took lands for permanent use under the Improvement Acts of 1825, 1826, 1827 and 1828, and similar acts, and constructed and operated a canal upon it, she acquired an estate in such land in perpetuity, and may dispose of the same in fee.

When land is procured for the building of a canal thereon the presumption is that the right of soil is acquired, and not a mere easement. The Commonwealth sold the canal to a corporation: *Held*, that the fee in the land occupied by the canal was in the Commonwealth and passed to the corporation, and that the former owner had no title to it nor to the coal under the canal: Wyoming Co. *v.* Price, 81 Pa., 156; Robinson *v.* R. R. Co., 22 P. F. S., 316; Union Canal Co. *v.* Young, 1 Whart., 410; Malone *v.* City of Toledo, 34 Ohio, 541.

Where a corporation is authorized to acquire land in fee, either by legal proceedings or purchase, the property so acquired may, by authority of the legislature, be devoted to a new and different public use, after the use for which it was originally acquired has been terminated; or the land may be aliened by the corporation. In such cases no right of property of any individual is violated. The original owner has no reversionary or other interest in the land: Heard *v.* City of Brooklyn, 60 N. Y., 242.

Wherever the Commonwealth, in the construction of her public works, acquires a fee simple in lands taken therefor, and land is devoted to that use, a cessation of that use would not revest the title in the former owner: Haldeman *v.* Penna. Cen. R. R. Co., 50 Pa., 425. See, also, Rexford *v.* Knight, 11 N. Y., 308; Pittsburgh & L. E. R. R. *v.* Bruce, 102 Pa., 23; Heywood *v.* Mayor, 7 N. Y., 314.

WILLIAM A. DAVIS.

DEPARTMENT OF PRACTICE, PLEADING AND EVIDENCE.

STATE *v.* KENYON.[1] SUPREME COURT OF RHODE ISLAND.

Evidence—Homicide—Threats.

Upon the trial of an indictment for homicide it appeared that the defendant, some time after a personal encounter with the deceased, had taken his position, rifle in hand, where he could see his victim but could

[1] Reported in 26 Atl. Rep., 199.

not be seen by him. As the latter approached, the defendant fired at him twice, the second shot inflicting a mortal wound. The deceased was unarmed. *Held*, that it was not error to exclude evidence of threats previously made by the deceased to the effect that he intended to kill the defendant, since there was no evidence that the deceased made any attack upon the defendant, or that the latter was in any imminent danger.

Opinion by STINESS, J.

EVIDENCE OF THREATS IN HOMICIDE CASES.

"Can evidence," asks WHARTON (Crim. Evid., 9th ed., § 757), "to the effect that the deceased, prior to a homicide, threatened the defendant's life, be received; and if so, is it a prerequisite to the proof of such threats that they should be shown to have been communicated to the defendant?" The learned author proceeds to answer the question, briefly referring to the many cases in which the point has come up for decision. It should seem to be worth while to examine these cases, and others, at greater length and to attempt a careful classification of them.

The question may present itself in three possible ways: (1) A threatens B's life. B hears of it and kills A by way of precaution. Is evidence of the threats admissible by way of justification? (2) A threatens B's life. B hears of it, and in a subsequent personal encounter A is killed. The question is, which was the aggressor? Is evidence of the threats admissible as tending to prove that A was? (3) Vary the facts of (2) by supposing B to have been ignorant of the making of the threats. Is evidence of them admissible?

(1) *Evidence of threats against defendant as justification for homicide.* The questions arising under this head have been treated by text writers and courts alike as questions in the law of evidence. The writer is unable to understand what ground there is for such treatment. The question here raised is, it is submitted, not a question of *remedial*, but of *substantive* law: it is to be settled by a reference not to the law of evidence, but to the principles of criminal law. Is it a justification for homicide that the deceased threatened the life of the defendant? If it is, of course evidence of the fact that threats were made may be given. If it is not, then the evidence will be excluded, not because of any technical rule of evidence, but because the substantive law declares that the existence or non-existence of the fact sought to be proved has no bearing whatever on the rights of the parties.

