11

UNION SUBJECTS

I

PARAGRAPH 15 (1) of the Cabinet Delegation's statement, dated May 16, 1946, recommends that there should be a Union of India which should deal with the subjects of foreign affairs, defence and communications. The precise content of each of these categories has not been defined and questions will doubtless arise on this point in the course of the proceedings of the Constituent Assembly. The following references may be useful:

AMBIT OF "FOREIGN AFFAIRS"

The plain dictionary meaning of "foreign": "Dealing with matters concerning other countries." (*New Oxford English Dictionary.*)

The sense in which the term has been used in Empire constitutions:

(1) Section 51 (xxix) of the Australian Constitution, "External Affairs". See Dr. Wynes's *Legislative and Executive Powers in Australia*, 1936, *pp.* 205-222; also Quick and Garran's commentary on the section. These authors agree that "external affairs" as used in the section extends to—

(i) the external representation of Australia by accredited agents;

(ii) the conduct of the business and promotion of the interests of Australia in outside countries; and

(iii) extradition.

(2) Entry 3 of list I in the seventh schedule to the Government of India Act, 1935 runs:

> "External affairs; implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's Dominions outside India."

The items following "external affairs" in this entry are, it may be contended, illustrative of what constitutes "external affairs". But are they exhaustive? For example, take immigration and emigration or naturalisation. Both in the Australian Constitution and in the Government of India Act of 1935, these subjects are mentioned separately from "external affairs". [Section 51 (xxvii) and (xix) of the Australian Constitution and entries 17 and 49 of list I in the seventh schedule to the Government of India Act, 1935.] Does this necessarily imply that these subjects are not included in "external affairs"? Note in this connection that "the relations of the Commonwealth with the islands of the Pacific" is also separately enumerated in the Australian Constitution [section 51 (xxx)], although this is obviously "external affairs", which shows that the enumerations are not always mutually exclusive. Note further that the Foreign Office in England deals not only with treaties and extradition, but also, *inter alia*, with nationality, naturalisation, prize courts, territorial waters, deportations, passports and visas. [*The Foreign Office* by Sir John Tilley and Stephen Gaselee, 1933, *p.* 287]. In nationality cases, the Foreign Office works very closely with the Home Office (*op. cit.*, *p.* 291). As will be pointed out presently, administrative practice may be relevant in this matter.

To what extent can foreign trade and commerce be said to be comprised in "foreign affairs"? If we may be guided by English practice, it is relevant to observe that the English Foreign Office was always concerned with the promotion of trade (*op. cit.*, *p.* 228) and there has been a sort of rivalry

between that Office and the Board of Trade as to who should be master of the Department of Overseas Trade. It is now partly under the Foreign Office and partly under the Board of Trade (*op. cit.*, *p.* 249). General commercial policy is the responsibility of the Board of Trade; the duty of the Overseas Trade Department is to give effect to that policy. In other words, general commercial policy is not included in "foreign affairs", but giving effect to it in foreign countries is (*op. cit.*, *pp.* 249-250).

How far is administrative practice a legitimate criterion in these matters? In *Croft v. Dunphy* [1933] A. C. 156, 165, the Privy Council observed: "When a power is conferred to legislate on a particular topic, it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power." By analogy, a power to "deal with" a certain topic must be similarly construed in the light of administrative practice. And since the power in the present case may be said to be conferred by the Cabinet Delegation's statement, it is the administrative practice of the United Kingdom that is particularly relevant.

Can the Union utilise the treaty-making power given to it by the category "foreign affairs" for the purpose, say, of enforcing a forty-hour week in selected Indian industries, "conditions of labour" being assumed to be a provincial subject? Dr. Wynes answers a similar question under the Australian Constitution in the affirmative ["Legislative and Executive Powers in Australia", 1936, *p.* 209]; but he wrote before the Privy Council decision in *Attorney-General for Canada v. Attorney-General for Ontario and Others* (1937 A. C. *p.* 326). In this case, the Privy Council ruled as invalid certain Acts of the Canadian Parliament regulating conditions of labour in various ways, as the legislation related to a provincial subject, although it was sought to be justified on the ground

that it was required to give effect to certain international conventions which had been ratified by the Dominion of Canada.

> " The Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth. . . . It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and provincial together, she is fully equipped. But the legislative powers remain distributed and if, in the exercise of her new functions derived from her new international status, Canada incurs obligations, they must, so far as legislation be concerned, when they deal with provincial classes of subjects, be dealt with by co-operation between the Dominion and the provinces."

