

province of the jury by passing upon the credibility of the complaining witness; and irregularity in the proceedings of the court in the presence of the jury occurred by which the defendants were prevented from having a fair trial by reason of the trial court making the following statement in the presence of the jury:

"THE COURT: The witness has impressed the Court as being extremely fair.

"MR. GATT: May we have an exception to that statement?

"THE COURT: You may." (Trans. page 63).

XV

The District Attorney was guilty of misconduct, and irregularity in the proceedings of the adverse party in the presence of the jury occurred by which the defendants were prevented from having a fair trial by reason of the District Attorney asking the following questions of T.J. Belnap, a witness in behalf of defendants:

"C. About two o'clock. As a matter of fact, Mr. Belnap, at the present time you are under indictment, are you not?"
(Trans. page 282).

XVI

The trial court erred in refusing, over the objection and exception of the defendants, to submit to the jury in its charge to the jury the question of petit larceny, and in refusing to instruct the jury that under the evidence they might find the defendants guilty of petit larceny instead of grand larceny. (Trans. page 363).

XVII

The trial court erred in overruling defendants' motion for a new trial upon the grounds set out in said motion.

Wherefore, defendants and appellants pray for a reversal of the judgment made and entered in said cause, and that a new trial thereof be ordered.

D. B. Hempstead.
Attorney for Defendants and Appellants.