CASE LAW

JUDICIAL NOTICE AND TESTS OF INVALIDITY UNDER SECTION 92

BOLAND v. *SNEDDON; COMMONWEALTH FREIGHTERS PTY. LTD.* v. *SNEDDON*

In the *Sneddon Cases*[1] the High Court has in effect absolved the system of exacting levies on transport in New South Wales under the Road Maintenance (Contribution) Act, 1958, from any taint of invalidity under s.92 of the Constitution in its operation on vehicles engaged in inter-State transport. The system ordained by the Act is the levying of a rate per mile for every mile of main street in New South Wales on which a commercial vehicle travels. The rate is one-third of a penny per ton of the sum of (a) the tare weight of the vehicle and (b) forty *per centum* of the load capacity of the vehicle. The *Sneddon Cases*[2] briefly decide that these exactions in relation to vehicles engaged in inter-State trade do not amount to a forbidden "tax or impost—laid upon the entry of goods or people out of a State into another State",[3] but merely to legitimate compulsory charges for the use by inter-State commerce of a physical thing which without a legal obligation the State provides for the purpose. . . ."[4]

What is the importance of the distinction and by what evidentiary criteria does one determine on which side of the magical line the facts of any given case fall? In order to appreciate the answers to these questions within the framework of the current approach to s.92 favoured by the High Court, it will be necessary to enumerate briefly several of the major features of that approach which have become settled doctrine in the last ten years of the section's turbulent history.

From *James* v. *Commonwealth*[4a] till the *Banking Case*[5] the "official" approach to s.92 was to differentiate between enactments which had a prohibitive effect on inter-State trade and commerce and those which had a merely regulatory effect. "But the weakness of this distinction is that it is quantitative, it is one of 'fact and degree', for all regulation to the extent that it inhibits is prohibition *sub modo*; and confusion arises particularly in that area where regulation by quantitative increases advances towards prohibition. Such a distinction is criticized in logic because it is founded on contraries

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[1] 32 A.L.J.R. 408. Of particular importance for the subject of this Note are: Julius Stone, "A Government of Laws and Yet of Men: Being a Survey of Half a Century of the Australian Commerce Power" (1950) 1 *W.A. Univ. Annual L. Rev.* 461; and D. P. Derham, "The Second Hughes and Vale Case" (1955) 29 *A.L.J.* 476. And see now the Report from the Joint Committee on Constitutional Review 1959, pp. 150-58, on which Mr. Justice R. Else Mitchell, (1959) 3 *Sydney L.R.* 76.

[2] 32 A.L.J.R. 408.

[3] *Id.* at 411, *per* Dixon, C.J., quoting the joint judgment of Dixon, C.J., McTiernan and Webb, JJ. in *Hughes & Vale Pty. Ltd.* v. *State of N.S.W. (No. 2)* (1955) 93 C.L.R. 127, 176, 177.

[4] *Ibid.*

[4a] (1936) A.C. 578, 55 C.L.R. 1.

[5] *Commonwealth* v. *Bank of N.S.W.* (1949) 79 C.L.R. 497; (1950) A.C. 235.

instead of being built on contradictories . . .".[6]

By the time the first *Hughes & Vale Case*[7] was decided, it was clear that an altogether different test had become orthodox; henceforth, when legislation was challenged under s.92, one asked two questions, (a) is the activity for which protection is claimed itself a part of inter-State trade, commerce or intercourse? and (b) "does the challenged law operate directly, as a matter of law and not of material or economic effect, to interfere with the activity for which protection is claimed"?[8] If the answers to both questions were in the affirmative the legislation could be struck down. The theoretical advantage of the new test was that it avoided in terms any questions of nice degree; either an activity was "essentially" a part of inter-State trade, etc. or it was not.[8a] In point of fact, it might be asked whether one had only changed the formula: whether one had replaced a category of indeterminate reference[9] based on a prohibition-regulation antithesis by another category of indeterminate reference based on some notion of what is "essentially" a part of inter-State trade.[10]