It is interesting to note that the existing provision on this point in the Government of India Act, 1935, follows a similar view. See section 106 (1): " The Federal Legislature shall not, by reason only of the entry in the Federal legislative list relating to the implementing of treaties and agreements with other countries, have power to make any law for any province except with the previous consent of the Governor."

The American case, *The United States of America v. Curtiss-Wright Export Corporation*, reported in 299 U.S. 304-333, contains a useful discussion of the " foreign relations " power in the U.S.A. The point of interest is that in certain circumstances a penal tariff or even a total prohibition of the import of goods may come within its ambit. For example, if a foreign country discriminates against the nationals or the goods of the Indian Union, the Union may, in the discharge of its functions in relation to foreign affairs, retaliate either by prescribing a penal duty on the import of the goods of that country or by prohibiting their import altogether. [See foot-note at *p.* 324 of the above report.] In certain circumstances, therefore, the " foreign affairs " power may include powers in relation to the import of goods from a foreign country, although normally the powers may be distinct.

It may be useful to note the classes of external matters, whether described as foreign or external affairs or not, which are dealt with by the Centre in various constitutions:

The United States of America

Article 1—

Section 8.—The Congress shall have power . . . to regulate commerce with foreign nations . . . ; to establish a uniform rule of naturalisation . . . ; to regulate the value of foreign coin . . . ; to define and punish piracies and felonies committed on the high seas; and offences against the law of nations; to declare war . . . ; and to make all laws, which shall be necessary and proper for carrying into execution the foregoing powers.

Section 9.—The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by Congress prior to the year 1808, but a tax or duty may be imposed on such importation not exceeding 10 dollars for each person.

Canada

The Canadian Parliament has power to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. No aspect of foreign affairs is assigned to the provincial legislatures. On the other hand, for greater certainty and without prejudice to the generality of the residuary powers of the Canadian Parliament, the following powers have been expressly conferred exclusively on the Parliament of Canada:

The regulation of trade and commerce; and naturalisation and aliens.

(*See* section 91, entries 2 and 25.)

Australia

The Commonwealth Parliament has power to make laws with respect to—

Trade and commerce with other countries, naturalisation and aliens, foreign corporations, immigration and emigration, external affairs, the relations of the Commonwealth with the islands of the Pacific, and matters incidental to the execution of any of these powers.

[*See* section 51, items (*i*), (*xix*), (*xx*), (*xxvii*), (*xxix*), (*xxx*) and (*xxxix*).]

South Africa

The Union Parliament has full power to make laws for the peace, order and good government of the Union; in other words, it has plenary powers in respect of all subjects. (*See* section 59 of the Union Constitution.)

India

Under the Act of 1935, the Federal legislative list comprises—

Preventive detention for reasons of State connected with external affairs.

External affairs; the implementing of treaties and agreements with other countries; extradition.

Admission into, and emigration and expulsion from, India; pilgrimages to places beyond India.

Import and export across customs frontiers.

Admiralty jurisdiction.

Naturalisation.

(*See* entries 1, 3, 17, 19, 21 and 49 in list I of the seventh schedule to the Act.)

Austria-Hungary

Under the Compact of 1867, the following subjects were declared to be common to the two halves of the dual monarchy:

> Foreign affairs, including diplomatic and commercial agencies *vis-a-vis* foreign countries; but the ratification of treaties, so far as it was constitutionally required, was reserved to the two separate Parliaments.

Among subjects which were not common, but were to be dealt with according to principles agreed upon from time to time, were:

> Commercial affairs and especially the tariff; indirect taxes affecting industrial production; money and coinage; and the military system.

These subjects, most of which, in other federations, fall within the province of the Central legislature, were regulated in the dual monarchy by concurrent statutes of the two Parliaments and thus nearly everything in the nature of positive law had to be enacted separately in Austria and Hungary.

(*See* Lowell's *Governments and Parties in Continental Europe*, 1917, Vol. II, *pp.* 162-179.)

Switzerland

Article 8—

The Confederation alone has the right to declare war and to make peace as well as to conclude alliances and treaties with foreign States, especially customs arrangements and commercial treaties.

Article 9—

In exceptional cases, the cantons retain the right to conclude treaties with foreign States on matters concerning public economy and neighbourhood and police relations;

however, such treaties shall contain nothing contrary to the Confederation and to the rights of other cantons.*

Article 10—

The official relations between the cantons and foreign governments or their representatives shall take place through the medium of the Federal Council.

However, the cantons may correspond directly with the subordinate authorities and agents of a foreign State when dealing with the matters mentioned in the preceding article.

