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New Jersey State Library

New Jersey Supreme Court

Essex County

E. CLEMENS HORST COMPANY,
Plaintiff-Appellee,
v.
THE PETER BREIDT CITY BREWERY COMPANY,
Defendant-Appellant.

Action-at-Law.

STIPULATION.

It is stipulated by and between the respective parties by their counsel:

1. That the above entitled cause was argued on brief before the trial Judge.

2. That the defendant's brief, submitted to the trial Judge, contained the following request:

> "An effort was made by the plaintiff to minimize Mr. Phleger's authority by claiming that he was a sort of errand boy for Mr. Horst, and that he acted only on specific instructions in every case, and an effort was made to introduce in evidence certain correspondence between Phleger and his principals at San Francisco. These were exhibits P. 38, P. 39, P. 40 and P. 41. They were tentatively admitted by the Court, over the objection of the defendant, with leave to move to strike them out * * * *. The grounds of objection are stated in the record, and we urge them again on the motion to strike out these exhibits."

3. That the brief of the defendant also contained the following request:

> "The Brewers Bulletin for October 7, 1914, (D.-35 for identification) quoted prices as follows:
>
> **'1914 Pacifics prime to choice, 16 @ 17c.'**

The same quotation appears in the Brewers Bulletin of October 9, 1914, (D.-3 for identification).

At the time these bulletins were offered in evidence, the Court reserved decision on the question of their admissibility. The discussion between Court and counsel appears in the record from the bottom of page 1038, through page 1042.

Pursuant to the leave there reserved, we now renew the offer, and offer in evidence the bulletins of October 7th, (D.-35 for identification), and October 9th, (D.-3 for identification)."

It is stipulated by and between counsel for the parties that the defendant shall have the right to print the foregoing fact into the record of this case.
Dated: November 3, 1919.

LINDABURY, DEPEW & FAULKS,

Attorneys of Plaintiff-Appellee.

STAMLER & STAMLER,

Attorneys of Defendant-Appellant.

Supreme Court of New Jersey

ESSEX COUNTY.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff, vs. THE PETER BREIDT CITY BREWERY COMPANY, a Corporation, Defendant.	Action at Law

Complaint.

Plaintiff, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal office in the City of East Orange, in the County of Essex and State of New Jersey, says that:

FIRST COUNT.

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office in the City of East Orange, in the County of Essex and State of New Jersey.

2. Defendant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office in the City of Elizabeth, in the County of Union and State of New Jersey.

3. On or about March 26, 1914, plaintiff and defendant entered into a written contract, in and by

which plaintiff agreed to sell to defendant the following named quantities of hops equal to or better than Good Brewing Pacific Coast Hops of the crops of each of the following named years, and at the following named prices:

100 Bales of each crop of years 1914 to 1918, incl., at 17½c per lb. on approved samples.

The terms of payment for said hops were in said contract agreed to be net cash; and it was therein further agreed that said hops were to be delivered on or at cars or ex dock or store, Elizabeth, N. J., or at delivering lines' terminals convenient thereto. The time of shipment or delivery of said hops was therein agreed to be during the months inclusive of September and February following the harvest of each year's crop, with certain extra time as provided in said contract; and it was further agreed that the plaintiff might treat all or any part or parts of entire unfulfilled portion thereof as violated by the defendant; and upon or at any time or times after defendent's refusal to pay for any hops, or if the said contract or any part thereof was otherwise violated by the defendant; and it was further agreed that upon or at any time after delivery of any hops under said contract, the plaintiff should be entitled to net cash payment for the same by allowing to the defendant interest on the unpaid portion of the account (if the hops were sold on time) at the rate of six per cent. per annum for any unexpired term of credit; and it was further agreed that the difference if any between the quality of the hops sold and the quality delivered under said contract should entitle the defendant to an equivalent allowance but not to rejection of delivery; and it was further agreed that the defendant waived all

rights to rejection or to allowances on any delivery on account of quality unless such claim was delivered to the plaintiff by telegraph or in writing within five days after arrival of the hops at place of delivery and unless such claim was so made prior to the defendant's exercise of any right of ownership of the said hops; and it was further agreed that if for any reason the defendant should be dissatisfied with or object to all or any part of any lot or lots of hops delivered under said contract, the plaintiff might within thirty days after receipt of written notice thereof ship or deliver other hops of the contracted quality in place of any objected to. The said agreement was expressed to be subject to telegraphic or other written confirmation sent by the plaintiff to the address of the defendant on or before ten days from the date thereof. A true copy of the said contract is hereto annexed and made a part hereof and marked "Schedule A."

4. On or about March 26, 1914, the said contract was duly confirmed as provided therein.

5. On or about August 29, 1914, and September 4, 1914, plaintiff sent defendant samples of hops equal to or better than Good Brewing Pacific Coast Hops of the crop of the year of 1914.

6. Upon the expiration of a reasonable time after the shipment of said samples and prior to the receipt of advices from defendant that the same were not approved by it, to wit, on September 19, 1914, plaintiff in pursuance of said written contract shipped to defendant at Elizabeth, N. J., 100 bales of hops equal to or better than Good Brewing Pacific Coast Hops of the crop of the year 1914 of the net weight of 18,911 pounds, for which defend-

ant agreed by said contract to pay plaintiff 17½ cents per pound or $3309.42. Defendant has paid freight on gross weight of said shipment amounting to $339.69, for which plaintiff has credited defendant. Annexed hereto and made a part hereof and marked "Schedule B" is a true copy of the invoice of said shipment. Said hops were duly delivered on cars at Elizabeth, N. J., on October 1, 1914, and on the same date were taken by defendant into its brewery at Elizabeth, N. J.

7. Defendant retained said hops at its brewery for more than a reasonable time after October 1, 1914, and for more than five days after the arrival of said hops at place of delivery without delivering any claim to plaintiff by telegraph or in writing of its right to reject the same or to allowances on said delivery on account of quality.

8. There is due and owing from defendant to plaintiff on account of the purchase price of the hops so shipped as aforesaid $2969.73 with interest thereon at 6% from October 1, 1914. Plaintiff has frequently requested defendant to pay said sum of $2969.73with interest thereon as aforesaid.

9. Defendant has refused and neglected and still does refuse and neglect to pay the whole or any part of said sum.

10. By reason of the defendant's neglect and default aforesaid, plaintiff has treated and hereby elects to treat all of entire unfulfilled portion of said contract, Schedule A, as violated by defendant.

11. By reason of defendant's neglect and default aforesaid, plaintiff has suffered loss and damage in the sum of $15,000.

SECOND COUNT.

12. Plaintiff repeats the allegations of paragraphs 1, 2, 3 and 4 hereof.

13. On September 19, 1914, plaintiff in pursuance of said written contract, Schedule A, shipped to defendant at Elizabeth, N. J., 100 bales of hops equal to or better than Good Brewing Pacific Coast Hops of the crop of the year 1914 of the net weight of 18,911 pounds for which defendant agreed by said contract to pay plaintiff 17½ cents per pound or $3309.42. Defendant has paid freight on gross weight of said shipment amounting to $339.69, for which plaintiff has credited defendant. Annexed hereto and made a part hereof and marked "Schedule B" is a true copy of the invoice of said shipment. Said hops were duly delivered on cars at Elizabeth, N. J., on October 1, 1914, and on the same date were taken by defendant into its brewery at Elizabeth, N. J.

14. Plaintiff repeats the allegations of paragraphs 7, 8, 9, 10 and 11 hereof.

THIRD COUNT.

15. Plaintiff repeats the allegations of paragraphs 1, 2, 3 and 4 hereof.

16. On September 19, 1914, plaintiff shipped to defendant at Elizabeth, N. J., 100 bales of hops of the crop of the year 1914 of the net weight of 18,911 pounds. The reasonable value of said hops and the amount which the defendant agreed to pay plaintiff therefore was $3309.42, being 17½ cents per pound upon the net weight thereof less freight upon the gross weight thereof of 19,411 pounds at

the rate of $1.75 per hundred pounds aggregating $339.69. Annexed hereto and made a part hereof and marked "Schedule B" is a true copy of the invoice of said shipment. Said hops were duly delivered on cars at Elizabeth, N. J., on October 1, 1914, and on the same date were taken by defendant into its brewery at Elizabeth, N. J.

17. Plaintiff repeats the allegations of paragraph 7 hereof.

18. There is due and owing from defendant to plaintiff for the reasonable value of the hops so shipped as aforesaid $2969.73 with lawful interest from October 1, 1914. Plaintiff has frequently requested defendant to pay it the said sum of $2969.73 with lawful interest thereon from October 1, 1914.

19. Plaintiff repeats the allegations of paragraph 9 hereof.

20. By reason of defendant's neglect and default aforesaid, plaintiff has suffered loss and damage in the sum of $5,000.

FOURTH COUNT.

21. Plaintiff repeats the allegations of paragraphs 1, 2, 3, 4, 5 and 6 hereof.

22. Defendant has hitherto refused and still refuses to accept said shipment.

23. Plaintiff repeats the allegations of paragraphs 8, 9, 10 and 11 hereof.

FIFTH COUNT.

24. Plaintiff repeats the allegations of paragraphs 1, 2, 3, 4, 13, 22 8 9 10 and 11 hereof.

SIXTH COUNT.

25. Plaintiff repeats the allegations of paragraphs 1, 2, 3, 4, 5, 6 and 7.

26. On or about October 17, 1914, plaintiff received a written notice from defendant expressing dissatisfaction with said shipment. Within thirty days after receipt of said written notice plaintiff offered to ship or deliver other hops to defendant of the contracted quality in place of the hops shipped defendant as aforesaid and objected to by it. Defendant has hitherto refused and still does refuse to accept delivery of such hops so offered to be shipped to it by plaintiff.

27. Plaintiff repeats the allegations of paragraphs 8, 9, 10 and 11 hereof.

SEVENTH COUNT.

28. Plaintiff repeats the allegations of paragraprs 1, 2, 3, 4, 13, 7, 26, 8, 9, 10 and 11 hereof.

EIGHTH COUNT.

29. Plaintiff repeats the allegations of paragraphs 1, 2, 3, 4, 16, 7, 26, 18, 9 and 20 hereof.

Plaintiff demands as damages upon the first count the sum of $15,000; upon the second count, a like sum; upon the third count, $5,000; upon the fourth count, $15,000; upon the fifth count, $15,000; upon the sixth count, $15,000; upon the sev-

enth count, $15,000; and upon the eighth count, $5,000. Besides costs.

LINDABURY, DEPUE & FAULKS,
Attorneys of Plaintiff.

Summons issued April 23, 1915. Defendant was served with summons and complaint on April 24, 1915.

Schedule A.

HOP CONTRACT.

(1) Parties: Memorandum of agreement made this day by and between E. CLEMEN'S HORST COMPANY, (A Corporation), Hop Growers, hereinafter referred to as the "Seller," and Peter Breidt City Brewery Co., of the City of Elizabeth, N. J., hereinafter referred to as the "Buyer."

(2) What sold and price: The Seller agrees to sell to the Buyer the following named quantities of Hops, equal to or better than Good Brewing Pacific Coast Hops, of the crops of each of the following named years, and at the following named prices:

100 Bales of each crop of years 1914 to 1918, incl., at 17½ cents per lb. on approved samples.

Tare five (5) pounds per bale.

Terms: Net cash.

Seller shall be entitled to Interest at 6% per year on Deferred Payments.

(3) Place of Delivery. Said Hops are to be delivered on or at cars or ex dock or store Elizabeth, N. J., or at delivering lines' terminals convenient thereto.

Schedule A

(4) Time of Shipment, etc. Time of shipment and or delivery during the months inclusive of September-February following the harvest of each year's crop, with such exta time as provided in Paragraphs 11 and 15 endorsed hereon.

(5) Separate Bales: It is agreed that this Contract is severable as to each Bale.

(6) Default: The Seller may treat all or any part or parts of entire unfulfilled portion of this contract as violated by the Buyer upon or at any time or times after Buyer's refusal to pay for any Hops, or any note or acceptance given in payment for Hops that have been delivered and accepted hereunder, or if this contract or any part of it is otherwise violated by the Buyer.

(7) Conditions: This Agreement is subject to the printed conditions at foot and endorsed hereon. It is specially agreed that the terms and conditions of this written agreement comprise the entire agreement and that no variation from the same shall be valid unless made in writing subsequent hereto.

Dated at Elizabeth, N. J., March 26, 1914.

E. CLEMENS HORST COMPANY,
By C. A. Phleger,
For the Seller.

THE PETER BREIDT CITY BREWERY CO.
By D. F. Collins, Prest.
For the Buyer.

(8) Confirmation: This Agreement is subject to telegraphic or written confirmation sent by Seller to address of Buyer on or before ten days from date hereof.

Endorsements.

(9) Freight, Etc.: If any delivery hereunder is subject to freight, storage, duty, and or any other charges which under the terms of this Agreement Seller may be liable, Buyer shall pay such charges and charge same to Seller.

(10) Discount: Upon or at any time after delivery of any hops hereunder, Seller shall be entitled to net cash payment for the same by allowing to the Buyer interest on the unpaid portion of the account (if the hops are sold on time) at the rate of 6% per annum for any unexpired term of credit.

(11) Delays: Buyer gives to the Seller sufficient extension in time for shipments and or deliveries under paragraphs 4 and 15 to cover any and all delays arising from Fires, Riots, Strikes, Car Famines, Blockades, Wrecks, Quarantines, or other extraordinary conditions beyond Seller's control.

(12) Prior Delivery: Seller has privilege of making deliveries hereunder at any time prior to that herein specified for delivery, but in case of such prior delivery Buyer shall be entitled to allowance on the hops prior delivered, to cover all the ordinary carying charges of Interest, Storage and Fire Insurance.

(13) Arbitration and Differences in Quality: Differences of opinion and claims for allowance in regard to quality of hops submitted or tendered hereunder shall be settled by arbitration if requested by either Buyer or Seller, Difference, if any, between quality sold and quality delivered hereunder shall entitle Buyer to equivalent allowance, but not to rejection of delivery. Any arbitration under this agreement shall be by distinterested brewers and or hop growers, of whom one shall be

named by Seller and one by Buyer. The two thus chosen shall, at their option, name a third. A written decision of any two of said arbitrators shall be final. The number of days from date of either party's written request for arbitration till arbitrators' written notice of decision has been received by both parties, shall be given to the Seller for time for subsequent shipment in addition to the time as provided in paragrph 15 herein.

(14) Claims, Etc.: The Buyer waives all rights to rejection or to allowances on any delivery on account of quality unless such claims be delivered to Seller by telegraph or in writing within 5 days after arrival of the hops at place of delivery, and unless such claim be so made prior to Buyer's exercise of any right of ownership of the said hops. Buyer waives all claims for shortage of weight from invoice weight, unless claim (accompanied by Certificate of Public Weigher's reweights) be delivered to Seller within 10 days from date of Buyer's receipt of notice of arrival of hops at destination.

(15) Subsequent Shipments: If for any reason the Buyer shall be dissatisfied with, or object to all or any part of any lot or lots of hops delivered hereunder, the Seller may, within 30 days after receipt of written notice thereof, ship or deliver other hops of the contracted quality in place of any objected to.

(16) Quality: The delivery by Seller of hops of a quality at least as good as any accepted by Buyer from Seller on any then previous delivery under this or similar quality specifications, shall be a compliance as to quality under this contract.

(18) Non-Transferable Without Seller's Con-

Schedule B

sent: The Buyer shall have no right to sell, transfer or assign this contract or any of the Buyer's rights or benefits thereunder without first having obtained the written consent of the Seller.

Schedule B.

Invoice
No. 8591

E. CLEMENS HORST CO.
HOP GROWERS.

San Francisco, Sept. 12/14.

Rating 750,000
Credit High

Car No. SP. 24125 Sold to The Peter Breidt City Brewery Co.
Routing SP. UP. CMSTP. Penn. R.R. Elizabeth, N. J.
Terms: Net Cash On Account Sale of March 26/14. No. 120.

Bales No.				
Lot 13	:	100 Bales Good Brewing Pacific Coast Hops crop 1914	:	:
500/599	:	Gross 19411 lbs.	:	:
		Tare 500 "	:	:
		Net 18911 " at 17½c. Elizabeth	:$3309.42	:
	:	Less freight from Pacific Coast to Elizabeth 19411 lbs. at $1.75 per 100 lbs.	: 339.69	$2969.73

Made out by ——— Checked by T Entd. H. L. Fol. 20

Schedule B

E. CLEMENS HORST CO. Invoice No. 8591

The Peter Breidt City Bry. Co.
Elizabeth, New Jersey.

100 Bales Lot No. 13 Weighted by S. P. Rooney Date Sept. 6th, 1914.

No. Lbs.	No. Lbs.	No. Lbs.	No. Lbs.	No. Lbs.	No. Lbs.	No. Lbs.
5:00196	510:196	520:188	530:200	540:189	550:186	560:191
1:199	1:186	1:200	1:196	1:199	1:193	1:196
2:186	2:183	2:194	2:190	2:189	2:196	2:202
3:194	3:188	3:192	3:200	3:195	3:193	3:198
4:182	4:178	4:198	4:200	4:195	4:191	4:206
5:182	5:186	5:186	5:198	5:200	5:194	5:197
6:180	6:186	6:180	6:206	6:205	6:197	6:195
7:207	7:188	7:200	7:190	7:196	7:193	7:204
8:193	8:189	8:192	8:187	8:198	8:204	8:195
9:183	9:192	9:204	9:196	9:199	9:207	9:176
1902	1872	1934	1963	1965	1954	1960

No. Lbs.	No. Lbs.	No. Lbs.	Totals:
570:204	580:199	590:196	1902
1:199	1:178	1:188	1872
2:205	2:182	2:194	1934
3:187	3:192	3:189	1963
4:210	4:194	4:186	1965
5:183	5:195	5:184	1954
6:188	6:190	6:183	1960
7:202	7:193	7:181	1978
8:203	8:196	8:185	1914
9:197	9:195	9:183	1969
1978	1914	1869	

Received in Good Order
Hubach.

Gross	19411
Tare	500
Net	18911

It is stipulated that Schedule "B" on pages 12 and 13 is Exhibit P-5.

Answer and Counterclaim.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff, vs. THE PETER BREIDT CITY BREWERY COMPANY, a Coporation, Defendant.	ACTION AT LAW.

The defendant, the Peter Breidt City Brewery Company, a corporation of the State of New Jersey, having its office and principal place of business in the City of Elizabeth, Union County, New Jersey, answering the complaint in the above entitled cause, says:

DEFENSE TO FIRST COUNT.

1. Defendant admits the allegations contained in paragraphs 1, 2, 3 and 4.

2. The defendant has no knowledge that plaintiff sent samples of hops as alleged in paragraph 5, but on the contrary alleges the fact to be, that this defendant, to-wit, on or about the sixteenth day of September, 1914, received samples of hops, but, before being able to ascertain whether the same were equal to or better than Good Brewing Pacific Coast Hops of the crop of the year 1914 as provided in the contract annexed to the complaint as "Schedule A," this defendant was informed that the plaintiff, without awaiting a rea-

sonable time to have the samples approved by defendant, had shipped to this defendant one hundred bales of hops.

3. This defendant admits that on the first day of October, 1914, one hundred bales of hops were delivered on cars at Elizabeth, New Jersey, and, believing that said hops were equal to, or better than Good Brewing Pacific Coast Hops of the crop of the year 1914, as provided to be furnished by the contract aforementioned, on the second day of October, 1914, removed the same from said cars to its brewery in order to save any car demurrage to both this plaintiff and the defendant; but this defendant denies that said shipment was made by the plaintiff on September 19th, but alleges that the said shipment was made on September 12th, 1914; that said hops were not shipped on approved sample, and that defendant was not allowed a reasonable time after the receipt by it of samples in which to approve or disapprove of said samples. This defendant admits that it paid three hundred and thirty-nine dollars and sixty-nine cents as and for the freight on gross weight of said shipment as alleged in paragraph 6.

4. This defendant admits that the one hundred bales of hops were at its brewery more than five days after the arrival of said hops at the place of delivery as alleged in paragraph 7, but denies that the said hops were at its brewery more than a reasonable time before sending a notice of disapproval to the plaintiff and alleges that by reason of the fact that said shipment of 100 bales of hops was made by the plaintiff without the sample having been approved by defendant, and without allowing defendant a reasonable time to approve samples, that it became necessary for this defendant

after unloading said hops from the railroad cars to have a test of the same made to ascertain whether they were of the quality provided to be furnished under said contract; that defendant caused a test to be made of said hops by a chemist of the City of Elizabeth by the name of Carl Hainlin who reported that the same were of an inferior quality and not equal to or better than Good Brewing Pacific Coast Hops of the crop of the year 1914; that in order to not do injustice to the plaintiff or to act hastily in regard to the shipment of 100 bales of hops this defendant sent a sample of said hops to the scientific station under date of October 10th. A report was made by said scientific station to this defendant, which report was received by this defendant on October 12th, 1914, and on said twelfth day of October, 1914, this defendant in writing notified the plaintiff of the result of the examination as made by said scientific station and of the refusal of the defendant to accept the shipment for the reason that they were not in accordance with the contract.

5. Defendant denies the allegations contained in paragraph 8 of the complaint.

6. The defendant admits the allegations contained in paragraph 9 of the complaint but alleges that it is not indebted to the plaintiff in any sum of money because the plaintiff has failed to carry out the terms of its contract, and has not delivered hops of the quality provided to be furnished by said contract.

7. The defendant denies that there has been any violation by it of any of the terms of the contract set forth in the complaint as "Schedule A."

8. Defendant denies the allegation contained in paragraph 11 of the complaint.

DEFENSE TO SECOND COUNT.

9. Defendant repeats the allegations contained in paragraph 1 of this answer.

10. Defendant admits the payment of freight and that 100 bales of hops were delivered on cars at Elizabeth, N. J., on October 1st, 1914, as alleged in paragraph 13, but denies that said hops were shipped at the time, in the manner or of the quality alleged in said paragraph, and alleges that the hops which were delivered at Elizabeth on October 1st, 1914, were of the quality far inferior to those agreed to be furnished under the contract, "Schedule A."

11. In answer to paragraph 14 of the complaint the defendant repeats the allegations contained in paragraphs 4, 5, 6, 7 and 8 of this answer.

DEFENSE TO THIRD COUNT.

12. In answer to paragraph 15 of the complaint the defendant repeats the allegations contained in paragraph 1 of this answer.

13. In answer to paragraph 16 of the complaint the defendant says that on September 12th, 1914, and not on September 19th, 1914, as alleged in the complaint, plaintiff shipped to defendant at Elizabeth, New Jersey, 100 bales of hops; that the defendant did not order the hops which were shipped by the plaintiff, but ordered hops of the quality as specified in contract set forth in the complaint as "Schedule A," and defendant has never received from the plaintiff any hops as provided in and by

said contract; defendant repeats the allegations contained in paragraph 3 of this answer as to the receipt of hops.

14. In answer to paragraph 17 of the complaint the defendant repeats the allegations contained in paragraph 4 of this answer.

15. Defendant denies the allegations of paragraph 18 excepting that plaintiff has asked for money which this defendant contends is not owing to it.

16. In answer to paragraph 19 of the complaint, the defendant repeats the allegations contained in paragraph 6 of this answer.

17. Defendant denies the allegations of paragraph 20 of the complaint.

DEFENSE TO FOURTH COUNT.

18. In answer to paragraph 21 of the complaint the defendant repeats the allegations contained in paragraphs 1, 2 and 3 of this answer.

19. In answer to paragraph 22 the defendant admits its refusal to accept said shipment, and alleges that it was justified in so doing as said hops were not shipped on an approved sample and were not of the quality to be furnished as required by the contract set forth in the complaint as "Schedule A," and that immediately upon definitely ascertaining that said hops were of an inferior quality in writing so notified the plaintiff, and also in said writing notified the plaintiff of its refusal to accept said shipment of hops, and that said hops were being held subject to the advice of plaintiff. There-

after plaintiff negotiated with defendant to exchange said hops for hops in compliance with the terms of the contract and finally agreed to ship other hops which would be in compliance with the contract to this defendant, but the plaintiff in fact, never shipped any other hops to defendant, and although, defendant did upon divers occasions request plaintiff for instructions as to the place to which defendant should re-ship said shipment of 100 bales of hops received at Elizabeth, N. J., as mentioned in paragraphs 3 of this answer and receiving no instructions from plaintiff as to place of shipment defendant notified plaintiff that it would re-ship said hops to plaintiff at San Francisco, California, the place from which the same had been originally shipped unless this defendant received from plaintiff another destination to which to ship said hops, and after waiting a reasonable time and receiving no instructions as to any other place of destination defendant did on the ninth day of November, 1914, re-ship 99 of said bales of hops to the plaintiff at San Francisco, California, the hundredth bale of said hops having been opened by this defendant for the purpose of making tests of the same to ascertain whether said hops were of the quality required to be furnished under the contract, "Schedule A."

20. In answer to paragraph 23 of the complaint the defendant repeats the allegations of paragraphs 5. 6, 7 and 8 of this answer.

DEFENSE TO FIFTH COUNT.

21. The defendant repeats the allegations contained in paragraphs 1, 10, 19, 5, 6, 7 and 8 of this answer.

DEFENSE TO SIXTH COUNT.

22. In answer to paragraph 25 of the complaint defendant repeats the allegations contained in paragraphs 1, 2, 3 and 4 of this answer.

23. In answer to paragraph 26 of the complaint, defendant says that on October 12th, in writing it notified the plaintiff that the shipment of 100 bales of hops which arrived at Elizabeth on October 1st, 1914, were not in accordance or compliance with the contract set forth as "Schedule A," a copy of which written notification defendant hereto annexes and makes a part hereof as "Exhibit A"; that it admits that the plaintiff by writing and by parol through its duly authorized agent stated the willingness of plaintiff to exchange said hops which were invoiced by plaintiff to defendant on September 12th, 1914, for other hops, but annexed a condition that such exchange would be made only after acceptance by the defendant of the original shipment; that defendant has upon divers occasions expressed its willingness to plaintiff and to its authorized agent to accept the shipment of 100 bales of hops from the plaintiff of the quality provided to be furnished under the contract, "Schedule A," but that the plaintiff has never in fact made any such shipment and defendant has not been supplied by the plaintiff with 100 bales of hops of the crop of the year of 1914, equal to or better than Good Brewing Pacific Coast Hops as provided for in and by contract, "Schedule A"; and that defendant has always been ready and willing, and is now willing to accept and receive from plaintiff a shipment of 100 bales of hops equal to or better than Good Brewing Pacific Coast Hops of the crop of the year 1914 at the price specified in said contract "Schedule A."

24. In answer to paragraph 27 of the complaint defendant repeats the allegations of paragraphs 5, 6, 7 and 17 of this answer.

DEFENSE TO SEVENTH COUNT.

25. Defendant repeats the allegations of paragraphs 1, 10, 4, 5, 6, 7, 17 and 23 of this answer.

DEFENSE TO EIGHTH COUNT.

26. Defendant repeats the allegations contained in paragraphs 1, 13, 4, 23, 5, 6, 7 and 17 of this answer.

Defendant denies that the plaintiff is damaged in any sum of money upon any of the eight counts aforesaid.

COUNTERCLAIM.

The defendant by way of counterclaim against the plaintiff alleges:

FIRST COUNT.

1. The defendant repeats the allegations contained in paragraphs 1, 2, 3 and 4 of the complaint.

2. That on the twelfth day of September, 1914, plaintiff shipped to defendant at Elizabeth, New Jersey, 100 bales of hops and represented the same to be equal to or better than Good Brewing Pacific Coast Hops of the crop of the year 1914; that defendant believing such representation to be true, paid the freight upon such shipment amounting to three hundred thirty-nine dollars and sixty-nine cents and removed said hops to its brewery.

3. That within a reasonable time after receiving said hops at its brewery defendant caused tests

of said hops to be made and then for the first time ascertained that said hops were not equal to or better than Good Pacific Coast Hops of the crop of the year 1914, but were far inferior thereto, and that the representation of the plaintiff was false.

4. That upon defendant learning that the representation of plaintiff that the hops shipped by plaintiff to defendant as alleged in paragraph 2 of this counterclaim was false, defendant in writing notified plaintiff of its refusal to accept such shipment, and that the same was being held subject to orders from the plaintiff and after waiting a reasonable time and receiving no directions or orders from plaintiff, defendant re-shipped ninety-nine bales of said hops to plaintiff, the hundredth bale having been opened by defendant for the purpose of making tests; that the cost of carting said hops from the railroad cars to defendant's brewery and from defendant's brewery back to said railroad cars was the sum of Twenty Dollars ($20.00).

5. By reason of plaintiff's breach of contract in its shipment of inferior hops as aforesaid defendant has suffered loss and damage in the sum of three hundred fifty-nine dollars and sixty-nine cents, together with interest.

SECOND COUNT.

6. Defendant repeats the allegations of No. 1 of the counterclaim.

7. Plaintiff has failed, neglected and refused to supply defendant with 100 bales of hops equal to or better than Good Brewing Pacific Coast Hops of the crop of the year 1914, although defendant has always been ready and willing and is now will-

ing to accept and receive hops of the quality provided to be furnished under contract "Schedule A" and to pay the price therein stipulated.

8. Plaintiff has wrongfully and unlawfully treated contract "Schedule A" and all portions thereof as violated by defendant and plaintiff refuses to furnish defendant with 100 bales of hops of the respective crops of the years 1914 to 1918 inclusive equal to or better than Good Brewing Pacific Coast Hops.

9. Defendant will be forced and obliged to pay out and expend divers large sums of money in purchasing 100 bales of hops for the years 1915 to 1918 inclusive equal to or better than Good Brewing Pacific Coast Hops in excess of the price agreed to be paid for said hops in contract "Schedule A."

10. By reason of plaintiff's breach of said contract "Schedule A," defendant is damaged in the sum of Fifteen Thousand Dollars.

Plaintiff demands as damages on the first count of the counterclaim three hundred and fifty-nine dollars and sixty-nine cents and upon the second count the sum of fifteen thousand dollars. Besides costs, and interest.

JOHN J. STAMLER,
Attorney of Defendant.

Reply and Answer to Counter-Claim.

SUPREME COURT OF NEW JERSEY.

ESSEX COUNTY.

E. CLEMENS HORST COMPAANY, a Corporation, Plaintiff, vs. THE PETER BREIDT CITY BREWERY COMPANY, a Corporation Defendant.	ACTION AT LAW

The reply and answer to counter-claim of the plaintiff to the answer and counter-claim filed herein by the defendant.

OBJECTIONS TO DEFENSE TO FIRST COUNT IN POINT OF LAW.

FIRST OBJECTION: 1. The facts alleged in said defense do not constitute a defense to the first count of the plaintiff's complaint.

SECOND OBJECTION: 2. The facts alleged in said defense show that the defendant waived all its rights to rejection or to allowances on the delivery of hops made to it by the plaintiff on account of the quality thereof.

THIRD OBJECTION: 3. The facts alleged in or admitted by the said defense show that the plaintiff had the right to and did treat all of the entire unfulfilled portion of said contract of March 26, 1914, annexed to the complaint as Schedule "A," as violated by the defendant prior to the commencement of this action.

ANSWER TO DEFENSE TO FIRST COUNT

Plaintiff says that:

4. It denies that defendant removed any hops from cars to defendant's brewery for the purpose of saving car demurrage to plaintiff as alleged in paragraph 3 of the answer and counter-claim. It alleges that on or about October 2, 1914, the defendant exercised the right of ownership of the hops mentioned in said paragraph 3.

5. It has not at any time hitherto consented or agreed that the defendant should be relieved from its obligation expressed in said contract, Schedule "A" annexed to the complaint, to claim the right to rejection or to allowances on any delivery of hops on account of quality by telegraph or in writing delivered to the plaintiff within 5 days after arrival of the hops at the place of delivery named in said contract and prior to the defendant's exercise of any right of ownership of the said hops or else to waive all rights to rejection or to allowances on any delivery thereof on account of quality. It alleges that the defendant failed to make any such claim in manner aforesaid prior to its exercise of the right of ownership of the hops delivered to it by plaintiff.

OBJECTIONS TO DEFENSE TO SECOND COUNT IN POINT OF LAW.

FIRST OBJECTION: 6. The facts alleged in said defense do not constitute a defense to the second count of the plaintiff's complaint.

SECOND OBJECTION: 7. Plaintiff repeats the allegations of paragraph 2 hereof.

THIRD OBJECTION: 8. Plaintiff repeats the allegations of paragraph 3 hereof.

ANSWER TO DEFENSE TO SECOND COUNT.

9. Plaintiff repeats the allegations of paragraph 5 hereof.

OBJECTIONS TO DEFENSE TO THIRD COUNT IN POINT OF LAW.

FIRST OBJECTION: 10. The facts alleged in said defense do not constitute a defense to the third count of the plaintiff's complaint.

SECOND OBJECTION: 11. Plaintiff repeats the allegations of paragraph 2 hereof.

THIRD OBJECTION: 12. Plaintiff repeats the allegations of paragraph 3 hereof.

ANSWER TO DEFENSE TO THIRD COUNT.

13. Plaintiff repeats the allegations of paragraphs 4 and 5 hereof.

ANSWER TO DEFENSE TO FOURTH COUNT.

14. Plaintiff repeats the allegations of paragraph 4 hereof.

15. Plaintiff alleges that defendant retained the hops mentioned in paragraph 19 of said answer and counter-claim at its brewery for more than five days after their arrival at Elizabeth, New Jersey, the place of delivery named in said contract of March 26, 1914, and after exercising rights of ownership of the said hops without delivering to plaintiff by telegraph or in writing any claim of right

to rejection or to allowances on said delivery on account of quality. Plaintiff denies it agreed as alleged in said paragraph 19 to ship other hops to the defendant which would be in compliance with the contract dated March 26, 1914. It says that on or about October 17, 1914, it received a written notice from the defendant expressing dissatisfaction with plaintiff's previous shipment of hops; that within thirty days after receipt of said written notice it offered to ship or deliver other hops to the defendant of the contracted quality in place of the hops previously shipped and objected to by defendant as aforesaid, but alleges that defendant has hitherto refused and still does refuse to accept delivery of said hops so offered to be shipped to it by plaintiff. It has no knowledge or information sufficient to form a belief as to whether the defendant on the 9th day of November, 1914, or at any other time re-shipped all or a portion of the bales of hops mentioned in said paragraph 19 as alleged in said paragraph, or as to whether the hundredth bale of said hops was opened by the defendant, or, if so, for what purpose.

ANSWER TO DEFENSE TO FIFTH COUNT.

16. Plaintiff repeats the allegations of paragraph 15 hereof.

ANSWER TO DEFENSE TO SIXTH COUNT.

17. Plaintiff repeats the allegations of paragraphs 4 and 5 hereof.

18. Plaintiff denies that it annexed as a condition to making the exchange shipment mentioned in paragraph 23 of the said answer and counterclaim that said shipment would be made only after

acceptance by the defendant of the original shipment mentioned in said paragraph. It denies that defendant has not been supplied with hops as specified in said contract, Schedule "A."

ANSWER TO DEFENSE TO SEVENTH COUNT.

19. Plaintiff repeats the allegations of paragraphs 5 and 18 hereof.

ANSWER TO DEFENSE TO EIGHTH COUNT.

20. Plaintiff repeats the allegations of paragraphs 4, 5 and 18 hereof.

OBJECTIONS TO FIRST COUNT OF COUNTER-CLAIM IN POINT OF LAW.

FIRST OBJECTION: 21. Said count does not state a cause of action.

SECOND OBJECTION: 22. The facts alleged in said count show that the defendant waived all its rights to rejection or to allowances on the delivery of the hops made to it by the plaintiff on account of the quality thereof.

THIRD OBJECTION: 23. The facts alleged in the said count show that the plaintiff might treat all or any part or parts of the entire unfulfilled portion of said contract of March 26, 1914, annexed to the complaint as Schedule "A," as violated by the defendant prior to the commencement of this action.

ANSWER TO FIRST COUNT OF COUNTER-CLAIM.

Plaintiff says that:

24. It sent the hops mentioned in paragraph 2 of the answer and counter-claim to defendant after the expiration of a reasonable time from the date of the defendant's receipt of the samples of hops previously sent defendant by plaintiff.

25. It repeats the allegations of paragraphs 4 and 5 hereof.

26. It denies the allegations of paragraph 3 of the said counter-claim.

27. It denies that it made any false representation to defendant with reference to the hops shipped by it to defendant. It has no knowledge or information as to whether or where defendant re-shipped the hops shipped by it to defendant, but denies that any of said hops have ever been received by plaintiff. It has no knowledge or information as to the cost of carting said hops from the railroad cars to defendant's brewery and from defendant's brewery back to said railroad cars.

28. It denies the allegations of paragraph 5 of said counter-claim.

ANSWER TO SECOND COUNT OF COUNTER-CLAIM.

29. It repeats the allegations of paragraphs 4, 5 and 24 hereof.

30. It denies the allegations of paragraphs 7 and 8 of the counter-claim.

31. It says that the defendant will not be forced or obliged to pay out or expend any of the sums mentioned in paragraph 9 of the counter-claim by reason of the plaintiff's neglect or default.

32. It denies the allegations of paragraph 10 of the counter-claim.

LINDABURY, DEPUE & FAULKS,
Attorneys of Plaintiff.

Testimony

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

E. CLEMENS HORST COMPANY, a Corporation,
vs.
THE PETER BREIDT CITY BREWERY COMPANY, a Corporation,
} Action at Law.

Before: Hon. FREDERICK ADAMS, J., without jury.

For plaintiff appears Messrs. LINDABURY, DEPUE & FAULKS, by KINSLEY TWINING, Esq.
For Defendant appears John J. Stamler, Esq.; CONOVER ENGLISH, Esq., of Counsel.

Mr. Twining: I would like to make a motion on the record, your Honor, at the outset.

I move for a judgment, or finding, on the pleadings in favor of the plaintiff and against the defendant for such damages as the plaintiff may be found to have sustained. The grounds of the motion are:

1. That it appears from the aerments and admissions of the answer that the defendant has committed a breach of the entire contract sued on.

2. That it appears from the averments and admissions of the answer that the defendant has waived further performance of the contract sued on and has committed a breach of the entire contract.

3. That it appears from the averments and admissions of the answer that the first installment of hops to be delivered to the defendant by the plaintiff under the contract sued on was delivered to and accepted by the defendant, and was retained by the defendant for such period that all objections thereto by reason of quality were waived, as was also the defendant's right to require that a sample be approved by it before it could become obligated to accept and pay for the said installment of hops; that the defendant has failed to pay the price agreed upon for said hops, and that the plaintiff was entitled to treat and has treated the entire contract as violated by the defendant.

This is an action, if your Honor please, for the recovery of damages for the breach of a contract in writing, which is annexed to the complaint and admitted in the answer.

The plaintiff is a hop grower; it is a New Jersey corporation, but carries on its business in California. The defendant is also a New Jersey corporation, carrying on a brewing business in Elizabeth.

The question to be discussed turns upon a correct construction of the contract, which I shall read to your Honor. I shall ask your Honor to bear with me if I make rather a lengthy opening, because, if this motion is well taken, it will make it unnecessary to read a large part of the depositions which have been taken in the case, and probably save a day or two of time later.

The contract is attached to the complaint as Schedule A (reading).

The complaint contains a number of counts, and is very involved, owing to the pleader's conception of the present rules of the Supreme Court with reference to how different counts, or different allegations, are restated; that is to say, instead of

setting out in full the provisions of the first count in subsequent counts, the pleader has adopted what he conceived to be the rule of the Supreme Court, and refers to earlier paragraphs by simply referring to them and stating that the allegations of paragraph 1, and so forth, are repeated; but the point of the complaint is this. In the first count the plaintiff alleges a performance of the contract; the delivery of the first installment of the hops, the 1914 crop to the defendant; the defendant's acceptance thereof; the fact that the defendant, after accepting the hops, retained them at its brewery for more than five days, contrary to the provisions of paragraph 14 of the contract, and that by such retention it waived its right to subsequently object to the quality of the hops which had been delivered to it and accepted by it.

Mr. English: You did not state all the counts; it says that they sent samples.

The Court: What is contrary to which provision?

Mr. Twining: Contrary to paragraph 14 of the contract. I stated in the first part of my statement that the complaint alleged performance by the plaintiff of the contract.

The Court: The effect of retaining the hops at the brewery five days was to do what?

Mr. Twining: Paragraph 14 provides that "The buyer waives all rights to rejection or allowances on any delivery on account of quality. unless such claim be delivered to seller by telegraph or in writing within five days after arrival of the hops at place of delivery."

The Court: What paragraph is that?

Mr. Twining: Paragraph 14. This is the paragraph referred to.

As I have said, there are various counts. The first count sets up that samples of hops were first sent, and were not approved or disapproved. The

second count does not claim that samples were sent, but claims that the right to a sample and the right to the objection to the hops on account of delivery was waived by reason of defendant's actions. And the different positions taken by the plaintiff are set up in the different counts of the complaint. It is not necessary for me to go all over them, because the point is as I have stated it.

The defendant's answer to the first count, after admitting that the plaintiff and defendant are each corporations of New Jersey, and after admitting the execution and confirmation of the contract as provided in the contract, states this with reference to the sample. Your Honor will recall that the contract provided this with reference to a sample—(I am reading from article 2 of the contract) (reading): "The seller agrees to sell to the buyer the follow-named quantities of hops, equal to or better than good brewing Pacific Coast hops, of the crops of each of the following named years, and that the following named prices: 100 bales of each crop of years 1914 to 1918, inclusive, at 17½ cents per pound, on approved samples." This is what the deefndant says with reference to that: "The defendant has no knowledge that plaintiff sent samples of hops, as alleged in paragraph 5, but, on the contrary, alleges the fact to be that this defendant, to wit, on or about the 16th day of September, 1914, received samples of hops, but, before being able to ascertain whether the same were equal to or better than good brewing Pacific Coast hops of the crops of the year 1914 as provided in the contract annexed to the complaint as "Schedule A," this defendant was informed that the plaintiff, without waiting a reasonable time to have the samples approved by defendant, had shipped to this defendant 100 bales of hops. This defendant admits that on the first day of October,

1914, 100 bales of hops were delivered on cars at Elizabeth, New Jersey, and, believing that said hops were equal to or better than good brewing Pacific Coast hops of the crop of the year 1914, as provided to be furnished by the contract aforementioned, on the 2d day of October, 1914, removed the same from said cars to its brewery in order to save any car demurrage to both this plaintiff and the defendant; but this defendant denies that said shipment was made by the plaintiff on September 19th, but alleges that the said shipment was made on September 12, 1914; that said hops were not shipped on approved sample, and that defendant was not allowed a reasonable time after the receipt by it of samples in which to approve or disapprove of said samples. This defendant admits that it paid $339.69 as and for the freight on gross weight of said shipment as alleged in paragraph 6. This defendant admits that the 100 bales of hops were at its brewery more than five days after the arrival of said hops at the place of delivery, as alleged in paragraph 7, but denies that the said hops were at its brewery more than a reasonable time before sending a notice of disapproval to the plaintiff, and alleges that, by reason of the fact that said shipment of 100 bales was made by the plaintiff without the sample having been approved by defendant, and without allowing defendant a reasonable time to approve samples, that it became necessary for this defendant, after unloading said hops from the railroad cars, to have a test of the same made to ascertain whether they were of the quality provided furnished under said contract." Your Honor will remember all the time that the contract provides that where the buyer is making any point with reference to quality of hops, he must make that point within five days. It is admitted that they did not make

that point within five days in the answer. This is their excuse: "That it became necessary for this defendant, after unloading said hops from the railroad cars, to have a test of the same made to ascertain whether they were of the quality provided to be furnished under said contract; that defendant caused a test to be made of said hops by a chemist of the City of Elizabeth by the name of Carl Hainlin, who reported that the same were of an inferior quality and not equal to or better than good brewing Pacific Coast hops of the crop of the year 1914; that in order to not to do injustice to the plaintiff or to act hastily in regard to the shipment of 100 bales of hops, this defendant sent a sample of said hops to the scientific station under date of October 10th. A report was made by said scientific station to the defendant, which report was received by this deefndant on October 12th, 1914, and on said 12th day of October, 1914, this defendant in writing notified the plaintiff of the result of the examination as made by said scientific station and of the refusal of the defendant to accept the shipment for the reason that they were not in accordance with the contract."

The next paragraph denies the allegations of paragraph 8 of the complaint, which is this: "There is due and owing from defendant to plaintiff on account of the purchase price of the hops shipped as aforesaid $2,969.73, with interest thereon at six per cent from October 1, 1914. Plaintiff has frequently requested the plaintiff to pay said sum of $2,969.73 with interest thereon as aforesaid.

The next paragraph in the answer, paragraph 6, admits the allegations in paragraph 9 of the complaint, which are that "Defendant has refused and neglected and still does refuse and neglect to pay the whole or any part of said sum." The answer goes on: "but alleges that it is not indebted to the

plaintiff in any sum of money, because the plaintiff has failed to carry out the terms of its contract, and has not delivered hops of the quality provided to be furnished by said contract."

The next paragraph of the answer denies that there has been any violation of the terms of the contract, and denies the allegation that there is anything due to the plaintiff.

In its complaint, paragraph 10, the plaintiff alleges this: "By reason of the defendant's neglect and default aforesaid, plaintiff has treated and hereby elects to treat all of entire unfulfilled portion of said contract, Schedule A, as violated by defendant." It is right to do that is not based on the provision of the Sales Act, which, your Honor recalls, provides that where a breach is material it may go to the entire contract, but that its materiality is a question of intention, but is based upon the express provision of the contract, Article 6, which provides: "The seller may treat all or any part or parts of entire unfulfilled portion of this contract as violated by the buyer upon or at any time or times after buyer's refusal to pay for any hops, or any note or acceptance given in payment for hops that have been delivered and accepted, hereunder, or if this contract or any part of it is otherwise violated by the buyer."

So that the allegations of the complaint, as they stand admitted in the answer, are that the plaintiff sent the 1914 installment of 100 bales of hops to the defendant; that the said hops were received at the place of delivery on October 1, 1914; that on October 2, 1914, they were taken to the defendant's brewery; that tests were then made as to the quality of the hops; that on October 10th the hops were sent to a scientific station, which reported two days later that the quality was inferior, whereupon the defendant notified the plaintiff that

it would not accept the hops. Our contention is that by that action the right to further performance has been waived; that the failure of the defendant to pay the plaintiff for the first instalment of hops entitled the plaintiff to treat, and the plaintiff has treated, the entire contract as violated, and is now entitled to a judgment against the defendant for such damages as it may be able to show it has sustained by the defendant's violation of the entire contract.

(Mr. Twining cites cases.)

(At one o'clock P. M., the court takes a recess of one hour.

AFTER RECESS

Mr. English. I want to move to amend the answer, if your Honor please, with reference to a date. In the fourth paragraph of the answer there is a date, October 10th, referring to the time when the sample of hops was sent to the scientific station. As a matter of fact, that was sent on October 6th, and a letter, which we will produce, if necessary, will show that fact. I think, as far as statements of fact go, the answer ought to correspond with the facts. I do not think it makes any difference in Mr. Twining's legal contention, but I think the answer ought to comply with the facts, so far as it relates to dates.

Mr. Twinning. I do not think that the answer ought to be amended for the purposes of this motion. I have no objection to letting the fact go in as it may be proved if the motion is denied, but it seems to me that where a motion is made on the pleadings, waiting until after the argument has been made on the pleadings, and then coming in with a statement that the fact is very different

from what appears in the pleadings ought not to be permitted for the purposes of this motion.

That date has this materiality, your Honor. As your Honor will recall, I argued to you that the answer shows that a sample was sent to the scientific station on October 10th, as alleged in the pleadings, and that two days after that a reply came back from the scientific station showing what what the test of that scientific station disclosed, and I made the point that showed on the face of the pleadings that five days, which is the time permitted by the contract to make the test, was a reasonable time, because, by their own showing, the test was in fact made in two days. Now, if they change that date, they change the situation with reference to the first test. The answer shows that two tests were made, one by Carl Hainlin, which was made some time between October 1st, when the hops were delivered, and October 6th, when the sample was sent to the scientific station. After they had received the report from Carl Hainlin, which was some time within five days, they did not notify us of the objection to these hops on account of quality, as the contract provides they might, but, with those facts in their possession, with that adverse report from Carl Hainlin in their possession, they saw fit, they now say, to take a further sample of these hops and mail it over to New York to a scientific station, and it was not until they had received the second report, from the scientific station, on October 12th, that they made their first objection to us, and that objection was not made by telegraph, but made by letter, as set up in the answer.

Now, it seems to me, so far as the argument that I have made goes, it ought to stand on the pleadings as they are, because, if the date is changed, the argument would differ; but the point that I

make is the same in each case. When they come to putting in proof, of course, I shall not stand on a mere change of four or five days, if the fact shows, when they offer their proof, that that second sample was in fact sent to New York on the 6th instead of on the 10th. So that I object to the making of the amendment at this time, and say that the pleadings should be permitted to stand as they are and my argument should be allowed to stand as it is on the pleadings as they were until this moment, and I say it is too late now for them to come in after waiting, until my argument is made, and then ask for an amendment of their pleading.

The Court: What position would that put the court in? Would it not put the Court in the position of sustaining your argument founded on an assumption which may be erroneous?

Mr. Twining: No, sir; my argument, as Mr. English states, is an argument based on the pleadings. My argument has been made. They now ask leave to amend, and it is an application, of course, addressed to your Honor's discretion. I oppose the motion because, as I say, in fairness to me, they ought to make such an application before the argument is made, when they know that my argument is based on the pleadings; they ought to make it before the argument is closed.

Therefore I think that your Honor's discretion should not be exercised.

Mr. English: I make it at the close; I do not want to interrupt you.

The Court: It might affect the questions of costs, perhaps, equitably, because of having beguiled you into making an argument that the defendant ought to have corrected, because it was founded on a date which the defendant knew to be incorrect. I think I shall grant the motion.

Mr. Twining: What is the date?

Mr. English: The date is October 6th.

(Counsel argue.)

The further hearing of the cause is

Adjourned until Monday, December 11, 1916, at ten o'clock, A. M.

SECOND DAY

Monday, December 11, 1916.

Met pursuant to adjournment.

Present, counsel as before stated.

The Court: This is an action brought by a seller against a buyer. The plaintiff is E. Clemens Horst Company, a corporation; the defendant is The Peter Breidt City Brewery Company, a corporation.

A motion has been made on behalf of the plaintiff for judgment on the pleadings in favor of the plaintio, leaving only for examination and decision such sum as may be proved to be due to the plaintiff from the defendant. The defendant resists this motion on the grounds: first, that a certain shipment of 100 bales of hops was not made under the contract, and so the provisions of the contract are inapplicable, and, secondly, that, even if the shipment was made under the contract, the motion should still not be granted.

The contract is dated March 21, 1914. The leading features of the contract, for present purposes, seem to me to be two. The first feature to which my attention is now called is that part of the contract which reads as follows: "The seller agrees to sell to the buyer the following named quantities of hops, equal to or better than good brewing Pacific Coast hops, of the crops of each of the following named years, and at the following prices:

100 bales of each crop of years 1914 to 1918, inclusive, at 17½ cents per pound, on approved samples. Tare, 5 pounds per bale; terms, net cash." The second provision is found in what are called indorsements, and is numbered 14. The marginal heading is "Claims, etc." "The buyer waives all rights to rejection or to allowances on any delivery on account of quality, unless such claim be delivered to seller by telegraph or in writing within five days after arrival of the hops at place of delivery, and unless such claim be so made prior to buyer's exercise of any right of ownership of the said hops."

It will be observed that this contract is both a sale by description and a sale by sample. The description is hops "equal to or better than good brewing Pacific Coast hops." The provision as to sample is that these shipments shall be sent "on approved samples"; that is, on samples approved by the buyer.

Section No. 14 of the Sales Act reads as follows: "Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, and if the contract or sale by by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description." This is a reenactment of the common law rule. It has been so held in the case of *Lissberger* v. *Kellogg*, 49 Vroom 85. It is, of course, true, as stated in section 47 of the "Act Concerning the Sale of Goods," that "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

Where a contract specifies the number of days which the buyer shall have to make his examination for the purpose of ascertaining whether the goods are in conformity with the contract the generality of the statutory language is limited by the contract. Such a contract is a determination by the parties that the specified number of days affords a reasonable opportunity, in the language of the statute.

As Mr. Justice Blackburn said in the case of *Calcutta Company* v. *DaMattos,* cited in *McNeal* v. *Braun,* 24 Vroom 621: "There is no rule of law to prevent the parties from making whatever bargain they please." Therefore, it is competent for them to say what number of days would afford a reasonable opportunity, and the specification contained in the contract would, as I said before, be an expression of the parties' determination as to what time would afford a reasonable opportunity.

The words "on approved samples" makes it incumbent upon the seller to furnish the buyer samples and to procure his approval before making a shipment. This was a condition precedent. The approval of samples was not an approval of the coming shipment. The comparison of the quality of such shipment with the contract requirement as to quality was still to be made. The samples might be all right, and the goods shipped might yet be all wrong. Nevertheless, the provision as to samples was a sensible provision, and might prove a very useful preliminary, for it is easier to examine small samples than to examine large bales. If the samples corresponded with the contract requirement as to quality, it would show to the buyer that the seller correctly understood the contract on that point, and would justify the buyer in telling the seller to proceed. There would be a natural and reasonable, but not conclusive, presumption

that shipments to follow would be satisfactory in quality—a presumption to be verified by the buyer on examination of the shipments when they should follow. On the other hand, if the samples did not come up to the contract requirement, the buyer would be immediately put on his guard, and would be able to protect himself by requiring further samples before going in any deeper.

Now, what happened was this: The seller on September 12, 1914, or, as the complaint says, September 19, 1914—September 12th was the date of the bill of lading, schedule B—without waiting to receive from the buyer approved samples, shipped 100 bales of hops from San Francisco. Schedule B is a copy of the invoice. Samples had, in fact, been sent by the seller and received by the buyer, but had not been approved. This shipment was premature, for the condition precedent as to samples had not been performed. The buyer might, therefore, have refused to receive this consignment. Paragraph 6 of the complaint seeks to shift the onus on this point to the defendant by words which suggest the claim that the shipment was not premature. The complaint says: "Upon the expiratoin of a reasonable time after the shipment of said samples and prior to the receipt of advices from defendant that the same were not approved by it, to wit, on September 19, 1914, "plaintiff made a shipment." This is not a valid statement of the situation. It was not for the seller to assume that the samples were approved from the fact that the buyer had not advised him that they were disapproved. No time was specified in the contract within which the samples must be examined and either approved or disapproved. The buyer, therefore, had a reasonable time, and only a reasonable time, to make his decision. Still, it remained true that approval of samples was a pre-

requisite to shipment of goods under the contract. The seller's remedy probably was to treat as a breach of the contract an obstinate refusal of the buyer to pass upon the quality of the samples and to claim damages. The shipment arrived, and the situation then was this. The buyer had received the samples and had not communicated to the seller either his approval or disapproval. What was the buyer to do about this shipment? Two courses were open. One course was to decline provisionally to receive the shipment, on the ground that it had been prematurely sent, and then to pass upon the samples, and, in the case of disapproval, to decline absolutely to receive the shipment, or, in the case of approval, to receive the shipment, subject to the inspection provided for by the contract. That was one course. The other course was to let the sample matter drop, and to accept the shipment relying on the contract right to examine the shipment and claim allowance, if necessary within five days. Most practical business men would, I think, have adopted the latter course. Why bother about samples when the goods themselves were on hand and open to inspection? Even if the samples were approved, it would still be necessary to examine the shipment, and why not do it at once? If the samples had proved unsatisfactory, the buyer might be likely to take the first course, without taking the trouble to examine the shipment. But, judging from the third paragraph of the answer, this was not the case. The answer says: "This defendant admits that on the first day of October, 1914, one hundred bales of hops were delivered on cars at Elizabeth, New Jersey, and *believing that said hops* were equal to or better than good brewing Pacific Coast hops of the crop of the year 1914, as provided to be furnished by the contract aforementioned, on the second day of

October, 1914, removed the same from said cars." *The defendant could hardly have been of the belief that the shipment would prove to conform to the contract if the samples had proved unsatisfactory.* It seems clear that the buyer took the second course and not the first course; that he waived the requirement as to samples, accepted the shipment under the contract, and so was bound by the five day provision. As the buyer did not ask within five days for an allowance because of defective quality, he waived his right to allowance as to that shipment. The first claim of the defendant, that the delivery was not made under the contract, is therefore disallowed.

The second claim is that, even if the delivery was made under the contract, the motion of the plaintiff should not prevail.

I have examined the cases referred to by the learned counsel for the defendant, and I have not found in them anything to support the proposition contended for. As I have already said, the words "reasonable opportunity" in section 47 are construed by the contract, and that means five days. The seller may, therefore, enforce against the buyer the provisions as to default contained in paragraph 6 of schedule A. In other words, my decision is in favor of the motion.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

The further hearing of the cause is

Adjourned until Wednesday, December 13, 1916, at ten o'clock, A. M.

THIRD DAY

Wednesday, December 13, 1916.

The further hearing of the case is adjourned until Thursday, December 14, 1916, at ten o'clock, A. M.

FOURTH DAY

Thursday, December 14, 1916.

Met pursuant to adjournment.

Present, counsel as before stated.

Mr. Twining: If your Honor please, I have a package of original dispositions here. I suppose they should be opened. I shall hand them to your Honor.

(The Court opens package produced by Mr. Twining.)

Mr. Twining: If your Honor please, with a view to shortening the reading of the depositions as much as possible, Mr. English and I have entered into a stipulation waiving objections by reason of the reading by either side of a portion only of the depositions, and I now offer that stipulation in evidence, and I think it should appear at the head of the testimony to show exactly what it is.

The Court: (After examining stipulation.) Let it be marked.

(Stipulation marked Ex. P. A.)

(The stipulation, Ex. P. A., is as follows:

"It is stipulated and agreed between the attornies of the respective parties hereto, that all objections are hereby waived by reason of the failure of

either party to read the whole of the California depositions taken in the above entitled action.

"It is further stipulated and agreed that all objections are hereby waived by reason of the failure of either party to read from said depositions except as follows:

p. 1 to p. 6, line 13; p. 8, l. 23, to p. 16, l, 25; p. 20, l. 10, to p. 23; l. 9; p. 30, l. 4, to p. 31, l. 31; p. 43, l. 10, to p. 47, l. 1; p. 48, l. 5, to p. 48, l. 16; p. 70, l. 12 to p. 71, l. 18; p. 82, l. 19, to p. 82, l. 31; p. 84, l. 7, to p. 84, l. 28; p. 90, l. 30, to p. 91, l. 5; p. 92, l. 7, to p. 93, l. 3; p. 107, l. 12, to p. 111, l. 20; p. 116, l. 13, to p. 118, l. 1; p. 138, l. 4, to p. 139, l. 5; p. 145, l. 24, to p. 146, l. 10; p. 218, l. 26 to p. 219, l. 16; p. 219, l. 30, to p. 220, l. 3; p. 258, l. 25, to p. 259, l. 18; p. 262, l. 13, to p. 262, l. 27; p. 269, l. 23, to p. 269, l. 29; p. 276, l. 9, to p. 288, l. 23; p. 290, l. 11, to p. 312, l. 8; p. 313, l. 15, to p. 314, l. 25; p. 316, l. 24, to p. 317, l. 13; p. 318, l. 30, to p. 328, l. 5; p. 330, l. 1, to p. 335, l. 7; p. 335, l, 15, to p. 335, l. 18; p. 339, l. 13, to p. 339, l. 26; p. 342, l. 22, to p. 343, l. 5; p. 351, l. 16, to p. 353, l. 8; p. 358, l. 8, to p. 358, l. 22; p. 425, l. 26, to p. 426, l. 11; p. 428, l. 10, to p. 429, l. 29; p. 444, l. 12, to p. 445, l. 2; p. 445, l. 30, to p. 447, l. 9; p. 447, l. 10, to p. 490, l. 11; p. 494, l. 11, to p. 508, l. 10; p. 490, l. 12, to p. 490, l. 28; p. 491, l. 12, to p. 492, l. 12;

"It is further stipulated and agreed that neither party shall be required to read all of such portions of said depositions above specified, but that in case of the failure of one party to so read, the other party may read the portions omitted.

"It is further stipulated and agreed that all objections as to the competency or materiality of the said portions of said depositions are hereby expressly reserved.

"It is further stipulated and agreed that the

plaintiff shall have the right to read in rebuttal to any proofs which may be offered by the defendant and admitted, relating to the quality of the hops of the crop of 1914, shipped to the defendant, or as to whether the said hops were of the character described in the said contract, such portions of the said California depositions as may be material to said question."

Mr. Twining: I now offer, if your Honor please, the following portions of the deposition of E. Clemens Horst, and I shall read page 1 of the depositions:

> "E. CLEMENT HORST, of the City and County of San Francisco, State of California, called as a witness on behalf of plaintiff, being first duly sworn according to law, by the Commissioner, testified as follows:

"Direct examination by Mr. Harrison:

"Q. What is your name? A. E. Clemens Horst.

"Q. What is your age? A. Forty-nine.

"Q. Where do you reside? A. San Francisco.

"Q. What is your occupation? A. Hop grower.

"Q. Are you an officer of the plaintiff in this action, E. Clemens Horst Company? A. I am.

"Q. What office do you hold in the plaintiff company, the E. Clemens Horst Company? A. I am.

"Q. What office do you hold in the plaintiff company, the E. Clemens Horst Company? A. President and general manager.

"Q. How long have you held that office? A. Since the formation of the company, about thirteen years ago.

"To what extent did you have control over the management of the affairs of the E. Clemens Horst Company during the year 1914? A. I managed the entire business.

"Q. What experience have you had as a grower of hops? A. I have been growing hops for the last twenty years and upwards.

"Q. Have you grown hops extensively or otherwise? A. I have grown them extensively in many parts of the Pacific Coast."

I then omit the next two questions—the next question and answer. Lines 16 and 19 are omitted.

Beginning again at line 20 on page 3:

"Q. What was the cost of production of good brewing Pacifist Coast hops during the month of October, 1914?"

Mr. English: I object to that, your Honor, and that raises one of the questions in this case. I suppose we might as well have it out now as any other time.

The Court: That is the question on line 19?

Mr. English: Yes, sir: "What was the cost of production?"

Your Honor has ruled in this case that there has been a breach of the contract, and has ruled that the plaintiff had a right under the terms of the contract to declare the whole contract breached, and sue for the entire damages, whatever they might be. So we start with that as the major crux.

Now, the Sales Act is very plain in its language on the measure of damages in the case of a broken

contract. I refer to section 64 of the Sales Act, subdivision 3: "where there is an available market for the goods in question the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

The pleadings, upon which your Honor has ruled, have fixed the time of the refusal to accept. There could be no fixed time for acceptance under the contract, for two reasons: one, because it covers a term of five years, and the other, because the delivery in any given year was an elastic one, beginning in September and ending in February. The pleadings fix the time of the refusal; namely, October 12, 1914; and that being the situation, the damages to this plaintiff, if any, are the difference between the contract price and the market price, and the cost of production has got nothing to do with it, unless the plaintiff can prove that there is no market. There is no proof now that there is a market. Therefore, the measure of damages will have to be the difference between the contract price and the market price, when the market price appears in evidence.

For that reason I say that at this stage of the case the cost of production is entirely irrelevant and immaterial, and ought not to be admitted in evidence.

(Mr. English argues further.)

Mr. Twining: If your Honor please, the rule applicable to this case, as I contend, is the rule applicable to all cases of breach of contract under the

New Jersey cases; namely, that the measure of damages is the measure of damages which is reasonably in the contemplation of the parties that would flow from the breach. The question is whether that was the difference between the cost of production and the contract price, in so far as that cost can be determined from the evidence. The best evidence that can be produced, which is what the jury would have to pass upon if there were a jury, is whether there was a market price, or a market, for these goods. This is the first question, preliminarily. The witness states what the cost of production was in 1914. He goes ahead and follows that up every month right up to the time when the depositions were taken, January, 1915, I think it was, or January, 1916, and then testifies that there was not any market for futures for hops. He did testify that when he received notification from the defendant that it was not going to take these bales of hops he plowed up some of his hop fields, and claims that the only way that the damages can be computed which were resonably in the contemplation of the parties as flowing from a breach is the difference between the cost of production, as nearly as that can be arrived at, and the contract price.

If your Honor thinks this preliminary question raises the whole question, I have a long memorandum on the subject, which I am prepared to read now. It had not seemed to me that the question was fairly raised now. Indeed, I had not supposed that there would be any question in this case, except a question of fact as to whether or not there was a market, within the meaning of the cases, because I had supposed it would be conceded—it seems to me settled by the cases—that, if there is not a market, the only other way that you can arrive at the damags in contemplation of the parties is by finding out what profit the seller would have

made if the bargain had been carried out, and that would have been the difference between the cost of production and the contract price, because he could not dispose of the goods to others if there was no market.

Now, this question, as I said, is the first question. It is a preliminary question; it starts with the month of October, 1914, and follows it up with the subsequent months, and then follows it up with proof with reference to the question as to whether or not there was a market. It seems to me that this is a preliminary question, and it is clearly competent. Of course, I cannot put in my whole case at once, and it does not injure the defendant any by putting in this question now, because if I do not follow it up with the proof that there is no market, the evidence is immaterial and can be struck out on motion; but at this time, I think, the question is properly raised, upon my statement that I shall follow it up with proof that there is no market.

The Court: I shall overrule the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (reading):

"Q. What was the cost of production of good brewing Pacific Coast hops during the month of October, 1914? A. 6¼ cents a pound.

"Q. State what was the cost of production of good brewing Pacific Coast hops during the time between September 1914, and February 1915."

Mr. English: I suppose that is subject to the same objection and exception, your Honor?

The Court: Yes, your exception will be

considered as applicable to this line of inquiry—that whole line of inquiry—unless there is going to be some uncertainty as to just what that means, in which case you have better taken an exception to every question.

Mr. English: Then I shall do that; I shall take an exception to this next question.

Mr. Twining: (Reading:)

"Q. State what was the cost of production of good brewing Pacific Coast hops during the time between September, 1914, and February, 1915."

Mr. English: Same objection.

The Court: I make the same ruling.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading:)

"Q. What has been the cost of production of good brewing Pacific Coast hops during the period from September, 1915, to the present time?"

Mr. English: Same objection. That, your Honor, ought to be discussed a little bit. This deposition was begun to be taken on January 31, 1916.

Mr. Twining: Can we not stipulate on the record that the depositions of E. Clemens Horst was started on January 31, 1916?

Mr. English: And continued for several days thereafter.

Mr. Twining: Yes.

Mr. English: That is satisfactory.

This man gave his testimony in January, 1916. He is asked now to state the cost

of production for 1916. You see, the hops had not been planted yet; they are not planted until April or thereabouts; and that is so as to 1917 and 1918 and 1919. He is asked to prophesy, when there is no testimony—

Mr. Twining: You are getting ahead of the question.

The Court: The question is on line 28.

Mr. English: Oh, "to the present time." I shall just ask a formal exception on the same ground.

The Court: Yes.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading:)

"Q. What has been the cost of production of good brewing Pacific Coast hops during the period from September, 1915, to the present time?"

Mr. English: "The present time" being the date of the deposition.

Mr. Twining: January 31st, 1916.

Mr. English: I object to that, and I take an exception on the ground that your Honor previously ruled on.

The Court: Yes, I make the same ruling.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: Reading:)

"A. The same price.

"Q. What in your opinion will be the cost of production of good brewing Pacific Coast hops during the years 1916, 1917, 1918 and 1919, that is to say, from the present time until February, 1919?"

Mr. English: That is the one that I object to as highly speculative, and that raises a new question, outside of your Honor's ruling. This deposition was taken in January, 1916. They all plant their hops in the spring and harvest them in the fall. The crop of 1916 had not been planted; the year 1917 had not come, nor had 1918 and 1919.

I shall give your Honor some cases. The best case in our own state is *Wolcott* v. *Mount,* which was taken hold of by the United States Circuit Court of Appeals and made the basis of quite a learned opinion. Here is the general rule stated in Cyc., 13, section 56 (reading). The United States case is 193 Federal P.1; this Federal case was a case for damages for the failure to deliver seed, like the Wolcott case. On page 4, 193 Federal, the Court said (reading).

In other words, if this were dealing with a crop of 1915 which had been planted in that same locality, and they knew what the weather conditions were and they knew what the character of the soil was, because they had experience with such things, and they knew how the thing turned out, then there would be reason why they had not planted the 1917 crop, and then, I think, the question would be material. But there is no foundation for it here. You have got to have some basis of comparison. If somebody else planted a crop in the same locality, and you know what has happened to it, you have got a guide to go by; but where you have no idea of the weather or anything else there, and the crop has not been planted, then you cannot get the evidence in.

The Court: You observe that this question

is not the question as to profits or value, but merely as to the cost of production.

Mr. English: But that comes under the same head; that is speculative. The labor market varies; wages vary. Your Honor can taken judicial notice of that. The war comes on, and labor goes up; and when the war is over labor will go down.

(Counsel argue.)

The Court: (To Mr. Twining.) I want to be sure that I understand you. In what case are you entitled, under these decisions, do you think, to estimate the cost of production as of the date of the breach, 1914? Does that depend on whether there is an available market? The Massachusetts case suggest the idea that the rate then prevailing might be taken as the rate that governed the whole question, if I caught the point of it.

Mr. Twining: Well, I think the better rule is that, if there is no market value for these hops, the rule of damages should be the differences between the cost of production at the time of the breach and the contract price. I think that is the logical rule, because that is a rule that permits you to offer positive proof as to the amount of the damages. Witnesses can testify what the cost of production is on the date of the breach, because the breach is in the past. The other rule, as to giving the opinion of experts as to what the cost of production probably will be, is more or less uncertain, but it is admissible for what it is worth, just as the evidence of a physician as to whether an injured person has a permanent injury. It is speculative, of course, but the physician does not testify that in years hence his broken leg will not

be any better. He says, "In my opinion, based upon my experience, it will not be." The jury, in estimating the amount of damages to award in that case, says, "We believe that the physician is right." Now, this testimony is of exactly the same character.

In answering your Honor's question, I think that probably, if your Honor finds as a fact that there was an available market for these hops, the recovery would be limited to the difference between what your Honor finds to be the market price at the time and place of the breach and the contract price, leaving out, now, the fact, which is a fact in this case——

The Court: But that would cover all the years?

Mr. Twining: That would cover all the years; yes, sir.

—Except for the fact that this plaintiff did what he had a right to do, and plowed up the hops in his field applicable to this contract when he received notice that the contract had been repudiated. They may make a difference; but, leaving that question out, I think that the proper rule is that the damages are either the difference between the market price at the time and place of delivery and the contract price, or the difference between the cost of production at that same time and the contract price. But I say that there is a difference of authority on that latter question—the cost of production—and therefore I want to put this question in——

The Court: Is not the cost of production one of the elements which make up market value?

Mr. Twining: Why, I suppose it would undoubtedly go into it; yes, sir.

The Court: The market value might vary according to the cost of production.

Mr. Twining: Yes, I suppose that is true. I suppose that would make this question admissible, on any theory; but I do not want to offer it in that view, that it is applicable on the question of market value, because I do not think market value is applicable to this case.

The Court: The two rules, one of which you think must be adopted—just kindly restate in your own way what those two rules are.

Mr. Twining: On my theory?

The Court: Yes.

Mr. Twining: That the plaintiff is entitled to recover damages as to the 1915 shipment and subsequent years equal to the difference between the contract price and the cost of production, either at the time and place when and where the contract was breached or as that cost of production may be estimated upon the basis of expert testimony with regard to the balance of the term subsequent to the breach.

The Court: But as to the first shipment you are dealing with known values.

Mr. Twining: As to the first shipment I claim the defendant is entitled to recover the contract price; that is, the 1914 shipment.

The Court: I shall overrule the objection and allow the question to be answered.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (Reading):

"Q. What in your opinion will be the cost of production of good brewing Pacific Coast hops during the years 1916, 1917, and 1918 and 1919, that is to say, from the present time until February, 1919? A. The same price.

"Q. What was the cost of transporting good brewing Pacific Coast hops from the Pacific Coast to the City of Elizabeth, New Jersey, during the month of October, 1914?"

Mr. English: I would like to make an objection to that, only saying, in addition to what has been said, that, if anything is uncertain now, it is the cost of railroad transportation.

Mr. Twining: No, this is as to the past.

Mr. English: All right.

Mr. Twining (Reading):

"A. One cent a pound.

"Q. What was the cost of transporting good brewing Pacific Coast hops from the Pacific Coast to the City of Elizabeth, New Jersey, during the period of time from September, 1914, to February, 1915? A. One cent a pound.

"Q. And state also the cost of production of good brewing Pacific Coast hops from the Pacific Coast to the City of Elizabeth——

"Mr. Alling: Cost of production?

"Mr. Harrison: Q. Cost of transportation of good brewing Pacific Coast hops from the Pacific Coast to the City of Elizabeth, New Jersey, during the period of time from September, 1915, to the present time? A. One cent a pound.

"Q. What in your opinion will be the cost of transportation of good brewing Pacific Coast hops during the year 1916, 1917, 1918 and 1919, that is to say, from the present time until February, 1919?"

Mr. English: That I should like to object to, your Honor, on the ground that, if there is anything uncertain at the present time, it is the cost of railroad transportation. I think that is a pure guess on the part of this gentleman.

Mr. Twining: It could be taken for which it is worth.

Mr. English: It is not worth anything.

The Court: I shall take it.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (Reading):

"A. One cent a pound.

"Q. State whether or not in the case of each period of time, about which you have testified, the aggregated cost of delivering good brewing Pacific Coast hops at the City of Elizabeth, New Jersey, consists only of the cost of production, as testified to by you, and the cost of transportatinn, as testified to by you, or whether there are any other elements entering into such aggregate cost of delivering said hops." A. There are no other costs. The aggregate is 7¼ cents." Then I omit to line 25, on page 5. That is supposed to be an answer. It says "A," but there is a question mark after it.

The Court: Yes, I shall correct that.

Mr. Twining (Reading):

"Q. In October, 1914, was there any market for

contracts for the future delivery of good brewing Pacific Coast hops during the years 1915, 1916, 1917 and 1918? A. No, sir.

"Q. Has there been any market from October, 1914, until the present time for such contracts for future delivery? A. There has not.

"Q. State whether or not from October, 1914, until the present time there has been any market for contracts for future delivery of hops? A. Not for future crop hops.

"Q. Now, you have stated these various figures of cost of value with reference to pounds; how many pounds does a bale of hops contain? A. 200, about 200.

"Q. So that the cost or value in each case of a bale of hops would be about 200 times the cost of value of a pound? A. Yes, sir."

I shall stop at page 6, line 12, and now offer the contract in evidence. I think the original is probably attached to the depositions.

Mr. English: It is attached to the depositions.

The Court: Are you omitting something?

Mr. Twining: Yes, sir.

The Court: What is it that you omit?

Mr. Twining: I omit a great number of pages now. I stop at line 13, page 6, and I offer in evidence the contract upon which the suit is based, which, I think, is attached to the depositions and marked "Ex. Pl."

The Court: That is already in evidence.

Mr. English: It is admitted by the pleadings. There is no dispute about it.

Paper marked Ex Pl.)

Mr. Twining: Page 8, line 23 (reading):

"Mr. Harrison: I show you next what purports to be a copy of a letter from plaintiff to defendant, dated September 19, 1914, and ask you if that is a copy of a letter sent on that date from plaintiff to defendant (handing paper to witness)? A. It is.

I now offer the letter in evidence, which is attached to the deposition and marked 'Ex. P4."

(Paper marked Ex. P1.)

Mr. English: Here is the original, if you want it (producing paper).

(The paper produced by Mr. English is offered in evidence and marked Ex. P4. A.)

Mr. Twining: I ask the other side to produce the invoice, memorandum of weights and bill of lading inclosed to them in the letter of September 19, 1914, Exhibit P4-A.

(Defendant's counsel hand papers to plaintiff's counsel.)

Mr. Twining: I offer in evidence, first, the original bill of lading of the Southern Pacific Company, dated September 12, 1914, a memorandum of weights, dated September 6, 1914. and an original invoice, dated September 12, 1914, which was sent to the defendant with the plaintiff's letter marked P4 A, and I as that——

Mr. Stamler: That is not the fact, though, at all; that letter does not say that at all.

Mr. Twining: The testimony is that it is the fact.

Mr. Stamler: I would rather have you prove that.

Mr. Twining: I shall withdraw those offers, and read the deposition instead.

Page 9, line 3 (reading):

"Mr. Harrison: Q. I show you now what pur-

ports to be a copy of an invoice from plaintiff to defendant and ask you whether or not that invoice was sent with the letter last mentioned, being the letter of September 19, 1914 (handing paper to witness)? A. It is a copy."

I now offer in evidence the paper just referred to, which is attached to the deposition and marked P5, and ask that it be now marked P5.

Mr. English: You mean to offer the copy?

Mr. Twining: Yes.

Mr. English: We have got the original here.

The Court: Is your offer of the invoice alone now?

Mr. Twining: I am offering exactly what is offered here, your Honor. I am going to call on the other side for the original.

The Court: I do not quite get the offer. Beginning on page 9, line 3, when the witness was shown what purported to be a copy of an invoice, he said that it was a copy.

Mr. Twining: Now I offer the copy of the invoice in evidence.

Mr. Stamler: We object to it on the ground that it does not prove anything; the invoice in itself does not prove anything, and it is not admissible evidence on which they can base any charge against the defendant.

Mr. Twining: Well, I call upon the defendant to produce the original invoice.

Mr. Stamler: We have it here, and I raise the same objection (producing paper).

The Court: Then the question is whether the original has been brought home to the defendant?

Mr. Twining: That is all.

Mr. Stamler: My objection is not that we have not got it; my objection is that the paper writing itself, the invoice, does not establish any evidence of any charge against the defendant. That is my objection.

The Court: Well, is it a paper that was communicated to the defendant?

Mr. English: Yes, and we received it, if that is what your Honor means.

Mr. Stamler: We received that.

The Court: It was inclosed in a letter?

Mr. Stamler: No, I do not say that. We received it in the ordinary course of business; it got into our possession.

The Court: Apparently the witness says that it was sent with Exhibit P4, on page 9. Is it referred to in the letter as being an inclosure?

Mr. Twining: Yes.

Mr. English: Yes, it does say so in our letter.

The Court: Then it is part of the correspondence, and I shall receive it as part of the correspondence.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: I ask that the original be marked.

(Paper marked Ex. P5 A.)

Mr. Twining: I start at line 19, page 9 (reading):

"Mr. Harrison: Q. State whether or not there was any other enclosure in the letter——

"Mr. Alling: I think I had better examine

these as they are offered, just a glance at them.

"Mr. Harrison: Yes.

"Q. —in the letter, of which Exhibit No. 4 is a copy? A. Yes, that is a copy.

"Mr. Harrison: Read the question.

"(Pending question read.)

"A. Yes, there is a memorandum of detailed weights and the original bill of lading.

"Q. State whether or not the paper that I now show you dated September 6, 1914, was the memorandum of weights sent to the defendant by the plaintiff with the letter of September 19th (handing paper to witness)? A. Yes, sir."

I now offer the original memorandum of weights, of which P6, annexed to the deposition, is a copy, which is now handed to me by the other side. I offer it in evidence and ask that it be marked Exhibit P6 A.

Mr. Stamler: I object to it on the ground that it does not establish any charge against the defendant.

The Court: It is received. I presume it is referred to in the letter?

Mr. English: Yes, sir; it is.

The Court: It is received as forming part of the correspondence, and therefore being a part of the plaintiff's claim against the defendant, communicated to him at the time, without reference to the question what it may establish as mere proof.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The paper referred to is marked Ex. P6 A.)

Mr. Twining: I now skip to page 15, line 23 (reading):

"Mr. Harrison: Q. I show you what purports to be a letter from plaintiff to defendant dated April 1, 1914, and ask you if that was sent by plaintiff to defendant on that date (handing paper to witness). A. Yes, sir."

I offer in evidence the exhibit attached to the depositions marked P23, and ask that it be so marked and call upon the defendant for the original of that letter.

Mr. English: We have the original; there is no doubt that we have got it; but I think it is immaterial. It confirms the contract, and the contract is admitted. What is the use of it? It burdens the record.

The Court: I do not think the record will feel the burden very much.

Mr. Twining: They produce the original, and I offer it and ask that it be marked P23 A.)

(The paper referred to is marked Ex. P23 A.

Mr. Twining: I now read from page 16, line 2 (reading):

"Mr. Harrison: Q. I show you now what purports to be a copy of a letter signed on behalf of the plaintiff by C. A. Phleger and dated March 26, 1914, with a registry receipt attached, and I ask you how that came to be in your possession (handing paper to witness)? A. The letter was sent by my direction to the defendant and instructions were given to send the copy of the letter to me.

"Mr. Alling: Was this sent from New York (indicating)?

"Mr. Harrison: Yes, that is the receipt.

"Mr. Alling: Yes."

I now offer the exhibit attached to the depositions and marked P24, and call upon the defendant to produce the original.

The Court: To whom was the letter addressed?

Mr. Twining: The letter was signed by the plaintiff, by C. A. Phleger, and was addressed to the defendant dated March 26, 1914.

Mr. English: We have not got the original.

Mr. Twining: I offer the copy.

The Court: The Original is called for and not produced?

Mr. English: Yes, sir.

(Paper marked Ex. P24.)

Mr. Twining: I shall now skip to page 20, line 10.

Now, if the Court please, a good deal of what I am proposing to read in the record relates to a fact which is covered by this portion of Mr. Horst's deposition, which, I think, may be covered by a stipulation. As I understand it, the original bill of lading of the hops of the crop of 1914 which were subsequently delivered to the defendant was dated September 12, 1914, and was a consignment of 100 bales of hops from the plaintiff at San Francisco to itself at Chicago. While that shipment was in transit, and on September 16, 1914, it was diverted to Elizabeth, New Jersey, under a new bill of lading, which is in the defendant's pos-

session here, and which was still dated September 12, 1914. That bill of lading was sent to the defendant by the plaintiff in its letter of September 19, 1914, and is referred to therein—the letter of September 19, 1914, that I refer to being marked Exhibit P4 A. Now, I ask Mr. English whether he agrees to stipulate that my statement of facts is correct.

Mr. English: Yes, we so stipulate.

Mr. Twining: Then I call upon the defendant to produce the original bill of lading which is referred to, and which is dated September 12, 1914, and I offer it in evidence.

The Court: You mean the one which affected the transhipment.

Mr. Twining: The one which resulted in the diversion of the hops from a consignment to the plaintiff at Chicago into a consignment to the defendant at Elizabeth. The bill of lading referred to was marked at the time of the taking of the depositions as "Defendant's identification A," and should be marked in this proceeding "P37," as the original is not an exact copy, I understand it, of any exhibit which was offered on behalf of the plaintiff at the time of the taking of the depositions.

(The paper referred to is marked Ex. P37).

The Court: So that that paper is the original?

Mr. Twining: Yes, sir.

Now, on page 22, line 12 (reading):

"Q. You have stated that you are an extensive hop grower? A. Yes, sir.

"Q. Where do you grow? A. I grow hops at Chilliwack, British Columbia, at Aggasiz, British Columbia, at Salem, Oregon, at Independence, Oregon, at Los Molinos, California.

"Q. What county is that in? A. In Tehama county; at Yuba county near Wheatland and in Placer county near Wheatland; at a place called Hopfen on the American River in Sacramento; at Perkins in Sacramento county and two different localities on the Consumnes river.

"Q. How do you spell that? A C-i-s-u-m-n-e-s—: and at Ukiah on the Russian river, California.

"Q. How Hopfen, the American river, what county? A. Sacramento county.

"Q. Consumnes river? A. Sacramento county.

"Q. Ukiah, Mendocino? A. Mendocino county.

"Q. Where were these hops raised? A. They were raised at Wheatland.

"Mr. Harrison: By 'the hops' you mean the hops shipped?

"Mr. Alling: Yes.

"Q. In Yuba county or Placer county? A. We consolidated the two ranches there at Yuba and Placer county, they are adjoining. The ranch is one ranch running into the two counties."

I stop reading at line 9, page 23, and skip to page 82, line 19 (reading):

"Q. Now, you have stated that subsequent to October 14th, there has been no market for contracts for future delivery. Was there prior to October 14th, 1914? A. No, for the last—there was in previous seasons, but the market the last two years on contracts has been—future contracts, has been played out on account of surplusage and prohibition agitation and general bad trade conditions and heavy importations.

"Q. Well, have you had more difficulty in making contracts for future delivery than other people? A. I believe the situation has been bad all along the line."

Now I skip to page 90, line 30 (reading):

"Q. You testified that the reasonable value of hops at Elizabeth, New Jersey, in October, 1914, was about 16 or 17 cents. Choice hops would be a cent higher? A. That is no fixed market price on hops. There is not such a thing as a fixed market price on hops like there is on wheat or anything else."

Skip to page 92, line 16 (reading):

"Q. You don't know, as a matter of fact, just what the price was in October? A. I know generally. A man don't know what the market is today, let along what it was a year ago—cannot tell exactly what it is today. If you ask me what today's market is, I couldn't tell you There is no fixed market, no way of determining exactly what the market is on hops. The trading is few and far between.

"Q. Well, the probabilities are they were worth something less in October than they were in August? A. Well, they were worth less in October than in August, I know that.

"Q. Then they could not have been worth 16 or 17 cents in October? A. Well maybe worth only 15 or 16 cents in October.

"Q. And there has been no—since then there has been no market for contracts for future delivery? A. No, there has been no market."

Page 107, I think, is covered by the stipulation.

The Court: You read to line 3 on page 93?

Mr. Twining: Yes, sir.

The Court: And go on where?

Mr. Twining: I think this is covered by the stipulation that we just made.

Now, on page 218, line 26 (reading):

"Q. What elements enter into the cost of production of hops? A. Well, the price that we pay for producing them. We grow the hops by contract.

"Q. Did you grow them by contract in 1914? A. Yes, sir.

"Q. On the Wheatland ranch? A. I don't know whether grew them by contract in 1914 on the Wheatland ranch, I think I did.

"Q. Will you ascertain what the fact is as to that and be prepared to testify at the next hearing as to the matter? A. Yes, sir.

"Q. Are hops bought and sold on any exchange? A. No, sir.

"Q. Nowhere in the country? A. No, sir, not in this country.

"Q. What governs or determines the market price of hops? A. The price at which buyer and seller meet.

"Q. The price at which buyer and seller meet; so there is no fixed standard as to the price of hops at any given time? A. No, sir."

Skip to page 269, line 23 (reading):

"Mr. Alling: Q. Did you ever offer to arbitrate this controversy as to quality?"

Mr. English: Here I should like to object, your Honor, because we have got a case

in our Court of Errors, *Anderson* v. *Odd Fellows' Hall,* 86 *N. J. L.,* 271, beginning at page 273, with which your Honor is, no doubt, familiar, which holds that any such offer to arbitrate, unless it is a condition precedent to the situation, is not binding or material.

Mr. Twining: If your Honor please, that question was undoubtedly prompted by sections 13 of the contract, which says that "Differences of opinion and claims for allowance in regard to quality of hops submitted or tendered hereunder shall be settled by arbitration, if requested by either buyer or seller." The purpose of the question was undoubtedly to show that there was no arbitration, because it was not requested. There is no attempt to show that there was an arbitration that was binding upon anybody, but that there was no arbitration, because neither side requested it.

Mr. English: Well, I say it is immaterial.

The Court: What would be the force and effect of this testimony, if it were admitted?

Mr. Twining: I think the only purpose must have been to preclude any argument on appeal, or any other time, that the provisions of the contract were that these questions should be first settled by arbitration, if there were any requests that there should be an arbitration, and that it might be incumbent on the plaintiff to show that that was not done, because there was not any request. I had supposed the rule was with reference to arbitration that, although the arbitration may not be binding on anybody, it may be a condition precendent to your right to bring suit.

The Court: If it is so provided.

Mr. Twining: Yes, sir.

Mr. English: Yes, sir.

Mr. Twining: I think this contract might be capable of the construction that it is so provided. It says that there shall be arbitration if either party asked for it, and I am showing that neither party asked for it.

The Court: If this is all that appear, I should not suppose that, to use the language of the court? "The right of action is made dependent upon the result of an arbitration;" and if that be so, the objection, I think, is good. It seems to be irrelevant.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: I now skip to page 292. At page 292 tracers were offered in evidence, I suppose for the purpose of showing that the hops were deliveerd to the defendant. I understand there is no question raised here as to whether the hops were in fact delivered. Is that so?

Mr. English: We admit that they arrived at Elizabeth, if that is what you want. We will admit that a shipment purporting to be 100 bales of hops arrived at Elizabeth.

Mr. Twining: Under that bill of lading?

Mr. English: Yes, but we do not admit the weight.

Mr. Twining: I resume reading at page 292, line 18 (reading):

"Mr. Harrison. Q. State whether or not the letter of the defendant dated October 12, 1914, and marked plaintiff's exhibit 8 caused the plaintiff to

do anything with regard to the conduct of its business?"

Before this question on page 292, I offer in evidence the original letter from the defendant to the plaintiff dated October 12, 1914, which was attached to the depositions and marked P8. I ask that that letter be marked P8 in this proceeding.

(Paper marked Ex. P8.)

Mr. Twining: I now read, beginning with 18, page 292 (reading:)

"Mr. Harrison: Q. State whether or not the letter of the defendant dated October 12, 1914, and marked plaintiff's exhibit 8 caused the plaintiff to do anything with regard to the conduct of its business?

"Mr. Alling: Objected to as leading and suggestive.

"Mr. Harrison: Q. Answer the question yes or no. A. Yes, sir.

"Q. That is, answer it by stating whether or not it did. A. Yes, sir.

"Q. State what was done because of the receipt of that letter in that regard. A. We plowed out hops.

"Q. State what was done in detail in that regard? A. We plowed up enough hops on the Consumnes river to offset the quantity of hops we sold for future hops to the Breidt brewery."

The Court: Let me see if I understand what this means. The witness says in answer to the question at lines 27 and 28, "We plowed out hops," and in the answer to the question at line 30, the same page, he says, on the following page, "We plowed up enough hops." What is meant by that? I

do not know anything about hops. What is it to plow out or plow up hops?
plow out or ploy up hops?

Mr. Twining: Well, that is described later, but it means, I think, that the vines are pulled out of the ground. The hop is not an annual, but it is a perennial, and the hops were destroyed.

The Court: Destroyed the vines?

Mr. Twining: Destroyed the vines.

The Court: The answer is, "we plowed up enough hops on the Consumnes river to offset the quantity of hops we sold for future hops to the Breidt brewery."

Mr. Twining (reading):

"Q. State whether or not by such plowing out the plaintiff lost any improvements? State what loss, if any, the plaintiff suffered by reason of plowing out these hops."

Mr. English: That we object to, your Honor. In the first place, there was an objection made on the record as leading, as indicating that a loss was sustained. We avail ourselves of that objection. Further, we say that it is not the proper measure of damages. It is a voluntary step which the plaintiff took, which he was not bound to take, by which he enhanced rather than diminished his damages. If he had gone on and raised the hops he could have raised the hops and sold them. He put himself in a position so that he could not even avail himself of the market or diminish his damages.

The Court: I think it is better to reserve the point, because, while the witness's answer does not bind the Court, it will develop

his view as to the subject, and make it possible to act more intelligently in dealing with the case. So that I think it is better to let the hops and the weeds grow together until the harvest, and then discriminate.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: I presume I can reserve the right to move to strike this out, if the case takes a different turn.

The Court: Yes.

Mr. Twining (reading):

"A. We lost the difference between the cost of production and the sale price and we lost the value of improvements, that is, hops in bearing, hop trellis, hop drying houses, cooling houses and other improvements that became worthless by reason of plowing up.

"Q. What was the value of the improvements so lost to the plaintiff? A. On the entire amount of plowing up, the loss was upwards of $25,000, though in considering my loss with regard to the Breidt default, I simply apportioned the loss to the quantity of hops involved in the Breidt sale.

"Mr. Alling: Objected to and move to strike on the ground it is non-responsive.

"Mr. Harrison: Q. What was the value of the improvements lost by the plaintiff by reason of the plowing up caused by the acts of the defendant with regard to this transaction?

"Mr. Alling: Objected to as leading and as implying something not appearing in evidence.

"A. In excess of $3000.

"Mr. Harrison: Q. In order that there may be no objection to the form of the question, I will ask you to state generally what effect upon the business of the plaintiff was produced by the receipt of defendant's letter of October 22 marked plaintiff's exhibit No. 8?"

Mr. Twining: That should be dated October 12th.

This is at the top of page 294. (Reading):

"Mr. Harrison: Q. State whether or not any effect was produced on the business of the plaintiff by the receipt of the letter of October 22 referred to?

Mr. Twining: That should be the 12th. (Reading):

"A. Yes, sir.

"Q. State what that effect was. A. That effect was that we were growing more hops than were sold and we did not wish to grow unsold hops and therefore we plowed up hops and by such plowing up we lost the value of all the improvements on the ranches where the hops were plowed up, as well as losing what would have been the profit as between the difference in the contract price and the cost of production"

I stop at line 20, page 294, and I omit from line 21, page 294, and begin at line 14, page 295 (reading):

"Q. You have said you produced about 4000 bales in 1914 from the Wheatland ranch? A. Yes sir.

"Q. What other hops did you produce in 1914? A. About 5000 bales in British Columbia.

"Q. What other? A. About 4000 bales at Perkins.

"Q. What is that? A. About 4000 bales at Perkins.

"Q. Perkins? A. About 4000 bales in Oregon.

"Q. Yes. A. About 4000 bales on the Consumnes river, 3 or 4000. I can't give you the exact number. About 3500, I guess.

"Q. On the Consumnes? A. Yes.

"Q. All right, any others? A. About 500 bales on the Russian River and about 1,700 in Tehama.

"Q. Is that figuring the Brewer Ranch? A. Yes, sir.

"Q. Which one of those is the Brewer Ranch? A. The Brewer Ranch is included in the Perkins.

"Q. That is all, is it, that you raised in 1914? A. I think that is all.

"Q. And where was it you plowed up hops? A. We plowed up hops on the Consumnes and at Wheatland.

"Q. Well how many hops did you produce on the Wheatland Ranch in 1915? A. Above 3,000 bales.

"Q. How many on the Consumnes River? A. About 2.000.

"Q. Now, did you produce in 1915 as many hops in British Columbia and on the Perkins Ranch and in Oregon and on the Russian River and Tehama as you did in 1914? A. Yes, sir, about the same.

"Q. Well, the 1915 crop was 1,000 less on the Consumnes river than 1914? A. That is about it.

"Q. In other words, 2,500 bales less? A. Yes, sir.

"Q. Did you plow all those up on account of receiving defendant's letter of October 12? A. No, I didn't say I did.

"Q. Well, I asked you if you did. A. No, I did

not, and I didn't figure the losses on 2,500 bales. I figured the losses on a hundred bales.

"Q. I see; well now your loss, you figure to include not only destruction of growing hops and trellises and that sort of thing, but drying kilns and all the apparatus that are situate on the ranches used in curing and so forth? A. I have included only those things that became absolutely worthless, and I will still further say that I considered only those losses where they were absolutely obliterated, that is, where the trellis was taken down, where the hops were plowed out and where the buildings were torn down.

"Q. You destroyed buildings then on the Wheatland ranch and on the Consumnes river because of this reduction of acreage? A. I didn't say I destroyed the buildings simply because of the reduction of this 100 bales.

"Q. No, but the reduction of 2,500 bales; there was 1,000 reduction at Wheatland and 1,500 on the Consumnes? A. I didn't destroy any buildings at Wheatland.

"Q. What buildings did you destroy? A. I destroyed the buildings on the Consumnes river.

"Q. All of them? A. Yes, sir, all of them on one of the ranches.

"Q. Have you more than one ranch on the Consumnes? A. Yes, sir.

"Q. How are they known? A. Well, we had a number of ranches on the Consumnes river. We had Dalton, the Pierson, the Murphy, the Patterson, Belcher, Cothrin, and Murray.

"Q. How many acres in the Dalton. A. A hundred.

"Q. How many in the Pierson? A. I think about 50.

"Q. How many in the Murphy? A. I can't tell you offhand; about 50, I guess.

"Q. How many in Patterson? A. I think about 20.

"Q. How many in the Belcher? A. I think about 20.

"Q. How many in the Cothrin? A. I think about 20.

"Q. How many in the Murray? A. I think also 20. I am giving these figures just from impression.

"Q. That makes about 280 acres; were those ranches contiguous? A. Some of them were. The Dalton and Pierson were contiguous and the others.

"Q. The rest of them were contiguous? A. In one group, contiguous.

"Q. Now, what buildings did you have on Dalton and Pierson? A. We had hop kilns, hop picking machines, and hop picking machine shed and improvements inside of the barn.

"Q. What is that? A. Improvements inside of the barn, which converted the barn into a hop house, into a hop cooling house and tracks and trestles, engine house, pumping station, electric light and power line, irrigation system, hop trellis poles and hop trellis set up, hop plants in full bearing. That is about all I can think of at the moment.

"Q. Well, the hop plant, is it perennial or an annual? A. It is perennial.

"Q. How many years would it bear; how many years do you permit it to bear ordinarily before you renew it? A. We never renew it.

"Q. It never requires new stock? A. No; there are some plants in a field that die every year and those that die every year are replaced and there is no telling just how long a hop plant does bear.

"Q. Now, did you have two sets of kilns, one on the Dalton and Pierson group, and one on the other group? A. Yes, sir.

"Q. Two sets of machine sheds? A. Yes, sir.

"Q. And two engine houses? A. Yes, sir.

"Q. Two pumping stations? A. Yes, the two ranches are three or four miles apart.

"Q. Oh, yes, and each independently equipped? A. Yes, sir.

"Q. Well now, that was the condition in 1914? A. Yes, sir.

"Q. Now, how many acres did you plow up? A. We plowed up all of the Dalton and we terminated our lease on the Pierson.

"Q. How much on the Pierson? A. We terminated the lease. We plowed up on some of the others, I don't know just which ones.

"Q. About how many bales did these various ranches on the Consumnes river produce to the acre in 1914? A. About 10 bales.

"Q. About how did the crop of 1915 run, about 10 bales to the acre? A. Somewhere around there; both years runs, somewhere between 10 or 12 or 13 bales.

"Q. The yield in 1915 was about what it was in 1914? A. Yes.

"Q. Then you tore down the kilns; any salvage, or were they a total loss? A. Practically a total loss.

"Q. Machines a loss? A. Well, the machines were not a total loss. I would say the machines represented an 80 per cent. loss, and the machine sheds represented a total loss.

"Q. I suppose you saved something out of your pumping stations and engine house? A. We saved a little out of those things, very little.

"Q. Did you use any of the plants or did you just simply plow them out and let them go; did you transplant any of them? A. We plowed them up. I don't think we used any of them.

"Q. You don't know as to that? A. Well, I

dont know as to that. They wouldn't be worth much.

"Q. Now, you say the total loss in connection with the plowing up of the Dalton and Pierson ranches and the dismantling of these ranches was $25,000, approximately? A. Yes, sir.

"Q. Well, did you dismantle these other ranches? A. No, sir.

"Q. So it was only the equipment on the Dalton and Pierson that was disposed of? A. We simply let go of the Pierson lease.

"Q. And plowed up the Dalton ranch? A. And then on the Dalton ranch we dismantled everything there.

"Q. Yes, so that the equipment, kilns and machine sheds, and engine house, pumping station, etcetera, etcetera, on the other group of ranches was kept? A. Yes, we kept the equipment. We kept the equipment and plowed up hops. Of course that makes us top heavy with equipment on the other end.

"Q. Now, you produced 2,500 bales less—oh, by the way, how much did you plow up at the Wheatland? A. I think about 100 acres.

"Q. Did you destroy any buildings there? A. No, sir.

"Q. No damage to your equipment there? A. No, sir, excepting that we were top heavy on equipment; we got more equipment than we need for the crop.

"Q. Well, by reason of what you plowed up and by reason of the less acreage, you produced 2,500 bales less in 1915 than you did in 1914? A. That is correct, in round figures.

"Q. And the total damage was 25,000? A. I said the total damage was in excess of 25,000.

"Q. So that, apportioned to the bale, it would be $10 a bale, or on the defendant's hundred bales,

a thousand dollars? A. Yes, only you don't figure it right.

"Q. Oh, yes, the defendant ought to bear more of the burden. A. No, there is a lot of equipment, a lot of the buildings became worthless by reason of the plowing up, and by simply taking one of the properties like the Dalton ranch where the whole investment was sunk there, on the matter of a thoosand bales, the loss was over $25,000, from one ranch.

"Q. But I understood you to testify that your total loss was 25,000? A. I said it was in excess of 25,000.

"Q. Well, it couldn't be three times that, could it? A. Well, if you figure the poportion of the buildings that became worthless, it comes pretty near to that amount.

"Q. Then your total loss was 75,000? A. Well, if you figure it that way. I don't figure a loss on a building that I don't tear down, though there is a loss by having the building and not having the use of it.

"Q. The total loss would have to be 75,000 before the defendant's pro rata on his 100 bales would amount to 3,000. A. I didn't pro rate the hundred bales on the 2,500. I pro rated the hundred bales on a thousand bales.

"Q. Why? A. Because there is a clean cut proposition. We see a ranch where we grow a thousand bales and we see by losing all of the investment on that thousand bales, we have got a clean cut basis for calculation.

"Q. I see; but wouldn't you have to have a total loss of $75,000 before 1-25 of the shortage in crop would amount to a damage of $3,000? A. I didn't consider anything whatever in the line of plowing up on any other place but the Dalton ranch. Whatever losses were suffered by plowing up on other

ranches has nothing to do with this matter and I made no charge for losses on other ranches.

"Q. I see; well you are shy 2,500 bales in 1915, as compared with the crop of 1914, of which you claim the defendant is responsible for 100 bales, which would be 1-25 of the total? A. I didn't say—

"Q. Now do you undertake to say that the $3000 damages which you claim you have sustained on account of the defendant's action is 1/25 of your total damages? A. I never made any such claims. I never made any such statements. I claim that I based the 100 bales on the 1000 bales that were plowed up on the Dalton ranch?

"Q. I see; when did you do this plowing up? A. At the end of the 1914 season.

"Q. What month? A. About November."

The Court: Does it appear just why that was? Was it because hops do not keep?

Mr. Twining: No.

The Court: A man would raise unsold apples and unsold potatoes. Why not unsold hops?

Mr. Twining: The view that he took evidently was that the expense of maintaining a property which was not going to be of revenue to him was an expense that he was not going to bear and which he thought he was not bound to bear.

Mr. English: As I understand it, this is on the theory that the proof does not subsequently show market value. That is correct, it is?

Mr. Twining: Yes.

Mr. English: Then I have a right to move to strike this out if it appears that there was market value.

Mr. Twining: (Reading:)

"Q. When the price of hops was pretty near low water mark? A. Yes, sir, and I didn't care to raise hops on speculation. I didn't care to raise unsold hops.

". According to your figures and estimate of the crop of 1914, you produced 22,700 bales in 1914 on all your ranches, and you plowed up enough so that your 1915 crop was 2500 bales less than that, leaving your 1915 crop at 20,200; now what proportion of 20,200 bales of your 1915 crop was sold or under contract for sale at the time you plowed up these hops? A. Nearly all of it.

"Q. Well, what proportion of them? A. Well, say 90 per cent, 80 per cent. somewhere around there.

"Q. Under contract, eh? A. Yes, sir.

"Q. Well, the 20 per cent. that was not under contract would be 4,000 bales; now if you plowed up any hops on account of the defendant's hundred bale contract, why didn't you plow up enough to dispose of this 4000 bales that were not sold? A. I did plow up a lot against that.

"Q. Yes, but I have taken off the 2,500 bales that you plowed up and you have a net product for 1915 of 20,200; now if 80 per cent of that was under contract in November or December when you plowed up the hops, that would leave 20 per cent not under contract, not sold, or 4,000 bales; now if you were so frightened on account of the defendant's failure to take a hundred bales that for that reason you go to plowing up hops, why didn't you plow up enough more so that you would not have to carry this burden of 4,000 bales of unsold hops of 1915 crop?

A. Of course all these figures I am giving you are given from memory and impressions at the moment. I am not testifying from any records, and the figures may be several thousand bales out.

"Q. I see. A. For instance our Oregon crop in 1915 was perhaps a thousand bales larger than our crop of 1914 and our British Columbia crop was 500 bales larger in 1914. I am giving you only rough figures, and when I say that 80 per cent. of the crop was contracted, so with those reservations, I will go ahead.

"Q. And there was a great many more of the 1915 crop unsold at the time you plowed up these hops than the defendant's contract would amount to? A. Why, yes.

"Q. Surely; when you plowed up these hops, had you had any trouble with any other contracts? A. Yes, sir.

"Q. How many of them for the year 1914? A. I think I had two.

"Q. Who were they? A. One was the United States Brewing Company in Chicago, and one was the—no, I think that is the only one.

"Q. What did your contract with them call for as to 1914 delivery?

"Mr. Harrison: You mean what quality of hops?

"Mr. Alling: Q. No, quantity?

"A. A thousand bales.

"Q. Well, that contract calling for a thousand bales and the defendant's contract calling for a hundred bales made eleven hundred bales? A. Yes.

"Q. And yet you plowed up hops enough to reduce your crop 2500 bales? A. Yes, sir.

"Q. Why did you plow up so much? A. Because the hops looked like they were going to be cheap and I didn't want to raise any more than I had to raise.

"Q. Wasn't that the main reason, the sole reason, why you plowed up hops, to reduce your produc-

tion? A. No, but I wouldn't have plowed up as many hops if these people would take their hops; I would plow up hops I had sold, but I would plow up hops that are not sold.

"Q. But you didn't plow up all the hops that weren't sold? A. No.

"Q. You left a good generous margin to go on? A. I left a safe margin.

"Q. A margin of 4000 bales or better. A. Well, I didn't say it was 4000. It may have been only 1000 bales.

"Q. Well then this measley little hundred bale contract didn't cut very much ice in inducing you to plow up hops to such an extent as to reduce your 1915 crop of 2500 bales? A. Yes, sir, it cut just as much figure in proportion to the plowing up as one hundred bales to 2500.

"Q. I see; then 1/25 part of your motive in plowing up hops, you hold us accountable for? A. No, sir, I gave you the calculation of it. I hold you accountable for about one-tenth of the loss on the one ranch that was plowed up.

"Q. I see. A. Without regard to the hops that were plowed up on other ranches.

"Q. Well, do you hold us accountable for anything else? A. I hold you accountable for the difference between cost of production and the contract price.

"Q. Anything else? A. I don't think of anything else."

Then there are some remarks of counsel, which I skip, and begin again on line 15, page 307.

At one o'clock, P. M., the Court takes a recess of one hour.

AFTER RECESS.

Mr. Twining: I read through line 28, on page 306, and then I start in on page 307. Beginning at line 15, on page 307, if your Honor please (reading):

"Q. Well, now, you hold us accountable for one-tenth of the damage, whereas our 100 bales is only 1/25 of the reduction of the crop of 1915; now is that after proper allowance for the fact that you had reason to apprehend that hops would be a glut on the market the next year? A. Well, I didn't figure anything pertaining to glut on sold hops. If I have got a valid contract, why the glut doesn't make any difference, I can deliver the goods. If the buyer will take his goods on the contract, the subsequent gluts make no difference and I don't take them into consideration at all.

"Q. Was it a little while ago you said that your forecast of the market was such that you didn't want to raise any more hops than you had sold? A. I didn't say that.

"Q. Well you said that you apprehend that there would be an overproduction the next year, didn't you? A. I apprehended that there would be low prices.

"Q. Yes. A. For a course of years.

"Q. Yes. Now that had its weight with you in determining you to plow up hops, didn't it? A. Why, yes, but I wouldn't plow up sold hops.

"Q. But you didn't plow up sold hops. A. No, sir, because the loss of plowing up is too great. A man can't plow up and then go into it without having the losses all over again. He would have to go to the enormous expense of replacing his improvements. A man can't plow up for the sake of one or two years; he had better take a big loss than

plow up, because if you plow up you have got a certain loss, and if you don't plow up, things may frame around that it might pay you better to stand a loss in growing up than to plow up, but those are speculative features.

"Q. Well, your apprehensions were largely mistaken, weren't they, as to that, judging from the prices at which you sold hops, as given a little while ago? A. The prices at which we sold hops is no criterion, we have to figure the prices at which we can buy hops and the hops we grow are not worth to us more than hops of equal quality that we can buy, and the price we pay for hops is the best basis of valuation of what hops are worth to us.

"Q. I see, but judging from these prices which you gave me awhile ago, had you known that these prices were going to prevail— A. I never know what prices are going to prevail a year hence or a month hence.

"Q. —had you known these prices were going to prevail, would you have plowed up hops? A. Yes, sir; I am taking the whole range of prices. I would not plow up as against the high range of prices, but I would as against the low range of prices.

"Q. The market condition was the controlling consideration which moved you to plow up the hops, was it not? A. No, sir; it was not. Of course if a man defaulted in his contract, and I expected to get as much more when the hops were harvested, of course I would not plow up, but in a situation the prospects that existed at that time, I would not grow a lot of unsold hops.

"Q. Well, if the market conditions were not the controlling and dominating reason for plowing up those hops, do you undertake to say that our little measley 100 bale contract was the controlling reason? A. Yes, it would be the measley proportion as a hundred is to the others.

"Q. Was this brewing company in Chicago under contract for hops of crop of 1915? A. Yes, sir.

"Q. And they had refused to accept the hops of 1914, had they? A. They refused to accept the hops in 1913 and 1914.

"Q. On account of quality? A. On account of price.

"Q. Was there any question as to the quality between you and these people? A. Well, of course the buyer always gives the quality as his excuse.

"Q. I see; well you didn't plow up hops in 1913, did you? A. Yes, sir.

"Q. How many? A. Well, I plowed up about 100 acres and sold off the ranch of 300 acres.

"Q. Was your 1914 crop less than your 1913 crop? A. Yes, sir.

"Q. By how many bales, approximately? A. About 4000.

"Q. Well, you had written off the Chicago Brewing Company's repudiation by the hops you plowed up in 1913, hadn't you? A. No, sir.

"Q. You didn't plow up the hops in 1913 because the Chicago Company refused to take a thousand bales in 1913? A. No, sir, I plowed them up in 1914.

"Q. You did plow up some in 1913? A. Yes, sir.

"Q. What did you do that for, on account of the market conditions and the prospect of lower prices? A. Yes, sir.

"Q. You waited till 1914 before you reduced your acreage on account of the repudiation of the contract by the Chicago brewery? A. Yes, sir.

"Q. Now did you plant any hops in 1914? A. I don't know whether we plowed up any hops in 1913 on account of that Chicago matter. I couldn't tell that without referring to the records, and I am just testifying now offhand. I know that the default of the Chicago brewery was in 1913 and that

that year we sold off one of our ranches of about 3500 bales aside from that plot of another hundred acres. Now I haven't got it clearly in my mind whether it applied to the 1913 or 1914 plowing up on account of the United States Brewery, but in 1913 we knew that the Unied States Brewing Company was not going to take any hops in 1914 or thereafter.

"Q. Well, now was none of your acreage increased in 1914? A. No, sir.

"Q. Not in British Columbia? A. No, sir.

"Q. Or Oregon? A. No, sir.

"Q. Or any of the California ranches? A. No, sir.

"Q. Was there no increase in acreage of any of these ranches in 1915? A. There was not.

"Q. Well you have been, to the extent that you have plowed up hops and reduced your acreage, to a certain extent, a victim of a falling market, have you not? A. A victim of a falling market and falling buyers.

"Q. Any other buyers who fell down on you besides in 1913 or 1914, or 1915, besides this defendant and the brewery in Chicago? A. In which years?

"Q. 1913, 1914, or 1915? A. Oh, yes, some of them went broke, a number of them went broke.

"Q. All breweries? A. Yes, all our business with brewers.

"Q. You don't sell to anybody but brewers? A. We do after the harvest.

"Q. You don't contract with anybody but brewers, do you? A. We don't make contracts with anybody but brewers. Once in a while we do, exceptionally.

"Q. And those contracts are made with other dealers, I suppose? A. The exceptional ones, yes."

Mr. Twining: We will start again on page 316, line 24 reads):

"Q. Have you any other contracts outstanding and unfilled providing for delivery on approval of samples?"

Mr. English: I think I ought to object to this, your Honor, because it is entirely immaterial.

Mr. Twining: It begins, "Have you any other contracts outstanding and unfulfilled."

Mr. English: Well, go ahead.

Mr. Twining: (Continues reading):

"A. I believe there are a few others"—

Mr. English: Counsel is reading a question which his own counsel out on the Coast objected to.

That was our question and plaintiff object to it.

The Court: If he does not object to it you ought not to.

Mr. Twining: No, sir (reads):

"A. I believe there are a few other, but not the same as the contract in question.

Mr. Alling: Q. Have you ever had contracts with buyers providing for delivery on approved samples? A. No, sir.

"Q. In what respect did the contracts which you just referred to differ from this contract in respect to the approval of samples? A. Well, I have a few contracts where the contract specifies that prior to delivery the seller shall submit samples, but there is nothing about approval.

"Q. This is the only contract you ever had calling for delivery on approved samples? A. I can't think of any other in this country.

"Q. Any other country? A. Well, we may have some in England, but I am not sure."

Mr. Twining: Skip to page 330. This is not of the Horst deposition.

Mr. English: He has not read all of this. I have a right, under our stipulation, to read any other parts in I want to. Shall I read it now or shall Mr. Twining put in his cases and let us put in our case?

The Court: I do not care.

Mr. English: Then let Mr. Twining read what he wants to and I will read mine.

Mr. Twining: I will now offer the balance I will read from the deposition of P. M. Rooney.

"P. M. Rooney called as a witness on behalf of the plaintiff," page 330, line 11.

"*Direct Examination by Mr. Harrison*:

"Q. What is your name? A. P. M. Rooney.

"Q. What is your age? A. Fifty-six.

"Q. Where do you reside, Mr. Rooney? A. Sacramento.

"Q. In this state? A. Yes.

"Q. What is your occupation? A. Hop grower.

"Q. How long have you been a hop grower, Mr. Rooney? A. Since 1882.

"Q. Where have you grown hops during that time? A. In Sacramento county and Yuba county.

"Q. How large a crop of hops have you grown during the last three or four years, yearly. A. Well, from 1600 to 2300 bales.

"Q. As the result of your experience and observation as a grower of hops, have you become familiar with the cost of production of good brewing Pacific Coast hops? A. Yes.

"Q. And you know what that cost of production has been during the time that you have been growing hops? A. Yes.

"Q. What was the cost of production of good brewing Pacific Coast hops during the season of 1914, that is to say, the cost of producing good brewing hops for delivery from September, 1914, to February, 1915? A. Well, the total cost?

"Q. The cost of production?"

Mr. English: That question I would like to object to, and ask your Honor for an exception.

The Court: The same ruling.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

"A. About seven cents.

"Q. You mean seven cents per pound? A. Per pound, yes.

"Q. What is the cost of production at the present time? A. Well, I am speaking had picking now.

"Q. Yes. A. About seven cents.

"Q. Not to lead you in any way, Mr. Rooney, I want you to state whether that repreesnts the cost during the past three or four years or whether there have been any dieffrences during the past three or four years, and if there have been, what are they? A. Seven cents is practically the cost unless you get into some fields that don't produce; that will cover the cost of fields that will produce about 10 or 11 bales to the acre. Of course if you get one that will run down to six or seven, of course it is a little more, but that is very rare.

"Q. But generally speaking the cost of production during the coming three years, that is to say, from the present time through the season of 1918 and 1919——

Mr. English: That also I would like to object to, and I suppose you will make the same ruling?

The Court: The same ruling.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (Continues reading):

"A. Well, if conditions were the same as the past three years, why it would be about practically the same; of course, conditions may change the price; it may be cheaper and it may be higher.

"Q. You have said that the figures stated by you refer to hand picked crops? During the times about which you have testified, would the cost of production of machine picked hops be greater or less than the cost of production of hand picked hops? A. No, my experience is less.

"Q. That is that the—— A. The machine picked would be less.

"Q. Are you familiar with the so-called Wheatland ranch of the E. Clemens Horst Company? A. Yes.

"Q. Would that come under the general class you have mentioned where the cost of production would be about 7 cents a pound, or would it come under the class of poor paying ground? A. No, it would be about the same.

"Cross Examination by Mr. Alling:

"Q. How much less does it cost to produce machine picked hops? A. Well the only advantage you have is the harvest time, it cuts the cost of harvesting practically in two. In other words where it costs you about say 2.80 to pick by hand, it will cost you about 1.90 to pick by machine; that is, where you have to pay a royalty. Of course, we unfortunately have to pay Mr. Horst a royalty when we use his machine. He can do it for less money than that.

"Q. 2.80 a bale is that? A. That is 2.80 a hundred.

"Mr. Harrison: Q. A hundred pounds? A. 2.8 cents.

"Mr. Alling: Q. 2.8 cents a pound? A. Yes, that is hand picked.

"Q. Yes, hand picked; and machine picked 1.9 per pound. A. Well, that is where we pay the royalty.

"Q. Where you pay the royalty? A. Yes.

"Q. What form does the royalty take, so much a pound or so much a bale? A. No, it is a dollar a bale, practically half a cent.

"Q. Half a cent?

"Mr. Harrison: Q. It is half a cent a pound? A. Yes.

"Mr. Alling: Q. So that if a man owns his own machine, the picking by machine would represent a cent and four-tenths approximately? A. Sure, he might do it for less than that, I don't know; of course it depends on what experienced hands he has on the machine, but that has been my experience.

"Q. You have been growing hops all this time; I suppose you have been selling them, too? A. Sure, that is the only reason for growing them."

Mr. Twining: Skip to page 335, line 15 (continues reading:)

"Q. And fancy; Mr. Harrison asked you a moment ago concerning the cost of production. I suppose the cost of production is the same as to all of the grades? A. Oh, yes; it don't make any difference."

Mr. Twining: Skip to page 342, line 22 (continued reading):

"Q. The cost of production of course per pound varies with the yield? A. Yes.

"Q. And this cost of production that you have tetstified to is based upon what year's yield? A. What year's yield?

"A. Yes. A. Well generally it is the general cost for the last eight or ten years.

"Q. Based upon the average production for that period? A. Yes, well I am speaking now of the Sacramento Valley, that is about the yield; of course there are sections I guess that cost more, but I am not familiar with that."

Mr. Twining: I stop on line 5, page 343. I now go to page 444, line 12, I now offer the portion of the deposition I am about to read of T. B. Settle.

"T. B. Settle called as a witness on behalf of plaintiff.

"Direct Examination by Mr. Harrison:

"Q. What is your full name, Mr. Settle? A. Thomas Benjamin Settle.

"Q. What is your age? A.Thirty-nine.

"Q. Where do you reside? A. San Francisco.

"Q. What is your occupation? A. Clerk.

"Q. By whom are you employed? A. E. Clemens Horst Company.

"Q. How long have you been employed by the E. Clemens Horst Company? A. Nine years—eight or nine years.

"A. And during the year 1914 what duties did you perform as an employee of the E. Clemens Horst Company? A. General office duties.

"Q. I show you now a paper which has been marked plaintiff's exhibit No. 2 and which pur-

ports to be a copy of a letter from E. Clemens Horst Company to the Peter Breidt City Brewery, and I will ask you by whom that letter was dictated (handing document to witness)?

"Mr. Alling: What is the date—the 29th?

"Mr. Harrison: 29th of August.

"The Witness: I dictated it.

"Q. At whose direction did you dictate it? A. Mr. Horst's.

"Q. What position does Mr. Horst occupy in the plaintiff corporation, E. Clemens Horst Company? A. President.

"Q. State whether or not this paper, plaintiff's Exhibit No. 2, is a copy of a letter mailed on its date to the defendant (handing document to witness)? A. It is.

"Q. I show you now a paper marked Plaintiff's Exhibit No. 3 and purporting to be a copy of a letter dated September 4, 1914, from plaintiff to the defendant, and ask you who dictated that letter (handing document to witness)? A. I did.

"Q. Under whose direction did you dictate it? A. Mr. Horst's.

"Q. Is it a copy of a letter mailed on its date to the defendant? A. It is.

"Q. I show you now a paper marked Plaintiff's Exhibit No. 4 and purporting to be a copy of a letter dated September 19, 1914, from the plaintiff to the defendant, and ask you who dictated the original of that letter (handing paper to witness)? A. I did.

"Q. Was that letter mailed on its date to the defendant, to the addressee shown on the copy? A. Yes.

"Q. Were there any enclosures with that letter at the time it was mailed? A. Memorandum of weights, and the invoice and the original bill of lading.

"Q. Showing you now a paper marked Plaintiff's Exhibit No. 5, I ask you whether that is a copy of one of the papers inclosed with the plaintiff's Exhibit No. 4 at the time it was mailed (handing document to witness)? A. Copy of the invoice, yes, copy of the invoice.

"Q. Showing you Plaintiff's Exhibit No. 6, I ask you whether that is a copy of the memorandum of weights inclosed in the letter of which Plaintiff's Exhibit No. 4 is a copy (handing document to witness)? A. It is.

"Q. Showing you now Plaintiff's Exhibit No. 27, I ask you whether that is a copy of the bill of lading which was inclosed with Plaintiff's Exhibit No. 4 at the time it was mailed (handing document to witness)? A. Yes, that is a copy.

"Q. I show you now Plaintiff's Exhibit No. 23, which purports to be a copy—"

Mr. English: What is the use of that. We have got the original invoice, now.

Mr. Twining: Yes, I will stop on line 28, page 446. Now, there is just one other subject I want to bring up. I now offer this much here from the deposition of S. J. Rooney, from page 359, line 9.

"Direct Examination by Mr. Harrison:

"Q. What is your full name, Mr. Rooney? A. Stephen J. Rooney.

"Q. What is your full name, Mr. Rooney? A. Stephen J. Rooney.

"Q. And your age? A. Twenty-four.

"Q. Where do you reside? A. Sacramento.

"Q. In this state? A. California.

"Q. What is your occupation? A. Why at the

present time foreman for the E. Clemens Horst Company, Sacramento warehouse.

"Q. Were you employed by the E. Clemens Horst Company during the months of September and October, 1914? A. I was.

"Q. In what capacity were you employed by the E. Clemens Horst Company at that time? A. As inspector.

"Q. Are you familiar with lot 13 of the crop of 1914 of the E. Clemens Horst Company? A. Lot No. 13, yes.

"Q. State whether or not that was the only lot of that number of the crop of 1914, or whether there were several lots by that number? A. That was the only lot by that number.

"Q. Who inspected lot 13 in the crop of 1914 of the plaintiff? A. I did.

"Q. What did you do about the inspection of lot 13 of that crop? A. How do you mean, as to the way I inspected them?

"Q. Yes. A. Why the usual way of inspecting hops.

"Q. What is that? Why that is—in the first place you try each bale, and as is customary with the company, we draw samples from every tenth bale.

"Q. Is any distinguishing mark attached to the lot so it can be identified as lot 13? A. Yes there is.

"Q. What mark is attached to it? A. Why we tag the bale with the lot number on the tags and we also stencil the bale No. 13 or whatever number we happen to be inspecting.

"Q. Did you do that at this time? A. I did.

"Q. In connection with lot 13? A. Yes.

"Q. Who weighted lot 13 of the crop of 1914? A. I did.

"Q. I show you now what purports to be a mem-

orandum of the weight of that lot, and ask you, Mr. Rooney, if that is in your handwriting? (handing paper to witness). A. Yes, sir; it is.

"Q. And by whom was the typewriting done that is found on that paper? A. By myself.

"Q. When did you make that memorandum? A. On September 6, 1914.

"Q. At what time did you make the memorandum with reference to the weighting of the hops? A. Just shortly after it was weighed, on the same day."

Mr. Twining: I now offer in evidence the paper identified by the witness, which is attached to the deposition as plaintiff's exhibit No. 25, which seems to be the paper from which the exhibit marked this morning as 6A was copied.

Mr. Stamler: I object to it on the same ground as I have heretofore objected when exhibit 6A was offered in evidence and I object to it on the further ground that there is no evidence connecting the weights, as set forth in the exhibit, with the shipment in question.

The Court: I will receive it for what it is worth and overrule the objection, and give you an exception.

Exception noted as ground of appeal.

Marked Ex. P25.

Mr. Twining (Continues reading):

"Q. State whether or not at the time you made that memorandum you knew the weights as stated in it, to be correct? A. What is the question? (Pending question read.) A. Yes.

"Q. Refreshing your recollection by this memorandum, will you state what the total weight of this lot was in pounds? A. In pounds? 19,411

pounds, that is, that was the gross weight of the lot."

Mr. Twining: I will stop there, on line 27, on page 361. I will now read from the deposition of the same witness on page 365, line 6.

"Q. Who shipped lot 13 of the crop of 1914? A. I did.

"Q. I show you now what purports to be a copy of a bill of lading dated September 12, 1914, and which purports to be signed by you on behalf of the E. Clemens Horst Company, and ask you whether or not that is your signature (handing paper to witness). A. Yes, sir; it is.

"Q. State whether or not that is a carbon copy of the bill of lading under which lot 13 of the crop of 1914 was shipped? A. Yes, sir; it is."

Mr. Twining: I now offer in evidence paper attached to the deposition marked P26 and ask that it be marked P26 in this suit.

The Court: Is that a copy of the bill of lading.

Mr. Twining: Yes, sir.

Mark Ex. P26.

Mr. Twining (continues reading):

"Mr. Harrison: Q. Mr. Rooney, at the time that bill of lading was issued, did you know to correctly state the fact of the shipment? A. Yes, sir.

"Q. Refreshing your recollection from that copy of the bill of lading identified by you, will you state on what date you shipped lot 13 of the crop of 1914? A. On September 12th.

"Q. 1914? A. 1914."

Mr. Twining: Now, if your Honor please,

that concludes the portion of the deposition which I propose to read at this time. I have reserved certain rights under the stipulation which has been offered in evidence, and in case it becomes necessary to offer any other portion of the deposition in rebuttal that question will be developed, depending on how your Honor rules on certain exhibits that will be offered by the other side.

The Court: That concludes your *prima facie* case?

Mr. Twining: No, sir; I have one witness I wish to call.

CARL ALBERT PLEGHER, sworn in behalf of plaintiff.

Direct Examination by Mr. Twining:

Q. By whom are you employed? A. E. Clemens Horst Company.

Q. How long have you been in the employ of that company? A. Since March 1, 1912.

Q. In what capacity? A. As a salesman and eastern representative.

Q. Will you state, generally, the volume of business done by the E. Clemens Horst Company, annually? A. I should say in the neighborhood of twenty or twenty-five thousand bales.

Q. How does that compare with the volume of business done by other hop growers?

Mr. English: No, do you know?

Q. (Continuing.) If you know.

Mr. English. No, do you konw?

A. Yes, I know that it is very much in excess of the business done by other growers.

Mr. English: That was not the question. The question was whether you knew, as a matter of fact, that the business of the E. Clemens Horst Company was larger than that done by other growers?

Witness: It is.

Mr. English: How do you know?

The Court: It is a very ordinary question.

Q. What is the nature of your duties as salesman and eastern representative of the company? A. We sell hops to brewers.

Q. Does that occupy all your time? A. Practically all.

Q. That is your only employment, the employment by the E. Clemens Horst Company? A. That is my only employment.

Q. Is it generally your experience, as to selling hops during the past four years—that is to say, in a general way, what has been the volume of the hops you have handled for this company annually? A. Do you mean with respect to the actual number of bales I sold or the actual number of bales with which I have had to do in connection with invoices, inspecting, etcetera?

Q. That is what I mean,—the latter. A. I should say that I have had to handle, at New York, from five to ten thousand bales, annually.

Q. By handling, what do you mean? A. I mean everything in connection with the receipt of the goods from our headquarters on the Pacific Coast down to the final delivery and collecting of the bills.

Q. Is there an average weight per bale of hops? A. There is an average weight per bale.

Q. What is that average weight, approximately? A. About 200 pounds.

Q. Do you know, of your own knowledge, whether or not lot 13 of the crop of the year 1914, of the hops grown by the plaintiff company, was delivered to the defendant? That is to say, did you see them. A. Yes.

Q. By "yes" do you you mean it was delivered or not? A. Yes, they were delivered.

Q. Where did you see them? A. In the brewery.

Q. Whose brewery? A. Peter Breidt City Brewery Company, Elizabeth.

Q. Do you remember the month when you saw them there? A. I should say October, 1914.

By the Court:

Q. In what place was the brewery situated? A. In Elizabeth, New Jersey.

By Mr. Twining:

Q. Did you have any occasion, in the month of October, 1914, to sell or offer for sale hops of the plaintiff company, of the crops of the years 1915, 1916, 1917 and 1918, in 100 bale lots?

Mr. English: I objected. I think it is immaterial whether he had any occasion or not.

Mr. Twining: It bears directly on the question of whether there was any market or not.

The Court: The question would probably lead to another step on the question of market. I think it is preliminary; I will allow it to stand.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. [Question read]. A. If you mean did I attempt to sell them——

Q. Yes. A. I did.

Q. Were you successful? A. No.

Q. Why? A. There was no market.

Q. Is there any exchange upon which hops are dealt with? A. Do you mean any common place where hops are dealt with like other commodities, as wheat, and so forth?

Q. Yes. A. No, no standard market.

Q. Was that true in October, 1914? A. Yes.

Q. Has it been true ever since? A. Yes.

Q. And is true now? A. Yes.

By the Court:

Q. No quotations in any trade papers? A. There are trade paper quotations, but one could not, on the basis of a trade paper quotation, go to the buyer and secure that price. The buyer might pay more and might pay less.

By Mr. Twining:

Q. Is there any standard form of hop contract?

Mr. English: I object.

The Court: I will allow it to stand.

A. No.

Q. State whether or not hops are customarily dealt with under special forms of contracts, which differ as each sale is made? A. From my own experience I should say that each sale was covered by special terms agreed on at the time the sale was effected.

Q. State whether or not the terms of the contract under which sales, so far as your experience goes, are made do or do not affect the price obtained for the hops? A. They do affect the price.

By the Court:

Q. That is, the price obtained for the hops depends upon what the contract is? A. Yes.

Mr. Twining: That is all I have for this witness, subject to the right to recall him under the stipulation, or recall him in rebuttal, if the balance of the depositions which you may read are admitted.

Cross Examination by Mr. English:

Q. Mr. Phleger, how long have you been working with the Horst Company? A. Since March 1, 1912.

Q. Always located in New York? A. Except for the three or four months when I was travelling East.

Q. What had you been engaged in before that time, when you first came to Mr. Horst? A. I was a student in the University of California from 1908 to 1912.

Q. You went to work for him on your graduation from college? A. Yes.

Q. Your duties were to represent him in the East? A. Yes.

Q. How much territory do you cover? A. East of a line through Pittsburg to Buffalo.

Q. Do you run all along the Atlantic seaboard? A. Yes.

Q. Do you place contracts for him? A. Yes.

Q. And keep informed of conditions as to the hop market? A. Yes.

Q. I presume, of course, when you try to make a contract you try to get one as advantageous as possible for your principal? A. Yes.

Q. Now, you have to keep informed of the general market prices of hops, don't you? A. Yes.

Q. What means do you take to keep yourself informed of the market price of hops? A. With respect to each particular crop or as to the market for futures?

Q. Divide that up and answer the question either way you want to. A. I keep informed by daily telegraph quotations from San Francisco.

Q. Where are those quotations given out from? A. Wires from our San Francisco office to our New York office.

Q. You mean you telegraph from New York to the home office in San Francisco? A. We don't request the prices in a particular case, but all the prices, to keep us posted.

Q. Every day? A. From day to day.

Q. Where does the home office get the information from that they give you over the wire? A. I couldn't say as to that.

Q. Did you work in the home office at one time? A. Only for a month, during March, 1912.

Q. During that month what was your home office's course of knowledge as to the market prices of hops? A. I couldn't say as to that.

Q. Well, you get almost daily wires from the San Francisco office of your company, giving you the then current market prices, don't you?

Mr. Twining: I object. He did not say that.

Mr. English: I am asking him.

Mr. Twining: But you are incorporating the statement in the question which is not a correct statement of the earlier testimony, as it assumes to be.

Mr. English: It does not have to be.

Mr. Twining: As I understand it, the quotations which he got were prices that he was

authorized to sell at. This question purports to put in his mouth the words, that he got quotations of the current market prices.

The Court: That phrase has not been used before. I will sustain the objection. I think it is somewhat doubtful.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What information does the home office give you, by telegraph, as to prices? A. The authorized selling prices.

Q. You mean they telegraph, every day, that "On this day we will sell hops for" such and such a price? A. Not every day.

Q. Well, how often? A. Whenever there is—whenever there may have been a fluctuation on the cost, or whenever we have requested them on a price for a special lot.

Q. When you say fluctuation on the Coast you mean fluctuation in the market price, on the Coast, don't you? A. I mean any different, any other, than the previous authorizations to me; that is to say, they would ask me to secure a higher or a lower price.

Q. In other words, if there is a market for hops today at a higher price than there was yesterday they will wire you to that effect, won't they? A Well, I don't know whether that means higher or lower market; it is simply their authorization to me to sell.

Q. You are not answering my question. (Question read.)

Mr. Twining: I submit he had answered that question.

The Court: I think the witness may answer it.

A. Yes.

Q. Your answer is yes? A. Yes, but there must be some reason.

Q. And, conversely, if you have been selling hops for a given price, they have authorized you to sell hops at a given price, and it developed that the price on the Coast is less than that, they would authorize you to sell lower, wouldn't they? A. I presume that would account for their lower authorization.

Q. So, isn't it a fact that the character of the authorization given you is based on the fluctuations of the market price on the Pacific Coast? A. I presume so.

Q. That is true, isn't it? A. To the best of my knowledge it is true.

Q. Well, you as a salesman know that if hops sell at fifteen cents on the Coast you cannot sell them at seventeen cents here, don't you? A. Yes, I know that.

Q. And, conversely, if hops sell at seventeen cents on the Coast Mr. Horst wouldn't permit you to sell them at fifteen cents here? A. No.

Q. So, isn't it a fact that the prices they are selling for, on the Coast regulate the price you are authorized to sell them at here? A. I cannot say definitely that they would, but you seem to draw that conclusion.

Q. Wouldn't you draw the same conclusion on the same state of facts?

Mr. Twining: I object.

The Court: It is a matter of positive knowledge rather than inference.

Q. Don't you make it part of your business, in addition to what information you get from California, from Horst & Company, to keep in touch with the general quotations on hops? A. Yes, I try to keep as well informed as possible.

Q. What sources of information do you go to, outside of the information you get from the Horst Company: A. Conversations with the dealers, brewers and other persons who are interested in the purchase of hops.

Q. What else besides conversations? A. Occasional reference to market quotations in printed bulletins and papers.

Q. Just give me a list of the printed bulletins and papers which you sometimes consult to get information on or about the state of the market? A. The Brewers' Daily Bulletin.

Q. What else? A. The New York Journal of Commerce?

Q. What else? A. Those are the trade papers.

Q. What else? A. I think those are the only printed books that I refer to.

Q. They make a regular business of publishing daily hop quotations, do they not? A. Yes.

Q. Aren't these prices contained in the New York daily papers—the New York Sun? A. I never saw them in the Sun; possibly.

Q. And the Tribune? A. Possibly.

Q. Some Chicago trade papers? A. I am not acquainted with them.

Q. What newspaper do you read? A. The Times.

Q. Don't these quotations appear in the Times? A. I don't remember reading them in the Times.

Q. Do you know a book called "Pure Products," published by the Scientific Station for Pure Products? Do you know such a publication as that? A. Could I see it.

By the Court:

Q. No. Do you know it.

By Mr. English:

Q. I show you a publication which bears on the front the imprint, "Pure Products," apparently the monthly for the month of October, 1914, and ask you if you have ever seen that publication? A. No; I don't remember ever having seen it.

Q. I call your attention to page 15 of this very issue which I have, that purports to——

Mr. Twining: I object to any statement as to the contents of that book.

Q. [Continuing.] Page 515, that purports to give quotations as to the market price of hops, doesn't it?

Mr. Twining: I object to that as immaterial. The fact that some printed book not shown to be authenticated in any way is no evidence whatever as to what its contents are.

The Court: The witness, evidently, has no knowledge of the book.

[Marked D1 for identification.]

Q. You have spoken of the Brewers' Bulletin as one of the trade papers, is that right? A. Yes, sir.

Q. Where is that paper published? Chicago? A. I think it is published in Chicago.

Q. I show you what purports to be an issue of the Brewers' Bulletin, dated Chicago, Monday, October 12, 1914, is that so? A. Yes, that is a copy of the Brewers' Bulletin.

Q. That is published three times a week, tri-weekly, it says? A. I think it is tri-weekly.

Mr. English: I ask that it be marked for identification.

[Marked D2 for identification.]

Q. I show you another copy of the Brewers' Bulletin, this time dated October 9, 1914. See if this is the real thing? A. Yes.

Mr. English: I ask that it be marked for identification.

[Marked D3 for identification.]

Q. Now, I call your attention to Exhibit D3 for identification, which is the October 9th edition of the Brewers' Bulletin and ask if you can find therein quotations referring to the market for hops?

Mr. Twining: I object to the reading of anything from either of these so-called bulletins, or to any statement to what they contain. The proper foundation has not been laid for reading from these papers.

The Court: State the ground of your objection.

Mr. Twining: My grounds are that the papers which are shown to the witness are not shown to be authentic in any way, and that they are not shown to contain statements of the market value at the time of hops of the crops of 1915, 1916, 1917 and 1918, but they are, at most, nothing more than quotations of the then current sales of hops made, as this witness states, under special contracts, at the best prices that could be obtained in each instance, after negotiations

between buyer and seller. They do not show in any way any general market; they do not show, or pretend to show, that this plaintiff could have gone out, in 1914, and sold, under his form of contract, 100 bales of the crops of 1915, 1916, 1917 or 1918, which is the only question which is material here.

The Court: Answer the question either yes or no.

Q. Do you find any such reference? A. Yes.

Q. On the front page, on the left hand column, isn't it?

Mr. Twining: If your Honor please, before this witness goes into any statement as to this so-called bulletin's contents I would like to cross-examine him and find out whether he knows whether this is the Brewers' Bulletin or not.

Mr. English: He has identified it.

Mr. Twining: I have a right to cross-examine him on that question.

The Court: If you desire to cross-examine, you may. I would not receive a cross examination as to this paper from this witness. There is no harm in his saying that he found something there.

Mr. Twining: I do not want there to creep into this record statements of their contents, in the form of questions or admissions, where the admissions are not based on the knowledge of this witness. Now, I am going to contend that if they are copies of the Brewers' Bulletin they contain nothing more than a statement that John Smith sold Bill Jones 100 bales of hops, of the crop of 1914, on a certain date. It has got to be

authenticated. In the regular way before any statement goes on the record.

The Court: I do not think there is anything now before the Court.

Q. Mr. Phleger, you said that one of the trade papers which made a business of publishing hop quotations is the Brewers' Bulletin. Is that so? A. Yes, sir.

Q. These two editions which you have indentified here, D2 and D3, are regular copies of that trade paper, are they not? A. They look like that.

Q. If they are fakes they are pretty good ones? A. Yes.

Q. Well, they are the papers, are they not? A. Yes.

Mr. Twining: Now, I have a right to cross-examine on that, of course.

Q. This is one of the publications that you went to to keep yourself informed, in the line of your business duties, as of the market price of hops, isn't it? A. I think that I said I occasionally referred to it.

Q. Well, whether occasionally or otherwise, this is one of the papers you did refer to for that purpose? A. Yes.

Q. In order to go out and do business with a brewer, to make a contract with him for the sale of hops, you had to be informed about the prices of the market, didn't you? A. Well, when I went to sell a brewer I worked on the basis of the price that was authorized to me by the Pacific Coast.

Q. I know you do, but whether authorized or not you couldn't sell a brewer at prices which differed very much from the market price, could you? A. It would be hard to say. A brewer would find it

difficult through any medium to secure a market price on future crops, to base anything by.

Q. You are not answering the question. If you sat down with General Collins, for example, and tried to sell him hops at a price which was in excess of that quoted in the Brewers' Bulletin on the day you were talking, you wouldn't be apt to succeed, would you? A. There is nothing in the Brewers' Bulletin which would give General Collins a line on what the price of futures would be.

Mr. English: I move to strike that out, and I move that he answer the question.

The Court: There is nothing in the statement to show it relates to the sale of futures. Does it?

Mr. English: No, it does not.

The Court: Can you answer the question?

[Qestion read.]

Mr. Twining: That is objected to on the ground that it does not relate to futures and it is immaterial at what price he could have sold hops of the crop of 1915.

The Court: I will sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Hops are not sold over the counter, like sugar, are they? A. No.

Q. They are generally on long contracts, aren't they? A. Some are sold as spots; some as futures.

Q. Which are the more, spots or futures? A. Some years it is impossible to sell futures, and in such years the predominence of hops sold are spots.

Q. You have been in business for four years? A. Yes.

Q. During which time you have handled five to ten thousand bales, annually? A. Yes.

Q. Were these five to ten thousand bales which you handled sold on contracts for futures or spot transactions? A. I should say that both of them were being contracted for future deliveries.

Q. The fact is that practically the great majority of hop contracts are contracts for futures, aren't they? A. No.

Q. What are they, then? A. Spot sales.

Q. But the majority that you handled were otherwise weren't they? A. Yes, because I was, in effect, a distributor. I was getting hops in here by the carload and delivering them out to brewers who had contracts with us for foreign countries.

Q. When a hop grower and a brewer make a contract for future deliveies they usually go in at the price which prevails at the time that they make the contract, isn't that true?

Mr. Twining: I object. That has no bearon whether there is a market.

A. No; that is not exactly so. A sale is made at a price where buyer and seller meet and take into consideration the special terms of the contract.

Q. Isn't it a matter of fact, in your experience, that a buyer and seller usually meet at the price which is about the price which is quoted at the time they make the contract, as a basis for their negotiations?

Mr. Twining: I object. The question is too indefinite. That does not help us any to get at what the market is.

The Court: You may answer.

A. I don't see how it could be governed by any

comparison because I don't see how quotations would be available.

Q. You are not answering the question. [Question read.]

> Mr. Twining: I object on the ground that the question does not state where it is quoted. The question asks the witness now whether, when a seller and buyer get together, it does not show that the price as about the same as the price quoted. Now, what does that mean? In the first place, "about the same" does not mean anything. In the next place, what price is it a quotation of? A quotation of the spot sales or a quotation of futures? The question is so indefinite it does not mean anything.
>
> The Court: I will leave it to the witness to say whether he can answer it.

A. I should say that it is apt to be governed by quotations available. For instance, I would say that when I began to work for the company, in 1912, they were selling out the 1911 crop, I will say, fifteen cents, futures seventeen cents, which had entirely no relation to the present market.

Q. When these quotations are given in the Brewers' Bulletin and the New York Journal of Commerce do they make any distinction between spot sales and future sales? A. To my best belief the quotations printed are simply information given to the papers' reporter by perhaps one or more dealers. A reporter will call up and say, "Is there anything new?" If nothing new, quotations remain the same, although this particular dealer may not have heard of any recent sales, and they put in what purports to be the market. But there is no

place in the country where you could go and buy and sell hops over the counter, or in any special place, at those prices.

Mr. English: I move to strike that all out.
The Court: I will let it stand.

Q. [Question read.]

Mr. Twining: I object to that on the ground that it is immaterial what the Journal of Commerce and Brewers' Bulletin say.
The Court: Objection overruled.

Q. What is your answer, is there any distinction in the quotations? A. I don't think they quote futures at all. I think they quote present crops and old crops.

Q. Is there anything in the quotation to indicate whether it is present, past or future, or is it just a quotation of the then current price of hops? A. It gives the crop year.

Q. Does it say whether they are for future sales or spot sales? A. I don't quite understand that question.

Q. The question is whether, when you read a quotation in the paper for the crop of 1914, for example, the paper being dated 1914, does it appear in that quotation whether the prices therein set forth relate to future sales or spot sales? A. If it is dated before the harvest it is present hops, spot hops.

Q. Suppose it is after the harvest? A. If it was in the spring of 1914—we will say, with reference to 1914—and there was a 1914 crop quotation I would say that it was with respect to 1914 hops.

Q. Then there are market prices for future deliveries, aren't there. A. Only with respect to one or two months before the next succeeding crop.

Q. Whatever it is with respect to the fact is that there are market quotations for future deliveries, aren't there? A. Well, to that extent there is, yes.

Q. These trade papers discuss the prospects of futur hops and the prospects of what the market will be, don't they?

Mr. Twining: I object to what the newspapers discuss.

Mr. English: No, these are trade papers.

The Court: I will sustain the objection.

Q. You made this contract which is the subject of this suit personally, did you, with General Collins, the president of the defendant company? A. Yes.

Q. And it appears by its date it was made on March 26th, 1914? A. Yes.

Q. Do you remember what the quotations show the market price of hops to be at the time you made that contract?

Mr. Twining: I object to that as not cross examination and as not material.

The Court: I will allow the question.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I do not remember.

Q. As a matter of fact, wasn't it 17½ cents? A. The market, or the particular price at which I sold?

Q. The market. A. No, I don't know that to be a fact.

Q. Isn't it a fact that the market price was taken into consideration in the negotiations between you and General Collins, in making this contract.

Mr. Twining: I object to the constant use of the word "market price." The witness has stated a number of times that he does not consider that these prices contained in these papers constitute a market price.

The Court: I will allow the question.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. [Question reda.] What do you say, Mr. Phleger? A. As to what may have passed through the mind of General Collins I can't say. I would simply say, with regard to that price, I worked on that price because I was authorized to do so by the San Francisco office.

Q. One reason you were authorized to do so was because that was the current price—

Mr. Twining: I object.

The Court: The witness cannot say what induced the authorization.

Q. Isn't it a fact that the price you were authorized to work on was, as a matter of fact, the current price as quoted in the trade journals? A. I don't know that to be a fact.

The Court: The witness just siad he didn't know whether it was or not.

Q. Is there any distinction between hops sold in 100 bale lots or sold in some other sized bale lots—number of bale lots? A. Well, as a general proposition I would say that the only difference would be in freight. That is to say, if the freight rates are less than 100 bale lots, in less than carloads, would be higher, that would increase his basis to

a larger number of bale lots in his new price. In your question you say the crops of 1916 to 1918. There were included in his original question the crops of 1915 to 1918.

Q. All right; make it that. A. I would say that that was a matter governed largely by the particular circumstances at the time the sale was made.

Q. You are asked to say whether you had occasion to sell the crops of 1916 to 1918 in 100 bale lots and you said no. Now, I want to know whether you had occasion to sell the crops of 1915 to 1918 in larger than 100 bale lots? A. The question confuses me a little bit because I don't recollect that I—

Q. [Question read.] A. First, to clear up that word "occasion." If I had occasion meaning opportunity? If I could effect a sale, no; If I had to, that is, if my people gave me an opportunity to sell if it was possible, yes. I tried my hardest to sell. With respect to quantities, more or less than 100 bales, I cannot say.

Q. [By the Court.] Did you, in fact, make any sales for 100 bale lots, for futures, in those years? A. In October, 1914?

Q. [By Mr. English.] No, at any time during the year 1914. A. No; not to the best of my knowledge.

Q. Then this contract with General Collins was the sole contract that you made for your company during 1914, is that so?

The Court: No, your question related to 100 bale lots.

Q. Can you answer that original question, whether you sold any contracts for future sales during the years 1915 to 1918 in more than 100 bale lots? A. No, I did not.

Q. When was the last contract for future sales that you have made?

Mr. Twining: I object. That is immaterial.

The Court: I think it is a question relating to the course of business; I think it is liable to, and will throw some light on the question.

A. I don't recollect any sale for futures since that time.

Q. What have you been doing for your company since 1914? A. I have been working for the best I was able to do—I mean to say that no hops were sold under the identical terms those hops were sold.

Q. You mean the price was smaller? A. With respect to the other alterations put in the contracts.

Q. What are the other alterations? Cutting out sight draft against bill of lading? Is that another thing? A. That is an alteration in the present form.

Q. This hop contract which is the subject of this suit was made on a printed form, wasn't it? A. Yes.

Q. To which were made some changes by pen and ink? A. Yes.

Q. This printed form is the form you usually use in making sales, isn't it? A. Well, it is the basis, or it is in most cases to meet the particular requirements of the sale.

Q. It is prepared—you take that with you when you start out to make sales? A. Yes.

Q. You adhere to it as close as you can in making a sale? A. Yes.

Q. When you answered Mr. Twining's question, whether you had an opportunity to sell hops in 100 bale lots in 1915 to 1918 were you limiting your direct answer to contracts from sales identical

with this one which is the subject of the suit? A. When I answered I didn't limit it; later I did limit it; but the answer is the same, I have not sold any futures.

Q. Under any kind of contract?

The Court: Futures for those years, you mean?

Witness: You mean for 1915, 1916, 1917, 1918?

The Court: The question related to specific years.

Q. What is your answer? A. No.

Q. So that, did you, in 1914, make any contract for the sale of future deliveries for the years 1915, 1916, 1917 and 1918? A. Outside of the contract in question?

Q. Yes. A. None.

Q. That is the only contract you made? A. Yes.

Q. Yet during that year you had handled between five and ten thousand bales? A. Yes, sir.

Q. Most of which, you said, were for future delivery. A. They were to be delivered on term contracts.

Q. Well, what you call a term contract is what I have been calling future contracts, isn't it? A. Well, yes, that is the same thing.

Q. What is the difference, in your mind, between a term contract and what I have been calling future contracts? A. The question is not quite clear, Mr. English. For instance, if we are talking about delivery of hops of years to come I would call that future; or for, say, two years from now, that is not a delivery on a contract today. I would say that when we were delivering on those contracts, on that particular year, we—

Q. What you call spot transaction? A. No. It is present crop delivery.

Q. Let us assume that nothing had happened to this contract. You had made it in 1914. When you were delivering hops due in 1914, you say you were delivering under a term contract? A. A term contract, I use the term, term contract.

Q. You would say under a term contract? All right. So that, when you made a contract for the sale of hops to begin present delivery and cut it up for a series of years you call that a term contract, is that right? A. To deliver the present crop?

Q. And then continue. Let us say it began, for example—suppose you made a contract in 1914 which required you to deliver in 1914, and then crops for a term of years, do you call that a term contract or a future contract? A. If I made that contract before the crop was harvested I would call that contract a contract for futures.

Q. What do you call this contract with General Collins? A. A term contract for futures.

Q. Because it was made in the year in which the first delivery was to be begun, is that it? A. Not because of that reason, but it is a term contract for futures because it was made in advance of the harvest of the first crop that was to be delivered.

Q. It ran along for a term of years after that? A. Yes.

Q. Did you make any contract of that kind, during or after March of 1914, for the delivery of hops? A. No, none.

Q. Did the E. Clemens Horst Company, the plaintiff in this suit? A. I couldn't say as to that.

Q. Did they make any contract through you? A. No.

Q. You are handling hops at the present time, aren't you? A. Yes.

Q. Are they alt the contracts which were made, April, 1914? A. No.

Q. Some contracts were made in 1915? A. I am under the impression that there were some; I mean contracts, not necessarily for future delivery, but contracts for delivery of the present crop.

Q. Have you any present knowledge of any other term contracts, such as this contract which is the subject of this suit, under which your company is now delivering hops? A. Well, if you mean under the identical terms of that contract—

Q. No, I don't mean under these identical terms, I mean under any terms which might have been written in that particular contract? A. Yes.

Q. How many of them? A. I should say, off hand, about twelve.

Q. How old are those contracts? How far back do they go? A. In the main they date from about 1912.

Q. When is the latest one?

Mr. Twining: I object to evidence with reference to the contents of those contracts. I think we have gone far enough on that line. He is now giving the contents of the face of the various contracts.

Mr. English: He says there is no possibility to sell on the future contracts or term contracts and it now appears in evidence that there are twelve of them going now.

Q. [Question reda.] That is, the latest contract for the sale of goods under whcih he is now shipping.

The Court: You may answer the question.

A. There were.

Q. [By the Court.] No, you are asked now for a single date. If you can give it, give it; if you cannot remember it, say so. A. I don't remember the date.

Q. [By Mr. English.] Well, was it in 1916? Are you shipping now, under a contract made in 1916? A. Only for spot.

Q. Are you shipping for any term contracts made in 1916? A. You see I don't want to confuse the thing, you know. I am very anxious to tell in a clear concise way the facts. I think you are trying to bring out whether a contract was made subsequent to the contract made with General Collins. If that is so, I will say, now—

Q. I am just trying to say—my question is, whether you are delivering, at the present time, under any term or future contracts which were dated in 1916? A. No, sir.

Q. Are you delivering at the present time under any term or future contracts made in 1915? A. None that I can remember.

Q. Or 1914? A. I think there are some.

Q. Do you want to go on record as saying that the Horst Company has not made a contract, a future contract, since 1914, on which goods are to be delivered in your district, or passing through your hands? A. I don't understand, quite, the question.

Q. Well, now, what is hard about it, that you cannot understand? A. You ask me if there are any deliveries being made under any contracts that were made in this territory in 1914?

