LESLIE MEYERS, EXECUTOR OF THE ESTATE OF EDWIN MEYERS, AND BANDY LEE (*Plaintiffs*) .....

APPELLANTS;

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*May 9, 10, 11, 12 Oct. 4

AND

FREEHOLDERS OIL COMPANY LIMITED AND CANADA PERMANENT TRUST COMPANY (*Defendants*) .....

RESPONDENTS;

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF SASKATCHEWAN (*Intervenant*).

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Illegality—"Minerals Lease"—"Top lease"—Whether prior lease "non est factum, illegal and void"—Trial judge's finding as to plea of non est factum affirmed by Court of Appeal—The Securities Act, R.S.S. 1940, c. 287, ss. 2(10), 3(1), 17a, 20, as amended.

*PRESENT: Locke, Cartwright, Fauteux, Martland and Judson JJ.

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On July 7, 1950, one K, an agent of the respondent company F, visited the plaintiff M at the latter's farm-house and persuaded him to sign a document entitled "Minerals Lease", by which M granted and leased his mineral rights to F in return for shares in the company and certain royalty rights.

In June 1955, M executed a petroleum and natural gas lease to one L in respect of the same lands which had been the subject matter of the minerals lease to F. L. was engaged in a "top leasing" programme, whereby the top leases obtained would take effect upon the termination of the prior existing leases. It was implicit in this programme that steps would be taken to set aside the existing prior leases. An action was commenced by M and L seeking a declaration that the lease to F was "*non est factum*, illegal and void". It was alleged (1) that the obtaining of the mineral lease was a part of a fraudulent scheme by F and its promoters to deprive farmers of their mineral rights; (2) that the mineral lease was void, based on the plea of *non est factum;* (3) that it was rendered void by virtue of certain provisions of *The Securities Act,* R.S.S. 1940, c. 287, as amended. The action was dismissed at trial and that judgment was sustained by the Court of Appeal on equal division.

Held: The appeal should be dismissed.

As found by the learned trial judge, there was nothing in the evidence to support the appellant's first submission.

The finding of the learned trial judge, affirmed in the Court of Appeal, that the plea of *non est factum* was not established on the evidence, should not be disturbed. *Prudential Trust Co. Ltd. v. Forseth,* [1960] S.C.R. 210, and *Prudential Trust Co. Ltd. v. Olson,* [1960] S.C.R. 227, referred to.

With respect to the third submission, the respondents were afforded no protection by s. 20 of the Act, and their further contention that the transaction involved was not a trading in a security within the meaning of s. 2(10) of the Act was rejected.

F was registered as a broker under the Act for the purpose of trading in its own securities. A trade in which it was itself a party was, under s. 3(3)(c), one in which registration was not required and consequently was not the kind of trade which, under clause (a) or clause (c) of s. 3 (1), required the registration of K as a salesman. There was, therefore, no breach of s. 3(1) of the Act.

The purpose of s. 17a of the Act is not to prevent trading of an unauthorized kind, but is intended to prevent persons in their own residences from being sought out by stock salesmen. A breach of the section, in relation to a transaction otherwise lawful, results, not in preventing the contract from being valid, but in the incurring of a penalty by the person who is in breach of it. The breach of s. 17a by K, therefore, did not result in the agreement here in question being rendered void. *Mellis v. Shirley Local Board,* 16 Q.B.D. 446, applied; *McAskill v. The Northwestern Trust Co.,* [1926] S.C.R. 412, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Graham J. Appeal dismissed.

L. McK. Robinson, Q.C., for the plaintiffs, appellants.

[1](1959), 28 W.W.R. 625.

E. J. Moss and *C. A. Lavery*, for Freeholders Oil Co. Ltd., defendant, respondent.

E. C. Leslie, Q.C., and *W. M. Elliott*, for Canada Permanent Trust Co., defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The respondent, Freeholders Oil Company Limited (hereinafter referred to as "Freeholders"), was incorporated under the laws of the Province of Saskatchewan on January 4, 1950. One of the objects stated in its memorandum of association was

> To acquire lands and mineral rights from the freeholders owners thereof and to pool the same for and on their behalf and to vest control over their disposition in the owners of lands and mineral rights for the purpose of equitably distributing the rights and benefits over the same among members of the Company;

The articles of association provided that each member should have one vote on a poll at shareholders' meetings and not one vote for each share held by such member.

