THE "UNWRITTEN LAW"

ADDRESS OF E. W. TIMBERLAKE

Full Text of the Able, Entertaining and Instructive Paper Read Before the Recent Meeting of the North Carolina Bar Association at Hendersonville by Popular Wake Forest Member—An Exhaustive, Clever Discussion and Presentation of a "Live, Up-To-Date Topic" —A Delicate Subject Treated Delicately, but in a Masterly Manner.

At the request of a number who heard it, The Observer is reproducing this morning the full text of the splendid address delivered at the recent meeting of the State Bar Association at Hendersonville by Mr. E. W. Timberlake, Jr., of Wake Forest, whose subject was "The Unwritten Law."

The subject of the paper which I have the honor to read on this occasion was suggested by the notification that I should be expected to write on some "live, up-to-date" topic. While being permitted thus by its terms to select from the entire field of recently adjudicated matters, it may be presumed that this notification carried with it the implied limitation that a subject be chosen which is not necessarily dry. To this limitation I have tried to conform. Doubtless there are few here present, however, who will fail to recall the story of an ancient people who were set by their taskmasters to make brick in a place where there was no straw, so that they were forced to go in the fields and gather stubble. If I have likewise been "driven to glean in the stubble-fields of the law," as once said a distinguished Virginia jurist, my excuse is that it is not my own fault. And if there be one among my brethren of the bar so unsympathetic as to sentence me to a term for having constructed a dry article out of "material which affords no other essential element," I should feel myself sufficiently revenged if Pharaoh's order be enforced against him, and he be deprived of his straw, when at noon to-day he will need it for an article that has never been looked upon as otherwise than wet.

Of all matters which are of interest and importance to the profession at the present time, there is none which I could approach with so much hesitation as that of the so-called "unwritten law," for there is probably none other which is so difficult to treat of with clearness and impartiality, at the same time avoiding anything that partakes of the scandalous and offensive.

With the full realization, therefore, that a delicate subject must needs require delicate treatment, it has seemed proper to approach it from two or three different points of view—the first of which is the historical. It is a fact that there have been periods in history in which the right of the individual to take the law into his own hands and inflict punishment for a wrong done, has been recognized. Probably the most noteworthy instance of this right was the satisfaction given for the blood of a murdered kinsman. This custom, known as blood revenge, has at times been almost world-wide in its operation, and was especially characteristic of society in the earlier stages of its development. It is recorded in Holy Writ—Ex. 21:23—"If any mischief follow, then thou shalt give life for life, eye for eye, and tooth for tooth;" and again in Numbers, 35:19, it is declared that the "revenger of blood shall slay the murderer; when he meeteth him he shall slay him." We find in the Koran, page 230, that "whosoever shall be slain unjustly, we have given to his heir power to demand satisfaction." Such also, was the Arab custom, while the right to avenge blood has been practised among the Semitic peoples from prehistoric times.

HISTORICAL VIEWPOINT.

While it is true historically that the cases in which the technical right of blood revenge has been exercised, have been nearly or all of them cases of homicide, and while we do not anywhere find authority for the practice where the sanctity of the home has been invaded, yet the theory is not unlike the modern conception of the right claimed under the "unwritten law" in its present technical sense. Indeed, it might be said that the "unwritten law" is blood revenge limited to satisfaction for the encroachment upon family purity.

The second point which it seems proper to notice, is that the "unwritten law" as it is technically understood, disregarding the matter of its justification, has an existence in fact, although its existence is to be found rather in public sentiment than in any definite recognition by the courts. There are two general classes of cases in which one may be exempted from punishment for homicide—self-protection, which is a natural right, and the defense of his household against the intrusions of the felon. This sentiment in favor of adding a third class, namely, exemption in those cases in which one kills in defense of the family relation, is the natural result of the high supervision which every enlightened community feels itself bound to exercise over the chastity of the family and the sanctity of the home. The matron's honor and the virgin's purity are, and of right ought to be, the peculiar objects of watchcare of every civilized community, for upon their protection rests the preservation of society. Says Milton, "Who knows not that chastity and purity of living can not be established or continued, except it be first established in private families, from whence the whole breed of men come forth?" The higher the degree of civilization to which a State has attained, and the higher the position which women have been assigned in the community, just in such proportion has this sentiment, as expressed in the "unwritten law," increased and developed.