Q. Through your hands? A. Through my hands?

Q. [Question read as follows: "Do you want to go on record as saying that the Horst Company has not made a contract, a future contract, since 1914, on which goods are to be delivered in your district, or passing through your hands?"] A. To the best of my knowledge there are none.

Q. Then the Horst Company has nothing but spot contracts since 1914? A. Through me, nothing but spot sales.

Q. Nothing but spot sales through you? A. Yes.

Q. Had the Horst Company delivered goods through New York on anything but spot contracts in 1914? A. They made deliveries of the term contracts and spot sales.

Q. And the term contracts were all dated in April of 1914? A. To the best of my knowledge, not later than March, 1914.

Q. Shipped March, 1914, the Horst Company has not made a single term contract or contract for future deliveries, under which they are now delivering through your district? A. To the best of my knowledge.

Q. What knowledge have you got on the subject? A. I have the facts. If they were being delivered I should know about that.

Q. How many other salesmen has the Horst Company got besides you? A. In New York?

Q. Yes. A. Just myself.

Q. Who else in this vicinity? A. I have two assistants in New York.

Q. Do they cover the whole Atlantic Coast? A. They don't travel. One man took a short trip for about two weeks.

Q. How many salesmen have they got in other parts of the country outside of your territory? A. One with headquarters in Chicago, and the main office in San Francisco.

Q. Your company ships a good many hops abroad, doesn't it? A. Yes.

Q. Who makes those contracts? A. The London office.

Q. They pass through New York? A. Yes.

Q. Pass through your hands? A. Generally.

Q. Have you included those in your testimony that you have given about these term or future contracts? A. As regards handling hops?

Q. Yes. A. Yes.

Q. So that there are, to your knowledge, no contracts made for delivery abroad? A. Yes.

Q. What is the character of your contracts for hops that go abroad now? The present date?

Q. Yes. A. There is an embargo on hops in England; nothing goes abroad.

Q. You were asked if there was any exchange for the sale of hops and you said that there was no standard market. By that you mean there is no organization, like the stock exchange, for example, and the wheat pit in Chicago? A. Yes.

Q. That is what you meant? A. That, or any ramification of it; no place at all where I could go, say, this afternoon, or tomorrow morning, where I could go and dispose of some hops if I had them on hand and really wanted to get rid of them.

Q. You mean there is no centralized buying and selling place? A. Yes, there is no centralized market.

Q. You buy and sell wherever you can? A. Yes.

Q. That is true of the apple market, isn't it? A. I don't know anything about that.

Mr. Twining: I object.

Q. But when you do go up to somebody to make a sale the prices which are quoted in the various trade journals have a bearing or influence on the terms, don't they? A. Not necessarily. I have the prices confirmed through my San Francisco office. It wouldn't make any difference to me what it said in the journals, I could not go beyond my instructions.

Q. That is because of the limitation on your authority, is it not? A. Yes.

Q. But the authority which you get as a matter of fact coincides with the market price, doesn't it? A. I don't know that it does.

Q. Yet, it is your business to keep informed on market prices you don't deny that? A. I will say that with respect to the sale of spot goods.

Q. I am not talking about that. A. Of futures, I don't know where I could go to put a market price on it.

Q. You want to go on record as saying that you are a salesman for hops, and have been for four years, and that it is your business to keep informed of the price of hops, and that to that end you consult the trade journals, and yet, when you make a sale of hops, under instructions from your company's home office, you have no knowledge of what the market quoted price of hops is? Do you want to say that? A. With respect to spot hops, I do get some information from the journals, and from talking with other hop men, and with brewers. With respect to futures, I have nothing to go by; I get quotations; but I only know under what trade terms they agree to sell the commodity.

The Court: I think the witness has explained that any market price is fixed. I think the question is hardly fair to the witness.

Q. What was the market price for spot hops for the crop of 1914?

Mr. Twining: I object.

The Court: I think that is irrelevant.

Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. You know the Horst Company, not the E. Clemens Horst Company, but "The Horst Company" of Chicago? A. Yes, I know of them.

Q. Is that a rival of yours? A. A competitor.

Q. You have to keep informed of the prices that they sell for, don't you? A. Not necessarily.

Q. Don't you compete with them? A. We compete with them to the extent that we are attempting to sell hops, and they are, too.

Q. They sell hops for future delivery, don't they?

Mr. Twining: I object.

A. I have no positive knowledge.

Q. You talked to General Collins when you signed this contract in suit, didn't you? A. Yes.

Q. Didn't they, at that time, show you a contract that they had made with the Horst Company a few days before?

Mr. Twining: I object.

Adjourned until tomorrow, Friday, December 15. 1916, at ten o'clock, A. M.

FIFTH DAY

Friday, December 16, 1916.

Met pursuant to adjournment.

Present, counsel as before stated.

Carl Albert Phleger resumes the stand in behalf of plaintiff.

Cross Examination (continued) by Mr. English.

Q. [Question read.]

The Court: You may answer the question.

Q. What do you say, Mr. Phleger? A. I don't remember that he showed me any contract.

Mr. English: He seemed to equivocate
Q. Did he tell you anything about such a contract? A. I don't remember his speaking of that.
Q. I show you a contract between the defendant company and the Horst Company, not the plaintiff, dated March 13, 1914, and ask you if General Collins, in his talk with you did not show you that contract?

Mr. Twining: I object to that as immaterial, whether he did or not; cannot effect the question of market price, which is the only question.

The Court: No, it could only start an inquiry. The design might be to show that witness might be mistaken about some of his statements as to the cost of business conducted by the plaintiff.
about the price of the market, and I want to show him what the price at the time—

Mr. Twining: I deny that the witness has shown any evidence of equivocating about that question, or any other question. He has stated a number of times that he has used various methods to try and keep himself informed as to the prices of spots, but that he did not know how he could find the prevailing price in such a market because, in his opinion, there was no such market. He has stated that, so far as this company is concerned, he has consulted quotations which he has seen from time to time in some of these journals, and also has consulted some of these brewers; but whether he was shown a contract by General Collins at the time of this sale cannot have any bearing at all upon the question of what the market was then for futures, or have any bearing as contradict-

ing or explaining any testimony he has given.

Mr. English: This shows what the market for futures was. This is a contract for futures made for three or four years.

The Court: How does the fact that another contract was made with another party for futures at the time mentioned, or at any other time, throw any light on the issue we are now trying?

Mr. English: He says there was no market for futures. To contradict that I confront him with a contract for futures. It is the very essence of this case.

The Court: I do not understand the witness to say that other concerns may not have made contracts with respect to futures.

Mr. English: I understood him to say that you could not go out in the world at large and make any contracts for futures; that it was not done.

The Court: I did not understand the witness to say that there was any such thing as a market for futures. I fail to see how this affects a contract; it cannot prove anything except that certain things, on a certain day, made a market for futures. I do not understand the witness denies the possibility of that. I do not think it helps us at all, and I think it is irrelevant. I will sustain the objection.

Mr. English: I ask that this paper be marked for identification.

Marked D4 for identification.

Mr. English: Will your Honor permit me to state another question?

The Court: Yes.

Q. I show you a paper, now marked D4 for identification, which purports to be a contract between the defendant company and the Horst Company, not the plaintiff, dated at Elizabeth, April 13, 1914——

Mr. Twining: I object to any statement on the record as to the contents of that paper. This witness has already testified that he does not recall seeing any contract. There is no purpose for asking this question other than to get on the record a statement of what the contract purports to show.

The Court: It is sufficiently identified by the identification mark. I do not think the contents of the paper ought to be put in the question. Strike out the statement as to the date.

Q. At the time the contract in suit was negotiated had not General Collins, the president of the defendant, showed to you a contract marked D4 for identification, between the defendant company and the Horst Company, not the plaintiff, and was not that contract discussed between you and him in arriving at the price of the hops, which was set forth in the contract now in suit?

Mr. Twining: I object upon the ground that it is immaterial.

The Court: Does not that raise another question, whether the conversation preliminary to the execution of the contract, is evidential. The contract itself is conclusive. I have always supposed that preliminary conversations were merely the scaffolding which was swept away by the contract itself, and on that ground I sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Look at Exhibit D4 and tell me whether you have ever seen it before?

Mr. Twining: I object to that as immaterial, and also upon the ground that it now appears that the purpose of the offer is to show the preliminary conversations leading up to the making of the contract in suit.

The Court: He may answer the question yes or no. (Addressing witness): Look at it please and say.

Q. (Continuing) When I say before, I mean before yesterday. A. To explain the answer, your Honor, I would say that I saw this Mr. English showed it to me some days previous. But before that I don't remember seeing it.

Q. Well, did you see the contract at the time, or during any of the negotiations between you and the defendant for the contract in suit?

Mr. Twining: I object to that as immaterial.

The Court: Objection sustained. *Naumberg* v. *Young* is against any such line of inquiry as that.

Q. Now, Mr. Phleger, do you want to say that in 1914, when this contract in suit was entered into, that there was no market for future delivery of hops? A. I don't clearly understand the question.

Q. What is obscure about it? A. The fact that I did, in effect, make a contract would indicate that I personally had made a contract for futures on that date; but with regard to comparing my

activities along this line with what anybody else might be doing, I cannot say.

Q. But so far as your personal experience went there was a market for futures in 1914, wasn't there?

Mr. Twining: I object, unless the date to which Mr. English is referring is given, that is, what date he is referring to in the year 1914, and also what he means by "futures," that is, whether or not he is referring to hops of the years 1915 to 1918 inclusive, which is the question here.

Mr. English: No; I am referring to hops contracted for for delivery on future dates.

The Court: You may answer the question.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. In March, 1914, yes; in October, 1914; no.

Q. Why do you distinguish between March and October in making your answer? A. Because I found an opportunity to sell hops for future crops in March, 1914, and in October, 1914, when I endeavored to sell the some future growths I couldn't find a market for them.

Q. How many efforts did you make? How many prospective purchasers did you try to sell hops to in October, 1914? A. I did when I saw my way, yes.

Q. You don't know what the California office did? A. No. I ran the New York office. De were constantly circularizing the trade and making personal visits to the brewers, and pushing the sale of future growths of hops, as far as possible. Wherever we thought there was an opportunity or chance to sell we did our best.

Q. You are doing that now, aren't you? A. Yes.

Q. That is your business? A. Yes.

Q. You do that right along? A. Yes.

Q. Sometimes you are lucky enough to make a sale and sometimes you don't? A. That is the way it runs.

Q. You didn't happen to make any sale in October, is that it? A. We tried to; couldn't do it.

Q. I understand you tried. You didn't happen to make any sale for future delivery in October? A. We didn't make any.

Q. That is why you say there wasn't any market for future deliveries in October? A. It wasn't a question of luck; it was a question of hard work. I feel that when I cannot sell any hops there is no market for them.

Q. You think that if you cannot sell hops nobody can? A. Not exactly that.

Q. Isn't that what your answer means? A. No. If there is a market, any fair opportunity to sell future crops, I will sell them.

Q. There is a lot of competition in the sale of hops? A. Some.

Q. The chief consumers are brewers? A. Yes.

Q. All hop growers compete with one another to sell to brewers? A. Not all hop growers.

Q. Which hop growers do not sell to brewers? A. There are very few hop growers who do sell to brewers.

Q. Who do they sell to? A. Dealers.

Q. And the dealers sell to brewers? A. Yes.

Q. Through the dealer to the consumer? A. The brewers are the only one who take hops in quantity. Dealers do not, as a general rule, offer contracts.

Q. If brewers do not buy hops, practically speaking nobody does, is that right? A. Yes.

Q. So, then, it is a fact, isn't it, that hop growers primarily raise the market for hops, either directly or through the dealers? A. Yes.

Q. So that the fact is that hop growers do compete one with another for the sale of hops to brewers, do they? A. Well, indirectly.

Q. Either directly or indirectly, through middlemen? A. Yes.

Q. And the consumption is limited to the extent of the brewing industry, is that right? A. Yes, as a general proposition, because that is the main market for hops.

Q. I understand you to say that in October, 1914, there was a market for what you call spots, is that right? A. I don't recollect having said there was a market.

Q. Well, was there no market for hops at any price in October, 1914? Couldn't you give them away? A. I suppose you could sell some hops, yes, for a price.

Q. What do you call spots? A. Hops of the present crop, after harvest.

Q. Ready for delivery? A. Or delivery within a few weeks.

Q. Practically for then delivery? A. Yes.

Q. Now, there was a market for hops on that basis, wasn't there? A. Without referring to my record I couldn't say what I personally sold, but I am under the impression that there was a market, on that date, for spots.

Q. You think you did sell or make some contracts for spots in October, 1914? A. I couldn't say distinctly as to whether or not I did.

Q. Don't you know that your company was both buying and selling hops all through 1914? A. Yes.

Q. And that included the month of October? A. Yes.

Q. Were all those sales spots or were some of them for future delivery? A. I don't remember. I am under the impression that whatever was sold in 1914 was for spots.

Q. You don't think your company made a single sale for future delivery, except for the contract with this defendant, for future delivery during the entire year of 1914? A. None that I remember.

Q. Do you know what the market price was in October, 1914, for the sale of hops on spot contracts? A. No.

Q. Do you say no because you never heard of it or because you do not now remember? A. I say no because the only way I would feel justified in saying yes would be to refer to the records of my actual sales that I made at that time.

Q. You think that the sales you personally made are the only accurate record for spot hops in October, 1914? A. For spot hops? A very good indication of them. What the brewers bought spot hops for at that time would be a fair indication.

Q. And that record of what hops were sold for at that time appeared in this Brewer's Bulletin, didn't it, the trade journal to which you referred? A. What purported to be the market price was shown in the Brewer's Bulletin.

Q. What purported to be the market price was also shown by the New York Journal of Commerce? A. Yes.

Q. And those records of what purported to be the market price influenced the buying and selling of hops, the prices that time, did it not? A. The record, as shown by these memorandums, didn't influence the buying and selling; the buying and selling influenced these records, to a certain extent.

Q. You think that a buyer or seller getting together on any given date would negotiate any date without any reference whatever to the quotations which had that morning appeared in any of those trade journals as to the previous sales of hops, is that right? A. Yes; I really believe that——

Q. You think that quotations——

Mr. Twining: Wait a minute. He has not finished his answer.

Q. Do you want to say anything more? A. Yes. I really believe they make their contracts for spot hops without any reference to those journals, because I cannot think that every actual spot sale was made at the same price quoted in those journals.

Q. How much is the variation? A. Maybe two cents from the price; maybe above, maybe below.

Q. So that the quotations in the journals were sort of a guide by which they get together in agreeing between themselves as to what the price quoted was, the price at which they could actually make sales.

Mr. Twining: I object. The examination is absolutely unfair. It seems to be a statement.

Mr. English: Does your Honor overrule the question?

The Court: No. It is somewhat misleading.

A. No.

Q. What were the quotations in the journals? A. I believe the quotations in the journals were simply information given to the journal reporters by——

Q. No. I want to know what purpose they serve? A. They serve the purpose of giving information to persons interested in the hops business as to what had transpired in the past, some time back.

Q. In other words, they inform prospective brewery buyers what the latest purchases and prices had been? A. In effect they set up to be what purported to be quotations on the market. I don't believe myself——

Q. We don't want your personal theory on this thing, we want——

The Court: You seem to have answered the question.

Q. So that these quotations appearing in these trade journals do perform this purose, they inform prospective purchasers and buyers the prices at which previous sales had been made? A. Not exactly. It purported to be what a particular dealer or dealers, who had given that information to the paper, thought the market would be.

Q. But those quotations, whatever they purported to be, had their influence on any prospective buyer or seller that tried to get together on a contract, didn't they?

Mr. Twining: I object.

The Court: I think that question has been already answered.

Mr. English: I think it has. I think you are right.

Q. Are the majority of hops sold directly from growers to brewers or are the majority sold direct from the growers to the dealers and by them to the brewers? A. The bulk of the hops are sold direct from the growers to the dealers and thence to brewers.

Q. And the quotations which are given in the trade journals and the Brewer's Bulletin are quotations to brewers, are they not? A. Yes, I understand that they are the prices that are being sold by the last hands for the stuff.

Q. Because the brewer is the ultimate consumer. A. Yes.

Q. How long to your knowledge has the Brewers' Bulletin been published?

Mr. Twining: I object to that as immaterial, how long the Brewers' Bulletin has been published.

The Court: So far as the testimony shows, at this point, it seems to me that these reports which have been referred to in the bulletins, and one other paper, have no evidential character. They are like any other item in a newspaper; different from the quotations on the stock exchange in New York, or in other cities; merely like a report of births, marriages and deaths, or any other item of current intelligence, and unless more of an official character can be given to this class of items in these papers I do not see that they have any further standing in court than that of mere paragraphs, which couldn't prove anything.

Mr. English: It does appear that these papers go the trade and are consulted by the trade and that they influence the trade in the buying and selling of hops.

The Court: I have heard the testimony, but my difficulty is to see that they have any evidential character.

Mr. English: You mean the papers themselves?

The Court: The contents of the papers. You don't prove a fact by showing a newspaper which contains something in the case.

Mr. English: He has already said that one of the ways in which they keep in touch with the market is through this paper. Now I asked him how long the paper has been published.

The Court: It does not seem to me to make any difference how long the paper has been published unless the contents of it can

be shown to have some probative force. I will sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. How long have you been consulting the Brewers' Bulletin for the purpose of ascertaining the quotations to brewers of hops, as set forth in that publication?

Mr. Twining: I make the same objection.

The Court: The same ruling.

Defendant's counsel prays an exception to this ruling of the Court:

Exception noted as ground of appeal.

Q. Have you any knowledge of the classification of hops? A. Well, only sort of superficial.

Q. You were out with the company in California for some months? A. In the San Francisco office.

Q. Did you learn the season of the year when they plant hops while you were out there? A. I believe that hops are perennial; they come up themselves unless the root is destroyed.

Q. If they have to be planted, or new plants set out, when is that planting done, do you know? A. I don't know; I can only guess.

Q. When is the hop harvest? A. The crop harvest begins at different times in the different sections. I should say that the earliest hops were harvested in August, and the harvest goes through the month of September.

Q. It appears in the evidence that these hops were grown on what was called the Wheatland ranch and the Brewers' ranch. Do you know where they are located? A. In a general way.

Q. When do the hop crop harvests come in those ranches? A. I could not say for certain; about September 1st.

By the Court:

Q. What is that which is plucked, the flower, the fruit, or the leaf? A. They call it a berry. It is conical shaped.

By Mr. English:

Q. It appears that you personally negotiated this contract with General Collins? A. Yes.

Q. You have said, also, that you were at the defendant's brewery after the first shipment had been made and saw the shipment also? A. Yes.

Q. How many times were you there after the contract was made?

The Court: You say it is the defendant's brewery?

Mr. English: Yes, sir.

The Court: In Elizabeth?

Mr. English: Yes, sir.

Q. Now, I ask you how many times you were there after the contract was made. You have testified to one occasion. A. To make a guess at it, I should say five times.

Q. Was it the first time or some other time that you saw these hops that you have testified to? A. It wasn't the first time; I think it was about the third.

Q. What was it that took you there on the day that you did see the hops?

Mr. Twining: I object to that as not cross

examination. The only question I asked with reference to the defendant's brewery was whether he had ever seen lot 13 of the crop of 1914 there and he said he had; I asked him when and he said it was during the month of October, 1914.

Mr. English: I am entitled to cross-examine on the circumstances.

Mr. Twining: No.

Mr. English: I think I am.

The Court: You think you are entitled to cross-examine? I think he may answer the question.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Answer the question. A. I went down to see General Collins at the brewery.

Q. For what purpose did you go down to see General Collins?

Mr. Tining: I object.

The Court: I am not sure that you are entitled to that. You are entitled to some statement as to how he came to go there, I think, but the direct examination has not touched upon that matter except as to the physical fact of his going there.

Mr. English: I realize that; but I think that, on cross examination, I am entitled to probe into that a little bit.

The Court: Not very much.

Mr. English: Do you think that this question goes beyond the limit?

The Court: I am not sure about it. I will allow the question.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. For what purpose did you go there? A. I went to talk to the General about hops that were there, and about the delivery, in general, of the 1914 crops.

Q. Had your company already heard from the General with reference to the shipment that was there?

Mr. Twining: I object. The issue now being tried before your Honor is the question of damages. Your Honor has already ruled that the right to samples has been waived; the right to object to the quality has been waived and that the contract has been breached now. This question is one which will be raised later when the question of the depositions has been offered, and also, I understand, by the offering of other testimony. I submit that the defendant should not be permitted to go into any question relating to the right of the plaintiff to treat this contract as breached.

The Court: The defendant has not gone into the question of quality at all. The language and construction put by the Court on the contract operate to waive all rights to rejection or allowance on account of delivery or quality under the 14th paragraph, and under the endorsements on the contract, so that that contract is out of the case. As to this shipment I don't know that your question is designed to open that question.

Mr. English: It is not, sir.

Mr. Twining: I think I am entitled to a

statement of what the purpose of the question is, then.

The Court: I will allow it to be developed in the course of the examination.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. (Question read.)

The Court: Now, let us consider where we are. He says, "I went to talk to the General about hops that were there and about the delivery, in general, of 1914 crops." The contract calls for 100 bales of the crops of the years 1914 to 1918. 100 bales had been delivered; that is, the full delivery had been made for the crop of 1914. Nobody has appeared to waive the right of rejection or allowance upon that delivery with respect to quality unless rejection was made within five days, which was not done. There is more to say about that. What difference does it make what the conversation was with General Collins at that time?

Mr. English: Because, assuming that the defendant had waived his right to object it was still within the power of the seller to waive the waiver. I want to show that that was the fact.

Mr. Twining: There is no such issue in the case or in the pleadings.

Mr. English: Will your Honor permit me to call your Honor's attention to the pleadings, the 19th paragraph of the answer (reads): "In answer to paragraph 22 the defendant admits its refusal to accept said shipment, and alleges that it was justified in

so doing, as said hops were not shipped on an approved sample, and were not of the quality to be furnished as required by the contract set forth in the complaint as 'Schedule A' and that immediately upon definitely ascertaining that said hops were of an inferior quality in writing so notified the plaintiff, and also in said writing notified the plaintiff of its refusal to accept said shipment of hops, and that said hops were being held subject to the advice of plaintiff."

Mr. Twining: That is not the count which is an issue in this case now.

The Court: The Court has treated the matter as accepted.

Mr. English: Then I think counsel ought to elect on which of these paragraphs he stands.

The Court: I think I have practically ruled out any question as to non-acceptance in holding that, under the contract, this shipment was accepted. I do not think that is in the case.

Mr. English: I only read the preliminary. (Continues reading:) "Hereafter plaintiff negotiated with defendant to exchange said hops for hops in compliance with the terms of the contract and finally agreed to ship other hops which would be in compliance with the contract to this defendant, but the plaintiff in fact never shipped—" and so forth. Now, the replication joins issue, and you will see, the answer to the fourth count, No. 15 of the replication. It says in so many words, "Plaintiff denies, it agreed, as alleged in said paragraph 19, to ship other hops to the defendant which would be in compli-

ance with the contract dated March 26, 1914."

Paragraph 15 of the erplication.

Mr. Twining: That 15th reply to the replication is based on a clause in the contract which is not applicable to section 15 of the contract. (Reads:) "If for any reason the buyer shall be dissatisfied with, or object to all or any part of any lot or lots of hops delivered hereunder, the seller may, within thirty days after receipt of written notice thereof, ship or deliver other hops of the contract in quality in place of any objected to." That is section 15 of the contract.

The Court: That merely repeats the allegations in section 1, 2, 3 and 4.

Mr. Twining: No; section 15 of the contract.

Mr. English: If he takes that position, then, he cannot take the position he has taken, that the contract is broken.

Mr. Twining: Your Honor has held that their refusal to pay was unjustified, and it is on that theory, now, that we are proceeding.

The Court: These clauses ought to be read together, if possible. But ought not the buyer to express his dissatisfaction or objection mentioned in paragraph 15 of the contract within the five days mentioned in section 14?

Mr. English: Yes, he must elect, if he is going to stand on this contract, within the five days; but it does not prevent the sel from waiving that requirement, if he wants to, and that is the thing we are talking about now.

The Court: I am trying to see, now, whether there was a waiver.

Mr. English: We have said that after we refused this shipment they began negotiations with us. We refused it after the five days. If they did negotiate with us they showed that they still recognized the binding force of the contract. I say, when the did that they waived election and rejection within five days. The answer says they negotiated with us. They come back to us and say, "We never negotiated with you." That is the ultimate fact; whatever the result of the fact is, it is a conclusion of law.

Mr. Twining: Your Honor has held that under the pleadings the plaintiff is entitled to a judgment, and it is on that theory, now, that we are going ahead on the theory of damages. Now, they say that on some other theory in the pleadings we are not entitled to judgment. It seems to me that that point has been adjudicated against them. Your Honor has said that the only question now open is the question of damages. It seems to me that they are not entitled to come now, on any other theory than the question of damages. The issue on the pleadings is closed and the only question now before your Honor is the question of damages. If these points were in the case they should have been raised before; that point was decided against them.

Mr. English: I understood your Honor's decision was on these pleadings which were material to this question. I am not going back of that at all; but there are other issues of fact that are put in effect by the plead-

ings. While we are practically willing to stand on your decision on the points in the pleadings which are applicable, this is another issue of fact. We do say that the rejection did not take place within the five days, and we say the defendant's mouth is closed to that; but our mouths are not closed to say that they came in and negotiated with us. That is not changed by your Honor's decision on that point of law which is in the case. Both theories assume that we broke our contract. They had a right to overlook that and come in and negotiate with us. We say they did; they say they didn't. What is the fact? The law will take care of itself.

The Court: The allegation of paragraph 19 of the answer is, "In answer to paragraph 22 the defendant admits its refusal to accept said shipment." The replication is a denial that they would be able to ship their hops (reads:) "That on or about October 17, 1914, it received a written notice from the defendant expressing dissatisfaction with plaintiff's previous shipment of hops; that within thirty days after receipt of said written notice it offered to ship or deliver other hops to the defendant of the contracted puality in place of the hops previously shipped and objected to by defendant as aforesaid, but alleges that defendant has hitherto refused and still does refuse to accept delivery." Whatever embarrassment there is about these pleadings arises out of the fact that they present different views as to the facts. I think the answer itself virtually alleges that the parties opened the question as to quality because they negotiated. It does not say they waived the right which the

plaintiff acquired under the 8th or 9th section of the contract; but it does speak of negotiations. That the plaintiff denies, but he says that he did receive a written notice expressing dissatisfaction, and within thirty after that he offered to ship other hops, but that defendant has refused to accept them in exchange. It seems to me there is enough in the pleadings to allow the defendant to present proof on that subject.

Mr. Twining: Then, if your Honor please, I call your Honor's attention to section 15 of the contract and I ask your Honor to bear in mind that the issue made under this section 19 of the answer is upon the question whether or not the goods were accepted, t plaintiff alleging breach on account of the refusal of the defendant to accept, and t defendant defending on the ground that t goods were not up to quality, that is to say. refusal to accept from the plaintiff these goods on that issue, which is not in this case at all, because your Honor has found that they were accepted. We then came along under this section 15 and offered them other hops, which they refused to accept. It is just as if it was any other case where the breach alleged was failure to accept and the justification of the breach and his refusal to accept because the goods were not up to quality; and the replication, whether they were up to quality or not. That came in under section 15, offering to give you some that were up to quality in thirty days. That is the issue; that is, of course, the question which must have been before your Honor when the case was argued. Mr. English had a right to resist my argument on that fieeld.

Not having been raised, it has been adjudicated against him. He picks out section 19, begin an answer to an entirely different point than is at issue in this case; but it cannot be considered in answer to the first and third counts, which are based upon the refusal to pay. Section 14 provides, "The buyer waives all right to rejection or to allowances on any delivery on account of quality unless such claim be delivered to seller by telegraph or in writing within five days after arrival of the hops at place of delivery, adn unless such claim be so made prior to buyer's exercise of any right of ownership of the said hops. Buyer waives all claims for shortage of weight from invoice weight, unless claimed (accompanied by certificate of public weigher's reweights) be delivered to seller within ten days from date of buyer's receipt of notice of arrival of hops at destination." Section 15 says and it is the seller's opinion if he thinks for business reasons or other reasons it is better for him to negotiate, he is protected under this clause, providing that he may enter into negotiations within thirty days. There is nothing to indicate that if he does enter into such negotiations he waives his right to stand on the contract. Furthermore, section 15 says, "If for any reason the buyer shall be dissatisfied with, or object to all or any part of any lot or lots of hops delivered hereunder"—indicating that it was the intention of that section to cover a case where the hops were not accepted. But in this case your Honor has found that the hops were accepted, that they were taken into the brewery, and that the right to object to their

quality has been waived. I do not think section 15 applies to this case at all; I think section 15 applied to a case where delivery is made and refused, and that is the situation covered by the second count in the complaint and answered by section 19 of the answ Section 19 is not applicable at all to the case as it has now been adjudicated.

The Court: Section 19, as you have noticed, and as I erad, begins with an admission that it refuses to accept the shipment. It is a very brief statement that defendant refuses to accept the shipment which, under the views that had been taken by the Court of the contract and under the contract rights, is not in accordance with the correct legal conclusion; the defendant then admitting that the refusal to accept admits something that is really not in the case. Then it goes on to allege that it was justified in so doing because of the poor quality. Nor is the poor quality in the case, the question having been foreclosed by the failure, under the contract, to object within five days. Then it goes on to say under section 19 that the plaintiff was notified of its refusal to accept. Then, on that, is based the allegation of a negotiation between plaintiff and defendant entered into with a view of shipping other hops which would be in compliance with the contract, and that it came to nothing for reasons stated. Then, going on to 15, with the replication, I find a brief statement of the fact that the hops were retained more than five days; that the rights of ownership were exercised, and a denial of the allegations of the plaintiff, after this negotiation. It says that they did receive a written notice ex-

pressing dissatisfaction and offering to ship other hops to the defendant, of the contracted quality, in place of those previously shipped, which said defendant refused to receive. So that came to nothing. It is difficult to get a clear and satisfactory view of this case; but it seems to me that under the statement in the replication, that the plaintiff, after this consignment was delivered, got a notice expressing dissatisfaction, he was not bound, as I view it, before that thirty days. After he got that he did offer to deliver him other hops, and that that offer went down. It seems to me that that furnishes a sufficient basis for the defendant to offer proof as to what was done in the way of this adjustment, after the shipment was delivered and after the five days had expired.

Mr. English: You can justify that conclusion, even better, under the sixth count of the answer and replication, because that does not even bring in the question mentioned in paragraph 26 of the complaint. That count is the sixth count. That count is a count under the contract. It says that they sent a sample and sent the goods, and then the 26th paragraph says the plaintiff received a written notice, and within thirty days after the written notice plaintiff offered to ship or deliver other hops to defendant of the contracted quality in place of the hops shipped to defendant aforesaid and objected to by it.

The Court: That is an admission of something he stated; that is not an allegation. But it occurs in the sentence which begins, so that something was admitted. Now, there it takes a turn. You allege something.

Mr. English: Yes; it is an allegation of fact.

The Court: It alleges that—going along—"after accepetance of the oridinal shipment, that the defendant," and so forth.

Mr. English: Now, will your Honor turn to paragraph 18 of the replication. That answers a question which your Honor just asked me. In other words, they said, "We ready been ready to make this shipment."

Mr. Twining: Do I understand that by this ruling the issues raised by the various counts of the complaint are now opened again? For instance, the question whether or not there was a refusal to accept, and the question whether or not the right to a recovery exists? In other words, your Honor has held, as I understood your finding, that I was entitled to judgment on the pleadings, and the only question that was left open was the question of damages. Now, this question that we are going into has nothing to do with the question of damages. I don't know what the result of the ruling that the issues under the other counts in the pleadings are open would be. Your Honor stated, a moment ago, that by your findings you had virtually stricken out a count of my pleadings. If you have not stricken them out I wish to say I do not stand on any proposition here, now, in this case, except the proposition the plaintiff made, the delivery of 100 bales of hops to the defendant, which was accepted by the defendant, and after the acceptance payment was refused, which constituted a breach, which I have treated as a breach of an entire contract entitling me to recover such damages as I

can prove. Now, these other issues seem to raise the question as to whether or not, by negotiating under section 15 of the contract there was a waiver by operation of law under the contract, by the provisions of section 14. Otherwise, this inquiry is not pertinent. But I cannot see how your Honor could hold that I was entitled to a judgment unless your Honor held, also, that the negotiations under section 15 of the contract did not operate as a waiver; in other words, this other question that they are now seeking to put into this case is a question that your Honor has already decided against them. The depositions that I have read all the way through this case have stated a number of times that the only question here is the question of damages. Now, what negotiations Mr. Phleger may have had with General Collins subsequent to the breach of the contract—and if there are any other questions I ought to know it now, because I will have to start in and read from these depositions sufficient to cover all these other matters. The fact is that letters telegrams passed between these parties, under this section 15, under which the offer was made to deliver other hops upon the statement that the hops in the shipment of October, 1914, were accepted. If there is any other issue now open other than the question of damages I ought to know it, now, before I close my case. I cannot see how it is possible for your Honor to have filed the memorandum which you did without deciding against the defendant; and I say that by negotiating under section 15 of the contract there was a waiver, by operation of law, and under the contract, section 14, this is what

your Honor says. (Reads:) "A motion has been made on behalf of the plaintiff for judgment on the pleadings in favor of the plaintiff, leaving only for examination and decision such sum as may be proved to be due to the plaintiff from the defendant." Nothing could be clearer than that. And then your Honor goes on to state your reasons, and concludes by saying, "In other words, my decision is in favor of the motion." Now, how can it possibly be said that this application to have this witness recount what took place and what negotiations were had under section 15 of the contract has anything to do with the issue as defined by your Honor, leaving open to your Honor for decision only such sums as may be due from the plaintiff to the defendant? If any other issue is now opened I say that I am embarrassed to the extent that I cannot tell how to go on or where I find myself.

The Court: Probably the Court is responsible for the embarrassment in which counsel find themselves. The argument on the motion the other day was an argument which seemed to turn on the question whether the delivery of this first consignment was made under the contract or not under the contract. Mr. English had two lines of entrenchment. His first line of entrenchment was that the delivery was not made under the contract. The conclusion of the Court was that the delivery was made under the contract; that the five day provision applied—it was strenuously insisted that the five day provision did not apply—and that therefore the delivery was under the contract, and that the

five days must be held to be a reasonable time.

The second line of entrenchment was that the defendant had reasonable time; that five days was reasonable time. I do not think I went much further into the case than that. There was no argument whatever, that I recall, as to this question of waiver, as to this matter of subsequent negotiations, so that it comes upon me today as rather a new proposition rather than on an original argument. My question, now, is can the Court shut its eyes to the fact that plaintiff on its replication admits, that it did enter into negotiations, and that there was a proposal for a delivery of other hops in substitution for the hops already delivered, as counsel says that would amount to a waiver.

Mr. Twining: May I suggest that that question is a question of law, namely, a construction of this contract, whether an operation under section 15 of the contract could not, in view of the contract, amount to a waiver of the provisions of section 14.

The Court: Section 14 is the section in which the buyer waives all rights to repection or to allowances unless claim is made within five days. That is a waiver of the right to raise the question of quality and waiver by appeal. Now we come to section 15. It says, "If for any reason the buyer shall de dissatisfied with or object to all or any part of any lots of hops delivered hereunder the seller may, within thirty days after receipt of written notice thereof, ship or deliver other hops of the contracted quality in place of any objected to."

Mr. Twining: In other words, he may do that whether the first shipment was of the contracted quality or was not, for business reasons. I don't see how any waiver can possibly be spelled out of that section. It is admitted that there was no delivery, in these pleadings, within thirty days.

The Court: These ought to be reconciled, if they are reconcilable; that is, the two sections. The 15th section treats of hops delivered which are the subject of dissatisfaction by the buyer, and gives the seller the option of substituting other hops. Must the satisfaction or objection mentioned in the 15th section be subject to a claim made by the buyer on the seller within five days?

Mr. Twining: I think section 15 relates to two situations. The first is the dissatisfaction of the buyer, which possibly may be applied to the satisfaction at any time. Under those circumstances an option is given to the seller, if he wants to, to deliver other hops, which admittedly was not done in this case, even when no five days' notice had been given.

Mr. Twining: The other case was where the buyer objects to the hops, and I think that objection must be an objection given within five days, that is, an objection to quality, by which it gave a right to repudiate the sale. In either case it gave a right to the seller which was not exercised in this case, although there were negotiations, as stated in the pleadings. But how it could amount to any waiver of his right to hold this defendant I cannot see. It is a question, I should think, entirely of construction.

In this case, your Honor, there was an objection given which came within this latter question, but it was given late, consequently, I think—

The Court: It was not within the five days.

Mr. Twining: It was not within the five days, therefore there wasn't anything covered by this section 15.

The Court: I do not know that there is yet anything before the Court as to what that objection was.

Mr. Twining: There is a letter of October 12th, which is annexed to the depositions, and has been read in evidence. The letter of October 12th, marked P8, I might state, says, "Contrary to contract, which calls for 'Approved sample' you have sent in 100 bales of Pacific hops. The sample of these hops were not satisfactory. However, we took them in pending a further investigation, and report from our Scientific Station. This report is at hand this A. M., and it states as follows: 'These hops are of 1914 Pacific crop, are free of mold, but thin in Lupulin and only possesses a fair but grassy arona. The hops canno be classed as fair, and should be used up very rapidly, otherwise they will quickly deteriorate and become worthless! In view of this report we cannot accept this shipment of hops and we hold them subject to your advice.'" That was certainly an attempt to exercise the right of rejection which is spoken of in Article 14; but in view of the defense he didn't have to exercise that within the five day period. That was held against him. Now, the question is whether, after the re-

ceipt of that notice, negotiations were entered into amounting to a waiver of the plaintiff's right to recover in this action.

The Court: If the seller did exercise its option and delivered other hops in place of those objected to would that not operate as a waiver of the right secured by the 14th section?

Mr. Twining: I think, your Honor, that if there had been an unconditional delivery or substitution the intent would have been to waive the breach; but it is not claimed in the pleadings that there was any such thing; it is claimed in the pleadings that negotiations were entered into. Now, this section 15 simply provides that the seller may ship or deliver other hops of the contracted quality. It is not claimed by either party that any hops were shipped or delivered.

The Court: Let us see what is claimed. (After examination of pleadings.) The idea that the plaintiff exercised its option would break down under the pleadings as to this part of the case. In fact, the seller never did ship other hops. According to the defendant, it did not unqualifiedly agree to.

Mr. English: He joins issue on that and says that it did. That is where the issue of fact came in.

The Court: It says that the defendant retained the hops and gave no notice within five days, while it denies that, as alleged in paragraph 19, he shipped other hops. What paragraph 19 says about it is that the plaintiff negotiated with the defendant to exchange said hops for hops in compliance with the terms of the contract and finally

agreed to ship other hops which would be in compliance with the contract to this defendant, but the plaintiff in fact never shipped any other hops. Now, the other allegation is denied.

Mr. Stamler: Excepting, that he admits, if your Honor please—

The Court: No, it denies that it agrees, as in paragraph 19, "to ship other hops to the defendant which would be in compliance with the contract dated March 26, 1914. It says that on or about October 17, 1914, it received a written notice from the defendant expressing dissatisfaction with plaintiff's previous shipment of hops; that within thirty days after receipt of said written notice it offered to ship or deliver other hops to the defendant of the contracted quality in place of the hops previously shipped and objected to," and the defendant refused to receive them. First, it denies the allegation of paragraph 19; that alleges pretty much what paragraph 19 alleges, which is not like the statement in paragraph 19. It does admit that it offered to ship and deliver hops to the defendant of the contracted quality in place of the hops previously shipped, and says that the defendant refused to take them. I question whether these words dissatisfaction and object can be disassociated; whether they do not relate to the same thing, the rejection being related to the objection; but it is not disassociated. But why is not that within the five day provision of the previous section? Even if the seller wishes no to insist on the five days provision and chooses to exercise his option of shipping within thirty days other hops in substitu-

tion the two sections then might be read together. Now the question is whether an offer to ship, especially if coupled with some provision,—as the answer in one place says that it was—would be a waiver of the provisions of section 14. Would an offer to deliver, especially to deliver other hops in substitution, be of itself a waiver of the provisions of section 14?

Mr. Stamler: The pleadings also say not only the offer but the agreement of the defendant to deliver. "Offered and finally agreed to deliver." That is what the pleadings show. I am speaking of section 19 of our answer. It says, "Thereafter plaintiff negotiated with defendant to exchange said hops or hops in compliance with the terms of the contract and finally agreed to ship other hops which would be in compliance with the contract to this defendant."

Mr. Twining: Yes, but if you are going to consider the whole answer as applicable to those particular counts—which I say they are not—you must also consider section 15 (reads): "Defendant denies the allegations of paragraph 18 excepting that plaintiff has asked for money which this defendant contends is not owing to it." Now, I appreciate the fact that that is denied in the answering pleadings, and if you are taking a statement of the situation from the whole answer that seems to be the situation. In one place they say it was agreed and in another place they say it was not, so that I think that all you can possibly spell out of these pleadings is that after the receipt, in the middle of October, of the notice repudiating this contract, negotiations were entered into be-

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tween the plaintiff and defendant to see if plainti ffand defendant could not get together, and these negotiations subsequently fell through. How could that affect the right of the plaintiff to sue for a breach of the contract?

The Court: It seems to show that the negotiations were without result.

Mr. Twining: There was no delivery, and that of itself shows that the parties could not agree, and therefore were relegated to the rights they had before the negotiations were entered into. It certainly has not shown any intent in any way. We simply say to General Collins, "All right, if you don't want to take these hops don't take them; I will pocket the loss." Furthermore, the refusal to pay for the hops was the breach of the contract; the right under the contract became fixed at the time of the breach. Now, the fact that subsequently they have gotten together and tried to patch up the loss on the 1914 shipment, which was the shipment which was in existence at that time, would not have any effect on Mr. Horst's rights as to subsequent shipments. That right was fixed on the refusal of the defendants to receive the goods. How could this question have anything to do with the damages on the subsequent shipment?

The Court: Only in this way, if at all that the right to declare a violation of the unfulfilled portion of the contract hangs upon the failure to complain within five days as to the quality of the first shipment.

Mr. Twining: This letter was written after the expiration of those five days. The right to receive the payment for the 1914

shipment became absolute upon the failure of the defendant to repudiate within five days. There was a breach; there was a right that the plaintiff had to the money; and the refusal on the part of the defendant to pay hat moneq. That breach gave him a right to repudiate the whole contract, which was done. Now, after that day, they are trying to show by this witness, after the date of the repudiation and the breach, when the rights became fixed, that negotiations were entered into between Mr. Collins and Mr. Horst with reference to this 1914 shipment, Mr. Collins saying, "I have got it here and I don't want it," and Mr. Horst saying, "Well, won't you take others in their place," evidently for the purpose of minimizing damages or making some kind of an adjustment with reference to that very shipment. Those negotiations fell through and the hops weren't shipped; those negotiations came to an end. How could that effect the right of action which Mr. Horst had prior to that date and treat the whole contract as fixed. That right, I think, became fixed before these negotiations and if that right was waived it must be expressly pleaded and set up.

The Court: It does not seem as though it could reasonably be understood as a waiver of the whole contract, but I cannot get over the difficulty that the plaintiff admits its offer to send goods in substitution. It seems to me more natural to regard that as an offer which, if carried out would be a waiver.

Just on whom the failure to carry it out falls it is impossible to state, now, from the

pleadings, because they do not agree. If the failure falls on the defendant, then I do not see how the defendant could take advantage of the waiver, because he refused to receive the goods; but if the offer was made by the plaintiff and not carried out because he withdrew it, or for some reason not attributable to the defendant, why, then, I should think it would stand as evidence of a waiver; and therefore I think that the Court ought to take testimony on this subject. It is easy to get tangled up over these pleadings, which are pretty extensive, and perhaps not altogether consistent. But is not the broad commonsense view of the matter that the Court should take testimony to develop what the facts were and then give a construction to them?

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

[Question read as follows: "Had your company already heard from the General with reference to the shipment that was there?"]

The Court: Do you understand the question?

A. Yes, I do. That is, as to the date that I saw the hops in the brewery. I previously to that date learned that our San Francisco office had had advice from the brewery that the hops were not satisfactory.

Mr. Twining: May I have your Honor's view as to what his may waive? Is it a waiver of the whole breach of the year 1914?

The Court: Well, the contract is a unit; the unperformed part hangs upon the treatment of the first shipment. If there was a waiver of the advantages accruing to the plaintiff from the defendant's conduct with respect to the first shipment I don't see why that waiver is not as broad in its effect as the application of section 14 gives, that it would go to the whole contract, because the unfulfilled contract depends upon the treatment of the first shipment. Now, if the plaintiff did something which surrendered its advantageous position with respect to the first shipment, then the right to use the language of the contract, or the right to treat the unfulfilled portion as violated would seem to be given. All this depends upon what the proof is going to be as to the facts which are supposed to be in the waiver; and if the waiver is made out it would be effective. Proceed.

Q. So when you went to see the General, at the time that you saw the goods, you did know that your company had heard from him? A. Yes.

Q. Had you personally heard from the defendant company or any of its officers? A. Well, with reference to the date that I actually saw the hops in the brewery, I had been to see General Collins previous to hat time with regard to the shipment.

Q. Was your first visit to him provoked by the fact that he or his company had notified you, or your company, that they had rejected the shipment?

Mr. Twining: I object to that as not cross examination, under any possible theory. The evidence now is that this alleged conversation was after the breach, namely, af-

ter the date of the rejection, and any rights under the contract were fixed as to that date and could not be changed by the conversations between the sales agent and the representative of the company. But in any view it is not cross-examination. I also object upon the ground that there is no pleading to support testimony of this character, on the issue made by the first three counts of the complaint, which are the counts upon which it has been decided that the plaintiff is entitled to a judgment.

The Court: What is there in the direct examination that makes this cross-examination?

Mr. English: I don't think there is anything that makes it cross-examination, but if your Honor will let us meet it here—

The Court: No, the objection is sustained on the ground that it is not cross-examination. That only makes confusion.

Q. So out of the five visits you made the third one was the one you testified to, in your direct examination, as to when you saw the goods, is that correct? A. I say about the third.

Q. At the time you were there and saw the goods did you the nhave any conversation with General Collins with reference to the reshipment of other goods to take the place of those goods?

Mr. Twining: I object.

The Court: I think maybe I should have said, when I left in testimony with respect to that interview, that I would limit it to the fact that there was such an interview, but that I did not regard the examination in chief as opening the question as to what the

conversations were on that occasion. I think that is my view. I think it is not cross-examination; it is not fairly opened.

Mr. English: Will your Honor permit me to ask this question?

Q. At the time you were at the brewery, on the third visit, and saw the shipment there, did the question of making a new shipment to take the place of those goods come up at all?

Mr. Twining: I object.

The Court: You may say yes or no.

A. Yes.

Mr. English: Now, your Honor will not let me go into that cross examination?

The Court: No.

Mr. Twining: I would like an exception in regard to the admission of that question. I objected to it before it was answered.

Exception noted as ground for appeal.

The Court: Let me say now, in order to define my own position, that the question as to what has been called a waiver, while it is suggested, at least, by the pleadings, although it is not called by that name, it did not attract my attention at the time when, on the 11th of December, I expressed my conclusion on the motion made by the plaintiff's counsel for judgment on the pleadings in favor of the plaintiff, leaving only for examination and decision such sum as may be proved to be due to the plaintiff from the defendant. That phase of the case was not argued, or I probably should have paid more attention to it, although nothing was said about it, because it would have been dis-

closed by a more careful examination of the pleadings. The question has now been considerably discussed, and the attitude of the Court, at this point I think, ought to be this, that the motion granted on the 11th of December should be held open until the plaintiff's case has been fully developed, or until the defendant has had a fair opportunity to present its defense; and the Court ought not, in this condition of the pleadings and proofs, to prejudge the case by adjudging that the only question is the amount of damage due to the plaintiff. To that extent I shall re verse my previous conclusion.

Mr. Twining: Then, if your Honor please, I do not feel justified in going on at this time, in view of this decision, and I would want to put in other portions of the depositions. I do not think that by splitting them up and putting them in piecemeal the way I have, or by putting in piecemeal such other portions as your Honor has in mind, it would be at all satisfactory.

Mr. English: Does your Honor declare a mistrial, then?

The Court: Mr. Twining undoubtedly thought he could save time by making the motion, and it seemed so to me. This phase of the case has crept up, and I cannot ignore it.

Mr. English: It was not in the pleadings; that is my point.

The Court: Let us consider what the best thing will be to do next. I am bound to give Mr. Twining every opportunity that he desires to prove his case.

Mr. English: I have no objection to that. I do not want to have him embarrassed.

Mr. Twining: I hardly know what to say.

The Court: We can let things stand over until you make up your mind as to what you want to do.

Mr. Twining: I was going to suggest that the case be referred to your Honor, as I suppose it will have to be, because this is a Supreme Court action, and your Honor is hearing Circuit Court actions, and I suppose the reference under which the case has been heard only lasted until the expiration of last term.

The Court: Oh, I think it lasts until we get through with it.

Mr. Twining: All right. Then I suggest that your Honor set some time later in the term, a month or two, or perhaps two or three months, later on, at your Honor's convenience, when we can go on.

The Court: I shall do anything in the world that I can to facilitate you.

Mr. Twining: Can it be adjourned indefinitely?

Mr. English: Until a day to be fixed?

The Court: Suppose I give you some week right out of the Circuit, after you get ready to go on.

Mr. Twining: Later on?

The Court: Later on, after you get ready to go on.

Mr. Twining: That is satisfactory to me.

The Court: And I shall hold up the Circuit list for that purpose.

Mr. English: What we want to know is, when we meet again, do we try the case *de novo,* as though there had been no trial, or do we go on from where we leave off?

The Court: I think that ought to depend on Mr. Twining's judgment as to the way in which he can best present his client's case. I shall leave it to him.

Mr. English: Well, we ought to have reasonable notice of that.

Mr. Twining: Yes. Suppose we say it can be brought on—well, your Honor will fix the week, and if the Court can give us ten days' notice, each of us, of the week when it will be tried, will that be satisfactory to you?

Mr. Stamler: If your Honor please, we will have to have testimony taken, in that case, in Philadelphia, and I suppose to take testimony in Chicago and some in California, in order to show that there is a market for this merchandise, the same as there is for grain or anything else.

Mr. English: We shall have to go into the quality now, in view of this situation.

Mr. Stamler: And we shall have to have at least a month's notice in advance that the case will be tried in another way.

Mr. English: I was thinking whether we could take depositions in the pending case? I suppose we can, but it seems to me the most satisfactory thing would be to declare a mistrial and take a fresh start, and then we could see what bears on the issue.

The Court: If Mr. Twining can now decide upon what he prefers, I should be glad to hear it.

Mr. Twining: If I were sure that the only reservation in your Honor's mind upon which your Honor granted the motion the other day is the question whether it is a waiver of a waiver, I should be glad to go

on again with the testimony in the depositions and with Mr. Phleger's testimony, because that question is fully covered, as far as I know; I do not know of any other testimony I can get.

The Court: I have no other reservation in my mind.

Mr. Twining: But the situation in which I am left is that my motion for a judgment on the pleadings has been denied now.

The Court: Yes.

Mr. Twining: And therefore, under ordinary circumstances, of course, I ought to put in my whole case, put in proof of quality and all that, and that is the thing that fills up this book, but if that matter could be settled by some other proof, or something of that kind, to get your Honor's ruling on those questions, and eliminate from the case everything except this question whether there was a waiver of a waiver and the question of damages, then I am ready to go on with the case today.

The Court: That is for counsel to say, whether they can formulate anything.

Mr. English: No, I do not think we ought to be asked to do that; I think Mr. Twining ought to go on or go off, under the Court's ruling.

Mr. Twining: All right. I am ready to go on for the present.

Mr. English: That is qualified.

Mr. Twining: I am ready to go on until we get to a point where your Honor will be called upon to rule on these questions other than waiver of waiver. I know that that

point is coming in the case, and coming before long.

The Court: Then you prefer to proceed?

Mr. Twining: Yes, sir; I prefer to proceed, with this reservation: that I may read such portions of these depositions as I see fit to read, and, of course, subject to Mr. English's objection as to competency or materiality.

The Court: That would be your normal right. You restricted yourself as to certain portions because of my ruling.

Mr. Twining: Yes.

The Court: Now, my ruling I have taken back, and therefore you do not need anybody's consent to read anything that you please.

Mr. Stamler: Then we shall insist that the entire testimony be read as it was given there, and the Court will rule on the questions. In other words, the agreement that Mr. English signed was only based upon the fact that your Honor had ruled out a certain part of the case. Now this agreement falls, and therefore the testimony as taken in California will have to be read in its entirety.

Mr. Twinng: All right, I am ready to go on, then, and read all the testimony in the book.

Mr. Stamler: All right.

The Court: Now the question is what arrangement I can make with respect to my Circuit list.

Mr. English: I suppose this can be postponed. It is all in writing.

The Court: Judges Dungan and Cutler

have divided the Supreme Court list, and I have to try the entire Circuit list, and I ought not to cripple the Circuit list in order to accommodate one Supreme Court case.

Mr. English: Then why don't we adjourn to a day to be fixed, and then when your Honor gets on with your list, we will see how it goes——

The Court: I shall give you any week that you now choose to go on with the case in its present attitude.

Mr. Twining: So far as I am concerned, I should like the second week in January.

Mr. English: I cannot consent to that, Mr. Twining, because I have a case in Chancery with Mr. Faulks, your partner—the Morse case. Some time in February, I should think.

Mr. Twining: Suppose we say the first week in February?

Mr. Stamler: All right.

The Court: Shall we say Monday, the 5th of February? Suppose we say the week beginning Monday, February 5th?

Mr. Twining: If I am going to have to read all these depositions, I suppose we might as well call it a mistrial

Mr. English: I should think so.

Mr. Stamler: That would be the better way, we think; it would be better to call it a mistrial.

The Court: What would we save by having a new trial? Why not go on now?

Mr. Twining: All right, I will go on, and when I get to the points that I have read I can leave them out.

Mr. English: Suppose we put this on the

record: That, in view of the turn the case has taken, the stipulation between counsel, which was put in evidence as Exhibit PA, is withdrawn by mutual consent and abrogated. Is that right, Mr. Twining?

Mr. Twining: Yes.

Mr. English: It is withdrawn from the evidence and is abrogated by mutual consent? Shall we say that?

Mr. Twining: Yes.

The Court: Then this brings us to February 5th.

Mr. Twining: I asked an exception to your Honor's ruling reversing your previous ruling for judgment on the pleadings.

The Court: Yes.

Plaintiff's exception noted as ground of appeal.

The further hearing of the cause is ADJOURNED until Monday, February 5, 1917, at ten o'clock, A. M.

SEVENTH DAY.

Wednesday, April 4, 1917.

Present, counsel as before stated.

[Depositions taken on the part of the Plaintiff are produced by the clerk of the court and handed to the Court.]

Mr. Twining: If your Honor please, I shall start reading the deposition of E. Clemens Horst.

"E. CLEMENS HORST, of the City and County of San Francisco, State of California, called as a witness on behalf of the plaintiff, being first duly sworn according to law, by the Commissioner, testified as follows:

"*Direct examination by Mr. Harrison:*

"Q. What is your name? A. E. Clemens Horst.

"Q. What is your age? A. Fortynine.

"Q. Where do you reside? A. San Francisco.

"Q. What is your occupation? A. Hop grower.

"Q. Are you an officer of the plaintiff in this action, E. Clemens Horst Company? A. I am.

"Q. What office do you hold in the plaintiff company, the E. Clemens Horst Company? A. President and general manager.

"Q. How long have you held that office? A. Since the formation of the company, about thirteen years ago.

"Q. To what extent did you have control over the management of the affairs of the E. Clemens Horst Company during the year 1914? A. I managed the entire business.

"Q. What experience have you had as a grower

of hops? A. I have been growing hops for the last twenty years and upwards.

"Q. Have you grown hops extensively or otherwise? A. I have grown them extensively in many parts of the Pacific Coast.

"Q. What experience have you had as a shipper of hops? A. I have shipped hops very extensively.

"Q. What experience have you had in buying and selling hops? A. I have been engaged in that business for twenty-five years and upwards almost exclusively.

"Q. As the result of your experience and observation, have you become familiar with the costs of production of good brewing Pacific Coast hops? A. Yes.

"Q. Have you become familiar with the cost of production of good brewing Pacific Coast hops during the years 1914 and 1915? A. Yes, sir.

"Q. Are you familiar with the cost of production of good brewing Pacific Coast hops at the present time? A. Yes, sir.

"Q. Are you familiar also with the cost of transportation of good brewing Pacific Coast hops from points on the Pacific Coast to the City of Elizabeth, New Jersey A. Yes, sir.

"Q. Are you familiar with the cost of transportation of such hops from the Pacific Coast to Elizabeth, New Jersey, as that cost existed in 1914 and 1915? A. Yes, sir.

"Q. And also with the cost of transporting such hops from the Pacific Coast to Elizabeth, New Jersey, at the present time? A. Yes, sir."

I move to suppress the next question and answer. That seems to be the practice recognized by this State where a portion of a deposition which has been taken is immaterial.

Mr. English: We object to that.

The Court: What is the motion?

Mr. Twining: The motion is to suppress the next question and answer.

The Court: Who makes the motion?

Mr. Twining: I make the motion.

The Court: I understood this was your witness.

Mr. Twining: Yes, sir; it is.

The Court: You move to suppress part of the testimony?

Mr. Twining: Yes, sir.

The Court: On the ground that it is immaterial?

Mr. Twining: Yes, sir.

The Court: The question is reserved.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"Q. Are you familiar with the reasonable value of good brewing Pacific Coast hops during the past few years and at the present time? A. Yes, sir.

"Q. What was the cost of production of good brewing Pacific Coast hops during the month of October, 1914?"

Mr. English: Now, if your Honor please, we would like to object to that question. Your Honor will see that, in the stipulation entered into by counsel all the objections were reserved, so that I think we have the right to make the objection.

The Court: What is the stipulation?

Mr. English: It is part of the deposition, at the very beginning, your Honor, the very

top of the page, before the witness is sworn (reading):

"Mr. Alling: I would like the ordinary stipulation entered concerning objections.

"Mr. Harrison: That is, that all——

Mr. Allings: All objections reserved save those going to the form of the interrogatories.

"Mr. Harrison: Yes, or the responsiveness of the answer.

"Mr. Alling: Or the responsiveness of the answer.

"Mr. Harrison: Yes, that is satisfactory. It will be stipulated that all objections to the questions propounded in these depositions may be reserved until the trial, except objections to the form of the questions or any of them, or the responsiveness of the answers or any of them."

The ground of my objection is this, your Honor. The general rule, as we all recognize, is that the measure of damages in a contract case is the difference between the market price and the contract price, unless there is no market price. Then a different rule prevails; but before you invoke your different rule you must show that you do not come under the general rule. This question is directed to a theory that there is no market price. Now, they must prove that first. We say that there is a market price, and propose, if there is any dispute about it, to furnish evidence on that subject. But before the plaintiff can go into a different rule, then, he must show that the ordinary rule does not apply, and therefore we say that before the question is answered it must be shown that the ordinary

rule does not apply. There is no foundation for the question.

Mr. Twining: The same objection was made when the same question was read on page 30 of the record, and it was overruled by your Honor.

Mr. English: Well, this is a new trial.

Mr. Twining: No, it is the same trial; it is a continuation of the same trial.

Mr. English: Well, it is a new situation.

Mr. Twining: No, it is the same situation.

I am reading it so that it will all be together, that is all.

Mr. English: With all deference to the Court, I would have to make that objection again. I think we tried it on a little different theory before.

The Court: (After further argument.) I have not looked at this case or thought of it since I had it before me before. I shall overrule the objection and allow the question. I reserve the right to change my mind as the case goes along.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: Might we know, for the sake of saving interruption—the page at which Mr. Twining has now arrived in this deposition goes into the question of the cost of production, on the theory that that is a measure of the damages—may we have it considered that we do object to that line of testimony, without objection, and have the same ruling and exception?

The Court: Yes, let that go on the record. I will take notice of it.

Mr. English: Then I suppose we can re-

serve the right, if we can persuade your Honor later on, to move to strike out all that testimony?

The Court: Yes.

Mr. Twining: That ought to be supplemented with my statement that I propose to follow that up with testimony that there was no market, so that it is every sense a preliminary question, as everybody knows who has read these depositions.

Mr. English: I think that is putting the cart before the horse. Before counsel can produce evidence as to the cost of production he ought to prove that there is no market.

The Court: You wish to be understood as production upon the grounds stated by you? objecting to all questions as to the cost of

Mr. English: Yes, sir. I think your Honor overrules that, and allows me an exception, without interrupting every time?

The Court: Yes.

Defendants pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"Q. What was the cost of production of good brewing Pacific Coast hops during the month of October, 1914? A. 6¼ cents a pound.

"Mr. Alling: Read that, Mr. Stenographer.

"(Question and answer read.)

"*Mr. Harrison:*

"Q. State what the cost of production of good brewing Pacific Coast hops during the time be-

tween September, 1914, and February, 1915? A. The same price.

"Q. What has been the cost of production of good brewing Pacific Coast hops during the period from September, 1915, to the present time? A. The same price.

"Q. What in your opinion will be the cost of production of good brewing Pacific Coast hops during the years 1916, 1917, 1918 and 1919, that is to say, from the present time until February, 1919."

Mr. English: Now, if your Honor pleases, that raises a little different situation. That is calling on the witness to speculate as to the future. That is a thing which is quite apart from the reasons I have already advanced and which your Honor has dealt with, and I think it ought to be objected to. If the costs warranted it, he might give the cost of production of something that he has raised, and so knows what he is talking about, but how a man, in the present condition of the world, with the war going on, and all these other things, can undertake to say what it will cost this summer or the next summer or the following summer, I cannot imagine. That is going into the realm of prophecy, and not any accurate or responsible testimony.

The Court: I suppose that means other things being equal.

Mr. English: I do not know what it means. It calls on the witness to prophesy.

Mr. Twining: Your Honor will find a long argument in the record on an objection to the same question, with a citation of cases. Some of the cases, as I pointed out to your Honor at the last hearing, hold that the

damages will be based on what the cost of production was at the time of the breach, and other cases hold that where the suit is brought before the time of performance has arrived that you have to do the best you can, by the use of expert opinion, to show what the probable cost of production would be. Of course, it is not certain; it is subject to the uncertainty of all expert opinion; but it is the opinion of this witness, and it is admissible as his opinion for whatever it may be worth. This same objection was made before your Honor at the previous hearing and fully argued, and your Honor overruled the objection. As I stated before, I am merely reading this portion of the deposition now so that it will all go in the record together, but I assume that rulings which have been made on the same objections that are made now will obtain.

Mr. English: Of course, I do not want to burden the record with double objections. If the other record is to stand, all right. I haven't it before me, and as these things come up it seems to me proper to object.

The Court: It strikes me in this way: that the objection goes rather to the value and weight than to the competency of the testimony; in other words, to use Mr. Twining's phrase, the testimony is receivable for what it may be worth. At any rate, I shall act on that view of it.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"A. The same price.

"Q. What was the cost of transporting good

brewing Pacific Coast hops from the Pacific Coast to the City of Elizabeth, New Jersey, during the month of October, 1914? A. One cent a pound.

"Q. What was the cost of transporting good brewing Pacific Coast hops from the Pacific Coast to the City of Elizabeth, New Jersey, during the period of time from September, 1914, to February, 1915? A. One cent a pound.

"Q. And state also the cost of production of good brewing Pacific Coast hops from the Pacific Coast to the City of Elizabeth——

"Mr. Alling: Cost of production?

"*Mr. Harrison:*

"Q. Cost of production of good brewing Coast hops from the Pacific Coast to the City of Elizabeth, New Jersey, during the period of time from September, 1915, to the present time? A. One cent a pound.

"Q. What in your opinion will be the cost of transportation of good brewing Pacific Coast hops during the years 1916, 1917, 1918 and 1919, that is to say, from the present time until February, 1919? A. One cent a pound.

"Q. State whether or not in the case of each period of time, about which you have testified, the aggregate cost of delivering good brewing Pacific Coast hops at the City of Elizabeth, New Jersey, consists only of the cost of production, as testified to by you, and the cost of transportation, as testified to by you, or whether there are any other elements entering into such aggregate cost of delivering said hops. A. There are no other costs. The aggregate is 7¼ cents."

Mr. Twining: Now I move to suppress from line 8 to line 25 on page 5, on the

ground that the questions and answers contained in that portion of the deposition are immaterial to the issues now before the Court, and that they constitute separate matter.

Mr. English: We object to that.

Mr. Twining: They are all questions going to the reasonable value of the hops.

The Court: That would be a case parallel to the first motion to suppress, would it not?

Mr. Twining: It raises the same question.

The Court: I shall make the same ruling.

Mr. Twining: I want to protect myself by an exception, but if your Honor is merely reserving the question, I do not object to your Honor reserving it, but I want an exception to an adverse ruling.

The Court: Yes. I am not prepared to rule either way just now. I will give you an opportunity to take an exception if the ruling is against you.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"Q. What was the reasonable value of good brewing Pacific Coast hops at Elizabeth, New Jersey, during the month of October, 1914? A. About 16 cents a pound, 16 or 17 cents a pound.

"Q. What was the reasonable value of good brewing Pacific Coast hops delivered at Elizabeth, New Jersey, during the month of February, 1915, and particularly at the end of February, 1915? A. About 14 cents a pound.

"Q. State in general what was the reasonable value of good brewing Pacific Coast hops from September, 1914, until February, 1915, with any

general variations in the reasonable value with which you are familiar?"

Mr. English: Just a minute, Mr. Twining, please. If your Honor will permit me, I think we ought to make an objection on this ground, that the——

Mr. Twining: There is no objection to the objection, becauseI moved to suppress it. I acquiesce in striking out this question.

Mr. English: What do you acquiesce in?

Mr. Twining: Striking out the whole thing.

Mr. English: No, I have not objected to the whole thing. My point is that the value as of February, 1915, is not material evidence, because that is after the alleged breach. Whatever testimony is relevant, as we conceive it, relates to the time of the breach, which, as alleged in the complaint. is October, 1914.

The Court: This month is what?

Mr. English: This question deals with February, 1915. If counsel is anxious to suppress the question beginning on line 12 and the second question beginning on line 17 there is no objection. That is page 5 of the depositions. Those are the two questions which deal with the value at the end of February 1915.

The Court: What is the other question?

Mr. English: The one just before it, your Honor. The question begins on line 12. There are two questions there, both of which ask values as of February, 1915, which is some months after the breach. The first question begins at line 12 on page 5 and the second question at line 17. If counsel wants

to suppress those two questions, all right. If he does not, we object to the question.

Mr. Twining: I do not think you can suppress fragments. If the whole case is thrown open—I do not know whether it is or not; I assume that it is for the purposes of this argument—the question is plainly material, because, among other things, it tests this witness's credibility as an expert, and, in the second place, it shows a motive for the Breidt Company's refusal to perform this contract, which was that after they made the contract the market dropped, and they knew they could go out in the market and buy these hops for a good deal less than the contract price, as appears throughout this testimony, which, I suppose, would be one argument that we would make as indicating that they did break it because of this fact, among other facts.

Mr. English: There are two answers to be made to that, if your Honor please. In the first place, this witness's capacity as an expert is not impeached. We do not attack him on that ground. And, in the second place, this contract was broken in October, if it was broken at all, and I do not suppose that General Collins or anybody else had a periscope on the future and could tell what the price would be in 1915.

Mr. Twining: The testimony shows that the market dropped from prior to the breach to this time; it started dropping in August.

Mr. English: Well, here is your evidence—sixteen or seventeen cents.

The Court: I think that there is something to be said in favor of the policy of letting the wheat and the tares grow together until the

harvest in this case. It is very difficult for the Court to carry in mind all the aspects of this voluminous controversy and it is not wise for the Court to make absolute rulings at the outset, without having the whole case in mind. Unless it is going to embarrass counsel in the progress of the case, I should prefer, as a general method, to hear objections and reserve them.

Mr. English: I do not see how it can embarrass counsel, because the whole thing is written out right before us and either of us can make a note of what we want to move your Honor to strike out thereafter.

The Court: At any rate, I shall reserve this particular question, and counsel may understand that if, when the question is passed on, it is adverse to either side, that side will have the right to take an exception. That will save time in the presentation of the case now, and also reserve the rights of counsel on both sides.

Mr. English: Then will your Honor allow us an exception to that question?

The Court: Certainly.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"A. The market dropped very materially after September until about December or January and then it advanced.

"Mr. Alling: December, 1914, I suppose?

"Mr. Harrison: December, 1914.

"Q. In October, 1914, was there any market for

contracts for the future delivery of good brewing Pacific Coast hops during the years 1915, 1916, 1917 and 1918? A. No sir.

"Q. Has there been any market from October, 1914, until the present time for such contracts for future delivery? A. There has not.

"Q. State whether or not from October, 1914 until the present time there has been any market for contracts for future delivery of hops? A. Not for future crop hops.

"Q. Now, you have stated these various figures of cost of value with reference to pounds; how many pounds does a bale of hops contain? A. 200, about 200.

"Q. So that the cost or value in each case of a bale of hops would be about 200 times the cost of value a pound? A. Yes, sir.

"Q. The pleadings in this case refer to a contract dated March 26, 1914, between the plaintiff E. Clemens Horst Company and the defendant, Peter Breidt Brewing Company; I show you what purports to be a contract between those parties and ask you if that is the contract referred to (handing paper to witness)? A. Yes, sir.

"Mr. Harrison: I will ask the Commissioner to mark the paper referred to by the——"

The Court: That is the contract of March 26th?

Mr. Twining: That is the contract of March 26, 1914. I offer in evidence and ask that it be marked Exhibit P1. I think the original is attached to the deposition, but I do not know.

Mr. English: I think it was, and it is admitted by the pleadings. There is no question about it at all.

(The paper referred to is marked Ex. P1.)

Mr. Twining: Now, if the other side will consent, I will omit reading from line 20, page 6, to line 12, page 7. There is a colloquy between counsel.

Mr. English: Yes, we have no objection to that.

Mr. Twining: I start again on page 7, line 13 (reading):

"Mr. Harrison:

"Q. State whether or not the signature, 'C. A. Phleger,' attached to this contract is the signature of an employee of the plaintiff, the E. Clemens Horst Company? A. It is.

"Q. What position did Mr. Phleger hold at the date of that contract with the E. Clemens Horst Company? A. He was selling agent.

"Q. State whether or not Mr. Horst, you have in your possession the original of all communications received by the E. Clemens Horst Company from the Peter Breidt Brewing Company from the date of that contract until the present time and also copies of all communications by letter or telegram from the E. Clemens Horst Company to the Peter Breidt Brewing Company during the same time? A. I have."

Mr. Twining: Now, at this point, if your Honor please, some exhibits were offered, which were marked Exhibit P2 and P3, which I move to suppress. Those exhibits raise a question which should now be considered, I think, by the Court, because if the Court takes the view now that I understand you did originally, and takes the view that I take, the result will be that it will only be

necessary to read very little more of these depositions, whereas, under the ruling which your Honor indicates you may make, it will be necessary to take the testimony, and it will be necessary to spend two or three days reading these depositions. The question raised by Exhibits P2 and P3 and by a mass of this other testimony is whether or not the hops that were delivered, and which we claim and as you held under the pleadings were accepted by the buyer, were of the contracted quality. The two letters, P2 and P3, were letters sending samples from the seller to the buyer of these hops, and there appears in these depositions at great length an examination as to what the quality was and what the analysis of these samples showed, and so on. All that, as I contend, is now immaterial, the hops having been accepted under the contract and the Court having held that they were accepted under the contract. Therefore I move to suppress those two exhibits.

Mr. English: Well, this brings us where we were at the close of the last effort at this trial. The situation is not, as Mr. Twining seems to conceive it. Your Honor, after we had a long argument, as you may remember, said this, on page 190 of the record, at the last hearing: "The question has now been considerably discussed, and the attitude of the Court, at this point I think, ought to be this, that the motion granted on the 11th of December should be held open until the plaintiff's case has been fully developed, or until the defendant has had a fair opportunity to present its defense; and the Court ought not, in this con-

dition of the pleadings and proofs, to prejudge the case by adjudging that the only question is the amount of damages due to the plaintiff. To that extent I shall reserve my previous conclusion." Further discussions followed, and your Honor said on page 196 "Now, my ruling I have taken back, and therefore you do not need anybody's consent to read anything that you please." The question there came up as to how much should be read and how much should be left unread, and the situation was that your Honor reversed your previous ruling for the present and left the case as though it had not been made.

Now counsel says that the question as to whether or not the goods were as represented is out of the case. It is not out of the case, first, because your Honor reversed your ruling, and, second, it is a question raised by the pleadings. The thing which your Honor said in this record you could not close your eyes to was a statement in the plaintiff's pleadings——

Mr. Twining: What count?

Mr. English: I will tell you in a moment. These pleadings, your Honor, are a great wilderness. There is a statement in the pleadings which we sa yraises this very question. I am going to read from the pleadings.

Mr. Twining: What count?

Mr. English: Just give me time, and I will answer your question. In the sixth count of the complaint, paragraph 26: "On October 17, 1914, plaintiff received a written notice from the defendant expressing dissatisfaction with said shipment. Within

thirty days after receipt of said written notice plaintiff offered to ship or deliver other hops to defendant of the contracted quality in place of the hops shipped to defendant as aforesaid and objected to by it. Defendant has hitherto refused and still does refuse to accept delivery of such hop so offered to be shipped to it by plaintiff." In other words, the plaintiff recognizes and pleads that there was objection to the character of the hops; that they recognized the propriety of the objection, and offered to send other hops. That is repeated verbatim in the seventh and in the eighth counts. We have got three counts in the complaint repeating that identical language; namely, that they shipped up hops, that we objected, and they offered to ship other hops in their place. Now, why would they offer to ship other hops if these first hops were of proper quality? We go back at them in our answer, and say that we offered to accept other hops, and they annexed impossible conditions, and they deny that. The whole thing comes down to a contest whether the hops that we objected to were according to the contract, the propriety of which objection they recognized by offering to send us other hops, but annexed these conditions. That raises the question whether that was an offer in good faith, that we refused to accept for a reason and they refused to carry out for a reason. That raises, as your Honor said before, the question whether there was a shipment of hops had in accordance with the terms of the contract, of the quality called for. The legal effect of that was, under these plead-

ings, to upset the supposed estoppal that the defendant was under by that five day clause in the contract. In other words, if we waived the right to object in five days, they waived the waiver by recognizing our objection and offering to send us good hops.

I do not want to sit here and hear all the testimony, any more than any one else, but it is impossible to escape reading these depositions. The thing that was before your Honor on the first motion was the first two counts. We had that out before, and it was all discussed here in the record.

The Court: (After further argument.) I am not anxious to take any unnecessary testimony, but I am not prepared to suppress Exhibits P2 and P3 at this time. The motion is therefore held in reserve.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twilling: (Reading):

"Mr. Alling: I have no objection to a collective offer of proofs and all documents.

"Mr. Harrison: Well, I will run through these quickly so they can be separately marked and identified in that way.

"Mr. Alling: All right.

"Mr. Harrison: The witness here produces certain letters and telegrams and copies of letters and telegrams.

"Q. I call your attention to what purports to be a letter from E. Clemens Horst Company to Peter Breidt Brewing Company dated August 29, 1914, and ask you if that is a true copy of a letter sent on that date from the plaintiff in this action to the defendant in this action (handing paper to witness)? A. It is.

"Mr. Harrison: I ask that the Commissioner mark the letter referred to by the witness, as plaintiff's Exhibit 2.

"Whereupon said paper was marked by the Commissioner, Plaintiff's Exhibit 2."

Mr. English: If that was not marked before, it ought to be marked now.

Mr. Twining: I offer it in evidence and ask that it be marked Exhibit P2.

Mr. English: Are you going to mark it?

Mr. Twining: They are all attached to asp that it be marked Exhibit P2.
think.

(Ex. P2—not marked.)

Mr. Twining: (Reading):

"Mr. Harrison: I show you now a letter dated September 4, 1914, purporting to be a copy of a letter from the plaintiff to the defendant and ask you if that is a copy of a letter sent on that date from the plaintiff to the defendant? A. Yes, sir.

Mr. Harrison: I ask that the Commissioner mark that as Plaintiff's Exhibit 3.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit 3."

Mr. Twining: I move to suppress it.

The Court: I have already said as to that that I am not prepared to grant that motion.
this ruling of the Court.

Exception noted as ground of appeal.

The Court: I reserve my ruling as to whether it shall be suppressed.

Mr. English: Pending that, the paper is marked in evidence.

Mr. Twining: No, it will not be marked

in evidence until the Court decides to mark it in evidence.

The Court: They would not be marked in evidence unless the Court concluded to receive them. They can be marked for identification.

Mr. English: I thought your Honor was pursuing the practice to let this in, and counsel may move to strike it out afterwards. These documents are just as much testimony as the questions and answers.

The Court: It is merely a matter of form.

Mr. English: The trouble is that when you leave the things out they are apt to be forgotten.

The Court: As long as no misunderstanding arises out of what we do, one way is as good as another.

Mr. English: Yes, sir; I can see that. I thought the arrangement was that these things should go in, subject to objection of counsel and subject to a motion to strike out afterwards. I am just suggesting this in the interests of consistency.

The Court: Here are two documents which are referred to in the offer as P2 and P3, and the motion is to suppress them. The Court reserved its ruling on that motion. That is the way it stands now. I have no objection to calling them P2 and P3, as long as it is understood that it does not mean that the Court has received them.

Mr. English: Yes, sir; I understand that.

Mr. Twining: (Reading):

"Mr. Harrison: I show you next what purports to be a copy of a letter from plaintiff to defendant, dated September 19, 1914,

and ask you if that is a copy of a letter sent on that date from plaintiff to defendant (handing paper to witness)? A. It is.

"Mr. Harrison: I ask that the Commissioner mark that as Plaintiff's Exhibit No.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit 4."

Mr. Twining: I call for the letter of September 19, 1914 from the other side.

Mr. Stamler: We produce it (producing paper).

Mr. Twining: It is already marked Exhibit P4 A.

Mr. English: You are putting this in, now, are you?

Mr. Twining: Yes.

Mr. English: That was marked at the last hearing.

(The paper referred to was heretofore marked Ex. P4A.)

Mr. Twining: (Reading):

"Mr. Harrison:

"Q. I show you now what purports to be a copy of an invoice from plaintiff to defendant and ask you whether or not that invoice was sent with the letter last mentioned, being the letter of September 19, 1914 (handing paper to witness)? A. It is a copy.

"Mr. Harrison: I ask that the copy referred to be marked as Plaintiff's Exhibit No.——

"Mr. Alling: Did h witness say that invoice was sent with Exhibit 4?

"The Witness: It is a copy of the invoice sent.

"Mr. Alling: With Exhibit 4?

"Mr. Harrison: Yes, and you are marking that invoice 'Exhibit 5', that is the next number.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit No. 5."

I call for the orginal of that letter.

Mr. Stamler: I have it here—marked P5 A.

(The paper referred to was heretofore marked Ex. P5 A.)

Mr. Twining: That is the original?

Mr. Stamler: That is the original.

The Court: That is a paper the original of which was inclosed in 4 A?

Mr. English: Yes, sir; it is a bill for the goods shipped.

Mr. Twining: It is the paper that was inclosed in P4 A.

Mr. English: Yes, sir.

Mr. Twining: (Reading).

Q. State whether or not there was any other enclosure in the letter——

"Mr. Alling: I think I had better examine these as they are offered, just a glance at them.

"Mr. Harrison: Yes.

"Q. ——in the letter, of which Exhibit No. 4 is a copy? A. Yes, that is a copy.

Mr. Harrison: Read the question.

"(Pending question read.)

"A. Yes, there is a memorandum of detailed weights and the original bill of lading.

"Q. State whether or not the paper that I now

show you dated September 6, 1914, was the memorandum of weights sent to the defendant by the plaintiff with the letter of September 19th (handing paper to witness)? A. Yes, sir."

Mr. Twining: I call for the memordandum of weights dated September 6, 1914.

Mr. Stamler: It is marked P6 A (producing paper).

Mr. Twining: I offer it in evidence.

(The paper referred to was heretofore marked Ex. P6 A).

Mr. Twining: (Reading:)

"Mr. Harrison: I ask that the comsioner mark that as Plaintiff's Exhibit No. 6.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit 6.

Mr. Alling: Copy of original?

"Mr. Harrison: Copy.

"Q. I show you now what purports to be the original of a letter dated September 17th from defendant to plaintiff, and ask you if that was received by you through the United States mails (handing paper to witness). A. Yes, sir.

"Mr. Alling: What is the date of that?

"Mr. Harrison: September 17th.

"Q. What date was that received by the plaintiff? A. September 22d."

I call for the letter of September 17, 1914.

Mr. Stamler: We cannot have that, Mr. Twining; you must have that letter.

Mr. Twining: Oh, yes, that is right. Then I offer the orginal letter of September 17,

1914, which is annexed to the depositions and marked by the Commissioner P7, and ask that it be marked in this case Exhibit P7 A.

(The paper referred to is marked Ex. P7 A.)

Mr. Twining: (Reading:)

"Q. What date was that received by the plaintiff? A. September 22d.

"Mr. Harrison: I ask that this be marked Plaintiff's Exhibit No. 7.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit 7.

"Mr. Harrison:

"Q. I show you now a letter dated October 12, 1914, addressed to the plaintiff by the defendant and ask you if that was received by you and when (handing paper to witness)? A. It was received by me on October 17th.

"Mr. Harrison: I ask that that be marked Plaintiff's Exhibit No. 8.

"Whereupon said paper was marked by Commissioner Plaintiff's Exhibit 8."

I offer that in evidence and ask that it be marked P8 A.

(The paper referred to is marked Ex. P8 A.)

Mr. Twining: (Reading:)

"Mr. Harrison:

"Q. I show you now what purports to be a copy of a letter from plaintiff to the defendant dated October 17, 1914, and ask you if that is a copy of

a letter sent to the defendant by the plaintiff on that date (handing paper to witness)? A. Yes, sir.

Mr. Harrison: I ask that that be marked Plaintiff's Exhibit No. 9.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit 9."

(The paper referred to is offered in evidence and marked Ex. P9 A.)

Mr. Twining: (Reading:)

"Mr. Harrison:

"Q. Who signed the original of that letter, Mr. Horst? A. I did.

"Q. I show you now what purports to be a letter from defendant to plaintiff dated October 24, 1914, and ask you whether that was received by you and when (handing paper to witness)? A. Received by me October 28th.

"Mr. Harrison: I ask that that be marked Plaintiff's Exhibit No. 10.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit No. 10."

I offer that in evidence and ask that it be marked P10 A.

(The paper referred to is marked Ex. P10 A).

Mr. Twining: (Reading):

"Mr. Harrison:

"Q. I show you now what purports to be a letter from plaintiff to the defendant dated October 29, 1914, and ask you if that is a copy of a letter sent by plaintiff to defendant on that date (handing paper to witness)? A. Yes, sir.

"Mr. Harrison: I ask that this be marked, that this letter of October 29th, Plaintiff's Exhibit No. 11.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit 11."

I call for that.

(Defendant's counsel produce paper).

Mr. Twining: That is the letter of October 29, 1914. I offer it in evidence an ask that it be marked P11 A).

Mr. Twining: (Reading):

"Mr. Harrison:

"I show you now what purports to be a telegram from defendant to plaintiff November 9th, 1914, and ask you if that was received by the plaintiff from the defendant (handing paper to witness)? A. It was received.

"Mr. Harrison: I ask that that me marked Plaintiff's Exhibit No. 12.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit 12."

That is attached to the depositions. I should like to have that marked P12 A. It is a telegram dated November 9, 1914.

(The paper referred to is marked Ex. P12 A.)

Mr. Twining: (Reading):

"Mr. Harrison:

"Q. I call your attention to what purports to be a copy of a telegram from plaintiff to defendant dated November 9, 1914, and ask you if that was sent to the defendant by the plaintiff on its date (handing paper to witness)? A. It was.

"Mr. Harrison: I ask that that be marked Plaintiff's Exhibit No. 13.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit No. 13."

Will you produce that?

Mr. Stamler: I do not believe we have that, but we consent that the copy be used. It is attached to the depositions.

Mr. Twining: It is consented that the copy attached to the deposition be used and marked P13 A.

(The paper referred to is marked Ex. P13 A.)

Mr. Twining: (Reading):

"Mr. Harrison:

"Q. I show you now what purports to be a telegram from defendant to plaintiff dated November 27, 1914, and ask you if that was received by you from defendant (handing paper to witness)? A. It was.

"Mr. Harrison: I ask that that be marked Plaintiff's Exhibit 14.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit 14."

Mr. Twining: I offer it in evidence and ask that it be marked P14 A.

(The paper referred to is marked Ex. P14 A.)

Mr. Twining: (Reading):

"Mr. Harrison:

"Q. I show you now what purports to be a copy of a night lettergram from plaintiff to defendant dated November 27, 1914, and ask you if that is a copy of a night lettergram sent by plaintiff to de-

fendant on that date (handing paper to witness)? A. Yes, sir.

"Mr. Harrison: I ask that that be marked Plaintiff's Exhibit No. 15.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit No. 15."

I call for that telegram an ask that it be marked P15 A.

(Defendant's counsel produce a paper.)

(The paper referred to is marked Ex. P15 A.)

Mr. Twining: (Reading):

"Mr. Harrison:

"I show you what purports to be a copy of a letter marked 'Registered' dated November 27, 1914, from plaintiff to defendant, and ask you if that is a copy of a letter sent by plaintiff to defendant on that date (handing paper to witness)? A. It is.

"Q. By whom was the original of that letter signed? A. By me.

"Mr. Harrison: I ask that that be marked as Plaintiff's Exhibit No. 16.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit No. 16."

Mr. Twining: I call for the original.

(Defendant's counsel produce a paper.)

Mr. Twining: It is produced, and I offer it in evidence as P16 A.

(The paper referred to is marked Ex. P16 A.)

Mr. Twining: (Reading):

"*Mr. Harrison:*

"Q. I show you what purports to be a receipt for registered mail from the United States postoffice, and ask you whether that is a receipt from the United States postoffice for the letter of which the last exhibit is a copy (handing paper to witness)? A. It is."

Mr. English: What is the use of that? We produce the original.

Mr. Twining: All right. With the consent of the other side, I omit from page 13, line 22, to page 14, line 13, and also omit the exhibits marked by the Commissioner as No. 17 and No. 18.

Mr. English: Yes, that is all right.

The Court: You do not offer the receipt and the card?

Mr. Twining: No, sir.

The Court: That would make a gap in your numerical series.

Mr. Twining: I shall read it, then.

(Reading):

"*Mr. Harrison:*

"Q. I show you what purports to be a receipt for registered mail from the United States postoffice, and ask you whether that is a receipt from the United States postoffice for the letter of which the last exhibit is a copy (handing paper to witness)? A. It is.

"Mr. Harrison: I ask that that receipt be marked Plaintiff's Exhibit No. 17.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit No. 17."

I offer it in evidence and ask that it be marked P17 A.

(The paper referred to is marked Ex. P17 A.)

Mr. Twining: (Reading):

"Mr. Harrison:

"Q. I show you what purports to be a receipt signed by the defendant on the form of the United States Postoffice for a registered letter, the receipt being dated December 3, 1914, and ask you whether or not that is a receipt for the letter of which plaintiff's Exhibit No. 16 is a copy (handing paper to witness)? A. Yes, sir.

"Mr. Harrison: I ask that that be marked Plaintiff's Exhibit No. 18.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit No. 18."

Mr. Twining: I offer it in evidence and ask that it be marked P18 A.

(The paper referred to is marked Ex. P18 A.)

Mr. Twining: (Reading):

"Mr. Harrison:

"Q. I show you what purports to be a telegram from the defendant to the plaintiff dated November 28, 1914, and ask you whether that was received by you (handing paper to witness)? A. Yes, sir.

"Mr. Harrison: I ask that that be marked Plaintiff's Exhibit 19.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit No. 19."

I offer that in evidence and ask that it be marked Exhibit P19 A.

(The paper referred to is marked Ex. P19 A.)

Mr. Twining: (Reading):

"Mr. Harrison:

"Q. I show you what purports to be a copy of a telegram from plaintiff to defendant dated November 29, 1914, and ask you whether that is a copy of a telegram sent on that date (handing paper to witness)? A. Yes, sir.

"Q. By whom was that telegram written? A. It was written by me.

"Mr. Harrison: I ask that that be marked Plaintiff's Exihibit No. 20.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit No. 20."

I call for that.

(Defendant's counsel produce a paper.)

Mr. Twining: The other side produces the telegram, and I ask that it be marked P20 A.

(The paper referred to is marked Ex. P20 A.)

Mr. Twining: (Reading):

"Mr. Harrison:

"Q. I show you what purports to be a letter from John J. Stamler to the plaintiff in this action dated January 2, 1915, and ask you whether that is a copy of a letter received from Mr. Stamler (handing paper to witness)? A. Yes, sir.

"Q. When was it received by you? A. January 6, 1915.

"Mr. Harrison: I ask that that be marked Plaintiff's Exhibit No. 21.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit 21."

I offer it in evidence and ask that it be marked P21 A.

(The paper referred to is marked Ex. P21 A.)

Mr. Twining: (Reading):

"Mr. Harrison:

"Q. I show you what purports to be a copy of a letter from plaintiff to defendant dated June 18, 1915, and ask you if that is a copy of a letter sent by plaintiff to defendant on that date (handing paper to witness)? A. Yes, sir.

"Mr. Harrison: I ask that that be marked Plaintiff's Exhibit No. 22."

Mr. Stamler: We object to that. It has no possible connection with the case.

Mr. Twining: Is that the one about the rice?

Mr. Stamler: Yes.

Mr. Twining: I may state that it will be agreed that it appears in the depositions that the reason why this letter was offered in the West was because counsel called upon Mr. Horst to produce all communications between his company and the Peter Breidt City Brewery Company, which he did. This communication was a communication from the Horst Company to the brewing company. It has no relevancy in this suit, but being part of the correspondence, it was produced and offered in evidence. With that statement appearing on the record, I have no reason for wanting to offer it in evidence.

The Court: You do not desire to offer it?
Mr. Twining: No, sir.
Mr. English: It goes out by consent.
Mr. Twining: (Reading):

"Mr. Harrison:

"Q. I show you what purports to be a letter from plaintiff to defendant dated April 1, 1914, and ask you if that was sent by plaintiff to defendant on that date? (Handing paper to witness). A. Yes, sir.

"Mr. Harrison: I ask that that be marked Plaintiff's Exhibit No. 23.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit No. 23."

Mr. Stamler: It was so marked on the last trial—P23 A.

Mr. Twining: The letter is offered in evidence. It has been marked P23 A.

(Ex. P23 A.)

Mr. Twining: (Reading):

"Mr. Harrison:

"Q. I show you now what purports to be a copy of a letter signed on behalf of the plaintiff by C. A. Phleger and dated March 26, 1914, with a registry receipt attached, and I ask you how that came to be in your possession (handing paper to witness)? A. The letter was sent by my direction to the defendant and instructions were given to send the copy of the letter to me.

"Mr. Alling: Was this sent from New York (indicating)?

Mr. Harrison: Yes, that is the receipt.

"Mr. Alling: Yes.

"Mr. Harrison: And I ask that that be marked as Plaintiff's Exhibit No. 24 with the registry card attached, letter and registry receipt, that is, a copy of a letter with a registry return card attached.

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit No. 24."

I offer it in evidence and ask that it be marked.

Mr. Stamler: We have not got the letter; you can put in the copy.

Mr. Twining: I offer in evidence the copy of the letter and the registry receipt attached to the deposition and marked by the Commissioner No. 24, and ask that it be marked P24 A.

(The papers referred to are marked Ex. P24 A.)

Mr. Twining: (Reading):

"*Mr. Harrison:*

"Q. State whether or not the various communications you have testified to, constitute all the communications which have passed between the plaintiff and defendant from the time the contract referred to was signed until the present time. A. Yes, sir.

"Q. Do you know Emil A. Zipfel?

A. Emil Zipfel, yes, sir.

"Mr. Alling: How is that name spelled?

A. Z-i-p-f-e-l.

"*Mr. Harrison:*

"Q. Is he an employee of the plaintiff, E. Clemens Horst Company? A. Yes, sir."

I move to suppress the testimony appearing from page 17, line 2, to the end of Mr. Horst's direct examination, page 19, line 16, upon the ground that this testimony relates to a separate subject which is immaterial to the issues presented in this case. The objection may perhaps be accompanied by the statement that this testimony relates to the quality of the hops which were shipped by the plaintiff to the defendant and all of what was done with reference to the sending of samples. My insistment is that the issue which is being tried in this court is upon a count under which, as admitted by the answer, the question of whether or not samples were sent is immaterial, as is also the question of what the quality of the shipment was. Without prolonging the discussion, I want to state that the fact that the complaint in counts other than the early counts contains allegations with reference to what was done after the shipment reached Elizabeth and was accepted—admittedly accepted—by the defendant has no bearing on the issues which are now being tried before your Honor, any more than would be the case if a man sued another under one count of his declaration on a promissory note, and under another count sued on a book account, and under another count of his declaration sued on a *quantum meruit*, and under another count sued on an express contract, and under another count sued on some other theory which was entirely inconsistent with the theory stated in the previous counts in declaration. The fact that allegations of fact under one count would amount to admissions which would defeat your right to

recover under another count cannot be made use of at the trial, if at the time of the trial it appears that you are entitled to recover on any single count, whether that appears by reason of proofs which you put in or whether it appears by reason of admissions in the answer, which is the case here.

Mr. English: We object to the motion on the same grounds that I have already stated, and, further, I want to say this to your Honor: that these questions which now follow are the subject of a very elaborate cross examination, and the deposition would be garbled beyond recognition if you left it out. I suppose the ruling will be the same as before.

The Court: I shall reserve my ruling on this point.

Mr. Twining: May I have an exception?

The Court: Certainly.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"Q. Did Mr. Zipfel show you this morning what purported to be any samples representing hops that had been sent or samples that had been sent to the Peter Breidt Brewing Company? A. Yes, sir.

"Q. State how many samples showed you and what he stated them to be. (Pending question read.) A. He showed me eight samples; three of the samples were duplicates of samples No. 1, 2 and 3 that were sent to the defendant according to letters which I have testified to this morning, and 5 samples represented the shipment of 100 bales of hops of lot 13 covered by the invoice to which I testified this morning.

"Q. During your experience with hops, have you become familiar with the various grades and quality of hops? A. I have.

"Q. Have you become familar particulalry with the grade known as good brewing Pacific Coast hops? A. Yes, sir.

"Q. Is that the highest grade of hops that there is? A. No, sir.

"Q. What other better grades are there? A. There are choice and fancy.

"Q. State whether or not the samples you have mentioned as having been pointed out to you by Mr. Zipfel this morning were or were not good brewing Pacific Coast hops in quality?

"Mr. Alling. Objected to as leading.

"Mr. Harrison. Well, I withdraw the question.

"Q. State what in your opinion is the quality of the samples shown to you by Mr. Zipfel, about which you have testified?"

Mr. Stamler: We do not press that objection.

Mr. Twining: (Reading:)

"Mr. Harrison. Answer the question.

A. The hops were equal or better than good brewing Pacific Coast hops for the crop for the year 1914.

"Mr. Harrison:

"Q. State what is the quality of the samples pointed out to you by Mr. Zipfel as being duplicated of samples, one, two and three, sent to the defendant in this action? A. They are equal to

or better than good brewing Pacific Coast hops for the crop of the year 1914.

"Q. State what is the quality of the samples pointed out to you by Mr. Zipfel as being samples of lot 13 mentioned in the invoice referred to? A. They are the same quality as I have just testified to.

"Q. State whether or not the samples just testified to by you were or were not thin in lupulin? A. They were not thin in lupulin."

Mr. Stamler: We do not press our objection.

Mr. Twining: If you do not press your objections, I shall go right ahead and read it.

Mr. Stamler: No, we do not.

Mr. Twining: (Reading:)

"Mr. Harrison:

"Q. State what was the quality of the samples to which you have testified, with regard to their being or not being thin in lupulin. A. The hops were good in lupulin and were not thin.

"Mr. Harrison:

"Q. State to what extent it is possible at the present time to determine the aroma of the samples of the crop of 1914. A. You can tell whether the aroma is sound or unsound or good or bad.

"Q. Can you tell that as well as you could if the samples were fresh? A. No, sir. You can tell in a general way, but you can't tell the aroma of a hop when it is old as well as you can when it is new.

"Q. What is your opinion as to the quality of

the samples to which you have testified, with regard to their aroma? A. I know the aroma of the hops was good.

"Mr. Harrison: That is all."

I wish to call counsel's attentoon to the stipulation that appears from the bottom of page 54 to page 56 of the previous record, and ask them whether they are willing to stipulate that now? The stipulation begins at the bottom of page 54: "As I understand it, the original bill of lading of the hops," and so forth, through to page 56: "Mr. Twining: Yes, sir."

Mr. English: Why do you want us to stipulate that now? What is the reason for it?

Mr. Twining: Well, I just want to get it in at this point, that is all. This is the place where it belongs, if it is going in.

Mr. English: I am afraid of the Greeks bearing gifts. I think we had better read the cross examination.

Mr. Twining: Then I call attention at this time to the following pages of the record: Page 54, beginning at the last line of the page with the words, "As I understand it," to page 56, line 10, ending with the words, "Yes, sir."

Mr. English. Why does counsel call attention to this on the record?

Mr. Stamler: It is part of his case.

Mr. English: Why do you call attention to it?

Mr. Twining: Well, I want to call attention tion to it at this time; I suppose it is because I want to call attention to it.

Mr. English: Also on page 98 of the case——

Mr. Twining: That is another stipulation.

Mr. English: Yes. This is what happened on page 198 with reference to another stipulation:

"Mr. English: Suppose we put this on the record: That, in view of the turn the case has taken, the stipulation between counsel, which was put in evidence as Exhibit PA, is withdrawn by mutual consent and abrogated. Is that right, Mr. Twining? Mr. Twining: Yes." That is the impression that I went away with the last time—that we were through with all stipulations.

Mr. Twining. The first stipulation gave me the right to read what portions of the depositions I saw fit and gave Mr. English the right to read what portions he saw fit, and there would be no objection to the portions that were read. Now, as the case took a different turn, and it appeared that we could not save time that way, that stipulation was abrogated by mutual consent. But this stipulation has to do with an entirely different matter, and was made, as I recall it, for the purpose of saving quite lengthy proof as to what the course of conduct was with reference to changing the original bill of lading from a consignment to Chicago to a consignment to the defendant here at Elizabeth.

Mr. Stamler: If your Honor please, we have a reason for not consenting to this: Because we have since learned facts which are not embodied in the stipulation. In other words, we will offer proof entirely different to what we supposed the stipu-

lation at that time contained. This shipment in question was first sent to Chicago, and we want to show why it went to Chicago and to whom, and what happened to it in Chicago. We did not have that information last time. Therefore we object to the stipulation at this time, and we shall submit our proof.

Mr. English: I am not in the habit of repudiating stipulations, and I wish Mr. Twining would not ask me to admit it.

Mr. Twining: I do not ask you to admit it. I want at this time to have a reference to it, so that it will not be overlooked. It is in the record, whether I call attention to it or not.

Mr. English: If it is here, it is here, and whatever we agree to do we will do; but the impression that I had was that, in view of the turn that the case took, all these attempted shortcuts were waived. Whatever I agreed to I will stand by, but I thought we had withdrawn all these shortcut stipulations.

Mr. English: Now, your Honor, it comes to the cross examination reading):

"Cross examination by Mr. Alling:

"Q. You say you know the aroma of the hops was good; what hops are you speaking of, the samples which you examined this morning or the samples which were sent to the defendant in 1914, or the hops which were shipped to the defendant in 1914?"

Mr. Twining: That is objected to, if your Honor please. I shall make the objection

once for all. It is perhaps a little different than moving to suppress a portion of the deposition that was taken on behalf of the plaintiff; but this is objected to on the ground that it is immaterial, and your Honor will note that, as your Honor's attention has already been called to the fact that objections of all kinds, except on account of the form of the question, were reserved until the time of the trial, this testimony and the succeeding testimony through line 10, page 20, relates to the quality of the hops, and it is my insistment that that question is immaterial.

The Court: In what previous question was the word "aroma" used?

Mr. English: In some testimony that Mr. Twining read on the direct examination: "*Question:* State to what extent it is possible at the present time to determine the aroma of the samples of the crop of 1914. *Answer:* You can tell whether the aroma is sound or unsound or good or bad. *Question:* Can you tell that as well as you could if the samples were fresh? *Answer:* No, sir. You can tell in a general way, but you can't tell the aroma of a hop when it is old as well as you can when it is new. *Question:* What is your opinion as to the quality of the samples to which you have testified, with regard to their aroma? *Answer:* I know the aroma of the hops was good." This is cross-examination on that, you see.

The Court: Now read the question.

Mr. English: The question objected to

is: "You say you know the aroma of the hops was good; what hops are you speaking of, the samples which you examined this morning or the samples which were sent to the defendant in 1914 or the hops which were shipped to the defendant in 1914?"

The Court: It sems to be an inquiry as to the meaning of the witness in giving some previous testimony. I think that that ought to be competent.

Mr. Twining: But the previous testimony, your Honor—a motion was made to suppress the previous testimony.

The Court: I shall allow this.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English. (Reading:)

"A. I know the aroma was good in each of the classifications which you have named.

"Q. Then you are conversant with the quality of that particular shipment of 10 bales made to the defendant in 1914? A. I am what?

"Mr. Alling: Read the question.

(Pending question read.)

A. Yes, sir."

Well, then we asked to have the witnesses put out, and all the witneses were excluded.

(Reading:)

"Mr. Alling:

"Q. When was the shipment of 100 bales made to the defendant in 1914? A. The date is shown on the invoice.

"Q. Plaintiff's Exhibit 5 (handing paper to witness) which purports to be a copy of the invoice is dated September 12th; do I understnad you to say that shipment was made on that date? A. That is, that would be the date that the shipment left the coast. That would not necessarily be the date upon which the shipment was ordered to the defendant.

"Q. What do you mean by ordered to the defendant? A. Well, the shipment might be diverted in transit. It might be a shipment on the way to England or some other destination and then diverted in transit to the consignee; then the diversion date would be subsequent to that date of the shipment.

"Q. September 12th was the date of billing? A. September 12th would be the date that the hops left the Pacific Coast.

"Q. What do you mean by the date of shipment; do you mean the date of the delivery to the transportation company? A. Yes, the date of delivery to the transportation company.

"Q. Then the date of the bill of lading would be the date of shipment? A. Approximately, yes.

"Q. Where were these 100 bales delivered to the railroad company? A. Where?

"Q. Yes. A. They were delivered at Wheatland.

"Q. Were you present at Wheatland at the time of their delivery? A. I was not, as far as I know at this time.

"Q. By whom were they delivered to the Southern Pacific Company? A. By our ranch at Wheatland.

"Q. Then these particular hops were not diverted in transit, but were delivered originally to the railroad from your ranch for shipment to the defendant? A. No, they were originally consigned to Chicago and then diverted.

"Q. When were they originally consigned to Chicago? A. They were originally consigned to Chicago on September 12th and then diverted on September 16th or 17th.

"Q. To whom were they consigned at Chicago? A. When we ship the hops we just start them on the way east and we use Chicago as a preliminary point of destination so that by the time the documents and the samples reach us in San Francisco we then after examination of the samples, order them to particular consignees."

The Court: The exhibit was referred to as P5?

Mr. English: P5; yes, sir.

The Court: And the date, September 12th?

Mr. English: That is the invoice, which is the bill.

The Court: I was trying to find the date in connection with P5.

Mr. English: I guess the date was not given. This is September 12, 1914. That is the date of the bill, or invoice, as they call it.

The Court: I do not find that date.

Mr. English: That is the day the paper was dated, although it was not sent to the defendant on that day.

The Court: September 6th there was a memorandum of weights.

Mr. Stamler: Yes.

The Court: P7 A was the letter dated September 17th.

Mr. Stamler: That is right.

The Court: P4 A was the letter dated September 19th.

Mr. English: P4 A was the letter with

which this P5, the bill, and P6, list of weights were inclosed. They were started on their way all on September 19th.

The Court: I have not got September 12th.

Mr. Stamler: No.

Mr. English: That is the date on the bill; the bill was dated September 12th. It was sent off in a letter dated September 19th, which is Exhibit P4.

The Court: What is the mark of that bill?

Mr. English: P5.

The Court: The date of that is not given on my notes.

Mr. English: The paper itself is dated September 12th.

(Reading:)

"Mr. Alling. Read the question.

(Pending question read.)

A. They were consigned to ourselves at Chicago.

"Q. Was this 100 bales of hops an independent consignment or a part of a larger consignment to Chicago, to yourselves as consignees? A. I don't know what you mean by independent, but we ship the hops out in lots of approximately 100 bales in a car and this was one of many cars.

"Q. A hundred bales is approximately a car load? A. It is approximately a car load, yes, sir.

"Q. You have stated that you are an extensive hop grower? A. Yes, sir.

"Q. Where do you grow? A. I grow hops at Chilliwack, British Columbia; at Aggasiz, British Columbia; Salem, Oregon; at Independence, Oregon; at Los Molinos, California.

"Q. What county is that in? A. In Tehama

county, at Yuba county near Wheatland and in Placer county near Wheatland; at a place called Hopfen on the American River in Sacramento; at Perkins in Sacramento county and two different localities on the Cosumnes River.

"Q. How do you spell that? A. C-o-s-u-m-n-e-s; and at Ukiah on the Russian River, California.

"Q. Now Hopfen, the American River, what county? A. Sacramento County.

"Q. Cosumnes River? A. Sacramento county.

"Q. Ukiah, Mendocino? A. Mendocino county.

"Q. Where were these hops raised? A. They were raised at Wheatland.

"Mr. Harrison. By 'the hops' you mean the hops shipped?

"Mr. Alling: Yes.

"Q. In Yuba county or Placer county? A. We consolidated the two ranches there at Yuba and Placer county they are adjoining. The ranch is one ranch running into the two counties.

"Q. Do you know the standard recognized grade of hops—withdraw that question. There is a recognized difference in the general quality of hops raised in different localities in the State of California?"

Mr. Twining: That is objected to if your Honor please from page 23 line 10 to page 31 line 30. I should like, if I can, to have a separate objection to each of those questions, the ground of all the objections being the same; namely, that it is evidence with reference to the quality of the hops, which. I contend, is immaterial, because the hops were accepted, and it has been so held.

The Court: State your objection again.

Mr. Twining: The ground of my objec-

tion is that the testimony relates to the grade, or quality. of the hops, both the shipment and the samples, and that that question is not in this case, it appearing from the defendant's answer that the shipment itself was accepted, and therefore objections to quality were waived under the contract.

Mr. English: That is the same question that we had before.

The Court: I shall reserve my ruling on your objection, and give you an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English. (Reading:)

"Q. Do you know the standard recognized grade of hops—withdraw that question. There is a recognized difference in the general quality of hops raised in different localities in the State of California? A. There is a recognized what?

"Q. Difference in the general quality of hops raised in different localities in the State of California? A. No. there is not a recognized difference; different kind of hops are grown in different sections and the same kind of hops are grown in different sections.

"Q. Is it not a fact that Sacramento Valley hops rank lowest in grade in the market, of any California hops? A. There are some of them rank lower and some do not.

"Q. Is it not true that as a rule Sacramento hops are in the market recognized as a lower grade than Sonoma county hops? A. They are by some people and they are not by others.

"Q. That is not responsive to my question. I asked you is it not a fact that as a rule Sonoma county hops are recognized in the market as a bet-

ter hop than Sacramento Valley hop? A. They are not recognized, as a rule.

"Q. Is it not a fact that Russian River hops are as a rule regarded in the market as superior to Sacramento Valley hops? A. Not as a rule, no.

"Q. Is it not true that there is a distinction recognized in the market as between Sonoma county hops and Sacramento hops? A. Say that again.

(Pending question read.)

"A. We refer to hops as Sacramento hops and we refer to them as Sonoma hops——

"Q. Is it not—— A. I will answer the question as nearly as I can, so that the answer will give my views fully and fairly.

"Q. Does not that——

"Mr. Harrison: Has the witness finished his answer?

"A. Well. I don't know.

"Mr. Harrison: Proceed and finish your answer.

"A. There are some hops grown in Sonoma and Mendocino county that are better than some hops grown in Sacramento county or Sacramento Valley and there are some hops grown in Sacramento Valley that are better than some hops grown in Mendocino and Sonoma.

"Mr. Alling:

"Q. Are not Sonoma county hops generally recognized in the market as supeiror to Sacramento Valley hops? A. They are by some people and they art not by others.

"Mr. Alling: Read the question.

(Pending question read.)

"Mr. Alling: If he can't answer, all right; if he can answer, all right.

"A. On an average they are so recognized by many people."

That is, that Sonoma hops are better than others. that they are so recognized by many people.

(Reading:)

"Q. Are not Russian River hops generally recognized in the market as superior to Sacramento Valley hops? A. The same answer as to the previous question.

"Q. What part of your time did you spend on the Wheatland ranch during the hop season of 1914? A. I was on the ranch a number of times.

"Q. Were you there during the picking? A. Yes. sir.

"Q. For how long? A. I went there several times during the picking season. I don't know how long I was there, but I was there several times.

"Q. You were not there on the 12th day of September, 1914. were you?

"Mr. Harrison:. If you remember.

"A. I don't remember whether I was there on that date or not.

"*Mr. Alling:*

"Q. Did you see the 100 bales of hops which were shipped to the defendant? A. I saw the crop generally. I didn't see the particular 100 bales. ,

"Q. You have testified that you know—— A. But I saw samples of them.

"Q. You have testified that you know the aroma of the hops shipped to the defendant was good; how do you know it? A. I know that the aroma of all the hops that we grow on the ranch was good; they were all well handled.

"Q. By that I supppse you mean the aroma of all that you examined; did you examine as to aroma all the hops grown on the Wheatland ranch in the season of 1914? A. Yes, sir.

"Q. Then you examined the hops in this particular 100 bales that were shipped to the defendant? A. Yes, sir.

"Q. When? A. I examined the hops—I examined all of the hops that were grown on the ranch.

"Q. How many acres does the ranch contain? A. About 500 acres of hops.

"Q. At what stage of their growing or curing did you examine them. At every stage.

"Q. How many bales did the ranch produce in 1914? A. About 4.000 bales.

"Q. Did you examine all of the hops in each of the 4,000 bales? A. I examined all of the hops sufficiently to form an opinion as to the aroma of all of the hops of the crop.

"Q. That is not an answer to the question. Read the question.

"(Pending question read.)

"Mr. Harrison. He can explain his answer, of course.

"Mr. Allison. He can answer and then explain.

"A. I will explain the answer. The crop is divided off into lots of about 100 bales to a lot. I see samples of every lot and from examination of

the samples of each of the lots and from my general knowledge of the entire operations of the ranch, I know that the aroma of the entire crop was good.

"Mr. Alling: Now, repeat the question:

"Q. Did you examine each of the 4,000—did you examine the hops of each of the 4,000 bales grown on the ranch in the season of 1914?

"Mr. Harrison: I object to that on the ground that the question has already been asked and answered. The witness may answer it again if he so desires.

"A. I believe I have fully answered the question.

"*Mr. Alling:*

"Q. Do you refuse to explicitly answer the question? A. No, I don't want to refuse anything. I want to answer every question you ask me just as fully and fairly as it is possible to answer it. I don't mean to say that I examined every single bale of the entire 4,000 bales, that is, to examine each bale individually, but I examined the crop as the crop was growing I examined the crop as it was being harvested and I saw the samples of each lot and I examined the samples of ech lot and I examined the entire lot of hops grown so thoroughly that I am justified in saying that I know that the aroma of the entire crop of hops grown on that ranch was good.

"Q. How many acres have you planted to hops in British Columbia? A. About 500.

"Q. How many acres have you planted to hops in Oregon? A. About 600.

"Q. How many at Wheatland? A. About 400, I guess.

"Q. How many at Hopfen? A. About 400—300.

"Q. How many at Perkins? A. About 150.

"Q. How many on the—— A. Cosumnes River about 300.

"Q. How many on the Russian River? A. About 60, that is, the crop of 1914.

"Q. How many bales altogether did you produce in 1914 from all of these ranches? A. About 25,000.

"Q. Did you give more particular and thorough examination to the hops grown on the Wheatland ranch than you did to the hops grown on these other ranches? A. I gave more particular attention to the hops grown on the Wheatland and the American River ranches than on any of the other ranches.

"Q. Why? A. They are more convenient to reach.

"Q. And likely to produce lower grade of hops unless great care is exercised, is it not true? A. No, sir.

"Q. Well, both the American River and the Wheatland ranches are in the Sacramento Valley, are they not? A. Yes, sir.

"Q. There is more poor hops come from the Sacramento Valley than from the Rusian River or Sonoma county? A. No, sir.

"Q. Is it not true? A. No, sir.

"Q. You mean to say that the average grade of the hops produced in the Sacramento Valley is equal to the grade produced on the Russian River and in Sonoma county? A. Very often it is far superior.

"Q. Well, what is the rule generally as recognized in the market; is it not true that a greater

quantity of low grade hops are produced in the Sacramento Valley than in Sonoma county and on the Russian river?

"Mr. Harrison: Are you speaking of the market rule, Mr. Alling, or as to the actual fact as to quality of the hops?

"Mr. Alling: As to the actual facts and I ask the question to be read to see whether it don't call for actual facts.

"(Pending question read.)

"Mr. Alling: Strike that first part out. Let the question begin, "Is it not true."

"(Question read as amended as follows: 'Is it not true that a greater quantity of low grade hops are produced in the Sacramento Valley than in Sonoma county and on the Russian River.')

"A. No, it is not true. In Sonoma county and Russian river they get moldy hops, that is, hops affected by lice, and they get them so bad that those hops very often are very poor and the Sacramento Valley don't have that trouble. It is very rarely that any Sacramento hops have mold and when they have mold they have very little of it.

"Q. Mold is not the only thing that makes bad hops is it? A. No.

"Q. What are the elements that enter into a market classification of hops—withdraw that question. What are the recognized market classifications of hops? A. I don't know what you mean by market classification. In what way did you mean the word?

"Q. As to grades? A. Fancy, choice, choice brewing, prime, good brewing medium common.

"Mr. Alling: Will you repeat that Mr Stenographer?

"(Answer read.)

"A. And then other and lower grade hops, too.

"Q. Now, I repeat my former question: What are the elements that enter into that classification; what are the factors that are taken into consideration in determining the grade of hops, the grades which you have testified to? A. Well, the wholeness of the hop, the cleanlins in picking, the richness the soundness in aroma, the soundness in color the maturity. I guess that is about all; the soundness in the handling and the freedom from disease.

"Q. What do you mean by handling? A. Well, the proper drying, curing.

"Q. How do you pick your hops at Wheatland? A. We pick them by machine.

"Q. Did you in 1914? A. Yes, sir.

"Q. All of them? A. Yes, sir.

"Q. Are machine picked hops worth as much as hand-picked hops? A. Yes, sir.

"Q. No difference in the market as between the value of the machine picked hops and the hand-picked hops? A. It is a little better for machine picked.

"Q. Do you mean to testify that machine-picked hops will bring more money on the market than hand-picked hops, other things being equal? A. They will bring more money from brewers, yes.

"Q. They contain a quantity of stems, do they not? A. They contain less stems than hand-picked.

"Q. Is it not true that on a high market, there is at least one cent difference between machine-picked hops and hand-picked hops in favor of the hand-picked hops? A. It is not true.

"Q. Was it not true in 1914? A. No, sir.

"Q. Has it ever been true? A. Well, when the machine was in its early stages in 1907, the machines did not do as good work as the best of the hand-picking.

"Q. But at present the machine-picked hop is worth more in the market than the hand-picked hops? A. It is worth at least as much.

"Q. I understood you to say it was worth more. A. With the brewer, yes.

"Q. Is it worth more with te brewer? A. Yes.

"Q. Is it not true that on a declining market the difference in the market value of machine-picked hops and hand-picked hops is from 2 to 3 cents in favor of the hand-picked hops? A. It is not true.

"Q. Is it not true that in September of 1914 there was a recognized difference in the market value of hops as between machine-picked hop and hand-picked hop, of more than one cent? A. No, it is not true.

"Q. Are machine-picked hops as a rule as clean and free from trash and foreign matter as hand-picked hops? A. Yes, sir, they are cleaner. The machine is cleaner than hand-picked.

"Q. What became of these hops?

"Mr. Harrison: Which hops do you refer to?

"Mr. Alling: The 100 bales shipped to the defendant in September, 1914.

"A. They were delivered to the defendant.

"Q. Were they not reshipped to you? A. The 100 bales were delivered to the defendant and accepted by him; then 99 bales were reshipped by him, consigned to us at San Francisco and refused by us.

"Q. When were they delivered to the defendant?

"Mr. Harrison: If you know.

"A. I don't know the date. The correspondence would show.

"Mr. Alling:

Q. Have you any personal knowledge of that delivery? A. Yes, sir.

"Q. What does that personal knowledge consist of? A. As shown by the correspondence with the defendant.

"Q. The only thing you know personally as to what you claim to be a delivery, you get from the correspondence? A. And from the carriers, the rail carriers.

"Q. That is, the reports of the rail carriers? A. Yes, sir.

"Q. You say 99 bales of those hops were reshipped by the defendant to you and refused by you? A. Yes, sir.

"Q. When did you refuse them? A. We refused them before they were shipped and after they were shipped.

"Q. Were the hops returned to the coast? A. Yes, sir.

"Q. The 99 bales? A. Yes, sir.

"What became of them? A. As far as I know, they are here on the coast.

"Q. Where are they? A. In San Francisco.

"Mr. Harrison: If you know.

"Mr. Alling:

Q. Where? A. I don't know in what warehouse they are. They were shipped back to San Francisco. I believe they are in the unclaimed warehouse of the railroad.

"Q. Didn't you buy them? A. We did not.

"Q. They were put up for sale, weren't they? A. They were put up for sale by the railroad and sold by the railroad at 10 cents a pound.

"Q. To whom were they sold? A. I don't know who the buyer was.

"Q. They were not sold to the plaintiff in this case? A. No, sir; they were not sold to us.

"Q. You have never had them? A. I beg pardon?

"Q. You have never had them since? A. No. sir.

"Q. Were you present at the sale? A. No, sir.

"Did you have a representative there? A. No, sir.

"Q. You knew when the sale was to take place? A. Yes. sir.

"Q. You were notified by the warehouse company? A. Yes, sir.

"Q. Depue Warehouse Company? A. I don't know what warehouse; some unclaimed warehouses of the railroad. We got notice of the sale, we had no interest in the hops and we didn't attend. directly or indirectly. We had nothing to do with the sale, but we heard afterwards that they were sold by the railroad at 10 cents and that the buyer, whoever he was, repudiated the purchase.

"Q. Have they been offered for sale again? A. Yes, sir.

"Q. When? A. They were offered some time after that 10 cent sale.

"Q. Offered for sale by the same warehouse company? A. They were offered for sale by the railroad company for charges.

"Q. By the railroad company? A. Yes. sir, or by the warehouse; the unclaimed warehouse and the railroad company; they work together in some way or other, I don't know in just what way they work together.

"Q. Were they sold, do you know? A. They were not sold.

"Q. Were you present at the sale? A. They were not sold again.

"Q. Oh, I understood you to say they were offered for sale again. A. Yes, but they were not sold again as far as I know.

"Q. Were you present at the time they were offered again for sale? A. The railroad and the unclaimed warehouse people, both of them, or one of them offered them for sale for the charges and we offered to buy them for the charges.

"Q. How much were the charges? A. I don't know, something about 3 or 4 cents.

"Q. They offered to sell them for the charges and you offered to buy them for the charges? A. Yes. sir.

"Q. What was done? A. Nothing was done.

"Q. Did you buy them? A. We did not buy them.

"Q. Why? A. Because the railroad company could not give title on them.

"Q. What kind of title did you demand? A. We wanted a bill of sale.

"Q. Did they refuse to give you a bill of sale? A. Yes, sir.

"Q. And that offer on their part and acceptance on your part was for the charges alone? A. For the freight and warehouse, and I don't know, incidental charges.

"Q. Have you any recollection as to approximately what they aggregated? A. I think it was 3 or 4 cents a pound, something like that.

"Q. Have you ever had any trouble with the hop shipments before?

"Mr. Harrison: I object to that.

"*Mr. Alling:*

"Q. On account of quality?

"Mr. Harrison: I object to that on the ground it is irrelevant and immaterial and has no bearing whatever on the issues in this case. The witness may answer if he desires.

"Mr. Alling: I thought we were going to reserve our objections?

"Mr. Harrison: I would rather state the objection now. As a matter of fact, I would be entitled to instruct the witness not to answer.

"Mr. Alling: Sure you would, but I wondered——

"Mr. Harrison: Oh, I am not withdrawing the stipulation at all.

"Mr. Alling: What is that?

"Mr. Harrison: I am not withdrawing the stipulation at all.

"Mr. Alling: I wondered if you had some special objection in this instance to this question that was not covered by the stipulation?

"Mr. Harrison: Not to the form of the question.

"Mr. Alling: Read the question.

"(Pending question read.)"

Mr. Twining: I shall waive the objection.

Mr. English (Reading):

"Q. Have you ever had any trouble with the hop shipments before? A. I have been in the hop business for thirty years and have handled I guess close on to a million bales of hops and I must

confess I have had trouble with deliveries heretofore.

"Mr. Alling:

"Q. Claims were made as to the hops not being up to contracted quality, were they not, in your experience before?"

Mr. Twining: I object now, if your Honor please, from page 36, line 21, to page 69, line 15, on the ground that the testimony embraced between those lines is immaterial to the issue in this case, relating principally to the quality of the hops which were shipped or the samples of the hops which were shipped.

The Court: I reserve the ruling, and give you an exception, either now or hereafter, if it is against you. Proceed.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English (Reading):

"Mr. Alling:

"Q. Claims were made as to the hops not being up to contracted quality, were they not, in your experience before? A. I am ready to go into the question of any delivery I have ever made, if you care to investigate my dealings for the past thirty years, I am ready to go into them fully and fairly.

"Q. I understand you have had quite a lot of litigation.

"Mr. Harrison: I object to that on the

ground it is immaterial and instruct the witness not to answer.

"Mr. Alling: Is that under the stipulation?

"Mr. Harrison: I instruct the witness not to answer this question on the ground it is entirely foreign to the case.

"Mr. Alling: Are you not recognized in the hop trade on the coast as being not only highly experienced, but extremely expert in respect to hop litigation involving questions of quality of shipment? A. I don't know just what sort of a question you mean. If it pertains to my experience in the business, they say that I have had considerable experience in the hop business.

"Mr. Alling: Read the question, Mr. Reporter.

"(Pending question read.)

"A. I have been recognized as—I don't know that I have been recognized as being particularly expert in litigation. We deliver what we sell and if the buyers don't take what they buy, we are sometimes forced to litigate and in the past when we have been forced into litgation, we have always won our suits, because we have always delivered what we have bargained to deliver.

"Q. Well, you have had a good deal of litigation, haven't you?"

Mr. Twining. I object to that question. It is highly improper. It is immaterial whether he has had a good deal of litigation or not.

The Court: If I understand the matter correctly, the objection is to the question asked of the witness as to whether he has had considerable litigation.

Mr. English: Yes, that is the question.

The Court: Do you think that is a question that ought to be answered?

Mr. English: No, I do not think it is of any importance at all. I am perfectly willing to omit it.

The Court: I sustain the objection.

Mr. English: He was examined quite a good deal about that. We shall just skip that. If it is agreeable to counsel, I shall skip over to page 40, line 3. The intervening relates to his experience in litigation.

Mr. Twining: All right.

Mr. English (Reading Page 40, line 3:

"Q. You anticipated a repudiation in this instance? A. Yes, I did.

"Q. When did you first begin to anticipate a repudiation in this instance? A. My impression at this time is that my first fear was when I offered to deliver other hops in place of these hops that were rejected and when the buyer refused to consider the other shipments and also when my letters to him, my first letters to him, sending samples were left unanswered.

"Q. Well, the first occasion which you name, namely, the occasion of the defendant's failing to accept your offer of other hops, occurred after the shipment, did it not? A. Well, he first left my letters unanswered——

"Q. Well, no, answer this question now; I will come to that. You have detailed two occasions, upon the occurrence of which, apprehensions arose in your mind as to possible repudiation by the defendant; the first occasion you have stated was that when the defendant failed to accept your

offer of other hops. Now that occasion arose subsequent to the shipment, did it not? A. Well, these matters are cumulative. My first in point of time——

"Q. Yes, I was coming to that in a moment. A. My first fear in point of time was when my letters were left unanswered.

"Q. I see. I was coming to that later. A. And then coupled afterwards with his rejection of hops that had been approvingly accepted by our largest and best trade, and then coupled with this buyer's rejection of the same quality of hops and then further coupled with his refusal to accept other hops in lieu of these hops that he rejected, made me feel that there might be litigation.

"Q. My that time it was practically demonstrated that there would be? A. Well, that, of course, is not my answer. It is your answer to the question.

"Q. Did the defendant's failure to accept your offer of other hops occur after the shipment? A. After what?

"Q. The shipment? A. Yes.

"Mr. Harrison: You mean after the shipment of the 100 bales? A. Yes.

"*Mr. Alling:*

"Q. And I understand you to say that at an earlier time you had become apprehensive of a repudiation? A. Well, I was not really apprehensive of a repudiation until the point when he would not take other hops instead.

"Q. I see. A. It is not one thing that makes a man fear a repudiation; it is a combination of circumstances.

"Q. Well, your first apprehension, as I under-

stood you to say, arose when the defendant did not respond to letters mailed by you enclosing samples? A. Well, the samples are not enclosed with the letters, they are sent concurrent with the letters.

"Q. That was the first time you had any apprehension of repudiation? A. Well, that repudiation would not be material.

"Q. Well, you had some apprehension, didn't you? A. Well——

"Q. I have understood you so to state. A. That of itself I would not have considered seriously.

"Q. Did you have any apprehension of repudiation at that time? A. A slight apprehension.

"Q. I see; that was before you made the shipment? A. Yes, we sent the samples before we made the shipment and we sent samples of such hops as were being delivered to the best trade in the United States on contracts calling for a quality higher than the quality that we had sold to these defendants, and then when they ignored my letters and rejected my hops, which had been sold on a lower grading to other brewers and then they refused on top of that to take other hops, why I began to feel there was going to be litigation—that there would be trouble.

"Q. But I understood you to testify a little while ago that you first began to be apprehensive of repudiation when the defendant failed to respond to letters concerning samples which were contemporaneously mailed to them. A. Well, I really feel I have fully answered all the questions on that line that you have put to me thus far. By simply referring to the testimony already given, I feel that those questions are fully answered.

"Q. Did you have any apprehensions of repudia-

tion prior to the shipment? A. Now I have answered that.

"Q. Well, I ask for a yes or no answer to that, plus such explanation as you may desire to make. A. No, I did not. At the time those hops left the coast I did not have the apprehension.

"Q. Then the failure of the defendant to respond to your letters calling attention to concurrent forwarding of the samples did not excite in your mind any suspicion or apprehension of repudiation?

"Mr. Harrison: I object to that on the ground that that does not state the testimony of the witness accurately.

"Mr. Alling: I am asking him if that is a fact.

"A. There was a slight feeling to that effect, a slight feeling of apprehension, but not a material feeling.

"Mr. Alling: Q. You shipped these hops before you had received any approval, any letter from the defendant approving the samples sent him, did you not? A. Well, they were approved quality, the quality was approved by plenty of other trade and were approved on a higher grading of hops sold to other people.

"Mr. Alling: Please read the question again.

"(Pending question read.)

"A. Yes, before he approved the samples.

"Q. And before you had received any letter from the defendant approving the samples; that is a fact, is it not? A. Well, he had lots of time to approve the samples, but he did not approve the samples, he did not affirmatively approve them.

"Q. Did he approve them at all? A. Well, he didn't object to them.

"Q. You construed his silence as an approval, did you? A. Yes, I construed his silence as an approval.

"Q. The contract provides, does it not, that the hops to be shipped under the contract were to be on approved sample? A. Yes, on approved sample, yes.

"Q. And you elected to construe the defendant's silence as to the samples mailed him as approval? A. Well——

"Mr. Harrison: I object to that on the ground it is immaterial. The witness may answer if he so desires, if he knows of the facts. I object to it further on the ground that it calls for the conclusion of the witness. The correspondence and all communications between the parties are offered in evidence. They speak for themselves.

"Mr. Alling: Please read the question.

"(Pending question read.)

"Mr. Alling: Q. What is the answer?

A. Shall I answer that question?

"Mr. Harrison: You may answer it if you so desire.

A. Well, I considered that an approval though the samples were approved by other people, I didn't need his approval.

"Mr. Alling:

"Q. You understood the contract to provide then that shipments were authorized to this defendant under that contract if other people approved the samples?

"Mr. Harrison: I object to that on the ground that the understanding of this witness is wholly immaterial; that the contract speaks for itself and provides fully with regard to this matter of approval and the obligation on the defendant in this case to reject within the time specified in the contract and that the understanding of this witness is wholly immaterial and I instruct the witness not to answer.

"Mr. Alling: Read the question.

"(Pending question read.)

A. I don't care to answer that question on account of counsel.

"Mr. Alling: Q. You refuse to answer the question? A. Yes, on advice of counsel.

"Q. Did you ship these hops under this contract because other people than the defendant had approved the samples which you mailed to the defendant? A. Yes.

"Q. You did not consider that approval of the samples mailed the defendant by the defendant itself was necessary to the carrying out of a contract?

"Mr. Harrison: I object to that on the ground it is immaterial and that the understanding of this witness cannot vary the obligations of the contract which is in writing and I instruct the witness not to answer.

"Mr. Alling: What is the witness's answer?"

Mr. Twining: I object to that. The construction placed on the contract by the witness does not make any difference; it cannot affect the construction that the Court may place on it.

The Court: The contract ought to settle that.

Mr. English: I think it does. He did not answer it, as a matter of fact; he declined to answer, on the advice of counsel.

The Court: Well, his counsel was right.

Mr. English: (Reading):

"Q. Who approved the samples mailed to the defendant prior to the shipment, who if any one? A. Well, I can't recall at this time; plenty of people did.

"Q. Did the defendant? A. Well, the defendant didn't do anything else excepting what is shown by the correspondence.

"Mr. Alling: Please repeat the question, Mr. Stenographer.

"(Pending question read.)

A. I have answered the question I think fully.

"Q. Do you refuse to answer the question as asked?

"Mr. Harrison: The witness has answered that the correspondence shows all the communications between the parties and I submit that that is a complete answer to the question. The correspondence speaks for itself and any other answer would be improper as evidence.

"Mr. Alling: I will take an answer.

A. Well, I decline to answer the question any further on advice of counsel."

Mr. English: I think that is a question that ought to have been answered. The question was, "Did the defendant approve the samples?" He declined to answer that. That is a material question. I shall have to read back a little (reading):

"Q. Who approved the samples mailed to the defendant prior to the shipment, who if any one? A. Well, I can't recall at this time; plenty of people did.

"Q. Did the defendant? A. Well, the defendant didn't do anything else excepting what is shown by the correspondence.

"Mr. Alling: Please repeat the question, Mr. Stenographer.

"(Pending question read.)

A. I have answered the question I think fully.

"Q. Do you refuse to answer the question as asked?

"Mr. Harrison: The witness has answered that the correspondence shows all the communications between the parties and I submit that that is a complete answer to the question. The correspondence speaks for itself and any other answer would be improper as evidence.

"Mr. Alling: I will take an answer.

A. Well, I decline to answer the question any further on advice of counsel."

That he declined to answer, on the advice of counsel.

Mr. Twining: No, he said the defendant did not do anything else except what is shown in the correspondence.

Mr. English: Then he said: "Well, I decline to answer the question any further, on the advice of counsel."

The Court: Then it depends on the interpretation of the correspondence, does it not?

Mr. English: Yes. I suppose it does. He

says: "Well, the defendant did not do anything else excepting what is shown by the correspondence."

The Court: I think that will pass for an answer.

Mr. English (reading):

"Mr. Alling: Is it your custom in filling contracts, containing the same terms that this contract contains, to make shipments on approval of the samples by parties other than those to the contract?

"Mr. Harrison: I object to that on the ground that custom of a particular party is immaterial unless it is a generally recognized custom of the trade known to both of the contracting parties. However, if the witness desires to answer the question he may do so.

"Mr. Alling: Read the question, Mr. Stenographer.

(Pending question read.)

A. If you wait for a buyer to approve samples and the market is below the contract price and the buyer wants to repudiate, why there would be no method of enforcing a sale contract, if a construction were put on it that the buyer had the say whether or not to approve.

"Mr. Alling: The defendant moves to strike the answer as unresponsive and I now call for an answer to the question. Please repeat the question.

"(Pending question read.)

A. That is my practice, when a buyer does not approve the sample or any sample, then I ship the hops that were contracted probably without any approval.

"Q. Then it is your custom to ignore the terms of the contract at your pleasure when for any reason you do not hear from the buyer one way or the other as to the samples sent him.

"Mr. Harrison: I object to that on the ground that the manner of the question is highly improper and on the further ground that it is wholly immaterial as to what the custom of this witness or any other person has been, and on the further ground that the contract itself in this case expressly provides that the buyer waives all rights to rejection or to allowances on any delivery on account of quality unless such claim be delivered to seller by telegraph or in writing within five days after arrival of the hops at place of delivery. And on the further ground that there is nothing in any of the testimony or in any of the facts in this case to show any ignoring of any terms of this contract by the plaintiff.

"Mr. Alling: Read the question, Mr. Reporter.

"(Pending question read.)

A. I never ignore the terms of any contract, but when a buyer does not approve samples, I make a shipment to him of the contracted quality and it has been my practice after I have made the shipment, if the buyer wants to take hops under his contract, I do everything possible to complete a delivery to the buyer's satisfaction, even going beyond the contract requirements in my efforts to please the buyer.

"Q. Is it your custom to ship under a contract like this before the buyer has approved the samples as often when the market is going up as when the market is going down?"

Mr. Twining: I object to that. The custom that this witness followed with regard to what he did under other contracts could have no bearing. The issue here is whether or not the plaintiff has performed and the defendant has breached this contract. What difference does it make what the situation was with regard to others?

The Court: I shall sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English (reading):

"Mr. Alling: Q. How long a time did you allow for the buyer in this case to approve or disapprove the samples sent him?"

Mr. Twining: I object to that question on the ground stated by Mr. Harrison, that the correspondence, being all the communication between the parties, is the best evidence and establishes that fact.

Mr. English: Then he says: "The witness may answer, if he so desires." The correspondence settles that very much against this witness, because he sent his samples on the 29th of August and the 4th of September, I think, and he started off his shipment on the 12th of September.

Mr. Twining: And diverted it on the 17th.

Mr. English: Yes.

The Court: Does that answer the question?

Mr. English: No, I do not think it does. the witness gave on cross-examination.

Mr. Stamler: During that period of time the samples were rejected by us.

Mr. Twining: Well, it did not reach us until after the——

I think we ought to have the answer that

Mr. Stamler: That is just the point.

Mr. Twining: I do not know what you are talking about.

Mr. English: Well, he makes a contract to sell on approved sample, but he pays no attention to that; he ships any way, and counsel says: "How long do you ordinarily give a buyer to consider the question?"

The Court: Is not that settled by the papers?

Mr. English: I suppose it is, because you can figure out the difference in the dates of the letters, if that is what your Honor means.

The Court: It seems to be a matter conducted by correspondence throughout, the parties being at a considerable distance from one another. What is his answer as to that?

Mr. English: His answer was: "A. Well, we allow from the time that we send the first sample until the shipment itself reaches its destination, because if during any period of time between the sending of samples and the arrival of the shipment at destination, it is a very simple matter for us to ship other hops and make other disposition of a shipment that is on the way."

The Court: I will let the testimony stand.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English (reading):

"Mr. Alling: Q. How long a time did you allow for the buyer in this case to approve or disapprove the samples sent him? A. Well, we allow from the time that we send the first sample until the shipment itself reaches its destination, because if during any period of time between the sending of

samples and the arrival of the shipment at destination, it is a very simple matter for us to ship other hops and make other disposition of a shipment that is on the way.

"Mr. Alling: Q. Then you never wait to hear from the buyer—— A. We always——

"Q. —as to the approval or disapproval of samples before shipping?"

Mr. Twining: That is objected to because it relates to transactions other than this transaction; that is to say, what his custom is cannot make any difference.

The Court: Unless the effort is to prove a custom of the trade, which does not appear to be the case. I shall sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English (reading):

"Q. How long a period of silence do you construe as assent?"

Mr. Twining: I object to that.

Mr. English: Well, that was not answered. We need not waste any time on that. Yes, it was answered later on.

The Court: "How long a period of silence do you construe as assent?"

Mr. English: Then the further question, "In respect to the approval or disapproval of samples sent the buyer?"

Mr. Twining: I object to that.

The Court: "How long did you in this case?"

Mr. English: "How long do you?" I sup-

pose that relates to the custom. "How long a time was it your custom?" is the question.

The Court: That would be objectionable.

Mr. English: Except that the answer shows, your Honor, that he applied it to this case; he interpreted it as applying to this case.

Mr. Twining: No, I do not think he did.

Mr. English: Well, let me read it from the record: "Well, to give him ample time to get the sample and examine it and respond. It takes four days for a sample to cross the continent and reach the buyer."

The Court: If the answer about the four days' time alleges a fact which the correspondence does not show, it may be competent.

Mr. English: The correspondence does not show how long it takes.

The Court: I shall let it stand.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"How long a period of silence do you construe as assent, in respect to the approval or disapproval of samples sent the buyer? A. Well, to give him ample time to get the sample and examine it and respond. It takes four days for a sample to cross the continent and reach the buyer.

"Q. Do you ever make any allowance for the possibility of the sample not reaching the buyer? A. Well, when you send a man a sample and a letter advising it, then send him anothel lot of samples and another letter advising it and you request answer by wire, and you have no answer in ten or twenty days afterwards, why you can feel

reasonably certain that that letter is not going to be answered.

"Q. My question is do you make any allowance in cases of that kind for such letters and samples failing to reach the buyer? A. Yes, we make an allowance. We make that allowance that is reasonable considering the operations of the mails.

"Q. Do your envelops have a return notice printed upon them? A. Yes, sir.

"Q. What number of days are the postal authorities requested to hold a letter before returning? A. We haven't any return notice on the envelope. We have got our name and address on the envelopes and on the samples, and up to this time none of those letters have ever come back.

"Q. How are the samples sent, parcels post? A. They are sent by mail. I don't know just in which particular form. We usually send them regular postage. We usually pay letter postage on them.

"Q. How much do you samples weigh? A. Oh, about six or eight ounces, I guess.

"Mr. Alling: I think that is all. I suggest an adjournment until 2 o'clock."

Then they go on again at 2 o'clock (reading):

"Q. Let's ee. I guess I was talking about samples, wasn't I?

"Mr. Harrison: The last statement that the witness made was that he paid postage on such samples.

"Mr. Alling: I see, yes. Now, any single grade of hops that you have mentioned as being recognized in the market, I presume, is arrived at by a consideration of each and all of the factors which you name, includ-

ing wholeness, cleanliness, richness, aroma, color, maturity, drying and curing and the presence or absence of mold or disease, is that right?

"A. We consider all of them in the making of the grade.

"Q. Yes, exactly—— A. But we don't need to —no hop is perfect, you know, in all respects.

"Q. But in grading hops all these factors are considered? A. Yes, sir.

"Q. And in arriving at the conclusion as to whether any given lot of hops is of any one of these recognized grades which you have named, the presence or absence of all of those factors is considered? A. Yes.

"Q. Now, take the factor which you name as richness, I assume that relates to the relative amount of lupulin that the hop contains? A. Yes, sir.

"Q. That is the only factor that makes that and is what you mean when you speak of richness? A. Well, the hop itself—properties of the hops are in the lupulin and in the rest of the hop.

"Q. And what? A. In the rest of the hop.

"Q. In the rest of the hop? A. Not only the lupulin, but in the whole hop.

"Q. But what are the other factors, aside from the lupulin, which make for what you call richness? A. Well, maturity.

"Q. I see. A hop that is strong in lupulin and well matured and properly dried and cured will have a good aroma, will it not? A. Yes, sir.

"Q. Aroma, as you have been using the word in connection with hops, is the effect of the combination of those factors which make for richness? A. I don't understand that question.

"(Question read by reporter.)

"Q. I will put the question in another form if it is not plain. Given those elements which make for richness, namely, the presence of a good quantity of lupulin, maturity, a good handling as to drying and curing, and you would have good aroma, would you not? A. Why, yes, you have aroma—the hop has aroma no matter whether it is rich or is not rich; it will have aroma whether it is dried one way or dried another—it will have aroma.

"Q. It won't have a good aroma if it is immature, will it? A. Might have a good aroma if it is immature.

"Q. Isn't it the immaturity which gives the grassy odor or poor aroma? A. But aroma is the smell of the flower.

"Q. I am speaking now—— A. It has that smell whether it is mature or is not mature.

"Q. I am speaking of good aroma, that kind of aroma which makes it recognized as a good hop; that requires maturity and proper handling in curing and drying, doesn't it? A. It requires proper handling and drying in order to maintain the aroma that is in the hop.

"Q. And that requires maturity, doesn't it? A. The more mature the hop is, why, the better the aroma up to a certain extent.

"Q. What is the cause of what is known as the grassy flavor in hops? Isn't it immaturity? A. Yes, when the hop is immature, they say—the grassy flavor, they say that, but you hear of immature hops only in the beginning of the season, never hear anybody talking about immature hops after the beginning of the season.

"Q. Don't it depend on the season? Aren't there seasons when the hops don't mature fully? A. Oh, no, there is no such thing.

"Q. Well, now, do you always get the same degree of richness, lupulin and aroma in successive

crops on the same land, or isn't there a difference due to seasonal conditions? A. Well, I have been raising hops for thirty years, twenty-five years on the same land, and the hops are good every year.

"Q. Just as good one year as another? A. So good that you or I could not tell the differenece.

"Q. Is there no difference wrought in the hop crop by reason of seasonal differences, climatic and otherwise? A. Yes, if you go to hair-splitting, there is a difference.

"Q. Is there no difference in the market value of hops due to seasonal conditions? A. No, not in some sections. It is where climatic conditions affect the hop, but that is not the case with the Sacramento Valley.

"Q. Climatic conditions do not affect the hop at all in the Sacramento Valley? A. It don't affect those phases of the hops which you are talking about.

"Q. Climatic conditions or seasonal conditions in the Sacramento Valley don't affect the question of the full maturity of the hop? A. No, get hops fully matured every year from the Sacramento Valley.

"Q. Quite irrespective of the seasonal conditions? A. Yes, sir, get hops properly matured in the Sacramento Valley every season regardless of weather.

"Q. Do those seasonal conditions make no difference in the hops of the Sacramento Valley as to the amount of lupulin they contain? A. No difference with the per cent.

"Q. No market difference? A. No.

"Q. How about color? Do those seasonal conditions affect the colol of the hop in the Sacramento Valley? A. Yes, sometimes the color is a little different than other seasons.

"Q. How about the size? A. There is a differ-

ence in size some years. Some years they are larger than others.

"Q. Yes. Well, now, suppose the hop is immature, which one of these factors that enter into grade would be affected by it, richness, aroma or color? A. Richness would be affected by it; color would be affected, but not unfavorably—size.

"Q. Aroma? A. Size would not be affected unfavorably. Aroma would be affected, but not unfavorably.

"Q. Is the grassy flavor not an unfavorable effect? A. Some people like the so-called grassy flavor; that is, they don't like the name, when you refer to the name as a grassy flavor, they don't like any such term, but the hop that is not well matured has a good aroma and some people like it very much. But at the same time, the hop growers don't pick the hops immature. It is suicidal to pick hops immature, because the rate of drying out is so great the hop farmer would lose a lot of money if he picked them before they were matured.

"Q. Do I understand you as claiming that a hop that, by reason of immaturity, has a grassy flavor, is worth as much in the market as one that has a good aroma? A. Sometimes worth much more.

"Q. Sometimes worth more. Well, what is the general rule as to the market value? A. That depends upon individual preference.

"Q. There is no general market recognition of the inferiority of a grassy hop? A. There are some people that want a hop that is green; they want green color first of all and they prefer the green hop that is not fully matured to a later matured hop that is not green.

"Q. I did not ask you what some people preferred. I asked you whether or not, in the market generally a grassy hop was worth as much

as a hop with a good aroma? A. Yes, it is, but you don't use the word 'grassy' in connection with the aroma. A green colored hop——

"Q. I am not talking about the color. I am talking about the smell. Is the grassy flavored hop worth as much in the market generally as a hop with a good aroma? A. Depends upon other factors in the hop. If there were no other factors in the hp whatever execept immaturity, and aroma, and maturity, then of course, the buyer would prefer the maturity of aroma, but as there are other factors in the hop, other factors prevail.

"Q. What other factors? A. The color.

"Q. What other factors would prevail? The prime factor is lupulin, isn't it? A. No, the prime factor in the hop is the general appearance.

"Q. Is not the prime factor that goes to the grading of the hop and the value of the hop in the market the element of lupulin? A. No, lupulin is one of the factors. The brewing value of a hop is in the hop, in the entire hop, not only in the lupulin but in the rest of the hop.

"Q. Don't they extract the lupulin alone from the hop and use that in making beer? A. Not that I ever heard of.

"Q. In brewing the hop, is not the purpose of it to extract the lupulin? A. I don't care to go into the brewing business. I am not a brewer. But they don't extract any lupulin in brewing hops as far as I ever heard of, though lupulin—though some brewers do use lupulin.

"Q. The presence or absence of lupulin is manifest to the eye, isn't it? A. Yes, you can see the lupulin.

"Q. It is the yellowish powder on the inside of the hop? A. Yes, but if there was only—the lupulin is only a part of the brewing value

of the hop; the entire hop is the brewing value, not only the lupulin.

"Q. Is not lupulin principally considered in grading hops? A. Yes, it is considered but it is simply one of the factors.

"Q. Isn't it the principal factor? A. Oh, I don't know what you would call principal or not principal.

"Q. You say you are an experienced hop grower. I ask you if lupulin is not the principal factor considered in the grading of hops? A. No, it is not. It is one of the important factors, but not the principal factor.

"Q. What is the principal factor? A. I don't know that one is more principal than another. There are a good many factors, and you consider all of them.

"Q. Is not the presence of lupulin more important than color? A. With some people it is and some people it is not.

"Q. How is it so far as the general market is concerned? A. There is no general market on those things.

"Q. No general market on hops? A. No general market on what is the principal factor in a hop.

"Q. No general market estimate of the value of a hop or of the elements that enter into its value? A. No, you consider the general sum total of all the factors and size them all up on that; don't make up any detailed figures of each different factor.

"Q. I see. One is just as important as another? A. No, one is not as important as another, but you consider the hop in its entirety.

"Q. What are the important factors? A. I have told you.

"Q. What are the important factors? A. They

are all important if you want to call them important; every factor that you consider is important.

"Q. Is any one more important than another? A. I don't know that one is more important than another; I don't know which is more important.

"Q. You know what a fat hop is, don't you, what is known on the market as a fat hop? A. Yes, I know what it is.

"Q. What kind of bud has a fat hop? A. These hops that we shipped, lot 13, are fat hops.

"Q. That is not an answer to my question. A. What is the question?

"Mr. Alling: Read the question.

"(Question read by reporter as follows):

"Q. What kind of bud has a fat hop? A. I don't know what kind of bud a fat hop should have.

"Q. Small or large? A. Some people want them small and some large.

"Q. Is there no general recognition as to whether a fat hop should be small or large? A. No, some brewers want them big and some small.

"Q. No general market recognition? A. No, sir.

"Q. How about the bud as to their being flat or plump, as to their being flat or plump as to being a fat hop? A. As to being flat?

"Q. As to being flat or plump as to being a fat hop? A. All hops are flat after they are in the bales, they are round when they are growing and they are flat when they are pressed.

"Q. You don't understand that there is any difference in baled hops as to buds being flat or plump upon opening? A. I really don't know what kind of questions you are asking. You seem to not realize that a hop grows round, is put in a bale and

flattened out in the bale. and when you talk about flat hops and round hops, I don't know what you are talking about.

"Q. You don't know what I am speaking of when I ask you about the buds being plump as contradistinguished from flat? A. No, I don't know what you mean by flat, no.

"Q. Well, is it not a fact and recognized by dealers in hops in the market generally that hops that open up plump rather than flat are more desirable and worth more? A. I don't know what you mean by opening up plump and opening up flat—truly, I don't know what you mean by it.

"Q. All right. Have you never seen hops that upon opening showed plump as contradistinguished from the flattened hop that did not to any degree regain plumpness upon the pressure being relieved? A. I don't know what you are talking about.

"Q. I see. Now, you do not recognize that conditions of curing and drying, improper curing in drying make for the production of what is known as flat hops as contradistinguished from plump hops? A. I never heard the expression flat hops; I don't know what you are talking about.

"Q. Your experience has not extended that far? A. Nor has the experience of anyone else.

"Q. I see. You know all there is to be known about hops? A. No, I don't, but I know in thirty years I never heard the expression 'flat hops.'

"Q. Ever see any flat hops? A. Don't know what you mean by flat hops.

"Q. Well, you have seen some hops that were improperly dried and cured, haven't you? A. Yes, have heard of hops improperly dried and cured.

"Q. In all these law suits you have had about hops have you always been the plaintiff? Haven't you been the defendant at some time? A. For the

benefit of counsel, I want to suggest—I think he has his word wrong—I think he means slack hops.

"Q. No, I am coming to slack hops or the effects of slack drying. Read the question.

"(Question read by reporter as follows:)

"Q. In all these law suits you have had about hops, have you always been the plaintiff? Haven't you been the defendant at some time?)"

Mr. Harrison objects.

Mr. Twining: I object.

Mr. English: I do not care anything about it.

The Court: That is unprofitable.

Mr. English: I shall just skip this law-suit matter, Mr. Twining; I shall omit from line 8 on page 61 over to line 12 on page 62.

(Reading:)

"Mr. Alling: Now, what is the effect of defective drying and curing where too much heat is used or they are subjected to too long a time to heat in the kill? What is the effect on the hop? A. Over-dried.

"Q. Now, will it affect its richness? A. Well, it will affect the hops, yes.

"Q. Does it affect the richness of the hops? A. No, it does not affect the richness of the hops.

"Q. Does it affect the aroma of the hop? A. If they are dried out at too high a temperature, it affects the aroma.

"Q. Does it affect the color of the hop? A. Well, yes, you can affect the color by over-drying.

"Q. Hops sweat sometimes in the pile, do they not, when they are not turned? A. Sweat in what pile?

"Q. Yes, they sweat, do they not, where they are left in the pile and not frequently turned? A. You mean before they are dried?

"Q. Yes. A. Yes.

"Q. How does that affect their richness? A. A. Don't affect the richness.

"Q. Does it affect their aroma? A. If the hops sweat badly, it affects their aroma.

"Q. Does it affect their color? A. Yes.

"Q. Now, they sometimes heat in the sacks, too, don't they? A. Yes, sometimes heat in the sack.

"Q. That will affect color and aroma, won't it? A. Yes, if they really heat in the sack.

"Q. Well, what is the effect upon the hop if they are underdried? A. Well, they will turn black.

"Q. That affects color. Does that affect aroma? A. Yes.

"Q. And all those things go to the market value of the hop, don't they? A. Makes them worthless.

"Q. Now, does overdrying—is it calculated to militate against the wholeness of the hop? A. Over-drying may hurt the wholeness of the hop; may not.

"Q. If carried too far, it usually would, wouldn't it? Render them brittle and likely to break in handling? A. If you over-dry them enough, it will do that.

"Q. Yes. Now, what is the reason, if you know, why some hops are rich in lupulin and others are thin in lupulin? What makes for that—seasonal conditions? A. I don't know what makes it.

"Q. Isn't it true that—— A. If you pick them too soon, they are thin.

"Q. If they are immature, they are thin? A. Yes.

"Q. But aren't there some districts where the hop crops are not up to the average so far as rich-

ness in lupulin is concerned? A. No, not that I know of.

"Q. Well, aren't there the same seasons—— A. I am referring now to the Pacific Coast.

"Q. Yes. Aren't there some seasons when the crop from a given piece of ground will be richer in lupulin than the previous or subsequent crops? A. Not enough to be worth mentioning.

"Q. Well, if it is not the soil and if it is not seasonal conditions which produce the difference in lupulin what is it, in your judgment? A. Well, immaturity, as I tell you, is the only thing that will affect the thinness.

"Q. All hops have approximately the same amount of lupulin if they are matured? A. I didn't say anything of the sort.

"Q. Well, if there is a difference in hops as to the amount of luplin, what besides immaturity tends to contribute to it? A. I don't know of anything else on this coast.

"Q. Then, so far as you know, if the hop is immature there would be no difference in the amount of lupulin? A. No, I didn't say that.