That the new test was quite distinct from the many competing varieties of the old one was quite clear. But the boundaries of the new test were in many respects far from clear. For example, on the one hand, it was consistently claimed that the new test could be applied irrespective of social or economic considerations, that it enabled the solution of s.92 problems by syllogistic logic. Yet, on the other hand, the Court sometimes asserted that it had power under s.92 to strike down colourable schemes although on their face syllogistic logic was powerless to strike them down.[11] In other words, the freedom guaranteed by the section was not even a practical concept of liberty, to be preserved from indirect no less than frontal assaults, but also a purely legal concept. It was the latter aspect which was the more frequently stressed. The exponents of the new test claimed that it released them from the necessity of examining economic and social phenomena in order to determine whether or not an enactment infringed s.92. Its opponents replied that it reduced the promised liberty to a draftsman's obstacle.

The new test was applied with remarkable success to a number of cases in the last 10 years dealing with the production, marketing and distribution of goods and with other aspects of inter-State trade.[12] Its application to transport legislation, which perhaps involves different social and economic considerations, has been less happy. One aspect of the application of the test in relation to

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[6] P. H. Lane, "Present Test for Invalidity under s.92 of the Constitution" (1957) 31 *A.L.J.* 715.

[7] (1955) A.C. 241.

[8] D. P. Derham, *op. cit.* n. 1, at 484.

[8a] See *O. Gilpin Ltd.* v. *Commr. for Road Transport and Tramways (N.S.W.)* (1935) 52 C.L.R. 189, 206; *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55, esp. at 78; and many other references collected by P. H. Lane, "Approaches to and Principles of Section 92 of the Constitution" (1959) 32 *A.L.J.* 335, 341 n.

[9] See Julius Stone, *The Province and Function of Law* (1946, 2 impr. 1950) 185ff. This is hereafter cited as Stone, *Province.*

[10] *Cf.* D. P. Derham, *op. cit.* n. 1, at 485.

[11] See, e.g., *A.G. for N.S.W.* v. *Homebush Flour Mills Ltd.* (1937) 56 C.L.R. 390; *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955) 28 *A.L.J.* 632, (1955) A.L.R. 331; and other authorities cited by P. H. Lane, "Approaches to and Principles of Section 92 of the Constitution" (1958) 32 *A.L.J.* 335 at 340; and see D. P. Derham, *op. cit.* n. 1, at 486.

This seems to the writer to constitute a remarkable example of what Professor Stone has called "legal categories of competing reference". (*Province* 176ff.). In any given case where the question at issue is "Is Act of Parliament X valid?" it is competent for the court to say *either* "No, for though it might constitute an economic hindrance to interstate trade it is not a legal disturbance" *or* "Yes; it is an indirect attempt to do what cannot be done directly". Which of the two answers is given does not depend on logic as applied to facts or law but on creative choice between available alternative versions of the facts or law.

See generally on this topic, D. K. Singh, "What Cannot be Done Directly Cannot be Done Indirectly" (1958) 32 *A.L.J.* 374, (1959) 33 *A.L.J.* 3.

[12] See generally R. Anderson, "Recent Trends in the Federal Commerce Power and Section 92" (1955) 29 *A.L.J.* 99, 276.

transport is that it is invalid to tax those engaged in intra-State transport (whether alone or together with those engaged in inter-State transport) for the maintenance of some governmental service of particular advantage to those so engaged. Thus, for example, it is invalid to tax inter-State transport for the purpose of raising a levy to enforce traffic laws.[13]

If this reasoning were applied with thorough-going logic, persons engaged in inter-State trade, etc. would not have to pay the toll on the Sydney Harbour Bridge; an aeroplane would not have to pay any fees towards the maintenance of aerodromes. However, the High Court was loth to pursue the syllogism to quite such lengths, in view of "the apparently absurd inequity of accepting a rule that inter-State hauliers should escape charges which all other hauliers pay towards maintenance of roads",[14] and the staggering damage done by transport vehicles to the roads of Australia. The solution of the problem adopted by the High Court in the second *Hughes & Vale Case*[15] was in effect to add a rider to the new test, an extra symbol in the new formula: namely that in certain cases at least it is valid for a law to interfere directly with inter-State trade, etc. provided that the interference is not *real, substantial* or *unreasonable* and can be referred to the maintenance of some physical thing which the State is not legally obliged to provide.

