REVIEWS AND NOTICES

Police Manual of Arrests and Searches. By LEONARD J. HOBBS. Toronto: The Carswell Company Limited. 1946. Pp. ix, 118. ($1.50)

This is a modest but very useful short treatise on the "constable's" powers of search and arrest, as well as a description of the historical origins of his duties and authority. It is designed to help the average police officer better to understand the nature of his job, as that job impinges on certain of those crucial problems of "order" and personal inviolability in a free society.

Mr. Hobbs, a member of the Saskatchewan bar, has therefore a good deal to say in summary form that is of concern to those associated with and interested in the administration of justice. It is, for example, proper to be reminded that the police officer is not a municipal agent running errands for the corporate fathers of his town. Rather is he ". . . . a servant of the Crown, and consequently his powers, whether conferred by common or statute law, are exercised by him by virtue of his office as 'constable' and cannot be exercised on the responsibility of any person but himself, his liability being determined according to the original principle of the individual responsibility of the citizen". So the cop on the corner and John Doe are under the same umbrella of history and authority, and when each essays to move about in a stormy social moment the leaks in their authority expose the constable no less than the citizen to the effects of an unauthorized or unlawful move—a tort or a crime or both as the case may be.

Thus the Anglo-American tradition of severely inhibited powers of arrest and search continues as a working rule in the daily administration of the criminal law. There are, as always of course, frequent breaches of the "rules"—so fully annotated by the judges of many generations. And the hard facts of a fast-moving, automobilized urban society have altered the conditions under which many of these restraining concepts were formulated. So that "arrest without a warrant" is a problem that becomes more complicated and the standards more flexible as the varieties of detection and escape multiply with the flowering mechanics of our time. More restrained, however, have the courts been where "search" is concerned. A man's home may not be his castle, as once ran the saw, but the rights of "privacy" still hold a high place on the list of democratic privileges. The courts and the statutes still say that a "search" must be based upon a warrant or other lawful authority save for unusual cases (*e.g.* section 17(1) of the Opium and Narcotics Drug Act, R.S.C., 1927, c. 144). There are nice questions to be answered about the proper limits to search on a warrant, the exactness of the required description, the degree of information necessary to satisfy the issuing magistrate; and the cases are many where these matters have received close attention. Mr. Hobbs covers the points with admirable conciseness.

Almost any lawyer interested in the problem of criminal administration and personal freedom has difficulty sometimes in knowing just how far the law permits a certain line of police conduct; *a fortiori*, the poor "arm of the law" must be doubly troubled by unclear lines in the penumbral areas. The policeman on the beat is "law in action", and his is the tricky task of translating precepts into conduct at the wink of a light. Not many lawyers

would care to make such literally "curbstone" decisions, and yet the constable may have to do it every day. He can therefore be forgiven if his batting average isn't always .1000. But the really significant social result of this ambiguity in authority is to inhibit executive conduct—the policeman—by the very juridical uncertainty under which often it operates.

It is too much to hope, however, that even in a democratic society the policeman will be everybody's friend, but as yet very few in this part of the world begin to shake at night when there is a knock on the door. Serious students of our legal system—and Mr. Hobbs would want to be included—are not likely to approve, therefore, of any suspension of these principles except under the most urgent of national threats. For while ancient standards can quickly be soiled with the stains of an easy governmental expediency, it is probably impossible to restore their pristine position once executive power has become accustomed to by-passing their inhibitions. Mr. Hobbs' small but effective study will help to instruct policemen, as well as laymen and lawyers, that these are standards that took a long time to develop and that they represent the wisdom of the governance of many centuries.

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Chalmers and Hood Phillips' Constitutional Laws of Great Britain, The British Empire and Commonwealth. Sixth edition by O. HOOD PHILLIPS. London: Sweet & Maxwell Ltd. 1946. Pages xxxii, 710. (£1 10s. net)

This is the 6th edition of a work modestly described by the editor of the 5th (appearing in 1936) as a manual which "has never claimed any virtue beyond practical utility". That the volume attains this excellent level few students would deny. The new edition will fully maintain the previous standard.

It is interesting to see where the principal revisions have been found necessary. These reflect the sections of constitutional law that are vital and growing. Part III of the former edition dealing with the Executive has been greatly expanded. The growing influence both of the concept and content of Administrative Law is plainly evident. The former edition contained, in the text, but 10 pages devoted to "Proceedings by and against the Crown", while tucked away in the Appendix were sections on "Remedies against the Crown" and "Encroachments of the Executive on the Judiciary". In the current edition the whole material is gathered under the more expressive headings of "Legal Liability of Public Authorities" and "Remedies against Public Authorities". The attempt to force the law relating to modern state agencies into the ancient concept of the Crown as chief executive authority leads only to confusion. The Crown is merely one of many public authorities.

