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Opinion: No. 9

Subject: *EXCISE DUTY : BOUNTIES  
DIFFERENTIATION BETWEEN SUGAR GROWN BY BLACK LABOUR AND SUGAR GROWN  
BY WHITE LABOUR*

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Key Legislation: *CONSTITUTION, ss. 51 (ii), (iii), 88, 89, 90, 92, 93, 94, 95, 99*

Date: 21 August 1901

Client: *The Prime Minister*

Related Opinion: --

Opinion text: The questions are:

1. Whether an excise duty may differentiate between sugar grown by black labour and sugar grown by white labour?
2. Whether a bounty may be given on the production of white-grown sugar only?

Duties are imposts or taxes, for the purpose of raising revenue for the public treasury-whether with or without any further intention. Duties are levied upon goods either-

- a. introduced into the country from without (customs), or
- b. produced within the country (excise).

Duties of customs are taxes or imposts, especially on the import of commodities: New English Dictionary, Encyclopaedia Britannica.

Excise is a duty on home goods, either in the process of their manufacture or before their sale to the home consumer: Encyclopaedia Britannica.

'Excises {excidere-to cut off from) is the withholding by the Government from the producer of a part of his product as a license tax on his business': Tucker, Constitution of the United States, Vol. I, p. 460. And see Cooley, Constitutional Limitations, p. 589.

Duties of excise are analogous and complementary to duties of customs. See Constitution, section 93; Quick & Garran, pp. 837, 854.

A bounty is a sum of money paid from the public treasury to merchants or manufacturers for the encouragement of some particular industry: New English Dictionary.

Under the Constitution of the Commonwealth, duties of customs or excise, like other taxes (section 51 (ii)), must not 'discriminate between States or parts of States'. In later sections (88-95), the Federal duties of customs are described as 'uniform', but there is no similar description of duties of excise. The reason is that the financial periods referred to in those sections date from the imposition of customs duties, irrespective of whether or when excise duties were imposed. But it does not seem that the word 'uniform' in those sections is intended to add anything to the prohibition of discrimination; by uniform duties therefore is meant duties which do not discriminate between States or parts of States. This applies to all duties whether of customs or excise.

In the United States, the constitutional requirement that 'duties, imposts and excises shall be uniform throughout the United States' has been held to mean that the tax must be at the same rate on the same article wherever found: Head Money Cases 112 U.S. 580; Quick & Garran, p. 550; Tucker, Constitution of the United States, Vol. I, p. 461. Section 99 provides that the Commonwealth shall not, by any law of trade, commerce, or revenue, give preference to one State

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or any part thereof over another State or any part thereof. As regards taxation, this provision does not seem to add anything to the words of section 51 (ii), cited above.

Customs duties can be employed to discourage the importation of goods and therefore to encourage local production. When however it is necessary to raise money from particular sources of production while at the same time giving local manufacturers or growers an advantage, a difference is made between the amounts of the customs and the excise duties. Duties of either kind are always levied with the purpose of raising money, though the additional object of encouraging or discouraging particular imports or products is often coupled with it.

Bounties on the other hand are gifts instead of levies, and are made with the single purpose of encouragement extended at the public cost to industries desired to be fostered. Bounties on the production or export of goods must be 'uniform throughout the Commonwealth' (section 51 (iii)). See definition of 'uniform' with respect to duties, above. Laws granting bounties are probably also covered by section 99, as laws of trade and commerce. Beyond this the Constitution does not go.

Attention may be drawn to a distinction of purpose between the imposition of excise duties and the granting of bounties. The Constitution speaks of excise duties not as duties on the production or manufacture of goods, but as duties on goods produced or manufactured (section 93). Similarly it speaks of customs duties as duties on goods imported (sections 92, 93, 95). Duties of customs and excise are thus incidentally defined as duties on the goods themselves.

On the other hand, the Constitution speaks of bounties, not on goods, but on 'the production or export of goods'.

This language corresponds to a distinction in fact. An excise duty is as a rule imposed for the purpose of revenue; it is a tax on goods which cannot be reached by customs duties. For the purpose of raising revenue the method by which the goods were produced is immaterial. On the other hand a bounty is for the encouragement of industry; and for that purpose the social, economic and other conditions under which the industry is carried on may be most material.

Excise duties, as taxation, must not discriminate between States or parts of States. Is then a different rate of excise upon white-grown and black-grown sugar such a discrimination? If we admit that an excise duty is a tax on the article itself it is. The same product is differently dealt with because of some difference in its mode of preparation. This is a discrimination, but is it 'between States or parts of States'? On its face it is not between States; in its effect it may be. Sugar can be grown in Queensland by either white or black labour. Its effect would be that most of the sugar grown there under existing conditions would be subject to the higher tax. Sugar grown in the cooler States by white labour would not. If between 'parts of States' means *inter alia* parts of the same States there is a similar difficulty. North of a certain point in Queensland it is said that all sugar is grown by black labour. South of that, white labour is to some degree employed. Should this climatic condition prove to be not merely a question of extra cost but amount to an actual prohibition of white labour, the clause would then apply.