Article 69 (*a*)—

. . . .

The Confederation is responsible for the control of imports on the national frontier.

Article 69 (*b*)—

The Confederation has the right to legislate on foreigners entering and leaving the country and on their sojourn and establishment within it.

The cantons shall, in accordance with federal law, decide on the sojourn and establishment of foreigners. However, the Confederation has the right to decide in final appeal—

(*a*) on cantonal authorisation of prolonged sojourn and establishment, as well as on favours granted in this connection,
(*b*) on the violation of treaties of establishment,
(*c*) on cantonal expulsions when they have repercussions on the territory of the Confederation,
(*d*) on the refusal of the right of asylum.

Article 70—

The Confederation has the right to expel from its territory the foreigners who jeopardise the interior or exterior security of Switzerland.

---

* For instance, if the canton of Ticino concludes a treaty with Italy for furnishing salt this does not affect the Confederation. See *The Swiss Confederation* by Adams and Cunningham, 1889, *p.* 30, footnote.

U. S. S. R.

Article 14—

The jurisdiction of the Union of Soviet Socialist Republics, as represented by its highest organs of State authority and organs of government, extends to—

(*a*) representation of the Union in international relations, conclusion and ratification of treaties with other States; and the establishment of the general character of the relations between the Union Republic and foreign States.

(*b*) questions of war and peace;

. . . .

(*h*) foreign trade on the basis of State monopoly;

. . . .

(*v*) laws on the rights of foreigners.

AMBIT OF DEFENCE POWER

1. See the Report of the Joint Committee on Indian Constitutional Reforms, Vol. I, para. 238: "Apart from a considerable revision of the language of the first five entries of list I, as they appear in the White Paper, which collectively define the ambit of the reserved subject of defence, etc." From this it follows that in the opinion of the Joint Committee the first five entries of list I of the White Paper collectively define the ambit of "defence". The White Paper in question is printed as Appendix VI to the Report and it will be seen that the first five entries of list I of that Paper are equivalent to entries 1 and 2 of list I in the seventh schedule to the Act of 1935 *plus* "the common defence of India in time of an emergency declared by the Governor-General" *plus* "the employment of the armed forces of His Majesty for the defence of the provinces against internal disturbance and for the execution and maintenance of the laws of the Federation and the provinces". The defence of India in a declared emergency is now provided for in section 102 of the Act of 1935.

2. See the Australian Bread Case, 21 C.L.R. 433 (*Farey v. Burvett*), in which the validity of a war-time regulation fixing the maximum price of bread was impugned. The regulation was held valid by a majority of 5 to 2. Isaacs J. held that "defence" included *everything in relation to national defence that the Commonwealth Parliament might deem advisable to enact* (*p.* 455). Griffith C. J.—"The word 'defence' of itself includes all acts of such a kind as may be done in the United Kingdom either under the authority of Parliament or under the Royal Prerogative for the purpose of the defence of the realm . . . *It includes preparation for war in time of peace* and any such action in time of war as may conduce to the successful prosecution of the war and defeat of the enemy." (*Ibid.*, *p.* 440.)

3. Note that in Australia the entry in section 51 (*vi*) of the Commonwealth Constitution relates to the "naval and military defence" of the Commonwealth. Hence the dissentient judgment in the above case that price-fixing was outside Commonwealth powers.

4. See Dr. Wynes's *Legislative and Executive Powers in Australia*, *pp.* 178-190, where the author discusses a large number of reported cases bearing on the subject of defence.

5. It has been held in Australia—

(*a*) that it is not competent for the Commonwealth Parliament under its defence power to set up manufacturing or engineering businesses for general commercial purposes in peace-time, merely because such activities may conduce to the works of a department of the defence administration [*Commonwealth v. Australian Shipping Board* (1926) 39 C.L.R. 1];

(*b*) but that it is competent for a Commonwealth clothing factory, created essentially for defence purposes, to engage incidentally in commercial transactions. [*Attorney-General for Victoria v. The Commonwealth* (1934-5) 52 C.L.R. 533.]

The latter decision has distinguished the former on the ground that the Australian shipping board was not an organ of the Executive Government itself. The Commonwealth clothing factory, on the other hand, had been established by the Commonwealth Government itself in 1911 for the manufacture of naval and military equipment and uniforms. During the war of 1914-1918, there was a large increase in the output of the factory; at the end of the war, the demand for naval and military clothing was very greatly reduced; but, rather than reduce staff or plant, the factory accepted orders from other Government departments and from public bodies. The legality of this course was challenged at the instance of the Victorian chamber of manufacturers. The High Court held in effect that it was clearly " necessary for the efficient defence of the Commonwealth to maintain intact the trained complement of the factory so as to be prepared to meet the demands which would inevitably be made upon the factory in the event of war ".