In a concrete case, the rider to the new test worked thus: there are general services which a State is obliged to provide from its revenue; and this revenue may not be raised by legislation which takes as its *discrimina* some activity which forms part of inter-State trade, etc. For example, as we have seen, inter-State traders need not pay a tax devoted to enforcing the traffic laws essential for the existence of such trade. But, on the other hand, if the State provides a facility which it is not obliged to provide, it may do so by an imposition (provided the imposition does not amount to a substantial burden) on all trade, even inter-State trade. Thus, the State is not obliged to provide highways, and may therefore finance their maintenance by an imposition of the kind indicated on those engaged in the use of that road; not indeed for that use but for wear and tear. It is, perhaps too early to know how one distinguishes the activities which a State is obliged to provide from taxes and those it voluntarily provides. It is difficult to see perhaps in what sense the State can be said to be *obliged* to provide any facilities for anybody at all.[16]

If the purpose of enunciating formulae in the type of case under discussion is to reduce the area of uncertainty in cases as they arise in practice, then it seems to the present writer that this enunciation of "principle" is (with respect) conspicuously unsuccessful. Not only does it suffer from the defects of widening the field of enquiry by posing almost insoluble questions of what services the State is obliged to provide from general revenue; it also casts one back on to the very quantitative distinctions which the course of decision prior to the *Banking Case*[17] had tried to use. It requires the court to decide, just as before the *Banking Case*,[18] similar questions involving similar categories of indeterminate reference, but, as it were, one stage more remotely. Before the *Banking Case*,[19] to ascertain if a given law offended s.92, one asked the question, Did it prohibit or merely regulate inter-State trade? Now one asks, (1) Does it affect an activity which is "essentially" part of inter-State trade? then (2) Does it legally (whether or not also economically or socially) affect it? And (3) If it does, does it place a permissible (i.e. not real or not unreasonable)

[13] (1958) 32 A.L.J.R. 408, 411.
[14] D. P. Derham, *op. cit.* n. 1, at 483.
[15] (1955) 93 C.L.R. 127.
[16] With great respect, it seems difficult to regard it as self-evident that road maintenance is not a facility which the State is obliged to provide out of revenue, while traffic control is. See generally for analogous difficulties in this field, Julius Stone, article cited *supra* n. 1, *passim*.
[17] *Supra* n. 5.
[18] *Ibid.*
[19] *Ibid.*

or a forbidden (i.e. real or unreasonable) burden on it? This third question in the new test seems substantially the same as the old test in its entirety except that it is in some respects wider. Not only that, but although in form only a rider to the new test, the third question of the new test in effect supersedes all the rest of the new test.

In a way it is particularly vague to ask the court, "Is such and such a burden reasonable?" If a legal test depends on a criterion of reasonableness, it patently involves a category of indeterminate reference;[20] for example, whether the plaintiff's conduct in crossing a street against the traffic lights was the conduct of a reasonable man. But few major social facts need be considered in such a case. However, if a court has to decide what is a reasonable fee to charge for the "wear and tear" on a highway how can it judge the point with any degree of objectivity unless it hears substantial evidence of many social and economic factors?[20a] "Reasonable" with regard to what? The bare maintenance? Maintenance plus adornment and embellishment? Further, what about unexpressed decisions of policy of maintaining the road at a higher standard in the cities than in the country or *vice versa*? In regard to whose rights or interests is the impugned law to be reasonable? If the *Banking Case*[21] has, as seems likely, transformed s.92 into a guarantee of private enterprise in the sense that it protects the individual's freedom of contract and vocation, will the plaintiff be heard to say that a levy is unreasonable insofar as it would drive him out of business, whether or not the levy was justifiable from the view of road maintenance *simpliciter*?[22] As Taylor, J. trenchantly remarked in *Armstrong's Case*:[23] "But reasonableness alone is an abstract concept and does not by itself provide a test for determining what charges may or may not be made; it is a useful guide if, and only if, we are aware of the various matters which must be considered when the necessity arises of determining whether particular charges are or are not reasonable."[24]

If the concept of "reasonableness" in the instant connection is not legally determinate, how does one prove or disprove the reasonableness of a charge or levy? In 1954 the New South Wales Government passed legislation imposing a levy on transport, including inter-State transport, provisions of which in effect deemed the charges so made to be "reasonable" in the pious hope that the High Court would take judicial notice of their reasonableness without further argument. The hopes were scornfully dashed by the second *Hughes & Vale Case*[25] which held that the legislature cannot "deem" the existence of the issue in dispute. After this case it seemed clear that evidence should have to be given in the normal manner.

