REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1925.

[HIGH COURT OF AUSTRALIA.]

THORNLEY . . . . . APPELLANT;
PLAINTIFF,

AND

TILLEY AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1925.

SYDNEY, *April* 7, 8, 9; *May* 7.

Knox C.J., Isaacs, Higgins and Rich JJ.

Principal and Agent—Sharebroker and client—Purchase of shares—"Carry at 8 per cent"—Right of sharebroker to deal with shares—Natural meaning of term—Usage of Stock Exchange—Reasonableness.

A client instructed a sharebroker to buy a certain number of shares in a company and "carry at 8 per cent."

Held, that the sharebroker was not entitled to deal on his own behalf with the shares bought in pursuance of such instructions, and was bound to account to his client for any profits made by such dealing.

Per Knox C.J. and *Higgins* J.: A custom under which sharebrokers retain such profits would be unreasonable, and would not bind the Court, even if proved; but no such custom was proved and under the pleadings any evidence of such a custom was inadmissible.

Decision of the Supreme Court of New South Wales (*Harvey* J.): *Thornley* v. *Tilley*, (1924) 41 N.S.W.W.N. 171, reversed.

H. C. OF A. 1925.

THORNLEY v. TILLEY.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court, in its equitable jurisdiction, by John Brooks Thornley against William Tilley, Frank Edward Tilley and Herbert Vivian Hordern, trading as William Tilley & Co. as stock and sharebrokers, in which the plaintiff alleged in his statement of claim, shortly, that in or about March 1920 it was agreed between him and the defendants that the defendants would buy shares on behalf of the plaintiff when instructed by him so to do, that they would on behalf of the plaintiff pay the amounts required to purchase such shares, that they would on behalf of the plaintiff obtain and hold such shares, that the plaintiff should repay to the defendants such amounts together with the customary fees for brokerage and interest at the rate of 8 per cent per annum on the respective amounts so paid by the defendants from the respective dates of payment by them to the date of repayment by the plaintiff, and that thereupon the defendants should hand to the plaintiff such shares; that the plaintiff instructed the defendants to purchase certain shares on the terms of such agreement, and that the defendants informed him that they had accordingly purchased 1,150 shares in the Kampong Kamunting Tin Dredging Ltd.; that the defendants furnished the plaintiff with a document which purported to show that the defendants had purchased, at different dates from 5th June 1920 to 18th June 1920, 1,150 shares in that company for a sum which, including £67 17s. 9d. being interest at 8 per cent "carry over charges on daily balances," amounted to £3,364 10s. 11d.; that £258 15s. had been received by the defendants as interest on the shares, and that the balance owing by the plaintiff to the defendants was £3,105 15s. 11d.; that on 18th November 1920 the plaintiff paid to the defendants such sum of £3,105 15s. 11d. and asked for the scrip for the shares, but that the defendants did not give him the scrip except that for 1,000 shares on 25th November 1920, that for 100 shares on 1st December 1920 and that for 50 shares on 17th December 1920; that the defendants alleged that they had bought the shares mentioned in the document at prices varying from 56s. to 57s. each; that the plaintiff had ascertained that 600 of the scrip delivered to him had been purchased by the defendants at prices ranging from 45s. 6d. to 47s. 9d. after 18th

November 1920; that the plaintiff believed and charged as a fact that the defendants had bought and received the shares mentioned in the document and had dealt with them without the knowledge or authority of the plaintiff and had made secret profits thereby. The plaintiff claimed (*inter alia*) (1) an account of what was due from the plaintiff to the defendants in respect of the matters aforesaid, and that, if it appeared that the amount paid by the plaintiff to the defendants was in excess of such amount, the defendants should be ordered to repay such excess to the plaintiff; (2) an inquiry as to the amount of secret profit made by the defendants, and an order that the defendants pay the amount thereof to the plaintiff.

The suit was heard by *Harvey* J., who dismissed it with costs: *Thornley* v. *Tilley* (1).

From that decision the plaintiff appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Weston, for the appellant. The words "carry at 8 per cent." in the contract between the appellant and the respondents bear their natural meaning; and that meaning is that the brokers must buy shares for the principal, that they are not to expect immediate payment, but in consideration of giving credit are to receive interest at 8 per cent as long as they are out of pocket, and that they are to receive any dividends and pay any calls on the shares, crediting and debiting them respectively to the client. The respondents in their amended defence have abandoned the plea of usage, and have set up a plea that the words have a natural meaning. Evidence as to usage was therefore inadmissible; and, even if it were admissible, no usage was proved which is applicable to the circumstances of this case (see *Nelson* v. *Dahl* (2)).

