three chickens (R. 706) nor did he testify that they were aware of their condition. And as we have said, the Board of Health officer, called for the specific purpose of condemning these chickens, found it necessary to perform a *post mortem* examination and then condemned only one of the three chickens. This is the evidence upon which the defendants were convicted of selling unfit poultry. It is clearly insufficient to support the verdict and was insufficient to warrant the submission of this count to the jury. Only by contending that it is the duty of slaughterers to perform a post mortem examination on chickens slaughtered before sale may this conviction be allowed to stand. *United States* v. *Murdock,* 290 U. S. 389.

2. The Sale of Uninspected Poultry.

Counts 4 and 5 charge the defendants with the sale of certain poultry trucked in from Philadelphia, not previously inspected as required by local law. There was no charge that any Federal law requiring inspection was violated.

The evidence establishes that the poultry which was not inspected was a small portion of shipments from Philadelphia which was received in New York on a Sunday night (R. 1396) at which time no inspection could be had (R. 235). The greater portion of the entire shipment was inspected (R. 1394-5). To submit them for inspection the next day was impracticable because they were required for resale in the early morning (R. 1396). The entire lot was declared to be of the best quality by the seller who testified for the Government (R. 1005-1006).

In any event, the validity of a conviction depends upon the proof of a *sale* and the evidence is undisputed that the 59 baskets referred to in Count 4 were purchased by the de-

fendants on behalf of the Mogen David Live Poultry Market, Inc. (R. 1396). In fact, such poultry was trucked from Philadelphia to New York City by an independent trucker who was paid by the Mogen David Live Poultry Market, Inc. (R. 1619).

3. The Filing of False Reports.

The defendants[8] are charged with the filing of false reports, in that reports filed for each of the weeks from the week ending May 19th to and including the week ending June 11th, 1934, did not contain a correct statement of the volume of sales, in violation of Article VI, Sections 1 and 2 and Article VIII, Section 3 of the Live Poultry Code.

Proof adduced by the Government was that the volume of sales for that period of time was in the amount of 151,861 lbs., whereas, the reports as filed only show a volume of 106,659 lbs., a difference of 45,202 lbs. (R. 1058).

The object of the Code provisions with respect to the filing of reports is to enable the Code Authority to make assessments. The amount therefore involved, on the basis of an assessment of $.20 per 1,000 lbs., is $9.04.

The reports were not false. The computation made by the Government failed to take into consideration "accommodation" sales.[9] These accommodation sales are purchases

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[8]The defendants, A. L. A. Schechter Poultry Corporation and Martin Schechter, are the only defendants involved in this Count.

[9]An accommodation sale is illustrated as follows: One of the corporate defendants would buy a truckload of poultry, half or any part thereof for its own use and the balance thereof for the use of the Mogen David Live Poultry Market, Inc., in order to save trucking expenses. Although the transaction would be listed on the books in its totality, this would be only for the purpose of keeping the accounts of the various parties accurate.

made by one of the corporate defendants on behalf of the other corporate defendant or on behalf of the Mogen David Live Poultry Market, Inc. (operated by the father of the individual defendants).

It is also contended by the Government that the report as filed was false with respect to the range of daily prices. This contention is erroneous in that the range of daily prices was arrived at by taking an average price for the total volume of sales, which included the price range for separate and distinct classes of poultry, to wit: colored fowl, leghorn fowl and broilers. The correct procedure would be to average each class of poultry by itself.

The Government failed to establish in any manner the effect of the filing of a false report upon interstate commerce. That there is no effect needs no further argument.

Count 38 is also open to the objection that the requirement of filing reports is contrary to the Fourth and Fifth Amendments to the Constitution. This is developed more fully in the discussion of Count 39.

4. The Failure to File Reports.

The defendants, under this count (Count 39), are charged with wilfully, knowingly and unlawfully failing and refusing to submit weekly reports or any reports for the period commencing June 11, to and including July 26, 1934, in violation of Article VIII, Section 3 of the Live Poultry Code.

With respect to defendants, Schechter Live Poultry Market and Joseph Schechter, the Government's Exhibit 29 brands the charge as unfounded. Exhibit 29 clearly indicates that reports were filed by these defendants for the weeks ending June 15th and June 22nd. The record

further shows that these defendants went out of business on July 7, 1934, by reason of their inability to remain in business due to the persecution of the Code Authority (R. 1431-2).

