[HIGH COURT OF AUSTRALIA.]

COLLIER GARLAND LIMITED . . . APPELLANT;
DEFENDANT,

AND

HOTCHKISS . . . . . RESPONDENT.
INFORMANT,

H. C. OF A. 1957.

SYDNEY, *Mar.* 26; *July* 2.

Dixon C.J., McTiernan, Webb, Fullagar, Kitto and Taylor JJ.

Constitutional Law (Cth.)—Freedom of inter-State trade, commerce and intercourse—State statute—Regulations—Validity—Prohibition of motor vehicles not registered in any State operating on State roads—Promulgation of regulations—Power—Subject matter—Exemption—Registration—Refusal—Discretion of executive officer—"Fit and proper person"—Appeal—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Motor Traffic Act* 1909-1955 (*N.S.W.*), *ss.* 5B (1), 6 (1) (*c*) (*v*).

The defendant, a company with a place of business in Brisbane, engaged in carriage of goods between States. The informant alleged that the defendant had permitted to be driven upon a public street in New South Wales a motor vehicle not registered under the *Motor Traffic Act* 1909-1956 (N.S.W.); since the defendant was not an exempt person, nor was the vehicle exempt from registration under s. 5B (1), this was an offence against s. 6 (1) (c) (v) of the Act. There is a proviso to s. 6 (1) that no person shall be liable to a penalty for breach of par. (c) if he proves to the satisfaction of the court hearing the case that the motor vehicle was being driven or was about to be driven to the nearest district registry for the purpose of being registered and had otherwise complied with such conditions as prescribed; the vehicle must remain at the registry until it obtains registration. Neither the Act nor the regulations made under it contain any provision exempting motor vehicles registered in another State from the necessity of registering in New South Wales. Regulation 13 (2) invests the Commissioner for Motor Transport with discretionary power to refuse registration of a motor vehicle in the name of any person who, in the opinion of the commissioner, is not a "fit and proper person" to be the holder of the registration of a motor vehicle; section 3 (1) (m) of the Act gives an appeal from the licensing authority to a court of petty sessions. Despite the absence of any exception from these provisions it is the practice in New South Wales to allow a visiting motor vehicle registered in another State to use the roads without being required by any authority to register again under the *Motor Traffic Act*. Since the defendant's vehicle

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which was apparently used for inter-State haulage between Queensland and New South Wales was not registered in Queensland it did not come within the concession accorded by this practice. The defendant was convicted by a court of petty sessions.

Held: (1) that in considering the validity of a law a court must deal with the law according to its terms and cannot uphold its validity on the ground that in practice it is not enforced according to its tenor; administrative practice is not the measure of the legal operation of a law:

(2) that the words "fit and proper person" in reg. 13 (2) are so indefinite as in effect to confer a discretionary judgment on the licensing authority and that such a regulation in so far as it affects vehicles engaged in inter-State trade or commerce is inconsistent with the freedom assured by s. 92 of the Constitution; the appeal given by s. 3 (1) (m) does not save this provision, for that tribunal is given the same indefinite criterion:

(3) that the proviso to s. 6 (1) subjects a vehicle engaged in inter-State trade or commerce to restraints or delays which in their terms would, if enforced, render inter-State transport impracticable in any efficient form; the proviso is inconsistent with s. 92 of the Constitution and is invalid.

REMOVAL under s. 40 of the *Judiciary Act* 1903-1955.

The relevant facts, statutory provisions and regulations are sufficiently stated in the headnote and the judgments hereunder.

B. P. Macfarlan Q.C. (with him *P. Jeffrey*), for the appellant. The prohibition against driving an unregistered vehicle is contained in s. 6 of the *Motor Traffic Act* 1909-1956 and not in the regulations. There is no provision exempting a vehicle registered in another State from registration in New South Wales: see *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1). The regulations do not confer any right entitling a person to be registered nor do they state identifiable conditions with which an applicant may comply as a condition precedent to a right to register, and, further, that any application for registration may be refused in any case where the commissioner is of opinion that the applicant is not a fit and proper person to hold a registration. The regulations apply to the whole of the State and without any material exemption every person using any public road in the State must be registered at every point of time when he is using the road, and in so submitting the provisions of the proviso to s. 6 are not overlooked. In the case of a trader engaged in inter-State trade such a position conflicts with s. 92 of the Constitution and is a provision to which the principle stated in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (2)

(1) (1955) 93 C.L.R. 127, at p. 154. (2) (1955) 93 C.L.R. 127.