In the early ages when men were yet barbarians and their habits of life nomadic, when war and the chase were their chief occupations and the standard of excellence measured by their qualifications for these pursuits, it is not unnatural that women should have occupied an inferior and degraded position. The result was a certain laxity in the social relation. But even in this early age might be found the rudiments of a moral sentiment destined to grow and develop as civilization advanced. Marriage existed as an institution, and the value of chastity was recognized in the feeling against violations of the marital obligation. The first distinct step was taken towards the elevation of women in the abandonment of the custom of purchasing wives and in the repudiation of the practice of polygamy. Monogamy prevailed at an early age in Greece, while "the whole history of the siege of Troy," says Mr. Lecky in his history of European morals, "was a history of the catastrophes that followed a violation of the nuptial tie."

WHENCE COMES SENTIMENT?

But the inquiry may naturally be suggested, I think, whence comes the present intensified sentiment as manifested in the "unwritten law?" The answer must of necessity be hazed in uncertainty. It is clear that it is not of sudden nativity. It is rather a growth, born of instinct. But a suggestion may possibly be worthy of consideration. May not the present intensified sentiment be a survival of the ideas that were so strongly characteristic of the age of chivalry? Or at least may not chivalry have had a pronounced influence in shaping and developing it? This social arrangement seems first to have assumed the defined character of an institution during the eleventh century, and appears to have had its origin among the German tribes, whose moral purity, Tacitus tells us, has never been surpassed by any race of people. Is not this very fact suggestive? With the introduction of feudality into England, chivalry reached its full proportions, and has been regarded by some writers as "The complement of that institution." Feudality exhibited the political, chivalry the moral and social side of medieval life.

The most characteristic feature of the institution, however, and that one with which our inquiry is chiefly concerned, was the devotion to the female sex. Says Sir Walter Scott in his Essay on Chivalry, "Amid the various duties of knighthood, that of protecting the female sex, respecting their persons and redressing their wrongs, became the champion of their cause and the chastiser of those by whom they were injured, was represented as one of the principal objects of the institution. Their oath bound the new-made knight to defend the cause of all women without exception; and the most pressing way of conjuring them to grant a boon was to implore it in the name of God and the ladies."

Of late years, however, our fair sisters have seemed disposed to doubt our ability to conduct their quarrels after the fashion of a true knight, and have demanded a place by our side in the tournaments of the forum. To our field of ennobling strife we bid them welcome, and hereafter, in the language of a not unappreciative member of the fraternity, "When we speak of our honored profession we must be understood to embrace our sisters-in-law."

A DUTY TO SOCIETY.

It is obvious that an institution in which extravagance and exaggerated ideas were such a pronounced feature could not endure, and it can not be said that it is desirable that it should have done so in all its intensity. At the same time, the habits derived from the age of Chivalry have produced a significant effect upon our manners, and have helped to establish a public sentiment, which upon the whole has been for the improvement of society. As has been said by an eminent writer "Every man enters the world under the impression that neither his strength, his wealth, his station, nor his wit, will excuse him from answering at the risk of his life, any unbecoming encroachment on the civility due to the weakest, the poorest, the least important, or the most modest member of the society in which he mingles. All, too, in the rank of gentlemen are forcibly called upon to remember that they must resent the imputation of a voluntary falsehood as the most gross injury; and that the rights of the weaker sex demand protection from every one who would have a good character in society."