The other defendants admit that they did not file any reports from June 11th to July 26th, 1934.

They were justified in not filing these reports by reason of the direct information given by the Government authorities that the latter were preparing a criminal prosecution against the defendants for violations of the Recovery Act, and of the Code provisions (R. 548).

It is well established that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the prohibition of the Fourth Amendment to the Constitution. The unreasonable searches and seizures condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is equivalent to having a witness testify against himself, which practice is condemned under the Fifth Amendment. *Boyd* v. *United States,* 116 U. S. 616; *Weeks* v. *United States,* 232 U. S. 383.

In addition thereto, the defendants had retained counsel to advise whether or not one engaged in industry and operating at a loss would nevertheless be obliged to pay code assessments. It was during the period in which negotiations between the defendants' counsel and the Code Supervisor were in progress that the failure to file reports occurred. Immediately upon the close of such negotiations an indictment was returned.

We maintain that there is no legal authority for the imposition of the assessment.

The other essential element required to the successful prosecution of the defendants, to wit: that the non-filing of reports affects interstate commerce, was not proved. The Government offered no evidence on this point.

5. The Counts Relating to Minimum Wages and Maximum Hours.

In view of the reversal by the Circuit Court of Appeals of the convictions on these Counts, on the ground that the provisions of the Live Poultry Code relating to wages and hours of labor were unconstitutional the evidence relating to such Counts need not be discussed.

6. The Sale to Unlicensed Poultry Dealers.

This Count charges the individual defendants connected with the A. L. A. Schechter Poultry Corporation and A. L. Schechter Poultry Corporation, with the unlawful *sale* of live poultry to the other defendants, Joseph Schechter and Schechter Live Poultry Market, in that Joseph Schechter and/or Schechter Live Poultry Market were persons not legally entitled to conduct the business of handling live poultry, not having a permit[11] or license to handle, sell or slaughter live poultry as required by the ordinances of

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[11]Article 2, Section 19 of the Sanitary Code of the City of New York provides:

> "No live rabbits or poultry shall be brought into, or kept, held, offered for sale, sold or killed in, any yard, area, cellar, coop, building, premises, public market, or other public place, except premises used for farming in unimproved sections of the City, without a permit therefor issued by the Board of Health, or otherwise than in accordance with the terms of said permit and with the regulations of said Board."

the City of New York, and by the rules and regulations of the Board of Health of the City of New York, in violation of Article VIII, Section 15 of the Live Poultry Code.

Counsel for the Government stipulated in the record that the place of business conducted by the defendants, Schechter Live Poultry Market and Joseph Schechter, was licensed in the name of Sam Schechter, but not in the name of either of the two defendants above named (R. 1432). Sam Schechter had sold the business to Joseph Schechter.

Furthermore, the veterinarian for the Department of Health, when called as a witness for the Government, testified that the Board of Health always knew that Joseph Schechter was the owner or operator and that the matter "was straightened out afterwards with the Department" (R. 596).

A reading of the regulation indicates that all that is necessary is a permit in the premises. The place of business of the defendants, Schechter Live Poultry Market and Joseph Schechter, did have a license.

In addition thereto, it has been previously shown that no *sale* did in fact take place. The transaction was an accommodation purchase.

X

DEFENDANTS WERE IMPROPERLY CONVICTED UPON THE CONSPIRACY CHARGE

The conviction of the several defendants upon the charge of conspiracy to commit an offense against the United States (Count 1, R. 2-62) is based upon an indictment which charges a conspiracy having a number of separate objects such as selling unfit poultry, selling uninspected poultry, violating "straight killing", submitting false reports, refusing to submit reports, paying less than the minimum wages established by the Live Poultry Code, requiring an employee to work more than the maximum hours established by the said Code and interfering with the execution of the Code by the Code Supervisor, all in violation of said Live Poultry Code (R. 48-49).

It is well settled that proof of a conspiracy having any one of the objects referred to in the indictment is sufficient to sustain a conviction providing the object in question is an offense against the United States Government.