applies. A distinction between the provisions of this Act and regulations and the provisions of the *Motor Car Act* 1951 (Vict.) was pointed out by *Fullagar* J. in *McCarter* v. *Brodie* (1), which was cited with approval by the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (2). Section 4 (1) was in force when *Willard* v. *Rawson* (3) and *McCarter* v. *Brodie* (1) were dealt with. The registration provisions of the regulations cannot stand in the light of the principles stated in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (4); [*No.* 2] (5). Those regulations stand or fall as a composite whole; they contravene s. 92 and must be invalid. There is no regulation upon which s. 6 (1) (c) can operate because the offence in that section is driving a vehicle which is not registered and registered means registered under and in accordance with the regulations. The provisions of s. 6 (1) (c) (v) are themselves invalid. In accordance with the principles stated by this Court the trade in fact comes to a stop unless there is a certificate of registration issued, and there is no way of compelling the issue of one, nor are there any grounds stated which are truly regulatory. The true construction of the proviso to s. 2 of the Act is that when regulations on these subject matters are made the regulations must make provision for the appeal to the court of petty sessions, and there not being any such regulation, or not any such appeal conferred in any part of the regulations, then the regulations dealing with registration and stemming from pars. (j) to (m) inclusive of s. 3 are not validly made. The proviso should be read as an exception or a qualification upon the exercise of the regulation-making power. The express power of the commissioner to refuse registration is inconsistent with an interpretation of reg. 6 as being mandatory upon the commissioner in the case of every application to issue a certificate, not to registration, that is to say, it is an obligation to certify the fact of registering, if it be a fact. Assuming the Court does not accept the argument put on the construction of the proviso but considers that there is an appeal provided for against any refusal of a registration, then that advances the matter no further at all. When considering a matter under this proviso the magistrate is exercising a purely administrative function and in that respect he is not in any different position from the commissioner in so far as being bound by relevant considerations in determining whether the certificate should or

(1) (1950) 80 C.L.R. 432.
(2) (1954) 93 C.L.R. 1, at pp. 23-28.
(3) (1933) 48 C.L.R. 316.
(4) (1954) 93 C.L.R. 1.
(5) (1955) 93 C.L.R. 127.

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should not issue. It may be he does exercise the independent discretion. But his discretion is completely at large. It is either (i) a discretion limited in the same way as is the discretion of the commissioner under reg. 13 or, (ii) it is a discretion which is not limited in the same way as the commissioner's discretion, but is unlimited so far as any specification of the Act is concerned. If that be the position then the principles of *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1) make it even plainer that the powers which he exercises must suffer from the same vice. The expression " fit and proper person " as used in the State *Transport* (*Co-ordination*) *Act* 1931-1951 was considered in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (2). The combination of the provisions of this Act requiring the registration and the payment of a fee is such that in the manner of its operation it imposes a burden upon the inter-State trader : *Armstrong* v. *State of Victoria* (3). Although applications for registration may be made at the various registries it does not follow as a necessary consequence of this law that an inter-State trader coming to this State is entitled to obtain registration without that degree of hindrance or delay which would be a burden to him upon his trade, for the power to grant or refuse registration is by the regulations vested in the commissioner alone. Nowhere is there any statement in the regulations as to any powers with respect to the issue of a certificate of registration or the dealing with an application for registration which are conferred upon the district registries. The vice of the legislation is in the creation of a licensing system which is not seen to be purely regulatory in accordance with the prescribed conditions which it must observe (*Hughes & Vale Pty. Ltd.* v. *State of New South Wales* (4)).

[FULLAGAR J. The Chief Justice in *McCarter* v. *Brodie* (5) quoted a passage from the judgment of *Isaacs* J. in *Country Roads Board* v. *Neale Ads Pty. Ltd.* (6) in regard to that, and I cited both in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (7). *Swan Hill Corporation* v. *Bradbury* (8) also was referred to.]

The same principles have been referred to in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (9) and *Armstrong* v. *State of Victoria* (10). There is a real burden in the way this legislation operates.

(1) (1955) 93 C.L.R. 127.
(2) (1955) 93 C.L.R., at pp. 156, 187, 202, 203, 243.
(3) (1955) 93 C.L.R. 264, at pp. 274, 277, 281, 287-289.
(4) (1953) 87 C.L.R. 49, at p. 68.
(5) (1950) 80 C.L.R., at p. 467.
(6) (1930) 43 C.L.R. 126, at p. 139.
(7) (1955) 93 C.L.R., at p. 206.
(8) (1937) 56 C.L.R. 746.
(9) (1955) 93 C.L.R., at pp. 166, 187, 201.
(10) (1955) 93 C.L.R. 264, at p. 285.