Freeholders proceeded to acquire mineral rights from land owners, some of whom had not previously granted leases of their petroleum and natural gas rights and some of whom had already granted such leases to other lessees. With respect to the former class, Freeholders would obtain the grant of a mineral lease of the minerals within, upon or under the lessor's lands for a term of 99 years, renewable at Freeholders' option. The consideration paid by Freeholders for such a lease consisted of the allotment to the lessor of one fully paid share in its capital stock for each acre of land involved. It also covenanted to pay and deliver to the lessor an undivided 20 per cent of the benefits or proceeds received by Freeholders from any disposition made by it of such minerals.

With respect to the latter class, Freeholders would take from the land owner an assignment of the royalties payable to him under his existing lease, together with the grant to Freeholders of a 99 year mineral lease running from the date of the assignment, which, however, would only take effect upon the termination of the existing lease. The consideration from Freeholders for such an assignment consisted of a covenant for the allotment of one fully paid share in its capital stock for each acre of land involved, of which one-half of the shares would be allotted forthwith and the

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other one-half only when the mineral lease to Freeolders should take effect. Freeholders was to have the right to deal with and dispose of the assigned royalties, but covenanted to pay to the assignor 20 per cent of the benefits received by Freeholders from such disposition.

On the same date that Freeholders was incorporated its promoters also incorporated Western Royalties Limited (hereinafter referred to as "Western"). By an agreement made between the two companies dated April 20, 1950, Western agreed to act as manager of Freeholders for a period of five years and to pay the cost of organizing, managing and operating Freeholders during that period up to a sum not exceeding $10,000 in each year. In consideration of its services, Western was to receive an undivided 30 per cent interest in all mineral rights and royalties acquired by Freeholders. Freeholders agreed that if it earned a profit of not less than $250,000 in the five year period it would reimburse Western for its expenditures up to a total of $50,000.

In brief, therefore, the plan was that Freeholders would be the recipient of mineral rights and royalties acquired on its behalf. Western would provide the initial capital and management. Freeholders would be in a position to dispose of the mineral rights which it acquired. Western would have a 30 per cent undivided interest therein. The individuals who leased or assigned to Freeholders would each be entitled to 20 per cent of the proceeds of the disposition of those mineral rights which each had leased or assigned. The remaining 50 per cent would belong to Freeholders, in which company each lessor or assignor to it would have acquired a share interest. Essentially the scheme was one for the pooling of mineral rights and royalty rights, with Western receiving a 30 per cent interest in such rights in compensation for its provision of capital and the furnishing of management services.

The campaign for the acquisition of mineral rights and royalties for Freeholders was completed by August 1950. By that time it had acquired leasehold interests in some 23,000 acres and assignments of royalties in respect of previously leased lands of approximately 613,000 acres.

On August 9, 1951, Prairie Oil Royalties Company Limited (hereinafter referred to as "Prairie") was caused to be incorporated in Saskatchewan by Lehman Brothers,

investment bankers, of New York. It entered into an agreement of the same date with Western to acquire Western's 30 per cent interest in the mineral rights and royalties to which Western was entitled under its agreement with Freeholders. A price of $3.00 per acre was paid in respect of lands subject to mineral leases to Freeholders and $1.50 per acre in respect of lands the subject of assignment agreements to Freeholders. The purchase price was paid as to 75 per cent in cash and as to 25 per cent in the form of fully paid shares of the capital stock of Prairie. The necessary capital for Prairie was raised by the sale of its shares, chiefly to clients of Lehman Brothers.

In order to effect this sale of mineral interests a trust agreement was made between Freeholders and the respondent Canada Permanent Trust Company (hereinafter refererd to as "the Trust Company"), approved by Western and Prairie, whereby Freeholders assigned all its various mineral interests to the Trust Company, which agreed to hold the same in trust as to an undivided 30 per cent for Prairie and the remainder for Freeholders. The Trust Company agreed to issue three trust certificates in the form provided in the agreement, one for an undivided 30 per cent interest to Western and two respectively for an undivided 50 per cent interest and an undivided 20 per cent interest to Freeholders. Provision was made for the conversion of the latter certificate into certificates for individual parcels of land, which Freeholders could deliver to the individual land owners from whom it had acquired mineral rights.