Thus in the principal case, while the learned Judge obviously has in mind the appropriate principles upon which the decision should be based, he yet thinks it proper to discuss the problem before him *under the form of a question of evidence.* He might have said: "The undisputed evidence shows that there was no personal encounter and that, on the defendant's own showing, the shooting was done by way of precaution. Such proceeding is without legal justification. All the threats in the world will not alter the aspect of the defendant's act." What he did say was, "taking the defendant's

own statement, notwithstanding its contradiction by other testimony, as the basis for the evidence offered, *it was clearly inadmissible.*" As above stated, it is clear from many passages that the learned Judge had the reason for the exclusion clearly in mind, as witness the following: "Under such circumstances, evidence of previous threats was plainly irrelevant, for *they could not justify the use of the deadly weapon.*" It is only to be regretted that he did not avoid every appearance of deciding upon the basis of the law of evidence. In the judgment of the writer the treatment of a similar question by RYLAND, J., in State *v.* Hays, 23 Mo., 287 (1856), is to be preferred: "Upon such a transaction as this, what good to the prisoner would proof of previous threats against him by the deceased have produced? Could they have changed the facts? Could they have altered the routine of events in their melancholy detail? Or would such threats have altered the law? Surely not. . . . . Why, then, offer this evidence of a loose threat, without any date? It was a mere after-thought, got up *to distract the jury with a collateral matter utterly foreign to the issue on trial, and was properly rejected.*"

It is, of course, clear that where, as a matter of substantive law, threats constitute a justification or amount to a mitigating circumstance, they may be proved. Thus in Meade's case (1 Lewin's C. C., 184; Roscoe's Crim. Ev., 772, 5th ed.), Meade's life and property had been threatened the day before the killing by a company of persons of whom the deceased was one. Meade, under an apprehension, as he alleged, that his life and property were in actual and immediate danger, fired a pistol with deadly effect. Evidence of the threats was admitted, HOLROYD, J., saying to the jury: "If you are of opinion that Meade was really attacked, and that Law and his party were on the point of breaking into the house, or likely to do so, and execute the threat of the day before, *he was, perhaps, justified in firing as he did.*" A similar principle underlies the decision in State *v.* Keene, 50 Mo., 358 (1872). With these cases may be compared Rector's case, 19 Wend., 569 (1838). In that case the facts are somewhat similar to Meade's case (*supra*), except that the threats had been made a week before the killing, and the assailants were not positively identified with the previous rioters. COWEN, J., speaking for the majority, thought the evidence was admissible, it being a question for the jury whether "*the resistance offered was out of proportion to the injury which there was reasonable cause for apprehending.*" (p. 590). BRONSON, J., dissented, thinking that it was competent for the Court to declare, as a matter of law, that threats made under the circumstances of this case constituted no justification. The Chief Justice (NELSON), while doubting if the fact of such threats would exert any influence on the minds of the jury, hesitated to adopt the view of the trial judge and of BRONSON, J., and concurred in ordering a new trial.

(2) *Evidence of threats communicated to defendant offered to prove that the deceased was the assailant.* If the criminal law of any jurisdiction accepts the plea of self-defence as a justification for murder,

whether evidence offered by the defendant does or does not support that plea is never decided by any rule of evidence. The substantive law defines what is a justification for murder and all evidence probative of that justification is admissible.

It has been seen that B can never justify the murder of A upon the grounds that the latter threatened the former's life: Smith *v.* Comm. (Ky.), 4 S. W., 798; State *v.* McCahill (Iowa), 33 N. W., 599; Phillips *v.* State (Tex.), 2 S. W., 601; State *v.* Partlow (Mo.), 4 S. W., 14. Evidence, therefore, of threats made by the deceased are very properly rejected.

But if there has been any demonstration on the part of the deceased at the time the mortal blow is given this fact, when coupled with the fact of defendant's knowledge of the threats, may render the conduct of the defendant justifiable, though were no threats uttered, it would not be so.

