

sufficient interest in the case so far as the defendants were concerned, he could possibly have checked up on the amount of wheat Glenn sold in Tampo and might have found the missing wheat there. At all events, the defendants were entitled to develop this theory of the case and to show the interest the complaining witness would have had in disposing of this wheat in such a manner that he would not have to account for its proceeds to the mortgage Bank. As a preliminary to this the defendants were entitled to show that the Bank had a mortgage on all the wheat, but this the trial court refused to permit them to do.

A further reason in support of the theory of the defendants' attorney that no wheat had been stolen from Glenn, is found in the testimony of all the witnesses, both for the state and for the defendants, who examined the alleged path from the wheat pile to the place where Glenn said the truck had stood, to the effect that there was no wheat spilled anywhere around on the ground. The sacks were old, second hand sacks full of holes so that it would have been impossible to carry 44 such sacks full of wheat a distance of 16 steps and load them into a truck without some wheat spilling on the ground. On this point we refer to the testimony of James Cottam. (Trans. page 287). It is corroborated by every other witness in the case who examined the premises in question immediately after the alleged theft.

#### ASSIGNMENT XIV.

Section 7722 - C.T. of Utah, provides that "the jury are the exclusive judges of his (any witness) credibility." During the cross examination of the complaining witness the court, in the presence of the jury, stated: "The witness has impressed the court as being extremely fair", to which statement of the court the attorney for the defendants then and there duly excepted. (Trans. page 63). This error of the court was extremely prejudicial to the defendants, and by it the court invaded the province of the jury and passed upon the credibility of the witness. By this remark the court gave the jury the impression that he believed the testimony of the complaining witness, who had charged the defendants with the theft of his wheat, to be true.