R. Else-Mitchell Q.C. (with him *K. J. Holland*), for the respondent. If in the light of observations made in *Armstrong* v. *State of Victoria* (1) the inter-State trader is not to be hindered by having to register his vehicle and display a number plate then the regulation of traffic within the State becomes one of extreme difficulty, if not a matter of impossibility. The discretion under reg. 13 (2) "to refuse registration or renewal in the case of a person who is not a fit and proper person" is of no consequence. The only cases in which reg. 13 (2) has ever been availed of are cases where a person under the minimum age for holding a licence has sought to have a car registered in his name. Such obligations as the duty to register, to display a number, be identified, to carry appropriate third-party insurance, are duties which must be capable of being imposed upon vehicles from the moment they enter the State. There cannot be any obligation on a State to grant any exemption from registration to a vehicle entering from another State merely because it happens to be registered in another State. The matters mentioned are proper matters for prescription if the primary proposition put to the Court is accepted, that is, if the State is entitled to require registration and the display of the number plates, then it may properly prescribe the several offences embraced within sub-s. (1) (c) of s. 6. The proviso to s. 6 (1) is adequate to cover the situation. The plain intention of s. 6 (1) (c) is to exonerate from liability and not merely to exonerate from penalty. Because s. 6 does not itself prescribe a penalty, this being caught up by some general provision towards the end of the Act, the clear meaning of the proviso is that no person shall be guilty of an offence under par. (c) if either of those circumstances set out in the proviso occur. All those provisions fall within the primary proposition put to the Court and must be regarded as clearly valid. In accordance with the approach made in *Ex parte Australian Sporting Club Ltd.*; *Re Dash* (2) it would be open to the appeal court to consider afresh the fitness of the applicant for a licence and to make a determination on that matter apart from any question of the commissioner's opinion. It is in a totally different category from the provisions that were held to be invalid in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (3). Sub-regulation (3) of reg. 13 refers to "fit and proper person", the other matters are matters of objective fact and matters which have no vitiating quality. If sub-reg. (2) prescribed fitness and propriety in relation to age and to matters such as those enumerated

(1) (1955) 93 C.L.R. 264.
(2) (1947) 47 S.R. (N.S.W.) 283; 64 W.N. 63.
(3) (1955) 93 C.L.R. 127.

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in s. 7 then it would probably be good. The way these regulations should be construed is to approach them first by looking at regs. 4 and 6 and discarding any inhibition about constitutional power by virtue of s. 92 to read reg. 6 and reg. 13 together and to produce some such result as interposing before reg. 6 words such as " subject as hereinafter provided " or " except as hereinafter provided ", and then sub-regs. (1) and (2) of reg. 13 are to be read as carving out from the obligation that has been either expressed or assumed some field of exception.

[DIXON C.J. referred to *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1).]

The best complete discussions of the problem are to be found in *Australian Boot Trade Employés' Federation* v. *Whybrow & Co.* (2) and *Owners of S.S. Kalibia* v. *Wilson* (3). This is not a case where a law has been made to apply to a whole field and the effect of severance is that one applies it only to some part of the field. Sub-regulation (1) applies to vehicles and sub-reg. (2) applies to people. The essential feature of registration if sub-reg. (2) be severed is that there exists a scheme of registration dealing with vehicles and in effect compelling registration provided the vehicle is fit, that is adequately equipped and so on. On the basis of passages in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (4) and *Owners of S.S. Kalibia* v. *Wilson* (5), severance by cutting off sub-reg. (2) of reg. 13 would not produce any different law because it only deals with persons and it would leave intact the provisions relating to the fitness of vehicles. If reg. 13 (1) were to go too then a registration system would be left and it is not to be thought that the legislature would intend that the whole registration system should stand or fall on the basis of those provisions alone. As to the obligation to register or to take a vehicle to a place for registration being a burden, the proviso to reg. 6 overcomes that burden. *Armstrong* v. *State of Victoria* (6) presents no real analogy with the situation which is dealt with here. Although the passages read to the Court on behalf of the appellant might seem to have some bearing on the question they were comments that were being made in a totally different context and in reference to a totally different Act, and have no application (7). As to the question of whether the administrative power implicit in these regulations and in the Act, to fix places for the registration of

