

action the price of the goods sold, there being no set-off or counterclaim setting up inferiority and claiming a diminution of amount sued for."

It seems that a fair sample was taken from the bulk by selecting the centre bag from each tier, the bags being arranged in tiers, and drawing a pebble or two from the bags "without looking." If the plaintiffs were not satisfied with these samples they could have selected samples themselves. If the samples were fairly selected, the evidence of the defendants' witnesses, if it stood alone, would be overwhelming to shew that the goods were not according to contract. It is met by evidence for the plaintiffs which, if it stood alone, would be convincing to the effect that the goods were such as were contracted for. Having examined the evidence with the greatest possible desire to appraise it fairly I cannot say, with anything approaching conviction, which set of witnesses is most worthy of credit. Nor do the circumstances throw much light upon the question. It is difficult for me to believe that the defendants, being desirous of having these goods for use in their mills, would refuse to accept without some reasonable ground for complaint, and it is equally difficult to understand why the plaintiffs being desirous of securing a new customer would not send the defendants a merchantable article as they swear they have done. The result of the evidence being to leave my mind in an even balance I have to apply the principle of burden of proof, and the burden is in this case upon the plaintiff.

If the learned trial Judge had made a finding of fact in favour of the plaintiffs I should have accepted it. He could not have done so without disbelieving the defendants' witnesses and I should have felt bound to concur in his finding. But if he has made any finding at all it is to the effect that the samples taken from the bags selected, and which seem to have been fairly selected, were inferior in quality although not wholly useless, and he has declined to allow any diminution in the price because there is no set-off or counterclaim. I do not find it necessary to discuss the question whether the pleadings are sufficient to give the defendant the benefit of an abatement of price because of inferiority in quality, in lieu of a remedy by way of cross-action on the warranty.

The action here is for goods to be supplied according to a description, and it is a condition of the contract that the