> " It is obvious that the maintenance of a factory to make naval and military equipment is within the field of legislative power. The method of its internal organisation in time of peace is largely a matter for determination by those to whom is entrusted the sole responsibility for the conduct of naval and military defence. In particular, the retention of all members of a specially trained and speciàlly efficient staff might well be considered necessary and it might well be thought that the policy involved in such retention could not be effectively carried out unless that staff was fully engaged. Consequently, the sales of clothing to bodies outside the regular naval and military forces are not to be regarded as the main or essential purpose of this part of the business, but as incidents in the maintenance for war purposes of an essential part of the munitions branch of the defence arm. In such a matter, much must be left to the discretion of the Governor-General and the responsible ministers." (*p.* 558)

6. In the U.S.A., the " war power " of Congress extends to—

the raising and supporting of armies, the provision and maintenance of a navy, the governance of the land and naval forces, and the organising and calling forth of the militia;

but the right of the people to keep and bear arms is not to be infringed. In addition, Congress has of course the power to make all laws necessary and proper for carrying into execution the foregoing powers. (See article I, section 8, of the Constitution of the U.S.A.)

Writing in 1942, Dodd, in *Cases on Constitutional Law* (Shorter Selection), says:

> "The participation of the United States in the world war (1917-1919) was the occasion for a more extensive exercise of federal war powers than ever before in our history, both as regards strictly military matters and the incidental civil control of the energy and resources of the nation. No act of Congress was held invalid by the Federal Supreme Court, as outside the war power, and only part of one—the Lever Act—for exercising a war power in a forbidden way." (*p.* 338)

For the almost limitless activities which may be undertaken in exercise of the war power, see *pp.* 59 to 184 of the United States Government Manual, 1945, first edition, describing the "Council of National Defence" (formed under an Act of Congress in 1916, for the "co-ordination of industries and resources for the national security and welfare" and "the creation of relations which render possible in time of need the immediate concentration and utilisation of the resources of the nation") and the various emergency war agencies set up during the last two world wars.

7. The following accounts—

(*a*) of the Austro-Hungarian defence system and

(*b*) of the Swiss defence system,

taken respectively from Lowell's *Governments and Parties in Continental Europe* (*pp.* 171-172) and *Governments of Continental Europe*, 1940, edited by James T. Shotwell (*pp.* 1028-1030), may be of interest:

The Austro-Hungarian Defence System

"The next department of the joint administration is that of war, and here again is found the strange mixture of federal union and international alliance that is characteristic of the relations of Austria and Hungary. The regular army and the navy are institutions of the joint monarchy, although they are governed by separate standing laws of the two States, which are, of course, substantially identical. These laws determine, among other things, the number of the troops, and provide that the men shall be furnished by the two countries in proportion to population; but the contingent of recruits required from each country is voted annually by its own Parliament. It is useless to inquire what would happen if either half of the Empire should refuse to raise its quota of troops, for there is no possible means of compulsion; and in this, as in most other cases, the smooth working of the joint government depends ultimately on a constant harmony between the Cabinets of Vienna and Buda-Pesth. After the recruits are enlisted they are under the control and in the pay of the joint administration. The Emperor, as Commander-in-Chief, appoints the officers, and regulates the organisation of the army. The minister of war, curiously enough, is not required to countersign acts of this nature,* but he is responsible for all other matters, such as the commissariat, equipment and military schools.

"Besides the regular army, which belongs to the joint government, there are military bodies, called in Austria the *Landwehr*, and in Hungary the *Honveds*, which are special institutions of the separate halves of the monarchy. These troops are composed of the recruits that are not needed for the contingents to the regular army and of the men who have already served their time in it. They form a sort of reserve, but cannot be ordered to march out of their own state without the permission of its Parliament; except that in case of absolute necessity, when the Parliament is not in session, the permission may be given by the Cabinet of the country to which they belong. After such a permission has been granted, however, they are subject to the orders of the general commanding the regular army. The *Landwehr* and *Honveds* are organised under independent laws which happen to be very much alike but are not necessarily so, and

* Law of Dec. 21, 1867, sec. 5.

their ordinary expenses are borne entirely by the country to which they belong, only the increase of cost arising from their actual use in war being defrayed out of the joint treasury."

