

into the unlovely undercurrents which run below the noble surfaces of even the great and 'good. But conversion is open to us all, and perhaps this book will [prove to be a primer in introspection which may find a way even into the tents of righteousness.

LEARNED HAND.

THE SPIRIT OF THE COMMON LAW. By Roscoe Pound. Boston: Marshall Jones Co. 1921. pp. xiv, 224.

This volume contains the brilliant lectures delivered by Dean Pound in the summer of 1921 as one of the lecturers of the Dartmouth Alumni Lectureships on the Guernsey Center Moore Foundation. Starting with the premise that "if not actually upon trial in the United States, the common law is certainly under indictment," Dean Pound says that it behooves the lawyer "to examine the body of legal tradition on which he relies, to ascertain the elements of which it is made up, to learn its spirit, and to perceive how it has come to be what it is, to the end that we may know how far we may make use of it in the stage of legal development upon which the world has now entered." For such a survey certainly no one could be found better qualified by scholarship, training and experience than Dean Pound.

An examination of our legal tradition discloses two outstanding characteristics, — on the one hand, an extreme individualism; on the other, a tendency to impose duties and liabilities upon men as members of groups or classes, independently of their individual will. Seven factors, the lecturer says, have primarily contributed to these characteristics. They are the Germanic origin of our legal institutions, the feudal law, Puritanism, the contests between the courts and the crown in the seventeenth century, the political ideas of the eighteenth century, the frontier conditions under which American law was developed between the Revolution and the Civil War, and the philosophical ideas with respect to justice, law, and the state that prevailed during this formative period. Six of these have made for individualism. One of them, the feudal law, has given to our legal system a fundamental mode of thought which has always tempered individualism and has supplied the other characteristic of our legal tradition. These seven factors are discussed in the first six lectures. The two remaining lectures are entitled "Judicial Empiricism" and "Legal Reason." They deal respectively with the technique of legal growth and the theory of the end of law which obtains in the new stage of legal development upon which we seem now to be entering.

The method of the lecturer is that of brilliant generalization and of stimulating suggestions of parallelism drawn from legal history. Illustration can better show the method than attempted definition. "Judicial activity must be directed consciously or unconsciously to some end," he says (p. 194). "In the beginnings of law this end was simply a peaceable ordering. In Roman law and in the Middle Ages it was the maintenance of the social *status quo*. From the seventeenth century until our own day it has been the promotion of a maximum of individual self-assertion. Assuming some one of these as the end of the legal ordering of society, the jurist works out an elaborate critique on the basis thereof, the legislator provides new premises for judicial decision more or less expressing the principles of this critique, and the judge applies it in his choice of analogies when called upon to deal with questions of first impression and uses it to measure existing rules or doctrines in passing upon variant states of fact and thus to shape these rules and doctrines by extending or limiting them in different directions. The basis of all these operations is some theory as to what law is for." Or again (p. 69): "In these contests between courts and crown prior to the Stuarts, the courts had been guarding social interests by preventing perversion to quite different uses of powers which

could be used rightfully only to further public or social interests. In the nineteenth century we find common-law courts going much beyond this and thinking themselves bound to put limits in the interest of the individual to social control for the social interest. This change in the spirit of the common law resulted from the political phase of the contests between courts and crown under the Tudors and Stuarts and from the political and juristic theories of the eighteenth century."

The end of law as seen by those who believe that we have entered upon a new stage of legal development is socialization. An infusion of social ideas into the traditional element of law is needed and is taking place before our eyes. Consideration of the public weal as well as of the interests of the individuals before the court has always played some part in our judicial decisions, but undoubtedly a change of emphasis, or at least a more conscious recognition of the importance of this consideration, has occurred within the last few years. That law must change to keep abreast of changing social and economic conditions is admitted by all. Sometimes the change has been subconscious, sometimes cloaked in fictions. The greatest merit of Dean Pound's volume is to prove that "it may grow consciously, deliberately and avowedly through juristic science and legislation tested by judicial empiricism."

Dean Pound has himself been one of the foremost prophets of social utilitarianism in the field of law. In these lectures he has tested each of the factors which has entered into our legal tradition, with reference to its utility to promote socialization of the law. It is with a sense of satisfaction and of optimism that one reads his conclusion that the spirit of the common law is not hostile to the spirit of twentieth-century jurisprudence.

The only criticism of the volume that the present reviewer is disposed to express is the regret that the published edition of the lectures has not been annotated by footnotes. It betrays a wealth of learning which makes the ordinary reader covetous of possessing a bibliography of the materials from which the author has drawn his information.

THOMAS W. SWAN.

#### INSANITY AND MENTAL DEFICIENCY IN RELATION TO LEGAL RESPONSIBILITY.

By William G. H. Cook. New York: E. P. Dutton & Co. 1921. pp. xxiv, 192.

This is a very clear and concise statement of the problem presented by the divergent views of the law and of medicine upon insanity and mental deficiency. In spite of the very great interest that is being manifested in the relation of mental science to the problems of human behavior in general and especially to criminal acts, there is still a great deal of confusion in regard to the interpretation of such acts and of the laws relating to them. In writing books that touch upon this subject the temptation is to attempt rather more than our present knowledge justifies. It is particularly satisfactory to note that the author of this book has throughout maintained a very sound restraint and has presented a very complex subject with a directness and a simplicity which have in no way diminished the thoroughness of this study.

Sir John Macdonell in the foreword says "It is still true, as Brett, L. J., remarked in 1879, that the law relating to civil responsibility of lunatics stands upon a very unsatisfactory footing." Nothing is so likely to disclose the differences in method between the law and medicine as a discussion of responsibility. It is perhaps unfortunate that this discussion has been raised most frequently and most prominently in connection with criminals. Dr. Cook points out some of the reasons for this difference of opinion and supports his statement with a discussion of over two hundred cases.