"Q. Well, you said you didn't know of any other. A. Well, I didn't say the words you put in my mouth—didn't use those words nor convey that impression.

"Q. Well, is there a difference between mature hops as to the amount of lupulin they contain? A. Yes, there is a difference, but nobody knows what that difference is.

"Q. Nobody knows. A. I don't know the difference.

"Q. What is the difference—there is a difference in quantity in lupulin, you will admit that? A. There is a difference in the quantity of lupulin between different hops, but not enough to make it a material factor except in so far as immature hops are concerned.

"Q. Now, dealing only with mature hops, is there so much difference as to the amount of lupulin found in mature hops as to affect the market value? A. Not enough to affect the market value.

"Q. You have known of such a case? A. No.

"Q. Then so far as mature hops are concerned, considering only the quantity of lupulin contained, all hops are equally rich? A. No, I didn't say anything of the sort.

"Q. Well, you say there is not enough difference in lupulin to affect the market price? A. There is nobody ever measures the lupulin or weighs it; people don't handle hops that way. Lupulin is one of the factors in the hop but it is not the controlling factor of the hop. A man does not examine the hop to see how much lupulin there is and determine that and figure the price. It is not done that way. Nobody does that. When you get down to lupulin, when you get down to the fine points on lupulin, the hop that fetches the most money has got the least lupulin. In fact, European hops would, and, for instance, the Wisconsin hops, they have got hardly any lupulin at all and they fetch more money that the coast hops with a whole lot of lupulin.

"Q. I see. What quality or factor that enters into the determination of grade determine the keeping character or quality of the hops? A. I don't know that and I don't know how to find it out.

"Q. Some hops keep better than others, don't they? A. No, there is no difference in the keeping quality if they are kept in cold storage.

"Q. Well, suppose they are not—is there a difference then? A. Well, the hops are all kept in cold storage. When the brewer gets them he puts them in cold storage and keeps them there.

"Q. A hop that is not kept in cold storage, does it deteriorate with age? A. That is something I

don't know. It does—all hops deteriorate with age, yes; they all deteriorate with age.

"Q. What element that enters into grade declines with age? A. Well, that is one of those scientific puzzles.

"Q. Maybe an indeterminate combination? A. It is a puzzle that I have worked a good many years trying to solve what it is.

"Q. And it has not been determined just what it is? A. Nobody has determined it yet, as far as I know.

"Q. Some hops deteriorate with age less than others, do they not? A. Well, it depends upon what you mean by deterioration, whether it is brewing deterioration or whether it is apparent deterioration or real deterioration.

"Q. Hops are sold for brewing principally, are they not? A. Yes.

"Q. And the brewing deterioration would be practically market deterioration, would it not? A. No, not necessarily.

"Q. Well, if they were not good for brewing, what would they be good for? A. The prices don't run in rings for brewing purposes, brewing properties. There is no relation, no co-relation between brewing value and market value in hops.

"Q. I see. The ultimate consumer is the brewer, though? A. Yes, the ultimate consumer is the brewer.

"Q. And if the hops decline in brewing qualities, you say they don't decline in market qualities? A. Well, the hops that are the poorest in brewing qualities sell the highest in price very often.

"Q. Is not the general rule—— A. In the marketing of hops it is a matter of individual preference. One man wants one thing and one another, and there is no co-relation between brewing properties in hops and market price.

"Q. No relation at all. A. No real relation; it works by reverse as often as it works by the direct.

"Q. In other words, do I understand that the hops which are of less value for brewing sometimes bring the most money? A. Yes, sir.

"Q. Do you know why they do that when the brewer is the ultimate consumer? A. Well, that is one of those things we have been studying on and studying on many years to try to bring out rational standards, and it has never been possible to make rational standards. The government has taken it up and tried to make rational standards so that the market price would run in harmony with the brewing value, but has never been able to do it, though they have worked on it many years and pointed out these very inconsistencies I have been telling you about.

"Q. The brewing quality declines with age, does it not? A. It does to some extent.

"Q. Then we should expect that, and am I right in assuming that the market value would increase with age? A. Sometimes hops which are old sell for a higher price than hops which are new.

"Q. Is that generally true? A. No, but whenever old hops are scarce they fetch as much as new hops, and I have known them to sell for much above the price of new hops.

"Q. I see, but you would not testify that that was the general rule as to old hops? A. I have told you how it is.

"Q. Isolated cases you have spoken of. Now, how about the general rule or the general fact? Do old hops bring more than new hops, usually? A. No, they do not, not generally.

"Q. I see. Well, generally the prices will decline with brewing qualities. A. I didn't say that.

"Q. Well, I ask you if it is not so? A. I have answered that thing very fully.

"Q. You do not wish to answer that question? A. Well, I do not want to be kept here longer than necessary. I am perfectly willing to give you full information, but you ask the question over and over again and I answered it fully, and then you repeat the question, and I don't think it is fair to me to do that.

"Q. I don't wish to do anything that is unfair, but you have testified as an expert here and I am entitled to examine you quite generally concerning matters that would be calculated to show whether you are an expert. Now, we will take up another subject for the sake of variety. Did you have any eastern agencies in 1914? A. I had a man working for me in 1914, yes, New York.

"Q. Anywhere else in the east? A. In Chicago.

"Q. Offices at both places? A. Well, I have a man working there and he has desk room.

"Q. Do you spend any time at your eastern agencies? A. I did not in 1914—I don't think I did in 1914.

"Q. How many trips did you make to British Columbia in 1914 during the hop season? A. None.

"Q. Make any trips to Oregon in 1914 during the hop season? A. No.

"Q. Your general offices are in San Francisco, are they not? A. I did in 1914 make a trip to Oregon during the hop season—I am not sure—yes, I did make a trip to Oregon in 1914 during the hop season.

"Q. You have two ranches there, I believe you testified? A. Yes.

"Q. Your general offices are in San Francisco? A. Yes, sir.

"Q. You spent considerable time in your general offices in connection with the business which is transacted there? A. Yes, sir.

"Q. And only occasionally would you be on the Wheatland ranch in 1914 during the hop seaon? A. Yes, sir.

"Q. Now, this 100 bales of hops, calling your attention now to the factors that enter into classification, were the hops whole?"

Mr. Twining: I object to that, from page 70, line 11, to page 80, line 20. This is further examination into the quality of these hops, and I wish to object to this testimony on the grounds already stated.

The Court: I make the same ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English (reading:

"Q. Now, this 100 bales of hops, calling your attention now to the factors that enter into classification, were the hops whole? A. Yes, sir.

"Q. Were they clean? A. Yes, sir.

"Q. Free from stems and trash and extraneous substances? A. Yes, substantially free.

"Q. Did they have the average amount of lupulin? A. Yes, sir.

"Q. More than the average or less than the average? A. They were fat hops, what we call fat hops.

"Q. And the aroma you say was good? A. Was good.

"Q. Was not grassy? A. How is that?

"Q. They had no grassy smell? A. No, sir.

"Q. They were mature? A. Yes, sir.

"Q. What color? A. Good color.

"Q. Good color. Now, did you inspect the drying and curing of those hops? A. Yes, sir.

"Q. Was it done properly? A. Yes, sir.

"Q. No defects in it? A. None

"Q. Neither over-dried nor under-dried? A. No.

"Q. Did they have no mold? A. No.

"Q. You are not troubled with pests up there at all? A. None.

"Q. Now, what grade were they? A. They were a choice brewing hop.

"Q. Choice brewing hop. Why were they not fancy? If you testified that they had all these characteristics, what did they lack from being fancy? A. Oh, I don't know.

"Q. Well, what would they have had to have that they didn't have to make them a fancy hop—more lupulin? A. Oh, there was no defect in the hops. The hops were all right in every respect, but when you use the term 'fancy' you are using a pretty high grade, high type.

"Q. But in what respect were these hops below the fancy grade? A. Well, I would not know.

"Mr. Harrison: Object to that on the ground it is immaterial whether these hops were fancy hops or not, it appearing that they were good brewing Pacific Coast hops or better, that being the only question in issue. However, the witnes may answer the question if he so desires.

"*Mr. Alling:*

"Q. Would you call them fancy hops? A. No I would not say they were fancy.

"Q. What did they lack from being fancy? If they were whole, they could not be wholer; if they were clean, they could not be cleaner; if they were rich—could they have been richer? A. If they were whole, they could not be wholer, and if they

were rich they could not be richer, and if they were clean, they could not be cleaner. That hop wasa hop which is passed by the trade and by the largest and best brewers of the United States as choice brewing hops, and so certified to by many of them, and perhaps some people would call them fancy, but so far as the term 'fancy'—I don't care to use it.

"Q. Well, were they choice? A. Yes, sir, they were choice, positively choice.

"Q. Then they were better than choice brewing? A. Yes.

"Q. Better than brewing? A. Yes.

"Q. They were next to the highest grade of hop? A. Yes, sir.

"Q. And you cannot even say what they lacked to be the highest grade? A. They didn't have any defect of any sort.

"Q. No defect of any sort? A. Well, not what you call a substantial defect—not a defect that—not what you would call a commercial defect.

"Q. Do you know the defect which is sometimes known as red spider? A. Yes.

"Q. What occasions it? A. What occasions red spider?

"Q. Yes. A. Red spider.

"Q. Yes. A. Red spider—I say red spider occasions red spider.

"Q. In other words, do you claim red spider is the result of an insect? A. Yes.

"Q. Isn't it a seasonal effect? Aren't all hops of certain localities in certain years—don't all hops in certain localities in a certain year and under certain seasonal condtions develop what is known as red spider in color? A. Well, there is some red spider in all yards.

"Q. And you think that is an insect? A. Yes. But we had no red spider here—enough to talk about.

"Q. You don't think red spider is the effect of seasonal conditions? A. No, sir.

"Q. Did you have any red spider show in any of your hops on the Wheatland ranch in 1914? A. No, sir.

"Q. It is a characteristic of certain districts, isn't it, in certain years? A. There are some places that have red spider to an extent where it is an injury. The red spider is every place, but a small number of red spiders does not hurt anything—only when you get a big number.

"Q. Characteristic of the Sacramento Valley, isn't it? A. Not any more characteristic of that than any other valley.

"Q. Does the Sacramento Valley have no more trouble with red spider than Sonoma county? A. I guess on the general run, the Sacramento Valley has more red spider than Sonoma district.

"Q. Also than the Russian River district. A. And the Russian River district.

"Q. But you are very sure there was no red spider in these hops? A. I said not enough red spider to talk about.

"Q. Was there some? A. I haven't noticed any red spider in the hops.

"Q. I mean in this 100 bales? A. No.

"Q. You didn't see this 100 bales, did you? A. I saw the samples of them.

"Q. You didn't see—— A. And the samples don't show red spider.

"Q. You didn't see the bales themselves? A. No, sir.

"Q. You didn't see the hops that went into the bales? A. I saw all the hops, saw the general run of the hops that we grew, and the samples of each lot of 100 bales I saw.

"Q. So you saw samples from these 100 bales? A. Yes, sir.

"Q. Now, how many times and at what stages of development of the curing, grading or curing process did you see those samples? A. I think I have answered that in previous testimony—went up to the ranch a number of times.

"Mr. Harrison: About what time did you see the samples, that is the question.

"A. I saw the samples at the time the hops were shipped and I saw the samples a number of times afterwards.

"Mr. Alling: Yes, it was after they were baled and the samples taken from them at the time they were baled?

"A. Yes, sir.

"Q. Before or afterwards? A. Right afterwards.

"Q. Now, this had a lot number, didn't it? A. Lot 13.

"Q. Just what does that signify? How many bales in lot 13? A. One hundred.

"Q. Was the lot given that number at the time they were originally placed in the car? A. Yes, sir.

"Q. Or before that? A. At the time.

"Q. They were placed in the car? A. No, at the time they were loaded up.

"Q. Were they the lots loaded out, kept separate before they were loaded on the cars? A. Yes, sir.

"Q. Who made up those samples? A. S. J. Rooney, I think.

"Q. Where did he make them up, at the ranch? A. Yes, sir.

"Q. How soon after they were baled was that lot set apart and samples taken?

"Mr. Harrison: If you know.

"A. Oh, within a week or so.

"Mr. Alling: When did you—how long after they were taken did you examine them?

"Mr. Harrison: That is, the samples?

"Mr. Alling: Yes.

"The Witness: Right afterwards.

"Q. Where? A. Shortly afterwards, within a few days afterwards.

"Q. Where, I say? A. San Francisco.

"Q. And you were examining samples, I suppose, right along as they were sent down? A. Yes, sir.

"Q. Of various lots? A. Yes, sir.

"Q. Well, about what month of the year 1914 would that be that you examined the samples in lot 13? A. September.

"Q. And about how long before the shipment? A. About that time.

"Mr. Harrison: That is to say, you examined them about that time?

"A. Examined the samples about that time, yes.

"Mr. Harrison: Yes.

"Mr. Alling: How did the samples reach San Francisco?

"A. By expres, I believe.

"Q. How far is Wheatland from San Francisco? A. One hundred and thirty miles.

"Q. How many samples of lot 13 did you examine? A. I don't recall now.

"Q. How many samples were sent to the San Francisco office of lot 13? A. Ten or 12.

"Q. How are those samples generally taken? A. What is that?

"Q. How are those samples generally taken? A. I don't know how you mean—how taken. You mean taken out of the bale?

"Q. Yes. A. Taken out of the bale with a pair of tongs.

"Q. Would each sample represent one bale or would any given sample represent more than one bale? A. Why, no; 100 bales, you would sample out of every tenth bale and one or two extra samples to make a dozen samples, and every bale would be inspected.

"Q. So that barring the one or two extra samples, the ten samples would represent the ten bales from which they were taken? A. They would represent the 100 bales, but the ten samples would be alike, because the 100 bales would be alike and we take a sample out of every tenth bale.

"Q. That is, on the assumption that all the bales are alike? A. Well, they are alike.

"Q. As a matter of fact, the samples would be taken—ten samples, barring the extras, would be taken solely from every tenth bale, one for each bale, as I understand it.

"Mr. Harrison: One for each tenth bale, you mean.

"Mr. Alling: One for each bale that was sampled?

"A. Yes.

"Q. In other words, the whole 100 bales were not sampled? A. Yes, they were all sampled, every bale of the 100 was sampled, but the sample would not be kept except out of every tenth bale.

"Q. That is what you mean by every bale was inspected? A. Yes.

"Q. But you didn't see samples from every bale? A. No, I saw samples from every tenth bale—may not have seen all of the ten samples, but——

"Q. Well, now, taking the hops on the Wheatland ranch for the year 1914, were they entirely uniform as to grade? A. They were all better than good brewing hops.

"Q. Well, did you notice any defects at all as to grade in the samples of that year's crop which you saw and examined? A. They would run on different samples. The entire crop did not run on the same sample.

"Q. You mean on the same grade? A. No, they would all run better than good brewing, but there would be a difference in the apearance of the hops —would not all look alike.

"Q. Well, if they were to be graded—if they had been graded, all the samples, you would have had various grades represented in a year's growth, crop? A. We would have had various appearing samples—would have looked different; they would have been of the same grade, but they would not look alike.

"Q. Well, were all the hops raised on your ranch in 1914 of the same market grade? A. Yes, sir.

"Q. What was that grade? A. Choice hops.

"Q. Choice hops, next to the highest grade I understand from you? A. Yes, sir.

"Q. And none of them in that year's crop under that grade? A. Crop ran choice.

"Q. You say you had some red spider. Will any hop that has any red spider in it run choice grade? A. I had no hops damaged by red spider.

"Q. How is that? A. I had no hops damaged by red spider.

"Q. I understood you to say there was some red

spider showed in the hops? A. I didn't say that.

"Q. Well, was it a fact? A. I said there was red spider in all of the yards, every yard—some red spider.

"Q. But there was no showing of red spider in your hops? A. Not all the hops, no, sir.

"Q. Isn't it a fact that one of the market objections to machine picking is that it flattens the hop so that upon being opened up they do not bud out and assume a plump appearance? A. The machine don't flatten the hops, and I don't know the other thing that you said. What was the other thing?

"Q. So that they don't bud out upon being opened up and assume a plump appearance? Isn't that one of the results? A. I don't know what you mean by opening out a hop and making it plump by opening it out. I really don't know what you mean by it.

"Q. Well, some hops, when they are opened out, do assume a plump appearance, do they not, as contradistinguished from a flattened appearance? A. The machine picked hops are all right in appearance and they open up the same as the hand-picked hops, so far as the appearance goes and as far as every other quality goes.

"Q. Hops do get weak with age, don't they? A. Hops do what?

"Q. Get weak with age? A. Yes, with age they get a little weaker, gradually get weaker.

"Q. Sometimes spoken of as getting cheesy? A. Yes.

"Q. Now, is a hop that is weak and cheesy as the result of age worth as much on the market as a new hop? A. Generally not; exceptionally, yes.

"Q. When the 99 bales which were shipped back to you were first placed on sale, don't you know that there were other bidders besides the bidder who finally bid ten cents? A. I don't know any-

thing about it—didn't know at the time that the sale was coming off. We knew it was going to come off, but at the time it came off we paid no attention to it, didn't go there and had nobody there and knew nothing about the results of it until afterwards.

"Q. Well, at the time that the warehouse people or the railroad people, or either of them, or both of them, subsequent to that first sale, attemped sale, offered as you say the hops for the amount of charges against them, transportation and warehousing, was that offer in the form of a public sale? A. The first sale that was made at 10 cents?

"Q. No, that second sale, if it was a sale when, as I understand you, they offered the hops for the amount of the charges against them and you offered to give that amount, but would not do it on account of their not being willing to give you a bill of sale—was that a public sale? A. No, sir.

"Q. It was a private offer made to you? A. Well, it was an offer made to everybody else, but it was not made at an auction.

"Q. What form was it made in? A. Orally.

"Q. Orally. You were orally notified that if you would pay the amount of charges the hops would be yours, you could have them? A. They were all notified if they could get the charges they would sell the hops.

"Q. I see, and you offered to give that amount if they would give you a bill of sale? A. Yes, sir.

"Q. Who did you make that offer to? A. I don't know directly which party; it was from the Southern Pacific or the warehouse people, I don't know which.

"Q. Was it you personally to whom that oral offer was made, or some of your employes? A. It was made to one of my employes and transmitted by my employe to me.

"Q. Do you know to what employe the offer was orally made? A. Yes, Mr. Settle.

"Q. Was it Mr. Settle who responded with the offer to pay that amount if they would give a bill of sale? A. Yes.

"Q. Well, now, do you know what the transportation charges were against those hops? A. Something like 4 or 5 cents transportation and freight —3 or 4 or 5 cents.

"Q. What is the rate on hops from where these hops were shipped to Elizabeth? What was the rate in 1914? A. I don't know. We never have shipped hops westbound, never have shipped hops from the east to the west.

"Q. You didn't get my question. I said what was the rate from the point where these hops were shipped to Elizabeth, New Jersey? A. These particular hops were shipped at a cent and three-quatre rate. They may have been shipped at one cent rate.

"Q. Now, you have stated that subsequent to October 14th, there has been no market for contracts for future delivery. Was there prior to October 1, 1914? A. No, for the last—there was in previous seasons, but the market the last two years on contracts has been future contracas, has been played out on account of surplusage and prohibition agitation and general bad trade conditions and heavy importations.

"Q. Well, have you had more difficulty in making contracts for future delivery than other people? A. I believe the situation has been bad all along the line.

"Q. Generally. What I was getting at was whether your frequent lawsuits over contracts had in any respect or to any extent made it more difficult for you to close such contracts?

"Mr. Twining: I object to that.

"Mr. English: This may bear on his testimony as to futures. If he had any difficulty in making future contracts because he had a bad reputation, that might have a bearing on the making of the future contracts, as he testified. Mr. Phleger testified to the difficulty in making future contracts. There might be some personal taint as to him that would prevent buyers from making future contracts. That would seem to me to be material, your Honor.

The Court: I shall take the testimony.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English (reading):

"Q. Generally. What I was getting at was whether your frequent lawsuits over contracts had in any respect or to any extent made it more difficult for you to close such contracts? A. I have not had frequent lawsuits, so if you will repeat your question without stating that 'frequent lawsuits.' I will be glad to answer it.

"Q. I understood you to say a little earlier in your examination that you averaged about one lawsuit a year for the last ten years. A. That is not many in handling a commodity that is so violently fluctuating in price as hops are.

"Q. In other words, you don't think you have been more unfortunate than other people in that regard?"

Mr. Twining: I object to that question.

Mr. English: Well we do not press that particular question.

Now by consent of counsel, I shall start

from line 16 on page 83, and go over to line 7 on page 84.

(Reading):

"Q. Now in the grades to which you have testified the market grades, fancy. choice, choice brewing, prime, good brewing—good brewing being the fifth grade—is it your understanding that this contract in using the words 'equal to or better than good brewing Pacific Coast hops' calls for the good brewing grade to which you testified a while ago? A. Yes, sir, calls for good brewing hops.

"Q. Then in filling with choice hops you gave the defendant three grades higher than the contract called for? A. Yes, sir.

"Q. Now, what especial and particular element of the situation moved you to ship hops three grades better than the contract called for? A. Well, we had plenty of them of that grade and we always shipped better than the contract called for.

"Q. Always have—that is your universal custom? A. Yes, sir.

"Q. Well, your apprehension of repudiation of the contract which you have testified, prior to the shipment, did that have anything to do with your filling the order with three grades higher than the contract called for? A. No, sir, we would have shipped them choice hops anyhow.

"Q. You spoke awhile ago of differences with brewers, and I gathered from what you said that you regarded them as risky. Are they more risky than other customers of yours? A. I haven't made any statement that brewers are risky.

"Q. Is it your experience that you are more likely to have trouble with brewers than other people with whom you have contracts? A. No, I have not told you anything of the sort. I don't think it is fair for you to say that I call the brewers risky.

"Q. Well, now, read my question. That is the way I understood it, and if I have not understood it correctly, I am perfectly willing to reform my question.

"(Previous question read by reporter as follows: 'Q. Is it your experience that you are more likely to have trouble with brewers than other people with whom you have contracts?')

"The Witness: I wish you would read all of that. I want that all in the record.

"(Answer read by reporter as follows: 'A. No, I haven't told you anything of the sort. I don't think it is fair for you to say that I call brewers risky.')

"Mr. Harrison: Will you put your question now?

"Mr. Alling: The question is there. Read it.

"(Question read by reporter as follows: 'Q. Is it your experience that you are more likely to have trouble with brewers than other people with whom you have contracts?')"

Mr. Harrison objects, and then they read the question again.

(Reading):

"A. No, it is not my experience.

"Mr. Alling: Is it your custom to take unusual precautions in your dealings with people with whom you have contracts when the market is falling?"

Mr. Twining: I object to that. The question of custom is immaterial; the question of what his custom was is immaterial.

The Court: Is this the usual question about the witness's own personal custom?

Mr. English: Yes.

The Court: Well, that cannot be binding, not being a general custom.

Mr. English: I am perfectly willing to omit right along here. I omit from line 5 on page 96 to line 28 on page 89.

(Reading):

"When did the market begin to go down in 1914? A. Started going down right after the harvest.

"Q. When did the harvest take place? A. August and September.

"Q. This contract was made in March, wasn't it—yes the 26th day of March it is. What were hops worth, choice hops worth in August of 1914?"

Mr. Twining: I object to that.

Mr. English: That is evidence of market value after the contract. That ought to be good.

The Court: Read the question again.

(Mr. English reads the question.)

The Court: That is the same year?

Mr. English: Yes sir.

The Court: I think it is competent as showing what was the state of the market at that time.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English (reading):

"Q. This contract was made in March, wasn't it yes, the 26th day of March it is. What were hops worth choice hops worth in August of 1914? A. Oh about as near as I can recall now, worth about 15 cents out here.

"Q. What would that make the price at Elizabeth? A. Well 16 if shipped by water and 16¾ if shipped by rail but the market was sick—the market was on the down grade.

"Q. What were choice hops worth at Elizabeth, New Jersey in September of 1913?"

I suppose he means 1914.

Mr. Twining: Yes.

Mr. English: Shall we amend that to 1914?

Mr. Twining: Yes.

Mr. English (reading):

"A. Well, the prices ran down. I cannot tell you just how they ran each month but the trend was downward. It ran down as low as—oh, as low as 7 cents and around 7 and 8 cents a pound.

"Q. What month was that in? A. In about December I think; then it went up again.

"Q. Seven—that would be 8 and 8¾ at Elizabeth? A. Yes.

"Q. Now, this is choice hops. How much below that figure would good brewing hops be? A. Oh, about a cent lower.

"Q. What grade of hops had you in mind when you testified this morning concerning values reasonable value at Elizabeth, New Jersey—choice or good brewing? A. Oh, I don't know what I testified to this morning. I don't know what the question was and I don't know what the answer was.

"Q. You testified that the reasonable value of hops at Elizabeth, New Jersey, In October, 1914, was about 16 or 17 cents. Choice hops would be a cent higher? A. That is, no fixed market on hops like there is on wheat or anything else."

The Court: Is that "There is" or "That is?"

Mr. English: It says "That is no fixed." It means that there is no fixed market.

(Reading):

"Q. At any given time and at any given stage of the market, choice hops are always worth more than good brewing hops, aren't they? A. Yes.

"Q. Well, now, you say that in September the market was sick and the price was lower. In August these hops were worth 16 to 16¾ cents at Elizabeth, New Jersey. In September the market was down. About what were choice hops worth at Elizabeth, New Jersey, in October? A. Well, the course of the market was downward. The market started dropping in about September.

"Q. Yes. A. And we had a stagnant market and things ran down until about December, and then in January or February, I don't know just when it was but somewhere in that neighborhood, the market started going up again.

"Q. Well, if the market was down through the month of September, approximately what was the value of choice hops at Elizabeth in October? A. Whenever you say the market at Elizabeth—I am always taking the price on the Coast and then the freight.

"Q. Yes. Well—— A. It was somewhere in the neighborhood of about 16 cents, somewhere in that neighborhood, in September.

"Q. Well, you gave the market in August as 15 cents on the Coast and 16 to 16¾ at Elizabeth. Now, if it is 15 cents in August and the market was sick then and it went down in September, it must have been less than that in October? A. Yes, it was less than that in October? A. It dropped, kept dropping down from September until December—kept dropping.

"Q. Then you were in error this morning when you stated that the reasonable value of these hops at Elizabeth, New Jersey, in October of 1914, was about 16 or 17 cents? A. Well, it was about 16 cents, somewhere in that neighborhood.

"Q. But you have just testified that that was the price in August? A. Well may not have dropped very fast; I don't know just how fast it dropped.

"Q. You don't know, as a matter of fact, just what the price was in October? A. I know generally. A man don't know what the market is today, let alone what it was a year ago—cannot tell exactly what it is today. If you ask me what today's market is, I couldn't tell you. There is no fixed market, no way of determining exactly what the market is on hops. The trading is few and far between.

"Q. Well, the probabilities are they were worth something less in October than they were in August? A. Well, they were worth less in October than in August, I know that.

"Q. Then they could not have been worth 16 or 17 cents in October? A. Well, maybe worth only 15 or 16 cents in October.

"Q. And there has been no—since then there has been no market for contracts for future delivery? A. No, there has been no market.

"Q. How is the aroma of a hop affected by adding two years to its age?"

Mr. Twining: I object from line 3, page 93, to line 12, page 97, on the ground that this testimony relates to the quality of the hops and the samples.

The Court: That is the general objection that has been made before?

Mr. Twining: Yes, sir.

The Court: There will be the same reservation of ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English (Reading):

"Q. How is the aroma of a hop affected by adding two years to its age? A. Well, the hop gets an oldish odor to it.

"Q. If the hops is weaker, there is less strength to the aroma, I suppose? A. In the age comes—the aroma changes, regardless of the richness of the hop.

"Q. I see. Any element of mustiness develop with age? A. No, sir.

"I mean mustiness of smell? A. No, not musty.

"Q. No mold? I don't mean the mold, but you spoke of smelling old, and can that old smell be properly described as to any degree musty? A. No.

"Q. Three of the samples—oh, did I understand that you had this morning examined eight samples from the hops returned by the defendant? A. Examined five of them.

"Q. Did you—I understood you to say that three were duplicates of one, two and three sent to the defendant in advance of the shipment? A. Yes, sir.

"Q. And that five represented the shipment of 100 bales? A. Yes, sir.

"Q. Now, those five, were they five of the same samples which you examined in 1914? A. I don't know whether they were drawn in 1914 or drawn more recently.

"Q. If they were drawn more recently they would have been drawn from the bales in the warehouse, would they not? A. Yes, sir.

"Q. And you cannot tell whether those five were part of the original samples taken from the bales or whether they were samples taken from the bales after they were reshipped to San Francisco? A. No, sir.

"Q. Did Mr. Zipfel bring you all those eight samples? A. Yes.

"Q. You have no personal knowledge of where they came from? A. No, sir, any more than I know the hops—identified the hops.

"Q. Can you tell a 1914 hop from the look of it if grown on the Wheatland ranch? A. Yes, generally—can't be dead sure of it.

"Q. In what respect would it differ form the 1913 hop grown on the same ranch? A. Oh, it would not be as old.

"Q. You can detect from observation and examination the age of a hop as well as the locality of its production? A. Cannot tell between—when they get old, you cannot tell the year any more than you can tell a new hop from an old hop generally, but cannot tell the old hop from an older ne except in a way.

"Q. Can you tell a Wheatland hop from any other hop by looking at it? A. You cannot be sure of it. You can be reasonably sure.

"Q. They have certain more or less marked characteristics, each locality, as between them? A. Well, I cannot say that it has. You can tell in a general way.

"Q. Cannot you easily tell a Sonoma county hop from the Sacramento Valley hop? A. No—no, sir.

"Q. Isn't there a distinct difference in color? A. No—difference between some of them.

"Q. There is no such general and uniform difference as to enable you to distinguish between them? A. No, the one runs into the other. You cannot tell. One kind of a hop runs into another

kind and you cannot tell them—not to be sure about it.

"Q. Well, now, these samples that you examined this morning, were they of choice hops? A. Yes, sir.

"Q. Did you examine them for lupulin? A. Yes, sir.

"Q. Did you examine each sample for lupulin? A. Oh, I didn't examine them carefully—just saw the samples and took a look at them.

"Q. And that, of course, means without particular or detailed examination? A. Yes, knowing the hops and seeing them again, I know all there was to be known about the hops before I looked at them, and I simply looked at them again.

"Q. Well, the aroma therefore was not so good as it was when they were shipped? A. It was just as good as when they were shipped, subject to the ordinary deterioration from age.

———

"E. CLEMENS HORST, heretofore called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

"Cross examination (continued) by Mr. Alling:

"Q. Exhibit 1, I take it, is a contract which was negotiated by your agent in the east? A. It was negotiated by Mr.—I don't know his name.

"Q. Phleger? A. Mr. Phleger.

"Q. He was an agent of yours? A. He was an employe.

"Q. Yes, and do you know where this contract was made? A. Well, the correspondence shows.

"Q. Do you know where it was made? A. Only

from what appears on the page of the correspondence.

"Q. It was, as a matter of fact, made back in New Jersey, was it not, by Mr. Phleger? A. I beg your pardon.

"Q. It was, as a matter of fact, made back in New Jersey, was it not, by Mr. Phleger?

"Mr. Harrison: Show him the exhibit, please.

"Mr. Alling:

"Q. By Mr. Phleger. A. Well, I don't know any more than appears on the face of it.

"Q. Do you know whether it was mede here or not; well that contract that you have in your hand, that you refer to as Exhibit 1, that was signed in the east, that was not signed in San Frncisco That is what I was getting at, and sent to you by Mr. Phleger. A. Yes, sir.

Q. What was his duties in the spring of 1914? A. To act under my directions, whatever directions I might from time to time give him.

"Q. What was he doing in the east? A. Acting under my direction.

"Q. Was he selling hops for you? A. He was selling hops under my direction.

"Q. Was he doing anything else besides selling hops in the month of March, 1914? A. That is about all.

"Q. Travelling from place to place soliciting orders and contracts? A. He was travelling from place to place under my directions.

"Q. Soliciting orders and contracts for hops? A. Doing all those things under my directions.

"Q. I say soliciting orders and contracts for hops? A. Soliciting offers, yes.

"Q. Orders, was he soliciting orders for hops? A. Well, he would solicit the offers and then the offers would be transmitted to me and if I thought it advisable I would accept them.

"Q. Was he soliciting contracts? A. In the same way as I have already mentioned.

"Q. Was there any communication between you and Mr. Phleger concerning this contract prior to its execution? A. I don't think so.

"Q. His presence in the east in the spring of 1914 was for the purpose of selling what hops he could, was it not? A. Well, I have tried to explain that; he would travel under my directions and get offers for hops and when he would get the offers, he would transmit them and we would accept the offers, if we thought they were good offers, satisfactory offers.

"Q. He didn't solicit orders at all. A. Well you might say that he solicited orders; he solicited offers.

"Q. I see, offers. A. He couldn't close any sales without my authority.

"Q. But he was in the east for the purpose of trying to dispose of hops for your company? A. Yes, in that method that I have outlined.

"Q. You have stated, as I remember, that the various letters and telegrams and copies of letters and telegrams which have been introduced or offered as exhibits, represent all of the correspondence between your company and the defendant, that is true, is it? A. Yes, sir.

"Q. I show you Exhibit No. 23 (handing paper to witness) and ask you whether or not that is a copy of a letter written in accordance with what you just testified as to necessary confirmation by you of the memorandum contract signed up by Mr. Phleger with the defendant. A. Well, that is one of the confirmations. I believe there were two

confirmations. One was sent from New York and one was sent from San Francisco.

"Q. Does exhibit No. 24 represent the other confirmation (handing paper to witness)? A. Yes, sir.

"Q. Now the date of the contract which is marked Exhibit 1, on its face, is March 26th; the date of the confirmatory letter from New York or the copy of the confirmatory letter from New York, which is marked Exhibit No. 24, is also March 26th; the date of the second confirmatory letter copy of which is marked Exhibit No. 23 is April 1st. I presume that the letter of April 1st was written on account of your not knowing that the contract had already been confirmed from New York? A. Well, I don' recall just why it was written.

"Q. You regard this Exhibit No. 24, the letter written from New York as a confirmation of the contract? A. I regard them both as confirmations of the contract.

"Q. Well, that is not the question, Mr. Horst. Repeat the question.

"(Pending question read.)

"Mr. Harrison: I object to that question on the ground that the letter speaks for itself as to whether or not it is a confirmation. The witness may answer the question, however, if he desires?

"Mr. Alling:

"Q. What is your answer? A. I regard that as a confirmation of the contract and I regard the subsequent letter from San Francisco as a confirmation of the contract.

"Q. Well, if the Exhibit No. 24 of date March

26th was a confirmation of the contract, the subsequent confirmation was not necessary in order to make it a contract, a binding contract, was it?

"Mr. Harrison: I object to that on the ground it is purely argumentative and calls for no statement of fact. The witness may answer if he so desires.

"Mr. Alling: Read the question.

"(Pending question read.)

"A. If the first letter was sufficient to confirm it, the second letter was not necessary.

"Q. Was the first letter sufficient to confirm it? A. I think so.

"Q. Is the signature of the person who signed for the E. Clemens Horst Company the confirmatory letter of March 26th in Exhibit 24, the signature of the same person who signed the contract for your company? A. Yes, sir.

"Q. Now, you stated previously in your examination that subsequent to the repudiation of his bid by the person who bought those hops from the warehouse company when they were offered for sale, the warehouse company verbally offered to let your company take them for the amount of charges and that you offered to pay that amount if they could give title or bill of sale and that they refused to give bill of sale; that is right, isn't it? A. Well, you don't state—I don't think you state the question in accordance with the facts, or in accordance with my testimony. I will be very glad to——

"Q. Well if that is not a correct representation of your testimony, wherein is it incorrect?

"Mr. Harrison: Read the question.

"(Pending question read.)

"Mr. Alling: Now wherein is that an incorrect statement of what you testified to?

"A. Just read the first part. The question is in several parts. I will answer the various parts separately.

"(The pending question was read as follows: 'Now you stated previously in your examination that subsequent to the repudiation of his bid by the person who bought those hops from the warehouse company when they were offered for sale, the warehouse company verbally offered to let your company have them?')

"A. The company didn't offer to let us have the hops. They offered to sell us the hops, which is a difference between letting us have them. There is a difference between letting us have them and selling them to us. They offered to sell them to us.

"Mr. Alling: Q. For the amount of charges? A. For the amount of charges, or for approximately the amount of the charges,

"Q. Now, I understood you to say—— A. Now there is another part to the question.

Q. Well, I am going to split it up.

"Mr Harrison: The witness may answer the question fully if he desires.

"The Witness: I would like to answer the question first.

"Mr. Alling. Q. All right. Go ahead.

"(The remainder of the previous question was read as follows: "——for the amount of charges and that you offered to pay that amount if they could give title or bill of sale, and that they refused to give bill of sale; that is right, isn't it?")

"A Now, it was not a case of their giving title of bill of sale because it was not optional with the warehouse company to give us either title or bill of sale. It was a proposition of their giving us a bill of sale and at the time that these negotiations were going on with the warehouse, it was our understanding that if somebody else would pay to the warehouse a price higher than the amount on which they were negotiating with us, we understood that the other parties would get the hops.

"*Mr. Alling:*

"Q. Well, you were willing to pay te amount out of the charges, that is, buy the hops for the amount of the charges if they would give bill of sale. A. We were willing to buy the hops for the amount of the charges if they gave us a bill of sale, and had previously in writing notified both the railroad company and the warehouse company that we had no ownership whatever in the hops.

"Mr. Alling: Read that answer.

"(Answer read.)

"The Witness: Instead of 'and had' 'we had previously notified.'

"Q. 'And we had?' A. No, it is not 'and we had,' it is 'we had.'

"Q. All right. A. The two are not connected.

"Q. You say you were willing to buy the hops for the amount of the charges; did you offer to buy the hops for the amount of the charges; did you offer to buy the hops for the amount of the charges? A. Yes, we did. They offered to sell them to us for the amount of the charges and thereupon we offered to buy them for the amount of the charges.

"Q. Was that offer verbal? A. Yes, sir.

"Q. Who made it? A. I made the offer.

"Q. To whom did you make it? A. To both the railroad and to the warehouse people.

"Q. What is the name—— A. But I made the offer.

"Q. ——of the person to whom you made it? A. I didn't personally carry on all of the negotiations.

"Q. But you made that verbal offer? A. I made the verbal offer through our Mr. Settle. I instructed Mr. Settle to make that offer.

"Q Yes. Did you go any farther than merely offering to buy them? A Yes.

"Q. Did the negotiations go any further than that? A. Yes, the negotiations went further and then they came to an end.

"Q. What was done over and above—beyond and after you made the offer to buy the hops for the amount of the charges? A. Well, we bought the hops and the warehouse company promised to give us a bill of sale as soon as we sent them the check for the hops. We sent them a check for the hops and the bill of sale didn't come the next day, so we called for the bill of sale and after a few days —a few days thereafter they declined to give us a bill of sale and they said they couldn't give us a bill of sale and then the warehouse people wanted to consider that simply as the payment of the freight charges without regard to bill of sale and to that proceeding we protested to both the railroad and the warehouse and called to both the railroad and the warehouse and caled their attention to our previous correspondence.

"Q. Did you stop payment on your check? A. It was too late to stop payment on the check.

"Q. You tried to, didn't you? A. I am inclined to think we did try to stop payment on the check. Yes, we did try to stop payment on the check. . .

"Q. But it has been already paid? A. No, it

had not been paid. It had been paid by us to the warehouse but the warehouse had not paid the railroad and the railroad notified the warehouse that they would not accept the money from the warehouse.

"Q. And did you try to stop payment at the bank? A. We tried to stop the check at the bank, yes.

"Q. And were unable to do so? A. We were unable to do so.

"Q. So the warehouse company has got your money now? A. Yes, sir, and they have got the hops.

"Q. Have you ever applied for the hops? A. No, we have never applied for the hops. We tried to recover our money.

"Q. What steps have you taken to recover your money? A. Well, interviewing the railroad to get the money. We have had it up continuously from the time that the money was paid.

"Q. How much did you pay the warehouse company at that time? A. I believe the amount was about $600 or $700, something in that neighborhood.

"Q. You have the cancelled voucher check? A. Yes, sir.

"Q. I will ask you to produce that. A. Yes, sir, I will be glad to.

"Q. You spoke of certain correspondence. A. Yes, sir.

"Which passed between you and the warehouse company and you and the railroad company concerning those hops? A. Yes, sir.

"Q. You have that? A. Yes, sir.

"Q. And carbon copies of the letters which you wrote them? A. Yes, sir.

"Q. And the originals which they wrote you? A. Yes, sir.

"Q. Will you produce that correspondence? A. Yes, sir.

"Q. All of it at the next session? A. Yes, sir.

"Q. Now, Mr. Settle, I understand was the gentleman through whom your initial negotiations were conducted concerning the purchase of the hops for the amount of the charges? A. He conducted part of those negotiations, yes.

"Mr. Alling: Mr. Settle is to be——

"Mr. Harrison: I believe so, I am not sure whether he will be available, Mr. Alling. He is one of the witnesses named in the notice.

"Mr. Alling: I see.

"Q. Now, where was the diverting of this shipment of hops arranged for? A. In San Francisco.

"Q. I assume that you personally don't attend to matters of that kind? A. I give the directions.

"Q. I know, but you personally would not be the one who executed those matters; what I am trying to get at is, who is, you know (handing paper to witness)—who handled that original bill of lading in which the defendant is named as consignee? A. Well that would come under Mr. Zipfel's head.

"Q. I see. A. He would do the——

"Q. Yes. A. ——detail work.

"Q. I see; you personally don't know anything about that particular document which I show you? A. Well, any more than I know that is the bill of lading for the shipment.

"Q. Yes, but you didn't have anything to do with having it issued or forwarding it to the defendant? A. Why, yes, I had to do with issuing it and forwarding it to the defendant.

"Q. Well. you know the signature? A. Yes.

"Q. And you recognize the signature? A. Yes, sir.

"Mr. Alling: Miss Lawrence, I will have you mark this, if you will. Defendant's Exhibit A for identification."

Mr. Stamler: We will mark that for identification.

Mr. Twining: Why do you not put it in?

Mr. Stamler: We cannot do that without your consent.

Mr. Twining: You can have my consent.

Mr. English: It is in already—P37.

Mr. Stamler: You put it in the other day.

Mr. Twining: I will consent to its going in now.

Mr. English: All right, it is offered in evidence. It is the paper referred to in the deposition as Defendant's Exhibit A for identification. It is already marked in the case at an earler hearing as Exhibit P37—the paper being a bill of lading over the Southern Pacific Railroad, dated September 12, 1914, for 100 bales of hops, machine compressed, lot No. 13, bales 500 to 599 inclusive.

(Paper referred to is marked Ex. P37.)

"Mr. Alling: Make it just defendant's identification 'A'.

"Mr. Harrison: Your idea is that—

"Mr. Alling: I am not going to have it made a part.

"Mr. Harrison: Oh yes.

"Mr. Alling: I simply want to have it identified.

"Mr. Harrison: Exhibit for identification, isn't that it?

"Mr. Alling: Well I don't want to make

it an exhibit with this deposition: defendant's identification A. You might mark that defendant's identification 'B'."

Mr. Twining: Now, if your Honor please, I should like to see that defendant's identification B. It is not attached to the depositions; it must be in their files. I do not know what it is.

Mr. Stamler: Suppose we reserve this for awhile? We will try to locate it.

Mr. Twining: Inasmuch as it was marked for identification, I should like to see it.

Mr. English: We should, too. It is apparently a copy of identification A.

Mr. Stamler: We will try to locate it.

Mr. English: (Reading):

"Mr. Alling:

"Q. Now I show the document marked defendant's identification A and ask you whether or not that is the original bill of lading which you secured from the railroad company at the time the shipment represented by original bill of lading—

"Mr. Harrison: That is a copy.

"Mr. Alling: That is a copy of that (indicating).

"Mr. Harrison: Yes.

"Mr. Alling: This is the one I want.

"Mr. Harrison: You want the exhibit.

"Mr. Alling: Yes, read that question.

"(Pending question read.)

"Mr. Alling: Q. ——a copy of which is in this case as Exhibit 26.

"Mr. Alling: Read it again.

"(Question read as amended.)

"Mr. Alling: Q. ——was diverted and consigned to the defendant?

"A. Well, I don't know whether there is any catch in the question.

"Q. Not at all. A. Because you have already been advised that the diversion took place subsequent to the date of the bill of lading and the date of the bill of lading is the date that the shipment originally left the shipping point and therefore when a diversion is made, the railroads always put on the bill of lading not the diversion date, but the date of the original shipment.

"Q. Well—— A. The date that it leaves the original shipping point.

"Q. Well, we will get at it in another way. That bill of lading which is marked Defendant's Identification A is an original bill of lading, is it not secured by your company from the railroad company? A. Well, it is an original bill of lading, but that does not mean to say that there may not have been another original bill of lading prior to that time.

"Q. Yes, I am coming to that. A. This is the original bill of lading issued at the time of diversion.

"Q. I see. A. But dated as of the date that the hops left the shipping point.

"Q. The hops referred to in the original bill of lading which you have in your hand, marked defendant's for identification A, are the same hops that are represented by the bill of lading, a copy of which is in this case marked Exhibit—what is it, Exhibit 26, is it? A. Exhibit 26.

"Q. Yes.

"Mr. Harrison: 26.

"A. Yes, but the Exhibit 26 is the bill of lading that was issued at the time the hops were destined to Chicago.

"Mr. Alling:

"Q. Surely, surely. A. And subsequently the destination was changed to Elizabeth and a new original bill of lading, identification A was issued.

"Q. Yes, with the defendant as consignees? A. With the defendant as consignees; that is the regular practice of our business of shipping the goods to Chicago and diverting them in transit.

"Q. I simply wanted to have this identified, is all; and this original bill of lading marked defendant's for identification A, was I presume mailed to the defendant? A. Yes, I presume so. I can tell by the correspondence.

"Q. Yes. I show you plaintiff's Exhibit 4 (handing paper to witness), and ask you whether or not the original bill of lading named and referred to in that letter is this document which has been marked defendant's for identification A? A. Yes, sir.

"Q. And is the invoice marked defendant's identification B (handing paper to witness) the same as that referred to—the same as the invoice referred to in this letter marked Plaintiff's Exhibit 4? A. Well, yes, excepting that at the time that we sent this invoice, it didn't have the notation that is upon the back of the invoice as follows: 'Received in good order,' and signed by Hubach, evidently one of the people connected with the consignee."

Mr. English: The paper referred to in the deposition as identification B is the same as Exhibit P5 A in this case.

Mr. Twining: That is right.

Mr. English: Now, I shall skip lines 10 to 20, Mr. Twining. It is simply a colliquy between counsel. That is on page 111. I shall go on at line 21 on page 111.

(Reading):

"Q. Now, you have identified all these letters and all these copies of letters. Take Exhibit No. 2; did you dictate that letter (handing paper to witness)?"

Mr. Twining: This is objected to, from page 111, line 21, to page 116, line 23. The testimony here relates to the authenticity of the letters sending the samples, and, under my view of the case, testimony with reference to the samples, whether or not they were sent or what they contained, is immaterial, because it relates to the quality or to the provisions of the contract requiring an approval sample, which, I think, is immaterial under the issues now being tried.

The Court: I shall reserve the question as to materiality, and give you the right to an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"A. I want to say that I have identified all those letters that I have identified, but I don't know what you mean by 'all these letters.' I don't know what letters you have got before you.

"Q. I refer to the letters which have been introduced and marked as exhibits? A. Yes, sir.

"Q. Did you sign it? A. No, sir. It is signed in typewriter.

"Q. You notice the letter 'L' under the typewritten signature? A. Yes, sir.

"Q. What does that represent? A. It represents one of my employees, Mr. Lange.

"Q. What capacity was he employed in, in August, 1914? A. General duties.

"Q. Of what nature? A. Anything I instructed him to do.

"Q. Well, what were you in the habit of using him for? A. Well, as I say, general duties.

"Q. Well, Mr. Horst, be a little more explicit unless you want to dodge. A. I don't want to dodge. I couldn't tell you myself what his general duties are. He works in the office or does any or all kinds of work in every department of our business.

"Q. What were his duties, clerical? A. Yes, sir.

"Q. Bookkeeper? A. He does bookkeeping, and other work.

"Q. Secretary? A. Yes, sir.

"Q. Typewriter? A. Yes, sir.

"Q. Does he do your typewriting? A. He does some of it.

"Q. Does he sign your letters? A. Some of them.

"Q. Does he dictate some of your correspondence? A. Yes, sir.

"Q. Does he have charge of your correspondence when you are not there? A. No, sir.

"Q. Who does? A. I do myself.

"Q. When you are not there, I say? A. When I am not there I attend to it myself anyhow.

"Mr. Harrison: You mean not there, you mean not in San Francisco.

"Mr. Alling: Yes.

"A. When I am not in San Francisco I have the mails forwarded to me and I attend to the answers to the letters.

"Q. None of the business correspondence of the E. Clemens Horst Company is opened during your absence from San Francisco, but all forwarded to you wherever you may be? A. No, the letters are

opened during my absence, but the answers to the letters, the contents of anything that requires attention out of the regular routine, is passed on to me and I dictate the answers.

"Q. Who opens that mail in your absence? A. The office boys.

"Q. Who?

"Mr. Harrison: Do you want the names of the office boys?

"Mr. Alling: Sure.

"A. I have three or four office boys. I don't know their names. I can get them for you.

"Q. And who is it that determines which of the letters that are opened should be forwarded to you when you are absent? A. Well, my bookkeeper, Mr. Yandell, some letters, any one else in the office might.

"Q. Is any one in charge of the office when you are not there? A. Mr. Yandell is in charge of the office when I am not there. But he again works under my direction.

"Q. Who looks after the mailing of the samples? A. The mailing of samples?

"Q. Yes. A. Mr. Zipfel.

"Q. Where is your office located? A. 150 Pine Street.

"Q. You have a warehouse in the city? A. No, sir.

"Q. All your samples are carried at 150 Pine Street? A. Yes, sir.

"Q. Forwarded to you from your various ranches? A. Yes, sir.

"Q. Now in mailing samples, do you mail a full sample as it comes to you from your ranches, or do you mail a less quantity? A. We keep a duplicate.

"Mr. Alling: Read that question. It is hardly an answer.

"(Pending question read.)

"A. We always keep a part of the sample that we send out, that is, if we have a given sample, we send part of it out and keep part of it.

"Q. Did you at the time know anything about the sample which is mentioned in the copy of the letter which is marked Plaintiff's Exhibit 2 (handing paper to witness)? A. Well, I can give you any data about it.

"Mr. Alling: Read the question Mr. Stenographer?

"(Pending question read.)

"A. Yes, sir.

"Q. Did you see it on the 29th day of August, 1914? A. Yes, sir.

"Q. Examine it? A. Yes, sir.

"Q. As a rule are hops worth more in August than they are later in the year? A. There is no rule about it at all. Sometimes they are and sometimes they are not.

"Q. Well, isn't it generally true that the early hops are worth more? A. There is no 'general' about it.

"Q. Aren't the prices ordinarily higher in the early stages of the harvesting than they are later on? A. No, sir, it is as often one way as it is the other.

"Q. It was not in 1914? A. No, sir.

"Q. The price was higher in August than it was at any other—during any other portion of that year? A. No, I think it was higher in July.

"Q. You weren't offering any 1914 hops in July, were you? A. Yes, sir.

"Q. You were selling hops of the 1914 crop of July in 1914? A. I don't know that we were selling any, we were offering them.

"Q. Well, there were not any to sell, were there; you were offering future deliveries, but you weren't offering hops ready for shipment in July, were you? A. I don't think we had any hops in July, 1914, but I am not sure. We have harvested hops in July.

"Q. Did you in 1914? A. I am not sure about the exact date, but it is possible that we harvested hops the end of July, 1914.?

"Q. Well, hops were higher in July than they were in August in 1914? A. That is my recollection now.

"Q. And higher in August than they were in September? A. That is my recollection.

"Q. And as you have testified, they continued to go down until December at least, when they stopped there or they rallied somewhat? A. I don't know whether they rallied in November or December; somewhere around that neighborhood.

"Q. So that in 1914 early hops were more valuable than hops sold later on, early sales; you got more money for them? A. The prices that were obtained in August were higher than the prices obtained in November.

"Q. Do you keep track of the Coast acreages from year to year in connection with your business as dealer in hops? A. In a general way, yes.

"Q. How did the Coast hop acreage for 1914 compare with that of 1913 ? A. It was larger than 1913 and 1912—a little larger in 1914 than 1913.

"Q. How did the acreage for the 1913 crop compare with the acreage for the 1912 crop? A. The acreage was a little larger.

"Q. Your harvesting continued from about the 1st of August until about the middle of October, did it not? A. My harvesting?

"Q. At Wheatland I mean? A. Until when?

"Q. At Wheatland, how long did your harvest last? A. It lasted about three weeks.

"Q. In 1914? A. Three or four weeks.

"Q. Were the hops that you grew on the Wheatland ranch, all of the same variety? A. Yes, sir."

Mr. Twining: Now, if your Honor please, object from page 117, line 1, to page 138, line 4. The testimony appearing between those pages relates to the variety and quality of the hops, and, under my view of the case, that is immaterial.

The Court: I shall hear it, subject to your objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Mr. Harrison: That refers to the crop of 1914?

"Mr. Alling: Yes.

"Q. Is there any difference in ths varieties which growers grew in 1914 in California? A. Generally speaking there is no difference; there are some different varieties grown.

"Q. And there were in 1914? A. Yes.

"Q. Can you name them? A. We have a government station on our Wheatland ranch, United States government station, and we have been testing out a lot of different varieties in co-operation with the United States government.

"Q. Well I mean were the growers using more than one variety in 1914 in California? A. Generally no—generally not.

"Q. The variety which the growers were so practically uniformly using in 1914, was it known by any name? A. Well, generally speaking them they call them English Clusters. That is what they generally call them.

"Q. You produced only one grade of hops on the Wheatland ranch in 1914, I understand. A. On the Wheatland ranch we produced only one kind of hops except the government experimental plots.

"Q. Yes, one variety, but my question went to another matter: is it true that you produced only one grade of hops on the Wheatland ranch in 1914? A. Substantially yes.

"Q. All the hops you grew with the exception of a few bales were of one grade? A. Yes, sir.

"Q. What did you mean when you said in your letter, a copy of which is marked Plaintiff's Exhibit 2: 'By this mail we are sending you for selection against your contract with us, sample marked No. 1, representing 100 bales new crop early variety hops.' What did you mean by the words, 'early variety'? A. Those mean hops that matured early.

"Q. Did that represent the single variety that all California hop growers raised in 1914? A. Yes, excepting that some hops mature earlier than others. It depends upon the way you handle the hops in the field.

"Q. Then the early variety as used here, related not to the variety of hop grown, but to the early maturity due to proper cultivation? A. Well it is due to different cultivation. The late variety would also be proper cultivation.

"Q. Different cultivations? A. Different method of cultivation.

"Q. Were all your hops on the Wheatland ranch cultivated in accordance with the method calculated to produce early maturity? A. No, sir.

"Q. What proportion of your Wheatland ranch was so cultivated as to produce early maturity? A. Well we always cultivate a part of it to mature early and a part of it to mature at the normal time and a part of it to mature at the late time, but all of those maturities will run within three or four weeks. The idea is so that you will have all mature hops during the season, so you won't have over ripe hops or immature hops.

"Q. Now how much of your Wheatland ranch in 1914 was so cultivated as to produce an early maturity? A. Well I couldn't give you those figures offhand.

"Q. Well approximately what proportion of the ranch, a third? A. Somewhere in that neighborhood.

"Q. And was approximately a third cultivated in such a manner as to produce normal maturity? A. Well, I couldn't give you the figures. It might be a third. it might be a sixth, I don't know offhand.

"Q. There was a portion of your ranch cultivated in a manner calculated to produce late maturity in 1914? A. Why that is the regular method of hop growing?

"Q. I see; now you say there is a difference of some weeks; about what difference would there be in point of time between the maturity of the earlier hops and the maturity of hops cultivated to mature normally? A. You can string them along three or fours weeks and make a difference of three or four weeks in the maturity.

"Q. How much time was there between the maturity of those two sections of your crop on Wheatland ranch in the year 1914? A. I told you it took about three or four weeks to harvest the crops and all of the hops were matured.

"Q. Then all three sections would mature within that three or four weeks? A. Yes.

"Q. Pardon me, I understood you that that was the difference between the sections. I got that idea, that is why I asked that question. What do you mean by very rich in soft resins; what are soft resins, what do you refer to—— A. The resins are——

"Q. ——as soft as resins. A. Soft resins are those that are soluble in petrolic ether.

"Q. Is that a quality discernible to the eye? A. No, sir.

"Q. Does it take some kind of laboratory test to determine that? A. No, sir.

"Q. How is it determined? A. Well if you how the hop is dried, you know that a larger proportion will be soluble in petrolic ether by one method of drying than by another method and these hops were dried by the best method of drying.

"Q. Then you judged as to their having this quality solely by reason of the method of drying them which you employed? A. Well we know that hops were fully matured, we know the hops were dried at minimum temperatures and therefore we know that they are rich in soft resins, that is, in the soluble resins.

"Q. Did you personally superintend the mailing of the sample marked number one, referred to in Plaintiff's Exhibit No. 2? A. Yes, sir.

"Q. You mailed it yourself? A. I didn't put it in the mail box myself, no, I simply instructed the sample to be mailed.

"Q. You didn't address it did you? A. No, sir.

"Q. Do you know who did address it? A. No, sir.

"Q. To whom did you give the instructions that it be mailed? A. To Mr. Zipfel.

"Q. On the same day this letter was written? A. On that day or thereabouts?

"Q. Have you any personal recollection concerning giving those instructions or are you assuming that you gave them from the fact that the mailing of the samples is referred to in this letter? A. Well I am assuming the fact that they were mailed because they were mailed.

"Q. But you say you didn't mail them? A. And I am assuming the fact that I gave the instructions because that is in the regular line of my duties.

"Q. I see; but you have not now in your mind a present recollection of the incident? A. I have in my mind a recollection of directing that the samples be sent to the Peter Breidt Brewing Company.

"Q. And those directions were given to Mr.—— A. Zipfel.

"Q. ——Zipfel; did you give more than one direction, did you give Mr. Zipfel or to anyone else directions at more than one time concerning these samples? A. Concerning that particular sample?

"Mr. Alling: Read the witness's last answer.

"(Answer read.)

"Mr. Alling: No, read the witness's answer to the last question and you will see what this question means.

"(Question and answer read as follows: 'Q. ——I see; but you have not now in your mind a present recollection of the incident? A. I have in my mind a recollection of directing that the samples be sent to the Peter Breidt Brewing Company.')

"*Mr. Alling:*

"Q. Now, Mr. Witness, remembering your use of the plural, did you give directions as to these samples at more than one time to anyone? A. Not on that particular sample, no.

"Q. But you used the word 'samples,' you used it in the plural and I want to know whether you gave more than one set of directions? A. Well there was another set of samples.

"Q. I see; well now, were directions given as to all three of these samples at the same time? A. No, sir.

"Q. Or did you give directions at different times? A. No, I gave directions at different times.

"Q. Now from what number lot was sample number one taken? A. I can't tell you at this minute. I can find out for you.

"Q. You can't say as to whether that sample was taken from lot number thirteen? A. Well, I am satisfied it was not taken from lot thirteen.

"Q. That is, sample number one? A. No, I don't know from which particular lot of hops that the sample was taken.

"Q. Now I show you plaintiff's exhibit number three (handing paper to witness) and ask you if you dictated that letter, or the letter of which that is a copy? A. No, I didn't dictate it.

"Q. Was it dictated; you didn't typewrite it, did you? A. It was dictated, but I say I didn't dictate it.

"Q. Do you know who did? A. Mr. Settle.

"Q. What position did Mr. Settle hold with your company in September, 1914? A. General duties.

"Q. Clerical in nature? A. Yes, sir.

"Q. Was he a bookkeeper? A. No, sir.

"Q. What did you require him to do? A. Anything I told him.

"Q. Well please answer the question, Mr. Horst. A. Well we haven't got a department store so that each man does one particular line of business.

"Q. Well it only takes—— A. We all have varied duties.

"Q. Yes. A. And the duties of the different employees overlap, that is, they all do one another's work.

"Q. Yes. A. It is not mixed up into different departments.

"Q. I don't want to extend this record and it will depend upon the witness as to whether I have to. You say Mr. Settle did anything you asked him to. What did you require him to do? A. Write letters.

"Q. Do anything else? A. And make arrangements for shipping and send out offers for hops; in fact, pretty much everything that would be done in a business office outside of keeping books.

"Q. I see; he conducted certain portions of the correspondence? A. Yes.

"Q. Where is Mr. Settle? A. In San Francisco.

"Q. Will he be here to-morrow? A. I don't know.

"Q. He is usually in your San Francisco office? A. Yes, sir. He goes out of town occasionally.

"Q. Do you intend to take Mr. Settle's deposition?

"Mr. Harrison: I object to that on the ground——

"A. I intend to take it if it is necessary.

Mr. Harrison: I object to that on the ground that the management of this case is under the direction of the witness's at-

torney. I will state that if we find it necessary to call Mr. Settle we will try and have him here.

"Mr. Alling: Well, will Mr. Settle's deposition be taken if I desire it, if the defendant desires it?

"Mr. Harrison: Do you wish to take his deposition as your own witness?

"Mr. Alling: No, no.

"Mr. Harrison: If we have any question to put to Mr. Settle, we will try and get him here. I don't suppose you want all this to go in the record, do you?

"Mr. Alling: No.

"Q. Did you see samples Nos. 2 and 3 referred to in plaintiff's exhibit No. 3, before they were sent by mail to the defendant? A. Yes, sir.

"Q. Were you in the San Francisco office at the time this letter, exhibit three, was dictated? A. I believe so.

"Q. Were those samples sent to the defendant, samples 2 and 3, on your instructions? A. Yes, sir.

"Q. Was this letter dictated in accordance with your instructions? A. Yes, sir.

"Q. Do you know from what numbered lot of hops, samples 2 and 3 were taken from? A. I don't know at this time.

"Q. Was sample number one, referred to in plaintiff's exhibit 2, taken from bales raised on the Wheatland ranch? A. I don't know at this time. I can find out for you.

"Q. Were samples number 2 and 3, referred to in plaintiff's exhibit 3, taken from bales of hops raised on your Wheatland ranch? A. I don't know, but I can find out for you.

"Q. Were you in the habit of sending samples

to contract customers from one lot and making shipments of an entirely different lot under that contract? A. Why, yes, if they are the same type of hops.

"Q. At the time you mailed samples 1, 2, and 3, referred to exhibits 2 and 3, did you have on hand samples of lot number 13? A. I can't tell you for sure at this time. I can find out for you.

"Q. I will ask this question; of course I assume you can't answer it now, but I will ask you at some other time to give the information: when did you receive at the San Francisco office samples of lot number 13? A. I will get you the information.

"Q. Now did you consign any hops in the year 1914 to your company as consignee at New York? A. Yes, sir.

"Q. In the same manner that you consigned lot 13 to Chicago? A. Yes, sir.

"Q. And I take it that those consignments were made with the idea if orders required that they would be diverted in the same manner that lot 13 was diverted? A. Yes, sir, they are all started out with a view of diversion.

"Q. Yes; had you prior to the 4th day of September, 1914, shipped any hops to your company as consignee at New York?

"(Pending question read.)

"Mr. Alling: I had better reframe that question.

"Q. Had you prior to September 4, 1914, shipped any of the crop of 1914 to New York consigned to your company? A. Yes, sir.

"Q. Calling your attention to the first paragraph of plaintiff's exhibit No. 3 and asking you to re-

fresh your recollection therefrom (handing paper to witness), I ask you whether or not samples 2 and 3 mentioned in that letter, were not taken from lots other than lot 13? A. Well, they may have been taken from lot 13, they may have been taken from other lots. When the shipment is on the way to Chicago, it is on the way to New York. I don't attach any point to that question.

"Q. Well, this is true, is it not, that samples 2 and 3, referred to in exhibit No. 3, were taken from lots which had been shipped prior to September 4th, the date of the letter? A. Yes, they were taken from lots that had ben shipped before September 4th.

"Q. Well, lot 13 was not shipped until September 12th, was it? A. Yes, but the other lots may have been the same type of hops.

"Q. Well that may be, but it is very evident, is it not, when you consider the date, as well as the statements contained in paragraph one of plaintiff's exhibit 3, that samples two and three, referred to in that exhibit, could not have been taken from lot 13? A. Well, they might not have been taken from lot 13, but taken from other lots identical therewith.

"Q. Yes, that is not the question. Read the question. A. A different number does not mean a different hop.

"Q. That is argument and not an answer to the question.

"Mr. Harrison: Some of the questions are arguments also.

"Mr. Alling: Not this question.

"(Pending question read.)

"Mr. Harrison: I object to the question as argumentative.

"Mr. Alling: Q. What is the answer?

A. Well, I believe I answered that question.

"Q. Did you consider that there was any difference between samples number 2 and 3, mentioned in exhibit number 3? A. Yes, there was some difference, but not difference in the grade. Both of the samples, as well as the previous samples were hops of the contracted quality or better than that.

"Q. What did the difference between those samples consist of? A. My recollection is they showed a difference in appearance, but not of grade.

"Q. In what respect did they differ in appearance? A. Perhaps in color principally.

"Q. You say 'perhaps,' have you any recollection about it? A. My recollection is that they differed a little in color.

"Q. And you thought that the defendant might have a choice between those two samples? A. Yes, sir; if he wanted it. It is not a case of giving him a choice between two samples, it is a case of giving a man anything he wants. Our aim is to give anything a man wants, so long as he wants to take hops. I know when he didn't want to take hops, that the difficulties arise.

"Q. It is stated in the letter marked exhibit 3, 'Please inspect these samples at your earliest convenience and let us hear from you at once, preferably by wire, indicating which of the two samples will be satisfactory against your contract.' Now as a matter of fact when you shipped or diverted 100 bales of hops to the defendant at some time after the 12th day of September and before you have received any response to either your letter of the 29th of August, marked exhibit 2, or your letter of the 4th of September, marked exhibit 3, you shipped the defendant hops that you did not represent either one of the samples enclosed in your latter letter. A. I didn't say that they didn't represent any of the samples.

"Q. Well, the samples enclosed in your letter of September 4th, marked exhibit 3, did not come from lot 13, did they? A. Well, but if they don't come from the sample, that don't mean to say that they are not the quality of the sample, because we don't——

"Q. I am not saying anything about that. That may be all true, but I am asking for the fact. A. Well, I am trying to answer your questions fully and fairly.

"Q. You shipped a lot——

"Mr. Harrison: Well, read the last question to the witness.

"(Question read as follows: 'It is stated in the letter marked "Exhibit 3," please inspect these samples at your earliest convenience and let us hear from you at once, preferably by wire, indicating which of the two samples will be satisfactory against your contract.' Now, as a matter of fact, when you shipped or diverted 100 bales of hops to the defendant at some time after the 12th day of September and before you had received any response to either your letter of the 29th of August marked Exhibit 2, or your letter of the 4th of September marked Exhibit 3, you shipped the defendant hops that did not represent either one of the samples enclosed in your latter letter.")

"Mr. Harrison: Do you want to add anything to that answer?

A. I want to state that simply because a lot is given a certain number that doesn't mean that those hops and only those hops are according to that lot number. There would be many other lots out of the same quality and whether they were shipped

prior to or subsequent to a given date wouldn't change the quality of the hops any, and as far as not waiting for an answer, we had waited much more time than was necessary to get an answer even though we requested telegraphic answer; we waited longer than was necessary to get answer by mail to both of the letters and we got no answer.

"Mr. Alling: All of which is not responsive. That is your record and not mine.

"Q. All of your hops were sampled by lots, were they not? A. They were sampled in 100 bale lots.

"Q. And the samples which you sent to the defendant and which were numbered 1, 2 and 3, were samples taken from some particular numbered lots, were they not? A. I am not sure of that, that they were taken from any particular number of lots; they may have been taken from some bales that had not been numbered up to that time.

"Q. Well, all your crop was classified by lots of a hundred bales, was it not? A. I would not use the word classified exactly. A car ordinarily carries about a hundred bales and carries that quantity continually; consequently we use a different number for every hundred bales for purposes of identification to make the hops fit their respective cars and for the benefit of our records; a different lot number does not mean a different crop.

"Q. But it might mean a different hop? A. It might mean anything.

"Q. As a matter of fact, your hops after being baled, are arranged in hundred bale lots, are they not? A. Yes, they are split up in 100 bale lots.

"Q. And after they have been split in 100 bale lots, each lot is sampled with the tongs and a sample made up from every tenth bale with one or two extras? A. Well, it depends upon what you

mean by 'made up.' They are cut out, they are not made up.

"Q. They are cut out and wrapped up? A. They are cut out and wrapped up.

"Q. Yes, and marked with that lot number? A. Yes, sir.

"Q. Now, if your crop represented more than one grade, no two grades would be mingled in the same lot, would they? A. In the same lot number?

"Q. Yes. A. No, sir.

"Q. And the samples are taken, as I have stated, and you have assented, by lot for the purposes of getting a representation of the quality of that lot? A. For the purpose of keeping our records of that lot.

"Q. And of getting a representation of the quality of that lot? A. Well, we know what the quality of the lots may be before the hops are even baled.

"Q. That is true. A. We know the quality of the hops while we are handling them.

"Q. But if it is not the purpose of ascertaining the quality of the lot, why do you take the sample? A. We take the samples in order to fix the identity.

"Q. Well, the number would fix the identity without the sample. A. But the sample fixes the identity of the quality of the particular lot.

"Q. Exactly. A. But that does not mean that the quality of one lot will be different from the quality of many other lots.

"Q. Certainly not, but the purpose of taking the sample is to give you some data on the quality of that particular lot. A. No, that is one of the purposes, because if that were the only purpose, we wouldn't take samples of the lot.

"Q. Well, why do you take samples, for what purposes do you take samples of the individual lot other than to determine the quality of that lot?

A. To keep a record of the lot itself, so that we can establish the identity of the shipment of hops with a particular sample or with a particular line of samples.

"Q. Well, don't the number establish the identity; do you need a sample of it to establish the identity? A. Why, yes, the sample establishes the identity of that particular lot, even though there are many other lots exactly the same quality.

"Q. Well, you wouldn't judge as to what lot a bale of hops belonged to by looking at the sample and paying no attention to the number, would you? A. No, because the particular sample might have come out of different lots than the particular number.

"Q. So that the sample itself independent of the number gives you no clue as to identity? A. No.

"Q. Then the sole purpose of taking the sample must be to establish and maintain a record as to the quality of that particular lot. A. Well, now, I said that is not the sole purpose.

"Q. What is the other purpose? A. I say to establish that identity of the particular lot with the particular sample, because we might have exactly the same quality in three or four or five or ten or twenty other lots, and if we took only one sample, that sample might not have been drawn from a particular lot on which a controversy might arise.

"Q. I see; so that it is important to have a sample of the particular lot. A. It is desirable to have that.

"Q. Yes; against the arising of a situation just like this. A. An arising over hair splitting, yes.

"Q. Then isn't it as desirable when you ship hops on a contract which provides for approved sample, that you ship from the same lots that you sent samples from? A. I don't say that that is necessary.

"Q. In other words, the sampling then is intended to protect you but not your customer? A. The customer is amply protected in every way under the contract. So long as the customer wants to take hops on his contract, there is no difficulty whatever in satisfying him.

"Q. I see. A. But the troubles arise when the buyer does not want to take any hops, and that is the only case when troubles arise.

"Q. Well, what is the use of sending a customer samples if you are not going to ship the same hops that you sent him the samples from? A. But he didn't approve any samples. There is no way as far as getting approval of samples of them, to make the shipment. If you don't approve any samples, we have got to make you shipment.

"Q. Why didn't you ship the same hops you sent the samples of? A. The identical hops?

"Q. No, the same samples that you sent the samples of. A. Well, I don't see that it is a question of what kind of hops you ship when a man don't want any hops he won5t take any.

"Q. Well, you didn't ship him the hops from the lots from which samples two and three were taken which are referred to in Exhibit 3? A. Well, I didn't say that we shipped him the identical hops or not the identical hops. I said the samples we sent him were equal to or better than the contracted grade, and the hops we shipped him were equal to or better than the contracted grade.

"Q. But the samples which you sent him were not drawn from the bales which you shipped him? A. I believe they were not.

"Mr. Alling: This is a good place to stop."

Mr. Twining: You may skip page 137.

Mr. English: Yes, by consent of counsel, I shall omit page 137, and being again at line 1, page 138 (reading):

"Mr. Alling:

"Q. I failed to make a note of who you testified dictated this Exhibit 3; I think it was Mr. Settle, was it not (handing paper to witness)? A. Yes, sir.

"Q. I show you plaintiff's exhibit 4 (handing paper to witness) and ask you who dictated that. A. Mr. Settle.

"Q. Who signed it, if you know? A. It is a typewritten signature. I do not know whether the original had any further signature.

"Q. Well, can you state whether or no the date of plaintiff's exhibit 4 (handing paper to witness) approximately represents the date of the diversion of that car and issuance of the new bill of lading with the defendant as the consignee? A. The date of the diversion was September 16th, the date of this letter is September 19th.

"Q. I see; what steps were taken in this instance for the diversion of that car from its original destination? A. Well——"

The Court: Just what is meant by "the diversion"? I understand that it is a change from Chicago to Elizabeth?

Mr. English: Yes, sir.

The Court: But what act was the act of diversion? He gives the date of an act that he calls the diversion.

Mr. English: I think they telegraphed their office in Chicago, or something like that.

Mr. Twining: No. This is what happened. They go to the railroad and make arrangements with the railroad to issue a new bill of lading, which is issued under the same date as the original bill of lading, but the

consignee's name is changed from the consignee in Chicago to the consignee in Elizabeth. In this case the original was to the E. Clemens Horst Company, in Chicago.

The Court: You understand that the date of the act of diversion is the date of the arrangement with the railroad company?

Mr. Twining: Yes, sir; the issuance of the new bill of lading by the railroad company.

Mr. English: (Reading):

"Q. Did you in this instance and is it your custom in cases of that kind, to make out a new bill of lading and present it to the railroad company for signature? A. Yes, sir.

"And the original bill of lading mentioned in this letter, which is marked plaintiff's Exhibit 4, was prepared in your office and presented to the railroad company for signature and after being signed was enclosed with this letter to the defendant, I take it? A. Yes, sir.

"Q. And you say that diversion occurred on September 16th? A. Yes, sir.

"Q. By that, do you mean that was the date you presented the bill of lading in which the defendant is named as consignee to the railroad company for signature? A. Yes, sir.

"Q. Now, calling your attention to plaintiff's Exhibit 6 (handing paper to witness); is that a copy or an original? A. That is the original that was sent to the defendant.

"Q. Well, that is not the original memorandum as to weights which came to you from the ranch? A. No, sir.

"Q. Do you know who prepared the document marked Plaintiff's Exhibit 6? A. That was prepared in our office.

"Q. I see. A. In San Francisco.

"Q. That was I suppose taken from original weights as sent you by Mr. Rooney from the ranch? A. Yes, sir.

"Q. And is Exhibit 25 the original memorandum of weights (handing paper to witness) made out by Mr. Rooney at Wheatland and mailed to your office in San Francisco? A. Yes, sir.

"Q. Can you state when that was received at your office in San Francisco, plaintiff's Exhibit 25? A. That was received approximately September 7th.

"Q. I see. A. Or September 8th, or thereabouts."

Mr. Twining: Now, then, I object from line 28, page 139, to line 14, page 141. This testimony included in those pages has to do again with the source of the sample. It appears in this case that one set of samples was sent with a letter dated August 29th and another sent with a letter dated September 4th. Prior to the receipt of any approval of the samples the shipment of the hops was sent forward. So that it seems to me that testimony relating to what these samples contained or from what ranch they were taken, or what the quality of the hops was represented by those samples, is entirely immaterial. The samples cut no figure in this case.

The Court: I shall take the testimony, subject to your objection, and give you the right to an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Well, with reference to the receipt by

your company at its San Francisco office of the original memorandum of weights marked plaintiff's Exhibit 25, when were the samples of lot 13 received at your San Francisco office? A. About the same time that the weights were received.

"Q. Yes, was it usual for Mr. Rooney to send you weights and samples at the same time? A. Yes, sir.

"Q. They usually came together? A. Yes, sir.

"Q. Then if the original memorandum of weights marked plaintiff's Exhibit 25 and the samples of lot 13 were received in your office about September 7th —your office in San Francisco, neither the sample No. 1 refered to in plaintiff's Exhibit 2 being your letter of August 29th, or the samples 2 and 3 referred to in plaintiff's Exhibit 3 being your letter of September 4th, could have been taken from samples drawn from lot No. 13. A. Well, but sample No. 3 was taken from lot No. 11 which was the same day's, or practically the same day's picking as lot No. 13, and lot No. 11 was identical with lot No. 13.

"Q. I see; but it is true, is it not, that none of these three samples were taken from lot No. 13? A. They were identical hops but not taken out of the particular bales.

"Q. None of them taken from any of the bales of lot 13? A. Well, I would like to explain that. We pick on that ranch approximately two or three hundred bales of hops per day.

"Q. Yes. A. And lot No. 11 therefore would be practically the same day's picking as lot No. 13 and the hops of lot No. 11 were in fact identical with lot No. 13.

"Q. Yes. A. Lot No. 11 was identical with lot No. 13 and the particular sample of No. 3 was taken out of lot 11 which was identical with lot 13.

"Q. What lot was sample No. 1 taken out of, do

you know? A. It was taken out of the same crop, but I don't know the lot number. I can get it for you.

"Q. It was not taken out of lot No. 13? A. It was not taken out of the same lot, no.

"Q. And do you know what particular lot sample No. 2 was taken from? A. No, I don't know at this moment. I can get it for you.

"Q. But it was not out of lot 13? A. No, sir.

"Q. Have you copy of the original bill of lading which is referred to in plaintiff's Exhibit 4 (handing paper to witness)? A. Yes, sir.

"Q. Is that a copy? A. Yes, sir.

"Q. Which you are now examining? A. Yes, sir.

"Mr. Harrison: At this point we ask that the copy identified by the witness be marked by the Commissioner, plaintiff's Exihibit No. 27.

"Whereupon said paper was marked by the Commissioner plaintiff's Exhibit No. 27."

Mr. English: Plaintiff's Exhibit No. 27 in the deposition seems to be a copy of the same paper as defendant's Exhibit A now in evidence as Exhibit P37.

Mr. Stamler: That is right.

Mr. Twining: We might as well have P27 marked P27 A, then.

(The paper referred to is marked Ex. P27 A.)

Mr. English: (Reading):

"Mr. Alling:

"Q. I take it that the blue penciling, '8234' is something which was done in your office after the bill of lading was signed? (Handing paper to witness.) A. I don't know what the '8234' refers to.

"Q. You don't know whether that was on the original bill or not? A. I don't know what it refers to. If you care to know about that No. 8234, I can find out for you.

"Q. Well, it is unimportant. Now, I take it that plaintiff's Exhibit No. 5 is the invoice (handing paper to witness) which is referred to and mentioned in your letter of September 19th marked Exhibit 4—a copy of the invoice rather. A. This is marked Exhibit 5.

"Q. I say—read the question, Mr. Stenographer.

"(Pending question read.)

"Q. The letter is four, you know, and invoice five? A. Yes, this is the copy of the invoice the way we sent it, but it is not a copy of the original invoice the way you have it now, in that the original invoice is endorsed, 'Received in good order,' and signed by Fritz Hubach the brew master of the defendant.

"Q. Did you ever meet that gentleman? A. I don't know that I ever met him.

"Q. How do you know he is brew master of the defendant? A. Well, I know that as a matter of fact.

"Q. How do you know it? A. A matter of business knowledge.

"Q. How did you gain it? A. Well, the brewers' directories show that he is the brew master of that brewery.

"Mr. Alling: We move to strike on the ground the testimony as to a person being brew master of the defendant is hearsay.

"Q. Now, calling your attention to plaintiff's Exhibit 5, I note the following appearing upon the face, 'rating 750,000 credit high,' was that on the original bill of lading? A. No, sir.

"Q. And I notice something written under that; do you know what it is? A. Yes, sir.

"Q. What is it (handing paper to witness)? A. Deliver without payment—'deliver bill of lading without payment.

"Q. Was that on the original invoice? A. No, sir.

"Q. Then this is not in all respects a copy of the original; these were endorsements that were made on the copy after the original was sent? A. These memoranda on the copy were put on the copy and not on the original and the endorsement on the original as already referred to, 'received in good order' and signed by Fritz Hubach was not on the original at the time we sent in.

"Q. Naturally; you will get that in sufficiently after awhile. Doubtless the hops were in good order. A. Undoubtedly they were.

"Q. But it may be a question as to whether they were of good quality. The defendant is not complaining of the order in which they were received, but of the quality of the hop when they were shipped. A. Of course the endorsement refers to the quality of the hops when they were delivered.

"Q. It refers to the condition of the hops and not the quality of the hops, as to being damaged in transit, all of which is argument which your attorneys in the east will think is evidence that you haven't much confidence in them to properly argue the case.

"Mr. Harrison: I move that the remarks be stricken out as improper and no relation to the taking of this testimony."

Mr. Twining: Now, if your Honor please, I object from page 143, line 27, to page 184, line 13. This testimony relates again to either the source of the samples or the qual-

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ity of the samples or the quality of the shipment, and it is therefore immaterial, I think.

The Court: I shall reserve decision, and give you the right to an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: By consent, I shall leave out from line 2 on page 144 to line 23 on page 145.

(Reading):

"Q. Between August 29th and September 19th, had you received from the defendant any letter or telegram? A. Between which dates?

"Q. August 29th and September 19th, 1914, had you received from the defendant any letter or any telegram? A. I did not receive any.

"Q. When did you receive the later marked plaintiff's Exhibit 7 (handing paper to witness)? A. On September 22d. What are those former dates that you gave me?

"Q. August 29th and September 19th.

"Mr. Harrison: August 29th and September 19th.

"Mr. Alling: Q. August 29th being the date of plaintiff's Exhibit 2 and September 19th being the date of the letter in which memorandum of weights, original bill of lading and invoice was enclosed; this memorandum three days afterwards. Now, calling your attention to the first line of the letter marked plaintiff's Exhibit 7, 'In reply to your letter S-72962' I will ask you whether the letter referred to there, as being the letter in reply to which plaintiff's Exhibit 7 was written, is not your letter of August

29th, a copy of which is marked Exhibit 2?" Suppose I leave out, by consent, from line 1 on page 147 to line 13?

Mr. Twining: All right.

Mr. English: On line 14, page 147 (reading):

"Mr. Alling:

"Q. I see; do you know where lot 13 was on September 22, 1914, when you received the letter from the defendant marked plaintiff's Exhibit 7? A. It was on the way to the Peter Breidt Brewing Company.

"Q. In transit? A. Yes, sir.

"Q. Upon the receipt of this letter, Exhibit 7, notifying you that the quality of the hops as indicated by the sample sent August 29th was poor and of very little hop flavor, and of the fact that the defendant did not consider it a choice brewing hop and would not accept it on its contract, did you take any steps to recall lot 13 then in transit? A. We did not agree with them in their comments on the hop, nor did we agree with them on their statement that the hops were not choice brewing hops, nor did we sell them choice brewing hops; our contract simply provided for good brewing hops.

"Q. You took no action on receipt of this letter to again divert that shipment? A. No, sir. The documents were out of our hands at that time. The original bill of lading had been sent to the defendant. The bill of lading controls the shipment

"Q. I take it that the purple stamp mark in the lower tighthand corner of Plaintiff's Exhibit 7 with the ink notations within that stamp mark were placed upon the letter after you received it? A. Yes, sir.

"Q. What do the letters 'S,' 'S-75192' indicate?

A. That would be the number of the letter. The 'S' would be the initial of the party that wrote the letter in reply and the number would indicate the number of the letter sent in reply to that letter.

"Q. Yes; well now, does the first 'S' indicate Mr. Settle as the person who answered this letter. A. Yes, sir.

"Q. And 'S-75192' indicates the number of your answering letter? A. Yes, sir.

"Q. You have got introduced as an exhibit in this case, or produced on this hearing, the letter which you wrote in reply to the letter marked plaintiff's Exhibit 7, have you? A. I think I have introduced all the correspondence.

"Q. Now, this may be it; I was misled by the fact that an 'H' is there instead of an 'S,' but it refers to the 24th I notice, and probably that is your answer. A. Yes, now the answer was dictated by me instead of by Mr. Settle.

"Q. I see; Oh, no, that is not, that is another letter."

Suppose I just skip from line 25 on page 148 to line 20 on page 149?

Mr. Twining: All right.

Mr. English: (Reading):

"Q. Now what does the second pen notation there indicate, is that a figure 3 or a letter 'Z'? A. That is a letter 'Z.'

"Q. What does that indicate? A. That is the initial of Mr. Zipfel.

"Q. What does its presence there indicate? A. It shows that his attention was called to the letter.

"Q. And the same thing true with the next letter 'H'? A. Yes, sir.

"Q. Indicating yourself? A. Yes, sir."

Now, by consent, I shall skip from line 1 on page 150 to line 22 on page 150.

(Reading):

"Q. Do you know as to whether a letter was dictated and mailed by your company or anyone connected with it, in reply to the defendant's letter dated September 17, 1914, and received by you September 22, 1914, and marked plaintiff's Exhibit 8? A. No I don't know but I can find out for you.

"Q. I hand you now plaintiff's Exhibit 8 which reports to be a letter from the defendant to your company of date October 12th and ask you to indicate what if anything appearing upon the face of that letter was placed thereon after its receipt by you (handing paper to witness)? A. Well, the rubber stamp showing the receipt of the letter on October 17th, then the memorandum showing that the letters were to be referred to myself, to Mr. Settle and to Mr. Zipfel, and a further memorandum that the letter was answered by me in a letter numbered 75523, and furthermore that the hops arrived at destination and were delivered to the consignee on October 1st.

"Q. The latter being a pencil notation? A. Yes, sir.

"Q. Upon that margin? A. Yes, sir.

"Q. Now who made that pencil notation? A. Mr. Zipfel.

"Q. I will ask you whether or not plaintiff's Exhibit 9, which purports to be a copy of a letter written and mailed by your company to the defendant company on October 17th, is the reply made by your company to defendant's letter of September 12th, marked plaintiff's Exhibit 8? A. Yes, sir.

"Q. You dictated and signed that letter did you not? A. Yes, sir.

"Q. Is the scientific station not scientific? A.

Well, on hops, they don't know any too much about them.

"Q. Do you know more than they do? A. I don't care to make any comparisons.

"Q. They are invidious of course always, but do you consider that you know more about hops than they do? A. I certainly do.

"Q. Did you attach no weight at all to the quoted report made on lot 13 by the scientific station which appeared in defendant's letter of October 12, marked plaintiff's Exhibit 8? A. Absolutely none, excepting that scientific reports carry weight with some people who don't know their own business.

"Q. I see; well did you consider this report of the scientific station to which your attention was called in defendant's letter of October 12 marked Exhibit 8, to be erroneous? A. Certainly.

"Q. Did you consider that that erroneousness was the result of misrepresentation or lack of capacity to accurately judge?

"Mr. Harrison: I object to that on the ground that it is wholly immaterial what this witness thought the motives of a particular other person were. It is entirely foreign to the question of whether the particular criticism was justified or not. The witness may answer the question if he desires and if he knows.

"Mr. Alling: Read the question, Mr. Stenographer.

"Pending question read.)

A. The hop business is not done on scientific station reports. The people that judge hops in scientific stations know nothing whatever about the growing of hops. They make their reports so frequently contrary to the actual quality of the hops

in their brewing use, that nobody ever considers the reports of brewing schools and so-called scientific stations, in the marketing or trading of hops.

"Q. Nobody, not even brewers? A. The trading as done by the hop grower with the hop dealers utterly ignores scientific stations.

"Q. Do buyers utterly ignore scientific stations? A. Absolutely. Nobody pays any attention to scientific stations' opinions on hops.

"Q. Do brewer buyers pay absolutely no attention to the reports of scientific stations? A. Some brewers do go to scientific stations for opinions; large brewers, competent brewers do not go to them.

"Q. Why? A. And pay no attention to them.

"Q. Why, do you know? A. Because the scientific stations' reports on hops are too often of no use or benefit whatever.

"Q. Do you know what their methods are in the examination and testing of hops as a basis for their report? A. Why I am generally familiar with their methods of operation.

"Q. Well what are they; do they make any actual scientific tsets, laboratory tests? A. It is the same rule with which you are confronted in so-called expert testimony.

"Q. You are testifying as an expert aren't you? A. I am not testifying as an expert, I am testifying as a practical hop grower and hop dealer.

"Q. Of experience? A. Of experience, yes, sir.

"Q. Well that makes an expert, that makes an expert witness. Now I repeat my question: Do you know if the scientific stations employ any scientific laboratory tests as a basis for their reports? A. Some do and some don't, and where they do, the tests are unreliable.

"Q. Unreliable by reason of the fact that they are improperly made or unreliable by reason of the

fact that the tests used are no proper tests; which? A. Tests that are used are not commercial tests.

"Q. Well, would hey be proper scientific tests to determine the strength of the hops? A. Scientific tests can be made of the strength of the hops but the unfortunate part is that no two scientific stations proceed on the same theory of determining the strength, and after they have determined the strength by the methods that are used by the scientific station, they are of little or no guide in actual brewing results of the hops so tested.

"Q. Have you ever—— A. ——because——

"Q. Pardon me. A. ——because scientific stations in making tests of strength of hops use petrolic ether in order to determine the soft resins of hops while in the brewing process no petrolic ether is used, in that the hops are dissolved in water and malt and not petrolic ether. Therefore, the results of the investigations or reports of scientific stations are in no way in line with actual brewing result.

"Q. Well, as a matter of fact, those tests will determine the strength of the hop, will they not? A. They will not determine the strength of the hop in the brewing process.

"Q. Well the brewing process may not get all of the strength of the hop by reason of the fact that it is not as searching as laboratory tests, but will not the laboratory tests show the maximum strength of the hops? A. The laboratory tests will not show anything of practical working with the brewing property of the hop.

"Q. Is it not a fact that the laboratory tests will show more strength invariably than the practical results in brewing will show? A. Say that again please.

"(Pending question read.)

A. No.

"Q. Are not the laboratory tests more searching and do they not represent the maximum strength of the hop, while the brewing process invariably results in getting less than the maximum strength of the hop? A. Oh, in going into the matter of the strength of the hop, a man gets into deep water, because the hops that have the minimum strength too often sell for the maximum price. There is no guidance to be had by either the producer or the consumer of hops by submission of hops to scientific stations.

"Q. Are you a brewer? A. I am not a brewer.

"Q. Have you ever been in the brewing business? A. I have never been in the brewing business.

"Q. Do you know anything about brewing? A. I know something about hops. I don't know anything about brewing.

"Q. Now isn't it strength that a brewer is after? A. Sometimes he is and sometimes he isn't.

"Q. Does he ever prefer a hop of little strength rather than a hop of more strength? A. Yes, very often.

"Q. Well, in using a hop of less strength, he will have to usemore hops to get the same result, won't he, than if he used a hop of greater strength? A. Some brewers want hops of small strength.

"Q. How? A. Some brewers want hops of small strength?

"Q. How? A. Some brewers want hops of small strength.

"Q. That is not an answer to the question; in using hops of less strength, in order to get the same results he would have to use more hops, wouldn't he, than if he used hops of greater strength? A. It depends upon what he refers to as the strength. He might want the strength and he might not want the strength.

"Q. I see. A. If hops are too strong——

"Q. Is it as often—— A. I am going to finish that answer, if you please.

"Q. Surely, I never want to cut you off.

A. Some brewers want the preservative property of a hop and not the bitter property and others want the bitter —some brewers want the preservative property of the hop rather than the bitter; others want the bitter rather than the preservative.

"Q. Don't they both—— A. There is unfortunately no standard upon which the seller can count, and there is no standard division of hops in so far as concerns any analytical examinations.

"Q. Do you say that as a brewer or as a seller? A. I say that as one who has made a study of the subject from a disinterested viewpoint.

"Q. As a seller or as a brewer? A. I have already stated from a disinterested viewpoint.

"Q. When did you make that examination from a disinterested viewpoint; at a time you were in the business of selling hops or prior thereto? A. During all the time that I have been in the business.

"Q. I see; and you think your conclusions are disinterested notwithstanding the fact that your interests were all on the selling end? A. My interests are not all on the selling; I buy enormous quantities of hops. I have bought enormous quantities of hops every year for the last 25 or 30 years and I never yet have bought, nor have I known of any other man that trades in hops that ever bought or had been in any way guided by any analytical tests.

"Q. But you have never bought hops to use, have you, you have always bought them to sell? A. I bought them to sell.

"Q. Yes, now, it is a fact is it not that those who use hops, those who put them to use and don't buy

A. I have already answered that, that some do and some don't, and the people that do are generally the people that don't understand their business.

"Q. And the people who understand their business, is it true that they regard the analytical tests and the laboratory tests and the reports of scientific stations as abosolutely worthless? A. They don't consider them as absolutely worthless.

"Q. Well, to what extent for instance? A. You can take any hop that is ever grown and send it to a number of scientific stations and you are sure to get a series of reports to the effect that the hops are no good, I don't care what the hops are.

"Q. I see; well, then, that must be a severe impeachment of either the integrity or the ability of the gentlemen in charge of the scientific stations?"

Mr. English: Now, here is a little upheaval between counsel. I shall leave this out; I shall skip from line 4 on page 158 and drop down to line 18 on page 158.

(Reading):

"Q. Well, then, that must be a severe impeachment of either the integrity or the ability of the gentlemen in charge of the scientific stations? A. Well, all I can say to that is that I have been working for many years trying to get hops to be standardized and to get a rational standard of value, of brewing value of hops, and in that connection the United States Department of Agriculture has been working for many years past and to my mind up to the present time, the position is almost hopeless to get any rational method of valuation of hops.

"Q. Now, you have found the reports on hops made by scientific stations, as you say, generally worthless? A. They are unreliable, I will put it that way.

"Q. Have they generally been adverse to your hops? A. No, sir.

"Q. Well, in the lawsuits you have had over hops, have you generally found the scientific stations arrayed against you on the question of quality?

"Mr. Harrison: The same objection. I instruct the witness he need not answer the question if he doesn't desire to.

A. I can't recall a case where scientific stations have given testimony either for or against me in any litigation.

"Mr. Alling:

"Q. But in the controversy which preceded the lawsuits—controversies which preceded lawsuits, had the reports of scientific stations been unfavorable to the quality of your hops?

"Mr. Harrison: The same objection and the same instructions.

A. Well, if you will tell me any particular cases, I will be very glad to give you full information.

"Mr. Alling:

"Q. Have scientific stations ever reported unfavorably as to the quality of your hops in instances where you have had a disagreement with your customers as to quality.

"Mr. Harrison: Same objection and same instruction.

A. Well, if the buyer don't want to take hops, he can always find a scientific station to condemn the hops that the buyer wants to reject.

"Mr. Alling:

"Q. Well, has that ever happened in your experience prior to this incident.

"Mr. Harrison: The same objection and the same instruction noted.

A. Well, if the brewer goes to a scientific station and the scientific station reports unfavorably, it is a very easy matter to make another delivery to the buyer if the buyer wants to take hops at all, and the difficulty only arises when the buyer does not want to take any hops under his contract.

"Q. You evade answering the question. I repeat it: Has it ever occurred in your experience where there was a dispute between you and your customer as to quality of hops, that scientific stations have reported unfavorably to you as to quality? A. Yes, and whenever the cases have gone into litigation, why——

"Q. You have always beaten them?

"Mr. Harrison: Let the witness finish his answer.

A. ——the scientific station was taken for what it was worth.

"Mr. Alling: Q. But you have won your lawsuits, you have never lost a lawsuit in a situation of this kind?"

That is objected to and not answered—yes, it was answered, too.

(Reading):

"Mr. Alling:

"Q. Now, just what did you mean when you state

in your letter of October 17th marked Exhibit 9 that, 'It never pays us to get into an argument about hops with any scientific station'? A. I don't know what the question is.

"Mr. Alling: Read it.

"(Pending question read.)

A. Well, these people pose as knowing a whole lot about hops that they don't know, and the absurdities published by the scientific stations are so many, that it is of no benefit to get into any argument with them, because they will simply pose as knowing it all, and as they derive their income from the brewer, we never expect them to side with us in any controversy.

"Q. I see; you think then that the fact that their employment comes from the brewer, is sufficient reason to discredit their reports?

"Mr. Harrison: That is a misstatement of witness's evidence I think.

"Mr. Alling: Q. Well, do you so think?

A. What was that question again?

"(Pending question read.)

"Mr. Harrison: The witness has already stated quite fully the reasons for his opinion.

A. It seems that there is an effort made to on my part make an attack against the brewing schools and thus to get the brewing schools lined up against me, and I don't care to go further into this subject.

"*Mr. Alling:*

"Q. Well, let it end at that. You say in this letter that it never pays to get into an argument about hops with any scientific station. Did you make that

statement in this letter as the result of your experience with the reports of scientific stations? A. Yes, sir. They make such wild statements, statements that are absolutely absurd and they give them out under the authority of a so-called scientific station. I might mention dozens of instances of that sort. I have them on record, I have them on hand for presentation any time a person cares to look into the subject. I might say only recently, one of the big scientific stations in this country published a report to the effect that dead hop lice breed and another to the effect that the pollen of the male hop travels hundred of miles. And there is not one of them that can tell a New York State hop, tell many New York State hops from Pacific Coast hops, though they will give their report after they are told where the hop comes from, in spite of the fact that the State hop may be selling for two or three times the price of the California hop.

"Q. Now, in speaking of the wild and absurd statements put out by the scientific station, do you include their representations in the form of reports and the exact results obtained from laboratory tests? A. Yes.

"Q. They are wild and absurd in their claim as to the results of laboratory tests? A. Yes.

"Q. Well, do you regard that as due to the fact that the tests are improperly conducted, or that they are falsely reported?

> "Mr. Harrison: Same objection and the same instruction to the witness, that he need not answer the question.

"Mr. Alling:

"Q. Laboratory tests, if properly conducted, should give accurate results, should they not? A.

Well, one of the heads of one of the scientific stations told me only recently that the other scientific stations made their laboratory tests without ever taking the stuff into the laboratory; they send out the reports of laboratory tests though they threw the samples into the waste paper basket immediately when they arived.

"Q. But if the laboratory tests are accurately made, the results should be accurate? A. If they had the same method of testing, but they don't even have the same methods of testing, and the laboratory tests of one brewing school will vary from the laboratory tests of another brewing school because of the different methods used in arriving at the conclusions.

"Q. I see; well you don't want to be understood as testifying that it is the rule with scientific stations to throw the samples into the waste basket and not to make any laboratory tests at all, and then make a report as though laboratory tests had been made? A. I simply quote what one brewing school manager says of another one.

"Q. Well, is it upon statements of that character that you base your opinion that scientific stations reports are of no value? A. I base it upon the reports that they have made to me. Whenever they get into a discussion on any subject, they show clearly that in so far as concerns hop valuation, that they are talking over their own heads.

"Q. Well are they as unreliable when they talk about hop qualities as they are when they talk about hop valuation? A. Yes, sir.

"Q. And you have found that it never paid you to get into any argument with scientific stations?

"Mr. Harrison: Oh, that question has been answered several times.

"Mr. Alling: Yes, this is preliminary to

another one to follow. I want to recall the witness's testimony on that proposition. I will change the question.

"Q. You state in this letter that it never pays you to get into an argument about hops with any scientific station. Now, was that statement the result of your experience in reports from scientific stations being invariably or generally adverse to you as a seller, on questions of quality? A. Why, there isn't one case in a hundred where a scientific station gets in between the buyer and the seller.

"Q. Well, when they do get in between the buyer and the seller, is it your experience that the reports are generally unfavorable to the seller? A. Th scientific stations, when they get a sample from a brewer to pass on, they try to see if they can't find some fault with it. They feel that their experting requires them to pick faults, and inasmuch as nothing in the world is perfect, these scientific stations point out the unfavorable features, or what they believe to be unfavorable features, and forget the rest of it.

"Q. Well, is that disposition to pick faults general among scientific stations, or does it apply only to certain scientific stations; what is your experience as to that? A. There are responsible men in the scientific station business, but they are those men who don't venture an opinion above their capacity to judge.

"Q. I see; do you know about the scientific station and the gentlemen who conduct it, who made the report in this case? A. I don't know who it is.

"Q. And did you between the date of the receipt of defendant's letter of October 12th marked Exhibit 8, and the date of your answer, October 17th, make any attempt to discover the standing, to learn

the standing and reliability of the particular scientific station that had reported on these hops to the defendant? A. I don't think I know now what scientific station or so-called scientific station reported on the hops.

"Q. Well, between those dates, you made no attempt did you, to learn as to whether or not that report should be given credence? A. I told you I paid no attention to scientific stations. I don't know who made the report.

"Q. Well, that isn't an answer to my question; between those dates did you or did you not make any attempt to ascertain whether or not this report was entitled to credence? A. I knew that the report was not entitled to credence and I don't think that I made any effort to find out who made the erroneous report.

"Q. I see; now there are hops that deteriorate more quickly than others, are there not? A. It depends on what you call deteriorate.

"Q. Well, you say in your letter of October 17th marked Exhibit 9, 'The scientific station is quite wrong in its other unfavorable statement, especially in its statement that the hops will quickly deteriorate.' Now, you recognized then and you recognize now, do you not, that some hops deteriorate more quickly than others? A. Well, it depends upon what you mean by deteriorate.

"Q. Well, you have used the word 'deteriorate,' what did you mean by it as you used it in this letter; you say they are wrong in saying that. Now what kind of deterioration did you have in mind when you incorporated that statement in this letter? A. For instance, if a hop has got too much moisture in it, it will deteriorate.

"Q. Is that the only thing that will work for deterioration? A. That is about all that would make any substantial difference.

"Q. Then as to whether or no these particular hops, lot 13, were likely to quickly deteriorate, it was simply a question of whether they were too moist, whether they were moist enough, is that right? A. Well, if you take a hop with varying percentages of moisture, then a man that didn't know his business might consider a hop deteriorated if the moisture was reduced, where, as a matter of fact, it hadn't deteriorated at all. It would feel as though it had deteriorated because of the less amount of water in it, but actually it does not deteriorate.

"Q. Well, you take issue with the scientific station in your letter of October 17th, as to whether these particular hops will quickly deteriorate; in so taking issue with the scientific station, did you have in mind any other element save the presence of an undue amount of moisture? A. Well, I knew the hops, I had been raising the hops on the ranch for the last twenty years, and I knew that the hops on that ranch don't deteriorate.

"Q. I see; and you don't know any other element making for deterioration save undue moisture? A. Simply the moisture proposition on that and if the moisture is excessive the hops will genuinely deteriorate and otherwise they might dry out more, but the drying out is not deterioration in the brewing sense of the word.

"Q. Well, there is no other element save that, that is likely to make a hop deteriorate? A. There is no other element that will make it deteriorate in actual brewing value, that is, none that I think of at the moment."

By consent of counsel the depositions from page 168, line 1, to page 176, line 30, are omitted, and in lieu it is agreed that the plaintiff never made any reply to the letter

of the defendant to the plaintiff dated December 17, 1914, Exhibit P7 A.

Now, I will begin reading at line 1, on page 177 (reading):

"Mr. Alling:

"Q. Calling your attention to the letter purporting to have been written by the defendant on the 24th day of October, 1914, and marked Plaintiff's Exhibit 10, I will ask you if you can state when that letter was received (handing paper to witness). A. The letter was received on October 28th.

"Q. And when received—and after received, I assume the rubber stamp was placed on it? A. At the time it was received, yes, sir.

"Q. And the notations as to the reply which was made to it, within the rubber stamp? A. The notation shows a number which I believe is the number of the letter that was sent in reply to that letter.

"Q. And plaintiff's Exhibit 11 is a copy of the letter which you wrote in reply? A. Yes, sir.

"Q. ——to Exhibit No. 10? A. Yes, sir.

"Q. And that reply was dictated by yourself I assume from the notations (handing paper to witness)? A. Yes, sir.

"Q. Again calling your attention to Plaintiff's Exhibit 7, which purports to be defendant's letter September 17th, I will ask you whether or not you remember as to whether you were in the city of San Francisco on the 22d day of September, 1914? A. I don't remember.

"Q. Are there any records or files in your office from which you would be able to determine whether on the 22nd day of September you were in the City of San Francisco or not? A. Well, I was in the City of San Francisco on that date, but I don't remember that I was. I see by the memorandum on

the letter which shows the date the letter was received, that my initials are on that letter and they were put on at that date.

"Q. Yes. A. So, I simply testify from the record,

"Q. Now, referring to the rubber stamp on Plainti's Exhibit 7, the first column indicates, in the first line, the person who dictated the letter in the subsequent lines the persons to whom the letter is to be referred? A. Well, that is——

"Q. Does it not? A. Yes, that is the intention, but that is never followed out, that is, no attention is paid to that. It simply refers to the people to whom it is referred."

By consent, I shall omit reading from line 16 on page 178 to line 11 on page 183.

Mr. Twining: All right.

Mr. English: Beginning at line 12, page 183 (reading):

"Q. When you received defendant's letter of September 17th, marked Plaintiff's Exhibit 7, apprising you of the fact that the samples were not up to grade, and would not be accepted under defendant's contract, that hops of that grade would not be accepted under the contract, why did you not appraise the defendant in the interest of an amicable adjustment, that the samples to which they objected were not samples of the hops which you had shipped them, but were taken from other lots? A. I don't know. I might say that in the light of the answer that I have given heretofore, your question is rather misleading.

"Q. Are you misled by it? A. Well, if you take that question by itself, it is certainly misleading.

"Q. I say does it mislead you? A. It does not mislead me.

"Q. Well, if you understand it and are satisfied

with the answer—I don't know whether I questioned him about 11 or not. I will ask him again. Is Exhibit 11 the answer which you dictated to Plaintiff's Exhibit 10, being defendant's letter of October 24th (handing paper to witness)? A. Yes, sir.

"Q. Did you tell Mr. Phleger to call upon the defendant? A. I don't recall now.

"Q. You say in this Exhibit No. 11, 'Our Mr. Phleger will call on you with samples of lots now in New York and en route to New York and to you'; did you instruct Mr. Phleger to call upon the defendant? A. I presume I did.

"Q. Don't you remember as to whether you did or did not? A. I don't recall now.

"Q. If you did, would it have been by letter or wire? A. I don't know.

"Q. It would have been by one or the other, wouldn't it?

"Mr. Alling: Defendant's counsel at this time requests the witness to produce all correspondence either by letter or wire with Mr. Phleger concerning the contract between plaintiff and defendant and concerning the shipment by plaintiff of hops to the defendant, or concerning the controversy which thereafter arose as to the quality of the hops so shipped, and also as to the exchange proposed by plaintiff of other hops for the hops so shipped. Defendant requests that that correspondence either by letter or wire, telegram, and the whole thereof be produced at the next hearing.

"Q. To your knowledge, did Mr. Phleger call upon the defendant in connection with this controversy? A. I don't recall at this time.

"Q. Do you know whether Mr. Phleger made any report to you whatever concerning this matter? A. I know he made some reports, but I don't know what reports he made without looking up the files.

"Q. Mr. Phleger's office is in New York? A. Yes.

"Q. He is in your employ? A. Yes, sir.

"Q. And was in August, September, October, November and December of 1914? A. I think so.

"Q. On salary?

> "Mr. Harrison: I object to that on the ground it is immaterial. I instruct the witness he need not answer.

"Mr. Alling: Q. What is the answer? A. Well, if I don't need to answer I don't care to go into my relations with Mr. Phleger.

"Q. Well what was the nature of your relations with Mr. Phleger? A. He acted under my directions.

"Q. Yes, was he employed by you; you say he was employed by you; was he employed on a commission basis or on a salary? A. I decine to answer.

"Q. Was he your agent? A. He was my employe, working under such directions as I gave him from time to time.

"Q. Did that amount to an agency? A. I don't know.

> "Mr. Harrison: I object to that on the ground it calls for a conclusion of the witness.

"Mr. Alling:

"Q. Well, then, what was the work which he did for you from time to time? A. Anything and everything that I directed him to do.

"Q. Yes. Well, what did you direct him to do? A. I gave him particular directions about everything that he did do.

"Q. You have an office in New York, haven't you? A. Well, I have and I haven't.

"Q. Where is it located? A. We have a place in the Produce Exchange Building in New York.

"Q. Where is it? A. In New York.

"Q. What is the address? A. Bowling Green.

"Q. Is that a street? A. It is a little square.

"Q. Yes But what is the number of the room? A. I don't know.

"Q. Do you know what building it is in, the Produce Exchange Building, is that it? A. Yes, sir.

"Q. Do you pay office rent on a room there? A. Yes, sir.

"Q. Who is in charge of that office? A. Well, it is not what you call an office. We have a room there and we have Mr. Phleger traveling around in and out different places in the east.

"Q. Is that room his headquarters? A. He makes that room his headquarters.

"Q. Is he in charge of your business in the east?

> "Mr. Harrison: I object to that on the ground that it calls for a conclusion of the witness. The witness may answer if he desires.

"A. There is nobody in charge of my business any place; I am in charge of it every place, and I give directions to my employes what to do and they follow directions.

"Mr. Alling:

"Q. Have you got an agent in New York? A. I have got Mr. Phleger who makes his headquarters in New York.

"Q. Have you an agent in New York? A. It depends upon what you mean by an agent. He is an agent to do the things I tell him to do.

"Q. This sounds mysterious. Does Mr. Phleger make no solicitation for orders or contracts except upon your express directions? A. He takes no orders except upon my express instructions.

"Q. That is not the question; does Mr. Phleger make no solicitation for orders or contracts except on your express and explicit instructions? A. He makes, solicitations, but he does not close any orders.

"Q. I see. A. ——wthout my knowledge and consent.

"Q. Well, does Mr Phleger always have to have your express instructions when he undertakes to settle a difficulty? A. Yes, sir.

"Q. He is not authorized to even go near the customer to see what the trouble is without your explicit instructions? A. Well, I don't know whether he is not allowed to go near him, I allow him to go any place he wants to go, but he can't do anything without my instructions.

"Q. Well, will you state that Mr. Phleger is not your agent in New York?

> "Mr. Harrison: Oh, that question has been gone into fully. I make the objection at this time that it calls for the conclusion of the witness and instruct him he need not answer.

"*Mr. Alling:*

"Q. Do you refuse to answer? A. No, I have told you the scope of his authority, and when you use the word 'agent,' you might mean it in a wider sense than I have stated.

"Q. Do you wish to be understood that Mr. Phleger had absolutely no authority to act independent of instructions from you? A. That is what I mean.

"Q. In no circumstances, or situation? A. That is it.

"Q. That he was an automaton, is that right?"

There is another upheaval between counsel, and I shall omit, by consent, from line 3, page 189(to line 20, page 189.

(Reading):

"Q. You promised the defendant in your letter of October 29th, marked Exhibit No. 11, that Mr. Phleger would call on them. You won't know whether you kept your promise or not? A. Well, I can't tell you at this time exactly what I did without referring to my files.

"Q. I see; well, we will wait the production of the correspondence between you and Mr. Phleger. Now I call your attention to plaintiff's exhibit 12 and ask you how much of that was on the face of the telegram when you received it? (Handing paper to witness.) A. Nothing but the typewriting matter was there; all the other notations were put on afterwards? A. Well, all the typewritten part was on the telegram, and that part that the brewery had the message charged to me, that is stamped on.

"Q. You think it was inconsiderate on the part of the brewery?

"Mr. Harrison: I object to the question and instruct the witness he need not answer it.

"Mr. Alling: Q. Does exhibit 13 represent your reply? A. Yes, sir.

"Q. —to exhibit 12? A. Yes, sir.
"Q. Did you dictate that yourself? A. Yes, sir.
"Q. The notation in pencil at the bottom of exhibit 12 is in your handwriting? A. Yes, sir."

Now, we might as well omit by consent from line 16, on page 190, through to page 191, and resume at line 2, page 192 (reading):

"Q. Exhibit 15, is that a wire sent by you in reply to Exhibit 14? A. Yes, sir.
"Q. I assume that everything but the typewriting was placed there after it was delivered to the telegraph company? A. Yes, sir."

Then, by consent, Mr. Twining, I shall omit from line 7 on page 192, to line 22 on page 194. Is that right?
Mr. Twining: Yes.
(Reading):

"Q. Were copies of these telegrams and letters, or either or any of them, forwarded to your New York office? A. I can't tell without referring to the files.
"Q. Was Mr. Phleger attending to any part of this complication at his end? A. The correspondence would so indicate.
"Q. Well, what part of the negotiations toward adjustment, if any, was Mr. Phleger charged with by your direction? A. I can't tell without referring to the correspondence.
"Q. You have no recollection? A. No, sir.
"Q. —as to what Mr. Phleger did in the matter, or what you asked him to do? A. No, sir.
"Q. But you distinctly remember that the quality of sample No. 1 which was sent to the defendant August 29th—— A. Yes, and I will distinctly

remember everything about Mr. Phleger if I refer to the correspondence.

"Q. Showing you plaintiff's Exhibit 21, the rubber stamp with pen and ink notations I presume were made after its receipt? A. At the time of its receipt.

"Q. At the time of its receipt, from the lack of notations indicating reply, am I correct in judging that no reply was made to that? A. I don't know. I can't tell without referring to the correspondence.

"Q. Is there corespondence in your office relating to this subject matter which you have not produced? A. I presume there would be correspondence with Mr. Phleger and with our attorneys.

"Q. Now I show you plaintiff's exhibit 22 (handing paper to witness)—— A. Yes, sir.

"Q. —and ask you if you ever sent to the defendant any samples as suggested in this copy of your letter of June 18th? A. I don't remember. This is about rice, which does not seem to have anything to do with the hops."

Then I shall, by consent, omit from line 30 on page 195 to line 16 on page 196 (reading):

"Q. Did you tell Mr. Phleger to write the letter, a copy of which is marked plaintiff's exhibit No. 24? A. I believe so.

"Q. Did you know when the letter of which a copy is marked plaintiff's exhibit 23 was written? A. Only by the date on it.

"Q. You don't know that you knew of it at the time (handing paper to witness)? A. Oh, yes, I knew of that at the time.

"Q. Well, if you had previously on March 26th instructed Mr. Phleger to confirm in the name of the E. Clemens Horst Company that contract, why

was it necessary to confirm it again from this end? A. I might not know whether Mr. Phleger acted according to instructions. I don't know why we confirmed it twice instead of only once.

"Q. Now I call your attention to plaintiff's exhibit 25 (handing paper to witness) and particularly to the pencil entry in the lower lefthand corner; is it there indicated as to how many samples were sent you?"

"Mr. Twining: I object on page 197, lines 1 to 18, because that testimony has to do with the number of samples and how they were procured, and, inasmuch as it is my contention that the answer shows that the shipment was accepted, this seems to be immaterial.

The Court: The decision will be reserved and an exception allowed.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English (reading):

"Q. Now I call your attention to plaintiff's exhibit 25 (handing paper to witness), and particularly to the pencil entry in the lower lefthand corner; is it there indicated as to how many samples were sent you? A. Yes, sir.

"Q. How many? A. Twelve.

"Q. Those were sent by Mr. Rooney, Mr. S. J. Hooney, wer they not, from Wheatland to San Francisco? A. Yes, sir.

"Q. Were they received at San Francisco? A. Yes, sir.

"Q. Have you got them now? A. I have got some of them or parts of some of them.

"Q. I will ask you at the next hearing to pro-

duce all that you have, either in whole or in part. of the 12 samples sent you by Mr. Rooney of lot 13. A. Yes, sir.

"Q. How did you ascertain the exact date of the diversion of lot 13 to the defendant? A. From the records.

"Q. What records? A. That have been introduced in evidence.

"Q. Form some of these exhibits? A. Yes, sir.

"Q. Which ones? A. I don't know. I have seen it in your hand several times."

Mr. English: I shall omit, by consent, from line 28 on page 197 to line 8 on page 198.

(Reading:)

"Mr. Harrison: At this point plaintiff's counsel produced two papers, one dated September 16, 1914, and the other dated September 17, 1914, each one of which was entitled, 'request for diversion of hops en route.' I ask that the paper just produced dated September 16th be marked plaintiff's Exhibit 28."

Mr. Twining: I ask that that be marked P28 A.

Mr. English: And the next one was 29.

Mr. Twining: I shall offer that as P29 A.

(The papers referred to are marked respectively Ex. P28 A and Ex. P29 A.)

Mr. English (reading):

"Mr. Alling: Q. Exhibit No. 28 represents the order given for diversion (handing paper to witness)? A. Yes, sir.

"Q. Who is Mr. Taylor? A. He is one of our employees—I don't know, I don't know who Mr. Taylor is. I think he is one of our employes.

"Q. Well, that may be an office order on the

strength of which Mr. Taylor procured from the railroad company—just what is the function of each one of those in the ordinary course of procuring a diversion of a shipment in transit? A. Well, I am not familiar with these forms. This is the first time I have seen them, but it would appear from these forms that exhibit 28 is a memorandum from Mr. Zipfel, one of our employes, to Mr. Taylor, one of our employes, to give instructions to the railroad to make the diversion; and that exhibit 29 is the instruction by Mr. Taylor to the railroad company to make the diversion.

"Q. Now, have you the correspondence consisting of copies of letters written by you and originals received by you from the warehouse company and the railway company concerning these 99 bales? A. Yes, sir.

"Q. Have you got them with you? A. (Witness produces papers.) Here is the letter to the—(indicating).

"Q. Let's take them in the chronological order in which they arrived. When those 99 bales reached San Francisco were you notified by any one of their arrival? A. Yes, sir.

"Q. By whom were you notified? A. By the railroad company.

"Q. Now, if you have that written notification, we will start with that. A. Here is the notice of arrival (handing paper to counsel).

"Mr. Harrison: Witness here produced paper dated 12/30/14.

"Mr. Alling: Which we will have marked?

"Mr. Harrison: You may do that if you wish, Mr. Alling.

"Mr. Alling: Well, I see the E. Clemens Horst Company at San Francisco is the consignee and the notice came to you as con-

signee, didn't it? A. Well, the notice came to us——

"Q. The notice came to you as consignee, did it not?

"Mr. Harrison: That is a conclusion.

A. The notice came——

"Mr. Harrison: I object to that, it calls for a conclusion of the witness as to what capacity it came in. The writing speaks for itself.

"Mr. Alling: I see.

"Mr. Harrison: Of course, if there are any facts you want to get at, I don't want to interfere with it.

"Mr. Alling: Q. What, if any, action did you take after having received that notice? A. We notified the railroad company that the goods were not ours.

"Q. Was that in writing? A. Yes, sir.

"Q. Will you let me see it? A. Here it is (handing paper to counsel).

"Mr. Harrison: Witness here produces what purports to be copy of letter dated December 29, 1914.

A. Mr. Hardy to whom the letter is addressed is the freight agent of the Southern Pacific Company.

"Mr. Alling: Q. What, if any, letter or communication did you receive concerning this shipment subsequent to the mailing of this letter dated December 29, 1914; what is the next that you heard of those hops? A. A notice from Hardy under date of January 4, 1915, acknowledging that the goods were received in San Francisco on December 30,

1914, and that the goods were refused by us. (Handing paper to counsel.)

"Mr. Harrison: The witness here produced paper dated January 4, 1915.

"Mr. Alling: Q. This is a notice to the railroad agent at East Hannibal, Illinois, is it not? A. Yes, it is a notice from the Southern Pacific Company at San Francisco notifying the agent at East Hannibal, Illinois, and giving us a carbon copy of that notice.

"Q. Yes, notifying of arrival and your refusal to accept. Now what next, either from you to the railroad or the warehouse or from the warehouse or the railroad to you? A. Letter from the Southern Pacific addressed to us under date of January 4, 1915, acknowledging that the goods were refused by us at San Francisco (handing paper to counsel).

"Mr. Harrison: The witness here produces letter dated January 4, 1915, purporting to be signed by J. M. Brewer and addressed to the plaintiff.

"Mr. Alling: Q. In this letter dated January 4, 1915, addressed to the E. Clemens Horst Company, 150 Pine Street, San Francisco, signed J. M. Brewer, the letter being upon Southern Pacific stationery, it is stated: 'Please be advised that unless disposition is given on or before January 10, 1915, this company will arrange to release equipment and store freight in public warehouse as unclaimed freight.' What, if any, reply did you make to that? A. I have no record of any reply.

"Q. What communication or correspondence of any kind next passed between you and the warehouse or railroad-- company on the one hand or

conversely between the railroad company or the warehouse company and you? A. We received a letter from the Southern Pacific Company dated January 11, 1915, acknowledging that the shipment was refused by us and advising us that the shipment had been ordered into public warehouse at San Francisco subject to claim of lawful owner. (Handing paper to counsel.)

(Mr. Harrison: The witness here produced letter last mentioned dated January 11, 1915.

"Mr. Alling: This letter being written upon Southern Pacific stationery signed J. M. Brewster, P. W. C.

"Mr. Harrison: Brewer, I think that is.

"Mr. Alling: Q. —Brewer, and addressed to E. C. Horst Company, 150 Pine Street, San Francisco, and stating: 'Disposition being refused both by consignor and consignee at San Francisco, I have this day ordered the shipment into public warehouse at San Francisco subject to claim of lawful owner.' What, if any, answer did you make to that communication? A. No written answer was made.

"Q. Well, what next passed either way, between you and the warehouse or railroad company? A. We got a notice from the warehouse dated January 14, 1915, advising us that they had put the 99 bales of hops into Occidental Warehouse, San Francisco, for the Southern Pacific Company (handing paper to counsel).

"Mr. Harrison: Witness here produces postal dated January 14, 1915, addressed to the plaintiff purporting to be signed by De-Pue Warehouse Company.

"Mr. Alling: And entitled, 'Notice to consignee of goods on storage.'

"Q. Did you make any reply to that? A. Yes, sir, I wrote the DePue Warehouse Company under date of January 14, 1915, to the effect that the hops did not belong to us (handing paper to counsel).

"Mr. Harrison: The witness here produces what purports to be the copy of letter from plaintiff to DePue Warehouse Company dated January 14, 1915.

"Mr. Alling: Q. What was the next communication to pass either way between yourself—your company on the one hand and the railroad or warehouse company on the other?

"Mr. Harrison: You mean in writing?

"Mr. Alling: Yes, in writing, or by telephone or otherwise, concerning these 99 bales of hops.

"Mr. Harrison: Yes.

A. The next notice was a notice to us from the DePue Warehouse Company under date of August 16, 1915. The notice was the notice in writing given that the warehouse would sell the hops at auction on September 14, 1915 (handing paper to counsel).

"Mr. Harrison: The witness here produces notice last mentioned purported to be dated August 16, 1915.

"Mr. Alling: Signed DePue Warehouse Company." Then they marked the paper for identification.

A. Page 204 of the depositions contains the formal marking for identification of exhibits for identification A, B, C, D, F, G and H respectively. I shall not physically read that page. We offer those

now for identification in our case, with the same exhibit numbers for the present.

Mr. Twining: You offer what was marked for identification on page 204?

Mr. English: That is right.

(Reading:)

"Q. Did you bring with you the correspondence with Mr. Phleger? A. Yes, sir.

"Q. Please let me examine all of the correspondence which passed between you and Mr. Phleger, either by letter or telegram concerning the contract between your company and the defendant, or concerning in any manner the controversy represented by the preset suit, or the samples sent, or the hops delivered, or the quality of either; that includes it all, I guess.

"Mr. Harrison: In response to the demand of counsel, we produce certain letters. As far as we are able to find at the present time, those constitute the originals and copies of all the correspondence between the parties, except only certain letters from the plaintiff to Mr. Phleger and from Mr. Phleger to the plaintiff constituting mere messages from the attorneys of the plaintiff to the plaintiff and contrarywise (handing paper to counsel).

"Mr. Alling: Everything not of privileged character.

"Mr. Harrison: That is it, yes.

"Mr. Alling: Q. You are acquainted with Mr Phleger's signature, are you? A. Yes, sir. That is it (indicating).

"Q. That is it (indicating)?

"Mr. Harrison: The witness is referring to what purports to be a copy of a letter dated September 15, 1914.

"The Witness: From Phleger to us.

"Mr. Harrison: Yes, from C. A. Phleger

"Mr. Harrison: Yes.

"Mr. Alling: It is a copy apparently of such a letter?

"Mr Harrison: Yes.

"Mr. Alling: Q. This is a copy which was mailed to you by Mr. Phleger? A. Yes, sir.

"Q. Was there any enclosure with it, indicating whether or not it had been mailed from the New York office to the defendant? A. I don't know any more than appears in the letter.

"Q. Well, my question perhaps should be this: Did any letter from Mr. Phleger to you or to your company accompany this copy of Mr. Phleger's letter to the defendant? A. About this business or about other business?

"Q. No, you don't catch my meaning. In the envelope enclosing this letter, which is a copy of a letter from Mr. Phleger to the defendant, was there any letter from Mr. Phleger to you concerning this copy, for instance, 'Enclosed herewith a copy of a letter written'?

A. No, we don't get letters of advice along with the copies, we simply get the copies.

"Mr. Alling: I see. We ask that this be marked plaintiff's exhibit on cross-examination witness Horst, No. 1.

"Mr. Harrison: You mean defendant's don't you?

"Mr. Alling: Defendant's exhibit on cross-examination, witness Horst, No. 1.

"Whereupon said paper was marked by

the Commissioner defendant's exhibit on cross-examination witness Horst No. 1."

Mr. English: Then we shall ask to have it marked for identification on this trial as Horst No. 1 for identification.

(Horst No. 1 for identification—not marked.)

Mr. English (reading):

"Mr. Alling: Read the last question.

"(Question read as follows:) 'Now will you please hand me for examination all the rest of the correspondence between your company and the railroad company or the warehouse company concerning the 99 bales reshipped to San Francisco by the defendant.') A. Here is the correspondence (indicating).

"Q. One moment, the request is that the documents be handed to counsel for examination. A. Here are the documents (handing papers to counsel).

"Mr. Harrison: The witness here hands papers to counsel.

Now, at line 8 on page 213 (reading):

"Mr. Alling: Q. I hand you a letter on the letterhead of the DePue Warehouse Company addressed to plaintiff, signed DePue Warehouse Company, dated October 2, 1915, and ask you if that letter was received by the plaintiff company? A. Yes, sir.

"Mr. Alling: We ask that it be marked defendant's exhibit on cross-examination, witness Horst, No. 2.

"Whereupon said paper was marked by the Commissioner defendant's exhibit on cross-examination witness Horst No. 2."

We shall also ask now to have it marked at this time for identification.

(Horst No. 2 for identification—not marked.)

(Reading:)

"Mr. Alling: While there is only one of these letters that I really care for, as a matter of fairness, and it would perhaps be no more than right, that they all be offered at this time, so I call your attention to a copy of a letter addressed to the DePue Warehouse Company by the plaintiff corporation, dated October 4, and ask you if that is a copy of a letter mailed by plaintiff to the DePue Warehouse Company (handing paper to witness)?

"Mr. Harrison: October 4 of what year?

"Mr. Alling: 1915.

"Mr. Harrison: 1915.

A. Well it was sent. I don't know whether it was mailed.

"Mr. Alling: I ask that it be marked defendant's exhibit on cross-examination, witness Horst, No. 3.

"Whereupon said paper was marked by the Commissioner defendant's exhibit on cross-examination, witness Horst, No. 3."

I shall ask to be marked for identification the exhibits marked for identification on the record, pages 213, 214, 215 and 216, which are Horst for identification, Nos. 1 to 9, inclusive.

(Reading):

"Mr. Alling: That is dated October 4th.

"Q. I show you a letter addressed to the DePue Warehouse Company signed by plaintiff corporation dated October 23, 1915, and ask you if the original of that letter was mailed by plaintiff to

the DePue Warehouse Company or delivered (handing paper to witness)? A. Yes, sir.

"Mr. Alling: You had better mark that.

"Whereupon said paper was marked by the Commissioner defendant's exhibit on cross-examination, witness Horst, No. 4.

"Mr. Alling: Q. Had the DePue Warehouse Company prior to the writing of the latter asked for a bond? A. Yes, sir.

"Q. How was that request made; in what form was that request made? A. I believe it was made orally.

"Q. By whom and to whom? A. Made by the DePue Warehouse Company to us through Mr. Settle.

"Q. You don't know what individual requested bond of Mr. Settle? A. No, sir.

"Q. I show you what purports to be a copy of a letter addressed to Mr. T. O. Edwards, auditor Southern Pacific Company, by plaintiff corporation dated October 25, 1915, and ask you if the original of that letter was either mailed or delivered by plaintiff to Mr. Edwards (handing paper to witness)? A. Yes, sir.

"Mr. Alling: I ask that it be marked defendant's exhibit on cross-examination, witness Horst, No. 5.

"Whereupon said paper was marked by the Commissioner defendant's exhibit on cross-examination, witness Horst, No. 5.

"Mr. Alling: Q. I now show you a letter which purports to have been addressed to plaintiff corportation by the DePue Warehouse Company of date October 28, 1915, and ask you if the plaintiff company received that letter (handing paper to witness)? A. Yes, sir.

"Mr. Alling: We ask that it be marked defendant's exhibit on cross-examination, witness Horst, No. 6.

"Whereupon said paper was marked by the Commissioner defendant's exhibit on cross-examination, witness Horst, No. 6.

"Mr. Alling: Q. I show you what purports to be a copy of a letter addressed by the plaintiff corporation to the DePue Warehouse Company of date October 31, 1915, and ask you if the original of which that is a copy was addressed and mailed by the plaintiff company or delivered to the DePue Warehouse Company on or about that date (handing paper to witness)? A. Yes, sir.

"Mr. Alling: Seven.

"Whereupon said paper was marked by the Commissioner defendant's exhibit on cross-examination, witness Horst, No. 7.

"Mr. Alling: Q. I show you now what purports to be an original letter addressed to plaintiff corporation by the DePue Warehouse Company of date November 4, 1915, and ask you if that letter was received by the plaintiff company? (Handing paper to witness.) A. Yes, sir.

"Mr. Alling: We ask that be similarly marked No. 8.

"Whereupon said paper was marked by the Commissioner defendant's exhibit on cross-examination, witness Horst, No. 8.

"Q. I show you now what purports to be a letter from T. O. Edwards addressed to the plaintiff corporation of date November 4, 1915, and ask you if that letter was received by the plaintiff corporation on or about that date (handing paper to witness)? A. Yes, sir.

"Mr. Alling: Nine.

"Whereupon said paper was marked by the Commissioner defendant's exhibit on cross-examination, witness Horst, No. 9.

"Q. Did you bring such of the samples of lot No. 13 as are still in the possession of the plaintiff company? A. No, I haven't brought them. I will bring them at the next session.

"Q. You stated yesterday everything which Mr. Phleger did in connection with this matter concerning this contract, shipment and dispute, had been done under and pursuant to your express and explicit instructions. I now ask you if the letter, a copy of which is marked defendant's exhibit on cross-examination, witness Horst, No. 1, was written and mailed by Mr. Phleger pursuant to your instructions?

"Mr. Harrison: I have no objection to the actual question asked, but it was preceded by the statement that is not I believe an accurate statement of the witness's testimony and because we are required to the form now, I would object to it on the ground that it does not correctly state the witness's testimony.

"Mr. Alling: All right.

"Mr. Harrison: Giving counsel thus the opportunity——

"Mr. Alling: Strike the question and ask this——

"Mr. Harrison: —to put the question properly.

"Mr. Alling: Q. Was the letter a copy of which is marked defendant's exhibit on cross-examination, witness Horst, No. 1, written by Mr. Phleger pur-

suant to your instuctions? A. No, sir, I gave him no instructions to write that letter.

"Q. I suppose it your position that he had no authority to write it?

> "Mr. Harrison: I object to that on the ground it calls for the conclusion of the witness.
>
> "Mr. Alling: What is your answer?
>
> "Mr. Harrison: And I instruct the witness he need not answer unless he so desires.
>
> "Mr. Alling: The plaintiff giving a deposition, can refuse to answer, but it is generally a rather dangerous proposition.
>
> "Mr. Harrison: You may ask the witness anything bearing upon Mr. Phleger's authority to write the letter, but to ask him the question whether he considers it was within Mr. Phleger's authority, it seems to me is asking for his opinion.
>
> "Mr. Alling: All right, what is your answer?

A. Well, I have answered that I gave him no instructions to write the letter. I see that he has written the letter and whether I am bound by the letter or not, I don't know, and I don't see that it makes any difference one way or the other whether I am bound by it or not.

"Q. Didn't you hold Mr. Phleger out to your patrons in the east as your representative? A. He is my representative in a way. He has limited authority.

"Q. The limitations upon his authority are matters that are secret within your breast and his? A. I didn't say so.

"Q. Well, is there any way by which your customers in the east can learn the limitations of his authority? A. Yes, by asking me.

"Q. I see; you deal with them through him, don't you? A. I use him as an intermediary.

"Q. Yes, and you expect them to write to you to find out the limitations of his authority, do you? A. Well, I don't know that that question has ever arisen.

"Q. Have you ever had occasion to repudiate any of his acts? A. No, sir.

"Q. You stated the other day that you had parts of those samples which were sent to the defendant accompanying your letters of August 29th and September 4, 1914, and named in those letters as samples one, two and three; will you produce those at the next hearing? A. Yes, sir.

"Q. And also I will ask you at the next hearing to testify as to what lots those samples one, two and three were drawn from? A. Yes, sir.

"Q. I understood you to say that your records would disclose that? A. Yes, sir.

"Q. What elements enter into the cost of production of hops? A. Well, the price that we pay for producing them. We grow the hops by contract.

"Q. Did you grow them by contract in 1914? A. Yes, sir.

"Q. On the Wheatland ranch? A. I don't know whether grew them by contract in 1914 on the Wheatland ranch. I think I did.

"Q. Will you ascertain what the fact is as to that and be prepared to testify at the next hearing as to the matter? A. Yes, sir.

"Q. Are hops bought and sold on any exchange? A. No, sir.

"Q. Nowhere in the country? A. No, sir, not in this country.

"Q. What governs or determines the market price of hops? A. The price at which buyer and seller meet.

"Q. The price at which buyer and seller meet;

so there is no fixed standard as to the price of hops at any given time? A. No, sir.

"Q. I will ask you at the next hearing the following questions, which I presume you will not be able to answer without investigating the records; I will ask you to examine your records and be prepared to answer the questions: What was the highest and the lowest price at which you sold hops during the month of October, 1914; what was the highest and the lowest price at which you sold hops during the month of November, 1914; what was the highest and lowest price at which you sold hops during the month of December, 1914; what was the highest and the lowest price at which you sold hops during each calendar month of the year 1915; what was the highest and the lowest price at which you sold hops during the month of January, 1916. Is the price of hops in New York, that is, delivered in New York, the same as the price of hops delivered at Elizabeth, New Jersey? A. Substantially the same.

"Q. I will ask you at the next hearing and ask you to make such investigation of your records as will enable you to answer: What was the highest and lowest price at which you sold hops in New York for each of the months of October, November and December of 1914; and also for each calendar month of the year 1915; and also for the month of January, 1916? Now I understood you to say previously during this examination, that in many cases preference of brewers rather than market grades controlled sales and prices in given cases? A. Yes, sir."

Mr. Twining: Now, I object from line 14, page 220, to line 14, page 228, upon the ground that this testimony relates again to the quality of the hops and of the samples, and that that question is immaterial, the shipment itself having been accepted.

The Court: Decision will be reserved and exception allowed.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (reading):

"A. Yes, sir.

"Q. That color and the other things which you have mentioned, enter into the making of the market grades, but that in many instances certain brewers would prefer elements such as color and other things of a lower grade rather than those pertaining to a higher grade? A. I don't know what I said that.

"Q. Well, perhaps you don't catch my question. Color is a factor of grade, is it not? A. No.

"Q. Market grade? A. No, it is not a factor of grade in a good brewing hop.

"Q. Well, you gave us certain market grades; I am not talking now about a good brewing hop, I am talking about the certain market grades which you named, recognized in the market. Color goes to make those grades, does it not? A. It does not go to make the grade of good brewing hops, the kind of hops that I sold.

"Q. Well, now, please remember the form of the question; referring now to the market grades which you named, is color a factor in determining those grades? A. In some of them.

"Q. Of the recognized market grades, is color not a factor in determining? A. Good brewing hops?

"Q. Is there such a market grade as good brewing hops? A. Yes, sir.

"Q. Didn't you yourself testify that good brewing hops could be anything from choice down? A. No, sir.

"Q. Isn't a prime hop a good brewing hop? A. A prime hop is better than a good brewing hop.

"Q. Is a choice hop a good brewing hop? A. It is better than a good brewing hop.

"Q. Is a medium hop a good brewing hop? A. Yes, sir.

"Q. Is a common hop a good brewing hop? A. It might be, but it wouldn't be so considered—if you use that expression 'common hop,' you would mention a low grade of a brewing hop.

"Q. Well, does a brewing hop take more than one grade, market grade? A. No, a good brewing hop is a grade that is recognized in the trade.

"Q. Between what other grades does it stand; what is next higher and what is next lower than a good brewing hop? A. Well, there would be——

"Q. —as known in the market? A. There would be common to medium; and common, and damaged hops.

"Q. Those would be lower; what would be next higher than a good brewing hop? A. Well, the prime and choice.

"Q. The next higher? A. And choice brewing.

"Q. I said the next higher; that would be prime, would it? A. Yes, sir.

"Q. Then a good brewing hop is between prime and medium? A. Yes, sir.

"Q. Isn't it a fact that there is no such market grade as a good brewing hop and that that is the reason why you so word your contracts, that you can send in anything under your contract for which your samples are approved? A. It is not a fact. The term 'good brewing hop' is a recognized term as long as I have been in the business and long before.

"Q. A distinct grade, isn't it? A. It is a recognized grade, good brewing hop, it is a recognized grade, recognized by everybody.

"Q. Now you say many brewers prefer a certain color to a certain other color; that is true, isn't it? A. Yes, they have their preferences on color.

"Q. Well, now are there any other factors going to grade or market quality, concerning which brewers have individual preferences, in your experience? A. They have individual preferences and they change their preferences.

"Q. Well, that is not answering my question, Mr. Horst; are there any other factors going to grade or market quality, concerning which they have preferences, so far as your experience goes? A. Yes, they have preferences on other matters.

"Q. What other matters? A. They have preferences on the size of the bud; some brewers like them big and some like them short, small; some like a medium size.

"Q. Now are there any other elements going to grade or market quality, other than color and size of the bud, concerning which in your experience, bewers express a preference? A. Yes. Some like them with seeds, with much seeds and some like them with a moderate amount of seeds and some like them without seeds.

"Q. Now is there anything else concerning which they have a preference besides color and size of bud and presence or absence of seeds? A. Yes, they have preference as to geographical origin.

"Q. I see; anything else? A. Some want them dry and some want them——

"Q. Moist? A. —moist—not exactly moist, but not dry.

"Q. Not dry; anything else? A. I can't think of anything else at the moment.

"Q. Now it was to allow latitude for just those matters of individual preference which brewers have, that this provision was inserted in the contract allowing for approval on sample, was it not? A. No, sir.

"Q. Well, if the contract provides, as it does, for approved samples, it would give the brewer, would it not, an opportunity to exercise his preference in respect to these matters, concerning which you say it is your experience that brewers have distinct preferences?

"Mr. Harrison: At this point, without desiring to encumber the record, or interfere with the stipulation regarding the reserving of objections, I simply want to repeat as to the obligations of the contract, or the rights of the parties under it, that it is our claim they are fixed by the contract and by the contract alone.

"Mr. Alling: All of which gives the witness breathing time. Read the question.

"(Pending question read.)

"Mr. Harrison: That remark is entirely unwarranted. The objection is made in good faith.

"Mr. Alling: Unquestionably. We are in the habit of objecting to things that are uncomfortable on general principles.

"Mr. Harrison: The duty of propounding proper question is just as obvious as the duty of not making unnecessary objections. Read the question.

"(Pending question read.)

A. I don't understand the question.

"Mr. Alling: Q. Well, would a brewer under a contract providing for approved samples, have a right to exercise a preference in respect to color and these various matters of which you have spoken? A. Why, no, if he wants to get a particular color or a particular character of hop, he wants to buy that particular character of hop and specify that character in a contract.

"Q. Well, what was the function then of approval by sample?"

Mr. Twining: I object to that question, because the contract speaks for itself. The witness's interpretation of the function of the terms of the contract would not be binding.

The Court: Perhaps I do not understand the question. It may be a question limited to the contract and it may be a genral question as to business dealings.

Mr. Twining: I think it was under the contract, because the preceding question, said, "Well, would a brewer under a contract providing for approved samples have a right to exercise a preference in respect to color and these various matters of which you have spoken?" There was an answer to that, and then the question was, "Well, what was the function, then, of approval by sample?"

The Court: I shall let it stand, subject to your objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"A. Well, we like to get the brewer to approve samples so that we can ship him what he approves, so we don't have a rejection.

"Q. I see; the provision as to approved samples was all a matter of precaution, as you testified to awhile ago, in order to prevent rejections? A. Well, the method facilitates business with a buyer that is willing to carry out his bargain.

"Q. And it is not made in any degree in the interest of the brewer, is that your idea? A. It is

made in the interest of both buyer and seller, in the carrying out of the contract to mutual satisfaction.

"Q. How can it be for the benefit of the buyer if his rejection does not have any effect, his rejection of samples? A. Well, if a buyer is going to take hops, if he doesn't approve some samples, we submit him enough samples or more samples till he approves, but when the buyer ignores the approval, it leaves you nothing else to do but to make him a shipment of hops that are fully up to the contract quality and then stand by the delivery.

"Q. I see, when he ignores the samples, but when he disapproves the samples, has he no rights? A. Not if he ignores the samples until after the goods have been passed out of our hands, as in this case where the bill of lading which represents the goods—the goods were shipped on negotiable bills of lading and the negotiable bills of lading were sent to the buyer, therefore we lost all control over the shipment when we sent him the bill of lading, and up to the time we sent him the bill of lading he had ignored our samples.

"Q. I see, and you ignored his rejection of the samples, didn't you, by not answering his letter, the letter in which they rejected the samples? A. There was no occasion for answering his letter after the shipment had been made.

"Q. I see. A. And the negotiable bill of lading delivered to him.

"Q. Then as to samples and approval of samples and the part that that played in the execution of the contract, it was heads you won and tails the other fellow lost, wasn't it? A. It is just the other way, because if that interpretation were taken that you are evidently trying to give to it, the buyer would never approve any samples if the market didn't suit him and he didn't want to carry out his bargain.

"Q. Assuming he was dishonest; do you assume all of the buyers are dishonest? A. I assume that the buyers that are dishonest are few and far between. The brewers as a general rule carry out their bargain.

"Q. Well, do you play any favorites in the matter of paying attention to rejection of samples from customers who are buying on a contract providing for approved samples, or do you ignore such disapprovals only on a falling market? A. No, we do our level best to satisfy everybody and we go far beyond our contracts requirements to suit everybody, and it is only when the buyer won't take any hops of any quality, that the troubles arise.

"Q. The fault is always the other fellow's? A. Yes, sir. We couldn't continue business if we worked on any other policy.

"Q. Well, ordinarily when a contract calls for approved samples, don't you try to give the brewer a chance to exercise a preference in respect to color and these other things you have named? A. We do that regardless of whether the contract mentions anything about the samples.

"Q. You didn't do it in this case, did you? A. Why, yes we did it in this case. We do it in practically all cases regardless of any contract comments on samples.

"Mr. Alling: I think that winds up about all I wanted to ask him about except this matter of prices and these samples."

Then there is some discussion as to how long it will take. Shall I read that, Mr. Twining?

Mr. Twining: No.

Mr. English: Then, by consent, I shall omit reading from line 11 on page 227 through page 228.

Mr. Twining: There is an exhibit that I offer there. I offer and ask it to be marked as P30 A a letter offered in evidence on page 228 of the deposition, written by the plaintiff to DePue Warehouse Company, dated October 5, 1915, and marked P30.

(The paper referred to is marked Ex. P30 A.)

Mr. English: I shall resume reading at line 22, page 228 (reading):

"Mr. Harrison:

"Q. What was the mistake of inadvertence in your testimony which you were attempting to explain at the opening of this afternoon's hearing. A. The letter of September 16, marked defendant's exhibit on cross-examination, witness Horst 1, is addressed to the Peter Breidt City Brewing Company, Elizabeth, New Jersey, instead of to ourselves at San Francisco.

"Q. Mr. Horst, have you made the necessary examination of your records to be able to testify as to the matter of prices concerning which I interrogated you at the last hearing? A. No, I haven't quite finished it. I expect to have it finished today.

"Q. All right, then, that can be taken up later? A. Yes, sir.

"Q. You had better let it go until the figures are all compiled.

"Mr. Harrison: Yes."

Mr. Twining: Now, I object from page 229, line 23, to page 255, line 14. That testimony relates to the method of obtaining the samples and to what the samples contained. It is a question of the character of the

samples, whether they represented the shipment or not, and that goes to the question of quality, and that is immaterial.

Mr. English: We will consent to that, Mr. Twining.

The Court: You consent that that testimony be disregarded?

Mr. Stamler: Yes, sir; that it be stricken out.

Mr. English: That testimony deals with the samples of lot 13.

Now, I shall resume reading at line 15 on page 255 (reading):

"Q. How are hops stored; aren't there some special precautions which have to be taken or usually are taken to prevent deterioration if they are held any considerably length of time? A. Some people store them in ordinary storage and some store them in cold storage.

"Q. Well, I notice on one of these labels, the words 'Iron cooler' appearing; what does that signify? A. That is simply the name of one of the coolers on one of the ranches.

"Where you stored hops? A. We don't store the hops there at all.

"Q. Well, they are sometimes stored in cold storage, aren't they? A. Yes, sir, but never by the sellers.

"Q. They are by the brewers? A. Only by the brewers.

"Q. What is the idea, what is the purpose to be subserved by the cold storage? A. Well, we haven't got anything to do with the cold storage. The producer or the seller never puts hops in cold storage and the only people that have cold storage are the consumers.

"Q Do you know why the consumers use cold stor-

age? A. Some of them believe that the quality of the hops is better preserved by keping the hops in cold storage.

"Q. Yes, now cold storage facilities would naturally in any event be limited, and it is your understanding under that contract that the buyer had no election or option at all as to the time of the shipment, and that you have a right to force the hops on him at your pleasure whether he is in a position to receive them or not?"

Mr. Twining: Now, I object from page 256, line 8, to page 282, line 26. The testimony relates in part to this witness's construction of the meaning of the contract, and also to the quality of the hops. In so far as it relates to this witness's construction of the meaning of the contract, it is immaterial, and in so far as it relates to the quality of the hops, it is immaterial, the hops having been accepted.

The Court: The witness's construction of the contract would not be justified, unless there is some peculiarity of the contract——

Mr. Stamler: No, but this includes questions and answers as to market value.

Mr. Twining: Perhaps I had better make a separate objection as to that. I object to this question on the ground that it is an attempt to interpolate into the record the witness's construction of the contract. The contract speaks for itself.

The Court: What is the question?

Mr. English: (Reading):

"Q. Yes, now cold storage facilities would naturally in any event be limited, and it is your understanding under that contract that the

buyer had no election or option at all as to the time of the shipment, and that you have a right to force the hops on him at your pleasure whether he is in a position to receive them or not?

It seems to me that ought to stand, because he sent the hops. It is not an interpretation.

The Court: I think that is a conclusion that the Court would have to draw and not the witness. I shall sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Now, that matter of approved samples don't appear in your printed contracts, does it?"

Mr. Twining: I object to that. That relates to other contracts that the witness made.

Mr. English: He is cross-examining on the contract that is now in evidence.

The Court: The reading of the contract would show whether it contained any mention of approved samples.

Mr. English: Yes, but that is not the question; that is not the purport of the examination. It is cross-examination on the contract which was put in evidence.

The Court: This particular question, I understood, asked the witness whether a certain provision, or phrase, appeared in the contract.

Mr. English: In the printed contract; yes, sir.

The Court: Anybody could answer that question.

Mr. English: Yes, sir; he could look at it and see.

The Court: Of course, it may be regarded as merely an introductory question.

Mr. English: I think it is.

Mr. Twining: My point, if your Honor please, is this: that an inspection of the contract shows that it was not in this particular printed contract, but it was written in. Now whether or not it was in some other written contract that the Horst Company got out does not make any difference. As to this question, whether it means anything is ridiculous, because it and every other word in the contract means something. You do not have to call a witness to prove that.

The Court: I sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. That was written in?"

Objected to on the same ground.

Objection sustained.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Whose handwriting does it appear in?"

Objected to on the same ground.

Objection sustained.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. So that we are entitled to indulge in the presumption that it meant something, aren't we?"

Objected to on the same ground.

Objection sustained.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Mr. Alling:

"Q. And was not mere empty words with no significance at all, so far as the contract rights of the parties are concerned?"

Mr. Twining: I object to that.

Mr. English: That is what he did under the contract. That is material.

Mr. Twining: No, the question is not how he treated the contract, but what he did.

The Court: The question is rather doubtful, I think. I sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Well, you treated it as having no significance and no bearing upon the contractual rights of the parties at all?"

Objected to on the same ground.

Same ruling.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Now, asking you the question again inasmuch as you did not answer it: You treated these words which were written into this contract as having no significance or bearing upon the rights of the defendant, did you not?

Mr. Twining: I object to that. The question goes to the inquiry as to how he interpreted this contract. The evidence that is material is what he did, and the Court would have to say whether or not he had a right to do it, but the intent with which he did it makes no difference.

The Court: Yes, I think the question is not competent. I sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Well, what is the purpose of submitting samples if you don't wait for their approval before you ship?"

Mr. Twining: That is also objected to. Here the contract says, "On approved samples." This witness testified that he thought that "approved sample" meant a sample which was generally approved in the trade. If he sent a sample of that kind, and this buyer did not see fit to accept it, and he waited a reasonable time, he was then entitled to treat it as approved and he had a right to send on the shipment, whether it was approved or not. That is the way he construed the contract. It does not make any difference whether he construed it correctly or incorrectly. That is for your Honor to determine.

The Court: It does not seem to be a word of art that would require an expert to explain. I should think the witness's construction was wrong.

Mr. English: We think so, too.

Mr. Twining: Very likely so, but he says that was his construction. I think it is immaterial what his construction was. Your Honor is not passing on the question whether or not his construction was correct or not.

The Court: I am passing on the contract. That is what I meant: that my idea about such a contract was that it meant samples approved by the party to the contract, not samples generally approved by the trade.

Mr. English: This particular question is: "Well, what is the purpose of submitting samples, if you don't wait for their approval before you ship?"

Mr. Twining: In other words, "What do you think that contract meant?"

The Court: I sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. But you did get a response? A. And the contract was running on. My right of delivery began on the 1st of September and I was being prejudiced by not receiving his response.

"Q. You did get a response, didn't you? A. I didn't get a response until after I had shipped the hops and delivered him the bill of lading.

"Q. They were in transit at the time you got his reply disapproving the samples? A. That has been gone into so thoroughly that I don't think I ought to be asked the same question over and over again.

"Q. Well, is it not a fact that they were still in transit when you got his letter disapproving the samples? A. I have already answered that.

"Q. What is the fact? A. Well, I am not going to answer the same question a thousand times. I have answered that same question at least ten times.

"Mr. Alling: The defendant at this time gives notice that by reason of the refusal of the witness to answer questions upon cross-examination, the defendant will move to strike the deposition of Horst in toto and will object to its being read or considered as evidence.

"The Witness: I am ready to answer the question if I haven't answered it.

"Mr. Harrison: In order that there may be no question about the willingness of the witness to answer every possible question, I will ask the witness to again answer the question, although it has been covered in detail by the previous examination and repeatedly. Read the question to the witness, Mr. Reporter.

"(Pending question read.)

A. I believe the hops at that time were still in transit. I don't know, however, the exact dates of arrival, nor the date of the arrival of his letter without again referring to the files.

"*Mr. Alling:*

"Q. Under contracts of this kind, you recognize the right, do you not, of the buyer to decline for any reason which may be based on preference, or non-preference, of samples submitted?"

Mr. Twining: I object. That is again asking him what the contract means.

The Court: It looks very much like it. I sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Well, it is not your purpose then under contracts of this kind, or your custom, to give the brewer what he wants in respect to color and other things, even if he expresses a dissent as to certain samples?"

Mr. Twining: I make the same objection.

Mr. English: That is not asking him for his interpretation of the contract; it is asking for his custom.

Mr. Twining: The question here for determination is not what the custom was or what his purpose was, but what he did.

Mr. English: His custom or purpose bears on what he did.

Mr. Twining: The facts as to what he did are in evidence.

The Court: We must keep in mind that the contract is the foundation and is not to be qualified, except by a general custom, not by the witness's custom. So that I sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Well, you have testified that many brewers have preference in respect to color and in respect to other elements that go to grade, which can be met and supplied within the grade called for, in

that hops of the same grade differ as to those matters, and that being true, in a case of this kind where the contract provides for approved samples, was it your understanding of the contract that you could entirely disregard any expressions of preference which the buyer might make?"

