COMMENT.

The Court of Appeals of the State of New York in reviewing the celebrated case of *People* v. *Thorn*, for the murder of William Guldensuppe (50 N. E. Rep. 947), passed upon an important question of law which heretofore has never been fully considered or passed upon by that Court, and about which the courts of the country are greatly in conflict. In the trial below, the Court, under provision of the Code of Criminal Procedure (Sec. 411), allowed the jury, under proper instruction, to visit and view the premises where the murder was committed. This was done in the absence of the accused, who by his counsel waived the right of being present, and had requested that the jury be allowed to view the premises without his presence, or that of his counsel. On appeal it was contended in behalf of the accused that this reviewing of the premises was both a part of the trial and receiving evidence, and consequently was such a proceeding at which one on trial for a capital offense could not waive the right of being present. The argument being that the view by the jury could not be deemed an idle ceremony; that it must be deemed to have been done for a purpose, and taking place under order of the Court, was a part of the trial (*People* v. *Palmer*, 44 Hun. 401; *People* v. *Bush*, 68 Cal. 623, 10 Pac. 169).

On this point the Court of Appeals was divided, the majority, however, holding that such a view of the premises was not part of the trial, nor taking testimony within the Constitutional Amendment, Art. 6, as incorporated in the bill of rights of the New York Code of Criminal Procedure, and was, therefore, a proceeding at which the accused could waive being present. "The provision in the bill of rights," quoting from the opinion, "that the accused shall be confronted with the witnesses against him was designed to prevent secret trials in which the accused was often arrested and executed without a hearing, and without any knowledge as to who were his accusers, or the evidence upon which they relied. The provision had reference to the persons who should testify against him. It is doubtless true, as claimed, that jurors may draw inferences from the objects which come under their vision. While mute, inanimate objects may, in one sense, be witnesses, are they witnesses within the contemplation of the Constitution and the Statute? We think not. If seeing the locality is the taking of evidence in one

case, it must be in another. If viewing the locality during the trial is the taking of testimony, why is not the seeing of the locality before the trial the taking of testimony? * * * It appears to us that the more rational and reasonable construction to be given to the provisions of the section is that the view is not the taking of testimony within the meaning of the bill of rights; but that the sole purpose and object of the view is to enable the jurors to more accurately understand and more fully appreciate the testimony of witnesses given before them. The wise and beneficent object of the Statute should not be lost sight of."

The Supreme Court in *Thompson* v. *State of Missouri* (18 Sup. Ct. Rep. 922), affirms the decision of the Supreme Court of that State in holding that a Statute authorizing the comparison of disputed handwriting with any writing proved to be genuine was not an *ex-post facto* law as applied to crimes previously committed, because "altering the legal rules of evidence" in existence at the time the offense was committed. Thompson was twice tried and convicted for the murder of the sexton of a church by poisoning by strychnine. An important question in the case was the authorship of a certain prescription for strychnine, and also a letter addressed to the organist of the church containing threatening language about the sexton. In the first trial, letters of the defendant to his wife were admitted and compared with these papers for the purpose of showing defendant had written both. This the Supreme Court of the State held to be error and reversed the decision of the trial court and ordered a new trial. The Legislature of the State then passed a law authorizing the "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine." Under this Statute, the defendant's letters to his wife were again introduced in the new trial and he was again convicted. This the defendant contended was illegal, because the act of the Legislature as applied to him was an *ex-post facto* law. The Supreme Court, however, held that it failed to perceive any ground upon which the Statute could be declared unconstitutional; that it did nothing more than permit evidence of a particular kind to be admitted upon an issue of fact in a criminal case, which, under the rules of evidence as enforced by judicial decision at the commission of the crime, was not admissible; that it did not enlarge the punishment, nor make that criminal which was not criminal at the time the act was done. Nor did it change the quality or degree of the

offense, nor in any way materially impair the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed, inasmuch as it did not require "less proof, in amount or degree," but left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared admissible, and did not disturb the rule that the statement overcame the presumption of innocence and established the accused's guilt beyond a reasonable doubt. The case of *King* v. *Missouri*, 106 U. S. 221, was cited and distinguished.

One of the first decisions which has come to our attention in which the War Revenue Act of 1898 has been discussed, is that of *Western Wheel Works* v. *The United States Express Co.*, decided by Judge Tuley of the Circuit Court of Cook County, Illinois. The question in the case was whether the express company should pay for the stamp or the shipper. This the Court held to be the duty of the express company, and says that it is no less a part of the express company's duty, under the Act, to affix and cancel the stamp, than it is to issue a receipt to the shipper. The Court's reasoning on this point is very clear. It says: "It would be an absurd conclusion to say that the company is required to issue to the shipper an unstamped bill of lading or receipt, the issue of which is made a penal offense by section seven of the Act. It was not the intent of the Statute to place express companies under an obligation to do an illegal act. The bill of lading or receipt which the express company is to issue must be a complete bill of lading, a legal instrument, and this can only be a stamped instrument." This, in our opinion, is as it should be. The law in effect is that there shall be a tax paid on each express package, that this shall be done by requiring a stamp to be placed on the express company's bill of lading or receipt. It requires the express company to issue such a receipt or bill of lading to the shipper and penalizes it if the stamp is not thereto affixed and cancelled. From this it should logically follow that it is the duty of the express company to affix and cancel the stamp. To prevent the company from revising its rate of transportation, and thus transfer to the public the burden of the tax, Judge Tuley also held that a common carrier cannot arbitrarily revise and increase its rate so as to impose the war tax upon shippers, and thus relieve the carrier of the tax imposed by law. In the present case, which was brought for a mandamus compelling the express company to do its duty, the Court in accordance with *Nelson* v. *Chicago & Alton Railroad Co.*, *C. & N. W. Ry. Co.* v. *People*, 56 Ill. 365, and *Vincent* v. *Chicago & Alton.*, 49 Ill. 33, granted a continuing mandamus, holding that to compel the shipper to seek a mandamus for each shipment would be a mere travesty of justice, leaving the weak at the mercy of the strong.