The present case arose in respect of one of the mineral leases granted to Freeholders by Edwin Meyers (hereinafter referred to as "Meyers") on July 7, 1950, which related to the mines, minerals and mineral rights (referred to as "minerals") within, upon or under the North ½ of Section 5, Township 6, Range 11, West of the 2nd Meridian in the Province of Saskatchewan. The document was entitled "Minerals Lease" and by it Meyers granted and leased to Freeholders the minerals, together with the exclusive right and privilege to explore, drill for, win, take, remove, store and dispose of them, to have and enjoy the same for a term of 99 years, renewable at Freeholders' option. The

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consideration was 320 fully paid shares of the capital stock of Freeholders, to be allotted by it to Meyers. Clause 1 of the minerals lease provided:

> 1. Payment to Lessor:
>
> The Lessee shall have the full and absolute right to deal with, dispose of and make such agreements in relation to the said minerals, or any part thereof, as it shall from time to time deem advisable; Provided that the Lessee shall pay or deliver to the Lessor an undivided twenty (20%) per cent. of the benefits or proceeds received by the Lessee from any such agreement or disposition whether the same consist of a cash consideration or a royalty interest under a drilling lease or other contract for the production of any minerals; and in the event that the Lessee should receive a royalty interest the Lessee shall secure the issue and delivery to the Lessor of a Trust Certificate covering the said twenty (20%) per cent. interest in such form as the management of the Lessee shall designate, which interest shall be subject to the terms and conditions of the said Certificate and of this Agreement.

Meyers did not receive the share certificates for his 320 shares until December 11, 1951. On May 15, 1953, after consulting a solicitor, he filed a caveat against the lands in question, in which he alleged that the lease had been obtained by fraud and misrepresentation. Freeholders did not receive any notice of this caveat. Subsequently Meyers attended three shareholders' meetings of Freeholders, one in November 1953, and two in December 1954.

At the time the lease was granted in 1950 oil had not been discovered in the area in which Meyers' lands were situated. By 1955 there had been substantial development in that area and oil had been discovered in close proximity to Meyers' land.

In 1955 the appellant Bandy Lee (hereinafter referred to as "Lee") commenced a "top leasing" programme in that area. A top lease is one which takes effect upon the termination of a prior existing lease. It was implicit in Lee's programme that steps would be taken to set aside the existing prior leases. Meyers consulted another solicitor, who was acting on behalf of Lee, and then executed a petroleum and natural gas lease dated June 9, 1955, to Lee in respect of the same lands which had been the subject matter of the minerals lease to Freeholders. On the 27th of the same month he sent a letter of repudiation to Freeholders in respect of the mineral lease to it, which repudiation was not accepted by Freeholders.

On December 17 of the same year Meyers and Lee commenced action against the two respondents, seeking a declaration that the lease to Freeholders was *"non est factum,* illegal and void". Meyers died in December of the following year and the appellant Leslie Meyers is his sole executor.

The action was dismissed at the trial and that judgment was sustained by the Court of Appeal of Saskatchewan on an equal division.

Three main submissions were made by the appellants: (1) that the obtaining of the mineral lease was a part of a fraudulent scheme by Freeholders and its promoters to deprive farmers of their mineral rights; (2) that the mineral lease was void, based on the plea of *non est factum;* (3) that it was rendered void by virtue of certain of the provisions of *The Securities Act,* R.S.S. 1940, c. 287, as amended.

A great deal of evidence was tendered at the trial with reference to the first submission, which it is not necessary for me to review here. The learned trial judge found nothing in the evidence to support this submission. This claim was not supported by any of the judgments in the Court of Appeal and the detailed submission on this point presented by counsel for the appellants has failed to persuade me that the learned trial judge should have reached any other conclusion than that which he did.

