fer, or the circumstances are equivocal as to which one of the two commenced the affair, it is highly relevant to admit in evidence the previous threats of the deceased, to be taken into consideration by the jury with the other facts of the case, as tending to show the intention of the defendant to act when the opportunity occurred: People *v.* Arnold, 15 Col., 476; Wiggins *v.* People, 93 U. S., 465; Turpin *v.* State, 55 Md., 462; State *v.* Turpin, 77 N. C., 473; State *v.* Alexander, 66 Mo., 148; State *v.* Hall, 9 Nev. 58. But there must be direct proof of some encounter or affray between the parties in order that uncommunicated threats may be received: Hoye *v.* State, 39 Ga., 718; Lingo *v.* Ga., 29 Ga., 470. If the deceased did nothing in the conflict but defend himself, then the evidence is irrelevant; Lingo *v.* Ga., 29 Ga., 470.

In Nevelling *v.* Com., 98 Pa., 336, the Supreme Court of Pennsylvania said, concerning evidence of this character: "It was no part of the *res gestæ*, it was not even alleged that the evidence was communicated to Nevelling, and it was altogether inapt to a defence of mental incapacity. Had there been any evidence of an affray at the time of shooting, and had the threat, such as it was, been communicated to Nevelling, it might have been admissible, though of very little real weight in the case."

To quote the language of Mr. Justice MILLER, it is evident after this brief review of so broad a field that: "Where the question is as to what the attitude of the deceased was at the time of the fatal encounter, recent threats may become relevant to show that this attitude was hostile to the defendant, even though such threats were not communicated to defendant." Wiggins *v.* People (*supra*), Southern Law Review, June, 1878, p. 261; Wharton's Crim. Ev., § 757.

JOHN A. MCCARTHY.

EDITORIAL NOTES.

BY W. D. L.

STATE TAXATION OF CORPORATE FRANCHISES AND THE COMMERCE CLAUSE OF THE CONSTITUTION.

DURING the last two years there have been many decisions affecting the commerce clause of the Constitution. The most important are those which develop the doctrine of the States' right to tax corporate franchises. It is of these we desire to treat in this note.

The right of incorporation is a privilege of value apart from the value of the property invested in the corporation. As said by Mr. Justice FIELD: "Its (a corporation's) creation, except where the corporation is sole, is the investing of two or more persons with the capacity to act as a single individual, with a common name, and the privilege of succession in its members without dissolution, and with a limited individual liability. The right and privilege, or the franchise, as it may be called, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire according to the law of most of the States. Thus the franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation."[1]

A corporation organized under the laws of one State has not the right to carry on business in another without the consent of the latter. This principle was established in the leading cases of the Bank of Augusta *v.* Earle,[2] and also in Paul *v.* Virginia.[3]

To this assertion, that a State can prohibit a corporation organized under the laws of another State from doing business within her borders, there is certainly one and possibly two exceptions. The first and undoubted exception is where the corporation is in the employ of the general government. "If," said Mr. Justice BRADLEY, in Stockton *v.* Balto. & N. Y. R. R.,[4] "Congress should employ a corporation of ship builders to construct a man-of-war, they would have the right to purchase the necessary iron in any State of the Union." And in the Pembria Mining Co. *v.* Penna.,[5] the Supreme Court added, "without the permission and against the prohibition of the State." The second and perhaps doubtful exception is where the corporation is carrying on interstate commerce, and has been expressly authorized by Congress to carry on that business in any

[1] Opinion in Horn Silver Mining Co. *v.* New York, 143 U. S., 312, 313 (1892).

[2] 13 Pet., 519 (1839).

[3] 8 Wall., 168 (1868).

[4] 32 Fed. Rep., 9, 14 (1887).

[5] 125 U. S., 181, 186 (1888).

State of the Union. This last was decided in Pensacola Tel. Co. *v.* W. U. Tel. Co.[1] The Act of the 24th of July, 1866, provided that any telegraph company organized or to be organized under any State laws shall have the right to construct, maintain, and operate lines of telegraph along all the post roads of the United States. All the railroads within the United States are post roads.[2] The State of Florida gave exclusive permission to a company to operate telegraph lines within the State. The Court, through Mr. Chief Justice WAITE, held that Congress has the right to confer on persons or corporations the right to carry on interstate commerce, and that when it has done so, any interference with this right by a State is unconstitutional. Justices FIELD and HUNT dissented, on the ground that the Act of Congress in question did not pretend to confer the right of a telegraph company, organized under the laws of one State, to operate telegraph lines on other than the public domains. But from the language used on page 19 it is evident that Mr. Justice FIELD considered that Congress has no power to confer on a corporation, organized under the laws of one State, the right to enter another State on interstate business. He says: "Never has it been suggested that the United States could enable a corporation of one State to condemn property in another State, in order that it may transact its private business there." He even appeared to doubt the power of Congress to establish a railroad.[3]

Mr. Justice HARLAN did not sit on the case. All who formed the majority are now dead. And though, from the opinion in California *v.* Pacific Railroad Co.,[4] one may consider the right of Congress to establish a railroad as conclusively settled, we have no means of knowing whether

[1] 96 U. S., 1, 12 (1877).