Hogan v. *United States* (C. C. A. 5th), 48 F. (2d) 516, involved an indictment charging a conspiracy to commit an offense against the United States (1) by importing intoxicating liquors in violation of the National Prohibition and Tariff Laws, and (2) by transporting intoxicating liquors in violation of the National Prohibition Law. In discussing this indictment, the Court stated, at page 517:

> "There is no merit in the attack on the conspiracy count. It is competent to charge, and the indictment does charge, simply and clearly, a single conspiracy to violate both the tariff and the prohibition acts, and proof as to either will support conviction."

In *McDonnell* v. *United States,* 19 F. (2d) 801 (C. C. A. 1st), the Court reached the same conclusion upon the same facts and held that the proof was sufficient even if it related only to the unlawful transportation of liquors and thus proved only one of the objects of the conspiracy charged in the indictment. For other decisions to the same effect, see *Christiansen* v. *United States,* 52 F. (2d) 950 (C. C. A. 5th), and *Commonwealth* v. *Meserve,* 154 Mass. 64, at page 73.

It is impossible to determine whether the jury in finding the defendants guilty of conspiracy found them guilty of conspiring to perpetrate any particular one or more of the objects enumerated in the indictment. The record discloses that the jury really desired to limit the verdict to a verdict of guilty of a conspiracy to interfere with and obstruct the Code Supervisor in the performance of his duties (Code, Art. VI, Secs. b(1) and b(2), R., fol. 147, 1551-1552). This is not even a violation of the Code.

Therefore, if this court should hold that the agreement to carry out any one or more of the objects charged in the indictment would not constitute an offense against the statute, the conviction of a conspiracy must be reversed. Otherwise the defendants may be sentenced for a criminal conspiracy consisting of nothing more than a combination to do an act not in contravention of law.

That the offenses contained in the counts upon which the defendants were convicted were not proven, that they should not have been submitted to the jury, has been argued heretofore in this brief. The conspiracy is alleged to have been entered into on May 16, 1934. While an agreement to violate the law may be inferred from overt acts or circumstantial evidence, in this case the Government relied on direct evidence.

On June 1, 1934, a representative of the Code Authority, who was also employed by an accounting firm which had many clients in the live poultry industry, called at the place of business of the defendant, A. L. A. Schechter Poultry Corporation, and sought to examine the books. He appeared without a previous appointment, and without credentials of identification (R. 515). He telephoned to the Code Supervisor and Joseph Schechter being thereupon called to the telephone, according to the testimony of the Code representative, made the following statement over the telephone to the Code Supervisor:

"We are violating the Code every minute of the day."

He also testified that the brothers of Joseph Schechter were near the telephone at the time when those words were spoken, but said nothing.

Some of the defendants were willing to permit an examination of the books but Joseph Schechter suggested that the defendants first consult their attorney to determine whether or not the Code Authority was entitled to examine their books (R. 521). The defendants also suggested that they would first like to speak to Mr. Peterson, the Code Supervisor, before permitting an examination (R. 500-517). It appears that the defendants did consult their attorney after this incident, and two conferences with the Code Supervisor were held between June 1 and June 18, 1934.

It is claimed that at the conference of June 18, 1934, which his attorney attended, the defendant Joseph Schechter, admitted to the Code Supervisor that he and his brothers were violating the Code and confirmed the statement alleged to have been made over the telephone on June 1, 1934 (R. 529). Said conference was arranged by

the defendants and their attorney, to ascertain whether the Code Authority was legally entitled to examine the books, and whether the defendants were obligated to pay assessments although they were operating at a loss (R. 542-5).

At the conclusion of the conference, the defendants and their attorney were advised that the matter had been placed in the hands of the Department of Justice, and that nothing could be done about the situation (R. 548). Prior to that conference, however, neither the defendants nor their attorney were advised of the already contemplated criminal prosecution.

From the foregoing recital it is contended that a concerted plan to violate the Code was proved.

It is to be noted that the above quoted statement was alleged to have been made by Joseph Schechter. He spoke for himself only. None of the other brothers made any such statement nor does the government claim that they did. The mere statement cannot constitute a plan or scheme as well as an agreement or understanding to violate the code. *United States* v. *Munday* (C. C. N. D. Wash.), 186 Fed. 375. It was a mere opinion, binding only the defendant Joseph Schechter. A conspiracy cannot be predicated upon blood-relationship. The mere fact that several persons have simultaneously engaged in a course of conduct, even assuming such conduct to have been unlawful (which has not been established in this case) is not enough to constitate a conspiracy.