With respect to the second point, the question of fact is as to what was stated to Meyers by Knox, the agent of Freeholders who obtained for it the execution of the minerals lease by Meyers. The appellants contend that Knox fraudulently misrepresented to Meyers the nature of the instrument which he was being asked to sign. This the respondents deny.

It is common ground that Knox visited Meyers at the latter's farm on July 7, 1950. It is also common ground that prior to this visit three other oil companies had sought to obtain leases from Meyers and in each case he had refused to make an agreement. His evidence was taken *de bene esse* before the trial. He alleged two main points on which he said that Knox had misrepresented the nature of the instrument.

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The first was in respect of the matter of the royalty payable under the document by Freeholders to Meyers. The evidence at the trial was that the prevailing rate of royalty payable under petroleum and natural gas leases being granted to oil companies was 12½ per cent. According to Meyers, Knox represented to him that under the terms of the mineral lease which he was being asked to sign he would receive royalties at the rate of 20 per cent. In fact, of course, the minerals lease to Freeholders did not provide for a 20 per cent royalty, but provided for payment to Meyers of 20 per cent of the benefits or proceeds received by Freeholders on a disposition by it of the minerals. If Freeholders subleased the minerals, under the prevailing form of petroleum and natural gas lease, to an oil company, Meyers would only receive 20 per cent of the royalty payable to Freeholders under such sublease.

The second major misrepresentation alleged was as to the term of the lease. Meyers testified that Knox had led him to believe that, except as to the matter of royalty and as to payment of a consideration in the form of Freeholders' shares, the minerals lease submitted to him was similar to the so-called "standard" lease of the oil companies and he, therefore, concluded that it would be for a ten year term and not for a term of 99 years, subject to renewal.

Knox gave evidence that prior to working for Freeholders he had not had previous experience in negotiating mineral agreements. He only worked for Freeholders for about a month and then terminated his employment because of his lack of success in obtaining agreements. He only negotiated about 15 agreements for Freeholders. He recalled that he was furnished with a supply of yellow forms, green forms and white forms, which were respectively the assignment agreement form, the mineral lease form and the prospectus of Freeholders. He was instructed to furnish to each party whom he visited a copy of the prospectus and, in the ordinary course of events, he would have left a prospectus with Meyers, although he did not specifically remember either Meyers or the interview with him. On this point Meyers, when asked whether he had received a copy of the Freeholders prospectus, failed to give any answer.

Knox stated that he did not misrepresent the agreement to anyone. He testified that in the few cases where he was able to negotiate agreements the parties whom he approached were anxious to sign up immediately. His practice, so far as he could recall, was to explain in a general way that Freeholders was a pooling arrangement and that shares would be allotted in return for the execution of the agreement. He would then deliver a copy of the prospectus, with the form of agreement, to the persons whom he interviewed. He said that he did not in any way prevent them from reading the forms and he endeavoured to answer any questions that might be put as fully as he could. He said that he did not know anything about the forms of lease of other oil companies, or the length of the term of such leases. The only leases he had ever seen were those of Freeholders.

The learned trial judge accepted Knox's evidence and decided that the appellants had failed to discharge the onus of establishing fraud or misrepresentation on his part in the securing of the agreement. This finding was sustained by the Court of Appeal on an equal division.

Culliton J. A., who delivered the judgment of the Court of Appeal dismissing the appeal, after referring to the principles relating to the position of an appeal court with reference to findings of fact made by a trial judge, said:

> Learned counsel for the appellants argued that these principles did not apply to the learned trial judge's findings in this case. This argument was based on the contention that the only direct evidence as to the actual circumstances surrounding the execution of the lease was the de bene esse evidence of Meyers. It was argued that because of this the appeal court was in just as good a position to determine the effect and weight to be given to this evidence and the inferences to be drawn therefrom as was the trial judge. I cannot agree with this view. It seems apparent to me that in determining the truth or veracity of the de bene esse evidence, one of the dominant factors must be the credence to be given to the evidence of Knox, Broughton and Hardy, all of whom appeared before the trial judge, as well as the conduct and attitude of Meyers as disclosed in other evidence. In no other way could the de bene esse evidence be properly assessed.