[ISAACS J. referred to *Maxwell* v. *Official Assignee of Gillespie* (3).

[KNOX C.J. referred to *Sutton & Co.* v. *Ciceri & Co.* (4).]

Flannery K.C. and *Jordan*, for the respondents. The natural meaning of the term "carry at 8 per cent" among persons who deal in shares is similar to that of "carry over" and "contango" in

(1) (1924) 41 N.S.W.W.N. 171.
(2) (1879) 12 Ch. D. 568, at pp. 575, 591.
(3) (1909) 8 C.L.R. 553, at p. 582.
(4) (1890) 15 App. Cas. 144.

H. C. OF A. 1925.

THORNLEY v. TILLEY.

England. The broker's duty is to purchase shares for the client, but there is no obligation on the broker to keep the scrip for those shares. He may use the scrip for his own purposes, and is not liable to the client for any profits made by him (*Halsbury's Laws of England*, vol. XXVII., p. 231 ; *Sachs* v. *Spielmann* (1)).

[ISAACS J. referred to *Levitt* v. *Hamblet* (2).]

Expanding the transaction, the broker buys shares for the client; then, assuming the broker has paid for the shares, the client sells the shares to the broker and the broker then sells the same number of shares to the client for future delivery upon terms that the client will pay on delivery. The interest is thus interest on the price of the shares which are to be delivered in the future. If the evidence as to the meaning of the term " carry at 8 per cent " is admissible, it shows that the term means an arrangement between the parties whereby the client does not acquire any title to the shares bought until the time for delivery and has not a right to inquire as to the dealings by the broker with the scrip in the meantime. [Counsel also referred to *Bentinck* v. *London Joint Stock Bank* (3) ; *Bongiovanni* v. *Société Générale* (4).]

Weston, in reply.

Cur. adv. vult.

May 7. The following written judgments were delivered :—

KNOX C.J. In the month of February 1920 the appellant wrote to the respondents, who are stock and sharebrokers and members of the Sydney Stock Exchange, a letter which so far as is material was in the words following :—" *Re* New Shares.—I have every confidence in your judgment ; therefore if you hear of anything which you think is good for a rise within, say, two months, I shall be glad if you will go into it on my behalf to the extent of £1,200 to £1,500. I am not anxious to take over anything that I will have to hold for a considerable time before the rise occurs, as I may or may not require the money in about eight or ten weeks. I leave this

(1) (1889) 5 T.L.R. 487.
(2) (1901) 2 K.B. 53.
(3) (1893) 2 Ch. 120, at p. 141.
(4) (1886) 54 L.T. 320.

entirely to your discretion, and any cheque you may require will be given by Mr. C. Markell, 131 Clarence Street, if you send him the purchase note." On the following day the plaintiff saw the respondent William Tilley at his office, and gave him particulars of his financial position. At this interview it was arranged that, instead of getting from Mr. Markell the purchase-money of shares which the respondents might buy for the appellant, the respondents should carry the shares for him at 8 per cent; and accordingly the last sentence in the passage set out above was struck out and the words "carry at 8 per cent" were written in the margin. Acting on these instructions, the respondents bought as brokers for and on behalf of the appellant 1,150 Kampong Kamunting shares at a total cost of £3,296 13s. 2d. Bought notes for the several parcels of shares were sent by the respondents to the appellant. These notes were in the usual form, "Bought for J. Brooks Thornley Esq.," and signed "William Tilley & Co. as brokers." The appellant was in New Zealand from March till September 1920. In the month of November 1920 the respondents requested him to reduce his indebtedness to them, and, at his suggestion, on 17th November 1920 rendered him an account of the amount owing in respect of the Kampong Kamunting shares. In this account the appellant was charged with the purchase price of the shares and interest at 8 per cent on daily balances to date of the account, and was credited with dividends paid on the shares, the net balance against him being £3,105 15s. 11d. On 18th November the appellant paid this amount, and asked for the scrip representing the shares, but no scrip was handed to him until 25th November, when he obtained scrip for 1,000 shares, the scrip for the remaining 150 shares being handed over some time later.