[2] Rev. Stats, 3964; 17 Stat., 306, 201.

[3] See also Elliot's Debates, ed. of 1836, 433, 487; Views of President Monroe, accompanying his veto message of May 3, 1832; Views of Judge McLEAN, in his dissenting opinion in the Wheeling Bridge Case, 18 How., 441, 442.

[4] 127 U. S., 1 (1887).

the new members of the bench would not agree with Mr. Justice FIELD in limiting the federal power to delegate to corporations the power of eminent domain for purposes of interstate commerce to corporations created by the laws of Congress. Neither is it clear from the recent decisions whether a corporation engaged solely in interstate commerce, apart from the question of eminent domain, can carry on its business in other States than the one of its incorporation, without the permission of such States. In every case which has come before the Court the corporation has admitted that it was also engaged in other business beside that of interstate commerce. Thus, in the late case of Horn Silver Mining Co. *v.* New York,[1] where the absolute right to enter a State other than the one of its incorporation was claimed by a company, the Court held that the declaration of the company that they were a manufacturing corporation in New York was an admission that they were engaged in the State of New York in other than interstate business.

One thing seems, however, to be certain. A corporation organized under the laws of one State cannot, though engaged in interstate commerce, exercise the right of eminent domain in another State without its permission or the permission of Congress, express or implied.[2]

Therefore, we may start out with the proposition that for the purpose of doing interstate commerce, or for the right to exercise eminent domain even solely for the purpose of interstate commerce, a corporation must knock at the doors of the State legislature whose territory they desire to enter, and the legislature has the right to refuse them. This at present being granted, is a State legislature restricted by the Constitution in the conditions for admission which it can impose on a corporation?

In Barron *v.* Burnside,[3] the Court, while refusing to enter into the question whether a statute was constitu-

[1] 143 U. S., 305 (1892).

[2] Maine *v.* Grand Trunk R. R. Co., 142 U. S., 217 (1891). But see Lyons Thomas Hardware Co. *v.* Reading Hardware Co., Ct. of Civil Appeals of Tex., 21 S. W. Rep., 300. (Supra p. 504). Decided Feb. 7, 1893.

[3] 121 U. S., 186 (1887).

tional, which required a corporation engaged in interstate commerce to obtain a permit from the State before it would be permitted to carry on business, held that "no conditions can be imposed by the State which are repugnant to the Constitution of the United States,"[1] and that a condition that suits against the corporation should not be transferred to the Federal Courts was a condition which tended to deny to the corporation rights secured by the Constitution.

It would seem by analogy that the right to carry on interstate commerce unrestrained by State legislation was one of the rights impliedly guaranteed in the Constitution, and that, even though a State might refuse to admit a corporation engaged in interstate commerce to act in the State, the State could not cripple with its consent conditions which tended to burden and impede the interstate commerce to be carried on by the corporation.

And yet this argument has not always, and does not now, appeal to the Court. In the case of Balto. & O. R. R. *v.* Md.,[2] the statute of the State, which conferred the right to construct the railroad in Maryland, provided that the railroad should have the right to charge a price from Baltimore to Washington not greater than $2 per passenger, and that one-fifth of the whole amount of money received from carrying passengers from Baltimore to Washington and intermediate points should go to the State. Yet Mr. Justice BRADLEY upheld this on the express ground that, "So long as it is conceded (as it seems to us it must be) that the power to charge for transportation, and the amount of the charge, are absolutely within the control of the State, how can it matter what is done with the money, whether it goes to the State or to the stockholders of a private corporation?" And the reason for this is "that the State could have built the road itself, and charged any rate it chose, and could have filled the coffers of its treasury without having been questioned therefor."[3] The

[1] Op. Mr. Justice BLATCHFORD, p. 250.
[2] 21 Wall., 456 (1874).
[3] Op., pp. 471, 472.

great constitutional lawyer here first lays down the principle, whose logical application to a slightly different state of facts called forth his last and most vigorous dissent.[1]

Previous to this the Court had held that a tax placed on the railroad after its corporation, on every passenger carried out of the State, was invalid,[2] and it is now beyond question that a State cannot regulate the rates of fare or freight from points outside to points inside the State, or *vice versa.*[3]