(1) (1925) 35 C.L.R. 422.
(2) (1910) 11 C.L.R. 311.
(3) (1910) 11 C.L.R. 689.
(4) (1910) 11 C.L.R. 1, at pp. 27, 45, 54.
(5) (1910) 11 C.L.R., at pp. 698, 701, 702, 709, 713, 718, 719.
(6) (1955) 93 C.L.R. 264.
(7) (1955) 93 C.L.R., at pp. 275, 289, 290.

vehicles itself, infringes s. 92: see *Wilcox Mofflin Ltd.* v. *State of New South Wales* (1) and *Mansell* v. *Beck* (2). Whatever rights s. 92 may give, they do not give the inter-State trader any better right to have his vehicle unregistered than they give to an intra-State trader. To require any greater service or facility for an inter-State trader is a misconception of the whole notion behind s. 92. Protection is given by the proviso to s. 6 (1). The conviction should be upheld. There is nothing which is bound to collide with s. 92.

B. P. Macfarlan Q.C., in reply. With regard to the appeal court, the court of petty sessions, under the proviso to s. 3 of the Act: see *McCartney* v. *Victorian Railways Commissioners* (3). The word "penalty" in s. 6 of the *Motor Traffic Act* really means "conviction". The distinction between a conviction and a penalty is made clear in s. 10 where "penalty" is used in reference to the punishment as opposed to the finding of wrongdoing involved in the idea of conviction. The purpose of the words "fit and proper person" is to give the widest scope for judgment and, indeed, for rejection: *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (4). It is not possible, consistently with maintaining this scheme of registration, that either sub-reg. (1) or sub-reg. (2) of reg. 13 or both can be invalidated and the remainder allowed to stand.

Cur. adv. vult.

July 2.

The following written judgments were delivered:—

DIXON C.J., FULLAGAR, KITTO AND TAYLOR JJ. By an order made under s. 40 of the *Judiciary Act* 1903-1955 on the application of the Attorney-General this cause was removed into the High Court as involving the interpretation of the Constitution. The proceeding removed is an order nisi for statutory prohibition made by a judge of the Supreme Court of New South Wales in respect of a conviction under s. 6 (1) (c) (v) of the *Motor Traffic Act* 1909-1955 of New South Wales. The defendant convicted who obtained the order nisi is Collier Garland Ltd., a company carrying on business in Brisbane. The offence alleged against the defendant company is that, not being a person exempted by the regulations made under the *Motor Traffic Act*, it did on 5th June 1956 permit to be driven upon a public street, to wit Pacific Highway, Swansea, in New South Wales, a motor vehicle, to wit a motor lorry, which was not then registered under the said Act.

(1) (1952) 85 C.L.R. 488, at p. 522.
(2) (1956) 95 C.L.R. 550, at p. 601.
(3) (1935) V.L.R. 51; (1935) 52 C.L.R. 383.
(4) (1955) 93 C.L.R., at p. 156.

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The facts were proved before the magistrate by evidence and admissions. From that material it appears that the defendant company is engaged in the carriage of goods by motor vehicle between different States of the Commonwealth. On 5th June 1956 a motor vehicle of the company loaded with plywood consigned from Brisbane was found at Swansea standing unattended on the Pacific Highway. The motor vehicle had been bought by the defendant company about a year earlier and it had been duly registered under the Queensland *Motor Roads Act* 1920 to 1952. In May 1956, however, the defendant company caused that registration to be cancelled, and from that time the vehicle was not registered in Queensland; nor was it ever registered in New South Wales. It was admitted that the defendant company permitted the vehicle to be used on 5th June 1956 when not registered. No point was made as to the possibility of the permission having been given outside New South Wales.

In New South Wales an unfortunate distinction exists between the condition of the law with reference to the entry of motor vehicles from other States and the administrative practice which has long prevailed in allowing them to enter. The fact was adverted to in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1). A visiting motor vehicle registered in another State is in practice allowed to use the roads of New South Wales without being required by any authority to register again under the *Motor Traffic Act* and regulations of that State. There is a provision exempting a licensed driver from another State from the necessity of obtaining a driving licence in New South Wales and a provision making it unnecessary for a visiting car to carry a New South Wales number plate in addition to that of the State where it is registered. But the unmistakable terms of the law of New South Wales are that the motor vehicle, whether it is or is not registered elsewhere, must be registered in New South Wales. Moreover the law gives no right to the visiting owner or other person using the motor car to have it registered. He commits an offence if he drives or permits it to be driven upon the roads of New South Wales, that is unless perhaps it is proceeding to the nearest place of registration. It is out of this condition of the law that the difficulties in the present case arise. For the defendant is able to say that the law of New South Wales under which he has been convicted denies to motor car owners and users entering New South Wales from other States the right to do so except subject to conditions which leave the law at variance with s. 92 of the Constitution. It is true that the administrative reason for prosecuting the