After some correspondence between the parties the appellant instituted this suit, alleging that the respondents had dealt with the shares bought for him without his knowledge or authority and had made secret profits by such dealings, and claiming an account and an inquiry as to the amount of secret profits so made by the respondents. The respondents filed a statement of defence, par. 3 of which was in the words following:—"3. We say and the facts are that by the custom of the Sydney Stock Exchange a broker

H. C. OF A. 1925.

THORNLEY v. TILLEY.

KNOX C.J.

who agrees to buy shares on behalf of a purchaser is required actually to buy the said shares and to deliver to the purchaser when delivery is required by such purchaser either the said actual shares so bought or at the broker's option an equivalent number of like shares, and, in any event, to put the purchaser in the same position as if the broker had held throughout for the purchaser the shares originally bought for him; and is not liable to account to the purchaser for any dealing which may be effected by the broker with the shares so originally bought. We believe and charge it as a fact that the said custom was well known to the plaintiff during and prior to the year 1920 and that all instructions to buy given by the plaintiff to us were given on the footing of the said custom and not otherwise." They admitted that the shares were bought for the appellant and that he had been charged commission and stamp duty on each purchase in addition to the price paid for the shares. They admitted also having dealt with the shares "pursuant to the said custom," and having made a profit of £147 10s. 9d. by such dealings, and offered, if the appellant should allege that he was not aware of the said custom, to pay him that amount.

Before the trial the respondents amended their statement of defence by striking out all references to the custom of the Stock Exchange, including par. 3 above set out. Par. 3 of the amended statement of defence, so far as now relevant, was in the words following:—"A request by a prospective purchaser to a broker that the broker shall buy and carry shares on the purchaser's behalf at a specified rate of interest has a well defined and well known meaning and according to the said meaning imports a request that the broker shall actually buy the number of shares mentioned in the request, shall be at liberty to charge the purchaser interest at the specified rate on the price together with commission and stamp duty, shall be under an obligation to deliver to the purchaser when delivery is required by the purchaser and payment made by the purchaser of the said price, interest and charges, an equivalent number of like shares (but not, unless the broker chooses, the same shares) and to account to the purchaser for the amount of any dividends, bonuses or other advantages which may have accrued in respect of an equivalent number of shares of the same class between

the date of such purchase and the date of such delivery, and shall be at liberty to deal as he chooses with the shares actually bought by him pursuant to the said request without being liable to account to the purchaser for any profits which the broker may make by such dealings or otherwise howsoever with respect to such dealings. When the plaintiff made us the said request we understood him to do so according to the said meaning which is the natural meaning thereof." In the amended statement of defence the offer to pay to the appellant was struck out. Issue having been joined, the case came for trial on the amended pleadings.

Notwithstanding the abandonment by the respondents of the ground of defence founded on an alleged custom of the Stock Exchange, evidence was called on both sides as to the meaning attributed by individual brokers on the Stock Exchange to the expression "buy and carry," no objection being taken to the admissibility of such evidence until much of it had been admitted. In my opinion, evidence of this class was inadmissible on the issues raised by the amended pleadings. The respondents alleged that the instruction to buy shares for a client and carry them on his behalf had a well defined and well known meaning and that such meaning was the natural meaning of the words. They did not allege any usage by virtue of which a meaning other than the natural meaning was to be attributed to the words used, and in these circumstances, the words being ordinary English words not alleged to have any technical meaning and not insensible in themselves, their true meaning was to be ascertained by the Court without the aid of extrinsic evidence.

If, as the respondents allege in their pleadings, the request or instruction is to be understood according to the natural meaning of the words used—an instruction to buy shares and carry at 8 per cent—I find no difficulty in ascertaining what the instruction imports. It means that the broker is to buy shares on behalf of the client, to pay for those shares, and to carry the shares for the client, charging him interest at the rate of 8 per cent per annum until payment of the money laid out on his behalf. But, even if the respondents were allowed to depart from the case made on their pleadings and to set up that by the usage of the Stock Exchange

H. C. OF A. 1925.

THORNLEY v. TILLEY.