And yet in the Delaware R. R. Tax[4] the Court carried the doctrine of the right of a State to impose conditions on the exercise of a franchise one step further; and held that a State, subsequent to the incorporation of the company and the grant of its right of way, could tax the company's franchises, and the tax would be measured by the amount of the net receipts of the railroad. In the particular case, only a portion of the net receipts were taken, which proportion was measured by the relative number of the miles of road in the State to the whole number operated by the company. Yet this fact would not have made any difference in the decision, for Mr. Justice FIELD says: "The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion." This case not only upholds the right of a State to tax the net receipts from interstate commerce, but also its right to place a tax varying in amount according to the actual cash value of the capital stock, even though most of the property of the company is outside the State. As the Court had decided that a tax on the actual value of the capital stock of a corporation was a tax on the property of the company, the case must be considered as

[1] See *Infra,* and 31 AM. L. REG. & REV., 203.

[2] Crandall *v.* Nevada, 6 Wall., 35 (1867).

[3] Wabash, etc., R. R. *v.* Ill., 118 U. S. 557 (1885).

[4] 18 Wall., 206 (1873).

unintentionally overruling the decision in the leading case of Bank of Commerce *v.* New York,[1] where it was held that a tax on the actual cash value of the stock of a corporation was void, in so far as the corporation had invested in United States bonds. However, in the Delaware case, it was considered a tax on franchise, and by that magical word, a tax otherwise bad, as a tax on interstate commerce, or on property outside the jurisdiction of the State was made good. In the case of the Baltimore & Ohio Railroad, the State of Maryland, having the right to refuse to charter the corporation, the State could impose, as a condition of the charter, that the rates of interstate fare should not exceed a certain sum, and that part of the revenue from the interstate traffic should pass to the coffers of the State; and in the Delaware case it was held that since the road could have refused to charter, after they had chartered, the value of this right to act as a corporation could be taxed according to the value of the corporate property held outside of the State, or the amount of interstate business done by the corporation.

The recent case of Grand Trunk R. R. *v.* Maine[2] is on all fours with this decision of the Delaware Railroad Tax Case. The Maine tax was in terms for the privilege of operating a railroad within the State. The amount of the tax was determined by two factors—the amount of the gross receipts, and the proportion of the number of miles in the State to the whole number of miles operated by the railroad. The Court upheld the tax, four judges dissenting. The ground of the dissent was that the tax was a regulation of commerce. Judge FIELD delivered the opinion, taking the same ground which he had taken in the Delaware case years before, to wit: That is was nothing but a fair way of getting at the value of the franchise, as fair as charging a lump sum for it, and, therefore, the Act was constitutional.

The case of the Horn Silver Mining Company *v.* New York,[3] before mentioned, was decided on grounds similar to

[1] 2 Back, 620 (1862).
[2] 142 U. S., 217 (1891).
[3] 143 U. S., 221 (1891).

the Maine case. The State of New York taxed all corporations doing business in the State according to the dividends on their capital stock, or, where no dividends were paid or dividends less than a certain amount, on the actual value of the capital stock. Most of the property of the corporation was outside the State, and little of its business was transacted in the State. The Court, however, through Mr. Justice FIELD, considered the tax as on the franchise, and the mode of assessing the value of the franchise as fair.

In most of these cases two decisions are generally cited as laying down the principle which controls the decision. The first case is that of Paul *v.* Virginia,[1] where the State law required foreign insurance companies to deposit a certain sum with the State treasurer before they could transact business. But there can be no possible objection to such a law. The amount of money to be deposited did not depend on the value of the company's property in other States, or the amount of business which it did in other States.

The other case is that of the Home Insurance Company *v.* New York,[2] on which the Maine decision is so largely based. There a law of New York was involved which taxed a foreign corporation on the dividends and the par value of the capital stock. Some of the capital stock of the insurance company was invested in United States bonds. The company, claiming that the tax was a tax on the stock, demanded a reduction *pro tanto* for the bonds. This was mistaken ground. The tax was not on the stock, but on the dividends according to their amount. It was a tax not on the property, but on the business of the corporation.

Had the law been attacked on the ground that the business of the company was partly outside the State and, nevertheless, the law had been upheld, then it would be a case in point.

The Court in the Horn Silver Mining case also apparently employ an argument which in Ficklen *v.* Shelby

[1] 8 Wall., 16 (1868).
[2] 134 U. S., 594 (1889).