The Swiss Defence System

"*Unusual Features of the Army:* For the defence of their neutrality the Swiss rely not merely upon the pledges of other States but also upon their own army and auxiliary air service. The Swiss army differs quite remarkably from the prevailing Continental military systems. To be sure, like all her neighbours, Switzerland has adopted universal and compulsory military service. Except for those exempted for reasons of physical or mental incapacity who, incidentally, are required to pay a military exemption tax, every Swiss citizen must begin his initial period of army service during his ninteenth year. This initial period, however, is not the two or even one-year interval normally required of other Continental military recruits. The Swiss infantry recruit is called to the colours for a period of approximately three months, during which he is thoroughly grounded in military essentials. At the end of this period he is considered a full-fledged member of the army's first-line troops, known as the *Auszug* or *Elite*, and resumes his civilian activities. Recruits in other branches of the service have similar training periods, ranging from 60 days for the medical and supply corps to 102 days for the cavalry. During the next 12 years the infantry recruit is called to the colours annually for 13-day periods to repeat the courses of instruction he received as a recruit and to supplement that instruction. From the end of his thirty-second year until his forty-first, the Swiss soldier is enrolled in the *Landwehr* or first reserve and from his forty-first year until his forty-eighth, in the *Landsturm* or second reserve. During these 16 years the time actually spent with the colours in periods of peace is about two weeks. Altogether, therefore, the formal training of the Swiss soldier throughout his active affiliation with the army rarely exceeds seven or eight months. It must be added that both before and during his military career, the Swiss infantryman's formal training is usually supplemented by practice in drill and marksmanship in the various volunteer rifle clubs which dot the land and receive active support from the public authorities. Recently annual practice in musketry under the jurisdiction of a rifle club has been made compulsory for all first-line and *Landwehr* troops.

" Still another unusual feature of the Swiss military system is the absence of a permanent professional military staff. No person can be appointed to the rank of commander-in-chief except in time of national emergency when the Federal Assembly has decreed general mobilisation; the appointment, moreover, lapses as soon as the emergency has passed. A Commander-in-Chief has been appointed on four different occasions since 1848. The most recent appointment is that of Colonel Henri Guisan, who took charge of the forces which the Confederation mobilised at the outbreak of the European War in September, 1939. The only military officials in the permanent service of the federal government are those engaged in staff work in the military department of the Federal Council and those officers and non-commissioned officers who instruct army recruits. Of these there are at present about 300. The regular commissioned and non-commissioned officers of the army are recruited from the ranks and, like the private soldiers, are called upon only intermittently to serve with the colours after their initial period of training and study; at other times they are engaged in ordinary civilian pursuits.

" *Dual Political Control:* A third distinctive feature of the Swiss army system is the dual character of the political authority which has jurisdiction over it. Although the current of constitutional reform since 1874 has run strongly in the direction of centralising military jurisdiction in the government of the Confederation, the cantonal governments still exercise many military prerogatives. Within their respective territories they enforce most of the federal military regulations, keep the military registers, call the troops to the colours, and provide them with their personal equipment. They also form the principal infantry units and appoint their non-commissioned and commissioned officers, the latter up to the rank of captain. Military powers are exercised by the cantonal authorities under the supervision and with the approval of the Federal military department; and for at least a portion of the expenditure they incur, the cantons are reimbursed by the Federal Government.

" *New Defence Measures:* The Swiss military system provides an organised and disciplined force of approximately 425,000 first- and second-line troops subject to mobilisation during periods of national emergency. It is a system well adapted to the nation's democratic and federalistic political institutions; and despite the strictures of certain Swiss politicians, there is little evidence that

the system inspires the militaristic influence commonly associated with professional armies. Whether this system can provide Switzerland with an adequate defence organisation at a time like the present is another question. With neighbouring belligerent Great Powers but poorly concealing irredentist and imperial ambitions which could quite logically include Switzerland, and with offensive military weapons developed to such a point that not even Switzerland's peculiar topography any longer affords a serious obstacle to invasion, this question has become a very grave one. The Swiss themselves appear to be pondering it at length and to have concluded that their defence needs strengthening. At any rate the Federal Council, with the concurrence of a popular majority in a referendum held in 1936, has taken steps to increase the period of active training with the army, to supplement military aviation and artillery service, to perfect anti-aircraft defence and defence against gas attacks, and to strengthen every variety of border fortification. Moreover, as long as the period of national emergency, decreed at the end of August 1939, continues, the Swiss army, at least partially mobilised, will maintain a continuous watch on the nation's frontiers."