Another improvement in this edition results from the enlargement to the section on the British Empire and Commonwealth. Mr. Hood Phillips, the present editor, has devoted considerable space to an analysis of the present position of the Dominions as well as to a description of their individual constitutions. His statement that they probably "could not

lawfully secede from the Commonwealth by *unilateral action*",[1] though convention might make opposition to secession improper, would probably not receive South African or Irish support. He admits however that it is now settled that "a Dominion has the *right* to remain neutral in a war in which His Majesty is engaged".[2] He supports the orthodox view that the mutual relations between members of the Commonwealth are not governed by International Law,[3] a position reinforced for Canada by our government's continuation of the reservation of inter-Imperial disputes at the time of our joining the new International Court of Justice. This lingering attempt to keep the nation states of the Commonwealth in a specially favoured position in the international community is not supported by any argument other than the statement in the 1926 Imperial Conference Report that, since treaties were made in the name of the King, it would be superfluous to stipulate that they should not regulate *inter se* the rights and obligations of the member territories on whose behalf they are signed. Yet the concept of the British Empire treaty to which this notion was attached has already gone by the board. It may be suggested that the *inter se* doctrine is equally due for abandonment.

In the Addenda is included a statement regarding Eire's present relations with the Commonwealth, which is perhaps worth calling to the attention of Canadian readers. Mr. Phillips says:

> "Mr. De Valera stated in the Dail on 17th July, 1945, that Eire was, and has been since 1937, an independent republic associated as a matter of its external policy with the States of the British Commonwealth. More recently, Mr. de Valera stated at a party meeting that, although Eire did not accept allegiance to the British Crown, she would, as a mark of her association with the British Commonwealth, continue the practice of obtaining the King's signature on letters of credence to foreign diplomatic representatives coming to Eire and of representatives of Eire going abroad."

A full discussion of the finer points of constitutional law is not to be looked for in a general text-book. Within the limits imposed by its nature, this volume provides a most useful statement of the outlines of British constitutional law.

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The Law of Income Tax. By E. M. KONSTAM. London: Stevens & Sons, Limited. Tenth Edition. 1946. Pp. lxviii, 851. (£3 10s. net)

This is one of three outstanding text books on Income Tax Law published in the British Empire.

The editor, Mr. E. M. Konstam, K.C., was a member of the Codification Committee headed by the Right Honourable Lord Macmillan, P.C.

The first edition was published on the 19th of March, 1921, and the usefulness of the work is indicated by the fact that this is the tenth edition.

[1] Page 576: italics in the text.
[2] Page 582.
[3] Page 583.

In the preface to the first edition, the editor frankly states:

> "the obscurity of the Income Tax Acts has become a by-word. . . The law of income tax affords a perhaps unique instance of a body of law which purports to be contained in Statutes but which in fact rests upon principles that are to be found only in the judgments of the Courts and of the House of Lords, while the statutory directions are often mere illustrations of those principles."

It is difficult, if not impossible, to set out in chronological order legal principles applicable to income tax. Consequently, the editor takes each topic, states the law applicable thereto and lists the cases on which his conclusions are based.

This work should be of much use to the Canadian practitioner because the Canadian act follows the same plan and frequently uses the same language as the English statute. But a word of caution is necessary. The draftsman of the Canadian act has frequently modified or changed the language and these changes sometimes produce surprising results: profits which are taxable under the English Act may be non-taxable in Canada, and profits which are free in England may be taxable here. Consequently, when considering any English case referred to by the editor, it is necessary to examine the language of the relevant statute and compare it with the section in force here.

This work should be a valuable acquisition to any library.

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Studies in Polish and Comparative Law: A Symposium of Twelve Articles. With a foreword by Professor H. C. GUTTERIDGE, K.C., LL.D. London: Stevens & Sons, Limited. 1945. Pp. viii, 274.

Several Polish lawyers (professors of Polish universities and members of the Polish bar), while in Great Britain during the last war and associated in The Polish Lawyers' Association in the United Kingdom, hit on the scheme of presenting to English-speaking lawyers the more salient features and problems of interest in Polish law. Technical difficulties caused by the war prevented them from the full execution of their original plan and they had therefore to limit themselves to a review of the law of their native land on a lesser scale. Their presence in the United Kingdom, with access to all libraries and constant liaison with English lawyers, greatly assisted the authors no doubt in interpreting their own system of law to the lawyers from other lands.

In Poland, as in other countries, civil law and penal law occupied paramount positions in the legal life of the State, organized on western ideas after it was legally revived by the Treaty of Versailles. Poland had been subjugated for over 150 years by three neighbouring powers who imposed their own systems of law in incorporated territories.

These two features of the legal life of Poland are presented to the reader by Professor Glaser and Dr. Nagorski, a member of the Polish Bar. In his essay "Some Remarks on the Polish Criminal Code" Professor Glaser emphasizes "the principle of subjectivity" as the main feature of the Polish

Code. "Punishment is considered as correlative with fault, and never in relation to the harm done by the offender." The principle of subjectivity is expressed above all in the definition of "fault" (guilt), which is either "intentional" or "unintentional".