In *Armstrong's Case*[26] the main facts were: the State of Victoria had passed legislation imposing charges on vehicles engaged in trade including inter-State trade. Its essential features were: the imposition of charges calculated on a rate *per* mile travelled on highways; its application irrespective of whether the journey was inter- or intra-State; the variation of the charge according to the tare weight and loading capacity of the vehicle; its non-applicability to smaller vehicles; its application indifferently to every journey on every road or

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[20] See Stone, *Province* 185ff.

[20a] See J. Stone, article cited n. 1, *passim* esp. 456-67, 491ff.

[21] *Op. cit.* n. 5.

[22] See J. Stone, article cited n. 1, *passim*; R. Anderson, "The Main Frustrations of the Economic Functions of Government Caused by Section 92 and Possible Escapes Therefrom" (1952) 26 *A.L.J.* 518, 521; D. P. Derham, *op. cit.* n. 1, at 485, Proposition (e).

[23] *Armstrong* v. *The State of Victoria (No. 2)* (1957) 99 C.L.R. 28 at 88-89.

[24] See also *McCarter* v. *Brodie* (1950) 80 C.L.R. 432 at 456-57.

It should be noted that the majority in *Armstrong's Case* do not all seem to have the same concept of "reasonableness": see (1957) 99 C.L.R. 28 at 86ff., *per* Taylor, J. Indeed, Fullagar, J. in *McCarter* v. *Brodie* seemed to think obviously reasonable certain legislation which in some cases had a more onerous incidence than the legislation which the same judge seemed to think obviously unreasonable in the first *Hughes & Vale Case*.

[25] *Supra* n. 3.

[26] *Supra* n. 23.

highway; and the fact that the moneys received would be applied to a maintenance account. An enormous amount of evidence was led by the State of Victoria showing various statistical computations. In the result, the levy was held reasonable and the legislation consequently valid.

The interesting features of this Victorian case include the following: (1) There was no evidence that any element representing capital cost was involved in the computation, and the court apparently considered this a significant factor in favour of Victoria. In other words, they assumed that no capital costs were covered by the levy unless otherwise proved. (2) There was much admitted conjecture in the evidence. (3) In the words of Taylor, J. "the computations proceed on the basis that it is fair and reasonable to make a charge against the owners of vehicles engaged in inter-State traffic based upon maintenance cost for every mile of roadway in Victoria",[27] although inter-State traffic probably used only a small fraction of the total mileage. The answer of Dixon, C.J. to this vital objection was in part to rely on "the general probabilities to which conditions in Victoria give rise".[28] (4) Nobody could explain why "an arbitrary percentage"[29] (40%) of the loading capacity of a vehicle was to be added to the tare weight. Why not 30% or 60% or 90% or 100% or 10% or nothing? (5) "The most serious objection to the validity of the charge lies in the fact that it is named in the statute as an unexplained figure".[30] Why a basic rate of 1/3rd of one penny *per* mile? Why not 1/6th of a penny, one penny, 2d., 6d., 1/-, 2/-, etc.?

Armstrong's Case[31] seems on its face to demonstrate, at least, that evidence of admittedly inadequate probative effect can nevertheless be held to prove that the facts of a case conform with a test the very formulation of which makes demonstrable proof of such conformity impossible. It is surely right to say, with the court, "that we cannot, in this problem, ignore the ultimate financial relationship between the road and the traffic . . . (that) the means of transport by road depends upon the state of the roads and the state of the roads depends upon the expenditure upon them. . . ."[32] But is not the very assertion of this truth a confession that we cannot determine the "direct legal effect" of a law on the affected commerce without examining the social and economic factors? And if so, does not this confession strike at the roots of the orthodox rationale of the case law of s.92?