In State *v.* Jackson, 32 S. C., 42, the deceased meeting the defendant upon a road made a movement of his hand toward his hip pocket. The defendant, who had heard of murderous threats made by the deceased, thought, erroneously, that the deceased was about to draw a revolver to execute the threat. It was held that evidence of the threats was admissible to prove that the defendant's impression as to the reality of his danger was justifiable, taking into consideration his knowledge of the *animus* of the deceased toward him.

If, under the circumstances of the above case, there had been no threats made by the deceased, the killing certainly would not have been justifiable, unless the danger had been actually present. See State *v.* Gibson (Ala.), 9 S., 171; State *v.* Turner, 6 S. E. Rep., 723; Watson *v.* Comm., 87 Va., 608; 13 S. E. Rep., 22; Comm. *v.* Barners (Ky.), 16 S. E. Rep., 457.

Evidence of threats made by the deceased are never admissible in justification, where in the transaction which results in the victim's murder there has not been some overt act or demonstration sufficiently aggressive to impress the defendant that the victim was about to execute such threats. State *v.* Howard, 14 S. E. Rep., 481; Watson *v.* Comm., 87 Va., 608; 13 S. E. Rep., 22; Gibson *v.* State, 91 Ala., 64; Gonzales *v.* State (Tex.), 12 S. W., 733; Bernard *v.* State, 88 Tenn., 183; 28 Tex. App., 130; Price *v.* People, 131 Ill., 223. If it is affirmatively shown that the defendant fired the first shot, and the demonstration of the deceased occurred after the event, evidence of previously made threats is inadmissible. State *v.* Brooks, 2 S. Rep., 198.

It is thus seen that in discussing the admissibility of threats made by the deceased in justification of his acts we are simply dealing with a principle of criminal law, not a rule of evidence.

The character of the demonstrations of the deceased upon encountering the defendant must impress the latter with a sense of danger. The danger need not be real, but it must be apparently "imminent, urgent and pressing." Price *v.* People, 131 Ill., 223; Gilmore *v.* People, 124 Ill., 380; Hughes *v.* People, 116 Ill., 330; Campbell *v.* Comm. (Ky.), 16 S. W. Rep., 127.

In Smith *v.* Florida, 25 Fla., 517, the deceased and defendant met on

a public road. The defendant fired and killed, alleging in justification that the deceased had threatened to take defendant's life upon meeting him. The evidence showed that deceased was unarmed at the time; that he did not approach the defendant rapidly, and made no demonstration of any kind. It was held that the evidence of the threat was inadmissible, as the fear of the defendant was cowardly and not a reasonable outcome of the deceased's conduct. See Wesley *v.* State, 37 Miss., 327; Evans *v.* State, 44 Miss., 762; Myers *v.* State, 30 Tex., 527; Pritchett *v.* State, 22 Ala., 39.

Where there is no direct evidence of whether the deceased or the defendant was the assailant, no eye witnesses to the encounter, but it is known that both principals participated, it is often well-nigh impossible to solve the question without resorting to facts and circumstances antecedent to the encounter to show the animus of the one to the other.

Take the class of cases of which Wiggins *v.* People, 93 U. S., is the type. A justifies the murder of B upon the ground that B fired the first shot, and he killed him in self-defense. At the encounter four shots were known to have been fired, of which three came from the defendant's weapon. Upon arrest two revolvers are found upon the accused, one with three, and the other with one of the chambers emptied. It is in evidence that one of these revolvers belonged to the deceased and was picked up by A immediately after the shooting. The question was, whether A or B fired the first shot? The Supreme Court said, in reversing the ruling of the trial judge, who had rejected the evidence of threats (uncommunicated) made by the deceased:

"Now, when, under the circumstances, the witness, and the only witness who was present at the encounter, swears that he cannot tell where the first shot came from, though he knows the defendant only fired three, it must be very apparent that if the person to whom the deceased exhibited that pistol a few minutes before the shooting had been permitted to tell the jury that deceased then said, 'he would kill the defendant before he went to bed that night,' it would have tended strongly to show where that first shot came from, and how that pistol with one chamber emptied came to be found on the ground." See, also, Patillo *v.* State (Tex.), 3 S. W. Rep., 766.