(1) (1955) 93 C.L.R., at p. 154.

defendant is that the company's vehicle was not registered in Queensland. Had it been so registered doubtless a prosecution in New South Wales would not have been instituted. But it is not the law of Queensland that the prosecution could or did assume to enforce. It is the law of New South Wales that the informant relied upon and it is the validity of that law that the defendant has put in question. In considering its validity a court must deal with the law according to its terms and cannot uphold its validity on the ground that in practice it is not enforced according to its tenor. Had the law been brought into conformity with what is said to be the practice there is no reason to suppose that its validity would have been open to the present attack. As it is the matter must depend on certain of the existing provisions of the *Motor Traffic Act* 1909-1955 and the regulations thereunder.

The defendant was convicted under s. 6 (1) (c) (v) of the *Motor Traffic Act*. That provision says that if any person, unless exempted by the regulations, drives or causes or permits to be driven upon any public street a motor vehicle which is not registered shall be guilty of an offence under the Act. Section 5B (1) provides that every motor vehicle (other than a motor vehicle exempted from registration by or under the Act) shall be registered before being used or driven upon a public street. There is a proviso to s. 6 (1) which, among other things, provides that no person shall be liable to a penalty for a breach of par. (c) of the section if he proves to the satisfaction of the court hearing the case that the motor vehicle was being driven or was about to be driven to the nearest district registry for the purpose of being registered, and had otherwise complied with such conditions as prescribed. Section 3 (1) enables the Governor in Council to make regulations upon subjects set out in some detail in a number of lettered paragraphs. The regulations may provide that motor vehicles shall be registered, that certificates of registration be issued and that the drivers of the vehicles shall be licensed. There is power, by regulation, to appoint district registries where such vehicles may be registered and such drivers licensed. The regulations may, under another paragraph, provide that motor vehicles shall have separate distinguishing numbers, regulate the form of such numbers, the manner of placing them upon such vehicles, and the issue and return of such numbers. Another power, which is of present importance, is to prohibit the use, upon public streets, of motor vehicles that are unregistered, or have not the registered number upon them, or have a number that is in any way obscured or not easily distinguishable. A paragraph lettered (m) gives power to regulate the manner and duration of registration

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of motor vehicles and of the transfer and renewal of such registration, and the granting, duration, renewing, suspension, cancellation, and return of drivers' licences. To par. (m) there is a proviso to the effect that there should be an appeal to a court of petty sessions, whose order should be final, in any case where (i) registration is refused or cancelled; or (ii) its renewal or transfer is refused; or (iii) a licence is refused, suspended, or cancelled. In the exercise of the powers conferred by the Act a full code of regulations has been made. The regulations contain no provision exempting cars registered in another State from the necessity of registering in New South Wales. Yet there is a definite exemption of cars registered in other States from the provisions relating to number plates. Regulation 34 (e) provides that a visiting motor vehicle, clearly displaying in accordance with the law of the State where the owner resides the number there allotted in respect of registration or licence of the vehicle, shall be exempt from the requirement of s. 6 (1) (c) (i) of the Act. That requirement is that there shall be a prescribed number affixed to a motor vehicle if it is driven on a public street. A condition of the exemption given by reg. 34 (e) is that the approval of the Commissioner of Road Transport of the inter-State numbering should be in force. By reg. 31 it is made unnecessary for the driver, if he is licensed in another State where he usually resides, also to obtain a driving licence in New South Wales. But the regulations contain no exemption in favour of a car registered in another State which could operate to except such a vehicle from s. 5B (1) of the Act which requires registration nor from s. 6 (1) under which the defendant was prosecuted. Accordingly it remains an offence under the law of New South Wales for a motor vehicle from Queensland, even if registered in Queensland, to drive on New South Wales roads, unless it is registered in New South Wales.

It is the defendant's contention that, in so far as s. 5B (1) and s. 6 (1) (c) (v) of the *Motor Traffic Act* would otherwise operate to make it an offence to drive, or to cause or permit to be driven, a motor vehicle in New South Wales upon an inter-State journey from another State unless the motor vehicle is registered in New South Wales, those provisions would impair the freedom of trade commerce and intercourse among the States and are prevented from so operating by s. 92 of the Constitution.