AMBIT OF "COMMUNICATIONS"

1. "Communications" is a wide term and, interpreted in the widest possible sense, would include even village roads. Some such qualification as "inter-unit" may have to be imported, if "communications" not extending beyond the limits of a province or State and not connected with any inter-unit line of communications are not to be dealt with by the Union.

2. As to the detailed items which "communications" may include, see, in particular, entry 7 of list I and entry 18 of list II in the seventh schedule to the Government of India Act, 1935. It is clear from the former that posts and telegraphs, including telephones, wireless and broadcasting would be included under the existing constitution as "forms of communication". The latter entry runs: "Communications, that is to say, roads, bridges, ferries and other means of

communication not specified in list I, etc." The "means of communication" included in list I are mainly railways, seaways and airways. Seaports, being related to sea communications in much the same way as railway stations are related to railways, would also probably be included in the term "communications", and similarly lighthouses and other safety devices for shipping and aircraft; so too, the carriage of passengers and goods by rail or sea or air. Port quarantine can hardly be dissociated from seaports or airports. Practically, therefore, entries 7, 18, 20, 21, 22, 24, 25 and 26 of list I in the seventh schedule to the Act of 1935 would be largely included in the term "communications", even if we limit it to inter-unit communications.

3. In Canada, besides the regulation of trade and commerce and the postal services, the following enumerated subjects fall within the authority of the Canadian Parliament:

> Navigation and shipping; quarantine; lighthouses; ferries between a province and any British or foreign country or between two provinces; lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting a province with any other province or provinces or extending beyond the limits of a province; lines of steamships between a province and any British or foreign country; and such works as, although situate within a province, are declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces. (*See* section 91, entries 9, 10, 11 and 13, and section 92, entry 10.)

4. In Australia, the Commonwealth Parliament has power to make laws with respect to—

(1) trade and commerce with other countries and among the States;
(2) postal, telegraphic, telephonic and other like services;
(3) lighthouses;
(4) quarantine;
(5) the control of railways with respect to transport for the naval and military purposes of the Commonwealth;

(6) the acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State; and

(7) railway construction and extension in any State with the consent of that State.

[*See* section 51, items (*i*), (*v*), (*vii*), (*ix*), (*xxxii*), (*xxxiii*) and (*xxxiv*) of the Australian Constitution.]

It has also been made clear in a subsequent provision (section 98 of the constitution) that the power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping and to railways owned by any State.

Railways in Australia occupy, and occupied in 1900, a special position in that they were and are owned and carried on by the various State governments. Hence the power of the Commonwealth Parliament in respect of railways is somewhat limited. [*See* Dr. Wynes's *Legislative and Executive Powers in Australia*, *p.* 160.]

5. In the U. S. A., Congress has been granted express power to establish post offices and post roads. See article I, section 8, U. S. A. Constitution. In other respects, federal power appears to have developed as incident to "inter-State commerce". It has been held that "commerce" includes the telegraph, the telephone, the radio and communication by correspondence through the mails, besides railways and navigation. (*See* Dodd's *Cases on Constitutional Law*, Shorter Selection, 1942, *pp.* 356 and 391.)

6. In Switzerland, the Confederation is responsible for legislation concerning navigation, as also legislation on the construction and working of rail roads and on aerial navigation. The postal and telegraph services belong to the Confederation. The Confederation can order at its expense or encourage by means of subsidies public works which interest the whole or any considerable part of Switzerland. The Confederation also exercises supreme control over the roads and bridges in whose maintenance it is interested and can decree provisions

concerning motor traffic. (*See* articles 23, 24*b*, 26, 36, 37, 37*a* and 37*b*.)

7. In the U. S. S. R., the powers of the Union extend to the "administration of transport and means of communication". [*See* article 14 (*m*) of the Constitution of the U. S. S. R.]. There are separate departments ("People's Commissariats") for railways, communications and water transport.

II

Paragraph 15 (1) of the Cabinet Mission's statement of May 16, 1946 recommends that the Union of India should deal with foreign affairs, defence and communications and should have the powers necessary to raise the finances required for these subjects. Whether these powers should be powers of direct taxation in the right of the Union or merely powers to levy contributions from the provinces is a question of great importance on which the statement is silent. One view is that the finances should be raised only by contribution and not by taxation. The other is that the Union should have the power of taxation. The experience of other countries may be useful in this connection.

U.S.A.

