



1922

Common Sense vs. Common Law

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Recommended Citation

Roberts, W. Lewis (1922) "Common Sense vs. Common Law," *Kentucky Law Journal*: Vol. 10 : Iss. 3 , Article 2.
Available at: <https://uknowledge.uky.edu/klj/vol10/iss3/2>

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Kentucky Law Journal

Vol. X.

MARCH, 1922

No. 3.

COMMON SENSE VS. COMMON LAW

Volume fifty-seven of the New Hampshire Law Reports contains an interesting charge to a jury delivered shortly after the American Revolution. During the greater part of the last century, it was the practice in New Hampshire, as well as in many states, to print the briefs of the attorneys in a case. This custom enabled one Highlands, an attorney in the case of King vs. Hopkins, to preserve this old charge, which he had found somewhere, by incorporating it in his brief.

An interesting story is told of Highlands who was often pitted in the trial of cases against the late Cyrus A. Sulloway, for many years Congressman from New Hampshire and noted principally for fostering pension bills and drinking good old Kentucky whiskey. Highlands always dressed in the height of fashion. Sulloway sought favor by appearing in shabby clothes. Sulloway attempted to prejudice the jury against Highlands by referring to him as the fashion plate of the county bar. Highland's retort was that he did not know he was any more to blame for being the fashion plate of the Hillsboro County bar than his brother Sulloway was for being the scarecrow of the Hillsboro County bar.

In the early history of New Hampshire the court consisted of three judges, one a lawyer and two men known for their integrity and common sense. Judge Dudley, one of the latter, lived at Raymond, New Hampshire and died in the year 1801.

The conclusion of his charge in the case was as follows:

“Gentlemen of the jury, you will not pay much attention to what the lawyers, the rascals, have said in this case. But I will not abuse them. They are paid to work for their clients and in this case they have done well enough. But, gentlemen, we have something else to consider. The common sense of Raymond, Exeter, and other towns, have sent you and me here to try a case between our neighbors. A clear head and an honest heart are worth more than all the law of the lawyers. They want to govern us by the common law of England. Trust me, gentlemen, common sense is a much safer guide for us. It is our duty to do justice between the parties not by any quirk of the law out of Coke and Blackstone, books I never read and never will read; but by common sense and common honesty between man and man. That is our duty and the curse of God is upon us if we evade or turn from it.

“There was a pretty good thing said at the bar. It was from an English player, I believe. No matter, it is almost good enough to be the Bible. It was, ‘Be just and fear not.’ That is law enough in this case and law enough in any case. Be just and fear not.

“Now, Mr. Sheriff, take out the jury and you, Mr. Foreman, do not keep us waiting with any idle talk, of which we have had too much already, about matters that have nothing to do with the case. Give us an honest verdict as plain, common-sense men, you need not be ashamed.”

It is interesting to contrast with this early view of the American lawyer, that presented over a hundred years later by one of the foremost statesman of our time, Elihu Root. The following is taken from his address to the American Bar Association at Salt Lake City, Utah, October 20, 1914:

“Criticisms regarding the conduct of litigation having such an origin probably cover the greater part of the field of complaint. They do not, however, sink very deep in the public mind. There is a strain of practical good sense in the American layman which leads him to discount very heavily the expressions of litigants who have not had their own way, and there is abundant evidence that, under all the noisy fault-finding, the American people do respect and trust the American Bar. They may well do so, for the Bar is worthy of their

respect and confidence. We may challenge all records, past and contemporaneous, to show in the preservation of order, the security of property, the protection of individual liberty, and the maintenance of the fundamental ideas of a system of jurisprudence, a degree of general efficiency higher than that we have attained in the United States through the service of the American Bench and the American Bar. Their standards of probity and honor are high. The occasional derelictions, which are inevitable among imperfect men, always come as a surprise and shock to the community in which they occur. The independence and courage of the American lawyer befit the man who passes his life, not in suing for favors but in asserting and maintaining rights. He does not cringe before power. He does not fear the face of man. He knows no superior. The fearless frankness of his utterances in behalf of his client are so much a matter of course among our fortunate people that they pass without notice; but if we study the annals of those countries in which the Bench and Bar tremble under fear of political power we shall begin to realize how much America owes to the independence and courage of her Bar. Above all else the American lawyer has loyalty—loyalty to his client's cause. That cause is his, and to it his learning, experience, industry and skill are devoted ungrudgingly. Some of our chief faults are but the defects of this noble and attractive virtue.

“If we go behind the surface of fault finding, and study the conduct of our people we find a real attitude of respect and confidence. For every detractor, we find a thousand men and women who trust their lawyers implicitly in their most intimate and vital affairs with the frankness and confidence of personal friendship, and who are justified in their trust. Above the men of all other callings it is to the lawyers that the American people turn with the burdens and the responsibilities of political office. It is the members of the Bar who chiefly are trusted to carry on the most important business the people have—their free, self-government.”

W. LEWIS ROBERTS.