If one knew no more about the regulations than has been stated above, it would seem reasonable to expect such a contention to fail. For from the first case in which s. 92 was relied upon in connexion with motor transport it has been conceded that provisions of legislation regulating motor traffic, prescribing the duties

and responsibilities of owners and drivers and requiring the owner to register the description and particulars of his car and obtain a number do not impair the freedom of trade commerce and intercourse among the States : cf. *Willard* v. *Rawson* (1). It is convenient to set out a passage from the judgment of *Fullagar* J. in *McCarter* v. *Brodie* (2), which deals with the very matter : " The distinction between what is merely permitted regulation and what is a true interference with freedom of trade and commerce must often, as their Lordships observed, present a problem of great difficulty, though it does not, in my opinion, present any real difficulty in the present case. We may begin by taking a few examples, confining our attention to the subject matter of transportation, which is now under consideration. The requirements of the *Motor Car Acts* of Victoria afford very good examples of what is clearly permissible. Every motor car must be registered : we may note in passing that there is no discretionary power to refuse registration. A fee, which is not on the face of it unreasonable, must be paid on registration. Every motor car must carry lamps of a specified kind in front and at the rear, and in the hours of darkness these lamps must be alight if the car is being driven on a road. Every motor car must carry a warning device, such as a horn. A motor car must not be driven at a speed or in a manner which is dangerous to the public having regard to all the circumstances of the case. Other legislation of the State—Parliamentary or subordinate—prescribes other rules. In certain localities a motor car must not be driven at more than a certain specified speed. The weight of the load which may be carried by a motor car on a public highway is limited. The driver of a motor car must keep to the left in driving along a highway. He must not overtake another vehicle on a curve in the road which is marked by a double line in the centre. He must observe certain 'rules of the road' at intersections : for example, the vehicle on the right has the right of way. Such examples might be multiplied indefinitely. Nobody would doubt that the application of such rules to an inter-State trader will not infringe s. 92 " (3). The observation of his Honour that there was no discretionary power to refuse registration deserves particular attention.

When from such general considerations as are suggested by the foregoing one turns to the text of the New South Wales regulations the contrast at once appears and the expectation that the defendant's contention might fail immediately weakens and no longer seems

(1) (1933) 48 C.L.R. 316, at p. 332.
(2) (1950) 80 C.L.R. 432.
(3) (1950) 80 C.L.R., at pp. 495, 496.

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reasonable. At the expense of repetition it is necessary to say that law and administrative practice must not be confused: administrative practice is not the measure of the legal operation of the regulations and it is with the latter alone that we are concerned. The first thing to note is that the regulations do not confer upon the owner of a vehicle entering from another State any right to registration. Further, so far as the regulations go, the registration of his car in another State does not dispense with the necessity of registering in New South Wales. He is not entitled to enter New South Wales on the faith of the registration in that other State. The regulations give no right to registration: the Commissioner of Road Transport, who administers them, may refuse registration of a motor vehicle in the name of any person who, in the opinion of the commissioner, is not a fit and proper person to be the holder of the registration of a motor vehicle: reg. 13 (2). No definite measure is supplied by the words "fit and proper person" of the qualification for registration. It must be borne in mind that it is the owner of the car who seeks registration. Even in relation to a licence for the carriage of goods, the words "fit and proper person" were considered by this Court to be so indefinite as to confer in effect what amounted to a discretionary judgment on the licensing authority. Such a thing lies outside any conception of a permissible regulation consistent with the freedom of inter-State intercourse assured by s. 92 of the Constitution: see *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1). It is true that by the proviso to par. (m) of s. 3 (1) there is an appeal to a court of petty sessions. But that tribunal has no more definite measure or standard on which to judge of the desirability of registering the owner. What, however, is perhaps even as important is that a vehicle entering New South Wales cannot lawfully proceed on its journey without finding a registry and securing registration at that place. Schedule "E" of the regulations is a list naming a large number of places in New South Wales at which registration may be obtained. Comparatively few of them are upon the borders of New South Wales. Yet the owner or driver of an ordinary motor vehicle entering New South Wales from South Australia, Victoria or Queensland according to ss. 5B and 6 (1) (c) of the Act is guilty of an offence unless the vehicle proceeds directly to the nearest of such places and obtains registration. If he does proceed to such a place he is relieved by the first proviso to s. 6 (1) from liability to any penalty for breach of s. 6 (1) (c), the provision under which this

(1) (1955) 93 C.L.R., at pp. 156, 157, 187, 188, 202.

particular case arises. But, strangely enough, there is no relief even then from liability to conviction under s. 5B (1); for although there is an exception from s. 5B (1) of a motor vehicle exempted from registration that exception cannot be interpreted as incorporating or referring to the proviso to s. 6 (1). The terms of that proviso do not admit of such a construction. Regulation 14 requires the motor vehicle to be produced when an application is made for its registration. The same regulation provides that upon registration there shall be issued a certificate of registration and a number plate. The latter is to be securely fixed to the vehicle but is to remain the property of the Commissioner of Motor Transport. The application for registration is to be made in writing (reg. 4), and the registration is to continue in force for one year (reg. 7 (2)).