Before the present Constitution of the U.S.A. was framed by the Philadelphia Convention, the States had been linked together in a loose confederacy by certain articles of Confederation. Under these articles, they had only one central organ, the Congress of States, in which all the States were on an equal footing. The purpose of the confederacy was to provide for the common defence of the States, the security of their liberties, and their general welfare. Article 8 provided that "all charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and

allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person . . . . The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled." In other words, Congress was to determine the amount of money needed and to apportion to each State its share.

"Congress did so, but the States honoured the requisitions exactly to the extent that each saw fit, and Congress had no power and no right to enforce payment. What was the result? If one may judge by the complaints that were entered, it was more profitable to disobey than to obey. In the dire straits for funds to which it found itself reduced, Congress took advantage of the lack of information on land values to juggle with the estimates, so as to demand more of those States that had previously shown a willingness to pay. The financial situation was so serious that early in 1781 before the articles had been finally ratified, Congress had already proposed to the States an amendment authorising the levy of a five per cent duty upon imports and upon goods condemned in prize cases. The amendment was agreed to by twelve States. But another weakness of the Confederation was here revealed, in that the articles could only be amended with the consent of all of the thirteen States. The refusal of Rhode Island was sufficient to block a measure that was approved of by the twelve others. In 1783 Congress made another attempt to obtain a revenue by requesting authority for twenty-five years that the States should contribute in proportion $1,500,000 annually, the basis of apportionment being changed from land values to numbers of population, in which three-fifths of the slaves should be counted. In three years only nine of the States had given their consent and some of those had consented in such a way as would have hampered the effectiveness of the plan. It was, however, the only relief in sight and in 1786 Congress made a special appeal to the remaining States to act. Before the end of the year, all of the States had responded with the exception of New York. Again the inaction of a single

State effectually blocked the will of all the others." (*The Framing of the Constitution* by Farrand, *pp.* 4-5.)

It was to rectify these and other defects that the Philadelphia Convention was called. Under the constitution framed by that Convention—which is substantially the present Constitution of the U.S.A.—Congress has been given "power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States"; "to borrow money on the credit of the United States"; "to coin money, regulate the value thereof and of foreign coin". Thus, the right of direct taxation was substituted for the right of levying contributions.

CANADA

Under the British North America Act (section 91, item 2), the Centre has the power to raise money by any mode or system of taxation; to borrow money on the public credit; to regulate currency, coinage and legal tender as also the issue of paper money. The provinces are limited to direct taxation within their own borders in order to the raising of revenue for provincial purposes and the borrowing of money on their own credit.

AUSTRALIA

The Commonwealth, that is to say, the Centre, and the States have concurrent powers of taxation except that the imposition of duties of customs and excise belongs exclusively to the Commonwealth. Currency, coinage, legal tender and the issue of paper money are also Commonwealth subjects, the States being prohibited from coining money or making anything but gold and silver coin legal tender.* But even where the powers are concurrent, section 109 of the Constitution

* [See sections 51, 52, 69 and 115 of the Commonwealth of Australia Constitution Act, 1900.]

Act provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid.

SOUTH AFRICA

In South Africa the Union (Centre) has plenary powers of taxation, because under section 59 of the Constitution Act, the Union Parliament has full powers to make laws for the peace, order and good government of the Union. The power of the provinces is severely limited:

"Subject to the provisions of this Act and the assent of the Governor-General-in-Council as hereinafter provided, the Provincial Council may make ordinances in relation to matters coming within the following classes of subjects, that is to say,

(*i*) direct taxation within the province in order to raise a revenue for provincial purposes;

(*ii*) the borrowing of money on the sole credit of the province with the consent of the Governor-General-in-Council and in accordance with the regulations to be framed by Parliament (of the Union). . . ."

(See section 85 of the Constitution Act.) But of course the Union of South Africa is not a federation and the provinces are almost completely subordinate to the Centre.

SWITZERLAND

According to article 42 of the constitution, the expenses of the Confederation have to be met—

(*a*) from the income of federal property;

(*b*) from the proceeds of the federal customs;

(*c*) from the proceeds of posts and telegraphs;

(*d*) from the proceeds of the powder monopoly;

(*e*) from half of the gross receipts from the tax on military exemptions levied by the cantons;

(*f*) from the contributions of the cantons which shall be determined by federal legislation with due regard to their wealth and resources; and

(*g*) from stamp duties.