If the Government relies solely upon the statement made over the telephone and the subsequent alleged confirmation of that statement no further argument need be made that no conspiracy was proved. However, the Government, through the testimony of witnesses, Cohen and Danziger, employees of one of the defendants and of witnesses,

Alampi and Forsmith, employees of the Code Authority, attempted to supply alleged declarations and acts to establish a concerted plan. The interest of the above mentioned witnesses will be shown.

Cohen was the secretary of Local 167 of the Chicken Helpers Union (R. 876). The Union had previously called a strike to compel the defendants to employ other help (R. 960). Danziger was the man hired as a result of the strike. One of the Schechter brothers was a witness for the prosecution at a trial in which an executive of the same union was convicted of a crime. Cohen and Danziger were out to "get" the Schechters. On May 23, 1934, they appeared at the Code Supervisor's office and there received instructions on how to "get" evidence against the Schechters (R. 958). Cohen testified that he volunteered to give the Government an affidavit, which later formed part of the basis of the indictment returned.

These witnesses in their zeal to point a finger at the defendants, would have it appear that it is extraordinary for chickens to die on a hot day. From the fact that these chickens were put in a bag, they would have it inferred that the chickens were subsequently sold; however, they could not state that the chickens were in fact sold. No proof that the chickens were subsequently sold was offered by the Government.

The testimony of these two witnesses in respect of sales of "culls" by the defendants was not only biased, but proceeded from an erroneous conception of the meaning of the word "cull". A "cull" is defined in the Live Poultry Code as "poultry unfit for human consumption". Cohen, however, defined a cull as a chicken with a broken leg or wing (R. 886) and Danziger stated it to be a chicken with no meat on the breast, but edible if not diseased (R. 970). We

call attention likewise to the fact that although these two employees stated that unfit poultry was sold each day in the place of business of the defendants, they themselves took some of the same poultry home to their own families (R. 969).

An even more extraordinary situation arises in the case of the witness Forsmith, who was the Chief Inspector of the Live Poultry Code. Although engaged generally in the investigation of slaughter house practices in the metropolitan area (R. 641), he was in the business of making purchases of chickens in West Washington Market (R. 653). The bias of a competitor is self-evident. That he was not too well disposed toward the defendants is further evidenced by the fact that his brother had been discharged from the employ of the defendants (R. 653).

Witness Alampi obviously was sent down to the place of business of the defendants with instructions to get evidence against the Schechters. He knew that a raise in salary was awaiting him if he obtained the evidence; his interest is, therefore, apparent. Accordingly, when he believed three chickens to be unfit he told no one about it; he deemed it more advisable that they be sold on the assumption that if he could establish the sale he would then have obtained the incriminating evidence he so desired. He did, in fact, get the raise in salary (R. 726).

The conduct of the defendants should be considered in its entirety. In that light, it is obvious from various conferences of the defendants at the offices of the Code Authority that defendants intended to cooperate with that authority in every possible manner. Government accountants were permitted to examine the defendants' books for eight consecutive days. The defendants tolerated the presence of three inspectors, out of five employed by

the Code Supervisor, at their place of business for a period of approximately one month, although the investigators interfered with the conduct of their business.

Uncontradictable proof that every chicken sold by the defendants was slaughtered in accordance with Jewish dietary laws and that no diseased chickens were slaughtered or sold was given by two shochets of long experience, one of whom is a Rabbi (R. 1293-1297, 1281).

Code Supervisor Peterson received an annual salary of $13,000; his assistant $5,000; his counsel $6,000; and various employees $75.00 per week (R. 556).

The groundwork for the prosecution was laid prior to June 1, 1934. There is testimony in the record that the Code Supervisor stated, in attempting to justify an assessment of $80,000 which he deemed necessary to run his office, "We are going to get an indictment and convict the Schechter brothers and that will be a whip over it" (R. 1166).

Mr. Forsmith, Chief Inspector, on the staff of the Code Inspector, was heard (R. 1167) to remark in reply to the question, "Abe, what have you done so far for the industry? You originated that Code, and you are in the code, and you are just ruining us." "Louis, I know it, the only benefits so far that is got out of this industry is myself and Mr. Peterson."