This division of fault is important in the system of the Polish Penal Code, which deals only with the more important offences called "crimes" and "felonies".

Crimes, which can be committed only with "intentional" fault, are offences for which the penalties are death or imprisonment for over five years. Felonies, which can be committed either with "intentional" or "unintentional" fault, are offences for which the principal penalties are imprisonment for not more than 5 years, detention for more than 3 months or a fine of more than 3,000 zlotys (about $600). Minor offences are codified separately but governed by the same principles as the Penal Code.

The offender will be convicted of "intentional fault" not only when he intended to commit a particular offence (*dolus directus*), but also if he foresaw the possibility of criminal consequences from his conduct and assented thereto (*dolus eventualis*). The Polish Code puts the direct intention and the so-called resultant or eventual intention in the same category of fault. The "unintentional fault" may appear in two forms: either as an "inconsideration or thoughtlessness" (when the offender foresaw the possibility of criminal consequences from his conduct and considered unreasonably that he could avoid them), or as an "inadvertence" (when he did not foresee the criminal consequences of his conduct, although he could or should have foreseen them).

Another feature of the Polish Penal Code is the principle of "individuality", which finds application in the rules governing "imposition of penalty" and especially in the provisions concerning "aiding and abetting". The instigator and the abettor "are responsible within the limits of their intent independent of the responsibility of the person who committed or meant to commit the offence". In this respect the Polish Code has departed from the traditional conception of "participation in crime" (complicity).

While the penal law of Poland was codified in a comparatively short time (1932), the codification of the civil law, which in Polish jurisprudence comprises all branches of private law (law relating to persons and personal relations, marriage and divorce; contracts and torts; property, possession and mortgages; and wills and inheritance) went through several stages, interrupted by the outbreak of the Second World War. After the rebirth of Poland in 1918, the country was divided into four different legal areas: Western Poland under the German Civil Code; Southern Poland under the Austrian Civil Code of 1811; Central Poland under the Code Napoléon; and Eastern Poland under the Russian Code of Law. The Polish legislator, confronted with this problem, removed first the most striking differences existing between the provinces. The idea was then advanced to extend one of the provincial codes to cover all Polish territory. The Code Napoléon was particularly recommended for this purpose since, above all, it had not been imposed on Poland, it contained some purely Polish amendments and would be most adaptable to the needs of the Polish people. The Russian law was excluded for its principle of class and religious distinction, the privileges it extended to the orthodox church and generally

because it presented neither a complete nor a modern system of private law. Finally it was decided that the reborn Poland should create her own new and modern civil law.

The Polish code of obligations, which came into operation on July 1st, 1934, is described by Dr. Nagorski as "an original Polish achievement". In its Article I, the Code defines obligations as arising "from manifestations of the will or from acts and other facts which the law considers as the source of obligations". Article 107, "Manifestation of the will should be interpreted in the light of surrounding circumstances and in accordance with the principle of good faith and fair dealing", is one of the rules designed to assist the judge in interpreting manifestation of the will.

Detailed aspects of modern Polish law are discussed by Dr. Alexandrowicz in "Marriage Law in Poland" and by Dr. Bloch, a member of the bar, in his essay on "Labour Legislation and Social Insurance in Poland".

Although the world has heard the verdict of the International Military Tribunal at Nuremberg, it is interesting to read the opinions of Dr. Szurlej on war crimes with special reference to Germany. This practical lawyer adheres completely to the principle *nullum crimen, nulla poena sine lege*, but to him the maxim *nullum crimen sine poena* is even more important; crimes cannot be left unpunished. He does not believe, however, in a simplified judicial procedure taking the form of an international tribunal not operating on the principle *nullum crimen sine lege*.

In other essays, "The Spirit of Polish Constitutional Law and its Recent Development", "The Revision of Treaties and the Interests of Peace", "The Status of Consuls in International Law", "A General Outline of Some Principles of Conflict of Laws in Poland", "Andrew Wolan: Sixteenth Century Polish Calvinist Writer and Philosopher of Law," "The Principles of Polish Budget Law" and "Certain Aspects of Modern Corporations", the authors give the reader an insight into Polish legislation.

One may echo Professor Gutteridge's statement in his foreword that "the appearance of this valuable collection of monographs by distinguished Polish lawyers will be welcomed by all who are interested in the international aspects of legal study". They present a review of the law of their native land as it was formed, with the outstanding assistance of some of the authors, between 1918 and the outbreak of the Second World War.

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THE END OF LAW

One of the achievements of Professor Pound is to have challenged this dogma of the finality of the common law as the beginning of wisdom and the eternal jural order. Law is a means, not an end. The end is a just life between living human beings here and now. As social conditions change, the law must keep pace. (Morris R. Cohen: Law and the Social Order. New York: Harcourt, Brace and Company)