Co.[1] is made the basis of a decision. Mr. Justice FIELD, in the New York case, seems to admit that had the business of the company been exclusively interstate commerce, the company would have had an absolute right to enter the State, and the tax on the franchise would then be unconstitutional. Part of the opinion is based on the admission of the company that the Horn Silver Company was a manufacturing corporation in the State of New York. Therefore, for the right to do a business which was not interstate commerce a tax could be levied which varied in amount according to the amount of interstate business the company did. In the Shelby Taxing case above cited, the Court held that a license tax on all brokers, varying according to the amount of their commission on sales, was constitutional, even though part of these sales were of the products of other States, provided part were of the products of the State imposing the tax. The tax is considered valid, though in effect a tax on interstate commerce, because it is in terms for permission to do interstate business. On this reasoning A could be taxed in Pennsylvania for real estate owned in Ohio as a charge for a license to carry on any retail trade. The Court say that the case does not affect their decision in Robbins *v.* Shelby Co. Tax,[2] where it was held that a tax on an agent of a house outside the State of so much per week for permission to sell the goods of his firm is unconstitutional. It cannot but be hoped that in this last case the Court has not intentionally modified the important principle established by this first case, and that a tax for the sale of goods imported from other States, and still in the original package, is unconstitutional; but we fear, with Mr. Justice HARLAN, "that the present decision will be cited as having that effect."

At the same time that the doctrine was being developed that a State has a right, in valuing the franchise of a corporation, to tax the interstate business of the company or the value of the property outside the State, cases

[1] 145 U. S., 1 (1891).

[2] 120 U. S., 489 (1886).

in which the terms of the Act have not called attention to the fact that it could be upheld as a tax on the franchise, have been drifting toward the principle that a tax falls on that on which its amount depends. In other words, that it falls on that phenomenon on which it is graded. The rule which is being universally applied to persons other than corporate persons, has also, in many instances, been applied to corporations. Thus, in the case of the State Freight Tax,[1] a tax graded on the amount of freight carried by corporations, was held to be a tax on the business of carrying freight, and void as far as it fell on freight taken from points inside to points outside the State, or *vice versa*. The value of this decision to the freedom of interstate commerce was temporarily greatly impaired by that in the next case of the tax on railroad gross receipts.[2] It was here held that a tax on the gross receipts of a transportation company was valid, even though the business was principally interstate commerce, for the reason that the tax did not fall on the company until the money for the transportation had been paid and was within the treasury, and, therefore, it could be upheld as a tax on the money or property within the State. The fact that it might be considered as a tax on the franchise was also considered, but the principal ground was the one first mentioned.

This case was overruled by that of the Southern Steamship Company *v.* Pennsylvania,[3] where it was held that a tax on the gross receipts of a steamship company was invalid in so far as it fell on the receipts received from carriage of interstate or foreign freight.

Mr. Justice FIELD declares that the case of the Maine statute is totally different from the case of the Pennsylvania statute. The only reason given is that the tax in the latter was "in terms" on the gross receipts. It is true that the Maine statute was "in terms" on the franchise. That is the only difference between the two statutes,

[1] 15 Wall., 232 (1872).

[2] 15 Wall., 284 (1872).

[3] 122 U. S., 326 (1886). See also Fargo *v.* Mich., 121 U. S., 230 (1886).

except that in the Maine case the tax for one year was measured by the amount of freight carried during the previous year, while in the Pennsylvania case the amount for the current year was the basis of the law. In the Maine law the tax on all the gross receipts was reduced by the proportion of mileage of the line which was outside of the State. This was undoubtedly done to give the Act validity, but that it was an unnecessary precaution is seen in the case of the Horn Silver Mining Company,[1] where, as we have pointed out, the entire gross receipts of a company were successfully taxed for the privilege of doing State business, though practically the sole business done in the State was interstate business, and the majority of the company's business and capital were outside of the State.

This doctrine of the valuation of the franchise by the business of the company we cannot but believe will ultimately be abandoned by the Court. It enables the States by a word to make a tax otherwise invalid, valid. This must be seen by the Court. Either they will modify the doctrines of the taxation of commerce previously held, or modify the recent decisions as to the power of a State to tax franchises.

It may seem, at first glance, as absurd to say that a State can charge a lump sum for its franchise to a corporation, or so much per year, and yet not be able to grade the value of the franchise to each company according to the amount of business it does in other States, or the amount of its property. It is a plausible argument which tells us that this method of valuation is a fair way of getting at what a State confers on a company when it permits it to act as a corporation in the State. And yet, under cover of a franchise tax "in terms," has not, as a practical matter of fact, the State of Maine taxed corporations on the amount of interstate commerce hauled through the State, and the State of New York taxed a company because it had property situated in Utah and carried on business in Illinois?

It is true that a franchise is more valuable to a rich

[1] 143 U. S., 305 (1891).