The perplexity has, indeed, advanced one step further in the New South Wales cases which are the subject of this Note. Here similar legislation was involved, since the New South Wales Act was copied from the Victorian Act;[33] but in these cases, the defendant offered no evidence of the economic and financial basis of the tax, nor indeed at all. The court upheld the legislation, saying that on an analysis of its provisions, and in view of the decision in *Armstrong's Case*[34] the legislation was valid—or more accurately that the defendant had not shown to be unreasonable what *prima facie* appeared reasonable. The court in terms denied[35] that it was taking judicial notice of the applicability in New South Wales of the Victorian evidence given in *Armstrong's Case*.[36] But it is hard to see that they did not in fact do so. From reading the majority decision in *Armstrong's Case*[37] it is impossible not to gain the impression that the vices in the legislation then in question (e.g. the absence of any means of correlating the actual cost of road maintenance in Victoria with the charges made in the legislation) were only cured in that Victorian case by the evidence actually led, coupled with a consideration of

[27] *Supra* n. 23, at 91.
[28] *Id.* at 48.
[29] *Id.* at 48 (*per* Dixon, C.J.).
[30] *Id.* at 49 (*per* Dixon, C.J.).
[31] *Ibid.*
[32] *Id.* at 45.
[33] Almost but not quite; see *per* Dixon, C.J. at 413.
[34] *Supra* n. 23.
[35] *Supra* n. 1; e.g. *per* Menzies, J. at 416.
[36] *Supra* n. 23.
[37] *Ibid.*

"the general probabilities to which conditions in Victoria give rise".[38] The legislation in question in the *Sneddon Cases* in New South Wales[39] was upheld because it was similar to that upheld in *Armstrong's Case* in Victoria.[40] This logically seems to involve the proposition that the High Court thought that the economic and social conditions of New South Wales gave rise to the same decisive (although unspecified) "general probabilities" as did the (economic and social) "conditions in Victoria", so that (despite the court's contrary language) the evidence in the Victorian case must have borne on the decision in the New South Wales cases. For the propriety of the Victorian legislation, on the similarity to which the decision upholding the New South Wales legislation was based, was itself dependent on an assessment of the conditions in which it was applicable.[41]

It perhaps confirms these questionings, that the learned Chief Justice in *Commonwealth Freighters Pty. Ltd.* v. *Sneddon*[42] observed, as to the *Armstrong* decision,[43] that "whether this involved too ready a response to what appeared truth in substance at the expense of a strictness of logical proofs or of demonstration of the fact it does not lie with me to say". If "truth in substance" means the apparently obvious social justice of exacting charges from the owners of the inter-State vehicles which most contribute to the destruction of the highways, it seems difficult to disagree with the court's action in *Sneddon's Case*,[44] despite the absence of any relevant evidence led concerning conditions in New South Wales. Yet, it may be added that if the court will bow to the "truth in substance" (thus intuitively realized) to the extent of permitting a State to charge levies on inter-State transport without "demonstration of the fact" that the charges are reasonable, the conduct of the case on the footing (which is ostensibly purely logical) that proof of reasonableness is a condition of validity, may add uncertainty rather than certainty to the course of decision.

Considerations of onus of proof seem to lead to similar conclusions. On current principles the legislation would be clearly invalid if it purported to apply to inter-State trade, apart from the special question of whether it imposed charges reasonably necessary to maintain a gratuitous physical facility. This writer would have thought that the State should have been fixed with a heavy onus if it wished to claim the benefit of this very special exception. Yet under *Armstrong's Case*[45] and the *Sneddon Cases*[46] the onus of proof seems (in effect) to repose, within the range of "truth in substance" as intuitively perceived by the court, on those who wish to impeach the legislation.

