officer, contrary to s. 44 (1) of the Intoxicating Liquor Licensing Ordinance, Cap. 316. Against that conviction both appellants appealed to the Full Court. The Full Court, after hearing considerable argument and considering many authorities by counsel for the appellants in support of their appeal, dismissed the appeal.

The appellants now appeal to this court and counsel for the appellants has put forward and has argued only one ground of appeal and it is, he says, the learned magistrate and also the Full Court were both wrong in concluding that the appropriation of the article in question, that is to say, the half bottle of rum, took place in the parlour and not in the licensed premises. That is the only point arising in this appeal.

Counsel has cited most of the cases that were cited before the Full Court and he has argued the appeal very fully. Most, if not all, of the cases that were cited by him do not relate to the circumstances of this case. This is a case where a seller and buyer confronted each other and a very simple transaction took place such as takes place whenever a customer goes into a shop and asks for an article.

Counsel for the appellants maintained that the appropriation took place the moment the female appellant went into the rum shop and took up the bottle of Russian Bear rum. He said that at that stage there was an executory agreement for sale. That matter has been fully argued and I do not propose to deal with the authorities because, as I say, most of the cases cited are cases where messengers were sent to certain licensed premises to obtain liquor, but here the facts are a simple transaction where a person goes into a parlour and calls for a bottle of rum; there was no rum in the parlour, which was not licensed premises, and a bottle was obtained elsewhere and presented to the customer. I don't think I need even go on and say "delivered to him" or even "paid for by him" because I think that in the circumstances of this case a complete authority and complete answer is to be found in part of the judgment of Lord GODDARD in the case of *Fusby* v. *Hoey*, [1947] 111 J.P. 167.

My brother on my right has read the whole of that passage. I will not repeat the whole passage but I shall just identify it by saying that it commences with the words "In our opinion, the sessions did not sufficiently distinguish between appropriation and delivery," and it concludes with the words "The customer has, by his conduct, impliedly assented to the appropriation."

The particular portions of that passage on which I rely for the purpose of my judgment are two. First of all, the second sentence which is as follows :—

> "Property in unascertained goods passes to the buyer when there is an appropriation of goods to the contract—which need not be a pre-existing contract—by the buyer with the assent, express or implied, of the seller, or by the seller with the assent of the buyer."

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47

And then the second portion on which I rely is the portion which gives an illustration which, I think, absolutely fits the circumstances of this case, where Lord GODDARD said :—

> "If he says, (that is, the potential purchaser) and the gin being under the counter, or elsewhere, 'please let me have a bottle.' and the shopman takes one out and hands it to him, and he accepts it, there is an appropriation from the seller's stock with the buyer's express consent."

I think that illustration amply fits the circumstances of this case and so far as I am concerned that is sufficient authority for me to rule that in this case appropriation of the rum took place in fact and in law in the parlour. For those reasons I would dismiss this appeal.

LEWIS, J. : I agree.

MARNAN, J. : I agree.

Appeals dismissed.

[illegible] v. RICHMOND

[Supreme Court (Fraser, J.,) January 24, 25, February 12, 1962]

Contract — Agreement to grant lease — Commencement of lease and rent not stated in memorandum — Whether memorandum satisfies the requirements of the Civil Law of British Guiana Ordinance, Cap. 2, s. 3(D)(d).

A tenancy transaction between the parties was evidenced by a document whereby the defendant acknowledged the receipt from the plaintiff of the sum of $80 for one month's rent of certain premises and undertook to grant the plaintiff a lease for the same premises for 15 years to be prepared thereafter. In an action by the plaintiff for specific performance of this undertaking it was submitted for the defendant that there was no sufficient memorandum in writing to satisfy the requirements of s. 3 (D) (d) of the Civil Law of British Guiana Ordinance, Cap. 2, inasmuch as the memorandum did not clearly indicate the date of commencement of the lease or the consideration for it.

Held : (i) in an action of this kind the memorandum relied upon must contain all the terms of the agreement between the parties and cannot be complemented by parol evidence. *Munday* v. *Asprey*, 13 Ch. D. 855, applied;

(ii) the memorandum relied upon disclosed no agreement with regard to the commencing date of the term nor with respect to the rent and in consequence failed to satisfy the requirements of s. 3 (D) (d) of Cap. 2.

Judgment for the defendant.