Mr. Twining: That is objected to. That calls for the witness's opinion.

The Court: I make the same ruling.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. But you didn't give the defendant any opportunity to exercise any preference which you might have as to color and other things? A. Why, yes, if he wanted to express any preference, he could have sent me samples of such hops as he wanted and I would have given him hops according to those samples if such hops were in existence.

"Q. Didn't he express a preference, or a non-preference, which is the same thing, when he disapproved the samples which were sent him? A. He didn't send me any samples of the kind he did approve.

"Q. Oh, then, your understanding of this contract is that the samples to be approved were to be sent you by the defendant?"

Mr. Twining: I object to that. It calls for the witness's understanding of the contract.

The Court: Same ruling and exception.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Have you ever known of a case where a contract of this kind existed between seller of hops and buyer of hops, for the buyer to submit the samples? A. Plenty of them.

"Q. Lots of cases of that kind? A. Plenty of them, plenty of them.

"Q. Then this clause, do you understand it to mean that if this clause is to have any effect at all upon the contractual rights of the parties, that the samples should be submitted by the brewer?"

Objected to on the same ground.

Same ruling.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Well, what does this mean, 'On approved sample,' that samples were to be submitted by the seller or by the buyer?"

Objected to on the same ground.

Same ruling.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. If samples are submitted by the seller, aren't they submitted subject to approval?"

Mr. Twining: I make the same objection. He is still referring to the contract, and he wants to know what the witness thinks it means. It is another way of asking or arguing with the witness and trying to show that his conclusion as to what "on approved

samples" means—that what he says it means is correct.

The Court: In such a case as this.

Mr. Twining: Yes.

The Court: Yes, I thing that is objectionable.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. What would be the object of the approval of the samples by the seller?"

Mr. Twining: That is exactly the same question. I make the same objection.

The Court: I make the same ruling.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Well, can you tell in advance whether a buyer is unwilling to fulfill his contract or not?"

Mr. Twining: I object to that, because that question is also argumentative. He is trying to show the witness that his construction of the contract is ridiculous. He says, "Can you tell in advance whether a buyer is unwilling to fulfill his contract or not?"

Mr. English: This is preliminary to the next question obviously.

The Court: Read them both.

Mr. English: The first question is, "Well, can you tell in advance whether a buyer is unwilling to fulfill his contract or not?" The next question is, "Was there any evidence or indication of that in this case, in advance

of the shipment?" You see, that first question which is objected to is preliminary to the next question, which, I think, is a proper question.

Mr. Twining: No, I think the two questions are separate. I think the first question is still argumentative. It is trying to show this witness that his construction of the contract is not a practicable one, and then it goes on and asks him to particularize in this case. I object to the first one on the ground that it is argumentative, and to the second one on the ground that it is immaterial, because the answer itself admits that the hops were accepted and the provision that it was his right to object was waived.

The Court: Well, possibly they are connected, so that I shall reserve my ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Well, can you tell in advance whether a buyer is unwilling to fulfill his contract or not? A. Sometimes.

"Q. Was there any evidence or indication of that in this case, in advance of the shipment? A. No, there was not.

"Q. Well, why didn't you wait then for his letter which came three days later? A. Because shipment had been made three days previous.

"Q. Well, I say, why did you ship before you heard from him?"

Mr. Twining: I object to that question, if the Court please. It is immaterial what the intent was. If he did ship beforehand, that

is a thing that the Court must base its ruling on. The reason does not make any difference.

Mr. English: This man is under cross-examination on his own contract. He says there was not any evidence of any repudiation on the part of the defendant in advance of the shipment, and he did not observe the terms of the contract. Now, "Why didn't you?" That is proper cross-examination.

The Court: I shall reserve my ruling as to this question also.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Well, I say, why did you ship before you heard from him? A. We needed the money. We grow 25,000 bales of hops and we have to convert our hops into cash, and it is difficult to finance a business with that volume of hops; we have to get our deliveries made and get our money.

"Q. I see; then you made the shipment in this instance without waiting for the approval of the samples sent defendant because you were operating with insufficient capital."

Mr. Twining: I object to that question because it is an unfair statement of the witness's testimony, and also because it does not make any difference why he shipped in advance.

The Court: I shall let it stand.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: Then the further question is:

"Q. Is that the fact? A. I haven't stated that

we operated with insufficient capital. We operate with sufficient capital to run our business on the basis of the buyers taking their hops and paying for them at the time they are bound to take them and pay for them.

"Q. At the drop of the hat, without the approval of samples? A. There is no drop of the hat about it. I told you that we waited a reasonable time for an answer. We got no answer. We made the shipment. The documents were out of our possession.

"Q. And yet on the very day you made the shipment, your New York office by letter, Exhibit No. 1 on cross-examination of Horst, inquires of the defendant as to approval of these samples, did it not?"

Mr. Twining: I object here. There is a line of questions, and it is not necessary to object to each one of them, I think, because the point is always the same: that the testimony with reference to his reasons for making this shipment before he received advices from the buyer as to whether or not he would accept the goods is immaterial, first, upon the general ground that reasons for making the shipment cannot affect the contract rights and obligations, and, second, upon the ground that subsequent to the shipment the goods were accepted under the contract, and that upon their acceptance under the contract and no disapproval within the time named in the contract the obligation to pay for them arose.

The Court: I shall reserve my ruling as to that line of inquiry, and give you an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. And yet on the very day you made the shipment, your New York office by letter, Exhibit No. 1 on cross-examination of Horst, inquires of the defendant as to approval of these samples, did it not? A. Yes, that showed we were in a hurry to get an answer.

"Q. Well, having asked them if they approved those samples, on the 16th and having shipped the hops on the same day, did you give them a reasonable time to reply? A. Yes, we gave them a reasonable time to the previous letters.

"Q. How long does it take a letter to go from here to Elizabeth, New Jersey, and vice versa? A. Four or five days.

"Q. You sent samples on the 4th of September and shipped on the 16th of September without having heard from them? A. Yes, we asked them to telegraph. We could have got a telegraphic answer by the 8th of September.

"Q. Now, allowing five days each way with one day for answer, that would be 11 days added to September 4th, the day you mailed the samples.

"Mr. Harrison: You mean the last two samples?

"*Mr. Alling*:

"Q. ——would be September the 15th, and you shipped the next day? A. No, now that is not a fair way to put the question. We sent him samples beginning on the 27th of August or thereabouts. We sent the second bunch of samples on the 4th of September and we asked for telegraphic response in both cases and we got neither telegraphic or mail response to either of the letters. That is, within the time, there was no answer sent by the brewery when they received the first letter and there was no answer sent when they received the second letter

nor when they received the third letter. They sent no answer either by mail or by wire upon their receipt of those letters.

"Q. Well, didn't you get their letter of September 17th; you have testified you did? A. Well, September 17th is a long time after September 4th. They would get the letter of September 4th by September 8th or 9th, and if they didn't answer until September 17th, that is a very long wait.

"Q. What do you consider in judging whether it is a long wait or not, lack of capital and wanting the money; is that what makes the wait long? A. I didn't say we had a lack of capital.

"Q. Well, you said you needed the money and you had to turn your hops into money? A. Needing the money is not lack of capital. We have ample capital to conduct our business on business lines.

"Q. How much capital have you got?"

Mr. Twining: That was objected to.

Mr. English: Well, it is not pressed.

(Reading):

"Q. Then when you said you needed the money and that was the reason why you shipped the hops before you had received word from the defendant approving the samples, you mean that your needing the money was no greater than it was ordinarily? A. The more money we have to operate with, the more business we can do.

"Q. Well, now, was it only the fact that you needed the money that you made the shipment before you received an approval of the samples? A. No. No, we are in a hurry to perform our contracts. We want our contracts performed at as early a date as possible.

"Q. Had thee been anv decline in the market value of hops between the high price in August

which you have testified to, and the 16th day of September, 1914, when you made the shipment? A. The market gave every indication of breaking, and everybody handling hops or nearly everybody handling hops believed that the market would collapse.

"Q. Well, was that one reason why you hurried this shipment and made it before you heard from the defendant as to whether or no it approved the the samples sent it? A. Was that one of the reasons?

"Q. Yes. A. Oh, everything contributes to the desire to complete one's contracts.

"Q. Well, did that enter into your consideration? A. I presume it did.

"Q. Yes, did you think that if the market went too low, it would be a temptation on the part of this defendant to repudiate his contract, or refuse to fulfill it? A. No, I did not.

"Q. During your examination you spoke of taking precautions in anticipation of repudiations; was this precipitous shipment of the hops under the circumstances, in that you had not heard from the defendant approving the samples sent him, a precautionary measure? A. It was not a precipitous shipment.

"Q. Well, was the shipment, made at the time it was made and under the circumstances that it was made, a precautionary measure? A. No, sir.

"Q. Do you hurry all your shipments by reason of the falling market? A. We hurry all shipments every year, whether the market is up or whether the market is down.

"Q. The danger of repudiation is much greater on a falling market, isn't it? A. For some people it is. With most people, it is not.

"Q. Well, you deal with some of that kind of people, don't you? A. Yes, sir.

"Q. Judging from the number of lawsuits you have? A. I haven't had many lawsuits.

"Q. I understood you to say you average one a year? A. Well, one a year is very little, a very small amount of litigation considering the volume of business that we do.

"Q. Well, you consider you have always been right in those controversies?

"Mr. Harrison: I object to that on the ground it is wholly immaterial and foreign to the issues in this case. It is easy enough to see, from the scope of counsel's examination, whether he hopes to get at the facts in this case or not. I instruct the witness he need not answer that question.

"Mr. Alling:

"Q. Well, you say that with some buyers, the liability of repudiation is greater on a falling market; now I take it that your litigations arose out of repudiations of contracts or failure to fulfill them by your buyers. Does your experience indicate that controversies of that character are more likely to occur on a falling market? A. With some buyers, yes.

"Q. Yes, you didn't consider at that time the defendant to be that kind of a buyer, did you? A. No, sir.

"Q. So then the falling market would not have influenced you in making the shipment at the time you did and under the circumstances you did? A. Why, I have gone into that very fully. I have told you that we ship all our hops as early as we possibly can ship them. We are in a hurry to get our deliveries made regardless of the market.

"Q. You didn't regard that under paragraph numbered 4 of this contract reading as follows: 'Time of shipment et cetera; time of shipment, all deliver-

ies during the months inclusive of September-February, following the harvest of each year's crop,' gave the buyer any right to say as to when the shipment should be made? A. It gave him no right whatever so long as it was——

"Q. Did you understand——

"Mr. Harrison: Let the witness finish the answer.

A. ——so long as it was between the time limitations of the contract.

"Mr. Alling: No, I will withdraw that question.

"Q. In shipping the hops on the 16th of September, as you did, without any expression on the part of the buyer as to whether he desired the shipment at that time, did you so do under the understanding that paragraph 4 of the contract gave an option and election to you as to the time of shipment which it did not give to the buyer under the contract? A. The contract not only specifies the time of shipment or delivery as September to February inclusive, but there is another clause in the contract with specifically permits me to make the shipment or delivery prior to September, if I so elect, and in case of such prior shipment or delivery, that I have to allow to the buyer interest and insurance charges.

"*Mr. Harrison:*

And referring to paragraph 12 of the contract.

"*Mr. Alling:*

"Q. That is No. 12 in the endorsements? A. Q. Did you ever offer to arbitrate this controversy as to quality? A. No, sir, nor did the other party."

Mr. Twining: With that question, line 23 on page 269, ends my objection last stated.

Mr. English: (Reading):

"Q. This contract, so far as the printed form appears, is a contract which was prepared and printed by the plaintiff? A. Yes, sir.

"Q. Now, have you made any further search for a copy of a letter written by the plaintiff on September 16th? A. Yes, sir.

"Q. No——

"Mr. Harrison: 22nd, I think it was.

"*Mr. Alling:*

"Q. Yes, on September 22nd. A. Yes, sir."

Mr. Twining: That is the letter that we did not find.

Mr. English: By consent, we then omit from line 1 on page 270 to line 30 on page 274, and agree that, as a matter of fact, no reply was made by the plaintiff to the defendant's letter of September 17th, received by the plaintiff on September 22d, and marked Exhibit P7.

Mr. Twining: Yes, no reply was made to that letter.

Mr. English: I now resume reading from line 30, page 274 (reading):

"Q. Now, I take it, Mr. Horst, that you have no personal knowledge concerning the identity of these samples with the lots and bales which they purport to have been taken from?"

Mr. Twining: I object from line 30, page 274, to line 9, page 276, on the ground that that testimony relates to the quality of samples, and is therefore immaterial, the shipment itself having been accepted.

The Court: I shall reserve my decision on that.

Plaintiffs' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. Now, I take it, Mr. Horst, that you have no personal knowledge concerning the identity of these samples with the lots and bales which they purport to have been taken from? A. Well, I have that knowledge that I would naturally have in the proper conduct of my business. I know the hops.

"Q. Well, I repeat my question—read it, Mr. Reporter.

"(Pending question read.)

"Q. Using personal knowledge as contradistinguished from what you have learned from what others have represented by letter or otherwise? A. Well, I know of those samples you have there, seven of them are of our Wheatland crop.

"Q. Well, you know it only because you got them from Mr. Rooney by express. A. Oh, no, I would know that they were those hops without that.

"Q. Oh, I see, you would be able to identify those samples as coming from the bales and lots which they purport to come from, quite irrespective of any letter or other communication from Mr. Rooney or anybody else? A. No, I would not know that they came from the particular bales, no.

"Q. Or lots? A. No, I would not know that they came from the particular lots, but I would know that they came from the crop.

"Q. I see. A. And I would know that that was the general character and type of hop in those respective lots.

"Q. I see; are you able to identify at sight,

samples of hops raised on the Wheatland ranch from hops raised on any other ranch in that vicinity? A. In a general way, yes.

"Q. In a general way; well, I am asking whether there are such characteristics, peculiar characteristics of the Wheatland hop, or were in 1914, that you are able by looking at them, to tell that the hops in these samples came from the Wheatland ranch? A. I could tell in a general way. There would be room for question.

"Q. Sure; now I will ask you what was the highest and lowest price at which you sold hops during the month of August, 1914?"

Mr. Twining: If the Court please, I object to that. The witness has testified that there was no market for futures, and this testimony relates merely to current sales. Furthermore, it relates to current sales made during the month of August, which was prior to the breach.

Mr. English: No, he said he could not answer that.

Mr. Twining: All right. If he does not answer it, there is no use in objecting to it. I withdraw that objection.

Mr. English: (Reading):

"Q. Sure, now I will ask you what was the highest and lowest price at which you sold hops during the month of August, 1914? A. I was not asked to furnish prices for August. I was asked to commence with September, I believe.

"Q. I see. A. All right.

Mr. Twining: Then I object to this question relating to current sales during the month of September It is no criterion of the

market for futures and no criterion as to what the damages might be under this contract.

Mr. English: It is cross-examination on his direct. He testified to market prices.

The Court: I shall reserve decision.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining.: I should like that ruling to apply from line 9, page 276, to line 5, page 278, which is the portion of his testimony in which he tabulates these sales.

Mr. English: We will consent to that objection after the date of the breach, which was in October, 1914. We will consent that counsel may strike out what he wants to after that date.

Now, I am reading from line 14, page 276. He is asked about September, 1914. (Reading):

"A. The lowest price in September for 1914 that we sold at 12¾ cents and the highest was 25½.

"Q. What grade was the 25½? A. Well, now, I didn't get the particulars on that. I want to say generally that the range of price would not be accounted for by difference in grade.

"Q. Were the hops in each instance, one where you sold for 25½ and the other where you sold for 12¾, from the Wheatland ranch? A. I didn't hunt up those particulars.

"Q. You don't know where they were from? A. No, sir.

"Q. Well, what was the highest and lowest price for October? A. The lowest was 7¾ cents and the highest was 20 cents.

"Q. You don't know where those were raised or

what their grades were? A. No, but I can find out

"Q. How was it in November?"

Now, from there on we will consent to leaving it out.

Mr. Twining: Oh, no, I do not consent to that. If you want to omit a portion of a deposition, you must omit all the portion relating to a certain subject. I do not consent to its being left out. If your Honor thinks it must be taken subject to my exception, then the whole subject must be taken.

Mr. English: As I understood counsel's position, he objected to certain questions included between certain lines on certain pages, to save time, instead of making a specific objection on each occasion. Now, we read up to a certain point, and then we leave out the rest, and he has the benefit of his objection.

The Court: I understood Mr. Twining's original position, at the outset, to be that it was allowable to read only a part of a deposition, provided everything was read that was a part of the subject—I am not stating it very well—that was relevant as a part of the matter of the inquiry. Probably that is not the way you stated it. Now, is that rule correctly stated a rule which is violated by this matter?

Mr. English: I do not think it is violated, for this reason. From our point of view, the only material evidence of market value of any particular time would be at the time of the breach. The time which the statute fixes as to when the evidence is material is at the time of the breach. Our point of view is that there was a market value, and, secondly, that

there being a market value at the time, the time of the breach, which concededly was October, 1914, if any time, that is the time that the market value should be given. I have read what the selling prices were, high and low at the time of the breach, in October Now, the depositions proceed on dates after that date, which, in our point of view, is immaterial and has no place in the case.

The Court: Are you objecting to that?

Mr. English: Well, I am giving him the benefit of his own objection. He said that he objected to all the evidence, his theory being that there is no market value. He says evidence as to market value is immaterial. I say it very material, and it relates to a certain date, namely, the date of the breach, and we will produce evidence showing that there was a market value, which he says is not so. Now, your Honor is letting in evidence as to market value. The next question is, of what date is the evidence material? We say at the time of the breach.

Mr. Twining: Mr. English is forgetting entirely that this is an installment contract. The damages for future years are not fixed as of the date of the breach of the first installment, which was in 1914. The damages for future years, if there was a market price, would be the difference between the contract price and the market price at the time of the performance of each one of those future installments. It would be a monstrous idea to say that a contractor could pick out some time when the market happened to be up and break an installment contract, and say, "You cannot get any damages, because the market is higher than the contract price," and in

that way prevent a man from getting the value of his bargain, which would be the profit that he would make over a term of years. Now, this testimony goes month by month through the year 1914 and the year 1915, and brings what this witness said with reference to a market for current sales down to the time when he gave his deposition, and it is a separate subject. If any testimony is given with reference to it, it must be given on the whole subject. When I objected to the giving of this testimony, I objected upon the ground that it was not testimony of anything but a market for current sales. I objected to those portions subsequent to October, 1914; the objection went to the whole testimony; and now, I say, if any of it is read, it all must be read, because it relates to the whole period prior to the time when this witness gave his deposition as to what the market was for current sales.

The Court: I think the safest course for the Court to take at the present time is to have all the testimony before it.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: I shall begin at line 1, page 277 (reading):

"Q. How was it in November? A. The lowest 7¼; the highest 16.

"Q. How was it in December? A. Lowest 7¼; highest 13¾.

"Q. How was it January of 1915? A. Lowest 6¾; highest 20.

"Q. And in February? A. Lowest 6¾; highest 14¾.

"Q. And in March? A. The lowest 8¼; highest 17½.

"Q. And in April? A. Lowest 6¾; highest 17¾.

"Q. In May? A. Lowest 5¾; highest 17¾.

"Q. And in June? A. Lowest 5¾; highest 17.

"Q. And in July? A. Lowest 12 cents; highest 16.

"Q. And in August? A. Now, the prices beginnig with August are on the 1915 crop.

"Q. Yes. A. Not 1914 crop. The lowest was 12 cents and the highest 14½.

"Q. September? A. Lowest 8¾; highest 15.

"Q. October? A. Lowest 9 cents; highest 14¾.

"Q. November? A. Lowest 9 cents; highest 12¾.

"Q. And in December? A. Lowest 8½; highest 15.

"Q. And in January of 1916? A. Lowest 8¾; highest 15.

"Q. February? A. I haven't got the figures for February.

"Q. Oh, yes, that is right, you haven't got the figures.

Now, were any of these highest sales on grades above good brewing Pacific Coast hops?

"Mr. Harrison: You mean did the contracts call for that or was the quality of the hops?

"Mr. Alling:

"Q. Were they as a matter of fact? A. They were generally higher than good brewing Pacifics.

"Q. About the same grade as the hops you shipped to the defendant? A. Yes, sir; some better.

"Q. Now, were all or any part—what was the fact

as to that—of these sales made on contract or otherwise? A. These were the sales that were made after the harvest.

"Q. Well, were they shipments that were made on contract; contracts that were previously entered into, or made with the current sales? A. Current sales; sales made during the period of time mentioned for which the price is given.

"Q. Were any of them fancy? A. Yes, sir.

"Q. Those of them that were fancy would be represented by the higher price, I suppose? A. Not necessarily.

"Q. Were some of the low figures, fancy? A. No sir.

"Q. Did some of these prices represent sales of choice hops? A. Of which?

"Q. Choice hops? A. Of which sales?

"Q. For which you have given us the figures? A. The high prices?

"Q. Yes. A. Yes, sir.

"Q. Would any of the low prices represent choice hops? A. Yes, sir.

"Q. What do these prices represent, Pacific Coast prices or delivered prices in the east? A. They represent the gross price that we get for the hops, less the freight to the east. The prices don't consider any cost of selling.

"Q. Transportation? A. Or storage, or the many other items, charges that come off the price before arriving at the net price that we realize.

"Q. I see, these prices were net to you? A. No, these prices were gross to us, less the freight to the eastern points.

"Q. Oh, less the freight to the eastern points. Well, were all of these figures which you have given me, eastern sales? A. No, sir, it was a consolidation of the eastern and the coast sales.

"Q. These figures do not represent averages, do

they; they represent, do they not, individual transactions? A. You asked me for the highest price and the lowest price, the range, and that is what they represent.

"Q. They represent in each case individual transactions? A. Yes, sir.

"Q. Wherever they represent sales made in the east, the cost of transportation is represented? A. It is deducted from the price realized, and the figure given you would represent the eastern price less the freight to the east.

"Q. In other words the net to you? A. Well, the net, if you consider only the freight.

"Q. Yes. A. But not the net if you consider the other charges.

"Q. Yes. Now, I notice quite a large difference during some of these months; take October, 1914, lowest price 7¾ and the highest price 20; did that represent market fluctuations or did it represent difference in quality of the hops? A. No, it represents difference. Principally it represents difference in sales, making a good sale or a poor sale.

"Q. I see; well, did the difference in the quality, in any case, so far as you know, account for the difference between the high and the low in any given month? A. It does to some extent, yes. The real difference is the difference between making a good sale and making an ordinary sale or a poor sale.

"Q. Yes, did the difference in the quantity of the sale have something to do between the high and the low price in any given month? A. That figures in it as well.

"Q. As well, naturally. Now, do these sales on the low side throughout, represent some medium hops? A. They might.

"Q. Some common? A. No.

"Q. No common? A. No.

"Q. Were there any damaged hops among those represented by these low prices? A. Any what?

"Q. Hops damaged in drying or curing? A. No, sir.

"Q. Were there any immature hops represented by these low priced transactions? A. No, sir.

"Q. Now, ordinarily the high priced transactions would represent the smaller quantities, I take it, transactions involving smaller quantities? A. They do and they don't. Some of them represent large quantities and some represent small quantities; mostly speaking the high price would represent small quantities.

"Q. Yes, and the same thing would be correlatively true with reference to the low price, that those are more likely to be large transactions? A. Yes, sir.

"Q. Well, do you know about what the ruling price was in August of 1914 of choice and prime hops? A. The difference between the price of choice and prime, or the different grades, is very little.

"Q. Well, take hops similar to those shipped the defendant, do you know about what the ruling price for the month of August, 1914, was? A. I can't tell you without looking at my books. My impression is that the price was a little higher than the first of September.

"Q. Higher than in September. I understood you had so testified before. Now, you have that mailing book with you? A. No, I forgot it.

"Q. Well, never mind, it is of minor importance. I won't trouble you about it. I was going to ask one or two questions with reference to office custom in that connection. A. Well, I can have the book here in five minutes.

"Q. Well, I won't put you to that trouble. Are there any regularly published quotations on hops? A. Yes, sir.

"Q. Do you know how they are given out? A. Where they get their data?

"Q. Yes; do they get the data from dealers like you? A. They get the data from dealers.

"Q. Is there any publication that applies to you for data? A. No, sir.

"Q. How is the market value of the hops at any given time ascertained? A. By the reports of sales or purchases.

"Q. Are those reports published in any form, are they accessible to any given dealer? A. Yes, sir.

"Q. Where are they published? A. The only publications I know of are the publications of the reports of the sales from growers to dealers. There is no publication of the reports of the sales from dealers to brewers.

"Q. I see; now where and by whom is the data collected concerning sales by growers to dealers? A. Well, it is not collected any place that I know of. These are publications of some of the purchasers in different papers.

"Q. I see. A. There is no collection of them.

"Q. There is no authoritative source? A. They generally publish those sales that some dealer wants them to publish and don't publish the sales that the dealers don't want published.

"Q. I see. A. They are therefore rather unreliable.

"Q. But that is the best data you have in arriving at what is supposed to be the market value of hops at any give time? A. No. Those figures that are published are too often wrong.

"Q. Have you any better data than that? A. Yes, we keep in touch with the growers and find out what sales they are making regardless of any publications, and that seems to be the best way to find out what is really doing because the prices that are published——

"Q. Are not always reliable? A.——are only a guide, and furthermore, because a lot of hops is sold

by a grower at a given price is no indication that more hops could be bought at the same price or more could be sold at the same price.

"Q. Do those published statements of sales by growers to dealers include the matter of grade as well as price? A. No, sir; they give the names of the crops.

"Q. I see; well, now can an experienced dealer form a reasonably accurate estimate of the grade from a knowledge of the grower and the quality of hops he usually produces? A. No, you can't go by the usual end of it, you have to know the kind of hops he grew that particular year.

"Q. I see; locality and personality are not factors in arriving at a judgment as to price? A. The are factors, but they are far from conclusive.

"Q. Yes; I assume you have been testifying as to coast conditions? A. Yes, sir.

"Q. Concerning this matter of data as to market price, are the conditions at New York in anywise different or other? A. Well, he can't find out what the people get from New York. It is hard to find out.

"Q. Well, there are other sections of this country that produce hops besides the Pacific Coast, are there not? A. Yes, New York state produces some hops.

"Q. And Ohio? A. Not htat I know of.

"Q. What other, if any states besides New York? A. None.

"Q. New York and Pacific Coast then grow all the hops that are grown in this country? A. Yes, sir.

"Q. What is the recognized market center for hops, San Francisco or New York or Portland? A. New York used to be. Now the centers are San Francisco, California, Salem and Portland, Oregon.

"Q. Well, are not more hops bought and sold in

New York than in any other single city? A. No, sir, that is, there are more hops bought by the brewers in New York than in any other single city.

"Q. But not by dealers? A. Not by dealers.

"Q. Well, doesn't the price ultimately paid by the consumer, control the market? A. Why, I don't know that the price by the consumer is an indication of the market, because the consumer might pay a whole lot more than the market and he might pay a whole lot less.

"Q. And the dealer might trade on a speculative basis, but a consumer wouldn't, would he? A. Consumers speculate just as much as the dealers.

"Q. It is the dealer's business to speculate, isn't it, in hops and it is the brewer's business to use them? A. Well, it depend on what you call speculation. The dealer's use of the hops is the selling of them and the brewer's use of the hops is the brewing of them, and in both cases, there is speculation on the part of the brewer and the dealer. The only difference is that the brewer can't brew the hops until he buys them.

"Q. Can the dealer speculate in them and get the advantage of his speculation without buying them? A. Yes.

"Q. How does he do that? A. He sells them first and buys them afterwards. He may not buy them for six months after he sells them or he may not buy them for five years after he sells them.

"Mr. Alling: I think I am through with this witness."

Mr. Twining: If the Court please, I move to suppress from page 286, line 14, to page 288, line 2. The testimony relates again to the quality of the hops which were delivered and accepted as I contend, and is therefore immaterial.

The Court: I shall reserve my ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"Redirect examination by Mr. Harrison:

"Q. I understood you to state in your cross-examination, Mr. Horst, that you were familiar with the Wheatland crop of the year of 1914, is that correct? A. Yes, sir.

"Q. With the exception of a few bales, I understood you to say that the crop was uniform in quality? A. Yes, sir.

"Q. Have you with you now the data from which you could tell us whether any of that crop was accepted by brewers on contracts calling for a better grade of hops than good Pacific brewing hops?"

Mr. Stamler: I object to that.

The Court: What is the point of the objection?

Mr. Stamler: What difference does that make, what other brewers did?

Mr. Twining: It has a bearing, I think, on whether or not these hops were of the contracted quality—the fact that they were accepted generally under a contract calling for a better grade than good Pacific Coast brewing hops. Our contract, your Honor will recall, provided that we sold 100 bales of hops of the crops of 1914 to 1918 inclusive, good Pacific Coast brewing hops, on approved sample. Now, this question asks whether or not hops of this crop were accepted generally by other brewers on contracts calling for a better grade than good Pacific Coast brewing

hops. It seems to me it would have some bearing on the question as to whether or not those hops were in fact of the contracted quality or superior to it, and had been so recognized generally.

Mr. English: This was on approved sample. What somebody else might do would not affect our judgment in any way whatever.

Mr. Twining: But if the sample question is out of the case, as it may be, then the question would arise as to whether or not there was an obligation to accept these because they were of the accepted quality, if the right to a sample was waived.

The Court: I shall reserve decision on it and let it stand.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"A. Yes, sir.

"Q. Is that the fact that some of the crop was so accepted? A. Practically all of the crop——

Mr. Alling: Well, one moment——

"A. ——was so accepted."

Mr. English: Then they make a motion to strike it out on the ground that it is immaterial, and I suppose we might make the same motion and have the same ruling.

The Court: I make the same ruling.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: Then I shall skip down to

line 17, page 287. (Reading):

"Mr. Harrison:

"Q. Well, Mr. Horst, are you able to tell what brewers did accept any part of that crop on contracts calling for better grades than the grades specified in this contract, or will you be able to get that data for a later hearing?"

Mr. English: I suppose that is the same question. We make the same objection.

The Court: I make the same ruling.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"A. I can give you all that data in detail at a later hearing, but in a general way I can tell you that the bulk of the entire crop was delivered to the largest and best breweries in the United States on contracts for choice brewing Pacific Coast hops and hops identical with the hops rejected by Breidt in question in this case.

"Q. And as I understand it, the term good Brewing Pacific Coast hops has a definite meaning in the trade, has it? A. Yes, sir.

"Q. Is the grade known as choice higher or lower than the grade known as good brewing Pacific Coast hops? A. Higher. A choice brewing is higher.

"Q. Has the plaintiff ever been paid for the hops shipped to the defendant in 1914? A. No, sir."

Mr. Twining: Now, I move to suppress on page 288, line 6 to 23, on the ground that this portion of the testimony relates to what was done by the defendant with reference to the samples which were sent to it, which,

under my view of the case, is immaterial, because the right to receive and approve a sample was waived.

The Court: I shall reserve decision.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"Q. State whether or not those hops were shipped to the defendant before the plaintiff had any notice that the defendant disapproved the hops? A. Yes, sir.

"Q. State whether or not those hops were shipped to the defendant before the plaintiff had any notice that the defendant disapproved the samples which had been sent him? A. Yes, sir.

"Q. Calling your attention to defendant's letter dated September 17, 1914, which has been marked Plaintiff's Exhibit No. 7, I will ask you to state again when that letter was received by the plaintiff? A. September 22nd.

"Q. Prior to the receipt of that letter, did you have any notice of knowledge that the defendant was dissatisfied or had disapproved the samples or any of the samples that had been sent? A. No, sir.

"Q. State whether or not after receiving the defendant's letter of October 12, 1914, which has been marked Plaintiff's Exhibit No. 8, you were willing to deliver to the defendant——

"Mr. Alling: One moment. Finish the question, but I want to warn the witness to give me a chance to enter an objection.

"Mr. Harrison:

"Q. State whether or not after the receipt of Plaintiff's Exhibit No. 8, the plaintiff was willing

to ship to the defendant other hops of the contract quality?

"Mr. Alling: One moment, objected to as leading.

"Mr. Harrison:

"Q. State, if you please, Mr. Horst, the fact as to whether after the receipt by the plaintiff of Plaintiff's Exhibit No. 8, the plaintiff was willing or unwilling to ship the defendant other hops of thec ontracted quality?"

Do you object to that?

Mr. English: That was objected to at the taking of the deposition as leading. Never mind that.

Mr. Twining: (Reading):

"A. Yes, sir.

"Mr. Harrison:

"Q. Was it willing or unwilling to ship other hops?

Mr. Alling: Objected to as leading:

"A. It was willing.

"Mr. Harrison: Q. What was the disposition of the plaintiff company after the receipt of plaintiff's Exhibit No. 8, with regard to the shipment of other hops besides lot No. 13?"

Mr. English: That was objected to. No objection; let it go.

Mr. Twining (reading):

"A. We were desirous of giving them other hops

to satisfy them regardless of the fact that the quality of the hops we shipped them we considered to be better than the contract requirements.

"Mr. Harrison: Q. State whether or not the defendant has ever indicated its willingness to receive under the contract introduced in evidence any other hops?

"Mr. Alling: Objected to as leading and suggestive.

"Mr. Harrison: Q. Answer the question. A. The only thing I know about their attitude in the matter was the correspondence that passed. What the correspondence shows is all I know."

Now, I move to suppress page 290, lines 1 to 28. This testimony relates to samples and was offered for the purpose of showing the quality of the samples, and is therefore immaterial.

The Court: How much does your motion include?

Mr. Twining: Lines 1 to 28 on page 290.

Mr. Stamler: No objection.

Mr. English: We consent to that.

Mr. Twining: I shall start reading at line 29, page 290 (reading):

"Q. I call your attention to the fact that there have been introduced in evidence here, two papers, each of which purports to be a bill of lading covering lot 13, one of which is Plaintiff's Exhibit 26 and the other of which is Plaintiff's Exhibit 27, and I ask you to explain again why there are two bills of lading to cover that shipment (handing paper to witness)? A. Neither of two papers is a bill of lading. They are simply memorandum copies

of bills of lading. The only bill of lading that was issued for the shipment is the bill of lading that was sent to Breidt along with the invoice at the time of the shipment.

"Q. Which of those exhibits is a copy of the bill of lading sent to the defendant at the time of the shipment? A. Exhibit No. 27 is a copy of the original bill of lading that was sent to the defendant.

"Q. At the time that that bill of lading was issued what was done with the bill of lading of which Exhibit No. 26 is a copy? A. Well, the bill of lading of which No. 26 is a copy, showed the shipment on its original preliminary destination of Chicago and the bill of lading for the preliminary destination was afterwards changed for the final bill of lading for the destination to the defendant.

"Q. At the time of that change or at the time of the diversion, as you have described it in your cross-examination, do you know what was done? A. Well, the original of the preliminary Chicago bill of lading was returned to the railroad company.

"Q. You stated in your cross-examination that your knowledge of the delivery of lot 13 was derived in part from answers to inquiries from the carriers? A. Yes sir.

"Q. I show you now four papers which purport to be tracers and ask you whether or not those were received by the plaintiff (handing papers to witness)? A. Yes, sir.

"Q. State whether or not those were received by the plaintiff in response to inquiries regarding that shipment? A. Yes, sir.

"Mr. Harrison: I ask that the four papers identified by the witness be marked plain-

tiff's Exhibits 31, 32, 33 and 34 respectively.

"Whereupon said papers were marked by the Commissioner Plaintiff's Exhibits 31, 32, 33 and 34 respectively."

I now offer those papers and ask that they be marked respectively P31A, P32A, P33A and P34A.

[The papers referred to are marked respectively Ex. P31A, Ex. P32A, Ex. P33A and Ex. P34A.]

Mr. Twining (reading):

"Mr. Harrison: Q. State whether or not the letter of the defendant dated October 12, 1914, and marked Plaintiff's Exhibit 8, caused the plaintiff to do anything with regard to the conduct of its business?"

Mr. English: That is objected to as leading.

Mr. Twining: I should not think that was leading.

Mr. English: That is all right.

Mr. Twining (reading):

"Mr. Harrison: Q. Answer the question yes or no. A. Yes, sir.

"Q. That is, answer it by stating whether or not it did. A. Yes, sir.

"Q. State what was done because of the receipt of that letter in that regard."

Mr. English: I think we ought to object to that, your Honor, on the ground that what they did after the receipt of that letter, which was the letter of repudiation, was immaterial. By bringing this suit they have shown what they did; that is, they

elected to regard the whole contract as terminated and sue for the entire breach. What they may have done after that in the way of showing what damages they incurred is immaterial.

Mr. Twining: I do not think this question raises the question, but I suppose that is the question. The testimony shows that as the result of the receipt of this letter the Horst Company plowed up hops.

The Court (after further argument): Decision is reserved.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (reading):

"Mr. Harrison: Q. State whether or not the letter of the defendant dated October 12, 1914, and marked plaintiff's exhibit 8, caused the plaintiff to do anything with regard to the conduct of its business. A. Yes, sir.

"Q. That is, answer it by stating whether or not it did. A. Yes, sir."

Mr. English: If it is agreeable to your Honor, I shall ask for an exception to all this line of testimony dealing with the plowing up of the hops.

The Court: Yes.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (reading):

"A. We plowed out hops.

"Q. State what was done in detail in that regard? A. We ployed up enough hops on the

Cosumnes River to offset the quantity of hops we sold for future hops to the Breidt Brewery.

"Q. State whether or not by such plowing out the plaintiff lost any improvements?

"Mr. Alling: One moment, objected to as leading.

"Mr. Harrison: State what loss, if any, the plaintiff suffered by reason of plowing out these hops.

"Mr. Alling: Objected to as leading, as indicating that a loss was sustained.

"Mr. Harrison: Q. Answer the question. A. We lost the difference between the cost of production and the sale price and we lost the value of improvements, that is, hops in bearing, hop trellis, hop drying houses, cooling houses and other improvements that became worthless by reason of plowing up.

"Q. What was the value of the improvements so lost to the plaintiff? A. On the entire amount of plowing up, the loss was upwards of $25,000, though in considering my loss with regard to the Breidt default, I simply apportioned the loss to the quantity of hops involved in the Breidt sale."

Mr. Stamler: I ask the Court to strike that answer out, as it is not responsive. The question was, "What was the value of the improvements so lost to the plaintiff by reason of the damage caused by the defendant?" He puts his answer in, $25,000, on some other ground, other than that of the defendant.

The Court: Mr. Twining does not object to it?

Mr. Twining: No, I do not.

The Court: If it is relevant, it may stand.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (reading):

"Mr. Harrison: Q. What was the value of the improvements lost by the plaintiff by reason of the plowing up caused by the acts of the defendant with regard to this transaction?

"Mr. Alling: Objected to as leading and as implying something not appearing in evidence.

A. In excess of $3,000.

"Mr. Harrison: Q. In order that there may be no objection to the form of the question, I will ask you to state generally what effect upon the business of the plaintiff was produced by the receipt of defendant's letter of October 22d marked plaintiff's exhibit No. 8?

"Mr. Alling: Objected to as leading and because it does not as yet appear that any effect was produced upon the business of plaintiff.

"Mr. Harrison: Q. State whether or not any effect was produced on the business of the plaintiff by the receipt of the letter of October 22d referred to? A. Yes, sir.

"Q. State what that effect was. A. That effect was that we were growing more hops than were sold and we did not wish to grow unsold hops and therefore we plowed up hops and by such plowing up we lost the value of all the improvements on the ranches where the hops were plowed

up, as well as losing what would have been the profit as between the difference in the contract price and the cost of production."

Mr. Twining: Now, I move to suppress page 294, line 20, to page 295, line 10. That deals with the discussion of the character of the different kinds of hops. It goes to the question of quality, and comes under the general objection.

The Court: I make the same ruling as before in similar cases.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (reading):

"Q. Is there such a thing as a perfect hop commercially speaking? A. No, sir.

"Q. Might a hop be a choice hop and not a fancy hop and still have some substantial defect?

"Mr. Alling: Objected to as leading.

"Mr. Harrison: Q. Answer the question.

A. I don't understand the question.

"Q. Well. I will withdraw the question and reframe it then. State whether or not a hop might be of such a kind that it could be graded as a choice hop and still that it could not be graded as a fancy hop? A. Yes, sir.

"Q. And would it necessarily under those circumstances have any substantial commercial defect? A. It might not have a substantial commercial defect in either case.

"Mr. Harrison: Those are all the questions that I have in mind at the present

time. I may want to put some further questions when the witness had had a chance to consult his records."

Mr. English (reading):

"Recross-examination by Mr. Alling:

"Q. You have said you produced about 4,000 bales in 1914 from the Wheatland ranch? A. Yes, sir.

"Q. What other hops did you produce in 1914? A. About 5,000 bales in British Columbia.

"Q. What other? A. About 4,000 bales at Perkins.

"Q. Where is that? A. About 4,000 bales at Perkins.

"Q. Perkins? A. About 4,000 bales in Oregon.

"Q. Yes. A. About 4,000 bales on the Cosumnes River, 3,000 or 4,000. I can't give you the exact number. About 3,500, I guess.

"Q. On the Cosumnes? A. Yes.

"Q. All right, any others? A. About 500 bales on the Russian River and about 1,700 in Tehama.

"Q. Is that figuring the Brewer ranch? A. Yes, sir.

"Q. Which one of those is the Brewer ranch? A. The Brewer ranch is included in the Perkins.

"Q. That is all, is it, that you raised in 1914? A. I think that is all.

"Q. And where was it you plowed up hops? A. We plowed up hops on the Cosumnes and at Wheatland.

"Q. Well, how many hops did you produce on the Wheatland ranch in 1915? A. About 3,000 bales.

"Q. How many on the Cosumnes river? A. About 2,000.

"Q. Now, did you produce in 1915 as many hops in British Columbia and on the Perkins ranch and in Oregon and on the Russian River and Tehama as you did in 1914? A. Yes, sir, about the same.

"Q. Well, the 1915 crop was 1,000 less at Wheatland than the 1914 and 1,500 less on the Cosumnes River than 1914? A. That is about it.

"Q. In other words, 2,500 bales less? A. Yes, sir.

"Q. Did you plow all those up on account of receiving defendant's letter of October 12th? A. No, I didn't say I did.

"Q. Well, I asked you if you did. A. No, I did not, and I didn't figure the losses on more than 100 bales. I didn't figure the losses on 2,500 bales. I figured the losses on a hundred bales.

"Q. I see; well, now, your loss, you figure to include not only destruction of growing hops and trellises and that sort of thing, but drying kilns and all the apparatus that are situate on the ranches used in curing, and so forth? A. I have included only those things that became absolutely worthless, and I will still further say that I considered only those losses where they were absolutely obliterated, that is, where the trellis was taken down, where the hops were plowed out and where the buildings were torn down.

"Q. You destroyed buildings then on the Wheatland ranch and on the Cosumnes River because of this reduction of acreage? A. I didn't say I destroyed the buildings simply because of the reduction of this 100 bales.

"Q. No, but the reduction of 2,500 bales; there was 1,000 reduction at Wheatland and 1,500 on the Cosumnes? A. I didn't destroy any buildings at Wheatland.

"Q. What buildings did you destroy? A. I destroyed the buildings on the Cosumnes River.

"Q. All of them? A. Yes, sir, all of them on one of the ranches.

"Q. Have you more than one ranch on the Cosumnes? A. Yes, sir.

"Q. How are they known? A. Well, we had a number of ranches on the Cosumnes River. We had the Dalton, the Pierson, the Murphy, the Patterson, Belcher, Cothrin, and Murray.

"Q. How many acres in the Dalton? A. A hundred.

"Q. How many in the Pierson? A. I think about 50.

"Q. How many in the Murphy? A. I can't tell you offhand; about 50, I guess.

"Q. How many in Patterson? A. I think about 20.

"Q. How many in the Belcher? A. I think about 20.

"Q. How many in the Cothrin? A. I think about 20.

"Q. How many in the Murray? A. I think also 20. I am giving these figures just from impression.

"Q. That makes about 280 acres; were those ranches contiguous? A. Some of them were. The Dalton and Pierson were contiguous and the others.

"Q. The rest of them were contiguous? A. In one group, contiguous.

"Q. Nnw, what buildings did you have on the Dalton and Pierson? A. We had hop kilns, hop picking machines, and hop picking machine sheds and improvements inside of the barn.

"Q. What is that? A. Improvements inside of the barn, which converted the barn into a hop house, into a hop cooling house, and tracks and trestles, engine house, pumping station, electric light and power line, irrigation system, hop trellis

poles and hop trellis set up, hop plants in full bearing. That is about all I can think of at the moment.

"Q. Well, the hop plant, is it perennial or an annual? A. It is perennial.

"Q. How many years would it bear; how many years do you permit it to bear ordinarily before you renew it? A. We never renew it.

"Q. It never requires new stock? A. No; there are some plants in a field that die every year and those that die every year are replaced and there is no telling just how long a hop plant does bear.

"Q. Now, did you have two sets of kilns, one on the Dalton and Pierson group, and one on the other group? A. Yes, sir.

"Q. Two sets of machine sheds? A. Yes, sir.

"Q. And two engine houses? A. Yes, sir.

"Q. Two pumping stations? A. Yes, the two ranches are three or four miles apart.

"Q. Oh, yes, and each independently equipped? A. Yes, sir.

"Q. Well, now, that was the condition in 1914? A. Yes, sir.

"Q. How many acres did you plow up? A. We plowed up all of the Dalton and we terminated our lease on the Pierson.

"Q. How much on the Pierson? A. We terminated the lease. We plowed up on some of the others, I don't know just which ones.

"Q. About how many bales did these various ranches on the Cosumnes River produce to the acre in 1914? A. About 10 bales.

"Q. About how did the crop of 1915 run, about 10 bales to the acre? A. Somewhere around there; both years runs; somewhere between 10 or 12 or 13 bales.

"Q. The yield in 1915 was about what it was in 1914? A. Yes.

"Q. Then you torn down the kilns; any salvage, or were they a total loss? A. Practically total loss.

"Q. Machines a loss? A. Well, the machines were not a total loss. I would say the machines represented an 80 per cent. loss, and the machine sheds represented a total loss.

"Q. I suppose you saved something out of your pumping stations and engine house? A. We saved a little out of those things, very little.

"Q. Did you use any of the plants or did you just simply plow them out and let them go; did you transplant any of them? A. We plowed them up; I don't think we used any of them.

"Q. You don't know as to that? A. Well, I don't know as to that. They wouldn't be worth much.

"Q. Now, you say the total loss in connection with the plowing up of the Dalton and Pierson ranch and the dismantling of these ranches was $25,000 approximately? A. Yes, sir.

"Q. Well, did you dismantle these other ranches? A. No, sir.

"Q. So it was only the equipment on the Dalton and Pierson that was disposed of? A. We simply let go of the Pierson lease.

"Q. And plowed up the Dalton ranch? A. And then on the Dalton ranch we dismantled everything there.

"Q. Yes, so that the equipment, kilns and machine sheds, and engine house, pumping station, etc., etc., on the other group of ranches was kept? A. Yes, we kept the equipment. We kept the equipment and plowed up hops. Of course, that makes up top heavy with equipment on the other end.

"Q. Now, you produced 2,500 bales less—oh, by the way, how much did you plow up at the Wheatland? A. I think about 100 acres.

"Q. Did you destroy any buildings there? A. No, sir.

"Q. No damage to your equipment there? A. No, sir, excepting that we were top heavy with equipment; we got more equipment than we need for the crop.

"Q. Well, by reason of what you plowed up and by reason of the less acreage, you produced 2,500 bales less in 1915 than you did in 1914? A. That is correct, in round figures.

"Q. And the total damage was $25,000? A. I said the total damage was in excess of $25,000.

"Q. So that, apportioned to the bale, it would be $10 a bale, or on the defendant's hundred bales, a thousand dollars? A. Yes, only you don't figure it right.

"Q. Oh, I see, the defendant ought to bear more of the burden? A. No, there is a lot of equipment, a lot of the buildings became worthless by reason of the plowing up, and by simply taking one of the properties like the Dalton ranch where the whole investment was sunk there, on the matter of a thousand bales, the loss was over $25,000 from one ranch.

"Q. But I understood you to testify that your total loss was $25,000? A. I said it was in excess of $25,000.

"Q. Well, it couldn't be three times that, could it? A. Well, if you figure it that way. I don't figure a loss on a building that I don't tear down, though there is a loss by having the building and not having the use of it.

"Q. The total loss would have to be $75,000 before the defendant's pro rata on his 100 bales would amount to $3,000. A. I didn't pro rate the hundred bales on the $2,500. I pro rated the hundred bales on a thousand bales.

"Q. Why? A. Because there is a clean cut prop-

osition. We see a ranch where we grow a thousand bales and we see by losing all the investment on that thousand bales, we have got a clean cut basis for calculation.

"Q. I see; but wouldn't you have to have a total loss of $75,000 before 1/25 of the shortage in crop would amount to a damage of $3,000? A. I didn't consider anything whatever in the line of plowing up on any other place but the Dalton ranch. Whatever losses were suffered by plowing up on other ranches has nothing to do with this matter and I made no charge for losses on other ranches.

"Q. I see; well, you are shy 2,500 bales in 1915, as compared with the crop of 1914, of which you claim the defendant is responsible for 100 bales, which would be 1/25 of the total? A. I didn't say——

"Q. Now, do you undertake to say that the $3,000 damages which you claim you have sustained on account of the defendant's action is 1/25 of your total damage? A. I never made any such claims. I never made any such statements. I claim that I based the 100 bales on the 1,000 bales that were plowed up on the Dalton ranch.

"Q. I see; when did you do this plowing up? A. At the end of the 1914 season.,

"Q. What month? A. About November.

"Q. When the price of hops was pretty near low water mark? A. Yes, sir, and I didn't care to raise hops on speculation. I didn't care to raise unsold hops.

"Q. According to your figures and estimate of the crop of 1914, you produced 22,70 bales in 1914 on all your ranches and you plowed up enough so that your 1915 crop was 2,500 bales less than that, leaving your 1915 crop at 20,200; now what proportion of 20,200 bales of your 1915 crop was sold

or under contract for sale at the time you plowed up these hops? A. Nearly all of it.

"Q. Well, what proportion of them? A. Well, say 90 per cent., 80 per cent., somewhere around there.

"Q. Under contract, eh? A. Yes, sir.

"Q. Well, the 20 per cent. that was not under contract would be 4,000 bales; now if you plowed up any hops on account of the defendant's hundred bale contract, why didn't you plow up enough to dispose of this 4,000 bales that were not sold? A. I did plow up a lot against that.

"Q. Yes, but I have taken off the 2,500 bales that you plowed up and you have a net product for 1915 of 20,200; now, if 80 per cent. of that was under contract in November or December when you plowed up the hops, that would leave 20 per cent. not under contract, not sold, or 4,000 bales; now, if you were so frightened on account of the defendant's failure to take a hundred bales that for that reason you go to plowing up hops, why didn't you plow up enough more so that you would not have to carry this burden of 4,000 bales of unsold hops of 1915 crop? A. Of course, all these figures I am giving you are given from memory and impressions at the moment. I am not testifying from any records, and the figures may be several thousand bales out.

"Q. I see. A. For instance, our Orgeon crop in 1915 was perhaps a thousand bales larger than our crop of 1914, and our British Columbia crop was 500 bales larger in 1914. I am giving you only rough figures, and when I say that 80 per cent. of the crop was contracted, it is possible there was 90 per cent. contracted, so with those reservations, I will go ahead.

"Q. And there was a great many more of the

1915 crop unsold at the time you plowed up these hops than the defendant's contract would amount to? A. Why, yes.

"Q. Surely; when you plowed up these hops, had you had any trouble with any other contracts? A. Yes, sir.

"Q. How many of them for the year 1914? A. I think I had two.

"Q. Who were they? A. One was the United States Brewing Company in Chicago, and one was the—no, I think that is the only one.

"Q. What did your contract with them call for as to 1914 delivery?

"Mr. Harrison: You mean what quality of hops?

"Mr. Alling: Q. No, quantity. A. A thousand bales.

"Q. Well, that contract calling for a thousand bales and the defendant's contract calling for a hundred bales made eleven hundred bales? A. Yes.

"Q. And yet you plowed up hops enough to reduce your crop 250 bales? A. Yes, sir.

"Q. Why did you plow up so much? A. Because the hops looked like they were going to be cheap and I din't want to raise any more than I had to raise.

"Q. Wasn't that the main reason, the sole reason, why you plowed up hops, to reduce your production? A. No, but I wouldn't have plowed up as many hops if these people would take their hops; I would not ploy up hops I had sold, but I would plow up hops that are not sold.

"Q. But you didn't plow up all the hops that weren't sold? A. No.

"Q. You left a good generous margin to go on? A. I left a safe margin.

"Q. A margin of 4,000 bales or better? A. Well, I didn't say it was 4,000. It may have been only 1,000 bales.

"Q. Well, then this measley little hundred bale contract didn't cut very much ice in inducing you to plow up hops to such an extent as to reduce your 1915 crop of 2,500 bales? A. Yes, sir, it cut just as much figure in proportion to the plowing up as one hundred bales to 2,500.

"Q. I see; then 1/25 part of your motive in plowing up hops, you hold us accountable for? A. No, sir; I gave you the calculation of it. I hold you accountable for about one-tenth of the loss on the one ranch that was plowed up.

"Q. I see. A. Without regard to the hops that were plowed up on other ranches.

"Q. Well, do you hold us accountable for anything else? A. I hold you accountable for the difference between cost of production and the contract price.

"Q. Anything else? A. I don't think of anything else.

"Mr. Harrison: The theory upon which plaintiff seeks to recover damages is set out in the pleadings.

"Mr. Alling. Q. You don't seek any exemplary or punitive damages here, do you?

"Mr. Harrison: That question is also settled by the pleadings.

"Mr. Alling: Naturally. Well, I was wondering if the pleador was daring enough and audacious enough to ask to recover on the amount of the damages concerning plowing up of hops.

"Mr. Harrison: I suppose you had better ask the pleador about that.

"Mr. Alling: I haven't had the privilege of seeing the complaint. If the pleador serious advances any such theory of recovery, it would be worth the price of admission to see the complaint.

"Q. Well, now, you hold us accountable for one-tenth of the damage, whereas our 100 bales is only 1/25 of the reduction of the crop of 1915; now is that after proper allowance for the fact that you had reason to apprehend that hops would be a glut on the market the next year? A. Well, I didn't figure anything pertaining to glut on sold hops. If I have got a valid contract, why the glut does't make any difference, I can deliver the goods. If the buyer will take his goods on the contract, the subsequent gluts make no difference and I don't take them into consideration at all.

"Q. Was it a little while ago you said that your forecast of the market was such that you didn't want to raise any more hops than you had sold? A. I didn't say that.

"Q. Well, you said that you apprehended that there would be an over production the next year, didn't you? A. I apprehended that there would be low prices.

"Q. Yes. A. For a course of years.

"Q. Yes. Now that had its weight with you in determining you to plow up hops, didn't it? A. Why, yes, but I wouldn't plow up sold hops.

"Q. But you didn't plow up all except sold hops, did you? A. No, sir, because the loss of plowing up is too great. A man can't plow up and then go into it without having the losses all over again. He would have to go to the enormous expense of replac- his improvements. A man can't plow up for the sake of one or two years; he had better take a big loss than plow up, because if you plow up you have

got a certain loss, and if you don't plow up, things may frame around that it might pay you better to stand a loss in growing up than to plow up, but those are speculative features.

"Q. Well, your apprehensions were largely mistaken, weren't they, as to that, judging from the prices at which you sold hops, as given a little while ago. A. The prices at which we sold hops is no criterion, we have to figure the prices at which we can buy hops and the hops we grow are not worth to us more than hops of equal quality that we can buy, and the price we pay for hops is the best basis of valuation of what hops are worth to us.

"Q. I see; but judging from these prices which you gave me awhile ago, had you known that these prices were going to prevail— A. I never know what prices are going to prevail a year hence or a month hence.

"Q. —had you know these prices were going to prevail, would you have plowed up hops? A. Yes, sir; I am taking the whole range of prices, I would not plow up as against the high range of prices, but I would as against the low range of prices.

"Q. The market condition was the controlling consideration which moved you to plow up the hops, was it not? A. No, sir, it was not. Of course, if a man defaulted in his contract, and I expected to get as much more when the hops were harvested, of course I would not plow up, but in a situation the prospects that existed at that time, I would not grow a lot of unsold hops.

"Q. Well, if the market conditions were not the controlling and dominating reason for plowing up those hops, do you undertake to say that our little measley 100 bale cntract was the controlling reason? A. Yes, it would be the measley proportion as a hundred is to the others.

"Q. Was this brewing company in Chicago under

contract for hops of the crop of 1915? A. Yes, sir.

"Q. And they had refused to accept the hops of 1914 had they? A. They refused to accept the hops in 1913 and 1914.

"Q. On account of quality? A. On account of price.

"Q. Was there any question as to the quality between you and these people? A. Well, of course, the buyer always gives the quality as his excuse.

"Q. I see; well, you didn't plow up hops in 1913, did you? A. Yes, sir.

"Q. How many? A. Well, I plowed up about 100 acres and sold off the ranch of 300 acres.

"Q. Was your 1914 crop less than your 1913 crop? A. Yes, sir.

"Q. By how many bales, approximately? A. About 4,000.

"Q. Well, you had written off the Chicago Brewing Company's repudiation by the hops you plowed up in 1913, hadn't you? A. No, sir.

"You didn't plow up the hops in 1913 because the Chicago Company refused to take a thousand bales in 1913? A. No, sir, I plowed them up in 1914.

"Q. You did plow up some in 1913? A. Yes, sir.

"Q. What did you do that for, on account of the market conditions and the prospect of lower prices? A. Yes, sir.

"Q. You waited till 1914 before you reduced your acreage on account of the repudiation of the contract by the Chicago brewery? A. Yes, sir.

"Q. Now, did you plant any hops in 1914? A. I don't know whether we plowed up any hops in 1913 on account of that Chicago matter. I couldn't tell that without referring to the records, and I am just testifying now offhand. I know that the default of the Chicago brewery was in 1913 and that that year we sold off one of our ranches of about 3,500 bales aside from that plot of another hundred

acres. Now I haven't got it clearly in my mind whether it applied to the 1913 or 1914 plowing up on account of the United States Brewery, but in 1913 we knew that the United States Brewing Company was not going to take any hops in 1914 or thereafter.

"Q. Well, now was none of your acreages increased in 1914? A. No, sir.

"Q. Not in British Columbia? A. No, sir.

"Q. Or Orgeon? A. No, sir.

"Q. Or any of the Califoria ranches? A. No, sir.

"Q. Was there no increase in acreage of any of these ranches in 1915? A. There was not.

"Q. Well you have been, to the extent that you have plowed up hops and reduced your acreage, to a certain extent, a victim of a falling market, have you not? A. A victim of a falling market and falling buyers.

"Q. Any other buyers who fell down on you besides in 1913 or 1914, or 1915, besides this defendant and the brewery in Chicago? A. In which years?

"Q. 1913, 1914 or 1915? A. Oh, yes, some of them went broke, a number of them went broke.

"Q. All brewers? A. Yes, all our business with brewers.

"Q. You don't sell to anybody but brewers? A. We do after the harvest.

"Q. You don't contract with anybody but brewers, do you? A. We don't make contracts with anybody but brewers. Once in awhile we do, exceptionally.

"Q. And those contracts are made with other dealers, I suppose? A. The exceptional ones, yes."

Mr. Twining (reading):

"*Redirect examination by Mr. Harrison*:

"Mr. Harrison: At this point, in order that there may be no question about the taking of this deposition, I desire to withdraw my advice to the witness to refuse to answer certain questions, and if counsel desires an answer to them, I will ask him now to answer them.

"Q. In the first place counsel asked you whether Mr. Phleger is employed on a salary. The witness may answer that question if he so desires, although in withdrawing my advice in this regard I reserve the objections stated and all objections to the question. A. He got a salary and a small commission.

"Mr. Harrison: And I also withdraw my objection, with the same reservation to the following question asked by counsel: You understood the contract to provide then shipments were authorized to this defendant under that contract, if other people approved the samples? A. Yes, sir.

"Q. And likewise to the following question asked by counsel: 'You did not consider that approval of samples mailed to the defendant, by the defendant itself, was necessary in carrying out the contract?' A. State that question again.

"Q. You did not consider that approval of samples mailed to the defendant, by the defendant itself, was necessary in carying out the contract? A. No, sir.

"Q. And the one question put as follows: 'Did the defendant approve the samples mailed to the defendant prior to the shipment?' You answered

as follows: 'Well, the defendant did not do anything else excepting what is shown by the correspondence.' Now subject to the same reservations, you may add anything to that answer that you think is necessary to fully answer the question. A. He did not approve the samples sent to him.

Q. You state in redirect examination that the plaintiff was willing to ship other hops to the defendant. State whether or not in expressing its willingness to so ship other hops, the plaintiff or any person on behalf of the plaintiff, ever waived any right to rely upon the hops actually delivered.

"Mr. Alling: One moment, objected to as leading and suggestive.

"Mr. Harrison: The witness may answer the question.

"(Pending question read.)

A. No, we made our delivery and the hops were accepted, and part of the hops used by the defendant, that is, one bale was used and subsequently 99 bales were shipped to San Francisco against our protest.

"Q. You stated a moment ago that the practice that you had to pay for hops were better indications of the market value than the prices at which you sold. Have you in your possession any data from which you can testify what was the lowest and the highest price at which you bought hops during the months about which counsel for the defendant has asked you? A. Yes, sir.

"Q. Will you please state what was the lowest and highest price at which you bought hops during the months in question? A. In September, 1914, we bought nothing."

The Court: These other figures were as to sales, were they?

Mr. Twining: Yes, sir.

The Court: And these figures are to purchases?

Mr. Twining: Yes, sir.

Mr. Stamler: Purchases by him.

Mr. Twining (reading):

"A. In September, 1914, we bought nothing. In October, 1914, the lowest price was 11½ and the highest 11½. In November, 1914, the lowest was 7½ and the highest 9½. In December, the lowest price was 8 and the highest 12¼ In January, 1919, the lowest was 8 and the highest 12½. price was 8 and the highest 12½. In February, 1915, the lowest 9, highest 15. In March, 1915, the lowest 10½ highest 13½. In April we bought nothing. In May we bought nothing. In June the lowest was 10 and the highest 10½. In July the lowest was 10 and the highest 12¼. And then as to the 1915 crop, in August we made only one purchase at 14 cents. In September the lowest was 12½ and the highest 13½. In October lowest 10, highest 13½. In November lowest 8, highest 11¼. December lowest 7½, highest 13¾.

"Mr. Alling: Q. 7½? A. 7½; highest 11¾. In January, 1916, lowest 9, highest 12¼.

"Mr. Harrison: That is all for the present."

Mr. English (reading):

"Recross-examination by Mr. Alling:

"Q. For how long a time was Mr. Phleger on a salary from the plaintiff? A. Ever since he has been in our employ.

"Q. How long is that? A. I don't know how many years. Five years, I guess, maybe longer.

"Q. Has any one else in the New York office drawn a salary? A. Yes, sir.

"Q. How many more besides Mr. Phleger?

"Mr. Harrison: You mean during that time?

"Mr. Alling: Yes.

A. Well, we have had different people in New York.

"Q. Well, from the month of March, 1914, to the month of November, 1914, did any one else in the New York office draw a salary besides Mr. Phleger? A. Well I believe they have a typist there and a boy in the office.

"Q. Was Mr. Phleger the only one connected with the office except the typist and the boy? A. That is all.

"Q. Is he a manager? A. Is who a manager?

"Q. Is Mr. Phleger a manager? A. Well, I have told you what he is. He is an employee that works under my directions.

"Q. What title does he have? A. I don't know that he has got any title. He represents us in the east and in New York and in such capacities as we want him to represent us.

"Q. He signs correspondence for the company? A. Yes, sir. He has not got any power of attorney for the company. He don't sign checks for the company.

"Q. Do you keep any bank account at New York? A. Not for the company.

"Q. How is the cash kept there, in Mr. Phleger's name? A. Yes, sir, we keep an account in New York in the company's name, but he does not sign checks against it. We sign checks against it from out here.

"Q. Has he no bank account against which he can check? A. He keeps a petty cash account.

"Q. For the company? A. No, he simply keeps a petty cash account in his own name.

"Q. Is he disbursing agent for the company in New York? A. No, sir; except what he disburses out of his petty cash account.

"Q. Are all salary checks for the New York office made out here? A. I think so, I am not sure. The New York business is done from San Francisco.

"Q. Are the expense checks made out here? A. Yes, sir.

"Q. Rent paid by check from this office? A. Yes, sir. Everything is paid either out of his petty cash or it is paid out of the San Francisco office, and the petty cash is all paid out of the San Francisco office.

"Q. Have you any other contracts outstanding and unfulfilled providing for delivery on approval of samples?

"Mr. Harrison: Object to that on the ground it is immaterial but the witness may answer if he desires."

Do you want to object?

Mr. Twining: No.

Mr. English (reading):

"A. I believe there are a few others, but not the same as the contract in question.

"Mr. Alling: Q. Have you ever had contracts with buyers providing for delivery on approved samples? A. No, sir.

"Q. In what respect did the contracts which you just referred to differ from this contract, in respect to the approval of samples? A. Well, I have a few contracts where the contract specifies that prior to delivery, the seller shall submit samples, but there is nothing about approval.

"Q. This is the only contract you ever had calling for delivery on approved samples? A. I can't think of any other in this country.

"Q. Any other country? A. Well, we may have some in England but I am not sure."

Mr. Twining: I object to the remainder of Mr. Horst's deposition, because it refers to a description of the hops themselves and of the samples.

The Court: I make the same ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

"Q. Why do you say that the approval of samples submitted under this contract may be made by parties other than the buyer under the contract? A. Well, if the seller sends me a sample and says that hops according to that sample are satisfactory, why that would be the buyer's approval.

"Mr. Harrison: You said 'if the seller.'

A. If the buyer, I meant to say; that would be the buyer's approval.

"Mr. Alling: Q. I understood you to say that you considered that the samples which you sent to the defendant had been approved? A. Had or hadn't?

"Q. Had been approved prior to shipment because they had been approved by other brewers? A. Yes, that would constitute an approval. It might be a third party approve them as well as the contracting parties.

"Q. I see; that is your idea of the contract. A. Well, I have followed the safe course all along the line on the question of approval. I didn't

ignore the condition of sending samples, if such a condition was imposed upon me.

"Q. But you regarded that it had been fulfilled because other brewers had approved those amples? A. No, I regarded firstly that it was not necessary to have samples——

"Q. Approved at all. A. —approved, that is, I assume that it would be necessary for some exchange of samples prior to the shipment, but regardless of what samples were sent, that the buyer was bound to take any hops that complied with the contract requirements, that is, any hops that would be good brewing Pacific Coast hops whether he approved them or not. In other words, that if we submit him samples of hops that are of the contract quality or better than the contract quality, that the mere disapproval by the buyer of the samples would not release him from taking hops that were according to the contract.

"Q. Yes, but did you not understand that the provision for delivery on approved samples would allow a certain latitude to the buyer for preference in respect of color and matters of that kind? A. Well, now, we would give him that latitude and would be only too willing for him to have that latitude provided he exercised it at the time that we made that tender of the samples, but when he does not exercise that latitude that ends it.

"Q. Now, a little while ago your counsel permitted you to answer a question which you had previously refused to answer, and in answering you said that you considered that approval by some one else other than defendant was all that that provision of the contract required, and you have stated to me thta these same samples had been approved by other brewers; now, I will ask you what other brewers approved sample No. 1. A. Well, I have here a list of 30 brewers in the United

States that approved on contracts calling for choice brewing and choice and strictly choice, the same hops according to sample No. 1, brewers that had similar contracts in other respects excepting that the contract called for a higher quality, and all these brewers accepted and paid for their hops and the aggregate on this list is over 1,500 bales. Now, aside from this, we shipped a large proportion of the crop to England where the hops were used on similar contracts.

"Q. And the sample No. 1 came from lot No. 3; do you wish to be understood that all those 30 brewers got samples from lot No. 3? A. They got samples of the same crop, substantially the same as lot No. 3.

"Q. Of the same crop? A. Of the same crop, and substantially the same as sample No. 3, so near equal that nobody can tell the difference.

"Q. That is on the theory there is no difference between various hundred bale lots in your year's crop? A. There is no substantial difference.

"Q. Now, will you let me see that list of brewers which you have just testified from? A. (Witness hands paper to counsel.) Here is the list.

"Mr. Harrison: The witness here hands paper to counsel for the defendant.

"Mr. Alling: Q. Were all these hops which you say aggregate a matter of 1,500 bales, shipped from the Wheatland ranch? A. Yes, sir.

"Q. And the 1914 crop? A. Yes, sir.

"Q. Now, were there samples submitted to each one of the persons, firms or corporations whose names are included in this list? A. Well, the hops were delivered to them and accepted.

"Q. I say were samples submitted to them? A. Prior to the delivery?

"Q. Yes. A. To most of them.

"Q. And were those samples—— A. Possibly to all of them.

"Q. To most of them and possibly all of them; were these hops all sold under a contract? A. Yes, sir.

"Q. Did, in any case, the contract call for approved samples? A. I don't think so.

"Q. And yet you submitted samples? A. Yes, sir. Some of them may have provided for it, I don't know, but we submitted samples anyhow.

"Q. Were samples of either lot 3, or lot 11, sent to any of these——

"Mr. Harrison: If you know.

"Mr. Alling: Q. —people? A. Well, No. 3 contained only one bale lot, No. 3 contained only one bale.

"Q. This was drawn from bale No. 1? A. No, that was one bale in the lot.

"Mr. Harrison: No, lot 3 one bale.

"Mr. Alling: Yes, he has testified that number there (indicating) indicates the bale number; 577.

A. Well, it indicates the bale numbers on the other samples, but as to lot No. 3, that indicates one bale.

"Q. So there was only one bale of lot 3? A. Yes.

"Q. Lot 3 didn't have 100 bales? A. No.

". Just one bale? A. Yes, sir.

"Q. Well, then, samples of lot 3 weren't sent to all these people? A. How is that?

"Q. Samples from lot 3 were not sent to all these people? A. Well, samples from lot 3 were sent to

a number of the people; lot 3 would represent——

"Q. Well, now—— A. One moment now, let me answer that question; now lot 3 would represent the crop.

"Q. Yes, that is what you say. A. And one sample, one bale of the crop would be sent to the San Francisco office and that bale would be marked lot 3 and samples would be drawn from that bale and sent to a good many brewers.

"Q. That was sample lot 3. A. It is lot 3, not sample lot 3; it is lot 3.

"Q. Well, your lots ordinarily consist of 100 bales? A. They consisted of 100 bales when we are shipping them out, but when we make a shipment before the hops are put in lots, we give a different lot number to each shipment; if there is only one bale in the shipment, there is only one bale in the lot.

"Q. How do you know there was only one bale in lot 3? A. The records show that.

"Q. And that was sent to the San Francisco office and broken up and sent out as samples? A. It was not broken up. Samples were cut from that bale.

"Q. I see, and that, I take it, then was taken to represent the whole crop? A. That sample would represent practically the crop.

"Q. I see; well, now that would not be true of lot 11, would it? A. Why, yes, it would.

"Q. Well, lot 11 consisted of more than one bale, didn't it? A. Well, lot 11 represented 100 bales and the whole crop would be represented by that sample as well as by the No. 3.

"Q. How about lot 209? A. That is from an entirely different ranch.

"Q. Yes, but that represented 100 bales, didn't it? A. Yes, but that is from a different ranch.

"Q. Surely. A. The same sample of lot 209 would not represent the other lot.

"Q. One of the samples which you sent to the defendant didn't come from the Wheatland ranch, it came from another ranch entirely? A. Yes, sir, ample No. 2 came from another ranch.

"Q. Well, were any of these people in this list which you hand me, sent samples from lot 11? A. They were either sent samples from lot 11 or samples from the same ranch that were the same as lot 11.

"Q. You are assuming that all the lots were exactly alike? A. They were all substantially the same.

"Q. That there was no difference in the quality of that whole crop. A. There was no substantial difference in the crop.

"Q. Were the hops of the 1914 crop raised on the Brewer ranch identical with those raised on the Wheatland ranch? A. No, sir.

"Q. You don't know how many of these people in this list were sent samples prior to shipment, do you? A. No, sir.

"Q. You don't know whether any of them received samples prior to shipment, do you? A. I know that a lot of them did receive samples before shipment, but I don't know which ones did and which ones didn't.

"Q. How many of them approved samples sent? A. All those that received the samples.

"Q. Did not any of them find any fault? A. I don't think so.

"Q. In no instance were you put to the trouble of sending second samples? A. Possibly we sent second samples, but, of course, those were all a higher specification quality.

"Q. All these called for a higher grade of hops

you say than the defendant's contract? A. Yes, sir, practically all of them. None were lower.

"Q. Do you have more than one form of printed contract? A. Yes, sir.

"Q. How many? A. Oh, a good many. I don't know how many.

"Q. Do you have any printed contracts calling for fancy hops? A. No, sir.

"Q. Do you have any printed contracts calling for choice hops? A. No, sir.

"Q. Do you have any printed contracts calling for prime hops? A. No, sir—well, yes, sir, we have. Yes, we have them for prime hops.

"Q. Do you have any printed contracts calling for medium hops? A. No, sir.

"Q. Aside from those calling for prime hops, your contracts are printed so as to call for choice brewing Pacific Coast hops or good brewing Pacific Coast hops, is that right? A. We have printed contracts for choice brewing Pacific Coast, prime brewing Pacific Coast and good brewing Pacific Coast.

"Q. Which is the best? A. Of the three grades mentioned, choice brewing is the best.

"Q. What is next? A. Prime brewing.

"Q. Good brewing is the lowest grade of this three? A. It is the lowest of those three, yes, sir.

"Q. Do you know anybody else in the hop business on the Pacific Coast that makes contracts for either one of those grades? A. Yes, sir.

"Q. By those names? A. Yes, sir.

"Q. Who? A. Well, I believe they all do.

"Q. Well, name one of them. A. I don't see their contracts. I am of the opinion that they all do. Now, I don't know, I don't see their contracts. I couldn't tell you.

"Q. You don't know, then. A. No, but I am satisfied that they do.

"Q. Isn't it a fact that there are no such grades recognized, and isn't it a fact that you make your contracts in that form with a non-market grade, to the end that your customers shall not be permitted to be too exacting? A. I think that question is very unfair, especially in view of the fact that I have testified earlier today that the good brewing grade is a well recognized grade and has been all the time that I have been in the hop business and long before, and there isn't a telegraphic code book of hop grades, or any book on hop grades that does not include the good brewing type and refer to the good brewing Pacific Coast hops as a recognized grade.

"Q. Is the same thing true of prime brewing? A. Well, I don't know that prime brewing is used to any extent, but prime is used in the code books, in fact in every code book.

"Q. Is the same thing true of choice brewing? A. Yes, sir, choice brewing is used in every code book that I have ever seen and I have seen the code books of practically every hop dealer.

"Q. Is choice brewing better or poorer than choice hops? A. Choice brewing is poorer.

"Q. Is prime brewing poorer than a prime hop? A. Well, I tell you, you get so close together in those things that they are practically the same, whether you say prime or prime brewing, it would be about the same thing. The whole range of price between the good brewing and the choice brewing would not be over a cent a pound, the ordinary range of price.

"Q. Isn't it a fact that the standard market grades are fancy, choice, prime, medium and common? A. Those are standard grades, but there are other standard grades.

"Q. A prime brewing is a lower grade than prime, I understand you to say. A. Well, it is

substantially the same. If there is a difference, the prime brewing would run below the prime.

"Q. And a good brewing is below that? A. Yes, sir.

"Q. Below a prime brewing? A. Yes, sir.

"Q. So a good brewing hop is only a shade above a medium hop? A. That is it.

"Q. And that is only one step from the bottom. A. Oh, no, when you are talking about one step from the bottom, for instance, if hops are worth, we will say, 20 cents a pound for the fancy, then the medium would run about 18 cents, and that is a long ways down to common, because common hops might be a cent a pound; the wide range would be in the common. The common might be from a cent a pound to 17 cents, so the way you ask the question you make it look as though the good brewing hop is next to rubbish.

"Q. Pretty close to the bottom? A. Well, it isn't.

"Q. The steps are longer when you get down there. A. Well, I have explained that.

"Q. The distance between good brewing and medium is greater than the distance between good brewing and prime, isn't it? A. Than the difference between what?

"Q. The difference between good brewing and medium is greater than the distance between good brewing and prime? A. No, I don't say anything of the sort.

"Q. Is the difference between medium and common greater than the difference between prime and choice? A. Why, yes, the difference between medium and common may be a difference of 15 cents a pound, where the difference between prime and choice might not be a half a cent a pound.

"Q. I see; that is why I say the differences. as you go down in the list, spell bigger money. A.

Well, no, the one big range is between the common and the medium. That is where your range is.

"Q. Because there are all kinds of commons. A. Because the common run from a cent a pound or half a cent a pound up to 15 cents, where there might not be a longer range from the medium up to the fancy of two cents range.

"Q. Calling your attention again to this list of buyers who bought hops of varying quantities of the 1914 crop, you construe the fact that they did not kick, to amount to an approval of the samples sent to the defendant, is that right? A. Why, yes, sir.

"Q. And that upon the assumption that there was no difference between different 100 bale lots of the Wheatland crop? A. Yes, sir.

"Q. Is there any difference in color between any of the lots of the 1914 crop? A. No substantial difference.

"Q. Any noticeable difference? A. No, no material difference.

"Q. You had some red spider, didn't you, there in spots? A. We had no damage from red spider.

"Q. Well, it showed some on some of the hops, didn't it? A. Not on the hops. It showed on the vines.

"Q. It didn't show on the hops at all? A. No, sir.

"Q. Not even in small localities? A. Oh, I suppose a man with a microscope might find anything. Commercially speaking, the hops have no red spider.

"Q. Wherever there was any of that, even if it was over a small area, it would make the hops of some one hundred bale lot, to that extent at least, different from the hops of other hundred bale lots,

would it not? A. I know the red spider. If there is a vine affected by red spider, you don't get the hops, they lose the hops in the field.

"Q. You say the defendant accepted those hops. All you know about that is what the correspondence shows and what the reports of the transportation companies show, is it not? A. Well, I know that the contract shows that they accepted it, the contract specifications provided what shall constitute acceptance.

"Q. I say, so far as what the defendants actually did in the premises, you are dependent entirely on what you learned from the correspondence, are you not? A. What they did about them?

"Q. What they did in the way of accepting or not accepting? A. Yes.

"Q. Now you say they used one bale? A. Yes—no, they kept one bale.

"Q. Yes; well, you have learned from the correspondence, have you not, that that was accidentally damaged by wetting? A. No, I don't know whether that is in the correspondence or not. I don't recall that.

"Q. Anyway they kept one bale. It may come in handy at this trial, and it is not because they have got one bale of those hops back there, that you don't want these samples to go back for purposes of comparison, is it? A. No.

"Mr. Alling: Take the witness."

Mr. Twining (reading):

"P. M. ROONEY, of the City of Sacramento, County of Sacramento, State of California, called as a witness on behalf of the plaintiff, having been first duly sworn by the Commissioner, according to law, testified as follows:

"Direct examination by Mr. Harrison:

"Q. What is your name? A. P. M. Rooney.

"Q. What is your age? A. Fifty-six.

"Q. Where do you reside, Mr. Rooney? A. Sacramento.

"Q. In this state? A. Yes.

"Q. What is your occupation? A. Hop grower.

"Q. How long have you been a hop grower, Mr. Rooney? A. Since 1882.

"Q. Where have you grown hops during that time? A. In Sacramento County and Yuba County.

"Q. How large a crop of hops have you grown during the last three or four years yearly? A. Well, from 1,600 to 2,300 bales.

"Q. As the result of your experience and observation as a grower of hops, have you become familiar with the cost of production of good brewing Pacific Coast hops? A. Yes.

"Q. And you know what that cost of production has been during the time that you have been growing hops? A. Yes.

"Q. What was the cost of production of good brewing Pacific Coast hops during the season of 1914, that is to say, the cost of producing good brewing hops for delivery from September, 1914, to February, 1915?"

Mr. English: Now, we would like to ob-

ject to that question and the subsequent line of questions, giving the cost of production. That is the same question as we had this morning.

The Court: Yes, I make the same ruling.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (reading):

"A. Well, the total cost?

"Q. The cost of production. A. About seven cents.

"Q. You mean seven cents per pound? A. Per pound, yes.

"Q. What is the cost of production at the present time? A. Well, I am speaking hand picking now.

"Q. Yes? A. About seven cents.

"Q. Not to lead you in any way, Mr. Rooney, I want you to state whether that represents the cost during the past three or four years or whether there have been any differences during the past three or four years, and if there have been, what are they? A. Seven cents is practically the cost unless you get in to some fields that don't produce; that will cover the cost of fields that will produce about 10 or 11 bales to the acre. Of course, if you get one that will run down to six or seven, of course, it is a little more, but that is very rare.

"Q. But generally speaking the cost of production would be as you have stated it, during the past three or four years? A. Yes.

"Q. In your opinion what would be the cost of production during the coming three years, that is to say, from the present time through the season of 1916 and 1919?

Mr. English: That raises a different question, if your Honor please, in that it deals with future years, as to which there has been no basis of comparison. We would like to object to that on the same ground, that it is not the proper measure of damages, and secondly, any testimony as to the cost of production in the future is entirely too speculative and remote.

The Court: I make the same ruling.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (reading):

"A. Well, if conditions were the same as the past three years, why it would be about practically the same; of course, conditions may change the price, it may be cheaper and it may be higher.

"Q. You have said that the figures stated by you refer to hand picked hops? During the times about which you have testified, would the cost of production of machine picked hops be greater or less than the cost of production of hand picked hops? A. No, my experience is less.

"Q. That is, that the—— A. The machine picked would be less.

"Q. Are you familiar with the so-called Wheatland ranch of the E. Clemens Horst Company? A. Yes.

"Q. Would that come under the general class you have mentioned where the cost of production would be about 7 cents a pound, or would it come under the class of poor paying ground? A. No, it would be about the same."

Mr. English (reading):

Cross-examination by Mr. Alling:

"Q. How much less does it cost to produce machine picked hops? A. Well, the only advantage you have is the harvest time, it cuts the cost of harvesting practically in two. In other words, where it costs you about say 2.80 to pick by hand, it will cost you about 1.90 to pick by machine, that is, where you have to pay a royalty. Of course, we unfortunately have to pay Mr. Horst a royalty when we use his machine. He can do it for less money than that.

"Q. 2.80 a bale is that? A. That is 2.80 a hundred.

"Mr. Harrison: Q. A hundred pounds? A. 2.8 cents.

"Mr. Alling: Q. 2.8 cents a pound? A. Yes, that is hand picked.

"Q. Yes, hand picked; and machine picked 1.9 per pound. A. Well, that is where we pay the royalty.

"Q. Where you pay the royalty? A. Yes.

"Q. What form does that royalty take, so much a pound or so much a bale? A. No, it is a dollar a bale, practically half a cent.

"Q. Half a cent?

"Mr. Harrison: Q. It is half a cent a pound? A. Yes.

"Mr. Alling: Q. So that if a man owns his own machine, the picking by machine would represent a cent and four-tenths approximately? A. Sure, he might do it for less than that. I don't know; of course, it depends on what experienced hands he has on the machine, but that has been my experience.

"Q. You have been growing hops all this time; I suppose you have been selling them, too? A. Sure, that is the only reason for growing them.

"Q. And you are familiar with market conditions? A. Yes.

"Q. Market prices? A. Yes.

"Q. Is there any difference in the market value, other things being equal, between machine picked hops and hand picked hops? A. Well, I don't think so. No, I shouldn't think there is any difference.

"Q. Do you machine pick all of your hops? A. No, no.

"Q. You hand pick some? A. Yes.

"Q. And machine pick others? A. Yes.

"Q. Yes, and have you ever realized in disposing of your crop any difference in price as between hand picked and machine picked? A. No, I can't say that I have. In fact, when you talk of machine picked to me, why I have only had one year's experience in machine picked.

"Q. I see; what year was that? A. Last year.

"Q. Last year? A. Yes.

"Q. So you have only had one crop to market? A. That is all.

"Q. —that included any machine picked? A. That is all.

"Q. Well, it is a fact, is it not, that there are more or less stems get into the machine picked hops? A. You mean they are picked dirtier than hand picked?

"Q. Yes, there are some stems. A. Well, that is the case in any case, hand picked or machine picked.

"Q. A greater amount of stems and larger stems get into the hops where they are machine picked than where they are hand picked? A. No, I don't agree with you on that. I think, where a machine is properly run by experienced hands and not overcrowded, that the machine picked is the cleanest of the two.

"Q. I see. What market grades of hops are there,

as you understand; what are the market grades of hops? A. Well, there is medium, prime, choice, fancy, common—you want to start with common, there is common, medium, prime, choice."

Mr. Twining: Now, if your Honor please, I object to the testimony from page 335, line 8, to page 342, line 21, on the ground, first, that it does not constitute cross-examination of this witness, and, second, on the ground that it relates to the quality of the hops, and that is immaterial under the statement that I previously made.

The Court: Is it cross examination?

Mr. English: I think it is.

Mr. Twining: It is supposed to be cross-examination.

Mr. English: It is on the theory of cross-examination. I think it is cross-examination.

The Court: (After further argument.) I doubt whether this was, strictly speaking, cross-examination.

Mr. English: Does your Honor want me to read that question?

The Court: Yes.

Mr. English: (Reading): "What market grades of hops are there, as you understand; what are the market grades of hops?"

The Court: I do not think that is cross-examination. The other point I would reserve my opinion on.

Mr. English: I want to see how much covers market grades, and then take an exception to that part. Then, Mr. Twining, let us agree that from line 8 on page 335 to line 6 on page 336 relates to the cross-examination, or attempted cross-examination, on market grades.

Mr. Twining: Well, I think it goes further than that.

Mr. English: It goes into the productiveness and all that there.

The Court: The other division of your motion related to what?

Mr. Twining: The fact that this testimony was as to the different grades of hops. I suppose we will have to carry out the idea that this examiner seems to have, that Mr. Horst——

The Court: Well, the objection as to the grades would be covered by the objection that it was not cross-examination.

Mr. Twining: Yes, sir.

The Court: What is there outside of that?

Mr. English: He goes into this same general question about quality and all that—the same question that your Honor reserved your ruling on before—richness of the lupulin, and all that matter.

The Court: I am assuming that the testimony related to the cost of production, and nothing else.

Mr. English: It did; there is no question about that.

The Court: Anything that is not involved in the cost of production would not be cross-examination.

Mr. English: I should like to wait until the Court rules on a specific question. I shall concede that from line 8 on page 335 to line 6 on page 336 the cross-examination deals with market grades, which your Honor rules out as not cross-examination. Now, let me read another question, and then we can get another ruling.

I shall start at line 12 on page 336 (reading):

"Q. Yes, there is a difference in both production and quality, is there not, as between different localities? A. They all have their choice.

"Q. Well, by that you mean that there is a difference in productiveness and in quality as between different districts? A. Yes, there is; not so much so in the Sacramento Valley.

"Q. The Sacramento Valley, as a district, is reasonably uniform? A. Yes.

"Q. But there are other districts, which compared with the Sacramento Valley, would show a difference in productiveness and quality? A. Oh, yes.

"Q. Now, for instance, when you speak of the Sacramento Valley as a hop growing district, I suppose you include Yolo and Yuba, American River and Consumnes? A. Consumnes and Butte."

Mr. Twining: As I understand it, I have a right to take an exception to the reading of this portion of the testimony on the second ground of my original objection. I object to the testimony as going into the question of quality.

The Court: Yes. I shall reserve my ruling on that.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. And Butte? A. Tehama and all those up on the Sacramento River; Wheatland.

"Q. Wheatland is? A. All the yards in the Sacramento Valley. We generally say Sacramentos, Yolos, Wheatlands, Buttes, Tehamas.

"Q. American River, too? A. American River —yes, well, we call it the Sacramentos.

"Q. There are other hop districts in the state, are there not? A. Oh, yes.

"Q. What are some of the more important? A. Sonoma, Mendocino.

"Q. Sonoma, Mendocino, Russian River; is that in—— A. That is in Mendocino.

"Q. And Ukiah also is in Mendocino? A. Yes.

"Q. Now, do you know as to how Sonoma county compares, as a hop growing district, with the district known as the Sacramento District, as to quality of production?

"Mr. Harrison: Just a moment. I want at this point to object to this line of testimony as not being proper cross-examination. If you wish to make Mr. Rooney your own witness, you may do so.

"Mr. Alling: The questions are asked with the understanding that they go to the question of qualification as an expert.

"Mr. Harrison: On cost of production. Of course, Mr. Rooney is offered as a witness on the cost of production.

"Mr. Alling: Well, you have qualified him or attempted to qualify him as an expert and it all goes to that question.

"Mr. Harrison: Well, the objection is reserved under the stipulation, I understand.

"Mr. Alling: Surely.

"Mr. Harrison: Yes.

"Mr. Alling: Read the question.

"(Pending question read.)

"A. The production is lighter, the quality sometimes better and sometimes not as good.

"Q. What is the recognized general grade of Sonoma County production as compared with Sacramento, better? A. Grade of production?

"Q. Yes, quality, I say. A. Well, the quality, it has the call sometimes; for instance on this year's, Sonoma is a very choice hop.

"Q. Now, isn't it true generally that quality as well as quantity is largely, or measureably, at least, the result of seasonal conditions; a given district may produce a high grade one year and a poorer hop another year? A. What is that last question?

"Mr. Alling: Just read it, Mr. Stenographer.

"(Pending question read.)

"A. That is the case with Santa Rosa but not with Sacramento. Sacramento is about the same all the time, that is, Sacramento Valley, because they don't have those fogs and they never have anything to injure the hops, during my experience.

"Q. You have no pests in the Sacramento Valley? A. No, we haven't.

"Q. Well, you understand I suppose that there are certain elements in a hop, characteristic of any given crop, which all, taken into consideration, constitute the grade of that particular crop? A. Yes, sure.

"Q. What would you say were the elements that should be considered in classifying or grading hops?"

Mr. Twining: I object to that as not cross-examination.

Mr. English: That is the same thing as before. I shall consent that that question go out as not cross-examination; that is, I shall consent that it comes within your Honor's ruling as not cross-examination.

(Reading):

"Q. Pardon me just a moment. You have named certain recognized market grades? A. Yes.

"Q. Of common, medium, prime, choice and sometimes fancy?"

Mr. Twining: I object to this for the same reason.

Mr. English: That would come within your Honor's ruling, I suppose.

(Reading):

"Q. Now, will you name the factors or elements as to quality which in your judgment should be taken into consideration in determining the grade of hops?"

Mr. Twining: I make the same objection.

Mr. English: I do not think that comes within the objection as to cross-examination; it comes within the stock objection.

Mr. Twining: It comes within the stock objection. Now, the question is, "Now, will you name the factors or elements as to quality which in your judgment should be taken into consideration in determining the grade of hops?" It seems to me that that is not cross-examination.

The Court: Unless there is some connection established between the grade and the cost of production, I should not think it was cross-examination. I do not see what that has to do with cost of production.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: I will concede that the next question, on line 27, will come within the same ruling of the Court, and ask for an exception on that.

The Court: Very well.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: And the same is true as to line 30.

The Court: Yes.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Adjourned until Monday, April 9, 1917, at ten o'clock A. M.

NINTH DAY.

Monday, April 9, 1917.

Met pursuant to adjournment.

Present, counsel as before stated.

Mr. English: We stopped with page 340 of the deposition of P. M. Rooney, who was called by the plaintiff to prove the cost of production.

Mr. Twining: If your Honor please, I object to the reading of the deposition from line 2 on page 340, where counsel is about to resume, to line 21, page 342, upon the ground, first, that that portion of the deposition does not constitute cross-examination of this witness, and, upon the second ground, that it relates to testimony as to to the grade or quality of the hops, which is immaterial, the hops themselves, the shipment, having been accepted. Your Honor will recall that this was the witness who on the direct examination was called upon to testify as to the cost of production alone, and at the last hearing the testimony of the witness with relation to the grade of the

hops was excluded upon the ground that it was not cross examination. This testimony that is about to follow relates to that same subject, I think.

Mr. English: I think counsel is right, your Honor, in claiming that it is not proper cross examination; that is quite true. If your Honor will rule it out on that ground, I should like to reserve to ourselves the right to read it on our case, as part of our direct case. It is in the deposition here.

The Court: I will now exclude it on the ground that it is not cross examination.

Mr. English: Will your Honor reserve our right to read it, or will you rule on it later on?

The Court: I will rule on it later on.

Mr. English: Then I will begin on page 342, line 21 (reading):

"Q. The cost of production of course per pound varies with the yield? A. Yes.

"Q. And this cost of production that you have testified to is based upon what year's yield? A. What year's yield?

"Q. Yes. A. Well, generally it is the general cost for the last eight or ten years.

"Q. Based upon the average production for that period? A. Yes, well I am speaking now of the Sacramento Valley, that is about the yield; of course, there are sections I guess that cost more, but I am not familiar with that.

"Q. Immature hops, when you get them, as a rule is it the result of unwise harvesting or of seasonal effects?"

Mr. Twining: Now, your Honor, I object from page 343, line 5, to page 353, line 9, to the end of the cross examination of this

witness, on the ground that the remaining testimony of this witness does not constitute cross examination, and upon the further ground that, if it does, it is immaterial, because it relates to the witness's knowledge of the quality or the grade of hops and what enters into that quality and what the factors are that go to make up a particular grade of hops.

Mr. English: If your Honor yields to the point of not cross examination, we reserve our right to read it as part of our direct case.

Mr. Twining: I am beginning on page 383, line 11 (reading):

"Redirect examination by Mr. Harrison:

"Q. Judging from your experience of hand picked hops and machine picked hops, would or would you not say Mr. Rooney that the machine picked hops are as clean picked as the hand picked hops? A. Well, they are just as clean picked and maybe cleaner, if the machine is run properly. Of course you can make them dirty if you wish."

I move to suppress from page 353, including this question that I read, line 11, to page 354, line 13, upon the ground that that testimony relates to the quality of hops, and is therefore immaterial. The purpose evidently for the redirect examination was to meet the cross examination which appears in the deposition, which, as your Honor has held, does not properly constitute cross examination. Of course, the examiner could not tell what the ruling might be at the trial, and consequently was obliged

to conduct his redirect examination on the theory that it would all go in. This portion of the testimony relates to the character, quality and grade of hops and the factors that go to make up particular grades. I therefore think it is immaterial and should be suppressed.

Mr. English: That is the stock objection that my friend has urged all the way through. I think we ought to have it.

The Court: I make the stock ruling, that, until I see reason to admit or exclude it, I shall entertain the objection, and not rule on it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: I shall resume reading on line 16, page 353 (reading):

"A. Well, they are just as clean picked and maybe cleaner, if the machine is run properly. Of course, you can make them dirty if you wish.

"Q. Yes, well, is it a fact that in practically every hop that is dealt in commercially, there are some stems and some leaves? A. Oh, yes, I have never seen a strictly choice hop without a few leaves in it. I think it is impossible to get them picked otherwise.

"Q. Commercially speaking is there such a thing as a perfect hop? A. That is, absolutely cleanly picked?

"Q. Yes. A. No, there is not. If there is, I have never seen them.

"Q. In the course of your experience in growing hops in the Sacramento Valley, have you known of any occasion when the seasonal conditions brought about any damage to the crops through

lice or otherwise, substantially? A. No, I have seen many years ago one yard that was damaged some by lice. That is the only yard and the only time I ever remember seeing it. It was a good many years ago, 10 or 12 years ago.

"Q. Do you recall the conditions that obtained climatically in the Sacramento in the season of 1914? A. Yes.

"Q. There was nothing in those condition or was there, that affected the quality of the hops? A. No, no it was a very favorable season.

"Q. Is the quality of a hop a matter mathematically determined or is it a matter of individual preference to a greater or less extent? A. Well, now, I can answer that question this way: I have seen different dealers, one dealer would say for instance he would like a green hop; the other one would take in preference the yellow one. Some seem to prefer the yellow and some prefer the green. It may be that the brewer prefers it, I don't know, I suppose they get orders for different colored hops. The one hop is just as good as the other. It is just a matter of taste, I think."

Mr. Twining: Now, I move to suppress from page 354, line 25, to page 355, line 9, upon the ground that all that testimony relates to the character and quality and grades of hops, and is therefore immaterial, and is not redirect examination upon anything properly opened in the cross examination.

Mr. English: That is the same as the last previous objection.

The Court: I make the same ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"Q. When you said that seasonal conditions enter into the preference that might exist one way or the other betwen Sacramento hops and Sonoma hops, did you refer principally to seasonal conditions in the Sacramento Valley or seasonal conditions in the Sonoma district? A. No, Sonoma.

"Q. In stating the various grades of hops, you stated the grades to be, fancy, choice, prime, medium and common; are you familiar also with the grade known as good brewing hops or good brewing Pacific Coast hops? A. Yes, I would call prime a good Pacific brewing hop.

"Q. So that a hop might be a good brewing Pacific Coast hop and not a choice? A. Oh, no, it would not necessarily be choice."

Mr. English: (Reading):

"Recross examination by Mr. Alling:

"Q. You say your experience leads you to believe that the color of a hop to a certain extent is a matter of preference? A. Yes, I think so, that is, where they are both rich in lupulin, they are both the same quality of hop.

"Q. Yes, I was just coming to that. A. Yes.

"Q. The market value of a hop would be affected by color for that reason? A. No, I don't think so.

"Q. But the market value of a hop in any event would be effected by its richness or thinness, would it not? A. Yes.

"Q. And it would not be a matter of personal preference in your judgment, but a matter going directly to the market value if a hop was thin in lupulin? A. Oh, yes, there would be a difference, there is a difference between a fat hop and a thin hop, there is no question about that.

"Q. And that is recognized in the market quite

irrespective of any individual preference? A. Yes.

"Q. ——as to color? A. Yes.

"Q. Now, while there is no absolutely clean hop, as they are ordinarily handled—— A. Yes.

"Q. ——at the same time there are some hops that are cleaner than others? A. Oh, there is no question about that.

"Q. And carelessness in picking can characterize machine picking as well as hand picking? A. Oh, yes, just one equally with the other. You can pick hops—— I was going to say you could pick them as clean by hand as you can by machine, but it is harder work because you can make the machine, pick clean easy enough, but it is very hard to make hand picked clean, or you can make machine picked dirty if you want to.

"Q. When a machine picks dirtily or in an unclean manner, I presume it is the result of crowding a machine, making it do too much work? A. That is it, or carelessness.

"Q. Or carelessness in handling? A. Yes.

"Q. Does the machine move along the road? A. No, no, they are stationary.

"Q. And the vines are pulled up and brought to them? A. The vines are put on wagons and hauled to the machine.

"Q. And they are handled something after the fashion of threshing wheat? A. Well, no, I wouldn't say that.

"Q. Are the vines run throught the machine? A. Yes, they are run through the machine, but it is a little different from shreshing wheat. You know what wheat threshing is, I suppose.

"Q. Oh, yes. A. Well, they don't tear the hops up that way.

"Q. Naturally not. Now wholeness of the blossom is an element that enters into grade, does it not? A. Oh, yes.

"Q. And what makes for brokeness of the blos-

som, over-drying? A. Yes, you can do it by over-drying and handling it too much in the cooling room.

"Q. A broken hop affects its market value, does it not?"

There is no answer to that.

Mr. Twining: (Reading):

"Redirect examination by Mr. Harrison:

"Q. The matter of richness in lupulin is not, as I understand your testimony, Mr. Rooney, the sole factor in determining the quality? A. It is one of the main ones, it is not the sole one.

"Q. May hops vary somewhat in the amount of lupulin contained in them and still belong to the same grade? A. Oh, if the variation is not too extreme.

"Q. Is not what? A. If there is not too much difference—well, now, that is getting down pretty fine; there might be a hop with a little less lupulin in than another, still it would not be noticeable; there would have to be some expert to determine it.

"Re-recross examination by Mr. Alling:

"Q. Well, the strength of the hop depends on the amount of lupulin, doesn't it? A. Yes, it does.

"Q. Do you know what produces the rich hop; is it relatively favorable seasonal conditions? A. No, the soil and season both and the cultivation.

Q. Cultivation? A. I think cultivation and good soil is the main thing.

"Q. The main factors in the production of lupulin? A. Yes, I think so.

"Q. So that even with good soil and a good season, if there had been improper cultivation, there might be less lupulin as a result? A. Yes, likely there would be."

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EXHIBITS.

Plaintiff's Exhibit No. 1- is Schedule "A" printed at pages 8-12 of cause

Plaintiff's Exhibit No. 2—M. I. L., Commissioner 863
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Defendant's Exhibit on Cross-examination—Witness Horst No. 7—M. I. L., Commissioner 906

Defendant's Exhibit on Cross-examination—Witness Horst No. 8—M. I. L., Commissioner 907

Defendant's Exhibit on Cross-examination—Witnesss Horst No. 9—M. I. L., Commissioner 908

Mr. Twining: I shall read the deposition of S. J. Rooney (reading):

"S. J. ROONEY, of the City of Sacramento, County of Sacramento, State of California, called as a witness on behalf of the plaintiff, having been first duly sworn by the Commissioner, according to law, testified as follows:

"Direct examination by Mr. Harrison:

"Q. What is your full name, Mr. Rooney? A. Stephen J. Rooney.

"Q. And your age? A. Twenty-four.

"Q. Where do you reside? A. Sacramento.

"Q. In this State? A. California.

"Q. What is your occupation? A. Why, at the present time foreman for the E. Clemens Horst Company, Sacramento warehouse.

"Q. Were you employed by the E. Clemens Horst Company during the months of September and October, 1914? A. I was.

"Q. In what capacity were you employed by the E. Clemens Horst Company at that time? A. As inspector.

"Q. Are you familiar with lot 13 of the crop of 1914 of the E. Clemens Horst Company? A. Lot No. 13, yes.

"Q. State whether or not that was the only lot of that number of the crop of 1914, or whether there were several lots by that number? A. That was the only lot by that number.

"Q. Who inspected lot 13 in the crop of 1914 of the plaintiff? A. I did.

"Q. What did you do about the inspection of lot 13 of that crop? A. How do you mean as to the way I inspected them?

"Q. Yes. A. Why the usual way of inspecting hops.

"Q. What is that? A. Why that is—in the first place you try each bale, and as is customary with the company, we draw samples from every tenth bale.

"Q. Is any distinguishing mark attached to the lot so it can be identified as lot 13? A. Yes, there is.

"Q. What mark is attached to it? A. Why, we tag the bales with the lot number on the tags and we also stencil the bale No. 13 or whatever number we happen to be inspecting.

"Q. Did you do that at this time? A. I did.

"Q. In connection with lot 13? A. Yes.

"Q. Who weighed lot 13 of the crop of 1914? A. I did.

"Q. I show you now what purports to be a memorandum of the weight of that lot, and ask you Mr. Rooney if that is in your handwriting? (Handing paper to witness.) A. Yes, sir, it is.

"Q. And by whom was the typewriting done that is found on that paper? A. By myself.

"Q. When did you make that memorandum? A. On September 6, 1914.

"Q. At what time did you make that memorandum with reference to the weighing of the hops? A. Just shortly after it was weighed, on the same day."

I offer in evidence the memorandum of weights identified by this witness, which was marked by the Commissioner Plaintiff's Exhibit No. 25, and ask that it be now marked P25 A.

Mr. Stamler: Is not that the same as Exhibit P6?

Mr. Twining: Not exactly.

Mr. Stamler: Excepting that writing?

Mr. Twining: Yes, I think it is.

(The paper referred to is marked Ex. P25 A.)

Mr. Twining: (Reading):

"Whereupon said paper was marked by the Commissioner Plaintiff's Exhibit No. 25.

"Mr. Harrison:

"Q. State whether or not at the time you made that memorandum, you knew the weights as stated in it, to be correct? A. What is the question?

"(Pending question read.)

"A. Yes.

"Q. Refreshing your recollection by this memorandum, will you state what the total weight of this lot was in pounds? A. In pounds? 19,411 pounds, that is, that was the gross weight of the lot."

I move to suppress from line 26, page 361, to line 7, page 365. This testimony relates to the quality of lot 13, and also to the quality of the samples of lot 13, and therefore, in the view I take of the case, it is immaterial.

The Court: Just what is the question for me now?

Mr. English: That is the stock objection, your Honor. I suppose it is up to your Honor to make the stock ruling, as you have described it.

Mr. Twining: There was not any question pending. The next question was——

The Court: What is the motion?

Mr. Twining: I move to suppress from certain pages in this deposition, which I have stated on the record, because the testimony relates to the quality of the hops

and to the quality of the samples of the hops, and therefore, in my view of the case, it is immaterial.

The Court: I shall note your objection and reserve the question, and give you an exception, if you need it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: I resume reading at line 26, page 361 (reading):

"Q. State whether or not this lot 13 of the crop of 1914 was uniform in quality? A. It was."

Mr. English: I see that Mr. Alling moves to strike that out on the ground that there is no foundation to terrogate the witness as to the quality. We shall cancel that objection.

Mr. Twining: (Reading):

"Mr. Harrison:

"Q. For how long a time, Mr. Rooney, have you been familiar with hop growing? A. Well, I have been raised right on a hop ranch, but I have only taken an active part in the business in the last five or six years, that is, to work right in it.

"Q. Are you familiar with the various grades and qualities of hops? A. Yes, to a certain extent.

"Q. Are you able to determine whether or not a particular lot of hops is or is not uniform in quality? A. Yes, sir.

"Q. State whether or not lot 13 of the crop of 1914 was uniform in quality? A. It was uniform in quality.

"Q. How many samples did you say you took from that lot? A. 10 samples.

"Q. State whether or not those samples fairly represented the quality of the lot? A. Yes, they did.

"Q. What did you do with the samples after you took them? A. I shipped them to the E.

"Q. Do I understand you that each one of those samples represented the quality of the lot? A. Each one represented the quality of the lot.

Clemens Horst Company, San Francisco.

"Q. How did you ship them? A. By express.

"Q. And you addressed the packages to the E. Clemens Horst Company, San Francisco? A. I addressed the packages to the E. Clemens Horst Company, San Francisco, 150 Pine Street, San Francisco.

"Q. Did you put on the wrapper of the samples any identifying mark? A. I did.

"Q. What mark did you put on them? A. Lot No. 13 from Wheatland ranch and also with my signature.

"Q. Have you seen any of those wrappers since? A. I have.

"Q. When did you see them? A. I saw them yesterday and I saw them this morning in our office in San Francisco.

"Q. State the circumstances under which you saw them yesterday. A. As to——

"Mr. Harrison: I will withdraw that question.

"Q. Who showed you those wrappers? A. Mr. Zipfel.

"Q. Mr. Emil A. Zipfel? A. Yes, sir.

"Q. Did he show you samples enclosed in those wrappers? A. He did.

"Q. How many samples did he show you enclosed in the wrappers with those identifying marks of yours which you used to identify the samples of lot 13? A. Five.

"Q. That, as I understand it, was yesterday morning? A. Yesterday morning.

"Q. January 31st; did you examine those five samples? A. I did.

"Q. What was the quality of those samples as to their being good brewing Pacific Coast hops of the crop of 1914 or otherwise? A. Well, as to good brewing hops——

"Q. I simply ask you—read the question, Mr. Reporter.

"(Pending question read.)

"A. I should judge them to be a good brewing hop.

"Q. By that you mean a good brewing Pacific Coast hop? A. Yes, Pacific Coast hop.

"Q. Did Mr. Zipfel yesterday morning show you any other samples? A. Yes, he showed me three samples or duplicates of samples taken from the same lot.

"Q. He stated those three samples to be what?

Mr. Alling: One moment, objected to as hearsay.

"Mr. Harrison:

"Q. Mr. Zipfel did point out to you three samples, did he? A. He did.

"Q. And only three others? A. And only three others, yes.

"Q. What was the quality of those other three samples that Mr. Zipfel pointed out to you yesterday as being good brewing Pacific Coast hops or

otherwise? A. They were good brewing Pacific Coast hops.

"Q. Who shipped lot 13 of the crop of 1914? A. I did.

"Q. I show you now what purports to be a copy of a bill of lading dated September 12, 1914, and which purports to be signed by you on behalf of the E. Clemens Horst Company, and ask you whether or not that is your signature (handing paper to witness). A. Yes, sir, it is.

"Q. State whether or not that is a carbon copy of the bill of lading under which lot 13 of the crop of 1914 was shipped? A. Yes, sir, it is.

"Mr. Harrison: I ask that the paper referred to by the witness be marked by the Commissioner, Plaintiff's Exhibit No. 26."

I now offer it and ask that it be marked Exhibit P26 A.

(The paper referred to is marked Ex. P26 A.)

Mr. Twining: (Reading):

"*Mr. Harrison:*

"Q. Mr. Rooney, at the time that bill of lading was issued, did you know it to correctly state the fact of the shipment? A. Yes, sir.

"Q. Refreshing your recollection from that copy of the bill of lading identified by you, will you state on what date you shipped lot 13 of the crop of 1914? A. On September 12th.

"Q. 1914? A. 1914."

Mr. English: (Reading):

"Cross examination by Mr. Alling:

"Q. Lot 13 according to this copy of the bill of lading which has been marked Exhibit 26, I take it, was shipped to the E. Clemens Horst Company —no, was shipped to—was consigned to the E. Clemens Horst Company at Chicago, Illinois, that is right, is it not? A. Yes, sir.

"Q. Routed by the S. P., U. P. and C. M. & St. P? A. I believe so; S. P., at P. C. and St. P.

"Q. And loaded into S. P. car 24125? A. Yes, sir.

"Q. Now what is the name of the agent at Wheatland? A. Mr. Moore.

"Q. Moore? A. At that time I believe Mr. Moore.

"Q. You wrote the original bill of lading, that is, the original of Exhibit 26? A. I did.

"Q. And the words 'permit inspection' were placed there by you on the original bill? A. Yes, sir.

"Q. Were those bales numbered? A. Yes, sir.

"Q. How did that number appear? A. As to the lot number or as to the bale number?

"Q. Bale number. A. Lot No. 13.

"Q. Did this number "500 to 599" appear on the bales? A. Well, that was bale number, they started it with 500 and ended with 599.

"Q. And each bale had a number? A. Each bale had a number.

"Q. And did you have anything to do with the rebilling of those hops? A. The rebilling?

"Q. Yes. A. No, the only billing I did was just the billing out of Wheatland.

"Q. Well, assuming that these hops were diverted and rebilled to Elizabeth, New Jersey, who would arrange for that rebilling? A. Why, as to

that, I haven't the least idea. The San Francisco office handled that.

"Q. When did you enter the employ of the Horst Company? A. In 1912 I believe for a short period, and then again in 1914.

"Q. Been with them ever since? A. With the exception of about four months.

"Q. What were your duties as inspector? A. Why, grading hops and shipping and weighing.

"Q. Anywhere else than Wheatland? A. Besides Weatland?

"Q. Yes. A. Also at the Bohemia ranch.

"Q. Where is that? A. Tehama County.

"Q. How many acres in the latter ranch? A. In the Bohemia ranch?

"Q. Yes. A. I couldn't say just how many acres there is in that ranch.

"Q. Approximately? A. I don't believe I could state approximately.

"Q. Did you duties as inspector last throughout the entire season? A. Just during the harvest season until the hops are inspected.

"Q. Take the year 1914, how many months were you employed as inspector? A. From August until the middle of October some time I believe along in there.

"Q. The 1st of August? A. Yes—the latter part of July it was that I went to Wheatland.

"Q. Until about the 1st of October? A. Yes—well it was along about the middle of October. I was not there steadily, I was traveling back and forth between different ranches.

"Q. Any other ranches besides those two? A. That is all.

"Q. That you have named? A. Just the Bohemia ranch and the Wheatland ranch.

"Q. Did you duties as inspector include anything other than the examination and grading of hops after they had been baled? A. No.

"Q. What proportion of your time of 1914 were you at the Bohemia ranch? A. What is that?

"Q. What proportion of the time from the 1st of August until the middle of October of 1914 were you at the Bohemia ranch? A. As I remember it, I made four trips to the Bohemia ranch. The first time I believe was three or four days and the second time the same length of time and the third and fourth time I was up there for seven or eight days.

"Q. Each time? A. Each time—well that was, for the first three times, I was up there probably three or four days and the last time I was there a little longer on account of finishing the crop.

"Q. What I am trying to get at is were as many hops raised at the Bohemia ranch as were raised at the Wheatland ranch? A. No, sir.

"Q. Do you know how many bales were produced at the Bohemia ranch in 1914? A. At the Wheatland ranch?

"Q. Bohemia ranch? A. No, I couldn't state just now how many bales there was raised there.

"Q. Approximately—I am trying to get at the relative production of the two ranches? A. In the neighborhood of 1400 bales, I believe.

"Q. At the Bohemia ranch? A. At the Bohemia ranch.

"Q. How many at the Wheatland? A. Between, I should say, 3,700 and 4,100, along in there.

"Q. You have an appliance for drawing samples from the bales, I suppose? A. Yes, sir."

Mr. Twining: I object, if your Honor please, to the testimony appearing from line 22, page 369, to line 8, page 401. This testimony is directed to testing the witness's knowledge and experience both as to the samples and the hops themselves, as to

their uniformity in quality—this lot 13— and as to the quality of the samples, and there is also a long discussion as to how he took the samples out of the bales. Now, inasmuch as I contend that the sample provision of the contract was waived, and that the hops themselves were accepted under the contract, without requiring that a sample be first approved, this testimony seems to me to be all immaterial.

Mr. English: You do not object to it as not cross examination?

Mr. Twining: No.

Mr. English: We think it is very material.

The Court: The ruling in similar cases has been to note the objection and to reserve the question, with leave to except if the decision is against you. That will be the ruling now.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Q. You have an appliance for drawing samples from the bales, I suppose? A. Yes, sir.

"Q. How deeply is the appliance operated in the bale? A. Oh, 10 inches, that is, for the sample.

"Q. Yes. A. The tryer is about 22 inches long.

"Q. What do you mean by tryer? A. Why, a tryer is a piece of iron about half an inch or three-quarters of an inch in diameter, about 22 inches long and has a knife on one end with a blade and when you pull it out of a bale, you pull a hand full of hops out.

"Q. With a barb on the end? A. With a barb on the end; when it goes in, it goes in easy and

when you pull it out, it catches the hops in the center of the bale.

"Q. What is the dimension of a bale? A. The dimension of a bale of hops—well, all bales are not the same, but they average about 5 foot long and about 23½ inches wide and about 24 inches thick, that is, high.

"Q. Now, you have another appliance for drawing your sample? A. Yes, sir. We call them tongs.

"Q. In sampling a bale of hops, is your sample taken with one insertion of your sampling appliance or do you make a number of insertions? A. One.

"Q. And the material to make up your sample—to get the material to make up your sample? A. One insertion.

"Q. One insertion? A. Yes.

"Q. And that insertion is about 10 inches deep? A. 10 inches deep.

"Q. About how many pounds or ounces to the ordinary sample? A. The ordinary samples would be about 8 or 9 ounces.

"Q. Is that the size of the samples you took of lot No. 13? A. About.

"Q. What is the name of that other appliance? A. Tryer.

"Q. Tryer; what is that used for? A. For trying each bale separately.

"Q. Each bale of an entire lot? A. Each bale of the lot, you try every bale, it is customary with the company, they try every bale with the tryer and draw samples from every tenth bale.

"Q. I see; now would there be more than one insertion of the tryer to each bale? A. One is about all. Sometimes they take two but very seldom.

"Q. Unless something off color shows up the first time? A. Yes.

"Q. Now to what depth is the tryer inserted? A. The tryer is inserted——

"Q. Ordinarily? A. Ordinarily about 16 or 14 inches, along in there.

"Q. Beyond the center? A. Just about to the center.

"Q. Now, each bale has its number, is that stenciled or is it on the tag? A. It is on the tag.

"Q. That is, the bale number? A. That is the bale number.

"Q. And each bale is marked with the lot number? A. Lot number.

"Q. Both on the bale and on the tag? A. On a separate tag, yes.

"Q. On a separate tag? A. They have the bale number on one tag and if I believe right the lot number on back of the bale and numbers and also a tag with the lot number.

"Q. Well, now, the bales, do they have any wrapping? A. How do you mean?

"Q. Any burlap wrapping or anything of that kind? A. Burlap wrapping.

"Q. Then the lot number is stenciled on the burlap? A. On the burlap.

"Q. The bale number not? A. No.

"Q. I see; does that burlap go clear around the bale? A. Yes, sir.

"Q. So that you have to cut through the burlap to use your tryer and your sampler? A. Oh, you have to cut through the burlap, yes, for both.

"Q. For both? A. Yes.

"Q. Now, are there any other marks placed upon either tags or the burlap than those which you have indicated? A. No.

"Q. Nothing on the bales themselves or on any tags attached to the bales indicating grade? A. No.

"Q. Do you know what the recognized grades, marked grades, of hops are? A. Yes, sir.

"Q. What are they? A. Well, the four standard grades are fancy, choice, prime and common; there is also——

"Q. Also what? A. Also medium prime.

"Q. Is that between common and prime? A. Common and prime.

"Q. Is there a marked grade known as good brewing Pacific Coast hops? A. I believe there is.

"Q. Is it different from either fancy, choice, prime, medium or common? A. Well, as to good brewing purposes I am not familiar.

"Q. You don't know what makes a good brewing? A. Well, as to brewing, I don't.

"Q. Is that a hop grower's gradation or classification or is it a brewer's classification? A. I believe it is a brewer's classification as far as I am familiar with it.

"Q. And you don't know which of the classifications fancy, choice, prime, medium or common corresponds to the brewer's classification, know as good brewing hops? A. No.

"Q. Well, then, you testified inadvertently when you said a few moments ago that these were good brewing hops? A. Well——

"Q. ——if you don't know what good brewing hops are. A. Well, as to good brewing hops, I consider a choice or a prime or most any of those hops for brewing purposes.

"Q. But I thought you said a moment ago you didn't know what good brewing hops were? A Well, as to the brewing or brew master's idea of a good hop, I don't.

"Q. These gradations, these grades or classifica tions which you gave us a moment ago, fancy, choice, prime medium, and common are the recog-

nized grades in the hop trade? A. I believe so, yes.

"Q. Well, why is a common hop common? A. Well, a hop that is probably not cured just right, probably little off color.

"Q. Anything else? A. Well, and probably dirty picked.

"Q. Anything else? A. And slack.

"Q. What is that? A. Probably a little slack.

"Q. Slack dried? A. Slack dried.

"Q. Anything else? A. That is about all.

"Q. Well, now, does it take all of those things to make a common hop or will any one of them make a common hop? A. Well, most any one, I believe, will make a common hop, a hop that was a trifle dirty and dried slack.

"Q. What makes a hop off color, poor handling or seasonal conditions? A. Poor handling will make a hop off color.

"Q. Do seasonal conditions sometimes affect a hop? A. No, I believe not, not in the Sacramento Valley.

"Q. Under drying would? A. Under drying would, yes.

"Q. Slack would? A. Slack would.

"Q. Sweating would? A. Sweating would; you know sweating is caused by slackness.

"Q. Did you ever have anything to do with curing hops? A. Not to any extent.

"Q. You are not an expert? A. I am not an expert.

"Q. Have you ever had any experience in handling hops? A. Yes, sir, some.

"Q. Before they came to the baled stage? A. Some, yes.

"Q. Some; when you were young on the ranch where you were raised? A. Yes, and also in the last five or six years.

"Q. Well, what makes a medium hop? A. A medium hop?

"Q. How does the medium hop differ from a common hop? A. Well, it is a little better grade of hop than a common hop.

"Q. In what respect? A. Well, in color, and the drying, and sometimes in picking.

"Q. Well, what makes a prime hop? A. A prime hop is a hop that has been cured properly and handled properly and also picked properly.

"Q. How about the color? A. The color, and also good color.

"Q. What makes a choice hop? A. Well, a choice hop is a hop that is picked clean or fairly clean, properly dried and cured and of a good color.

"Q. Well, now, that is just what you said about a prime hop, a prime hop properly cured, good color and properly picked; now how does a choice hop then differ from a prime hop? A. Well, it may be cleaner picked, more care taken in the drying process and the color may be a little bit better.

"Q. How about fancy hop, what makes a fancy hop? A. A fancy hop?

"Q. It is like the choice hop was, pretty near a perfect hop. A. Well, a fancy hop, there is some people call a fancy hop that has extra care taken in picking clean and also the drying.

"Q. The dring has to be you said properly done for a choice hop and for a prime hop; isn't it something like gilding refiner's gold to build a fancy hop on a choice hop? A. Well, no, I can't exactly explain it to you, but it has a difference in the color and the flavor of the hop, that has a lot to do with it.

"Q. Flavor; you haven't mentioned flavor before; so these are not the only things to be con-

sidered in grading hops, the curing and color and picking? A. Yes.

"Q. Are there other elements? A. Oh, yes, there are several other things.

"Q. What, for instance? A. The flavor, for one thing, and the wholeness of the hop for one thing, too.

"Q. Well, then, how about a common hop as to wholeness? A. Well, a common hop as to wholeness, it is more or less broken up.

"Q. How about a medium hop as to wholeness? A. Trifle better than common.

"Q. And the prime hop? A. Still better.

"Q. Is a prime hop whole? A. Not quite.

"Q. Is a choice hop whole? A. It is.

"Q. Well, a fancy hop couldn't be any wholer, could it? A. No, well——

"Q. Well, now, how about flavor; by flavor I assume you mean what is generally called aroma? A. Aroma, yes.

"Q. What kind of an aroma has a common hop? A. Well, a common hop could have different aromas, it could vary.

"Q. Poor handling, curing? A. Yes.

"Q. ——and so forth could easily affect in a great many different ways—— A. Yes.

"Q. ——the aroma, could it not; destroy it? A. Well——

"Q. Destroy the normal—— A. Yes, normal.

"Q. ——the normal aroma? A. Normal aroma of the hop, yes.

"Q. Well, now, begin at the bottom, common, running up, what grade would you arrive at when you have the full aroma represented, prime or choice? A. Prime.

"Q. Full aroma prime; and it could naturally be no better than the choice or fancy? A. No.

"Q. Now, in the medium the aroma would be off a little? A. It would be off.

"Q. Well, now, you haven't said anything about maturity or immaturity; is that ever taken into consideration in connection with grading? A. Yes.

"Q. How far would you have to ascend in the scale of grades before you got by all immaturity? A. Prime and sometimes medium.

"Q. Everything above would be mature and under might be immature? A. Immature.

"Q. Immaturity could affect aroma, could it not? A. Yes.

"Q. And it could affect color? A. Also.

"Q. Now, those are the only things that you think of, that you take into consideration in grading hops? A. Yes, it is the principal things in the grading of hops.

"Q. Yes, well would you regard—what do you regard as the prime factor in grading hops; what is the principal element or quality that tends to establish grade; is there one? A. No, it is all those elements combined.

"Q. Yes, a combination of them all. A. A combination of them all.

"Q. Well, do you know anything about the market, do you know how the prices range on the various grades since you have been connected with the business? A. Well, as to prices, I haven't had anything to do with those; just sort of hearsay is about all.

"Q. Do you—did you ever hear hops spoken of as being rich or thin, fat or thin, rich or poor? A. Well, I have heard of rich——

"Q. Rich hops? A. Rich looking hops.

"Q. And did you ever hear of fat hops? A. Well, there is a hop they call fat hops; you take the Bohemia hop for instance is a small hop and

"Q. That is, the large hop is called the fat hop? A. Well, in a field, one year you probably have a hop we call fat, and full bud; the next year probably out of the same field, you would probably have a small one.

"Q. But it is the large blossom that is called the fat hop? A. Yes.

"Q. The large full blossom? A. Full blossom.

"Q. The brewing strength of the hop has nothing to do then with the hop being fat? A. Well, I couldn't say as to that.

"Q. Well, if size is what makes a fat hop, then the question as to whether it had brewing strength or not naturally would have nothing to do with it, is that your idea? A. I didn't just exactly get what you said.

"Q. I say, if size is what constitutes a fat hop, then brewing strength would not have anything to do with it being fat or otherwise? A. No.

"Q. And what do you understand to be meant by a rich hop? A. A rich hop, well rich in flavor and rich color.

"Q. Rich in color and flavor; you don't understand that the term rich hop has anything to do with its strength? A. No.

"Q. But only with its aroma and its color? A. And its color.

"Q. Well, a rich hop has a darker color than a poor hop? A. Well, as to color, there is different colors in hops. Some people prefer a green colored hop and others a yellow one.

"Q. Yes. Well, what color is a rich hop? A. Well, it could be either.

"Q. It could be either; well, if richness denotes color, it would have to be some particular color, wouldn't it? A. Well, no, not exactly. Some people would probably call a rich hop a green color; others would prefer a yellow.

"Q. Then whether a hop was rich or not would depend upon the preference of the—— A. Of the people that were buying and using it.

"Q. Yes, the hop would be rich to one man and poor to another according to his preference in color? A. In color, yes.

"Q. Now, did you ever hear anything about lupulin? A. Yes, sir.

"Q. What is it? A. Well, lupulin is a kind of a powder that is in a hop.

"Q. In the center of the hop? A. In the center of the hop.

"Q. Yellowish golden powder? A. Gold color.

"Q. Does that play any part of any importance in the quality of the hop? A. It does.

"Q. Does it have anything to do with its richness? A. It does.

"Q. Well, then, richness has to do with lupulin as well as color? A. Yes.

"Q. Well, has the presence or absence of lupulin anything to do with the hop being fat or poor? A. Well, a poor hop would not have so much lupulin in it as a fat or rich hop would.

"Q. For the reason that it is smaller? A. Yes.

"Q. Now, are there large hops that don't have as much lupulin as other smaller hops? A. Yes.

"Q. There is a difference in the amount of lupulin? A. Yes.

"Q. Quite irrespective of the size of the hop? A. Yes.

"Q. Isn't it a fact that lupulin is the big thing in a hop? A. No, I can't say that it is.

"Q. Where do the hops ultimately all go? A. Well, I suppose the biggest portion of them goes for brewing purposes.

"Q. Only a very minute fraction of the hops that are produced are used for other purposes than

brewing, is that right? A. Oh, yes, a small proportion, I suppose.

"Q. Well, now are you not aware that lupulin is the element that the brewery is after? A. No, I couldn't say that I am.

"Q. And you consider that a hop that has relatively little lupulin is just as good a brewing hop as one that is very strong in lupulin? A. You say that——

"Q. I say, do you consider that a hop that is relative very poor in lupulin is just as good for brewing purposes as a hop that is very strong in lupulin? A. No, I don't.

"Q. Then lupulin determines in a large measure the value of hops for brewing purposes? A. Well, it is one of the parts.

"Q. It is a fact, isn't it, that a hop is rich or fat according to the amount of lupulin it contains? A. No, not always. There are other parts of the hop that amount to as much as the lupulin.

"Q. For brewing purposes? A. Well, yes, for brewing purposes.

"Q. You say you don't know anything about brewing? A. Well, that is as far as I know.

"Q. I see; well, take lot 13, how was it for lupulin? A. Lot No. 13, it was good for lupulin.

"Q. How would lot 13 of the crop of 1914 grade, according to these market grades, which you have named? A. Well, I would grade them a choice hop.

"Q. What did it lack from being fancy? A. Well, I couldn't say as to that.

"Q. Was it fancy? A. I don't know whether I would call it a fancy hop or not.

"Q. Pretty close to fancy, wasn't it? A. Yes, a fancy is not much better than a choice, if any.

"Q. Was lot No. 13 of the crop of 1914 as good a hop as you ever saw? A. No, I have seen better hops.

"Q. Better in what respect? A. Well, I don't know just in what respect, probably better dried.

"Q. I see; so lot No. 13 was not dried as well as it might be? A. Well, it was dried as far as a choice hop is concerned.

"Q. Well, it could have been dried better? A. No, I don't know as it could have.

"Q. I understood you to say that you had seen fancy hops that were better dried than lot 13. A. Well, you take a fancy hop is a hop that a man would take particular care in in every respect as far as picking and everything is concerned.

"Q. Well, there was not particular care taken as to lot 13 in your judgment? A. Oh, yes, particular care in it, but probably in a fancy hop they would take more pains than in an average choice hop.

"Q. Well, just in what respect was the drying of lot 13 short of making it a fancy hop? A. I had nothing to do with the drying whatever.

"Q. Well, you say that you have seen fancy hops that were better dried than lot 13. I want to know what was wrong with the drying of lot 13 that made them less than fancy? A. Well, I couldn't say as to that myself.

"Q. You couldn't; now going back to lupulin, you said the amount of lupulin enters into the process of grading hops? A. Yes.

"Q. Well, by that do you mean that the presence or absence is considered in grading or that the relative amount is given weight? A. Well, lupulin is taken into consideration when you are grading, yes, as well as the other factors of the hop.

"Q. Yes, well, the amount of lupulin is not affected by the drying or curing, is it? A. No.

"Q. It is the aroma of the hop—does the aroma of the hop largely depend that is, as to strength,

upon the amount of lupulin which the hop contains? A. Yes, in a way.

"Q. A hop with a good aroma then is rich in lupulin? A. Yes.

"Q. Now, what will affect aroma; if a hop is rich in lupulin, what will tend to destroy the flavor or aroma? A. Well, slackness will affect it in one way.

"Q. I see; is an immature hop usually rich in lupulin? A. Not usually, no.

"Q. And an immature hop usually does not have a good aroma, does it? A. No.

"Q. Do you ever encounter a grassy flavor in hops? A. A what?

"Q. A grassy flavor? A. I don't believe I ever heard the expression before in hops.

"Q. Well, you have had some experience with immature hops? A. Some, yes.

"Q. And you have stated that an immature hop does not have the normal aroma? A. Yes.

"Q. Well, what is the characteristic smell of an immature hop that has not been affected or damaged in drying or curing? A. Well, it wouldn't have the strength of a hop that was fully matured.

"Q. I see; it would be a hop aroma but a weak aroma? A. Yes.

"Q. Well, would an underdried hop have a good aroma? A. Well, it depends on whether the hops are turned off too slack or a trifle slack.

"Q. I see; if too slack, what woudl be the effect upon the aroma? A. Well, they would probably sweat and discolor the hop and give it a bad smell.

"Q. Something like a musty smell? A. Yes.

"Q. What produces, as you understand it, the greater amount of lupulin in one hop than is found in another; to what is it due? A. I couldn't say as to that.

"Q. Is it due to climatic conditions or due to

the character of the soil? A. Well, I would imagine that it is the character of the soil and probably the cultivation of the crop.

"Q. Yes, cultivation would have something to do with it; now is the product of some districts usually richer in lupulin than that of other districts? A. Sometimes, yes.

"Q. Do you know anything about the Oregon hop? A. The Oregon hop?

"Q. Yes. A. Some; just what I have seen of the hops that have been brought into California.

"Q. You have never dealt in the Oregon hop, have you? A. No, not to any extent.

"Q. How does the Oregon hop compare with Sacramento Valley hop in respect to the amount of lupulin which it contains? A. Well, I think the Oregon hop has a trifle more lupulin in it in some, and in others, probably not as much.

"Q. But as a rule which locality will be richest in lupulin? A. I couldn't say as to that.

"Q. Do you know the Sonoma county hop? A. Yes, I have seen some Sonoma county hops.

"Q. Well, have you handled them to any considerable extent? A. No, not to any extent.

"Q. Do you know whether or not they have a reputation for containing more lupulin than the Sacramento Valley hop? A. No, I don't know as they have.

"Q. You have never heard anything about that; now, have you ever seen any of the hops of lot 13 since you shipped them on the 12th day of September, 1914, save the five samples which you saw yesterday and possibly the three samples which were shown you? A. No, I have not.

"Q. Lot 13 was machine picked, wasn't it? A. Yes, sir.

"Q. All of the hops on the Wheatland ranch were machine picked, were they not? A. Yes, sir

"Q. In 1914? A. With the exception of a few hops that the government men were experimenting with.

"Q. The government experimented with some? A. Yes.

"Q. They hand picked those? A. Yes, just a few vines, is all, probably a quarter of an acre.

"Q. Now, you say these hops, lot 13 of the crop of 1914 were choice and lacked very little of being fancy. That means I suppose that they were whole, no broken hops among them? A. No, it does not mean that all the hops were whole, it means that the biggest proportion of them were in good condition.

"Q. Some of them were broken? A. A few hops were, yes.

"Q. Yes, now isn't it true that machine picked hops are more broken than hand picked hops? A. No, not in the last couple of years, since they have got the machines down to a certain point now where they are picking the hops as good or even better than hand picked hops.

"Q. There are more broken hops in machine picked hops than in hand picked hops? A. No, not in the last couple of years.

"Q. Was that true in 1914? A. What is that?

"Q. Was that true in 1914? A. Yes, sir.

"Q. Did these hops lack anything of being fancy hops in respect to wholeness? A. Well, a fancy hop would probably be—they would be more whole hops in them.

"Q. Well, in grading for wholeness, is the question how many whole hops there are or how many broken hops there are? A. Well, that is just taking an average, is all.

"Q. I see; a choice hop, the hops don't have to be whole? A. No, not necessarily, but the biggest proportion of them are whole.

"Q. Well, now, as to flavor of lot 13. A. The flavor was good.

"Q. Do you test flavor in connection with each sample that you take? A. Yes.

"Q. That is, you make a test, an examination, as to wholeness with each sample that you take? A. Yes.

"Q. As to cleanliness of picking? A. Also.

"Q. In each sample that you take? A. Yes.

"Q. Do you make an examination as to color with each sample that you take? A. Yes, sir.

"Q. And as to curing? A. Yes, sir.

"Q. What do you do it for? A. In the course of inspection.

"Q. I see; do you make any record of your inspection other than is shown upon the wrappers of the samples and the tags which you affixed to the bales? A. No, sir.

"Q. What in respect to lot No. 13 did you mark upon the wrappers of the samples? A. I marked the lot number and also the bale numbers that they were taken out of.

"Q. I see; is that all? A. And also from the ranch they were from I believe, the Wheatland ranch.

"Q. Is that all? A. And my own signature.

"Q. That was all? A. That was all.

"Q. Now you have told us that on one tag you would put the bale number? A. Well, also on the samples, we put the lot number, then the bale number. I stated that I believe.

"Q. Yes, you stated that. A. Yes.

"Q. Well, now, on the tags which you affixed to the bales, I understood you to say that you would put the lot number, and either on the back of that or on another tag, the bale number? A. No, we would put the bale number—would be on one tag.

"Q. Yes. A. And on the back of that the lot

number, and then another tag with the lot number.

"Q. Yes, and then the lot number—— A. Would be stencilled on the burlap.

"Q. Stencilled on the burlap; now were there any other marks upon either the bale or tags affixed to the bale? A. None whatever.

"Q. Now, then, you made no registration upon either the bale nor upon the wrappers or the samples, indicating the grade, your judgment as to the grade of the hops? A. No.

"Q. Now, then, you made no registration upon either the bale nor upon the wrappers of the samples indicating the grade, your judgment as to the grade of the hops? A. No.

"Q. Well, then, what was the occasion for you to smell of each sample and examine each for color and examine each for wholeness and for curing, et cetera? A. Well, in grading the hops, why if we should run across any hops that was not up to the grade, we would take them out.

"Q. What was the grade to which they had to be up to? A. Well, a choice hop.

"Q. Oh, the ranch then was not supposed to turn out anything but choice hops? A. Well, we try to have it right that way.

"Q. Did the Wheatland ranch in 1914 produce no prime hops? A. Yes, I believe we had a few bales that we couldn't call choice hops, very few though.

"Q. Well. now, when you were inspecting, if they were choice hops you would let them go and make no record of your inspection as to that? A. Yes.

"Q. As I understand you? A. Yes.

"Q. What did you do if they were prime? A. Well, if they were a prime hop, the samples would show it in the city office and they would disopse of them, they would have the grading down there.

"Q. I see; you have nothing to do with the grading? A. Oh, yes, I had something to do with the grading, grading on the ranch and setting them in lots, taking the samples that represented the different lots and sending them to the city.

"Q. You took the samples and sent them to the city? A. Yes.

"Q. But aside from that, you didn't have anything to do with grading? A. Well, the grading on the ranch, yes.

"Q. Well, what did that consist of? A. It consisted of inspecting and setting hops of different colors and lots by themselves.

"Q. I see; so your grading really was represented so far as net result was concerned in the lot groupings of the bales? A. Yes, and also as to the grade of hops.

"Q. Were the lots assembled before you took the samples or afterwards? A. Before—well, they were assembled just as we take the samples, we go through them and try them and set a hundred bales out, or whatever amount the bales would be in a lot, as to color, flavor; then I would take my samples.

"Q. That is, you would create your lots by a general look over? A. Yes.

"Q. Without accurate sampling? A. Without what?

"Q. Without accurate sampling? A. Yes.

"Q. Assemble your lots? A. Well, it was accurate sampling.

"Q. Accurate sampling? A. That is, what you mean is taking the large samples out of the bale, I wouldn't take the larger samples out until after I had my lot assembled. You can get your general opinion of your lot of hops with your tryer.

"Q. I see; now with your tryer you would gauge in a general way? A. Yes.

"Q. ——the classification, and assemble your lots on the basis of quality shown by your tryer? A. No, we would grade our hops with our tryer.

"Q. I see; after having used the tryer, you would assemble the lots on the basis of what your tryer showed? A. Yes.

"Q. Then they would be marked? A. No, they would be sampled.

"Q. Sampled before they were marked? A. Well, either way.

"Q. Don't you get their lot number first before you sample them? A. Not always, no.

"Q. All right now as a result, you had some lots that varied and different from other lots? A. A few.

"Q. Yes. A. Well, yes, they were as to color.

"Q. Yes. A. And some of them were a greenish color and some of them yellow.

"Q. Now, in assembling them into lots in that way, as a result of sampling by tryer—that is the implement? A. Yes.

"Q. ——would you consider anything else than color? A. Oh, yes, we would consider the composition that makes a hop.

"Q. Consider wholeness and aroma and all these other things? A. Yes, sir.

"Q. So that you would have some lots that differed from others in color and in aroma? A. No, not necessarily in aroma.

"Q. Well, did you grade them as to lots in respect to aroma? A. Yes, certainly; and aroma and lupulin and wholeness and curing, all those things were taken into consideration in your tryer sampling? A. Yes.

"Q. For the purpose of breaking into lots? A. Yes.

"Q. Your idea being and your purpose being, I take it, to get the same in a general way, in a

large general way to get the same quality of hop? A. Yes.

"Q. Uniform quality of hop? A. Yes.

"Q. In a given lot? A. Yes.

"Q. Now that being done, there would be as much difference in lots as there was difference in the product and output of the ranch? A. I didn't get that just exactly.

"Mr. Harrison: Read the question.

"(Pending question.)

"A. No, not necessarily, because we would only put them out in hundred bale lots. There would probably be a number of lots that would not be exactly the same.

"*Mr. Alling:*

"Q. I see; well, now, assuming—— A. ——the same grade of hops.

"Q. Assuming that there was a difference in the product of the ranch? A. Yes.

"Q. ——in respect to color and lupulin et cetera, it would result in uniform lots, and lots that as between themselves, would not be uniform? A. No.

"Q. Now, was the whole crop of the Wheatland ranch for 1914 entirely uniform? A. Well, you couldn't say entirely because there were a few bales that were off, but practically the whole crop.

"Q. Was the whole crop of one color? A. No.

"Q. What was the difference, what kind of colors were represented? A. Well, there was green—that is, a kind of a green color; a little lighter green; there was a yellow; there was a kind of gold color, a golden yellow.

"Q. There was a green and a lighter green and a golden? A. And yellow.

"Q. And yellow? A. A kind of a golden yellow.

"Q. A golden yellow; now which of those classifications as to color did let 13 fall into; was it green, light green or golden yellow? 9. As I remember, I think it was yellow.

"Q. Was the difference in the color of the product of that ranch for 1914 due to difference in soil; did the yellows come from one part of the ranch and the green from another or was the difference in color due to different curing conditions? A. Well, no, probably the difference in the color comes from crops that are a little riper than others. There is a hop though that is naturally——

"Q. A yellow hop—— A. A yellow hop.

"Q. While these hops on the Wheatland ranch in 1914 were all the same kind, weren't they? A. Practically, yes.

"Q. And the yellow color of some of them was not due to the fact that it grew on what you call a yellow hop vine? A. Well, yes, that could be the cause of it. There are different groups, you know, of hops.

"Q. Yes, you have the two varieties in the Wheatland ranch? A. Well, I believe they have, I couldn't say for sure. The color may have been caused from one being——

"Q. Being riper than the other? A. ——being riper than the other.

"Q. Now a yellow was thoroughly ripened, I suppose? A. Yes.

"Q. Yes, a green was not as thoroughly ripened? A. Yes.

"Q. The light green was probably between the two as to ripening? A. Yes.

"Q. And you are sure that this lot 13 was yellow and not green? A. Yes.

"Q. You have a distinct recollection as to that?

A. No, not a distinct, but it is my remembrance now. I believe it was a yellow hop.

"Q. Now, how does the color of a hop—how is it affected by age? A. What do you mean, after the hop is in the bale?

"Q. Yes, imagine a hop five years old that was green when first baled; that five years of aging, what effect would it have upon the color? A. Well, a hop that would be five years old, why would be somewhat of a rusty color to it, I believe.

"Q. I see; but it wouldn't tend to turn yellow, golden yellow? A. No.

"Q. Would it? A. No, not necessarily golden yellow. If a hop gets five years old why it is pretty hard to tell the difference between any of the colors.

"Q. I see. And the same thing is true of a couple of years old; hops gravitate toward an average after a year? A. After a year.

"Q. Now, what is the color of these samples as you saw yesterday morning? A. I should judge they were a yellow hop, that is, not a bright yellow.

"Q. Yellow; now you say—— A. They are a kind of a yellow.

"Q. Did you have any immature hops in 1914? A. Not that I remember of.

"Q. On the Wheatland ranch; you had some, you have stated, that were more mature than others? A. Yes.

"Q. Well, those that were mature were mature and those that were less mature were to a degree immature, were they not? A. Well, yes, to a certain degree, but very small; they were what you would call a mature hop and the others were more so.

"Q. I see, but 13 being golden yellow—— A. It was not a golden yellow, it was a yellow hop.

"Q. A yellow hop, not a golden yellow; there

was not any question about those being fully matured? A. No, they were fully matured.

"Q. And if it should develop that they had a grassy, a green flavor and lacked the aroma of the fully matured hop, would you still be of the opinion that lot 13 was fully matured?

"Mr. Harrison: I object to that on the ground that there is no foundation laid. It doesn't appear that they did have the defects mentioned in the question.

"A. I don't understand you on that; grassy?

"Mr. Alling: Read the question.

"(Pending question read.)

"A. What do you mean by grassy?

"Q. Well, you have notice the aroma or lack of it of immature hops, have you not? A. Yes.

"Q. Like all green things they smell green, don't they? A. Well, I never noticed it in a hop.

"Q. Well, how does an immature hop smell compared with the mature? A. Well, it has not got the strength of a fully matured hop.

"Q. But it is not a grassy vegetable smell? A. No.

"Q. No. A. Not necessarily.

"Q. There is no smell detectable other than the normal aroma and the only difference is that it is weaker? A. That is all.

"Q. Now you say there were some hops in 1914, the 1914 crop, that were not up to the uniform standard of the ranch, a few bales, I understood you to say? A. Yes, there were about 12 bales that were turned back and when I left there they were still on the ranch.

"Q. There was no full 100 bale lot that in any

essential respect differed from the uniform quality of the whole ranch? A. No, only in color of the hop.

"Q. Well, did you consider the matter of lupulin in making those lot classifications? A. Yes.

"Q. Was the amount of lupulin uniform as to the whole crop? A. Yes, practically the same all the way through.

"Q. Have you ever seen a richer hop than the crop of 1914 on that ranch? A. No, 1914; I don't believe I have. That was the first year that I was inspecting on that ranch.

"Q. Well, have you ever since seen a richer hop than the crop of that year? A. No, I haven't.

"Q. A top notcher, lacking only a frazzle of being fancy, the whole crop; is that right? A. No, I don't say that they were fancy, but they were a choice hop, they were a choice Sacramento Valley hop throughout.

"Q. No better anywhere? A. No, I don't say that.

"Q. Well, you have never seen any better? A. Yes, I have seen better hops.

"Q. Oh, I understood you to say you hadn't.

"Mr. Harrison: You asked him about richer hops before.

"Mr. Alling: Oh, yes, pardon me, yes, that is right.

"Q. But you never saw hops with more lupulin than those hops had? A. Yes, I have.

"Q. Where were they grown? A. I believe they were grown in Oregon.

"Q. You never saw better dried hops than those, did you, with the exception of those 12 bales? A. With the exception of what?

"Q. Those 12 bales?

"Mr. Harrison: Which 12 bales are you referring to?

"Mr. Alling: Those that he sent back.

Mr. Harrison: Those that he set aside?

A. Those that I set aside were not properly dried. That is why they were turned back.

"Mr. Alling:

"Q. I say, with the exception of those, you never saw better cured hops, did you? A. Yes, I have seen better cured hops.

Q. Where? A. Why, I don't know just where; I saw the samples, but those Wheatland hops were an average Sacramento Valley choice hop.

"Q. Yes, but isn't an average Sacramento Valley hop considered a poor hop as compared with the hops raised in other localities? A. No, I don't know as they are.

"Q. Don't you know that as a matter of fact in the market, the Sacramento Valley hop stands at the bottom in point of comparison as to grades? A. No, I do not.

"Q. Don't you know that both the American River and the Sonoma County hop has the market call on the Sacramento Valley hop? A. Well, no the American River hop is a Sacramento Valley hop.

"Q. I don't mean the American River; the Russian River. A. No, I am not familiar with the Russian River hops to any extent, but there is Sacramento hops that even top the Russian River hops.

"Q. I see; how about Sonoma County hops? A. The same way, Sonomas.

"Q. The Sacramento are really better than Sonomas? A. I think they are on an average with the Sonomas.

"Q. I see. A. I don't say they are any better or considered less.

"Q. You have never handled any of those? A. No, not to any extent.

"Q. All you know is Sacramento hop and I don't blame you for your hop patriotism, standing up for that valley.

"Mr. Harrison: We appreciate the words of counsel.

"Mr. Alling: Kind words.

"Mr. Harrison: Yes.

"The Witness: Of course, I am not familiar with the Russian River; the Sonoma County hops——

"Mr. Harrison: There is no question asked, Mr. Rooney.

"Mr. Alling:

"Q. You did the weighing? A. I did the weighing at Wheatland, yes.

"Q. The weighing represented by this list which has been marked Exhibit No. 25? A. Yes, sir.

"Q. No stems in lot 13? A. Well, yes, what would be in an average hop, a choice hop.

"Q. A choice hop is better than an average hop? A. Well, there are stems in most any grade of hops, that is, small ones, not large stems.

"Q. Any as big as a lead pencil? A. None whatever.

"Q. Did you have any red spider on the ranch in 1914? A. No, not in 1914.

"Q. You don't have any mold there? A. No.

"Q. Any insects? A. Well, there are years that they have had insects.

"Q. Not in 1914? A. Not in 1914.

"Q. Do you know whether the small bud hop is

worth more in the market than the large bud? A. No, I couldn't say.

"Q. Do you know whether a small bud hop takes a higher grade than a large blossom in the market classification? A. No, sir, I don't know.

"Q. Where is the original of Exhibit 26? A. Is that for me to answer?

"Q. Yes.

"Mr. Harrison: Yes.

"A. I couldn't say.

"Mr. Alling:

Q. What did you do with it? A. I sent it to the San Francisco office from Wheatland on the same date.

"Mr. Alling: We move to strike Exhibit 26 on the ground no proper foundation for its introduction. That is all."

We have already admitted that in evidence, so I will let that go.

Mr. Twining: Now, if the Court please, I move to suppress from page 402, line 18, to page 403, line 21, on the ground that this is a further discussion of the quality and grade of the hops, which is immaterial, in my view of the case.

The Court: The objection is noted and decision is reserved. You may have an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"*Redirect examination by Mr. Harrison:*

"Q. In speaking of the wholeness of a hop, you said that that was one element to be considered in grading, and that with regard to that quality, as I understood you, a common hop was more or less broken up? A. Yes, sir.

"Q. Might a hop be without defect as to wholeness and still by reason of other defects, be a common hop? A. Oh, yes, certainly.

"Q. And the same would apply to other defects; in other words, it might be perfect with regard to some of these elements and still because of the presence of some other defect, be a common hop or other low grade hop? A. Yes.

"Q. With regard to the eight samples which Mr. Zipfel showed you yesterday morning, state whether or not they were choice hops? A. Yes, I considered them choice hops.

"Q. With regard to lot 13, about which you have testified, was the aroma of that lot such as should be found in choice hops? A. Yes.

"Q. State whether or not machine picked hops, during the season of 1914, produced as clean picked hops as hand picking did—I will withdraw that question. That is not very clear. State whether or not during the season of 1914, the machine picked hops were as clean as the hand picked hops? A. Yes.

"Q. State whether or not the grade of fancy hops is one usually demanded and considered in grading hops, or whether the grading of hops as fancy or otherwise, is exceptional? A. Well, a fancy hop is not usually used for the grading of hops."

Mr. Twining: Now, I object from page 403, line 21, to page 405, line 3, upon the ground last stated.

The Court: I make the same ruling as I last made.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Recross examination by Mr. Alling:

"Q. You have never on the Wheatland ranch or anywhere else undertaken or had occasion to make lot classifications for fancy hops? A. No.

"Q. Did you ever see any fancy hops? A. Yes, I have seen fancy hops—what were considered fancy hops.

"Q. Samples simply? A. Yes, and also some hops in the bale.

"Q. But in your experience on the ranch, you have never undertaken to create that classification? A. No.

"Q. Have you ever on the Wheatland ranch made a lot classification of grades under choice? A. No.

"Q. How long have you been on the ranch? A. At Wheatland?

"Q. Yes. A. I went up there in August, I believe, as I stated before.

"Q. 1914? A. 1914, and was there off and on until October.

"Q. Yes, subsequent years. A. In 1914, but I have been there other times during the hop season.

"Q. Were you there last year? A. No, not during the hop season. Since that time I have been stationed in Sacramento.

"Q. Did you at Sacramento handle the product of the crop of 1915? A. Yes, that is, part of the crop; not as to inspecting, though.

"Q. Was all of it which you handled, choice?

A. I didn't have the inspecting of the hops. All that I had was the recompressing of the hops.

"Q. You had no opportunity to judge of the grade of the crop of 1915? A. No."

Mr. Twining: (Reading):

"Redirect examination by Mr. Harrison:

"Q. You spoke of stems in hops; is it or is it not a fact that all hops, choice or otherwise, contain some stems? A. Yes, a certain amount of stems.

"Q. Is there such a thing as a perfect hop, commercially speaking? A. I believe not, commercially speaking."

I object to the recross examination, appearing on page 406 from line 5 to line 27, on the ground last stated.

The Court: I make the same ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Recross examination by Mr. Alling:

"Q. Well, the presence of stems don't tend to increase the grade, do they, or improve the grade? A. No, that is, any amount of them.

"Q. I say, the presence of any stems don't tend to improve the grade? A. No.

"Q. And the grade would decline in strict accordance with the presence of stems? A. Well, even a fancy has stems in it, what is considered a fancy hop.

"Q. Yes, but the less stems, the better the hop? A. Oh, yes, certainly.

"Q. And the more stems the poorer the hop, is that right? A. Well——

"Q. Because stems weigh. A. Well, it doesn't decrease——

"Q. It don't decrease the grade? A. Well, yes, the stems do; of course it naturally would.

"Q. And just in proportion as the hops are dirty, the grade would naturaly decline? A. Yes."

Mr. Twining: Now, if the Court please, I move to suppress the redirect examination, page 407, line 1 to line 7 inclusive, on the ground last stated.

The Court: I make the same ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"Redirect examination by Mr. Harrison:

"Q. When you use the word 'dirty,' you refer to the presence of any stems at all, or to the presence of an undue amount of stems? A. Undue amount of stems and also leaves."

I object to the recross examination, page 407, lines 9 to 30, on the ground last stated.

The Court: That is, because it relates to quality?

Mr. Twining: Yes.

The Court: I make the same ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: (Reading):

"Recross examination by Mr. Alling:

"Q. What is an undue amount of stems and leaves? A. Well, where you can notice them all through your samples and all through your hops.

"Q. I see; that would be an undue—if it were noticeable, it would be undue.

"Q. They are noticeable in a choice or fancy hop, but what I mean, dirty picked, where you can find stems as big as a lead pencil.

"Q. But if the stems are not as large as a lead pencil, it is all right, is it? A. Well——

"Q. In a choice hop? A. No, it is not all right because a choice hop would not have stems as large as a lead pencil.

"Q. Would it have any considerable number of stems at all? A. Not enough to speak of.

"Q. That whole thing is relative in its bearing upon grade, I suppose? A. Yes."