In the development of this line of cases the actual language has tended to diverge further from the inarticulate major premise which may provide the real ground for the decisions. "Legally" the present cases decide that no exactions on inter-State transport are valid unless shown to the High Court's satisfaction to be reasonably necessary for the maintenance of the highways used by the inter-State vehicles. Practically they have now come to mean that

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[38] See n. 28.
[39] *Op. cit.* n. 1.
[40] *Supra* n. 23.
[41] One cannot help thinking how difficult it usually is in other contexts to cause judicial notice to be taken of a fact in constitutional law; see e.g. *Communist Party of Australia* v. *The Commonwealth* (1951) 83 C.L.R. 1. And must not some of the relevant factors, e.g. population density and distribution, vary as between the two States,
[42] *Op. cit.* n. 1.
[43] *Supra* n. 23. Consider also the Chief Justice's remark at p. 413 of *Sneddon's Case* (*supra* n. 1): "In the case of *Armstrong* I considered that, notwithstanding the *unsatisfactory* basis of the information upon which . . . the conclusion must rest, the *realities* of the case clearly were . . ." (italics are the present writer's).
[44] *Op. cit.* n. 1.
[45] *Ibid.*
[46] *Supra* n. 23. Another interesting (and possibly unforeseen) consequence of the decisions in the cases under discussion, is the role to be played in New South Wales by the jury in cases when the State as plaintiff tries to recover from a defendant haulier charges made by transport legislation. If the defendant's defence to non-payment is a plea that the charges are unreasonable *semble* this will present a simple question of fact for trial by the jury.

a State may impose charges on inter-State transport by appropriately expressed enactments if only the charges are not obviously out of all proportion to the cost of the maintenance of highways. One cannot cavil at social considerations overruling logical *elegantia juris*; but one might be permitted to express the respectful wish that the process were not accompanied by frequent protestations that logical analysis operating with purely legal propositions holds a sufficiently illuminating candle of absolute truth. "Legally" it should be open for anybody aggrieved to prove, for example, that the moneys derived from the transport exactions are disbursed largely on maintaining routes seldom used by inter-State vehicles; and this should lead to a refund of the charges. "Legally" again, it should be possible for an aggrieved person to query each stage of the application and administration of the moneys. As a practical matter, however, the position is that the State can do as it likes short of imposing charges which are *ex facie* preposterous; and that in most cases the potential plantiff will lack all relief.[47]

In fine, *Armstrong's Case*[48] shows that evidence as to the economic and financial basis of the tax will be admitted if offered; but the *Sneddon Cases*[49] leave us with the question, What purpose is really served by offering it?

R. P. MEAGHER. *

IMPUTATIONS ON THE PROSECUTION

R. v. *DUNN; R.* v. *COOK*

In the conduct of a criminal trial it has long been recognised that the character or antecedents of the accused should be treated as irrelevant except in special circumstances. Whether these matters are introduced on the question of guilt or only for testing the accused's credit as a witness, the danger of prejudice to him in the eyes of the jury makes it desirable that such evidence be admitted with great caution.

The problem in its present form did not arise until 1898 when, in England, by s.1 of the Criminal Evidence Act,[1] the accused was enabled to give evidence on his own behalf. In order to prevent his complete assimilation to the position of an ordinary witness certain protection was deemed necessary and this was afforded in proviso (f) to the same section:

> A person charged and called as a witness in pursuance of this Act shall not be asked and if asked shall not be required to answer any question tending to show that he has committed or been convicted of, or been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless . . .
> (ii) . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. [2]

A similar provision has been adopted in other Australian States[3] but not

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[47] Not the least curious feature of the cases is the paradox involved in that, while the court will not take judicial notice of what a State thinks is a reasonable exaction (see *Hughes & Vale Case (No. 2)* (1955) 93 C.L.R. 127), it will do so in effect if the draftsmen are astute enough. It is ineffectual to say "A charge of x pence per ton per mile will be payable; such charge is reasonable"; but it may be effectual to say "A charge shall be made for reasonable wear and tear of the roads; that charge will be x pence per ton per mile multiplied by 40% of the vehicle's loading capacity; all charges shall be payable into a fund which shall only be expended on road maintenance".

[48] *Supra* n. 23. [49] *Op. cit.* n. 1.

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[1] 61 & 62 Vict., c. 36.

[2] *Id.* s.1(f)(ii).

[3] Crimes Act 1958 (Vic.), s.399(e)(ii); Evidence Act, 1929 (S. Aust.), s.18(vi)(b);