Need we go further to find an explanation of that sentiment that demands protection for the weaker sex? I do not undertake to pronounce Chivalry its birth-place, but offer the suggestion for what it is worth. That the sentiment back of the "unwritten law" exists, more strongly, perhaps, in some localities than in others, is undeniably true; whether for good or for evil I do not assume the responsibility of judging. As government grows strong, the individual grows correspondingly weak, and each member of society surrenders to central authority many of his natural rights in return for its protection. All governmental powers are delegated powers. All powers being originally in those who formed government, they delegate whatever powers they desire to be exercised by their servants, and these, acting under this delegated authority, become the officers of the law. Thus the power to grant redress for civil injuries and to punish for crime generally, has been yielded by the individual to government. But the right to protect the weaker sex, the right to guard the sanctity of the home, and to punish him who dares invade it, is one which the individual has not been willing to surrender. He feels that the injury is peculiarly mischevious to him; he is not willing to accept the remedy afforded by the slower process of law, but feels that vengeance must be speedy and sure. The death penalty alone will satisfy. This is the individual feeling, and public sentiment allows it. The judges decry it, but the juries admit it.

LAW REGISTER'S COMMENT.

In commenting upon the famous Strother case in Virginia, the Law Register of April, 1907, says, "There are times and circumstances that seem to make it necessary to the welfare of society that a common-sense view of right and justice should prevail over the arbitrary letter of a statute, and civilized and enlightened men everywhere are inclined to regard the protection of women as a mitigation of otherwise unpardonable crime. Whatever may be the opinion of the public concerning its effect on morals, or of the judges as to its weakening influence or fear of the law against homicide, the decision will be, or at least should be, a strong determent to the Bywaters brand of enterprise in the Old Dominion, and may result in lasting good to society and the State."

Says the Raleigh Evening Times, May 31, 1907:

"Right or wrong—from the cold and exacting standpoint of the statutory law—it is an extremely difficult matter for the average properly constituted man, who has a mother, a sister, and perhaps a wife, to bring himself (as a juryman) to the point of condemning a prisoner for doing what he knows he himself would do under the same conditions. And, therefore, there comes a time when he will say 'not guilty,' although he knows, beyond a reasonable doubt, that the man whom he is trying, killed the man for whose murder he is indicted, deliberately and with malice aforethought.

"The majesty of the law is indeed a great thing to contemplate. Upon it as a general proposition the order and safety of society depend.

"But it never has and never will and never can revolutionize the working of a human conscience, nor transform the character of the acts of a man performed in response to its promptings and dictation."

If there be one who doubts the existence of the sentiment supporting the "unwritten law," let him but glance for a moment at the records of the cases in which it has been invoked and the verdict in each. Probably the most noteworthy case of its kind on record is the prosecution of Gen. Daniel E. Sickles for the murder of the Hon. Philip Barton Key, in Washington City in 1859. These gentlemen had been friends for years, but Key had violated the bonds of friendship in a most unworthy manner. From the front window of his home, Mr. Sickles saw Mr. Key drive past and wave his handkerchief as a signal to Mrs. Sickles. A few hours later, meeting Key upon a public thoroughfare in the city, and outraged and mortified beyond endurance, Mr. Sickles exclaimed, "Key, you scoundrel, you have dishonored my house; you must die." Whereupon he shot and killed him upon the spot. Perhaps the most powerful argument ever made in a case of this character was made by Edwin M. Stanton in defense of Gen. Sickles, the trial resulting in a verdict of acquittal.

SOME ILLUSTRATIONS.