Mr. English: On pages 409, 410 and 411 of the depositions certain exhibits were marked, by request of defendant's counsel, on the taking of the depositions. We reserve the right to offer them later, if we think they are material.

Mr. Twining: This is the testimony of Emil A. Zipfel (reading):

"EMIL A. ZIPFEL, of the City and County of San Francisco, State of California, called as a witness on behalf of the plaintiff, having been first duly sworn by the Commissioner, according to law, testified as follows:

"Direct examination by Mr. Harrison:

"Q. What is your name? A. Emil A. Zipfel.

"Q. What is your age? A. Thirty-one years.

"Q. Where do you reside? A. San Francisco.

"Q. What is your occupation? A. Hop buyer and hop inspector, and do office work, general office work, for the E. Clemens Horst Company.

"Q. Are you employed by the E. Clemens Horst Company here? A. Yes, sir.

"Q. How long have you been employed by the E. Clemens Horst Company? A. About eighteen years."

Now, I move to suppress the testimony of Mr. Zipfel from page 412, line 19, to the end of his direct examination, which is on page 422, line 13. This testimony relates entirely to what Mr. Zipfel did with regard to identifying and examining the samples and forwarding the samples, and, inasmuch as it is my contention that the shipment itself was accepted and that the right to approval of samples prior to the acceptance or rejection of the shipment was waived, this testimony seems to me to be immaterial.

The Court: I shall make the same ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"Q. Who has charge of the samples kept in the office of the E. Clemens Horst Company? A. I have.

"Q. During the time that you have been associated with the E. Clemens Horst Company, have you had occasion from time to time to inspect and grade hops? A. Yes, sir.

"Q. Have you had occasion to grade samples? A. Yes, sir.

"Q. Have you become familiar with the various grades of hops? A. Yes, sir.

"Q. Did you, during the year 1914, receive from S. J. Rooney a sample of Lot 13 of the crop of 1914 of the E. Clemens Horst Company? A. Yes, sir.

"Q. About how many samples did you receive? A. Ten or twelve samples.

"Q. Were some of those samples used or sent away by the plaintiff in this action, E. Clemens Horst? A. Yes, they were.

"Q. Of those that remain, who had the custody? A. I did.

"Q. How many of those samples remain in your custody on behalf of the plaintiff, let us say, two weeks ago? A. Five.

"Q. Since that time what, if anything, have you done with those five samples? A. I sent half of those five to our New York man, Mr. Phleger.

"Q. State whether or not each one of those samples was uniform in quality? A. They were.

"Q. State whether or not the half of each sample which you sent to Mr. Phleger fairly represented the quality of the whole of each sample?

"Mr. Alling: One moment. Objected to as leading.

"Mr. Harrington: Well, I will withdraw the question then. State to what extent those samples sent to Mr. Phleger represented the quality of the whole samples?

"Mr. Alling: Objected to as leading.

"Mr. Harrison: Answer the question.

A. They fully represented the whole of the samples.

"Q. How did you send those, Mr. Zipfel, to Mr. Phleger? A. Registered parcel post.

"Q. Through the United States mails? A. Yes, sir.

"Q. How were they addressed? A. Addressed 'C. A. Phleger, care E. Clemens Horst Company, New York.'

"Q. Did you put any distinguishing marks on those five samples that you sent to Mr. Phleger and which you have stated you took from the samples of Lot 13 in your possession? A. Yes, I numbered them.

"Q. Do you remember how you numbered them? A. Well, the five samples, were numbered B-4, B-5, B-6, B-7 and B-8.

"Q. That is to say, one was numbered B-4 and one was numbered—— A. Next one B-5 and so on.

"Q. And the other three numbered B-6, B-7 and B-8, is that correct? A. Yes, sir, that is correct.

"Q. When did you mail them? A. January 31 of this year.

"Q. Before you sent those samples or those parts of samples to Mr. Phleger, did you examine the whole of those samples to determine their quality? A. Yes, sir.

"Q. State what was the quality of those samples? A. They were choice brewing hops.

"Q. From the time when the samples were sent

by Mr. Rooney and received by you at the San Francisco office and until the time that you sent a part of each of the five remaining samples to Mr. Phleger, as you have testified, in whose possession were those samples? A. They had been in my possession.

"Q. State whether or not during that time any of those five samples were removed from the wrappers in which they were contained at the time they were received by you from Mr. Rooney? A. No, they were never removed from the wrappers—had been in the same wrappers all the time.

"Q. Who sent the samples to the defendant, Peter Breidt City Brewing Company, during the months of August and September, 1914? A. I sent them some samples at that time.

"Q. I call your attention to this paper and I will ask you to state from what book it is taken (handing paper to witness)? A. This is taken out of our sample book.

"Q. What does that sample book contain? A. Contains a record of all items, all of the samples that we receive, and also a record of all the samples which we send out.

"Q. I notice that in this memorandum there is a certain statement after the date of August 29th and also a certain statement after the date of September 8th and I will ask you when, with reference to each of those dates, those memoranda were made?"

There was some objection, and then the foregoing sample book page was marked by the Commissioner as Exhibit P35. I offer it and ask that it be marked now P35 A.

(The paper referred to is marked Ex. P35 A.)

Mr. Twining: (Reading):

"Mr. Alling: What is this? You say this memorandum is taken from a book?

"The Witness: Taken from our sample book, yes.

"Q. Sample book in your possession? A. Well, I had it in the office, yes.

"Q. This sample is a copy from it? A. No, this is the original leaf we took out of the book.

"Q. And the book is in the office of the E. Clemens Horst Company in this city? A. Yes, sir."

I resume reading at page 417, line 13, after the objection (reading):

"Mr. Harrison: Mr. Zipfel, do any of the other pages in that book contain any reference to the Peter Breidt Brewing Company or samples sent to the Peter Breidt City Brewing Company?

"A. No, that was the only page.

"Mr. Alling: One further question on cross examination. Who made these entries? Whose handwriting is it?

A. It was written by Joe Schmitt.

"Mr. Alling: We make the further objection to the introduction of the detached leaf as an exhibit on the ground that the entries therein contained were not made by this witness and, further, move on that ground that the exhibit be stricken out.

"Mr. Harrison: State, Mr. Zipfel, under whose direction those entries on plaintiff's Exhibit 35 were made?

A. The entries were made under my direction.

"Q. What do the entries in this book indicate? A. Well, the book is a record of all samples that we send out and also a record of samples that we receive.

"Q. State whether or not in the case of the entries under the name of Peter Breidt City Brewing Company, plaintiff's Exhibit 35, that is the record of samples received or of samples sent? A. This record on page 28 shows the samples sent to the Breidt Brewing Company. It is a record of samples sent to the Breidt Brewing Company.

"Q. State at what time, with reference to the sending of the samples, the memorandum was made? A. This memorandum was made at the time the samples were sent.

"Q. At the time that memorandum was made, did you examine it? A. Yes.

"Q. At the time the memorandum was made, did you know it to be correct? A. Yes, sir.

"Q. Refreshing your recollection from that memorandum, will you state on what dates samples were sent to the defendant in this action, The Peter Breidt Brewing Company? A. On August 29th we sent them one sample and on September 8th we sent them two additional samples.

"Mr. Alling. What was that last one—September 8th?

A. September 8th, yes.

"Mr. Harrison. Independent of this memorandum altogether, have you a recollection of having sent samples to the Peter Breidt Brewing Company during the year 1914? A. Well, I remember of samples that we sent, yes.

"Q. How did you send those samples? A. To Breidt?

"Q. Yes, to the Peter Breidt Brewing Company. A. By mail.

"Q. Was the postage prepaid on those? A. Yes, sir.

"Q. And to whom was it addressed? A. The samples were addressed to the Peter Breidt City Brewing Company, Elizabeth, New Jersey.

"Q. Did it have the return card of the E. Clemens Horst Company, with the address, on the wrapper of the samples? A. Yes, it had our regular label on it.

"Q. At the time those samples were sent, did you examine the samples to determine their quality? A. Yes, sir.

"Q. State what was the quality of those samples? A. Those were all choice brewing hops.

"Q. After you sent those three samples did you keep in your possession parts of those samples? A. Yes, sir.

"Q. State to what extent those parts kept by you corresponded in quality with the samples sent to the defendant? A. How is that?

"(Question read by reporter.)

A. They were exactly the same.

"Q. Did you afterwards send away any parts of the samples kept which represented the samples sent to the defendant, in quality? A. Yes, sir, sent part of them away.

"Q. When did you send them? A. January 31st.

"Q. To whom did you send them? A. To Mr. Phleger at New York.

"Q. Addressed as in the case of the five samples of lot 13? A. Yes, they were sent at the same time, in the same package.

"Q. Did these three samples which represented in quality three samples sent to the defendant, have upon them any distinguishing marks at the time you sent them to Mr. Phleger? A. They were numbered B-1, B-2 and B-3.

"Q. Do you recall the occasion of having shown these 8 samples, a part of which you have testified you sent Mr. Phleger, to any persons on January 31st of this year before you sent them to Mr. Phleger? A. Yes.

"Q. To whom did you show them on that occasion? A. I showed them to Mr. Horst and to Mr. S. J. Rooney.

"Q. Mr. E. Clemens Horst and Mr. S. J. Rooney? A. Yes, sir.

"Q. On that day did you show any other samples to Mr. Horst or Mr. Rooney, on that occasion? A. Other than which samples?

"Q. Other than thse eight you have mentioned. A. I think I showed them a few others, too, yes.

"Q. Did you state to Mr. Rooney and to Mr. Horst what those samples were? A. Yes, sir.

"Q. What did you state them to be? A. I explained to them that the samples marked—they were afterwards marked B-1, B-2 and B-3—were duplicates of the Breidt Brewing Company, the samples that we had sent to the Peter Breidt Brewing Company, and the other five samples numbered B-4 on to B-8 were samples of lot 13.

"Q. I show you now what purports to be a receipt from the U. S. Postoffice for an insured parcel, and I will ask you to state for what package that receipt was given? (Handing paper to witness.) A. This is a receipt for the package containing eight samples that I sent to Mr. Phleger on January 31st.

"Mr. Harrison. Will you mark that plaintiff's Exhibit 36.

"(Whereupon paper above referred to was marked as plaintiff's Exhibit 36 by the Commissioner.)"

I offer that and ask that it be marked P36 A.

Mr. English. That is the postoffice receipt?

Mr. Twining. Yes.

(The paper referred to is marked Ex. P36A.)

Mr. Twining. (Reading:)

"Mr. Alling. As I understand it, this package that you sent Mr. Phleger contained eight samples, marked respectively B-1, B-2, B-3, B-4, B-5, B-6, B-7 and B-8. Is that correct? A. That is right.

Mr. Harrison. And the ones marked B-1, B-2 and B-3 were duplicates of the samples sent the defendant in 1914? A. Yes, sir.

"Q. And the samples B-4, B-5, B-6, B-7 and B-8 were parts of the samples of lot 13 received by you during 1914 from Mr. S. J. Rooney? A. Yes, sir, that is correct.

"Q. Are you familiar with the grade of hops known as good brewing Pacific Coast hops?

"Mr. Alling. One moment. Objected to on the ground that it does not appear there is such a grade.

"Mr. Harrison. Is there such a grade of hops as good brewing Pacific Coast hops?

A. Yes, sir.

"Mr. Alling. One moment. Objected to as leading.

"Mr. Harrison. State what are the grades of hops.

A. Fancy, choice, choice brewing, prime, good brewing, medium and common.

"Q. Is the grade of good brewing Pacific Coast hops a well-recognized one and has it a well recognized meaning in the trade, or has it not? A. Yes, it is a recognized grade.

"Q. What quality does that grade represent with reference to the other qualities? A. Well, it is not quite as good as choice hops and it is better than a medium hop."

Now, on the cross examination I object from page 422, line 14, to page 437, line 27, constituting the entire cross examination, because it relates to the quality of the samples and the quality of the hops themselves, and therefore, in my view of the case, it is immaterial.

The Court. The objection will be noted and the question reserved.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English. (Reading:)

"*Cross-examination by Mr. Alling:*

"Q. Did you have samples of any other lot 13? A. What is that?

"Q. Did you have samples of any other lot 13 of the crop of 1914? A. No, sir, I only had one lot No. 13 in that season.

"Q. Did you get samples at the San Francisco office of the crops grown on the British Columbia ranches? A. Yes, sir.

"Q. Did you receive samples at the San Francisco office of the Oregon crop? A. Yes, sir.

"Q. And of the Perkins crop? A. Yes, sir.

"Q. And also samples of the Cosumne River crop? A. Yes, sir.

"Q. And the Russian River crop? A. Yes, sir.

"Q. And the Tehema crop? A. Yes, sir.

"Q. Now, take the crop from the Perkins ranch, did you not have a lot No. 13 for crop raised on the Perkins ranch? A. No, sir.

"Q. What are the lots numbered on the Perkins ranch? A. Well, we have a series of lot numbers for each ranch.

"Q. How did they differ in 1914? A. Well, we apportion a certain bunch of numbers for each ranch; that is, for the Wheatland crop we would take probably numbers from 1 to 100, for Tehema maybe 100 to 200, and for the Perkins ranches we would take 201 up to 400, maybe, just according to how many bales and lots we expected to have at each place.

"Q. How many numbers were apportioned to the Wheatland ranch in 1914? A. We apportioned numbers 1 to 100 but of course, we did not use all those numbers. We used maybe sixty or seventy numbers.

"Q. Raised six thousand to seven thousand bales on the Wheatland ranch in 1914? A. No, they didn't have that many bales, but sometimes we don't have one hundred bales in a lot. We generally put one hundred bales in a lot, but not always.

"Q. How many bales in lot 13? A. One hundred.

"Q. How many samples did you get from Mr. Rooney from lot 13? A. I don't remember exactly, but there would have been 10 samples at least and probably 12.

"Q. What did you do with the other seven? A. Why, they were used up in the ordinary course of business.

"Q. And when were those twelve samples of lot

13 received? A. They were received some time during September of 1914.

Q. I will call your attention to Plaintiff's Exhibit No. 25 which purports to be Mr. Rooney's original list of weights of lot 13 and I will ask you if it does not show that 12 samples were sent to the San Francisco office on September 7th? A. Yes, it does.

"Q. That would mean that they were received by you some time after September 7th? A. Well, probably a few days afterwards—a day afterwards, maybe.

"Q. Now, you say the other seven samples, other than the five which you have testified to as being partially present and partially sent to Mr. Phleger on January 31st, the other seven samples from lot 13, you say, were disposed of in the ordinary way? A. Yes, sir.

"Q. What do you mean by that? A. Well, they were sent out to the different——

"Q. Buyers? A. Buyers, yes.

"Q. Do you know when they were sent you? A. No, I couldn't say about that.

"Q. That sample book would show, wouldn't it? A. I couldn't say that it would. Yes, I could go through the whole book and see how many of the samples were used.

"Q. You know now how many were used, don't you? A. Yes, but what I meant was to give you a list of how many people I sent those particular samples to. The samples we sent were sometimes large samples to a buyer and then sometimes we would send only a piece of a sample.

"Q. That is, half of a sample? By a large sample you mean a whole sample? A. Whole sample, yes.

"Q. Now, were those seven samples of lot 13, other than these which are accounted for, all sent out before the 16th day of September of 1914? A. 1914?

"Q. Yes. A. Oh, I don't know; I can't tell.

"Q. Well, they were received some time after the 7th, were they not? A. Yes, sir.

"Q. And you don't know whether the whole seven samples were sent out to buyers between the time of their receipt in San Francisco and the 16th day of September? A. No, they might have been sent out a long time afterwards; I don't remember.

"Q. After lot 13 had been shipped to the defendant? A. Yes.

"Q. So you don't hesitate to send samples of a lot which have already been sold? A. Oh, no, this lot might have been just the same as some other lot we had in stock at the time or in transit, or we might have used the sample to represent some other car.

"Q. I see. That is on the assumption that all samples are alike? A. Oh, no, not all of them are alike. We have quite a few lots, though just alike from one ranch.

"Q. Now, the Wheatland ranch, the Wheatland crop for 1914, was not absolutely uniform, was it? A. Oh, there would be some slight variation for the entire crop, yes.

"Q. It would be a difference in color as between certain lots? A. Yes, there might be a slight difference in color.

"Q. And there would be, as between some lots, a difference in market grade? A. No, the whole crop of Wheatland was choice quality. There might have been five bales or so of clean-up at the end of the baling season that, of course, would have been kept separate, would not grade in with the balance of the crop, the bulk of the crop.

"But there would be a difference in color and some difference in aroma and certainly a difference in maturity, would there not, as between different lots? A. No, the whole crop ran uniform.

"Q. Absolutely identical as to color, maturity and every other element that enters into the grading? A. No, I don't mean every bale is like another.

"Q. Nor one lot ust like another? A. No, there would be a slight difference in color.

"Q. And difference in maturity? A. Well, they are all matured.

"Q. Well, some were picked sooner than others? A. I know, but——

"Q. You had 4000 bales on the Wheatland ranch in 1914, did you not? A. Yes, about 4000, I think.

"Q. And they could not all be picked the same day? A. Well, they don't all ripen the same day.

"Q. Well, how do you pick hops? Do you pick at one end of the ranch and pick right through, or do you pick in spots, here and there as you think the hops are ready to be picked? A. Yes, we pick them—start picking where they ripen and we pick at places which are ripened, pick them as they are ready to pick.

"Q. Do they ripen at one end of the ranch quicker than at the other? A. Well, they don't ripen at the same time all over the ranch. One portion might ripen a little sooner than another.

"Q. Can you pick out spots to pick? You don't pick straight away from the time you begin until the time you get through, do you? A. No, we don't go right through the ranch.

"Q. You pick a few here and a few there and so on, do you? A. Pick them wherever they are ready to pick, yes.

"Q. I see. Well, if the crop is so aboslutely uniform that the sample from any given lotis an equally good sample of every other lot, why do you sample each lot? A. Well, we sample them in order to find out what they are.

"Q. I see. Same set of samples taken from each

lot and the purpose is to establish the grade of that lot, isn't it? A. Yes.

"Q. Is it your custom, that being the purpose of the sampling, to send samples from one lot which has been already sold and thereafter, upon acceptance of sample, fill the order from another lot? A. Well, not the custom, no.

"Q. Well, you did it in our case, didn't you? A. I didn't say we did absolutely. It might have been that way, because——

"Q. Well, did the sample which has been known as sample No. 1 sent to the defendant on the 29th of August come from lot 13? A. No, it did not.

"Q. What lot did it come from? A. It was from lot 3.

"Q. How many bales was there in lot 3? A. I don't know offhand without looking at the record, but probably 100 bales.

"Q. Well, as a matter of fact, isn't it true there was only one bale in lot 3? A. Yes—what is that?

"Q. I say, isn't it a fact that there was only one bale in lot 3? A. Well, I don't know; I would have to look at the record to see how many bales there were.

"Q. Well, where did the two samples come from that you sent to the defendant on September 8th? A. One sample was from the Sacramento ranch, that is, the Brewer ranch, and the other from Horstville ranch.

"Q. What lots did those two samples come from? A. One was from lot 209 and the other was from lot 11.

"Q. Lot 209 was from the Brewer ranch? A. Yes.

"Q. Lot 11 was from the Wheatland ranch? A. Yes, sir.

"Q. How far is the Brewer ranch from the Wheatland ranch? A. Why, I think it is about forty miles or something like that.

"Do you know how many bales of hops were raised on the Brewer ranch in 1914? A. Not exactly, no.

"Q. About how many? A. Well, I guess about 2500, maybe 3000.

"Q. You sent the defendant one sample from the Brewer ranch and then shipped lot 13 to him afterwards from the Wheatland ranch? A. We shipped him lot 13, yes.

"Q. One of the samples you sent him was from the Brewer ranch? A. Yes, sir.

"Q. And those two samples, one from lot 209, Brewer, and the other from lot 11, the Wheatland, were not sent until September 8th. A. They were sent on September 8th, yes.

"Q. And all the seven samples of lot 13 were sent to other buyers? A. Well, they might have been sent to buyers or might have been sent to our New York or our Chicago office. I don't know. I would have to check them all up if you wanted to find out just what disposition we made of them.

"Q. I see. Now, take these three samples representing—from which you sent samples to the defendant, being one sample from lot 3, Wheatland ranch, one sample from lot 11, Wheatland ranch, one sample from lot 209, Brewer ranch—what part of those samples did you send to the defendant? A. Just a small piece of each.

"Q. What fractional part of a sample, of the whole thing, about one-half? A. No, not as much as that.

"Q. One-third? A. No. Oh, I should say, a fourth or maybe—Oh, something like that.

"Q. Was any disposition made of the balance other than you have testified to, of those three samples? A. No, sir. Well, I sent half of what was left to Mr. Phleger and the balance we have here.

"Q. In other words, of these three samples which I have named, approximately one-quarter of each was sent to the defendant and a half of the remainder to Mr. Phleger and the other half of the remainder is here in evidence? A. Yes, that is right.

"Q. Now, as to these samples representing five samples from lot 13, was any disposition made of those samples, or any one of them, or any part of anyone of them, other than sending a portion to Mr. Phleger and the balance here? A. No, no other disposition made of them.

"Q. You said in answer to Mr. Harrison's last question that good brewing hops were not as good as choice and were better than medium? A. Yes, sir.

"Q. Now, what factors or elements in a hop are considered in determining the grade of hops? A. How is that?

"Q. What factors or elements are considered in determining the grade of hops? A. Well, the drying, curing, picking, color and the aroma.

"Q. Anything else? A. And general appearance.

"Q. Anything else? A. No, that is about all, I guess.

"Q. Well, what is lacking in a good brewing hop which would be necessary to make a choice hop, you say it is not as good as a choice hop. In what respects is it not as good, and which one of those respects which you have named? A. Why, in one respect, if you didn't take all the qualities collectively and judge of them—you don't judge it on any one particular element alone, you know.

"Q. I see. Then a good brewing hop would be poorer than a choice in respect to drying and curing and in respect to picking and in respect to color and in respect to aroma and in respect to gen-

eral appearance? A. Well, it would be—might be the difference in any one of those or it might be more than one of those qualities.

"Q. I see. It could be dirty as a result of careless picking and in all other respects be a choice hop and that would make a good brewing hop? A. Well, it depends on how dirty it was.

"Q. Well, do you mean if it had a bum aroma that it could be a good brewing hop if it was otherwise a choice grade? A. It would have to have a good aroma.

"Q. Would have to have a good aroma? A. Yes.

"Q. To be a good brewing hop? A. Yes.

"Q. Well, it would have to be clean picked to be a good brewing hop, wouldn't it? A. Fairly clean, yes.

"Q. And have to be properly dried and cured, wouldn't it, to be a good brewing hop? A. Yes.

"Q. Now, wouldn't it have to be as well handled in respect to drying and curing to be a good brewing hop as to be a choice hop? A. Well, a choice hop would have to be handled properly, too.

"Q. I see, but there could not be any carelessness in handling as to drying and curing and still be a good brewing hops? A. No, a good brewing hop would have to be handled properly.

"Q. So there is no difference between a good brewing hop and a choice hop as to drying and curing? It has to be done properly in both cases? A. Oh, yes.

"Q. Now, as to aroma, do you believe a good brewing hop would have a sound aroma? A. It would have to be sound.

"Q. And in that respect it would not differ from a choice hop? A. Well, no, a choice hop would have a sound aroma, too.

"Q. Yes. Now, how about color? Is there any difference in color between a choice hop and a good

brewing hop? A. Well, a choice hop is generally a very bright color.

"Q. A very bright color? A. Very bright.

"Q. By 'bright' you mean golden yellow or something like that? A. Not necessarily yellow—might be green or yellow or reddish.

"Q. What does a dark green color represent as to the immaturity of a hop or a hop that has been insufficiently dried? Does it mean that? A. No, not necessarily.

"Q. What makes that dark color? A. Well, some hops are green and they don't get any other color.

"Q. Now, the color, then, the difference in the color, may make one hop choice and the other good brewing? A. What is that again?

"Q. I say the difference in the color alone might make some hops good brewing and some hops choice? That is , would poor color make a hop, which was otherwise a choice hop, a good brewing hop? A. It might not have as good a color as an ordinary choice hop and it would be a good brewing hop.

"Q. Now, what is considered the right color? A. What was that?

"Q. What color is considered the right color? A. Well, a hop that is bright in color might be green nor yellow or reddish and be a good color; all depends on what the buyer prefers. Some buyers like the green and some like the yellow.

"Q. It is a matter of preference then, largely, with the individual brewers, color, is it? A. Yes, sir.

"Q. Then is color an important factor in grading when it is so largely a matter of preference with individual brewers? A. Yes.

"Q. It takes them for grading a bright color to be a choice hop? A. Yes.

"Q. And it need not be so bright to be a good brewing hop? A. No, it might be—would not have to be extra bright.

"Q. But a dirty hop, a hop that is not clean or cleanly picked, could be a good brewing hop, could it? A. Yes.

"Q. And not a choice hop on account of its being poorly picked, is that it? A. Yes.

"Q. So color, cleanliness are the principal things that differentiate a good brewing hop from a choice hop? A. Well, not those two factors alone. You would have to take in——

"Q. All the other factors should be taken into consideration? A. Why, you would have to take in every factor, of course, because you judge a hop by all these factors.

"Q. I know, but you would not consider a hop that didn't have a sound aroma a good brewing hop, would you? A. No.

"Q. You would not consider a hop that is not properly dried and cured a good brewing hop? A. No.

"Q. So there is no difference between choice and good brewing as between drying and curing and as to aroma—has to be properly dried and cured in either event and have a sound aroma in any event? A. Yes.

"Q. So that only leaves the picking and the color as the elements in which choice hops differ from good brewing hops? A. Yes, I know, but you have to take them all into consideration when you put them into the different grades.

"Q. I know, but could a hop be improperly dried and cured and be good brewing? A. No.

"Q. Could a hop be good brewing and not have a sound aroma? A. No.

"Q. Very good. Then a good brewing hop and a choice hop are the same so far as aroma and drying

and curing are concerned? A. They might not be exactly the same.

"Q. Not exactly the same, but the drying and curing would have to be proper and the aroma would have to be sound? A. Well, they would have to be properly dried and cured, yes, but they might not be just alike—would not be alike.

"Q. Never are exactly alike? Well, now, those are the only things which you know about that are taken into consideration in grading hops, the drying and curing, the picking, the color, the aroma and the general appearance? A. Yes.

"Q. Did you ever have any experience in brewing? A. Never have had, no, sir.

"Q. Do you know what kind of a hop the brewer prefers or wants? A. Well, it all depends on the brewer. Some prefer one style of hop and some prefer another.

"Q. Is there not some general quality which all brewers want and which is recognized in the trade? A. They all want good hops but they don't all like the same kind of a hop.

"Q. Did you ever hear about a rich hop? A. Yes, sir.

"Q. What makes a rich hop? A. Well, a rich hop is one that is plentifully supplied with lupulin.

"Q. Its richness—is it not true that the richness of the hop is the principal factor which is considered in grading? A. It is one of the factors.

"Q. How did you come to overlook it and forget it? A. Well, I took that in, didn't I.

"Q. No, you omitted that. A. That goes right in with the aroma, the richness.

"Q. Aroma is the smell, isn't it? A. Well, you get the smell from the lupulin and from the petal of the hop, from the whole hop.

"Q. Lupulin is the yellow, dusty pollen or powder found on the inside of the hop, isn't it? A. Yes, sir.

"Q. And it is one element which makes for strength of the hop, is it not? A. Yes, sir.

"Q. And is one element which goes to the richness of the hop, is it not? A. Yes, sir.

"Q. And is the only element which goes to the richness of the hop, is it not? A. Yes, sir.

"Q. And it is the only element that the brewer is after, isn't that a fact? A. Sometimes.

"Q. Are there some brewers that don't want a rich hop? A. They all want a rich hop and some of them are more for color maybe than they are for other particular elements.

"Q. Are there any brewers that like a hop that is poor in lupulin? A. No, I don't think so.

"Q. They all want that, don't they? A. They all want a rich hop, I guess.

"Q. Well, now; you say the brewers have preferences in respect to color, some liking them green and some liking them yellow? A. Yes.

"Q. And some liking them quite dry, dryer than others? A. Yes, that is right.

"Q. Are there any other elements concerning which brewers have and express a preference beside those to which you have testified, namely, color and dryness, or the reverse? A. Oh, I don't know; there might be."

Mr. Twining (Reading):

"Redirect-examination by Mr. Harrison:

"Q. I call your attention to Plaintiff's Exhibit 28 and 29 and I will ask you to state what those papers are, Mr. Zipfel (handing paper to witness)? A. That is, the diversion request.

"Q. Refresh your recollection from those papers and state when and by whose direction lot 13 was diverted in transit? A. Lot 13 was divert at my request.

"Q. Were those papers written under you direction? A. Yes, sir.

"Q. At the time the diversion took place? A. Yes, sir.

"Q. And did you know that these were correct at the time they were prepared? A. Yes, sir.

"Q. Refreshing your recollection of them by those exhibits, will you state when that lot was diverted? A. It was ordered diverted on September 16, 1914.

"Q. And ordered diverted as indicated in these exhibits? A. Yes, sir.

"Q. I call your attention to Plaintiff's Exhibit 27 and I will ask you to state whether or not that is a copy of the bill of lading which was issued at the time of the diversion (handing paper to witness)? A. Yes, sir.

"Q. At the time that bill of lading was issued, was the former bill of lading surrendered to the carrier? A. The former bill of lading was surendered at the time this one was issued.

"Q. And is Plaintiff's Exhibit No. 26 a copy of the bill of lading which was surrendered at the time of the diversion (handing paper to witness)? A. Yes, it is."

Now, I move to suppress from page 438, line 29, to page 440, line 10, on the ground that this testimony relates again to the question of quality of the hops or the samples of the hops.

The Court: I make the same ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: (Reading):

"Q. You have stated that good brewing Pacific Coast hops are not as good as choice but are better

than medium hops. How do good brewing Pacific Coast hops compare with prime hops? A. How do good brewing compare?

"Q. With pdime hops, yes. A. They are not as good as prime hops.

"Q. You stated that a sound aroma was necessary in order that the hop be a good brewing or good brewing Pacific Coast hop? A. Yes.

"Q. Would the question of aroma be considered in determining whether a hop was a good brewing Pacific Coast hop or a choice hop? A. Well, it would, yes—not alone, though. It would take in all the——

"Q. It would be considered in connection with the other factors that you mentioned? A. Yes.

"Q. With regard to the samples received by you from Mr. Rooney as representing lot 13, will you state whether or not those samples were sound in aroma? A. They were.

"Q. And will you state as to what the quality of those samples was with regard to their being or not being thin in lupulin? A. They were not htin in lupulin. They were well supplied with lupulin.

"Q. Will you state the quality of the three samples which you sent to the defendant in 1914 with regard to their aroma? A. They were of the same quality as the other shipment; they were good aroma, sound aroma.

"Q. Will you state also the quality of the three samples sent to the defendant with regard to their being or not being thin in lupulin? A. No, they were not thin in lupulin?"

I shall resume reading on page 441, line 11 (reading):

"Q. Mr. Zipfel, at the last hearing you stated that on January 31 of this year you mailed to Mr. Phleger eight samples of hops and that each one

of those samples was enclosed in a wrapper upon which was put certain identifying marks, and you also stated that upon three of those wrappers there were respectively the marks B-1, B-2 and B-3?"

I move to suppress from line 10, page 441, to the end of the redirect examination, line 5, page 442, on the ground that this relates to the samples and the quality. That is the same objection.

The Court: I make the same ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (reading):

"A. Yes, sir.

"Q. I ask you now what was the sample identified as B-1, identified in that way as B-1? A. B-1 was a duplicate of sample No. 1 which we sent to the Breidt Brewing Company.

"Q. And what was the sample contained in the wrapper marked B-2? A. B-2 was a duplicate of sample No. 2 which we sent to the Breidt Brewing Company.

"Q. What was the sample contained in the wrapper marked B-3? A. That was a duplicate of sample No. 3 which we sent to the Breidt Brewing Company.

"Q. And as I understand it, the other samples marked respectively B-4, B-5, B-6, B-7 and B-8 were parts of the samples still then on hand of lot 13 of the crop of 1914? A. Yes, those were representative samples of lot 13 which were shipped to Breidt."

Now, if your Honor please, I object to the recross examination, page 442, line 7, to

page 443, line 23, on the ground last stated.

The Court: I make the same ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Stamler: Mr. Twining, do you understand this deposition to state that a sample of lot 13 was sent to the defendant?

Mr. Twining: There was no such testimony.

Mr. English: They sent samples of three other lots and sent a shipment of this lot. That is what it shows, does it not?

Mr. Twining: Yes.

Mr. English (reading):

"*Recross-examination by Mr. Alling:*

"Q. You are very sure of that? A. How is that?

"Q. You are very sure that the sample which you sent to Mr. Phleger, which was marked upon the wrapper B-1, was a part of sample No. 1 mailed to the defendant August 29th? A. I am not sure that it is an exact duplicate of the sample No. 1 of that date, but I am sure that it is an exact duplicate of the sample No. 1 mailed to Breidt.

"Q. Yes, and that was marked B-1 upon the wrapper? A. It was marked B-1 to Phleger and it was marked No. 1 to Breidt.

"Q. One of the samples which you have here is a part of that same sample, isn't it? A. Yes, sir.

"Q. How is that sample marked? A. How is it marked?

"Q. Yes. A. Well, I think it is marked H-3; I am not positive; I can tell by looking at that sample sheet.

"Q. Which one of those samples, all of which have been marked as exhibits, is a part of the sam-

ple which you sent Mr. Phleger and marked B-1 (handing exhibits to witness)? A. Can I look at the sample advice? We have a record of the numbers and I can tell from this.

"Mr. Harrison: I might suggest that if the witness would open these samples he could, I think, identify them.

A. Well, you see, those are our reference numbers here (indicating).

"Mr. Harrison: I suggest that the witness open the samples, and if there are any memoranda he can find them. (Witness examines exhibits.)

A. How was that question now?

"Mr. Alling: Read the question, Mr. Reporter.

"(Question read by reporter as follows:)

"Q. Which one of those samples, all of which have been marked as exhibits, is a part of the sample which you sent Mr. Phleger and marked B-1?' A. The sample of lot 3, marked H-3, is a duplicate of sample marked B-1 to Phleger.

"Q. What is the exhibit number on that sample? A. It is exhibit No. 15.

"Mr. Harrison: Defendant's exhibit No. 15 on cross-examination of witness Horst.

A. Yes.

"Mr. Alling: That is all."

Mr. Twining (reading):

"T. B. SETTLE, of the City and County of San Francisco, State of California, called as a witness on behalf of the plaintiff, having been first duly sworn by the Commissioner, according to law, testified as follows:

"*Direct examination by Mr. Harrison*:

"Q. What is your full name, Mr. Settle? A. Thomas Benjamin Settle.

"Q. What is your age? A. Thirty-nine.

"Q. Where do you reside? A. San Francisco.

"Q. What is your occupation? A. Clerk.

"Q. By whom are you employed? A. E. Clemens Horst Company.

"Q. How long have you been employed by the E. Clemens Horst Company? A. Nine years—eight or nine years.

"Q. And during the year of 1914 what duties did you perform as an employee of the E. Clemens Horst Company? A. General office duties."

I move to suppress page 445, lines 2 to 29. This testimony relates to the contents of the letters inclosing or purporting to inclose the two sets of samples that were sent to the Breidt Company, and, under my view of the case, they are immaterial. That is the usual objection.

The Court: I make the same ruling.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (reading):

"Q. I show you now a paper which has been marked plaintiff's exhibit No. 2 and which purports

to be a copy of a letter from E. Clemens Horst Company to the Peter Breidt City Brewery, and I will ask you by whom that letter was dictated (handing document to witness)?

"Mr. Alling: What is the date, the 29th?
"Mr. Harrison: 29th of August.
"The Witness: I dictated it.

"Q. At whose direction did you dictate it? A. Mr. Horst's.

"Q. What position does Mr. Horst occupy in the plaintiff corporation, E. Clemens Horst Company? A. President.

"Q. State whether or not this paper, plaintiff's exhibit No. 2, is a copy of a letter mailed on its date to the defendant (handing document to witness)? A. It is.

"Q. I show you now a paper marked plaintiff's exhibit No. 3 and purporting to be a copy of a letter dated September 4, 1914, from plaintiff to the defendant, and ask you who dictated that letter (handing document to witness)? A. I did.

"Q. Under whose direction did you dictate it? A. Mr. Horst's.

"Q. Is it a copy of a letter mailed on its date to the defendant? A. It is.

"Q. I show you now a paper marked plaintiff's exhibit No. 4, and purporting to be a copy of a letter dated September 19, 1914, from the plaintiff to the defendant, and ask you who dictated the original of that letter (handing paper to witness)? A. I did.

"Q. Was that letter mailed on its date to the defendant, to the addressee shown on the copy? A. Yes.

"Q. Were there any enclosures with that letter at the time it was mailed? A. Memorandum of

weights, and the invoice and the original bill of lading.

"Q. Showing you now a paper marked plaintiff's exhibit No. 5, I ask you whether that is a copy of one of the papers inclosed with the plaintiff's exhibit No. 4 at the time it was mailed (handing document to witness)? A. Copy of the invoice, yes, copy of the invoice.

"Q. Showing you plaintiff's exhibit No. 6, I ask you whether that is a copy of the memorandum of weights enclosed in the letter of which plaintiff's exhibit No. 4 is a copy (handing document to witness)? A. It is.

"Q. Showing you now plaintiff's exhibit No. 27, I ask you whether that is a copy of the bill of lading which was enclosed with plaintiff's exhibit No. 4 at the time it was mailed (handing document to witness)? A. Yes, that is a copy.

"Q. I show you now plaintiff's exhibit No. 23, which purports to be a copy of a letter from plaintiff to defendant, dated April 1, 1914, and I ask you who dictated that letter (handing document to witness)? A. I did.

"Q. At whose direction did you dictate it? A. Mr. Horst's.

"Q. Was that letter mailed on its date to the defendant? A. It was.

"Q. That is the letter of which this is a copy (handing document to witness)? A. Yes, the original.

"Q. I show you now what purports to be a copy of a letter from the plaintiff in this action to Mr. W. J. Hardy, dated December 29, 1914, this copy being marked defendant's exhibit on cross-examination of witness Horst, B, and I will ask you who dictated the letter of which that is a copy (handing document to witness)? A. I did.

"Q. At whose direction did you dictate that letter? A. Mr. Horst's.

"Q. Was that letter on its date mailed or delivered to the addressee named in the letter? A. Mailed.

"Q. The original of which that is a copy was mailed? A. Yes, the original was mailed.

"Q. I show you now a paper which has been marked defendant's exhibit on cross-examination of witness Horst, H, purporting to be a notice of sale of certain hops, and ask you when that was received by the plaintiff (handing document to witness)? A. Received by registered mail August 16, 1915.

"Q. I call your attention to plaintiff's exhibit No. 30, which purports to be a copy of letter from plaintiff to the DePue Warehouse Company, dated October 5, 1915, and ask you who dictated that letter (handing document to witness)? A. I did.

"Q. At whose direction did you dictate the original, of which this is the copy? A. Mr. Horst's.

"Q. Was the original of which that is a copy mailed or delivered to the addressee named therein on its date? A. Sent by mail.

"Q. On that date? A. On that date, yes.

"Q. Between the time when you received the notice marked defendant's exhibit on cross-examination witness Horst, H, and the time when the letter of which plaintiff's exhibit No. 30 is a copy, was sent to the DePue Warehouse Company, did you have any conversation with any employee of the Southern Pacific Company or the DePue Warehouse Company with reference to any hops that had been shipped to the plaintiff? A. Answer that yes or no? A. Yes.

"Q. State, if you please, Mr. Settle, with whom you had any conversation and what was said at any such conversation.

"Mr. Alling: Objected to as immaterial, irrelevant and incompetent and hearsay.

"Mr. Harrison: Answer the question.

A. Mr. Burgess of the DePue Warehouse Company.

"Mr. Alling: Do you know his initials?

A. No, I do not.

"Q How do you spell the name? A. B-u-r-g-e-s-s, I think.

"Mr. Harrison: Proceed, Mr. Settle.

A. He 'phoned and stated that the party who bought these hops in at the public aucion had repudiated the bid and that the hops were going to be sold for the charges, and he offered——

"Q. What was the date of that telephone conversation? A. September 29, 1915.

"Q. Proceed, Mr. Settle. A. And he offered to sell us the hops for the charges and stated they amounted to $640.95. I told him that I did not think we could have anything to do with the hops, but I would take the matter up with Mr. Horst, and if he was willing to buy them at that price, I would let him know.

"Q. What did you do thereafter? A. I took the matter up with Mr. Horst, asked him if he wanted to have anything to do with the shipment, and after explaining to him that the warehouse company were going to sell the hops for the charges, that they had offered to sell them to us, why, he said that he would buy them in.

"Q. After that conversation what else did you do in this regard? A. I called up Burgess over the 'phone and told him we would accept his offer and that we would send him a check for $640.95 as the purchase price of the hops.

"Q. After that time, what else did you do with regard to the same matter? A. September 30th, I

took the check down to the Occidental Warehouse and tendered it to Mr. Burgess as the purchase price of the hops, and before—and when tendering the check, I explained to him that the check was for the hops and that we were buying them at that price. I explained to Mr. Burgess that, being involved in litigation, we could not afford to have anything to do with it except as a straight purchase of the hops and he so understood. He understood that it was a straight purchase, and he accepted our money——"

Mr. English: Mr. Alling says, "I move to strike out what Mr. Burgess understood." We make the same motion, to expunge from the answer that part of the answer which reads, "He so understood; he understood that it was a straight purchase."

The Court: That is a question that sometimes arises, and I think the ruling always is that it is for the witness to state the language just as nearly as he can remember, but not to state his conclusions as to the intentions as to the mental operations of the parties.

Mr. English: Yes, sir. He is undertaking to state what he understood. He says, "I stated so and so to Mr. Burgess," and then he goes on to state what Mr. Burgess understood.

The Court: I think it ought to be struck out, for the reasons stated.

Mr. Twining (reading):

"Mr. Harrison: Just state what was said, Mr. Settle, by each of you, what was said and done. Proceed and state anything further that was said or done at that conversation.

A. I asked Mr. Burgess if he would give us a bill of sale and he stated that the warehouse company or the auctioneer selling unclaimed freight could not give a bill of sale or a clear title to the goods that they were selling. I then asked him how the transaction would show on their books, whether it would show as a delivery or as a sale, and he explained—assured me that it would show as a sale. I then left the check with him.

"Q. What did you do thereafter with regard to the same matter? A. He was to mail us the warehouse receipt on receipt of the check.

"Q. Well, was it so stated? A. Yes, he was to mail us the warehouse receipt for the goods the next day.

"Q. Did he do so? A. No, we did not get the receipt until late Saturday, two days later.

"Q. What did you do about the matter then? A. On examining the warehouse receipt and the recepited freight bills, as sent to us, they looked as if there might be a delivery, so I took the matter up with the uptown office of the DePue Warehouse Company.

"Mr. Harrison: Just a moment. I move to strike out what the witness has said with regard to what it might look like, and proceed, Mr. Settle, and state what was said and done.

A. I 'phoned the uptown office of the DePue Warehouse Company and they took the position that it was a delivery to us and not a sale.

"Q. And what else did you do about the matter after that? A. I called on Mr. DePue.

"Q. Before calling on Mr. DePue did you discuss the matter with Mr. Horst? A. Yes, I took the matter up with Mr. Horst and he insisted on hav-

ing a bill of sale for the goods, otherwise he would have nothing to do with the receipt.

"Q. What did you do then? A. I took the matter up—called on Mr. DePue personally.

"Q. Did you have a conversation with Mr. DePue then? A. I called on Mr. DePugh and he promised to return us our check and place the matter in the same position that it was in before we bought the hops.

"Q. This Mr. DePue that you mention is on some —does he hold some position with the DePue Warehouse Company? A. He is the president, I believe, yes.

"Q. What further did you do? A. We returned the warehouse receipt to Mr. DePue by letter and Mr. DePue protested against receiving the letter and stated if we insisted on leaving the letter with him or if Mr. Horst insisted on handling it as he had started out to handle it, that he would not return us our money.

"Q. Had there been, previous to this transaction, any dispute between Mr. DePue and the plaintiff in this matter?"

Mr. English: That is objected to as immaterial, and we urge that objection. Any particular row that might have been on between Mr. DePue and Mr. Horst is immaterial on this particular question.

The Court: Undoubtedly that is so, but I should have supposed the question to be narrower than that and to refer to this particular matter.

Mr. English: No, it does not. Mr. Twining will agree to that, of course.

Mr. Twining: Yes, I do not know whether it is material or not. The question was asked, presumably, for the purpose of showing the animus.

The Court: I sustain the objection.

Mr. Twining: Then I skip from page 452, line 2, to line 25, that covering the subject of the alleged dispute between Mr. DePue and Mr. Horst. I begin at line 25, page 452 (reading):

"Q. Have you stated now, Mr. Settle, everything that occurred between you and any representative of the DePue Warehouse Company between August 16th, when you say you received this notice of sale, and October 5th, when the letter of which plaintiff's exhibit No. 30 is a copy, was sent to the DePue Warehouse Company, so far as you can remember at this time? A. I think so, yes.

"Q. What papers were enclosed with the original, of which plaintiff's exhibit No. 30 is a copy, at the time it was sent to the DePue Warehouse Company? A. The warehouse receipt and the receipted storage bills, storage and freight bills, I think.

"Q. How soon after the receipt of those papers was this letter, of which plaintiff's exhibit No. 30 is a copy, sent? A. Returned three days later.

"Q. Have you had any conversation with Mr. DePue since October 5, 1915? A. Yes, I called up Mr. DePue's office——

"Q. Well, in order that the answers may seem to be responsive, I will ask you to state the substance of any such conversations."

Mr. English: I think we ought to object to that now, if your Honor please. The evidence shows that they paid to the warehouse company the exact amount of the storage charges, and applied for the goods. Now, what conversation they had after that, it seems to me, is immaterial. It is objected to here on the record, and we urge that objection now upon your Honor.

Mr. Twining: I should think we ought to put in the whole transaction from beginning to end, your Honor. This witness testified that the request was and the understanding was prior to the delivery of the check that the transaction should be a sale of the goods from the warehouse company to the Horst Company; that when the documents were received it turned out that there might be some question as to whether it was a sale or whether it was an attempt on the part of the warehouse company to collect its charges, and might be construed, therefore, as a delivery. What occurred after that situation developed, which did not develop until after the receipt of the receipt from the warehouse company, ought to be shown. I think it is all part of one transaction.

The Court: I think the Court ought to receive anything that throws any light on the nature of the transaction. If that involves taking this subsequent matter, I shall receive it.

Mr. English: I suppose we can object to certain questions as you go along.

Mr. Twining: Line 13, page 453 (reading):

"Q. Well, in order that the answers may seem to be responsive, I will ask you to state the substance of any such conversations."

Mr. English: We object to that, and ask your Honor to allow us an exception for the purpose of the record.

The Court: Yes, I shall receive it.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (reading):

"A. Mr. DePue promised to—Mr. DePue took the position that this transaction was simply a misunderstanding between this——

"Mr. Alling: One moment. Move to strike that as conclusive.

"Mr. Harrison: State what he said in that regard, Mr. Settle, as nearly as you can remember it. If you cannot remember the exact words, state the substance of what he said.

A. Well, he took the position that——

"Mr. Alling: Objected to as a conclusion.

"Mr. Harrison: State what in substance Mr. DePue said in this regard, Mr. Settle."

Mr. English: I make the same objection, your Honor: that it is immaterial and not binding to the defendant in this case.

The Court: The objection is overruled and an exception granted.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

"A. He said that he would take the matter up with Burgess and would then let me know whether he would restore the proposition to the same position it was before we entered into negotiations for the purchase of the hops.

"Q. What had you said to him at that conversation? A. I told him we had bought the hops and we understood we were buying them at the time and that Mr. Burgess offered them to us for the

amount of the charges and there was no chance of any misunderstanding on our part as to whether or not they were bought as a purchase.

"Q. Have you stated, as far as you remember, all that was said there, or was there anything else said that you remember by either party to that conversation? A. On Monday, October 5th, I think it was, I called on Mr. Edwards, freight auditor of the Southern Pacific Company, and explained the proposition to him and he then instructed Mr. Hardy, the agent of the Southern Pacific Company in this city, not to accept the money that we had paid the DePue Warehouse Company——"

Mr. English: I move to strike that out—everything that Mr. Edwards said to Mr. Hardy being hearsay. We are getting pretty far afield to go first to DePue, and then to the Southern Pacific, and then to Mr. Hardy, the agent of the Southern Pacific. That is going a good ways from the parties to the case and their representatives.

The Court: Do you think these statements are competent?

Mr. Twining: I think not.

The Court: I think they are hearsay. Whatever was done may be shown.

Mr. English: Then that ruling would cover quite a good deal, Mr. Twining.

Mr. Twining: No, I think it would cover the next answer.

Mr. English: Then your Honor strikes that out. That would be from line 8 on page 454——

Mr. Twining: No, not that he called at the office.

The Court: Strike out what has been read.

Mr. English: It covers from line 10 on page 454 to line 27.

Mr. Twining: Line 27.

(Reading:) Now, beginning again at line 28, page 454.

"Q. What is the next conversation that you remember in regard to this matter? A. I called on Mr. DePue again and he was a bit wrathy over calling on the Southern Pacific and stopping payment of the money, and he then took the position that he would not refund us the money."

Mr. English: Mr. Alling moves to strike out the statement as to Mr. DePue being wrathy as a conclusion.

Mr. Twining: I have no objection.

Mr. English: I should think that was well taken. Then the words that "he was a bit wrathy over calling on the Southern Pacific and stopping payment of the money" are struck out.

Mr. Twining: I do not care if the "bit wrathy" goes out. I think the rest of it ought to stay in.

Mr. English: Well, the "bit wrathy" goes out, and I think the words that "he then took the position that he would not refund us the money" are a conclusion. He says that "he took the position," so and so. He does not say that he said that. It is simply his conclusion from what he said.

The Court: If it is subject to the conclusion that Mr. DePue said it, I shall let it stand.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining (reading):

"Mr. Harrison: Did Mr. DePue at that conversation speak in an angry tone of voice, or otherwise?"

Mr. English: I object to that as immaterial.

The Court: It is not of itself important.

Mr. Twining (reading):

"Q. What, substantially, did he says? A. He said that he would show us who was running the unclaimed freight warehouse.

"Q. Do you remember anything further, any further details, of that conversation? A. That is about all.

"Q. Do you remember any further conversations that you had with Mr. DePue or Mr. Burgess or any other employee of the DePue Warehouse Company or the Southern Pacific Company with regard to this matter? A. No, that is all."

Mr. English (reading):

"Cross-examination by Mr. Alling:

"Q. You say you had your first talk with Burgess on September 29th, is that right? A. Yes, that is right.

"Q. Did you go to see him or did he come to see you? A. He called me up on the telephone.

"Q. This conversation was altogether on the 'phone, was it? A. Yes.

"Q. Well, then, at the conclusion of that conversation, you told him you would see Mr. Horst about it? A. Yes.

"Q. Now, you stated that you subsequently called Burgess up on the telephone. When did you do that? A. I think it was the next morning.

"Q. Was it the same day that you took the check

to the Occidental Warehouse Company? A. Same day, yes.

"Q. What was the occasion for calling him up to tell him that you would send the check on the same day that you went down with the check? A. I called him up and told him we would accept his offer.

"Q. I see. The talks you had with Mr. Burgess on the 29th and 30th concerning these hops were with reference to a private sale of the hops to you, were they? A. I don't know whether you would call it private sale or public sale. They were being sold by a public warehouse.

"Q. Did you understand there was any competition with respect to bids, and were there any bids? Were you submitting that as a bid, or was it an offer of sale for a fixed sum and accepted by you? A. An acceptance of their offer.

"Q. They offered you the hops for a fixed sum, is that right? A. That is right.

"Q. And you accepted it. As far as you know, there was no competition? A. I didn't know of any competition.

"Q. The price to be paid was the total amount of the charges that stood against the hops? A. Yes.

"Q. Including freight charges both ways and warehouse charges, is that right? A. I don't know about the freight both ways. I think it was freight only one way.

"Q. Well, do you know what the rate is to Elizabeth, New Jersey? A. The rate is $1.75 to Elizabeth, New Jersey.

"Q. Defendant's exhibit on cross-examination of witness Horst, marked H, shows unpaid freight due Southern Pacific Company, $537.03. Could that have been freight one way? A. Yes.

"Q. It could, but it wasn't, was it? A. I think so. Freight is higher westbound than eastbound.

"Q. All right. Anyway, the amount you were going to pay was the exact amount of the freight and storage charges? A. Yes.

"Q. Not a cent more nor a cent less? A. They said the charges were $640.95, and that is the amount we paid them.

"Q. Exactly. So that, as far as the amount is concerned, it might either be at purchase or a payment of charges?

"Mr. Harrison: That is objected to on the ground it calls for the conclusion of the witness. The witness may answer the question, however, if he desires.

"Mr. Alling: Oh, well, it answers itself.

"Mr. Harrison: It is argument, isn't it?

"Mr. Alling: No, it answers itself. Now, Mr. Horst signed that check, did he?

A. Yes, he signed it.

"Q. Have you got the cancelled voucher? A. It is over in the office.

"Q. I will ask you to produce it at the next hearing. Ever try to stop payment on that check? A. Yes.

"Q. Failed? A. Failed, yes, sir.

"Q. Had already been paid, hadn't it, when you tried? A. Yes, it had already been passed through the clearing house.

"Q. Well, now, when you gave them this check—this conversation with him with reference to the bill of sale, was that before or after you gave him the check? A. What is that?

"Q. This conversation with him as to the bill of sale, and so forth, clear title, and so forth, was that before or after you gave him the check? A. Before.

"Q. You asked him if he could give you a bill of sale? A. Yes.

"Q. And he told you it was not customary? A. Said that a warehouse company could not give a bill of sale or clear title to unclaimed freight sold for charges.

"Q. Well, the talk you had with him with reference to how the transaction would show on the books, was that had before or after you gave him the check? A. Before.

"Q. Anything said at that conversation as to the character of the receipt you were to receive? A. Said all he could issue would be a warehouse receipt.

"Q. Warehouse receipt for the hops? A. For the hops, yes.

"Q. Showing that from then on they held them for you? A. Yes.

"Q. Anything said in that conversation before you gave him the check as to the form of receipt you were to get for your money? A. Nothing said about that.

"Q. As a matter of fact, they sent you a receipted freight and warehouse bill, did they not? A. Yes.

"Q. That was two days later, two days later that you got them? A. Two days later, yes.

"Q. That would make it October 2d? A. Saturday, October 2d.

"Q. Did you 'phone that same day, after examining them? A. No, the letter was not received in the office until about closing time Saturday.

"Q. You 'phoned Monday? A. 'Phoned Monday, yes.

"Q. That would be the 4th? A. Fourth, yes.

"Q. Well, what was your complaint, because they had not sent you a warehouse receipt? A. Sent us a warehouse receipt, but the receipt for charges would indicate that we were taking delivery. We objected to that sort of a receipt.

"Q. The warehouse receipt they sent you was

just the kind of receipt you expected to get? A. Yes, an ordinary warehouse receipt.

"Q. Did you send that warehouse receipt back? A. Yes, returned on October 5th.

"Q. Also returned the receipted freight and warehouse bills? A. Yes.

"Q. And who was that talk had with over the 'phone on October 4th? A. I think it was with Mr. Hatch.

"Q. Do you know his initials? A. I don't know his initials.

"Q. An employee of the DePue Warehouse Company? A. Yes.

"Q. Had any of your previous negotiations or transactions been had with Mr. Hatch? A. No.

"Q. All of them were with Mr. Burgess up to that time? A. Yes.

"Q. What position, if you know, does Mr. Burgess hold with the DePue Warehouse Company? A. I think he is manager of the Occidental Warehouse.

"Q. What position, if you know, does Mr. Hatch hold with the company? A. I dont' know what his position is.

"Q. When you 'phoned on October 5th, did you 'phone the company at the Occidental Warehouse? A. I 'phoned to Burgess and he said to take it up with Hatch.

"Q. Up here (indicating)? A. Yes.

"Q. So you then 'phoned again to the central office? A. Yes.

"Q. In this building? A. Yes, sir.

"Q. And the talk you had thereafter concerning the matter was with Mr. Hatch? A. The first conversation was with Hatch, and as soon as he took the position that it was a delivery, I took it up with Mr. DePue from then on.

"Q. I see. That is the second call on the same

10 day, had on the same day? A. I think it was the same day. I am not sure about the dates.

"Q. Mr. Hatch took the position or stated that it was a delivery? A. Yes, he stated it was a delivery.

"Q. Well, just what did you ask Hatch to do? A. I told him that the receipt that we had showed that it was a delivery and that I wanted to know whether it was a delivery or if we should not nave a bill of sale or something showing the transaction
20 as a sale, something definite.

"Q. Mr. Burgess already told you they could not give a bill of sale, hadn't he? A. Yes.

"Q. You again asked Mr. Hatch for the bill of sale? A. Well, the receipts that they sent us showed—looked very much as if it was a delivery.

"Q. Did you demand a bill of sale from Mr. Hatch after Mr. Burgess had told you they could not give it to you? A. Yes, we demanded a bill of sale from Hatch Monday, the 4th.

30 "Q. What did Mr. Hatch say about giving you a bill of sale? A. He took the position that it was a delivery.

"Q. Did he refuse to give you a bill of sale? A. Took the position it was a delivery, and in that case would not be necessary for him to give a bill of sale.

"Q. Did he say anything as to why he considered it a delivery? A. No.

"Q. Nothing said about that at all? A. No. I
40 told him we had bought the stuff.

"Q. What did he say? A. He said it was a delivery.

"Q. Did he say why he considered it a delivery? A. No.

"Q. The same day, or as near as you can recall, you called up Mr. DePue? A. Yes.

"Q. What are his initials, Edgar? A. Edgar J., I think.

"Q. And you say he promised to return the check? A. He promised to return us the money.

"Q. And restore the situation to the condition it was in before anything was done? A. Yes.

"Q. Did he know that receipted freight and warehouse bills had been sent you when he told you he would do that? A. Yes, I think he knew that.

"Q. Did you tell him they had been sent to you? A. Yes.

"Q. He promised to do that and you fired the receipts back to him the next day, October 5th? A. They were returned October 5th.

"Q. Well, now, you say he protested. How did he enter his protest? A. Whose protest?

"Q. Well, you testified that you returned the warehouse receipt and the freight receipt to the DePue Warehouse Company by letter and that he protested and said he would not return the money? A. He said not to leave the letter with him—he said that if Mr. Horst was going to handle the proposition and introduce technicalities or send the warehouse receipts to him by letter, that he would not refund the money.

"Q. When did he say that? A. It was the 5th, same day we got the letter, I delivered the letter to him personally.

"Q. Oh, this letter was not mailed? A. I delivered that to him personally.

"Q. I understood you to testify this letter was mailed. Did you take that to the office in this building? A. Yes, I delivered that to Mr. DePue personally.

"Q. He said that if Mr. Horst was going to be technical he would go back on his promise and not refund the money? A. That if Mr. Horst was going to handle it, he would not refund the money.

"Q. Who in the world could handle it but Mr.

Horst? It was Mr. Horst's matter, wasn't it? A. Yes.

"Q. What was the ground of his objection? How did he—did he say in what respect he objected to Mr. Horst handling his own matter? A. No.

"Q. Was there anything said which would tend to explain that illogical remark? A. Yes, sir, up to that time I was handling the proposition with Mr. DePue. Mr. Horst had not called on him.

"Q. He knew you were only a clerk, didn't he? A. Yes.

"Q. He knew you were acting for Mr. Horst, didn't he? A. Yes.

"Q. You were acting for Mr. Horst when you delivered him the letter? A. Yes.

"Q. Mr. Horst was not any more to the front when you delivered the letter than he had been before, was he? A. Well, I don't know.

"Q. Did he say anything which would indicate just what he regarded as a technicality? What did he take objection to or exceptions to? A. He took exception to our returning the warehouse receipt by a letter, demanding the return——

"Q. I see—thought you were making a record against him? A. I don't know what he thought.

"Q. Did he say anything to indicate that that was the thing which he took exception to? A. No.

"Q. When was it, subsequent to October 5th, that you had a conversation with Mr. DePue over the 'phone, calling him up at his office? A. I think I called on him personally. I didn't talk to him over the 'phone.

"Q. You said a few moments ago that you called up his office and he said he would take the matter up with Burgess and let you know if he could refund the money and restore the matter to its original status? A. I called Mr. DePue up on, I think it was Sunday—it was the 4th, wasn't it?

"Q. Yes, but the question was when, after October 5th, did you have any further conversation, and you said you had one with DePue, called up his office, and he said so and so? A. That was before October 5th. I called him up on the 'phone October 4th, I think—Monday.

"Q. Now, when did you call on Edwards? A. I think it was the same day, right after Hatch took the position that it was a delivery.

"Q. Which was on the 4th? A. Fourth, yes.

"Q. What are Mr. Edwards' initials? A. T. O.

"Q. What is his position with the railroad company? A. Auditor of the Southern Pacific.

"Q. What are Mr. Hardy's initials? A. W. J.

"Q. What is his position? A. He is agent of the Southern Pacific Company.

"Q. Now, you said that after calling on Mr. Edwards that you called on DePue again. Now, when was that? A. I think it was the 5th—same day that I delivered that letter to him.

"Q. Same call, or did you call twice? A. Called twice, I think.

"Q. At which time, first or second call, did you deliver the letter? A. Second.

"Q. So you called on him first and had a talk with him before you went to the office, dictated the letter and returned him his receipts? A. No, I think I had the letter with me at the time.

"Q. Then it was only a single call and not two calls? A. Well, he first said, 'If you will leave the letter with me, I won't refund that money.'

"Q. Well, now, let us try to get this thing straight. You called on Mr. Edwards on the 4th? A. Yes.

"Q. And then on the 5th, which was the next day? A. Yes——

"Q. You called on Mr. DePue. Didn't you call on Mr. DePue the same day after you left Mr.

Edwards? Didn't I understand you to say so? A. I am not quite sure about that. It might have been the following day.

"Q. Did you make more than one call on Mr. DePue? A. Yes, called on him the 5th and then on the following day.

"Q. On the 6th? A. He objected to my leaving the letter and the warehouse receipts with him and said if I left them with him, if I insisted on leaving the letter with him, he would not refund the money; so I took the letters back and explained to Mr. Horst what DePue had said, and Mr. Horst says, 'Well, take the letter back to him, anyway, and leave it with him, whether he likes it or not.'

"Q. Then you went back again? A. Yes.

"Q. Second time the same day? A. Yes.

"Q. And left the letter? A. Yes.

"Q. And it was at that time that he told you he would show you who was running the warehouse company? A. He said he would show us who was running the Occidental Warehouse, yes.

"Q. When you were testifying in chief, you said he protested and would not return the money. Your recollection is now that he said he would not return the money if you left the letter, is that the straight of it? A. He said he would not return the money if I left the letter with him.

"Q. Then you went the second time and left the letter, and what did he say then? A. I left it with his bookkeeper there, I think.

"Q. You did not see him that time? A. I don't think so, no.

"Q. Then he did not on that occasion tell you he would show you who was running the warehouse company? A. Well, he may have said that on my next visit to him.

"Q. Oh, did you make another visit? A. Yes.

"Q. When was that? A. That might have been the 6th.

"Q. This is October 6th, and then October 5th you first left the letter with the clerk?

"Mr. Harrison: Now, the witness has not stated that.

"Mr. Alling: He said he didn't see him, left it with somebody else in the office.

A. That was the second call.

"Q. That is what I am getting at, the second call. You didn't see him but left it with somebody else? A. Left it with the bookkeeper in his office.

"Q. I see, and he said he would not return the money if the letter was left. Then on the second visit, the letter was left. Then on the next day you called again. What was the occasion of your call? What was the purpose of that call on the 6th? A. He promised to fix it up so that the proposition would be placed in the same position that it was before we entered into negotiations with his man for the purpose of the goods. I called to see if he had arranged it.

"Q. Was that the same time when he said he would show you who was running the warehouse company? A. That was the visit of the 6th, I think.

"Q. Well, it was on that visit on the 6th that he was angry, as you say, and told you that he would show you who was running the warehouse company? A. Yes.

"Q. And on that same occasion, did he promise to fix it up and restore the situation? A. No, he did not promise to fix it on that date.

"Q. Was it a subsequent date? A. He promised to fix it on the 4th when I first took it up with him.

"Q. Oh, I see. That then was when you went

there with the letter and he objected to your leaving the letter and he said he would take the matter up with Burgess and let you know if it could be restored to the original condition, and he told you that if you left the letter he would not return the money—that was all at that first visit, was it? A. No—called on him the 4th, Monday; he said he would take it up with Burgess and see if he could not fix it and return us the money. On the 5th I called at his office with the letter and the warehouse receipt and he told me that if the warehouse receipt was left with him that he would not return the money.

"Q. I see. Then this promise to fix it up—— A. So I left the letter and the warehouse receipt in his office that afternoon, and when I called the next day, that is the time he said he would show us who was running the Occidental Warehouse.

"Q. What did you say to him? Who opened the conversation on the 6th? You had left the letter the day before and he had told you the day before that if you left the letter he would not return that money. On the 5th you left the letter. Now, on the 6th you called on him, and who started the conversational ball, you or he? A. I suppose I started it.

"Q. What did you say? A. Asked him if he had arranged to return us the money.

"Q. What did he say? A. He stated that he would show us, that he would not return it, and would show us who was running the Occidental Warehouse, which he has done.

"Q. So, having told you on the 5th that if you left that letter you would not get your money back, and having returned on the 5th and left the letter, you called on the 6th to see if he would be as good as his word, is that it?

"Mr. Harrison: Object to that on the ground it calls for a conclusion of the witness.

"Mr. Alling: No, I asked him what he went for. Inasmuch as he told you on the 5th that if you left that letter he would not give you your money back, why did you go on the 6th?

A. I did not accept his statement of the 5th as final.

"Q. You thought he might change his mind? A. Yes.

"Q. Was he mad on the 5th? A. I don't remember now whether he was mad or not.

"Q. Anyway, he objected to Mr. Horst's disposition to be technical, didn't he, on the 5th? A. Yes.

"Q. He said if you left the letter he would not give you your money back? A. Yes.

"Q. Well, he was not in a very friendly frame of mind so far as his remarks and manner would indicate, was he?

"Mr. Harrison: That is, on the 5th?

"Mr. Alling: On the 5th.

A. Well——

"Q. Seemed to have it in for Mr. Horst? A. Well, he is involved in litigation with the Interstate Commerce Commission over some refunds that he was receiving from the S. P. Company, and he has probably had a lot of trouble over that and worried a little bit, and so he was not feeling any too kindly toward Mr. Horst.

"Q. Did Mr. Horst give it away? A. I dont think so.

"Mr. Harrison: What do you mean by that question?

"Mr. Alling: I am not on the witness-stand.

"Mr. Harrison: I object to the question. The witness need not answer the question.

"Mr. Alling: All right. Did Mr. Horst inform on him? A. No.

"Q. What was he mad at Mr. Horst for? A. You will have to ask Mr. DePue.

"Q. The litigation was not between Mr. Horst and Mr. DePue, was it? A. No, it was not.

"Q. Was Mr. Horst responsible for the litigation? A. No, Mr. DePue was responsible, I think; he was accepting some illegal refunds.

"Q. I see. It is a good thing, inasmuch as Mr. DePue's position is antagonistic, to impeach him if you can in advance. Now, you have gotten that all into the record and——

"Mr. Harrison: It was all in response to your own questions that the answers came out.

"Mr. Alling: All right. How and why was Mr. DePue, as you understood it, incensed at Mr. Horst on account of litigation to which Mr. Horst was not a party? A

You will have to get Mr. DePue to testify. He can tell you.

"Q. I see. But you gave that litigation as a reason for his being mad at Mr. Horst. Now, why, as you understood it, was it a reason for his being mad at Mr. Horst?

"Mr. Harrison: You may state the facts as fully as you know them.

A. That is as full as I know them.

"Mr. Alling: Now, let us see then what weight should be given to your testimony concerning that litigation as a reason why Mr. DePue was angry at Mr. Horst. You said Mr. DePue was angry and took exception to Mr. Horst's technicality, and then you ring in this litigation business. Now, did you understand that to be the reason why he was angry at Mr. Horst?"

Mr. Twining: I object to the question. The same subject was ruled out on the direct.

Mr. English: I am satisfied. We consent that the examination go out from line 8, page 472, to line 16 on page 474.

The Court: The objection is sustained.

Mr. English: I begin reading at line 17, page 474 (reading):

"Q. Now, turning to some of these exhibits, you say the charges were $640.95? A. You have the check there, Mr. Harrison?

"Mr. Harrison: Plaintiff's counsel here produces check demanded by defendant's counsel.

"Mr. Alling: Is that the cancelled check which you delivered for the charges on the 99 bales (handing document to witness)?

A. Yes, that is it.

"Q. This is $642.95, isn't it? A. Yes.

"Q. Do you know what the $2 extra is for? A. No.

"Q. Over and above the amount to which you testified? Probably additional storage? A. Yes, that is probably what it is.

"Q. Anything said about a bond at any stage of

the negotiations? A. Yes, Mr. DePue asked us for a bond, I think.

"Q. In which conversation of yours with Mr. DePue did he ask for the bond? A. I don't remember what date it was.

"Q. Was it the first conversation on October 4th? A. No, it was after the 6th.

"Q. After the 6th? Then you had a subsequent conversation with him. When was that, as near as you can remember? A. I don't remember the date.

"Q. Well, approximately how long after? A. May have been a week or two weeks.

"Q. Did you go to him—was that a personal conversation or a talk over the 'phone? A. I called at his office.

"Q. Did you see Mr. DePue himself? A. Yes.

"Q. What was said at that time? A. I asked for the return of our money and he stated that the only way he would refund it was by us depositing a bond with him for, I think, $3,000 or $8,000, whatever——

"Q. Was that all that was said? A. I told him I would take the matter up with Mr. Horst and see if we could not, see if he would give him a bond. I think we tendered him a bond after that which was not acceptable, and then it was turned over to Mr. Harrison and he drafted a bond which was afterwards tendered to Mr. DePue, which was not acceptable to him.

"Q. Have you got copies of those bonds? A. I think we have got a copy of it, haven't you, Mr. Harrison?

"Mr. Harrison: I don't seem to be able to find a copy of that first bond. I have a copy of the bond later prepared by myself.

"Mr. Alling: Yes. You may have that

check marked. Mark that defendant's exhibit on cross-examination of witness Settle, No. 1.

"(Whereupon document last referred to was marked by the Commissioner as defendant's exhibit on cross-examination of witness Settle, No. 1.)"

We will have that marked for identification now; we will have marked for identification the check referred to at line 8, page 476, which was the check for $642.95 made by the plaintiff to the DePue Warehouse Company.

(Reading:)

"Mr Alling: Now, have you got a copy of that bond?

"Mr. Harrison: I don't think I brought it with me. I can get it.

"Mr. Alling: I will ask Mr. Settle to produce a copy of the bond tendered.

Mr. Harrison: Bond tendered by him?

"Mr. Alling: By the Horst Company.

"The Witness: It was returned to the bonding company. We have no copy of it.

"Mr. Alling: Well, you say there was a subsequent bond produced and tendered?

A. It was drawn up by Mr. Harrison.

"Q. That you made a copy of, and I will ask you to produce it at the next hearing.

"Mr. Harrison: Have you a copy of it, Mr. Settle?

A. No, I haven't a copy of it.

"Mr. Harrison: As a matter of fact, I have a copy of it, I think, and if I have I will be glad to produce it.

"Mr. Alling: All right. Calling your attention to defendant's exhibit on cross-examination of witness Horst, No. 9, being letter written by Mr. Edwards of the Southern Pacific Company of date November 4th, in which he says: 'The matter is still in the hands of our legal department, and I hope to be able to advise you this company's position with respect to the controversy between the warehouse company and your company within a few days,' with your rubber stamp indicating the receipt on November 6, 1915, have you received any further communication from the Southern Pacific Company, or Mr. Edwards, concerning the matter since November 4th?

A. The only letters received are on that file (indicating). I don't remember of any letter since then.

"Q. Calling your attention to plaintiff's exhibit No. 2, the initial under the signature of that letter is yours (handing document to witness)? A. Yes, that is mine.

"Mr. Harrison: You mean the initial over the printed signature, or the initials in the margin?"

Now, I shall omit, by consent, from line 14, page 477, through line 2 on page 481. Is that satisfactory?

Mr. Twining: Yes.

Mr. English: I shall begin on line 3 on page 481 (reading):

"Q. When was it first called to your attention that the defendant was dissatisfied with the hops? A. I don't know; I don't remember now just when it was brought to my attention.

"Q. Well, did you know about it at any time in the fall of 1914? A. I think Mr. Horst handled the correspondence with the Peter Breidt Brewing Company and I didn't have anything to do with it, that is, concerning the rejection and their letter disapproving of the sample.

"Q. Did Mr. Horst ever ask you what kind of sample you sent them? A. I did not send the samples. They were sent by Mr. Zipfel.

"Q. Did Mr. Horst ever talk to you concerning the matter, with respect to the letters which you dictated when the samples were sent? A. No.

"Q. The matter was never discussed with you? A. Except he instructed me to write the letters to the effect we were sending them those samples.

"Q. I see. Did you dictate the plaintiff's exhibit No. 22 (handing document to witness)? A. No, I did not dictate that.

"Q. Do you know who did? A. I think Mr. Horst dictated it.

"Q. Did you dictate plaintiff's exhibit 23? A. Yes, I dictated that.

"Q. Didn't you know at the time that you dictated it that notice of acceptance had been mailed on May 26th from New York? A. What date was it mailed from New York?

"Q. March 26th? A. Probably had not been received in our office at the time that letter was dictated.

"Q. Well, now, I show you plaintiff's exhibit No. 24 (handing document to witness). That is a letter, is it not, from Mr. Phleger, or from the plaintiff company signed by Mr. Phleger, addressed to the defendant company, of date March 26th, accepting the contract or confirming the contract of March 26th? A. Yes.

"Q. Confirmation of the same date, and in order that there might be no possible chance of miscar-

riage, registered. Now, when was that prompt letter of confirmation received in your office in San Francisco? A. The carbon?

"Q. Yes. A. That was received on the 31st, according to this rubber stamp on here.

"Q. 31st of March. That was a carbon of the letter of confirmation and was sent you, I take it, by Mr. Phleger from New York? A. Yes.

"Q. Together with the registry card? A. Yes.

"Q. Now, what is the date—with that exhibit before you, I call your attention again to plaintiff's exhibit 23, which purports to have been written and bears the date of April 1st and which you say you dictated. Now, what was the idea of the second confirmation? A. I don't know; I couldn't explain that.

"Q. You wanted to nail that contract good and hard, didn't you? Wasn't that the idea—to leave no possible gaps open?

"Mr. Harrison: Object to that on the ground it is immaterial. The witness may answer if he knows.

A. I couldn't say. Draw your own conclusions.

"Mr. Alling: I see. You had evidence before you——

"Mr. Harrison: I move to strike out the last part of the witness's answer as not responsive.

"Mr. Alling: You had evidence before you at the time you dictated that letter that the letter of confirmation had not only been sent to them but sent by registered mail on the 26th of March from New York?

A. I don't know that I had a copy of this letter in

front of me, or this copy in front of me, when I dictated the other one.

"Q. I see. Well, what I was trying to get at was whether there was any special purpose to be served, as you understand it, and as you understood it then, in sending that second letter of confirmation dated April 1st? A. None that I know of, no, except to have it clean cut.

"Q. Except to make assurance doubly sure, even though it might amount to painting the lily and gilding the refined gold?

"Mr. Harrison: We enjoy counsel's comments, even though they enlarge the record.

"Mr. Alling: Did you know anything about plaintiff's exhibit 8 at the time it was received, being a letter of date, I believe, October 12th, written by the defendant company to the plaintiff company?

A. I saw the letter after it was received in the office.

"Q. It made some talk, didn't it, in the office? A. I don't remember."

Mr. Twining: I object to that.

Mr. English: I have no objection. Strike it out by consent.

(Reading:)

"Q. Don't remember any discussion about it at all?"

Mr. Twining: That is the same objection.

Mr. English: All right.

(Reading:)

"Q. Are rejections of shipments so common an occurrence in your office that they don't excite any comment?"

Mr. Twining: I object to that also.

Mr. English: I consent to that going out. I am satisfied to have it all go out down to line 28.

Mr. Twining: All right.

Mr. Twining: Then we will consent to leave out on page 484, from line 1 to line 28. I begin again at line 29 (reading):

"Mr. Alling: Or is it customary in your office, where a contract calls for delivery on approved samples, to make shipments before approval of samples?"

Mr. Twining: I object to that. What the custom was does not make any difference. The question here is whether this particular contract was.

Mr. English: Well, we can save time, because the witness says that he does not know. I shall consent to it going out, because the witness had no knowledge and could not answer. By consent, because it appears that the witness does not know, I shall omit from line 29, page 484, to line 14, page 486.

Mr. Twining: What followed is another attempt to find out whether that letter was answered.

Mr. English: It was not answered, was it?

Mr. Twining: No, it was not answered.

Mr. Stamler: No, it was not answered.

Mr. English: Then we shall say this: It is admitted that, beginning at line 15 on page 486 and running over to line 6 on page 487 it deals with an effort to ascertain whether any reply was made to the defendant's letter, Exhibit P7, and that no reply was ever sent.

Mr. Twining: That is consented to.

Mr. English: I begin on line 7, page 487 (reading):

"Q. You don't remember the occurrence of the receipt of defendant's letter of October 12th? A. No, I don't remember that.

"Q. Do you know anything about the hops which comprised the shipment to the defendant? A. Nothing, only that they were delivered to several contract brewers and were accepted as satisfactory deliveries.

"Q. Had you examined, prior to dictating the letter of plaintiff's of September 19th, in which the bill of lading and invoice were inclosed, had you examined the samples of lot 13? A. I may not have examined those particular samples; probably look at other lots that were grown on the s: ranch.

"Q. Are all hops grown in the same locality, on the same ranch, of the same quality? A. No, there is some slight difference in quality.

"Q. In this letter of September 19th, which you say you dictated and which is marked plaintiff's exhibit 4, you say, 'We take pleasure in handing you herewith invoice, memorandum of weights and original bill of lading covering our shipment to you of 100 bales choice, 1914 crop, Pacific Coast hops to apply against your contract of March 26th.' Were those choice hops? A. I would call them choice, yes.

"Q. Were all hops grown on the Wheatland ranch in 1914 choice hops? A. I am not a hop expert, I would not attempt to qualify as an expert.

"Q. I see. You don't know about the grade of hops? A. No.

"Q. That has not been your line of work? A. No.

"Q. You are a clerical man? A. Yes, clerical.

"Q. Who told you to say these were choice hops? A. Why, I examined the samples in the sample room—do that every once in awhile.

"Q. But you say you are not an expert? A. I am not an expert, no.

"Q. Well, were you talking about something that you didn't know anything about when you said that these 100 bales, which comprised this shipment, were choice 1914 crop hops? A. Well, I called them choice from my examination of them and from the fact that they were delivered to other breweries who had accepted them as choice quality.

"Q. Were those deliveries on contracts? A. Yes.

"Q. Did any of those contracts call for choice hops? A. I don't remember now.

"Q. Well, then, the acceptance by those breweries under contract, when you don't know what the contracts called for, of those hops, would not indicate they were choice hops, would it? A. Well, if they were not satisfied we would have probably heard from them.

"Q. But their contract might have called for a lower grade. You say you don't know what their contract called for, so the fact that they accepted under their contract when you don't know what their contract called for, that would not indicate necessarily they were choice, would it? A. Well, from opinions of the hop experts who have examined those hops grown on that ranch, why, I infer they were choice quality—accepted Mr. Zipfel's statement.

"Q. I see. Your statement then in this letter that those were choice hops was based on what you had heard? A. Yes.

"Q. Altogether? A. Yes.

"Q. A choice hop, you understand, is next to the highest possible grade of hops, is it not? A. I am not a hop expert.

"Q. Aren't you that much of an expert to know that choice stands next to fancy, than fancy there

is no higher? What made you think they would be well pleased with the hops? A. From the fact they were choice quality.

"Q. I see. Well, do you mean choice quality of choice grade? A. Choice grade.

"Q. And you assumed them to be choice grade because you have heard them referred to as that? A. Yes.

"Q. And that was the ground of your saying 'assuring you that you will be well pleased with the excellent quality of the hops,' was it? A. Yes.

"Q. Well, did you think they needed that assurance? Would not the hops speak for themselves? A. Case of where you had to add a closing paragraph to your letter.

"Q. Oh, this was mere correspondence, courtesy, eh? Something to gracefully preface 'yours faithfully,' was that all it meant? A. No, it meant what it said there, meant that they would be pleased with the quality.

"Q. Well, they evidently disagreed with you? A. We would not be here, I guess, if they had not.

"Q. Is it any part of your duties to keep informed as to hop quotations? A. Well, only—no, I would not say that it was included in part of my duties.

"Q. Well, do you keep informed? A. No, only in a general way.

"Q. Where do you get your information? A. Oh, get it from the brewer's bulletins, or something like that.

"Q. Is there any publication which gives or undertakes to give information concerning the ruling price of hops? A. The brewer's bulletin, I think, gives the prices.

"Q. Where is that published? A. Chicago.

"Q. Does that publication come to the plaintiff's office in San Francisco? A. Yes.

"Q. Was that the last time you had any talk

with Mr. DePue, that time a week or two after October 6th when you talked about the bonds? A. I think it was, yes?

"Q. Have you had any subsequent talks with Mr. Burgess or Mr. Hatch or with Mr. Edwards? A. No.

"Q. Ever take the matter up with anyone else? A. No.

"Mr. Alling: I guess that is all."

Mr. Twining: (Reading):

"Redirect-examination by Mr. Harrison:

"Q. I understood you to testify in your cross-examination that, as far as you knew, these hops comprised in lot 13 were diverted to the defendant before you had received any approval of the sample. Is it a fact that they were so diverted before you had any notice or knowledge that the sample had been disapproved? A. I couldn't say as to that.

"Q. Well, examine the correspondence and state if you can from the correspondence (handing documents to witness)? A. They were diverted before receipt of letter from the Peter Breidt Brewing Company dated September 17th, Exhibit No. 7.

"Q. And as far as you know, there was no communication from the Peter Breidt City Brewery Company, defendant in this action, to the plaintiff in this action, prior to that letter of September 17th? A. That is the first letter.

"Q. And that letter that I have just mentioned, that is to say, the letter of the defendant dated September 17th, 1914, which has been marked Plaintiff's Exhibit No. 7 was received by the plaintiff when? A. On September 22d.

"Q. You said that the hops had been delivered to several contract brewers. Did you mean by that

lot 13 or other hops of the same quality and crop?

"Mr. Alling: One moment. Objected to as leading.

"Mr. Harrison: Well, what did you mean when you said hops had been delivered to several contract brewers? To what hops were you referring? A. Hops of the same crop, grown on the same ranch.

"Q. You did not mean this lot 13? A. No.

"Q. The notice of sale which has been introduced in evidence here and marked defendant's exhibit on cross-examination of witness Horst, H, gives notice of a certain sale to take place on the 30th day of August. Were you present at that sale? A. 14th of September it is.

"Q. 14th of September. Were you present at that sale? A. No, I was not present.

"Q. So far as you know, was there anyone present representing the plaintiff? A. No one was there representing our firm.

"Q. I call your attention to defendant's exhibit on cross examination of witness Horst, No. 3, which purports to be a letter from the plaintiff to the DePue Warehouse Company, and ask you whether that letter was mailed or delivered on its date to the addressees, that is to say, whether the original, of which that is a copy, was mailed or delivered to the addressee on its date? A. Mailed on the same date, October 4th.

"Q. Did you dictate that letter, if you know? A. I don't know whether I dictated that letter or not. No, Mr. Horst dictated the letter.

"Q. Something has been said during the course of your cross-examination with regard to the previous dispute between Mr. DePue and the plaintiff respecting certain refunds from carriers. Now, as

that matter has been gone into, I wish you would state as fully as possible all the circumstances; that is to say, state the nature of the claim and the nature of the claim against the DePue Warehouse Company?

Mr. English: That has been ruled out.

Mr. Twining: I do not object to it going out. By consent, lines 12 to 30 on page 493 go out, as does the first line on page 494.

I begin again at line 2, on page 494 (reading):

"Q. Were you a witness in any of these hearings? A. Yes, I was a witness in all of them.

"Q. Were you subpoenaed as a witness to testify in those cases? A. Yes.

Mr. English: The beginning of the cross-examination goes into the same question that we have consented should go out. By consent, we shall omit from line 9 on page 494 to line 32 on page 495. I shall begin reading with line 1, page 496. Is that all right?

Mr. Twiing: Yes, that is all right.

Mr. English: (Reading):

"Q. Well, the check was for the exact amount of the charges, freight and warehouse, was it not? A. Yes.

"Q. And you did eliver it after you had been told you could not get a bill of sale, didn't you? A. How is that?

"Q. And you did deliver the check to him after you had been told you could not get the bill of sale? A. I delivered it to them as the purchase price of the hops.

"Q. That is not an answer to my question? A. The warehouse could not give a bill of sale for unclaimed freight.

"Q. And after they explained that to you, you gave him a check? A. Yes, after he explained that.

"Q. Yes. Now, then, do you undertake to say that was Mr. DePue's unfriendliness for Mr. Horst, rather than those facts, which led him to insist that it was a payment of charges and not a sale?"

This is about Mr. DePue's unfriendliness. By consent of counsel, I shall omit reading from line 17, page 496 to line 7 on page 498 (reading):

"Mr. Alling: Then I will ask you this: When you were told you could not get a bill of sale upon the delivery of a check for the amount of the charges to a cent, what did you deliver the check for? A. I delivered the check as the purchase price of the hops.

"Q. I see. Notwithstanding you were told that they could not give you any evidence of title? A. Explained that the warehouse selling unclaimed freight, or the auctioneer selling unclaimed freight, selling it at auction, could not issue a bill of sale or give title to the freight that was being sold.

"Q. And you bought under that condition? A. Yes, bought under those conditions.

"Q. Then when you gave your check for the amount of the charges to a cent, you understood you were not getting title?

"Mr. Harrison: Object to that on the ground it calls for the conclusion of the witness. The witness may answer if he desires and if he knows.

"A. I understood we were buying—that we would

get the hops with the same title that anybody would get if they were buying them under similar circumstances.

"Mr. Harrison: Rather a good statement of the law for a laymen, isn't it, Mr. Alling?

"Mr. Alling: You were told, however, that they could not give you title? A. Could not give a bill of sale.

"Q. In a former answer you said you could not give title?

"Mr. Harrison: Well, that, I don't believe, if a statement of the witness's testimony—

"Mr. Alling: I wish at this time to enter defendant's objection to the constant interruptions by counsel of the plaintiff, so manifestly and palpably made for the purpose of delaying the answer where the question suggests a danger.

"Mr. Harrison: And I desire likewise to object to the constant questioning by counsel that does not, according to my recollection, fairly state the previous testimony of the witness.

"Mr. Alling: I am not bound by the previous testimony of the witness.

"Mr. Harrison: No, but you should not state as a part of your question——

"Mr. Alling: Read the question.

"(Question read by reporter as follows: "Q. In a former answer you said you could not give title?')

"Mr. Alling: I am asking the question, and am not putting it in his mouth. Didn't you say in your former answer that they could not give title? A. I told you he said no auctioneer or warehouse man could give

a clear title to freight or anything else sold by an unclaimed warehouse at public sale.

"Q. Now, with that understanding you gave him a check for the amount of the charges to a cent?

"Mr. Harrison: Objected to on the ground it calls for the conclusion of the witness.

"A. Gave him a check as the purchase price of the hops.

"Mr. Alling: I see. Well, did you understand at that time that they could not and did not undertake to give you title to the hops?

"Mr. Harrison: Same objection.

"A. I understood we were buying them the same as anybody else was buying——

"Mr. Alling: That is not an answer——

"Mr. Harrison: Let the witness complete his answer——

"Mr. Alling: Move to strike the answer as unresponsive.

"Mr. Harrison: Complete your answer.

"Mr. Alling: Read the question.

"(Question read by reporter as follows: 'Q. I see. Well, did you understand at that time that they could not and did not undertake to give you title to the hops?')

"(Answer of witness read by reporter as follows: 'A. I understood we were buying then the same as anybody else was buying——')

"The Witness: ——same as anybody else would buy them as unclaimed freight.

"Mr. Alling: Move to strike as unresponsive. Read it again.

"(Question referred to again read by reporter.)

"The Witness: I repeat the same answer.

"Mr. Alling: Counsel for defendant demands an answer to the question. Read it again.

"(Question referred to again read by the reporter.)

"Mr. Harrison: While submitting that the question has been fully answered, if the witness has any other statement to make regarding it he can make any other answer to it he may see fit. If unable to make any other answer, he may so state, the desire of the plaintiff being that the witness should fully answer any questions propounded him.

"Mr. Alling: Read the question again, Mr. Reporter.

"(Question referred to again read by the reporter).

"The Witness: Bought them on the understanding that we would get the same title that anybody else would get if we bought them.

"Q. Did you understand at the time you paid the charges that they could not and did not undertake to give title to the hops?

"Mr. Harrison: Object to that on the ground that it assumes that charges were paid and there is nothing in the testimony to show they were paid.

Mr. Alling: Did you understand at the time you delivered the check that the warehouse company did not undertake to give title to the hops?

"A. At the time I bought the hops, we understood we would get the same title as anybody else would get if they bought them under the same conditions.

,"Q. Did they tell you that they did not undertake to give title before you gave them the check? A. He explained to me that a warehouse man could not give title to freight sold at public auction or sold for charges.

"Q. And with that understanding, you delivered the check?

"Mr. Harrison: Same objection, that it calls for the conclusion of the witness.

"Mr. Alling: Is that true?

"A. We bought the hops as unclaimed freight.

"Q. Answer the question, please. Read it, Mr. Reporter.

"(Question read by the reporter as follows:

('Q. And with that understanding, you delivered the check?')

"A. We delivered the check with the understanding that we would get them the same as anybody else would get them.

"Mr. Alling: Well, I am either going to make this witness answer my questions or I am going to make his reluctance to answer it appear very emphatic. They told you, did they not—Mr. Burgess told you—that the warehouse company would not undertake to give title to the hops?

"A. He said they could not give title to any freight sold by them.

"Q. He told you that before you handed him the check? A. Yes, he told me that before I handed him the check.

"Q. And you gave him the check with that understanding, that the railroad company would not undertake to give title?"

Mr. Twining: I object to this, if your Honor please. It has been gone over half a dozen times now. The witness's memory has been tested, and he stated exactly what his understanding was and the circumstances under which he delivered the check. I do not think he ought to be asked it again.

Mr. English: I shall skip over from line 17 on page 502 to line 12 on page 503. That is taken up with the wranglings of counsel. (Reading):

"Q. And you gave him the check with the understanding that the railroad company would not undertake to give title?

"Mr. Alling: What is the answer?

"The Witness: My negotiations were with the unclaimed warehouse.

"Q. Mr. Burgess is an official or employe of the DePue Warehouse Company, was he not? A. Yes.

"Q. And he told you, did he not, that the warehouse company and the railroad company would not undertake to give title to the hops, did he not? A. He said that they could not give title to any freight sold by an unclaimed warehouse for charges.

"Q. And after he told you that, you gave him a check for the amount of the charges, did you not? A. I gave him a check as the purchase price of the hops.

"Q. Did you not give him a check for the amount

of the charges? A. The check I handed to him was as the purchase price of the hops.

"Q. What was the amount of the charges? A. $642.95, I think.

"Q. What was the amount of the check? A. I think the check was for the same amount.

"Q. Then is it not a fact that you gave him a check for the amount of the charges? A. It is a coincidence that we bought the hops for the amount of the charges.

"Q. Quite a poetic coincidence. Did you talk with Mr. Horst after you got back from talking with Mr. Burges and delivering the check? A. Not until I received the letter from the warehouse company enclosing the warehouse receipt.

"Q. Did you keep a copy of that warehouse receipt? A. No, I did not keep a copy of it.

"Q. Did you keep a copy of the receipted freight bills? A. No, those were all returned.

"Q. Did those come by mail? A. Yes, either by mail or sent over by the boy, I don't know which.

"Q. Did you see them first or Mr. Horst see them first? A. I couldn't say.

"Q. Was Mr. Horst's letter about that written before you called on—made your call of the 5th? A. How is that?

"(Question read by reporter.)

"A. I delivered the letter on the 5th.

"Q. You say you got those bills a couple of days after the 30th? A. Received them on October 2d.

"Q. That was Saturday, and you got them along towards night? A. About 12:30, about closing time.

"Q. Did you have any discussion with Mr. Horst about them that afternoon? A. No.

"Q. Did you have any discussion with Mr. Horst about them before you 'phoned Mr. Hatch Monday morning, October 4th? A. Yes.

"Q. Mr. Hatch said right off the bat that they represented delivery and not sale, didn't he? A. I don't know whether he said it right off the bat or not, but the result of the conversation was to that effect.

"Q. Yes. Mr. Hatch is unfriendly to Mr. Horst? A. I don't know.

"Q. It was after you had your telephone talk with Mr. Hatch that you called on Mr. DePue? A. Yes.

"Q. Just what did Mr. Hatch say, if you remember? A. I don't remember the conversation other than he said he was treating it as a delivery.

"Q. You had previously called up Mr. Burgess? A. Yes, and Mr. Burgess referred me to Mr. Hatch.

"Q. Did Mr. Burgess say anything about it at all? A. No, he didn't say.

"Q. And did you tell Mr. Burgess what was the trouble? A. I don't think so.

"Q. What did you say to Mr. Burgess when you rang him up? A. I don't remember the 'phone conversation, but I think it was to the effect that the papers received from the warehouse would indicate that they were attempting to deliver us the stuff.

"Q. You were dissatisfied with the receipt sent? A. Yes.

"Q. And he referred you to Mr. Hatch? A. Mr. Hatch.

"Q. Without saying anything else concerning it? A. I don't remember what he said. He referred me to Mr. Hatch."

At one o'clock P. M. the court takes a recess of one hour.

AFTER RECESS.

Mr. Twining: I shall begin at page 506, line 12 (reading):

"Redirect-examination by Mr. Harrison:

"Q. Now, at the time of giving this check, delivering this check, that you have mentioned, state fully all that was said at that time. A. I told Mr. Burgess the hops were involved in litigation and that we could not take delivery of them or exercise right of ownership and that—he then explained that the hops were sold at auction, that for some reason or other the original sale fell through, and that they were going to sell them for the charges, and I asked him for a bill of sale and he said that a warehouse company could not give a bill of sale or clear title to any freight sold for charges, and I then asked him how the transaction would show on their books and he assured me it would show on their books as a sale, a sale of freight for charges.

"Q. Now, then, state all of the conversation that occurred at the subsequent interview when you delivered the check? A. I tendered them the check as the purchase price of the hops.

"Q. Well, did you say that? A. Yes.

"Q. What else was said at that interview? A. And they accepted the check as the purchase price."

Mr. English: (Reading):

"Recross-examination by Mr. Alling:

"Q. Was there anything said about sending receipts? A. He said the receipts would be mailed to us the next day. That was on Thursday, but they were not mailed to us until Saturday, Saturday about closing time, and it was then too late to stop payment on the check.

"Q. This conversation about—with Burgess, about title, bill of sale and title, you say was prior to the time you went there with the check? A. That was at the time I called at the warehouse.

"Q. Did you call at the warehouse before you went there with the check? A. No, no, called up on the 'phone.

"Q. And all this talk concerning title was had over the 'phone? A. No, it was had when I called there with the check.

"Q. It was had when you called with the check? A. Yes.

"Q. When you had the check in your hand and before you delivered it, was it then that you talked about the bill of sale? A. Yes.

"Q. And it was then that he said the company could not give title? A. Yes.

"Q. And after that you gave him the check? A. He said the warehouse company could not give title to freight sold for charges, and then he explained to me that the transaction would show on their books as a sale, and I tendered him the check as the purchase price of the hops."

Mr. Twining: Mr. English, do you raise any point as to whether or not these depositions were taken and returned in compliance with the statute?

Mr. English: No, we do not.

Mr. Twining: That closes, if your Honor please, the reading of the plaintiff's depositions.

Mr. English: Your Honor, we would like to read some depositions, which we took in New York, of the persons connected with this First Scientific Station, to which, it appears, the sample of hops was sent.

(Reading):

Deposition of Henry L. Schaefer—Direct

"HENRY L. SCHAEFER, sworn on behalf of the defendant.

"Direct examination by Mr. English:

"Q. What is your business? A. I am receiving clerk and assistant laboratorian in the First Scientific Station in the Art of Brewing.

"Q. And where is the First Scientific Station located? A. 200 Worth Street, Manhattan Borough, New York City.

"Q. I show you a letter dated October 6, 1914, addressed to the First Scientific Station. Did you see that letter on or about the date of its arrival? A. Well, I might have, but probably did not.

"Q. You have no recollection of it? A. No.

"Q. I show you a large black book, labeled on the outside, 'First Scientific Station for the Art of Brewing, Report 11,000 to 120,000,' and particularly page headed month of October, 1914, and direct your attention to line 43, and ask you if any of that is in your handwriting? A. The entry 118,543, Peter Breidt ity Brewery Company, hops received on the 8th, examined by F. and W., reported by R. S., reported on the 10th and 14th, was in my handwrting with the exception of the F.

"Q. As to who examined? A. As to the party who examined it.

"Q. The R. S. is in your handwriting? A. Yes.

"Q. Refers to who? A. Robert Schwarz.

"Q. The figure 14? A. To the 10th and 14th of October.

"Q. And that means that the hops there mentioned were received at this office? A. The hops were received on the 8th of October, 1914, from the Peter Breidt City Brewery Company, and were examined.

"Q. Did you receive the package yourself? A. I did, yes, sir.

"Q. Did you turn it over to Robert Schwarz? A. I called it to his attention.

"Q. You know it came to his attention? A. Yes, sir."

Mr. Twining: (Reading):

"Cross-examination by Mr. Twining:

"Q. What does the F. W. mean, Mr. Schaefer? A. F. is the name of the chemist that examines the samples. F. is Furst; W. was Williams.

"Q. Does that mean that Furst and Williams made the examination? A. Yes, sir.

"Q. And the only thing that Mr. Schwarz did was to make the report? A. Yes, sir; well, he made the report; he gets the report and does other things; he gets the sample also.

"Q. But in this case, so far as this book indicates, the only thing that R. S. did, by whom you mean Mr. Schwarz, was to make the report, is that right, so far as the book indicates? A. So far as the book indicates.

"Q. What was in this package of hops that you received? A. Sample of hops which—we received numerous samples during the course of the year; just like any other sample, wrapped in paper.

"Q. What was the weight of the sample? A. That I couldn't say. The hop samples we receive vary so much that I don't make any particular note of the size, provided they are not too small. If they are too small then I call Mr. Scwarz's attention, or whoever is in charge of the laboratory, and tell him the sample is too small for analysis.

"Q. You have no particular recollection of receiving that sample, have you? A. No.

"Q. And except for the fact that there is an entry in the book under that date, you have no recol-

lection about it at all, have you? A. I have no direct recollection of this sample. I know that Peter Breidt Brewery sent us a number of samples.

"Q. There was nothing peculiar about this sample that made it remain in your mind? A. Nothing that I can say.

"Q. Do you know when you made that entry in the book? A. What time of the day it was?

"Q. No; what time of the year; what date. A. Well, October 8, 1914.

"Q. You made it on the same day? A. I made it on the same day, yes, sir.

"Q. How do you know that? A. It's a rule of the house, when a sample is received and is entered, the package is opened, it has to be entered on the day it is received.

"Q. That's the only way you remember it was made on the day it was received? A. Yes, sir; and because it is my usual custom so to enter samples.

"Q. The figure 8 indicates that the samples was received when? A. On October 8, 1914.

"Q. Who is Mr. Furst? A. He was a chemist; Dr. Furst; who was with us at that time.

"Q. Is he here now? A. No, sir.

"Q. Where is he? A. I haven't the slightest idea.

"Q. Who is Dr. Williams? A. He is no doctor; he is an expert hop grader.

"Q. Is he in your employ? A. No, sir.

"Q. Is he in the employ of this school any longer? A. No.

"Q. What does the figure 10 under the heading 'Report' indicate? A. It reports that on the 10th day of October, 1914, one report on that sample was mailed.

"Q. What about the figure 14? A. And 14 says that on the 14th day of October, 1914, another report was sent on the same sample.

"Q. And that in each case the report was made by R. S. and the examination made by F. and W.? A. Yes, sir.

"Q. Do you know anything about the condition in which the hops were that were in the sample when they were received? A. About the grading of the hop—I mean the sample itself—I wouldn't know much about, just a little.

"Q. Do you recall what was done? A. For instance if the sample was received in a moist condition I would have made a note of it, as we have a space for remarks, and if there had been anything unusual about it, I would have entered it.

"Q. What was done with the sample after it was received? A. After it was received it was given to the chemist in charge of the laboratory.

"Q. How soon after? A. That very day, probably.

"Q. Do you know that it was given that very day? A. To the best of my knowledge it was.

"Q. Well, what makes you think it was? A. Because samples of hops—most of our sales are taken right away.

"Q. Was this a sample or not, or don't you recall? A. I can't say definitely.

"Q. You know whether it was received by express, parcels post or how? A. I do not."

Mr. English. [Reading]:

"Redirect examination by Mr. English:

"Q. Tell us who W. was again? A. W. refers to a man by the name of Edward Williams.

"Q. What did he do at the laboratory? A. He is a hop grader.

"Q. Did he have anything to do with this particular sample of hops? T. Yes; I took the sample

down to Mr. Williams and gave him that sample, and he looked at it carefully, as is customary, and then he writes out a little memorandum report, and he turns that over to me, and I turn that report over to Mr. Schwarz.

"Q. This is all done in the laboratory? A. No; this is not done in the laboratory. We take that to Williams' office.

"Q. He is not connected with the place here? A. Not directly.

"Q. But the analysis is done in the laboratory? A. Yes.

"Q. And Mr. Schwarz was then the head of the laboratory? A. Yes, sir.

"Q. And it is all done under his supervision? A. Yes, sir.

"Q. I show you a paper dated December, 1911, with some lead pencil writing on, and ask you whether you know anything about that paper? A. This is a report; the same kind as Mr. Williams makes out whenever I take him a sample to be graded.

"Q. Does this paper refer to the same hops which are referred to in this book which you have already testified from? A. It has a report, 118,543, which refers to the sample that I took down and handed to Mr. Williams to be graded.

"Q. That's the same number in the book? A. That's the same sample.

"Q. And in whose handwriting is the record on the paper? A. Mr. Williams'.

"Q. Was it written in your presence? A. Yes, sir.

"Q. After he had examined that sample? A. After he had examined that sample, yes, sir.

"Q. On the reverse side of this same paper which has the heading November-December, 1911, is some

other lead pencil writing. Whose is that? A. Written in my handwriting.

"Q. What sample of hops is referred to—what number? A. It refers to a sample of hops received on the 8th of October, 118, 543.

"Q. From? A. From Peter Breidt City Brewery.

"Q. Same sample that has been referred to all the way through here? A. Yes, sir.

"Q. At the lower part of this same page I see another handwriting. Whose is that? A. That's my writing, but I took that sample to another party.

"Q. What was the name of the party you took it to? A. Mr. Oppenheim.

"Q. What is his full name? A. I do not know his full name.

"Q. Where was the place—what address? A. 35 Pearl Street."

Mr. English: Then we mark for identification the same paper that has been marked for identification this morning, D33 for identification.

Mr. Twining: [Reading.]

"Recross-examination by Mr. Twining:

"Q. Mr. Schaefer, where is Mr. Williams now? A. He is still down at 2 and 4 Stone street.

"Q. This city? A. This city; yes, sir.

"Q. Is that the same place that he was in October, 1914? A. Yes, sir.

"Q. Where is Mr. Oppenheim? A. At 35 Pearl street.

"Q. That's the same place he was in 1914? A. Yes, sir.

"Q. Is it the fact that you took this sample to Williams first, or to Mr. Schwartz first? A. That

I can't remember definitely, but I took it to Mr. Williams and then to Mr. Schwarz.

"Q. You testified on your cross-examination that when the sample was received you took it to Mr. Schwarz. Now you say you took it to Mr. Williams. Which did you do? A. I took it to Mr. Schwarz first and then to Mr. Williams.

"Q. On the same day? A. No; I guess it wasn't the same day.

"Q. What day was it when you took it to Mr. Williams? A. Very likely the next day.

"Q. Was it the next day? A. I could find that out.

"Q. Do you recall? A. No; I don't.

"Did you make any entry in this book indicating that you showed this sample to Mr. Oppenheim? A. No.

"Q. Why didn't you? A. It was forgotten, I suppose.

"Q. Why was the fact that it was examined by Mr. Furst and Mr. Williams recorded in the book, and not the fact that it was examined by Oppenheim? A. Mr. Oppenheim—we only take the samples to him occasionally, and Mr. Williams makes out his own report.

"Q. But you say you took this? A. I took this, yes, sir.

"Q. So it is the fact, is it not, that the record of what was done with this sample, as shown in the book, is incomplete? A. Yes, sir.

"Q. And there is no way of telling by examining the book when you took it to Williams, when you took it to Oppenheim, or when it was examined by Schwarz or by Mr. Furst? A. It was either done on the 8th or 9th of October.

"Q. Why? A. It was done between the 8th and 10th of October.

"Q. Why? A. Because it is marked reported on the 10th; it must have been done before that.

"Q. You don't know it was reported on the 10th, do you? A. Yes; I have it marked.

"Q. Do you know that it was reported on the 10th? A. We report about seven or eight thousand samples. I wouldn't remember any one of these samples as reported.

"Q. So that you have no independent recollection whether it was reported on the 10th or not? A. None further than the book.

"Q. And the book shows it was reported on the 10th and 14th? A. Yes, sir.

"Q. So it is not the fact that it might have been shown to Mr. Williams or Mr. Oppenheim between the 10th and 14th? A. No, sir.

"Q. Why not? A. The report that I made out —my report—that is Williams' and Oppenheims' report, was reported immediately, and I know for a fact that the chemist would have to take longer than that to make the grading.

"Q. Do you know the report on the 10th was a chemist's report? A. I know that the first report, on the 10th, refers to the grading of the sample.

"Q. That was made by Williams? A. Yes, sir.

"Q. So that the chemist's report was not made until the 14th? A. No, sir.

"Q. How long does it take to make the chemist's report? A. I don't know. I know it takes longer than the grading.

"Q. The grading is just a matter of looking at it? A. Yes."

Mr. English: [Reading.]

"Redirect Examination by Mr. English.

"Q. It was your practice to make an entry in the

book on the day on which the various reports were sent?

"Mr. Twining: I object on the ground it is leading.

"Q. What was your practice with reference to making an entry in the book? A. When we receive a sample I enter the name of the brewery, what the sample is, and the date it is received. Then whenever I have to do anything with the sample, like in the case of this sample of hops I had to take out, when I get back I mark it on the book that it was examined by Mr. Williams.

"Q. What about the date of reports? A. When the report goes out I mail the letters in the evening; when I get the report to be mailed than I check off 'Reported' by the initial of the party that sends out the report, and the date on which his report goes out."

Then I offer in evidence the entry in the report book referred to, as follows, which was the witness's own entry.

Mr. Twining: I object to the reception of that entry in the record.

Mr. English: That is out of the black book.

The Court: The record in the entry book?

Mr. English: The record in the entry book; yes, sir. Instead of bringing the book—we could not bring the book—we wrote it in the deposition. Now, I will read it or not, according to whether your Honor receives it in the record or not. I think it is material. It shows the receipt of the sample and identifies the sample with the number as testified to by Mr. Williams this morning.

The Court: It is a memorandum, is it not?

Mr. English: It is a memorandum made by the witness in his book; yes, sir.

The Court: It is nothing but a memorandum. A memorandum may be used by a witness; it may be testified from and testified about, but it does not go in evidence as an instrument of evidence.

Mr. English: Well, he testifies from it. I will omit reading that entry which is copied in the deposition.

Mr. Twining: [Reading.]

"Recross-examination by Mr. Twining.

"Q. Who directed you to take this sample to both Williams and Oppenheim? A. That's a standing order.

"Q. To take it to both of them? A. Yes.

"Q. I thought you said a moment ago it was customary to have the grading done by Williams alone. A. Did I say that?

"Q. Isn't that the fact? A. No; Mr. Williams makes out his own report, and when I take it to Oppenheim—and I do not take them to Oppenheim invariably, but I take it to Williams invariably, and I do not take them to Furst invariably; I take sometimes to other firms. or omit Oppenheim occasionally.

"Q. Why did you take it to Oppenheim in this case? A. It is left more or less to my discretion.

"Q. Did you receive instructions to take it to Mr. Oppenheim? A. No.

"Q. Did you receive instructions to take it to Williams? A. Except standing instructions to take it to Mr. Williams.

"Q. Can you show me any entry in that book indicating a report made by Oppenheim?

"Mr. English: You mean on these hops?
"Mr. Twining: No; on any hops.

"A. I can show you an entry.

"Q. Made of what date? A. November 5, 1914, number 119,097, not from the Peter Bredit Company.

"Q. Is there any other report of Oppenheim's between this number that you have just given me, and the number opposite the Peter Bredit sample? A. Yes; 118,966, October 29, 1914.

"Q. Any others between that last mentioned number and the number of the Peter Bredit shipment? A. No.

"Q. The last number you gave me was 118,966. The number in the book of the Peter Bredit shipment is what? A. 118,543.

"Q. Does that indicate that there were nine hundred and odd samples examined between the two numbers I have indicated, without any report by Oppenheim? A. There were not any samples received in the interim.

"Q. No hop samples received in the interim? A. No.

"Q. Does it indicate then that it was the usual custom to indicate on the book when you had an examination made by Oppenheim, which was not done in this case? A. This might not have been done for the reason that there was an entry 'F'; just entered 'F' and the principal grader, Williams.

"Q. Who is Oppenheim? A. Oppenheim is a hop grader.

"Q. He is a salesman, isn't he? A. He might be a salesman also.

"Q. Working for Lowy? A. Yes, sir.

"Q. You don't know anything about his qualifications, do you? You are not an expert? A. No: I am not an expert, but I know he has been in the

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business for a good many years, and examinations he has made, in comparison with other people's, have been pretty nearly mostly correct.

"Q. How do you know that? A. By comparing them with other people. I have taken sometimes samples to these different people, and found out that Oppenheim's sample—his reports were as good as any others.

"Q. You mean they were about the same as 20 others? A. Yes, the same.

"Q. You don't know whether any were any good, do you? A. No."

Mr. English: [Reading.]

"*Redirect examination by Mr. English*:

"Q. How long have you been in this business? A. Nearly twenty years."

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Mr. English: No, the deposition of Mr. Schwarz. [Reading:]

"ROBERT SCHWARZ, sworn in behalf of the defendant.

"*Direct Examination by Mr. English*:

"Q. Mr. Schwarz, you live in the State of New 40 York? A. Yes, sir.

"Q. Not in New Jersey? A. No.

"Q. What is your business? A. Chief chemist for Lehn & Fink, manufacturing chemist, 120 William street, New York City, and 74 Irving street, Brooklyn.

"Q. Were you ever connected with the First Scientific Station for the Art of Brewing? A. I was.

"Q. When? A. From August, 1910, to August, 1916.

"Q. Continuously during that time? A. I was.

"Q. Have you had any special training as a chemist? A. Yes.

"Q. What? A. A graduate of Columbia University, special course in chemistry, class of 1909, New York City. I studied in Copenhagen on fermentation bacteriology, and at the brewing school in Berlin, and at the University of Berlin.

"Q. Have you specialized any in the analysis of hops? A. I took the course on hops at the brewing school in Berlin, and did some special work in the research labratory on the examination of hops.

"Q. When you were connected with the Scientific Station for the Art of Brewing, did you make analyses of hops? A. I examined all the samples; that is, looked them over, graded all the samples, and from time to time had chemical examinations made by the analyst under my supervision.

"Q. And that covered a period of six years? A. Yes.

"Q. I show you a letter from the defendant to First Scientific Station, dated October 6, 1914; did you ever see that before? A. Yes.

"Q. About when, with reference to its date? A. In October, 1914, the first week.

"Q. Do you know whether or not a package of hops, mentioned in that letter, was received at the Scientific Station? A. Yes."

We offered the letter in evidence. It is the same letter that was put in on the examination of the young lady this morning, which was marked D34.

[Reading:]

"Q. I refer you to the black book of the First

Scientific Station, which has already been identified and offered in evidence, on Schaefer's testimony, and ask you whether the record there of the hops from the Peter Breidt Company is the same package as is referred to in this letter. A. According to the record it must be.

"Q. Did you cause an analysis to be made of these hops? A. I did.

"Q. Was that analysis made under your supervision? A. It was.

"Q. Tell us how much personal attention you gave to it. A. The sample was submitted to me by the man that received it—receiving clerk, Mr. Schaeffer. This letter was given to me by Mr. Robitschek. He received the letter because this is his handwriting.

"Q. Who is he? A. He is the manager.

"Q. When you say this is his handwriting, what do you refer to? A. A notation on the letter, 'Received October 14, 1914.' As a result of this letter I had an examination made of that sample of hops. I had it tested as to the amount of total resins, the amount of soft resins, and the amount of hard resins present therein.

"Q. Did you check up the analysis? A. I did. I directed a chemist by the name of Dr. Furst to make the analysis, and supervised the work, and checked up the results when the work was finished. When that was finished I sent a report on the results of the chemical examination to the Peter Breidt City Brewery.

"Q. Did you have any examination made by a hop grader? A. Mr. Schaefer had standing instructions—

"Mr. Twining: I object to the instructions he had.

"A. (Continuing): from me to take all samples.

"Q. To whom? A. To Mr. Williams, hop grader; and if Mr. Williams' report was not entirely satisfactory in his opinion, to take it to another party, so that we could have an outside opinion beside our own.

"Q. Did you receive any report from either Mr. Williams, or anybody else? A. Mr. Schaefer gave me a slip, as I recall it, on which was written Mr. Williams' opinion of the hops, and also a slip on which he had written down the opinion given—that is, on which Mr. Schaefer had written down the opinion given by another man to whom he had submitted it.

"Q. Do you know the name of the other man? A. I do not recall definitely who it was.

"Q. I show you D1 for identification, and ask you whether Mr. Schaefer submitted to you that slip. You spoke of a slip. A. Yes."

Mr. English: That now has been marked D33 for identification this morning.

[Reading]:

"Q. That is the paper you spoke of; and does it refer to these same hops that are mentioned in the letter and in the book? A. Yes; it refers to the sample of hops received.

"Q. Do you know whose handwriting it is? A. That I recognize as Mr. Williams' handwriting.

"Q. I show you an original letter addressed to the defendant company, dated October 10, 1914, and signed 'First Scientific Station for the Art of Brewing, per Robert Schwarz.' Is that your signature? A. Yes.

"Q. You wrote that letter? A. I dictated that letter, and signed it.

"Q. And what did you base that letter on? A. Upon my own grading of the hops, and upon the re-

ports received from Mr. Williams and the other party to whom Mr. Schaefer submitted the sample."

We offered that letter in evidence as D3. We now renew the offer. Your Honor will recall that a copy of this letter was sent to the plaintiff, and appeared in the depositions which were taken out on the Pacific Coast. They put the copy in evidence, and we now produce the original.

Mr. Twining: The letter that was sent to the plaintiff on the coast did not purport to be a copy of this letter. There was a quotation from something, not stated to be from what, which was sent to the plaintiff on the coast.

Mr. English: I may be inaccurate in saying that it was a copy.

Mr. Twining: The letter is objected to on the ground that it contains a report as to the quality of the sample, and therefore it is immaterial.

Mr. English: I find that Exhibit P8A, which was offered in evidence as P8 in California and P8A here, quotes verbatim from this letter D3.

Mr. Twining: It does not state that it is quoting from anything.

Mr. English: Well, I shall read the letter P8 addressed to the plaintiff [reading]. Now, the letter D3 contains this extract which is quoted in the letter from the defendant to the plaintiff, marked P8 A.

The Court: The objection that quality is immaterial is one of your objections?

Mr. Twining: Yes, sir.

The Court: And what is the other?

Mr. Twining: I did not make any other objection.

The Court: Then I shall receive the evidence, reserving the ruling on that point, and give you the right to an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: We shall mark the letter D3.

[The paper referred to is marked Ex. D3.]

Mr. English. [Reading]:

"Q. You said you based that letter partly on your own grading. What experience have you had in grading hops? A. I saw every sample that was submitted here.

"Q. Was it part of your duties to grade hops, as well as superintend the analyses? A. It was my duty to see all the hops, and to supervise the examination of same.

"Q. How many samples a year do you suppose you examined?

"Mr. Twining: I object to any testimony as to the quality of this sample upon the ground that it is immaterial, the hops themselves having been accepted.

"A. I can't recollect.

"Q. Did the number of samples run into the hundreds or thousands in a year?

"Mr. Twining: Same objection to this whole line of testimony.

"A. I doubt whether they ran much over a hundred, but I can't say definitely.

"Q. Following the writing of that letter of Octo-

New Jersey State Library

ber 10, 1914, was the chemical analysis completed? A. Yes.

"Q. Did you make a report on that? A. I did.

"Q. Did you have letter press copies made of the letters you wrote? A. Yes.

"Q. I call your attention to the letter press copy —we fail to find the original among our papers; it has been mislaid somewhere—to a letter addressed to the defendant dated October 14, 1914.

"Mr. Twining: I object to the witness's being shown a copy of the letter for the purpose of refreshing his recollection or otherwise.

"Q. Is that a letter press copy of your letter?"

Mr. Twining: I object to the use of a letter press copy to refresh the witness's recollection or for any other purpose.

Mr. English: He says, "Yes, that is my signature." A letter press copy reproduces it; it is very much like a photograph.

The Court: I shall receive it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English. [Reading]:

"A. Yes, that is my signature.

"Q. And is a letter press copy of your signature there? A. Yes; a letter press copy of my signature is there.

"Q. Did you write that letter, of which that is a letter press copy?

"Mr. Twining: I object.

"Q. Dictate it, rather? A. Yes; I dictated and signed it later.

"Q. And does that set forth the result of the chemical analysis that was made?

"Mr. Twining: Same objection.

"A. It does.

"Q. What did that chemical analysis show?"

Mr. Twining: I object to that, if your Honor please. The witness's knowledge as to what the chemical analysis showed is based upon an examination of what he says is a letter press copy. There has been no explanation as to why he does not refresh his recollection from the original source or testify without refreshing his recollection. I do not understand that secondary evidence of this kind can be used for the purpose of refreshing recollection, at least until some explanation is made of the failure to produce the original report.

Mr. English: In the deposition it is objected to as immaterial.

The Court: No, "objected to on the further ground that it is immaterial," which refers back. The carbon copy having been received, does not that answer these questions?

Mr. English: What does your Honor refer to?

The Court: The witness says that the letter sets for the result of the chemical analysis, and then the question is, "What did that chemical analysis show?" It shows its result, I suppose.

Mr. English: Yes, sir.

The Court: And that result would appear from the report itself, would it not?

Mr. English: Yes, sir. We have the copy,

and Mr. Twining will admit it is a true copy of the original letter. He does not make any point of the form of the paper, as I understand. The original letter was lost. The carbon copy was before the witness when he testified.

Mr. Twining: I cannot agree that that is a copy; I cannot agree that it is a copy. I have never seen the original. I do not see how I could agree to that. I agree that that is a letter press copy, but I do not know what changes may have been made in it after the letter press was made. I agree that that is a copy of the letter press.

The Court: Is this anything but a comment on the letter?

Mr. English: No, sir.

The Court: Then, if the letter press copy is admitted, and I have admitted it, the case would stand just the same whether this explanatory and descriptive testimony was taken or not.

Mr. English: Yes, sir.

The Court: All that it would be necessary to do would be to look at the letter.

Mr. English: Yes, sir. He explains later on. Afterwards he gives the benefit of his knowledge and experience, interpreting what came forth in the analysis.

The Court: We have not come to that yet. It seems to me that the testimony on page 22 is merely descriptive of the letter, which has been admitted. I shall receive it, for convenience.

Mr. English: Then I shall have marked the paper which counsel concedes is a true copy of the letter press, which was marked D4 on the taking of the deposition.

Mr. Twining: I object to that.

Mr. English: This stands for the letter press. There is no distinction made by counsel between the letter press and this physical paper. Is that true, Mr. Twining?

Mr. Twining: Yes.

The Court: Then I shall rule that I will receive the letter press copy. To that you object, and you may take an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: By consent of counsel, this paper, D4, is to be treated as the letter press copy.

Mr. Twining: Yes.

[The paper referred to is marked Ex. D4.]

At one o'clock, P. M., the court takes a recess of one hour.

AFTER RECESS.

Mr. English. [Reading]:

"A. The chemical analysis showed the total amount of resin, the amount of hard resin, the amount of soft resin, contained in the sample of hops.

"Q. Can you tell us what those figures were, from memory?. A. No.

"Q. Can you refresh your recollection from any record that you have? A. I have no record in my personal possession.

"Q. Any record before you? A. Yes.

"Q. What? A. This letter press copy.

"Q. Refreshing your recollection from that, tell us what they were."

Mr. Twining: I object to that, if your

Honor please, on the ground stated in the record.

Mr. English: Well, that has already been ruled against you. That was your stock objection. Well, it seems that question was not answered, as a matter of fact. I think you object on the same ground to the following question

The Court: I shall follow up the reception of the letter press copy as far as that will carry me. It seems to cover everything except the objection that quality is not in the case, as to which I shall reserve my ruling, and take the testimony, and allow an exception when necessary.

Plaintiff's counsel prays an excepion to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: That particular question was not answered.

[Reading]:

"Q. Refresh your recollection from the letter, and tell us the total amount of resins.

"Mr. Twining: Same objection.

"A. 11.18 per cent.

"Q. Refreshing your memory in the same way, tell us the amount of soft resins.

"Mr. Twining: Same objection.

"A. 6.48 per cent.

"Q. And refreshing your recollection in the same way, tell us the amount of hard resins.

"Mr. Twining: Same objection.

"A. 4.70 per cent.

"Q. Have you made other analysis of California hops?

"Mr. Twining: Same objection, and the further objection that there is nothing to show that these were California hops.

"Q. Have you ever made analysis of California hops—Pacific Coast hops? A. Pacific Coast hops —similar analysis—I don't definitely recall.

"Q. Have you in the course of your business or profession had occasion to become acquainted with the analyses of Pacific hops? A. Yes.

"Q. Are there works of reference covering data of that character? A. There are.

"Q. Tell us how the amount of resins contained in the hops which you analyzed compared with the standard amount of resins, if there is such a thing, in Pacific Coast hops."

Mr. Twining: I object to that on the ground stated in the record on page 23.

The Court: As to the competency of the witness—

Mr. Twining: The question was not answered, your Honor. I shall withdraw the objection.

Mr. English. [Reading]:

"A. To be thoroughly frank with you, I don't want to appear as an expert here.

"Q. What do you mean by that? A. I simply—as I told you—I simply want to testify to my signature and to my reports, and the fact that they are correct, and any opinion I gave in that I believe to be right.

"Q. Have you any knowledge from your professional training and experience as to what amount of resins there ought to be in good brewing hops?

Mr. Twining: I object on the groun dit is immaterial.

"A. I have the knowledge, yes.

"Q. What amount? A. I don't think I ought to give it under the conditions which I promised to testify.

"Q. In this letter of October 10, 1914, you say, 'Our report on the chemical examinations of this sample will follow within a few days.' That is correct? A. Yes.

"Q. Does the letter of October 14, 1914, set forth the chemical examination which was referred to in the previous letter?"

Mr. Twining: I object to that on the ground stated in the record.

Mr. English: That is the letter that the Court has already admitted.

The Court: Then I shall allow it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: [Reading]:

"A: It does."

Then we offer the letter in evidence, which has already been marked D4.

[Reading]:

"Q. In this letter of October 14, 1914, you stated the comparative amount of resin in the hops, did you not?

"Mr. Twining: I object to anything as to the contents of the letter of October 14, 1914.

"A. I stated the actual amount of resins, total, soft and hard, as found by the chemical analysis.

"Q. Did you, or did you not, make any statement with reference to the percentage of resins as bearing on the previous statement contained in your letter of October 10, 1914?

"Mr. Twining: Same objection.

"A. Yes.

"Q. And what was that?

"Mr. Twining. Same objection.

"A. I stated that the percentage of resins was quite low, which bore out our original statement that the hops were only of fair brewing material.

"Q. You say the percentage is quite low. What do you compare it with?

"Mr. Twining: I object to any testimony as to the quality of this shipment upon the ground that it is immaterial, the hops having been accepted.

"A. If you gentlemen feel I am not acting as an expert if I answer that question correctly, I can simply state that I made that statement because of my knowledge of hops.

"Q. You say you answer that because of your knowledge of hops. Where did you get that knowledge? A. From the literature on that subject, and from examinations which I have made.

"Q. From that experience I take it you have a knowledge as to what a proper amount of resin in the hop ought to be?

"Mr. Twining: I object on the ground it is leading.

"A. I have.

"Q. When you made the statement in your letter of October 14th, you were comparing hops you analyzed with the proper amount as it was in your mind from your expert knowledge? A. That's correct.

"Mr. Twining: I object on the ground it is leading.

"Q. Are you willing to state what the proper amount of resins ought to be? A. No."

Mr. Twining. [Reading]:

"Cross examination by Mr. Twining:

"Q. Why are you unwilling to state what the proper amount of resins ought to be? A. Because I don't want to appear here as an expert in this case.

"Q. That you are not testifying as an expert? A. That I am not testifying as an expert.

"Q. Have you personally ever analyzed any Pacific hops? A. What do you mean—that I personally carried out the manipulations?

"Q. Yes. A. I don't recall whether any of my work was done on Pacific Coast or not.

"Q. Is it or not the fact that someone other than—— A. Pardon me, that refers to the chemical examination.

"Q. Is it or not the fact that someone else than yourself made the analysis of this particular sample? A. I won't say that someone other than myself made the examination.

"Q. The chemical analysis? A. The chemical analysis was made under my supervision, at my directions, the manipulations being carried out by an assistant analyst.

"Q. That's Mr. Furst? A. Dr. Furst.

"Q. You stated a while ago that the contents of

the letter of October 10, 1914, was based in part upon the analysis made under your direction, as you have tsetified, and in part upon what purported to be a report made by Mr. Williams, and in part upon what was told you by Mr. Schaefer, as to what Oppenheim said. Is that so? A. No; your statement was not correct.

"Q. I am going to ask you now to state again upon what you based the letter of October 10, 1914. A. I based it upon my own examination, and not upon the analysis as you state it. You asked me whether I based my opinion of the 10th on the analysis and Mr. Williams' supposed report. I based my letter of the 10th on my own examination; not the analysis.

"Q. Was that before the analysis was made? A. Yes. On my own examination and upon the reports of Williams and the other man.

"Q. Then, as I understand it now, you based your letter of October 10th upon three things; first, your own examination of the hops; second, what purported to be a report made by Wililams; and third, what Schaefer told you Oppenheim had told him. Is that so? A. What Mr. Schaefer had given me as a written report of what Oppenheim had told him.

"Q. Written in Schaefer's handwriting? A. Yes; that's correct.

"Q. Do you know, of your own knowledge, whether Mr. Williams made the report which Mr. Schaefer showed you? A. I know that the report is in Mr. Williams' handwriting, and I know that Mr. Schaefer took that sample of hops, stating that he was taking it to Mr. Williams, and reported to me that he had taken it to Mr. Williams and handed me Mr. Williams' handwritten report on the matter.

"Q. That's all you know about it, with reference

to Williams? A. Yes.

"Q. And if Mr. Williams did make an examination of this sample, you don't know what the examination was, to your own knowledge? A. Only as stated by his written report.

"Q. The same is true with reference to the purported report of Mr. Oppenheim, is it not? A. Yes.

"Q. You say that you received this letter of October 6, 1914—it came to your attention prior to the time, I suppose, that the chemical analysis was made. A. Certainly.

"Q. Some time about the 7th of October? A. On the 7th of October.

"Q. Who handed you that letter? A. Mr. Robitschek.

"Q. Did you and he have any conversation with reference to this sample when the letter was handed you? A. That I don't recall.

"Q. Did he ever hand you any other written communication from the Breidt Company with reference to that particular sample, before the analysis was made, or before the letter of October 10th was written? A. Before the letter of October 10th was written?

"Q. Yes. A. I do not recall whether Mr. Robitschek gave me any other communication, or any other letter, before my report of the 10th, but I know that some special information must have come to me because the determining of the resins was only made in special cases, and therefore I believe some special information regarding these hops reached me; I won't say positively.

"Q. Do you recall whether that was in the form of a written communication, or in the form of verbal instructions? A. I do not recall.

"Q. Why did you want an outside report by what you have termed a grader of hops? A. Why did I want that?

"Q. Yes. A. Because it is sometimes difficult to give the age of the hop, and we have always, therefore, made it a practice to have a hop grader look at the hops so as to confirm our opinion on the samples before us.

"Q. The chemical analysis, in other words, is not altogether accurate or reliable without the report of a grader? A. Not necessarily. The report of the grader has nothing to do with the chemical analysis.

"Q. Then the report made by you, or anyone else in the employ of this brewing school, as to the grading of the hp, is not sufficiently reliable to depend upon without the report of an outside party? A. I don't say that at all.

"Q. Then why do you have the report of an outside party made? A. Simply as a matter of business policy.

"Q. If your report is accurate and reliable, why is it necessary to have the report of any third person? A. That's been our policy.

"Q. That's the only answer you can give? A. That's the only answer I can give. It has been our policy to have an outsider grade of hops.

"Q. Isn't it a fact, Mr. Schwarz, that a chemical analysis of hops is unreliable? A. It is not so in my opinion.

"Q. Isn't it a fact that two chemists will take the same sample and come to materially different conclusions as to what the sample shows? A. In what respect do you mean that?

"Q. In respect to the proportion of moisture and the proportion of hard and soft resins? A. That's a question which is practically impossible to answer, Mr. Twining, because it covers so broad a field. You can take anything in the world and submit it to one accurate chemist, and he can give you a correct report, and you can submit it to an inac-

curate chemist, and he can give you a different report. It's the character and quality of the laboratory that counts.

"Q. And the analyzing chemists in the employ of this brewing school are accurate or inaccurate? A. Accurate.

"Q. Have you ever seen two analyses made by different chemists of a sample of hops which was identical unless these two chemists were working together? A. I think we are getting on to the expert. I will answer that, but I don't want to pose as an expert. Just as a matter of information I would say that I have seen reports made, and they were not identical, but they were within the experimental limits of error.

"Q. What were the names of the chemists in the employ of this station in October, 1914, do you recall? A. There was Dr. Furst, Mr. Ihnen, Mr. Anderson and Dr. Bielous.

"Q. I notice in the record book the letter D appearing. A. That was Mr. Dietrich; he was a biologist.

"Q. Did he make examinations? A. He did biological work.

"Q. Did he make analyses of hop samples? A. Not that I recall.

"Q. Do you know Mr. Emil Sschlichting? A. Yes, I know him.

"Q. By whom is he employed, do you know? A. Has this anything to do with my testimony?

"Mr. English: I object as not cross-examination.

"Q. Do you know by whom he is employed? Do you refuse to answer? A. Yes.

"Mr. Twining: I give notice now that I

move to strike out the whole testimony of Mr. Schwarz if he refuses to answer.

"Q. (By Mr. English.) What's your objection? A. Because what has it to do with my testimony? All right, I will answer it. As far as I know Mr. Schlichting was affiliated, or I will say was a member, connected with the National Brewers Academy.

"Q. Is he a competent man or not, in your judgment? A. I don't know.

"Q. Do you know or don't you know?"

Mr. English: We objected to that. Well, he says he does not know.

Mr. Twining: [Reading:]

"A. I don't want to pass on his competency.

"Q. What have you to say about it?

"Mr. English: I object to it as not cross-examination.

"Q. What have you to say about it? A. I have no means of knowing whether he was competent or not. I have never investigated his work.

"Q. Never seen any of his reports? A. Very rarely.

"Q. You say that Mr. Dietrich—if that's his name—was incompetent to make a chemical analysis of hop samples? A. I did not say that.

"Mr. English: I object to that as not cross-examination, and not a proper way to prove Mr. Dietrich's qualifications.

"Q. What is your opinion as to his competency?"

Mr. English: I object to that, as I stated

in the record on the page before, that that is not the way to prove an expert's competency, as to what somebody thinks about it. He has to testify on his own account. I think that is a proper objection. It is not cross-examination anyway.

The Court: It is not an unusual question to ask one physician as to another's standing in his profession. I shall let it stand.

Mr. English: It was not his standing, your Honor; it was this witness's opinion as to another's competency.

The Court: I shall let it stand. Take an exception.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: [Reading:]

"A. Mr. Dietrich is a very competent man, and if given proper instructions, could make a perfectly correct analysis of anything that he was set to do.

"Q. And has been in the employ of this station for twenty years, hasn't he? A. I don't know exactly. I know it is many years.

"Q. Do you say that he did not make reports of samples of hops for this stations? A. I don't know. I will answer that it was not customary for him to make examinations of hops and report on them. He may, in the absence of Mr. Robitschek and myself, have made a report. I don't know.

"Q. How do you know that this was a sample of Pacific Coast hops? A. From the general appearance of the hops."

Mr. English: [Reading:]

"*Redirect Examination by Mr. English*:

"Q. Mr. Schwarz, you say you haven't been testifying as an expert, but you have expert knowledge just the same?"

Mr. Twining: I object to that as leading.
Mr. English: Well, he did not answer it.
Mr. Twining: Well, all right.
Mr. English: [Reading]:

"Q. You have expert knowledge, have you not?

"Mr. Twining: Same objection.

"A. I have knowledge as the result of my experience.

"Q. Will you tell us as a matter of information for us, apart from any expert testimony, what the total amount of resins ought to be in good brewing hops?

"Mr. Twining: I object.

"A. No; I told Mr. Stamler and I am going to stick to it."

Mr. English: Now I shall read the deposition of Mr. Robitschek. [Reading]:

"CARL ROBITSCHEK, sworn on behalf of defendant:

"*Direct Examination by Mr. English*:

"Q. Mr. Robitschek, you live in New York? A. I live in New York, yes.

"Q. Are you connected with the First Scientific Brewing Station? A. I am.

"Q. In what capacity? A. At present as general manager.

"Q. You are head of it, in other words? A. Well, it is up to you.

"Q. Are you familiar with the analysis of brewing hops? A. Brewing hops, yes.

"Q. Have you had an expert training? A. In what line?

"Q. To qualify you to make anayses—pass on analyses of hops? A. Why to a certain extent, yes.

"Q. Tell us what your training and experience has been. A. I have been in this line of business for thirty-one years.

"Q. Have you had any professional training? A. As a hop expert?

"Q. As a chemist. A. As a chemist, yes.

"Q. Where? A. I studied chemistry at the Polytechnic High School in Prague; graduated from there; had position as analytical chemist in Europe; in Switzerland, and in Germany; came over to this country in 1886, and started in this business as an analytical chemist; was afterwards advanced to assistant manager, and since—I think it was 1901, about that time, when I became the manager of this plant.

"Q. In the course of your long career have you made analyses of hops? A. Yes, sir.

"Q. And have you had occasion to become acquainted with the ingredients of a brewing hop? A. Yes, sir.

"Q. How important are resins in hops for brewing purposes?"

Mr. Twining: I object to that on the ground stated on page 35.

Mr. English: That is your stock objection.

The Court: That is the quality question?

Mr. Twining: Yes, sir.

The Court: I shall note the objection and take the testimony, reserving to counsel the right to except.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English (reading):

"A. The soft resins are considered the most important ingredients of the hops.

"Q. For brewing purposes? A. For brewing purposes.

"Q. Why is that so? A. Well, ask the brewer. I can tell you if you want me to. Because they give the pure and mild bitter taste and preserve the properties.

"Q. Are you a teacher of any art? A. Yes, sir.

"Q. What? A. Of the art of brewing.

"Q. How long have you been a teacher of the art of brewing? A. Many years.

"Q. Are you doing that now? A. Yes, sir.

"Q. You are now head of a school of brewing? A. Yes, sir.

"Q. What would you say ought to be the total amount of resins in a good brewing hop? A. I don't know; never taught on that; I don't remember; I don't know exactly.

"Q. Have you examined comparative analyses of hops to know what proportion of resins, or what amount of resins ought to be in a good brewing hop? A. I have examined a number of samples of hops and determined the amount of soft resins and hard resins and total resins contained within them, myself, years ago.

"Q. What did you find was the total amount of resins in a good quality of hops, that you examined many years ago? A. Can I consult my papers?

"Q. Did you make them yourself? A. Yes.

"Mr. Twining: I object to his consulting the papers unless it appears what papers he is consulting and what the hops were.

"Q. What papers are you consulting now? A. I am consulting papers made by myself, in my own handwriting of certain analyses of hops and hop extracts, which I made quite many years ago; made myself.

"Q. Were there any Pacific Coast hops included in these analyses? A. I have no record of any Pacific Coast.

"Q. Tell us what the amount of resins ought to be in a good brewing hop, regardless of where it is grown."

Mr. Twining: I object to that.

The Court: The witness says that there is no fixed figure.

Mr. English (reading):

"A. There is no fixed figure of what it ought to be.

"Q. What did you find in the hops you examined?

"Mr. Twining: I object to that upon the ground that the sources of the information are not shown, and there is nothing to indicate that the basis is the true basis to be adopted in this case; nothing to show that the testimony relates to the proportion of resins which should be in Pacific Coast hops.

"A. I have it here now. Hops from Pacific Coast, 1898, total amount of resin was 14.88 of 1898 crop.

"Q. How much soft and how much hard? A. Soft resins 8.91, and hard the difference. That was new hops of 1898 crop.

"Q. What is this book I show you? A. Letters on brewing.

"Q. What year? A. 1911 to 1913; October, 1911, to July, 1913.

"Q. Does this book contain anything with reference to the amount of resins appearing in hops? A. There is an article in it published by the Hantke Brewing School of Milwaukee, on page 322; contains a compilation of the analytical results of hops made by Hantke Brewing School.

"Q. Are these reliable compilations?

"Mr. Twining: I object to the question.

A. I think they are, but that is a matter of opinion. I think they are.

"Q. Are they recognized in your profession as accurate compilations? A. Hantke Brewing School is recognized as one of the leading brewing experts in the country.

"Q. Do they publish a series of books or letters on results of their analyses? A. That book is published regularly for quite a number of years.

"Q. It is considered a standard work? A. It is considered a standard work.

"Q. Does it undertake to state the standard of what ingredients there ought to be found on analysis in a good brewing hop? A. That I don't know. I know that these have been published to show the work which they are doing.

"Q. Are those used by brewers or teachers of brewing as guides or standard? A. I think they are.

"Q. Do you know? A. I think they are.

"Q. Do you use it yourself? A. Yes, sir.

"Q. In your school? A. Yes, sir.

"Q. Have you made a study of reports and analyses and data of that character during your long career? A. I don't remember.

"Q. Can you undertake to say what in your judgment ought to be the amount of resins in a good brewing hop? A. Yes.

"Q. Can you say what ought to be the amount of resin in a Pacific Coast good brewing hop? A. I know, but that is last year.

"Mr. Twining: In response to same question by Mr. Stamler, the witness says: 'I know, but that is merely the result of tests for one year.'

"Q. That was referring to one paper that Mr. Stamler referred your attention to? A. Yes.

"Q. I ask you the broad general question whether you know from your wide experience what amount of resins there ought to be in a good brewing Pacific Coast hop. A. Total resin?

"Q. Do you know? A. I have a faint idea. Ten or twelve per cent."

Mr. Twining: I move to strike that out, if your Honor please. It is not expert testimony, Ithink.

The Court: I shall take it for what it is worth.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English (reading):

"Q. From your experience and learning in this matter, would you say that a total of 11.18 per cent. of total resins was a large or small percentage of resins in a good brewing hop? A. It is a small percentage.

"Mr. Twining: I object to the question

on the ground the witness is not qualified to say.

"Q. Would you say whether 6.48 per cent. of soft resins was a large or small percentage?

sample. What somebody else might do wo

"Mr. Twining: Same objection.

"A. For what?

"Q. For a good brewing hop. A. I would say a small percentage.

"Q. What would be a fair percentage of soft resins?

"Mr. Twining: I object to the question on the ground that it does not relate to Pacific Coast hops, and upon the further ground that the witness is not shown to be qualified to testify on the point as an expert.

"A. Ten per cent. or more.

"Q. Does that apply to hops generally, or Pacific Coast hops?

"Mr. Twining: Same objection.

"A. Both.

"Q. What would be a fair percentage of total resins in good brewing hops?

"Mr. Twining. Same objection.

"A. Thirteen per cent. or more.

"Q. Does that apply to Pacific Coast hops or generally? A. Generally.

"Q. Including Pacific Coast? A. Including Pacific Coast.

"Q. I show you the letter of October 6, 1914, writ-

ten to your station by the defendant brewery. Does that contain any notation in your handwriting? A. Yes.

"Q. What? A. I received that letter. It is in my handwriting 'Received October 7, 1914.'

"Q. Did the hops there mentioned come to the Scientific Station, do you know? A. I presume they came, but I don't receive the samples."

Mr. Twining. [Reading]:

"*Cross examination by Mr. Twining*:

"Q. Did you have any conversation with Mr. Schwarz about this sample? A. Not to my recollection. I don't know.

"Q. Did you hand Mr. Schwarz any other communications with reference to the samples? A. I don't remember.

"Q. What was the memorandum that you referred to on your direct examination? Some private notes of your own? A. Which memorandum do you mean?

"Q. You had in your hand a bundle of yellow papers. What were those? A. You have reference to these papers [indicating]?

"Q. Yes. A. Those were results of some examinations which I made myself many years ago as a chemist.

"Q. How many years ago? A. I mentioned the date, didn't I?

"Q. I don't think so. A. I think it was 1898 or 1899; somewhere around that time, I know. I analyzed the hops myself. It must have been in 1899, and the analysis was made either the latter part of 1898 or the beginning of 1899. Those are examinations which I made myself, personally.

"Q. Have you any record of examinations made

by you, personally, since that time? A. I have no records.

"Q. So that the only testimony given by you relative to the amount of resins which there should be in a good brewing hop of the Pacific Coast—so far as that testimony is based upon your personal knowledge and as the result of your personal analysis—is bas-ed upon analyses made by you in 1899 or 1898. Is that so? A. Well, my knowledge is not only based on my own personal examination, but also on other analyses which have been made later on by other people, in this and other laboratories.

"Q. But so far as it is based on your personal analysis, that personal analysis refers to this you made in 1898 or 1899? A. Yes; that is to my best recollection the last time that I made it personally.

"Q. Now, Mr. Robitschek, in this memorandum of analyses that you made personally, can you tell me how many samples of Pacific Coast hops you analyzed? A. Yes, if you allow me to consult the record.

"Q. How many? A. New hops from Pacific Coast 1898—there was certainly one sample which is specifically marked; one sample, possibly two.

"Q. One sample; possibly two? A. Possibly two.

"Q. Is it not the fact that the amount of resin in a hop may vary on each ranch? A. I can't answer that question 'yes' or 'no.'

"Q. Is it not the fact that the amount of resins varies during each year? A. I think it is.

"Q. It depends, does it not, somewhat on the climate? A. I don't know.

"Q. Do you know whether or not it depends upon the character of the soil? A. I don't know.

"Q. It depends somewhat, does it not, upon the time when the hops are harvested, or don't you know? A. I don't know.

"Q. Do you know whether or not it depends somewhat upon the amount of drying the hops have been subjected to? A. You want me to say what I think, or know?

"Q. I don't want anything you think; just what you know. A. I don't know.

"Q. Does it depend, if you know, to any extent upon the amount of sulphuring of the hops? A. Are the hops sulphured?

"Q. Do you know whether or not the hops are sulphured? A. In this country?

"Q. Yes. A. Well, I think, or to my best knowledge, they are; most of them are; perhaps few exceptions.

"Q. You are not sure about that? A. Wouldn't be sure.

"Q. You are not sure, are you, what the percentage of hard and soft resins should be in good brewing Pacific Coast hops? A. Well, I would be guided by the literature on the subject.

"Q. And, therefore, is it or is it not the fact, that your testimony on that point was what you think, rather than what you positively know? A. That is not the fact.

"Q. Your knowledge is determined—so far as your own personal experience goes, that personal experience based on analyses—from this private memorandum, is it not, relating to analyses which you made? A. And from general experience, of reading up the literature, and experiments which the subject; not only on my own tests, but also have been made by other recognized authorities on the subject; not only on my own tests, but also others.

"Q. Has Mr. Dietrich made chemical analyses for your Scientific Station? A. Yes and no.

"Q. He has made reports, has he not? A. Yes.

Chemical analyses is a broad expression. What do you mean by chemical analyses?

"Q. Has he not made chemical analyses and reports of the same character as the report of October 10, 1914, made by Mr. Schwarz- A. I can't answer that question offhand. Mr. Dietrich is the assistant, and is practically taking the place of Mr. Schwarz. He is taking his place at present.

"Q. He is equally reliable? A. I consider him.

"Q. And he has been in your employ? A. For many years; anyway about eighteen or twenty years; starting in a subordinate position, doing analytical work, and was afterwards advanced. Now he don't do any such work any more, except rendering reports on the strength of the analyses made by others. That's his business at present.

"Q. The reports of chemical analyses of hop samples vary very much, do they not, in the same establishment? A. On different samples, or the same?

"Q. The same sample. A. No. On the same sample?

"Q. Yes. A. Well, I wouldn't send out any report if they would differ.

"Q. Isn't it the fact that two chemists, in the same establishment, would come to a different conclusion as to the chemical analysis of the same sample? A. You mean as a general rule, or occasionally?

"Q. Occasionally. A. Exceptional cases, but one must be wrong; possibly both.

"Q. Would you be surprised to find that an analysis had been made under Mr. Schwarz's direction of a sample from a bale of hops, which showed soft resins of 6.48 per cent., and that an analysis under the direction of Mr. Dietrich had been made of a sample taken from the same bale, which showed a greater percentage of soft resins? A. How much greater?

"Q. Two per cent.; 3 per cent. A. I wouldn't be surprised. I would simply draw the conclusion from it that this sample of this bale of hops did not contain a uniform article; that the samples were not properly taken, or that the hops were not of uniform composition.

"Q. You would come to the conclusion that the analyses were correct in each case? A. I would come to the conclusion—the analyses being made in each case under exactly the same conditions, and being made with proper care and attention, and coming out different, would plainly show that the hops are not of uniform composition, if they are at all from the same bale.

"Q. Does it make any difference as to how old the sample are? A. In regard to what?

"Q. In regard to the percentage of hard or soft resins? A. Sometimes does; sometimes not. That is according to the condition under which the hops are being stored. They may change, and they may not.

"Q. Is it or not the fact that soft resins will turn into hard resins with age? A. Yes, they will; under unfavorable conditions quicker.

"Q. Will you give your answer again to that? A. Soft resins are apt and liable to change into hard resins under any conditions, but more so under unfavorable conditions of storage.

"Q. So that it is the fact, is it not, that as a sample becomes aged, the chemical analysis would show a larger percentage of hard resins and a lower percentage of soft resins, than would be the case if the sample had been chemically analyzed when it was fresh. A. That a sample of new hops would show a larger percentage of soft resin, and less of hard resin, and the same sample after some time shows a larger or more hard resin, and proportionally less soft resin: yes."

Mr. English (reading):

"*Redirect examination by Mr. English*:

"The total resin would be the same; the total percentage? A. Not necessarily; because the operation of moisture is not taken into consideration. That question was not asked. The total percentage may be even more, because they are apt to dry out, or be less if they absorb moisture. It all depends upon the condition of moisture.

"Q. Mr. Robitschek, does a low amount of resins indicate anything with reference to whether the hops were picked early or not? A. No.

"Q. Or green, or anything of that kind? A. I don't know whether it does or not.

"Q. Does the total amount of resins in a hop vary with age? A. It depends upon the amount of moisture contained in them; whether it loses moisture or absorbs moisture."

Mr. Twining (reading):

"*Recross-examination by Mr. Twining*:

"Q. You don't know anything about the conditions under which analyses were made, as shown in the book you have testified to, do you? A. What do you mean?

"Mr. English: He didn't testify from a book. I object to that. We passed by the book and went off on another exhibit."

We offer those depositions in evidence, your Honor. They were taken before Daniel B. Smith, Commissioner, by consent.

CARL ALBERT PHLEGER resumes the stand in behalf of plaintiff.

Direct Examination by Mr. Twining:

Q. Mr. Phleger, after October 1st did you go to the Peter Breidt Brewery Company? A. Yes.

Q. On how many occasions? A. I don't know just how many; on several.

Q. Well, one or two or three or four, or what is your best recollection? A. I think four times in all.

Q. State the dates. A. May I refer to copies of letters that I have written, to refresh my memory?

Q. Well, first state the dates as well as you now can recall them, without referring to any memorandum. Was it during the month of October, 1914? A. It was during the month of October, 1914, yes.

Q. And was it during any other month? A. I may have been there in November as well.

Q. Now, state what was the occasion of your visits. A. On instructions from Mr. Horst, I went down to the brewery to find out the exact situation existing there with regard to our delivery of the hops, and to inform Mr. Horst so that he would be thoroughly acquainted with the situation there, and on his instruction I endeavored to get General Collins to approve some samples for delivery in place of hops which he had already accepted and was at that time objecting to.

Q. Will you state what those instructions from Mr. Horst were?

Mr. English: We object to that—between this man and his principal. It has no pertinency as binding on us. The only thing we are concerned in is what he did.

Mr. Twining: I think the limitations of

an agent's authority are binding upon the other party to the extent, at least, that an agent cannot exceed his authority unless he is held out as having authority in excess of that which he actually has.

Mr. English: That question does not come up now. This gentleman called on us as representing Mr. Horst and as his agent. We are not taking any position that he exceeded his authority.

Mr. Twining: I press the question.

Mr. English: We object to it.

The Court: I sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Will you state whether or not your instructions were oral or in writing?

Objected to as immaterial.

Objection overruled.

A. The instructions were in writing.

Q. Have you the instructions with you? A. I have.

Q. Will you produce them? A. (Witness produces papers.)

Q. Now, will you state generally of what they consist; that is, whether or not they are in the form of letters and telegrams or otherwise? A. In the form of letters and telegrams.

Q. I call your attention to the first document, which purports to be a night lettergram, dated "San Francisco, California, October 17, 1914," and ask you whether or not that was received by you (paper shown to witness)? A. Yes, that was received by me on October 18th.

Q. 1914? A. 1914.

Q. Did that or did it not constitute part of what you have termed to be your instructions with reference to this shipment?

Mr. English: I object.

A. That was a part——

Mr. English: Wait. I object. I move to strike that out, and I object to the question.

The Court: You may state the ground of your objection.

Mr. English: Well, it is immaterial, in the first place. It asks him to characterize the paper, which speaks for itself, if it is admissible at all; and, in the second place, any instructions between the principal and his agent are immaterial and incompetent as binding on this defendant. We dealt with the representative of the plaintiff, and we know what he did and what he did not do, and what his instructions were is utterly immaterial one way or the other. We are not impeaching his instructions or saying that he exceeded them, or anything of that kind. You see, the effort apparently is to limit this man's dealings with us through some secret correspondence between him and his principal, which we knew nothing about. If this were submitted to us, it might be different, but there is no suggestion of that here.

The Court: Before any limitations of the authority of an agent can be made binding on the other party, must they not be brought home in some way to the other party? What the agent does is ostensible evidence of the

extent of his authority. To that extent the principal is bound, unless that apparent authority is qualified or limited by something of which the other party has knowledge. Is not that the rule?

Mr. Twining: I may preface this by saying that the defendant had knowledge of most of these letters, or of the important ones, as I will show in a minute; but I thought that it was always competent to show what an agent's actual authority was.

The Court (after further discussion): Well, I think the question on which this discussion arose was whether a certain paper formed a part of the witness' instructions.

Mr. Twining: That is right; that was the last question.

The Court: I think that ought not to be answered, because there is nothing to show the Court that those instructions were at that time brought home to the other party.

Mr. English: In view of that ruling, your Honor, I would say that the witness did start to answer. I move that what he said be struck out. He answered over my objection.

The Court: Certainly.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Twining: I now produce and offer in evidence the letters and telegrams and extracts from letters and telegrams just referred to, being the letters and telegrams which were produced at the hearing in San Francisco, as just stated.

Mr. English: Those produced at the

hearing were given an identification mark. Do you want to refer to them by the identification mark, so that we may know what you are talking about?

Mr. Twining: I did not think they were.

Mr. English: Well, I am mistaken about that; I thought they were; I am wrong about that. Mr. Harrison said that he desired to state on the record that he had produced the following papers, which he enumerated by their dates.

Mr. Twining: Do you object to their going in?

Mr. English: Certainly.

The Court: Have they been proved?