KNOX C.J.

the instruction given in this case had acquired the meaning they now seek to put upon it, I think the evidence given in support of their contention falls far short of what is necessary to enable them to succeed. The extent to which evidence of the existence of a custom or usage must go is defined by *Jessel* M.R. in *Nelson* v. *Dahl* (1). He says :—" That " (i.e., the existence of the alleged usage) " is a question of fact, and, like all other customs, it must be strictly proved. It must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself." In the present case the existence of the usage relied on by the respondents is denied by a number of brokers of experience and standing who are members of the Stock Exchange; and taking the whole of the evidence it may, I think, be fairly stated as establishing no more than that the majority of the members of the Stock Exchange who undertake to buy and carry at interest for their clients act as the respondents claim the right to act in this case, while the minority, if they undertake such a transaction, ear-mark as belonging to the client the scrip delivered to them in fulfilment of the contract made by them on the client's behalf. And if the evidence were sufficient to establish the usage, I think it would be open to objection on the ground that it was unreasonable. In effect, the respondents claim the right to charge the client interest on money advanced by them to pay for shares purchased on his behalf and at the same time to treat the shares delivered in fulfilment of the purchase as belonging to themselves. In other words, they claim to treat as their own property acquired by them as agents for their client, at the same time charging him with interest on the money laid out by them and commission for their services as brokers.

On the view I take of the meaning of the instructions given by the appellant, it was the duty of the respondents to hold on his behalf the scrip delivered in fulfilment of the contracts made by them as his agents, and to deliver that scrip to him on payment of the purchase price together with commission and stamp duty and interest at 8 per cent per annum on the money laid out by them on his behalf

(1) (1879) 12 Ch. D., at p. 575.

until the date of payment by him. If in any case the scrip delivered to the respondents could not be identified or ear-marked as having been delivered in fulfilment of contracts made by them on behalf of the appellant, their duty was to retain on his behalf scrip for a number of shares equal to the number purchased for him. They had, in my opinion, no right to use or deal with the scrip so obtained by them for their own benefit; and as they admit having made profit by dealing with such scrip or the shares represented thereby in breach of their duty to the appellant, and as such dealings were in fact without his knowledge or authority, they are, in my opinion, liable to account to the appellant for the profits so made.

For these reasons I am of opinion that the appeal should be allowed, the decree of *Harvey* J. discharged, and a decree made in terms of the first and second paragraphs of the prayer of the statement of claim. The respondents should pay the costs in the Supreme Court and the costs of this appeal. The cause should be remitted to the Supreme Court to do what is right in accordance with this judgment.

Isaacs J. This suit was brought in the Supreme Court of New South Wales by the appellant to obtain an account of profits made by the respondents upon shares which the respondents as his brokers had purchased. *Harvey* J. dismissed the suit with costs, holding that on the evidence the contract of agency between the parties was subject to a custom or practice of the Sydney Stock Exchange entitling brokers under "buy and carry" instructions to refrain from ear-marking the scrip received on the purchase for a particular client, and to deal with that scrip for other transactions. In my opinion, that—even if conceded—does not touch the vital question at issue; which is whether the scrip can be utilized for other transactions, without at the same time substituting equivalent scrip. Naturally, that would not serve the desired purpose, but the qualification is stated in order to make the problem clear. It is not the difference between the identical scrip and equivalent scrip: it is the difference between the requisite quantity of scrip and none at all. In other words, it is not the difference between equally potent evidences of title to given interests in a company, but the

H. C. OF A. 1925.

THORNLEY v. TILLEY.

Isaacs J.

difference between having and not having the interests themselves. I am unable to regard the evidence as sufficiently clear, strong and consistent to establish what is necessary to exonerate the respondents.

The expression which gives rise to all the difficulty is the expression " carry at 8 per cent " standing alone in the margin of the letter of 26th February 1920. As that letter stood when originally received by the respondents on the evening of 26th February, it was plain enough: the brokers were to have discretion to buy within the named limits and were to be paid at once by Markell's cheque. Next day, however, the appellant, before leaving for New Zealand, called personally at the respondents' office and discussed with Mr. William Tilley the matters mentioned in his letter. As to the new shares his own evidence is :—" I also asked him was he agreeable to buy and carry on my behalf at 8 per cent., at any rate until my return from New Zealand." He was asked by the learned Judge: " Had he ever bought and carried for you before ? " Answer: " That is a point upon which I am not quite certain." There is some evidence of the appellant, not very precise on the point now at issue, as to some previous arrangement he made with " people," but, reading that with the answer he made to the learned Judge, he cannot rely upon any prior dealings as conveying a conventional meaning to his mind. Other evidence of the appellant and the evidence of William Tilley lead in the same direction. After the discussion with Tilley, who says the request was to " carry over " and that he assented, the appellant struck out from his letter all about Markell and substituted in the margin these words " carry at 8 per cent." and initialled them " J.B.T."