"As stated in the constitution, this is a decidedly imposing array of resources, but upon analysis it shrinks considerably. Contributions by the cantons recall the old régime when the small sums necessary for the support of the Diet were thus procured. An ideal system for the apportionment of such contributions under the present federal government was worked out in 1875, but the central authorities have never asked for assistance on this basis. Posts, telegraphs and telephones yield moderate returns. The purpose of the powder monopoly established in 1848 was not to secure revenue but to assure the government adequate supplies for all purposes of this military necessity. Blasting powder is not included. However, the monopoly has been made to produce a small net profit annually. Receipts from the military exemption tax law are not large. They amounted to a little over a million francs a year in the beginning, increasing to 2,143,062 francs in 1910. As to the income from federal property, it must be remembered that the new Central government possessed very little property at the time of its creation in 1848. All in all, therefore, in spite of the number of different sources of revenue enumerated in the constitution, the real burden of providing for the expenditures of the Federation devolved very largely upon one of them—namely, the federal customs." (*Government and Politics of Switzerland* by Brooks, *pp.* 180-181.)

The history of currency and coinage in Switzerland is interesting. By the constitution of 1874, the Federation was given the power to regulate by law the issue and redemption of bank notes, but it was specifically prohibited from creating a monopoly for the issue of such notes. This left the numerous banks chartered by the cantons actually in control of the field. In 1880, advocates of a national bank endeavoured to amend the constitution by initiative, but were unsuccessful. Eleven years later the movement succeeded. In its present

form article 39 of the constitution confers the right to issue bank notes and other similar paper money exclusively upon the Federation.

A national bank with headquarters in Berne and Zürich was opened in 1907. "As the agent of the government in its difficult tasks of war finance, particularly in floating the mobilisation loans, the new national bank has proved itself one of the strongest foundation-stones of the whole federal structure." (Brook, *op. cit.*, *p.* 194.)

Under article 38, the Federation alone has the right to coin money.

> "In Switzerland the original division of taxing powers in the constitution of 1848 allotted customs duties to the Central government [that is, the Federal Government] and practically no other taxing power. The remaining powers of indirect taxation and the whole power of direct taxation seem to have been left to the cantons. This distribution came to be modified when Switzerland felt the effect of an event which probably affected federal public finance more than any other single factor—the First World War. Switzerland was not a belligerent but she felt the effects of the war none the less. Her army was completely or partially mobilised for over fifty months; her customs revenue fell sharply with the decline of international trade; and the revenue from the federal railways declined. To meet these increases in expenditure and decreases in revenue constitutional amendments were passed to authorise the Federal Government to enter the field of direct taxation. Taxation of incomes, property and profits was imposed by amendments of 1915 and 1919 and a tax on securities, insurance premiums and the like, by an amendment of 1917. In all the three cases, as I have mentioned earlier, an arrangement was made that the cantons should obtain some share in the proceeds of the tax. In 1925 a tax on tobacco was authorised by constitutional amendment. In 1938, largely to meet increased defence expenditure, an amendment of the constitution authorised taxes on war profits, income and capital, a tax on beer, and repealed the arrangement of 1917 by which the cantons shared in the yield of the stamp taxes." (K. C. Wheare, *Federal Government*, *p.* 108.)

AUSTRIA-HUNGARY

(Between 1867 and World War I)

As already mentioned, during this period Austria and Hungary were separate States with a common monarch and a common administration in respect of foreign affairs, defence and finance. Except for a few insignificant matters, such as the lease of State property, the sale of old material and the profits of the powder monopoly, the only direct source of revenue belonging to the joint government was the customs tariff, which rested upon a treaty made between the two countries for ten years at a time in the form of identical Acts of the two Parliaments. Side by side with the budget of each State, there was a common budget which comprised the expenditure necessary for the common affairs. The revenues of the joint budget consisted mainly of the net proceeds of the customs and the quota or the proportional contributions of the two States. This quota was fixed for a period of ten years and generally coincided with the duration of the customs treaty. Until 1897, Austria contributed 70 per cent and Hungary 30 per cent of the joint expenditure remaining after deduction of the yield from customs and other common revenues. Subsequently, Hungary's quota was slightly increased and in 1907, it was a little over 36 per cent.

SIR BASIL BLACKETT'S VERDICT ON PROVINCIAL CONTRIBUTIONS IN INDIA UNDER THE MESTON AWARD

"Ever since the reforms were inaugurated, the provincial contributions have been a millstone round the neck both of the Central Government and of the provincial governments, poisoning their mutual relations and hampering their every action. Their quality, even more than their amount, has strained the resources of the giver and the patience of the recipient. They have brought curses, not blessings, both to him who has given and to him who has taken." [Budget Statement (1927-8)]