Mr. English: Not that I know of. Counsel said that he produced them out West. That is all this record shows about that.

The Court: I have no objection to receiving anything that you have proved or that you can prove.

Mr. Twining: As I understand it, when an exhibit is called for and produced in response to a demand, and examined by the other side, it becomes evidence. I thought that was the rule.

Mr. English: Well, that depends on circumstances. The circumstances out West were not such as to bring it within the rule that Mr. Twining mentions.

The Court (after argument): In the deposition of Mr. Horst, Mr. Harrison says, on page 207, "Before that subject is gone into, I would like to have it appear that, in answer to the previous demand of counsel, the witness has produced and counsel appearing for the defendant has examined the following papers." Then follows an enumera-

tion. It does not seem to me very clear from the testimony that anything more was done than to produce these papers on demand—that any examination was made of them or any use made of them. Perhaps you can tell me what papers are the subject of the testimony on page 206. "Mr. Alling: You are acquainted with Mr. Phleger's signature, are you?" and so on. The witness is referring to what purports to be a copy of a letter dated September 15, 1914.

Mr. Twining: That is not one of these papers; that is a letter in which Mr. Phleger said that samples had been sent to the Breidt Company; that he would be obliged if they would favor the Horst Company, by telegraph or otherwise, with their acceptance.

Mr. English: No, that is totally different from these papers.

The Court: I do not yet see that the production of these papers on demand, in the presence of the counsel who demanded their production, but who does not seem to me to have made any use of them or to have examined them, so far as the record shows, lays the foundation for their introduction without further proof.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Mr. Phleger, did you receive this telegram, dated October 17, 1914, which I hand you (paper shown to witness)? A. Yes, I received that on the morning of October 18th.

Mr. Twining: I offer it in evidence

Mr. English: I object to it because it is

between the agent and the principal, and it is not suggested that it was shown to the defendant or its representative. There is no suggestion in the case, certainly not from us, that Mr. Phleger exceeded his authority in dealing with us or that he did not have authority to do what he attempted to do.

(Mr. Twining hands paper to Mr. English.)

Mr. English: It is a night letter, signed "E. Clemens Horst Company," and addressed to "E. Clemens Horst Company." The witness is apparently a part of the E. Clemens Horst Company. There is no suggestion that it was shown to the defendant or any of its representatives, and it is utterly immaterial in this case what instructions one man in San Francisco wants to give to another part of his same company in New York.

The Court: It does not appear what the object of the offer is. If I could see the telegram, I might form some judgment on the subject.

(Mr. Twining hands paper to the Court.)

The Court: I think it may be received, without expressing any opinion as to what the effect of it may be.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The paper referred to is marked Ex. P38.)

Q. I show you a letter dated October 29, 1914, on the letterhead of the E. Clemens Horst Company, addressed to the E. Clemens Horst Company, New York, N. Y., signed by the E. Clemens Horst Company. "Settle." Did you receive that letter (paper

shown to witness)? A. Yes, I received that letter about November 3d or 4th, 1914.

Q. By whom is it signed? A. T. B. Settle.

Q. Are you familiar with his signature? A. Yes, that is his signature.

Q. Do you know whether or not he was an employee of the Horst Company at about that time? A. Yes, he was.

By the Court:

Q. At what point? A. San Francisco.

Q. And where were your headquarters? A. New York.

By Mr. Twining:

Q. Now, after receiving this telegram marked Exhibit P38, did you go to Elizabeth? A. Yes.

Q. Had you been there prior to that time? A. No; that is, at the time of making the sale I was there.

Q. Well, when was that? A. That was——

Q. In the fall or spring or summer? A. It was in the fall or the summer.

Q. Was it about the time of the date of the contract? A. Well, it was at the date of the contract.

Q. I call your attention to the contract, which is Exhibit P1, and ask you to look at the date of that contract, and then state when it was, prior to the receipt of the telegram marked Exhibit P38, that you had been in Elizabeth at the Breidt Brewery Company's brewery. A. In March, 1914.

Q. Now, had you been to the brewery between March, 1914, when the contract, Exhibit P1, was signed and the date of the receipt of the telegram, Exhibit P38? A. I may have been there the day following, March 27th, but not later.

Q. Then you mean that you had not been there between March 26 or 27, 1914, and October 18, 1914? A. No, I had not been there between that time.

Q. Now, how soon after the receipt of this telegram, Exhibit P38, was it that you went to the Breidt Brewery Company's brewery in Elizabeth? A. Within a week afterwards.

Q. And what took place on that occasion? State fully whom you saw and what you said and what the person or persons that you saw said. A. I saw General Collins, the president of the brewery——

Q. The Breidt Brewery? A. Of the Breidt Brewery, of Elizabeth, New Jersey—in General Collins's office. I told him that I had been instructed by Mr. Horst to submit to him certain samples for his approval, it being——

Mr. English: No. Is this what you said?

Mr. Twining: Yes. this is what he said.

Mr. English: I want the witness to tell me. Is this what you said?

Witness: Yes, this is what I said to the General. I said, in accordance with the instruction from Mr. Horst, I was submitting to him certain samples for his approval. After he had approved these samples, or any of them, for his contract delivery, it would be our pleasure to accept the return of a hundred bales of hops which he had already taken delivery of on his contract.

Q. Did you have any samples with you on that occasion? A. Yes, sir.

Q. How many, do you recollect? A. I think I had four at that time.

Q. Did you submit those samples to him? A. Yes, sir.

Q. Was anyone else present? A. I believe that the brew master was called in to examine the samples.

Q. Do you know what his name was? A. I believe Mr. Hubach.

Q. What did General Collins or Mr. Hubach say in response to your statement, if anything? A. They examined the samples carefully, and stated that they were not acceptable to them for contract delivery.

Q. Did anything else take place then? A. I told them I would come again later with additional samples.

Q. Anything further? A. Not at that time.

Q. When did you go down the second time? This first time, you have stated, was about a week after the receipt of P38. When was it that you went there the second time? A. I believe about a week after that time.

Q. Was it before or after the receipt of this letter of October 29th that you have identified (paper shown to witness)? A. It was after the receipt of this letter of October 29th.

Mr. Twining: I offer that letter in evidence.

Mr. English: We object to it. Nothing appears to make it material at all, and, further, that it does appear that it is a letter from the plaintiff to himself, in the person of his agent, Mr. Phleger, and there is no suggestion that it has been shown to the defendant or that the defendant had any knowledge of it, nor is there any suggestion that this witness, acting as agent for the plaintiff, acted in contravention of his authority, or that we had any knowledge of

the limitations of his authority. I think it is immaterial and incompetent.

The Court (after examining the paper referred to): The objection is overruled.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The paper referred to is marked Ex. P39.)

Q. State what transpired on the second visit to the Breidt Brewery, which you stated to have occurred about a week later than the first week.

Mr. English: Tell us whom you saw first.

Witness: I saw General Collins again, in his private office.

Q. Was Mr. Hubach there, too, the second time? A. No, not when I first called. And I showed General Collins a further line of samples, which I explained to him were samples which I was submitting to him for his approval against contract delivery, and that after his approval of any or all of these samples, Mr. Horst had instructed me to say to him that we would accept the return of the hops which he had already accepted on his contract, replacing them with hops like the sample he would approve. General Collins called in his brew master, and we examined the samples on a long table, looked at them all, and they were all rejected as being unsatisfactory by General Collins.

By the Court:

Q. Do you remember how many there were? A. I think there were eight all told.

By Mr. Twining:

Q. Now, did you go down there again with other samples? A. I went down—before leaving that time, after submitting the eight samples, General Collins said to me that he would be pleased to examine a further line of samples, but that he was in no hurry to see them, inasmuch as he had plenty of room in the brewery, and I didn't see him again, perhaps, until a month after that. I was absent on a trip in Canada.

Q. Now, did you make any report of your conversations and what had taken place at the Breidt Brewery to Mr. Horst?

Mr. English: I object to that as immaterial.

The Court: The objection is overruled.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Each time after visiting the brewery I wrote Mr. Horst that I had been there and told him of what samples I had submitted and of the General's reply.

Q. Can you give approximately the date when you next went down to the Breidt Brewery with regard to this matter? A. I think about December 1st.

Q. State who was present at that time.

The Court: Do you now mean the third visit?

Mr. Twining: The third visit, yes.

Q. This would be the third visit, would it not? A. Yes.

Q. About December 1st. State who was present at the third visit? A. General Collins and Mr. Hubach, the brew master.

Q. What took place then? What was said and what was done? A. General Collins told me that he had instructed his employees that the hops should be loaded in a car and returned to San Francisco, and that he believed that the hops had already been loaded; but I spoke to Mr. Hubach about it, and he said, no, that on account of the stormy condition the hops had not been loaded, and that he believed they were still in the brewery, but that the orders had been given by General Collins for the hops to be loaded in a car and that they would be loaded on the first clear day.

Q. Did you have samples with you at that time? A. No, I had no samples with me at that time.

Q. Did anything else take place on that third visit? A. As I recall it, I went up into the plant with Mr. Hubach, the brew master, and saw the hops there. He explained——

Q. What do you mean by "the hops"? A. Lot 13.

Q. You meant the Horst Company hops? A. Yes, the hundred bales of hops that we had delivered to the brewery. And in looking at the hops, Mr. Hubach explained that there were only ninety-nine in the lot, since one bale had become wet and had been used up to prevent spoiling.

Q. Did anything else take place on that occasion? A. I sent a telegram to San Francisco saying that——

Mr. English: No, no. At the brewery, you mean?

Mr. Twining: Yes.

Q. Did anything else take place at the brewery

on that occasion, anything else said by you or General Collins or anyone else representing the Breidt Company regarding this matter? A. Well, General Collins said that he had given instructions to load the hops in a car and return them to San Francisco, and I told General Collins that our people had said that they would not accept the return of the hops until he had approved other samples, and that it would be a very unwise thing to ship them, because, entirely regardless of the dispute, if he was going to send the hops any place, it was a poor thing to do to send them back again across the continent, over the route that had already been traveled by the hops, when the market for hops was in the East.

Q. Anything else? A. I do not recall anything further.

Q. Did you go down to the Breidt Brewery on any later occasions? A. I think I went back the day following.

Q. For what purpose? A. To find out if the hops had been shipped or removed. And at that time they had been loaded in a car on the Jersey Central Railroad. I got the car number and the facts, and wired to San Francisco that the hops had been loaded and were being returned.

Q. Did you submit any samples on this fourth visit? A. No.

Q. So that you only submitted samples, as I understand it, on your first two visits? A. Yes.

Q. Did you make any other visits after this fourth visit to the brewery? A. Those visits were made in 1914; I made no further visits in 1914.

Q. Did you make any in 1915? A. I believe that I went down there some time during the year to see General Collins.

Q. Well, with regard to this matter or with re-

gard to some other matter? A. In a general way, with regard to this matter.

Q. Well, what was the purpose? A. To find out how General Collins felt about a continuation of business and to see if there was not some plan whereby we could adjust our differences.

Q. Was that after this suit was brought? A. Yes, subsequent to the bringing of the suit.

Q. Now, I call your attention to the last part of the telegram P38, which reads as follows: "We especially anxious unload several hundred bales Sacramentos at best possible price. Sell at twelve cents delivered. If cannot, wire best price obtainable." Had that portion of the telegram anything to do with the matters in controversy in this suit? A. No, it had nothing to do with it whatever.

Q. I show you a letter purporting to be signed by yourself, directed to the E. Clemens Horst Company, at San Francisco, and dated November 4, 1914, and ask you whether or not that is your signature (paper shown to witness)? A. Yes, that is my signature; I wrote that letter.

Q. Was it mailed to the Horst Company, in San Francisco? A. Yes.

Mr. Twining: I offer it in evidence.

Mr. English: (After examining the paper referred to.) This seems to be in the same class as the other, but a little worse, if your Honor please. It is a report from the agent to the principal, and there is no suggestion that it was shown to our people, or the defendant or its representatives, and it might be one of these self-serving declarations, so-called. We object to it as immaterial and incompetent and as not binding on the defendant.

The Court: The objection is overruled.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

[The paper referred to is marked Ex. P40.]

Q. I show you the letter dated November 4, 1914, and ask you if that is the report you made to Mr. Horst of your first visit at General Collins's brewery paper shown to witness)? A. Yes, that is the report that I made to Mr. Horst after my first visit with samples.

Q. Yes, I mean your first visit in the month of October. A. Yes.

Q. Now, I show you a letter dated December 8, 1914, purporting to be signed by you and addressed to the Horst Company at San Francisco, and ask you whether or not you signed that letter (paper shown to witness)? A. Yes, I wrote that letter and signed it.

Q. Did you mail it at about the date it is dated? A. Yes, December 8th.

Mr. Twining: I offer it in evidence.

Mr. English: (After examining the paper referred to.) We object to this on the same ground as the last previous one, your Honor.

The Court: The objection is overruled.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal .

(The paper referred to is marked Ex. P41.)

Q. Is this the report that you made to your company of your second visit with samples in the fall of 1914 at the Breidt Brewery Company?

The Court: Referring to the letter just received?

Mr. Twining: Yes, referring to P41.

A. No, I think this is the report of the third trip.

Q. This was the report of the trip at which you did not have samples? A. I so testified, that I did not have samples, but on referring to this letter, I see that I had samples, but evidently did not submit them, since he was returning the hops.

Q. Is that your recollection, that you did or did not submit samples on your third trip? A. It is my recollection that I did not submit them, although I had them with me.

Q. You testified that you sent a telegram to your company after you learned at the Breidt Brewery Company that the hops were to be shipped back to San Francisco. I show you what purports to be a a copy of a day letter, dated December 10, 1914, and ask you if that is the telegram that you referred to (paper shown to witness)? A. Yes, that is a copy of the day letter that I sent.

Q. And is that the one that you referred to in your testimony? A. Yes, in the testimony.

Mr. Twining: I offer it in evidence.

Mr. English: (After examining the paper referred to.) We make the same objection as before.

The Court: I shall receive the letter.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The paper referred to is marked Ex. P42.)

Q. Did you make any demand on the Breidt Com-

pany for payment for these hops, for the hundred bale shipment? A. Yes, I drew a draft on them.

Q. Was the draft paid? A. No.

Q. And have you the draft in your possession? A. Yes, it is in that pile of papers.

Q. Well, state, according to your best recollection, when the draft was drawn, the date, what month. A. In December, 1914.

Q. Was it drawn in pursuance of express instructions from Mr. Horst? A. Yes.

Q. I show you what purports to be a letter from the E. Clemens Horst Company, at San Francisco, to the E. Clemens Horst Company, in New York, dated December 19, 1914, and ask you by whom that is signed (paper shown to witness)? A. On behalf of the company, by Mr. Settle.

Q. Is that the letter to which you had reference just now, instructing you to draw a draft against the Breidt Company? A. Yes.

Mr. Twining: I offer it in evidence.

Mr. English: (After examining paper.) We have no objection. We do not dispute that we have not paid for the hops.

(The paper referred to is marked Ex. P43.)

Mr. Twining: It is admitted that on or about the latter part of December, 1914, a draft was drawn on the Breidt Company by the Horst Company and was not paid.

Mr. Stamler: We will admit that.

Q. Now, Mr. Phleger, have you stated everything that you can now recall which took place between you and the representatives of the Breidt Company subsequent to October 1, 1914, on the occasions when you called at the brewery in Elizabeth—the

Breidt Brewery in Elizabeth? A. Yes, I believe I have covered everything in my testimony that happened.

Q. And have you had any communications with regard to the matters in controversy in this suit with representatives of the Breidt Company elsewhere than at Elizabeth? A. No, only at Elizabeth.

Q. And on the occasions that you have testified to? A. Yes.

Cross Examination by Mr. English:

Q. You say when you went to the brewery on these various trips you met General Collins and Mr. Hubach. Did you meet anybody else down there? A. I would go in the brewery office, and I would see other employees of the office, but my business would be with General Collins, and as soon as he would be ready to see me I would be taken in to see him, and my business would be with him while I was there.

Q. Did you talk to anybody else besides General Collins about these hops? A. No, only General Collins and Mr. Hubach.

Q. Well, was anybody else present at any time when you talked with either of those men about these hops? A. Do you mean at the time I submitted samples?

Q. Any time; take your choice; any one of these trips. I want to know if you talked to anybody else besides General Collins and Mr. Hubach or if you talked to them in the presence of anybody else on any of these occasions? A. No, I didn't talk to anybody else, and, to the best of my knowledge, no other person was present at the times I talked to General Collins and Mr. Hubach.

Q. Where is General Collins's office in the brewery, what part of the building, upstairs or downstairs? A. I think he used two offices. The one I term his private office is upstairs, and he has an office downstairs, too.

Q. Well, where did you talk to him? A. On the first occasion, at the time I made the contract, in his lower office, and at different times I went to see him about the approval of samples, in the upper, or private office.

Q. That was beginning in October? A. Yes, sir.

Q. Would you wait for him in the upper office or in the lower office? A. Well, I would wait for him on the ground floor.

Q. Now, there were others in that office down there, were there not? A. What is that?

Q. There were persons in that office on the ground floor? A. Yes.

Q. Now, did you talk to them while you were waiting for General Collins upstairs? A. I may have bid the time of day, but I didn't have anything to say about my business there.

Q. Did you not learn that between the time you made your contract, in March, and when you made subsequent visits, in Ocober, that General Collins had changed his private office from the downstairs room to the upstairs room? A. No, that was not told me.

Q. You accounted for the fact, according to your mind, of the two offices—— A. It was not explained to me.

Q. Well, you found him in the downstairs office in March and in the upstairs office in October, at any rate? A. Yes.

Q. Do you remember a young lady stenographer in the downstairs office? I think she was present in court the first day that we had the trial. A. Yes.

Q. You remember her? A. Yes.

Q. A nice looking young lady? A. Very neat.

Q. Do you remember anybody else who was downstairs in that office? A. I think there were two other gentlemen there.

Q. Can you remember their names? A. No.

Q. Did you hear their names? A. No.

Q. Could you describe them or would you recognize them if you saw them again? A. I can't recognize them; I couldn't describe them.

Q. Two men and a young lady in the office downstairs; is that right? (No response.)

Q. I am speaking now of October and subsequent dates. A. You say there were three in the office there?

Q. That is what I am asking you. A. I believe I saw three people in the lower office.

Q. Two of them men and one the young lady? A. Yes.

Q. The General's office was upstairs? A. Upstairs, yes.

Q. Now, you cannot be absolutely accurate at this late date as to everything that you have described, can you? A. Well, with regard to my interviews with the General, yes, I can be very definite about that, because that is very important business, and I so seriously considered it——

Q. Well, the reason I asked you that, I noticed that you changed your testimony, having said that you had not brought samples on the third visit, and you subsequently say that you did bring samples, but did not exhibit them, so that I wondered whether that was an exhibition of the accuracy or inaccuracy of your recollection at the present time. A. No, it seems to me that that is a matter of minor importance, because I did not submit the samples to him for approval, so that the fact that I had them with me did not make any difference in my mind, as long as I didn't show them.

Q. Well, you have a fairly good recollection of what took place on those visits, because you sat down and wrote a letter afterwards, and you now refresh your recollection from the letter? A. Partly that, yes.

Q. And I take it that you say your first visit was on October 18th, or hereabouts, because you wrote a letter shortly after that describing that visit, is that right? A. Yes, that would be one of the reasons.

Q. Now, you do not undertake to say that that was the first time that you went there after the shipment arrived, do you? A. In October?

Q. Yes. A. With reference to the telegram received by me on October 18th——

Q. Oh, undoubtedly, because that telegram was not dated until October 17th. But what I want now is to have you search your recollection and see if you do not remember that you went there on an earlier date, before you got that telegram. A. No, I wasn't there before October 18th; I know that.

Q. Do you know what day this shipment arrived? A. No, I don't at the moment.

Q. Well, it appears that it was October 1st. Do you know what day of the week that was? A. No.

Q. Well, you can take my word for it that the calendar shows Thursday. Do you remember getting a telephone message on the following Saturday, which would be the 3d of October, at your office? A. From whom?

Q. From the brewery. A. No, sir.

Q. If you were not talked to personally, do you remember that your stenographer, or whoever it was, got such a message? A. If there had been any such call I would have gotten it myself.

Q. I am asking you if you remember whether you did receive any such calls? A. I am positive I didn't receive it.

Q. You do not remember that? A. I am positive I didn't receive it.

Q. Do you remember that you went to the brewery on the following Monday, which was the 5th of October? A. No, I don't remember that I did.

Q. You do not remember that either? A. No.

Q. And that on that occasion you went into this downstairs office and there encountered the two men and the young lady who occupied that office? A. No, I don't recall that.

Q. You don't remember that either? A. No.

Q. Do you remember the names of either of those men? A. No.

Q. Was one named Butler? Do you remember that name? A. No, I don't remember it.

Q. Was the other named Loehrs? A. No, I don't remember that either.

Q. Do you remember that one of the men was a thick-set, heavy fellow, with glasses, pompadour hair? A. No, I couldn't describe his appearance; I don't remember his appearance.

Q. Do you remember the other man, Loehrs, with a black moustache, a tall man? A. No, I don't remember him either.

Q. Can you make a better success of describing the young lady, do you think? A. Well, I could becauseas a general rule there are not very many young ladies in those offices, you know, and it is rather unusual to see a young lady there, so that I remember that there was a young lady.

Q. Now, you have no recollection of the visit on Monday, October 5th? A. No, I have not.

Q. Maybe I can help your recollection a little more. Don't you remember that on that occasion General Collins was not in and you could not see him? A. No, I don't remember.

Q. And that you had some conversation with Mr. Loehrs and Mr. Butler? A. No.

Q. Can you remember that the person whom you met, Mr. Butler, or Mr. Loehrs, told you that the brew master had condemned the hops? A. No, I don't remember that.

Q. And do you remember that you requested them to tell the General not to return them, that you would see about an exchange that would be satisfactory? A. No, I don't remember that.

Q. And do you remember that in your presence, in this room, Mr. Loehrs dictated to the young lady stenographer a message to that effect—to the effect to tell the General that you had called, and that he told you that the brew master had condemned the hops, as they were very poor, and that he wanted to return them, and that you requested him not to return them, but that you would exchange them, if the General was not satisfied with the shipment? A. No, sir; I do not.

Q. You cannot remember that at all? A. Not at all, no.

Q. And apparently you did not report that to Mr. Horst? A. No, I have no recollection of ever having taken part in any such proceeding at all.

Q. You seem to have observed this young lady somewhat. Did you observe what kind of a notebook she used? A. No.

Q. Well, I have got a stenographic notebook here. Is there anything familiar about this, from your visits at the brewery—an ordinary stenographer's notebook, so labelled on the outside (book shown to witness)? A. No, I don't remember having seen that before.

Mr. English: I will ask to have this marked for identification. It is a stenographer's notebook, indorsed on the outside, "Stenographer's notebook, from August 20, 1914, to October 12, 1914."

(The paper referred to is marked D31 for identification.

Q. Now, can you remember that you called the next day, can you remember that? A. No, I don't think I called the next day.

Q. And that on that second visit, which was the next day, October 6th, you saw General Collins? A. No, I don't remember.

Q. You cannot remember that either? A. No.

Q. Now, you have testified on the first day that you were on the stand in this case that you saw the hops at the brewery. Do you remember that? A. Yes, sir.

Q. When did you see them there? A. Oh, in October, 1914, and in November, 1914.

Q. That was your previous testimony. I want to know what date in October you saw the hops there? A. The latter part of October.

Q. Well, can you come any nearer than that? A. No, I couldn't come any nearer to a definite time than that.

Q. Well, on which visit when you saw General Collins, that you described in your testimony today, was it that you first saw the hops, as you remember it? A. I should say on the third visit, which brings it in the first part of December.

Q. You think that is the first time you saw the hops? A. No, I think that is the second time. I don't remember the first date, but I am positive I did see them just before they were loaded on the car there, the first part of December, 1914.

Q. Well, on which visit to the General was it that you saw them just before they were loaded on the car? A. I think it was the second.

Q. Do you remember the date of that? A. I think that was about the end of October or the first part of November.

Q. What was the occasion of your seeing the hops? How did that come about? A. I am under the impression that I asked for the privilege of drawing a sample from the lot.

Q. Well, was that privilege accorded to you? A. I believe that it was, that I was permitted to look at the hops and take a small handful out of one of the bales.

Q. Did you send those to Mr. Horst? A. No, I didn't send those to Mr. Horst.

Q. Why not? A. Well, I simply examined them, looked at them.

Q. Do you claim to be qualified to pass on the grade of hops? A. Well, I have handled a good many hops and deliveerd them on contracts calling for certain specified grades; I know by experience pretty well what certain grades are.

Q. Well, did you undertake to pass judgment on these hops at your examination? A. Yes, I would. I saw the hops there——

Q. No, I do not ask you what your judgment is; I want to know whether you did undertake to pass judgment on them? A. Judgment to whom, to myself?

Q. Yes. A. Well, of course, I would; just as soon as I saw the hops I had my own idea about what the grade was.

Q. You made up your mind about them, did you, when you looked at the samples? A. Yes.

Q. Now, did Mr. Hubach, the brew master, tell you that he had brewed up a bale, or a part of it? A. No—yes, he said that one bale had become damaged in the brewery, and he had used it to prevent spoiling. That is right.

Q. Did he say how he had used it? A. No. I presume that he boiled it in the kettle.

Q. To make brew with? A. Yes.

Q. Did he tell you about that brew, the result

of it? A. No, he did not. I would have been much surprised if he had, because it is presumed——

Q. I do not care about your surprise. Did he tell you the result of that brew? A. No.

Q. He did not give you a chance to sample it? A. No.

Q. Now, the first visit that you can remember of now is the one provoked by this telegram from the Horst Company to you dated "San Francisco, California, October 17, 1914;" is that right? A. Yes.

Q. And as appears from that telegram, your people had already received the letter of the defendant rejecting the hops? A Let me see it, please. (Plaintiff's counsel hands paper to witness.) A. Yes.

Q. And you are dead sure that you went down the next day, which was the 18th? A. No, I said within a week following the receipt of that wire.

Q. Oh, I thought you said you went on the 18th.

Mr. Twining: No, he said he received it on the 18th.

Q. Can you fix it any nearer than the range of a week within the date of the receipt of that wire? A. No, I don't remember; I don't believe I could come any closer. I went down the first opportunity that offered after the receipt of the wire.

Q. And was that your first trip, that you can remember—your first visit to the brewery? A. Yes, in October, 1914.

Q. Well, I mean in October. A. Yes.

Q. And was it on that occasion that you saw the hops, or later? A. Later.

Q. And every time that you went there it was in the interests of trying to make an exchange of the hops rejected for a shipment of other hops?

A. Yes, to make an exchange of the hops accepted for a shipment of other hops.

Q. Well, now, do not be so strenuous to get in this "accepted" feature. My question is whether every time that you went there it was in the interest of trying to make an exchange of the hops that had been shipped and received at the brewery in exchange for another shipment of hops that you proposed to ship? A. Yes, that is right.

Q. And you discussed that thing with General Collins every time, did you not? A. Yes.

Q. And the General always took the position that he was willing to live up to his contract, did he not? A. Yes.

Q. The only thing he insisted on was hops up to the contract quality, was it not? A. Well, he insisted on being submitted samples.

Q. Well, his contract entitled him to that, did it not? A. Yes, but we were tendering him samples right along.

Q. I know you were, but he insisted on having shipped to him a hop which was based on a sample that he had approved, did he not? A. No, I should say that his inspection of the samples was to approve a sample for a delivery which we were willing to make in place of hops that had been received.

Q. That is what I am trying to get at. Before he would let you send him hops he wanted you to submit him a sample of the kind of hop that he would receive as within the contract requirement; isn't that it? A. That is not exactly it——

Q. I am trying to get at his point of view, as he expressed it to you. Did he not say that he was willing to live up to his contract? A. Yes.

Q. And as a part of living up to his contract, he wanted you to submit him a sample of the hops, did he not? A. Yes.

Q. And before he would let you ship hops he

wanted to approve the sample, did he not? A. No, I won't say that, because I don't think from my conversation with him that he would have objected to shipping hops to him.

Q. Well, he was not likely to assent to the hops that you shipped until he had first approved samples, was he? A. No, I won't say that; I think he would have taken the hops if he liked them.

Q. If they were up to the contract requirements? A. Yes, if they were up to the contract requirements.

Q. And the reason that he gave you for rejecting the shipment that you did send him was that they were not up to the contract requirements, in his judgment; isn't that right? A. Yes.

Q. Plus the fact that you sent them on without any samples being approved? A. I don't recall that he made that objection to me, because I don't suppose that he would have objected to it at all if he had been satisfied with the hops after he had them in the brewry.

Q. Did he not complain of the fact that you had sent on these hops without having first waited to have the samples approved? A. Yes, he may have objected.

Q. Well, can there be any doubt about it? Let me show you your letter to the plaintiff, at San Francisco, Exhibit P41, dated December 8, 1914. I call your attention to this language: "He said that you had sent samples, and then shipped the hops without waiting his approval of any of the samples sent." You wrote that, did you not (paper shown to witness)? A. Yes.

Q. And you wrote that because he complained of that very thing, did you not? A. Yes.

Q. So that he had two grievances against you: first, that you had sent hops without waiting to have the samples approved, and, secondly, the hops

that you did send were not, in his judgment, up to the standard of the contract? A. Yes, I think he voiced both of those objections.

Q. Now, you remember that in your conversation with him he said—I do not know that I am using his exact language—but he said in effect that he would give you the benefit of every doubt and be fair with you and send the hops for examination to the scientific station? A. He may have said that.

Q. And you knew, or afterwards learned, as a matter of fact, that he did send the hops to the scientific station? A. Yes.

Q. And you learned also that the scientific station reported adversely to the quality of the hops, did you not? A. Yes, subsequently.

Q. Now, on which your visits to his office was it that he told you that he had sent them to the scientific station? A. On my first visit in October, that I described, towards the 25th of October.

Q. Whatever date it was, the first time that you saw the General was when he said that, in order to be fair with you and give you the benefit of the doubt, or whatever language he used, that he had sent samples of the hops to the scientific station? A. No, at the time I went to the brewery with a line of samples for him to approve he told me that the samples which had been previously sent to him, which had been analyzed, were reported to him unfavorable at that time.

Q. And those were samples of hops that your people had sent on from California? A. Yes, sir.

Q. Were they samples of the samples sent or samples of the shipment? A. I couldn't say as to that.

Q. One or the other, at any rate? A. Well, they were certainly samples that we had sent him.

Q. Well, as a matter of fact, they were samples

of the shipment sent, were thy not? A. Probably.

Q. And that was part of that one-hundredth bale which Mr. Hubach said was damaged, or whatever he said about it? A. I wouldn't say as to that. If a bale is damaged, it is a poor thing to send a sample from.

Q. No, I don't mean that he sent a sample of damaged hops, but I mean that he sent a sample from that bale that he pointed out to you afterwards. You said there were ninety-nine bales untouched.

Mr. Twining: I object to the question because the witness cannot know the answer to the question.

Q. Well, you sent one hundred bales? A. Yes, sir.

Q. And ninety-nine were untouched? A. Ordinarily a bale would be considered untouched if you just took a sample out of it; it wouldn't affect the bale any.

Q. Do you know what scientific station it was that made that analysis? A. Well, I believe that it was the First Scientific Station.

Q. That is over on Worth street, New York. That station makes analyses for your company, too, does it not? A. Yes, it has.

Q. At the present time? A. Well, not recently, that I know of.

Q. Well, since this shipment was sent your people have taken them on, have they not, as their analyzers? A. I think they have done some work like that for our company.

Q. You did not use them before that, did you? A. I couldn't say as to that.

Q. You have no knowledge of it, anyway? A. No.

Redirect Examination by Mr. Twining:

Q. Mr. Phleger, how do you know that you were not at Elizabeth during the month of October prior to the 18th of October? (No response.)

Q. Can you answer that question, Mr. Phleger? A. Well, my only purpose in going to Elizabeth would be to see——

Mr. English: No, not what would be your purpose.

Mr. Twining: On what ground are you objecting to this?

Mr. English: I think it is an improper answer.

Mr. Twining: I do not object to it as not being responsive. It seems to me to be material.

Mr. English: I did not say it was not responsive; I said it was improper. It calls for a matter of fact, and this witness is giving a hypothetical answer.

The Court: The question is, "How do you know?" The question was not objected to. I think it is unobjectionable, the witness having stated with some positiveness that he was not there before that date and that he knew he was not there. Now, the question is, "How do you know?" The witness ought to be allowed to say how he knows.

(Objection withdrawn.)

(Question read.)

A. Well, I wouldn't have been in Elizabeth except to see the Peter Breidt City Brewery Company, and I know that I was not there before the receipt of that wire on the morning of October 18th.

Q. How do you know that? A. Because that

was the first advice that I received that the delivery—that there had been an objection to the delivery, and so I wouldn't have any occasion to go down there before the hops were actually delivered and received there.

Q. Was that the first advice that you had from any source that the shipment, lot 13, the hundred bale shipment, was not accepted or acceptable to the Breidt Company? A. Yes, that was the first advice I had that it was not acceptable.

Q. The telegram that you refer to is P38, is it not—the one that I show you now (paper shown to witness)? A. Yes.

Q. Dated October 17, 1914? A. Yes, P38.

Q. State whether or not on the occasions when you saw General Collins during the months of October and November, 1914, to which you testified, and upon which occasions you discussed with him the acceptance by him of other shipments, or other hop samples, it is or is not the fact that you then also stated to him what your instructions were from the Horst Company. Answer yes or no to this question. A. Yes.

Q. What did you on those occasions state your instructions to be? A. I told him that I had no authority to accept the return of the hops; that I had been instructed to tender him further samples for examination, and that Mr. Horst had instructed me to tell him that after his approval of any of these samples that we would be pleased to make him another delivery. but that we wouldn't accept the return of the hops already delivered to him until he had approved other samples.

Re-cross Examination by Mr. English:

Q. Whatever authority it is that you are talking about now you got out of these telegrams and letters that were put in evidence this afternoon; isn't that so? A. And my definite instructions from Mr. Horst at the time I went to work for him and since, that I was always——

Mr. English: Do not tell us what they were.

Mr. Twining: I submit that the witness should be allowed to complete his answer.

Mr. English: His private instructions from Mr. Horst are not in evidence and are not in writing and are not brought home to the defendant.

(Question read.)

The Court: The witness is asked to explain his answer. You may finish your answer.

(Answer read.)

Witness: —to act in these matters only on his definite instructions and subject to his confirmation.

Q. These are your instructions that you have been telling us now; that is what you understand to be your instructions from Mr. Horst? A. What are those? You say that I have been telling you now?

Q. Yes, in this answer that you have just made, in your last answer. A. Yes, those were my instructions.

Q. Do you say that you told all those to General Collins? A. No, I dont' say that I told them all to General Collins.

Q. You have been telling us what your arrangement was with Mr. Horst? A. Yes, sir.

Q. But you do not claim that you told all that to General Collins? A. No, I told General Collins just as I have testified.

Q. I want to show you a letter annexed to the depositions here taken in California, which was marked there "Defendant's Exhibit on Cross-Examination of Witness Horst, No. 1," and is a carbon copy of a letter apparently dated September 16, 1914, written to the defendant by the Horst Company through yourself and it bears your signature; is that right (shown to witness)? A. Yes, that is my signature.

Q. That is a duplicate of the letter that went to the defendant, is it not? A. Yes.

Q. And signed by you? A. Yes.

Q. And you sent that out to the San Francisco office for their information? A. Yes.

Q. That is dated September 16, 1914, is it not? A. Yes.

Q. And in that letter you ask the defendant to inspect the samples which had been sent out from California, do you not? A. Yes, sir.

Q. Now, it appears, does it not, that on the very day that you were writing the defendant to inspect the samples the California office was sending on the shipment?

Mr. Twining: If you know.

A. If I know. This letter was not written to the Peter Breidt Brewery Company on any instructions from San Francisco.

Q. I am not dealing with instructions; I am dealing with facts. You have listened to the deposition in this case, and it appears that the goods left California on September 12th, and were re-

consigned from Chicago on September 17th. You remember that fact, do you not?

Mr. Twining: I object to the question, if the Court please. It is improper to incorporate in the testimony the effect or substance of testimony previously taken.

(Question withdrawn.)

Q. What was your object in writing this letter, Mr. Phleger? A. The letter was really written due to an oversight. We had received a letter from San Francisco saying, "Hurry up these contract brewers; get them to approve samples;" without specific instructions as to any specific brewer, and then we got out letters with respect to every brewer, without regard to what shipment the delivery was on. We simply had a copy of a letter that our San Francisco office had written previously to these different people. This was just a letter to hurry up the samples, without any direct relation to anything that may have transpired between San Francisco and the brewer.

Q. And you referred to a letter by the San Francisco office to the defendant dated September 7th, did you not? A. Yes.

Q. With reference to those samples? A. Yes, we just noted a copy of the letter as it came in and sent this as a follow up.

Q. And then you wrote the defendant to indicate which of the samples would be satisfactory? A. Yes.

Q. And the next thing that you expected from them was that the defendant would notify you which of the samples was satisfactory, did you not? A. Not necessarily; we didn't know what position it was in.

Q. Well, you expected, if they had not already

approved, for them to approve and notify you ? A. Yes.

Q. And when you got that approval you would have sent it out to California, would you not? A. We would have advised them.

Q. And you say here, in very polite language, that you would appreciate a response indicating whether they would be interested in the further purchase of this quality, and all that? A. Yes, that was the way the letter was written, so that we could sell more hops.

Q. You wanted to sell them further hops? A. Yes, sir.

Q. So that the letter had a double object; one was to approve the samples that were sent and one was to see if you could not do more business? A. Yes.

Q. And you were so anxious to do that that you asked them to telegraph? A. Well, that confirms my statement that we sent those——

Q. Just answer my question. Did you not ask them to telegraph you? A. Yes, we wrote——

Q. Telegraphic advice? A. Yes.

Q. And then when you got the approval of the samples you would have telegraphed out to California, would you not? A. Yes, we would include it.

Mr. English: I would like to have this letter marked for identification.

(The paper referred to is marked D32 for identification.)

Q. Let me call your attention to the letter which was referred to in California, under date of March 26, 1914, marked in California "Plaintiff's Exhibit No. 24" (paper shown to witness). That was a letter that you wrote concerning the original contract? A. Yes, that is right.

Q. And it was sent to General Collins by registered letter? A. Yes.

Mr. English: This letter is already in evidence as Exhibit P24 A.

PLAINTIFF RESTS.

ADJOURNED until tomorrow, Tuesday, April 10. 1917, at ten o'clock A. M.

TENTH DAY.

Tuesday, April 10, 1917.

Met pursuant to adjournment.

Present, counsel as before stated.

Mr. Twining: If your Honor please, I shall want to recall Mr. Phleger. I neglected to ask him three questions.

The Court: You may do so.

Mr. Stamler: We have no objection.

EDWARD A. WILLIAMS, sworn in behalf of defendant.

Direct-Examination by Mr. Stamler:

Q. Mr. Williams, what is your business? A. I am what is known as a hop inspector.

Q. And where do you reside? A. Brooklyn.

Q. And where are you employed? A. Employed by Elmer E. Fingarr, New York City.

Q. What business is he engaged in? A. He is a hop merchant.

Q. How many years have you been engaged in the hop business? A. Since 1892.

Q. And what have been your duties since that time to the present time? A. Taking care of the shipments and inspecting the hops as they go out.

Q. Are you a hop grader? A. Yes, sir.

Q. Is that the technical name? A. Yes.

Q. That is the name that you go by? A. We are known in the trade as hop graders.

Q. Have you any connection with the First Scientific Station of New York? A. Yes, sir; they send their samples to me for my opinion.

Q. When a sample is sent to you by the First Scientific Station, do you know where that sample comes from—that is, delivered at the scientific station? A. No, sir; it simply comes from the station; I don't know who sent it to the station, if that is what you mean.

Q. Yes. A. I don't know that; no, sir.

Q. I show you a paper and ask you whether it is in your handwriting (paper shown to witness)? A. It is; I wrote that.

Q. And to whom did you deliver that paper after you wrote it? A. The scientific station sent a young man down to our office with these samples, and I graded them and wrote that as my opinion of the samples that he gave me, and handed it to him.

Q. I call your attention to a number which purports to be 118,543 on that sheet of paper, and ask you what that purports to be (indicating? A. Well, these samples come to me as numbers. The sample was numbered 118,543; that was the number on the sample.

Q. Did you examine that sample? A. Yes, sir.

Q. Could you tell without the aid of that paper what hop you examined and what your determination was on that sample, without the aid of that

paper? A. No, I would have to look at that.

Q. Yes or no? A. No.

Q. You could not? A. No.

Q. Could you by inspecting that paper, upon examining that paper, tell what you examined and what you found? A. I would know that I examined the sample and graded it according to those specifications.

Q. Was that a true grading of that sample? A. Positively.

Q. Refreshing your recollection from that paper, which is marked "Exhibit D1 for identification" on the testimony of Robert Schwarz and others, I ask you to tell us how you found the hop in question?

Mr. Twining: I object to the question, if the Court please, on the ground that the quality of this sample, or the grade of this sample, or of any sample, is immaterial to the issues now before the Court.

The Court: As to that question I shall rule as I have previously ruled, reserving my decision, overruling the present objection, and giving the right to an exception, if it becomes necessary.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Stamler: Answer the question.

A. You wanted to know how this sample graded that came to me. That is No. 118,543, and I graded it just as I found it. It was a Pacific, 1914; the quality was fair, and it was thin—I mean by that that it was thin in lupulin—and the flavor was fair. It has a grassy flavor, instead of having the pungency of a hop.

Q. Anything else? A. The flavor generally is grassy and fair. That is all. I made a note on the bottom, "The above three samples are hops which do not keep their qualities very long; they age quickly."

By the Court:

Q. My question is whether the marks which you have made refer to three samples? A. Refer to that sample.

Q. Not to three samples, but to one sample? A. One sample.

By Mr. Stamler:

Q. Now, was the sample submitted to you equal to or better than a good Pacific Coast brewing hop of the year, or the crop, of 1914?

Mr. Twining: I object to that on the grounds stated in my last objection.

The Court: The same ruling and exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. No, sir.

Q. Do you know where the hop was grown? A. I know at the time I looked at that sample; yes, sir; but I didn't specify it there in the paper.

Q. Where did that sample come from?

The Court: What is the source of the witness's information?

Mr. Stamler: That is what I am to find out.

A. I don't know; I don't know that sample; I couldn't tell. I have graded samples that way that came from Sacramento, and usually that is how they run there.

Q. What other districts do hops come from from the coast? A. Hops are grown in Oregon, Washington and in California, several sections in California, and there are several sections—two sections in Washington.

Q. Comparing the hops from the various sections, which section do we get the best hops from? A. From Sonoma, in California; from Yakama, in Oregon. Those three sections are very good hops.

Q. And from which section do we get the poorest hop? A. I consider Sacramento the poorest section on the coast.

Q. What do you base your opinion on? A. The quality generally. The Sacramento hop is a hop which deteriorates very quickly.

Q. Has it anything to do with the market where the hop comes from?

Mr. Twining: I object. The witness has not qualified to testify on market price.

The Court: Not yet.

Q. You say you have been engaged twenty-five years in the hop business? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And have you sold hops during that period of time? A. No, that is not my business; I never sell hops.

Q. [By the Court.] Your business is inspection? A. Inspection; I am a hop inspector and a grader.

Q. [By Mr. Stamler.] You said a moment ago that the above three samples are hops which do not keep their quality very long; they age quickly. The Judge asked you whether you meant three

samples or the sample in question. A. Yes, sir; I meant the sample—I am talking about this sample that you called my attention to. I have not looked above at those samples to see what they were.

Q. This sheet of paper contains three reports, then? A. Yes.

Q. On three different samples; is that right? A. Yes, sir; I graded three samples. The numbers were as represented there.

Q. And the last statement made applies to all the three? A. Yes, sir.

Q. Including the sample 118,343? A. Yes, sir.

Q. Now, when you say that the hop was grassy, what do you mean by that? A. It lacks flavor; it does smell something like hay.

Q. What is the cause? A. Improper cultivation, immature, picked too quickly, or perhaps it comes from the nature of the soil.

Q. You say "thin in lupulin." What do you mean by that? A. The lupulin is the principal part of a hop. It is a yellow pollen, and that is where the hop gets its value; that is the essence of a hop. The essence of the hop is the lupulin. It is like the pollen in a flower; it looks like it, too.

Q. How are hops graded in the market? A. Well, the best hop is a choice hop; the next best is a prime, then the medium, then the poor.

Q. The samples which you examined would come under what grade that you specified? A. I said fair quality there. That is between a medium and a poor hop; that is a little lower than a medium.

Cross-Examination by Mr. Twining:

Q. Mr. Williams, when you inspect hops what do you do? A. Take the hop and examine it and break it apart to look at it for its intrinsic value

generally, flavor, its picking, it matureness, whether it is slack or high, dried, or whether it is properly cured.

Q. Well, your inspection consists in looking at it, by feeling it in your hands and smelling it? A. Yes, sir.

Q. It does not consist in any chemical analysis? A. I know nothing about the chemical analysis of a hop.

Q. How long does it take you to make an ordinary inspection of a sample of hops? A. A few minutes.

Q. You thought that these samples were about the same as Sacramento hops usually ran? A. Yes, sir.

Q. Now you stated in response to a question asked by counsel that, in your opinion, this was not as good or better than a good Pacific Coast brewing hop of the crop of 1914. You stated that there were four grades of hops, choice, prime, medium and poor? A. Yes, sir.

Q. Where does good come in in that classification? A. Well, the trade terms are those four terms which I have mentioned, but often still other names, like fair or good or—fair or good I have used.

Q. (By the Court.) But taking your classification, where does good Pacific Coast brewing hops of the crop of 1914 come in? A. A good Pacific Coast brewing hop would be what we call a strictly prime hop.

By Mr. Twining:

Q. What is the difference between a good hop and a good brewing hop? A. We always speak of them as good brewing hops.

Q. Is there any difference between a good hop and a good brewing hop? A. Yes, a good brewing

hop is a hop that contains a little more lupulin; it has a little more—a better flavor than a good hop.

Q. Then you think that a good brewing hop is better than a good hop? A. A good brewing hop is strictly prime hop; a good hop is a prime hop. We use the words "strictly prime" speaking of a good brewing hop.

Q. And then there are a great many more classifications than those that you have stated? A. Only about those.

Q. What about the fancy hops? A. That is classed as an export quality.

Q. Then there is such a term as an export hop? A. Yes.

Q. Ahead of choice or behind choice? A. Well, I never say "fancy hops;" I say "choice." That is as far as I go.

Q. What kind of hops do you generally grade, Pacific Coast or New Yorks? A. Pacific Coast and New York; very few New York State hops.

Q. Few New York State hops? A. Yes, sir.

Mr. Stamler: I shall mark for identification that paper from which the witness testified.

(The paper referred to is marked D33 for identification.)

MARTIN MOAKLER, sworn in behalf of defendant.

Direct Examination by Mr. Stamler:

Q. Mr. Moakler, where do you reside? A. Cooperstown, New York.

Q. How old are you? A. Fifty years old.

Q. And what is your business? A. Hop dealer and hop grower.

Q. And how long have you been engaged in that business? A. Well, almost all my life; dealing in hops about twenty years.

Q. Do you sell and buy Pacific hops? A. I do.

Q. Did you buy and sell Pacific hops during the year 1914? A. I did.

Q. Did you sell spots and futures that year? A. I did.

Q. During the month of October, 1914, did you sell spots or futures in Pacific? A. I did.

Q. Are you familiar with the market value of hops? A. I think so, yes.

Q. And were you familiar with the market value of hops during the year 1914? A. I think so.

Q. Well, have you bought and sold during the year 1914 and during the month of October? Were you familiar with the market price during the month of October, 1914? A. I was.

Q. For spots and futures? A. I was.

Q. What was the market price for spots of a good Pacific Coast brewing hop for the year 1914?

Mr. Twining: I object, if the Court please. The market price for spots, if there was any, would not determine this question. The contract was for the sale of a hundred bales of hops of the crops of each of the years 1914, 1915, 1916, 1917 and 1918, and the contract having been breached in October, 1914, the value of spots then would have no materiality, because, so far as the 1914 crop was concerned, that had been delivered and accepted, and the damages as to that crop would be the contract price. So that the value at that time of the

1914 crop—in other words, the value of spots—would have no bearing upon the damages which might be recovered in this suit. The damages, if any, which would be ascertainable as of that date would be the market price on that date of the futures of the succeeding four years. I think your Honor, too, ruled at the previous hearing, where similar questions were asked as to the market price of spots during the month of October, 1914. I have not the reference here, but I was reading it last night. I could find it in a few minutes.

Mr. English: This is material, your Honor, as bearing on the contract in question—that particular shipment.

The Court: [After further argument.] I shall receive the testimony for what it is worth as bearing on the question of acceptance.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

[Question read.]

Mr. Stamler: During the month of October, 1914.

The Court: What does "spots" mean?

Mr. English: Spot sales, as opposed to future sales.

A. Well, I should say 16 to 18 cents.

Q. By the word "spots" what do you mean? A. Why, goods sold on a certain date to be delivered in a short time.

Q. Of what crop? A. 1914.

Q. Now, what was the market price of good Pacific Coast brewing hops for futures during the month of October, 1914?

Mr. Twining: I object to that, if your Honor please, unless it shows what he means by "futures." It may mean one year or it may mean twenty years. The only materiality of the question would be what the price was for futures of the character described in this contract.

The Court: I suppose that counsel means to limit his inquiry in both those particulars. You had better ask your question in more specific form. It is too broad.

[Question withdrawn.]

Q. What was the market price during the month of October, 1914, of hops to be delivered of the crops and during the years of 1915, 1916, 1917 and 1918?

The Court: What kind of hops?

Mr. Stamler: Of the quality known as equal to or better than good Pacific Coast brewing hops.

The Court: Is this question clear to you?

A. Why, I think I refused to accept some offers at 17 cents.

The Court: Is that question clear to you?

Witness: I think so.

The Court: Very well. You may answer.

Witness: I think I refused offers of 17 cents; I think I did.

Fuller, President, J. Cutler Fuller, Secretary, are

Q. What was the market at that time? A. Well, the way I look at it, it varies. It is mostly a gamble on the part of a dealer and a buyer, and, if I remember right without consulting my books, there were sales made around those figures.

Q. During what month? A. October.

Q. Of 1914? A. 1914. At those prices.

Q. At what price do you say they were sold? A. About 17 cents.

Q. In the trade how many different kinds or qualities of hops are there as to grade? A. Three —four.

Q. What are they? A. Choice, prime, medium and low grades.

Q. In what classification does a hop come that is known as equal to or better than a good Pacific Coast brewing hop, if you know? A. Equal or better—

Q. Equal to or better than a good Pacific Coast brewing hop? A. Well, I class a good brewing hop as a choice hop; that is, a rich, fat hop, with all the qualities—perhaps not as good looking as some, but the brewing qualities; that is what I always class a good brewing hop.

Q. What are the good brewing qualities in a hop? A. Flavor, lupulin, what we call richness, oily, a hop perfectly cured, flavor mostly.

Q. In what classification would you include a hop which is described as follows: "Thin, no mold, grassy; lupulin is thin, but flavor is fair?" A. A medium hop.

Q. Would that be a good Pacific Coast brewing hop? A. I should say not.

Cross-Examination by Mr. Twining:

Q. Mr. Moakler, where were you on February 5, 1917, do you remember? A. February 5, 1917?

Q. Yes. A. I do not. In Cooperstown, I believe.

Q. You were not in the South, were you? A. No.

Q. Have you been in the South this winter at

all? A. No, I have not. I was booked to go to the South, but on account of sickness I did not go.

Q. Now, did you sell any Pacific Coast hops of the crop of 1914 in October, 1914? A. I did.

Q. From what county did they come? A. California; I don't know exactly what county.

Q. What county? A. I don't know.

Q. Were they Sacramentos? A. Yes.

Q. Sonomas? A. I don't know.

Q. Did you sell any Oregon hops? A. I did.

Q. Washington hops? A. I don't think so—Oregon.

Q. How do you recall so well, Mr. Moakler, that you sold spots of the Pacific Coast hops in the month of October, 1914? A. From the invoice that I asked a brewer for.

Q. Have you examined your books in order to prepare for this trial? A. Yes.

Q. Did you not state a moment ago that your testimony with reference to sales of futures in the month of October, 1914, was the best you could recollect without looking at them? A. I examined it at the time—last winter, wasn't it, or last summer—last winter, when the trial was here. I have forgotten just when it was.

Q. How is it that you remember so well about these spot sales in October, 1914? A. I have the invoice.

Q. Have you it with you? A. Yes.

Q. Have you any invoice of future sales with you? A. I have not.

Q. Why not? A. They didn't ask for it.

Q. Did you make any examination to find out whether or not you had sold futures of the Pacific Coast hops in October, 1914? A. I did not.

Q. So that your recollection now is not based upon any memorandum, is it? A. How is that, again?

Q. Is your recollection as to whether or not in October, 1914, you sold hops of the Pacific Coast of the crops of each of the years 1915, 1916, 1917 and 1918—is that based upon any written memorandum? A. No, I think I sold hops for two years —three years.

Q. For which years? A. 1914, 1915 and 1916.

Q. Well, 1914 was not a future, was it? A. No, that was delivered that year. It was a future sale, a three years sale.

Q. So that your present recollection is that the offer or offers that you think you may have refused at 17 cents related to Pacific Coast hops of the crops of 1915 and 1916 and 1914? A. No, I think there were three years.

Q. Well, what were the three years? A. 1914, 1915 and 1916.

Q. So that when you stated a moment ago that your recollection was that you had refused offers at 17 cents for future crops of each of the years 1914, 1915, 1916, 1917 and 1918, you now wish to change that testimony? A. No, I don't think I meant it that way. I think the only time I sold hops was three years; I never made any contracts long enough to refer to that.

Q. Now, never having made any contract for a longer period than that time, are you or are you not able to state whether there was a market for those crops during October, 1914? A. I always claim there is always a market.

Q. Well, there is not any market, is there, in a sense that you can say that on a certain date the market for a hundred bales of Pacific Coast hops of the crops of 1915, 1916, 1917 and 1918 is 17 cents or 18 cents or 17½ cents or 14 cents, is there? A. I couldn't say. I say I refused—

Q. What is that? A. I say I couldn't say.

Q. You could not answer that question? A. No.

Q. Now, is it not the fact, Mr. Moakler, that it is impossible to state whether or not there was or was not any definite market price on any day of October, 1914, for Pacific Coast hops of the crops of the years I have named: 1914, 1915, 1916, 1917 and 1918? A. This is the way I think. I think, as I said before, it is a gamble. There is no definite market, but the majority of hops are sold on future, and October is the biggest sale month we have in the hop trade. To give actual sales, I couldn't say, but I know there was a market at that time; there always is.

Q. But you cannot state what the market is, can you? A. Only that I was offered seventeen cents and I refused.

Q. That is the only recollection you have with reference to the market? A. Yes, sir.

Q. And that was a refusal to sell hops of the crops of the three years that you have named? A. Yes.

Q. 1914, 1915, 1916? A. Yes.

Q. With what kind of hops do you deal mostly, Mr. Moakler? A. New York States mostly.

Q. The value of New York State hops is very much greater than Pacific Coast hops, is it not? A. I think on that same date that I sold the Oregons I sold States at thirty-five or thirty-six cents.

Q. They are worth nearly twice as much or more? A. Yes.

Q. Have you ever done any grading of hops? A. Yes, we always grade our hops; when we buy them from growers we always grade them.

Q. The method of grading is to take a hop in your hand and examine it, break it and see what

its general appearance is, and smell it and weigh it, I suppose? A. Yes, sir.

Q. Observe its shape and form and color and flavor? A. Yes.

Q. That is true, is it not? A. Yes.

Q. It takes a few minutes, I suppose, to make a grade? A. Yes.

Q. You do not think it necessary to have a chemical analysis made of a hop to grade it, do you? A. Not a good judge of a hop; he doesn't have to do it.

Redirect Examination by Mr. Stamler:

Q. Mr. Moakler, do you know of any specific case where futures were bought or sold during the month of October, 1914?

Mr. Twining: I object, if the Court please. A single instance of a purchase or sale would not amount to market price, and I object on the further ground that it is not redirect examination. It is a subject that was fully opened on direct examination.

Mr. English: We forgot to ask the question.

The Court: I think the question may be answered.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Do you know? Yes or no. A. Well, I couldn't swear as to when exactly. I recollect from hearsay that there were a good many.

Objected to.

[Question read.]

The Court: I think that means actual knowledge.

Witness: Yes.

Q. Name them.

Mr. Twining: I object, unless the term "futures" is defined, so that we know what he is referring to—futures of what kind of hop and what years.

[Question read.]

The Court: The question is a broad question, and he has answered it "Yes," but the next question would have to be more specific.

(Question withdrawn.)

Q. Do you know of any purchases or sales of Pacific hops purchased or bought during the month of October, 1914, of future crops of the years 1915, 1916, 1917, -918, or any of those years? A. Those four years?

Q. Yes. A. Those four years, a term of those four years?

Q. Yes. A. No, I do not, not those four years.

Q. Do you know of any period of time?

Mr. Twining: I object. That is immaterial.

The Court: In what respect?

Mr. Twining: Because this sale was for the four years. Now, I do not know but the market price of the next succeeding year may be very high, whereas the market price for the next succeeding three or four years may be very low. I do not know what the relative values may be, but I can see that they might be very different, and therefore the

market value of a portion of the term would not be any indication of what the market value might be for the whole term.

The Court: There being no evidence on that subject, that I remember, I should be willing to take the witness's actual knowledge as to any sales of futures for any of those years.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. For which years do you know? A. 1914, 1915 and 1916.

Q. Now, what were those sales? A. Purchases.

Q. Well, who purchased? A. I did.

Q. From whom did you purchase? A. My dealer. Is it necessary for me to tell the dealer's name?

Q. No, you do not have to. From the dealer? A. Yes.

Q. And at what price did you purchase?

Mr. Twining: I object. A single purchase would not be an indication of the market price, if your Honor please.

The Court: I will overrule the objection and give you an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. 13¼, I think.

Q. Are those the hops that you refused the 17 cents for?

Mr. Twining: I object to that. That is immaterial.

The Court: I shall allow the question.

The Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Question read.)

A. I couldn't say if they were; I couldn't answer that.

Q. Now, do you know of any other sales or purchases? A. Only from hearsay.

Q. What were they?

Mr. Twining: I object.

The Court: Do you think that is competent?

Mr. Stamler: He is an expert, if your Honor please.

The Court: No, that does not make any difference.

Mr. English: My thought about that, your Honor, was this. Here is a dealer, buying and selling hops. You take a stock broker who qualifies as a witness. He qualifies as to his knowledge of the market. He may not have sold on a specific day Southern Pacific stock, but it is his business to be informed so as to inform his clients, and he knows that on a certain day Southern Pacific sold for so much.

The Court: I think the foundation of this witness's testimony must be his legal knowledge.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Recross Examination by Mr. Twining:

Q. What was the character of the hops that you bought for 13¼ cents; that is, what grade? A. Prime.

Q. Pacific Coast? A. Pacific Coasts.

PHILIP BICKLER, sworn in behalf of defendant.

Direct Examination by Mr. Stamler:

Q. Mr. Bickler, what is your business? A. Commission dealer in hops.

Q. For how many years have you been trading in hops? A. Thirty-nine years.

Q. Do you know the market price of hops during the various years that you have been in business? A. No, I couldn't recollect.

Q. Did you refresh your recollection as to the market price during the month of October, 1914? A. Yes, sir.

Q. Did you buy and sell that month? A. I sold on a commission basis to dealers.

Q. You sold to dealers? A. Yes.

Q. Is the price to dealers the same as to brewers? A. No, sir.

Q. How does it differ? A. A cent and a half to two cents a pound.

Q. Who pays more? The brewer.

Q. Did you sell spots and futures that year? A. I sold spots.

Q. Spots? A. Spot goods.

Q. What was the market price of Pacific hops during the month of October, 1914?

Mr. Twining: I object, if your Honor please. That relates to spots only.

The Court: The question does not use the word "spots."

Mr. Twining: No, but the witness has already testified in the previous answer that he sold nothing but spots during that year.

Mr. English: That month.

Mr. Twining: During that month or that year, I think he said.

Mr. English: No, he said "month." We asked the same question of the other witness, your Honor, and you allowed it—about the price of spots. Your Honor admitted it.

The Court: That may be so. I do not now recall it.

Mr. English: Yes, sir. It was Mr. Moakler.

Mr. Twining: The testimony was taken subject to the objection, I think.

Mr. English: Yes, you objected, but the Court allowed the question.

The Court: The Court does not know, of course, what the relation of a spot contract is as to another kind of a contract—a time contract. There may be a difference which would make one not a criterion of value of the other. I think it ought to appear that the same rule applies to both cases.

Mr. English: Here is what is in our minds in asking the price of a spot contract in October, 1914. There was a shipment made from the plaintiff to the defendant of a hundred bales of hops, which were refused by the defendant. Now, if the plaintiff can justify his shipment and the defendant cannot justify his refusal, then the question is going

to arise as to what is the damage to the plaintiff for that shipment of one hundred bales which was sent and not paid for, and our contention is that, if the plaintiff makes out his case, his damages are the difference between the contract price and the market price of those goods at the time they were rejected. Now, the goods were on hand. If there was a market for spot sales, as the traders call it, the plaintiff could have turned around and sold those same goods in the spot sale market to somebody else, and his damage is the difference between the contract price and the price he could have got in the market by selling those goods. That is why we think the evidence of spot sales based on the market is material.

Mr. Twining: That is why I think it is not material, if your Honor please, because, if the plaintiff is able to sustain the position tion he takes—the position is that the goods were delivered to and accepted by the buyer. the goods being in the possession, so far as the law is concerned, of the buyer—there is no obligation upon the seller, although the seller be able to take the goods and sell them in the market. The damages under that state of facts must be the contract price. Now, the testimony in this case is that the goods were delivered to the buyer, and, as I claim, accepted by him. Under those circumstances, what subsequently turned out, what may have been done with the hops, would not make any difference. As a matter of fact, as your Honor recalls, they were in the warehouse in San Francisco. But the market price for those hops cannot make any differ-

ence, because the seller had no control over them after they were accepted by the buyer.

The Court: I shall let you develop your case on this point, subject to the objection made by the other side.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Question read.)

A. Can I read from a memorandum?

Q. Yes, if you have one here. A. Yes, sir. (Witness produces paper.)

The Court: There is another criticism that suggests itself to me: that the question is not limited to this particular kind of hops that is called for by the contract.

Mr. Stamler: We will follow that up afterwards.

The Court: You had better follow it up before.

(Question withdrawn.)

Q. What was the market price of hops during the the month of October, 1914, the hops being designated as equal to or better than good Pacific Coast brewing hops?

Mr. Twining: That is objected to on the grounds that I have stated, your Honor.

The Court: I shall reserve my ruling on the question which this raises and allow the question to be answered, and give you the right to an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. (Referring to paper.) October 17, 1914, I sold to an out of town dealer 341 bales of 1914 Pacific Coast hops at 14½ cents. October 23d I sold to the same dealer 100 bales at 13½ cents. October 24th I sold 110 bales at 13¼ cents.

Q. You sold them to whom? A. To a dealer.

Q. To dealers? A. A country dealer.

Q. What quality of hops did you sell? A. Prime, strictly prime.

Q. In what class do you designate a hop which is known as equal to or better than a good Pacific Coast brewing hop?

Mr. Twining: I object. The witness is not qualified to testify to that question. He says he is a commission dealer in hops.

The Court: The witness is a commission dealer in hops, and has been so for thirty-nine years, and has bought and sold. I think he must be able to answer this question.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Question read.)

A. Prime quality.

Q. What does the term "future" mean in the trade? A. Contracts for future—further years, one, two, three, four, five years, whatever the contract may be.

Q. Was there a market for futures for the years —during the month of October, 1914—for the years 1915, 1916, 1917 and 1918, or any of those years? A. I cannot answer that question. Contracts have been made in those years for futures.

Q. Contracts— A. Yes, in 1916 I have made a contract.

Q. For how many years did you make that contract? A. For three years.

Q. Was there a market in the trade—was there a market for futures during the month of October, 1914?

Mr. Twining: I object.

A. I think there was; yes, sir.

Mr. Twining: I object. The witness testified that he did not know, and, furthermore, this question is not limited to the years in question.

Mr. English: Well, that is a general, preliminary question.

The Court: Limit your question.

Q. Was there a market during the month of October, 1914, for Pacific hops for the years' growth of 1915, 1916, 1917, 1918, or any of those years? A. Well, I didn't do any business for futures, but I have heard of several sales made.

Q. Now, do you know that such sales were made? A. Yes, sir.

Q. What was the price at which you sold them?

Mr. Twining: I object.

A. I couldn't tell the price.

Mr. Twining: All right.

Q. From your knowledge of sales having been actually made during the month of October, 1914, do you know what the market for futures during any of those years was for Pacifics?

Mr. Twining: I object, if the Court please.

The witness has testified that his knowledge was based on hearsay. He answered the question before the last, over my objection and before the Court ruled, by saying that he could not answer it, and this last question is also objected to on the ground that it is argumentative and suggestive.

The Court: I shall confine my ruling to the subject of the hearsay. The witness must confine himself to legal knowledge; that is, his own personal, actual knowledge.

Q. How did you hear about those sales for futures during the month of October, 1914? A. The concern that I do most of my business with.

Q. What is the name of it? A. Do you want me to tell you? I would rather not; I would rather you would not insist upon it.

Q. How did that information come to you? A. Sir?

Q. How did you get that information? A. We try to keep posted on the market, and we exchange news and views, and so forth.

Q. Do you make that your business? A. No, not regularly.

Cross Examination by Mr. Twining:

Q. Mr. Bickler, where were you on February 5, 1917? A. February 5th.

Q. Yes, last February. A. What day was that? I don't know.

Q. It was Monday, February 5th? A. I can't recall.

Q. Well, were you in the South? A. No, sir.

Q. Well, you have been in your office, in New York, right along, have you not, during the winter?

A. I think I was up the country on February 5th; I am not positive.

Q. Well, don't you recall having a conversation with Mr. Phleger on February 5th or 6th? A. No, sir.

Q. In New York? A. No, sir.

Q. Were you asked to come over here and testify in this case on February 5th? A. I can't recall; I can't recall the date.

Q. And did you state to counsel that you were going to be in the South? A. No, sir.

Q. You never made any such statement, nor never wrote any letter to counsel, that you were going to be in the South? A. No, sir.

Q. And isn't it a fact that you never went to the South? A. No, sir. I may have been up the State.

Q. Mr. Bickler, where is your business? A. 35 Pearl Street, New York City.

Q. Approximately how many hops do you sell during the course of a year on commission? A. Oh, it all depends on the market.

Q. Well, can you give me some idea? A. Oh, one year it was close to 9000 bales.

Q. How many did you sell in 1914, do you know? A. Oh, close to 5000 bales.

Q. And mostly on spots? A. Spots.

Q. Most hops are sold on spot sales, are they not? A. In the market.

Q. And when you speak of a market for hops, that is what is meant ordinarily, is it not—the spot sales? A. Yes, sir.

Q. Is it not a fact that it is impossible to say whether or not there is a market at a definite price for futures of a certain number of years, ordinarily speaking? A. Well, there is a market for spots all the time at a price. It all depends on who the brewer is. A cash brewer will buy for less money than a time brewer.

Q. Now, the hops that you sell, do they come into your possession? A. Well, what I sell to brewers I fill myself.

Q. Have you any warehouse in New York? A. Part of a warehouse, yes.

Q. And do you personally examine the hops that pass through your hands? A. Yes, sir. That depends. If they are a coast shipment, I do not inspect them.

Q. What is that? A. If they are shipped direct from the coast, I don't inspect them.

Q. They are sold on a purely commission basis? A. Yes.

Q. All those hops do not reach your warehouse at all? A. They are shipped right direct.

Q. Is that so with reference to all the coast hops that you sell? A. I get goods coming to New York.

Q. Coast hops? A. Coast hops.

Q. Some coast hops that you sell on commission come to New York and some do not? A. Yes, sir.

Q. What proportion come to New York and what proportion do not come to New York? A. The smaller portion, twenty-five or thirty per cent.

Q. They do what? A. They do not come to New York.

Q. And the balance come to New York? A. Yes, sir.

Q. And do they come to your warehouse? A. No, sir; they are shipped direct from the dock.

Q. Do they ever come into your possession? A. No, sir.

Q. What proportion of the hops that you sell on commission come into your possession? A. Oh, I couldn't tell.

Q. Well, is it ten per cent.? A. Oh, about that, ten or fifteen per cent.

Q. Now, these hops that you speak of having sold in October, 1914, did any of those come into your possession? A. No, sir they were shipped—

Q. They did not? A. No, sir.

Q. So that you do not know of your personal knowledge whether they were or were not prime hops? A. They were sold by sample.

Q. Did the samples come into your possession? A. Yes.

Q. And did you personally examine the samples? A. Yes, sir; I always do.

Q. Do you know whether or not the samples were the same as the hops themselves? A. Well, the buyer takes the sample.

Q. Well, do you know of your own personal knowledge whether the hops were the same as the samples? A. They were accepted by the dealer.

Q. Did you compare the hops with the samples? A. No, sir; I didn't inspect the shipment.

Q. From what part of California did these hops come that you sold? A. Part from Sonoma, California, and part from Washington.

Q. Oregon? A. No Oregons.

Q. Sacrementos? A. Washington hops, grown in Washington.

Q. Oh, they were all grown in Washington? A. Part were grown in Sonoma.

Q. Well, Sonoma is in California, is it not? A. Yes, sir.

Q. Were any of them grown in the Sacramento Valley? A. No, sir.

Q. Now, the contract that you say you made for three years, that was made in 1916, was it not? A. Yes, sir.

Carl Albert Phleger recalled in behalf of plaintiff.

Direct Examination by Mr. Twining:

Q. Mr. Phleger, at the close of yesterday's testimony you stated that you had written a letter to the Breidt Brewery Company in March, 1914, which was offered in evidence as Exhibit P24, the letter being dated March 26, 1914. I show you that letter [paper shown to witness]—

The Court: A letter written by the witness?

Mr. Twining: Written by the witness to the defendant, March 24th.

Mr. English: Is this supposed to be redirect examination on the cross?

Mr. Twining: Yes.

Q. Was that letter written by you? A. Yes.

Q. State whether or not it was written in pursuance of any instructions from anybody?

Mr. English: I object to that. How is that material? He wrote it, and the depositions taken in the West show that the copy was sent there and that he had authority to write it. That was brought out very fully by counsel in the West who was examining Mr. Horst and the other witnesses.

The Court: The objection is overruled.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I wrote that letter upon the receipt of telegraphic instructions to do so by our San Francisco office.

Q. I call your attention to your answer appearing at pages 122 and 123 of the record. Will you read that answer [handing book to witness]?

Mr. English: Wait a minute before you do that. I do not quite see the object of this. It seems to me it is rather a peculiar way to examine the witness, to put the record before him and tell him to read it. I think we ought to have a question.

Mr. Twining. All right, I shall incorporate the answer in my question, if you prefer.

Q. I call your attention to the following answer made by you, appearing on pages 122 and 123 of your previous testimony: "I should say that it is apt to be governed by quotations available. For instance, I would say that when I began to work for the company in 1912, they were selling out the 1911 crop, I will say, fifteen cents, futures seventeen cents, which had entirely no relation to the present market." Now, I ask you whether or not that answer is correct?

Mr. English: The witness wants to correct his previous testimony; is that the object of this?

Mr. Twining: Yes, that is the object.

Mr. English: I suppose the proper question is whether he wants to correct his testimony.

The Court: That practically is the question. Do you wish to correct that testimony.

Witness: Well, I wish to correct the stenographic error. I said at the time "fifty cents a pound."

Mr. English: Instead of what?

Witness: "Fifteen," as it shows on the record.

Q. Now, I call your attention to page 151 of the record of your previous testimony, where the following question and portion of an answer appear: "*Question*: What were the quotations in the journals? *Answer*: I believe the quotations in the journals were simply information given to the journal reporters by—." That is on page 151. Have you anything further to say in response to that question? Will you complete your answer?

Mr. English: I object to that, your Honor, because it appears here that the witness was not answering the question on my examination apparently. Here is what the record shows. I shall just read back a little bit. I was examining him about these trade papers which set forth quotations. "*Question*: So that the quotations in the journals were sort of a guide by which they get together in agreeing between themselves as to what the price quoted was, the price at which they could actually make sales?" That was objected to, and the answer was, "No." "*Question*: What were the quotations in the journals? *Answer*: I believe the quotations in the journals were simply information given to the journal reporters by— *Question*: No. I want to know what purpose they serve." You see, the witness was going off on something that I had not asked him. "*Answer*: They serve the purpose of giving information to persons interested in the hop business as to what had transpired in the past, some time back." There is no pertinency in the answer that was inter-

rupted in going off on a dissertation about journal reporters.

The Court: I think I shall have to see the page to get a clear recollection of it. [After examining the record.] The witness seems to have stopped in the middle of a sentence, in answer to the question, "What were the quotations in the journals?" He was apparently interrupted in his answer by a suggestion that the counsel wanted to know what purpose the quotations served. That, however, was not the question; the question was, "What were the quotations?" That question the witness appears to me to have been in the course of answering. He now may finish the answer, if he desires to do so.

Mr. English: All right.

[Question read.]

A. —certain brokers and commission men and obtain their information as a result of hearsay around the trade.

Cross-examination by Mr. English:

Q. How do you know where they get their information from? Are you with them when they get this information? A. Occasionally the reporters of the papers have asked me for information regarding the market.

Q. Well, what right have you got to say that any particular person who gives information to a reporter gets it from hearsay? [No response.]

The Court: You may answer the question. Let us get along. The question was, What ground have you for saying that?

A. Well, simply from talking with reporters from papers and with brokers and commission men that I know have in times past given such information to trade journals.

Q. Then your answer as to hearsay is based on hearsay on your part, is it not? A. What is that?

Q. [Question read.] A. Yes, that is hearsay.

Q. So that you really do not know what the source of information of the various dealers is which they give to these reporters, do you, so far as your personal knowledge goes? A. Well, I did not testify that the dealers give it; I don't know whether the dealers do or not; but I know that the brokers and commission men give that information to reporters.

Q. Then you do not know what the source of knowledge of the brokers and commission men is that they give to reporters, do you? A. It has been testified in this court that the commission men get their information by hearsay.

Q. No, you are undertaking to make a statement from your own knowledge, and I want to know whether you have got any knowledge. You have not, as a matter of fact, have you? A. Well, I testified that I talked with reporters of these trade papers and they told me that they got their information that way.

Q. What I want to know is whether you stood around when these reporters consulted this, that or the other dealer or broker, and learned of your own knowledge whether it was hearsay or direct knowledge the broker gave the reporter. A. No.

Q. So that you really have not any right to say that it was hearsay that the dealer or broker gives the reporter, have you? A. I am entitled to my belief on that.

Q. I do not want your belief. I want your knowledge. You have not any knowledge, have you? A. Just as I have stated.

Q. So that, so far as you know, the dealer or broker that gives the information to the reporter is reporting a sale of his own; isn't that right, so far as your knowledge goes? A. They are generally reluctant to tell about any sales of their own.

Q. I did not ask you what the general situation was; I am trying to get at your personal knowledge. So far as that goes, what information the reporter gets is or may be the firsthand knowledge of the broker or dealer who gives it to him, may it not? A. Yes, it might be that.

Q. Have you got that telegram you say you acted on when you wrote the letter of March 26th? A. I haven't got it with me.

Q. Was that in response to a previous telegram that you sent to Mr. Horst? A. Yes, sir.

Q. When did you send your telegram? A. The day previous or on the same day.

Q. Had you closed up the contract before you sent your telegram? A. No, it had been signed, but it was signed subject to his confirmation.

Q. So that it was signed, and then you telegraphed that it had been signed, and then Horst telegraphed back to you to write the letter; is that it? A. I didn't say it was signed; I said it was sold subject to confirmation.

Q. And he telegraphed back to confirm it? A. Yes.

Lillian E. Schroeder, sworn in behalf of defendant.

Direct Examination by Mr. Stamler:

Q. Mrs. Schroeder, you reside in Elizabeth? A. Yes.

Q. And during the year 1914 where were you employed? A. The Peter Breidt Brewery.

Q. At Elizabeth? A. At Elizabeth.

Q. In what capacity? A. Stenographer, typewriter, bookkeeper, telephone operator and general office work.

Q. Do you recall a controversy over a shipment of hops that is involved in this case? A. Yes, I do.

Q. What did you have to do with it? A. Why, write letters in reference to it, or telephone conversations, or any one come in to call.

Q. I show you a book marked Exhibit D31 for identification, and ask you what that book is [book shown to witness]? A. My stenography notes.

Q. Covering what period of time? A. From August 20, 1914, to October 12, 1914.

Q. I call your attention to an entry in that notebook on the date of October 5th, and ask you in whose handwriting that is [indicating]? A. In my handwriting.

Q. And when did you write that? A. October 5, 1914.

Q. In shorthand? A. In shorthand.

Q. Did you make a true translation of that for me? A. Yes, I did.

Q. I show it to you—I show you a paper and ask you what that is [paper shown to witness]? A. A copy of the stenography notes.

Q. A true translation of it? A. Yes.

Q. Will you read it? A. [Reading:] "Copy, for General Collins, by Mr. Loehrs. Tell the General Mr. Phleger was in. I told him that the brew master condemns the hops, as they are very poor, and he is going to return them. Mr. Phleger requested him not to return them, but would exchange them, if the General was not satisfied with the shipment."

The Court. Let me see just what is this. This is—

Mr. Stamler: This is a message to Gen-

eral Collins by Mr. Loehrs, who was also employed in the brewery. Now, I am going to connect that.

The Court: Just a moment. I want to understand at this point just what kind of a message this was.

By the Court:

Q. What kind of a message was this? A. This was delivered to me by Mr. Loehrs; the General not being in, the message was dictated to me as he was going out.

Q. It was something that he said to you? A. He dictated it to me, to be delivered; it was dictated in my notebook to be delivered when the General came to the office.

Q. He dictated to you with his voice, you put it down in your notebook, and what were you to do with it? A. Deliver the message to the General when he came in.

Q. Personally? A. Yes.

The Court: Proceed.

By Mr. Stamler:

Q. Who was present when that statement was dictated? A. Mr. Loehrs, Mr. Phleger and Mr. Butler.

Q. Prior to the 5th of October, 1914, did you have anything to do with this hop case? A. I 'phoned to New York to have Mr. Phleger call at the office to see the General.

Q. When was that? A. On a Saturday morning, I believe.

Q. A Saturday morning before that day? A. Before this, this being on a Monday.

Q. How do you recall that? A. Why, I know that he called the first day after, which was Monday, in response to the telephone call.

Q. What was the message that you delivered? A. To have Mr. Phleger call at Peter Breidt Brewery to see General Collins.

Q. Do you recall to whom you talked? A. No, I do not.

Q. Whether it was a man's voice or a woman's voice? A. No, I couldn't say.

Q. You know Mr. Phleger? A. Yes.

Q. Could you identify Mr. Phleger? A. Yes, I could.

Q. Is he in court here? A. Yes.

Q. Where? A. Sitting at the table [indicating].

Q. Now, did you deliver this message to General Collins? A. I did.

Q. Subsequently? A. Yes, I did.

Q. Now, calling your attention to the same notebook, a little further on, on the date of October 6th, you find a memorandum there with "Phleger." What does that mean [book shown to witness]? A. Mr. Phleger called—

Q. What date was that? A. October 6th.

Q. Do you recall whether or not Mr. Phleger saw General Collins that day? A. I believe he did.

Q. Now, how did you come to make that entry there? A. Perhaps the General was busy at the time, or out, and the message was placed there.

Q. Did you see Mr. Phleger that day there? A. Why, I did, or I wouldn't have put the memorandum down.

Q. Did you have anything to do with writing a letter and sending a sample of hops to the First Scientific Station in New York? A. I did.

Q. I show you a copy of that letter and ask you whether you wrote that letter [paper shown to witness]? A. Yes, I did.

Q. At whose request? A. Mr. Hubach's.
Q. Who is Mr. Hubach? A. Brewmaster.

Mr. Stamler: I offer it as a full exhibit.

Mr. Twining: That is objected to, if your Honor please, in the first place, because it is dated October 6, 1914, and was sent, I presume, on that date, which was after the time named in the contract for the acceptance or rejection of the delivery on account of quality.

The Court: I shall receive it, subject to your objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Stamler: I offer it in evidence as a full exhibit, and ask that it be marked.

[The paper referred to is marked Ex. D34.]

[Mr. Stamler reads Ex. D34.]

Q. Is there any relation between the footing of this letter to the Scientific Station, marked Exhibit D34, and the call of Mr. Phleger the day before?

Mr. Twining: I object, unless the witness knows of her own knowledge.

Mr. Stamler: Yes.

A. I do know, because on the 5th we were told to hold them subject to the General's approval.

Q. To hold what? A. To hold the shipment of hops.

Q. Who said that? A. Mr. Phleger.

Q. What did Mr. Phleger say? A. In the memorandum message to General Collins dictated by Mr. Leohrs in my presence.

Q. Did Mr. Phleger say anything in front of you or— A. Well, they were conversing over this matter between them, and then Mr. Loehrs dictated in the presence of Mr. Phleger.

Cross Examination by Mr. Twining:

Q. Do you remember the date when Mr. Phleger called—the first date in October when he called at the brewery? A. Only from my notebook.

Q. So that if it was not for the notebook you would have no recollection as to the date? A. No, I would not.

Q. Now, the second visit, which you said took place on October 6th, is that also true with reference to that date? A. It is also in the notebook.

Q. But you have no recollection of that date outside of what appears in the notebook? A. No.

Q. Do you know whether or not on October 6th Mr. Phleger saw the General? A. That I couldn't say.

Q. Who instructed you to write the letter of October 6th to the First Scientific Station? A. Mr. Hubach.

Q. Who is he? A. He was the brewmaster in the Peter Breidt Brewery.

Q. How do you know that this book that you have referred to, these stenographer's notes, covered the period from August 20, 1914, to October 12, 1914? A. I always put the date when I start and when it was finished on the front of the book.

Q. And that appears on the front of this book? A. Yes.

Q. Now, this note of October 5, 1914, is that dated in the book? A. Yes, it is.

Q. And also the one of October 6th? A. On October 6th the individual is not dated, but it is under the group of letters dictated on that day.

Q. Who is Mr. Loehrs? A. He was the bookkeeper and general office manager.

Q. And who was Mr. Butler? A. Superintendent.

Q. General Collins was not in on the 5th of October? A. On the 5th, no.

Q. Was he in on the 3d, Saturday? A. That I couldn't say.

Q. Who instructed you to call up Mr. Phleger's office? A. Why, either Mr. Loehrs or the General; I couldn't remember who called.

Q. Do you know when this shipment arrived at the brewery? A. No, I do not.

Q. Have you any note of that in your book? A. Why, I wouldn't put that in my book, unless there was a letter dictated, of which a copy would be mailed.

Q. Well, is there any reference in the book? A. When they came?

Q. Yes. A. No.

Q. Is there any reference in this book here that you have before you showing the date when the shipment in question arrived at the brewery? A. No, I wouldn't put anything in like that.

Q. Well, is there any? I am not asking you now whether you would. A. Not unless I go through the book and look.

Q. You do not know whether there is or not? A. No.

Q. Is there any note in your book with reference to this matter prior to October 5, 1914? A. Why, I couldn't say.

Q. When did you first read this note of October 5, 1914, next after it was originally put in the book? A. This note of October 5th?

Q. Yes. When did you read that first next after the date when it was put in the book originally? A. Why, a short time ago.

Q. At that time did you make any examination of the note sin your book for other subjects relating to—other matters or memoranda relating to this same subject? A. For the original trial I was requested to look for notes to the Scientific Station or the Clemens Horst Company, which I did, and this not being under either name, I didn't see it.

Q. Did you find anything to the Scientific Station or to the E. Clemens Horst Company before October 5, 1914? A. I do not remember.

Q. Were you the only stenographer at the Breidt Brewery? A. Yes.

Q. And did you copy all letters and telegrams, and so on, that were written? A. Yes.

Q. In that book—that is to say, during that period? A. Yes—well, not all telegrams received.

Q. No, I mean telegrams and letters that were written by the brewery were written in that book during the period that it covers, were they not? A. Not all. Some might have been sent by Mr. Loehrs or given verbally to transmit over the 'phone.

Q. In am not talking about verbal letters, but I am talking about written communications with reference to this subject. A. Yes, they would be in the book.

Q. For the period covered by the book? A. Unless it was dictated on the machine, as was the case with the First Scientific Station—the hops being shipped; they would not be in the book. That was dictated direct on the machine.

Q. Do you know whether or not there is any communication which appears in that book from the Breidt Company or any representative of the Breidt Company to the Horst Company prior to October 5, 1914? A. I couldn't say that.

Q. Or between October 1st and 6th, 1914? A. I do not remember.

Q. Will you look in your book and tell me, between October 1st and 6th, 1914? A. (After examining book.) There is no letter between the 1st and the 5th.

Q. The 1st and the 6th? A. The 1st and the 6th, outside of this message to be delivered.

Q. So that the memorandum that you made on October 5, 1914, and the memorandum that you made on October 6, 1914, are the only memorandum, letter or writing of any kind that appears in your book with regard to this matter between October 1st and October 6, 1914; is that so? A. Yes, that is all that is in the book.

Q. Now, who does the writing that is done on the machine; that is to say, when a letter is dictated to a typewriter, who does that writing? A. I did.

Q. You do it? A. Yes.

Q. Do you recall whether or not any letter or telegram was dictated to you with reference to this matter between October 1st and October 6th? A. That I do not remember.

Q. You do not recall that any was, do you? A. No, I do not recall.

Redirect Examination by Mr. Stamler:

Q. Will you look at your notebook of September 17, 1914 (book shown to witness)? A. That is September 26th.

Q. That starts when? A. (Refering to book.) There is a letter in here on September 17th.

Q. To whom? A. To E. Clemens Horst Company, San Francisco, California.

Q. And is Exhibit P7 A a true translation of that letter (paper shown to witness)? A. Yes.

HENRY F. LOEHRS sworn in behalf of defendant.

Direct Examination by Mr. Stamler.

Q. Mr. Loehrs, you reside in the City of Elizabeth? A. I do.

Q. And you are employed by the Peter Breidt City Brewery Company? A. Yes, sir.

Q. In the capacity of bookkeeper? A. Yes, sir.

Q. And general manager in the office? A. Yes, sir.

Q. And you have been so employed for how many years? A. Ten years.

Q. Do you know Mr. Phleger? A. I do.

Q. I show you, Mr. Loehrs, a book, and ask you whether you know what that book is (book shown to witness)? A. Yes, sir.

Q. What is that book? A. The entries of shippings received and shippings made by the brewery.

Q. By and to the brewery? A. By and to, yes.

Q. And it is in the handwriting of whom? A. Mr. Butler.

Q. And he is right here in court? A. Yes, sir.

Q. Do you find any entry here as to when the hops in question were actually unloaded by the defendant? A. Yes, sir.

Q. What date? A. (Referring to book.) October 2, 1914.

Q. Did you know about the hops coming into the brewery? A. Did I know??

Q. Yes, that they were coming. A. No, I did not.

Q. When did you first hear that the hops in question came to the brewery? A. When I got the arrival notice from the Pennsylvania Railroad.

Q. And how long before October 2d? A. October 1st.

Q. On October 1st? A. Yes, sir.

Q. When did you next hear about the hops or did you have anything to do with them? A. Well, I recall Mr. Hubach coming into the office with a sample of hops in his hand and going upstairs to General Collins' office.

Q. Now, when was that? A. Well, either the same day or the day after the arrival of the hops; I don't recall exactly.

Q. When you say "after the arrival," do you mean when they reached Elizabeth or when you unloaded them? A. Unloaded them.

Q. After you saw Mr. Hubach go up with a sample of hops to the General's office, did you get any further instructions after that?

Objected to.

Q. Did you have anything to do further with these hops? A. Yes, sir.

Q. What was it? A. Sent a sample to the Scientific Station.

Q. Before you sent a sample to the scientific station did you see any one relative to these hops? A. I did not.

Q. Did you see Mr. Phleger at all? A. I did.

Q. When, the first time? A. The Monday morning after.

Q. The Monday morning after what? A. After the hops were in the brewery.

Q. How do you fix the time that it was that Monday following. A. I heard the General give instructions to Miss——

Mr. Twining: I object to that.

Mr. English: I think that is material. That is how he fixes the time of something that he did.

The Court: I think it is doubtful. I am inclined to think there is better evidence.

Mr. English: I think that what he heard the General say is incompetent, but the fact that he heard the General say something is competent, as to how he fixes it in his mind. We do not propose to have him tell the conversation, but we would like him to be permitted to show that he heard the General give instructions to somebody, which fact fixes in his mind the date.

Witness: That is the idea.

The Court: That is my difficulty. It involves the instruction given by General Collins and General Collins can be called himself to say what he said. I sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Do you recall dictating a memorandum to Miss Woelfel, now Mrs. Schroeder? A. I do.

Q. On what occasion of Mr. Phleger's visit was that, so far as you were concerned? A. The first and only time I saw Mr. Phleger.

Q. Where did you see Mr. Phleger on that occasion? A. In the office of the Peter Breidt City Brewery Company.

Q. What part of the brewery, what part of the office, downstairs or upstairs? A. Downstairs.

Q. Where was the General's room at that time? A. Upstairs.

Q. Now, what was your conversation with Mr. Phleger on that date? A. Mr. Phleger came in the office, and I being at the screen window which separates the office from the hall, Mr. Phleger told me that he came here——

Mr. Twining: I object to what Mr.

Phleger said, if your Honor please, because he had no authority to represent the plaintiff, except for the purpose of negotiating for the making of a contract, and whether or not it is the fact that he appeared there and made certain representations would not make any difference, because those representations would not be binding upon his principal. His principal knew the limitations on his authority.

The Court: I think the evidence as to Mr. Phleger's authority is strictly limited all along by specific instructions that he had. He had no general authority.

Mr. Twining: That is true. He was a mere solicitor for business.

The Court: (After further argument.) I shall allow the testimony and determine afterwards what effect is to be given to it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

[Question and answer read.]

Witness—through a telephone call from General Collins, and I told Mr. Phleger, "General Collins isn't in, but come next day and I will tell him what it is about." Mr. Phleger came next day, and I introduced him to Mr. Butler, and I told him that the car of hops arrived and was unloaded; that our brew master, Mr. Hubach, has reported to the General that the hops are of an inferior grade and no good, and that the General feels inclined not to accept them, on the strength of Mr. Hubach's claiming that they are no good; and Mr. Phleger says, "Well, I will be back tomorrow, but in the meanwhile don't do any-

thing. I will take those hops back. I can dispose of them in New York or Brookyln, and ship other ones in place of them." He says, "In the meantime I will communicate with my firm at once to that effect, and I will be back tomorrow morning." And then I dictated to Miss Woelfel, who is Mrs. Schroeder now, the note that she has testified to before, as I had to go out collecting, to give that to General Collins when he should come in the office, but I did have the conversation with Mr. Phleger.

Mr. Twining: If your Honor please, I move to strike this answer out, upon the ground that the contract provides that objections to quality are waived unless they are made within five days after the arrival of the hops at the place of delivery and unless such claim be so made prior to buyer's exercise of any right of ownership of said hops. The testimony now is that the hops were unloaded and taken into the brewery. What could be more clear evidence of the exercise of dominion over them than that?

Mr. English: Oh, no, that was only for the purpose of inspecting them. The bill of lading said, "*Inspection permitted.*"

The Court: This depends largely on the construction of the contract. I shall let the testimony stand.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. I understand that you are the person who sent away the package of the sample of hops to the scientific station? A. I did.

Q. I show you Exhibit D34, and ask you whether you recognize that letter [paper shown to witness]? A. I was present when Mr. Hubach dictated it to Miss Woelfel at the time.

Q. Now, just tell us what you did in order to get a sample of these hops?

Mr. Twining: If your Honor please, that is objected to on the general ground that defects in quality or testimony with reference to the quality of the hops is immaterial.

The Court: I shall make the same ruling as I have made on similar questions, reserving decision, and giving you an exception, if you need it, and receive the testimony.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Stamler: Answer the question.

[Question read.]

A. When Mr. Hubach showed the General the sample of hops and complained about them, the General called me upstairs and told me, he says, "Henry, you go over with Mr. Hubach"—

Objected to.

Q. No. What did you do? Never mind what anybody told you. A. I went over to the brewery with Mr. Hubach and took a sample out of one of the bales and packed it and sent it by parcel post to the First Scientific Station of the Art of Brewing.

Q. The hops in question were from what shipment? A. From this shipment of a hundred bales.

By the Court:

Q. You took one sample? A. One sample, about half a pound or so.

By Mr. Stamler:

Q. Where was Mr. Phleger when you dictated that memorandum to Miss Woelfel, now Mrs. Schroeder?

A. Right in the office, right between Mr. Butler's office and the main office, in the door, Miss Woelfel being at the end of the desk, two or three feet away.

Q. Do you know whether or not Mr. Phleger heard what you dictated? A. Well, he must have.

Q. How far away was he from you? A. About 2 feet.

Cross examination by Mr. Twining:

Q. Mr. Loehrs, state again what it was that Mr. Phleger said at your conversation on the Monday after the arrival of the hops at the brewery. A. He told me to hold those hops; that he could dispose of them, and he would ship others for them, and he would communicate with his firm at once, and be back tomorrow morning to see the General.

Q. That is not what you dictated to the stenographer, is it? A. I dictated to the stenographer, "Tell the General that Mr. Phleger called, and that I explained to him that Mr. Hubach has complained about the hops, and he says not to be in no hurry about shipping them back," or something to that effect. Of course, I can't recall exactly the words —"and he will be back tomorrow morning to see the General."

Q. And that he will communicate with his firm about it? A. That he will communicate with his firm about shipping in a car in its place.

Q. That is not what you dictated to the stenographer, is it? A. Similar to that effect.

Q. You did not undertake to dictate to the stenographer exactly what Mr. Phleger said and exactly what you said, did you? A. Exactly at that time, because Mr. Phleger stood right alongside of me.

Q. You mean that you undertook to dictate to the stenographer everything that Mr. Phleger said and everything that you said, or just the sense of what the conversation was? A. Well, the main part, the main object of our conversation.

Q. Now, what lot of hops was this which was taken into the brewery on the 2d of October? A. What is that?

Q. What was the lot number of the hops that was taken into the brewery on the 2d of October, do you know? A. No, I don't know. You mean the number of the bales, if I understand you right?

Q. Yes. A. 100 bales.

Q. Yes, but do you know from what lot they came of the Horst Company? A. I do not.

Q. The notice from the railroad company said that they had arrived at Elizabeth on October 1st, did it not? A. Around that date, yes.

Q. Now, you said that they were taken into the brewery. What do you mean by that? A. Unloaded from the car, the railroad.

Q. Where was the car with reference to the brewery? A. At the Pennsylvania Railroad freight yard.

Q. How far is that from the brewery? A. Oh, I should say about a mile and a half away.

Q. And did you send your trucks down to get the hops? A. I did not.

Q. Well, I mean were trucks of the Breidt Company sent down for the hops? A. They were, yes.

Q. And the hops were unloaded from the car? A. Yes.

Q. And taken into the brewery? A. Yes.

Q. And where were they put when they reached the brewery? A. Upstairs.

Q. Mingled with other hops that were there, I suppose? A. No, they were put separately.

Q. In bales? A. In bales.

Q. How soon after that was it that you saw Mr. Hubach coming down the stairs, or going up the stairs, with some hops in his hands? A. I think it was on Saturday morning.

Q. And do you know what day of the week it was that the hops were taken in the brewery? A. On Friday; they were unloaded on Friday.

Q. Will you tell me once more what your conversation was with Mr. Phleger on the Monday after the arrival of the hops? A. I told Mr. Phleger that Mr. Hubach has complained to the General that the hops received from the E. Clemens Horst Company are of an inferior grade, poor quality, and that the General feels inclined not to accept them, and Mr. Phleger says, "Oh, it is all right. I can dispose of these hops somewhere else. Tell the General not to ship them back right away, to hold them a little while, and I will communicate with my firm at once, and I will be back tomorrow morning and see the General." Then I dictated this note to Miss Woelfel while Mr. Phleger was there.

Q. You do not know of your own knowledge whether Mr. Phleger came back next day? A. No, sir; I do not.

Q. You didn't see him after that? A. I didn't see him; I don't think he was, in fact.

Q. The only time you ever saw him was on that Monday morning? A. Yes, that is the only time I personally saw Mr. Phleger. He may have been in and seen me but I didn't see him.

EDWARD J. BUTLER, sworn in behalf of defendant.

Direct examination by Mr. Stamler.

Q. Mr. Butler, you reside in Elizabeth? A. Yes, sir.

Q. And you have charge of the receiving and shipping department of the Peter Breidt City Brewing Company? A. Yes, sir.

Q. I show you a book and ask you what that book purports to be (book shown to witness)? A. That is the receiving and outgoing of merchandise.

Q. Of merchandise of the company? A. Merchandise of the company, yes.

Q. And in whose handwriting is it? A. My own.

Q. At page 71 of that book do you find an entry when the hops arrived and when they were unloaded? A. Yes, sir.

Q. On what date were they unloaded? A. On the 2d of October.

Q. On page 79 of that book do you find any entry relative to the hops in question? A. Ninety-nine bales shipped to San Francisco, California.

Mr. English: What date?

Mr. Stamler: October 9, 1914.

Witness: October 9, 1914, yes, October 9, 1914.

Mr. Twining: What date is that?

Mr. Stamler: October 9th—no, December 9, 1914.

Witness: December 9, 1914.

Mr. Stamler: That was an error.

Q. Do you recall seeing Mr. Phleger at the office of your company? A. Yes, sir.

Q. On how many occasions did you see him? A.

Why, I think I had a conversation with him on two different occasions.

Q. When was the first, how long after the arrival of the hops?

A. Well, I think it was the Monday after we received the hops.

Q. Did you know Mr. Phleger prior to that time? A. No, I had never seen him before.

Q. Who introduced you to him? A. Why, Mr. Loehrs.

Q. What conversation did you have with him, if any, that day? Did you have any conversation with him at all? A. Why, no, not much. Mr. Loehrs brought him into my office and introduced him to me, and said that the General had sent for——

Mr. Twining: I object to what took place at this time in the way of conversation, if your Honor please.

The Court: You may state what was done, not what was said.

Q. What was said?

Mr. Twining: No.

Mr. English: This was the very question that came up when Mr. Loehrs was on the stand. Counsel objected and said Mr. Phleger had no authority, and we contended that he did have authority, and your Honor said you would receive it and consider it afterwards.

The Court: I though this question was different.

(Question and answer read.)

The Court: I got the impression that the witness was stating, not what Mr. Phleger

said, but what Mr. Loehrs said. I was correct.

Mr. English: But it was in the presence of Mr. Phleger; it took place in the presence of these three men and was about these hops.

The Court: Well, the answer to which the objection was made seems to be confined to what was said by one of the men to Mr. Phleger.

(Question withdrawn.)

Q. State the conversation that took place at that time between yourself, Mr. Phleger and Mr. Loehrs relative to the hops in question? A. Well, after Mr. Loehrs had introduced Mr. Phleger to me I said to Mr. Phleger that Mr. Collins was going to return the hops——

Mr. Twining: I object now. I could not object until the answer developed so that I knew what the subject of the conversation was going to be. I object on the ground that Mr. Phleger was a sales agent, or a sales solicitor, for the plaintiff, and therefore not impliedly, and, as has been testified, not expressly authorized to make any adjustment with the defendant with regard to this shipment, and that therefore what he said or what was said in his presence in regard to that question is not binding on the plaintiff and is hearsay and immaterial.

The Court: It seems to me to be analagous to the other question, as to which I thought the wisest thing for the Court to do would be to receive the testimony, and then, in view of the language of the contract and all the other testimony, to consider whether what

was said was evidential against the plaintiff. I shall make the same ruling now. I shall reserve the objection and take the testimony, giving you the right to an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Continue, Mr. Butler.

(Answer read.)

A. ——and Mr. Phleger asked me to hold them off a few days; that he thought he could ship them to New York or Brooklyn, to some other destination, not sending them back to California, because it would be too much expense, and asked me to hold them. I said, "All right, I will hold them."

Q. When was that conversation? A. That was on the Monday following the arrival of the hops.

Q. Were you present when the statement was dictated to Miss Woelfel, now Mrs. Schroeder? A. Well, I think I was; I don't just recall; I think I was at the time; but I didn't just pay attention to what Mr. Loehrs said. I am pretty sure I was present at the time.

Q. Now, did you see Mr. Phleger again? A. Yes, some time later on Mr. Phleger came to see me again.

Q. Where were the hops at that time A. I don't know whether they were in the brewery or whether I had them on the car ready to ship them back again; I think they were on the car ready to go back.

Q. Did you have any conversation with Mr. Phleger at that time? A. Mr. Phleger asked me to hold the hops again for a few days, until he could hear from the Clemens Horst Company, and then I didn't see Mr. Phleger or hear anything more about

it, and so I spoke to the General about it, and we shipped them right to California.

Mr. Twining: I object.

The Court: Never mind that.

Cross Examination by Mr. Twining:

Q. Do you know when the hops arrived at the Pennsylvania or Central Railroad yards? A. Yes.

Q. When? A. Well, they arrived, I think, on the 1st and were unloaded on the 2d.

Q. Well, was it at the Pennsylvania or Central Railroad yard, do you know? A. The Pennsylvania, I think, according to my book there.

Q. Well, is it in this book that Mr. Stamler read to you from? A. Yes.

Q. When they arrived at the yard? A. Yes, sir.

Q. Will you look at that book and refresh your recollection as to when that was? A. (Referring to the book.) It is right here (indicating in book).

Q. The Pennsylvania Railroad? A. Yes, sir.

Q. Well, the note is, "Car arrived October 1st, unloaded October 2d, Pennsylvania R. R.," is it not? A. Yes, sir.

Q. And that is the fact? A. Yes, sir.

Q. That they arrived on the 1st and were unloaded on the 2d? A. Yes, sir.

Q. Now, where was it that they arrived at, in the freight yard of the Pennsylvania Railroad? A. Certainly.

Q. Which is the Elizabeth terminal, I suppose, of the road? A. Yes.

Q. Did you give the orders to go down and unload the hops and bring them up to the brewery? A. Yes, sir.

Q. And Mr. Phleger requested you to hold the

goods for a few days, until he could communicate with his people, or did he request Mr. Loehrs in your presence? A. Mr. Loehrs had nothing to do with it; I was the one that was to send them back.

Q. No. I mean when Mr. Phleger first came over, on the Monday following the date of the arrival, as you have stated—— A. Yes.

Q. ——you had some conversation with him, did you not? A. Yes, sir.

Q. And with Mr. Loehrs—Mr. Loehrs was present, was he not? A. Yes, sir.

Q. Of whom was the request made that the hops be held for a few days, of you or Mr. Loehrs? A. Of me.

Q. Of you? A. Yes, sir. Mr. Loehrs has nothing to do with it, so far as returning and receiving is concerned; I attend to all that.

(Depositions taken on the part of the defendant: Henry L. Schaefer, Robert Schwarz, Carl Robitschek.)

FREDERICK HUBACH sworn in behalf of defendant.

Direct Examination by Mr. Stamler:

Q. Mr. Hubach, you reside in the City of Elizabeth? A. Yes, sir.

Q. And you are a brew master? A. Yes, sir.

Q. Employed by the Peter Breidt City Brewery Company? A. Yes, sir.

Q. How many years have you been a brew mas-

ter? A. I have been a brew master for over twenty-five years.

Q. Where did you get your training? A. In Germany, in Munich.

Q. Did you go to any school? A. Yes, sir; in the Brewers' Academy, in Munich.

Q. And how many years have you been engaged as brew master in the United States? A. Since about twenty-four years.

Q. And how many years have you been employed by the Peter Breidt City Brewery Company in the capacity of brew master? A. Over eleven years.

Q. And did you hold positions as brew master for other breweries in the United States? A. Yes, sir.

Q. Where? A. I held a position in Pennsylvania.

Q. What was the name of that concern? A. The Tremont Brewing Company. I was brew master in Brunswick, Georgia; I was connected with the Montgomery Brewery & Ice Company in, Montgomery, Alabama; I have been out in Detroit; I erected a brewery in Manistee, Michigan; then I have been out in Minnesota.

Q. Do you recall receiving a shipment of hops from the Horst people during the month of October, 1914? A. Yes, sir.

Q. How many were there? A. A hundred bales.

Q. When that hop in question came to the brewery what did you do with it? A I examined the hops.

Q. Where did you place them first? A. I placed them up in the brewery; I had a room reserved for these hops.

Q. Did you have any other hops in that room? A. I had no other hops in there except these special hops.

Q. Did you take any of these hops out of the

bales? A. I had to examine them; I had to take some out of the bales, certainly.

Q. How many did you send back? A. Ninety-nine.

Q. The ninety-nine that you sent back, were they opened? A. Well, you know, you open only a little part to take samples out, a dozen maybe.

Q. Well, how many did you take out that way for the purpose of taking a sample? A. Well, seven or eight or nine, several.

Q. What? A. Seven or eight or nine I opened to examine the hop. That means I took samples out.

Q. After you had the hops in the brewery, you say, you opened a bale to get a sample? A. To examine it; yes, sir.

Q. You say to examine it? A. Yes, sir.

Q. How much did you take out the first time? A. Oh, it might be a dozen of them hops.

Q. How much hops did you take out? A. About a dozen of the mhops—cones, as we call them.

Q. Blossoms? A. Yes, blossoms, cones.

Q. Before you received the shipment of hops did you also examine a sample of hops that were forwarded for your inspection and the inspection of General Collins prior to that time—a sample only? A. Yes, there was samples before these hops arrived.

Q. Did you examine those samples? A. Yes, I did.

Q. Who was present? A. They were handed out to me.

Q. By whom? A. By General Collins.

Q. Did you make a report to General Collins of those samples? A. Yes; I made a report to General Collins of the samples.

Q. And what was your report?

Mr. Twining: I object to what the report

was, first, upon the ground that that would not be admissible under any view—a report made by an agent of this company to an officer of the company—and, second, upon the ground that it is immaterial, under my view of the case, what was done with regard to this sample.

The Court: I shall sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. After examining the sample of hops that you received from the Horst people and before you received the original shipment, what was your opinion as to those hops?

Mr. Twining: I object. You are speaking of the sample?

Mr. Stamler: Only of the sample, the sample only.

Mr. Twining: I object to what his opinion was, first, because what his opinion was with reference to this sample would make no difference. Now, it appears that after the shipment itself was received it was treated as a sample, or, at least, was examined—samples from the shipment itself were examined—and that is what was relied upon; and, second, on the ground that the question of what was done with this sample is immaterial; and, third, on the ground that the opinion of this witness with reference to the sample would not be evidence, I should think, in any view.

Mr. Stamler: In reply I desire to state to the Court that they put in evidence letters showing that they had sent us a sample,

and that we replied to that, and we can show actually that we examined the samples, and, in good faith, rejected them, and here is the basis of our testimony; here is the basis of this letter.

The Court: I shall receive the evidence.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Stamler: Answer the question.

(Question read)

A. I examined the hops carefully, looked it over, examined it, according to my practical experience and knowledge, and found it was a poor sample.

Q. Did anybody else examine that sample? A. Yes, sir.

Q. Who? A. Mr. Hainlin.

Q. Did you furnish him with that sample? A. Yes, sir.

Q. For the purpose that he should make an examination? A. Yes, sir.

Q. Now, after you received the shipment, you took a sample from the original shipment—after the hundred bales came you took out a sample? A. Yes, sir.

Q. Did you examine that sample? A. I took out a sample.

Q. Did you examine it? A. Certainly I did.

Q. What did you find?

Mr. Twining: I object. It is immaterial what the quality of the hops was, the right to object to the hops on the ground of quality having been waived.

The Court: I make the same ruling as in other cases of the same kind.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Answer the question. What was the quality of the hop that you received? A. The quality of these hops I reported to the General——

Q. No. What did you find it to be? A. Common hops.

Q. Well, tell us what you did about it. How did you determine that? A. Well, I took a few cones in the palm of my hand, and looked them over, first to determine the color of the cones, and they were a brown green. After that I smelled of the hops. It was a grassy smell. After this I picked the hop—the cone—apart. I looked after the peduncle and the little hop leaves to ascertain the content of lupulin, because lupulin is right there in the stem and on the leaf. There was very little lupulin; there was very little lupulin. Then by rubbing the leaves. rubbing the cone, if there is enough soft resin it will stick together; it don't fall apart; it sticks together.

Q. How did you rub those leaves? A. Well (witness illustrates).

Q. Between your fingers? A. Yes, sir; between the fingers. And by the smell of the oil you can ascertain it.

Q. And by going through that examination you came to what conclusion as to the quality of the hops? A. It was a common hop.

Q. What do you mean by "a common hop?" A. Well, I didn't term it a good brewing hops; it was common, ordinary hops.

Q. You say that it had a grassy smell? A. Yes, sir.

Q. Or odor? A. Yes, sir.

Q. Can you tell us why it was grassy? A. Why, a good hops hasn't such a smell, you know; good hops has a specific hop smell.

Q. Well, what was the matter with that hop? A. It was not good hops.

Q. It was not good? A. No.

Q. Now, you said it was in color green and brown? A. It was a brown green color.

Q. What color should it have been? A. A nice yellow green.

Q. Does the color brown green indicate anything to you as to why the hop had a grassy smell? A. You know, to my estimation, it was probably hops that was not perfectly ripe, and then it might be by the drying process employed. the kiln drying process; it was probably overheated or burned by the drying process—kiln dried.

Q. What is the function that a hop performs in the brewing of beer? A. First it has to give the beer the specific hops bitter, and then the flavor, and the soft resins by the boiling to eliminate the albuminoids.

Q. What acts as a preservative of the beer? A. Bitter; the fine bitter acts at the same time as the natural preservative to the beer.

Q. Now, after you had examined that sample and found it to be a common hop, what did you do? A. I took a sample down to the General; I took a sample down to the General, to his office.

Q. And what did the General do with it? A. And I told the General——

Objected to.

Q. No. What did the General do? A. He looked at it.

Q. Did you report your opinion of the hop to General Collins? Yes or no. Only answer that

yes or not. Did you report that? A. Yes, I reported my opinion.

Q. And did you also report the opinion of the first sample that you examined to General Collins? A. Yes, General Collins knew that, too.

Q. Now, did you assist Mr. Loehrs in sending any hops to the scientific station? A. Yes, sir.

Q. From what shipment of hop was that sample taken? A. From those hundred bales.

Q. Do you recall directing Miss Woelfel, who was then a stenographer in the office, to send a sample to the scientific station? A. Yes, sir.

Q. Did you see that the sample was actually taken from the hundred bales? A. Certainly; I was present.

Q. You were right present? A. Yes, sir.

Q. Now, when did you see Mr. Phleger about this hop? A. I seen Mr. Phleger that time—the day when I sent that sample.

Q. The same day that you sent the sample? A. Yes, sir; the same day.

Q. Where did you see him? A. In the brewery.

Q. Where in the brewery? A. In that room where the hops was stored.

Q. Did you talk to him? A. Yes, I talked to the gentleman.

Q. What did you tell him? A. I told him——

Mr. Twining: I object to what he told him.

The Court: This is to whom?

Mr. Stamler: To Mr. Phleger.

The Court: Just what is the objection?

Mr. Twining: The objection is that Mr. Phleger was a mere solicitor of sales, and not authorized to make any adjustment of this shipment. Whatever may have been said to him would not make any difference, any more than

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what he said would be binding upon his principal. Furthermore, the conversation alleged to have taken place occurred more than five days after the date of the arrival of the hops at the place of delivery.

The Court: Subject to those objections, I shall take the testimony.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Answer the question. What did you tell Mr. Phleger when he called at the brewery in the place where the hops were? A. That the hops wasn't satisfactory.

Q. And what did you say and what did he say? A. Well, he said, "All right;" he said, "We can send you another hops."

Q. What else was said there? [No response.]

Q. Anything else said there at that time? [No response.]

The Court: Well, proceed.

Q. Did anyone else look at the hops there that day? A. Repeat this question, please.

Q. [Question read.] A. Yes, this gentleman looked at the hops, certainly.

Q. Whom do you mean? A. Mr. Phleger.

Q. He looked at the hops? A. Yes, sir—the representative of the Horst Company.

Q. What hops did he examine, which did he look at? A. A bale—he took a sample out of a bale.

Q. What was said about the hops? What did you say about them and what did Mr. Phleger say? A. I told Mr. Phleger that the hops wasn't satisfactory; that I didn't consider it good brewing hops; that I considered it as common hops.

Q. [And what did Mr. Phleger say? A. Mr. Phleger said, "Well, if you don't like it, we can send you other hops." That is all that was said.

Q. That is all that was said? A. Yes, sir.

Q. Did you see Mr. Phleger after that time? A. Yes, I seen him some time later on.

Q. Where? A. We were up in the brewery again.

Q. Where in the brewery? A. In the room where we had the hops, where the hops was stored.

Q. Did you see him at any time with samples of hops in the office of General Collins? A. Yes; I seen him once with samples.

Q. Was that after the hundred bales had been in the place? A. Yes, that was a considerable time after.

Q. And did you examine that sample of hops that time in his presence? A. Yes, sir.

Q. And what did you tell him about the hops that he then brought? A. I said the samples are dried out samples, and I requested him to send fresh samples.

Q. Could you make a proper inspection of that sample? A. Yes, I did.

Q. No. Could you have made a proper— A. I examined them. They were too dry; they were old samples.

Q. Could you make a proper examination of them by reason of that fact? A. No. not well; I wanted a fresh sample.

Q. Did he bring you fresh samples afterwards? A. No, sir.

Q. Now, after Mr. Phleger called on you the first time, which you say was the date when you sent the sample to the scientific station— A. Yes, sir.

Q. —did you make a brew of any of these hops?

A. I used one bale. That means not quite the content of a bale.

Q. And how much was your brew there, how many gallons or barrels? A. Well, I brewed 200 barrels.

Q. And you used how much hops? A. 175 pounds.

Q. That is, that one bale? A. Yes, that one bale. It was about twenty pounds left of that bale.

Q. Was that brew a successful brew?

Mr. Twining: I object to that; I object to what that brew showed. I have no objection to his showing that he appropriated part of the hops, but what the brew may have shown does not seem to me to be material. This was long after the period within which he would have to accept or reject.

The Court: I shall receive the evidence, subject to the objection.

Mr. Twining: Your Honor means that my exception is reserved?

The Court: Yes.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

[Question read.]

A. The braid of the wort was not right.

Q. What do you mean by that? A. After boiling the wort with hops for a certain length of time, usually two hours and a half, then, if a sample is taken out of the kettle, the wort must show perfectly brilliant.

Q. Well, did it in this case? A. No, it was hazy.

Q. Why was it hazy? A. The low content of the soft resins.

Q. Contained in what? A. Did not eliminate the albuminoids properly.

Q. Well, what was the cause of it? Did you have the proper amount of material in? A. Certainly, we had the proper material. It was the quality of the hops.

Q. It was what? A. The quality of the hops.

Q. What did you do to try to remedy that brew? A. The day after we sent a sample to the scientific station.

Q. No. Did you leave that brew out? A. No.

Q. What did you do with it? A. I mixed it with several other brews, and later on finished it.

Q. You made a test of that hop, did you not? A. Yes, sir.

Q. An actual test? A. An actual test.

Q. From the making of that test can you now say whether or not the hops were a good brewing Pacific Coast hop of the year 1914?

Mr. Twining: I object to the question on the ground that defects of quality have been waived.

Mr. English: We do not think so.

The Court: I make the same ruling in this case as in others. Answer the question.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

[Question read.]

Q. Do you understand the question? A. Yes.

Q. Well, answer it. A. It was not.

Q. Had you prior to that time used hops in brewing—Pacific Coast hops? A. Yes.

Q. For how many years have you used them? A. Since I am in the country.

Q. How many years is that? A. Well, twenty-eight years.

Cross Examination by Mr. Twining:

Q. Mr. Hubach, these hops, this hundred bale lot, were air dried, were they not? A. They were dry, yes.

Q. Well, were they dried by the application of heat or air dried? A. It seems to me they were dried by a kiln; they were kiln dried, in my estimation.

Q. Were they kiln dried? A. Yes, sir.

Q. You are sure about that, that they were not air dried? A. The looks of the hops showed it, to my estimation.

Q. Well, how much do you know about the matter of picking and drying and preparing hops? Have you ever had any experience in that? A. I have seen it done.

Q. But your principal experience is in the brewery, is it not? A. That is my principal experience.

Q. And the business of brewing hops has no relation to the business of picking and drying and preparing hops for shipment, has it? A. Not directly.

Q. Now, what experience have you had as a grower or picker or shipper of hops? A. Well, experience—I never shipped hops and never raised hops.

Q. Have you ever dried any hops? A. I never dried hops.

Q. When did you make the examination of the samples which you have testified arrived before the shipment of the hundred bale lot? A. Which sample have you reference to, to the sample out of the hundred bales?

Q. No the sample which arrived before that. What was the date that you made the examination of that sample? A. It was about two weeks previous; I couldn't tell you exactly.

Q. And how many samples were there, do you recall? A. There were two samples.

Q. Did you examine those the same day that they arrived? A. It was handed to me, and then I examined them the next day.

Q. The day or the day after they arrived? A. Yes.

Q. Now, do you know whether any other samples were examined by you or anyone else before the hundred bale lot arrived. A. They were the only two samples that I seen.

Q. They were the only two that you saw? A. Yes.

Q. When did you make the examination of the hundred bale lot? A. When the hundred bales came in.

Q. What date? A. It was the second day in October.

Q. And on that date you made the examination that you have testified and came to the opinion that the hops were common hops; is that so? A. I came to the opinion that they were common hops.

Q. And did you come to that opinion on the same day that you examined the sample from the hundred bale lot? A. I came to the same opinion.

Q. And it was on that day? A. Yes.

Q. Now, was it on that day that you reported the result of your examination to Mr. Collins? A. No, it was next morning.

Q. It was the next morning? A. Yes.

Q. Do you remember whether the sample of the hundred bale lot which was sent to the scientific station was taken from the one bale a portion of which you afterwards brewed or was taken from one of the other bales? A. I took another bale.

Q. You took another bale? A Yes.

Q. And sent a sample to the scientific station from another bale? A. Yes.

Q. Is that right? A. Yes, sir.

Q. How many barrels of beer do you brew a day over there ordinarily? A. How many barrels?

Q. Yes. A. Four hundred, two brews.

Q. I beg your pardon! A. Two brews.

Q. Two brews a day ? A. Yes.

Q. How long does it take to conduct a brew? A. Well, to finish a brew ready to strike off the kettle it takes ten hours.

Redirect Examination by Mr. Stamler:

Q. That does not mean that the beer is finished? A. No.

Q. You do not put it on the market for how long? A. Well, it takes two months, ten weeks.

CARL HAINLIN sworn in behalf of defendant.

Direct Examination by Mr. Stamler:

Q. Mr. Hainlin, you reside in the City of Elizabeth? A. Linden township.

Q. Linden township? A. Yes.

Q. What is your occupation? A. Manufacturing chemist.

Q. For how many years have you been engaged in that line of work? A. About ten years for myself.

Q. Where did you study that profession? A. Germany.

Q. In any recognized school? A. Yes, University of Trebbin and at Stuttgart.

Q. And you have been a manufacturing chemist in this country for ten years, you say? A. Yes, sir.

Q. For yourself? A. For myself.

Q. Well, did you have any experience before that? A. Yes.

Q. Tell us where. A. I was engaged with the Carl Barthman Company.

Q. Where are they? A. 45 Liberty street, New York.

Q. How many years? A. Well, I am engaged with them yet—about twelve years altogether.

Q. What do you do for them? A. I make certain acids.

Q. And what other experience did you have? A. Well, I am in the brewing line, brewing material, hops now and then, make analyses, hop extract, and so forth.

Q. Now, during the year 1914, during the month of September, did Mr. Hubach bring you a sample of hops to be analyzed? A. He did; he asked me to make an examination.

Q. Did you examine that sample? A. Yes, I did.

Q. Did you also analyze it? A. Yes, I did.

Q. Tell us your result of that examination and analysis.

Mr. Twining: If your Honor please, there is nothing to show that this sample of hops was connected up with the shipment in question, and if it was, the quality of the hops is immaterial, under my view of the case.

The Court: As to that I make the usual ruling. You may answer the question.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Stamler: Answer the question.

A. I examined the sample of hops, and found that it contained about six per cent of soft resins;

the appearance and smell of the hops were not good; and, furthermore, I came to the conclusion that it must be that is a pretty poor hop, having such a low percentage of extract of resins. That is what I found in that sample; that is what I reported to Mr. Hubach.

Q. You reported to Mr. Hubach that fact? A. That fact, yes.

Q. How did you make that test for resins? A. Well, I made it with machines.

Q. What did you do? A. I extracted it.

Q. What chemical did you use, for what purpose? A. Petroleum ether; that is purified benzine, if you understand that better.

Q. What effect has the ether on the hop when you analyze it? A. Well, it separates the resins; it extracts it from the hops; and then we can make our determination after we draw off our ether again and try the contents of what is left and weigh it; then we have the exact amount, or about the exact amount of the soft resins that the hops contain.

Q. Was that sample that you examined a good Pacific Coast hop? A. Well, I considered it as a poor hop, on account of the low percentage of resins.

Q. What percentage of resins should a good Pacific Coast brewing hop have?

Mr. Twining: I object. He is not qualified to state.

The Court: The witness has testified to his knowledge as a chemist. His acquaintance with different grades of hops I do not think he has told us about. Therefore the objection is well founded.

[Question withdrawn.]

Q. Did you prior to that date analyze hops for

the purpose of determining the percentage of resins contained in them? A. I did.

Q. Where? A. At my laboratory.

Q. How many such tests have you made? A. I have made a number of tests.

Q. How many? A. Well, I couldn't say exactly; maybe a hundred, maybe seventy-five.

Q. What kind of hops? A. Pacific, New York hops, New York State hops, and German hops, Bohemian hops, different kinds of hops.

Q. Do you know what percentage of resins a good Pacific Coast brewing hop should have? Answer yes or no first. A. Yes.

Q. What is it? A. At least from ten to fifteen per cent.

Q. All resins or only soft resins—the precentage that you gave us? A. Soft resins.

Q. After you had examined this sample of hops was another sample submitted to you by Mr. Hubach? A. About three or four weeks after I received a sample, stating that he sent——

Mr. Twining: I object to what he stated.

The Court: You seem to have answered the question.

Witness: I received another sample.

Q. Did you examine it? A. I looked at it; yes, sir.

Q. For what purpose? A. Well, to give Mr. Hubach my opinion.

Q. Did you examine it for that purpose, then? A. I didn't examine it thoroughly, not the second sample.

Q. What do you mean by that? A. Well, I didn't make an analysis as to the hard and soft resins.

Q. But did you make a physical examination? A. I looked it over; yes, sir.

Q. Was that a thorough physical examination? A. Well, I wouldn't say that it was thorough. It convinced me that the hops were poor——

Mr. Twining: I object. I move to strike out the answer.

Mr. Stamler: I consent to it.

Q. Was the examination that you made sufficient upon which you could give an opinion? A. Yes, sir.

Q. What did you find as to that hop?

Mr. Twining: I object. The witness has not qualified to make any examinations except chemical examinations.

Mr. Stamler: He said that he bought and sold and made analyses; he testified as to the first one.

The Court: I have not all the witness's testimony down on my notes. I do not remember any statement as to his knowledge of the quality of hops except as derived from chemical analyses.

Mr. Stamler: Well, I will ask the question again.

Q. Have you bought and sold hops? A. Yes, sir.

Q. For how many years? A. Oh, it will be fifteen years—more than that.

Q. Can you distinguish the different kind of hops? A. Well, I wouldn't like to give an expert opinion on it, but I could say that is a good hop—an apparently good hop—and the other is apparently poor.

Q. On what do you base your knowledge? A. Well, I base my knowledge, if I make an analysis, an analytical examination, as a rule; but I can see

that a hop is apparently good, if it is dried too much, if it is a poor hop, by opening it and by looking at them, but I wouldn't say that I could give testimony as an expert.

Cross-Examination by Mr. Twining:

Q. Mr. Hainlin, what was the percentage of hard resins in the sample that you examined? A. I only examined the soft resins, and after I found it contained less than six per cent.——

Q. No, you have answered the question. A. All right.

Q. What was the date when you made that ex amination? A. About the middle of September.

By the Court:

Q. 1914? A. 1914.

By Mr. Twining:

Q. And your report to Mr. Hubach was that it was six per cent. soft resins and the appearance and smell of the hops were not good; is that it? A. The appearance—I told him when he gave me the hops that I don't like it very much, and the soft resins I gave him about three days after; I gave him the analysis, and I told him that——

Q. Now, what is the difference in the percentage of soft resins in a Pacific Coast hop and a New York State hop? A. The difference?

Q. Yes, the percentage? A. You can have New York State hops which will only contain eight per cent. and you can have Pacific Coast hops which contain twenty per cent. even.

Q. What should a New York State hop contain so far as soft resins are concerned? A. From eight, ten to fifteen.

Q. Eight to ten to fifteen per cent? A. Yes, about the same as——

Q. About the same as a Pacific, is it? A. Yes, sir.

Q. What should the percentage of hard resins in the Pacific Coast hop be? A. From two to five or six per cent.; it all depends.

Q. Well, what should it be? A. Well, it only ought to be three and a half. The less it is, the better the hop.

Q. What is that? A. The less hard resins, the better the quality.

Q. Well, you said something about the percentage of soft resins being, or ought to be, from ten to fifteen per cent? A. Yes, Pacific hops.

Q. Now, if the percentage of the Pacific hops that you speak of is from ten to fifteen per cent., what should the percentage of soft resins be? A. That is the soft resins.

Q. What should the percentage of hard resins be in the same hop? A. It can be from two and a half, three per cent., up to five, four or five per cent.; they can be up to twenty per cent.

Q. So that the total resins in a Pacific Coast hop might be as high as twenty per cent.? A. Yes, sir.

Q. Can they be any higher than that? A. They may be; I think I saw some that was higher.

Q. How much higher? A. If you allow me to show you a book——

Q. No, I do not want you to read books. A. Well, I don't know exactly——

Q. What has your experience taught you? A. My experience is an average of eleven or twelve per cent. of soft resins and three per cent. of hard resins.

Q. Well, now, we are coming down. A. Well,

that is what I personally have seen, but through literature I know that they are up to fifteen, and even up to twenty per cent.

Q. Do you know that from your own tests? A. No.

Q. What is the highest percentage of soft resins that you have seen yourself? A. Twelve and a half to thirteen per cent. of Pacific hops.

Q. What is the highest percentage of soft resins that you have knowledge of? A. Fourteen and a half per cent., German hops.

Q. What about New York hops? A. Well, they contain about ten and a half, fifteen.

Q. What is the average of the soft resin contained in hops that you yourself have analyzed? A. I told you about twelve and a half or thirteen per cent.

Q. I understood you to say that was the highest percentage that you have ever had? A. Yes.

Q. What is the average percentage of soft resins in hops that you yourself have analyzed—Pacific Coast or New York state? A. Maybe ten or eleven per cent.

Q. Well, what was it? A. Well, I couldn't figure it out now; I would have to add them all together; but I believe it is about eleven per cent. That is a fair average.

Q. Upon what did you base your statement that you made a moment ago that a good Pacific Coast should contain from ten or fifteen per cent. of soft resins? A. From the literature that I have read.

Q. Not based on the result of your own examinations? A. No, the literature.

Q. The result of your own examination shows a considerably lower percentage of soft resins, does it not? A. Yes, sir; that is an average.

Q. Now, in making your examination, did you

take into consideration the percentage of moisture that there was in the sample? A. Well, I will tell you. I did not dry the sample; I used the sample as it was, and I believe the sample was well dried.

Q. That would mean, would it not, that there would be more hard resin in it than there would be if the sample were fairly moist? A. Yes, that may be.

Q. And might it not have been the case that the total resins, even in the sample that you had, were up to what they should have been—— A. I don't believe it.

Q. —— but that the percentage of soft resins was smaller than it should have been, because the sample was dry? Might not that be so? A. Well, that may be and may be not; I don't believe it, though.

Q. Well, you do not know what the hard resin was, do you? You did not test it for that? A. No, I didn't make any test for the hard resin, because that soft resin was so low, so that I didn't want to do any more than Mr. Hubach asked me to do.

Q. Do you know Mr. Carl Robitschek? A. Yes, sir.

Q. Is he the head of a recognized brewing school? A. Yes, sir.

Redirect-examination by Mr. Stalmer:

Q. Has the hard resin any brewing value? A. No, sir.

Q. None whatever? A. None whatever.

Q. What do you know about brewing, Mr. Hainlin? A. Well, I assisted in brewing for awhile.

Q. Where? A. In Brooklyn.

Q. How long? A. Well, that is fifteen or sixteen years, twenty years ago—sixteen years at least; I am fifteen years away.

Q. You say you were fifteen years of age when you assisted? A. Oh, no, I am fifteen years away.

DENNIS F. COLLINS, sworn in behalf of defendant.

Direct Examination by Mr. English:

Q. General Collins, you live in Elizabeth? A. Yes, sir.

Q. What officer are you of the defendant company? A. President and general manager.

Q. How long have you been? A. I have been in that capacity for twelve years past.

Q. And how long have you been in the brewing business? A. About twenty-one years.

Q. I suppose in the course of these twenty-one years you have become acquainted with hops for brewing purposes? A. I have bought a lot of them; yes, sir.

Q. You have been buying hops all those years? A. With the exception of a few years at the start; I probably have been buying hops for eighteen years.

Q. I suppose you have bought hundreds of thousands of pounds, have you not? A. Yes, sir.

Q. What is the annual consumption of hops in your brewery? A. In the past few years our consumption has been from seventy-five to ninety thousand pounds.

Q. A year? A. Yes, sir.

Q. And in the course of all these years you have had occasion to examine hops many times, I suppose? A. Look them over pretty carefully when we buy them.

Q. And from your experience you are able to tell from examination whether a hop is a good brewing hop or not? A. Yes, sir.

Q. In the course of these years have you become familiar with the prices of hops? A. That is my business, to keep in touch with the market.

Q. The state of the market for hops, whether there is a market or not? A. Yes, sir.

Q. Now, I show you plaintiff's Exhibit No. 1, which is the original contract in suit, and was attached to the depositions taken in California (paper shown to witness). Was that contract executed in duplicate? A. Yes, sir.

Q. I have here a duplicate copy which we produce from our files. That is also an original paper (paper shown to witness)? A. Yes, sir.

Q. And both of those were signed on behalf of the defendant by you as president? A. Yes, sir.

Q. On behalf of the plaintiff by whom? A. By Mr. Phleger.

Q. Is any of this contract in your handwriting? I see that it is partly written and partly printed. A. Yes, sir.

Q. What on it represents your pen marks? A. I struck out the word "about" where it would read and originally did read "about equal to or better."

Q. That was printed in the form? A. That was printed in the form.

Q. And you struck out the word "about"? A. Yes. I wanted no question as to the quality. And then I added in, with a view to be absolutely certain, the words "on approved samples," and that was written in in my handwriting before those contracts were signed.

Q. It is written in in your handwriting in each of the two of the original copies? A. Yes, sir.

Q. Who negotiated this contract with you? A. Mr. Phleger.

Q. Did you look him up or did he look you up? How did you come together? A. They generally look us up.

Q. Have you ever bought hops from him before? A. I doubt it; I doubt if I did; I don't think so.

Q. Well, he looked you up in your office, I suppose? A. Yes, he came in the office.

Q. He was trying to do some business for his company? A. He was in a couple of times before we concluded the contract.

Q. You saw him a couple of times? A. At least twice.

Q. How did it come that you struck out the printed word "about" in the contract?

Mr. Twining: I object to that. That is immaterial.

The Court: It seems to me immaterial.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. You have stated that you wrote in in writing the words "on approved samples." Why did you do that?

Mr. Twining: I object to that as immaterial. The contract speaks for itself, and it must be construed in the light of its own terms and not in the light of surrounding circumstances or testimony as to why things were done prior to the time the contract was concluded.

The Court: It does not require any argument, I think. I sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Did Mr. Phleger give you a definition of what he meant by "equal to or better than good Pacific Coast brewing hops"?

Mr. Twining: I object.

The Court: The words having been used with the assent of both parties, they are to bear such a construction as the Court may put upon them.

Mr. English: But, your Honor, you see that the testimony taken by the plaintiff in the West and put in by us today shows that there are different grades in the trade, choice, prime, medium, and so on, and in each case the witness was asked in which of the grades "equal to or better than good Pacific Coast brewing hops" came, and they each gave their testimony, both on the plaintiff's case and on our case, as to which grade, in their judgment, such hops belong. That seems to be an ambiguity about this contract. Now, I want to know what intorpretation was put on it by Mr. Phleger.

The Court: There is, of course, an exception to the rule: that where words of art are used, which are not easily understood, testimony will be received to show what they mean as they stand in the contract.

Mr. English: That is what I am after.

The Court: Not what the parties contend that they do mean, but what they do mean.

(After further argument): I sustain the objection. The distinction is between the Court interpreting the contract, which is the ordinary rule, and the jury interpreting such parts of it as are obscure by reason of the employment of words of art. In either case we do not go to the parties for their construction.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. At any rate, as a result of the negotiations between you and Mr. Phleger, this contract was signed between you? A. Yes.

Q. Now, that, it appears, was signed in March, 1914? A. Yes.

Q. Was there anything said at the time this agreement was signed as to whether it was subject to confirmation, or did Mr. Phleger purport to sign it then and there and be through with it?

Objected to.

Mr. English: That is in the nature of rebuttal, if nothing else, your Honor, because Mr. Phleger claimed that it had to be subject to confirmation, and counsel recalled him this morning for the purpose of having him explain two letters of confirmation which had been written and are in evidence in the case relating to this same contract.

The Court: There is certainly evidence on that point.

Mr. Twining: I think, your Honor, that evidence related to a letter which was written by Mr. Phleger after the making of this contract. As I recall it, that contract is dated March 26th, and the letter was written the same day. Mr. Phleger testified this morning that he received telegraphic authorization to write the letter.

Mr. English: He went further than that; he said that he had said to General Collins that the contract was only signed by him on confirmation, or words to that effect.

The Court: I shall refer to the testimony, if necessary, to determine what he did say.

Mr. nglish: Well, is it necessary to do that? I think the question is proper, in any event.

The Court: We shall look it up between now and tomorrow morning, and go on with something else, unless it is going to embarass you.

Mr. English: No, sir.

Q. At any rate, you got a letter confirming it, signed by Mr. Phleger? A. I believe we did.

Q. There is an exhibit here showing that such a letter was written. And you also got a letter written from California confirming it? A. Yes.

Q. That is also in evidence here. Now, coming on down to the fall of 1914. Was any sample sent to you for your approval prior to the shipping of any of the goods? A. Yes, sir.

Q. Do you remember approximately when that sample arrived? A. In September.

Q. In September, 1914? A. Yes, about the middle of September, I imagine.

Q. How many sets of samples did you receive, do you remember? A. One set.

Q. If any other set of samples was ever sent you never received it? A. No, sir.

Q. Now, I show you a letter which is in evidence as Exhibit P-7A, and ask you whether you wrote this letter after you had received the samples, which you say arrived about the middle of September (paper shown to witness)? A. Yes, sir.

Q. Prior to writing that letter had you examined the hops? A. Yes, sir.

Q. Had anybody else made any examination in the brewery? A. The brew master.

Q. Mr. Hubach? A. Mr. Hubach.

Q. He gave you a report of his judgment on the hops? A. Yes, sir.

Q. Did you make any independent inspection of the hops yourself? A. Before referring them to Mr. Hubach I looked them over.

Q. What did that looking over consist of? How did you go about it? A. Well, I opened the package, and it impressed me as being a poor hop.

Mr. Twining: I object to this.

The Court: You are now speaking of the samples?

Witness: The sample; yes, sir.

Mr. Twining: I object to what this witness found as a result of examining this sample, because I think that is immaterial, the shipment itself having been accepted.

The Court: The question will be reserved and the testimony received, and an exception will be noted.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Go on and describe what your inspection showed. A. On opening the sample, the appearance of the hop impressed me that it was a poor article; it didn't look to be fully matured; it wasn't fully grown or developed; the color of it was not what a healthy hop would have; and in breaking it up, the lupulin was rather scarce, very thin; the general appearance indicated that it was a poor quality of hop, and I immediately—a poor quality of hop.

Q. I see in your letter that you state that "Investigation shows the quality of your hops to be poor and very little hop flavor." A. Yes, sir; the flavor was also missing, which is usually prominent after you break the flower up and apply it to your nostrils.

Q. You also say in your letter, "We do not consider it a choice brewing hop and would not accept

it under our contract." Why did you refer to it in those terms?

Mr. Twining: I object to that. The letter speaks for itself.

The Court: I sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. General, how long after the sample had been received do you suppose it was before you wrote this letter? A. Oh, possibly a week.

Q. Now, to your own knowledge, what was the next thing that happened in the hop situation following your letter declining to approve of the sample? A. The brew master came to my office with another sample taken from a shipment which had come into the brewery.

Q. Did you examine that sample, or the sample of that shipment which he produced? A. I did.

Q. The same kind of examination that you made before? A. Yes, sir.

Q. What conclusion did you reach as to the quality of the hops that had been shipped? A. It was similar to the sample that we had already rejected.

Q. It is already in evidence that the hops were taken from the railroad station to the brewery on October 2d, which was Friday. Do you remember what day of the week it was and with reference to the 1st of October when it was that Mr. Hubach brought that sample of the shipment to your office? A. Yes, Saturday morning, the 3d, I believe.

Q. Yes, Saturday was the 3d. A. Saturday morning.

Q. Without stating what you said, did you give instructions with reference to communicating with the plaintiff or its representatives? A. I did.

Q. The instructions were to do what?

Mr. Twining: I object to instructions given; the testimony should be limited to what was done, I think.

Q. What did you do, General? A. I have a tube from my office to the office downstairs, the working office, and I called on the tube and instructed the——

Mr. Twining: I object to what was said.

The Court: I think it is allowable.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I instructed the young lady who was in the office at the time, and who was in court this morning,—Miss Woelfel she was then—to look up the office telephone of Mr. Phleger and notify him that I wanted to see him immediately on this matter.

Q. Of course, you do not know what she did. What was the result of those instructions with regard to the appearance of Mr. Phleger? A. The result was that, as I learned subsequently—I was not there in the office on Monday when he was there, but, coming in later, I received a message from Miss Woelfel that Mr. Phleger had called——

Q. That was the Monday following the Saturday that you had given these instructions? A. The Monday following the Saturday—and that he had a conversation with Mr. Loehrs and Mr. Butler, and would call to see me on the morning following, on Tuesday.

Q. Now, as a matter of fact, did he call on the Tuesday following? A. He did.

Q. That, by the calendar, was October 6th. A. Yes.

Q. Where did you see him then? A. In my office upstairs.

Q. Your office? A. Yes, sir.

Q. What took place between you and him with reference to the shipment of hops that had been sent out?

Mr. Twining: That is objected to on the ground that what Mr. Phleger said would not be binding on Mr. Horst.

The Court: I shall receive the testimony, as I have in parallel cases, on the same grounds previously mentioned.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Tell us what you said and what he said.

A. I asked Mr. Phleger what he meant by shipping in hops contrary to the contract, as he well knew that they were not to come but on approved sample, and that I thought his action was unfair. I further told him—I was pretty warm over the situation—I further told him that the sample was bad; that the hop was poor, as investigation of my own as well as the brew master's investigation showed, and that I had given instructions to have it sent to the brewing station to be analyzed, as it looked to me as if the company was trying to put something over on us and did not propose to give us the quality of hop that I was entitled to. Mr. Phleger, of course, didn't have much to say at first, but he finally said, "Now, this matter will be adjusted all right. I am sorry." He was sorry, no doubt, to all appearances at least, that there was any question about the quality of the hop; but he said, "We will remedy it. After you get your report, if you find that you are still dissatisfied with

the quality and you want to reject it, why, I will see that it is made good, and have other samples furnished for you to select from, and I will dispose of this hop in the Eastern market here."

Q. Now, prior to the time when Mr. Hubach walked nto your office with a sample from the shipment did you know that the shipment had in fact been sent? A. I did not.

Q. No preliminary warning of that at all? A. Absolutely no warning.

Q. Now, at the time you had this first conversation with Mr. Phleger did he make any statement as to whether or not the making good by him of the shipment was conditioned on the acceptance of the shipment which hal already been sent?

Objected to.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. No.

Q. Did he say that the exchange of the hops shipped for other hops was conditioned on your approving samples that he would submit? A. He said he would submit other samples for approval under the contract and would satisfy me as to the quality of the hop which we received.

Q. And then what, if anything, did he say he would do if you approved the samples which he proposed to submit? A. He would remove those hops and dispose of them; he said he would have no trouble in disposing of them in the local market, and did not want them sent back to San Francisco, as I threatened to have done, because that would be expensive; it could be easily taken care of here, and

when I approved the sample other hops would be shipped in their place.

Q. You say you told him that you had instructed a sample of the shipment to be sent to the Scientific Station for analysis? A. Yes, sir.

Q. Did he make any objection to that? A. No objection; no, sir.

Q. Did he say whether or not he would wait for the result of it? A. He agreed to; he said in the course of the conversation, as I have already stated, that if after I received the report I was still dissatisfied, that the hops were not according to the contract, that he would take them back and substitute others.

Q. Did he make any suggestion to you that you had waited more than five days, or anything of that character?

Mr. Twining: I do not want to object to each question, but I should like to have my objection deemed to be taken to all these questions along this line, the ground of the objection being that Mr. Phleger had no authority to bind Mr. Horst in this matter, and therefore what he may have said to General Collins would be immaterial and not binding on the plaintiff.

The Court: This question, like some of the preceding questions, seems to be designed to contradict the testimony of Mr. Phleger as to what was said at a certain conversation.

Mr. English: Yes, sir.

The Court: Without passing on the evidential force of that conversation, or whatever was said in that conversation, I think it is reasonably proper and fair to take tes-

timony on both sides tending to show what the conversation was. I therefore entertain the objection made, and receive the testimony, and reserve my decision, allowing an exception, if one should be desired.

Mr. Twining: Yes, sir.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Question read.)

A. No, sir.

Q. At that time when he was there, on Tuesday, October 6th, did he have any samples with him? A. No, sir.

Q. Did he subsequently call with samples? A. Yes, sir.

Q. When was that? A. Some weeks after.

Q. And who were present when the samples were looked over? A. I sent for the brew master, Mr. Hubach, to come to my office, and Mr. Phleger had the samples on the table.

Q. Before that second visit, when Mr. Phleger came bringing samples, had you received a report from the scientific station in New York? A. Yes, sir.

Q. I show you a letter which is marked here Exhibit D-3 dated October 10, 1914 (paper shown to witness). Was that one of the reports that you got? A. Yes, sir.

Q. Now, I show you a letter which is in evidence as Exhibit P-8, being annexed to the depositions taken in the West, apparently signed by you (paper shown to witness). Did you write this letter, Exhibit P-8A, to the plaintiff, following the letter D-3 which I just showed you? A. Yes, sir.

Q. And I see that your letter, P-8A, refers to a

letter, or report, received from the scientific station. Is the report therein referred to this report D-3? A. Yes, sir.

By the Court:

Q. When Mr. Phleger called on you the last time, General Collins, did he call on you by appointment or by reason of any previous arrangement? A. Yes, I felt it was in pursuance of the conversation that we had on the 6th, when he agreed to substitute other hops.

Q. Nothing else than that? A. Nothing else than that, that I can recall; no, sir; unless there is some communication. I reported, of course, the result of the scientific analysis, which showed that the hops were poor, and on that advised that we would not accept them, and I felt that his visit was in response to that.

By Mr. English:

Q. Now, it appears that a second letter was written from the scientific station to your company, which is now in evidence as Exhibit D-4, or at least a copy of it is. Do you remember receiving such a letter (shown to witness)? A. Yes, sir.

Q. Can you remember, General, whether in the conversation which you had with Mr. Phleger when he came bringing those samples these letters, or reports, of the scientific station were referred to? A. Yes, sir.

Q. What was said about them between you and him? A. I called his attention to the report that we received from the scientific station, and he seemed to be familiar with it, and I told him that I quoted the substance of the report in my communication that was addressed to the company.

Q. The plaintiff company, at San Francisco? A. Yes.

Q. I show you a letter from the plaintiff company to your company, dated October 17, 1914, already marked in the case as Exhibit P-9A (paper shown to witness). Do you remember receiving that letter? A. Yes, I received this letter.

Q. It appears that it takes four or five days. I presume that you got this letter somewhere around the 22d of October. Do you recall whether Mr. Phleger called with the samples before or after the receipt of that letter? A. I am inclined to believe it was subsequent.

Q. He came in after that? A. Yes.

(Mr. English reads Exhibit P-9A.)

Q. Now, you say that your recollection is that Mr. Phleger called after this letter was received? A. Yes, sir.

Q. Was there any discussion of this letter between you and him? A. I can't recall that there was.

Q. Now, let me show you the letter that you wrote in reply to this letter of October 17th, which is dated October 24, 1914, and is in evidence as Exhibit P-10A (paper shown to witness). You wrote that letter? A. Yes, sir.

Q. Was that letter written before or after Mr. Phleger came with those samples? A. Before he came.

Q. You mean he came with the samples first or you wrote this letter first? A. I wrote this letter first.

Q. Before he came with the samples? A. Before he came with the samples.

(Mr. English reads Exhibit P-10A.)

Q. Now, your recollection is, as I understand you, that following your writing of that letter Mr. Phleger appeared with his samples? A. Yes, sir.

Q. And you and Mr. Hubach looked them over? A. Yes, sir.

Q. You made the same kind of examination as you made with the other hops that you have testified about? A. Yes, sir.

Q. And what conclusion did you reach after examining his samples? A. The main objection seemed to be that the samples were old; they were not fresh samples; and we could not form an intelligent opinion of the real merit of the hop, and we refused to pass judgment and asked for fresh samples.

Q. Did he volunteer to send fresh samples, or did he suggest that he had better do it? A. Yes, he left with that understanding.

Q. While he was there what conversation, if any, was had with reference to the exchange of the shipment with which you were not satisfied for other different hops? A. He left agreeing to furnish fresh samples of hops, from which we could make a selection to replace the ones which had been shipped us.

Mr. Twining: I move to strike that out on the ground that it is not binding on the plaintiff, and, on the second ground, that the testimony constitutes a conclusion, whereas the witness's words, as nearly as can be, should be stated.

The Court: I get the first point, but not quite the second.

Mr. Twining: The testimony was, as I understood it, that Mr. Phleger left agreeing to do certain things.

[Answer read.]

The Court: Where is the conclusion?

Mr. Twining: I think he should testify what it was that Mr. Phleger said, and not come to the conclusion that what he said amounted to an agreement.

The Court: I shall ask the witness whether he can state the language more particularly.

Witness: Hardly, your Honor. We had a general conversation on the question, and I simply informed him, as I did at all times, "Mr. Phleger, we are ready to go on with our contract, and all we ask of the company is to give us the quality of hops that we are entitled to." He seemed to agree with that proposition—

Q. [By the Court.] Can you tell us just what he said that led you to understand that he agreed to your request? A. He told us that he would furnish such samples as we desired, fresh samples, from which we would select hops to be exchanged for the ones that were already shipped to us.

The Court: I think this objection is removed by the testimony now given. The other branch of the objection I shall deal with as I have dealt with it before; by noting the objection, taking the testimony, and letting it stand, and granting an exception, if it becomes necessary to except.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. [By Mr. English.] Now, General, what, if anything, was said in that conversation, which is the one where Mr. Phleger first appeared with his

samples, as to what was to be done with the shipment that had already been sent on and which you objected to? A. Will you please read the question?

Q. [Question read.] A. On the same occasion?

Q. Yes. What was said about that, about what disposition should be made of those hops, you having threatened to send them back, as I understand your testimony? A. I don't remember making any statement on that matter at that time.

Q. Well, in the first conversation was any statement made about that? A. Yes, there was in the first conversation.

Q. What was the conversation on that point? A. That he could easily dispose of those hops in the local market around New York, with no trouble, and he assured me that the difficulty would be straightened out to my satisfaction.

Adjourned until tomorrow, Wednesday, April 11, 1917, at ten o'clock A. M.

ELEVENTH DAY.

Wednesday, April 11, 1917.

Met pursuant to adjournment.

Present, counsel as before stated.

DENNIS F. COLLINS resumes the stand in behalf of defendant.

Direct Examination (Continued) by Mr. English:

Q. Mr. Collins, in one of the letters which I showed you last night, Exhibit P9 A. which was the letter from the plaintiff to the defendant dated October 17, 1914, acknowledging receipt of your let-

ter of October 12th, in which you had stated that the shipment was not up to the contract quality, they said, "If you follow our advice, you will brew the hops, and prove to yourselves that scientific stations' opinions on hops should not be taken at par." It appeared in the testimony yesterday of Mr. Hubach, the brewmaster, that he had brewed these hops. Have you any personal knowledge of the result of that brew? A. Yes, sir.

Q. Did he submit a sample of it to you to taste? A. Yes, he did.

Q. And did you sample it? A. Yes.

Q. And what kind of brew was it? A. The taste was rather insipid and it was not as clear and brilliant as it ought to have been.

Q. How did it compare with the standard brew which your brewery turns out? A. It didn't come up to the standard.

Q. Was it of such a quality that you could make use of it as it stood? A. No. I asked him what he proposed to do with it, and he thought he could prevent any loss by apportioning it to two other brews and some other treatment that he proposed giving it.

Q. But as it stood by itself was it usable or salable? A. No, sir.

Q. Could you undertake to fix the date when Mr. Phleger appeared with those samples about which you testified yesterday? A. Why, to the best of my knowledge and belief, it must have been about the 1st of November or thereabouts—several weeks after his visit of the 6th of October.

Q. Now, I show you a letter from the plaintiff to the defendant, in evidence as Exhibit P11 A, dated October 29, 1914, in which they state that "Our Mr. Phleger will call on you with samples of lots now in New York and on en route to New York and

to Europe." Possibly that will help you fix the time. Was it after the date of that letter that he came, as you remember [paper shown to witness]? A. Yes, it was subsequent to that, for I had in mind that I was expecting his call after receiving this letter; it was subsequent to the receipt of this letter.

Q. That is dated October 29th? A. Yes, sir.

Mr. English: I shall read it to your Honor [reading Ex. P11 A].

Q. I think you testified with reference to this statement in this letter that they had time to receive your approval when they shipped on September 12th—I think you testified yesterday that these samples arrived about the middle of September, did you not? A. That is my impression; yes, sir.

Q. Did Mr. Phleger ever call after the time when he called with the samples which you have testified about? A. Yes, sir.

Q. Did he bring samples with him on his next call? A. No, he did not.

Q. About when was it that he called the next time, if you remember, approximately? A. It was the latter part of the week prior to the date when we returned the hops; we were loading them at the time; Friday or Saturday of the week prior to the loading of the hops.

Q. As I remember your testimony, also that of Mr. Hubach, the first samples were dried or stale, and you asked for a fresh sample? A. Yes, sir.

Q. And you now say that you never approved the fresh samples? A. No, sir.

Q. I show you a telegram, in evidence as Exhibit P12 A, from your company to the plaintiff company. Did you cause that telegram to be sent [paper shown to witness]? A. Yes, sir.

Mr. English: I shall read it to your Honor [reading Exhibit P12 A].

Q. What hops do you refer to in that? A. The shipment of 100 bales which are in dispute.

Q. Well, did you get shipping instructions from them, or did you get a telegram in evidence as Exhibit P13 A. dated November 9th, a copy of which is annexed to the depositions [paper shown to witness]? A. This is what we received.

Mr. English: That telegram reads [reading Exhibit P13 A].

Q. Do you remember what you did after that? A. I wired again, I believe.

Q. I show you Exhibit P14 A, which is a telegram from your company to the plaintiff [paper shown to witness]. Did you cause that telegram to be sent? A. Yes, sir.

Mr. English: I shall read that to your Honor [reading Ex. P14, A]

Q. Now, up to that time had Mr. Phleger appeared? A. What is the date?

Q. That is the date of November 27, 1914. A. No. November 27th?

Q. Yes. A. No, and he had not—November 27th. Pardon me, I don't think he had; I think it was a little later when he made his third visit to me.

Q. After the telegram, then? A. After the telegram.

Q. Apparently you got a return wire, dated the same day, November 27, 1914, which is in evidence as Exhibit P15 A. Just look at it and see if that is right [paper shown to witness] A. Yes, sir; I received this telegram.

Q. And those last two telegrams were both repeated in a letter from the plaintiff to you, dated November 27, 1914, marked Exhibit P16 A, were they not [paper shown to witness]? A. Yes, sir.

Mr. English: I think I had better read this answering telegram. The first one was that they had loaded the hundred bales, dated November 27th. The reply is dated the same day [reading Ex. P15 A].