It is unfortunate that, where so much was and is at stake, there should have been such a false economy of words. No doubt Thornley thought he understood the meaning of " carry at 8 per cent." Perhaps he meant then what he now says they mean. He also probably thought Tilley understood them in the same sense. But Tilley did not mislead him or create whatever impression Thornley had. The negotiations did not eventuate in a definite contract in which it must be assumed both parties used the words in the same sense. Nor were the crucial words suggested by Tilley, leaving Thornley to place his own construction on them. The instructions

were Thornley's own words given to a broker, and as he selected his terms he took his chance of being honestly and reasonably understood in a sense different from that which he himself expected. This brings into play a principle to be presently mentioned. The words "carry at 8 per cent" are certainly elliptical. The word "carry" is a word of wide significance, and its context and the occasion must determine its precise denotation. The conversation referred to shows that both parties understood it so far as to mean "carry the shares." The phrase "buy and carry" makes that inevitable, and the appellant adopts that view in his evidence. *Harvey* J. comes to the same conclusion. The phrase then may at once be safely extended to "carry the shares at 8 per cent." But what does that mean? I know of no primary meaning that the general community ordinarily attaches to the operation of "carrying shares at a rate of interest." *Brett* M.R. in *Lion Insurance Association* v. *Tucker* (1) said:—"It is not because the words of a statute or the words of any document read in one sense will cover the case that that is the right sense. Grammatically they may cover it; but whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject matter with regard to which they are used, unless there is something which obliges you to read them in a sense which is not their ordinary sense in the English language as so applied. That, I take it, is the cardinal rule." It seems to me, in the absence of a settled trade usage, which is not now relied on, that, unless the meaning of the expression can be deduced from some other words throwing light upon that phrase or from the surrounding circumstances or from the subsequent mutual conduct of the parties, the full content of the expression would be little better than a guess. The parties have, by conduct mutually adopted and recognized by them, interpreted the term to a very great extent. What is left is highly important, and its solution depends on principle.

The employment of the respondents by the appellant was one of agency at their discretion to buy and carry shares for him at an

(1) (1883) 12 Q.B.D. 176, at p. 186.

H. C. OF A. 1925.

THORNLEY v. TILLEY.

Isaacs J.

agreed rate of interest, he then being bound to repay them and to receive from them shares representing what they had bought. Normally and essentially such an employment acted on constitutes a fiduciary relation, and the consequence of that is, unless displaced by special circumstances, that the agent cannot make profit for himself out of the principal's investments. How is that usually fundamental rule displaced here ? Usage is abandoned, the rest of the instructions are silent on the point, except so far as the word "hold" tells the other way, and the surrounding circumstances do not negative the rule.

The evidence, as I have said, does not go far enough to establish the respondents' case, which would mean that the client as against his debt at interest had not any property but only a mere promise. There remains, so far as I see, but one possibility in favour of the respondents, namely, the principle of law to which I have referred and upon which in the circumstances I should be prepared to act. Where a principal gives to an agent instructions so ambiguous that they can reasonably be understood in more than one sense, he is bound by whichever of those senses the agent bona fide acts upon. I have therefore looked through the case to see what Tilley & Co.'s interpretation of the instructions was, judging by the way they treated the transaction; and how far that interpretation was reasonable. The first material fact is that the respondents on 5th June 1920, acting on the appellant's instructions, purchased from Cooper & Co., brokers, shares in the Kampong Kamunting Tin Dredging Ltd. for £282 17s. 6d. This purchase was notified to the appellant by a bought note and, omitting formalities, in these terms :—" B/2552.—5th June 1920.—Bought for J. Brooks Thornley —100 shares Kampong Kamunting Tin, 56s., £280; contract duty 1s. 6d., commission £2 16s., £2 17s. 6d.: £282 17s. 6d.—W. Tilley & Co., H. P. Cooper, as brokers.—5/6/20." The name "H. P. Cooper" signifies the selling broker. Several bought notes of similar character and down to 18th June 1920 were sent, each with a specific identifying number of the note itself. Some of the purchases were for forward delivery. It is thus admitted by the notes that the shares were bought by the respondents "as brokers" and for the appellant.