S. L. Van B. Stafford, Q.C., for the plaintiff.

J. A. King for the defendant.

FRASER, J. : In this action for specific performance the plaiiff relies upon an agreement contained in a memorandum dated 29th August, 1958, and signed by [illegible] A. Richmond, the husband and

authorised agent of the defendant. The defence is that this action cannot be maintained because there is no sufficient memorandum in writing to satisfy the requirements of s. 3 (D) (d) of the Civil Law of British Guiana Ordinance, Cap. 2, which is in substance the same as a portion of s. 4 of the Statute of Frauds.

The memorandum relied upon is worded as follows :

"$80:

Georgetown, Demerara,
29th August, 1958.

Received from Mr. Richard Sue Sic Chew the sum of eighty dollars being one month's rent of premises consisting of the bottom flat of a two-storeyed building used for business and living quarters situate at Lot 3 Middleton Street, Campbellville, East Coast Demerara, payable in advance from the 1st September, to the 30th September, 1958. A lease for the term of fifteen years to be prepared hereafter with a clause that the tenant shall have the option of giving three months' notice terminating the said lease.

4 cts. stamps
29/8/58.
J. A. Richmond."

For the defence it is submitted *inter alia* that the memorandum does not clearly indicate the date of commencement of the lease nor the consideration for the lease and is therefore not tenable as evidence of a contract for a lease as contemplated by the Civil Law of British Guiana Ordinance. It is urged for the plaintiff on the other hand that the date of commencement is 1st September, 1958, being the date upon which the tenancy commenced.

There can now be no doubt that in an action of this kind the memorandum relied upon must contain all the terms of the agreement between the parties and cannot be complemented by parol evidence—see *Munday* v. *Asprey*, 13 Ch. D. 855. Moreover, in the case of a contract for a lease, the memorandum must state all the material terms of the contract—see *Clarke* v. *Fuller* (1864), 16 C.B. (N.S.) 24; WOODFALL ON LANDLORD & TENANT, (25th Edition) at p. 162; and FRY ON SPECIFIC PERFORMANCE, ss. 341 *et seq.* The material terms required to be stated are the name of the lessor; the name of the lessee; the description of the property; the term and its commencement; the rent; any special covenants or stipulations. On the subject of the commencement of the term LUSH, L.J., in *Marshall* v. *Berridge*, [1881] 19 Ch. D. 233, which affirmed *Blore* v. *Sutton* (1817), 3 Mer. 237, said at pp. 244-45 ;

" Now it is essential to the validity of a lease that it shall appear either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it [illegible]

perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain those elements."

This statement of the law was followed by Lord HALSBURY, L.C., in the case of *Humphrey* v. *Conybeare* (1899), 80 L.T. 40.

The important question in this case, therefore, is whether the document dated 29th August, 1958, clearly contains a commencing date of the term. I am of opinion that it does not and it is therefore unenforceable as a contract for a lease. It seems to me that the document is primarily a receipt for one month's rent arising from a monthly tenancy; and secondarily, it is an undertaking to grant to the tenant a lease for 15 years. The use of the words "A lease for the term of fifteen years to be prepared hereafter . . . " indicates an intention on the part of the defendant's agent to grant the plaintiff a lease at some date subsequent to 29th August, 1958 (the date on which those words were written). This view is reinforced by the terms of another transaction which took place on the same day between the plaintiff and Edward Moore who was the tenant of the premises at that time. By that agreement the plaintiff purchased Moore's right, title and interest in the tenancy of the premises for $1,000.00. Moore was a monthly tenant of the premises. By the memorandum of agreement between the parties it was stipulated that vacant possession of the premises would be given to the plaintiff on 15th September, 1958. This document was stamped and executed by the parties in the manner which is normal for documents of that kind whereas the memorandum signed by James Richmond was executed as a receipt for a sum exceeding $50.00. The first part of the receipt does no more than acknowledge by implication the plaintiff as the monthly tenant of the premises in substitution for Moore and therefore the memorandum relied upon as evidence of the contract for a lease is contained in the last sentence which reads :

" A lease for the term of fifteen years to be prepared hereafter with a clause that the tenant shall have the option of giving the landlord three months' notice terminating the said lease."

There is no agreement with regard to the commencing date of the term, nor is there any agreement in the memorandum as to the annual rent. It is not therefore a memorandum which satisfied the provisions of s. 3 (D) (d) of the Civil Law of British Guiana Ordinance, Cap. 2.

A decree of specific performance is a discretionary remedy and the court may therefore award damages instead. An award of damages as an alternative remedy can only be made however if the agreement in respect of which the action is brought is one upon which a cause of action can be founded. In a case such as this the plaintiff can obtain damages only if the memorandum satisfies the requirements of s. 3 (D) (d) which provides as follows :—

"(d) no action shall be brought whereby to charge anyone upon —

any contract or agreement for the sale, mortgage, or lease of immovable property or any interest therein or concerning immovable property . . . . . unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised."