As the regulations stand they mean that, whether a motor vehicle from another State is or is not registered in that State, it cannot enter New South Wales without proceeding at once to a registry, however distant that registry may be from its point of entry. There it must stop until registration is complete. We are not told what are the hours during which business is conducted at a registry. But whatever they may be there the vehicle must remain until it obtains registration. Any deviation from this course by the driver of the car involves an offence against the law of New South Wales. It is needless to repeat the considerations upon which we entered in *Armstrong* v. *State of Victoria* (1) and *Nilson* v. *State of South Australia* (2). But the following passage from the reasons given by *Taylor* J. in the former case, though expressed in terms relating to Victoria and to licensing or permits as distinguished from registration concisely puts the position which would result in New South Wales if the law were administered according to its provisions as they stand: "Road traffic enters the State at many points and at all hours of the day and night and, although it may be possible in many cases for permits to be obtained before the commencement of an inter-State journey, it is probable that frequently applications will be made for them at points on the border. At all events there appears to be no justification for requiring an application for a permit to be made at any earlier stage. Now, if the legislation of the State requires the holding of a permit as a condition of the continuance of an inter-State journey, it is, I should think, incumbent upon the State to provide a method or system whereby such permits may be obtained without undue delay. But if the board is the sole authority which may issue them it is not only conceivable

(1) (1955) 93 C.L.R. 264. (2) (1955) 93 C.L.R. 292.

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but inevitable that a substantial proportion of vehicles operating in the course of inter-State trade and commerce will be subjected to undue and intolerable restraints and delays. Such a result is, in my opinion, the effect of the relevant provisions of the legislation in its present form " (1). In the two cases cited reasons were given for the conclusion that the entry of vehicles engaged in inter-State trade might not consistently with s. 92 be impeded by requirements of State law which, if obeyed, made inter-State transport in any efficient form impracticable and left the person proceeding by a motor vehicle from another State into New South Wales without any legal right to do so.

The result is that the law of New South Wales, by s. 5B (1) and s. 6 (1) (c) (v) of the Act, creates prohibitions which, according to their terms, would apply to motor vehicles in the course of inter-State trade commerce or intercourse and the prima facie operation of those prohibitions is not qualified or modified by regulations rendering the law consistent with the freedom of inter-State trade commerce and intercourse. To that extent, therefore, the prohibition must be inoperative. It is nothing to the point to say that the actual administration of the law may be open to no such objection. Indeed to say that is perhaps only another way of saying that the impossibility is recognised in administrative practice of reconciling the provisions of the Act and regulations with s. 92.

The defendant company is entitled to rely on the invalidity *pro tanto* of the law under which it is prosecuted, even if by a law properly framed the case might have been covered.

Accordingly the order nisi should be made absolute and the conviction quashed.

McTIERNAN J. I agree that the conviction is wrong in law. The conviction was for an offence under the *Motor Traffic Act* 1909-1955 (N.S.W.) consisting in a contravention of s. 6 (1) (c) (v). I do not repeat the facts of the case.

The compulsory registration under statute of motor vehicles used on roads in the course of inter-State commerce is not necessarily incompatible with s. 92 of the Constitution. Such registration may be truly regulatory of the commerce of the operator of a motor vehicle engaged in such commerce. But the difficulty of reconciling s. 5B (1), and s. 6 (1) (c) (v) with s. 92 arises rather from the procedure prescribed by the regulations for registering a motor vehicle than the substantive system of registration embodied in the

(1) (1955) 93 C.L.R., at pp. 289, 290.