The result of the first transaction so far, taking that as a type, was that Thornley as the principal through Tilley & Co. as his agents bought from X as principal through Cooper & Co. as his agents (unless Cooper & Co. were principals) the shares mentioned for the price mentioned. But X had to be paid, and in accordance with the instructions to "carry at 8 per cent" Tilley duly paid X by his agents Cooper & Co., and received scrip certificates for the shares. At that moment whose were the shares? Apart from company requirements of transfer, X had parted with his ownership to Thornley, and had received from Thornley full payment. But as between Thornley and Tilley, the former owed a debt for money advanced, for duty and for commission, and until that was paid, Thornley, though having the property, was not entitled to possession.

Down to that point the respondents, in argument, do not dispute the position. Before entering upon the controversy at this point, it is desirable to see what Tilley & Co. did in fact. In their share register of the Kampong Kamunting Tin Dredging Ltd. (sometimes called "share journal") there is entered on one side :—

Date	S/N.	Bought from	No. Shares	Price	Amount	Date delivered
June 5th	2552	Cooper H. P.	100	56/-	280	July 13th.

And there is entered on the other side :—

Date	S/N.	Sold to	No. Shares	Price	Amount	Date delivered
June 5th	2552	Brooks Thornley J.	100	56/-	£282/17/6	Nov. 25th.

That indicates that the bought note No. 2552 represented a purchase from Cooper of 100 shares for £280, the real buying principal being Thornley. It denotes also that the "shares" represented by bought note No. 2552 were delivered by Cooper to Tilley & Co. on 13th July, and were delivered by Tilley & Co. to Thornley on 25th November. In the brokers' ledger, and in their accounts, the transaction is shown in the same way. And similarly as to all the transactions comprising the total 1,150 shares.

Interest is charged on 17th November at 8 per cent on "c/o Kampongs," which means "carry over Kampongs," and so appears in the receipted account of that date. The amount is £67 17s. 9d. But there should be mentioned a very significant entry on the credit side. On 25th June, a date when, on the respondents' view

H. C. OF A. 1925.

THORNLEY v. TILLEY.

Isaacs J.

presented in argument, the whole property in these 1,150 shares was in the respondents and not in the appellant, there is entered to his credit in his account in the respondents' ledger, "By divd. 1,150 Kampong Kam. £172 10s." In short, there is no trace in the respondents' books or documents of any such transaction as a purchase by respondents of the shares, and a resale by them to him on payment, such as was suggested at the close of the argument for the respondents. So far as anyone could judge from book entries, the appellant remained all through the owner of the shares as between him and the respondents. But, further, when the statement of defence is carefully examined, it will be seen that in substance the respondents always thought so, and never believed they were for a single instant the owners of the shares that they had bought for Thornley. In the original par. 3 the only thing disputed is the liability to retain the shares originally bought—by which, I apprehend, is meant and necessarily meant the original certificates, which are not shares but evidence of shares; "shares," which are interests, cannot be retained in any relevant sense. But that paragraph concedes that the broker *holds throughout for the purchaser* an equivalent number of shares. The new par. 3 I read on the whole as conceding the same; and in par. 5 it is stated: "*We throughout treated ourselves as holding on behalf of the plaintiff the number of shares bought for him and therefore credited him with dividends, some of which, by reason of having parted with the shares, we had not received.*" Now, all that is entirely inconsistent with the contention at the Bar that all that Thornley had was a contractual obligation to get shares. It admits that throughout Thornley was, as against the brokers, the present owner of 1,150 shares in the Kampong Company, and entitled *for that reason* to the dividends, &c. It entirely dissipates any suggestion that the respondents bona fide and reasonably believed they were entitled to regard shares purchased for Thornley as their own, so that they might traffic in them for themselves while Thornley was left without any shares. I am disposed to think the admission in par. 5, in the absence of some circumstance reasonably compelling or justifying the massing or substitution of securities, goes so far as to exclude even the bare legal right to exchange the scrip distinctly traceable to the Thornley

purchases, for any other scrip, even similar scrip. Of course, if such an exchange had been effected, probably no real alteration of position would have ensued, unless the owner of the substituted scrip could successfully demand it. But, conceding even the right of substitution of precisely similar scrip certificates, that does not justify denudation, while the fiduciary holder makes profit for himself out of the property of his principal.