The principles to which Culliton J.A. referred were considered in two recent cases in this Court: *Prudential Trust Company Limited v. Forseth*[1], and *Prudential Trust Company Limited v. Olson,* reported in the same volume at

[1] [1960] S.C.R. 210

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p. 227. The situation in the present case is similar to that in the *Olson* case, except that in the present appeal there have been concurrent findings of fact.

I do not consider that the circumstances of this case are such as to warrant a reversal of the findings of fact made by the learned trial judge. There was sufficient evidence to warrant them. In addition to the evidence of Knox, there were matters on which the learned trial judge could properly rely in reaching the conclusion which he did. There is the fact that no complaint was made by Meyers regarding the minerals lease until the filing of his caveat in May 1953, which complaint at that time was not made to Freeholders, but was merely stated in the caveat filed. After the filing of the caveat he attended three shareholders' meetings of Freeholders in 1953 and in 1954 and made no complaint as to fraud or misrepresentation at any of those meetings, even though he did speak at one of them. His only complaint was as to delay on the part of the company in drilling. He did not attempt to repudiate the minerals lease until 1955, after he had already effected another lease to Lee. By then the situation regarding oil development in his area had greatly changed. The likelihood of oil production on his own land then made the lease with Lee a more attractive proposition than the pooling arrangement with Freeholders. In addition, there is the evidence of Broughton and Hardy, which the learned trial judge apparently accepted. Broughton, the president of Freeholders, and Hardy, a field man employed by Freeholders who had known Meyers for 25 years, visited Meyers at his farm in 1955, subsequent to the granting by Meyers of his lease to Lee. They testified that at that time Meyers made no complaint in respect of any of the provisions of the minerals lease to Freeholders, other than to say that he wanted a new lease with a $12\frac{1}{2}$ per cent royalty and a drilling commitment. There was no suggestion that he had been misled into executing the lease to Freeholders and the conversation was quite friendly in tone. Meyers made no reference to the granting of the lease to Lee.

In my view, therefore, the finding of the learned trial judge, affirmed in the Court of Appeal, that the plea of *non est factum* was not established on the evidence should not be disturbed.

The third submission of the appellants is that the agreement between Meyers and Freeholders was void under the provisions of *The Securities Act*. The relevant facts in this connection are that Freeholders was registered under that Act as a broker (non-brokerage), but that Knox was not registered as a salesman under the Act. The minerals lease was executed by Meyers in his house on his farm. The Registrar of Securities, who was also the Registrar of Joint Stock Companies, was consulted by representatives of Freeholders before its operations commenced. In his opinion those operations were outside the provisions of the statute because they were, in essence, acquisitions of mineral interests and not an offer of securities to the public. For this reason he did not think that Freeholders required a licence under the Act but he did permit the issuance of a licence to Freeholders. He was fully informed of its intended method of operation and consented to the non-registration of its agents. He also consented to their calling at residences in connection with the carrying out of their duties.

The relevant sections of *The Securities Act* applicable at the times material to this action are the following:

2. In this Act, unless the context otherwise requires, the expression:

* * *

8. "Security" includes:

(*a*) any document, instrument or writing commonly known as a security;

(*b*) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company;

(*c*) any document constituting evidence of an interest in an association of legatees or heirs;

(*d*) any document constituting evidence of an interest in an option given upon a security; and

(*e*) any document designated as a security by the regulations.

* * *

10. "Trade" or "trading" includes any solicitation or obtaining of a subscription to, disposition of, transaction in, or attempt to deal in, sell or dispose of a security or interest in or option upon a security, for valuable consideration, whether the terms of payment be upon margin, installment or otherwise, and any underwriting of an issue or part of an issue of a security, and any act, advertisement, conduct or negotiation directly or indirectly designated as "trade" or "trading" in the regulations. R.S.S. 1930, c. 239, s. 2.

* * *

3. (1) No person shall:

(*a*) trade in any security unless he is registered as a broker or salesman of a registered broker;

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(*b*) act as an official of or on behalf of a partnership or company in connection with a trade in a security by the partnership or company, unless he or the partnership or company is registered as a broker;

(*c*) act as a salesman of or on behalf of a partnership or company in connection with a trade in a security by the partnership or company, unless he is registered as a salesman of a partnership or company which is registered as a broker;

and unless such registrations have been made in accordance with the provisions of this Act and the regulations; and any violation of this section shall constitute an offence.

