prohibited act by another. Such provisions are by no means uncommon, particularly (it should be noted) in the Victorian Crimes Act 1928,[20] and it is submitted that the opinion expressed in the joint judgment, that certainty of interpretation is especially desirable when dealing with enactments which provide, *inter alia,* for heavy criminal sanctions, is a sound one.

A. G. HISCOCK

COLEMAN v. GOLDER[1]

Landlord and Tenant – Contract – Part Performance

Pursuant to a verbal agreement between C and G, G entered into possession of a flat and remained in possession for eight years. C sought possession of the flat, which he alleged he had sub-let to G. G claimed that C had assigned his tenancy to him. The magistrate accepted G's account of the transaction, and refused the application. C sought to review the order, in particular on the ground that in the absence of written evidence of the transaction required by the Property Law Act 1928, s. 53, there were not acts of part performance sufficient to allow parol evidence of the transaction to be given. Martin J. discharged the order to review.

The taking of possession of the flat was accepted by both parties as an act of part performance sufficient to show the existence of some contract relating to the flat. The question was whether the acts of part performance must be referable unequivocally to a contract of assignment rather than a sub-lease before parol evidence could be admitted. Clearly an act which is referable to a contract, but not a contract concerning land, is not enough. It is for this reason that the payment of purchase money is not in itself sufficient. '[The] best explanation of it seems to be that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land.'[2] At the other extreme, the view of Lord O'Hagan in *Maddison v. Alderson*[3] was that the act 'must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in Lord Hardwicke's words, "as could be done with no other view or design than to perform that agreement." '[4] But Martin J. took as the starting

[20] *E.g.* ss. 8, 18, 19, 20, 28, 30, 62.

[1] [1957] V.R. 196. Supreme Court of Victoria; Martin J.

[2] *Maddison v. Alderson* (1883) 8 App. Cas. 467, 479, *per* Lord Selborne L.C. Other grounds have been suggested. See *Fry on Specific Performance* (6th ed., 1921), 290.

[3] (1883) 8 App. Cas. 467, 485.

[4] *Gunter v. Halsey* Amb. 586; 27 E.R. 381. It appears from a note of this case given by Mr West in his report of this case. West *temp.* Hard. 681, 'That the bill was dismissed because it was uncertain from whence the agreement was to commence and because the acts, done by the defendants were not shown to be in pursuance of

point the more equivocal proposition of Lord Selborne L.C. in the same case. 'All the authorities show that the acts relied upon as part performance must be unequivocally and in their own nature, referable to some such agreement as that alleged.'[5] Does 'some such agreement as that alleged' mean a contract of assignment rather than any other agreement relating to the flat? Martin J. accepted the view of Fry L.J. that the doctrine 'seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged'.[6] But he also accepted that it must be a contract 'falling within the general class to which the agreement alleged belongs'[7] – in the instant case the class being the disposition of an interest in the land the subject of the action.

It is submitted, with respect, that this is the correct view – indeed, the only possible view. The alternative confuses the requirements of two separate stages of the enquiry. Primarily, there must be a connection between the act of part performance and the contract alleged before parol evidence will be admitted; but when this parol evidence is admitted the acts alleged must be found to have been done in actual performance of that contract alone. If the acts of part performance were required to refer unequivocally to one particular type of contract, it would be but a short step to require them to refer unequivocally to all the details of a contract in a case where the existence of a lease was admitted but the details were in dispute. Not only would it be hardly possible that any act, considered without regard to any evidence of the agreement could be 'so eloquent as to point unequivocally to one particular contract and no other';[8] it is difficult to see what value at all the parol evidence would have.

Martin J. cited in support of his decision the opinion of Sholl J. that 'unequivocal reference' does not mean 'necessary reference.'[9] This would not appear to assist the conclusion. Sholl J. was dealing with the separate question of the test to be applied to acts of part performance to decide whether they were referable to some contract concerning land. Even if his test be less exacting, it affords no help in the instant case. The taking of possession was no more necessarily referable to an assignment rather than a sub-lease than it was equivocally referable.

N. R. McPHEE

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the agreement.' Lord Hardwicke considered payment of purchase money in whole or in part to be sufficient part performance. *Lacon v. Mertins* (1743) 3 Atk. 1; *Owen v. Davies* (1747-48) 1 Ves. Sen. 83.

[5] (1883) 8 App. Cas. 467, 479.

[6] *Fry on Specific Performance* (6th ed.; 1921), 278.

[7] *Francis v. Francis* [1952] V.L.R. 321, 340, *per* Smith J.

[8] *Williams on the Statute of Frauds*, 253; cited in *Francis v. Francis* [1952] V.L.R. 321, 331, *per* Sholl J.

[9] *Francis v. Francis* [1952] V.L.R. 321, 332. *Commonwealth Oil Refineries Ltd. v. Hollins* [1956] V.L.R. 169, 179.