Mr. Peterson was heard to say, prior to the indictment: "We got to get somebody to set an example in the industry for enforcement of this Code. We are building up a fine case against the Schechter brothers" (R. 1169).

Aside from the reprehensible conduct of a Government official to enlist the aid of employees to obtain evidence for the conviction of their employers, it is significant that although the Code Supervisor admitted that there were no

code violations between May 16 and May 23, 1934, the two employees of the defendants were called to the office of the Code Supervisor, where the attorney for the Code Supervisor was present, and then and there instructed in the manner they were to proceed to obtain evidence against the Schechters (R. 958).

In fact, one of the attorneys for the Code Supervisor, who on behalf of the Code Supervisor built up a case against the Schechters, attempted to obtain a counsel fund in the sum of $900 from members of the industry, to assist in the prosecution in the District Court (R. 684).

The record is replete with these and further instances revealing unprecedented persecution of law-abiding citizens.

This Court, in prior cases, has condemned, in no unmistakable terms, the prevalent practice engaged in by Government prosecuting attorneys of elevating misdemeanors to felonies by the subterfuge of charging the crime of conspiracy. *Report of Attorney General,* 1925, page 5. It was not intended by Congress that a violation of a Code provision should be a felony. Had Congress so intended, it would have so stated in Section 3 (f). The will of Congress should not be set at naught by the arbitrary action of prosecuting attorneys.

XI

NUMEROUS ERRORS WERE COMMITTED BY THE TRIAL COURT. DEFENDANTS DID NOT RECEIVE A FAIR TRIAL.

A. It was error to deny defendants' motion for a bill of particulars.

The indictment was lengthy and vague, making it impossible for the defendants to understand the nature and cause of the accusation against them.

The trial court in overruling the demurrer stated (R. 151-152).

> "In the Recovery Act the intent of Congress was to extend criminal jurisdiction so as to reach all cases where violations of approved codes affect interstate commerce, whether or not they substantially or unreasonably restrain such commerce.
>
> "Of course, the violations must substantially affect interstate commerce and not be merely incidental."

The view expressed by the trial court made the necessity for a bill of particulars more acute and the refusal to grant it error. *Nelson* v. *United States,* 273 Fed. 307; *Rosen* v. *United States,* 161 U. S. 34.

B. The court erred in reading the indictment to the jury. It operated to the great prejudice of the defendants because its reading by the court gave the matters alleged therein the semblance of truth.

C. The court erred in failing to charge the jury as requested. The request and the court's ruling thereon follow:

"May it please your Honor, I except to so much of your charge as does not adequately explain to the jury what is meant by affecting interstate commerce. I ask your Honor to charge that the indictment as you read it states the defendants' conduct in each particular count alleged, tended to and did diminish the total volume or value of the commerce that comes into the State, that their particular conduct disrupted the orderly flow thereof and diminished and demoralized the character thereof, and unless the Jury finds that their conduct did such a thing, their acts did not affect interstate commerce.

"The Court: I have already charged them. I read it at great length, the whole indictment. I told them that the charge in the indictment is what the Government is required to prove and asked the Jury to determine whether the Government has proved its case. I am not going to charge separate parts. I made that charge plain and distinct, and I think the Jury understood it. I read the whole of the first count, too.

"MR. HELLER: EXCEPTION (R. 1541-1543).

"* * * I ask your Honor to charge that what I just said applies to each particular count separately; they must be considered separate and apart.

* * * * *

"The Court: Let me see it. I read them at very great length. Each count, of course, depends upon the acts affecting interstate commerce. I find no necessity for further charging the Jury.

"Mr. Heller: Exception" (R. 1627-1628).

The Government claims that counsel for the defendants, in excepting to so much of the trial court's charge "as does not adequately explain to the jury what is meant by affecting interstate commerce" (R. 1541), did not thereby specifically tell the trial court in what respects the charge

was erroneous or deficient. It may be conceded that a general exception furnishes no basis for reversal by an appellate court. But, as this Court has pointed out in *McDermott* v. *Severe,* 202 U. S. 600, 610, the purpose of the requirement that an exception be specific is to call the trial court's attention to objections "in order that if necessary, it could correct or modify them." Clearly, the exception taken here was sufficient to call attention to the error asserted so that the trial court could have corrected or modified its instructions. The exception is, therefore, not subject to attack on the ground that it was not specific.