The respondents, then, cannot urge that they either reasonably or bona fide understood the ambiguous expression in the sense that "carry at 8 per cent" meant, as urged at the Bar—and urged, I rather think, on the ground that it was the reasonable and natural meaning in such circumstances—(1) that they were to buy for Thornley, by which the shares became his property; (2) that the act of buying and paying for him effected *uno ictu* an immediate sale by him to them at the same price (query as to duty and commission), and (3) that contemporaneously the purchase for him effected also a forward resale by them to him also at the same price plus 8 per cent up to payment (again query as to duty and commission). The argument was an attempt to construe the instruction so as to engraft upon a transaction wholly to be created *in futuro*, and obviously presenting difficulties of adaptation, the legal consequences which in England are understood to be the effect of carrying over an existing contract that cannot be fulfilled (see per *Romer* L.J. in *Levitt* v. *Hamblet* (1)).

So far, we have seen that not only does the expression "carry at 8 per cent" mean "carry the shares at 8 per cent" but it also means that the "shares," that is, the quantum of interest in the company (not necessarily and in all cases specific evidence of that quantum), so carried are, throughout the carrying, the property of Thornley and not of Tilley. Tilley's rights are to receive 8 per cent per annum on debt owing by Thornley, that is, price, duty and commission. It follows that, if on this basis they have used his property—as admittedly they have—to gain profit, they must account to him for it.

I have jealously examined this matter from a purely legal aspect; but I am content that I am not driven to hold the brokers entitled

(1) (1901) 2 K.B., at p. 71.

H. C. OF A. 1925.

THORNLEY v. TILLEY.

Higgins J.

to regard the shares as their own and to reap the profits of speculating in them, while charging their client interest on moneys no longer advanced, but recouped out of the client's property.

HIGGINS J. There is really no question as to the essential facts of this case. Stating it summarily and ignoring most of the dates, the defendants, brokers of Sydney, purchased at the request of the plaintiff, and on his behalf, out of their own funds, 1,150 shares in the Kampong Kamunting Tin Dredging Ltd. Being requested to reduce his indebtedness for these and other shares, he asked for a statement of the amount owing on these shares. The account showed eleven purchases of these shares in June 1920, interest at 8 per cent " carry over charges " on daily balances to date ; and, after deduction of two dividends, a debit of £3,105 15s. 11d. The plaintiff paid this amount at once (18th November 1920) and demanded his " scrip." The defendants had not got the scrip in hand, but on 25th November they handed him 1,000 of the scrip. The other 150 scrip were handed to him on 17th December. The plaintiff having asked why the scrip were not available for delivery as soon as he paid, it turns out that the defendants " loaned " and " sold " and dealt with many of the shares for market purposes, and treated the profits as belonging to themselves. Two of the members of the firm have been in the witness-box, and insist that they had the property in the scrip until the plaintiff paid, and are entitled to any profits made by their dealings with the shares. The plaintiff claims accounts of what was really due to the defendants, and that any excess money paid by him should be repaid ; and for an inquiry as to the amount of secret profits made by the defendants and for payment thereof to him.

The learned Judge of the Supreme Court of New South Wales who tried the case has dismissed the plaintiff's suit with costs, on the ground that under the agreement between the defendants and this client, taken with the custom of the Sydney Stock Exchange, they are entitled to keep any profits made before the client pays ; and then they deliver to the client the number of shares bought, but not necessarily the original shares which they purchased for him. But the defence does not allege any custom. It did originally allege a custom in par. 3 ; but the custom alleged there involves an obligation

" to put the purchaser in the same position *as if the broker had held throughout for the purchaser the shares originally bought for him.*" This means surely that the profits from any dealings with the shares originally bought are to go to the purchaser as well as any dividends: " The fruit follows the tree and goes the same way." In New South Wales practice, defendants make their defences on oath; and these defendants swore to this defence. But, on the defendants' application, the original par. 3 was struck out, and new paragraphs, pars. 3, 3A and 3B, inserted. The new paragraphs contain no allegation of any custom of any sort, but allege that according to the " natural meaning " of the plaintiff's request, a broker acting for him is " at liberty to deal as he chooses with the shares actually bought by him " (the broker) " pursuant to the said request without being liable to account to the purchaser for any profits which the broker may make by such dealings or otherwise howsoever with respect to such dealings." In my opinion, the Court below was not justified under these circumstances in giving any effect to the custom on which the defendants now rely in spite of their attitude on the pleadings: the Court had only to determine what is the " natural meaning " of the request. It is only fair to add that the learned Judge was probably misled by the general acquiescence in the evidence of custom. Not until late in the proceedings was there any precise objection to the question " What, from your experience on the Sydney Stock Exchange, is the course of dealing with regard to buy and carry transactions ? " This evidence was admitted " as to the practice."