* * *

(3) Registration shall not be required in respect of any of the following classes or trades or securities:

* * *

(*c*) a trade where one of the parties is a bank, loan company, trust company or insurance company, or is an official or employee, in the performance of his duties as such, of His Majesty in the right of Canada or any province or territory of Canada, or of any municipal corporation or public board or commission in Canada, or is registered as a broker under the provisions of this Act;

* * *

17a. (1) No person shall call at any residence and:

(*a*) trade there in any security; or

(*b*) offer to trade there or at any other place in any security;

with the public or any member of the public.

* * *

(4) A violation of this section shall constitute an offence.

* * *

20. No action whatever, and no proceedings by way of injunction, mandamus, prohibition or other extraordinary remedy shall lie or be instituted against any person, whether in his public or private capacity, or against any company in respect of any act or omission in connection with the administration or carrying out of the provisions of this Act or the regulations where such person is the Attorney General or his representative or the registrar, or where such person or company was proceeding under the written or verbal direction or consent of any one of them, or under an order of the Court of King's Bench or a judge thereof made under the provisions of this Act. R.S.S. 1930, c. 239, s. 16.

The contention of the appellants is that the negotiation of the minerals lease by Knox, who had not been registered as a salesman, was a breach of subs. (1) of s. 3 and was also a breach of s. 17a of the Act, the consequence of which was that the agreement was rendered void.

The learned trial judge decided that the respondents were protected by the provisions of s. 20, on the ground that the verbal consent by the Registrar of Securities respecting Freeholders' operations resulted in its receiving the protection afforded by that section.

This view of the effect of s. 20 was not adopted in the Court of Appeal. Culliton J. A. reached his conclusions upon the assumption, without so finding, that the transaction in question did come within the provisions of the Act. Both of the judges who dissented were of the opinion that s. 20 did not take Freeholders' operations outside the application of the statute. I agree with their view as to the meaning and effect of that section for the reasons stated in the judgment of Gordon J. A., as follows:

> I am glad to say that I have little doubt as to its meaning. It was passed for the protection of those persons who administer the Act and those who act upon the orders of the attorney-general or his representative when such orders are issued "in connection with the administration or carrying out of the provisions of this Act or the regulations." With every respect I do not think that it empowers the attorney-general or his representative to issue orders violating the express provisions of the Act.
>
> I do not think there could be the slightest doubt as to the meaning of this section if the words "or against any company" had been deleted and that protection would then have been confined to those people administering the Act.
>
> In my view the words, "or against any company" were only added to give protection to those companies that might be ordered to do or not to do certain things by the attorney-general or his representative under the provisions of sec. 15 of the Act.

The respondents further contended that the transaction involved here was not a trading in a security at all, within the meaning of the Act, because, in essence, it was an agreement for the acquisition of mineral rights to which the issuance and allotment of shares of Freeholders to Meyers was only incidental. However, the agreement itself contains, in para. 16, a subscription by Meyers for shares of Freeholders in the following terms:

> 16. Application for Shares:
>
> The Lessor hereby subscribes for and agrees to take up 320 shares with a nominal or par value of One Dollar ($1.00) per share in the capital stock of the Lessee, and tenders in full payment for the said shares the within lease, duly executed and hereby requests that the said shares be allotted to the Lessor and that such shares be issued as fully paid and non-assessable and that a certificate for the said shares be issued in the name of the Lessor as herein set out.

This subscription was obtained by Knox as a result of his negotiations with Meyers and there was, therefore, in my opinion, the "obtaining of a subscription" for a security within the definition of the words "trade" and "trading" in subs. 10 of s. 2 of the Act.

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The respondents further rely upon clause (c) of subs (3) of s. 3 of the Act, which has already been quoted. The effect of this clause was not considered in the Courts below, but it is my view that it does have application in this case. Freeholders was registered as a broker under the Act for the purpose of trading in its own securities. A trade in which it was itself a party, as it was here, was, therefore, one in which registration was not required and consequently was not the kind of trade which, under clause (a) or clause (c) of subs. (1) of s. 3, required the registration of Knox as a salesman. In my view, therefore, there was no breach of s. 3(1) of *The Securities Act*.