Since the killing of Stanford White in Madison Square Garden, a number of similar cases have occurred. Not long since, in Fulton, Missouri, Edmund F. Bailey shot and killed Jay Lawder, a wealthy mine owner, pleaded the "unwritten law" and was acquitted. At Buena Vista, Colorado, Mrs. Carl Bode was shot by Mrs. Grace Hutchison, having been accused by the latter of breaking up her home and stealing her husband. Mrs. Hutchison was almost instantly acquitted. Even in Mexico the "unwritten law" found efficacy, when at Valerdina, Frank Bauer was released on a nominal bond and was given to understand that his case would be continued indefinitely. A remarkable case transpired at Goldfield, Nevada, when Count Constantine de Podhorski was shot and killed by Jack Hines, this case being similar in many respects to the Thaw tragedy. Young like Evelyn Nesbit, Mrs. Hines, then Miss Edith Marr, was only seventeen when she met Count Constantine; poor like Evelyn Nesbit, she was forced to earn her own living by stenography; beautiful like Evelyn Nesbit, her personal charms led to a tragedy. The fatal shot fired, the outraged husband, like Harry K. Thaw, dramatically exclaimed, "He ruined my life," and declared his willingness to take the consequences. In the Strother case, supra, Judge Harrison, an able and conscientious lawyer, announced in the beginning that the defense must stand or fall by the written code—that there was no unwritten law in Virginia. But when the jury returned a verdict of acquittal, thereby deciding that there is an "unwritten law" in that State, Judge Harrison thanked them for their patience and painstaking care, and made the statement that "no man should be punished for defending his home."

It is hardly a matter of surprise that the plea would have proved ineffective in the Thaw trial. Mrs. Evelyn Thaw's past history was not a stable enough structure for the "unwritten law" to rest upon. Taking into consideration this fact, together with the other evidence tending to disprove the "gallant" conduct and to lower the "high moral" attitude of the prisoner, it could scarcely be supposed that a jury of twelve intelligent men should have accorded a very ready response to the appeal. Not even in Mrs. Thaw's "sublime renunciation," nor in Delmas' "dementia Americana" could this delicate instrument find an adequate support. "But where the 'unwritten law' is invoked in a just cause," declares a prominent North Carolina daily, "where the woman in the case has led a clean life hitherto, it has nearly always been effective, and will probably continue to be so in the South especially, for time indefinite."

CAN IT BE JUSTIFIED?

The third and last point of view from which it has seemed proper to approach the treatment of this subject, is supposing the existence of an "unwritten law" in individual feeling and tolerated by public opinion, can its existence be justified? Is there a justification, beyond the fact of its de facto existence, sufficient to warrant a definite recognition by the courts? In short, should the "unwritten law" be received as an established defense to homicide?

Homicide is defined to be the killing of a human being, and may or may not subject the doer of the deed to legal punishment. The circumstances determine whether or not the act is a legal crime. A man is justified, and is, therefore, exempt from judicial punishment where he kills another in protecting his own life from a murderous and unprovoked assault or in the prevention of a forcible and atrocious felony. Whether or not one is to be held justifiable in those cases arising out of the social relation is the problem presented for solution. Note the situation in this last class of cases. A husband kills the paramour of his wife; in invoking the aid of the "unwritten law," two lines of defense are presented to the court—One that under the peculiar circumstances of its commission the act is justified in law; the other, that by reason of the prisoner's state of mind, the doing of the act, whether justified or not, entails upon him no legal responsibility. In either point of view, the relations which the prisoner and the deceased sustained toward each other at the moment of the homicide are to be observed—on the one side, an outraged husband, on the other the invader of the marriage relation, without justification for his act. The incensed husband kills and dares to take the consequences, if need be, in order to be revenged upon him who has wronged him in his most sacred relation. And who among frail mankind would assume to judge him harshly? When a woman joins her hand in holy wedlock, she promises to love, cherish and obey her husband and him only; but her affections alienated and she having wandered away from the protecting love of her lord, no man can measure the awful consequences. The husband is deprived of the companionship which by the law of God and man are rightly his; the children of the union are despoiled of a mother's tender care and affection, their portion a heritage of dishonor. "Who seeing this thing," asks Mr. Stanton in his famous argument in defense of Gen. Sickles, "would not exclaim to the unhappy husband: Hasten, hasten, hasten to save the mother of your child. Although she be lost as a wife, rescue her * * *, and may the Lord who watches over the home and the family, guide the bullet and direct the stroke."