This brings us to the third head of the classification adopted at the beginning of this article:

(3) *Does it matter that the threats of the deceased are uncommunicated to the defendant?* It has been seen that proof of threats made by the deceased and brought to the knowledge of the accused may be received as tending to show the evidence of a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased, when in the absence of such threats, such acts and motions would cause no belief. In the leading case of Stokes *v.* People, 53 N. Y., 154, the question was whether Jim Fisk was aggressor in the encounter between the latter and Stokes. Evidence of threats made by Fisk "that he would first beggar Stokes and then kill him" was refused by the trial judge because they had not been brought to the knowledge of the defendant. The Court of Appeals,

through GROVER, J., declared that the evidence ought to have been admitted. "We think," said the Court, "that an attempt to execute threats is equally probable when not communicated to the party threatened as when they are so; and when, as in this case, the question is whether an attempt was made, we can see no reason for excluding them in the former that would not be equally cogent for exclusion of the latter; the latter being admissible only for the reason that the person threatened would the more readily believe himself endangered by the probability of an attempt to execute such threats. . . . *The difference is only in degree.*" See Keener *v.* State, 18 Ga., 194; Pulchette *v.* State, 22 Ala., 39; Campbell, *v.* People, 16 Ill., 17.

In Wiggins *v.* People (*supra*), it is evident that for the purposes for which the evidence was offered, it was perfectly immaterial whether the threats had been brought to the knowledge of the defendant or not. It was not to justify the act of the defendant upon the theory that the deceased acted at the encounter in such a manner as to create the belief that he was to execute his threats, but to prove that the cause of the defendant's shooting was the deceased's first shot.

The authorities by no means agree as to when the uncommunicated threats of the deceased are admissible. Some of the cases proceed upon the theory that inasmuch as the prior declarations of the defendant are admissible to show that in killing he was executing a preconceived intention, the defendant is entitled to show that the deceased made threats which he attempted to execute when the defendant anticipated him: Burns *v.* State, 49 Ala., 370; Roberts *v.* State, 68 Ala., 156; Hor. and Thomp. Cas. on Self-Defense; Campbell *v.* Ill., 16 Ill., 17; People *v.* Taing, 53 Cal., 602.

Again, the *animus* of the defendant toward the deceased may always be shown to prove motive, etc.; why should not the defendant be allowed to prove the feeling of the deceased toward him? In Keener *v.* Georgia, 18 Ga., 194, the Court asked: "Ought not this conversation, whether communicated to Keener or not, have been admitted as a substantive fact or not, to show the *malus animus* or evil intent toward Keener with which Reese went to the house that night? Laying aside all technical rules and reasoning, we ask, with the knowledge of the mind and feelings of the deceased disclosed by this witness, would we not, and ought not the jury to listen more indulgently to the alleged apprehension of injury, on the part of Keener, as well as the facts and circumstances upon which he relies to justify his conduct? . . . . Do not these facts serve to illustrate the transaction?" Keener *v.* Ga., 18 Ga., 194.

The evidence of the uncommunicated threats is inadmissible to show the evil intent of the deceased toward the defendant, because it is immaterial, as a principle of substantive law, what the animus of the deceased may have been. In any event, the hatred of an enemy never justifies his murder. See Edwards *v.* State, 55 Miss., 424; Kenrick *v.* State, 55 Miss., 436; State *v.* Malloy, 44 Iowa, 104; Morgan *v.* Com., 14 Bush., 106; Blackburn *v.* State, 23 Ohio St., 146.

It seems, then, that when an encounter occurs between two persons, one of whom is killed and the witnesses of the difficulty dif-