But it is difficult to say that unequal incidence of a tax involves discrimination. Every tax falls more heavily on some parts of the Commonwealth than on others. A uniform excise on sugar at present would fall heavily on Queensland, but would not touch Tasmania; yet it would not be a discrimination. If the Constitution had required excise duties to be 'uniform', a difference of excise based on a difference in the mode of production would be prohibited. The proposed difference between white- and black-grown sugar is certainly a discrimination, and if it is determined in fact by the part of the continent in which sugar is or might be grown it is a discrimination between States or parts of States. Without considering whether there are conceivable cases in which excise duties might be varied to suit conditions of production it is plain that a differential excise on black-grown sugar as such would be of doubtful constitutionality. It is opposed to the spirit if not to the letter of the Constitution to allow locality discriminations even if the words 'States or parts of States' be given their narrowest meaning. It would probably be possible, by ingenious discriminations between different modes of production, to impose effectively discriminating excise duties on nearly every article produced in the several States. Difference of climate and other conditions may involve different processes in the production of the same article in different States

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or parts of them, and there is no limit to the discriminations which might be introduced if these differences were held to excuse differences in the rate of excise. Such discriminations having such an effect would be a violation of the clear intention of the Constitution.

Bounties. It has been already argued that bounties may be given in respect to the process of production adopted in any industry as well as upon the product itself, or for any other purpose that commends itself to the legislature. It is true that bounties are usually paid at the rate of so much per quantity of goods actually produced; but even this is not essential. They might be awarded on a basis which took into consideration the quantity of employment given, the amount of wages paid, and so forth. All these may form essential elements of the economic purpose for which the bounty is granted. It seems clear that bounties may be awarded on conditions as to the mode of production; and that the unequal incidence of these conditions would no more constitute a discrimination than would the unequal incidence of an equal excise duty on a given article levied without regard to quality or value. The difference of treatment would be in pursuance of the legitimate object of the bounty. Every bounty discriminates between those who are to receive it and those who are not. It might be possible to make discriminations so obviously unfair that it would render the subvention void as not being 'uniform throughout the Commonwealth'. In this relation the word 'uniform' has the same meaning as in relation to duties of customs and of excise {Head Money Cases cited above). But within very wide limits a bounty may discriminate frankly. I am therefore of opinion that the offering of a bounty on white-grown sugar would be constitutional. In other words, a bounty may be used to encourage desired conditions of production, as this is germane to its fundamental purpose; an excise duty can rarely be so used, as this motive must usually be foreign to its fundamental purpose.

It may be objected that the practical result of giving a bounty would be to refund to certain growers a portion of the excise paid, and therefore that the granting of such a bounty would merely be a device to evade the Constitution by doing indirectly what could not be done directly. The answer to this is that such a bounty would be in no sense a refund of excise duty; it would be granted for purposes wholly distinct from the purpose for which the excise was imposed, and in respect of a wholly different matter. The bounty would be granted for the encouragement of industrial conditions which are thought to be desirable; and the mere fact that the effect of this is to lighten the burden of an excise duty upon those who comply with these conditions is irrelevant. The constitutionality of the bounty stands by itself. Suppose that no excise at all were imposed on sugar, but a bounty were given for the production of white-grown sugar. If the bounty is constitutional under those circumstances, it cannot become less so because the Parliament, in the exercise of a wholly distinct taxing power, imposes an excise on all sugar grown within the Commonwealth.

Excise duties must not discriminate between States or parts of States either in terms or in effect. Bounties may distinguish between modes of production and yet be uniform throughout the Commonwealth. The distinction between sugar grown by white labour and that produced by black labour may come within the prohibitions of the Constitution in the case of an excise duty which is levied upon all home-grown sugar as sugar. A bounty on the other hand certainly may be granted upon sugar prepared by a particular process or class of labour excluding all other sugar and therefore may legitimately be granted upon sugar grown by white labour, or upon beet sugar exclusive of cane, or vice versa.<sup>(1)</sup>

In one sense the proof of the pudding would be in the eating. If a reasonable difference in the excise levied throughout Australia upon sugar grown by white labour, as compared with that levied upon sugar grown by black labour, induced the employment of white labour exclusively in the far north, and enabled the plantations in its hottest districts to remain profitable when competing with those of the south, this would be a practical evidence that the difference did not amount to a discrimination between States or parts of States. The issue is not only one of principle. Discriminations are prohibited. The question whether any particular duty or bounty is a discrimination or not is a question of fact. But in regard to bounties there is a much wider latitude than in regard to duties of excise and consequently the latter require to be much more scrutinised.

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(1) In the Opinion Book Mr Deakin's signature appears at the end of this paragraph. The final paragraph seems to have been added by way of a postscript.

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