Holding, as I do, that the memorandum is inadequate, I must also find that the plaintiff is not entitled to damages. I believe, however, that the defendant's agent knew that the plaintiff was interested in taking the tenancy only if he could also have obtained a lease for fifteen years and it is for that reason that the undertaking was given. I believe that the plaintiff was misled. He may have been in a different position in an action for rescission of a contract of tenancy. He has, however, retained the monthly tenancy and is not being ejected. While it is perhaps true that the plaintiff has suffered no damage nevertheless I believe that the defendant's agent wilfully deceived him and I therefore order that both parties bear their own costs of the action.

The action is dismissed. Judgment for the defendant. Both parties to bear their own costs.

Judgment for the defendant.

Solicitors : *H. A. Bruton* (for the plaintiff) ; *D. DeCaires* (for the defendant).

BUDHU *v.* ALLEN

[In the Full Court, on appeal from the magistrate's court for the Berbice Judicial District (Fraser, J., and Khan, J., (ag.)) December 14, February 16, 1962.]

Criminal law — Sending or delivering an obscene writing — Separate offences of sending or delivering — Meaning of obscene writing — Summary Jurisdiction (Offences) Ordinance, Cap. 14, *s.* 141 (c).

Criminal procedure — Separate offences created by same provision — Charge amended after plea but before evidence by substituting one offence for the other — Necessity for further plea — Power of Full Court to substitute one offence for the other in complaint and conviction — Summary Jurisdiction (Procedure) Ordinance, Cap. 15, *s.* 94 *— Summary Jurisdiction (Appeals) Ordinance, Cap.* 17, *s.* 28.

Section 141 (c) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, makes it an offence to send or deliver to any person any obscene writing. The appellant was charged with sending an obscene writing. After she had pleaded not guilty but before any evidence was led, the magistrate at the request of the prosecution amended the charge by substituting the offence of delivering. No fresh plea was taken but the defence was offered an adjournment which was declined on the ground that the appellant was not prejudiced. The appellant was convicted of delivering although the evidence disclosed a sending. On appeal —

Held : (i) the accepted test of obscenity is whether the tendency of the matter charged as obscenity is to deprave those whose minds are open to such material, and into those hands a publication of this sort may fall. *R.* v. *Hicklin* (1868), 11 Cox C.C. 19, applied;

(ii) but this test is inapplicable to a summary prosecution for sending or delivering an obscene writing. In this context an obscene writing is one which is either offensive to decency or modesty or expresses or suggests lewd thoughts; or offensive to the sense or the mind and is disgusting or filthy in expression;

(iii) section 141 (c) of Cap. 14 creates two offences — one of sending an obscene writing and the other of delivering an obscene writing. The amendment was competently made by the magistrate but the effect was to make a fresh complaint to which a plea should have been taken notwithstanding that a plea had already been made to the original complaint;

(iv) the failure to take a fresh plea from the appellant was however immaterial since her defence was conducted on the basis of a plea of not guilty and she was in no way prejudiced by the failure.

(v) by virtue of s. 28 (a) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, the complaint and conviction would be amended by the Full Court by substituting the word "sent" for the word "delivered" appearing therein.

Appeal dismissed.

[**Editorial Note :** Reversed on appeal. See later herein]

H. D. Hoyte for the appellant.

J. C. Gonsalves-Sabola, Crown Counsel, for the respondent.

Judgment of the Court : The appellant, Magdalene Budhu, was charged summarily before a magistrate for sending to Christina Mohan a letter containing obscene writing contrary to s. 141 (c) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. At the hearing before the magistrate the complaint was amended by substituting the offence of "delivering" an obscene writing for that of "sending" an obscene writing as originally charged. In the order of conviction the appellant was apparently convicted for the offence of delivering an obscene writing and was fined $35.00 and ordered to pay $4.50 costs. She appealed against that conviction on four grounds.

At the hearing before this court counsel stated without reservation that the writing was repulsive and lewd but submitted that however morally indefensible it may be it did not amount in law to an obscene writing. He relied upon the test laid down by COCKBURN, C.J., in *R.* v. *Hicklin* (1868), 11 Cox C.C. 19, and stated at p. 26 as follows :

> " . . . . the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

This test is accepted as authoritative. Lord GODDARD, C.J., referred to it as a classic definition in delivering the judgment of the Court