WHAT AUTHORITIES SAY.

A brief examination into the authorities bearing on the question may not be improper at this point. There seems to have been four periods in which the right to punish in this general class of cases was permitted, namely: under the Jewish dispensation, in the laws of Solon, among the early Romans and among the Gothic peoples. The Jewish law was particularly stringent in punishing offenses of this character, and even among the Assyrians, as far back as Hammurabi, 2250 B. C., we find the law scarcely less strict. Code Hammurabi, sections 129-130. In the 34th chapter of the Book of Genesis, an interesting case is recorded. The sons of Jacob put to death a certain Shechem, the son of one Hamor who dwelt in a city called Succoth, and the reason assigned was that he had brought reproach upon the name of their sister Dinah. It has been said that in England from the reign of Edward II, to that of Charles II, no case is to be found in which a husband was punished for having killed one who had wronged him in his marital relation.

And yet this is undoubtedly not law at present. Blackstone states the law in this class of cases as follows: "So if a man takes another * * * and kills him directly upon the spot, though this was followed by the laws of Solon, as likewise by the Roman Civil Law, and also among the ancient Goths, yet in England it is not absolutely ranked in the class of justifiable homicide, but is manslaughter." IV. Black. Com. chap 14. The leading authority for this proposition is the celebrated Manning case, decided in the reign of Charles II. Mr. Stanton argues with great ingenuity in the Sickles case that the decision in Manning's Case was the result of the great corruption prevailing during the period in which it was rendered, and that conditions being no longer the same, it ought not now to be considered as authority.

However, this may be, modern decisions, both English and American, hold to the view that killing under such circumstances is not justifiable, not even excusable, but is manslaughter at least; and even then if there has been sufficient cooling time the slayer may be guilty of murder. The rule is laid down and the distinction drawn with great clearness by the Supreme Court of North Carolina in the cases of State vs. Samuel 48 N. C., 74, and State vs. Neville, 51 N. C., 423. Says Nash, C. J., in State vs. Samuel, "* * * if the prisoner had slain him (deceased) on the spot the crime would have been extenuated to manslaughter, the provocation being considered in law a legal one as producing that brevis furor which for the moment unsettles the reason. But if sufficient time has elapsed for the passions to cool, the crime is not extenuated to manslaughter, but the slayer is guilty of murder."

NO LEGAL DEFENSE.

A careful examination into the authorities has failed to disclose any modern case from which the inference could be drawn that the principle of the "unwritten law" can be made a legal defense to homicide. At the most, it could only be taken as an extenuating circumstance, reducing the act to a lesser degree of crime.

One other thought, and this discussion is closed. Has the "unwritten law" found justification in public policy? The answer must come unhesitatingly, no. There are some who would deny its justification from this point of view upon the theory that it is only a species of lynch law, and they would condemn both with equal severity. Says the Charlotte Observer of some weeks ago, in speaking of a recent Georgia tragedy, "Of course the 'unwritten law,' one of whose recognized precedents is that any negro accused of having a difficulty with a white man is to be lynched, immediately proceeded to demonstrate its entire freedom from color blindness."

However, it is submitted that there is a distinction between the two, worthy of consideration. There is no ground upon which the bloody deed of a mob can be justified or excused. Not only is mob law a usurpation of the function of government, but it is for the time being, so far as it is concerned, an overthrow of government. It knows no law. It has sustained no personal wrong at the hands of its victim, but slays without personal provocation and because it thirsts for blood. On the other hand, he who kills where the sanctity of his home has been invaded has sustained a personal wrong, and it is through personal provocation, not merely through bloodthirstiness, that he takes the life of the wrong-doer. It is true, his motive is one of revenge, but he is seeking it for a wrong done himself, not for a wrong done somebody else. Unlike the mob, he recognizes law, and in his own mind justifies his act under the law. Granted that he usurps the functions of government, the danger is not so great as when the mob is the usurper.