regulations. The difficulties begin with reg. 4. This regulation says that an applicant for the registration of a motor vehicle must make a written application on a form provided and sign the form; and that such forms may be obtained at any district registry. No form of application is prescribed by the Act or the regulations. It would appear that reg. 4 contemplates a form prescribed by the commissioner himself and containing such inquiries as he thinks proper. If, as I think, this is the effect of the failure to prescribe a form of application for registration of a motor vehicle or the particulars to be given in such an application, it is not possible to determine that the Act and the regulations give any applicant, whether inter-State carrier or otherwise, an enforceable right to the registration of a motor vehicle which he brings to a registry for registration. On the contrary I think that by reason of such failure the registration of a motor vehicle becomes a matter within the discretion of the commissioner. It is not compatible with s. 92 to qualify, as s. 6 (1) (c) (v) does, the right of the inter-State carrier to operate his motor vehicle on the roads by a condition that he must register the vehicle under regulations which place the manner in which he is obliged to apply for registration so completely as these regulations do within the control of an executive officer. It may be that the form provided by the commissioner for making an application for registration contains nothing irrelevant to the matter of registration. But under the regulations it is within his discretion to provide such a form of application as he thinks fit. It is this sort of discretion which according to the decisions upon s. 92 brings that section into play for the protection of the inter-State haulier.

WEBB J. On 5th October 1956 the defendant Collier Garland Ltd. was convicted in the Central Court of Petty Sessions at Sydney of an offence against the New South Wales *Motor Traffic Act* 1909-1955 in that it, not being exempted by the regulations under that Act, did permit to be driven upon a public street a motor lorry which was not then registered under the Act. The defendant applied to the Supreme Court of New South Wales on 25th October 1956 for a rule nisi for a writ of statutory prohibition restraining proceedings on the conviction and the complainant and the magistrate were ordered to show cause before the Supreme Court on 19th November 1956 why the conviction should not be quashed. But the proceedings in the Supreme Court were on 6th December 1956 removed into this Court on the application of the Attorney-General for New South Wales under s. 40 of the *Judiciary Act* 1903-1955.

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Although under the *Motor Traffic Act* 1909-1955 the defendant was required to make application to register the vehicle, as he was not exempted by the regulation, still he was not entitled as of right to registration as it was within the power of the commissioner under reg. 13 (2) to refuse registration if in his opinion the owner of the vehicle was not a fit and proper person. In other words the regulation purported to give to the commissioner a discretion to refuse registration which could not effectively be controlled. Then the provision for registration was inapplicable to owners of vehicles engaged in the inter-State trade: *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.*2] (1). For the State of New South Wales counsel relied on the decision of this Court in *Armstrong* v. *State of Victoria* (2) where it was assumed that the *Motor Car Act* of Victoria was valid and applicable to inter-State trade, although it required registration. But as pointed out by the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (3) that Act, while requiring registration, gave no discretionary power to refuse it.

The court of petty sessions seemed to think that the decision of this Court in *Grannall* v. *Marrickville Margarine Pty. Ltd.* (4) was applicable as the withholding of registration of the vehicle had no more effect on inter-State trade than the withholding of the licence to manufacture margarine. But the vehicle was in existence and ready to engage in inter-State trade, subject to registration, whereas the margarine was not in existence. If it had been, and the licence was directed to keeping it out of the inter-State trade, the decision would have been different. However, counsel for the State of New South Wales did not rely on *Grannall's Case* (4); but on registration being a principle which had to be conceded as of general application and as applying to inter-State traders as well as to others, and that if the principle was conceded the method of obtaining registration under the regulation was a subordinate matter. But although registration is a sound principle it must be as of right, in which event it would not be destroyed by the enactment of invalid subordinate measures to give effect to it, which would be severable apart from any express statutory provision to that effect: see *Owners of S.S. "Kalibia"* v. *Wilson* (5). But that is not this case. As to other points raised I agree with the joint judgment.

I think then that the regulation requiring registration is inapplicable to the defendant and that it was wrongly convicted.

I would quash the conviction.

(1) (1955) 93 C.L.R. 127.
(2) (1955) 93 C.L.R. 264.
(3) (1955) 93 C.L.R., at p. 24.
(4) (1955) 93 C.L.R. 55.
(5) (1910) 11 C.L.R. 689.

Order nisi made on 25th October 1956 *by Collins J. in the Supreme Court of New South Wales and removed into this Court under s.* 40 *of the Judiciary Act* 1903-1955 *by an order of the Full Court made on 6th December* 1956 *made absolute with costs and conviction of the defendant-appellant by the court of petty sessions dated 5th October* 1956 *quashed.*

Solicitors for the appellant, *Ralph S. B. Sillar & Maddison.*

Solicitor for the respondent, *F. P. McRae,* Crown Solicitor for New South Wales.

J. B.