Q. Now, it was after this telegram, as I understand you, that Mr. Phlager appeared? A. Yes, sir.

Q. And he met you and you met him at your office? A. He came into my office.

Q. What was the conversation? A. Why I told Mr. Phleger—

Q. Pardon me just a moment. I see another telegram that I want to call your attention to before you give that conversation. The telegram is dated the next day, November 28, 1914 in reply to the long telegram, Exhibit P15 A. Just see if that is not right [paper shown to witness]. A. Yes, sir; I sent that reply.

Mr. English: I shall read that to your Honor, Exhibit P19 A [reading].

Q. And then subsequently you got another wire in reply to that from the plaintiff, which is in evidence as P20 A, dated November 29, 1914, is that right [paper shown to witness]? A. Yes, sir; I received that telegram.

Mr. English: I shall read that to your Honor [reading Ex. P20 A].

Q. Then I guess it must have been that Mr. Phleger appeared; is that right? A. Yes, sir.

Q. Now, just give us the conversation. A. I advised Mr. Phleger that the car was—or we were loading the car, or it had been loaded, and was ready to be ordered forward to San Francisco. He made a very earnest plea to me not to do that, but to defer action for a few days longer, as he was still satisfied that the matter would be adjusted to our satisfaction; that he would take care of the hops which we had and dispose of them and that other hops would be furnished according to the contract on sample.

Mr. Twining: I move to strike out the answer, if your Honor please, on the ground that it is not binding on the plaintiff in the action, and it is immaterial anyway, the hops having been accepted prior to the conversation.

The Court: I shall note your objection and let the testimony stand, giving you an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Now, did he ever produce any more samples? A. No, sir.

Q. So that you could approve them? A. No, sir.

Q. After he had made this plea what did you say to him, if anything? A. Why, I said, "Very well, I will do this, but it is absolutely the last call. I will hold the hops up for a few days longer"—I think I mentioned five days; four or five days—"and if I do not hear from you by that time, why, they will be ordered out."

Q. Well, did you hear from him? A. I did not.

Q. And you did order them out? A. I ordered them out.

Q. Now, General, after the hops were unloaded from the railroad station and taken to the brewery was anything done with them or any use made of them, other than sufficient to take samples from the bales and make the sample brew? A. That was all, sir

By the Court:

Q. From what hops was the brew made? A. Out of the shipment of one hundred bales, sir.

Q. Was it made from the bale that had been broken or from other bales?

Mr. English: The testimony of Mr. Hubach was that he had taken one bale and brewed all but twenty-five pounds of it.

Mr. Twining: And that he sent a sample from another bale.

Q. Is that right? A. I could not say, sir. Mr. Hubach would know about that.

Mr. English: Mr. Hubach testified—

The Court: I am asking the witness.

Witness: I have no personal knowledge of that. your Honor.

By Mr. English:

Q. General, did it cost any money to move the hops from the station to the brewery and take them back from the brewery to the station and put them on the cars again?

Mr. Twining: I object to that as immaterial.

Mr. English: We have a setoff, your Honor will remember, in the case, based on just this thing—based on their shipping hops not of the contract quality, without any approval of sample by us.

The Court: I shall take the testimony and reserve opinion as to the objection and give you an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Yes, sir.

Q. Do you know how much, General? A. I would estimate the cost of loading and carting from the freight station to the plant to be about $25.

Q. And would it be another $25 to get it back from the plant to the station? A. Yes, sir.

Mr. English: I might say on the record, your Honor, that the freight from California to Elizabeth when the shipment was originally made was paid by the defendant. That is admitted in the pleadings, and under the contract it is admitted that the defendant should have credit for that, if the shipment was accepted, and, I presume, conversely, if the shipment is not accepted, or is rejected for a good reason, the defendant ought to have that money back.

The Court: Does it appear what that was?

Mr. English: Yes, $339.69. Is that right, Mr. Twining?

Mr. Twining: It is my understanding that the freight both ways was paid by the defendant.

Mr. English: No, you are misstating it. We did not pay it back.

Mr. Twining: Well, the freight east was paid by the defendant.

Mr. English: And that was $339.69, as stated in the bill.

Mr. Twining: Is that what the complaint says?

Mr. English: Yes, here is the bill.

Mr. Twining: All right, whatever it shows.

Q. Now, General, you said at the opening of your testimony yesterday that you bought a great many hops in the course of the last eighteen years and were more or less familiar with the market; is that true? A. Yes, sir.

Q. Do you know a publication called "The Brewers' Bulletin"? A. Yes.

Q. What is that? A. It is a publication published in Chicago, and it gives quotations for all brewers' supplies, including malt, hops and other ingredients.

Q. Is it a paper which is much consulted by brewers and hop dealers and growers as to prices?

Mr. Twining: I object. That is immaterial, if your Honor please.

The Court: Do you object on any other ground than the ground that there is a contract?

Mr. Twining: I object to this question on the ground that whether or not this paper is consulted by people generally would not tend to authenticate it.

The Court: [After argument.] I shall examine the cases and the testimony when I have an opportunity, and shall then make a ruling. In the meantime I shall admit the evidence.

Mr. Twining: If your Honor is treating

this as an argument on the main question— I did not think it was—I have some cases to the contrary. This seems to be a preliminary question, not raising the whole question, that is objected to on other grounds. If my objection goes to the whole testimony, I shall make it now.

The Court: All right. I shall reserve my opinion on that, and in the meantime if you wish to present cases in answer to those cited by Mr. English, I shall hear them now.

Mr. Twining. [After further argument.] Now, I put this case for the sake of argument. If the editor of this paper, or the person who collected the news, were produced and called upon to show the sources from which he got these lists, it might be that under those circumstances the evidence, under these cases that Mr. English cites, would be admissible. But that is not the situation here. General Collins is called upon to state whether or not he reads a paper known as the Brewers' Bulletin, and whether other hop dealers read it. That is the question I object to. Now, suppose he says he does and that all the other brewers read it. That does not show that the sources of information from which the lists are made up are accurate and complete or are in any way an indication of what the market is, and, as the proof now stands, the only proof on the point is that they are not accurate and reliable. Mr. Phleger's testimony has been read to your Honor, and Mr. Horst's testimony in the West is to the same effect: that it is a most fragmentary record of detached sales given by persons to the reporters as they see fit. Under those cir-

stances, I do not think that your Honor ought to permit all this testimony to go into the record and later determine whether or not it should be received. It seems to me that it is a point that is so clear that your Honor should rule upon it now and shut it out. At the previous hearing your Honor made the comment that the mere fact that something appeared in a newspaper would not prove the fact. If it did, an article in the New York Times that Paul Jones negligently operated his automobile would be all you would have to prove if you were trying a negligence case. Of course, you have got to come in with primary proof. Now, the cases have established an exception where the report is a report of sales and dealings on an exchange, because that is a reasonable, sensible, practical exception to make. Everybody knows that the transactions conducted on an exchange are conducted in large volume and do indicate what the market price is; but in this case, where the testimony is that, at most, this bulletin chronicles the statements of individuals as to isolated sales, I do not think your Honor should receive this evidence.

The Court: [After further argument.] Do you wish to make any use of these papers with the witness?

Mr. English: Yes, sir; I want to put them in evidence.

The Court: I did not make my question clear. I mean except to offer them in evidence?

Mr. English: That is all. offer them in evidence.

The Court: Then I shall adopt this course, as it is thought objectionable that the papers be admitted and perhaps afterwards ruled out: I shall take the opportunity between now and the time of the summing up to examine these cases on both sides, and by that time I shall notify counsel whether I will receive the papers or not.

[Question read.]

Mr. English: Now, I presume, on your Honor's ruling, he can answer the question?

The Court: Yes.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

[Question read.]

A. Very generally, yes.

Q. Does your company, for example, take the Brewers' Bulletin? A. For fifty years past.

Q. When you are about to make contracts for the purchase of hops are you in the habit of consulting it?

Mr. Twining: I object.

The Court: That question does not seem to go to the real question.

[Question withdrawn.]

Q. What do you use the Brewers' Bulletin for, what do you take it for, what do you consult it for, General?

Mr. Twining: I object.

The Court: I think the value of the paper as a record on this subject must depend very much on an inspection of the paper itself. I think this question is very much like the

last question. I do not think it throws any real light on the question of the admissibility of the paper. I might consult the New York Times every morning as to something on which the Times would not be a legal authority. Therefore I sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. General, I want to show you, for the purpose of having your identification, a paper entitled "Brewers' Bulletin," published at Chicago, Monday, October 12, 1914, and already marked D2 for identification on the testimony of Mr. Phleger in this case [paper shown to witness]. Do you recognize that to be the Brewers' Bulletin that you refer to? A. Yes, sir; that is the publication.

Q. I also show you for the same purpose another edition of the Brewers' Bulletin, dated October 9, 1914, and marked D3 for identification in this case on the testimony of Mr. Phleger [paper shown to witness]. Is that a copy of the paper that we are talking about? A. Yes, sir.

Q. Now, I show you still another copy or edition, of the same paper, which has not heretofore been marked for identification, and which is dated "Chicago, Wednesday, October 7, 1914" [paper shown to witness]. Is that a copy of the same publication? A. Yes, sir.

By the Court:

Q. All of these came out of your files? A. Well, I couldn't say, sir.

Q. Your name is not on them? A. No, sir.

By Mr. English:

Q. Well, if they did not come from your files, are they exact duplicates of what does come to your files? A. Yes, sir.

The Court: That is not my inquiry. I do not doubt the authenticity of the paper.

[The paper last referred to is marked D35 for identification.]

Mr. English: Now, if your Honor please, for the purpose of preserving the record, so that your Honor can rule after you have concluded your examination of the matter, I should like to formally offer in evidence these three papers; namely, the Bulletin dated October 12, 1914, D2 for identification; the Bulletin dated October 9, 1914, D3 for identification, and the Bulletin dated October 7, 1914, D35 for identification. I understand your Honor reserves your ruling on that.

The Court: I shall announce my ruling before the day when the case is summed up.

Mr. English: If the ruling is adverse to us, I presume we can have an exception?

The Court: Certainly.

Mr. Twining: If your Honor please, I object on the grounds previously stated, and also on the ground that there is no even purported market of futures, nothing but a purported market—I would not even say a purported market—a purported about market of 1914 and 1913 hops. It does not seem to be even a purported about market; it is apparently a purported range of some prices.

The Court: There is really no evidence yet as to what the paper undertakes to show.

Mr. English: No; I thought I would bring that out next, if your Honor permitted.

Q. Now, General, so far as the market price of hops is concerned, what do these various Brewers' Bulletins undertake to show?

Mr. Twining: I object to that.

The Court: That will be evidenced by an inspection of the papers.

Mr. English: I suppose it would; yes, sir.

Q. Do you know, General, whether the prices quoted in this bulletin are Chicago prices or are of what place?

Mr. Twining: I object to that.

Mr. English: I ask him whether he knows.

Mr. Twining: The paper will show itself.

The Court: I do not know what the paper shows. The Witness may answer the question yes or no.

[Question read.]

A. Chicago.

The Court: Are they Chicago prices? Is that your question?

Mr. English: Yes.

A. Yes, sir.

Q. Now, in judging the market price of hops with reference to the prices quoted in the Bulletin, would it or would it not be necessary to add on the freight from Chicago east? A. Yes, sir.

Q. Do you know what that freight is? A. I couldn't quote it just offhand.

Q. Well, it appears that it is $1.75 from California. A. $1.75 from California, yes—a fraction of a cent.

Q. A fraction of a cent or a cent? A. Yes, a fraction.

Q. A fraction of a cent, all right. Now, General, apart from these Bulletins, and referring now to your personal experience in buying hops, have you a knowledge of what the market price of hops was in October, 1914? A. Yes, sir.

Q. What was the market price?

Mr. Twining: I object, unless he states what kind of hops he is talking about, futures or spots, and for what years, if futures.

The Court: The question is somewhat too general.

Mr. English: I shall make it more specific.

Q. What kind of hops have you bought in your experience, what locations or what places? A. Why, we have bought Pacific Coasts and New York States.

Q. They are the two main locations for the growing of hops in this country, are they not? A. Yes, sir.

Q. Now, in 1914, did you buy any other Pacific Coast hops besides the contract that you made which is now in suit? A. Yes, sir.

Q. Do you remember from whom? A. We made several contracts subsequent to the one in question.

Q. For the purchase of Western hops? A. Yes, sir.

Q. California hops? A. Yes, California hops.

Q. Did you make any prior to the contract in question? A. I don't think so; I think that was the first contract we made that year.

Q. Now, basing your knowledge on the contracts which you subsequently made for Western hops, what can you say about the market?

Mr. Twining: I make the same objection, if your Honor please. It does not appear

what kind of a contract was made, whether it was for futures or spots or how many bales, or anything about it. Furthermore, the testimony of this witness as to what he may have paid for hops subsequent to the alleged breach would not be evidence of market value. Certainly it was not a market that was available to us anyway. We would not sell to General Collins's company the hops which he had already rejected, if it is a fact that he rejected them.

[Question read.]

The Court: The witness is asked to base his answer on a transaction subsequent to the transaction in question.

Mr. English: Subsequent to the date of the contract in question. Perhaps I had better ask him about that.

Q. The contract in question, General Collins, is dated March, 1914. When after that did you make a contract for Western hops? A. We made several contracts in that same year, within a few months, and also within a couple of years past, for futures.

By the Court:

Q. Within a couple of years? A. Within a couple of years past

Q. Past this time? A. Yes, sir; subsequent to 1914.

By Mr. English:

Q. Do you know whether you made any during or about the month of October, 1914? A. Any contracts?

Q. Yes. A. I made no contract in that month; no, sir.

Q. Did you make any between March and October, 1914? A. Yes, sir.

Q. And was that a spot contract, as they call it, or a future contract? A. Futures.

Q. For Western hops? A. Yes, sir.

Q. Can you remember the month when you made that? A. We made several contracts subsequent to March, 1914, and prior to August 1st, I should say.

Q. Now, you say they were for futures. For how long in the future? A. Covering the same period of time.

Q. That is, 1914, 1915, 1916, 1917 and 1918? A. Yes, sir.

Q. And they were California hops? A. Yes, sir.

Q. And what was the price?

Mr. Twining: I object. The market prior to the date of the breach is no indication of what it was at the time of the breach. The testimony is that the market was changing. It commenced to change at the time of the harvest, and this contract was made before the 1914 hops were harvested, and the testimony now is that from the latter part of August, which is a month later than the last of the contracts that the General speaks of was made, on until early in January of the following year the market was fluctuating back and forth; it was dropping generally.

Mr. English: Well, the Sales Act comes to the rescue in this case. Mr. Phleger said that there was no market during and after October. If that is so, then we have a right

to take the nearest date that there was any market to the date of the breach.

The Court: I am wondering whether we can go later than the date of the contract.

Mr. English: Oh, I think so.

The Court: Why should conditions subsequent to the date of the contract be evidential as to a situation that occurred on and before that date?

Mr. English: No. I am not concerned with the date of the contract so much as I am with the date of the breach. The breach admittedly was in October. Mr. Phleger says there was no market during and after October. If that is so, we are entitled to the market nearest to the breach, if we cannot get one in October. Now, the General says that he was buying hops for future delivery somewhere along in the summer.

The Court: [After further argument.] Well, where does this leave us? The month of August was mentioned by the witness, I remember, as a date when, I think, he made a sale, and that other sales were made, if I recall between March and that time. I think I had better take the testimony, subject to your objection, and consider it more at my leisure.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

[Question read.]

Mr. English: The price of those contracts during that time for futures, during the summer of 1914?

A. Seventeen cents.

Q. A pound? A. A pound.

Q. [By the Court.] The time that you have in mind, General Collins, is the summer of 1914? A. The summer of 1914. Now, I want to qualify that. I bought one lot of spots for either fifteen or fifteen and a half.

Q. [By Mr. English.] And when was that, General? A. That was within that same period of time. But for futures the price was seventeen cents.

Q. Were those spots of the 1914 or the 1913 crop? A. 1914—No. One moment.

Q. Was the crop ready to sell in the summer? A. No, that was the 1913 crop; that must have been the 1913 crop.

Q. The spots? A. Yes, sir.

Q. Now, General, when next after the summer of 1914 did you buy futures or make a contract for futures? A. In 1915 I made a contract.

Q. And for how many years was it to run?

Mr. Twining: I object to that as immaterial.

The Court: Immaterial on what ground? I want to get your view.

Mr. Twining: I shall withdraw that objection.

A. Made a five-year contract, covering the years 1916, 1917, 1918, 1919 and 1920.

Q. And hops grown where? A Pacific Coast, choice Pacific Coast hops.

By the Court:

Q. Not 1916? A. 1916, 1917, 1918, 1919 and 1920.

Q. That is what you said; you skipped 1916. A. Started in 1916.

The Court: I thought you said 1915.

By Mr. English:

Q. The contract was made in 1915, covering sales beginning 1916; is that right? A. Yes.

The Court: I misunderstood the witness.

Q. What was the price of that sale?

Mr. Twining: I object. There is no similarity between that contract and the one in suit.

Mr. English: I think there is this to be said about that, your Honor. Mr. Phleger says there was not any market for futures at all. Now, here is evidence that there was a market, and it ought to go in for what it is worth as bearing on both the fact of the market and the price of the market, as bearing on this contract in question.

The Court: Even if there were a market, a different contract would throw very little light on the real question. I shall sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: Just let me ask this question, if your Honor please.

Q. How did the general terms of this contract that you speak of, made in 1915, compare with the terms of the contract in suit?

Mr. Twining: I object to the terms of the contract, unless it is first shown that it was not in writing.

The Court: I think the question may be

answered for the purpose of seeing how different they are.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. How did the general terms of the two contracts compare, General? A. Practically the same —printed contracts.

Mr. Twining: I move to strike it out. It is testimony as to the terms of a written instrument.

Q. (By the Court) Then the difference was a difference as to the years; is that it? A. Yes, sir; that is all.

The Court: I will grant the motion to strike it out.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. After 1915 did you make any other contracts for futures? A. No, sir.

Q. General, Mr. Phleger testified that in 1911 the market value of spots on the sale of Pacific Coast hops was fifty cents a pound and futures seventeen cents a pound. Have you any knowledge or experience when spots were as much as fifty cents a pound in 1911? A. I have never paid any such price; I never heard of it before.

Q. Did you ever hear of such a discrepancy between the price of spots at fifty cents and the price of futures at seventeen cents? A. Never.

Q. Did you ever know Pacific Coast hops to sell as high as fifty cents a pound? A. Not within my

experience in the business, covering twenty years.

Cross-examination by Mr. Twining:

Q. Will you state again when it was that you first saw Mr. Phleger during the month of October, 1914, what date, General? A. It was the Tuesday after the receipt of the hops, which was, I believe, the 6th of October.

Q. Did you see him during the month of September? A. I don't recall.

Q. How do you fix the date, or the day of the week and the month, when you saw Mr. Phleger first in October? What fixes it in your mind? A. Why, the fact that the hops were received in the brewery on Friday; that the sample was submitted to me by the brew master on Saturday morning, and the instructions which I gave for notifying Mr. Phleger to come out, that I wanted to see him immediately, as the hops were not satisfactory, and the receipt on Monday when I arrived at the office of the message from Miss Woelfel of his visit on Monday, and that he had arranged to be out on the following day, which was Tuesday.

Q. How do you know, General, the day of the week when the shipment was taken into the brewery? A. From the records.

Q. So that your recollection as to when you saw Mr. Phleger first during the month of October is based, is it not, upon the records which support your recollection in the particulars that you have just stated—based primarily on the records? A. Not entirely so.

Q. But is it not based primarily on the fact that your records show that the hops were taken into the brewery on the 2d of October? A. Not entirely so.

Q. Well, if it was the fact that Mr. Hubach did not submit this sample of the shipment to you until a week or so after the hops had been received at the brewery, then the Monday and Tuesday and Saturday that you are referring to might have been a week or two after the week of the 6th of October, might they not?

Mr. English: I object to that, because there is no such evidence, and the evidence of Mr. Hubach is that he submitted it to the General the first of that week, and the letter went out on the 6th to the scientific station. That is in evidence, too.

The Court: I understand the question to state in a somewhat hypothetical form what the testimony of Mr. Hubach was or might have been. Is there difficulty in determining just what it was?

Mr. English: No. It is a hypothetical question, and the trouble is that it is not based on the facts.

The Court: My question was not addressed to you so much as to the counsel who asked the question.

Mr. Twining: I do not press the question, if there is any serious objection to it.

Q. If Mr. Hubach was mistaken in thinking that he submitted the sample of the shipment to you during the first week of the month of October, then there is no basis, is there, for your statement that you saw Mr. Phleger during the first week of that month? A. Oh, yes, there is.

Q. Well, what basis is there for it? A. Well, the fact that I saw him, the fact that he had been there on the Monday preceding the reception of the message which I received from the stenographer

that he would be in to see me again on the morning of the 6th.

Q. Now, will you state the conversation that you had with him on the first occasion when he came? A. Well, I went at him pretty warmly, I imagine—in fact, I know I did—about what I termed his sneaking in a lot of hops on us against our contract, which were to have been submitted on approved sample. Having rejected one sample, I was naturally expecting another. I told him all this, and I said, "Instead of receiving a sample, you sent in a shipment of hops without proper notice to me, and they got in this plant without my knowing of it, and," I said, "I consider it that you took an unfair advantage. The hops are not satisfactory, and I propose to have them analyzed, and if our investigations are sustained, I am not going to accept them. I tell you now that I won't accept them."

Q. Anything further that you said? A. That was about the substance of my conversation. He then attempted to ease me down, and said, "Now, I am sorry for this trouble," or words to that effect. This gentleman was sincere; there is no question about it. He said, "This matter will be all straightened out satisfactorily. If the hops are not satisfactory to you, I will take care of them and you will receive others, on approved sample. Samples will be submitted, and the matter will be straightened out to your entire satisfaction."

Q. That was the substance of the conversation between you, and after that he left? A. Yes, sir.

Q. Now, you and your company knew, did you not, General Collins, before the 1st of October that the shipment had started from the coast A. I knew nothing of it at all until the sample was brought into my office.

Q. I recollect your stating that, but your com-

pany must have known about it before that, must it not? A. I have no knowledge of it; I have no personal knowledge of it.

Q. Well, how did you get the goods from the railroad? A. Why, we are a pretty large plant; we have our wagons detailed to bring in material every day; it comes in and it is brought to the plant. It is natural to suppose that when a shipment comes in of material of that kind that it has been properly ordered, and the wagons go there when they have time, between their other duties, and cart in material, and it is recorded in the book which was produced here, which Mr. Butler controls. Had I known of the shipment, it would never have been taken in. You can gamble on that.

Q. But in order to get the shipment from the railroad company, the bill of lading had to be produced, did it not? A. I presume so. That did not come to my attention.

Q. The bill of lading was received, was it not, by your company some time prior to October 1st? A. I presume it was; I have no personal knowledge of it.

Q. I show you Exhibit P-4A. Have you ever seen that before, General Collins (paper shown to witness)? A. I have seen it before, yes.

Q. When did you see that first? A. Since this case started, since this suit started.

Q. It was not called to your attention before the suit started? A. Positively not.

Q. It is dated on September 19, 1914, and was received by your company, I suppose? A. I presume it was; I don't dispute that; it was received and it was accepted, the same as all other matters are, that it was a *bona fide* transaction.

Q. And you do not know, I suppose, whether or not this bill of lading that I show you was inclosed

in it, since you did not see the letter itself? A. I do not.

Q. I show you the original bill of lading, marked Exhibit P-37, and call your attention to the words "Permit inspection" at the foot of it, or near the foot of it (shown to witness)? A. Yes.

Q. Do you know what that means? A. An intelligent interpretation of it would be a chance to inspect goods; I suppose that is what it means.

Q. At the freight yard? A. I don't know whether that applies to the freight yard or what it applies to. You can put your own interpretation on it.

Q. Do you know whether or not any reply was made by your company to this letter of September 19, 1914, Exhibit P-4A, which I just showed you? A. Not that I am aware of.

Q. At any rate, you did not direct any reply to be made to it? A. Not having seen it, I could not direct any reply.

Q. I show you Exhibit P-7A, and I think you have testified already that that was written at your direction (paper shown to witness). That is the letter of September 17, 1914.

Mr. Stamler: General Collins signed that, did he not?

Q. And it was written at your direction? A. Yes, that is my signature.

Q. Give the date, as near as you can, when you saw Mr. Phleger next after October 6, 1914. A. Oh, it was around the 1st of November, there or thereabouts.

Q. Well, was it then or at the earlier conversation that you spoke to him about having a chemical analysis made? A. The earlier conversation.

Q. Well, will you state now what you said at the earlier conversation, then, with respect to the

chemical analysis? A. I told him I proposed having an analysis made of the hops and had directed that the sample be sent to a scientific brewing station for that purpose, and if that investigation coincided with our investigation and substantiated our view of the merit of the hop, why, we certainly would not accept it and would have it returned.

Q. Did you report to Mr. Phleger at any time what the result was of the chemical analysis? A. I think there are communications there in evidence on that matter.

Q. Well, from you to Mr. Phleger? A. Not to Mr. Phleger, it was not, no.

Q. Well, from you or your company to the Horst Company, in New York? A. The Horst Company, in San Francisco.

Q. But not to the Horst Company, in New York? A. No.

Q. Why did you not communicate what the result was of the chemical analysis to the Horst Company in New York or to Mr. Phleger? A. Well, naturally, I would consult or address communications of that sort to the headquarters.

Q. Why, General Collins? A. On general business procedure, an important matter of that sort, I would imagine, would naturally suggest that it be addressed to headquarters.

Q. Well, that had to do, did it not, with the question whether or not the hops were satisfactory? A. I said they were very unsatisfactory.

Q. Well, why did you address your first complaint to Mr. Phleger? It was on the same matter, was it not? A. I know, but I felt that immediate action had to be taken there.

Q. Why? A. Simply because of the fact that the shipment had come in; I had dealt with this man directly; the contract was consummated between him and me, signed, sealed and delivered,

and he knew of my insisting that these goods were to come in on approved sample, and, naturally, I felt that he should have first advice as to the fact that that provision was not carried out.

Q. Well, why is not that all equally true with regard to the result of your chemical analysis? A. I felt, naturally, that, having communicated that situation to him, that he would advise his company, that it was his duty to do that.

Q. Why should he? A. Well, if he did not and he was working for me, I think I would discharge him.

Q. Well, if the transactions were between you and Mr. Phleger, you say, why should he communicate with Mr. Horst or with the plaintiff company? A. I don't see why he shouldn't communicate with the company in a situation of that importance.

Q. I don't either, but I was wondering why you communicated with him in the first place instead of communicating with the headquarters in the first place. A. I told you why. I could not telegraph the representative of the Horst Company in San Francisco to come on here immediately, when I knew they had a representative in New York with whom I made the contract direct.

Q. That is true, but neither could you telegraph to the home office to come on immediately after you had your scientific analysis made, could you? A. No, but it was my duty to notify them.

Q. Why? A. Because they were the principals in the transaction, I suppose.

Q. Now, General, your first letter of September 17th, or 19th, that I just showed you, objecting to the sample, was written to whom, Mr. Phleger, the New York office, or the San Francisco office? A. After the first interview with Mr. Phleger, on the 6th?

Q. No, this is before that. A. I am saying that after the first interview with Mr. Phleger, on the 6th, except when he called on me personally, all communications were addressed to the headquarters.

Q. But this was a communication before that; it is the communication I just showed you, dated September 17, 1914, Exhibit P-7A? A. Oh, that is about the previous sample?

Q. Yes. Now, who was that communication with, Mr. Phleger or—— A. No, the headquarters, the Horst Company.

Q. Why did you send that to the headquarters? A. Because there was no violation of the contract there; the sample had been submitted in accordance with the contract. The sample had come from headquarters; it had been received from headquarters, and I was in duty bound to advise the headquarters of the Horst Company of the result —of whether I approved or disapproved the sample, whether it was satisfactory.

Q. Well, were you not also obliged to advise headquarters whether you approved or disapproved the shipment itself? That came from San Francisco, too, did it not? A. I suppose so.

Q. What I am trying to find out is why you notified the home office at San Francisco of your disapproval of the sample but when the hops themselves came—— A. One moment, please.

Q. All right. A. The sample was not the sample of this particular hop.

Q. I understand that. I am not trying to catch you or trap you, but I want to know why it is that you sent notice of your disapproval of the sample to the home office, but when the goods themselves came you called Mr. Phleger to come right over and see you. A. Because the goods had come in in violation of the contract, as I understood it.

Q. Well, that being so, why didn't you notify the home office? A. Because I felt that Mr. Phleger, as the representative of the company who was within touch, would produce the accomplished result, the most prompt results.

Q. But you did not continue your transaction with Mr. Phleger after his first visit, on the 6th of October? A. Only when he called as the representative of the company.

Q. And your notification to him, then, was the only transaction that you had with him from October to date, except on the other occasions when he called? A. On the other occasions when he called as the representative of the Horst Company.

Q. Is it not the fact, General Collins, that with the exception of the negotiations which led up to the signing of the contract, and the negotiations which you had with him on or about the 6th of October, all your other transactions with regard to this matter were with the home ojce? A. I had no transaction with the home office at all until the first sample was received and rejected, and as far as the making of the contract, all that incidental to the making of the contract and the signing and delivering was made with this gentleman here, Mr. Phleger.

Q. But all your negotiations with reference to the rejection of the shipment or the sample, with the exception of the conversation you had with Mr. Phleger on October 6th, were with the home office, were they not? A. After October 6th, except on such occasions as Mr. Phleger called at the office.

Q. Subsequently, with other samples and without other samples? A. He called with samples, as his company advised me he would do by letter.

Q. Why did you call upon Mr. Phleger to come over and see you immediately? A. Because I felt it was necessary.

Q. Why? A. I wanted to know what he meant

by violating the contract—what his company meant. No sample had been approved—submitted or approved.

Q. I showed you Exhibit P5A, the reverse of it, and I call your attention to a signature that is scratched out in pencil [shown to witness]. Can you tell me whose signature that is? It is pretty hard to see.

Mr. Stamler: It is admitted in the case that it is Mr. Hubach's.

He admitted it.

A. It is Mr. Hubach's, I suppose. It was received by Mr. Hubach.

Q. Is that his signature? A. I suppose it is, yes. That certified that the goods were received in the plant.

Q. Do you know who scratched out his signature in pencil and rubbed out the rubber stamp, as near as you can tell?

Mr. Stamler: "Received in good order."

Mr. Twining: "Received in good order."

A. No, I do not.

Q. You do not know who rubbed that out? A. No, I do not. He might have done it himself; I don't know.

Q. The hops which were brewed from this shipment, a portion of one bale, were afterwards mixed with a portion of another brew, were they not; and disposed of? A. They were subjected, as I understand it from the brewmaster, to some special treatment by him in some way, and then distributed in that way.

Q. You did not send back one hundred bales to the Coast, did you, General Collins? A. No.

Q. You sent back only ninety-nine? A. Ninety-nine bales, yes.

Q. I notice that Exhibit P14 A, which was shown you by Mr. English, I think you said you sent? A. Yes. That was, of course, a habit, a general custom of mine—the general shipment. I forgot at that time that there was one bale used. It says there "a hundred;" it should have been "ninety-nine."

Q. I think you testified that you thought that the cost of carting the hops, this one hundred bale lot, from the railroad terminal to your brewery was about $25 and the cost of returning them was about the same amount. Upon what do you base that estimate? A. Well, the labor of two men on each wagon, a team of horses; the usual charges that you would have to pay for work of that kind.

Q. Well, you do not know what was actually paid, do you? A. No, I do not.

Q. I notice that your counterclaim, paragraph 4, claims only $20 for the whole thing, instead of $50. A. $20 for what whole thing?

Q. "That the carting of said hops from the railroad cars to the said defendant's brewery and from defendant's brewery back to the railroad cars was the sum of $20." That is what your counterclaim says. A. I don't agree with that as to figures, but, however, if it is our claim we will stand by it.

Q. The Brewers' Bulletin does not contain any reported market for futures, does it? A. No, sir.

Q. What was the date of the contract for futures that you made in 1915? A. I couldn't recall the date.

Q. Well, was it during the first six months? A. I don't think so; I think it was later.

Q. I notice that it did not include any hops of the crop of 1915? A. No, it did not, no; it was 1916, 1917, 1918, 1919 and 1920.

Q. Probably made the latter part of the year 1915? A. I imagine that was so, yes.

Q. Well, you say it was made on a printed form? A. There is a usual standard form of contract.

Q. Have you got it here? A. No, I have not. It was here, but— It was in the hands of the attorney, but I understood it was turned back to the brewery at the adjournment of the case some time ago.

Q. Well, it was not made with the Horst Company? A. No, it was not.

Q. And not made on one of their forms? A. Not made on one of their forms; no, sir.

Q. Do you know, General, whether the Brewers' Bulletin quotations are hops delivered in the East or hops delivered at Chicago? A. I understand for the Chicago market.

Q. Are you sure about that? A. That is my understanding.

Q. And that therefore the freight from Chicago East must be added? A. That is my understanding.

Q. Well, do you say that the freight from the Coast to Elizabeth is different from the freight from the Coast to Chicago? A. I wouldn't want to be—I am not competent to pass on that: I wouldn't say just what it was. There is a charge—whatever it is, I don't want to testify to, because I don't know exactly. I know that the freight from Chicago here is $1.75.

Mr. English: Now, your Honor, the defendant took some depositions in California of two witnesses, one a California lawyer, named Gillespie, to prove the California warehouse law, and the other the deposition of Mr. DePue, who was mentioned in the depositions taken by the plaintiff as head of

the DePue Warehouse Company. By agreement with Mr. Twining, I am not going to read the deposition of Mr. DePue because we have both read it, and it appears from an examination of it that he practically had no personal knowledge at all, except as to one conversatior with Mr. Settle, I think, and that has been already covered by the examination of Mr. Settle.

As to the deposition of Mr. Gillespie, he was called to prove the California warehouse law, and it appears from a cursory examination of the testimony that they have out there the standard warehouse act, which is also the law of New Jersey, and we have therefore agreed to that, without reading verbatim the testimony of Mr. Gillespie, those quotations from the California statute which are in his deposition shall be considered as in evidence in this case. and then we can compare them with the New Jersey statute and see whether or not they do exactly correspond. Is that right, Mr. Twining?

Mr. Twining: Yes.

Mr. English: Reserving the right to call Mr. Seeber, if he comes in in time, and also to offer any documentary evidence that we may have overlooked we rest.

Defendant rests.

Carl A. Phleger (Recalled in Rebuttal)—Direct

CARL ALBERT PHLEGER, recalled in behalf of plaintiff in rebuttal.

Direct Examination by Mr. Twining:

Q. Since the close of the testimony yesterday have you made any examination of your records or memoranda for the purpose of definitely determining where you were from the 1st of October to the 10th of October, 1914? A. I have.

Q. State what that examination consisted of.

Mr. English: Not what the paper said, but what you did.

Mr. Twining: No, what you did.

A. I carefully examined the letter file and a cash book which I keep in my office.

Q. Now, state why you examined the letter file? A. I examined the letter file because when I am not in New York or in the Metropolitan district, which includes cities adjacent to New York, within the radius of perhaps thirty or forty miles, I sign all the outgoing mail from our office, and during the period mentioned from the 1st to the 10th of October, I note that my signature is not attached to any of the copies——

Mr. English: Wait a minute. I object to that.

The Court: I understand that the witness was asked to state what he did and not what he found.

By the Court:

Q. You examined your letter file? A. And my cash book.

Mr. English: I object to why. It is immaterial.

The Court: No, I do not think it is immaterial to give his reason.

Mr. English: Then your Honor will please warn him not to state the contents of his letter file, as he was doing when I interrupted him.

The Court: Yes, the witness may state why he examined the letter file, without stating the result of his examination.

By Mr. Twining:

Q. Have you concluded your statement as to why you examined the letter file? You cannot state yet what the contents of the file were, but simply why you made that examination. Have you concluded your statement on that? A. No, I don't think I answered that. I examined the letter file to find whether I signed letters or copies of letters during that date from the New York office.

Q. Now, why did you examine your cash book, without stating what the contents of the cash book were? A. To find out where I was on those dates.

Q. Well, how could you find that out from the cash book?

Mr. English: I object to that, because that goes with the contents of the cash book.

The Court: No, it merely calls for the witness to state the usual course of his business with respect to the cash book.

Mr. English: All right. I do not object to that.

A. Because the cash book shows a record of expense slips which I send from time to time to the

San Francisco office covering expense in connection with my work. In this particular instance——

Mr. English: No, I object to that.

The Court: Never mind that.

Q. By whom was that cash book kept during the months of September and October, 1914? A. By myself.

Q. In your own handwriting? A. Yes.

Q. State when with reference to the time when the expenditures shown therein are made the entries of those expenditures were made?

Mr. English: You mean the general practice?

Mr. Twining: I am referring now to the months of September and October, 1914, and I want to know how soon after the expenditures shown in the book were made the entries showing those expenditures were made.

A. At the same time, concurrently.

Q. Now, will you state whether or not you found any letters or copies of letters in your letter file signed by yourself during the period—or that indicated that the originals were signed by yourself—during the period from October 1, 1914, to October 10, 1914?

Mr. English: I object to that. I think the best evidence of that would be for him to produce his letter file, and then we can see for ourselves. Besides, he ought to have the letter file to be cross-examined on before he is allowed to testify.

Mr. Twining: If your Honor please, I think this is the usual way of showing that

nothing existed. I am not trying to show what did exist, but I am asking the question now as to whether or not anything appeared in that file to show that he signed any letters during that time. Of course, that is not calling for the contents of papers.

The Court: No, but the question is whether it brings in for inspection the letter file itself so that the witness's recollection may be verified or contradicted by it.

Mr. Twining: If they call upon us to produce the letter file, I can have it here by two o'clock. I have a portion of it here now. I say I can have it here by two o'clock, subject to correction by the witness. I understand there is someone over there who can bring it over immediately after being telephoned to.

The Court: I think the letter file, if it is asked for, should be produced.

Mr. Twining: May I ask the witness whether he will bring the letter file here at two o'clock for the period from October 1st to October 10, 1914?

The Court: Yes.

The Witness: Yes, certainly.

Mr. Twining: Then, with that statement I press the question.

(Question read as follows: "Now, will you state whether or not you found any letters or copies of letters in your letter file signed by yourself, or that indicated that the originals were signed by yourself, during the period from October 1, 1914, to October 10, 1914.")

A. I did not find any letters or copies of letters that I had signed or that indicated I had written them.

Q. During what period during the month of September or October, 1914, did your letter file show that there was nothing signed by yourself, or indicate that there had been no originals signed by yourself? To what dates does that testimony relate? A. I found copies of originals that I had written prior to September 22d and subsequent to October 10, 1914.

Q. Then will you produce at two o'clock your complete letter file between the dates of September 22, 1914, and October 10, 1914? A. Yes.

Q. For inspection by the other side, if they care to see it? A. Yes.

Q. Now, have you brought over with you the cash book to which you referred? A. Yes, sir.

Q. Is that the book that I now show you (book shown to witness)? A. Yes. That is page 90.

Q. Can you state without looking at the cash book, from your present recollection, as to whether or not you were in New York or in Elizabeth or in the vicinity of New York from on or about September 22, 1914, to October 10, 1914? A. I was not in the vicinity of New York or Elizabeth.

Q. Where were you during those periods—between those dates? A. In northern and western New York State and in Canada.

Q. What town or cities? A. Beginning with September 22d, I went from New York to Montreal, and from Montreal west in Canada to Walkerville and Windsor, in the Province of Ontario, back to Buffalo, Rochester, Syracuse, to Utica, thence to Montreal again, returning from Montreal to New York about October 10th.

Q. Were you in Elizabeth between those dates, September 22d and October 10th? A. No.

Q. I call your attention now to page 89 of the cash book which I hold in my hand, and which you

have identified, and ask you what that page indicates?

Mr. English: Do not give us the contents of it; tell us what it indicates.

A. A record of expense slips.

Q. In connection with what? A. In connection with my work and travelling.

Q. Travelling to what points?

Mr. English: No, that is giving the contents of the book now. I object to it.

The Court: On what ground?

Mr. English: On the ground that he ought not to state the contents of the book. If the book is evidence after cross examination, I suppose it will speak for itself. If not, he ought not to state what it contains. It is an indirect way of getting in evidence something that is not competent to be in evidence.

The Court: It depends on whether or not it is a memorandum. Whether it is a memorandum does not yet appear distinctly—whether it is a memorandum made by the witness or under his direction.

Mr. English: Ought not I be permitted to cross examine on it, then, if it is to be used in that way?

The Court: Undoubtedly, but it does not become evidence. Do you wish to cross examine?

Mr. English: Yes.

By Mr. English:

Q. Did you take this book with you on your trips? A. Yes.

Carl A. Phleger (Recalled in Rebuttal)—Direct

Q. Carry it around in your bag with you? A. Yes.

Q. When were you in the habit of making these entries that appear here? A. At the time I forwarded the expense slips to the Coast.

Q. When was that? A. Generally on the day or one or two days after the money had been actually expended.

Q. Now, what were those expense slips? A. They covered all minor expenses in connection with my work in travelling.

Q. Did you have a printed form that you used to fill in? A. No, just an ordinary—the expense slips that I sent forward were on a printed form, but they were an ordinary commercial traveller's expense book, but I didn't mark in any items after the different things that were printed there; for instance, travelling expense, meals, hotel, *et cetera;* I just wrote in without regard to the different items.

By the Court:

Q. You wrote in the total? A. Yes, I itemized it and totalled it, but I didn't have the same items that were printed there.

Q. They might not exactly fit, I suppose? A. No.

By Mr. English:

Q. Well, were you in the habit of writing this book up from the slips? A. I wrote the items in the book at the time I wrote the slips.

Q. What was your object in keeping this book, if you had already made up the slips? A. Because I was charged with the amount of money that they gave me by credit or through the medium of my

drawing drafts against them. I kept them on the lefthand page; those were the debits. On the right-hand page I entered the expense slips; those were my credits. At any given point I was responsible to them for the difference between the debits and the credits.

Q. Now, what particular page were you going to refer to? A. Page 89.

Q. Is there anything on that page to indicate what it refers to? A. Yes, sir.

Q. Well, where? A. (Witness indicates in book.)

Q. When did you write that in? A. At the time I entered the expense slips.

Q. Do you carry a fountain pen or not? A. Oh, sometimes I do and sometimes I don't.

Q. Well, did you in September and October, 1914? A. I don't remember it; possibly.

Q. When did you start on this trip? A. September 22d.

Q. And where did you go first? A. To Montreal.

Q. Where did you go from there?

Mr. Twining: I object to the question. This is not anything which is testing the accuracy of this book. He is asking the witness now to recite from memory where he went.

The Court: This is merely cross-examination on the book for the purpose of seeing whether it is a memorandum or what its character is.

Q. How do you account for three distinct colored inks on this page 89? A. I would account for it by the fact that it was written at different times and at different places, possibly with the ink and pens that happened to be handy at the places where it was written.

Q. Then how do you account for two distinct kinds of ink and apparently two different pens for the entry of October 3d? A. I will tell you as to that. At the time I sent in these expense slips I was unable to send in an expense sli for the amount of the office expenses, inasmuch as it would be necessary for me to receive a report from New York as to what these expenditures were. I simply entered the number of the slip, you see, and then waited unil I got these facts from New York before I entered it in the book. That is with regard to the office expense, the other items on the page being with regard to my own personal expense, which was entered by myself.

Q. Then this book was not all made up at he same time, contemporaneously with the matters purporting to be there? A. With regard to the travelling expense, concurrently; with regard to matters of the weekly office expense, when I was on the road it was sometimes necessary for me to wait until I got the itemized office report before I could write it in.

Q. Was it their habit to send it to you when you were on the road? A. Yes, sir; so that I could take credit for it.

Q. In what form was it sent? A. Memorandum.

Q. What expenditures did the office make in your absence?

Mr. Twining: I object to that. That is not cross-examination.

The Court: Any inquiry as to the manner of keeping the book is competent, I think.

(Question read.)

Mr. English: I will ask another question.

Q. This book purports to set forth expenditures from the office, does it not? A. Yes, sir.

Q. Now, what kind of expenditures would your office make in your absence?

Mr. Twining: I object. That is an entirely separate question. This question is limited to examination as to whether this may be treated as a memorandum made by the witness at or about the time—made by or under the direction of the witness—at or about the time of the expenditures to which I am calling his attention.

The Court: That is the way I understand it.

Mr. Twining: He now says it is, but that the office expenditures were not always put in at about the time they were made. I have no concern with the office expenditures. The only purpose of having him use this book to refresh his recollection is to find out whether he was incurring expenditures of a different character during that time; namely, travelling expenses. The office expenses would be going on anyhow, I suppose.

The Court: The witness may explain these matters so far as they are necessary in explaining the keeping of the book, and nothing else.

Mr. English: Does your Honor think that is explanatory or not?

The Court: I think it may be. I have not seen the book.

(Question read.)

Mr. Twining: The objection is overruled, as I understand it?

The Court: That seems to be remote from the inquiry as to the character of the book. I sustain the objection.

Mr. English: All right, sir.

Carl A. Phleger (Recalled in Rebuttal)—Direct

By Mr. Twining:

Q. Now, Mr. Phleger, looking at page 89 of the book, will you state first what that shows? A. Beginning at the top of the page, it shows the expense slips Nos. 17 to 30 inclusive.

Q. Covering what period? A. Covering a period from September 22d to October 2d.

Q. 1914? A. 1914.

Q. What else does it show? A. It shows where I was on those dates.

Q. Well, where were you on those dates? A. September 22d, in Montreal; September 23d, Montreal; September 24th, Montreal to Toronto; September 25th, Toronto; September 26th, Toronto; September 27th, Toronto; September 28th, Toronto, Hamilton, Frankfort, London, Ontario; September 29th, London, Windsor, Walkerville and Detroit to Buffalo; September——

Q. Where is Detroit? A. Detroit is in Michigan.

Q. And all the other points that you have named, except Buffalo, are in Canada, are they not? A. Yes, in Canada.

Q. Now, Buffalo is in New York? A. Yes. September 30th, Buffalo; October 1st, Buffalo and Tonawanda.

Q. Where is Tonawanda? A. It is about twenty miles from Buffalo towards Niagara Falls. October 2d, Rochester and Buffalo.

Q. Now, I call your attention to page 91 of the book. State what that shows? A. It shows expense slips Nos. 31 to 40 inclusive, from October 3d——

Q. 1914? A. 1914. —to October 12, 1914.

Q. What else does it show? A. It shows where I was on October 3d.

Q. Where? A. Rochester and Syracuse.

Q. New York? A. Yes.

Q. Well? A. October 4th, Syracuse, New York; October 5th, Syracuse, Utica to Montreal.

Q. Yes. A. October 6th, Montreal.

Q. Yes. A. October 7th, Montreal; October 8th, Montreal and Utica.

Q. Utica is in New York? A. Yes. October 9th, Utica and Albany; October 10th, Albany to New York.

Q. Have you any fact other than what appears in that memorandum which indicates to your mind where you were on October 7, 1914? A. Yes.

Q. What? A. I sold hops at Montreal on October 7, 1914, after several days' negotiations there.

Q. Have you a copy of that contract with you? A. Not with me.

Q. Is it in New York? A. I believe so.

Q. Well, will you try to get it and have it here by two o'clock, with the other papers? A. Yes, I will try to get it.

Q. Now, does the book show that you went to Elizabeth on any date subsequent to October 1, 1914? A. Yes.

Q. What page are you referring to? A. Page No. 97.

Q. To what item do you refer? A. Expense slip No. 4.

Q. What date? A. November 6th.

Q. What year? A. 1914.

Q. What does it show? A. It says, "Carfare and local 'phone, Metropolitan district, week ending November6th, including trips to Newark, November 2d, and Elizabeth, New Jersey, November 4th."

Q. Now, do you know what day of the week November 4th, 1914, was?

The Court: Is this for the purpose of testing the witness's recollection?

Mr. Twining: No, but I think it was the

same day of the week that some of these other witnesses have testified to, and I think it is just an error in the month, that is all. There is a disagreement.

Mr. Stamler: What date do you have there?

Witness: No date mentioned—November 4th.

Mr. Stamler: That was a Wednesday.

Q. Does this book show any trips to Elizabeth between October 10, 1914, and November 4, 1914?

Mr. English: I think that is objectionable, your Honor. I do not think the ques- is what the book shows, but what the fact was. If he can refresh his recollection, that is another thing.

Mr. Twining: Yes, that is true.

Q. Without looking at the book, can you state from recollection whether you went to Elizabeth between October 10, 1914, and November 2, 1914? Just what your best recollection is. A. My best recollection is that I was not there during that period.

Q. Well, now, refreshing your recollection by looking at the book during that period, state what your recollection is as so refreshed.

Mr. English: That is not rebuttal, your Honor, because on his direct examination a day or two ago he testified very clearly that he went to Elizabeth within a week or ten days after the receipt of a telegram which was received October 18th. He was very positive about that; he reiterated it on both direct and cross examination, and he ought

not now on rebuttal to be permitted to reopen the testimony and change it.

Mr. Twining: My recollection is that that was his best recollection, but I can ask him now, if you think it is necessary, whether he had refreshed his recollection.

Mr. English: Oh, no, there is no point in asking him now.

Mr. Twining: I assume that he will tell the truth.

The Court: I see no reason why he should not answer the question.

(Question read.

A. (Referring to book.) No, I was not in Elizabeth.

Q. Between those dates? A. Between those dates.

Q. Can you state, without looking at the book, first, whether you went on a Canadian trip later, in the fall or early winter of 1914? I refer to the months of November and December, 1914. A. I did.

Q. Do you remember, without looking at the book, when you started on that trip? A. I believe about November 6th or 7th.

Q. November 6th or 7th? A. Yes, 1914.

Q. How long did you stay away that time? A. Until about December 5, 1914.

Q. And did you go away again in 1914 to Canada? A. I don't remember; I don't think so.

By the Court:

Q. Where were you on Christmas? A. In New York.

Carl A. Phleger (Recalled in Rebuttal)—Direct

By Mr. Twining:

Q. Will you look at the book and state whether or not there are any entries there made in the way that you testified that the other entries were made showing whether or not you went on a Canadian trip in November, 1914?

Mr. English: I should like to ask what that is rebuttal of?

Mr. Twining: I think the testimony is important in this aspect, your Honor. The correctness and accuracy of the book is very important. Now, the testimony already shows that on December 8th, I think it was, this witness wrote a letter to his principal in San Francisco reporting a trip to Canada, and I think that I am entitled to introduce any evidence I can to corroborate the accuracy and completeness of this record.

Mr. English: I do not understand it that way at all. That would be on the theory that we have attacked the book and impeached it in some way and it was offered in evidence. My understanding is that it is simply used by the witness to refresh his recollection. That has not been attacked yet.

The Court: The objection is overruled. You may answer the question.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. (Referring to book.) Yes, I find on page 97 a series of entries, being expense slips, beginning with No. 7, which would show that——

Q. Well, give the dates covered by the expense

slips and the expense slip numbers to which you refer. A. Slip No. 7, New York to Toronto, November 8th; slip No. 8, Toronto, November 9th; slip No. 9, Toronto, November 10th; slip No. 10, Toronto, November 11th; slip No. 11, Toronto, Berlin and London, November 12th.

Q. Where are Berlin and London? A. In the Province of Ontario, Canada. Slip No. 12, London, St. Thomas and Buffalo, November 13th. London and St. Thomas are in the province of Ontario and Buffalo in the State of New York. Slip No. 15, Buffalo and Tonawanda, November 14th; slip No. 16, Buffalo and Toronto, November 15th; slip No. 17, Toronto, November 16th; slip No. 18, Toronto, November 17th; slip No. 19, Toronto, November 18th; slip No. 20, Toronto, November 19th; slip No. 22, Toronto and Berlin, November 20th; slip No. 23, Toronto, November 21st; slip No. 24, Toronto, November 22nd; slip No. 28, Toronto, November 23rd; slip No. 29, Toronto and Hamilton, November 24th; slip No. 30, Toronto and Hamilton, November 25th; slip No. 31, Hamilton and Toronto, November 26th; slip No. 32, Toronto, November 27th; slip No. 33, Toronto, November 28th; slip No. 34, Toronto, November 29th; slip No. 40, Toronto, November 30th; slip No. 41, Toronto and Montreal, December 1st; slip No. 42, Montreal, December 2nd; slip No. 43, Montreal, December 3rd; slip No. 44, Montreal, December 4th; slip No. 45, Montreal and New York, December 5th.

At one o'clock P. M., the court takes a recess of one hour.

Carl A. Phleger (Recalled in Rebuttal)—Direct

AFTER RECESS.

CARL ALBERT PHLEGER, resumes the stand in behalf of plaintiff in rebuttal.

Direct Examination (continued) by Mr. Twining:

Q. Mr. Phleger, will you look at the book we have been talking about, the cash-book, and state whether it contains any notations indicating that you visited Elizabeth on any occasions, other than those that you have testified to, during the month of November or December, 1914?

Mr. English: I do not quite like the phraseology of the question, if you Honor please. I do not understand that this book indicates that he visited anywhere; it indicates that he paid out certain disbursements on certain days and made a memorandum of them.

Mr. Twining: I will change the question.

Q. Will you look at the book and state whether it contains a memorandum of expenses in connection with trips made to Elizabeth during the months of November and December, or either of them, 1914, other than the trips to which you have testified? A. (Referring to book.) Yes.

Q. What dates? First state the page of the book that you are looking at. A. Page 103, expense No. 49, "Carfare, local telephones, *et cetera,* week ending December 12th, including two trips to Elizabeth."

Q. Does that give the dates of those trips, or just that they were made during the week ending December 12th? A. No, it does not give the date; it simply says during that week. It is my custom

for all incidental carfares and local 'phones, *et cetera,* to bulk them at the end of the week and put in one slip for it.

Q. Refreshing your recollection by look ing at that notation, what have you to say as to whether or not you visited Elizabeth during the week ending December 12th, and if you did, how many times? A. Twice.

Q. Does the book contain any memorandum of expenses incurred in connection with other visits in Elizabeth during the months of December or November, 1914? A. [Referring to book.] None other than already testified to.

Q. Now, having refreshed your recollection by examination of the cash-book, will you state upon how many occasions you visited Elizabeth in connection with this matter during the months of October, November and December, 1914? A. (Referring to book.) Three visits.

Q. And on what dates? A. November 6th, and two visits during the week ending December 12th.

Q. When you gave your testimony the other day as to the number of visits that you made to Elizabeth in connection with this matter and the dates of those visits, had you before giving that testimony refreshed your recollection by an examination of this book? A. No.

Q. Had you before giving that testimony refreshed your recollection by an examination of the correspondence files? A. No.

Q. Had you refreshed your recollection in any way other than by an examination of the telegram from your company in San Francisco to yourself dated October 17, 1914, and which you testified you received on October 18, 1914? A. That telegram is the only thing with which I refreshed my mind.

Q. Now, will you state generally what the cash-

book contains; that is, the number of pages and the period it covers and whether or not it relates subsequently to the matters that you have testified to or to other matters, and if so, what matters, and also as to whether or not all the entries in the book are in your handwriting?

Mr. English: I object to all that, except that it is in his handwriting. I think the rest is immaterial.

The Court: The objection is overruled.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. First state the number of pages in the book that are covered with writing. A. There are two hundred pages in the book—pages numbered 1 to 200—and the book has been used completely.

Q. Well, are there some blank pages in the book? A. Yes, there are some blank pages in the center of the book.

Q. Give me the numbers of those, please.

Mr. English: How is this rebuttal? I object to this as not rebuttal.

The Court: I think it is all a part of the memorandum.

A. [Referring to book.] Pages 124 to 131 inclusive are blank, and from 140 to 145 are also blank.

Q. Now state what date you started keeping a record of your expense account in that book? A. March 22, 1912—1913.

Q. And what is the date when you stopped keeping such a record? A. I kept a record for the

period of time following that date to September 30, 1915 inclusive, with the exception of a period August 2d—with the exception of the period July 24, 1915, to August 25, 1915.

Q. What appears in the book during that period? A. Entries by my assistant, Mr. D. Ober, during the time that I was on a visit to the Pacific Coast.

Q. Pleasure or business? A. Pleasure.

Q. And does the book contain any entries prior to the date when you started keeping your own expense account in it? A. Prior to March 22, 1913, and subsequent to July 2, 1912, the entries are in my handwriting, but are a true and exact copy of the book kept by my predecessor, who on leaving—

Mr. Twining: Well, that is all.

Mr. English: Well, we do not care anything about your predecessor.

Q. I show you the words "Permit inspection" on Exhibit P37 (paper shown to witness.) Do you know of your own knowledge whether or not those words have any trade significance?

Mr. English: I object to that as not rebuttal. It is immaterial anyway.

The Court: I shall allow it.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I know from my experience that the words have a trade significance.

Q. Now, what experience is that that you base that statement on? A. The handling of many, many shipments covered by similar billing and similar bills of lading.

Carl A. Phleger (Recalled in Rebuttal)—Direct

Q. What is the trade meaning of those words?

Mr. English: I object to that, if your Honor please. It seems to me that that is not rebuttal, and I do not see how it is material. I do not think this witness has got the qualification to pass on it; it is out of his line. He solicits orders, according to the cry of counsel all through the case, and how he can qualify him now to pass on a matter of that kind, which deals with shipments and matters of that character, I fail to see.

The Court: I think the witness's experience that you mention ought to be sufficient to enable him to give this testimony. I shall permit the question to be answered.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. These words, "Permit inspection," are our written authority to the railroad to permit the consignee to examine the goods on railroad property without surrendering the original order or bill of lading?.

Q. Will you state what the railroad practice is when a shipment is started from the Coast to the east with regard to the bill of lading or a copy of the bill of lading? What is done?

Mr. English: I would like to urge the same objection, and ask an exception.

The Court: Yes, I shall overrule the objection and allow the question to be answered.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. The bills of lading when presented to the railroad company are in duplicate, the original of which the agent of the railroad company signs, and in the case of an order bill of lading it becomes negotiable when indorsed by the shipper.

Q. Now you are talking about when it is presented to the railroad company? A. Yes.

Q. Do you mean presented to the railroad company originally at the time the shipment started? A. At the time and at the place the shipment originates.

Q. Go ahead. A .The duplicate copy is kept by the railroad, and from this duplicate copy the billing covering the shipment is made out. The billing goes forward with the shipment and is held by the delivering line. The billing contains the exact information contained on the bill of lading, and in the case where the original bill of lading specifies "Permit inspection," the billing also caries this notation, "Permit inspection," so that on arrival of the goods at destination it is not necessary for the railroad company to see the original bill of lading to know that the consignee of that particular shipment has the shipper's permission to inspect the goods, because the notation "Permit inspection" is carried on the billing.

Q. Is that the general custom of all railroads that you are testifying to? A. Yes, that is the general custom of all railroads throughout the United States.

Q. In the conduct of your business do you have hops consigned to you from the Coast? A. Practically all our shipments of hops are consigned to us on order bills of lading carrying the notation "Permit inspection."

Q. Do you speak of the Exhibit P37 as an order bill of lading? A. Yes.

Q. And is that indorsed? A. Yes.

Q. And negotiable? A. Yes.

Q. Now, how many bales of hops per year, approximately, are consigned to you in the way that you have spoken of?

Mr. English: I must say, your Honor, that I do not see what his has got to do with rebuttal in this case.

The Court: I shall allow the question.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Receive about from five to ten thousand bales, there being seventy-five or a hundred or more bales in a car.

Q. Now, during the course of your experience have you made attempts to remove or inspect the hops at the yard where you did not have a bill of lading which contained the words "Permit inspection" or similar words?

Mr. English: I object to that, because that is absolutely immaterial, because no such situation has arisen in this case.

The Court: How does that become important?

Mr. Twining: I just wanted to show, if your Honor please, that the railroad companies will not permit inspection at their yards or permit you to remove goods from the yards except under bills of lading of this kind, and that they will under bills of lading of this kind permit you to inspect at the yards, but in no case will they permit you to remove the goods without submitting the bill of lading.

Mr. English: Well, that may be all true.

Mr. Twining: If it is conceded, I shall not prove it.

The Court: You may prove it.

Mr. Twining: Do you concede it?

Mr. English: No, I do not dispute it, but I do not think it is material in this case.

The Court: Let it appear that that is conceded.

Mr. Twining: Then I shall state it this way: that it is the general custom of railroad companies not to permit consignees to remove the goods consigned from the railway terminal until the bill of lading representing the goods is surrendered.

Mr. Englsh: We will concede that that is a corect statement of fact, but we ask your Honor to strike it out from the record as an entirely immaterial fact in this case and as not rebuttal.

The Court: Yes, I understand that you object because it is immaterial. I will not strike it out.

Defendant's counsel pray an exception to this rulng of the Court.

Exception noted as ground of appeal.

Mr. Twining: And, further, that where a bill of lading is presented to the railroad containing the words "Permit inspection," or similar words, the railroad will permit the consignee to inspect the goods—open the car and inspect the goods—but only upon railroad property. Is that conceded, too?

Mr. Stamler: That is correct.

Mr. English: Subject to the same objection, motion and exception.

The Court: I make the same ruling.

Carl A. Phleger (Recalled in Rebuttal)—Cross

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Cross-Examination by Mr. English:

Q. This "Permit inspection" feature of the bill of lading, you understand, is an additional privilege which a consignee has over the ordinary bill of lading to examine the goods on railroad property? A. Under an ordinary order bill of lading, yes.

Q. When the words "Permit inspection" are on it, then he can look at it, if he wants to, on railroad property? A. He has permission to look at it, yes.

Q. That is what I say. A. Yes.

Q. If he does not want to look at it on railroad property, he can look at it somewhere else, I suppose? A. Not without taking delivery of it from the railroad, and, conversely, if it was not on the bill of lading, he could not look on it on the railroad property.

Q. You mean surrender the bill of lading to the railroad by taking delivery? A. I mean surrendering the bill of lading to the railroad or taking delivery of the hops from the railroad.

Q. In other words, they can leave the bill of lading behind entirely and go and pay the freight and take away the goods? A. If they put up a bond or if the consignee's standing is such that he can get the railroad to accommodate him in that way; but he is taking delivery, none the less——

Mr. English: I object to that, and I move to strike it out. He is giving a conclusion now.

(Question read.)

Q. (By the Court.) Can you answer that yes or no? If you can, you may answer it either yes or no; if you cannot, you may answer it otherwise. A. No, you cannot; you have got to give them the bill of lading.

Mr. English: Then I move to strike out the previous answer.

The Court: Strike it out.

Q. Now, in this case the defendant company had a bill of lading, did it not? It was mailed to them by your people? A. Yes.

Q. And they have still got it, and it was offered in evidence in this case as P37, was it not? A. Yes, sir.

Q. So, very evidently, they got the shipment without surrendering the bill of lading, did they not?

Mr. Twining: I object. The witness could not possibly know. The question is argumentative.

(Question read.)

The Court: Can you answer that?

A. No, it is not evident.

Q. Well, you know in this case that the defendant company paid the freight, do you not? A. I do not know it for a fact.

Q. Well, it is admitted in this case, whether you know it or not. And, having paid the freight, they took away the hops. You know that, I suppose? A. Yes, I know that they took the hops.

Q. And you do know that the original bill of lading has been offered in evidence in this case, do you not? A. Yes.

Q. Now, have you any definite recollection of

what happened on either of these two visits to Elizabeth during the week ending December 12, 1914? A. Yes.

Q. Can you sort out in your mind what happened on each visit? A. On the first visit——

Q. No, I did not ask you what happened; I asked you if you can definitely say? A. I can testify to the best of my recollection.

Q. Yes, I haven't any doubt that you can. I want to know how good your recollection is. Have you got a definite recollection? A. Yes, sir.

Q. Have you got a definite recollection of what happened on November 6th? A. Yes.

Q. Do you say now that the only times you went to Elizabeth after the 1st of October, 1914, were those three occasions? A. Yes, sir.

Q. Well, when you testified in this matter when the case was before the Court a couple of months ago or so, what had you done to refresh your recollection then about those visits? A. I do not remember that I had refreshed my recollection.

Q. You do not remember? A. No.

Q. When you testified last week what had you done to refresh your recollection? A. Referred to that telegram that I received October 18th.

Q. Is that the only thing you referred to? A. Yes.

Q. Don't you remember that you had in your possession up there on the stand a whole bunch of letters and telegrams, and that you asked permission to refer to those various letters and other papers for the dates? A. Yes.

Q. Well, why do you limit it to that one telegram? (No response.)

The Court: Do you get the question?

Witness: Yes, sir.

The Court: You may answer it.

A. Well, I remember distinctly having the letters here, yes, but I only refreshed my memory by the telegram, because I testified before I looked at the letters. I looked at the letters afterwards.

Q. Do you mean to say that you had not looked at the letters at all before then? A. Not to refresh my memory. I had the letters, but I don't remember looking them over for the purpose of refreshing my memory. I simply had them with me.

Q. Why did you testify the first time you were on the stand in this case that you had called at the defendant's place of business five times after the 1st of October? A. Well, that was my recollection at the time, that I had been there about—I didn't put it down to any definite number.

Q. Why did you testify last week that you had been there in October of 1914? A. Well, it was my recollection that I had been there about a week after the receipt of that wire, which was on the 18th. That would place it toward the end of October.

Q. Now, it appears that you have told us three distinct stories about your going there, does it not? Now, which one do you want the Court to take as the accurate one? A. Well, the time this wire—I generally confirm that fact with letters to our main office in San Francisco, which letters are part of the case and probably are the best proof.

Mr. English: I move to strike that out as not responsive, and ask the stenographer to read the question.

The Court: The answer does not seem to be in response to the question.

Q. (Question read.) A. Well, I am not aware that there are three distinct stories, in any event. I will leave it to the judgment of the Court.

Q. Well, I am aware of it, and I want you to say now which one you want the Court to believe? A. That I was there November 6th and twice during the week ending December 12th.

Q. And that is the story that you tell after the case has been tried and all the evidence of the defendant brought out, is it not?

Mr. Twining: I object to the question, if your Honor please. That is not a fair question. The record shows when he gave the testimony and as the result of what.

The Court: The objection is sustained.

Q. Which of these three trips which you now tie up to did you first see the hops? A. I saw the hops on November 6th and on December 8th or 9th, some time during the week ending December 12th.

Q. Well, what I want to know is on which of the trips you made it was that you saw the hops, the first, the second or the third? A. The first and the second.

Q. Then why did you testify in this case the first time that you were on the stand that it was not until the third trip that you made that you saw the hops? I am referring now to page 156 of your testimony. A. Because without refreshing my memory on it by reference to any memorandum, I was under the impression that it was the third time.

Q. Well, what is there in that book from which you refresh your memory now that enables you to say that it was the first time that you saw those hops? A. I might say by reference to this book and by hearing the testimony of Mr. Hubach, who

confirms that he showed me the hops at that time.

Q. When you testified before you had not heard Mr. Hubach, and then you were very positive that it was not until the third time that you saw the hops.

Mr. Twining: I object to the question. Counsel says that he is referring to the testimony on page 156. The witness says, "It was not the first time; I think it was about the third." That is a very different thing.

Q. Then you were very positive that it was not the first time that you had seen the hops? A. Yes, that was my recollection at that time, as I testified.

Q. So you do not make your latest and most revised version of this affair from your refreshing your recollection from your book, but from the testimony of Mr. Hubach; is that right? A. And from refreshing my memory from the book.

Q. Just point out a single thing in that book that enables you to say when you saw the hops. A. The item showing that I was there November 6th.

Q. What is there there to show that you saw the hops on November 6th? A. Because I saw the hops before I went to Canada and on my return from Canada, and November 6th was the first time that I was at the brewery subsequent to the delivery before I went to Canada.

Q. My question is what there is in that book which enables you to say that it was on your first visit to the brewery that you first saw the hop? The fact is that there is not any such entry, is there? A. Not that I saw the hops on that trip.

Q. Then why do you say that you refresh your recollection from the book, and, refreshing your recollection, that that was the first time you saw the hops? A. Why, it refreshes my recollection

that I was down there at that time, and it refreshes my recollection that that was the only time I was there previous to that trip to Canada, and I do remember very distinctly that I saw the hops before I went up to Canada.

Q. Now, are you able to say now when it was that you first took samples there? A. Well, I should say about early November.

Q. Well, when? A. November 4th or 6th.

Q. Do you say that you were there on November 4th? A. No, I have not so testified—November 6th.

Q. Why are you testifying to that now? Do you want us to understand now that you were there on the 4th? A. Well, I know that I submitted samples November 6th and I know that I submitted two batches of samples, and I know they were about the same time.

Q. How do you know that you submitted samples on November 6th? A. I brought them with me to submit them.

Q. When did you submit the second batch? You say you submitted two batches of samples. A. Yes, about that same time.

Q. Well, what do you mean by that? Because, according to your testimony, your visits were a month apart, your first and second visits were a month apart? [No response.]

Q. Answer the question. A. Is that the question that is asked now?

The Court: Yes, you are asked what you mean by that. I do not know exactly what "that" is. According to counsel, you have said that your first and second visits were a month apart. The apparent object of the question is to call your attention to what is said to be a discrepancy in your evidence.

Witness: Well, I must have submitted

other samples just *about that time, November 6th,* because I *remember distinctly* that I submitted two distinct sets of samples.

Q. Well, do you mean to say that you were there November 6th and there again shortly after November 6th? A. Well, or sightly previous, we will say November 4th.

Q. Then you will say that you made four trips there after the 1st of October? A. Yes, I will say that I made four trips there.

Q. Now, that does not appear in your book, does it? A. Well, it does not appear in this book that I made a trip to Elizabeth on November 4th, but I did put in expense for incidental traveling that I had done during that week, and that more than likely covered another trip, because I charged for a trip to Newark on that day.

Q. Now, you say that you made four trips to Elizabeth after October 1st, the first one on November 4th, and the second on the 6th; is that right? A. Yes, sir.

Q. And you submitted samples on both of those occasions? A. Yes.

Q. You submitted samples on each of those visits to General Collins? A. Yes.

Q. You do not find any record in your book of the supposed visit on November 4th, do you? A. May I refer to the book?

Q. Certainly. A. [Witness refers to book.]

Q. Well, do you find it? A. Yes, I see that I do say "Elizabeth, New Jersey, November 4th."

Q. Why did you not testify to that before? You undertook to testify to everything that was in your book. [No response.]

Q. Where do you see that? A. [Indicating in book.] "Elizabeth, New Jersey, November 4th." But, then, what it really means—

Q. No, you cannot interpret anything that is not there. Why do you say now that there is an entry of November 4th and why did you testify positively on questions by Mr. Twining that the first visit was November 6th? How much value do you want us to attach to your testimony? A. Well, the book is here; you can see plainly that it says "November 2d and November 4th."

Q. It does not say that you went to Elizabeth on November 2d; it does say "Newark," does it not? A. It does not say that I did not go to Elizabeth.

Q. Well, does it say that you did? A. No.

Q. Well, what do you say? A. I say I did go to Elizabeth November 2d and November 4th.

Q. And November 6th? A. No, I only made two trips at that time; *that would be November 2d and November 4th.*

Q. Now, in answer to Mr. Twining's questions you said the first time you went to Elizabeth after the 1st of November was November 6th. Now, do you change that testimony completely and say that you did not go there on November 6th? A. Yes, I say positively that I was not there on November 6th.

Q. You change your testimony completely on that? A. Yes.

Q. And you now change it further and say that the first time you went there was not November 6th, but was November 2d? A. Yes.

Q. And you bring in an entirely new fact, and say that you also went there on November 4th; is that right? A. Yes.

Q. That is an entirely new fact, is it not? A. That is what I intended to testify when I said "November 6th."

Q. Well, how much credence are we to give to what dates you say? You say one thing and intend another. A. When I refer to this book and give you

a date, you may rest assured that that is the date.

Q. Well, you have given us three sets of dates; they cannot all be right. A. Well, if I referred to the book and gave you any other date, I was away wrong.

Q. Well, you did that; you referred to the book and you gave us the date that you say you were away wrong on then? A. Well, it appears there in ink. If I said anything else, I was wrong. The book states it.

Q. Suppose you read this entry from which you interpret yourself to have been in Elizabeth on November 2. A. "Carfare and local 'phones, Metropolitan district, week ending November 6th"—that is what confused me—"including trips, Newark, November 2d, and Elizabeth, New Jersey, November 4th, two, $2.59."

Q. Where from that can you say that you were in Elizabeth on November 2d? A. Well, you can't say—the layman could not say from looking at that that I was in Elizabeth.

Q. Well, could anybody else? A. Well, I made the entry. If I came to Newark the same day that I came to Elizabeth, I might have easily put in "Newark"—

Q. Now, as a matter of fact, you do not know whether you were there on November 2d or not, do you? A. I know that I submitted two sets of samples—

Q. I did not ask you that. Do you know that you were in Elizabeth on November 2d? A. Yes, I was in Elizabeth on November 2d; I remember that was on Monday.

Q. Did you take samples with you the first time that you went to Elizabeth? A. Yes.

Q. You took the samples on what date? A. November 2d.

Q. And that was the first time that you went? A. Yes.

Q. So that you now say that the first visit you made to Elizabeth after October 1st, which date, you say, was November 2d, you took samples and submitted them to General Collins; is that right? A. I am not sure that I said I submitted them to General Collins at that time; I took samples.

Q. To whom did you submit them? A. If they were opened up actually for examination, it was to General Collins.

Q. Do you say now that you took samples the first time that you went to Elizabeth? A. Yes, sir.

Q. Do you say that you submitted them to anybody at that time? A. I can't recollect.

Q. When do you say that you submitted them the first time? A. November 4th.

Q. Was that the first or second trip? A. My second trip.

Q. Then why did you say last week on the stand that the first time you took samples to Elizabeth you submitted them to General Collins and the second time you did not submit them to him? A. Because I referred to the trip in December. The only time I did not submit any samples to him was the time he said the goods were in the car. What was the use of submitting them to him then?

Q. No. Why do you say now that the first time you went you took samples and did not submit them, whereas you testified last week that the first time you went you took samples and did submit them? Why do you change your testimony completely on that? A. I don't change my testimony completely on it.

Q. Well, the two statements are irreconcilable. What do you say about it? A. They would not be irreconcilable. Read the question.

Q. How do you explain the fact that now you

say the second time you took samples you submitted them to General Collins, whereas you testified last week that the second time you took samples and did not submit them to General ollins, and then you changed your testimony and said that you took samples and did submit them to General Collins? How do you explain that statement? A. To the best of my recollection, I testified that I submitted samples to General Collins twice, or on two visits, and on the next visit that I had samples with me and did not submit them, because at the time the hops were being looaded in the car to be sent away, and I did not consider it advisable to submit samples at that time.

Q. [Question read.]

Objected to.
Objection overuled.

A. Well, the question, as I understand it, is why did I say in the previous testimony that I submitted samples, and then say that I didn't submit them. I simply say that I don't remember whether I did or not.

Q. Now, on which of your visits was it that you first saw the hops at the brewery? A. The second visit.

Q. The second visit? A. Yes.

Q. Why do you say that? A. Because I remember that it was not on the first visit that I saw them; I remember distinctly that—

Q. Well, which date do you fix now that you first went down to the plant? A. November 2d.

Q. Did you see the General at that time? A. Yes.

Q. How many times did you see him before you saw the hops? A. Once.

Q. Well, why did you testify just this afternoon

that you remember the first time you saw the hops that you saw the brew master, Mr. Hubach? A. Well, because that is a fact.

Q. Well, which visit do you fix now as having seen Mr. Hubach? A. The second visit.

Q. Whom did you see on your first visit? A. General Collins and Mr. Hubach.

Q. And you saw Mr. Hubach the first visit? A. Yes.

Q. Which of the two visits when you saw Mr. Hubach do you fix as the one that you saw the hops? A. The second visit.

Q. How do you fix that? A. Because I remember that I did not see the hops the first time I went to the plant.

Q. What month was it that you saw the hops at the brewery? A. Early November, 1914.

Q. In November? A. Yes.

Q. Then why did you on the direct examination the first time you were on the stand in this case, say, in answer to the question put by Mr. Twining, "Do you remember the month when you saw them there?"—why did you say, "I should say October, 1914"? A. Because I was testifying to the best of my recollection at that time.

Q. Is that explanation to be applied to all the testimony that you have given in this case—that is, that it is to the best of your recollection—regardless of whether accurate or not?

The Court: That question is hardly fair. The witness need not answer it.

Mr. English: All right, sir.

Q. Now, is it true that when you first went to the brewery and saw General Collins that you had previously learned from the San Francisco office that the hops were not satisfactory to him? A. Yes.

Q. On which of these visits to the defendants' plant was it that you discussed the making of a new shipment? A. Each time I went down to see him I discussed that with him.

Q. Did you discuss that the very first time? A. Yes.

Q. Have you any recollection of what you did on this proposed trip to Canada in September and October? A. You mean what business I transacted?

Q. Yes. A. Yes.

Q. Who was the person to whom you sold the hops on October 7, 1914? A. Molson's Brewery, Limited, Montreal.

Q. And where was that? A. Montreal, Quebec.

Q. Have you got that contract with you? A. No, I have not got it.

Q. You said on the stand before lunch that you would produce it.

Mr. Twining: In response to my request.

Mr. English: I do not care in response to whose request it was.

Q. Do you produce it? A. No, there was some mistake about it; it is not here yet; there was some mistake on the part of the boy who was to bring it over.

Mr. Twining: If you want it, we will produce it. Do you want it?

Witness: We will produce it if you want it.

Q. Did you produce the file of letters that you talked about? A. Yes, sir; they were sent over.

Q. Where were you on Sunday, October 4, 1914? A. Syracuse, New York.

Q. How do you know? A. I remember very distinctly that I was there, after refreshing my memory from this book.

Q. What is there that shows where you were on Sunday, October 4th, in that book? Point it out to me. A. Page 87 (indicating in book).

Q. You made an entry on October 7th that was supposed to relate back to October 4th? A. Yes, October 7th was the date that I sent in the slips.

Q. What does the word "personal" in this book mean? A. Well, for all items relating to my own personal traveling expense I would write in "personal," and all the office expense I would write in "office," so that they can keep account of it in San Francisco.

Q. Who is "Ober" in this book? A. That is my assistant.

Q. Where did Ober get money to pay his salary with in your absence? A. I left it with him.

Q. Would he mail around to you wherever you were the items that he spent? A. He would mail me a memorandum that would enable me to put in the amount and take credit for it.

Q. Do those entries mean the week ending on those dates or do they mean the actual dates? A. For the expense slips while traveling?

Q. Yes. A. The actual date. You see that each date is mentioned right here after the expense slip number.

Mr. English: That is all.

Mr. Twining: I offer the book in evidence.

Mr. English: I object to it. That book was used, as I understood it, as a memorandum made by the witness to refresh his recollection from. It has not any evidential value in itself.

The Court: I understand that a memorandum does not go in evidence.

Mr. Twining: No, I do not think it does, but it seemed to me that this book might have the weight of a shop book. It is the record that this witness kept in his own handwriting of entries made at the time covering all of his expenditures made on these railroad trips, and it was used, he says, by the firm for the purpose of checking up the sums that were due from him and to him. It seems to have been a book kept in the ordinary course of his business, and so treated by the company. I think it would be one of the company's books.

The Court: There is something to be said on that side of the question, but we have treated it as a memorandum throughout, and I think I shall adhere to that view of it, and decline to receive it in evidence.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

GEORGE SEEBER sworn in behalf of defendant.

Direct Examination by Mr. Stamler:

Q. Mr. Seeber, you reside in Elizabeth? A. Yes, sir.

Q. And you are connected with the Rising Suun Brewery? A. Yes, sir.

Q. At Elizabeth? A. Yes, sir.

Q. And you are its president? A. Yes, sir.

Q. You have held that position for how many years? A. Fourteen years.

Q. During your long career have you been buying hops? A. Yes, sir.

Q. Pacific Coasts? A. Yes, sir.

Q. Did you buy spots and futures? A. Yes, sir.

Q. During the month of May, the latter part of May, 1914, did you buy for the Rising Sun Brewery Company Pacific Coast hops to be delivered in the future?

Mr. Twining: I object. That is immaterial.

A. Yes, sir (producing papers).

Mr. English: We had that very same question in General Collins' testimony. This is an exactly similar situation.

The Court: Yes, I shall take the testimony.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Can you tell us without referring to the paper that I showed you for what years you bought hops for futures? A. 1914, 1915, 1916, 1917, 1918 and 1919.

Q. And can you tell us what month you purchased that hop and what date, without referring to the paper itself? A. May—well, I have seen the date now. It was in May, I know that.

Q. May, 1914? A. Yes, sir.

Q. Have you got that contract with you? A. Yes, sir.

Q. Can you give us the exact date by referring to the contract? A. Yes, sir.

Q. Will you kindly look at it and give us the exact date? A. (Referring to paper.) May 29, 1914

Q. And at what price?

Mr. Twining: I object.

Q. What price did you buy at?

The Court: Just what were the terms of the contract? What years did this particular contract cover?

Mr. Stamler: May 29, 1914.

The Court: No, what years did this particular contract cover?

Mr. Stamler: Five years, he said.

Witness: It covers 1914, 1915, 1916 and 1917, that is all. The 1918 contract was made in 1916.

The Court: That is, four years

Q. Now, I ask the question again: At what price?

Mr. Twining: I object to that, if your Honor please, because the years covered are not the same as the years covered by the contract in question, and on the further ground that, even if this was deemed to be evidence of market value on May 29, 1914, that would have no bearing on what the market value might be on or subsequent to the breach, which was not until October, 1914. The testimony given by General Collins, which your Honor permitted to go in, was that between March and August 1st he made a contract; but this is even prior to that; it is the latter part of May; and it is so remote from the date when you have got to determine what the damages would be that I do not think it would be admissible on any ground. Furthermore, there is no evidence that the terms of this contract are similar to the terms of the contract in suit. Before this question was asked of General

Collins he testified that the terms of the contract were similar to the contract in suit.

The Court: What years did the contract in suit cover?

Mr. Twining: 1914 to 1918 inclusive. This covers 1914 to 1917 inclusive.

The Court: I think there was a ruling which excluded some proof on the ground that the number of years was not the same.

Mr. Twining: Yes, sir.

The Court: My idea being that that would probably make a difference in the price.

Mr. Stamler: It is urged also on another ground. Mr. Phleger and Mr. Horst testified that there was no market for futures at all. That is their testimony. We are offering this for the purpose of showing that there was a market for futures.

Mr. Twining: If your Honor please, that is not the testimony. I think the testimony was that at the time of the breach there was no market for futures. Mr. Horst testified in the West that prior to two years ago, as he put it, dating from the time that he gave his deposition, which was January 31, 1916, there had been a market for futures, but that there had been no market for the last two years. Mr. Phleger's testimony was that during the month of October, 1914, he made his best endeavors to dispose of these future crops and could not do it, and that he had not been able to and had not disposed of futures from that time to the present. But there is no claim made by the plaintiff that there never has been a market for futures. As was brought out by the testimony, in March, 1914, there was a market for futures, as is shown by this contract, and I think it

is admitted by all hands that prior to this temperance agitation and prior to the war there was a market—that is my understanding—but from the date of breach there was no market. That is what we stand on.

Mr. Stamler: Mr. Phleger said that after this sale to General Collins he could not make any more sales.

Mr. Twining: No, he said after October. Now, how would it be material? A man has no right to contradict on his own case immaterial testimony. If Mr. Phleger did say that he could not make any contracts for futures between March and October, which I do not think he did say—I think he said he did not make them, but whether he said that or not it would be immaterial. The question here is whether he could or not subsequent to October, 1914.

(After further argument, the question is withdrawn for the present.)

Q. Mr. Seeber, have you made contracts for futures since October, 1914? A. Yes, sir.

Q. And for what years? A. 1918, 1919 and 1920. (Mr. Stamler hands paper to witness.) 1918, 1919 and 1920.

Q. Of Pacific Coast hops? A. Yes, sir.

Q. In your experience as a brewer, how did you generally buy your hops, spots or futues? A. Why, we buy both.

Q. Which contracts do you make most, spots or futures? A. Futures.

Q. When did you make your last contract for futures? A. October 2, 1916.

Q. For what years? A. 1918, 1919 and 1920.

Q. At what price?

Mr. Twining: I object to that. That certainly has no bearing. That is for three years, 1918, 1919 and 1920. This contract covers the years 1915 to 1918.

Mr. Stamler: It includes one of the years it includes the year 1918, at least.

The Court: I think the evidential force of it would be so weak that it would be hardly worth while to take it. I sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Stamler: I have got that testimony now that we referred to. Here is the question, if your Honor please: "Question: Since March, 1914, the Horst Company has not made a single term contract or contract for future deliveries, under which they are now delivering through your district? Answer: to the best of my knowledge." That is one of the places. "Question: Had the Horst Company delivered goods through New York on anything but spot contracts in 1914? Answer: They made deliveries of the term contracts and spot sales. Question: And the term contracts were all dated in April, 1914? Answer: To the best of my knowledge, not later than March, 1914. Question: Since March, 1914, the Horst Company has not made a single term contract or contract for future deliveries, under which they are now delivering through your district? Answer: To the best of my knowledge. Question: What knowledge have you on the subject? Answer: I have the facts. If they were being delivered, I

should know about that." And he said further that if anybody could sell hops he could, so that shows that they could not.

Q. What was the price that you paid for Pacific Coast hops in May, 1914, for future deliveries?

Mr. Twining: That is objected to.

The Court: Future deliveries during that year?

Mr. Stamler: No, sir; for 1914, 1915, 1916 and 1917.

The Court: Well, was that the subject of my last remark?

Mr. Twining: No, your last remark was as to the contract of 1918 and 1919 and 1920. This is the earlier contract.

The Court: I shall take this evidence, reserving my opinion about it, and giving you an exception.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Stamler: Answer the question.

A. Eighteen and twenty cents a pound.

Q. Will you tell which is which? A. What do you mean?

Q. For which years eighteen and for which twenty? A. Well, there was different classes of hops; there was fifty bales of Pacifics and fifty bales of guaranteed Yakamas.

Q. What were the Pacifics? A. Those were eighteen cents.

Q. For all the years? A. Yes, sir.

Q. And the Yakamas were twenty? A. Twenty.

Cross-Examination by Mr. Twining:

Q. Are you referring to some memorandum, Mr. Seeber? A. I am refering to contracts.

Q. Have you ever seen the Horst Company contract that was made with General Collins' company and which is the subject of this suit? A. No, sir.

Q. Do you know anything about the terms of that contract? A. No, sir.

Q. And therefore, I assume, you know nothing about whether its terms are similar to or different from the contracts that you have in your hand? A. No, sir.

Q. The contracts that you have in your hand were not made with the Horst Company, were they? A. No, sir.

Q. And they constitute the only purchases that you made from March, 1914, to October 20, 1916, in futures? A. No.

Q. Why did you not bring the other contracts? A. Well, I didn't know that I was supposed to bring any contracts. They called me on the telephone, and I simply brought these along because they were handy.

Q. How did you happen to bring those contracts instead of others? A. I simply happened to get ahold of them first.

Q. I beg your pardon! A. I simply happened to get them first.

Q. Have you any recollection with regard to these facts you have testified to except as you have refreshed your memory from these contracts? A. I am almost positive that I made a contract in 1915 with another concern.

Q. Is your company in litigation with the Horst Company? A. No.

Q. How long was it since it was in litigation with

that company? A. I don't think we have ever had any litigation with it.

Q. You never have, eh? A. Not to my recollection; in fact, I am almost positive that we have not.

Mr. English: The defendant now rests, your Honor, but we would like to say that, so far as we know, we have put all the documents in evidence that we want to oeffr, but that, if it should develop on the argument that there are any documents that have been referred to and are supposed to go in evidence and are proper to go in evidence, we would like to have the right to formally offer them at that time.

Mr. Twining: I make the same reservation.

The Court: I will entertain your motion.

(Defendant Rests.)

Plaintiff's Exhibit No. 2—M. I. L., Commissioner

San Francisco, Aug. 29th, 1914.

Messrs. Peter Breidt City Brewery,
Elizabeth, N. J.

Gentlemen:

By this mail we are sending you, for selection against your contract with us, sample marked No. 1, representing 100 bales new crop early variety hops we now have in transit to New York.

Those hops possess a nice, mild flavor, are fully matured, very rich in soft resins and will give you excellent brewing results.

Kindly inspect this sample and wire us at once, if sample meets with your approval and we will then arrange diversion of the hops to you.

Faithfully yours,

E. CLEMONS HORST CO.,

TBH/AH L.

Plaintiff's Exhibit No. 3—M. I. L., Commissioner.

San Francisco, Sept. 4, 1914.

In reply refer to S-74027.7

The Peter Breidt City Brewery Co.,
Elizabeth, N. J.

Gentlemen:

By mail to-day we are sending you, for selection against your contract with us, two samples marked Nos. 2 and 3 of 2 lots of choice 1914 crop hops we now have in transit to New York.

These are exceptionally rich, fine flavor, fully matured hops and in our opinion will give you excellent brewing results.

Please inspect these samples at your earliest convenience and let us hear from you at once, preferably by wire, indicating which of the two samples will be satisfactory against your contract.

We would also appreciate response from you, indicating a special price.

Awaiting your telegraphic reply, we are

Faithfully yours,

E. CLEMONS HORST CO.

TBS/AH

Plaintiff's Exhibit No. 4—M. I. L., Commissioner.

San Francisco, Sept. 19th, 1914.

In reply refer to S-64169

The Peter Breidt City Brewery Co.,
Elizabeth, N. J.

Gentlemen:

We take pleasure in handing you herewith invoice, memorandum of weights and original bill of lading covering our shipment to you of 100 bales choice 1914 crops Pacific Coast hops to apply against your contract of March 26th.

Assuring you that you will be well pleased with the excellent quality of the hops and thanking you in advance for an early remittance, we are

Yours faithfully,

E. CLEMONS HORST CO.

TBS/AH

Plaintiff's Exhibit No. 6—M. I. L., Commissioner.

Invoice

from E. Clemens Horst Co. Invoice No. 8591
The Peter Breidt City Bry. Co.
Elizabeth New Jersey.
100 Bales Lot No. 13 Weighed by S. P. Rooney
Date Sept. 6th, 1914.

Plaintiff's Exhibit No. 7—M. I. L., Commissioner.

September 17, 1914

The E. Clemens Horst Co.,
San Francisco, Cal.

Gentlemen:

In reply to your letter S-72962 would advise that our investigations show the quality of your hops to be poor and very little hop flavor. We do not consider it a choice brewing hop and would not accept it on our contract.

Very truly yours,

The Peter Breidt City Brewery Co.,
D. F. Collins
President

DFC/W

Plaintiff's Exhibit No. 8—M. I. L., Commissioner.

PETER BREIDT CITY BREWERY COMPANY

Elizabeth, N. J., October 12, 1914

The E. Clemens Horst Co.,
San Francisco, Cal.

Gentlemen:

Contrary to contract, which calls for "approved sample" you have sent in one hundred bales of Pacific Hops. The sample of these hops were not satisfactory, however, we took them in pending a further investigation, and report from our scientific station. This report is at hand this a. m., and it states as follows:

"These hops are of 1914 Pacific Crop, are free of mold, but thin in Lupulin and only possess a fair but grassy aroma. The hops cannot be classed as fair, and should be used up very rapidly, otherwise they will quickly deteriorate and become worthless."

In view of this report we cannot accept this shipment of hops and we hold them subject to your advice, as they are not in accordance with our contract.

Very truly yours,

The Peter Beidt City Brewery Company
D. F. Collins.
President

Defendant's Exhibit on Cross Examination—Witness Horst, No. 1—D-32 Identification—M. I. L., Commissioner.

Sept. 16, 1914

Peter Breidt City Brewery Co.,
Elizabeth, N. J.

Gentlemen:

We have before us copy of letter written you by our San Francisco Office under date of Sept. 7th with reference to samples sent you for selection against your contract with me.

If you have not already done so, please inspect the samples referred to at your earliest convenience and let us hear from you at once, preferably by wire, indicating which of the samples will be satisfactory against your contract.

We would appreciate response from you indicating whether you will be interested in future purchase of this quality at a special price.

Awaiting your telegraphic advice we remain

Faithfully yours,

E. Clemens Horst Co

CAP/O C. A. Phleger

Plaintiff's Exhibit No. 9—M. I. L., Commissioner.

San Francisco, Oct. 17th, 1914

In reply refer to H 76523

The Peter Breidt City Brewery Co.,
Elizabeth, N. J.

Gentlemen:

Received your favor October 12th.

It will be our pleasure after acceptance by you of other hops in place of lot 13 invoiced you September 12th, and accepted by you on October 1st, to accept a return of these hops providing these hops are not now or ever have been put into cold storage at your end.

Such exchange will cheerfully be made free of cost to you, but without prejudice to the delivery already completed as per contract.

It never pays us to get into an argument about hops with any "Scientific Station", regardless how very wrong its opinion may be.

The hops delivered you are fully matured exceptionally fat hops of the New York State type. We are confident that they are as rich as the first average of New York State hops. The aroma of the hop is absolutely sound and is not grassy. The Scientific station is quite wrong in its other unfavorable statements, especially in its statement that the hops will quickly deteriorate. These hops will keep as long as any New York State or foreign hops. We have grown this particular crop ourselves for the past 10 years or more, and we know what we are talking about, while the Scientific Station is simply making a bad guess.

If you will follow our advice, you will brew the

Plaintiff's Exhibit 10.

hops and prove to yourselves that Scientific Station's opinions on hops should not be taken at par.

If you care for any reports from highest class brewers, who for years past have been using these same hops, and who call for them year after year, it will be our pleasure to furnish such reports to you.

Faithfully yours,

ECH/J E. Clemens Horst Co.

Plaintiff's Exhibit No. 10—M. I. L., Commissioner.

Peter Breidt City Brewery Company
Elizabeth, N. J., October 24, 1914

The E. Clemens Horst Co.,
San Francisco, Cal.

Gentlemen:

Replying to your favor of October 17th in reference to our refusal to accept the hops which you shipped us without our consent or approval as specified in your contract, we desire to say that the hops are at present in our store room and have not been put into cold storage.

We note your statement as follows: "such exchange will cheerfully be made, free of cost to you, but without prejudice to the delivery already complete as per contract." We take exception to the words "delivered as per contract" as our contract provides, that the hops be shipped only on "approved sample".

As informed in our first letter, we will hold them subject to your order, but without anl responsibility on our part.

Very truly yours,
The Peter Breidt City Brewery Company,
D. F. Collins,
President.

Plaintiff's Exhibit No. 11—M. I. L., Commissioner.

San Francisco, Oct. 29th, 1914

In reply refer to 175697

The Peter Breidt City Brewery Co.,
Elizabeth, N. J.

Gentlemen:

Answering your favor Oct. 24th.

Your letter overlooks the fact that we submitted you samples with our letters August 29th and Sept. 4th. and that we did not make shipment per our invoice Sept. 12th till after we had time to receive your approval.

There is no doubt but that we will easily be able to exchange the hops in question for hops to your entire satisfaction.

We ship many thousands of bales of hops to Europe via New York and we are entirely willing to give you anything we have.

Our Mr. Phleger will call on you with samples of lots now in New York and enroute to New York and to Europe.

Faithfully yours,

E.C.H./J

E. Clemens Horst Company.

Plaintiff's Exhibit No. 12—M. I. L., Commissioner.

WESTERN UNION TELEGRAM
Received at S. E. Corner Pine and Montgomery Sts, San Francisco 191 Co P 17 Coll Charged

Elizabeth, N. J. Nov. 9, 1914

E. Clemens Horst Co
San Francisco
Must have shipping instructions by return wire or will store hops at your expense need room

Peter Breidt City Brewery Co
10.26 a. m.

Plaintiff's Exhibit No. 13—M. I. L., Commissioner.

POSTAL TELEGRAM — COMMERCIAL CABLES TELEGRAM

San Francisco, Nov 9 1914

Breidt Brewing Co.,
Elizabeth, N. J.

We cannot accept return till you accept others instead

E. Clemens Horst Co

Charge E. C. H. Co.

Plaintiff's Exhibit No. 14—M. I. L., Commissioner.

WESTERN UNION

TELEGRAM

Received at S. E. Corner Pine and Montgomery Sts. San Francisco.

13 CO BX 17 IE

Elizabeth NJ Nov 27 1914

129

Clemens Horst Co.
San Francisco Cal

Have loaded the hundred bales on car absolutely no room kindly wire shipping instructions otherwise destination San Francisco.

H76099 Peter Breidt Brewing Co
S 638A H
L L. W.

Plaintiff's Exhibit No. 15—M. I. L., Commissioner.

NIGHT TELEGRAM

San Francisco
November 27th, 1914

Breidt Brewing Company
Elizabeth, N. J.

Answering your today's wire please be advised that without prejudice to our rights because of having completed delivery of one hundred bales of hops to which you object we are willing to accept return of these hops at Elizabeth immediately upon your acceptance of other hops in their place but we cannot accept return of the hops before that time and in event of your not accepting other hops we will have to stand on delivery already made. We see no reason why you cannot get hops from our New York Stock to your entire satisfaction. We also wish to suggest that if you reship the hops to San Francisco the loss of freight both ways would fall upon you in addition to invoice price of hops. We respectfully solicit your friendly co-operation to get differences satisfactorily adjusted.

E. Clemens Horst Co.

Chg. E. C. H. Co.

Plaintiff's Exhibit No. 16—M. I. L., Commissioner.

San Francisco November 27th, 1914

In reply refer to H. 76099

REGISTERED
Peter Breidt Brg. Co.,
Elizabeth, N. J.
Gentlemen:

We confirm interchange of telegrams with you as follows:

Received from you November 27th

"Have loaded the hundred bales on car absolutely no room kindly wire shipping instructions otherwise destination San Francisco"

Sent you November 27th

"Answering your today's wire please be advised that without prejudice to your rights because of having completed delivery of one hundred bales of hops to which you object we are willing to accept return of these hops at Elizabeth immediately upon your acceptance of other hops in their place but we cannot accept return of the hops before that time and in event of your not accepting other hops we will have to stand on delivery already made. We see no reason why you cannot get hops from our New York stock to your entire satisfaction. We also wish to suggest that if you re-ship the hops to San Francisco the loss of freight both ways would fall upon you in addition to invoice price of hops. We respectfully solicit your friendly co-operation to get differences satisfactorily adjusted."

Faithfully yours

ECH/AH E. Clemens Horst Co.

Plaintiff's Exhibit No. 17—M. I. L., Commissioner.

Receipt for Registered Mail
No. 13285.

San Francisco (Ferry Sta.) Cal.
Registered
Nov. 28, 1914.

Plaintiff's Exhibit No. 18—M. I. L., Commissioner.

Dec. 7, 1914. Registry Return Receipt

Delivery Dec. 3, 1914.

Peter Breidt B. Co.—addressee.
R. J. Tinsley—Addressee's agent.

Card addressed to E. Clemens Horst Co.,
150 Pine,
San Francisco,
California.

Plaintiff's Exhibit No. 19—M. I. L., Commissioner.

WESTERN UNION
TELEGRAM

November 28th, 1914

E. Clemens Horst Co.,
San Francisco, Cal.

In reply to Night Lettergram we advise that Hops are loaded for reshipment to San Francisco or such other point as you may direct.

We again advise our entire willingness to stand on contract and accept hops on approved sample. Refuse to recognize any liabilities for freight charges either way on lot which we are returning.

The Peter Breidt City Brewery Co.
10.12 a. m.

Plaintiff's Exhibit No. 20—M. I. L., Commissioner.

NIGHT LETTER

San Francisco, November 29, 1914.

Peter Breidt City Brewing Co.,
Elizabeth, N. J.

Without prejudice to our rights under delivery already completed, we are willing to cancel sale and accept return of the hops if you pay us difference between contract price and present market price to be agreed upon for hops of contracted quality or we will match as closely as possible any sample you send us of contracted quality. You are badly advised if you reship the hops without our consent and against our objections as all losses will fall upon you.

E. Clemens Host Co.

Chg E. Clemens Horst Co.

Plaintiff's Exhibit No. 21—M. I. L., Commissioner.

John J. Stamler

January 2nd, 1915.

E. Clemens Horst Co.,
150 Pine Street,
San Francisco, Cal.

Gentlemen:

My client, The Peter Breidt City Brewery Company has placed all the correspondence and contract relative to a shipment of 100 bales of hops in my hands. I beg to inform you that my client has acted entirely upon my advice in this matter. On the 9th of December 1914, my client shipped to you 99 bales of hops which were not accepted by it for the reason that the hops were not as represented.

The Central Railroad Company of New Jersey advised General Collins, the President of the Company, that you refused to accept the shipment in question. I further beg to inform you that under no circumstances will my client accept the hops. and as far as it is concerned it will not instruct the Railroad Company to re-ship the hops, and they are left there entirely at your risk.

I also beg to call your attention to the fact that my client was put to a great expense in reloading and reshipping the hops and it will look to you for reimbursement in addition to the freight charges paid by my client on the original shipment.

Respectfully yours,

John J. Stamler

Plaintiff's Exhibit No. 22—M. I. L., Commissioner.

San Francisco, Cal., June 18, 1915.

Peter Breidt City Brg. Co.,
Elizabeth, N. J.

Gentlemen:—

The cooperation of the Crop Improvement Committee of the United States Brewers' Association has materially helped the rapid development of the Rice Industry in California, so much so that beginning with nothing in 1911, the rice crop of California for 1915 will probably exceed one hundred million (100,000,000) pounds, and with every prospect of continued enormously increased acreage every year.

California is now raising the highest grade of rice for all purposes. We have been interested in the growing of rice from the beginning of the industry in this state and are in a position to handle our Brewers' requirements to their best advantage.

Please be good enough to send us samples of the rice you are using and the quantity you can use per annum. It will then be our pleasure to send you samples of our rice and to keep you advised of our prices.

The railroads and steamship lines are prepared to make such rates as may be necessary to develop this industry.

Awaiting your reply,

Faithfully,

E. CLEMENS HORST CO.

Plaintiff's Exhibit No. 24—M. I. L., Commissioner.

REGISTERED March 26, 1914

Peter Breidt City Brewery Co.,
Elizabeth, N. J.

Gentlemen: Attention Gen. Dennis F. Collins.

We wish to confirm contract made with you today by our Mr. Phleger covering 100 bales of Pacific Coast Hops of each crop of the years 1914 to 1918 inclusive at 17-½c per pound delivered Elizabeth, terms net cash.

We know that you will be well pleased with the hops which we will deliver to you, and thank you for your valued order, we remain

Faithfully yours,

E. Clemens Horst Co.,
C. A. Phleger

CAP/DO

Plaintiff's Exhibit No. 25—M. I. L., Commissioner.

E. CLEMENS HORST CO. Inv. 8591
Hop Growers

Lott 13 Wheatland
Bales 100. Sept. 6, 1914.
E. Clemens Horst Co.,
San Francisco.
Crop 1914 From Iron Cooler.

PLAINTIFF'S EXHIBIT No. 23.

M. I. L. Commissioner.

San Francisco, April 1, 1914.

In reply refer S 71252.

REGISTERED

Peter Breidt City Brewery Co.,

Elizabeth, N. J.

Gentlemen:

We take great pleasure in confirming sale made to you by our Mr. Phleger of 100 bales Pacific Coast Hops, annually of the crops 1914 to 1918, inclusive, at seventeen and one-half cents (17½c.) per lb. freight paid to Elizabeth.

Thanking you very kindly for this order and assuring you that the contract will work out to our mutual advantage, we are,

Yours, faithfully,

E. CLEMENS HORST CO.

T.B.S./J

Plaintiff's Exhibit No. 26—M. I. L., Commissioner.

Southern Pacific Company.

Memorandum that bill of lading has been issued.

Received
at Wheatland Cal. Sept. 12, 1914.
from E. Clemens Horst Co.
Consigned to order of E. Clemens Horst Co.
Destination Chicago State of Ill.
E. Clemens Horst Co.
At Chicago State of Ill.
Route S.P.U.P.C.M. & St. P. Car Initial S.P. Car No. 24125.
100 Bales of Hops 19411
Lot No. 13
Bales No. 500 to 599 inc.
Permit inspection.
Machine Compressed.

E. Clement Horst Co. Shipper R.V.Moore Agent.
Per S.J.Rooney.

Plaintiff's Exhibit No. 27—M. I. L., Commissioner.

Southern Pacific Company.

Memorandum that bill of lading has been issued.

Agents No. 5189.

Received
at Wheatland, Cal. Sept. 12, 1914.
from E. Clemens Horst Co.
Consigned to Order of E. Clemens Horst Co.
Destination Elizabeth, State of N.J.
Notify The Peter Breidt City Brewery Co.
At Elizabeth. State of N.J.
Route SP. UP. CM&ST. P. R. R. Car Initial SP. Car No. 24125.

100 Bales of Hops 19411
Machine Compressed
Lot No. 13
Bales No. 500 to 599 inc.
Permit Inspection 8234

E. Clemens Horst Co.
Per A.M.Taylor. H.C.Collins, Agent.

Plaintiff's Exhibit No. 28—M. I. L., Commissioner.

REQUEST FOR DIVERSION OF HOPS EN ROUTE

San Francisco, Cal. Sept. 16/14

Mr. A. Taylor

AS ORIGINALLY BILLED

Dear Sir:—

Car initials S.P. Number 24125 containing 100 Bs. Was shipped by ourselves, from Wheatland Date Sept. 12/14

Consigned to Chicago

CHANGE DESTINATION AND BILL NOW AT THROUGH RATE

To order E. Clemens Horst Co.

Notify The Peter Breidt City Brewery Co.

Change routing to SP. UP. C.M. & St Elizabeth, N. J.

P.Penn. R.R.

100 Bales, Hops Lot No. 13.

E. Clemens Horst Co.

Z.

Plaintiff's Exhibit No. 29—M. I. L., Commissioner.

REQUEST FOR DIVERSION OF HOPS EN ROUTE

San Francisco, Cal. Sept. 17, 1914.

Mr. H.C. Collins,
D.F.A. Southern Pacific Co.,

AS ORIGINALLY BILLED

Dear Sir——

Car Initials SP. Number 24125 Containing 100 Bales Hops
Was shipped by ourselves from Wheatland Cal. Date Sept. 12, 1914
Consigned to E. Clemens Horst Co. at Chicago, Ill.
Routed SP. UP. CM&ST. P.

CHANGE DESTINATION AND BILL NOW AT THROUGH RATE

To Order E. Clemens Horst Co. Elizabeth, N.J.
Notify The Peter Breidt City Brewery CO. Elizabeth, N. J.
Change routing to SP. UP. CM&ST P. Penn. R.R.
100 Bales Hops lot no. 13

E. Clemens Horst Co.

Plaintiff's Exhibit No. 30—M. I. L., Commissioner.

San Francisco Oct. 5th, 1915.

In reply refer to S-82955.

Depue Warehouse Co.
Merchants Exchange Bldg.,
San Francisco, Cal.

Gentlemen:—

We return you herewith all papers received from you with reference to our purchase of 99 bales of Hops from you.

Please be good enough to give us bill of sale for the Hops, or return us our money.

Very truly,

E. CLEMENS HORST CO.

TBS/J
encls.
Y.

Plaintiff's Exhibit No. 31—M. I. L., Commissioner.

E. CLEMENS HORST CO.

TRACER

San Francisco, Sept. 18, 1914.

Tracer Number 8234

Mr. H.C.Collins Date Passing Ogden
Mr. S.F.Booth Date Passing Co Bluffs
Mr. L.E.Stanton Date Passing Chicago, Ill.
E.M.Pormeroy Date of Delivery to Consignee The Peter Breidt Brg.

Union Pacific
Railroad Co.
Received
Sept. 18 1914
Office of Genl. Agent
Freight Dept.
San Francisco, Cal.

Mr. Penn. R.R.

Dear Sirs:—

Please trace the following shipment of HOPS, give passing record as requested, returning this tracer promptly, and oblige

Yours truly,
E. Clemens Horst Co.

From Wheatland, Cal. Date Sept. 12, 1914.
Original
Car Number SP. 24125
100 Bales, lot 13 Consignee The Peter Breidt City Brewery Co.
Destination Elizabeth N.J. B/L Number SP. 5189.
Routing SP. UP. CM&ST P. Penn R.R.
RV 31075

. . . . . .

Your shipment Referred to above transferred to Connecting Line at Junction point as indicated S.F.Booth Genl. Agt. 42 Powell St. San Francisco Cal. Phone Sutter 2940.

Council Bluffs 8a-21.

Plaintiff's Exhibit No. 32—M. I. L., Commissioner.

E. CLEMENS HORST CO.
TRACER

San Francisco Sept. 18, 1914.

Tracer Number 8234
Mr. H.C.Collins Date Passing Ogden
Mr. S.F.Booth Date Passing Co. Bluffs
Mr. L.E.Stanton Date Passing Chicago, Ill.
E. M. Pormeroy
Mr. Penn. R.R. Date of Delivery to Consignee
The Peter Breidt Brg.

Dear Sirs:

Please trace the following shipment of HOPS, give passing record as requested, returning this tracer promptly and oblige.

Yours truly,
E. CLEMENS HORST CO.

From Wheatland Cal. Date Sept. 12, 1914.
Original Transferred
Car Number SP. 24125 to Car No.
100 Bales Lot. 13 Consignee The Peter Breidt City Brewery Co.
Destination Elizabeth, N.J. B/L Number SP. 5189
Routing SP UP CM&ST P. Penn R.R.
ECH CO.
The above shipment delivered to Cen. Pac. at Ogden in car.....date Sept. 17, 1914.

Yours truly,

RW 310.

Plaintiff's Exhibit No. 33—M. I. L., Commissioner.

E. CLEMENS HORST CO.
Tracer.

San Francisco Sept. 18, 1914.

Tracer Number 8234
Mr. H.C.Collins Date Passing Ogden
Mr. S.F.Booth Date Passing Co. Bluffs
Mr. L.E.Stanton Date Passing Chicago, Ill.
E. M. Pormeroy
Mr. Penn. R.R. Date of Delivery to Consignee
The Peter Breidt Brg.

Dear Sirs:

Please trace the following shipment of HOPS, give passing record as requested, returning this tracer promptly and oblige.

Yours truly,
E. CLEMENS HORST CO.

From Wheatland Cal. Date Sept. 12, 1914.
Original
Car Number SP. 24125
100 Bales Lot. 13 Consignee The Peter Breidt City Brewery Co.
Destination Elizabeth, N.J. B/L Number SP. 5189
Routing SP UP CM&ST P. Penn R.R.
E C H Co.
The above shipment delivered to at
in car date Sept. 25

Yours truly,
L.E.Stanton.

Plaintiff's Exhibit No. 34—M. I. L., Commissioner.

G.H.C.

E. CLEMENS HORST CO. 55-8

Tracer 9/25

San Francisco Sept. 18, 1914.

Tracer Number 8234

Mr. H.C.Collins Date Passing Ogden

Mr. S.F.Booth Date Passing Co. Bluffs

Mr. L.E.Stanton Date Passing Chicago, Ill.

E. M. Pormeroy

Mr. Penn. R.R. Date of Delivery to Consignee The Peter Breidt Brg.

Dear Sirs:—

Please trace the following shipment of HOPS, give passing record as requested, returning this tracer promptly and oblige.

Yours truly,

E. CLEMENS HORST CO.

From Wheatland, Cal. Date Sept. 1914.

Original

Car Number SP. 24125

100 Bales Lot. 13 Consignee The Peter Breidt City Brewery Co.

Destination Elizabeth, N.J. B/L Number SP. 5189

Routing SP UP CM&ST P. Penn R.R.

(9/29) Chgo. (C.M.ST. P.)

E.C.H. Co.

The above shipment delivered to Consignee at destin. in car Date 10/1 1914.

Yours truly,

E.M.Pomeroy.

Plaintiff's Exhibit No. 35—M. I. L., Commissioner.

The Peter Breidt City Bry. Co.
Elizabeth, N.J.

Date	No.	Bales	Lot	Our No.	CROP OF	DATE
Aug. 29	1		H	3	Hville	Sept. 8
Sept 8	2		B	209	Brewer	" "
"	3		H	11	Hville	
	4					
	5					
	6					
	7					
	8					
	9					
	0					

Plaintiff's Exhibit No. 36—M. I. L., Commissioner.

Receipt.

United States Mail
Insured Parcel

No. 4360.
Fee 3 cents.

Defendant's Exhibit on Cross Examination—Witness Horst "a"—M. I. L., Commissioner—Plaintiff's Identification "A"—M. I. L., Commissioner.

. . . . . .

NOTICE OF ARRIVAL OF FREIGHT

04146 San Fran

Station 12/30/14

Freight

Consignee E. Clemens Horst Co. Bill No. 364.

Destination San Fran. 8551

Route WAB UP

There has been received by the SOUTHERN PACIFIC COMPANY, the following articles consigned to you.

Waybilled from	Waybill Date and No.	Full name shipper Car initials
East Hannibal Ill.	12/14/14 1195	Breedt Co.and No. NR 56966

Point and date of shipment	Connecting line reference	Previous waybill references
Elizabeth NJ 12/10	CRRNJ EX 461	5

Number of Packages, Articles and marks	Weight	Rate	Freight	Advances	Total
99 bbls. hops SL&C Bls. (Mach Compressed)	19231	265	361 72	147 88	

Delivered by

New Yard (M.T.) Tex. To collect 509.60

Southern Pacific Co.

Dec. 30 1914

Notice of Charges

Please remit

to

W.J.Hardy.

Plaintiff's Identification "B"—M. I. L., Commissioner—Defendant's Exhibit on Cross Examination — Witness Horst "B."

Peter Breidt Brg. Co. file

San Francisco, Dec. 29th. 1914.

In reply refer to S-76708.

Mr. W.J.Hardy,
Fourth & King Sts.
San Francisco, Calif.

Dear Sir:—

Confirming telephone advice to Mr. Terry, concerning 99 bales hops consigned to us in N.R. car 56966.

This is to advise that we did not order these hops, and we refuse to give you orders or in any way exercise right of ownership over shipment.

Faithfully,

E. CLEMENS HORST CO.

TBS/AH.
Y

Plaintiff's Identification "C"–M. I. L., Commissioner—Defendant's Exhibit on Cross Examination — Witness Horst "C"–M. I. L., Commissioner.

Peter Breidt file No. 5.

Southern Pacific Company Pacific System

Receiving Agent's Notice of Freight Unclaimed or refused at Destination.

San Francisco, Calif 1/4 1915

36T8551

Agt. Wab. R.R. 04146

East Hannibal, ILL.

Dear Sir:—

The following freight was received here 12/30 1914 billed from East Hannibal to S. Fran on Wab R.R's waybill No. 1195D Dated 12/14 1914 with charges collect.

....

Consignee and marks	Articles
E. Clements Horst Co.	99 Bls. Hops
San Francisco	
Calif.	

Weight 19231 Freight charges $36172 Advances $147.88 Storage accrued to this date $——— and additional storage accruing daily. Consignee notified of arrival of freight 12/30 1914 but goods have been refused—claimed not ordered.

Forwarding Agent will please furnish disposition of the above shipment at once. Orders for disposition, excepting for reconsignments by connecting line, must be accompanied by Original Bill of Lading or Shipping Receipt, or in lieu thereof, satisfactory indemnity bond duly signed as required by law.

W.J.Hardy

Agent.

Plaintiff's Identification "C"

SOUTHERN PACIFIC COMPANY

In your reply please refer to
No. MB 36

San Francisco Cal. Jan. 4, 1915.

E. CLEMENS HORST CO.,
150 Pine Street,
San Francisco, CAL.

Gentleman:—

Referring to phone conversation with your Mr. Settle this morning regarding car NR 56966 hops shipped by the Peter Bredit Brewing Co. of Elizabeth, N.J. to E. Clemens Horst & Co. at San Francisco, now refused by consignee at San Francisco.

Please be advised that unless disposition is given on or before January 10, 1915, this company will arrange to release equipment and store freight in public warehouse as unclaimed freight.

Yours truly,

J.M.Brewer.
PWG

Y

Rec'd Jan 6 1915

.....

To be answered by

.....

S S

.....

To be noted by

.....

H H

.....

Plaintiff's Identification "E"–M. I. L., Commissioner—Defendant's Exhibit on Cross Examination — Witness, Horst "E"–M. I. L., Commissioner.

SOUTHERN PACIFIC COMPANY

In your reply please refer to
No. MB 36
San Francisco, Cal. Jan. 11, 1915.

E.C.Horst Co.
150 Pine St.
San Francisco, Cal.

Gentlemen:—

Supplementing my letter 4th inst. regarding car NR 56966 hops shipped by Peter Breidt Brewery Co. Elizabeth N.J. to E. Clemens Horst Co. at San Francisco.

Disposition being refused both by consignor and consignee at San Francisco, I have this day ordered shipment into public warehouse at San Francisco subject to claim of lawful owner.

Yours truly,
J.M.Brewer.
PWG.

Y

Rec'd Jan 13 1915

.....

To be answered by

.....

S S

.....

To be noted by

.....

H H

.....

Defendant's Exhibit on Cross Examination—Witness Horst "F"—M. I. L., Commissioner.

Piainiiff's Identification "F"–M. I. L. Commissioner.

H 76875 DEPUE WAREHOUSE CO.
Warehousing and Forwarding
818 Merchants Exchange.

In replying
refer to lot 11245 San Francisco Jan. 14, 1915.

Notice to Consignees of Goods on Storage

....

There has this day been delivered for Storage in the Occidental (Public) Warehouse by the Southern Pacific Co. the following Merchandise:

99 Bales Hops 19231#

To obtain same surrender shipping receipt to Agent Southern Pacific Co. and obtain order on Warehouse.

Please be advised that this freight will be subject to storage charges.

Yours truly.

DEPUE WAREHOUSE CO.

Postmarked San Francisco Pan 14 1915 3 P.M.

Plaintiff's Identification "G"—M. I. L., Commissioner—Defendant's Exhibit on Cross Examination—Witness, Horst "G"—M. I. L., Commissioner.

Peter Breidt Brg. Co.

. . . . . .

San Francisco, January 14th, 1915.

In reply refer to H-76874.

DePue Warehouse Co.
Merchants Exchange,
San Francisco, Cal.

Gentlemen:—

We are today in receipt of your postal card notice of January 14th referring to your lot 11245, 99 bales hops. Please be advised that the hops in question do not belong to us, though they have been shipped consigned to us. We have no instructions to give regarding the goods.

Faithfully,

E. CLEMENS HORST CO.
E. C. Horst.

ECH/AH
Y

Plaintiff's Identification "H"–M. I. L., Commissioner—Defendant's Exhibit on Cross Examination—Witness, Horst "H"–M. I. L., Commissioner.

DE PUE WAREHOUSE CO.

Rec'd. Registered Mail
Aug. 16, 1915.

San Francisco, Aug. 16, 1915.

E. Clemens Horst Co.,
150 Pine St.,
Dear Sir:

You are hereby notified that we claim, as warehousemen, the following sums due upon Lot No. 11245, consisting of 99 Bales Hops stored in our Occ Warehouse on the 12 day of Jan. 1915, for account of Yourselves
namely:

UNPAID FREIGHT thereon due S. P. Co. at said date of storage.....	$537.03
Storage Charges in said Warehouse at the rate of.....$ per month from Jan. 12 1915 to this rate, payable monthly. in all.....$	72.27
Fire Insurance premium paid & Int. 1915 .....$	18.40
Drayage, due 191.....$	10.00
Handling charge for labor, due 191.$	
Other charges, viz.....$	3.25
In all to date.....$	640.95

We demand from you payment of said claim and of such further claim as shall accrue against said lot, on or before the 30 day of Aug. 1915; and we

Defendant's Exhibit No. 1

notify you that unless such payment is so made within the time above specified, the said goods will be advertised for sale, and sold by auction at said warehouse in San Francisco, California, on the 14 day of Sept. 1915, at the hour of ten o'clock A. M. of said day.

Very respectfully.
DE PUE WAREHOUSE CO.
By W. C. C.

Notice also sent to
Peter Breidt Brewing Co.
Elizabeth, NJ.

Defendant's Exhibit on Cross Examination—Witness Settle, No. 1—M. I. L., Commissioner.

San Francisco, Sep 30, 1915 191 No. 25107
THE BANK OF CALIFORNIA 11-1
National Association
San Francisco

Pay to the order of Occidental Whse Co. $642.95
Six Hundred fort two and 95/xx.....Dollars
E. Clemens
Horst Co. E. CLEMENS HORST CO.
By H. C. Yandle
(Lot 11245)
S. B. Settle
Endorsed: PAID
Bank of California, Paid Oct. 4 1915
Clearing House 11-1
Occidental Warehouse
Pay to the Order of
Mercantile National Bank of San Francisco
De Pue Warehouse Co.
Clearing House
Oct. 4, 1915
26
Mercantile National Bank of San Francisco.

Defendant's Examination on Cross Examination—Witness Horst No. 2—M. I. L., Commissioner.

DEPUE WAREHOUSE CO.
Merchandise and Grain Warehousing
Merchants Exchange Building,

San Francisco, Cal.
Oct. 2, 1915.

Messrs. E. Clemens Horst Co.,
150 Pine St.,
San Francisco, Calif.

Attention Mr. Settle.

Dear Sirs:—

Herewith warehouse receipt on 99-Bales of hops for which you paid charges in amount $642.95 on September 30th. Please note storage is paid to Oct. 11th. Kindly send this receipt to our Occidental Warehouse when you desire delivery of this lot.

Yours truly,

DePue Warehouse Co.

GFB/B B

Defendant's Exhibit on Cross Examination—Witness Horst No. 3—M. I. L., Commissioner.

San Francisco, Oct. 4, 1915.

In reply refer to H-82953.

De Pue Warehouse Co.,
Merchants Exchange Bldg.,
San Francisco, Cal.

Dear Sirs:—

We respectfully request that you give us a memorandum of sale for the 99 bales of Hops that we bought from you for $640.95.

The hops we refer to are the same Hops on which you gave us notice under date of August 16th, 1915 that they would be sold at public auction and on which you gave us further notice that they had had been sold by you at public auction for 10c per lb. and on which you gave us further notice that the buyers at the auction had defaulted on the purchase.

We have repeatedly given you advices that the Hops were not our property and we now need an acknowledgment from you that these Hops have been sold to us at the above price.

Very truly yours,

E. CLEMENS HORST CO.

ECH/J

Defendant's Exhibit on Cross Examination—Witness Horst No. 4—M. I. L., Commissioner.

San Francisco, Oct. 23, 1915.
In reply refer to H-83870.

De Pue Warehouse
San Francisco, Calif.

Gentlemen:—

We will be pleased to have bond executed in your favor for $3000.00 as per draft enclosed by you and received today, provided the bond shows that at the time we paid you for the hops we bought the hops from you.

You very well know that these hops were sold by you at public auction after notice to us and that at the public auction the hops brought, as we are informed, ten cents per pound and that for some reason your buyers dedaulted on their purchase. You then offered to sell us these hops at a price which would equal the amount of the charges on them. We understood in this offer you were representing the Southern Pacific Company as well as yourself.

We bought the hops under that arrangement and paid you the money and were promised a bill of sale, which bill of sale has not been given to us up to this writing.

We are entirely willing to cancel the sale but if it is cancelled we must have your immediate answer whether or not the sale is cancelled, but in any case we must respectfully request that if the sale is not cancelled you give us bill of sale and if the sale is cancelled you return us the money.

We are quite willing to hold you harmless for any claims that may arise by reason of your having cancelled your sale to us.

Faithfully,
E. CLEMENS HORST CO.
E. C. Horst
Pres.

ECH/AH

Defendant's Exhibit on Cross Examination—Witness Horst No. 5—M. I. L., Commissioner.

San Francisco, Oct. 25th, 1915.

In reply refer to S-84206.

Mr. T. O. Edwards,
Auditor, Southern Pacific Co.
San Francisco, Cal.

Dear Sir:—

For your information we are attaching copies of our letters to the DePue Warehouse Co. which clearly define our position with reference to the 99 bales Hops now stored in the Occidental Warehouse.

The offer from the Warehouse Company and our acceptance of their offer was positively on basis of our buying the hops, and unquestionably so understood at the time by Mr. Burgess in charge of the Occidental Warehouse, who opened negotiations with us for the purchase of the hops after the original purchaser at the auction sale repudiated his bid.

We now have suit pending in the eastern courts against the Eastern Brewer who shipped the hops to San Francisco. The writer is conversant with the legal phases of this litigaion and as our accepting the hops on any terms other than a straight purchase would seriously prejudice our position and rights of recovery, and being desirous of eliminating the possibility of future legal entanglements because of our taking the goods over, I personally called at the Warehouse and paid the money to Mr. Burgess of the DePue Warehouse Co. in payment and as the purchase price of the hops and the money so accepted by him.

On receipt of the Warehouse receipt from the

Defendant's Exhibit No. 6

DePue Warehouse Co. Several days after the money was paid to them, we found that no bill of sale accompanied the warehouse receipt. We then immediately protested against accepting the hops as a delivery and demanded clean bill of sale, or return of our money.

The position Mr. DePue is taking in this transaction will only force us into additional litigation, and we ask that you do not cancel your instructions to Mr. Hardy, wherein you asked that he refuse to accept our money from the Warehouse Company.

Faithfully,

E. CLEMENS HORST CO.

TBS/J
encls.

Defendant's Exhibit on Cross Examination—Witness Horst No. 6—M. I. L., Commissioner.

DE PUE WAREHOUSE CO.
Merchandise and Grain Warehousing
Merchants Exchange Building
San Francisco, Cal. October Twenty-eighth 1915.

REC'D OCT 29 1915

To be answered by
: H : 83839
To be noted by

Messrs. E. Clemens Horst Co.
150 Pine Street,
San Francisco,

Gentlemen:—

Replying to your letter of October 23rd with re-

Defendant's Exhibit No. 6

lation to a lot of hops, which your Mr. Settle paid us the freight and other charges upon, we beg to say that your letter indicates an entire misunderstanding of what has been done.

You shipped these hops to someone in New Jersey who refused to receive them, and they were returned to you and were held here on storage, you refusing to accept them or to pay freight and storage charges. Owing to this refusal on your part they were offered for sale at auction to pay these charges, namely: $642.95 and a purchaser bid ten cents a pound for the hops at this sale, but then refused to take them or pay for them and the sale was cancelled.

Thereupon, your representative offered to pay us the amount of the charges and take the hops, and gave us your check for that purpose—$642.95. We could not sell he hops to you as they belonged to you at all times, and you were entitled to them upon paying the charges, which you did. They are now on storage with us, to your account, and subject to your order.

You asked for a bill of sale, but we had no power to sell these hops to you and did not do so. The only sale made was the auction sale, which was not consummated. We cannot sell at private sale as warehousemen, nor can we sell your hops to you under any circumstances.

So far as the bond is concerned, if you desire to withdraw your payment and to give us a $3,000 bond that the freight and storage charges on these hops now existent, and all future storage charges, will be paid by you on demand, we are perfectly willing to accept such a bond and return you your money.

Very truly yours,

DE PUE WAREHOUSE COMPANY.

EJD/S DePue.

Defendant's Exhibit on Cross Examination—Witness Horst No. 7—M. I. L., Commissioner.

San Francisco, October 31st, 1915.
In reply refer to H-83839.

De Pue Warehouse Co.
San Francisco, Calif.

Gentlemen:—

Answering your favor of October 28th.

Our Mr. Settle did not pay the freight and other charges on the lot of Hops in question. He bought the Hops from you for an amount equal to the freight charges. We asked for Bill of Sale at the time of the transaction and were promised it by mail.

You are mistaken in saying that "we would not sell you the hops as they belonged to you at all times."

Both you and the Southern Pacific Co. had both written and oral notice that the hops were not our property and we specially refer you to our letter addressed to you under date of January 14, 1915, also to our letter addressed to W. J. Hardy of Southern Pacific Co. under date of December 29, 1914. We enclose copies of both of above letters.

We are now and at all times have been in the same position with reference to above hops as set forth in our letter to you of January 14, 1915.

Our rights with reference to a suit for $10,000.00 or more, brought by us against the shippers of above hops, would be lost were we to recede from our above position with relation to the above Hops.

We respectfully repeat our request that you hand us either Bill of Sale for the hops or that you return our money.

Faithfully,
E. CLEMENS HORST CO.

Y
ECH/AH. Y

Defendant's Exhibit on Cross Examination—Witness Horst No. 8—M. I. L., Commissioner.

November
Fourth
1915.

Messrs. E. Clemens Horst Co.
150 Pine Street,
San Francisco.

Gentlemen:—

Referring to yours of October 31st—
We stated our position clearly in our letter of October 28th, and see no reason for any change therefrom.

Yours truly,

DE PUE WAREHOUSE COMPANY.
De Pue.

EJD/S

Defendant's Exhibit on Cross Examination—Witness Horst No. 9—M. I. L., Commissioner.

SOUTHERN PACIFIC COMPANY
Pacific System

Accounting Department.
In your reply please
refer to No. A-620-03

San Francisco, Cal., November 4, 1915.

E. Clemens Horst Co.,
San Francisco, Cal.

Gentlemen:—

Acknowledge your letter of the 3rd instant with enclosures and previous communication in reference to shipment of hops stored in DePue warehouse.

Matter is still in the hands of our Legal Department, and I hope to be able to advise you this Company's position with respect to the controversy between the Warehouse Company and your Company, within a few days.

Yours truly,

T. O. EDWARDS.

REC'D NOV 6 1915
To be answered by
S S
To be noted by
H H

Plaintiff's Exhibit No. 37.

Order Bill of Lading—Standard form of Order Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908.

SOUTHERN PACIFIC COMPANY

Order Bill of Lading—Original

Shippers No.....
Agents No. 5189

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading.

At Wheatland, Cal. Sept. 12, 1914. 19

---

from E. Clemens Horst Co., the property described below, in apparent good order, except as noted (contents and condition of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this Original ORDER Bill of Lading properly indorsed shall be required before

the delivery of the property; inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

The Rate of Freight from.....
to.....is in Cents per 100 Lbs.

If Times 1st	If 1st Class	If 2nd Class	If 3d Class	If 4th Class	If 5th Class

If A Class	If B Class	If C Class	If D Class	If E Class	If Commodity

(Mail Address—Not for purposes of Delivery)
Consigned to ORDER OF E. Clemens Horst Co., Destination Elizabeth, State of N. J., County of ..... Notify The Peter Breidt City Brewery Co., at Elizabeth, State of N. J., County of ..... Route SP. UP. CM&ST. P. Penn. R.R. Car Initial SP Car No. 24125.....
....

No. Packages	Description of Articles and Special Marks	Weight (Subject to Correction)	Class or Check Rate Room
100	Bales of Hops Machine Compressed	19411	If charges are to be prepaid, write or stamp here, "To be prepaid."

colum

Plaintiff's Exhibit No. 37.

Lot No. 13	Received $..... to apply in prepayment of the charges on the
Bales No. 500 to 599 inc.	property described hereon.
	Agent or Cashier
Permit Inspection	Per————
	(The signature here acknowledges only the amount prepaid.)
	Charges Advanced $————
E. Clemens Horst Co. Shipper	M. C. Collins Agent
Per A. M. Taylor	Per C

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same).

(Across face of Bill of Lading—Defendant's Identification "a"—M. I. S., Commissioner.)

Plaintiff's Exhibit No. 37.

(COPY OF BACK OF BILL OF LADING)
ENDORSEMENTS

E. CLEMENS HORST CO.
Per H. Apendle

CONDITIONS

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of

the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liabilty so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination, but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any

carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delay in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise ex-

pressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or

landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or dam-

New Jersey State Library

age resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable acccordng to its original tenor.

Plaintiff's Exhibit No. 38.

POSTAL TELEGRAPH—CABLE COMPANY.
Delivery No.

NIGHT LETTERGRAM

INDEPENDENT COMPETITIVE
PROGRESSIVE.

33sf n k 815 pm 55 N L Oct 18, 1914.

SANFRAN CAL OCT 17-14
E Clemens Horst Co,
Flat Iron Bldg, New York.

Breidt Elizabeth accepted carload hops lot thirteen october first he writes october twelfth rejecting we refusing allow rejection (period) if breidt reships hops newyork dont touch them (period) we especially anxious unload several hundred bales sacramentos at best possible price sell at twelve cents delivered if cannot sell at this price wire best price obtainable.

E Clemens Horst Co.

Plaintiff's Exhibit No. 39.

Codes
A, B, C, 4th & 5th
A.1.
Western Union
Premier
Cable Address All Offices
"Clemhorst"

San Francisco
London
New York
Chicago

E. CLEMENS HORST CO.
Hop Growers.
SAN FRANCISCO, Oct. 29th, 1914.
In reply refer to S-75708.

Messrs. E. Clemens Horst Co.,
New York, N. Y.

Gentlemen:—

Herewith copy of letter from the Peter Breidt City Brewery, and copy of our reply.

We wish you would see these people at your earliest convenience, and submit samples of Horstvilles or Sacramentos.

We are shipping you 300 bales Cosumnes and 200 bales Hostvilles on the Sudden & Christianson S.S. "Neches". This boat is scheduled to sail from here on the 30th, and should arrive in New York about Nov. 19th.

These Horstvilles are about the same as your samples No. 518 to 520 inclusive, and the Cosumnes will match your samples No. 523 and 524.

Faithfully,

E. CLEMENS HORST CO.

TBS/J
encl.

Settle.

Plaintiff's Exhibit No. 40.

E. CLEMENS HORST CO.
San Francisco
Carl A. Phleger Hop Growers "Aircured"
Eastern Sales Manager

Tel. Gramercy 2166 Flatiron Building,
New York, Nov. 4, 1914.

Messrs. E. Clemens Horst Co.,
San Francisco, Calif.
Gentlemen:

PETER BREIDT CITY BREWERY CO.

Went down to Elizabeth today to see General Dennis F. Collins, President of the above brewery, regarding approval of sample for delivery of his contract Hops.

Submitted him a line of samples No. 518 to No. 520, inclusive and No. 523 and No. 524. Would not approve any of these Hops claiming they had a grassy flavor and that they were not rich enough. He claims not to be in a hurry for the Hops, as they have plenty on hand, and I made a further appointment with him for Saturday morning, when I will submit him a line of 10 to 15 samples including the five samples submitted today; also samples of our New York stock.

Do not anticipate having any trouble in getting these people fixed up and expect to be able to inform you on Saturday that they have approved sample.

Faithfully,

E. CLEMENS HORST CO.
C. A. Phleger.

REC'D NOV 9 1914
To be answered by
To be noted by
S S 75832
CAP/O

Plaintiff's Exhibit No. 41.

E. CLEMENS HORST CO.
San Francisco
Carl A. Phleger Hop Growers "Aircured"
Eastern Sales Manager

Tel. Gramercy 2166.

Flatiron Building,
New York, Dec. 8, 1914.
REC'D DEC 12 1914
To be answered by
S S
To be noted by
H H

Messrs. E. Clemens Horst Co.,
San Francisco, Calif.
Gentlemen:

PETER BREIDT CITY BREWERY CO.

Before leaving on the Canadian trip went down to see General Collins, Manager of the above brewery, relative the car of Hops which you had shipped him. He stated that the Hops were not satisfactory and that you had not submitted him satisfactory samples to select from. He said that you had sent samples and then shipped the Hops without waiting his approval of any of the samples sent. He told me that he was not in a hurry to get the Hops in and that I could take my time about making the exchange. Under the circumstances I felt that it would be all right to let this matter go over until I returned from Canada.

During my absence in Canada these people wired you and you wired them relative their threat to load the Hops in car and ship them to San Francisco or elsewhere for our account.

Went to Elizabeth this morning to see Collins and brought with me samples representing New York stock. General Collins said that he had given orders for the Hops to be loaded in car and sent to San Francisco in the absence of instructions from you, which he had requested by wire regarding dis-

posal of the car. I pointed out to him that, in line with your telegram, he had no right to send the Hops anywhere without first securing your permission, and said that we did not propose to have the Hops reshipped elsewhere until he had approved sample that would be satisfactory to him for his contract delivery. I called his attention to the fact that he had some time ago told me that they were in no hurry to make the exchange and he stated that he had recently taken in other Hops and being short of room determined to ship our Hops out, as they were not satisfactory to him under his contract. He said he was not sure whether or not the Hops had left, but would call the brewmaster and find out. The brewmaster came in and said that the Hops were still in the brewery and had not been loaded for shipment because of the inclement weather, but that he would load them the first clear day. Collins said that if they did not have instructions from you where to send the car they would forward it to San Francisco. I told them that I would be down tomorrow with a new line of samples representing some very nice Hops which I felt certain would suit them, and I propose to submit them samples representing all of the stock here, and hope to secure their approval of sample, in case we are unable to get them to keep the 100 bales which they have already taken in.

We have not as yet given up hope of getting them to be satisfied with the Hops already shipped them, but under no circumstances will we give them any instructions on reshipping the Hops they have until you give us permission.

Faithfully,

E. CLEMENS HORST CO.

C. A. Phleger.

CAP/O

Plaintiff's Exhibit No. 42.

DAY LETTER

New York Dec. 10/14.

E. Clemens Horst Co.
San Francisco, Calif.

Breidt this morning loaded ninety-nine bales in car via Central Railroad New Jersey number CNR 56966 consigned San Francisco in absence instructions ship elsewhere Breidt used on bale account getting wet in brewery they holding lading but intend sending San Francisco tomorrow have not approved other samples original eastbound freight paid by Breidt advise.

E. CLEMENS HORST CO.

Plaintiff's Exhibit No. 43.

All American Air Dried Hops are Grown by
E. CLEMENS HORST COMPANY

Cable Address "Clemhorst"
Codes
A. B. C. 4th & 5th
A. I.
Premier
Western Union

San Francisco
150 Pine ST.

Chicago
Great Northern Bl

New York
Flatiron Bldg.,

London
1 & 3 St. Thomas St.
S. E.

We Grow the Hops

Largest Hop Growers in the World.

San Francisco, Dec. 19th, 1914.
In reply refer to S-76560.

Plaintiff's Exhibit No. 43.

Messrs. E. Clemens Horst Co.,
New York City, N. Y.
Gentlemen:—

PETER BREIDT CITY BRG. CO.

Answering yours of the 14th inst.

As the hops were definitely accepted by the brewery, we are not interested in what disposition they see fit to make of the Hops.

You will please now make formal demand for payment of our account. If it meets with Mr. Gilbert's approval, we suggest that draft be drawn on them for amount of our bill, and in the event of its non-payment, that suit be commenced for amount of our bill, with as little delay as possible.

Faithfully,

E. CLEMENS HORST CO.
S

TBS/AH.

LECOUVER PRESS CO., Printers, 51 Vesey St., New York, N. Y.
Telephones: Cortland 3570 and 5571

Defendant's Requests to Charge.

NEW JERSEY SUPREME COURT
ESSEX COUNTY.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff, vs. THE PETER BREIDT CITY BREWING COMPANY, a Corporation, Defendant.	ACTION AT LAW

The defendant requests the Trial Judge, sitting as a jury for the trial of the issues of fact, to charge himself, so sitting as a jury, as follows:

1. There should be a verdict for the defendant.

2. It is an undisputed fact in the case that the plaintiff shipped the first 100 bales of hops for the year 1914, without first having received the defendant's approval of a sample, and this fact disentitles plaintiff to recover unless the Court, sitting as a jury, finds this requirement of the contract to have been waived by the defendant.

3. If the Court, sitting as a jury, finds that the hops as shipped by the plaintiff to the defendant did not measure up to the description in the contract, this fact disentitles the plaintiff to recover, unless the Court finds that such breach of contract was waived by the defendant.

4. The evidence entitles the Court, sitting as a jury, to find that the hops as shipped by the plain-

tiff to the defendant, did not measure up to the description in the contract, and the plaintiff is not entitled to recover unless the Court finds that this breach of contract was waived by defendant.

5. Even though the Court, sitting as a jury, finds that the shipment of the hops by the plaintiff, without the approval of a sample by the defendant, was waived by the defendant, nevertheless the plaintiff is not entitled to recover if the Court finds that hops shipped were not up to the description in the contract, and the defendant objected to the plaintiff, through it duly authorized agent, within five days after the arrival of the hops at the place of delivery.

6. Mr. Phleger, the representative of the plaintiff, was its duly authorized agent, and his actions, as disclosed in the evidence, are binding on the plaintiff.

7. If the Court, sitting as a jury, finds that the defendant did not object to the shipment of hops within five days, as required by the 14th paragraph of the contract, this fact is of no benefit to the plaintiff if the Court further finds that it waived this advantage.

8. If the Court, sitting as a jury, finds that the defendant did not object to the shipment of hops within five days, as required by the 14th paragraph of the contract, nevertheless the plaintiff waived any advantage therefrom by offering to ship and deliver other hops of the contracted quality to the defendant within 30 days after the receipt of written notice of the defendant's objection to the original shipment.

9. If the Court, sitting as a jury, finds that the defendant did not object to the shipment of hops within five days, as required by the 14th paragraph of the contract, nevertheless the plaintiff waived any advantage therefrom by exercising ownership over and taking delivery of said hops upon their reshipment by the defendant to the plaintiff in California.

10. Any exercise of ownership by the plaintiff over the original shipment of hops, upon its being returned to California, disentitles it to recover against the defendant under the contract in suit.

11. Plaintiff in the 6th, 7th and 8th counts of its complaint admits that on or about October 17th, 1914, it received written notice from the defendant, expressing dissatisfaction with the said shipment and within 30 days after receipt thereof offered to ship and deliver other hops to the defendant in place of the hops shipped to defendant as aforesaid and objected to by it, and by so doing plaintiff has waived any advantage it may have obtained by reason of the failure of the defendant to object to the shipment under the 14th clause of the contract, unless the defendant arbitrarily refused to accept delivery of other hops of the contracted quality so offered to be shipped.

12. Plaintiff in the 6th, 7th and 8th counts of its complaint admits that on or about October 17th, 1914, it received written notice from the defendant, expressing dissatisfaction with the said shipment and within 30 days after receipt thereof offered to ship and deliver other hops to the defendant in place of the hops shipped to defendant as aforesaid and objected to by it, and by so doing plain-

tiff has waived any advantage it may have obtained by reason of the failure of the defendant to object to the shipment under the 14th clause of the contract, unless the defendant arbitrarily refused to approve samples of the hops so offered to be shipped to it by the plaintiff.

13. Defendant was entitled to have submitted to it for approval proper samples which it could approve before being required to accept any shipment of other hops under the contract in place of the shipment objected to, and if the Court, sitting as a jury, finds that no such proper sample was submitted to it, the defendant was justified in its refusal to accept other hops, and the verdict must be for the defendant.

14. If the Court, sitting as a jury, finds that the defendant was at all times willing to accept a shipment of other hops of the contracted quality, in place of those objected to, there can be no recovery against it if its failure to accept such other shipment was due to the failure or refusal of the plaintiff to submit proper samples of such proposed shipment for approval.

15. The plaintiff can recover no damages in this action unless the Court, sitting as a jury, first finds that the defendant breached the contract, and that such breach was not subsequently waived by the plaintiff.

16. The plaintiff has elected to treat the contract as completely breached in October, 1914, and its damages recoverable, if any, must be fixed as of that date.

17. If the Court finds that there was a market for

the sale of hops in October, 1914, upon contracts of the same general character as the contract in suit, then the measure of damages to which the plaintiff is entitled, if any, is the difference between this market price and the price named in the contract.

18. In determining the amount of damages to which the plaintiff may be entitled, if any, the Court, sitting as a jury, should exclude from its consideration all evidence of the cost of production of the hops contracted to be sold.

19. In determining the amount of damages to which the plaintiff may be entitled, if any, the Court, sitting as a jury, should exclude from its consideration all evidence of the cost of production of the hops contracted to be sold.

19. In determining the amount of damages to which the plaintiff may be entitled, if any, the Court, sitting as a jury, should exclude from its consideration any evidence of loss or damage to the plaintiff for the shipments for the year 1916.

20. In determining the amount of damages to which the plaintiff may be entitled, if any, the Court, sitting as a jury, should exclude from its consideration any evidence of loss or damage to the plaintiff for the shipments for the year 1917.

21. In determining the amount of damages to which the plaintiff may be entitled, if any, the Court, sitting as a jury, should exclude from its consideration any evidence of loss or damage to the plaintiff for the shipments for the year 1918.

22. Any evidence designed to show the plaintiff's

loss or damage for the shipment for the year 1916 should be excluded by the Court, sitting as a jury, as too remote and speculative.

23. Any evidence designed to show the plaintiff's loss or damage for the shipment for the year 1917 should be excluded by the Court, sitting as a jury, as too remote and speculative.

24. Any evidence designed to show the plaintiff's loss or damage for the shipment for the year 1918 should be excluded by the Court, sitting as a jury, as too remote and speculative.

25. The plaintiff can recover nothing upon the ground that it plowed up hops in the Fall of 1914.

26. The Court, sitting as a jury, cannot assess any damages against the defendant for loss to the plaintiff for plowing up hops in the Fall of 1914 unless the Court first finds that the contract has been breached by the defendant, and such breach not waived by the plaintiff, and further that said plowing up of hops was the proximate result of such breach.

27. The maximum which the plaintiff is entitled to recover if anything, for the hops actually shipped, is the price of the one bale used by the defendant, being 195 pounds at 17½ per pound, amounting to $345.21, less a credit of 1½c per pound for freight paid by the defendant, amounting to $2.92, leaving the amount due, if any, on said bale, $338.33.

28. As against any damages which may be awarded to the plaintiff, the defendant is entitled to a credit of $339.69 for freight paid by it on the

original shipment of hops from Californit to Elizabeth.

29. In order for the plaintiff to recover damages for any shipments of hops due after the year 1914, other than those measured by the difference between the market price and the contract price, the Court, sitting as a jury, must first find that there were special circumstances known to the defendant in order to make applicable any other or different rule or measure of damages.

30. There is no evidence of any special circumstances being known to the defendant which would make applicable any other or different rule or measure of damages to be applied in this case than the difference between the contract price and the market price.

31. If the Court, sitting as a jury, finds that the conversations testified to by both Mr. Phleger and General Collins, to have taken place between them with reference to the defendant's complaint as to the character of the hops shipped, and the plaintiff's willingness to exchange them for other hops of the contracted quality, took place on October 5th, 1914, then plaintiff must be held to have waived the provisions of the 14th clause of the contract with reference to receiving objections in writing within five days.

32. If the Court, sitting as a jury, finds that the conversations testified to by both Mr. Phleger and General Collins, to have taken place between them with reference to the defendant's complaint as to the character of the hops shipped, and the plaintiff's willingness to exchange them for other hops of the contracted quality, took place on October

5th, 1914, then the plaintiff has estopped itself to claim the right to now insist upon the 14th clause of the contract, requiring the defendant to give notice in writing of its objections within five days.

33. If the Court, sitting as a jury, finds that the conversations testified to by both Mr. Phleger and General Collins, to have taken place between them with reference to the defendant's complaint as to the characte rof the hops shipped, and the plaintiff's willingness to exchange them for other hops of the contracted quality, took place on October 5th, 1914, then the defendant was entitled to rely thereon, and is relieved of the obligation of the 14th clause of the contract to have given notice in writing of its objections within five days.

34. The plaintiff has acquired no enforceable rights under the 13th clause of the contract relating to arbitration and differences of quality, and this 13th clause must be excluded as having no bearing upon the determination of the case.

35. The defendant had the right to reasonably examine and inspect the hops shipped for the purpose of ascertaining whether they complied with the terms of the contract, and any reasonable exercise of this right by the defendant did not constitute an act by it inconsistent with the ownership of the plaintiff, as seller.

36. The nature of the shipment was such that a mere inspection at the railroad station was not sufficient to properly enable the defendant to determine whether the hops shipped were up to the standard of quality required by the terms of the contract, and the paying of the freight and surren-

der of the bill of lading to the railroad company, and the taking of the hops to the defendant's brewery, were not in themselves acts inconsistent with the ownership of the plaintiff, as seller.

37. The nature of the shipment was such that a mere inspection at the railroad station was not sufficient to properly enable the defendant to determine whether the hops shipped were up to the standard of quality required by the terms of the contract, and the paying of the freight and surrender of the bill of lading to the railroad company, and the taking of the hops to the defendant's brewery, were not acts inconsistent with the ownership of the plaintiff as seller, if the Court, sitting as a jury, finds such acts were done by the defendant for the purpose of making a proper examination and inspection of the hops shipped.

JOHN J. STAMLER,
Attorney of Defendant.

NEW JERSEY SUPREME COURT.

E. CLEMENS HORST COMPANY, Corporation, Plaintiff, vs. THE PETER BREIDT CITY BREWING COMPANY, a Corporation, Defendant.	FINDINGS AND RULINGS

For Plaintiff, Messrs. Lindabury, Depue & Faulks, by Mr. Kingsley Twining.

For defendant, Mr. John J. Stamler and Messrs. McCarter & English, by Mr. Conover English.

The case was tried before Hon. Frederic Adams, to whom it was referred for trial by his Honor, Chief Justice William S. Gummere, without a jury, and was submitted upon briefs on December 5, 1917.

Findings and Rulings.

1. This is an action brought by a seller against a buyer. Each party is a New Jersey corporation; plaintiff, E. Clemens Horst Company, hop grower, having its principal office in East Orange; defendant, The Peter Breidt City Brewery Company, having its principal office in Elizabeth.

2. Plaintiff brings its action upon a written contract, dated March 26, 1914, a copy of which

is annexed to and made part of the complaint and is marked "Schedule A."

3. The contract is short and simple and need not be quoted in full. Its leading provisions are as follows:

Par. (2) The seller agrees to sell to the buyer the following named quantities of hops, equal to or better than good brewing Pacific Coast hops, of the crops of each of the following named years and at the following named prices: 100 bales of each crop of years 1914 to 1918 incl., at 17½ cents per pound, on approved samples; tare, five (5) pounds per bale; terms, net cash. Seller shall be entitled to interest at six per cent. per year on deferred payments.

Par. (3) Said hops are to be delivered on or at cars or deck or store, Elizabeth, N. J., or at delivering lines' terminals convenient thereto.

Par. (4) Time of shipment and or delivery during the months inclusive of September-February following the harvest of each year's crop, with such extra time as provided in paragraphs 11 and 15 indorsed hereon.

(Par. 5) It is agreed that this contract is severable as to each bale.

Par. (6) The seller may treat all or any parts of entire unfulfilled portion of this contract as violated by the buyer upon or at any time or times after buyer's refusal to pay for any hops, or any note or acceptance given in payment for hops that have been delivered and accepted hereunder, or if this contract or any part of it is otherwise violated by the buyer.

Par. (9) If any delivery hereunder is subject to freight, storage, duty and or any other charges for which, under the terms of this agreement, seller may be liable, buyer shall pay such charges and charge same to seller.

Par. (10) Upon or at any time after delivery of any hops hereunder, seller shall be entitled to net cash payment for the same, by allowing to the buyer interest on the unpaid portion of the account (if the hops are sold on time) at the rate of six per cent. per annum for any unexpired term of credit.

Par. (11) Buyer gives to the seller sufficient extension in time for shipments and or deliveries under paragraph 4 and 15 to cover any and all delays arising from fires, riots, strikes, car famines, blockades, wrecks, quarantines or other extraordinary conditions beyond seller's control.

Par. (13) Differences of opinion and claims for allowance in regard to quality or hops submitted or tendered hereunder shall be settled by arbitration if requested by either buyer or seller. Difference, if any, between quality sold and quality delivered hereunder shall entitle buyer to equivalent allowance, but not to rejection of delivery. Any arbitration under this agreement shall be by disinterested brewers and or hops growers, of whom one shall be named by seller and one by buyer. The two thus chosen shall, at their option, name a third. A written decision of any two of said arbitrators shall be final. The number of days from date of either party's written request for arbitration till arbitrators' written notice of decision has been received by both parties shall be given to the seller for time for subsequent shipment in addition to the time for subsequent shipment in addition to the time as provided in paragraph 15 herein.

Par. (14) The buyer waives all rights to rejection or to allowances on any delivery on account of quality unless such claim be delivered to seller by telegraph or in writing within five days after arrival of the hops at place of delivery, and unless such claim be so made prior to buyer's exercise of any right of ownership of the said hops. Buyer

waives all claims for shortage of weight from invoice weight, unless claim (accompanied by certificate of public weigher's reweights) be delivered to seller within ten days of buyer's receipt of notice of arrival of hops at destination.

Par. (15) If for any reason the buyer shall be dissatisfied with or object to all or any part of any lot or lots of hops delivered hereunder, the seller may, within thirty days after receipt of written notice thereof, ship or deliver other hops of the contracted quality in place of any objected to.

Par. (16) The delivery by seller of hops of a quality at least as good as any accepted by buyer from seller on any then previous delivery under this or similar quality specifications shall be a compliance as to quality under this contract.

4. The Court finds that on September 12, or 19, 1914, plaintiff shipped from San Francisco, California, to defendant, at Elizabeth New Jersey, 100 bales of hops. Samples had previously been sent by plaintiff to defendant, but had not been approved. The standard of quality prescribed by the contract was this: "Equal to or better than good brewing Pacific Coast hops."