But a more satisfactory and more tangible reason may be found why the right claimed under the "unwritten law" can not be justified. One of its greatest dangers to public policy comes into play when you consider the fact that the victim of the outraged slayer may have been guiltless of the offense for which he has been slain. At this point the "unwritten law" hangs on a slender thread indeed. In a recent Virginia case Judge Loving shot and killed a young man, Estes, who was supposed to have drugged his daughter. Subsequently discovered facts seemed to point to the innocence of the deceased. And yet these facts by an iniquitous rule of evidence were excluded from the jury, and the name of the dead man is left with the stigma of an infamous crime upon it. In State vs. Neville, supra, Chief Justice Ruffin in writing the opinion of the Court, illustrates very clearly the wisdom of the law on the subject. He says, "If it happen that he (the husband) be the deluded victim of an Iago, and that he has a chaste wife, how is it to be then? These inquiries suggest the impossibility of acting on any rule but that of the common law, without danger of imbruing men's hands in innocent blood, and certainly of encouraging proud headstrong men to slay others for vengeance instead of bringing them to trial and punishment by law."

THE MOST VICIOUS RESULT.

One of the most vicious results of a law "unwritten and undefined" is that it makes its executioner the sole tribunal to judge of the guilt or innocence of him who is arraigned under it. By its terms judge and jury become one and the same, the presumption of innocence is discarded, and evidence of guilt only is admitted. Here is a court of extraordinary powers indeed—a one-man tribunal having original, exclusive and final jurisdiction, and whose only presumption is that the prisoner at its bar is guilty. The person supposed to have committed a breach of the "unwritten law" is not allowed the opportunity to introduce evidence of his innocence; it is not even necessary to establish his guilt beyond a reasonable doubt. The only requisite is to charge him with the offence and execute the sentence. If it should afterwards be discovered that the deceased is really guiltless, he only is hurt, and the hurt done him is repaired in the vindication of his memory. "It looks very much," says the Rome, Ga., Tribune, "like this 'unwritten law' business is being run into the ground, and that a few written verdicts of guilty by juries throughout the country might have a salutary effect."

This article is intended neither as an attack upon the "unwritten law" nor as a defense of its doctrine. Its purpose is rather to enter a plea for the "orderliness and security of our social system." It would perhaps be not unwise for our lawmakers to take into consideration the question whether or not the present legal remedies against the encroachment upon family purity are proportionate to the enormity of the offense. In some cases under the rigid rule of the "unwritten law" the offender undoubtedly gets his just deserts, and public opinion approves the sentence. Perhaps it might be well if the law of the land prescribed the death penalty for him who invades the sanctity of the home—but it does not. Perhaps it might be well if this concession were made to public opinion. Such a compromise would give no recognition to the "unwritten law," but might go far towards removing the cause for its operation. It might go far towards satisfying the outraged individual, by imposing upon the offender the very penalty demanded under the "unwritten law," while it would at the same time insure to the offender the trial which the "unwritten law" denies.

I do not wish to be understood as going to the extent of advocating so far-reaching a step—there is much to be said both for and against—but as merely advancing the suggestion as a possible solution of a problem which is undoubtedly confronting the profession at the present time.

With the "unwritten law" itself no compromise can be made. Unsustained by authority and unsanctioned by public policy, it can find no legal justification in a well preserved and perfectly organized community.

Administrator's Notice.

Having qualified as admisistrator of Sarah R. Deaton, deceased, late of Mecklenburg County, North Carolina, this is to notify all persons having claims against the estate of said deceased to exhibit them to the undersigned on or before the 1st day of July, 1908, or this notice will be plead in bar of their recovery. All persons indebted to said estate will please make immediate payment.

This the 29th day of June, 1907.

W. C. MAXWELL,
Administrator.