

THE

VIRGINIA LAW REGISTER

VOLUME XIII.

MAY 1907 TO APRIL 1908.

R. T. W. DUKE, JR., Editor.
FRANK MOORE, } Associate Editors.
A. R. MICHIE, }

Charlottesville, Va.:
THE MICHIE COMPANY
1908.

WALDORF BINDERY COMPANY, LIBRARY BINDERS, SAINT PAUL MINN.

The importance of the attorney's position with respect to the courts is well pointed in *In re Applicants for License*, 143 N. C. 1. 10 L. R. A. (N. S.) 288, 55 S. E. 635, in which it is said: "The attorney is a necessary part of the judicial system, and his vocation is not merely to find persons who are willing to have law suits. He is the first one to sit in judgment on every case, and whether the court shall be called upon to act depends on his decision." Imagine a lawyer, however great his business ability may be, who does not know what hearsay evidence is, "sitting in judgment" on any case necessitating a knowledge of the law. Rather disastrous to litigants!

Of course "misery loves company," and we might have derived a deal of satisfaction from the verdict in Mrs. Bradley's case, because it afforded us a chance to crow over another jurisdiction just as lawless as we are, and di-

The Unwritten Lawless Virginia. us for a brief space at least, but we are so severely arraigned in a recent editorial in the *Canada Law Journal*, that we fear there is "no help in us." After stating that the unwritten law means that, as regards certain offenses, any man, or any body of men, are justified in making a law for themselves, and carrying it into effect without any respect for the ordinary tribunals, or the rules and principles by which they are governed, and this is done, not under the spur of sudden provocation, but by premeditated action, and defended as necessary for the protection of society, it is said:

"In obedience to this barbarous code we find that in the United States a certain class of offenders may be dealt with by those whom they have aggrieved, and the death penalty inflicted, without the aid of judge, jury, or executioner, without any inquiry into the merits of the case, and without any fear of ulterior consequences. Thus rape, adultery, seduction, slander and defamation of character, especially of a woman, may be punished by a shot from a revolver, or stab from a dagger, without the formality of a trial, and with perfect impunity to the person who undertakes the duty of thus giving effect to public opinion. The survivor of a fatal duel must be acquitted if the duel was fairly conducted, and a man who kills another in a fair fight must equally

be held blameless. No wonder that where such doctrines prevail Judge Lynch is supreme, and cases of homicide are of frequent occurrence. This doctrine of the unwritten law has also received the sanction of regular judicial authority. In a recent case a judge of the State of Virginia, when a jury had, in a trial for murder, given a verdict of not guilty, thus addressed them: "Gentlemen of the jury, I thank you for a verdict which I think will be approved by the public. It is an established precedent in the State of Virginia that no man tried for defending the sanctity of his home should be found guilty."

Commenting on this case, the *Albany Law Journal* says: "By the written law of Virginia and of every other state it is a crime for any man to take the life of another through private revenge, or for any other cause save in the extremity of defending his own life. When a jury renders a verdict of 'not guilty' on a confessed violation of that law, they bring the law and the courts into contempt. They have violated their oaths, and the judge who commends them is a self-confessed anarchist."

The learned editor of the *Canada Law Journal* says further: "Under this code the right of every man, whether white or colored to have a fair trial, is denied. There is no security for life or property, both are alike at the mercy of a mob, or of an individual acting under the influence of some outrage committed, and wreaking vengeance without time being taken, or effort made, to find out the truth. Under such a system, what protection is there for the innocent, what assurance that this rash assumption of judicial authority may not be made a weapon for private revenge, rather than the punishment of crime?"

But what hurts most (for we are bound to admit much of the foregoing) is that the Dominion of Canada is warned against following the example of their neighbor's bad boy to the south, lest they fall upon evil days. To think of this hitherto correct and dignified old Commonwealth being held up as an object lesson, not only to its sister states, but to the world at large! He says:

"We do not refer to the conditions above described for the sake of making any comparison as between them and those prevailing on our side of the border. We refer to them by way of warning lest we ourselves should fall into the same class of error. We are liable to the same influences, and to the same temptations, and

it is for those who may have any power of controlling or directing public opinion to use that power and that influence so that the spirit of law shall not yield to the spirit of lawlessness. Those in authority should make it manifest that by the power of law, as exercised through the regular courts of justice, the right of every man, no matter of what crime accused, to a fair trial is secured—that no crime, no matter how trifling or how serious, shall escape punishment, that by no hasty judgment shall there be any fear of the innocent being confounded with the guilty, and lastly, that the course of justice shall be swift as well as certain, and that no influences, or mere technicalities, shall interfere with or impede the execution of its judgments.”

There is a steady and rapid increase of crime in this country which should command more attention from the public authorities than is generally given it. The columns of daily newspapers bear testimony to the fact that criminality in every form **Increase of Crime.** is broadcast, and that in every city of the country the burglar and highwayman find abundant opportunities, while murders have become more numerous than ever before in our history. The last authoritative criminal statistics are of 1890 and they show a large increase in every phase of crime, but particularly so in acts of the most heinous character. The record of murders in this country for the six years from 1884 to 1889, inclusive, gives a total of nearly fifteen thousand, the last year exceeding by several hundred either of the preceding years in the number of lives taken by violence. It is interesting to note that but few more than ten per cent. of the murderers were legally executed, the larger number of them who paid the penalty of their crime, having met retributive justice at the hands of lynchers. By way of showing the difference in results of dealing with murderers by “due process of law” and by the system of Judge Lynch, it is stated that of the nearly fifteen thousand persons charged with murder last year only five hundred and fifty-eight were legally executed and nine hundred and seventy-five were lynched.

There has long been complaint, and it would seem from the facts, very justly so, of the slow and uncertain course of justice in this country as in large part accounting for the increase of

crime. When it is shown that in a period of six years murder was legally punished in only one case out of about twenty-seven, it is impossible to avoid the conclusion that there is some radical fault in our legal system. Whether it be in the delays of courts, the method of constituting juries, or in a popular hostility to capital punishment, it is extremely difficult to determine, but it is quite likely that all these have their influence. It is maintained by experienced jurists that the law's delay is very potent in encouraging crime, since under most circumstances the criminal is the gainer by such delay, especially in other than capital crimes, while even as to these it not unfrequently happens that public sympathy is worked upon in behalf of an accused person when a long period intervenes between arrest and trial. Almost everybody knows of a case where maudlin sentiment has been worked up in a community in behalf of a prisoner that has resulted in defeating justice. There has been a great deal of criticism, also, of the system of constituting juries in criminal cases, which is in most of the states practically the same now that it was when the system was first instituted. With regard to popular sentiment respecting capital punishment, the claim that there is a growing prejudice against the death penalty, which has recently been freely urged in some of the states by the advocates of a repeal of the law providing for capital punishment, we believe to be ill-founded. The argument derived from the fact that there are so few legal executions seems plausible, but it is by no means convincing that the general popular judgment is unfavorable to capital punishment.

But it is a condition, and a very serious one, that confronts us, and in looking for a practical way to meet it, not much help will be derived from discussing theories. When regard for human life appears to be everywhere growing less and the record shows the murderous impulse to be steadily advancing, it is necessary to determine what sure and summary remedy society can apply to such a state of affairs. The only rational recourse must be to a prompt and effective execution of the laws. This duty devolves upon the courts, which, while regarding to the utmost all that is implied in “due process of law,” should refuse to countenance or tolerate any of those devices or expedients by which justice is delayed and criminals are enabled to profit unduly.