Section 3(3)(c) does not, however, assist the respondents in connection with the application of s. 17a. That section is not concerned with registration and it applies equally to registered salesmen as well as to those who are not registered. It forbids any person to call at a residence and there to trade in securities and it makes such conduct an offence under the Act. There was, therefore, in my opinion, a breach of this section by Knox. The question then is as to what is the effect of that breach upon the agreement between Freeholders and Meyers. Does it render that contract void, or does it only involve liability on the part of Knox to a penalty in view of the provisions of subs. (4)?

The determination of the effect of the breach of a statutory provision upon a contract is often a difficult one and must, of course, depend upon the terms and the intent of the provision under consideration. In some cases the statute clearly forbids the making of a certain kind of contract. In such a case the contract cannot be valid if it is in breach of the provision. An example of this kind is found in the provisions of the Manitoba *Sale of Shares Act*, which was considered by this Court in *McAskill v. The Northwestern Trust Company*[1]. Section 4 of that Act provided:

> It shall hereafter be unlawful for any person or persons, corporation or company, or any agent acting on his, their or its behalf, to sell or offer to sell, or to directly or indirectly attempt to sell, in the province of Manitoba, any shares, stocks, bonds or other securties of any corporation or company, syndicate or association of persons, incorporated or unincorporated, other than the securities hereinafter excepted, without first obtaining from the Public Utility Commissioner, hereinafter styled "the commissioner," a certificate to the effect hereinafter set forth and a license to such agent in the manner hereinafter provided for.

[1] [1926] S.C.R. 412, 3 D.L.R. 612.

Section 6, in part, read:

> It shall not be lawful for any person or any such company, either as principal or agent, to transact any business, in the form or character similar to that set forth in section 4, until such person or such company shall have filed the papers and documents hereinafter provided for.

The Court held in that case that a sale of shares made by a company which had failed to comply with the statutory provisions was void and not voidable.

Section 16 of *The Securities Act,* itself, contains an express provision whereby, in the circumstances therein defined, a contract by a customer of a broker shall be void, at the option of such customer.

On the other hand, some statutes have been construed as only imposing a penalty, where the Act provides for one, although that is not necessarily the result of a penalty provision being incorporated in the Act. Lord Esher posed the question which must be determined in *Melliss v. Shirley Local Board*[1], as follows:

> Although a statute contains no express words making void a contract which it prohibits, yet, when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject-matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law.

In the present case I have come to the conclusion that it was not the intention of s. 17a of *The Securities Act* to render completely void a trade in securities because it is made at a residence. The general intent of the statute is to afford protection to the public against trades in securities by persons seeking to trade who have not satisfied the Registrar as to their proper qualification so to do. For that reason the registration provisions of s. 3 are incorporated in the Act. But s. 17a is not a part of this general pattern, because it applies to registered brokers and salesmen as well as to those who are not registered. As I see it, its purpose is not to prevent trading of an unauthorized kind, but is intended to prevent persons in their own residences from being sought out there by stock salesmen. It is the place at which the negotiations occur which is important in this section and not the character of the

[1] (1885), 16 Q.B.D. 446 at 451, 55 L.J.Q.B. 143.

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negotiations themselves. It seeks to deter salemen from attempting to make contracts, which otherwise may be quite proper, at a particular place. This being so, it is my opinion that a breach of s. 17a, in relation to a transaction otherwise lawful, results, not in preventing the contract from being valid, but in the incurring of a penalty by the person who is in breach of it.

I do not think, therefore, that the breach of s. 17a resulted in the agreement in question here being rendered void.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiffs, appellants: W. J. Perkins, Estevan, Sask.

Solicitors for the defendant, respondent, Freeholders Oil Co. Ltd.: Shumiatcher, Moss & Lavery, Regina.

Solicitors for the defendant, respondent, Canada Permanent Trust Co.: MacPherson, Leslie & Tyerman, Regina.