5. The Court rules that this shipment was premature, for the requirement as to approved samples was a condition precedent, and the hops were not sent on approved samples; that defendant might for that reason have refused to receive this consignment; that when the shipment arrived at Elizabeth on October 1, 1914, two courses were open to the defendant; that one course was to decline provisionally to receive the shipment, on the ground that it had been prematurely sent, and then to pass upon the samples, and, in case of disapproval of the samples, to decline absolutely to re-

ceive the shipment, or, in case of approval of the samples, to receive the shipment, subject to inspection of the shipment as to quality under Section 14 of the contract; that the other course was to drop the samples and to accept the shipment, relying on the right under Section 14 of the contract to examine the shipment, and to reject or claim allowance, if necessary, within five days.

6. The Court finds that the defendant took the second course and not the first course. The Court rules that the defendant waived the requirement as to samples, and, in taking the 100 bales into its own brewery at Elizabeth, accepted the shipment under the contract, subject to the right to reject it or to claim allowance on account of defect in quality by telegraph or in writing within five days after its arrival.

7. These conclusions which are now expressed were reached by the Court at an early stage of the case, and will be found stated more fully in the book of testimony under date of December 11, 1916.

8. The Court finds that the defendant did not, within five days after arrival of said shipment of 100 bales at Elizabeth, deliver to plaintiff by telegraph or in writing any claim to rejection or to allowance on said delivery on account of quality. The Court rules that the defendant, for want of such claim within said time, waived, under Paragraph 14 of the contract, all claim to such rejection or allowance on said delivery.

9. The Court rules that by reason of the premises plaintiff acquired the right at its optoin to treat the entire unfulfilled portion of said contract as violated by the defendant, and that the contrac-

tual language, "the entire unfulfilled portion of said contract," includes the unfulfilled obligation of defendant to pay for said shipment of 100 bales, at the contract price, which defendant, on October 12, 1914, refused to accept, as admitted in Paragraph 4 of the defendant's answer, which refusal the Court rules was unwarrantable. The Court rules that the above quoted contractual language included also the unfulfilled obligation of defendant to buy of plaintiff 100 bales of the contracted quality, at the contracted price, of each of the years 1915, 1916, 1917 and 1918, as provided in Section 2 of the contract.

10. The Court finds that plaintiff elected to treat the entire unfulfilled portion of the contract as violated. The Court rules that thereupon the rights of the parties became fixed. The Court finds that plaintiff has not waived or relinquished its rights so acquired and established, and that the only remaining question is that of damages.

11. The Court rules that the damages recoverable by the plaintiff upon the 1914 shipment are the contract price of the goods (Sale of Goods Act, 63, C. S. 4662), less the freight East, which the defendant paid, amounting to $339.69. The Court finds that the net weight of the shipment was 18,911 pounds, and that the contract price was 17½ cents per pound, making the contract price $3,309.42, from which is to be deducted the sum of $339.69 above mentioned, leaving:

Balance due on October 1, 1914.....	$2,969.73
Interest from October 1, 1914, to October 26, 1918	724.93
	$3,694.66

12. The remaining question is as to the damages recoverable by the plaintiff upon the undelivered installments for the years 1915 to 1918 inclusive.

13. The Court rules that the testimony and proofs do not afford satisfactory evidence that at the time of the breach there was an available market for deliveries in successive future years, such as those now under consideration.

14. The Court rules that upon failure of proof of an available market resort must be had to a comparison between contract price and cost of production. If the contract price exceeds the cost of production, the excess is the seller's profit. This is the rule to be here applied, deduction from the contract price th cost of transportation from the Pacific Coast to Elizabeth, New Jersey.

15. The Court rules that the weight of the evidence as to cost of production is that the cost of production of the shipment of 1914 was 6¼ cents per pound, and that the cost of transportation was 1 cent per pound.

16. It is urged on behalf of the plaintiff that the cost of production of the shipment of 1914 and the cost of transportation should be taken as the basis of an estimate as to the cost of production and transportation in the four following years; namely, 1915, 1916, 1917 and 1918. It is evident that such an estimate is not conclusive proof, for circumstances may alter cases, but it has evidential value because of the similarity of the several situations. The Court rules that it is the best evidence which the case affords.

17. Among the authorities to which the attention of the Court has been directed is one decided upon facts which much resemble those now before this Court: the case of *Roehm* v. *Horst,* 178 U. S. 1. The opinion of the Supreme Court was delivered by Chief Justice Fuller, and is now referred to upon the measure of damages. In 91 *Fed.* 341 Judge Kirkpatrick delivered in the same case the opinion of the Circuit Court of Appeals, which is also referred to on the same question.

18. Adopting, as to future deliveries, the rule mentioned in paragraph 16 as the measure of damages, and the proof mentioned in paragraph 15 as the guide, the Court rules that the plaintiff's damages upon the future deliveries are as follows. The figures are correctly stated in the brief of plaintiff's counsel:

Difference between the contract price and the cost of production and transportation of the 1915-1918 installments. Contract price per pound		17½ cents
Deduct cost of production, 6¼ cents per pound, and cost of transportation, 1 cent per pound		7¼ cents
Loss per pound		10¼ cents
Average weight of bale	200 pounds	
Less tare	5 pounds	
Net weight of bale	195 pounds	
Loss per bale	$19.9875	
Loss on 1915-1918 installments (400 bales		$7,995.00
Interest from October 1, 1914, to October 26, 1918		1,951.65
		$9,946.65

19. RECAPITULATION

Balance due on October 1, 1914, upon 1914 shipment	$2,969.73
Interest from October 1, 1914, to October 26, 1918	724.93
Loss upon 1915-1918 installments (400 bales)	7,995.00
Interest from October 1, 1914, to October 26, 1918	1,951.65
To balance due to plaintiff	$13,641.31

20. The plaintiff claims to recover $3,000 for loss sustained in November, 1914, upon plowing up hops applicable to the contract in suit. The Court finds that the evidence does not satisfactorily show that this plowing up of hops had for its proximate cause the breach of this contract. It seems rather to have been a part of a policy of retrenchment adopted by the plaintiff without special reference to or natural connection with this contract. The Court rules that this takes the case out of the rule laid down in *Hadley* v. *Blaxendale,* 9 Exch. R. 341; *Wolcott* v. *Mount,* 36 N. J. L. 262, 38 N. J. L. 496, and *Skirm* v. *Hilliker,* 66 N. J. L. 410, and that this claim is disallowed. The questions objected to in Book 1, on pages 63, 65, 66 and 67, and the answers thereto are allowed to stand for the purpose of developing the plaintiff's claim as to this matter of replowing.

Exceptions are noted.

21. The Court finds that there is due from the defendant to the plaintiff on the twenty-sixth day of October, 1918, the sum of thirteen thousand six hundred and forty-one dollars and thirty-one cents.

During the progress of the trial, in view of the volume of the testimony and the complexity of the

pleadings, it seemed to the Court wise to allow counsel to take certain testimony bearing on the question whether the plaintiff had waived or relinquished the contract provision in paragraph 14 that rights to rejection or allowance on account of quality must be claimed by the buyer, by telegram or in writing, delivered to the seller, within five days after the arrival of the hops at place of delivery. (Book 1, pp. 186, 190, 191.) Accordingly, considerable testimony was offered on behalf of the defendant against objections by the plaintiff and motions to suppress, the ruling on which was reserved by the Court. The Court took this course in order that the trial Court and the Court or Courts of Review might have before them sufficient facts to develop the case fully. A comprehensive ruling is now made, applicable to each one of said cases, that the testimony so objected to or sought to be struck out shall stand for the consideration of the Circuit Court and court or courts of review, and an exception in each case is hereby noted as ground of appeal.

In addition to the testimony contained in the five typewritten books above mentioned, depositions of C. B. Gillespie, an attorney at law, practicing in California, and of Edgar J. DePue, president of the DePue Warehouse Company, of San Francisco, were taken *de bene esse*, and were regularly transmitted to the Clerk of the Supreme Court, at Trenton, by whom they were received and receipted for on February thirteenth, 1917. They were forwarded by the Clerk of the Supreme Court to the Clerk of the Essex Circuit Court, at Newark, by whom they were received and receipted for on April fourth, 1917, by Frederic Adams, Circuit Court Judge, as appears by a memorandum thereon. They are now in the hands of said Circuit Court Judge, by whom they have been examined and con-

sidered, and who has not been asked to make any ruling upon the objections to the testimony of said witnesses.

One of the counsel for the defendant company has handed to the Court certain requests, to be embodied in the judgment of the Court, if approved. They are these:

> "1. There should be a verdict for the defendant."

This request is denied. An exception is noted.

> "2. It is an undisputed fact in the case that the plaintiff shipped the first 100 bales of hops for the year 1914, without first having received the defendant's approval of a sample, and this fact disentitles plaintiff to recover unless the Court, sitting as a jury, finds this requirement of the contract to have been waived by the defendant."

This request is approved. For reasons stated in paragraph 8 of this judgment, the Court rules that the defendant waived the requirement as to samples. (See also paragraphs 4, 5, 6 and 7.)

> "3. If the Court, sitting as a jury, finds that the hops as shipped by the plaintiff to the defendant did not measure up to the description in the contract, this fact disentitles the plaintiff to recover, unless the Court finds that such breach of contract was waived by the defendant."

This request is approved. The Court, for the reason stated in paragraph 8 of this judgment, and

without passing upon the question of quality, rules that the defendant waived all claim to rejection or allowance on account of quality. (See also paragraphs 4, 5, 6 and 7 of this judgment.)

> "4. The evidence entitles the Court, sitting as a jury, to find that the hops as shipped by the plaintiff to the defendant did not measure up to the description in the contract, and the plaintiff is not entitled to recover unless the Court finds that this breach of contract was waived by defendant."

This request is denied. It is disposed of by the ruling in paragraph 8 of this judgment that the defendant waived any such claim. An exception is noted.

> "5. Even though the Court, sitting as a jury, finds that the shipment of the hops by the plaintiff, without the approval of a sample by the defendant, was waived by the defendant, nevertheless the plaintiff is not entitled to recover if the Court finds that hops shipped were not up to the description in the contract, and the defendant objected to the plaintiff, through its duly authorized agent, within five days after the arrival of the hops at the place of delivery."

This request is approved. (See ruling as to request 6.)

> "6. Mr. Phleger, the representative of the plaintiff, was its duly authorized agent, and his actions, as disclosed in the evidence, are binding on the plaintiff."

This request is denied, because the Court finds

that Mr. Phleger was without authority to alter the terms of paragraph (14) of the contract. An exception is noted.

"7. If the Court, sitting as a jury, finds that the defendant did not object to the shipment of hops within five days, as required by the 14th paragraph of the contract, this fact is of no benefit to the plaintiff if the Court further finds that it waived this advantage."

This request is approved. The Court finds that the plaintiff did not waive this advantage.

"8. If the Court, sitting as a jury, finds that the defendant did not object to the shipment of hops within five days, as required by the 14th paragraph of the contract, nevertheless the plaintiff waived any advantage therefrom by offering to ship and deliver other hops of the contracted quality to the defendant within 30 days after the receipt of written notice of the defendant's objection to the original shipment."

This request is denied. The Court finds, in paragraph 10 of the judgment, that the plaintiff has not waived or relinquished its rights, fixed, acquired and established under paragraph (14) of the contract. An exception is noted.

"9. If the Court, sitting as a jury, finds that the defendant did not object to the shipment of hops within five days, as required by the 14th paragraph of the contract, nevertheless the plaintiff waived any advantage therefrom by exercising ownership over and

making delivery of said hops upon their reshipment by the defendant to the plaintiff in California.

"10. Any exercise of ownership by the plaintiff over the original shipment of hops, upon its being returned to California, disentitles it to recover against the defendant under the contract in suit."

These requests are denied. The Court finds there was no waiver. Exceptions are noted.

"11. Plaintiff in the 6th, 7th and 8th counts of its complaint admits that on or about October 17th, 1914, it received written notice from the defendant expressing dissatisfaction with the said shipment and within thirty days after receipt thereof offered to ship and deliver other hops to the defendant in place of the hops shipped to defendant as aforesaid and objected to by it, and by so doing plaintiff has waived any advantage it may have obtained by reason of the failure of the defendant to object to the shipment under the 14th clause of the contract, unless the defendant arbitrarily refused to accept delivery of other hops of the contracted quality so offered to be shipped."

12. (This request is the same as request 11, except that the words following the words "arbitrarily refused" are these):

"to approve samples of the hops so offered to be shipped to it by the plaintiff."

These requests are denied. The Court holds that these counts of the complaint establish no waiver

of rights previously fixed and asserted by the same complaint. Exceptions are noted.

> "13. Defendant was entitled to have submitted to it for approval proper samples which it could approve before being required to accept any shipment of other hops under the contract in place of the shipment objected to, and if the Court, sitting as a jury, finds that no such proper sample was submitted to it, the defendant was justified in its refusal to accept other hops, and the verdict must be for the defendant."

The request is denied, because the rights of the parties were fixed by the failure of the defendant to make claim on account of quality as prescribed in paragraph (14) of the contract, and there was no subsequent waiver by the plaintiff of its right so acquired. An exception is noted.

> "14. If the Court, sitting as a jury, finds that the defendant was at all times willing to accept a shipment of other hops of the contracted quality, in place of those objected to, there can be no recovery against it if its failure to accept such other shipment was due to the failure or refusal of the plaintiff to submit proper samples of such proposed shipment for approval."

This request is denied for the same reasons stated in denying the 13th request. An exception is noted.

> "15. The plaintiff can recover no damages in this action unless the Court, sitting as a jury, first finds that the defendant breached

the contract, and that such breach was not subsequently waived by the plaintiff."

This request is approved. The Court, as stated in paragraph 8 of this judgment, finds that the plaintiff can recover no damages based on any claim to rejection or allowance on delivery on account of quality, because of its failure to assert such claim as prescribed in paragraph (14) of the contract, and that, as stated in paragraph (10) of this judgment, the plaintiff has not waived or relinquished its rights acquired and fixed in paragraph (14) of the contract.

"16. The plaintiff has elected to treat the contract as completely breached in October, 1914, and its damages recoverable, if any, must be fixed as of that date."

This request is approved.

"17. If the Court finds that there was a market for the sale of hops in October, 1914, upon contracts of the same general character as the contract in suit, then the measure of damages to which the plaintiff is entitled, if any, is the difference between this market price and the price named in the contract."

This request is denied.

The Court rules in paragraph 11 of this judgment that the damages recoverable by the plaintiff upon the 1914 shipment are the contract price of the goods, less the freight, east. (Sale of Goods Act, sec. 63; C. S. 4662.)

As to the prospective deliveries for the years 1915 to 1918 inclusive, the Court finds in paragraph

13 of this judgment that the testimony and proofs do not afford satisfactory evidence that at the time of the breach of contract, in October, 1914, there was an available market for deliveries in these successive future years, and in paragraph 14 of this judgment the Court rules that, upon failure of proof of an available market, resort must be had to a comparison between contract price and cost of production, adding to cost of production, or, what is the same thing, deducting from the contract price, the cost of transportation from the Pacific Coast to Elizabeth, New Jersey.

An exception is noted.

"18. In determining the amount of damages to which the plaintiff may be entitled, if any, the Court, sitting as a jury, should exclude from its consideration all evidence of the cost of production of the hops contracted to be sold."

This request is denied. (See reasons assigned by the Court for denying request 17. See also *Roehm* v. *Horst,* 178, *U. S.* 1, and 81 *Fod.* 346, cases previously cited at paragraph 17 of this judgment.) An exception is noted.

"19. In determining the amount of damages to which the plaintiff may be entitled, if any, the Court, sitting as a jury, should exclude from its consideration any evidence of loss or damage to the plaintiff for the shipments for the year 1916."

20. Same request as to year 1917.

21. Same request as to year 1918.

These requests are denied, for the reasons assigned by the Court for denying requests 17 and 18. Exceptions are noted.

"22. Any evidence designed to show the plaintiff's loss or damage for the shipment for the year 1916 should be excluded by the Court, sitting as a jury, as too remote and speculative."

23. Same request as to shipment of 1917.

24. Same requested as to shipment of 1918.

These requests are denied. (See paragraph 16 of this judgment.) Exceptions are noted.

"25. The plaintiff can recover nothing upon the ground that it plowed up hops in the fall of 1914."

This request is approved for the reasons stated in paragraph 20 of this judgment.

"26. The Court, sitting as a jury, cannot assess any damages against the defendant for loss to the plaintiff for plowing up hops in the fall of 1914 unless the Court first finds that the contract has been breached by the defendant, and such breach not waived by the plaintiff, and further that said plowing up of hops was the proximate result of such breach."

This request is approved. The Court rules in paragraph 20 of this judgment that the breach of the contract was not the proximate cause of the plowing up of hops.

"27. The maximum which the plaintiff is entitled to recover, if anything, for the hops actually shipped is the price of the one bale used by the defendant, being 195 pounds, at 17½ cents per pound, amounting to $345.21, less a credit of 1½ cents per pound for freight paid by the defendant, amounting to $2.92, leaving the amount due, if any, on said bale $338.33."

This request is denied. The Court rules in paragraph 11 of this judgment that the damages recoverable by the plaintiff upon the 1914 shipment are the contract price of the goods, less the freight east. An exception is noted.

"28. As against any damages which may be awarded to the plaintiff, the defendant is entitled to a credit of $339.69 for freight paid by it on the original shipment of hops from California to Elizabeth."

This request is approved.

"29. In order for the plaintiff to recover damages for any shipments of hops due after the year 1914, other than those measured by the difference between the market price and the contract price, the Court, sitting as a jury, must first find that there were special circumstances known to the defendant in order to make applicable any other or different rule or measure of damages.

"30. There is no evidence of any special circumstances being known to the defendant which would make applicable any other or

different rule or measure of damages to be applied in this case than the difference between the contract price and the market price."

These requests are denied. The question is whether there was at the time of the breach of the contract an available market for contracts for deliveries in future years. (See paragraphs 12, 13 and 14 of this judgment.) Exceptions are noted.

"31. If the Court, sitting as a jury, finds that the conversations testified to by both Mr. Phleger and General Collins to have taken place between them with reference to the defendant's complaint as to the character of the hops shipped, and the plaintiff's willingness to exchange them for other hops of the contracted quality, took place on October fifth, 1914, then plaintiff must be held to have waived the provisions of the fourteenth clause of the contract with reference to receiving objections in writing within five days."

32. (Same as request 31, except that an estoppel is claimed of a waiver.)

These two requests are denied. (See paragraphs 6, 7, 8 and 9 of this judgment and rulings on requests 6, 7 and 8.) Exceptions are noted.

33. (This request is to the same effect as requests 31 and 32.)

The request is denied for reasons stated in denying requests 31 and 32. An exception is noted.

"34. The plaintiff has acquired no enforceable rights under the 13th clause of the contract relating to arbitration and differences of quality, and this 13th clause must be excluded as having no bearing upon the determination of the case."

This request is approved.

"35. The defendant had the right to reasonably examine and inspect the hops shipped for the purpose of ascertaining whether they complied with the terms of the contract, and any reasonable exercise of this right by the defendant did not constitute an act by it inconsistent with the ownership of the plaintiff as seller.

"36. The nature of the shipment was such that a mere inspection at the railroad station was not sufficient to properly enable the defendant to determine whether the hops shipped were up to the standard of quality required by the terms of the contract, and the paying of the freight and surrender of the bill of lading to the railroad company, and the taking of the hops to the defendant's brewery, were not in themselves acts inconsistent with the ownership of the plaintiff as seller."

37. This request is the same as request 36, with the addition of the following words: "if the Court, sitting as a jury, finds such acts were done by the defendant for the purpose of making a proper examination and inspection of the hops shipped."

These requests, 35, 36 and 37, are denied. The Court, at paragraph 6 of the judgment, rules that the defendant, in taking the 100 bales into its own brewery at Elizabeth, accepted the shipment under the contract, subject to the defendant's right to reject or to claim allowance on account of defect in quality by telegraph or in writing within five days after its arrival.

An exception is noted as to each request.

FREDERIC ADAMS,
Circuit Court Judge.

October 26, 1918.

Judgment.

NEW JERSEY SUPREME COURT.

E. CLEMENS HORST COMPANY vs. THE PETER BREIDT CITY BREWERY COMPANY	Action at Law. On Postea. Lindabury, Depue & Faulks, Attorneys.

Judgment entered the first day of November, A. D., nineteen hundred and eighteen, for the sum of thirteen thousand six hundred and forty-one dollars and thirty-one cents damages and ..... costs.

$13,641.31
.....
$.....

WM. S. GUMMERE, C. J.

I, Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in above stated cause which said judgment is recorded in this office in Vol. 11 of judgments, page 280.

In testimony whereof I have hereunto [SEAL] set my hand and the seal of said Court at Trenton, this twenty-seventh day January, A. D., nineteen hundred and nineteen.

ENOCH L. JOHNSON, Clerk.

Notice of Appeal

NEW JERSEY SUPREME COURT
ESSEX COUNTY.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

THE PETER BREIDT CITY BREWERY COMPANY, a Corporation,
Defendant.

ACTION AT LAW
NOTICE OF APPEAL

To Messrs. Lindabury, Depue & Faulks,
Attorneys for Plaintiff.

TAKE NOTICE, That the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause. Dated March 1st, 1919.

STAMLER & STAMLER,
Attorneys for Defendant.

Service of the within Notice of Appeal is hereby acknowledged this 1st day of March, 1919.

LINDABURY, DEPUE & FAULKS,
Attorneys for Plaintiff.

NEW JERSEY SUPREME COURT.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff, vs. THE PETER BREIDT CITY BREWERY COMPANY, a Corporation, Defendant.	ON APPEAL GROUNDS FOR APPEAL

The defendant assigns the following grounds for the reversal of the whole judgment entered in this cause.

1. Because the trial judge sitting as a jury for the trial of the issue of fact, refused to charge himself the following requests:

There should be a verdict for the defendant. (Request No. 1.)

The evidence entitles the Court, sitting as a jury, to find that the hops as shipped by the plaintiff to the defendant, did not measure up to the description in the contract, and the plaintiff is not entitled to recover unless the Court finds that this breach of contract was waived by defendant. (Request No. 4).

Mr. Phleger, the representative of the plaintiff, was its duly authorized agent, and his actions, as disclosed in the evidence, are binding on the plaintiff. (Request No. 6).

If the Court, sitting as a jury, finds that the defendant did not object to the shipment of hops within five days, as required by the 14th paragraph of the contract, nevertheless the plaintiff waived

any advantage therefrom by offering to ship and deliver other hops of the contracted quality to the defendant within 30 days after the receipt of written notice of the defendant's objection to the original shipment. (Request No. 8).

If the Court, sitting as a jury, finds that the defendant did not object to the shipment of hops within five days, as required by the 14th paragraph of the contract, nevertheless the plaintiff waived any advantage therefrom by exercising ownership over and taking delivery of said hops upon their re-shipment by the defendant to the plaintiff in California. (Request No. 9.)

Any exercise of ownership by the plaintiff over the original shipment of hops, upon its being returned to California, disentitled it to recover against the defendant under the contract in suit. (Request No. 10.)

Plaintiff in the 6th, 7th and 8th counts of its complaint admits that on or about October 17th, 1914, it received written notice from the defendant, expressing dissatisfaction with the said shipment and within 30 days after receipt thereof offered to ship and deliver other hops to the defendant in place of the hops shipped to defendant as aforesaid and objected to by it, and by so doing plaintiff has waived any advantage it may have obtained by reason of the failure of the defendant to object to the shipment under the 14th clause of the contract, unless the defendant arbitrarily refused to accept delivery of other hops of the contracted quality so offered to the shipped. (Request No. 11.)

Plaintiff in the 6th, 7th and 8th counts of its complaint admits that on or about October 17th, 1914, it received written notice from the defendant, expressing dissatisfaction with the said shipment and within 30 days after receipt thereof of-

fered to ship and deliver other hops to the defendant in place of the hops shipped to defendant as aforesaid and objected to by it, and by so doing plaintiff has waived any advantage it may have obtained by reason of the failure of the defendant to object to the shipment under the 14th clause of the contract, unless the defendant arbitrarily refused to approve samples of the hops so offered to be shipped to it by the plaintiff. (Request No. 12.)

Defendant was entitled to have submitted to it for approval proper samples which it could approve before being required to accept any shipment of other hops under the contract in place of the shipment objected to, and if the Court, sitting as a jury, finds that no such proper sample was submitted to it, the defendant was justified in its refusal to accept other hops, and the verdict must be for the defendant. (Request No. 13.)

If the Court, sitting as a jury, finds that the defendant was at all times willing to accept a shipment of other hops of the contracted quality, in place of those objected to, there can be no recovery against it if its failure to accept such other shipment was due to the failure or refusal of the plaintiff to submit proper samples of such proposed shipment for approval. (Request No. 14).

If the Court finds that there was a market for the sale of hops in October, 1914, upon contracts of the same general character as the contract in suit, then the measure of damages to which the plaintiff is entitled, if any, is the difference between this market price and the price named in the contract. (Request No. 17.)

In determining the amount of damages to which the plaintiff may be entitled, if any, the Court, sitting as a jury, should exclude from its consideration all evidence of the cost of production of the hops contracted to be sold. Request No. 18.)

In determining the amount of damages to which the plaintiff may be entitled, if any, the Court, sitting as a jury, should exclude from its consideratation any evidence of loss or damage to the plaintiff for the shipment for the year 1916. (Request No. 19.)

In determining the amount of damages to which the plaintiff may be entitled, if any, the Court, sitting as a jury, should exclude from its consideration any evidence of loss or damage to the plaintiff for the shipments for the year 1917. (Request No. 20).

In determining the amount of damages to which the plaintiff may be entitled if any, the Court, sitting as a jury, should exclude from its consideration any evidence of loss or damage to the plaintiff for the shipments of the year 1918. (Request No. 21.)

Any evidence designed to show the plaintiff's loss or damage for the shipment for the year 1916 should be excluded by the Court, sitting as a jury, as too remote and speculative. (Request No. 22.)

Any evidence designed to show the plaintiff's loss or damage for the shipment for the year 1917 should be excluded by the Court, sitting as a jury, as too remote and speculative. (Request No. 23.)

Any evidence designed to show the plaintiff's loss or damage for the shipment for the year 1918 should be excluded by the Court, sitting as a jury, as too remote and speculative. (Request No. 24.)

The maximum which the plaintiff is entitled to recover, if anything, for the hops actually shipped, is the price of the one bale used by the defendant, being 195 pounds at 17½ cents per pound, amounting to $345.21, less a credit of 1½ cents per pound for freight paid by the defendant, amounting to $2.92, leaving the amount due, if any, on said bale, $338.33. (Request No. 27.)

In order for the plaintiff to recover damages for any shipment of hops due after the year 1914, other than those measured by the difference between the market price and the contract price, the Court, sitting as a jury, must first find that there were special circumstances known to the defendant in order to make applicable any other or different rule or measure of damages. (Request No. 29.)

There is no evidence of any special circumstances being known to the defendant which would make applicable any other or different rule or measure of damages to be applied in this case than the difference between the contract price and the market price. (Request No. 30.)

If the Court, sitting as a jury, finds that the conversation testified to by both Mr. Phleger and General Collins, to have taken place between them with reference to the defendant's complaint as to the character of the hops shipped, and the plaintiff's willingness to exchange them for other hops of the contracted quality, took place on October 5th, 1914, then plaintiff must be held to have waived the provisions of the 14th clause of the contract with reference to receiving objections in writing within five days. (Request No. 31.)

If the Court, sitting as a jury, finds that the conversation testified to by both Mr. Phleger and General Collins, to have taken place between them with reference to the defendant's complaint as to the character of the hops shipped, and the plaintiff's willingness to exchange them for other hops of the contracted quality, took place on October 5th, 1914, then the plaintiff has estopped itself to claim the right to now insist upon the 14th clause of the contract, requiring the defendant to give notice in writing of its objections within five days (Request No. 32.)

If the Court, sitting as a jury, finds that the con-

versations testified to by both Mr. Phleger and General Collins, to have taken place between them with reference to the defendant's complaint as to the character of the hops shipped, and the plaintiff's willingness to exchange them for other hops of the contracted quality, took place on October 5th, 1914, then the defendant was entitled to rely thereon, and is relieved of the obligation of the 14th clause of the contract to have given notice in writing of its objections within five days. (Request No. 33.)

The defendant had the right to reasonably examine and inspect the hops shipped for the purpose of ascertaining whether they complied with the terms of the contract, and any reasonable exercise of this right by the defendant did not constitute an act by it inconsistent with the ownership of the plaintiff, as seller. (Request No. 35.)

The nature of the shipment was such that a mere inspection at the railroad station was not sufficient to properly enable the defendant to determine whether the hops shipped were up to the standard of quality required by the terms of the contract, and the paying of the freight and surrender of the bill of lading to the railroad company, and the taking of the hops to the defendant's brewery, were not in themselves acts inconsistent with the ownership of the plaintiff, as seller. (Request No. 36.)

The nature of the shipment was such that a mere inspection at the railroad station was not sufficient to properly enable the defendant to determine whther the hops were shipped were up to the standard of quality required by the terms of the contract, and the payment of the freight and surrender of the bill of lading to the railroad company, and the taking of the hops to the defendant's brewery, were not acts inconsistent with the ownership

of the plaintiff as seller, if the Court, sitting as a jury, finds such acts were done by the defendant for the purpose of making a proper examination and inspection of the hops shipped. (Request No. 37.)

2. Because the trial Judge erroneously determined that upon the pleadings in the cause, the only question to be determined by the Court, was the measure and amount of damage.

3. Because the trial Judge erroneously granted the motion made on behalf of the plaintiff for judgment on the pleadings, in favor of the plaintiff.

4. Because the trial Judge did not consider the defendant's counterclaim and erroneously rendered a verdict in favor of the plaintiff.

5. That the Court erroneously failed to find that the shipment sent to the defendant was of the hops a sample of which had previously been rejected by defendant, and that plaintiff fraudulently concealed the fact from defendant that the hops so sent were of the same quality as the sample previously rejected by the defendant.

6. That the Court erroneously found that the defendant accepted the shipment of one hundred bales subject to its right to reject by telegraph or in writing within five days.

7. That the Court erroneously determined that the defendant waived the right under paragraph 14 of the contract to make claim to rejection or allowance for the reason that it appeared from the evidence that a verbal notice of rejection was given and accepted by plaintiff and that such verbal no-

tice of rejection was thereafter acted upon by plaintiff.

8. That the Court erroneously determined that the defendant's refusal to accept the shipment was unwarrantable.

9. That the Court erroneously determined that such refusal to accept the shipment of 1914 also included the shipments at contracted price for the years 1915, 1916, 1917 and 1918.

10. That the Court erroneously failed to find at what time plaintiff elected to treat the unfulfilled portion of the contract as violated.

11. That the Court erroneously failed to find at what date the rights of the parties became fixed.

12. That the Court erroneously failed to find that the plaintiff had not waived or relinquished its rights which might have been acquired and established under the contract.

13. That the Court erroneously determined that the only question was one of damage.

14. That the Court erroneously adopted the wrong measure and basis of damages upon the shipment of 1914.

15. That the Court erroneously allowed damages upon the undelivered installments for the years 1915 to 1918 inclusive. ,,

16. That the Court erroneously fixed an improper measure of damages for the undelivered installments for the years 1915 to 1918 inclusive.

17. That the Court erroneously determined that the testimony and proofs offered by the defendant did not afford satisfactory evidence of the market value for future deliveries, and that the Court should have adopted the measure of damages as to future deliveries based upon the evidence of the market value offered by the defendant.

18. That the Court used as a basis of computing damages a comparison between contract price and cost of production, and rejected evidence as to available market value.

19. That the Court erroneously determined that the evidence of the cost of production and transportation for the year 1914 should be taken as the basis for the years 1915 to 1918 inclusive, and that such evidence was the best evidence which the case afforded, while on the contrary there was positive evidence before the Court of market value.

20. That the Court took the date of October 1, 1914, as the date of the breach of the cntract while the evidence disclosed negotiations between the parties subsequent to that date, which negotiations were a waiver f any rights which might have previously been asserted by plaintiff.

21. That the Court erroneously determined in the absence of any evidence to that effect, that the plaintiff on October 1st, 1914, elected to treat the unfulfilled portions of the contract as violated, by the defendant.

22. That under the terms of the contract payments were to be made each successive year and the Court erroneously allowed interest on deferred payments from the year 1914, instead of from each successive year.

Grounds for Appeal

23. That the Court erroneously allowed interest from October 1st, 1914, when there was no evidence of an election by the plaintiff to treat the unfulfilled portions of the contract as violated until said plaintiff instituted suit.

24. That the election of the plaintiff, if any, to treat the unfulfilled portions of the contract as violated by the defendant under the evidence did not take place until the time of instituting suit, and therefore the trial Judge erroneously allowed interest to the plaintiff from October 1st, 1914, upon the alleged losses for the shipments for the years 1915 to 1918 inclusive.

25. That the trial Judge erroneously allowed plaintiff interest on said shipments by reason that plaintiff by the verdict as rendered would receive more money than it would have received had the contract been fully carried out and performed.

26. That the Court erroneously determined that there was due to plaintiff from the defendant on October 26th, 1918, $13,641.31.

27. That the trial Judge erroneously failed to rule on the objections of the attorney of the defendant to the admission of evidence offered by the plaintiff and has allowed an exception in each of said cases although the Court has failed to rule upon defendant's objections to such evidence.

28. That the trial Judge has not ruled on the evidence offered by the defendant as to agency but has in its lonclusion disregarded such evidence without overruling the same.

29. That the trial Judge erroneously refused

the request of the defendant's attorney to direct a verdict for the defendant.

30. That the trial Judge erroneously refused defendant's request to find that plaintiff was disentitled to recover because it shipped one hundred bales of hops without first having received defendant's approval of the sample, and that the Court found erroneously that the requirement of sample was waived by the defendant.

31. That the Court also erroneously refused defendant's request to find for the defendant because the goods did not measure up to description and the Court erroneously found that such breach was waived by defendant.

32. The Court erroneously refused defendant's request to find for the defendant because defendant within five days after the arrival of hops made objection thereto to plaintiff's duly authorized agent.

33. That the defendant requested the Court to find that Mr. Phleger, the representative of the plaintiff, was its duly authorized agent and his actions were binding upon the plaintiff, which request the Court refused and erroneously found that Phleger was without authority to alter the terms of the fourteenth paragraph of the contract.

34. That the Court erroneously refused to find that the plaintiff had waived any advantage it might have had by reason of the defendant's failure to give notice by writing or telegraph as required by the fourteenth paragraph of the contract.

35. That the Court erroneously refused to find that plaintiff had waived any advantage by reason

of the failure of the defendant to object as required by paragraph 14 because said plaintiff within thirty days after receipt of notice of defendant's objections to the original shipment offered to ship defendant other hops of the contracted quality.

36. That the Court erroneously refused to find that the plaintiff after the rejection of said hops and the re-shipment of the same by defendant to plaintiff exercised ownership over said hops and thereby waived any advantage it might have had by reason of the defendant not complying with paragraph 14 of the contract.

37. The Court erroneously failed to find that the allegations contained in plaintiff's complaint admit that plaintiff made an offer, within thirty days after receiving written notice, on or about October 17th, 1914, to furnish other hops in place of those shipped to defendant and which defendant refused to accept and that such action was a waiver by plaintiff of any advantage which it might have had by reason of defendant's failure to literally comply with the fourteenth clause of the contract.

38. That the Court improperly found that the right of the parties were fixed by reason of the failure of the defendant to make any claim pursuant to paragraph 14 of the contract and that there was no subsequent waiver by plaintiff of the right so acquired.

39. That the Court improperly denied defendant's request to find that the measure of damages was the difference between the market price for the sale of hops on October, 1914, and the contract price.

Grounds for Appeal

40. That the Court improperly found that the measure of damages recoverable by the plaintiff upon the 1914 shipment was the contract price less the freight East.

41. That the Court improperly found that there is no satisfactory evidence of an available market in October, 1914, for deliveries of crops of subsequent years.

42. That the trial judge erroneously failed to find that there was a waiver by plaintiff of the defendant's failure to give notice as provided for in paragraph 14 of the contract by reason of plaintiff's agreement and willingness to ship other hops in place of those refused by defendant.

43. That the trial Court erroneously failed to find that there was an estoppel against plaintiff from insisting upon any benefits upon failure to give notice as provided in paragraph 14 of the contract by reason of an agreement between defendant's agent and plaintiff's agent on October 5th, 1914, that plaintiff would ship defendant other hops instead of and in place of those which defendant refused to accept.

44. That the Court erroneously found that the taking of hops into defendant's brewery was an acceptance of the same under the contract.

45. That the trial Judge erroneously refused to find that Mr. Phleger was the agent of the plaintiff with authority to do whatever was necessary to carry out the contract and that Phleger agreeing with the defendant to send other hops in the place of hops which the Court found defendant was unwarranted in rejecting was tantamount to a waiver of the fourteenth paragraph of the contract.

46. That the trial Judge erroneously refused to find that Mr. Phleger was the agent of the plaintiff with authority to do whatever was necessary to carry out the contract and that Phleger agreeing with the defendant to send other hops in the place of hops which the court found defendant was unwarranted in rejecting was an estoppel against plaintiff of its right to set up the fourteenth paragraph of the contract.

47. That the evidence produced by the defendant proved conclusively that Mr. Phleger was the duly authorized agent and representative of the plaintiff for the purpose of doing everything that was necessary from the time of taking the order to the delivery of the hops and the collection of money therefore, and that the trial Judge erroneously refused so to find.

48. That the trial judge erroneously refused to consider the evidence as to the agency of Mr. Phleger and erroneously found that nothing which was done by the plaintiff or its agent was a waiver of the rights which it is alleged to have acquired under the fourteenth paragraph of the contract.

49. That as a matter of law the evidence established that Mr. Phelger was the duly authorized agent and representative of the plaintiff and as such was empowered to do everything that was necessary to carry out the contract including the waiver of the fourteenth paragraph, and that the agreement of Phelger to send defendant other hops in place of those which defendant had rejected was a waiver by plaintiff of its right to claim any advantage by reason of the failure of the defendant to give notice in writing or by telegraph within five days as provided by paragraph 14 of the con-

tract, and that the trial judge erroneously refused so to find; that said matter became a question of law, the proper determination of which would have resulted in a verdict and judgment for the defendant.

50. The evidence disclosed that the hops in question were received into defendant's brewery on October 1st, 1914; that on October 5th, 1914, Mr. Phleger, the representative and agent of the plaintiff called at defendant's brewery and was informed by someone on behalf of the defendant that the hops were condemned as very poor and were going to be returned; that said Phleger then stated that they should not be returned but that he would exchange them if not satisfactory to defendant's president; that notwithstanding such evidence the trial judge erroneously refused to find that the plaintiff had notice within five days of the rejection of said hops by defendant

51. The evidence disclosed that the hops in question were received into defendant's brewery on October 1st, 1914; that on October 5th, 1914, Mr. Phleger, the representative and agent of the plaintiff called at defendant's brewery and was informed by someone on behalf of the defendant that the hops were condemned as very poor and were going to be returned; that said Phleger then stated that they should not be returned but that he would exchange them if not satisfactory to defendant's president; that notwithstanding such evidence the trial court erroneously held that the plaintiff was entitled to insist that no notice had been given under section 14 of the contract and that said plaintiff was entitled to treat the entire contract as breached.

52. The evidence disclosed that the hops in question were received into defendant's brewery on October 1st, 1914; that on October 5th, 1914, Mr. Phleger, the representative and agent of the plaintiff called at defendant's brewery and was informed by someone on behalf of the defendant that the hops were condemned as very poor and were going to be returned; that said Phleger then stated that they should not be returned but that he would exchange them if not satisfactory to defendant's president; that notwithstanding such evidence the trial court erroneously failed to determine and decide that such conduct did not work an estoppel against the plaintiff from setting up the fourteenth clause of said contract.

53. The evidence disclosed that the hops in question were received into defendant's brewery on October 1st, 1914; that on October 5th, 1914, Mr. Phleger, the representative and agent of the plaintiff called at defendant's brewery and was informed by someone on behalf of the defendant that the hops were condemned as very poor and were going to be returned; that said Phleger then stated that they should not be returned but that he would exchange them if not satisfactory to defendant's president that notwithstanding such evidence the trial court erroneously failed to find that there was a waiver by plaintiff of the fourteenth paragraph of the contract

54. The evidence disclosed that the hops in question were received into defendant's brewery on October 1st, 1914; that on October 5th, 1914, Mr. Phleger, the representative and agent of the plaintiff called at defendant's brewery and was informed by someone on behalf of the defendant that the

hops were condemned as very poor and were going to be returned; that said Phleger then stated that they should not be returned but that he would exchange them if not satisfactory to defendant's president; and Mr. Phleger being called as a witness during the course of the trial at one time admitted the call at defendant's brewery on the date stated by defendant's witnesses and subsequently stated that he did not call at defendant's brewery until November, 1904, and the court refused a request of the defendant to determine the question of fact as to whether verbal notice was given to Mr. Phleger as above recited on October 5th, 1914, and that therefore the finding by said trial judge that the plaintiff was entitled to a verdict was erroneous, irregular and improper.

55. Because the following questions were admitted over the objection of the defendant:

To the Witness, E. Clemens Horst.

Q. What was the cost of production of good brewing Pacific Coast hops during the month of October, 1914?

Q. State what was the cost of production of good brewing Pacific Coast hops during the time between September, 1914, and February, 1915.

Q. State what was the cost of production of good brewing Pacific Coast hops during the time between September, 1914, and February, 1915.

Q. What has been the cost of production of good brewing Pacific Coast hops during the period from September, 1915, to the present time?

Q. What has been the cost of production

of good brewing Pacific Coast hops during the period from September, 1915, to the present time?

Q. What was the cost of transporting good brewing Pacific Coast hops from the Pacific Coast to the City of Elizabeth, New Jersey, during the month of October, 1914?

Q. What in your opinion will be the cost of transportation of good brewing Pacific Coast hops during the years 1916, 1917, 1918 and 1919, that is to say, from the present time until February, 1919?

Q. State whether or not by such plowing out the plaintiff lost any improvements? State what loss, if any, the plaintiff suffered by reason of plowing out these hops.

To the witness, P. M. Rooney.

Q. What was the cost of production of good brewing Pacific Coast hops during the season of 1914, that is to say, the cost of producing good brewing hops for delivery from September, 1914, to February, 1915?

Q. The cost of production?

Q. In your opinion that would be the cost of production during the coming three years, that is to say, from the present time through the season of 1918 and 1919?

56. Because the following questions were overruled:

To the witness Carl Albert Phleger:

Q. Well, you get almost daily wires from the San Francisco office of your company, giving you the then current market prices, don't you?

Q. These trade papers discuss the prospects of future hops and the prospect of what the market will be, don't they?

Q. What was the market price for spot hops for the crop of 1914?

Q. At the time the contract in suit was negotiated had not General Collins, the president of the defendant, showed you a contract marked D-4 for Identification, between the defendant company and the Horst Company, not the plaintiff, and was not that contract discussed between you and him in arriving at the price of the hops, which was set forth in the contract now in suit?

Q. How long to your knowledge has the Brewers' Bulletin been published?

Q. Mr. Phleger, did you receive this telegram, dated October 17, 1914, which I hand you (paper shown to witness)?

A. Yes, I received that on the morning of October 18th.

Mr. Twining: I offer it in evidence.

(The paper referred to is marked Ex. P38.)

Q. Was it before or after the receipt of this letter of October 29th that you have identified (paper shown to witness)?

A. It was after the receipt of this letter of October 29th.

Mr. Twining: I offer that letter in evidence.

(The paper referred to is marked Ex. P39.)

Q. Now, did you make any report of your conversations and what had taken place at the Breidt Brewery to Mr. Horst?

Q. I show you a letter purporting to be signed by yourself, directed to the E. Clemens Horst Company, at San Francisco, and dated November 4, 1914, and ask you whether or not that is your signature (paper shown to witness)?

A. Yes, that is my signature; I wrote that letter.

Q. Was it mailed to the Horst Company, in San Francisco?

A. Yes.

Mr. Twining: I offer it in evidence.

(The paper referred to is marked Ex. P40.)

Q. Now, I show you a letter dated December 8, 1914, purporting to be signed by you and addressed to the Horst Company at San Francisco, and ask you whether or not you signed that letter (paper shown to witness)?

A. Yes, I wrote that letter and signed it.

Q. Did you mail it at about the date it is dated?

A. Yes, December 8th.

Mr. Twining: I offer it in evidence.

(The paper referred to is marked Ex. P41.)

Q. And is that the one that you referred to in your testimony? A. Yes, in the testimony.

Mr. Twining: I offer it in evidence.

(The paper refered to is marked Ex. P42.)

Q. State whether or not it was written in pursuance of any instructions from anybody?

Q. (By Mr. Twining). Will you look at the book and state whether or not there are any entries there made in the way that you

testified that the other entries were made showing whether or not you went on a Canadian trip in November, 1914?

Q. Now, will you state generally what the cash-book contains; that is, the number of pages and the period it covers and whether or not it relates subsequently to the matters that you have testified to or to other matters, and if so, what matters, and also as to whether or not all the entries in the book are in your handwriting?

Q. I show you the words "Permit inspection" on Exhibit P37 (paper shown to witness). Do you know of your own knowledge whether or not these words have any trade significance?

Q. What is the trade meaning of those words?

Q. Will you state what the railroad practice is when a shipment is started from the Coast to the east with regard to the bill of lading or a copy of the bill of lading? What is done?

Q. Now, during the course of your experience have you made attempts to remove or inspect the hops at the yard where you did not have a bill of lading which contained the words "Permit inspection" or similar words?

57. Because the following question was overruled:

To the witness, Frederick Hubach:

Q. And what was your report?

58. Because the following questions were overruled:

To the witness, Dennis F. Collins:

Q. What do you use the Brewers' Bulletin for, what do you take it for, what do you consult it for, General?

Q. What was the price of that sale?

59. Because the following question was overruled:

To the witness, George Seeber:

Q. At what price?

60. Because the Court would not permit the defendant to show that contracts for hops of the quality mentioned in the contract were actually made by the witness, George Seeber, for the years 1918, 1919 and 1920 and stating "I think the evidential force of it would be so weak that it would be hardly worth while to take it. I sustain the objection."

61. Because the Court during the trial and during the testimony of the witness, Phleger, erroneously made the following ruling, "I think the evidence as to Mr. Phleger's authority is stictly limited all along by specific instructions that he had. He had no general authority."

The defendant reserves the right to apply to the Court for leave to file additional reasons to the admission and rejection of evidence and to rulings of evidence by the trial Court on the depositions taken at California, the reason the same are not filed at this time being that the original record of said rulings have been mislaid and are not on file with the Clerk of the Supreme Court, and the defendant has at its expense instructed the stenographer to reprint another copy of said evidence. Dated March 26th, 1919.

STAMLER & STAMLER,
Of Counsel with Defendant.

New Jersey Court of Errors and Appeals

E. Clemens Horst Company,
Plaintiff-Appellee,

vs.

Peter Breidt City Brewery,
Defendant-Appellant.

On Appeal.

BRIEF FOR PLAINTIFF-APPELLEE.

I.

Statement of Facts.

The statement of facts in the appellant's brief is inadequate and it is considered necessary to make the following statement.

The judgment appealed from was rendered in an action for damages for breach by the buyer of a written contract which is set forth at length on pages 8-12 of the state of the case. The defendant filed a counterclaim in two counts. The first seeks to recover $339.69 for freight paid upon the first shipment of hops in the belief that they would be satisfactory, and the expense of carting them to the defendant's brewery, upon the ground that the hops were not of the agreed quality. The second count seeks to recover $15,000 upon the theory that the plaintiff broke its contract with the defendant by refusing to deliver hops of the agreed quality.

Plaintiff's reply contains a number of objections in point of law to the defenses in the answer and the allegations of the counterclaim, which will be discussed hereafter.

The facts proved are as follows:

It is admitted by the pleadings that the plaintiff and defendant entered into the contract above referred to. On March 26, 1914, the contract was duly approved by the plaintiff (case, p. 3, ll. 30-34; p. 14, l. 35, and Exhibit P. 23). On September 12th or 14th, plaintiff shipped from San Francisco, California, to Chicago, 100 bales of hops in car S P 24125, which on or about September 17, 1914, were diverted to the defendant at Elizabeth, N. J. (case, pp. 222-224; Exhibit P. 28, case, p. 883, and Exhibit P. 29, case, p. 884). Samples had previously been sent by

plaintiff to defendant (Vol. II, p. 768), but had not been approved. On September 19, 1914, plaintiff sent defendant the original bill of lading for this shipment (Exhibit P. 37, case, p. 890a). As the time for a letter to travel between the Atlantic and Pacific coast is four days (case, p. 210), the bill of lading must have reached the defendant on September 23rd or 24th. The contract provided that the place of delivery was "on or at cars at Elizabeth" and on October 1st the shipment arrived there (case, pp. 726, 733, 739). The bill of lading directed the railroad company to permit the defendant to inspect the shipment at the freight yards (Exhibit P. 37). The ordinary inspection would have consumed but a few moments (case, pp. 769, 770). The day after the arrival of the hops at the place of delivery, defendant's servant went to the freight yards, took possession of the hops, loaded them on trucks without first inspecting them and carted them back to the defendant's brewery and unloaded them (case, pp. 735, 739). It must then have paid the freight and surrendered the bill of lading to the railroad company (case, p. 805, Exhibit P. 37). Some time after the hops had been taken into the defendant's brewery, its president claims to have objected to plaintiff's New York sales agent, Mr. Phleger, that the shipment was made prior to the defendant's approval of the sample. No objection to the shipment on this, or any other, ground was made in writing or by telegraph until the defendant wrote plaintiff a letter dated October 12th (Exhibit P. 8), which could not have reached plaintiff's home office until October 16th or 17th. Thereafter defendant used one bale of hops (case, pp. 749, 750, 786). On December 9th, 1914, 99 bales were shipped back to the plaintiff in California (case, pp. 735, 785, 786), and refused by plaintiff when they arrived (case, pp. 235, 236). The contract price of the hops in question was 17½¢ a pound, and the amount sold was 100 bales of each of the crops of the years 1914, 1915, 1916, 1917 and 1918 (Exhibit P. 1). The gross weight of the 1914 installment was 19,411 pounds (case, pp. 102, 103, 483); the tare was five pounds per bale, or 500 pounds (case, p. 13), making the net weight 18,911 pounds, the contract price of which was $3,309.42. The defendant admits that it paid the freight, amounting to $339.69 (case, p. 17). The balance due on October 1, 1914, on account of the 1914 installment was, therefore, $2,969.73. Interest at 6% to October 26, 1918, the date of judgment, was $724.93. The average gross weight of a bale was 200 pounds (case, pp. 62, 106), the tare 5 pounds (case, pp. 8 and 13) and

the net weight 195 pounds. The cost of production was 6¼¢ a pound, and the cost of transportation 1¢ a pound (case, pp. 184, 187). The profit was, therefore, 10¼¢ a pound. The profit per bale was $19.9875 and the profit on 400 bales (100 bales each for the years 1915, 1916, 1917 and 1918) was $7,995.00 Interest from October 1, 1914, to October 26, 1918, at 6% amounted to $1,951.65.

Volumes 1 and 2 of the state of the case are supplemented by a pamphlet containing Exhibits P. 37 to P. 43, both inclusive, and another supplemental pamphlet containing Exhibits P. 5 and P. 23, together with a stipulation showing that certain contentions made on behalf of the defendant at the trial were renewed in its brief before the Trial Judge when the case was submitted.

II.

Grounds of Appeal.

Sixty-one grounds of appeal were filed by the defendant. The only ones urged in the defendant's brief are the following:

1. That the Trial Court should not have entered judgment for the plaintiff upon the pleadings.

2. Alleged improper admission of evidence as to limitations of Mr. Phleger's authority.

3. Alleged improper exclusion of the Brewer's Bulletin showing price quotations.

4. The contention that paragraph 14 of the contract is not controlling.

5. The contention that Mr. Phleger had authority to modify the contract and to waive a breach of it.

6. The contention that plaintiff is estopped from relying on Section 14 of the contract and that defendant's breach has been waived.

7. The contention that the allowance as damages of the difference between the cost of production and cost of transportation and the contract price is erroneous.

8. The contention that interest was improperly allowed.

Under *Aschenberg* v. *Mundy,* 76 N. J. L. 352, and *Marten* v. *Brown,* 80 N. J. L. 143, affd. 81 N. J. L. 599, no other grounds of appeal can be considered.

III.

Brief of Argument.

1.

Judgment was properly entered for the plaintiff upon the facts admitted by the pleadings.

The complaint contains eight counts. Each states a separate and complete cause of action, but the counts may properly be grouped into three classes,—the first, consisting of counts 1, 2 and 3 which proceed upon the theory that the defendant's breach consisted in its refusal to pay for the first installment of hops after acceptance; the second, consisting of counts 4 and 5 which proceed upon the theory that defendant's breach consisted in its refusal to accept the hops; and the third, consisting of counts 6, 7 and 8 which proceed upon the theory that, without regard to whether or not there had been a prior breach, plaintiff made a tender of a new lot in substitution of the lot previously delivered, within the time and as provided in Section 15 of the contract and that defendant's breach consisted in its refusal to accept any shipment tendered under that clause.

While the causes of action alleged in the three counts are inconsistent, they are not for that reason objectionable in view of the Supreme Court Rule 38, which was one of the rules incorporated by the Legislature in the Practice Act of 1912 and which provides that,

> "Inconsistent counts in the complaint or counterclaim and inconsistent defenses in the answer are not objectionable."

The first and second counts of the complaint alleged that plaintiff and defendant are New Jersey corporations; that they entered into the contract attached to the complaint as Schedule A and set forth in the record on pages 8 to 12; that the contract was confirmed in accordance with its provisions; that 100 bales of hops of the crop of the year 1914 were shipped by plaintiff to defendant, the agreed price of which was 17½¢ a pound; that defendant paid $339.69 freight on said shipment, for which it has been credited; that the 100 bale shipment was delivered on cars at Elizabeth, N. J., on October 1, 1914, taken by defendant into its brewery at Elizabeth and retained for more than five days without delivering any claim to plaintiff by telegraph or in writing of its right to reject the same or to

allowance on account of quality; that by reason thereof the purchase price of $3,309.42, less the sum of $339.69 paid by defendant for freight, leaving a balance of $2,969.73, became due on October 1, 1914, and that the defendant has refused to pay any part of it and that plaintiff has treated the entire unfulfilled portion of the contract as violated (R. 1 to 4; 5, 10-33).

The defense to the first count admits all of these allegations, except that the price became due, but seeks to avoid the effect thereof by alleging that the hops were not shipped on approved sample and that it was not allowed a reasonable time within which to approve or disapprove of samples. The defense to the second count makes the same admissions and, in addition to the grounds set up in the first defense, attempts to avoid the consequences thereof by alleging that the hops were not of the quality contracted to be furnished.

Upon the facts thus alleged and admitted, plaintiff is entitled to judgment for the reasons set forth in the objections to the defenses to the first and second counts of the complaint and to the counterclaim in point of law (case, pp. 24-28).

Upon the arrival of the hops at Elizabeth, defendant had two courses open. It could decline to have anything to do with the hops until it had passed upon the samples or it could waive the matter of samples and accept the shipment relying on the contract right to examine the hops and claim allowance if necessary within five days. It very sensibly adopted the latter course, surrendered its bill of lading to the carrier and removed the hops to its own warehouse, where it held them for eleven days without making any objections in writing or by telegraph on account of quality or otherwise.

Even if it had approved samples, it would have still been necessary for defendant to examine the shipment to determine whether or not the mass conformed to the samples. There was no reason why it should make two examinations, one of the sample and the other of the mass, when it could just as easily make one examination of the mass. As the Trial Court said, "Why bother about samples when the goods themselves were on hand and open to inspection." As a matter of fact, the samples must have been satisfactory for, if they had not been, defendant would have had no reason to believe that the shipment would be satisfactory, yet it expressly states in its answer that it removed the shipment to its warehouse believing that the hops were of the quality provided by the contract.

Section 47 of the Sales Act provides that:

> "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

But, as the Court said in *McNeal* v. *Braun*, 53 N. J. L. 617, 621, quoting from the opinion in *Calcutta Co.* v. *De Mattos*, 32 L. J. Q. B. 322:

> "There is no rule of law to prevent the parties from making whatever bargain they please."

It was therefore competent for the parties to say what number of days would afford a reasonable opportunity of examining the goods. The provision of the contract that any claim on account of quality should be waived unless objection should be made by telegraph or in writing within five days after the arrival of the hops at the place of delivery, is binding upon the parties. As the defendant admits by its answer that it did not make any objection in writing or by telegraph within this five-day period, it must be held to have waived any objection on account of the quality of the hops and to have accepted the shipment.

Having accepted the hops, it became the defendant's duty to pay for them at once under the provisions of paragraph 2 of the contract that the terms were to be net cash and its refusal to do so, under paragraph 6 of the contract, constituted a breach by the defendant of the entire contract.

In view of the specific allegations of fact, the denial in the answer that the price is due and the denial that defendant violated the contract cannot be held to constitute a defense. Whether the price of the goods sold is due and whether there has been a violation of the terms of the contract are conclusions from the facts proved or admitted. Under the rule in *Matlack* v. *Public Service Corporation*, 83 N. J. L. 118, they cannot be considered in determining the legal effect of the answer. Having admitted the facts, the question of the proper conclusion to be reached from them is not for the defendant, but for the Court.

That allegations contained in paragraph 23 of the answer, which is part of the defense to the 6th, 7th and 8th counts, and allegations in the counterclaim are inconsistent with the admissions made by the defenses to the first and second counts, can

have no effect on the plaintiff's right to judgment thereon. Under Supreme Court Rule 57,

> "Where the complaint is for more than one cause of action set forth in several counts, each separate matter of defense should be preceded by a designation of the cause of action which it is intended to meet, in this manner, 'First Defense to First Count,' 'Second Defense to First Count,' 'First Defense to Second Count,' and so on."

Each defense must stand or fall by itself. As was said in *Meyer* v. *Nichelsburg Brothers,* 37 N. J. L. J. 36, 38:

> "The plaintiff in support of his motion to strike out insists, first, that the plaintiff is entitled to judgment on the admissions of the answer. That is to say, the plaintiff says that by going over the different defenses and culling out a statement here and a statement there, he can construct a patch-work total which will admit away the defendant's case. This might be very well if it were not that Rule 38 of the Supreme Court (Rule 24, Pr. Act, 1912) permits inconsistent defenses. The classical example of this is the well-known action for the price of a copper boiler to which the defendant pleaded that he did not buy it; that the plaintiff did not sell it; that the plaintiff had never had it to sell; that there was a hole in it so that it could not hold water; and that there never was any such boiler. It might be easy to pick out fatal admissions if the plaintiff could range over the whole of such illogical pleading. But this method is illegitimate. Each defense must be taken by itself."

In *Hall* v. *Austin*, 11 Fed. Cas. 209, No. 5,925, the Court stated in the case thus (p. 211):

> "Each plea was to be considered as if it were pleaded alone. In the language of Lord Ch. J. Willis, one plea 'cannot be taken in to help or destroy another' but that 'every plea must stand or fall by itself.'"

As the matters alleged by the defenses in the answer to the first and second counts of the complaint do not constitute any legal defense to the causes of action set up by these counts, but on the contrary admit facts which clearly entitled plaintiff to a recovery, the plaintiff was entitled to judgment.

After concluding to grant a motion for the entry of judgment for the plaintiff on the pleadings (R. 40 to 46), the Trial Judge reconsidered the matter and took all of the evidence, but after considering the argument and briefs, adhered to his original conclusions (R. 922, 29-32).

The entry of judgment on the pleadings is fully warranted by the authorities.

In *The Columbia Rolling Mill Co.* v. *The Beckett Foundry and Machine Co.*, 55 N. J. L. 391, affirmed without opinion, 56 N. J. L. 714, an action was brought to recover the price of certain machinery manufactured by the plaintiff for the defendant under a written agreement. The contract required the plaintiff to deliver the machinery f. o. b. cars Erie Station in Jersey City, and contained the following clause:

> "The whole or any part of the above work, before being paid for, shall be subject to the approval of the general manager of the (defendant) company, Mr. W. L. Brockway; payments to be made, 70 per cent. 30 days after date of each delivery, and the balance 30 per cent. when the machinery is in working order, but time shall not exceed 90 days after date of last delivery at Erie station."

The contract was dated January 13, 1890. The earliest delivery was made about April 7, 1890, and the last about June 20, 1890. The Court said, at page 392:

> "At the trial in the Hudson Circuit, the defendant requested the court to non-suit the plaintiff for want of evidence of approval by the general manager, and to direct a verdict for the defendant, on the same ground, and also asked the court to charge the jury that, 'in order that they may find anything for the plaintiff, they must first find that the plaintiff has obtained the approval of Mr. Brockway, as required by the contract, or that such approval was fraudulently withheld.'
>
> "On the refusal of the court to comply with these requests are based the second, eighteenth and nineteenth assignments of error, which, with the twentieth, are the only assignments discussed before us by counsel for the defendant.
>
> "These assignments are not well founded.
>
> "Under a proper construction of the clause in the contract above quoted, it did not impose upon the plaintiff the duty of showing affirmatively the approval of the defendant's general manager. When goods are manufactured or sold, and delivered subject to approval, it is incumbent on the purchaser, unless he approves, to express disapproval within a reasonable time or *within the time limited by the contract,* and the absence of such expression is sufficient evidence of approval, or at least of a waiver of the right to insist upon approval as a condition precedent to a recovery by the seller."

And continues, at page 393:

> "In the present case the contract fixed the limit of the time within which disapproval was to be declared. In effect it provided that, if the general manager did not disapprove of any particular machinery delivered, within thirty days after its delivery, then seventy per cent. of the price of that machinery would become due, and if he did not disapprove within ninety days after the last delivery, then the balance of the price should become due.
>
> "The testimony shows that no cause for disapproval was discovered or thought of by Mr. Brockway before September 12th, 1890, and seems to indicate that no disapproval was expressed by him to the plaintiff before October, 1890, and his disapproval then related to the gears only. Before September 12th, the plaintiff had become entitled to seventy per cent. of the contract price, and if there was no disapproval before October, it had then become entitled to the remaining thirty per cent., subject only to such deduction as should be made for actual defect in the quality of the machinery, if there was any."

In *Sturtevant Mill Co.* v. *Kingsland Brick Co.*, 74 N. J. L. 492, the contract sued upon provided that if after thirty days' trial the automatic feeder rolls sold under the contract did not prove satisfactory, the buyer would load them on cars at its plant immediately after the expiration of above specified time. A test having been made, and the rolls appearing to be unsatisfactory, the defendant telegraphed the plaintiff that it was arranging for a re-shipment of the rolls, but so far as appeared, the rolls were not loaded on the cars at the defendant's plant immediately or at any other time after the expiration of the time specified for their trial. It was held that the defendant could not retain the machine and by giving notice to the plaintiff of its failure to fulfill the guaranty rescind the contract and escape liability to pay the price agreed upon. The Court of Errors said, at page 496:

> "In the contract in question the parties have made special provision as to what shall happen in case the rolls upon trial did not prove satisfactory, viz., the defendant was to load them on cars at its plant immediately after the expiration of the thirty days' trial. The defendant cannot substitute a right to rescind the contract for breach of the guaranty contained in it, upon notice to the plaintiff, for what he has agreed in his contract he will do upon the happening of such breach, nor can he add to the contract such additional right.

"The plaintiff was entitled to recover the price of the rolls agreed upon in the contract, and the motions of the defendant for nonsuit and for direction of a verdict were properly refused."

The leading English case on the point is *Humphries* v. *Carvalho,* 16 East 45, which contains the following:

"The plaintiff declared in assumpsit upon a special agreement made on (Saturday) the 21st of December, 1811, whereby he agreed to buy of the defendant, and the defendant sold to him, five casks of ipecacuanha at 13s. 6d. per pound, duty paid, the quality to be approved *on Monday then next,* paying for the same at a discount of £2 10s. per cent in 14 days, or by bill at 4 months; and then alleged as a breach, that the defendant did not, nor would, though requested on the *Monday* next, &c., the 23d of *December,* 1811, produce the said casks, &c., to the plaintiff for his approval and inspection as to quality, nor had the defendant yet delivered the said casks, &c., but refused so to do. This was laid in various ways. At the trial before Lord *Ellenborough, Ch. J.,* in *London,* the plaintiff called as a witness the broker who made the contract stated in the declaration between the parties; and he proved that he had agreed to purchase the five casks of ipecacuanha of the defendant for the plaintiff, at the price stated, on *Saturday,* the 21st *of December,* 1811, *subject to the plaintiff's approval of the quality on the Monday following;* and that the written note of the contract (commonly called the *bought note*), which he sent to the plaintiff on the *Saturday,* had these words on the face of it '*quality to be approved on Monday*'; but no *sold-note* was sent on that day to the defendant, because the broker having met him on the same day, and told him that he had sold the ipecacuanha to the plaintiff, upon the terms stated, there was no occasion to send him a written note. The broker further proved that it was the custom of the trade for either party to return the contract, if he disapproved of it, within 24 hours. That the plaintiff not having returned the contract, nor signified any disapproval, the broker on *Friday,* the 27th of December, sent the sold note to the defendant, with the words '*quality to be approved on Monday,*' struck out; but the defendant returned it again immediately to the broker; upon which the broker went to the defendant on the same day, and insisted on his completing the contract; but he refused to do so, on account of its not having been sent to him on the *Monday.* On these facts his Lordship was of opinion that the defendant having agreed on the *Saturday* to the actual sale of the commodity, at the price

stated, subject to the plaintiff's approval of the quality on the *Monday,* and the plaintiff having accepted the contract on those terms, and not having returned it on the *Monday,* which was to be taken as an approval by him of the contract, both parties were bound by it; and under that direction the jury found a verdict for the plaintiff for £41 18s. 9d."

* * * * * * *

"*Lord Ellenborough, Ch. J.* Here was a sale-note sent, and an actual sale made by the defendant through the intervention of the broker, who communicated to the defendant, on the same day, that he had sold the goods; and it was not merely an offer to sell, as in that case; but the buyer had an option of renouncing the purchase on the *Monday,* which he did not do; and therefore it stood absolute.

Grose, J., agreed.

Bayley, J. (a) The argument of the defendant is, that if a contract gives an option to one of the parties to determine it, the law will give the like option to the other, until both are bound; but here neither of the parties had an option after the *Monday;* for the plaintiff not having renounced the contract within that time, must be taken to have approved of it."

Defendant contends, apparently, that if there is a good defense pleaded to any count, judgment could not be entered against it on the pleadings. This is not the law. If there is a single count in the complaint to which no defense is pleaded, the action of the Trial Court should be sustained. *Gillespie* v. *Ferguson Co.,* 78 N. J. L. 470, 473; *Sadler* v. *Young, id.* 594; *Breintnall* v. *Sadler,* 82 N. J. L. 405; *Solomon* v. *Public Service Railway Co.,* 87 N. J. L. 284, 286.

Sections 57 and 58 of the Practice Act, cited by the defendant as authority for the proposition that the Court could not enter judgment upon the pleadings because of the allegation in paragraph 7 of the answer that defendant had not violated the contract, have no application. They both refer to the proof necessary for the issue of a *capias* and the arrest of a defendant. Supreme Court Rule 84, cited in support of the same proposition, provides that

"No summary judgment shall be entered except by virtue of an order of the Court or a Justice at chambers, and the application for such judgment may be made on *ex parte* affidavits."

There is no provision that this is the only manner in which it can be made. The rule can have no application where the Trial Court had heard all of the evidence in the case. Moreover, it is submitted that the rule could not in any case apply to a situation where all of the facts necessary to sustain the judgment are admitted by the pleadings, but that affidavits would only be necessary to prove some fact which did not appear upon the record.

2.

The judgment is sustained by the evidence.

Even should the Court feel that the judgment should not have been entered upon the pleadings, it is obvious that the defendant has not been prejudiced. After announcing his decision to enter judgment upon the pleadings the Trial Court reconsidered and took all of the evidence in the case. After all of the evidence was in and the case had been argued, the Trial Judge decided to adhere to his original decision to enter judgment upon the pleadings. It is well established that error which is not prejudicial to the appellant is not ground for reversal. *Van Ness* v. *No. Jersey Street Ry. Co.,* 77 N. J. L. 551; *Butterhof* v. *Butterhof,* 84 N. J. L. 285; *Dennery* v. *Great A. & P. Tea Co.,* 82 N. J. L. 517; *Bouquet* v. *Hackensack Water Co.,* 90 N. J. L. 203. Where the decision of the Trial Court is correct, it should be affirmed, although the ground assigned by the Trial Court cannot be supported. *Dimock* v. *U. S. National Bank,* 25 Atl. 926; *Mahoney* v. *Metropolitan Life Ins. Co.,* 80 N. J. L. 136, 142; *Meisel* v. *Merchants National Bank,* 85 N. J. L. 253, 255; *McMichael* v. *Horay,* 100 Atl. 205. And the decision of the Trial Court on questions of fact will not be reviewed if there is any evidence to support it. *Aschenberg* v. *Mundy,* 76 N. J. L. 352; *Marten* v. *Brown,* 81 N. J. L. 599. Moreover, this Court will assume sufficient findings of fact upon the part of the Trial Court to support the judgment if there is any evidence to sustain them. *Meisel* v. *Merchants National Bank,* 85 N. J. L. 253. This is true even though in the opinion of this Court the Trial Judge might properly have found otherwise than he did. *Knickerbocker Ice Co.* v. *Anderson,* 31 N. J. L. 333.

The judgment in this case is amply sustained by the evidence.

(A) *The evidence shows that defendant accepted the shipment of 100 bales of hops in 1914.*

On September 19th, 1914, the plaintiff sent the defendant the original bill of lading for the first installment of hops, directing the railroad company to permit the defendant to inspect the shipment at the freight yards (Exhibit P. 37). The ordinary inspection would have consumed but a few moments. The contract provided for delivery "on or at cars" at Elizabeth, where the hops arrived on October 1st, 1914. The next day the defendant's servant went to the freight yard, took possession of the hops, loaded them on trucks without first inspecting them and carted them back to the defendant's brewery and apparently must then have paid the freight and surrendered the bill of lading to the railroad company (pp. 839, 840). Some time after the hops had been taken into the defendant's brewery, the defendant's president claims to have objected to the plaintiff's New York sales agent, Phleger, that the shipment was made prior to the defendant's approval of a sample. No objection to the shipment on this ground or any other ground was made to the home office until the defendant wrote the plaintiff a letter dated October 12 (Exhibit P. 8, case, p. 867) which could not have reached the home office until October 16th or 17th. The defendant has at all times refused to pay the purchase price of the hops.

The Sale of Goods Act (Comp. Stat., pp. 4645, 4658) provides:

> "48. ACCEPTANCE BY BUYER.—The Buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after a lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

There was an acceptance of the shipment under any one of the three alternatives mentioned in the statute.

(a) *The buyer intimated to the seller that it had accepted the hops.*

The buyer retained the original bill of lading in its possession for a week or more before the arrival of the shipment without notifying the seller that the shipment would not be accepted until after approval of a sample and without intimating to the seller that the shipment would be rejected on this ground. It paid the freight, surrendered the bill of lading without objection and took the hops into its possession. In thus electing to take

the hops without objecting to the shipment on the ground that no sample had been previously approved or upon any other ground, and without even availing itself of its privilege of inspecting the hops at the freight yard, it intimated to the seller as unequivocally as was possible that it had accepted the hops.

(b) *The hops were delivered to the buyer and it did acts in relation to them which were inconsistent with the ownership of the seller.*

It was inconsistent with the ownership of the seller for the defendant (1) to pay the freight, (2) to obtain the original bill of lading and subsequently surrender it to the railroad company; and (3) to take the hops to its brewery without objection and without an inspection, which could have been made in a few moments at the freight yard, and afterward to use a portion of them. Everything the defendant did prior to the alleged conversation between Collins and Phleger on October 6th was inconsistent with the plaintiff's ownership and was an assertion of the defendant's ownership and right to possession of the hops.

(c) *After the lapse of a reasonable time the buyer retained the hops without intimating to the seller that it had rejected them.*

The fluctuations in the market for the 1914 crop and especially the fact that the market dropped after September, 1914 (case, p. 191) made it essential that the buyer should notify the seller promptly if it proposed to reject the shipment. There was no reason why there should have been a single day's delay. If the buyer wished to stand upon its right to approve a sample before accepting a shipment, it should have so notified the seller when it received the original bill of lading about a week before the shipment arrived. Certainly it should have availed itself of its right to inspect the shipment at the yard before taking it into its brewery. Instead, it accepted the hops, paid the freight, wrote on the invoice "Received in good order, Hubach" —Hubach being the defendant's brewmaster—(case, pp. 332, 811, Exhibit P. 5), took the hops into the brewery and kept them there for some days before it claims to have notified anyone connected with the plaintiff that there was any objection to the shipment or to the plaintiff's action in sending the shipment before receiving defendant's approval of a sample. Even after the defendant's president learned that the hops had arrived at

the brewery he did not act promptly. He does not claim to have done more than to have left instructions to have someone call up the New York sales agent on the telephone on a Saturday and leave word that he was to call at the brewery immediately. But when the sales agent came to the brewery the Monday following, the defendant's president was not there. The record will be searched in vain for any evidence of an attempt to reject the shipment until after it had been accepted within the meaning of any one of the three alternatives of Section 48 of the Sale of Goods Act.

The hops having been accepted, the buyer's right to reject or receive an allowance by reason of any defect in the quality of the hops was governed by Section 49 of the Sale of Goods Act and Section 14 of the contract. The former provides:

> "In the absence of express or implied agreement of the parties acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

In the present instance there was an express agreement (Section 14 of the contract) which limited the time within which the buyer might reject the shipment or claim allowances on account of its quality. It is conceded by the answer that the defendant did not assert its claim within the time limited in Section 14 of the contract and that it has not paid for the hops.

Defendant's contention under Point Four of its brief that paragraph 14 of the contract is not controlling is not well founded and its insistence that shipment was not made under the contract is absurd. All of the evidence indicates that it was made under the contract and that it was so treated by the defendant itself. Defendant's attempt to establish that the shipment of the hops was a mere offer and that their acceptance by the defendant merely raised an implied contract, cannot be sustained. An implied contract cannot exist where there is an express contract embracing the identical subject. *Voorhees* v. *Executors of Woodhull,* 33 N. J. L. 494; *Osterling* v. *Cape May Hotel Co.,* 82 N. J. L. 650, 653.

(B) *Plaintiff was entitled to treat defendant's action in refusing to pay for the 1914 shipment as a breach of the entire contract.*

The rule at present in force as to a breach in respect to a single installment in a contract such as that under consideration, is laid down in *DuPont* v. *United Zinc Co.*, 85 N. J. L. 416, 419, in which Justice Swayze said:

> "The rule formerly established in Blackburn *v.* Reilly, 18 Vroom 290, has been changed by statute. *Sale of Goods Act,* Sec. 45; *Comp. State.*, p. 4657. The question now is whether the breach in failing to deliver monthly installments is so material as to justify the plaintiff in refusing to proceed further and suing for damages, or whether the breach is severable, giving rise to a claim for compensation but not to a right to treat the whole contract as broken. This is ordinarily a question for the jury, but as in other cases, may be so clear that the court may decide it."

The question was decided by the Trial Judge sitting without a jury and in either view his decision was correct.

The parties to the contract had specifically provided by Section 6 of the contract that:

> "The seller may treat all or any part or parts of the entire unfulfilled portion of this contract as violated by the buyer upon or at any time or times after buyer's refusal to pay for any hops."

It was entirely competent for the parties to make this agreement and the defendant cannot now evade its effect.

Aside from this provision in the contract, the decision of the Trial Court should be sustained under the decision in *Roehm* v. *Horst,* 178 U. S. 1. There the president of the plaintiff, and others, brought action upon a contract similar to that here involved, by which they agreed to sell Roehm 1,000 bales of prime Pacific coast hops of the crops of a number of years. 600 bales had been delivered, accepted and paid for, so that in July, 1896, there remained undelivered 400 bales. These were deliverable at the rate of 20 bales a month from October, 1896, to July, 1898, both inclusive, excepting the months of August and September, 1897, when no deliveries were called for. Roehm having refused to accept delivery of any of the remaining 400 bales, Horst brought suit and recovered damages for the breach.

Chief Justice Fuller first discussed the anticipatory breach cases and adopted the rule of the leading case of *Hochster* v. *De la Tour*, 2 El. & Bl. 678, saying at page 20:

> "If in this case these ten hop contracts had been written into one contract for the supply of hops for five years in instalments, then when the default happened in October, 1896, it cannot be denied that an immediate action could have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the two remaining years. But treating the four outstanding contracts as separate contracts, why is it not equally reasonable that an unqualified and positive refusal to perform them constitutes such a breach that damages could be recovered in an immediate action? Why should plaintiff be compelled to bring four suits instead of one? For the reasons above stated, and having reference to the state of the authorities on the subject, our conclusion is that the rule laid down in *Hochster* v. *De la Tour* is a reasonable and proper rule to be applied in this case and in many others arising out of the transaction of commerce of the present day."

(C) *Plaintiff never waived defendant's breach of the contract.*

Defendant claims that on October 6, 1914, its president had a conversation with plaintiff's sales agent, Mr. Phleger, and that as a result of what transpired at that time and at subsequent interviews, plaintiff waived its right to insist upon defendant's breach. Nothing which Mr. Phleger said or did can properly be so construed. Mr. Phleger testified positively that the only offer he made to take back the shipment was qualified, as was his principal's offer of adjustment set forth in its letter of October 17, 1914 (Exhibit P. 9, p. 869), its telegram of November 9, 1914 (Exhibit P. 13, p. 872), its night telegram of November 27, 1914 (Exhibit P. 15, p. 874), its registered letter of the same date (Exhibit P. 16, p. 875) and its night letter of November 29, 1914 (Exhibit P. 20, p. 877). He said (p. 656):

> "I showed General Collins a further line of samples which I explained to him were samples which I was submitting to him for his approval against contract delivery and that, after his approval of any or all of these samples, Mr. Horst had instructed me to say to him that we would accept the return of the hops which *he had already accepted on his contract,* replacing them with hops like the sample he would approve. General

> Collins called in his brew-master and we examined the samples on a long table, looked at them all, and they were all rejected as being unsatisfactory by General Collins."

This is certainly no more than an offer of adjustment which was not accepted. It is conceded that no other hops were ever, in fact, accepted by the defendant. It is well established that an offer of settlement which is rejected will not be construed to be a waiver by a party of his rights. *Miller* v. *Halsey,* 14 N. J. L. 48, 51; *Gardner* v. *Short,* 19 N. J. Eq. 341, 342; *Wrege* v. *Westcott,* 30 N. J. L. 212, 214; *Lehigh Valley Terminal Ry. Co.* v. *Currie,* 54 N. J. Eq. 84, 93-94; *Scheurle* v. *Husbands,* 65 N. J. L. 40, 45; affirmed 65 N. J. L. 681.

Defendant in Point V of its brief insists that Mr. Phleger was the plaintiff's agent and that his actions were binding upon the plaintiff. It is also urged that the refusal of the Trial Judge to charge to this effect was erroneous and constitutes sufficient ground for reversal. This contention is unsound. The question was one of fact, and the decision of the Trial Court thereon is not subject to review, as there is ample evidence that Mr. Phleger's authority to act for the plaintiff was limited to the solicitation of orders to be transmitted to the company for its acceptance, if acceptance was deemed advisable. (Case, pp. 293-296, 108-111, 646, 654, 656, 678.)

Mr. Phleger's position was that of a sales agent having a limited authority to act for the company. The situation is similar to that in the leading case of *Law* v. *Stokes,* 32 N. J. L. 249, where Depue, *J.,* said, at page 251:

> "Sheridan was a mere salesman for a commission. As such he had authority to sell goods on credit, but not to discharge purchasers from debts incurred by them in purchasing goods through him, of the plaintiff."
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> * * * * * * *
>
> "A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agents to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent, within the scope

> of the authority he holds the agent out as having or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such cases, would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established, it must flow from the act of the principal. And when established it cannot, on the one hand, be qualified by the secret instructions of the principal, nor, on the other hand, be enlarged by the unauthorized representations of the agent."

The cases on the point are collected in 2 *Corpus Juris,* pp. 645, 646, where the author says:

> "Presumptively an agent is employed to make contracts, not to rescind or modify them, to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests for his principal, or to increase his obligations and liabilities for the mere benefit of third persons, unless the principal knows or approves of such modifications by the agent."

In *Phoenix Pottery Co.* v. *Perkins Co.,* 79 N. J. L. 78, the Court said, at pages 81, 82:

> "The goods for which suit is brought were billed to the defendant on August 25th and 28th, and on September 5th, 11th, 18th and 26th in the year 1908. It appears that the order for these goods was taken by William L. Cauley, a sales agent for the Phoenix Pottery Company."
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> * * * * * * *
>
> "The Trial Court ruled that neither the conversation between Mr. Cauley and Mr. Perkins at the time the order was given, nor at the time the check was delivered, was competent to bind the Phoenix Pottery Company. This ruling was obviously accurate, for no authority existed in Mr. Cauley, by reason of his authorization to take orders and state rates, to agree that his principal should discount bills by allowance for defective goods sold by other companies. Such an arrangement was neither within the implied nor the apparent authority of Mr. Cauley."

Defendant cites no New Jersey cases as authority for its contention that plaintiff's agent had authority to bind his principal by a waiver of the terms of the contract. All of the cases he cites are Iowa decisions and none of them raised the questions here involved. *Pitsinowsky* v. *Beardsley,* 37 Ia. 9; *Warder*

v. *Robertson,* 39 N. W. 905; *McCormick* v. *Brower,* 55 N. W. 537; *Osborne* v. *Backer,* 47 N. W. 70, are none of them cases where the contract required a written notice to be given. In *Peterson* v. *Walter A. Wood Co.,* 66 N. W. 96, the provisions differed from that in the contract here involved, in that it provided for written notice to the *agent* from whom the purchase was made. In all of the other cases, the waiver relied upon was the result, not of the unauthorized act of an agent, but of the act of the principal itself.

Defendant urges in the sixth point of its brief that by reason of the alleged waiver on the part of Mr. Phleger, plaintiff was estopped from insisting upon its right to receive a notice from the defendant in writing within five days, as provided by Section 14 of the contract. But the plaintiff cannot be estopped by any unauthorized acts on the part of Mr. Phleger.

The defendant was charged with notice of the limitations which the plaintiff had placed upon its sales agent's authority to act for it:

(a) *Because of the provisions of the contract.* Paragraph 8 provides that the contract was

> "subject to telegraphic or other written confirmation sent by seller to address of buyer on or before ten days from the date hereof."

While it is true that a letter of confirmation was sent the defendant by Mr. Phleger, it cannot be fairly claimed that there was any "holding out" of him by the plaintiff as a general agent having more than a limited authority to solicit orders and to accept the same subject to subsequent approval thereof by the company, in view of the explicit terms of the contract and of the fact that a letter of confirmation was also sent from the home office (case, pp. 294, 295, 768). The fact was, just as the contract indicated, that Mr. Phleger had to receive and did receive instructions from San Francisco before the confirmation could be given by him (case, p. 294, Exhibits P. 38 to P. 43). Paragraph 7 of the contract provides that:

> "The terms and conditions of this written agreement comprise the entire agreement and no variation from same shall be valid unless made in writing subsequent hereto."

Paragraphs 13, 14 and 15 define in detail the buyer's rights in case of dispute, defects in quality of the shipments, and dissatisfaction with any shipment for any cause. In view of these

provisions of the contract, the defendant must be deemed to have been charged with notice of the express limitations which the plaintiff had placed upon the authority of any of its soliciting agents to represent it with regard to the subject matter of the contract.

(b) *Because of plaintiff's letter to defendant of October 17, 1914, and the subsequent correspondence.* Not only was Mr. Phleger's authority to represent the plaintiff expressly limited by the contract, it was also limited in a manner which was disclosed to the defendant by the plaintiff's letter to the defendant, dated October 17th (Exhibit P. 9, p. 869). This letter notified the defendant of the basis upon which the plaintiff would be willing to adjust the dispute between the two companies. After receipt of word from the principal as to the basis upon which an adjustment might be made the defendant could not reply upon statements of an agent that a settlement might be made on a different basis.

(c) *By the statements which the defendant's witnesses testified were made by Mr. Phleger when he called at the brewery.* Mr. Loehrs testified that when Mr. Phleger called at the brewery, he said:

> "'Well, I will be back tomorrow, but in the meantime, don't do anything. I will take those hops back. I can dispose of them in New York or Brooklyn and ship other ones in place of them.' He says, 'In the meantime, I will communicate with my firm at once to that effect and I will be back tomorrow.'" (Case, pp. 729-730.)

Mr. Butler testified that at a conversation which he had with Mr. Phleger, after his call,

> "Mr. Phleger asked me to hold the hops again for a few days until he could hear from the Clemens-Horst Company. * * *" (Case, p. 738.)

It was entirely competent for the Trial Court to find that Mr. Phleger's first visit to the defendant's brewery was on November 2nd and not on October 5th (case, pp. 843-851). The date of this first call is significant, for if it was not made until after the defendant's receipt of the plaintiff's letter to it of October 17th, then it knew when Mr. Phleger called what terms were offered by the plaintiff and could not expect to obtain any better terms from Mr. Phleger.

There is nothing to show that Mr. Collins believed Mr. Phleger had authority to waive his principal's rights or to adjust the

differences between the two companies. On the contrary, it is clear that Mr. Collins assumed that he did not since, aside from the two conferences which led up to the making of the contract, the defendant never had any dealings with Mr. Phleger until the alleged conversation at the brewery on October 6th and both before and after that date all of its correspondence was with the home office at San Francisco. There is abundant support for the findings, not only that Mr. Phleger had no authority to waive the plaintiff's rights, but also that *the defendant knew that to be the case.*

3.

The measure of damages adopted by the Trial Court was correct.

Defendant contends that the measure of damages adopted by the Trial Court was erroneous. If this were true it would constitute no ground for reversal, but this Court would affirm the judgment and direct a new trial as to damages only. *Young* v. *Society, etc., of Verona,* 91 N. J. L. 310. To the same effect is the recent decision of the Supreme Court in *Queen* v. *Jennings,* not yet reported, the opinion by Justice Black having been filed on November 7, 1919. Moreover, the Court should not reverse the judgment as to damages without first allowing plaintiff to elect whether it will consent to the reduction of the judgment to the amount which this Court deems proper or will stand a new trial. *N. J. Flax Co.* v. *Mills,* 26 N. J. L. 60; *Newell* v. *Clark,* 46 N. J. L. 363, 380; *Vanderbeck* v. *Paterson,* 68 N. J. L. 584; *Heinz* v. *D., L. & W. R. R. Co.,* 90 N. J. L. 198.

It is submitted, however, that the measure of damages adopted by the Trial Court was correct.

As the 1914 installment of hops was delivered to and accepted by the defendant and defendant has wrongfully refused to pay the purchase price thereof, the measure of damages with respect to that installment is defined by Section 63 of the Sale of Goods Act (Comp. Stat., p. 4645 at 4662) as follows:

> "Where under a contract to sell or a sale the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods."

The net weight of the shipment was 18,911 pounds (case, p. 13), which at 17½¢ per pound, made the purchase price $3,309.42. The defendant was conceded to be entitled to a deduction of $339.69 therefrom on account of freight which it had paid, leaving a balance of $2,969.73, which was allowed by the Trial Court (case, p. 923).

Defendant's contention that the Trial Judge did not make an adequate allowance for the freight on the 1914 shipment is incorrect. A reference to the 11th paragraph of the Court's findings will show that he made an allowance to the defendant for the sum of $339.69.

With respect to the undelivered installments for the years 1915 to 1918, inclusive, defendant contended that plaintiff's damages should be limited to the difference between the contract price and the market price. It is apparent from an examination of the evidence, however, that the Trial Court was warranted in finding that there had been no market for "futures" in hops since the breach and that, therefore, the only way in which the damages with respect to these installments could be accurately and fairly estimated was by deducting from the purchase price the cost of producing hops applicable to the contract for the years 1915 to 1918, both inclusive, and for transporting them to Elizabeth.

Mr. Horst testified directly that there had been no market for "futures" between October, 1914, and the date when his deposition was taken (January and February, 1916). Mr. Phleger testified that after the defendant refused to take the hops he had attempted to sell the crops of 1915 to 1918, inclusive, and although he made every effort to do so, he was unable to find a purchaser. He further testified that the market price of "spots" did not indicate the price at which it might be possible to dispose of "futures" and that the price of "futures" depends upon the terms of the particular contract under which the scale was made. This testimony was uncontradicted. Mr. Moakler, testifying for the defendant, corroborated it, saying with respect to the market for "futures":

> "Well, the way I look at it, it varies. It is mostly a gamble on the part of the dealer and buyer" (case, p. 693).

Mr. Bickler, another witness for the defendant, testified that he could not say whether in October, 1914, there was any market for "futures" of the 1915 to 1918 crop.

The reason there was no market for "futures" is apparent. The unsettled conditions due to the war, which had become general by October, 1914, and the rapid spread of the prohibition movement had rendered conditions in the trade entirely unsettled and abnormal.

Defendant contends that the Trial Court was in error in excluding the Brewer's Bulletin from the evidence. The action of the Trial Court in this respect must be sustained upon two grounds. In the first place, as testified to by the defendant's president, the Brewer's Bulletin showed no quotations for "futures" (case, p. 812). In the second place, there is no evidence as to the sources from which the Brewer's Bulletin obtained its information and, as held in *Whelan* v. *Lynch*, 60 N. Y. 469:

> "A price current list, published in a newspaper, is not competent evidence of market value without proof as to the sources from which the information therein was obtained, or whether the quotations of prices were from actual sales or otherwise. The credit to be given the paper must depend upon some such extrinsic proof; it cannot be determined by the publication itself."

The opinion of the Courts contains the following:

> "Independent of the charge, the Court was also in error, I think, in admitting the Shipping and Price Current List as evidence of the value of the wool, without some proof showing how or in what manner it was made up, where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales, or otherwise. It is not plain how a newspaper, containing the price current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depend entirely upon the sources from which the information is derived. Mere quotations from other newspapers, of information obtained from those who have not the means of procuring it, would be entitled to but little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself without some proof or knowledge of the mode in which the list was made out. As there was no such testimony, the evidence was entirely incompetent, and should not have been received."

In *Johnson* v. *Johnson*, 36 Pacific 161, the Court excluded from evidence a copy of a passenger list of a steamship, as published

in a daily newspaper, certified to by the manager of the paper. The Court said:

> "A copy of the passenger list of the steamer State of California, as published in the Daily Oregonian, February 11, 1881, certified to by H. L. Pittock, manager of said paper, was offered in evidence, in which plaintiff's name appeared as one of the passengers, but it did not contain the name of said Beggs. This paper was not properly authenticated, and, as offered, was not admissible."

The Trial Court properly concluded that defendant had not proved that plaintiff could have disposed of the undelivered hops for a price at or above that named in the contract and therefore had not been legally damaged, but, on the contrary, held that plaintiff's damages were the difference between the cost of production and transportation and the contract price of the hops. These conclusions are amply sustained by the evidence and are free from error.

In *Roehm* v. *Horst, supra,* the Court said, at page 20:

> "As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damages is the difference between the contract price and the cost of performance. *Hinckley* v. *Pittsburg Company,* 121 U. S. 264. Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminshed by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing *for what price he could have made subcontracts,* just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of

> the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain."

This case is strikingly similar to the action now before this Court. The opinion of the Circuit is reported in 84 Fed. 565, and the Circuit Court of Appeals in 91 Fed. 345. It was tried before the Court without a jury, and proof was made that at the time of the defendant's refusal to receive the shipments, plaintiffs could have made contracts for delivery according to the contracts in suit at the price of 9¢ a pound for prime Pacific Coast hops of the crop of 1896 and of 11¢ a pound for hops of the crop of 1897.

Judge Kirkpatrick, of the Circuit Court of Appeals, said, 91 Fed., pp. 348-349:

> "That the right to bring an action carries with it the right to obtain judgment needs no argument. The only question is, what shall be the measure of damages in cases of this nature? In an action upon an ordinary contract for sale and present delivery the damage is measured by the difference in price, as fixed by the contract, and the market value at the time of delivery, but that this is not a general, invariable rule, is apparent from the fact that it cannot be made to serve as a measure in cases like the one at bar, where there is need for an immediate ascertainment, though the delivery, by the terms of the contract, was not to be made until after the rendition of the judgment. The rule was, no doubt, adopted because, in cases where applicable, it furnished the best means by which compensation might be made to the party injured. Where, however, from the nature of the case, other means must be employed, the courts do not hesitate to adopt a different rule. Thus, in *Hinckley* v. *Steel Co.,* 121 U. S. 264, 7 Sup. Ct. 875, where a contract was made for steel rails of a particular kind, which the plaintiffs were prevented from manufacturing and delivering by the misconduct of the defendant, the Court held that the 'proper rule of damages was the difference between the cost per ton of making and delivering, and the contract price.' The basis of the recovery was said to be the gain which the plaintiffs would have had, if permitted to complete the contract. The damages of the plaintiffs in this case should be assessed upon the same principle—that of the gain there was to him in the contract at the time. The best means of finding this gain was by learning the difference between the price for hops deliverable according to the terms of the contract and the price at which responsible parties in the market were willing to assume similar ha-

> bilities. The objection on the part of the plaintiff-in-error, that he is entitled to the benefit of the market at each due delivery, is not tenable, nor can any weight be attached to the suggestion that by this means the plaintiffs get the use of the money before the date called for by the contract. By his own acts he made necessary an antecedent ascertainment of the damages, and is bound to accept the situation caused by his own wrong-doing. *Mining Co.* v. *Humble,* 153 U. S. 540, 14 Sup. Ct. 876. The record shows at what price such subcontracts as are above referred to were obtainable, and the judgment was rendered in accordance therewith. It must be affirmed."

In *Boyd* v. *Meighan,* 48 N. J. L. 404, an action was brought upon a contract for the alteration and repair by Meighan of buildings owned by Boyd and for furnishing certain materials therefor. The contract price was $2,000, and it was provided that the work should be completed before September 4, 1883. No part of the work was done by Meighan, and on May 28, 1884, Boyd contracted with another person to do the same work. Meighan prepared to begin the work, purchased and had delivered on the premises the lumber, and made a door and window frame. The breach assigned was Boyd's refusal to allow plaintiff to proceed with the work and the wrongful discharge of the plaintiff. Justice Depue said, at pages 406-407:

> "Another exception is to the refusal to charge that the plaintiff could recover only for work actually done and materials furnished by him, and that he could not recover any supposed profits he might have made had he performed the contract in full. This question was raised on an exception to the admission of evidence as well as by exception to the Judge's charge. On the breach of an executory contract of this character, the true measure of damages is an equivalent in damages for the profits the party would have realized from the performance of the contract if he had been allowed to complete it, and the difference between the cost of executing the contract and the contract price furnishes the means of estimating such damages. *Masterton* v. *Mayor of Brooklyn,* 7 Hill, 61; *Fox* v. *Harding,* 7 Cush. 516; *Wolcott* v. *Mount,* 7 Vroom, 262."

In the leading case of *Masterton & Smith* v. *Mayor, etc., of Brooklyn,* 7 Hill, 61, plaintiffs in January, 1836, contracted to procure, manufacture and deliver at their own cost the marble necessary for the Brooklyn City Hall about to be erected by defendants, and defendants agreed to pay plaintiffs a specified

sum of money by installments as the work progressed. In July, 1837, the plaintiffs had delivered and been paid for about one-sixth of the marble, according to the contract, and defendants then suspended operations upon the building and refused further to perform. It appeared that the contract with the defendants could not have been fulfilled by the plaintiffs before 1842. In 1840 an action was brought upon the breach which occurred in 1837. *Held,* that the measure of damages in respect to so much of the contract as remained wholly unperformed at the time of the breach was the difference between what the performance would have cost the plaintiffs and the price which the defendants had agreed to pay. Held, also, that in estimating what the performance of the contract would have cost the plaintiffs the Court and jury should be governed by the price of labor and materials *at the time of the breach,* paying no attention to subsequent fluctuations in the market, and this though the cause was not brought to trial until June, 1843.

See also *Oswego Falls Pulp & Paper Co.* v. *Stecker Lithographic Co.,* 109 N. E. 92;

Ware Bros. Co. v. *Cortland C. & C. Co.,* 85 N. E. 666;

Meyer Bros. Drug Co. v. *McKinney,* 121 N. Y. Supp. 845, 848, 96 N. E. 1122.

In *Hinckley* v. *Pittsburgh Steel Co.,* 121 U. S. 264, defendant agreed in writing to purchase from plaintiff rails to be rolled by the latter, and to pay for them $58.00 per ton. The defendant having breached the contract, it was held that the plaintiff was not bound to roll the rails and tender them to the defendant and that the proper rule of damages was the difference between the cost per ton of making and delivering the rails and $58.00. The Court, in discussing the proper rule of damages, adopted the following language of the Supreme Court in *Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Howard,* 13 How. 307, 344:

> "Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam.* And in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to

> inflict this injustice. Wherever profits are spoken of as not a subject of damages it will be found that something contingent upon future bargains or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for and *its ascertainable* value or cost. See *Masterton* v. *Mayor of Brooklyn,* 7 Hill, 61, and cases there referred to. We hold it to be a clear rule that the gain or profit of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete the work, was a proper subject of damages."

Defendant's contention that 6¼¢ a pound should not have been held to be the cost of production, because all of the factors were not taken into account is not properly made to this Court. The same is true with respect to its contention that the finding that the cost of transportation of the crops of 1915-1918 was 1 cent a pound was erroneous. These were questions of fact. There is evidence in support of the Court's conclusions (case, pp. 184, 187), which is not contradicted, for even should the Court be of opinion that the cost of transportation in 1914 was more than 1 cent a pound, this would not show the cost of transportation for the years 1915 to 1918, particularly in view of the express testimony to the effect that the cost of transportation in those years was 1 cent a pound. It should be borne in mind that this testimony was not given until 1916. The Trial Court's conclusions upon this question of fact are supported by evidence and are therefore not subject to review.

Defendant contends that the allowance of interest on the amount allowed as damages for the breach of the contract as to the hops to be delivered during the years 1915 to 1918, inclusive, was erroneous, basing its argument upon the decision in *Philbrick* v. *Mundy,* 106 Atl. 361. That case was an action to recover damages for injury to the plaintiff's automobile sustained in collision with that of the defendant and is based upon a tort, whereas the present case is based upon a contract. Even if there were no distinction, *Philbrick* v. *Mundy* is a decision of the Supreme Court and does not limit the decision of this Court. The authority cited for the decision in *Philbrick* v. *Mundy* is *Speer* v. *Van Orden,* 3 N. J. L. 652 (4th Ed., p. 232) which was also a tort action.

Where a claim is wholly a pecuniary one, representing a distinct loss of value, ascertainable with reasonable certainty as of a definite time, interest has always been allowed from the time

of the breach and a clear distinction is recognized between such cases and those tort cases where the damages are unliquidated, as suits for assault and battery, slander, libel and others of like nature.

Thus, in *Healy* v. *Fallon,* 37 Atl. 495, the Court in allowing interest on a contract case said:

> "It is said, however, that the amount due is unliquidated up to the time of the judgment, and that interest is never allowed upon unliquidated amounts."
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> * * * * * * * * * *
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> "It is not true that damages measured by the rate of interest are never allowed for the non-payment of money where the claim is an unliquidated one. In an action for the value of personal property destroyed by the negligent act of the defendant, where the claim was in a sense an unliquidated one, damages were allowed in the shape of interest upon the value of the property as found upon the trial. *Parrot* v. *Ice Co.,* 46 N. Y. 361; *Frazer* v. *Carpet* Co., 141 Mass. 126, 4 N. E. 620. In our own state such damages are allowed in actions for damages for the conversion of goods and in actions of trespass for taking personal property, although in such cases the claims are in a certain sense unliquidated until the amount is ascertained by the court or jury" (citing cases).

In *Hoogendorn* v. *Daniel,* 202 Fed. 431, suit was brought for breach of a contract to convey mining claims to plaintiff. The Trial Court instructed the jury as follows:

> "If you find from the evidence that the plaintiff could have worked said mining claims at a profit during the winters of 1907 and 1908 and of 1908 and 1909, and the summers of 1908 and 1909, he would be entitled to legal interest at the rate of 8 per cent per annum upon the profits that he would have made, if any, during the period that he was kept out of the use of the money."

The Court of Appeals held this instruction was correct, saying at page 434:

> "The position of the plaintiff-in-error seems to be that the owner of a mining claim suffers no damage by being prevented from working it, for the reason that the gold is all there in the ground, and will be there when he does get the opportunity to work it, or that the measure of his damage is, at most, the interest on the purchase price of the mine. But the mine owner is entitled to the benefit of the use of the money which he can take from his mine, and the plaintiff-in-error has no ground to complain in this case that the court admitted the evidence which was ob-

> jected to, and instructed the jury that they might charge him with legal interest on the profits which the defendant-in-error might have made from the mining claims during the period of his exclusion from the possession thereof."

In *Gillen* v. *Parker,* 171 N. W. 61, a sub-contractor brought an action against a contractor to recover damages for delay caused by the latter. The Court held that interest was allowable on whatever sum was properly found as the damage sustained by the sub-contractor on account of the delay.

To the same effect are *Times Pub. Co.* v. *Rood,* 163 S. W. 1037; *Plumb* v. *Campbell,* 18 N. E. 790; *Bernhard* v. *Rochester German Ins. Co.,* 65 Atl. 134, 137; *Clegg* v. *N. Y. Newspaper Union,* 25 N. Y. Supp. 565; *M. K. & T. Ry. Co.* v. *Truskett,* 53 S. W. 444; *N. Y. Bank Note Co.* v. *Kidder Press Mfg. Co.,* 78 N. E. 463; *White* v. *Miller,* 33 Sickels 393; *Sullivan* v. *McMillan,* 19 So. 340; *N. Y. C. & St. L. Ry. Co.* v. *Roper,* 96 N. E. 468; *Fell* v. *Union Pacific R. Co.,* 88 Pac. 1003; *M. K. & T. Trust Co.* v. *Clark,* 83 N. W. 202, 203.

The leading case is *Van Rensselaer* v. *Jewett,* 2 N. Y. 135, which was an action of covenant for rent payable in wheat and services, the value of which was unliquidated. The Court held that interest was recoverable as a matter of law from the time the rent fell due, saying on page 139:

> "The only question is on the allowance of interest. The payment was not to be made in money, nor was a specified sum to be paid in any other way. The damages were unliquidated and there was no agreement for interest. As the authorities bearing on the question have been very fully considered by the Supreme Court in this, and another case which will be mentioned, it cannot be necessary to review them on the present occasion. It was decided in 1806, without assigning any reason for the judgment, that interest was not recoverable in a case of this kind. (*Van Rensselaer* v. *Platner,* 1 John. 276.) But since that time the Supreme Court has deliberately held, on three several occasions, including the present one, that interest is recoverable in such a case. (*Lush* v. *Druse,* 4 Wend. 313; *Van Rensselaer* v. *Jones,* 2 Barb. 643.) The principle to be extracted from these decisions may be stated as follows: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the

time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought, in all such cases, to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration, the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be ascertained; and when that has been done, the creditor, as a question of principle, is just as plainly entitled to interest after the default, as he would be if the like sum had been payable in money. The English courts do not allow interest in such cases; and I feel some difficulty in saying that it can be allowed here, without the aid of an act of the legislature to authorize it. But the courts in this and other states have for many years been tending to the conclusion which we have finally reached, that a man who breaks his contract to pay a debt, whether the payment was to be made in money, or in anything else, shall indemnify the creditor, so far as that can be done, by adding interest to the amount of damage which was sustained on the day of the breach. The rule is just in itself; and as it is now nearly nineteen years since the point was decided in favor of the creditor, and eight out of nine judges of the Supreme Court have, at different times, concurred in that opinion, we think the question should be regarded as settled."

In *Dana* v. *Fiedler,* 12 N. Y. 40, the damages were the difference between the contract price of goods agreed to be sold and the market value. The Court allowed interest on the damages, saying, page 51:

"The right to interest, in actions upon contract, depends not upon discretion but upon legal right, and in actions like the present is as much a part of the indemnity to which the party is entitled as the difference between the market value and the contract price."

Parkins v. *Missouri Pac. Ry. Co.,* 107 N. W. 260, was an action for a breach of contract for sale in which the measure of damages was held to be as in this case, the difference between the cost for which plaintiff could have procured and delivered the goods at the time and place specified by the contract and the contract price. Interest was allowed from the date of the accrual of the action. The Court, at page 266, said:

"The purpose of the law is to make the condition of the party aggrieved, as nearly as may be, what it would have been had the contract been performed. In other words, to see that the plaintiff suffers no loss, in money

or property, by reason of the breach of his contract. It is no answer to the claim for interest, as part of the amount required to make good his loss, to say that the amount required to compensate him was unascertained and could only be ascertained by verdict, and, consequently, the defendant was unable to make a tender of the amount, because that very uncertainty is one of the consequences of the defendant's own wrong, and if loss must fall upon one or the other by reason of such uncertainty, it is but just that it should fall on the wrongdoer, rather than upon his victim. Neither does the statute stand in the way of the allowance of interest as damages in such cases. The interest is a part of the damages sustained, and it is wholly immaterial by what name the specific item of damages are designated. But whatever damages are allowed, and by whatever name they are called, they are allowed as compensation, and any scheme of compensation, whereby it is sought to place the plaintiff in as favorable a position as he would have occupied had the contract been performed, that does not take into account the value of the use of the money for the time it has been withheld subsequent to the accrual of the action, is obviously defective and inadequate.

"We do not wish to be understood as holding that interest is recoverable in all actions sounding in damages. It is not necessary to go to that length in this case. No doubt a distinction may be drawn between actions for damages for assault, libel, alienation of affections, breach of promise to marry and the like, where the damages of necessity are more or less within the discretion of the jury, and those where they are mathematically computed from the data furnished by the evidence. This case falls within the latter class, and, we think, the true measure of damage is the difference between what it would have cost the plaintiff to procure and furnish the gravel according to contract, and the contract price, plus the interest on such difference from the accrual of the action."

Defendant contends that there is nothing to show when the plaintiff elected to treat the defendant's refusal to pay for the first shipment as a breach of the entire contract. Defendant admits, however, that the commencing of suit is a sufficient notice of such election. Plaintiff's right to damages, however, arose not upon the giving of notice of this election, but upon the breach, and the interest was properly computed from that date. *Griffing Co.* v. *Winfield,* 43 So. 687; *Watkins* v. *Junker,* 40 S. W. 11; *Happ Brothers Co.* v. *Hunter Mfg. & Commission Co.,* 90 S. E. 61; *Times Publishing Co.* v. *Rood,* 163 S. W. 1037.

FOR THE REASONS ABOVE STATED, THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

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NEW JERSEY COURT OF ERRORS AND APPEALS.

E. CLEMENS HORST CO.,
Plaintiff-Appellee,
vs.
PETER BREIDT CITY BREWERY COMPANY,
Defendant-Appellant.

On Appeal.

BRIEF FOR PETER BREIDT CITY BREWERY COMPANY.

This appeal brings before the Court for review a judgment of $13,641.31 in favor of the plaintiff and against the defendant. (C. p. 940). The cause was tried before Hon. Frederick Adams, Circuit Judge in the Essex Circuit of the New Jersey Supreme Court, without a Jury.

The plaintiff's action is founded upon contract dated March 26, 1914, for the sale and delivery of hops, 100 bales of each crop of the years 1914 to 1918 inclusive. (C. p. 8 &c.)

The plaintiff without having forwarded samples, shipped certain hops to the defendant, which upon inspection and test were found to be unsatisfactory and not in accordance with the terms of the contract. This contract was negotiated and entered into on behalf of the plaintiff by C. A. Phleger, who wrote to defendant the letter confirming said contract. (C. p. 880.) After the arrival of the hops Phleger came to the Brewery of appellant and was informed that the hops were not in accordance with the contract and were rejected. He asked appellant to hold the hops until he got further instructions. (C. p. 734, 737.)

The plaintiff by paragraph 26 of its complaint offered to send other hops in place of those to which

appellant objected (C. p. 7), but in fact never did so.

The complaint sets forth 8 separate counts and the written contract is referred to and made a part of each count. Defendant by its answer sets up a defense and counterclaim to each of the 8 counts.

When the cause came on for trial, plaintiff moved for judgment in its favor for such damages as may be found to have been sustained by it. (C. p. 31.) The Trial Judge decided such motion in favor of the plaintiff to which an objection and exception was noted. (C. p. 46.) In his written Findings and Rulings the learned Trial Judge reiterated his conclusions as made on page 46 (C. p. 922-930), and gave judgment for the plaintiff as of a breach upon the entire contract and for damages for each year's shipment, together with interest from October 1, 1914, although there was no evidence of an election excepting the bringing of suit which was instituted April 23, 1915. Defendant requested the Trial Judge to charge himself on 37 propositions, (C. p. 909-917). Most of these requests were denied or where approved were subjected to other adverse rulings of the Court.

From the judgment so entered the defendant appeals to this Court and alleges as grounds of appeal, 61 reasons which are all urged for reversal, but which for convenience may be considered under the following main headings.

POINT ONE.

That the Court Decided That Upon the Pleadings the Plaintiff Was Entitled to Judgment and the Only Question for Consideration Was the Amount and Measure of Damages.

The complaint comprises 8 counts founded upon the written contract between the parties, which contract is set forth on (C. p. 8, &c.). It will be noticed

that the 14th clause of this contract (C. p. 11) gives the buyer a limited right to reject and unless rejection is made within the time limited, provides for a waiver, while Section 15 provides that if the buyer for any reason shall be dissatisfied, the seller may within thirty days after receipt of written notice, ship or deliver other hops in the place of any objected to.

To this complaint the defendant answering sets up the defenses that the hops were not of the quality contracted for, that samples had not been supplied or approved, and that upon giving notice to the duly authorized agent of the plaintiff, that the hops were unsatisfactory, defendant was requested to hold the same for further instructions. That by the conduct of its agent the plaintiff waived the provisions of paragraph 14 of the contract and offered to supply hops in the place of those to which the defendant had made objection, but in fact never did supply any hops under its contract. Defendant also counterclaimed for damages for moneys actually expended by it and for damages which it would suffer by defendant's breach of contract.

In its complaint plaintiff sets up paragraph 26, 6th, 7th and 8th count (C p. 7) and by said paragraph sets up a written notice of dissatisfaction from defendant to plaintiff, and its willingness to ship to defendant other hops in place of those to which defendant had made objection and that the defendant refused to accept delivery of such other hops.

Defendant specifically answers such paragraph 26 by paragraph 23 of its answer (C. p. 20) by showing that plaintiff never in fact shipped any hops in place of those to which defendant had made objection, and that such defendant has been always ready and willing to accept hops of the quality provided for by the contract.

The Trial Judge erroneously concluded that upon

such pleadings the plaintiff was entitled to a judgment, that the only question for determination was the amount and measure of damages (C. p. 46, L 40; p. 992-930). Objection was duly noted to such ruling and said rulings are assigned as grounds for reversal. Grounds 2, 3 and 4 (C. p. 948).

The Court did not give judgment to the plaintiff against the defendant on any particular count, but gave judgment on the entire case and it is insisted that in the consideration of such motion, the Court must take cognizance of all of the facts well pleaded in the case and by paragraph 23 of the Answer the facts are pleaded and show a willingness of the authorized agent of the plaintiff to exchange the original shipment of hops and ship other hops. With this fact admitted in the case as it must be admitted by a motion for judgment on the pleadings, it was error in the ruling of the trial Judge to determine that the plaintiff was entitled to judgment on the pleadings.

It will be further noticed on pages 171-172 of the Case, the trial Judge expressed doubt as to his previous ruling and made a temporary reversal of his previous conclusions, but on his final determination on page 922 reiterated his original conclusions, which it is now strenuously urged are wholly erroneous.

The first count in the complaint proceeds on the theory that the shipment of 100 bales of hops was made after sample had been sent and reasonable opportunity given for approval and that there was no rejection for more than 5 days after arrival, and that the defendant did not pay for the same. To that count the defendant answered admitting the making of the contract, denying that samples were sent or approved, and alleging that the hops were removed to defendant's brewery to save car demurrage and denied that the shipment was made on September 19, 1914, as alleged in the complaint, or

that a reasonable time to approve samples was allowed; that the hops furnished were not equal to or better than good Pacific Coast brewing hops, but in order to do no injustice to plaintiff defendant had said hops examined and tested and as the result of such examination refused to accept the same and gave notice in writing thereof to plaintiff.

Defendant in its 6th paragraph denies that it owes any money to the plaintiff, **on the contrary in the 7th paragraph denies that there has been any violation by it of any of the terms of the contract set forth in the complaint as "Schedule A."** It is insisted that the terms of this 7th paragraph standing alone does constitute an absolute defense to the cause of action set forth in the first count of the complaint and under it the defendant should have been permitted to introduce any and all evidence which might tend to establish that the defendant had not in any manner violated any of the terms of the contract. In other words the case seems to turn upon the 14th paragraph of the contract, and that the defendant waived its right to reject in that, it did not telegraph or write to plaintiff, within 5 days after October 1, 1914. But the evidence which was submitted in the case and subsequently disregarded by the Court discloses that the plaintiff's agent, Phleger, accepted, within said period of five days, notice of rejection, and that the defendant at the request of said Phleger permitted the goods to remain in defendant's brewery. (C. p. 718, l. 25, &c.; p. 729-730, 736-740 and 748-749.)

The second count of the complaint is on the same theory as the first count, except that it is not alleged that the shipment was made on samples previously forwarded to defendant.

The defense to the second count also repeats the allegations of paragraph 7 of the defense to the first count.

The third count of the complaint is based upon a

shipment of 100 bales of hops, but does not claim that said hops were shipped in pursuance to written contract.

The defense to this third count is a denial of the ordering of the hops, alleged to have been shipped by plaintiff, or that any hops were received by defendant as provided in and by the contract or that any money is due and owing from defendant to plaintiff.

The fourth and fifth counts of the complaint are on the theory that defendant refused to accept the shipment.

The defendant among other things sets forth as a defense paragraph 7 of its answer, denying any violation of any of the terms of said contract.

The sixth, seventh and eighth counts proceeded on a theory that the plaintiff accepted from defendant written notice of dissatisfaction that the original shipment of 100 bales and offered to ship other hops, which offer was refused by defendant. The exact language in these counts, however, is that the plaintiff offered to ship or deliver other hops and that the defendant refused to accept delivery of the hops so offered. The defense was that upon the written notice, plaintiff by writing, through its duly authorized agent stated its willingness to exchange the hops shipped to the defendant, but annexed a condition that said exchange would only be made by defendant's acceptance of the original shipment and that the defendant is willing to accept shipment of 100 bales of hops of the quality provided for and to be furnished under the contract.

Thus an analysis of the complaint and defense will show that there was before the trial Court a pleaded defense to the cause of action set forth in each and every count; that the 7th paragraph of the answer by itself alleged matters which would have made it necessary for plaintiff to establish by evidence a prima facie cause of action to which

defendant should have been permitted to put in all evidence which will be in the nature of a denial of the facts upon which plaintiff based its cause of action. In other words by the 7th paragraph of the complaint plaintiff sets up the 14th paragraph of the contract and insists that the defendant has waived any and all right to a rejection of the shipment made, while on the other hand the evidence of the defendant shows as above referred to, that the authorized agent, Phleger, accepted a parol notice of rejection and within the period of five days requested defendant to hold the hops until he received instructions from the Company.

While it is true that the evidence upon this point was taken stenographically, the learned trial Judge in his Findings, refused to consider the effect of this evidence, holding by paragraph 7 (C. p. 922), that his conclusions reached in the early stage of the case were correct, that is, that the plaintiff was entitled to judgment on the pleadings. Growing out of this very ruling, we have the Court's refusal to find the 6th, 7th and 8th requests (C. p. 929-930), and therefore the ruling of the Court upon the question of pleadings became very material and the Court's attitude respecting the evidence as to the agency of Phleger worked harmful error to the defendant.

The ruling of the learned trial Judge on page 46 of the case reiterated in paragraph 7 of its Findings (C. p. 922) does not relate to any one or more of the particular counts of the complaint, but related to the whole case and as I have previously stated paragraph 7 of the answer denied any violation of the terms of the contract and constituted in itself a defense which the Court could not on summary motion overrule unless affidavits were produced by the plaintiff as required by the Practice Act and the Supreme Court Rules.

Practice Act. Sec. 57-58.
Supreme Court Rule 84.

Furthermore Section 23 of the Answer set up facts which constitute the waiver by plaintiff of defendant's obligation to make the claim within five days. Since this fact was well pleaded in the case, together with the allegations of the defense set forth in paragraph 7, the trial Court could not on the pleadings decide that the answer did not set up a defense.

The Court in the 5th paragraph of its Findings ruled that the shipment was premature; that two courses were open to the defendant, one to decline provisionally to receive the shipment and to insist upon samples and to approve or disapprove, and the other to drop the samples, accept the shipment and rely on its right to reject under Section 14 within five days. (C. p. 921.) In construing the contract we cannot pick out one provision and turn it or twist it as best suits our wishes. We must take the entire contract as a whole and this contract viewed as a whole required the furnishing of samples, which when approved were to be followed by a shipment. This shipment coming in, after samples had been approved certainly defendant would not then require more than five days as limited by Section 14 to accept or reject, and therefore it is insisted that the provision for five days rejection is coupled with the other condition that the plaintiff shall ship only upon approved sample. If the plaintiff chose to ship without first sending samples and procuring an approval, the plaintiff must take the risk of having its shipment subjected to the provisions of the Sales Act, Sec. 47, 4 Comp., Statutes 4658, which read as follows:

> 47. Opportunity to examine goods. (1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining

whether they are in conformity with the contract.

Tender of delivery; request for examination. (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

The appellant urges that when plaintiff shipped the goods without first having sent samples and receiving an approval, the provision of Section 14 of the contract did not apply in full force and effect and the shipment became subject to the provisions of our statutes which give the buyer a reasonable opportunity to examine. In the case of hops the reasonable opportunity would be the time required to make tests, this is all that the defendant did, and immediately upon receiving the result of the examination and test showing the inferiority of the hops, which the plaintiff tried to palm off, wrote a letter to the plaintiff. All of this, however, was preceded by the transaction within five days of October 1, 1914, with the agent Mr. Phleger, in which Phleger was informed within said period of five days, that the hops were not satisfactory and he requested defendant to hold said hops at their Brewery until he could give proper shipping instructions.

POINT TWO.

Evidence Improperly Admitted.

The Court improperly admitted in evidence secret instructions from Horst to Phleger.

The plaintiff offered in evidence "Exhibits P. 38, 39 and 40 and 41 comprising telegrams and letters between the Horst Company's offices at New York and San Francisco (C. p. 908, &c.).

These letters were admitted over objections (C. p. 651, &c.).

There is no evidence in the case showing that these restrictions or limitations upon apparent authority were brought home to the defendant and therefore their admission in evidence was harmful and erroneous.

SECRET INSTRUCTIONS.

"Secret instructions or restrictions do not limit the special agent's authority so far as third persons are concerned, unless they are brought to the knowledge of the third person dealing with the agent; and if a principal has permitted a special agent so to act as reasonably to induce others to credit him with broader powers than he actually possesses, he will be estopped to deny the existence of as broad an authority as he permitted the special agent to exercise."

"Where an agent is given power to modify a sale he may of course do so, notwithstanding a provision in the contract of sale that no agent of the seller has power to waive any of the conditions of the contract. Certainly if the principal asserts the authority of the agent to rescind the sale, third persons will not be heard to deny it. A general agent with full authority to represent the principal in a given locality, or to manager a particular branch of the principal's business, is more than a mere sales agent, and where the conduct of his agency reasonably requires power to modify the contracts he makes, courts have often held the right so to do to be within his implied powers. Thus an agent with general authority to sell and warrant machines has implied power, after having entered into a contract, to waive or change its terms. So also, where an agent is expressly authorized to sell on approval, he has implied authority to waive the return of the goods within the time limited in the contract, or a condition requiring notice when the goods are unsatisfactory, or to give further, or to waive the time for trial."

2 Corpus Juris, 609.
Law vs. Stokes, 32 N. J. L. 249.

The evidence of Phleger's general agency for the plaintiff is demonstrated as follows: On his examination he said that he did everything in connection with the receipt of the goods from headquarters on the Pacific Coast down to the final delivery and collection of bills. (C. p. 105, l. 21, &c.)

E. Clemens Horst also testified that he did not think there was any communication between him and Phleger concerning the contract prior to its acceptance. That there were two confirmations of the contract, one from New York and one from San Francisco. All of which are testified to by Mr. Horst (C. p. 294). He further says that he regards both letters as a confirmation and he says that he thinks the first letter, being the one written by Phleger on March 26, 1914, was a sufficient confirmation. (C. p. 296, l. 29.)

Phleger further testified that he was the salesman and Eastern representative of the Company (C. p. 105, l. 22; 104, l. 36). That he handled everything from the receipt of the hops to the final delivery for territory covering the entire Atlantic Coast as far as a line drawn from Buffalo to Pittsburgh. That he had two assistants under him and that all London contracts passed through his hands. (C. p. 108, l. 23-40; 129, l. 26-43.)

POINT THREE.

Evidence Improperly Excluded.

The learned trial Judge refused to permit defendant to show that there was a market value for hops by the production and offering in evidence of the Brewers Bulletin quoting market values. (C. p. 791.) One of the issues which was presented was that even if there had been a breach of the contract by the defendant to accept the 1914 shipment, the measure of damages was that as laid down in our Sales Act.

64. (3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

P. L. 1906, p. 336.

Counsel in his Brief to the trial Court requested these Brewers Bulletins to be admitted in evidence, but the Court did not admit them at the trial, and there was no subsequent ruling by the Court admitting these bulletins, although counsel expressly in his Brief requested the admission of these Bulletins in evidence.

Mr. Jones on his work on Evidence, Section 582, says:

> "The Courts have in various cases received those market reports in newspapers on which the commercial world rely as evidence of the state of the market. In discussing this subject an eminent judge used the following language: 'As a matter of fact, such reports which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and courts would justly be the subject of ridicule, if they should deliberately shut their eyes to the source of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character.' "

The quotation, is we understand, from Sisson v. Cleveland & T. Ry Co., 14 Mich. 489, 90 Am. Dec. 253.

The Sisson case has been followed as a leading case in Michigan.

Thus in Allus v. Young, Mich.) 57 N. W. 119. the Court said, (p. 120):

> "The Court admitted in evidence the market reports as shown in a newspaper called the Live Stock Review, showing the quotations on April 27th. The evidence was competent. This point is ruled by Sisson v. Railway Co., 14 Mich. 489."

In Peter v. Thickstum, (Mich. 17 N. W. 68, the Court said, (p. 70):

> "The seventh and eighth assignments relate to the admissibility of the newspaper quotation of the market value of the shingles in the City of Toledo on the twenty-seventh of June and the twenty-seventh of July, 1881. Toledo was the market to which the shingles were consigned and their value there was a material fact in the case. We think the testimony was properly received under the previous ruling of this Court. Sisson v. C. & T. R. Co., 14 Mich. 497; Cleveland & Toledo R. Co. v. Perkins, 17 Mich., 301."

The same rule is followed by the United States Supreme Court.

In Cliquot's Champagne, 70 U. S. 114, the trial Judge charged the jury as follows, (p. 126):

> "The United States have also offered in evidence various Prices-Current. These were obtained, I understand, from dealers in wines in Paris. Of course, if you believe that these merely indicate the retail prices of some grocer, or of some cabaret, or drinking shop, where some one sells wines by the bottle, or the half bottle, or the drink, or even two or three bottles, they will be but slight guides to you in estimating the market value of wines at wholesale. On the other hand, if they appear to be statements of the prices at which wines are held by dealers in Paris, a city which is within a few hours of Rheims, the place of production, and in some instances, if it be so, by the agents of these manufacturers themselves, then they do throw light on the market value of wines. If the place of manufacture were at San Jose, the

prices offered or demanded here at San Francisco for wines, as indicated by the Prices-Current, would be some guide to a candid man as to the market value of the goods, at San Jose. I am unable to see why the testimony should be rejected. It is before you for your consideration. The 'price-current' is, as nearly as one can get at it, the price which the manufacturer himself demands, if it is the price which his agent asks, and offers to deliver the wine for, at Rheims or at Paris."

In commenting on this Justice Swayne said, (p. 140):

"II. The second exception was to the admission, in evidence, of the Price-Current furnished by the agent to the witness. Coming from that source, it was clearly admissible. It was not so remote in its bearing upon the issue as to be irrelevant. Its weight and application depend upon the other evidence in the case, which is now shown. We cannot presume error. It must be made manifest. The presumption is the other way."

So in St. Louis & S. F. R. R. Co. v. Pearce, (Ark.) 101 S. W. 760, the head note says:

"Standard price lists and market reports shown to be in general circulation and relied on by the commercial world, and by those engaged in the trade, are admissible as evidence of market values of articles of trade."

The Court, in its opinion, said (p. 762):

"One of the plaintiffs was allowed, over defendant's objection, to testify from the market reports printed in a trade journal, printed and published where the stock were sold as to the market price of hogs and cattle during the period of delay in the shipment. Standard price lists and market reports, shown to be in general circulation and relied on by the commercial world and by those engaged in the trade, are admissible as evidence of market

values of articles of trade. 17 Cyc. p. 425; 3 Wigmore on Evi. S. 1704; Sisson v. Railway Co., 14 Mich. 496, 90 Am. Dec. 252; Cleveland & T. R. Co. v. Perkins, 17 Mich. 296; Nash v. Classen, 163 Ill. 409, 45 N. E. 276; Whelan v. Lynch, 60 N. Y. 474, 19 Am. Rep. 202; Harrison v. Glover, 72 N. Y. 454; Fairly v. Smith, 87 N. C. 367, 42 A. Rep. 522; Washington Ice Co. v. Webster, 68 Me. 463; Munshower v. State, 55 Md. 24, 39 A., Rep. 414."

In Whitney v. Thatcher, 117 Mass. 523, the headnote says:

"In an action to recover damages for a refusal to accept goods sold under a written contract, to arrive at New York, and the price of which at the time of the refusal was less than the contract price, merchandise brokers in Boston, members of firms doing business and having houses established in Boston and New York, who are familiar with the market value of such goods in New York, and whose information is derived from the daily price current lists and returns of sales daily furnished them in Boston from their New York houses, may testify to such value in the New York market at the time of the refusal."

The Court in its opinion said (p. 527):

"The exception on account of the evidence admitted to show the fall in the price of gunny bags presented in several aspects. 1. We see no reason why merchandise brokers in Boston, members of firms doing business and having houses established both in Boston and New York, might not properly be admitted to testify as to the market value, at a particular date, of an article of merchandise with which they were familiar, even though their knowledge was chiefly obtained from 'daily price current lists and returns of sales daily furnished them in Boston from their New York houses.' It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would

make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business, for the conduct of that business, that qualifies him to testify."

In Dos Passos on Stock Brokers, etc., page 802, the author says:

"The market value may be proved by prices current contained in a file of newspapers published at the time of the prices referred to for public information."

POINT FOUR.

Paragraph 14 of the Contract is not Controlling.

The 14th paragraph of the contract seems to be the one upon which the entire controversy revolves, and shortly states and requests that objection be made in five days by telegraph or writing. It is firstly insisted that this paragraph has no bearing upon the original shipment made by the plaintiff, because said shipment was not made in accordance with the terms of the contract.

Paragraph 2 of the contract provides for a sale of hops on approved sample. (C. p. 8, 1. 38.)

The undisputed evidence in the case is that the shipment was made without any such sample having been forwarded to appellant and approved. The Exhibits show that on September 4, 1914, samples were mailed from San Francisco and that the car of hops was shipped from San Francisco under date of September 6, 1914. That on September 17, 1914, defendant wrote plaintiff that the sample of hops were not choice brewing hops and would not be acceptable on contract. (C. p. 864-866.) Thus before the shipment of hops reached Elizabeth notice of rejection has gone forward.

The hops so shipped arrived at Elizabeth on October 1, 1914, and were taken into defendant's Brewery. Defendant paid the freight charges on

same amounting to the sum of $339.69. The Court in its Findings refused the 13th request of defendant (C. p. 932). It is urged that inasmuch as this shipment was made without approved sample and in fact that the shipment was sent forward by the plaintiff before it was possible for the sample to have reached defendant, that the shipment was not made under the contract, but was made for the purpose of making a sale and for the purpose of being governed by the terms of our Sales Act, and that upon such circumstancs upon the taking of the shipment into the Brewery of the defendant, the defendant had a reasonable time to ascertain whether such shipment was of good brewing hops and to make reasonable test and inspection to properly ascertain that fact and testimony shows that inspection and tests were made, as the result of which it was determined that the hops were not satisfactory. (C. p. 867, 770 and 769.) Sales Act, Sec. 47, Comp. St. 4658.

POINT FIVE.

Phleger Was Plaintiff's Agent.

Phleger negotiated the contract of sale, (C. p. 121) went to his New York office and wrote the letter of confirmation Exhibit 24 (C. p. 290-880). Mr. Horst testified that this letter was a sufficient confirmation of the contract. Phleger testified that he was the salesman and Eastern representative of the Company (C. p. 104-105). That he handled everything from the receipt of the hops down to the final delivery and collecting of the bills, that his territory covered the entire Atlantic Coast as far as a line drawn from Buffalo to Pittsburgh; that he had two assistants under him and that all London contracts passed through his hands. (C. p. 108-109.)

The learned trial Judge was requested to charge himself that Mr. Phleger was plaintiff's duly authorized agent and his actions disclosed in the evi-

dence are binding upon the plaintiff by the 6th request. (C. p. 910.) The Court in its Findings denied this request (C. bottom p. 929) and his refusal is made one of the grounds for reversal. (C. p. 942.)

Exhibits on pages 868-880 are both signed E. Clemens Horst, C. A. Phleger. The first one is under date of September 16, 1914, and refers to samples alleged to have been sent by the San Francisco office under date of September 7, 1914. The second under date of March 26, 1914, which is a letter confirming the contract of that date. This is the letter referred to by Mr. Horst in his examination as being a sufficient confirmation. (C. p. 295, l. 27; C. p. 296, l. 24.)

Mr. Phleger made several visits to defendant's Brewery and he testified that about a week after receiving the telegram of October 18, 1914, he called at the Brewery with samples and saw General Collins and stated that in accordance with instructions received from Mr. Horst he was submitting samples for his approval, and that after he had approved these samples or any of them for his contract delivery it would be our pleasure to accept the return of the 100 bales of hops which he had already taken delivery under his contract. (C. p. 654.) That he believed that the Brewmaster was called in to examine the samples, that they examined the samples carefully and stated that they were not acceptable to them for contract delivery (C. p. 655). Phleger further stated that he went down to the Brewery a second time about a week later, after the receipt of the letter of October 29, 1916 (C. p. 655), that he showed General Collins a further line of samples which he was submitting to him for approval as against his contract delivery; that after his approval of any or all of these samples Mr. Horst had instructed him to say that "We would accept the return of the hops which had already been

rejected on contract, replacing them by the sample he would approve." General Collins called in his Brewmaster and they examined the samples on a long table, they were all rejected as being unsatisfactory by General Collins (C. p. 656).

POINT SIX.

Waiver and Estoppel.

The judgment in favor of the plaintiff is really founded upon the determination of the trial Court, that the defendant did not exercise its right as required by paragraph 14 of the contract; in other words that the defendant did not within 5 days after the receipt of the goods make telegraphic or written objections to plaintiff.

Defendant's answer to this is that by the 26th paragraph of the complaint, plaintiff showed its willingness to accept a subsequent written notice expressing dissatisfaction and to ship other hops to defendant in place of those previously shipped and objected to by defendant, and in line with the idea so expressed the defendant claimed that on October 5, 1914, Phleger called at the Brewery of the defendant and was then and there informed by the Brewmaster, Mr. Hubach and Mr. Loehrs, an employee of the Brewery, that the hops were unsatisfactory; that the Brewmaster had reported to General Collins that the hops were of an inferior grade and no good and that the General feels inclined not to accept them; that Phleger then said, "I will be back to-morrow, but in the meanwhile do not do anything, I will take those hops back, I can dispose of those in New York or Brooklyn and ship other ones in place of them." (C. bottom p. 729-730.) This conversation with Phleger was not only in the presence of Loehrs, but in the presence of Lillian E. Schroeder, a stenographer who took a note of dictation from Mr. Loehrs which was handed

to General Collins which read as follows: "Tell the General Phleger was in, I told him that the Brewmaster condemns the hops as they are very poor, he is going to return them. Mr. Phleger requested me not to return them that he would exchange them if the General was not satisfied with the shipment." (C. p. 718.)

E. J. Butler also testified as to this conversation and said that Phleger asked that the hops be held for a few days. (C. p. 738.)

In ruling upon the evidence the learned trial Judge admitted the same, and said that in view of the language of the contract he will consider whether what was said was evidential against the plaintiff. (C. p. 737-738.)

By the 6th request to charge the Court was asked to find that Phleger was the duly authorized agent and that his actions were binding upon the plaintiff. The Court refused so to charge, (C. p. 929) and gave as a reason that Phleger was without authority to alter the terms of paragraph 14 of the contract.

As shown under the proceedings Phleger was certainly in law the agent of the plaintiff, because he was the persons who negotiated the contract, wrote the letter of confirmation and was authorized to do everything necessary from the receipt and delivery of the hops down to the collecting of the bills, and the contract by its very clauses permits the substitution of other hops under paragraph 15 of the contract and as alleged in its complaint was offered by plaintiff under paragraph 26 of its complaint. Thus the testimony offered and just recited shows that Phleger did the very thing contemplated by Section 15 of the contract.

In this case the proofs show that Phleger negotiated the contract, wrote the letter of confirmation and evidently performed certain acts trying to satisfy the defendant as to the quality of the hops

shipped, and if the statements of the witnesses, Loehrs, Butler and Schroeder are true, asked defendant not to return these hops as he could dispose of them in New York and that he would have other hops shipped to defendant in place and stead of the original shipment.

As late as October 29, 1914, a letter from the San Francisco office of the plaintiff was written to the defendant, expressing the willingness to exchange the hops for other hops to defendant's entire satisfaction, and that "our Mr. Phleger" would call on defendant with other samples. All of this shows that the plaintiff had at all times vested apparent and actual authority in Phleger to attend to its transactions and it is plain that by permitting Phleger to act as he did act and to sign confirmation of sale which he made, the plaintiff led defendant to believe that Phleger was an agent with general authority and was not a salesman who had no authority other than the taking of an order.

It is claimed that the action of Phleger and the plaintiff worked an estoppel against the plaintiff from now denying the agency of Phleger.

2 Corpus Juris, 929.
16 Cyc. 671.

It is also evident from the testimony of Mr. Phleger that between the middle and end of October, 1914, on instructions received from Mr. Horst he went to the Brewery of the defendant on several occasions and submitted other samples for approval, so that other hops could be shipped in place of the 100 bales rejected by defendant. (C. p. 654-655-656.) Exhibits 13 and 15, on pages 872-874 respectively, are telegrams sent by the Horst Company from San Francisco to defendant company and in which mention is made that an acceptance of the return of the rejected hops would be made upon the willingness of defendant company to accept others in their stead. All of these negotiations were

had under paragraph 15 of the contract; and under the decisions hereinafter cited; it is claimed that these actions on behalf of plaintiff and its agent, Phleger, were waivers of the right of the plaintiff to insist upon the strict terms of paragraph 14 of the contract.

But aside from all this the trial Judge refused to find as a matter of law that Phleger was or was not the agent and gave as his reason that Phleger had no authority to alter the 14th paragraph of the contract.

Now it is insisted that the actions of both Phleger and the plaintiff subsequent to October 1, 1914, in negotiating for an exchange of the original shipment of hops worked a waiver of any right which plaintiff had under the 14th paragraph of the contract.

It is a well settled rule that an agent having power and authority to sell a machine under a contract which contains conditions for the benefit of the seller, has authority to bind his principal by a waiver of such conditions.

Pitsinowsky vs. Beardsley, 37 Iowa 9.
Warder vs. Robertson, 39 N. W. 905.
McCormack vs. Brower, 55 N. W. 537.
Osborne vs. Backer, 47 N. W. 70.
Peterson vs. Walter & Wood Co., 66 N. W. 96.

In Osborne & Co. vs. Backer, 47 N. W. 70 Supra, the contract provided for written notice of defects, no such notice was given. The agent who made the sale was present and fully possessed of all facts touching the failure of the machine to work. The Court held that every purpose of that provision of the contract had been accomplished by the personal presence of the agent, and the knowledge obtained by him of its operation. Under such circumstances, to have required a written notice was to compel the plaintiff to do a useless act.

In Equitable Manufacturing Co. v. Stevens, 60 S. W. 350, there was a contract for the sale of musical instruments with a clause that unless claim be made by mail within five days a claim for the breach would be considered waived, held that a letter, written by plaintiff after the five days had passed for giving notice of defects and ten days had passed for making payment, assuring defendant of an intention to abide by the contract and stating that everything would be satisfactorily adjusted according to the agreement, treated the warranty as still binding and waived payment and notice as conditions thereto.

The First National Bank vs. Dutcher, 128 Ia. 413; L. R. A. N. S. 142 required the buyer to give notice of any defects by letter within two days. After the expiration of the two-day limit without objection. The seller endeavored to make the machine work, it was held that this was a waiver as to the requirements of notice.

The same effect, see Nichols vs. Wiedman, 75 N. W. 208, 76 N. W. 41.

Advance Tresher Co. v. Pierce, 74 Mo. App. 676.

Champion Mach. Co. v. Mann, 42 Kan. 372; 22 Pac. 417.

The appellant claims that when Phleger came to the Brewery on the 5th of October, 1914, and requested the representatives of the defendant not to make a rejection of the hops but to hold them a few days until he would have them resold in New York or Brooklyn, and would furnish defendant with other hops, this estopped the plaintiff from holding defendant to a strict performance of the provisions of the 14th paragraph of the contract, and when plaintiff on October 17, 1914, or shortly thereafter as alleged in paragraph 26 of its complaint, offered to supply defendant with other hops

in place and stead of the original shipment this was a waiver of the right of plaintiff to insist and claim that defendant had forfeited its right to reject by reason of the provisions of paragraph 14 and to the same effect is the letter written by the plaintiff company to the defendant under date of October 29, 1914.

POINT SEVEN.

Damages.

The learned trial Judge in paragraph 11 and 18, awarded damages to the plaintiff, allowing the contract price for the shipment of 1914, less freight paid by the defendant, besides interest from October 1, 1914. As to the future deliveries the Court adopted the ruling of charging the contract price less the cost of production and transportation and offered the ruling in the case of Roehm vs. Horst, 178 U. S., p. 1, as the basis for such determination. The case cited does not adopt the principle cost of production, but the express language used by Justice Fuller is the difference between the contract price and cost of performance. It may well be that hops can be grown on the Pacific Coast or in other words produced at 6¼c. per point, but it would be quite another operation for the plaintiff to perform its contract of selling and delivering hops f. o. b. Elizabeth for 6¼c. per pound plus the transportation charges, which is the measure adopted by the trial Court. The only evidence is that contained in the deposition of E. Clemens Horst in which he says that the only cost is that of production and transportation, and that it would aggregate 7¼c. per pound. (C. p. 53-72.)

This evidence produced by the plaintiff did not put the trial Court in the possession of any facts showing how the figures were arrived at, and it did not show to the trial Court whether the plaintiff

contracted to other growers the raising and growing of the hops or whether the Horst Company upon its own plantations raised hops. It would have been proper to produce figures, showing contract prices with other growers or the investment which the Horst Company had in plantations for the prduction of the hops in question, and there should have been evidence produced to show the overhead or office expenses; it being in evidence that the Company maintained extensive offices in San Francisco, New York and also London, and probably other places. In addition to which we have a very large item which is entailed in the cost of selling and the collection of the moneys. None of this evidence was produced before the trial Court so that it could arrive at a fair basis of profit upon the shipment of the 1914 or the shipments of the following years.

It is claimed that the estimate of 6¼c. per pound is a conclusion not based upon facts in evidence. It is firstly objected that the estimate of 6¼c. per pound is not evidential but is merely a conclusion not based upon facts in issue and secondly what the Court should have been supplied with by the plaintiff was evidence of the cost to which the plaintiff would have been put if it had performed the contract in full, not merely the production of the hops plus the cost of transportation.

The Court ruled by paragraph 15 and 16 of its Findings (C. p. 924) that the cost of production of the 1914 shipment was 6¼c. per pound, and the cost of the transportation was 1c. per pound, and that this estimated cost of production should apply to the four following years.

This finding of fact of cost of transportation of the 1914 shipment was 1c. per pound was in the face of positive evidence, uncontradicted and undisputed, that the defendant actually paid for the transportation of the 1914 shipment the sum of

$339.69 for net weight of 18,911 pounds amounting to 1¾c. per pound. (See paragraph 11 of the Findings, p. 923.)

The plaintiff is bound by this figure of 1¾c. per pound, because in its Schedule B annexed to and made part of its complaint, it makes a deduction for freight in the sum of $339.69 based on a freight rate of $1.75 per hundred pounds, thus corroborating in its own case the claim made by the defendant, that the cost of transportation is 1¾c. per pound. The Court took speculative evidence as the basis for its Finding when it had real substantial, affirmative and positive proof of transportation cost. The difference in the allowance of transportation for the year 1915-1919, inclusive, at the established rate of 1¾c. per pound instead of the fictitious rate of 1c. per pound would make a difference of approximately $600.00 in the verdict rendered, and defendant is certainly entitled to this allowance.

The Court also found in paragraph 13 of its Findings (C. p. 924) that there was no available market for delivery of future years.

In the case of Masterton vs. Mayor, 7 Hill, 61, 71, 72 and 76, Masterton made a contract to deliver to the City of Brooklyn a large quantity of marble, which he was to quarry, and while he was in the midst of performing his contract the City broke the contract. He sued for damages for the loss of profit which he would have made had he been permitted to complete the delivery of the marble. The trial Court held that the evidence discloses that there was no available market for the marble and adopted the rule for damages to which Masterton was entitled as follows: That he was entitled to the contract price, less reasonable deductions for the cost of rough material in the quarry, the expense of raising, dressing and transporting it to the place of delivery, including the outlay, trouble, risk, &c., which entered into and made up the cost to the

party producing the article, from all this the Jury will be able to determine the measure of damages.

The Court also stated that the Jury should not overlook the risks and contingencies which are almost inseparable in the execution of the contract like the one in question and which increases the expense independent of the outlay in labor and capital.

In the case of U. S. vs. Speed, 75 U. S. 77, the Government was to furnish hops which were to be dressed by the plaintiff and delivered at certain places. The Government breached its contract and claim was filed for damages. The case finally reached the United States Supreme Court which cited with approval the opinion in the Masterton case supra and laid down the rule that in such a case the measure of damages was the excess of the contract over the cost doing the work, less reasonable deductions for the less time engaged and for the release from the care, trouble, risk, salesmanship and responsibility attending a full execution of the contract.

In U. S. vs. Behan, 110 U. S. 342, 28 Law. Ed. 168; Hickler vs. Pittsburg Steel Co., 121 U. S. 275, 30 Law. Ed. 906, the same rule is adopted and followed.

Now in the case at issue Mr. Horst testified that the 1914 hops were grown on the Wheatland Ranch (C. p. 72). Mr. Rooney, a witness produced by plaintiff, testified that he was familiar with the Wheatland Ranch of the E. Clemens Horst Company (C. p. 464). The Plaintiff failed to produce any evidence before the trial Court of its investment and the costs of maintenance of the so-called Wheatland Ranch. There is no evidence of the over-head or office expenses nor or the maintenance of its sales force, all of which are elements of costs of performance of the contract and this does not take into consideration the risk and responsibility

of the raising of future hops which might be destroyed through droughts, insects or other causes. Mr. Horst testified that the crops had been attacked by insects. (C. 95, 1. 30-40., p. 233, 494.)

It is our insistment that the measure of damages adopted by the Court under the 18th paragraph of its Finding (C. p. 925) did not take into consideration all of the elements of the cost of performance of the contract, but merely took into consideration the cost of production plus transportation.

It will be noticed from the testimony of Rooney that hand picked hops cost 2-8/10c. per pound. If we should add to this the cost of preparing the field, sowing the seed and the constant care and attention required in the cultivating it can well be seen, that when these witnesses refer to 6¼c. per pound as the cost of production they mean the cost of growing the hops and it stands to reason without any extensive argument, that the cost of growing or producing the hops is far from being the entire expense to which the plaintiff would be subjected in the full performance of its contract. It follows that the plaintiff is not entitled to be put in any better position because of the alleged breach of the contract by defendant than if the defendant had fully performed the contract and accepted each year's shipment as it might have been tendered.

The plaintiff may insist that it has produced evidence of all cost of performance and secondly that if it has not produced all of the evidence that might have been produced, it was the duty of the defendant to produce this evidence either affirmatively or by way of cross examination, but it must be remembered that the questions asked of the witnesses for plaintiff was merely upon two branches.

a. Cost of production.
b. Cost of transportation.

The right of defendant to cross-examine must necessarily be limited to the scope of direct exam-

ination and any cross-examination outside of the cost of production and cost of transportation would not have been allowed as it would have been improper.

In this case it would have been impossible for the defendant to produce evidence of the overhead charges of plaintiff or the cost of maintaining its sales force or the various elements going into the labor necessary to prepare the growing hops for shipment or the investment required to be maintained by plaintiff for the production of its hops. These were elements which were clearly within the control of the plaintiff and it should not be permitted to hold a verdict where it concealed facts which were peculiarly within its own knowledge.

POINT EIGHT.

Interest Improperly Allowed.

By paragraphs 18 and 19 of the Findings, the Court improperly allowed interest on the amount estimated for the loss on the shipment of the years 1915 to 1918, from October 1, 1914, to the date of the rendering of the verdict.

It is claimed by the appellant that in the allowance of this sum of interest two errors were committed.

A. That the sum for which the defendant was entitled to recover against the defendant, assuming that defendant had committed a breach, was an uncertain sum, unliquidated, and that therefore no interest could be allowed whatsoever until the time the amount of money would be fixed by verdict. This has been settled in our Courts by the case of Philbrick vs. Mondy, 106 Atl. p. 361.

Interest is not allowed on an unliquidated damage for the reason that the person liable does not know what sum he owes.

22 Cyc., p. 1512.

B. By paragraph 10 of the Findings the Court holds that the plaintiff elected to treat

> the entire unfulfilled portion of the contract as violated but fixes no date when this election too place. The case is entirely barren of any evidence showing an election, excepting the commencement of the suit and the allegations in the complaint, to wit, paragraph 10 in which plaintiff says by reason of defendant's neglect and default aforesaid, the plaintiff has treated and hereby elects to treat all the entire unfulfilled portion of the contract as violated by defendant. (C. p. 4.)

The summons was issued on April 23, 1915, (C. p. 8, 1. 18). Thus we have the earliest date upon which there was an election to treat the unfulfilled portion of the contract as violated fixed as of April 23, 1915, and if the damages were liquidated, the earliest moment from which the plaintiff could claim money would be April 23, 1915, and interest would run from that date, instead of from October 1, 1914.

CONCLUSION.

From the exihibits it ppears that plaintiff wrote to defendant on August 29, 1914, and sent the samples. Another letter was written to the same effect under date of September 4, 1914. On September 16, 1914, the Horst Company, through Phleger, wrote a letter regarding the approval of samples and on the 17th instant the defendant company rejected the samples. It appears from the invoice of September 6, 1914, (C. p. 865) that the invoice No. 8591 is for 100 bales, lot 13, dated September 6, 1914.

This shipment of hops was consigned to the Horst Company at Chicago, Exhibit 26, (C. p. 881) and was subsequently diverted to Elizabeth, Exhibit 27 and 28, (C. p. 882-883). Thus it is apparent that the shipment of hops which eventually came to Elizabeth was undoubtedly of the same lot of which a sample had been rejected by defendant under its

letter of September 17, 1914, because said carload of hops was originally shipped from Wheatland on September 6, 1914.

Exhibit 34 (C. p. 889), shows delivery to consignee October 1, 1914.

On October 5, 1914, Phleger knew that the hops were not satisfactory and rejected and requested defendant to hold the same for a few days stating that he would give other hops in their place and stead.

It is evident that plaintiff was practicing a sort of a fraud on the defendant, trying to make them take a shipment of hops which by sample the defendant had already rejected, therefore it could not have been properly found by the trial Court that defendant had waived its right to reject under paragraph 14 of the contract.

The Finding of the Court is based upon the conclusion that the defendant waived the furnishings of samples, whereas the facts before the Court show that the samples which had been furnished were disapproved.

Mr. Horst testified however, that the hops sent to Elizabeth were known as lot 13 and the samples he claims were mailed to the defendant under date of August 29, 1914, and September 4, 1914, were not samples of said lot. (C. p. 316-1. 29.) There is no evidence showing that, there was ever any attempt made to furnish the defendant company with samples of the hops contained in the shipment of lot 13, and it may well be that inasmuch as these alleged samples are claimed to have been mailed from San Francisco on August 29th and September 4, 1914, and that the shipment of hops left Wheatland on September 6, 1914, that the very samples which were rejected by General Collins, under his letter of September 17, 1914, are the same hops which were contained in the shipment known as lot 13. At any rate the Court must take notice of

the testimony of General Collins showing the large volume of business done by his company (C. p. 763) and that when hops arrive for his Brewery from time to time and notice was received of their arrival at the railroad property, they were taken into the Brewery in the ordinary course of business, and the plaintiff knowing this, took a chance in sending on its shipment of hops, evidently believing that they would get into the Brewery in the manner in which they did get in there. (C. p. 805). I think it is fair to assume that the allegations made in the counter-claim that there was a representation that these hops were of the contract quality and that this was a false representation to mislead the defendant express the real and true facts in this case.

Phleger wrote his letter on September 16, 1914, and at that time when asking for approval of samples he knew that four days before, this shipment had been diverted from Chicago to Elizabeth for the defendant company (C. p. 868). It is evident that the plaintiff was endeavoring to practice sharp trickery on the defendant without permitting the defendant to have samples for approval as required by contract.

This is not a case where the market at the time had dropped so that the defendant was trying to get away from a bad contract. Mr. Horst himself testified in October, 1914, the value of hops delivered at Elizabeth was from 16 to 17c. (C. p. 188) and the contract price in this case is 17½c. The reason these hops were not taken was because they were not of the quality called for by contract and that is abundantly and overwhelmingly established by the evidence in the case and it would indeed be strange if this Court shall now permit the plaintiff to hold this large verdict which has for its basis the trick practiced in getting subordinates of the defendant company in the ordinary course of business to take into its Brewery the shipment of hops when in

fact the plaintiff knowingly violated the terms of its contract and sent these hops without submitting samples and knowing that they were of the quality rejected by the letter of September 17, 1914.

The plaintiff had time between September 7, 1914, and the arrival of the hops at Elizabeth on October 1, 1914, to have stopped them in transit and this was the duty of the plaintiff, and the plaintiff not doing so, it was tantamount to an absolute representation by the plaintiff that the hops were of the contracted quality. The plaintiff cannot now claim the advantage of this verdict when its own fraud was the inducing cause of defendant's action in the case.

Reitman vs. Fiorillo, 76 N. J. L. 815.

It is respectfully insisted first, that the case did not disclose any breach of contract by the defendant, but that the breach of contract was by plaintiff as set forth in defendant's counter-claim.

Secondly that the Court erroneously determined that the 14th paragraph of the contract had application to the shipment which arrived on October 1, 1914, and upon this point it is insisted that said clause makes what would be as against the defendant a short period of limitation. This period would be long enough had plaintiff sent a sample of the shipment and received an approval and that is the situation which is contemplated in the contract. Where a shipment is made and not in strict conformity with the terms of the contract, the Court cannot apply this strict limitation contained in paragraph 14, and such a shipment must be made in accordance with the ordinary rules of business and law and must give to the defendant a reasonable opportunity under the Sales Act for an examination and rejection. The trial Court did not pass upon the question of the reasonableness or unreasonableness of the time taken by defendant in making the rejection of the lot but held that in strict construc-

tion of the 14th paragraph of the contract, that the defendant did not give a telegraphic or written rejection within five days and on this point it is urged that there was an acceptance within five days of a verbal notice of rejection and that the 14th paragraph had no application because the shipment of lot 13 was not preceded by a sample duly approved.

Thirdly, that if defendant did breach the contract then the measure of damages adopted by the trial Court was erroneous and the the Court did not have before it evidence produced by the plaintiff, showing what it would have cost plaintiff to have performed the contract. The basis upon which damages were allowed by the trial Court was the contract price less cost of production and transportation charges, and thus excluded from consideration other elements of cost of performance of the contract and inasmuch as such evidence is not in the case of any degree of reasonable certainty, the verdict as a whole cannot stand and must be wholly set aside.

Fourthly, the defendant is entitled to a deduction of approximately $600.00 for the difference in transportation costs as estimated by plaintiff and as positively shown by the proof in the case.

Fifthly, the interest charges allowed the plaintiff in its verdict are contrary to law.

It is therefore respectfully urged that the judgment be reversed and a venire de novo ordered.

STAMLER AND STAMLER,

Of Counsel with Appellant.

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