through John Smith, broker, 173 barrels No. 1 Labrador herrings at $5.50; 29 barrels at $5.50; 20 barrels No. 1 shore herrings at $5; 32 barrels Sept. shore at $5; and 67 barrels T. P. No. 1 shore at $5, the whole stored in M. Davis' warehouses; terms, spot cash, less 2 per cent. On the same day, three delivery orders on M. Davis were given by defendant to plaintiff for the full amount of 321 barrels of above-described herrings; an invoice was also sent for the same; on the 24th November plaintiff wrote defendant asking his patience for the settling of the account and for the examination of the fish, saying he had had no time yet to make such examination. Defendant replied that if he had not examined the fish bought, it was his own fault; and although he might wait a day or two for the payment, he would recognize no claim for quality after this; requesting also a cheque on the next day for $1,000 on account.

On the following days the plaintiff made three payments to defendant on account of said sale, namely, on 26th November, $500; on 28th November, $250; on the 30th November, $250. On this last date, 30th November, plaintiff had seven barrels examined, and on 1st December he wrote defendant that out of seven barrels examined, three were found to be far from No. 1 fish; he would take no rusty or tainted fish; he would examine every barrel and leave out objectionable ones; however, he would return orders on payment of the $1,000 already paid. In his answer of same date, defendant protested that the quality, condition and size were out of the question. The sale had been had on 18th November, and should have been repudiated at the most within two days; the sale was not made subject to selection; plaintiff was therefore requested to pay the balance, otherwise the defendant would protect himself by disposing of the fish and charging plaintiff with the loss, deducting the $1,000 in question. Another letter from each party was sent on the same and following day, reiterating their pretentions, and defendant wrote Moses Davis suspending the delivery orders given to plaintiff, on account, as he says, of difficulties between them as to the payment. Defendant began to sell, as intimated, on the 2nd December, and continued to sell by small lots until 18th January. The balance of 33 barrels was not sold until April, and had to be sent to Chicago, netting only $13. Coming back, on the 10th December, plaintiff protested defendant, tendering $706, balance of purchase price, demanding delivery according to