds that subsec. 11(c) of the bye-laws is *ultra vires,* because it prescribes a fee which is in fact a tax (which only the Municipality can impose), are not foundations upon which it is possible to base such a finding.

Under sec. 99(1) of the Municipal Corporations Ordinance, 1934—and the bye-laws of Tel Aviv-Jaffa concerning the stationing and parking of vehicles were adopted pursuant to this section—the Municipal Council may adopt such bye-laws "to enable or assist it to carry out any of the matters it is required or empowered to do under this Ordinance or any other Ordinance or law...and may by such bye-laws provide for the payment of any fees or charges...and for the grant or issue of licenses or permits in connection with such matters, and for the fees to be paid therefor."

I infer from this that although the Council is under a duty to enact the bye-law and afterwards to obtain the approval of the High Commissioner (now the Minister of the Interior), it does not mean that it must in the bye-law itself take upon itself the execution of those things which are to be done pursuant thereto.

In the case before us, if we look at it in a practical and not merely a theoretical manner, it would appear that neither the Council nor even the Mayor would be able to prescribe the appropriate fee on the basis of personal knowledge alone.

The Council, like the Mayor, would have to refer to statistics regarding the volume of traffic in various places in the city before deciding where to instal parking meters. Additionally, the Council, if it were making the decision, and likewise the Mayor, if he decided, would have to know the price of the parking meters and the cost of their maintenance, and many other things in connection with the methods of using parking meters.

I do not imagine that all the members of the Council are required to stand a whole day or perhaps a week with notebook and pencil in hand at a particular spot in the city to record the number of cars that pass there at all the hours of the day, and having completed their work there to go on to a different spot to make a similar statistical study.

If the Council were indeed required to do this, the Municipality would not instal parking meters until Doomsday. The Mayor, likewise, who has to determine the places for installing the parking meters and the fee, would not be able to carry out this work by himself but would have to obtain detailed information from experts in this matter, and on the basis of the statistics he obtained from them and upon which he would have to rely, would prescribe the conditions under which a driver was to make use of the meters. It is therefore true to say that when the Council have delegated this function of designating the parking places and the fee which drivers have to pay, they do not impart any of their authority to anyone else.

The Mayor will determine the fee on the basis of the information which he receives from the experts and the Council thereby performs its function, for neither will it be able to determine the fee without such information.

This is not a delegation of authority; it is only a way of carrying into effect that which lies within its authority.

Sec. 99 of the Municipal Corporations Ordinance does not preclude the Council from taking steps for effecting the arrangement by one of its members, the Mayor, and with his help.

When we take into account the difficult problems which arise from the increase in the number of cars in our cities, we should look favourably upon regulations whose purpose is the enforcement of order in place of chaos, and not to be over zealous in inquiring whether or not they are *ultra vires* or according to the letter and not the spirit of the law.

Judge McReynolds says concerning this subject in *Frost and Frost*

Trucking Co. v. Railroad Commission of the State of California (25), (at p. 466), that the States (read, cities)

> "are now struggling with new and enormously difficult problems incident to the growth of automobile traffic, and we should carefully refrain from interference unless and until there is some real, direct and material infraction of rights guaranteed by the Federal Constitution"

This was said in 1926, and it is even more true in 1960. There is no real infringement of the citizen's rights because the Mayor received permission under a bye-law to fix a price for a service to car drivers.

It seems to me that the installation of parking meters is helpful to the citizen; they do not curb any of his privileges and I therefore see no reason for regarding that section in the bye-laws which empowered the Mayor to determine the level of the fee as *ultra vires.*

For my part, I would allow the appeal of the Tel Aviv-Jaffa Municipality.

Appeal dismissed.
Judgment given on February 11, 1960.