The Formative Era of American Law by Roscoe Pound

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The Formative Era of American Law consists of four lectures delivered by Dean Pound at Tulane University on the occasion of the centennial of the death of Edward Livingston. The development of juristic theory is traced from the time of Livingston, who was a leader of the codification movement of his day. Dean Pound covered the formative period of American legal history in four lectures: I—Natural Law; II—Legislation; III—Judicial Decision; and IV—Doctrinal Writings. This formative period covers, roughly, the first three quarters of the nineteenth century.

Natural Law—The common law of the colonists was that of the age of Coke and not the law of Lord Mansfield. The reshaping of the English common law for American use was well under way at the time of the Revolution. A distrust of English law arose after the Revolution. As Dean Pound points out, natural law, traceable to Greek philosophers and Roman lawyers, and grounded on reason and legal ideals, became the basis for the law of the formative period. “Livingston understood the nature and function of the theory of natural law very much better than Bentham.”

Legislation—Early legislatures assumed the power to reverse court judgments in particular cases. Their best work was done in criminal law and penal administration. Before the adoption of the Fourteenth Amendment, however, courts held invalid statutes if arbitrary and unreasonable. They applied the rationalism of natural law. As Dean Pound observed: “At any rate, as far as the law governing the everyday relations of man and man is concerned, our process of legislative lawmaking will not suffice.”

Judicial Decision—It is pointed out that “the common law technique of finding the grounds of decisions in reported judicial experience became the decisive agency of lawmaking in our formative era.”

Dean Pound gives the five patterns that affected American judicial decisions during the last century. “They are: (1) The law-of-nature theory in different stages of decay; (2) the analytical or imperative theory; (3) the historical theory or theory of deductions from rights as corollaries of liberty; and (5) a positive theory in various forms.”

Doctrinal Writings—This lecture covers the contributions of text writers. Among the most influential of these writers were Kent, Gould,
Story, Wheaton, Greenleaf, Wharton, Sedgwick, Racole, Bishop, Parsons, and Washburn. Their works helped to create the basic law in all but one of the states of the Union. Louisiana followed the civil law.

These doctrinal writings averted the danger of premature codification during the legislative reform movement. They preserved the unity in our law.

These four lectures are a real contribution to American legal history. They embody the results of much research and study in a field that has not yet received the attention of scholars that it should. Citations and references have been added. Dean Pound in his preface suggests that it would take a number of volumes to cover adequately the history of the formative era of American law but that as yet not sufficient preliminary work has been done. It is hoped that this is an implied promise that we may some day have such a work from his hand.

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Dean Robert C. Storey's foreword to this treatise clearly sets out the need for a work of this nature. The book is designed to give the graduates of our law schools a practical knowledge of court procedure by the time they enter law practice. It is planned for use in their practice court courses in the law schools. The work is well adapted for such courses as well as for use in seminar work.

This treatise is of real value to a trial lawyer since it is full of worthwhile suggestions, both pro and con, on any point that can arise regarding the preparation and trial of a cause of action from the time the client first enters the lawyer's office for advice until the case has reached the appellate court. Use is made of nearly a hundred hypothetical cases with thorough discussions of all points involved therein. The author has crowded into the 438 pages a surprising amount of material, raising questions that the practitioner is faced with and stating the possible results of his decisions whatever course he follows. The citation of a few of his section headings will serve to illustrate: "By what means may you emphasize important parts of a lengthy document?"; "How should you introduce secondary evidence?"; "What methods should you use in cross-examining a witness whose testimony is greatly influenced by his bias?"; and "What should you do when you know that an objection would be overruled by the court?"