The defendants rely on the " natural meaning " of the *request.* I may say that there was nothing in the other correspondence, or in conversations, to add to or qualify that request, except as follows :— The request is contained in a letter from the plaintiff to the defendants, dated 26th February 1920, in which—after referring to other share transactions which do not affect this question—the plaintiff has this passage :—" Re new shares. I have every confidence in your judgment, therefore if you hear of anything which you think is good for a rise within, say, two months, I shall be glad if you will go into it *on my behalf* to the extent of £1,200 to £1,500. I am not anxious to take over anything that *I will have to hold for a considerable time before the rise occurs,* as I may

H. C. OF A. 1925.

THORNLEY v. TILLEY.

Higgins J.

or may not require the money in about eight or ten weeks." This passage is followed by a statement that any cheque the plaintiffs might require would be given by a Mr. Markell, if he were sent the purchase note; but a day or two afterwards the plaintiff called, and, after conversation, struck out this statement as to Markell, writing in lieu thereof the words "carry at 8 per cent." It is quite obvious from the plaintiff's reference to shares with a speedy "rise" that he meant to get the benefit of any rise.

In my opinion, it is absurd to urge that these words "carry at 8 per cent," whether taken alone or with the whole context, convey in their natural meaning the complicated arrangement alleged in the new par. 3 of the defence. At the most, the meaning is that the defendants, instead of asking Markell to pay for the shares as bought, are to carry the shares, or the burden of the payment for the shares, until the plaintiff settle up, and are to charge him 8 per cent. on the purchase-money which they have paid for him. The natural and ordinary meaning of this request in natural and untechnical English is that the client takes the whole gain as well as any loss or risk resulting from the shares from the time that they are bought for him; and that the brokers take no loss, no risk, no gain, resulting from the purchase, but take the interest at 8 per cent. on the purchase-money, in addition to their commission as brokers. Of course, the usual bought notes were sent by the defendants to the plaintiff; and the form of the bought notes is wholly inconsistent with the defendants' case—"Bought for J. Brooks Thornley, Esq.—(Subject to the rules and regulations of the Sydney Stock Exchange.)—100 shares Kampong Kamunting Tin, 56s., £280; contract duty, 1s. 6d.: commission, £2 16s. . . . W. Tilley & Co., as *brokers*." We are told that there is nothing in the rules and regulations of the Sydney Stock Exchange on the subject; and they have not been put in evidence.

This view which I have stated seems to me to be a conclusive answer to the defendants' contention. But it would not be fair for the defendants to attribute their defeat on this appeal to a mere mistake in pleading. Even if we could treat the alleged usage as if it were pleaded, I do not think it is shown that the words "carry at 8 per cent" have acquired such a technical meaning that the Courts could give effect to it—even if over one-half or up to three-fourths

of the brokers on the exchange adopt the practice alleged. Moreover, the usage contradicts the express terms of the request and of the contract—" on my behalf " ; and, in my opinion, the suggested usage is unreasonable. Under the suggested usage a lender of money is to get not only his interest on his money lent, but the profits made by means of the money lent. As reasonably might a mortgagee, who has lent to his mortgagor money (at interest) wherewith to buy an orchard, claim to treat as his own and free from accounting any profits made from the sale of the apples in the market. It is surely not too much to say that if a broker want to get the profits from sales of shares as well as his interest and commission he ought to make an express stipulation to that effect.

The appeal must be allowed.

RICH J. I think this appeal should be allowed. The respondents abandoned in argument all reliance on usage or custom, and contended that on the evidence the natural meaning of the words " carry at 8 per cent " was that the brokers, after buying the shares, could " carry " them as their own property and make whatever profit they were able out of them, being bound only to hand over at the proper time to the client a corresponding number of like shares. It would need very clear evidence to establish such a meaning, and I am unable to find it. The pleadings, the documents and the brokers' books, in my opinion, are opposed to it. It is possible that the identical scrip is not always to be required, but that is not enough to justify the right claimed of making profit from the shares belonging to the client.

In my opinion the appellant should succeed.

Appeal allowed. Decree appealed from discharged. Decree made in terms of the first and second paragraphs of the prayer in the statement of claim. Respondents to pay costs in Supreme Court and of this appeal. Case remitted to the Supreme Court to do what is right in accordance with this judgment.

Solicitors for the appellant, *Minter, Simpson & Co.*

Solicitors for the respondents, *A. J. McLachlan & Co.*

B. L.