D. The trial court further erred in failing adequately to explain to the jury the meaning of the words "commerce" and "affecting interstate commerce" (R. 1541-1543).

An examination of the trial court's charge shows conclusively that it was left to the jury to decide whether the acts of the defendants affected interstate commerce, without adequate instructions as to the degree of affectation necessary. Never once in the charge was it said that there must be a substantial and direct effect upon interstate commerce, or anything of that nature. This is clearly reversible error.

The Government intimates that the trial court made some attempt to charge that there must be a substantial and direct effect upon interstate commerce. The reference is to R. 532 where the trial court charged "the violations must have been substantial and not merely incidental." The context of the charge at this point very clearly shows that the court was talking about the gravity of the violations *per se* and had no reference to their effect upon interstate commerce.

E. The trial court erred in failing to make intelligible to the jury the meaning of "overt act" and "vitalizing the conspiracy."

F. The trial court erred in refusing to admit evidence offered to prove the unreasonableness and impracticability of the provision requiring "straight killing".

G. The verdict of the Jury was not unanimous and was only made so by coercion exercised by the trial court upon a jury tired from 25 hours of deliberation.

The following[1] is the colloquy between the court and jurors when the jury was polled (R. 1551-1553).

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[1]"The Clerk: James Roxby.

"Mr. Roxby: As given, with one proviso, that on that Count 1, the principal count, we find him guilty on one Section of that item.

"The Court: No; you find him guilty on the count.

"Mr. Roxby: The last one, I think it is Section i, that has not been read, and I would like to put it in; otherwise the list as read is complete.

"The Court: You said you agreed on a verdict. If you have not agreed, why, I want to know it. You said you agreed upon a verdict. The verdict on the first count was announced as guilty. Is it or is it not? Have you or have you not agreed?

"The Foreman: We have agreed guilty on Count 1.

"Mr. Roxby: Well,——

"The Clerk: Mr. Roxby, how do you agree as to the verdict on the first count, guilty or not guilty?

"Mr. Roxby: Guilty under those conditions that I have stated.

"The Court: Now, guilty or not guilty? You came in and said you had agreed upon a verdict. Have you agreed or haven't you?

"Mr. Roxby: We have agreed.

"The Court: Then what do you find, guilty or not guilty, on that count?

"Mr. Roxby: Guilty; otherwise as read.

"The Court: Is that your verdict? Your verdict is guilty on the first count?

"Mr. Roxby: That is my verdict.

"Mr. Baumgarten: If he is guilty on this charge (i), does that consider the entire——

"The Court: The Count is presented. You said you agreed on a verdict. Now, if you have not agreed on it, and if you have agreed on the others, we will send you back on that.

Counsel for the defendants requested the court to give the jury further instructions (R. 1631). The court refused to do so. This was error. *Spurr* v. *United States,* 174 U. S. 728.

CONCLUSION

The defendants submit that the judgment of the Circuit Court of Appeals in No. 854 should be reversed and that in No. 864 affirmed.

Respectfully submitted,

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Counsel for Petitioners in No. 854 and Respondents in No. 864.

"Mr. Heller: I think the Jury did not understand Count I. They may require further instructions.

"The Court: They did not ask for it and you are not in a position to ask for it. Have you agreed on that or have you not?

"Mr. Roxby: Yes, sir.

"The Clerk: Samuel Blank.

"Mr. Blank: As given.

"The Clerk: Joseph Sommers.

"Mr. Sommers: As given.

"The Clerk: Noel Andrews.

"Mr. Andrews: As given.

"The Court: Now there is no doubt about it, you have agreed on a verdict of guilty on the first count, that is right, is it?

(Several jurors answered "yes".)

"The Court: No doubt about that? That is the verdict?

"The Foreman: That is the verdict.

"The Court: You gentlemen in the back, that is your verdict, guilty, that is, the seventh and the ninth? That is correct is it?

"Mr. Roxby: Correct.

"Mr. Baumgarten: Yes, sir.

"The Court: Then there is no question."