1901.
March 27.

LENORA *v.* AMARASEKERA.

D. C., Colombo, 12,716.

Contract for supply of goods—Place and time of delivery—Failure to take delivery—Damages—Penalty.

A contracted with B that B should deliver certain goods to A within one week from the date of the contract, viz., on or before the 17th March, and that the delivery should take place at B's stores. On the 17th March, A's manager called at B's place of business with a cheque at 8.30 A.M. and 1.30 P.M. in order to take delivery, but not finding him there, requested him by letter to forward the goods to C's store on that very day and call at his. A's. office for payment. B did not comply with this request.

Held, in an action brought by A for damages consequent upon non-delivery, that B had time up to the end of business hours on the 17th March to make delivery, and that as A did not demand delivery at B's store, he was not entitled to succeed in his action.

Held further that where a certain penalty was fixed by agreement for non-delivery, nothing in excess of that amount could be claimed.

IN this case the plaintiff sued the defendant for the recovery of Rs. 450, of which a sum of Rs. 400 was for damages sustained by reason of the defendant failing to deliver 2,000 tea shooks, which he had agreed to deliver to plaintiff within one week from the 10th March, 1899, and the balance Rs. 50 was an advance paid by the plaintiff to the defendant in respect of the said agreement. The defendant, admitting the agreement, pleaded that he was ready and willing to deliver the tea shooks at his store as agreed but that the plaintiff failed to demand or take delivery of them there.

The District Judge believed the evidence for the defence, and found that the plaintiff did not demand delivery of the tea shooks from the defendant within one week of the 10th March, 1899, and offer to pay for the same immediately after delivery. He entered judgment for plaintiff.

Plaintiff appealed.

Seneviratne, for appellant.

Schneider, for respondent.

27th March, 1901. BONSER, C.J.—

We are agreed to affirm this judgment. Speaking for myself, it seems to me a thoroughly clear case. The defendant entered into a written agreement with the plaintiff in the following terms: "I, James W. Amarasekera, in consideration of the sum of Rs. 50 received by cheque No. 424 on the Mercantile Bank of India, Limited, undertake to supply Messrs. Arnolis Lenora Bros. & Co. 2,000 tea shooks in good order and full size, that is to say,

containing 1,000 lb. net, within one week from date hereof, at the rate of Rs. 9.75 per 100. The delivery to take place at No. 20, Maliban street, and payment to be made at the rate agreed immediately after delivery. In failure, I bind myself for a penalty of Rs. 300." That was the contract dated 10th March, 1899, and it expired on 17th March, 1899. The plaintiff sued the defendant for the breach of that agreement, and claimed Rs. 400 as damages for the breach of the contract which they had suffered in consequence of having been obliged to buy tea shooks in the open market at a higher rate than that mentioned in the contract.

It seems to me that in no case could they recover more than Rs. 300, as that was the amount fixed by the parties to be paid upon breach of the agreement. The defendant denied he had broken the agreement. He pleaded that the plaintiff did not make any demand, and that they were ready to complete the contract on their part, and that was the issue between the parties.

The case for the plaintiff depended entirely on the evidence of a clerk named William Appu. The plaintiff cannot read or write English, and William Appu, his clerk, can, and plaintiff admitted that William Appu was practically the manager of his business. William Appu says that he had been several times in the course of the week to demand delivery, but the defendant put him off. He says he went on the last day—17th March—quite early in the morning, and not finding the defendant in his office, he left for him a letter, which was produced by the defendant, in the following terms: "Dear Mr. Amarasekera,—I came to see you at "8.30 A.M. and waited here till 9 o'clock. I shall thank you to- "send the tea chests to Messrs. J. M. Robertson & Co.'s store to- "day without fail, and please call over at our office for the cheque, "or you can send Mr. Dadabhoy." Dadabhoy is stated to be a sort of assistant in the defendant's business. The defendant said that he sent an answer to that letter, but would not comply with the legal requirements of proof of that answer, and plaintiff denied having received that answer. The District Judge was unable to accept the copy produced by the defendant as proof of the original letter. In the course of the same afternoon, about 1.30, William Appu says he went again to the defendant's store, and that the defendant then showed him a 150 tea shooks and wanted him to take those, and he said: "No, I cannot take that number. I "must have the whole 2,000." and thereupon defendant said; "Come by and by." He went home and reported matters to his master and did not return again that day. He says he returned on the following day. On every occasion that he went he says he took a cheque book with certain blank cheques

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signed by his master, intending, if the tea tea shooks were delivered, to fill up the amount of the shooks and hand the cheque to the defendant.

Now, it seems to me that even if we believe this story of William Appu—which, however, the District Judge did not believe—it falls short of proof that the plaintiff was ready and willing to take delivery of these shooks and to pay for them immediately after delivery. As I understand the contract, the defendant had up to the end of business hours on the 17th March to make delivery, and if he had those tea shooks ready, or, if he had not got them in his warehouse, had procured them from some other source and had them ready to deliver at a reasonable time before the close of the business on that day, he would have done all that was necessary on his part. But, as I said before, the District Judge did not believe William Appu, and the only demand of delivery which seems to be proved is that contained in William Appu's letter of 17th March, written at 9 o'clock in the morning; but that letter is not a demand of delivery under the contract. Delivery was to be made at defendant's store; that letter of demand 'requests' him to make delivery at some other place in the town of Colombo. It seems to me that that is not in accordance with the contract. For these reasons I think that the plaintiff's action was rightly dismissed.

LAWRIE, J.—Agreed.